CLOSING LOOPHOLES

An independent statutory review

15 June 2026

Susan Booth



Acknowledgement of country

The Reviewer acknowledges the Traditional Owners and Custodians of Country throughout the lands on which we work and live. The Reviewer acknowledges their continuing connection to land, water and community and pays respect to the people, their cultures and the Elders past and present.

The Reviewer is grateful to work on these lands and strives to build respectful and meaningful relationships with First Nations communities. First Nations knowledge and cultural practices have shaped and continue to enrich our shared Australian heritage. The Reviewer recognises the enduring contributions and wisdom of First Nations people and has sought to ensure their voices were heard.



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Reviewer's Note

The Closing Loopholes reforms brought major change to Australia's workplace relations landscape. This Review is required by the Acts that made the amendments. It is an early opportunity to reflect on the impact of the changes and assess if they are working as intended to close loopholes that developed over years of practice.

Approach taken to the Review

The Terms of Reference (reproduced in Appendix 2) require examination of the operational appropriateness and effectiveness of the reforms, identification of any unintended consequences, and suggestions for improvement.

They do not invite the Review to comment whether amendments are good policy or if different ideas are preferable. The approach taken in this Review is orthodox and is grounded in those terms of reference (see Introduction for more information).

Some stakeholders urged a broader inquiry and expressed concern about the narrow scope of the Review, pointing to the chapeau in the Terms of Reference providing that the Review is not limited to the matters listed. The Review has preferred an approach that has regard primarily to what the government intended in bringing forward the legislative reforms and what Parliament intended in passing the legislation, expressed in the Acts and support materials, and assessment of how the reforms are operating in the real world. The Review engaged substantively with the issues raised by stakeholders including on measures that are complex and raise compliance issues, and interactions between the reforms and existing workplace practices. The Review has made findings and recommendations it considers appropriate considering all the circumstances and the evidence, including early operational experience, available across various measures.

The Terms of Reference also required further consideration of the effectiveness of paid family and domestic violence leave, taking into account the 2024 independent review of that entitlement. In considering paid family and domestic violence leave, and in accordance with the Terms of Reference, the Review has built on the findings of the 2024 review and considered whether further reforms should be progressed.

What the Review found

Many Closing Loopholes amendments are intended to enhance the rights of workers and appear to be operating as intended.

The amendments have been substantially supported and endorsed by unions, community organisations and others as making a difference to bring greater clarity, reflect what is happening in practice, and strengthen protections to support secure, fair and safe work. Employer organisations are supportive

of some measures but are also critical of a significant number of others, citing additional complexity, compliance costs and heightened risk from increased penalties.

Full assessment of the operational effectiveness of all amendments is not yet possible. They have been in place for only a short period, and the effectiveness of those with longer-term impact will become clearer over time. This view was shared by many stakeholders.

The amendments also shift and increase workplace obligations. For a significant number of individual measures, this shift is deliberate and in line with the intention of the reforms.

While not all submissions agree that the Closing Loopholes measures contribute to improved workplace practices, they do agree there is a need for support to successfully implement the measures.

To ensure the success of these amendments, and to safeguard them to function as intended, additional support is recommended for employers, workers and institutional players including the Fair Work Commission and Fair Work Ombudsman. This is important in a tripartite system where government, unions and employers all have a role to play in making the system work.

A stronger framework

The Closing Loopholes and paid family and domestic violence leave amendments have enhanced the workplace relations framework. For example, changes include increased rights for employees and employee-like workers within the workplace, changes to the definitions of an employee's status, enhanced leave entitlements, intractable bargaining amendments, new rights for casual employees around conversion, and 'Same Job, Same Pay' provisions. Although employer groups did not support many of the changes, union submissions mostly supported the amendments and sought further amendments to clarify, strengthen and in some cases expand the protections.

Many measures that enhance rights for workers appear to be operating as intended. Implementation and compliance support for employers and workers is essential to safeguard the reforms so that they function as intended. This theme is developed in discussion of individual measures in the chapters that follow.

The Review also considered amendments to enhance the Commonwealth work health and safety and workers' compensation framework. These reforms focus on ensuring the arrangements in the Commonwealth jurisdiction are updated to reflect the model WHS laws and appropriate penalties are in place for WHS breaches, including industrial manslaughter, improving workers rehabilitation and compensation processes for injured workers, and establishing the Family and Injured Workers Advisory Committee.

Formal support to ensure success

Some measures, such as amendments to determine employment status, bring increased complexity because they require multifactorial assessment and the exercise of discretion. The Review does not see complexity as inherently problematic but without added support, that complexity could impede achievement of the reforms.

But complexity is not the only factor.

The new criminal offence of wage theft and the substantial increases in civil penalties do not change the underlying obligation to pay employees: the contested issues are about how best to achieve compliance. This Review prefers a strong emphasis on support and guidance.

Given the seriousness of the consequences of wage theft and the significant increase in civil penalties, clear practical tools are essential to help employers meet their obligations. These tools will help prevent inadvertent breaches; reduce business concern about penalties for genuine mistakes; and ensure employees are properly paid. Importantly, it will also expose deliberate underpayment by bad actors who might otherwise rely on arguments about complexity.

Where to from here?

Five themes emerged across the measures examined. Together they provide a roadmap for future government action.

Allow time to review outcomes and to develop and conduct targeted future reviews

Many reforms only recently commenced and it will be some time before their effectiveness can be fully assessed. Others depend on the development of case law, experience in tribunals and courts, making specific orders, or setting up and implementing a new criminal jurisdiction.

The Review's analysis shows, in some cases, early evidence is necessarily incomplete and further time is needed before meaningful review is possible. Hasty change risks disrupting reforms that are still bedding down.

Strengthen guidance and practical tools

A significant number of measures will work best if employers, workers and unions have access to clear, practical, industry specific guidance.

The Review considers for some individual measures that the government, in conjunction with the Fair Work Ombudsman (and where relevant, the Fair Work Commission and the Australian Small Business and Family Enterprise Ombudsman), should develop further guidance, checklists and tools to support implementation. The Fair Work Ombudsman and the Fair Work Commission are integral institutions within Australia's workplace relations framework and central to the operation of the statutory scheme. They are embedded within the system and have legislative functions that support implementation, compliance and a practical understanding of the amendments. The development of guidance for many measures is critical and should occur in consultation with relevant tripartite forums, engaging workers, business and government stakeholders. Employer groups and unions also have a significant role to play to continue to support their members to understand and successfully implement the reforms. While guidance does not remove employers' obligation and responsibility to correctly classify and pay their workers, it will assist all parties within the system to implement and receive the intended benefits of the reforms.

High-quality compliance tools are an important adjunct to successful implementation of the amendments, including digital tools that will help employers and employees ensure correct classification of workers, identify applicable awards and calculate lawful pay.

Monitor and support regulator and tribunal capacity

A number of measures created new jurisdictions or expanded existing ones. Success depends on the capacity of our institutions, including the Fair Work Ombudsman and Fair Work Commission, to manage new functions and increased workloads. The government should monitor the resourcing of the Fair Work Commission to ensure that increased workloads in new jurisdictions can be dealt with in a timely way and ensure the Fair Work Ombudsman has sufficient resourcing and capacity to provide guidance, outreach and develop sophisticated decision tools appropriate for business, including small business.

The Closing Loopholes reforms also included several changes to the Commonwealth WHS and workers' compensation frameworks. Again, it will be important that government continue to monitor the resources of Commonwealth regulators and Safe Work Australia.

Statutory clarification

Some measures are operating appropriately but contain specific issues that require legislative clarification or amendment. The Review identifies these in the individual measures, including why legislative change is required. The Review has also taken into account the introduction of recent legislative measures to improve the operation of some measures (for example the Workplace Relations Legislation Amendment (Building Cooperative Workplaces No.1 Bill) 2026), noting that these are still to be considered by Parliament.

Improve access and equity for vulnerable or hard to reach workers

Vulnerable and hard to reach workers are at heightened risk of not accessing or benefitting from the reforms in practice. Several recommendations highlight the need to ensure vulnerable cohorts can access the protections and the Review valued further insights provided by stakeholders on how to improve the accessibility of the system for these cohorts. To this end, government should:

- support outreach to workers in regional, rural and remote areas, migrant workers, young workers, women, First Nations workers, LGBTIQA+ workers, culturally and linguistically diverse workers, workers with a disability and workers with low bargaining power or in high-risk sectors
- consider whether there are any dynamics or barriers to uptake of the reforms in the care and disability sectors under the employee-like framework, as well as consider the possible extension of the framework to other sectors
- ensure regulated road transport contractors have equivalent access to the unfair contracts jurisdiction, and
- ensure trauma-informed outreach is available to workers experiencing family and domestic violence.

Future challenges

Because problems and issues can re-emerge as functions and understandings mature, case law develops and practices evolve, ongoing monitoring is essential to preserve the integrity of the reforms and how they operate in practice to advance the objectives of our workplace relations system. The Review recognises that tripartism is a critical underpinning of our workplace relations system and can, and should, continue to make a critical contribution to our response to future challenges.

These findings and themes shape the detailed analysis in the following chapters, which examine each individual measure and its early operation.

Recommendations

The reforms, as a whole, are working as intended. Recommendations are made to safeguard and ensure their ongoing success and should be read with this in mind. The following recommendations can be categorised into three interrelated themes, each designed to reinforce and support the intentions underlying the reforms:



Review, evaluate and monitor

These recommendations ensure the reforms operate, and continue to operate, as intended through flexible review mechanisms, data collection and ongoing monitoring and evaluation. They recognise that the reforms are embedding within the legislative framework and new jurisdictions or reforms require time and real-world application before issues may emerge or long-term impacts can be fully assessed.



Clarify and guide

These recommendations further support implementation of the reforms through legislative refinement for some measures and strengthened practical guidance and tools. They clarify the laws, by providing guardrails for the reforms or focusing the laws' purpose. They reflect the view that reforms work best if employers and workers have clear, practical and industry specific guidance and high quality and tailored tools that support compliance.



Access, equity and protection

These recommendations aim to improve uptake, fairness and protections, including for 'employee-like' workers, contractors, labour hire workers, victim-survivors of family and domestic violence, vulnerable cohorts, and workers with low bargaining power. Ensuring the reforms are accessible to diverse cohorts of workers will ensure that everyone in our community benefits from the reforms in practice.

Recommendation 1

Future legislative review provisions should provide flexibility in timeframes for completion of a review and be adapted to the specific reforms being considered. This requires consideration be given to:

- the length of time a reform might take to be implemented and for the operation of the provision to become clear, and
- the requirements for qualitative and quantitative evidence and/or data to properly assess the operation of the amendments.

Recommendation 2

Particular measures should be further reviewed, giving consideration to the appropriate method for their review and ensuring flexible and adequate timeframes:

- The employee-like jurisdiction (see Recommendation 10).
- The regulated road transport jurisdiction (see Recommendation 15).
- The right to challenge unfair contractual terms provisions (see Recommendation 18).
- The right to disconnect provisions (see Recommendation 19).
- The regulated labour hire arrangement orders framework (see Recommendation 20).
- The transitioning from multi-enterprise agreements provisions (see Recommendation 23).
- The criminal wage theft offence (see Recommendation 24).
- Changes to the civil penalties framework (see Recommendation 24).
- The delegates' rights provisions (see Recommendation 34).

Recommendation 3

The government should provide additional funding to unions and employer groups to improve outreach to vulnerable and hard to reach cohorts of workers and to further educate relevant employers about the reforms. This should include a focus on cohorts of workers who may face barriers to accessing the benefits of the reforms, including workers in regional, rural and remote areas, women, First Nations workers, workers with disability, young workers, culturally and linguistically diverse workers and migrant workers. Consideration should be given to options including:

- proactive outreach and education to vulnerable or hard to reach workers (especially in regional, rural and remote areas, and migrant communities)
- support for workers in horticulture, cleaning, and other high-risk sectors, and
- the delivery of tailored training and information to employers through trusted locally recognised organisations.

Recommendation 4

The government should establish or utilise an existing standing tripartite committee/s of peak employer and employee representative organisations, and government agencies (such as the National Workplace Relations Consultative Council), to support the monitoring and identification of emerging issues in the workplace relations system. Advice should be provided to the Minister for Employment and Workplace Relations on actions to address these issues.

The committee/s should report annually to the Minister.

Chapter 2: Employment relationships and standards

Recommendation 5 (Meaning of 'employee' and 'employer')

The government should consider the definition of 'employee' and 'employer' across relevant Commonwealth laws, including tax law, to ensure consistency with the *Fair Work Act 2009*.

Recommendation 6 (Meaning of 'employee' and 'employer')

The Fair Work Ombudsman should develop and publish industry-specific guidance (including for the road transport industry) on the application of section 15AA (ordinary meaning of 'employee' and 'employer') and its practical interaction with common practices in the relevant sector, to reduce uncertainty and support the appropriate classification of workers. In developing the guidance, the Fair Work Ombudsman should work with relevant employer groups and unions. (See also Recommendation 17)

Recommendation 7 (Casual employment)

The Australian Public Service Commission should assess the operation of the employee choice pathway in the Australian Public Service, including the operation of the Australian Public Service Commissioner's Directions, in consultation with the Community and Public Sector Union. As a first step, this should include collection of relevant data from Commonwealth agencies. The data should be made publicly available.

Recommendation 8 (Casual employment)

a. The government should establish a working group of universities, relevant unions and government representatives from relevant portfolios to develop a working model for academic employment pathways that enables access to casual conversion provisions under the *Fair Work Act 2009*. The working group should report within 12 months of publication of this report.

b. The government should monitor the operation of the employee choice pathway in higher education and provide targeted support to assist parties to reach agreement on an appropriate employment pathway. This could include facilitation, independent analysis and guidance from the Fair Work Commission.

Recommendation 9 (Casual employment)

The Fair Work Ombudsman should review and update (or develop if necessary) its guidance on applying section 15A, including ensuring the guidance uses plain and clear language and takes into account:

a. the application of the 'firm advance commitment' test

b. providing further examples of common scenarios

c. common questions in applying the definition of casual employee, and

d. regular rostering (including the extent to which this indicates whether an employee is a casual employee).

Recommendation 10 ('Employee-like' workers)

The government should undertake a targeted post-implementation review once the first employee-like minimum standards orders are made and the jurisdiction is more developed, to assess whether the framework is operating as intended in practice (including the operation of the Road Transport Advisory Group as it relates to employee-like minimum standards orders). The review should also consider the unfair deactivation framework (including any amendments made by the Building Cooperative Workplaces No.1 Bill 2026) and the operation of the *Fair Work (Digital Labour Platform Deactivation Code) Instrument 2024*. This review should take place within 2 years of the first orders being made.

Recommendation 11 ('Employee-like' workers)

The government should urgently address the management of unfair deactivation matters involving serious misconduct allegations. This should include considering whether legislative clarification on the evidentiary threshold is necessary.

Recommendation 12 ('Employee-like' workers)

The government should examine the role of minimum standards guidelines within the employee-like framework, including their interaction with minimum standards orders, to ensure they are operating as intended.

Recommendation 13 (‘Employee-like’ workers)



The government should examine the operation of the employee-like framework in the care and disability sectors (including low uptake of both the minimum standards and unfair deactivation pathways), including whether there are sector specific dynamics or barriers within the care economy inhibiting uptake or whether more time is needed for the minimum standards order regime to develop and become established in practice.

Recommendation 14 (‘Employee-like’ workers)



The government should consider whether the employee-like framework should be expanded to other cohorts of independent contractors experiencing similar conditions of low pay and low bargaining power, including journalists and media workers, musicians, performers, screen and live performance crew, writers, translators and interpreters.

Recommendation 15 (Minimum standards for the road transport industry)



The government should undertake a targeted post-implementation review once the first road transport minimum standards orders and road transport contractual chain orders (other than MS2026/1) are made and the jurisdiction is more developed, to assess whether the framework is operating as intended in practice (including the operation of Road Transport Advisory Group). The review should also consider the unfair termination framework and the limited uptake of this jurisdiction. This review should take place within 2 years of the first orders being made.

Recommendation 16 (Minimum standards for the road transport industry)



The government should examine the role of minimum standards and contractual chain guidelines within the road transport framework, including their interaction with minimum standards and contractual chain orders, to ensure they are operating as intended.

Recommendation 17 (Defence to sham contracting)



The Fair Work Ombudsman should develop clear guidance, in the form of a checklist, to assist persons engaging workers to assess the nature of the employment or contracting relationship by applying the multifactor test. This should include the development of industry-specific checklists (including for the road transport industry) to complement industry guidance developed in response to Recommendation 6. The Fair Work Ombudsman should work with relevant employer groups and unions to develop the checklists.

Recommendation 18 (Unfair contractual terms)



The new jurisdiction in the Fair Work Commission to resolve disputes about unfair contract terms in services contracts should be further reviewed in 2 to 3 years. As part of this review, consideration should be given to the measure's application to classes of service contracts.

Recommendation 19 (Right to disconnect)



A further review of the right to disconnect should occur in 2 to 3 years. The review should have regard to relevant matters, including:

- any Fair Work Commission jurisprudence that has developed, including identifying the boundaries of reasonableness of after-hours contact
- any interaction between the statutory dispute resolution process and the application of civil penalties for a breach of a right to disconnect term in a modern award, and
- any industry specific issues.

Chapter 3: ‘Same job, same pay’ and the bargaining framework

Recommendation 20 (Regulated labour hire arrangement orders)

The government should conduct a targeted review of the regulated labour hire arrangement orders framework to ensure it operates as intended and without undue delays.

Recommendation 21 (Workplace determinations)

Section 235 of the *Fair Work Act 2009* should be amended to provide a legislated set of guardrails that must be considered by the Fair Work Commission before an intractable bargaining declaration can be made.

Recommendation 22 (Workplace determinations)

The *Fair Work Act 2009* should be amended to ensure that mandatory terms to be included in an intractable bargaining workplace determination must be no less favourable to each employee and their representatives, than a term of the enterprise agreement that deals with the matter.

Recommendation 23 (Transitioning from multi-enterprise agreements)

A further review of the transitioning from multi-enterprise agreements measure should occur in 2 to 3 years. The review should have regard to any uses of this measure, or Fair Work Commission jurisprudence that has developed.

Chapter 4: Protecting workers and strengthening enforcement

Recommendation 24 (Criminalising wage theft)

The government should undertake a targeted review of the operation of the wage theft offence and changes to the civil penalties framework within 1 year of publication of this report (which will be approximately 2 and a half years after the offence commenced). The review should consider the operation of the offence provisions and the appropriateness of the Fair Work Ombudsman's powers, as well as the Voluntary Small Business Wage Compliance Code and cooperation agreement provisions.

The targeted review should:

- assess the effectiveness and timeliness of the criminal wage theft offence and civil penalty regime in deterring and remedying underpayments
- examine unintended consequences for employees and employers
- assess requirements for further legislative or administrative refinements about evidence, interagency data-sharing and prosecutorial pathways
- review the adequacy of resourcing, capability, interagency coordination and infrastructure supporting enforcement
- consider interactions with other workplace relations reforms including changes to the civil penalty framework, and any impediments to recovery of underpayments, and
- consider whether unions could assist the Fair Work Ombudsman to identify criminal wage theft and underpayment.

Recommendation 25 (Criminalising wage theft)

The Minister for Employment and Workplace Relations should require the Fair Work Ombudsman to report annually on its activities relating to wage theft and civil remedies for underpayment. The standalone report should be published to enhance transparency.

The Fair Work Ombudsman's report should be required to include:

- any investigations and enforcement work about criminal wage theft (see sections 327A–327D)
- referrals made for prosecution
- civil proceedings for underpayments, and
- systemic underpayment and wage theft compliance issues identified through its functions in Part 4-1 and Part 5-2.

Recommendation 26 (Criminalising wage theft)

The government should consider options to allow employees to recover unpaid entitlements despite any criminal investigation or prosecution that may be underway. This should include consideration of a mechanism to allow civil recovery proceedings without prejudicing any criminal prosecution.

Recommendation 27 (Criminalising wage theft)

The Fair Work Ombudsman should be funded to develop further practical compliance tools to help employers comply with their wage payment obligations. This should be done in conjunction with the Fair Work Ombudsman's Advisory Group and should include the expanded development of digital tools, including interactive calculators and decision support systems.

Recommendation 28 (Criminalising wage theft)

The government should work with industry to develop compliance tools that integrate with employer payroll software.

Recommendation 29 (Criminalising wage theft)

The Fair Work Ombudsman should further promote the support available to small business employers, including through the Fair Work Ombudsman's Infoline, Small Business Showcase and Employer Advisory Service.

Recommendation 30 (Changes to civil penalties framework)

The Fair Work Ombudsman should publish clear guidance explaining the distinctions between inadvertent underpayments or mistakes, recklessness, and contraventions that are done knowingly.

Recommendation 31 (Changes to civil penalties framework)

The *Fair Work Act 2009* should be amended to reduce the penalties for contraventions of subsection 66MA(8) and sections 359B and 359C in line with other equivalent civil remedy provisions, and these 3 provisions should be added to the definition of 'selected civil remedy provision'.

Recommendation 32 (Right of entry to investigate underpayments)

Form 2 in Schedule 3.3 to the *Fair Work Regulations 2009* should be amended to align with the explanation of section 502 of the *Fair Work Act 2009* (as amended by the Closing Loopholes No.2 Act), by including the words 'or act in an improper manner'.

Recommendation 33 ('Subjection to FDV' as a protected attribute)

The *Fair Work Act 2009* should be amended to make it clear that paragraph 351(2)(a) applies only to conduct that is expressly authorised or exempted by applicable state or territory anti-discrimination law that relates to 'subjection to family and domestic violence' rather than being enlivened merely because a jurisdiction's anti-discrimination statute does not prohibit discrimination on that ground.

Recommendation 34 (Enhancing delegates' rights)

The government should further review the delegates' rights amendments to assess whether they are operating as intended in practice. This review should take place in 2 to 3 years.

The further review should consider:

- whether the entitlement to reasonable communications with members and potential members requires amendments to adequately provide for electronic communications for workers working from home and in hybrid workplaces, and
- the operation of the right to reasonable access to delegate training.

Recommendation 35 (Enhancing delegates' rights)

The *Fair Work Act 2009* should be amended to:

a. provide that, where a delegates' rights term in a proposed enterprise agreement is less favourable to the workplace delegate than the applicable award term in some respects, but more favourable in other respects, the award term only replaces the agreement term to the extent of any deficiency, and

b. in respect of workplace determinations, clarify the interaction between agreed terms and the mandatory delegates' rights term under subsection 273(7).

Chapter 5: Safe workplaces

Recommendation 36 (Industrial manslaughter)

The Commonwealth should establish an evaluative framework to better determine the impact of the industrial manslaughter offence on deterrence, workplace safety culture and the prevention of workplace fatalities in its jurisdiction, and consult with Safe Work Australia's tripartite membership to inform this work.

Recommendation 37 (Increased WHS penalties and indexation)

The *Work Health and Safety Act 2011* should be amended to:

a. extend the penalty indexation mechanism introduced by the Closing Loopholes No. 1 Act to include the financial penalty for the industrial manslaughter offence, and

b. increase the financial penalty for industrial manslaughter to ensure it is set at the rate it would have been, had indexation applied from commencement.

Recommendation 38 (Family and Injured Workers Advisory Committee)

The Department of Employment and Workplace Relations should consider what further measures or amendments could be advanced to address the formal nature, structure and risk of trauma inherent in the Family and Injured Workers Advisory Committee by reviewing the committee's governance processes and any other relevant matters, and implement necessary changes as soon as possible.

Recommendation 39 (Family and Injured Workers Advisory Committee)

The Department of Employment and Workplace Relations secretariat to the Family and Injured Workers Advisory Committee should develop further guidance to help Advisory Committee members translate their lived experience into structured advice to government.

Recommendation 40 (Family and Injured Workers Advisory Committee)

The Secretary of the Department of Employment and Workplace Relations should meet with the Family and Injured Workers Advisory Committee annually, to ensure feedback on the operation of the Advisory Committee can be provided directly.

Recommendation 41 (Comcare Guide)

Comcare should review the *Guide for Arranging Rehabilitation Assessments and Requiring Examinations* and undertake further stakeholder consultation on its effectiveness within 1 to 2 years. Comcare's review could consider:

- Opportunities for streamlined pathways where a worker consents.
- Clarification that routine administrative changes (such as rescheduling) do not require new determinations.
- The interaction between the stop clock provisions and clinical urgency.
- How to manage delays in treating practitioner responses.

In consulting stakeholders, Comcare should work with relevant employer groups and unions.

Recommendation 42 (Health and safety representative assistants)

The government should monitor the operation of the health and safety representative assistant provisions to identify whether the balance between ensuring safety and preventing potential misuse of the provision has been struck.

Recommendation 43 (Health and safety representative assistants)

Safe Work Australia should work with work health and safety regulators, employer groups and unions to develop and deliver targeted and easily accessible education and training for:

- health and safety representatives and health and safety representative assistants (including union officials), to understand their roles and responsibilities under both the Work Health and Safety Acts and *Fair Work Act 2009*, and
- persons conducting a business or undertaking, to understand their obligations and existing right to refuse entry of health and safety representative assistants in certain circumstances.

The success of the education and training in addressing the risk of misuse should be evaluated.

Chapter 6: Paid family and domestic violence leave

Recommendation 44 (Paid FDV leave)

The government should regularise the collection of evaluative data about paid family and domestic violence leave, including usage, barriers to usage, employer familiarity with the entitlement, awareness raising efforts by employers and sentiments about the leave type, to ensure it can best identify whether the measure is operating effectively and whether further reforms are necessary to give effect to the intention of the measure.

Recommendation 45 (Paid FDV leave)

The government, in consultation with employer representatives, unions and family and domestic violence experts, should consider:

- options to amend and simplify the paid family and domestic violence leave entitlement to ensure that it is accessible where an employee needs to take leave from work to deal with the impact of family and domestic violence, including circumstances where the employee needs to take steps to manage, respond to, or recover from the impact of family and domestic violence, and
- aligning evidentiary requirements with the simplified approach to ensure they do not create additional barriers to access.

Recommendation 46 (Paid FDV leave)

The *Fair Work Act 2009* should be amended to clarify the types of evidence, such as statutory declarations, medical certificates or documents from support services, that could meet evidentiary requirements if requested by employers.

Recommendation 47 (Paid FDV leave)

The Fair Work Ombudsman should reissue guidance that supports employers to understand:

a. their discretion in requesting evidence for accessing the entitlement
b. the challenges victim-survivors may have obtaining evidence, and
c. how to approach assessing whether it is reasonable to request evidence, what evidence is reasonable to request, what evidence might satisfy a 'reasonable employer', and how to engage with employees when requesting evidence in a trauma-informed and practical manner.

Recommendation 48 (Paid FDV leave)

Government, employer, employee and community organisations (including family and domestic violence organisations) should partner together to improve awareness-raising efforts and develop and deliver additional materials and training seeking to educate employees and employers about family and domestic violence and paid family and domestic violence leave. This should include supporting employers to understand their proactive work health and safety obligations relating to family and domestic violence and have practical trauma-informed conversations about family and domestic violence and paid family and domestic violence leave with their employees.

a. The government should ensure that employer, employee and community organisations are funded to undertake this work.
b. The awareness-raising initiatives and educative materials should seek to support workers in insecure and low paid work, with a particular focus on casuals.
c. The awareness-raising initiatives and educative materials should be customised to support vulnerable cohorts, including culturally and linguistically diverse and migrant employees, First Nations employees, LGBTIQA+ employees, employees with disability, young employees, and regional, rural, and remote employees.
d. The educative materials for employers should particularly seek to support small business.

Recommendation 49 (Paid FDV leave)

The government, in consultation with employer representatives, unions and family and domestic violence experts, should further consider the reasons for low uptake of paid family and domestic violence leave among casual employees. This should include considering all relevant factors, including awareness, job insecurity, evidentiary practices, and workplace rostering arrangements, to identify practical options to ensure casual employees can meaningfully access the entitlement.

Recommendation 50 (Paid FDV leave)

The government should consider, in consultation with employer representatives, unions and family and domestic violence experts, amending the *Fair Work Act 2009* to allow victim-survivors to access paid family and domestic violence leave where the following cohorts of persons are perpetrating family and domestic violence:

a. Extended family members (including aunts and uncles).
b. Former immediate family members for both the victim-survivor and their former spouse or de facto partner.
c. Family relationships based on ethnic, religious or cultural kinship rules.
d. Former members of a person's household.

Recommendation 51 (Paid FDV leave)

In considering options to amend and simplify the entitlement (Recommendation 45) the government should also consider amending the definition of 'family and domestic violence' in the *Fair Work Act 2009* to align it with the *Family Law Act 1975* by providing that family and domestic violence is behaviour that 'seeks to coerce or control the person' or 'causes the person harm or to be fearful'.

Introduction

Ms Susan Booth (the **Reviewer**) was appointed by the Minister for Employment and Workplace Relations (the **Minister**), the Hon Amanda Rishworth MP, to conduct an independent review of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (**Closing Loopholes No. 1 Act**) and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (**Closing Loopholes No. 2 Act**) (together, the **Closing Loopholes Acts**). The Reviewer was also asked to undertake a further review of the operation of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) (the **PFDVL Act**).

The Australian Government decided that the statutory reviews would be undertaken jointly, to allow a coordinated assessment of the Closing Loopholes reforms and the paid family and domestic violence leave entitlement (**paid FDVL**).

The Department of Employment and Workplace Relations (**DEWR**) provided a secretariat to assist the Review. The Reviewer expresses gratitude to all members of the secretariat for their capable assistance in undertaking this substantial task. Views expressed in the report however are those of the Reviewer.

Conduct of the Review

The Closing Loopholes Acts each required the Minister to cause a review of the operation of the amendments made by those Acts within 2 years of commencement. This statutory review was undertaken within a 6-month period.

Terms of Reference

The Closing Loopholes Review commenced on 15 December 2025 with the final report required to be delivered to the Minister on or before 15 June 2026.

The Terms of Reference (see Appendix 2), without limiting the matters that may be considered, required the Reviewer to:

- consider whether the operation of the amendments is appropriate and effective
- identify any unintended consequences of the amendments, and
- consider whether further amendments to the *Fair Work Act 2009* (Cth), or any other legislation, are necessary to improve the operation of the amendments or rectify any unintended consequences that are identified.

Consistent with the Terms of Reference, the Review has focused on how the amendments are operating in practice and whether they are achieving their intended purpose. Available evidence was weighed against the stated intent of each measure to determine whether the outcomes match the government's intended outcomes and Parliament's expectations when the amendments were enacted.

The Review also further considered the effectiveness of the amendments made by the PFDVL Act, taking into account the 2024 independent statutory review of that Act (see Chapter 6 for more information).

Stakeholder engagement

The Review committed from the outset to ensure it heard from a broad range of groups across the Australian community affected by the legislation. Within the available timeframes for the Review, public submissions were invited and extensive engagement with stakeholders occurred through a series of roundtable meetings. The Review heard from a range of groups including employer representatives, employee representatives, academics, think tanks, gender and family and domestic violence advocates, community organisations, legal assistance providers, and representatives of First Nations workers and migrant workers.

The Review also met with, and received data from, a range of government agencies, the Fair Work Commission (**FWC**), and the Fair Work Ombudsman (**FWO**) and other regulators, to understand the implementation and impact of the reforms.

The Review's findings and recommendations are informed by stakeholder experience, opinions, insights and expertise and the Review is grateful for the time taken by stakeholders to make submissions, attend roundtables and engage in this Review.

Written public submissions

Public submissions opened on 18 December 2025 and closed on 3 March 2026. Broad public calls for submissions were made and promoted through the DEWR website and social media, with targeted invitations to make a submission sent to key workplace relations stakeholders. To ensure the Review heard from a diversity of groups, the Reviewer also wrote to relevant non-workplace relations stakeholders inviting them to make a submission.

The Review received 86 submissions. Stakeholders were able to make their submissions public, anonymous, or private. Public and anonymous submissions were published on the Review website on 23 March 2026. A list of submissions is at Appendix 3.

Draft report

On 18 May 2026, the Draft Report of the Closing Loopholes Review was published for stakeholder feedback. In accordance with the Terms of Reference, the Draft Report set out the Review's preliminary findings and recommendations.

Public submissions on the Draft Report opened on 18 May and closed on 29 May 2026. Calls for submissions on the Draft Report were made through the DEWR website and social media, and invitations were sent to all stakeholders who had made a prior submission. The Review received 49 submissions providing feedback on the Draft Report. A list of submissions is at Appendix 3.

Where available, DEWR, the FWO and the FWC provided the Review with updated data to inform the final report.

The Review is grateful for the constructive submissions received in response to the Draft Report. While not every proposal is adopted, all submissions have been considered and inform the final report. Where feedback has not been adopted or discussed in detail, this reflects that it falls outside the Terms of Reference, was not appropriate in all the circumstances or reiterates views already provided to the Review. Information, data or views that had not already been provided to the Review are included in relevant sections throughout.

Stakeholder roundtables

In February 2026, 8 roundtables were held to seek stakeholder views, insights, and expertise. Roundtable meetings took place in Melbourne with employer groups and unions to discuss all measures on 19 and 20 February 2026 respectively. A roundtable with academics, to discuss all measures, took place on 24 February 2026.

Due to the breadth of the amendments under review, 5 targeted roundtables were conducted to seek stakeholder views on specific measures. On 13 February 2026, the Review met separately with business and worker representatives to discuss measures of particular interest to the road transport industry. A roundtable with family and domestic violence advocates and legal assistance providers was held on 16 February 2026, to discuss the paid FDVL entitlement. The Review also met separately with business and worker representatives on 23 February 2026 to discuss measures relevant to digital platform work.

In May 2026, 3 further roundtables were held to seek stakeholder feedback on the Draft Report. On 22 May 2026, a roundtable was held to discuss the Review's preliminary findings on the paid FDVL entitlement, which was attended by employer representatives, unions, academics and community organisations. On 25 and 26 May, roundtables were held to discuss the Draft Report with unions and employer groups respectively.

A list of roundtables and attendees is at Appendix 3.

Additional meetings

Additional targeted consultations were conducted throughout the Review.

Meetings were held on the request of particular stakeholders, or to further consult with stakeholders who have specific expertise or experience relevant to the operation of the legislation. These consultations allowed the Review to obtain more detailed or practical information where submissions raised complex, technical, or implementation focused issues. A list of those meetings is set out at Appendix 3.

Meetings with government agencies and regulators

The following government agencies were consulted to understand the implementation and impact of the reforms:

- Asbestos and Silica Safety and Eradication Agency
- Australian Small Business and Family Enterprise Ombudsman
- Australian Public Service Commission
- Comcare
- Fair Work Commission
- Fair Work Ombudsman
- Safe Work Australia

Members of the Commonwealth Family and Injured Workers Advisory Committee were also consulted.

Meetings focused on the measures relevant to the specific agency, regulator or committee. Those consulted were also invited to provide a written submission to the Review and many provided further evidence to support consideration of issues raised in the meetings.

Approach to the review

It was important for the Review to engage with a range of stakeholders and adopt an evidence-based approach to capture the breadth of experience of those affected by the reforms. The Review has examined:

- the legislative intent and structure of the amendments
- available quantitative and qualitative data on the operation of the measures
- relevant Fair Work Commission and court decisions
- stakeholder views drawn from submissions and consultations, including case studies and insights from their lived experience, and
- comparative information from other jurisdictions and previous reviews where appropriate.

Many of the measures have been in operation for a relatively short period which makes long term behavioural and market impacts difficult to assess and has informed the view that further time is needed to fully evaluate a number of measures. For some measures, quantitative data was unavailable or limited, and these limitations are identified in the relevant chapters.

In evaluating the operation of the amendments, consideration was given to whether each measure is effectively closing the loopholes it was designed to address, including whether the reforms are reducing opportunities for avoidance, undercutting, or regulatory gaps.

The Review has also assessed whether the amendments are achieving their intended purpose. That is, delivering a safer, fairer, and more level playing field across Australian workplaces, consistent with the stated legislative aims. This required examining not only the legal operation of the measures, but also their practical impact on employers, workers, and the institutions administering the reforms.

The diverse experiences of different stakeholder groups, including women, First Nations workers, young workers, migrant workers, workers with disability, LGBTIQA+ workers, small businesses, people living in regional, rural and remote Australia, and sectors with unique operational models such as the digital platform and road transport industries were a focus of the Review. This approach was to ensure that findings and recommendations are grounded in how the reforms are operating across the full spectrum of Australia's labour market, and whether they are delivering equitable and effective outcomes in practice.

Evidence and analysis framework

To assess the effectiveness and consequences of the reforms, the Review applied a framework considering:

- **Appropriateness**: whether the amendments were fit for purpose, aligned with legislative intent, and addressed the identified policy problems.
- **Effectiveness**: whether the reforms are operating as intended in practice, supported by data and stakeholder experience.
- **Unintended consequences**: whether the reforms have created compliance complexity, operational challenges, inequities, or gaps in coverage.
- **Opportunities for refinement**: whether further legislative amendments may improve clarity, workability or practical outcomes.

Structure of the report

Chapter 1 of the report provides a brief history of the Closing Loopholes reforms and their overarching legislative intent. The chapter outlines and addresses key issues and concerns identified by stakeholders, including timeframes for the review, and the reforms' potential impacts on the economy, small business, and cohorts within the community that may experience particular vulnerabilities, low-bargaining power, or barriers affecting access to the benefits of the reforms.

Each measure covered by the Review is addressed individually in the report, at Chapters 2 to 6. Where measures are interrelated or affect specific cohorts, this is also addressed. Measures are grouped across the Closing Loopholes and PFDVL Acts under 5 key themes, to guide the structure of the report and the Review's consideration of the measures:

- Employment relationships and standards (Chapter 2)
- 'Same job, same pay' and the bargaining framework (Chapter 3)
- Protecting workers and strengthening enforcement (Chapter 4)
- Safe workplaces (Chapter 5)
- Paid family and domestic violence leave (Chapter 6)

Chapter 1

The Closing Loopholes reforms



The Closing Loopholes reforms

The Closing Loopholes Acts were part of the government's legislative agenda to implement its first term election commitments and outcomes from the 2022 Jobs and Skills Summit.

The reforms aimed to remove loopholes that undermined job security, wages and conditions, to strengthen the workplace relations framework and provide certainty, fairness and a level playing field for business and workers. These loopholes disproportionately affected vulnerable workers, including workers in lower skilled jobs, casual workers, young workers, women, single parents, workers on temporary visas and workers with disability. The reforms also aimed to better ensure safe working conditions.

The key reforms were designed to:

- **Strengthen employment relationships and standards** by clarifying the nature of the work relationship and strengthening minimum standards. Employment types and definitions are the foundation of the workplace relations system, and frame the obligations, entitlements, rights and standards each person in the workplace can expect and must comply with. The Closing Loopholes reforms intended to ensure that the characterisation of work reflects the practical reality of the relationship, and that workers performing work in conditions akin to employment are not left without appropriate protections. The reforms sought to improve job security, reduce opportunities for undercutting, and provide clearer and fairer minimum standards, while preserving genuine independent contracting and flexible work arrangements.
- **Ensure the same pay for the same job and strengthen the bargaining framework** through the introduction of regulated labour hire arrangement orders to stop labour hire workers being paid less than directly hired workers (the 'same job, same pay' principle) and other measures intended to support the effective operation of enterprise bargaining and protect the integrity of bargained outcomes. The reforms were intended to strengthen collective bargaining as a mechanism for improving wages and conditions, facilitate access to appropriate bargaining streams, and enhance the FWC's role in resolving bargaining disputes in a manner that promotes fairness, efficiency and good faith.
- **Protect workers and strengthen enforcement** through a focus on deterrence, compliance and access to remedies. The reforms aimed to address deliberate and systemic non-compliance with workplace laws, including underpayment of wages and exploitation of vulnerable workers. The reforms included a new criminal offence for intentional underpayments (wage theft offence), strengthened enforcement tools, increased civil penalties, and sought to improve workers' ability to challenge unlawful or unfair conduct.
- **Promote safe workplaces and better working conditions** by improving work health and safety (**WHS**) outcomes and strengthening accountability for serious harm. The reforms sought to strengthen WHS enforcement, improve regulatory oversight, and better support workers affected by workplace injury or illness, particularly in high-risk environments, including by establishing the Family and Injured Workers Advisory Committee (the **Advisory Committee**) and introducing a standalone industrial manslaughter offence.

The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 was introduced into Parliament on 4 September 2023. On 7 December 2023 the Senate divided the Bill into 2 separate bills to allow Parliament more time to consider the measures it considered more controversial. The Closing Loopholes No.1 Act was passed on 7 December 2023 and received Royal Assent on 14 December 2023. The Closing the Loopholes No. 2 Act was passed on 12 February 2024 and received Royal Assent on 26 February 2024.

Since the 2023–24 Budget, the government has provided $125.1 million (and $29.7 million per year ongoing) towards supporting and implementing the Closing Loopholes reforms. This includes funding to:

- establish the new jurisdictions in the FWC to set minimum standards for employee-like workers and the road transport industry, and to handle disputes about unfair contract terms
- implement the labour hire and casual employment measures
- support the implementation of the new criminal offence for intentional wage theft, including funding for the FWO and Commonwealth Director of Public Prosecutions (**CDPP**)
- boost the FWO's Employer Advisory Service (**EAS**), which provides eligible small business employers with free, tailored written advice about pay and conditions, and for the FWO to develop new resources to help businesses comply with the right to disconnect
- implement measures related to silicosis and silica-related disease, including funding for the Asbestos and Silica Safety Eradication Agency (**ASSEA**)
- preserve redundancy entitlements under the Fair Entitlements Guarantee (**FEG**) in relation to the measure addressing the anomalous consequences of the small business redundancy exemption in insolvency cases.

Consultation in a tripartite system: contesting, implementing and embedding change

Australia's workplace relations system is shaped by ongoing interaction between government, workers and their unions, and employers and employer groups. Engagement, contestation and cooperation between these actors are features through which interests and objectives are balanced and standards are set, applied and tested over time. Within this tripartite setting, views will differ and the framework is necessarily informed by compromise.

The Closing Loopholes reforms were subject to significant consultation, both during their development and in their passage through Parliament, with stakeholders playing a substantial and important role in shaping the reforms. The legislation was considered and passed by Parliament with the benefit of input from unions and employer groups, as well as academics, legal centres, advocacy groups and other community organisations. Stakeholder views on the reforms reflected a wide range of perspectives on the design and likely effects of the package, including differing views on whether particular measures appropriately balance flexibility, fairness and the objectives of the Fair Work system.

The Closing Loopholes reforms are now in place, and stakeholders continue to play an important role in their effective operation. Statutory objectives, regulatory oversight and tribunal and court processes provide the structure within which employer and worker interests are advanced and balanced and workplace issues are resolved. Many of the Closing Loopholes reforms rely on these institutional arrangements as the primary means of translating legislative intent into practical outcomes, with the FWC playing a central role across a number of measures, including in setting standards and resolving disputes within the statutory framework. As many of the reforms expand jurisdictions, increase compliance expectations, or introduce new pathways and tests, the capacity and accessibility of institutions such as the FWO, FWC and the courts are, and will continue to be, central to how the reforms operate in practice. A number of measures will work best when employers and workers can access clear, practical guidance and tools, and when regulator and tribunal capacity is sufficient to support timely decision making and effective compliance support.

The Review continued consultation on the reforms within the tripartite process, providing a mechanism through which stakeholder views can be tested against emerging evidence, institutional practice and implementation experience. Stakeholder positions submitted to the Review are largely consistent with those expressed previously, reflecting the same underlying perspectives on the policy objectives, design and expected impacts of the reforms.

Stakeholders were consulted on each of the individual measures in the Closing Loopholes Acts and stakeholder views and feedback are outlined and addressed in Chapters 2 to 5 of this report. Chapter 6 separately addresses feedback in relation to the PFDVL Act.

In addition to views on specific measures, many stakeholders also submitted that it was too early to assess the effects of a number of the amendments, either because the measures have only been operating for a short period of time or because relevant data and case law was limited or unavailable. These timing and evidentiary constraints were widely acknowledged across different stakeholder groups.

The Review also heard broader concerns about the cumulative and systemic effects of the reforms. In particular, some employer groups expressed concern that the amendments have increased complexity and reduced workplace flexibility and, over time, may adversely impact productivity, innovation, job creation and business growth. Other stakeholders, including unions and community organisations, emphasised the importance of the reforms to strengthen job security, fairness and compliance.

A number of workplace relations initiatives and review processes coincide with the Closing Loopholes reforms and intersect with stakeholder concerns raised during the Review. For example, the National Construction Industry Forum (**NCIF**) is undertaking broader work relevant to the building and construction industry, parliamentary inquiries into the operation and adequacy of the National Employment Standards (**NES**) and Wage Theft are underway, and Safe Work Australia (**SWA**) is undertaking a *Best Practice Review of the Model Work Health and Safety Laws* (**Best Practice Review**) to ensure the model WHS laws provide the highest level of protection for workers. These parallel initiatives and processes do not diminish the statutory task of this Review, which is to consider the operation of the specific amendments made by the Closing Loopholes Acts. However, awareness of related processes is relevant to understanding stakeholder positions, the implementation environment, and the broader policy and regulatory context in which the reforms are operating. Relevant intersecting processes are discussed in relation to individual measures in Chapters 2 to 6.

As the reforms continue to be implemented and embedded and evidence on impacts develops over time, ongoing monitoring, stakeholder engagement and data collection will remain critical to assessing how the reforms operate in practice and whether adjustments are required to ensure the system remains fair, effective and sustainable.

1.1 Timeframe for the Review

The Closing Loopholes No. 1 Act required a review to be conducted on the operation of its amendments no later than 2 years after 14 December 2023, and be completed within 6 months.[1] The Closing Loopholes No. 2 Act imposed equivalent requirements, with the review to commence no later than 2 years after 26 February 2024, and be completed within 6 months.[2] These review provisions were moved by members of the crossbench during consideration of the bills.[3]

The PFDVL Act was reviewed in 2024 in line with its statutory requirements,[4] with the government committing to a further review in its response.[5]

Although the review provisions were intended to allow approximately 2 years of operation of the measures before the Review commenced, many measures have been in operation for a significantly shorter period. Several key measures commenced in late 2024 or early 2025, with some subject to qualifying periods that further delayed practical operation. Some measures also had a delayed commencement for small business. Other measures introduced significant new jurisdictions that required time to establish and for stakeholders to begin utilising, while others required the development of guidance or the establishment of new bodies before they became operational.

Stakeholders widely acknowledged constraints resulting from the Review's timing. For example, the Australian Council of Trade Unions (**ACTU**) submitted that although the reforms have begun to deliver their intended objectives, some measures have been in operation for considerably less than 2 years.[6] Australian Industry Group (**AIG**) noted that some measures had commenced close to the start of the Review and that more time was required for the measures to be assessed.[7] The Australian Chamber of Commerce and Industry (**ACCI**) also submitted that the outcomes of the reforms were only beginning to be felt, with case law only beginning to flow, and that there was insufficient evidence to assess the impacts on productivity, innovation, and jobs growth.[8]

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[1] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) ss 2(1) item 1, 4(1), (3)–(4).
[2] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) ss 2(1) item 1, 4(1), (3)–(4).
[3] Commonwealth, 'Proposed Amendments to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023'. Detail – Crossbench, Allegra Spender MP, House of Representatives, 29 November 2023; Commonwealth, 'Proposed Amendments to the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023'. Detail – Jacqui Lambie Network and Senator David Pocock, Senate, Sheet 2367, 7 February 2024.
[4] *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) ss 4(1), (4)–(5); Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024).
[5] Australian Government, 'Australian Government Response to the Independent Review of the operation of the paid family and domestic violence leave entitlement in the *Fair Work Act 2009* (Cth)' (25 February 2025) 20.
[6] ACTU, Submission No 67 (6 March 2026) 5.
[7] AIG, Submission No 82 (8 March 2026) 4 [19].
[8] ACCI, Submission No 54 (3 March 2026) 3 [17]–[18].

The challenges faced in this Review are not unique. The Secure Jobs, Better Pay Review (**SJBP Review**) had similar statutory timeframes,[9] measures with staggered commencements and limitations arising from data availability.[10] For example, the SJBP Review was required to consider Chapter 16A of Schedule 1 of the Closing Loopholes No. 1 Act after only 9 months of operation.[11] The first review of the PFDVL Act concluded that insufficient time had passed to allow for a full understanding of the entitlement's operations and impacts,[12] particularly for small business employers.[13] These examples highlight some of the broad limitations in statutory review requirements that prioritise timeliness over flexibility and deep, evidence-based evaluation.

The Review's ability to assess some measures needs to be considered within this context. The Review relied on available data from the FWO, FWC, Comcare and other sources, as well as qualitative evidence from stakeholders on how the reforms are operating including case studies and emerging case law. Evidence for some measures was not available because the measures are untested, are in the process of being tested, or are designed to have impacts over the longer term. The Review recommends further review of specified measures, where additional time is likely to mean that further information, data, case law or other evidence will be available to a future review. The timing of these further reviews should remain flexible and take into account the workload and challenges for stakeholders associated with potentially overlapping reviews and processes.

Statutory reviews play an important role and provide valuable insights into the operation of legislative reforms, including opportunities to strengthen the reforms or address unintended consequences. Because legislative reforms can take time to commence or fully operationalise, the Review considers future statutory reviews would be assisted if legislative review provisions are more customised, flexible and long term. This would better allow for appropriate time and data to be collected and considered in the review, or enable consideration of the impacts when it is clear those have fully emerged.

[9] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) s 4(1), (3)–(4).
[10] Mark Bray and Alison Preston, *Final report of the Secure Jobs, Better Pay Review* (Final Report, 31 March 2025) 12–13.
[11] Mark Bray and Alison Preston, *Final report of the Secure Jobs, Better Pay Review* (Final Report, 31 March 2025).
[12] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) 78–83.
[13] Ibid 81–3.

Recommendation 1

Future legislative review provisions should provide flexibility in timeframes for completion of a review and be adapted to the specific reforms being considered. This requires consideration be given to:

- the length of time a reform might take to be implemented and for the operation of the provision to become clear, and
- the requirements for qualitative and quantitative evidence and/or data to properly assess the operation of the amendments.

Recommendation 2

Particular measures should be further reviewed, giving consideration to the appropriate method for their review and ensuring flexible and adequate timeframes:

- The employee-like jurisdiction (see Recommendation 10).
- The regulated road transport jurisdiction (see Recommendation 15).
- The right to challenge unfair contractual terms provisions (see Recommendation 18).
- The right to disconnect provisions (see Recommendation 19).
- The regulated labour hire arrangement orders framework (see Recommendation 20).
- The transitioning from multi-enterprise agreements provisions (see Recommendation 23).
- The criminal wage theft offence (see Recommendation 24).
- Changes to the civil penalties framework (see Recommendation 24)
- The delegates' rights provisions (see Recommendation 34).

1.2 Economy, labour market conditions and productivity

Some employer groups raised concerns with the Review that the operation of the Closing Loopholes Acts could have negative impacts on key economic measures, including productivity growth, and that this should be considered by the Review. These concerns mirror those raised during the legislative process, with some stakeholders saying the reforms could have negative effects on the economy, including on small business, and could contribute to decreased productivity, increased compliance costs and industrial disputes.

The Review considered a broad range of indicators to inform an assessment of economic trends in the period since the provisions of the Acts took effect:

- Since December 2023, and in the context of considerable macroeconomic uncertainty, the labour market has remained resilient overall, despite some signs of softening.
- At 4.3% as at March 2026, the unemployment rate remains low in historical and international terms. However, it has risen modestly from the 4.0% recorded in December 2023.
- The number of people who are employed and looking for more hours – the underemployed – has fallen, with the underemployment rate down from 6.6% in December 2023 to 5.9% in March 2026.
- Productivity growth has been sluggish for an extended period in both Australia and comparable advanced economies: labour productivity was at the same level in December 2025 as it was in December 2023. Despite this, there are positive signs, including 1.5% growth in market sector labour productivity over the year to the December 2025 quarter.
- There were 12.4 working days lost to industrial disputes per 1,000 workers in 2025 – equal to the 20-year average. This is a modest increase on 2024 and 2023 levels but is below 2022 levels.

The Review has not received clear evidence of a causal link between the amendments made by the Closing Loopholes Acts and any negative macroeconomic outcomes. In assessing early outcomes, the Review approaches claims of macroeconomic impacts with caution, recognising both the limited time since commencement and the many economic drivers affecting productivity, wages and participation.

The Review notes that changes in productivity and other macroeconomic indicators reflect a range of broader influences, including domestic and international factors. The magnitude of the workplace relations system's contribution to macroeconomic outcomes, and in particular productivity growth, is contested. The impact of amendments to the workplace relations system on growth and productivity is even less clear.

1.3 Complexity

A consistent theme in stakeholder input is that complexity, whether arising from multi-factor tests, new dispute resolution pathways, compliance complexity or interaction with other legal frameworks, can create uncertainty and risk aversion for workplace participants. Stakeholders reported that these effects are felt particularly acutely by small and medium businesses, including where limited in-house capability increases reliance on external advice for day-to-day decisions about engagement models, pay compliance and process obligations.[14]

Employer groups, in particular, characterised aspects of the amendments as introducing additional layers of legal and operational complexity, increasing perceived compliance risk and uncertainty in routine operational decision-making. For example, ACCI submitted that the Closing Loopholes reforms have created new layers of complexity, uncertainty and rigidity across the workplace relations system, created new avenues for conflict, expanded regulation and undermined the need for bargaining at the enterprise level.[15] These concerns were contrasted with strong support from unions and some community stakeholders, who regarded the reforms as necessary to restore protections and fairness for workers, adapt to the changing nature of working arrangements, and address gaps that had accumulated over time, including from legislative changes that were detailed or technical. Other drivers of complexity, including different definitions or frameworks across Commonwealth laws, were raised by stakeholders.

This is a practical challenge. Stakeholders emphasised that uncertainty can translate into business risk including through conservative engagement choices, increased compliance costs, and reduced confidence in applying the law without clearer, accessible guidance and compliance supports. Stakeholders also noted that increased complexity can create challenges for workers in navigating the reforms and accessing their benefits, particularly cohorts who rely on plain-language information and practical assistance to understand entitlements and available pathways for advice or remedy.

There are multiple examples across this report illustrating the ways stakeholders connected particular reforms to complexity concerns. For example, ACCI raised concerns that changes to the meaning of 'employee' and 'employer' (see Section 2.1) may reintroduce a more complex and uncertain characterisation task for businesses when determining status and associated obligations.[16] The Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) submitted that the changes to casual employment (see Section 2.2) requires small businesses to assess the 'totality' of the employment relationship over time and across multiple staff, which it characterised as a material compliance challenge for time-poor owners.[17] Housing Industry Association (**HIA**) similarly argued that employers must navigate new and more prescriptive procedures associated with casual conversion,

[14] See, for example, ASBFEO, Submission No 8 (27 February 2026) 3.
[15] ACCI, Submission No 54 (3 March 2026) 1 [7].
[16] Ibid 38 [230]–[232].
[17] ASBFEO, Submission No 8 (27 February 2026) 4.

with increased process and penalty exposure for non-compliance.[18] The National Farmers' Federation (**NFF**) raised concerns that the wage theft offence and strengthened enforcement settings (see Sections 4.1 and 4.2) heighten perceived exposure in complex award environments, particularly where payroll compliance is already demanding in seasonal and variable-hours contexts.[19]

The Review does not see complexity as inherently problematic. In some cases, complexity reflects the nuanced realities of modern work arrangements and the degree of legal specification required to fairly recognise and regulate those arrangements. However, stakeholders suggested complexity becomes an operational issue where it impedes uptake of intended protections, discourages compliance through uncertainty, or imposes a disproportionate administrative burden, particularly for small businesses without dedicated human resources or legal capability. On that view, the practical question is often less the existence of complexity than the availability of usable supports to assist workplace participants to apply the law in day-to-day settings, especially where reforms rely on fact-intensive assessments and introduce new or adjusted compliance pathways.

In these circumstances, complexity can be better managed if accompanied by further practical guidance and tools, including guidance tailored to particular sectors. While further guidance and tools would not remove employers' obligations to comply with their legal obligations, stakeholders pointed to the value of plain-language, industry-specific guidance, worked examples and decision-support tools (including digital tools) to reduce inadvertent non-compliance and support consistent application, including by clarifying how key tests operate in common engagement scenarios or specific industries. For example, the Business Council of Australia (**BCA**) recommended that, rather than penalising employers for misunderstanding or mistakes (as it submits the new civil penalty regime does), modern awards be reviewed to be 'simple and easy to interpret' and that the FWC or FWO 'create and share clear and unambiguous pay rules for all modern awards', including penalty rates, allowances and overtime clauses.[20]

The FWO leverages its stakeholder advisory and reference groups to develop, refine and share its advice and education resources and promote workplace compliance. The FWC similarly produces a range of educational materials on the workplace relations system. The FWC's Online Learning Portal includes free resources on a range of workplace relations topics, and its small business hub provides information on how small business employers can engage with FWC processes such as dispute resolution.

[18] HIA, Submission No 20 (2 March 2026) 5, 14.
[19] NFF, Submission No 7 (25 February 2026) 4.
[20] BCA, Submission No 50 (3 March 2026) 40 [9.2].

Unions and employer groups also have a key role to play in providing support, education and advice to workers and businesses, to ensure they understand their rights and obligations, including in relation to workplace relations reforms. The Productivity, Education and Training Fund, which was established to implement outcomes from the 2022 Jobs and Skills Summit, provides grant funding to eligible employer and employee peak representative organisations to 'engage with workplace reforms as they progress…[and] implement practical education and other activities to embed new laws in Australian workplaces'.[21]

The Review proposes a number of recommendations for further education supports and practical guidance directed to stakeholder concerns that aspects of the Closing Loopholes reforms have increased complexity, including by strengthening the availability of accessible tools to support compliance and understanding across the system.

[21] DEWR, Portfolio Budget Statements 2023–24 (Budget Related Paper, 2023) 16.

1.4 Small business

Small businesses play a crucial role in the Australian economy, and their capacity to understand and implement the Closing Loopholes reforms is central to the reforms operating as intended. Stakeholders emphasised that small business considerations cut across many measures examined in this Review, that reforms can have a cumulative burden, and that small business employers may experience complexity more acutely because they often lack internal human resources and legal and payroll capability, and may be less able to absorb the time and cost associated with navigating nuanced obligations.

A number of measures in the Closing Loopholes Acts include small business-specific provisions such as staged or delayed commencement, additional safeguards, or carve-outs from some provisions. These provisions reflect concerns about compliance burden and adjustment costs in workplaces that do not have specialist human resources expertise. For example, the Council of Small Business Organisations Australia (**COSBOA**) noted that the right to disconnect commenced for small business employers following an initial delay, but that awareness and implementation challenges persisted despite the lead time.[22] The NSW Small Business Commission submitted that it had more recently received representations from small business operators on their continued uncertainty regarding the scope of the obligations.[23] Consistent with this, stakeholders submitted that uniform obligations across business sizes can create disproportionate impacts where small businesses are required to apply the same compliance processes as larger enterprises.[24]

COSBOA suggested that the definition of 'small business' should be increased to 50 full-time equivalent employees and this new definition should be applied consistently across a range of measures (such as sham contracting, unfair contract terms, right to disconnect and enterprise bargaining) as part of a broader call for greater proportionality in how obligations operate for smaller employers.[25] However, while that suggestion reflects stakeholder concern about the cumulative burden of recent reforms, the Review notes that altering the statutory small business definition is outside the scope of this Review.

Stakeholders also pointed to the role of guidance and targeted supports in enabling practical implementation for small business. The ASBFEO, Lynda McAlary-Smith, emphasised that small businesses often require additional support to interpret and apply detailed *Fair Work Act 2009* (Cth) (**FW Act**) requirements, and that a more facilitative and education-focused approach can build confidence and improve compliance, particularly where resources are repeatable, scalable and delivered through channels that small businesses are willing to use.[26] In particular, the ASBFEO proposed a practical suite of measures focused on:

- improving the availability of up-to-date employment information through Application Programming Interfaces (**APIs**) so authoritative award and pay-rate information can be accessed through business software

[22] COSBOA, Submission No 45 (3 March 2026) 8 [35].
[23] NSW Small Business Commission, Submission on Draft Report No 5 (26 May 2026) 2.
[24] See, for example, COSBOA, Submission No 45 (3 March 2026) 2 [8], 8 [33(b)], 16 [74].
[25] COSBOA, Submission No 45 (3 March 2026) 2 [8].
[26] Letter from Lynda McAlary-Smith, ASBFEO to Susan Booth, 1 May 2026, 2.

- promoting existing education and advice offerings (including the FWO's EAS), and
- continuing to develop tailored small business guidance on employee entitlements.[27]

The ASBFEO also noted that the FWC has already made some awards pay data available through its Modern Awards Pay Database, and that the FWO provides the Pay and Conditions Tool (**PACT**) to help identify applicable awards and pay rates.[28]

The Australian HR Institute's (**AHRI**) submission noted that the successful implementation of legislative requirements 'depends not only on awareness of legislative requirements, but on equipping line managers with the skills and judgment to apply them appropriately and consistently.'[29] AHRI's submission referred to the Productivity Commission's observation that management capability in Australia compares unfavourably to other OECD countries, and noted the Productivity Commission's recommendation to expand advisory services for small and medium-sized businesses to strengthen management capability.[30] AHRI submitted that advisory services could 'assist organisations with limited internal capability to navigate legislative requirements, build line management capacity and embed workplace reforms more effectively.'[31]

With respect to the definitions of 'employee' and 'employer' inserted into the FW Act by the Closing Loopholes No. 2 Act, COSBOA submitted that '[t]he FWO's published guidance, while helpful, does not provide sufficient industry-specific examples for trades, professional services, creative industries, and regional agricultural contexts where contractor relationships are structurally common'.[32]

Currently, the FWO's Small Business Showcase provides tailored information for small business employers. The FWO's EAS also provides free tailored written advice on pay and entitlements issues to eligible small business employers.

Stakeholders submitted that confidence in engaging with guidance and advisory services can be affected by perceived enforcement risk. The ASBFEO noted that some small businesses are reluctant to contact the FWO for advice if they think they may have breached their obligations, particularly in relation to the wage theft provisions.[33] While the Voluntary Small Business Wage Compliance Code (**Voluntary Code**) provides that businesses that do not intentionally underpay will not be prosecuted, the ASBFEO observed that some small businesses still believe engaging with the FWO could lead to prosecution, indicating a need for clearer education about what conduct the wage theft provisions cover.[34]

[27] Ibid.
[28] Ibid.
[29] AHRI, Submission No 21 (2 March 2026) 6 [3.7].
[30] Ibid 6 [3.8].
[31] Ibid.
[32] COSBOA, Submission No 45 (3 March 2026) 4 [14].
[33] Letter from Lynda McAlary-Smith, ASBFEO to Susan Booth (1 May 2026) 2.
[34] Ibid.

The regulatory burden associated with the Closing Loopholes reforms is real, though not as extensive as some submissions suggest and is likely to reduce over time as measures are embedded and become more familiar. There is no doubt that the provision of high-quality, trusted support and advisory services would address the genuine concerns about the pace of reform. The Review agrees with the broad direction of a facilitative, education-focused approach and, in considering stakeholder input across measures, draws out areas where practical guidance, decision-support tools and trusted advisory channels could strengthen small business capability to comply with and apply the Closing Loopholes reforms in day-to-day settings.

1.5 Diverse worker cohorts

Several Closing Loopholes measures and the PFDVL Act were intended to address forms of insecure and low-paid work in which women and other cohorts in our community who experience particular barriers or vulnerabilities are disproportionately represented. These measures target loopholes associated with exploitation of workers with the least power in the labour market, whether due to being part of a particular cohort, or working within an arrangement associated with greater vulnerability to exploitation.

Women are disproportionately represented in casual employment. The reforms to casual employment and the clearer employee-led pathway to permanency were intended to improve women's job security and employment stability.[35] Family and domestic violence (**FDV**) also disproportionately affects women, with 27% or 2.7 million women having experienced FDV since the age of 15.[36] The reforms to include 'subjection to family and domestic violence' as a protected attribute in provisions that prevent discriminatory conduct and to introduce paid FDVL are examples of continued efforts to support workers subjected to FDV and ensure victim-survivors are not required to choose between safety and an income.[37] These measures align with broader objectives to support women's economic security and workforce attachment, particularly for those facing compounding vulnerabilities such as insecure work, caring responsibilities or limited bargaining power. Early labour market data shows continued growth in women's participation and full-time employment since the reforms were introduced, although causal links cannot yet be established.[38]

Other cohorts, such as migrant workers, are also disproportionately employed in insecure arrangements such as labour hire.[39] The reforms to introduce regulated labour hire arrangement orders ensure workers in labour hire arrangements are paid at the same rates as workers directly engaged by the employers.[40] As set out in Chapter 4, recent inquiries have found that migrant workers and those in insecure work are particularly vulnerable to underpayment. The reforms to increase civil penalties for underpayment and the introduction of the new criminal wage theft offence are intended to strengthen compliance and deterrence to ensure workers receive their entitlements. The introduction of the 'employee-like' reforms were also aimed at helping ensure that gig workers 'no longer fell through the cracks'[41] and were guaranteed a level of protections otherwise enjoyed by employees.

The Review heard consistently that worker cohorts such as women, youth, people living with a disability, and culturally and linguistically diverse (**CALD**), migrant, First Nations and regional, rural and remote workers face heightened risk of not accessing, or not fully benefiting from, the reforms, particularly where work is insecure, bargaining power is low, or familiarity with legal and institutional processes is limited. Stakeholders have highlighted that awareness and familiarity with available options, confidence to

[35] Australian Bureau of Statistics, 'Causal work continues to decline' (Media Release, 12 December 2025).
[36] Australian Bureau of Statistics, *Personal Safety, Australia, 2021–22 Financial Year* (15 March 2023).
[37] Tony Burke, 'Closing loopholes so workers don't have to choose between their safety and their pay' (Media Release,19 October 2023).
[38] Australian Bureau of Statistics, *Labour Force*, Australia (March 2026).
[39] Australian Bureau of Statistics, *Labour hire workers* (December 2025).
[40] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 17 [76].
[41] Tony Burke, 'World-leading legislation to protect gig workers' (Media Release, 31 August 2023).

engage in processes or formal systems, stigma, language, geography and cultural safety are all factors that practically affect vulnerable cohorts' ability to engage with or receive the full benefit of the government's reforms.

Stakeholders also emphasised the need for customised and tailored approaches to suit the needs of different cohorts. Culturally informed, trauma aware and accessible engagement are important to ensure the Closing Loopholes Acts and PFDVL Act reforms deliver their intended outcomes and ensure workers can effectively understand and use their rights, entitlements and available processes in practice.

The Review has sought to highlight the relationship between measures and vulnerable cohorts where possible and, where appropriate, made recommendations to improve the practical application of specific reforms, including greater customisation and support, to ensure they reach more vulnerable workers in the community and deliver their intended outcome.

The Review considers that there is also further scope for unions and employer groups to undertake outreach to increase awareness of, and access to, the reforms. The Review heard from unions that access and outreach to some cohorts of workers can be challenging, which limits unions' ability to organise and represent those workers.[42] The Review accepts that access to key Closing Loopholes measures, such as the employee-like reforms, regulated labour hire arrangement orders and paid FDVL, which seek to benefit diverse and vulnerable workers, is challenging. Further, the Review concludes that the overall success of the Closing Loopholes reforms depends on reaching all workers and it is necessary that there is successful continued outreach and engagement with these cohorts (see Section 1.6 for more on future challenges).

Employer groups similarly play a key role in supporting employers' education and compliance with the reforms. As outlined in Section 1.4 above, the Review heard the value of delivering guidance and support through channels that small businesses already use and trust.[43] This is particularly important in regional, rural and remote communities.

[42] See, for example, ACTU, Submission on Draft Report No 33 (29 May 2026) 14; ASU, Submission on Draft report No 24 (29 May 2026) 1; UWU, Submission on Draft Report No 20 (29 May 2026) 7; ANMF, Submission on Draft Report No 34 (29 May 2026) 5.
[43] See, for example, Letter from Lynda McAlary-Smith, ASBFEO to Susan Booth (1 May 2026) 2.

Recommendation 3

The government should provide additional funding to unions and employer groups to improve outreach to vulnerable and hard to reach cohorts of workers and to further educate relevant employers about the reforms. This should include a focus on cohorts of workers who may face barriers to accessing the benefits of the reforms, including workers in regional, rural and remote areas, women, First Nations workers, workers with disability, young workers, culturally and linguistically diverse workers and migrant workers. Consideration should be given to options including:

- proactive outreach and education to vulnerable or hard to reach workers (especially in regional, rural and remote areas, and migrant communities)
- support for workers in horticulture, cleaning, and other high-risk sectors, and
- the delivery of tailored training and information to employers through trusted locally recognised organisations.

1.6 Future challenges

The Review has considered a comprehensive package of legislative reforms. The amendments seek to address loopholes that have developed over years of practice. Just as gaps within the workplace relations framework arose over time, there is an ongoing risk that issues might emerge (or re-emerge) over time and affect the framework.

The tripartite approach is important in identifying future emerging issues within the workplace relations framework and addressing them as they arise.

There are a number of areas within the current reforms where past experience makes it reasonably predictable that new issues, gaps or problems may develop, including the classification of employment relationships, sham contracting, and 'employee-like' workers.

There are 3 key areas that the Review considers warrant close attention when monitoring developments that may give rise to emerging issues and which have become apparent during the Review. Emerging issues often form in response to changing business models or work arrangements, sector-specific pressures, or through the development of new technologies. Emerging problems and potential regulatory gaps can be exacerbated by bad actors who exploit the system. Increased awareness about the vulnerabilities of certain cohorts or communities can also bring to light what is not working within the system for some or all workers, including those who are hard to reach.

New and evolving working arrangements

New or changing working arrangements continue to evolve and the development of a coherent regulatory environment that addresses working arrangements is important. The emergence of the gig economy is a good example of the evolution of working arrangements through technological change.

The interaction between workplace relations laws and other legislative frameworks across different portfolios and different jurisdictions, including taxation, superannuation and corporations law, family law and criminal law, may create gaps or deficiencies when regulating new or evolving work arrangements. Changes in working arrangements, as well as shifts in other parts of the system, might continue to emerge that require continued scrutiny by government to ensure the aims of the legislation are still being achieved.

Changing technology

The Closing Loopholes amendments introduced world-first protections for employee-like workers. Driven by new digital platform technology, this area will continue to evolve and grow over time and challenge us all to consider how best to protect workers who do not fall within traditional employment relationships.

As new opportunities with cutting-edge technology are identified and adopted, they will increasingly intersect with existing protections which in turn will expose gaps, inconsistencies, or deficiencies. In particular, the development and use of artificial intelligence, automated decision-making and

big data presents both opportunities and risks. Government will need to continue to consider the impact on the future of work and how employers and employees will adopt and interact with these systems within a work context. Legislative regulation and guidance are just some of the possible options for preventing the emergence of new issues linked to evolving technology.

Diverse worker cohorts

As noted in Section 1.5, the reforms particularly sought to address the risks posed to more vulnerable worker cohorts. While the Review recommends several ways to support different cohorts of workers, numerous reports – including those addressing underpayment and temporary migrant workers – indicate that potential exploitation in the workplace relations system continues for many workers. Ongoing monitoring, support, and education for these workers and identification of any deficiencies in the workplace relations framework will assist in minimising scope for potential exploitation and support government to better protect and empower these cohorts of workers.

Tripartite support

As noted in the opening statements to this Chapter, the tripartite system plays an important role in supporting the effective operation of the workplace relations framework. Likewise, it can support the monitoring, identification and resolution of emerging issues.

A tripartite committee or committees should be established to bring together relevant stakeholders to support the monitoring, identification and resolution of emerging gaps or deficiencies in the workplace relations framework.

The committee or committees should advise the government on actions needed to address emerging problems to prevent them from becoming entrenched in practice. Consideration should be given to leveraging existing structures in place to support this function. For instance, it may be possible to utilise the National Workplace Relations Consultative Council (**NWRCC**) and/or the Digital Labour Platform Consultative Committee (**DLPCC**), which currently facilitate tripartite discussions on workplace relations policy, for structured engagement on emerging issues.

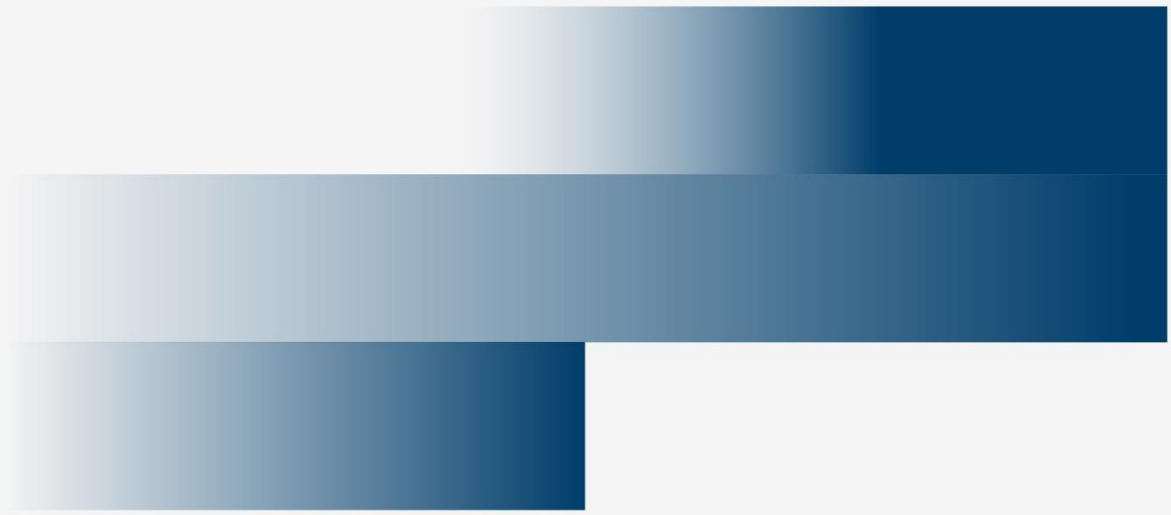
Recommendation 4

The government should establish or utilise an existing standing tripartite committee/s of peak employer and employee representative organisations, and government agencies (such as the National Workplace Relations Consultative Council), to support the monitoring and identification of emerging issues in the workplace relations system. Advice should be provided to the Minister for Employment and Workplace Relations on actions to address these issues.

The committee/s should report annually to the Minister.

Chapter 2

Employment relationships and standards



2.1 Meaning of 'employee' and 'employer'

What the measure does

The Closing Loopholes No. 2 Act inserted a new interpretative principle at section 15AA of the FW Act for determining whether an individual is an 'employee' or a person is an 'employer' by reference to the real substance, practical reality and true nature of the relationship between the individual and the person.[44]

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

- the totality of the relationship between the individual and the person must be considered, and
- in considering the totality of the relationship between the individual and the person, regard must be had to the terms of the contract governing the relationship and other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.[45]

The provision does not apply in certain narrow circumstances.[46]

A note to new subsection 15AA(2) clarifies that it was enacted as a response to the 2022 decisions of the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 (***Personnel Contracting***) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (***Jamsek***).[47] In these decisions, the High Court held that where parties have comprehensively committed the terms of their relationship to a written contract, its legal characterisation should be based on the rights and obligations of the parties under that contract. While the court would consider the relationship as a whole, this assessment was generally confined to the contractual terms, with post-contractual conduct considered only in limited circumstances.[48]

Section 15AA requires a multifactorial assessment, as was previously commonly understood to be the correct approach in determining whether a relationship is one of employment or contracting prior to the 2022 High Court decisions.[49] Under the multifactorial test, courts and tribunals must consider both the terms of the contract and how the relationship operates in practice, including factors such as control, delegation, financial risk, equipment provision and expected continuity of work.[50]

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[44] *Fair Work Act 2009* (Cth) s 15AA(1); *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 15A.
[45] *Fair Work Act 2009* (Cth) s 15AA(2).
[46] See ibid 15AA(3), which provides generally that the new interpretive principle does not apply to employees that are only covered by the Fair Work Act because of State referrals of their workplace relations powers.
[47] *Fair Work Act 2009* (Cth) s 15AA(2) note 1.
[48] *Construction, Forestry, Maritime, Mining and Energy Union & ANOR v Personnel Contracting Pty Ltd* [2022] HCA 1, [40]–[44] (Kiefel CJ, Keane and Edelman JJ), [173]–[177] (Gordon J); *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, [6]–[9] (Kiefel CJ, Keane and Edelman JJ), [109] (Gordon and Steward JJ).
[49] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 182 [1073]–[1074].
[50] See *Jiang Shen Cai trading as French Accent v Do Rozario* [2011] FWAFB 8307; *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; *Hollis v Vabu Pty Ltd* [2001] HCA 44.

The measure includes an opt-out mechanism for individuals earning above the contractor high income threshold (**CHIT**), set by the *Fair Work Regulations 2009* (Cth) (**FW Regulations**).[51] A person may notify an individual that they may opt out of the operation of section 15AA if the person considers that the relationship may be an employment relationship because of the operation of section 15AA, but they must not notify them unless they think the individual is likely to have exceeded the CHIT for work they had performed under the relationship.[52]

To opt out, eligible individuals must provide a written opt-out notice to the person stating they elect that section 15AA is not to apply to the relationship between the individual and the person. The opt-out notice must state that the individual considers their earnings for work performed under the relationship exceed the CHIT at the time the notice is given.[53] An individual who opts out may later revoke that decision.[54] As a result of opting out, section 15AA does not apply, and the relationship is determined by reference to the contract terms in accordance with the common law.[55]

The Closing Loopholes No. 2 Act gave the FWC power to deal with uncertainties or difficulties arising from the operation of section 15AA. The FWC can make a determination to vary a fair work instrument to resolve the uncertainty, including varying a modern award, an enterprise agreement, workplace determination or a FWC order.[56]

The opt-out provisions commenced on 27 February 2024. Section 15AA (the interpretative principle) commenced on 26 August 2024.[57]

Intention of the measure

The measure was intended to ensure a fairer test of employment relationships,[58] ensuring workers are correctly categorised even in the face of carefully drafted contracts which may not fully reflect how the contract is performed in practice,[59] and explicitly sought to counteract the principles established in *Personnel Contracting* and *Jamsek*.[60]

The question of an individual's work status is generally uncontroversial. Where this is the case, the amendments were intended to have little or no impact. Where the question of an individual's work status does arise, the amendments were intended to ensure that a fairer test applies to characterising the relationship.[61]

[51] *Fair Work Regulations 2009* (Cth) reg 1.08AA.
[52] *Fair Work Act 2009* (Cth) s 15AB.
[53] *Fair Work Act 2009* (Cth) s 15AB(7).
[54] Ibid s 15AD.
[55] Ibid s 15AC.
[56] Ibid sch 1 cl 120.
[57] Ibid s 15AB(8); *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 2(1) items 21 and 21A.
[58] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 185 [1092].
[59] Ibid 22 [107].
[60] Ibid 183 [1084].
[61] Ibid 185 [1092].

The multifactorial assessment of whether a relationship is one of employment, or of principal and contractor, for the purposes of the FW Act, ensures a flexible approach to enable the ordinary meanings of 'employee' and 'employer' to continue to adapt to changing social conditions, market structures and work arrangements.[62] By making the true nature of the relationship determinative, the new provision is intended to ensure that mischaracterised working relationships are legally ineffective.[63]

The measure sought to ensure that, while the terms of the contract between the parties will be a relevant factor, they are not determinative where they do not reflect the real nature of the working relationship.[64] The amendments align with Article 9 of International Labour Organisation (**ILO**) recommendation 198, which states that the nature of the relationship should be 'guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise…'.[65]

Amendments to establish the opt-out process were moved by Senator Jacqui Lambie and Senator David Pocock.[66]

What has happened since commencement

The principle has been applied in multiple FWC decisions, including unfair dismissal[67] and general protections[68] matters. In *Sarah Murray v 239 Brunswick Pty Ltd & Raffoul* [2025] FWC 978, the FWC confirmed that subsection 15AA(2) requires a consideration of the totality of the relationship. The FWC said that this involves examining both the terms of the contract and how the relationship operates in practice. In reaching its decision, the FWC referred to the common law approach reflected in case authority, including consideration of the nature of the work and how it is performed, the identification and application of the relevant indicia to the circumstances, and the terms of the contract between the parties.[69]

In *Hu v Optima Rea Pty Ltd* [2025] FWC 2296, the FWC found that in ascertaining the ordinary meaning of employee and employer, it must consider the parties' legal rights and obligations, consistent with *Personnel Contracting* and *Jamsek*, and can have regard to the totality of that relationship (including the multifactorial test as set out in the cases that predated *Personnel Contracting* and *Jamsek*) and how the contract was performed in practice, as required by section 15AA.[70]

There is no available data on the use of the opt-out provision.

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[62] Ibid 182 [1076].
[63] Ibid 183 [1079].
[64] Ibid 182–3 [1078].
[65] Ibid 183 [1079].
[66] Commonwealth, 'Proposed Amendments to the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023'. Detail – Jacqui Lambie Network and Senator David Pocock, Senate, Sheet 2371 revised, (8 February 2024).
[67] See, for example *Hayley Smith v Kohli Traders Pty Ltd* [2025] FWC 304.
[68] See, for example *Sarah Murray v 239 Brunswick Pty Ptd & Mousa Raffoul* [2025] FWC 978; *Bull v Rmbl Bxng Bondi Pty Ltd* [2025] FWC 3069.
[69] See *Murray v 239 Brunswick Pty Ltd & Raffoul* [2025] FWC 978, [17]–[18].
[70] See *Hu v Optima Rea Pty Ltd* [2025] FWC 2296, [10].

Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026

The Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026 (Cth) (**Building Cooperative Workplaces No. 1 Bill**) was introduced into Parliament by the government on 3 June 2026. The Bill would, if enacted, introduce the road transport contractor high income threshold (**RTCHIT**), a separate income threshold for regulated road transport contractors to apply instead of the CHIT[71] (see Section 2.4 for more detail on the Bill and the proposed RTCHIT). If enacted, a regulated road transport contractor would only be able to access the 'opt out' provisions in section 15AB of the FW Act if their earnings exceed the RTCHIT, rather than the CHIT.[72]

What the Review heard

The Review received substantial feedback on this measure, including 24 written submissions, with strongly contrasting stakeholder views reflecting the measure's impact on one of the foundational definitions in the FW Act. Employer groups were largely opposed to the measure, citing increased complexity, compliance burden and legal risk for employers. Unions generally supported the reinstatement of the multifactorial test, saying that it achieves its intended purpose to classify employment relationships by practical reality rather than a formal contract. The Review received a further 13 submissions on the Draft Report which addressed the measure.

Employer groups

Employer groups raised concerns that the new definition reintroduces uncertainty and complexity, compliance and litigation risks for businesses, and increased risk of underpayments.

The National Electrical and Communications Association (**NECA**), AIG, BCA and Master Builders Australia (**MBA**) submitted that the reintroduction of a multi-factor approach increases ambiguity, complexity and legal risk for businesses (including small and medium size businesses) engaging independent contractors, and can lead to reclassification risk over time depending on how work is performed in practice.[73] BCA submitted that this uncertainty, combined with the increased penalties for breaches of the FW Act, leads to significant legal risk of misclassification for any form of engagement other than permanent employment.[74]

BCA, the National Road Transport Association (**NatRoad**), and the Australian Trucking Association (**ATA**) also outlined that the increased ambiguity caused by the inconsistent definitions of employee across other pieces of legislation (for example, superannuation, tax and workers' compensation) is contributing to complexity, as the common law test (as clarified by the High Court in *Personnel Contracting* and

[71] Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026 (Cth) sch 1 item 15.
[72] Ibid sch 1 item 13.
[73] NECA, Submission No 3 (2 February 2026) 3; AIG, Submission No 82 (8 March 2026) 80–1; BCA, Submission No 50 (3 March 2026) 39; MBA, Submission No 34 (3 March 2026) 8–10.
[74] BCA, Submission No 50 (3 March 2026) 39.

Jamsek) still applies outside the FW Act context.[75] MBA suggested the measure discourages the formation of more small businesses which are crucial to the future of building and construction.[76] COSBOA submitted that the measure has introduced legal uncertainty for small businesses that legitimately engage independent contractors, and that awareness of the change among small businesses is low, indicating a need for clear, industry specific guidance.[77] COSBOA submitted that the removal of a single decisive contractual criterion and its replacement with a holistic multifactorial assessment means that no 2 engagement arrangements can be assessed with confidence by a small business owner without legal advice.[78] In its feedback on the Draft Report, COSBOA reiterated its recommendation for a statutory checklist or decision tool, developed with the FWO, that a small business employer can apply in good faith and that, if followed, would provide protection against prosecution for any misclassification.[79]

AIG strongly opposed the Review's draft recommendation for government to consider consistency between the FW Act definition across other Commonwealth laws,[80] describing the FW Act definition as complex, unclear and likely to result in inconsistent application by parties, the FWC and the courts.[81] AIG further contended that extending the definition beyond the FW Act would be premature and inappropriate, on the basis that there has been no adequate identification or assessment of the Commonwealth laws affected, nor analysis of the practical impacts of such a change. It submitted that different statutory regimes have historically adopted distinct definitions for specific purposes, and that a single definition would represent a wide-ranging reform without sufficient evidentiary or policy justification.[82] ACCI also submitted that it is not desirable for the definition to apply to other areas of the law (including tax law), especially as the framework only applies for the purposes of the FW Act and does not apply to state-based tax laws such as payroll tax.[83]

Several stakeholders raised concerns about the interaction of the new provisions with sham contracting. COSBOA submitted that the combination of the revised multi-factorial employment test and the tightened sham contracting defence creates 'double jeopardy' for small businesses that may misclassify their workers, exposing them to both potential back-pay or other entitlement liability and penalty risk, and noted low awareness of the sham contracting changes among small businesses.[84] The ATA highlighted opportunities to exploit inconsistent definitions across different Commonwealth legislation and stated that this is not curbing, and may even be encouraging, sham contracting.[85]

The NFF recommended protecting genuine contracting by providing clearer indicators and model contracting clauses for common agricultural contractor types, reducing reclassification disputes where commercial contracting is legitimate.[86]

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[75] Ibid; NatRoad, Submission No 36 (3 March 2026) 8 [32]; ATA, Submission No 46 (3 March 2026) 4 [24].
[76] MBA, Submission No 34 (3 March 2026) 8.
[77] COSBOA, Submission No 45 (3 March 2026) 3–4 [9]–[14].
[78] Ibid [10].
[79] COSBOA, Submission on Draft Report No 7 (29 May 2026) 4 [14].
[80] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 64 [Draft Recommendation 4].
[81] AIG, Submission on Draft Report No 45 (31 May 2026) 7 [33].
[82] Ibid 8 [38].
[83] ACCI, Submission on Draft Report (1 June 2026) 9 [34].
[84] COSBOA, Submission No 45 (3 March 2026) 6 [25]–[27].
[85] ATA, Submission No 46 (3 March 2026) 4–5 [25]–[31].
[86] NFF, Submission No 7 (25 February 2026) 7.

Unions

Unions supported the new definition on the basis it restores a fairer test focused on the real substance, practical reality and true nature of an employment relationship, and more effectively addresses misclassification. Unions submitted that the measure is consistent with the stated intent to re-centre classification on practical reality rather than contractual form.

The ACTU supported the statutory test and its intended role in restoring a multi-factorial assessment. It indicated there had been approximately 34 FWC decisions that had directly applied new section 15AA.[87] The ACTU recommended that the FWC be given power to arbitrate on the question of whether a worker is an employee under section 15AA directly, rather than as an artefact of another proceeding such as unfair dismissal.[88] In its feedback on the Draft Report, the ACTU supported the draft recommendation for the government to consider the definition of 'employee' and 'employer' across relevant Commonwealth laws, including tax law, to ensure consistency with the FW Act.[89] It submitted that this would address the problem that the contract-centric approach from the *Personnel Contracting* and *Jamsek* decisions still applies for the purposes of other federal statutes including taxation and superannuation.[90]

The United Workers Union (**UWU**) submitted that the measure is operating effectively but recommended it be strengthened by the inclusion of a non-exhaustive, illustrative list of factors as to whether an individual is an employee, to guide consistent decision-making. It submitted that this would provide clearer expectations and promote consistent application in the FWC.[91]

Road transport stakeholders

NatRoad and ATA raised concerns about the various definitions of 'employment' and 'contractor' that exist across different legislative frameworks, including superannuation, taxation, and workers' compensation.[92]

NatRoad submitted that characterising drivers in the road transport industry using the finely balanced multifactorial considerations can result in complex questions, particularly where independent contractors may work in ways that are similar to employed drivers.[93] NatRoad observed that overlapping and inconsistent tests for determining a worker's status may be contributing to ongoing non-compliance and sham arrangements.[94]

To reduce opportunities for bad actors to structure arrangements to avoid employee protections and entitlements, and to support effective enforcement, the ATA recommended that government catalogue and compare existing employment and contractor definitions and develop a clearer, standard multi-factorial test for assessing relationships in the road transport sector.[95] To further strengthen protections against

[87] ACTU, Submission No 67 (6 March 2026) 73.
[88] Ibid 74–5.
[89] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 64 [Draft Recommendation 4].
[90] ACTU, Submission on Draft Report No 33 (29 May 2026) 8.
[91] UWU, Submission No 62 (6 March 2026) 21.
[92] NatRoad, Submission No 36 (3 March 2026) 8 [32]; ATA, Submission No 46 (3 March 2026) 4 [24].
[93] NatRoad, Submission No 36 (3 March 2026) 7 [31].
[94] Ibid 8 [32].
[95] ATA, Submission No 46 (3 March 2026) 4 [25].

sham contracting, the ATA also recommended a new positive duty for the employer/head contractor to take proactive steps to apply, assess and document the elements of a multifactorial test when assessing the nature of the relationship between the parties.[96]

Both the Queensland Trucking Association (**QTA**)[97] and the ATA submitted that more detail is needed on the elements of a reasonable multifactorial test that could apply to the road transport sector. QTA and ATA suggested the elements of the test for a contractor could be that the driver:

- is paid for results to be achieved
- provides all or most of the equipment and materials
- is free to delegate work to other entities
- has freedom in the way the work is done
- provides services to the general public and other businesses
- is free to accept or refuse work, and
- is in a position to make a profit or loss.[98]

The ATA submitted that establishment of a road transport specific multifactorial test for contractors, and a positive duty to apply and record an assessment, would assist with compliance and enforcement on several levels.[99] The ATA submitted that these elements could play a role in further tightening the defence to sham contracting[100] (discussed further in Section 2.5).

Proposal for a road transport-specific CHIT

The ATA recommended a road transport-specific CHIT, on the basis that road transport contractors face high costs, with labour representing 'only 20% of interstate contractor costs'.[101] The ATA suggested the road transport CHIT be set at 5 times the employee high-income threshold ($183,100 in 2025–26). In 2025–26, this would make the road transport CHIT $915,000. The ATA recommended that the road transport CHIT should apply to gross revenue rather than net earnings, and that it should be clarified how revenue is annualised for contractors working less than 12 months or those who work in multiple businesses.[102] This proposal is discussed further in Sections 2.4 and 2.6.

Other stakeholders

The National Rural Women's Coalition (**NRWC**) supported the measure, in conjunction with other measures providing greater protections for independent contractors, as important for rural women working in dependent contracting or informal arrangements that lack access to leave, job security

[96] Ibid 5 [32].
[97] Following the roundtable consultation undertaken as part of the Review, QTA provided information for consideration.
[98] ATA, Submission No 46 (3 March 2026) 5 [36].
[99] Ibid 5 [37].
[100] Ibid.
[101] Ibid 6 [38]–[40].
[102] Ibid 6 [41].

or minimum conditions. It recommended establishing clearer tests for economic dependency (on one business) and called for targeted guidance and outreach for regional workers and small businesses.[103]

Circle Green Community Legal (**Circle Green**) welcomed the ordinary meaning approach, submitting that it provides clarity to both employers and employees about the nature of their working relationship. It recommended adding a non-exhaustive list of factors taken from case law into the FW Act, to add further clarity for employers and employees.[104]

Analysis

The definitions of 'employee' and 'employer' are foundational concepts of central importance to both workers and businesses. The amendments support a fairer and more accurate characterisation of the employment relationship by limiting reliance on contractual drafting where it does not reflect the real relationship.

The Review acknowledges the views of unions, academics and community legal stakeholders, and agrees that a totality-based assessment is necessary to restore fairness and accuracy to employment classification. This approach better reflects contemporary work arrangements and more effectively addresses misclassification by preventing contractual form obscuring the relationship's true nature.

However, at the same time, this increased fairness creates greater complexity and uncertainty for employers. Section 15AA is deliberately intended to re-establish a fact-intensive characterisation exercise. This means that employers cannot assume that employment status is fixed at commencement, and it may need to be reassessed where the substance of work changes from the original contract. This uncertainty has practical consequences for employers, including an increased risk of misclassification as working arrangements evolve. Employers may need to more actively monitor and reassess employment relationships, rather than relying on contractual terms alone. While stakeholders generally accept that this shifts the assessment away from a primarily contractual inquiry to a more holistic assessment of the work actually being performed, it also makes employment status questions less capable of clear or 'bright line' answers, and means that these answers may change over time.

The concerns raised by employer and small business groups about increased compliance and litigation risk arising from the multi-factorial approach are understandable. These risks are most acute where practices diverge from contractual arrangements over time, creating the potential for reclassification. The Review acknowledges views of employer groups that these concerns are amplified in the context of the broader compliance and enforcement settings under the Closing Loopholes reforms, including higher penalties and strengthened sham contracting provisions. For small businesses, the cumulative effect of these changes may be difficult to absorb without access to dedicated legal or human resources capability.

[103] NRWC, Submission No 29 (3 March 2026) 8.
[104] Circle Green, Submission No 65 (6 March 2026) 9.

Evidence on how the measure is operating in practice remains limited. It is not possible to definitively quantify the number of FWC, federal or state court matters applying section 15AA, and there is no available data on the uptake of the CHIT opt-out provisions. While multiple FWC decisions have applied the section, including in unfair dismissal[105] and general protections matters,[106] each turns on its own facts. This limits the extent to which consistent principles can be distilled at this stage. Given the relatively limited time that the amendments have been in operation, it is too early to fully assess effectiveness or determine whether the amendments are achieving their intended effect. However, the Review notes the amendments largely returned the law to the test as it was before 2022.

The ACTU suggested that conferring arbitral powers on the FWC to determine employment status under section15AA could be beneficial.[107] This could assist both individuals and employers to obtain greater clarity on the true nature of a particular engagement. However, as noted above, employment status determinations under section 15AA are inherently fact-specific and turn on the totality of the individual circumstances. Conferring an arbitral role on the FWC would be unlikely to provide clarity beyond the particular case.

The FWO has already issued guidance for determining whether a worker is a contractor or an employee,[108] which provides a useful starting point. However, stakeholder suggestions for additional guidance could potentially assist in promoting a more consistent application of the test.

Road Transport

The impacts of the amendments are reported to be particularly acute in the road transport sector, where legitimate contracting arrangements can closely resemble employment, making classification under section 15AA finely balanced and uncertain.

On 12 November 2025, Senator Glenn Sterle (WA) convened a Road Transport Industry Roundtable on Sham Contracting and the Shadow Economy (the road transport roundtable). This roundtable was attended by a number of industry participants including the Transport Workers' Union (**TWU**), ATA, QTA, NatRoad, National Road Freighters Association, Australian Road Transport Industrial Organisation (**ARTIO**), and others. The communiqué issued by the road transport industry stakeholders that attended the road transport roundtable describes concerns about sham contracting in the road freight industry, and its impacts on the sustainability of the industry.[109] Issues related to sham contracting are discussed further in Section 2.5 of this Review.

Industry participants in the road transport roundtable also raised the inconsistency in the definition of 'employee' in the FW Act and tax law. NatRoad and ATA submissions to this Review similarly point to compounded complexity arising from inconsistent employee and contractor tests across workplace

[105] See *Hayley Smith v Kohli Traders Pty Ltd* [2025] FWC 304.
[106] See *Sarah Murray v 239 Brunswick Pty Ltd & Mousa Raffoul* [2025] FWC 978.
[107] ACTU, Submission No 67 (6 March 2026) 74.
[108] FWO (Cth), 'Independent Contractors' (Web Page) <https://www.fairwork.gov.au/find-help-for/independent-contractors>.
[109] Senator Glenn Sterle, (Facebook, 14 November 2025) <https://www.facebook.com/SenatorGlennSterle/posts/following-the-roundtable-i-held-in-canberra-last-week-to-discuss-the-effects-tha/1219801019966117/>.

relations, taxation, superannuation, workers' compensation and other regimes, which they consider contributes to non-compliance and sham arrangements.[110] The ACTU also supports extending this approach beyond the FW Act to achieve greater consistency across Commonwealth laws, noting that the continued application of a contract-centred test in other regimes (such as taxation and superannuation) creates fragmentation and risks misclassification.[111]

This inconsistency and complexity arises because the common law test, as clarified in *Personnel Contracting* and *Jamsek*, still applies in these other areas of law. The co-existence of different definitions is creating practical uncertainty, including in relation to sham contracting (see Section 2.5). It is plausible that firms engaging workers will develop the impression that, if independent contracting is a legitimate mode of engagement in one context (for example tax law), it is legitimate in other contexts. Adopting consistent definitions or tests of employment status could assist in providing certainty for workplace participants, and reduce the risk of inadvertent non-compliance in the form of misclassification of workers. It may also assist in enforcement. This would not involve adopting a wholly novel or unjustified single definition. Rather, it would give government the opportunity to consider whether coherence across Commonwealth regimes should be restored following *Personnel Contracting* and *Jamsek*, now that the FW Act has largely returned to the pre-2022 multifactorial approach, including by weighing the potential benefits of greater consistency against any unintended consequences of amendment.

The ATA argues that the general principles in the FW Act are insufficient and calls for clearer, road-freight-specific guidance on applying the multi-factorial test, including clearer standards to support consistent and compliant decision-making as arrangements evolve. Consistent with that, both the ATA and QTA submit that road-transport guidance could be anchored in 6 practical elements as discussed above under 'Road transport stakeholders'.

The elements proposed by ATA and QTA are not dissimilar to the factors comprising the existing multifactorial test as summarised in *Jiang Shen Cai trading as French Accent v Do Rozario* [2011] FWAFB 8307, with the exception of ATA's and QTA's proposed inclusion of 'is in a position to make a profit or loss'.[112] The ATA and QTA proposal would be difficult to integrate into the FW Act framework, and would be a significant departure from the approach this measure sought to reinstate.

Despite the existence of general FWO guidance on the difference between contractors and employees, it is clear that there are some industries with common operating models, such as the road transport sector, that would benefit from industry-specific guidance on the application of section 15AA. In sectors such as road transport, legitimate contracting arrangements can closely resemble employment in practice, making the application of the multi-factorial test finely balanced and difficult to assess with confidence. Industry-specific guidance could assist both businesses and workers to better understand how the section 15AA factors are likely to apply in common engagement scenarios, promote more consistent classification, and reduce the risk of inadvertent misclassification without altering the underlying statutory test.

[110] NatRoad, Submission No 36 (3 March 2026) 8 [32]; ATA, Submission No 46 (3 March 2026) 4 [25]–[26].
[111] ACTU, Submission on Draft Report (29 May 2026) 8.
[112] *Jiang Shen Cai trading as French Accent v Do Rozario* [2011] FWAFB 8307, [30].

On 3 June 2026, the government introduced the Building Cooperative Workplaces No. 1 Bill into Parliament. If enacted, the Bill would establish a road transport-specific CHIT that would have the effect of limiting road transport workers' access to the opt-out mechanism in section 15AB, to those earning above the new RTCHIT. It would also make more road transport contractors eligible for unfair termination remedies and the new unfair contract terms jurisdiction (see Sections 2.4 and 2.6 for more detail).

Findings and recommendations

The measure is currently operating appropriately and effectively, and consistent with its stated intent to prioritise fairness through an assessment of the totality of an employment relationship. This approach supports correct classification by focusing on practical reality, but also makes the test more demanding to apply and contributes to uncertainty in marginal cases. The impacts are most acute at the boundary between employment and genuine independent contracting, while the majority of work relationships, where status is clear, remain largely unaffected.

The Parliament's intent in enacting this amendment was clear. As a result, this Review does not agree that the complexity and uncertainty highlighted by stakeholders is an unintended consequence. However, the Review acknowledges that the amendments can create legitimate concern for businesses in day-to-day application. Adopting consistent definitions or tests of employment status across relevant Commonwealth laws could assist in providing certainty for workplace participants, and reduce the risk of inadvertent non-compliance in the form of misclassification of workers. It may also assist in enforcement.

Recommendation 5

The government should consider the definition of 'employee' and 'employer' across relevant Commonwealth laws, including tax law, to ensure consistency with the *Fair Work Act 2009*.

Recommendation 6

The Fair Work Ombudsman should develop and publish industry-specific guidance (including for the road transport industry) on the application of section 15AA (ordinary meaning of 'employee' and 'employer') and its practical interaction with common practices in the relevant sector, to reduce uncertainty and support the appropriate classification of workers. In developing the guidance, the Fair Work Ombudsman should work with relevant employer groups and unions. (See also Recommendation 17)

2.2 Casual employment

What the measure does

The Closing Loopholes No. 2 Act amended the FW Act to change the definition of 'casual employee' and provide casual employees with a new legislative pathway to full-time or part-time employment where they no longer believe they are a casual employee.[113]

The new definition of casual employee and the employee choice pathway commenced on 26 August 2024.[114] Due to qualifying periods, employees of medium and large businesses could access the pathway from 26 February 2025 (6 months after commencement of provisions), and employees of small businesses from 26 August 2025 (12 months after commencement of provisions).[115]

Definition of 'casual employee'

Prior to the Closing Loopholes No. 2 Act amendments, the casual employment framework defined 'casual employee' by reference to the offer and acceptance of employment. This approach reflected reforms made by the *Fair Work (Supporting Australia's Jobs and Economic Recovery) Amendment Act 2021* (Cth) (**SAJER Act**).

The Closing Loopholes No. 2 Act amended the definition of 'casual employee' to provide an employee is a casual employee only if:

- the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work, and
- the employee would be entitled to a casual loading or a specific rate of pay for casual employees.[116]

This new test retains the concept that casual employees are employees who have no firm advance commitment to continuing and indefinite work. However, this is assessed under a new set of considerations, including the real substance, practical reality and true nature of the employment relationship. A firm advance commitment can be in the form of a contract or through a mutual understanding or expectations between the employer and employee not rising to the standards of a contract.[117] The assessment must also have regard to whether:

- the employer can choose or not choose to offer work or whether the employee can accept or reject an offer of work (and whether this occurs in practice)

[113] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 1; Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 1.
[114] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 2(1) item 2.
[115] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 70 [369].
[116] *Fair Work Act 2009* (Cth) s 15A(1).
[117] Ibid ss 15A(2)(a)–(b).

- it is reasonably likely that there will be future availability of continuing work in the business of the kind usually performed by the employee, given the nature of the business
- there are full-time employees or part-time employees performing the same kind of work in the employer's business that is usually performed by the employee, and
- there is a regular pattern of work for the employee.[118]

Under this test, no single consideration is determinative, and not all considerations need to be satisfied, to establish the employment relationship is characterised by a firm advance commitment to continuing and indefinite work.[119] There is no requirement for the 'continuing and indefinite work' to be according to an agreed pattern of work, unlike the previous definition.[120]

An exception to the definition of 'casual employee' is provided for where the contract for employment includes a term that provides for termination at the end of an identifiable period (i.e. the contract is a fixed-term contract) and the employee is a member of academic staff or teaching staff at a higher education institute (but not a state public servant) covered either by the *Higher Education Industry – Academic Staff Award 2020* or the *Higher Education Industry – General Staff Award 2020*.[121]

Employees engaged as casual employees remain casual until a specified event occurs, underpinned by an active employee choice, to change their status.[122]

The amendments reinstated the multifactorial test used prior to 2022 to determine whether a relationship is one of employment or contracting as it was understood in *Work Pac Pty Ltd v Skene* [2018] FCAFC 131[123], before the decision of the High Court of Australia in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (***Rossato***).[124]

Employee choice pathway

The Closing Loopholes No. 2 Act amended the FW Act to introduce a pathway for employees to convert from casual to permanent employment under the NES.[125] Previous conversion provisions were repealed and a single, employee-led pathway to permanent employment was introduced.[126]

Where a casual employee has been employed for at least 6 months (or 12 months for a small business employee), they may initiate a change to full-time or part-time employment by giving their employer written notice that they believe they no longer meet the definition of a casual employee at the point in time when they make the notification to their employer.[127] A casual employee will not be able to give notice if they

[118] Ibid s 15A(2)(c).
[119] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 60 [319].
[120] Ibid 58 [311].
[121] *Fair Work Act 2009* (Cth) s 15A(4).
[122] Ibid s 15A(5).
[123] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 59 [314].
[124] Ibid 57 [301].
[125] Ibid 57 [302], 64 [338].
[126] Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2024 (Cth) sch 1 items 10–11.
[127] *Fair Work Act 2009* (Cth) ss 66AAB(a)–(c); Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 65 [344].

have a dispute about the operation of the NES dealing with changes to casual employment status, including through arbitration, or in the last 6 months received a response from the employer rejecting a notification or had a dispute resolved relating to conversion.[128]

An employer must respond to an employee notification within 21 days of the employee's notice.[129] The employer must respond in writing and state whether they accept or do not accept the employee's notification.[130] Where they do not accept the notification, the employer has to provide reasons based on specified grounds.[131] The employer must consult with the employee, both before a decision on the notification and if the notification is accepted, on the changes to the employee's employment, including hours of work and when the conversion would take effect.[132] If they accept, the employer must provide details about the change to permanent employment, including hours of work, and when the change commences.[133]

An employer may only reject the notice if:

- the employee still meets the definition of 'casual employee'
- there are fair and reasonable operational grounds for not accepting the notification, or
- accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a state or a territory.[134]

The amendments also introduce an obligation on employers to not change the employee's pattern of work to avoid any right or obligation required under provisions relating to casual conversion, in addition to the pre-existing requirements to not reduce or vary an employee's hours of work, or terminate the employee's employment.[135]

Dispute resolution and anti-avoidance

Employers and employees must first attempt to resolve any disputes arising from the casual employment provisions about converting to permanent employment through discussions at the workplace level.[136] If not resolved at the workplace level, the employer or employee may refer the dispute to the FWC, which is required to first deal with the dispute through means other than arbitration unless there are exceptional circumstances.[137]

Where the FWC considers it would be fair and reasonable and consistent with the Act or a fair work instrument, it may make any orders it considers appropriate, including that the employee continue to be treated as a casual employee or that the employer treats them as a permanent employee from the

[128] *Fair Work Act 2009* (Cth) ss 66AAB(b),(d).
[129] Ibid s 66AAC(1).
[130] Ibid s 66AAC(2)(a).
[131] Ibid ss 66AAC(2)(a)(ii), (c).
[132] Ibid s 66AAC(3).
[133] Ibid s 66AAC(2).
[134] Ibid ss 66AAC(4)–(5). For instance, the APS Employment Principle under the *Public Service Act 1999* (Cth).
[135] *Fair Work Act 2009* (Cth) s 66L(1).
[136] Ibid ss 66M(1)–(4).
[137] Ibid ss 66M(5)–(6).

day of the employee's next pay period or a later day that the FWC considers appropriate.[138] The FWC must have regard to whether substantial changes to the employee's terms and conditions would be necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full-time or part-time employee, and disregard conduct of the parties that occurred after the employee gave notice.[139] Contravention of an order is subject to a civil penalty.[140]

Anti-avoidance provisions prohibit an employer from dismissing an employee to re-engage them as a casual in order to perform the same or substantially similar work[141] and from knowingly making false statements to an employee engaged in work other than casual work to influence them to accept casual employment where they would perform the same or similar work.[142]

Casual Employment Information Statement

The Closing Loopholes No. 2 Act also required that the Casual Employment Information Statement (the **CEIS**) prepared by the FWO be amended to include information about the right to request casual conversion and the grounds on which an employer can reject the notification.[143] The pre-existing obligation to provide the CEIS to casual employees on commencement of employment was extended to require it be provided after 6 months and 12 months of employment, and then annually.[144] A small business employer is only required to provide the CEIS upon commencement and 12 months after employment.[145]

Intention of the measure

Casual employment forms a significant proportion of the Australian labour market and suits the needs of many employees and employers.[146]

The amended definition of casual employee was intended to return the law to the common law approach to defining casual employment before the High Court of Australia's decision in *Rossato*.[147] This was intended to improve job security[148] and certainty as to status.[149] Together with the amendments to enhance employee choice, the new definition of casual employee sought to expand access to permanent employment for those employees who seek it.[150]

[138] Ibid ss 66MA(1)–(4).
[139] Ibid s 66MA(5).
[140] Ibid s 66MA(8).
[141] Ibid s 359B.
[142] Ibid s 359C.
[143] Ibid ss 125A(2)(aa)–(ab).
[144] Ibid s 125B(1).
[145] Ibid s 125B(2).
[146] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 5 [8].
[147] *Workpac Pty Ltd v Rossato* [2021] HCA 23.
[148] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 1.
[149] Ibid 57 [301].
[150] Ibid 57 [302].

The Workplace Gender Equality Agency (**WGEA**) has noted that women are overrepresented in casual employment, reporting that women represent 56% of all casual employment.[151] Australian Bureau of Statistics (**ABS**) data shows that women are more likely than men to be casual (54% of casual employees are women).[152] The amendments intended to positively engage the right of women not to be discriminated against based on gender by providing an easier pathway to permanent employment for those who choose it.[153]

The new casual conversion framework was intended to provide clear processes for employee driven choice about employment status, supplemented by the contractual ability of employees and employers to change employment status by consent.[154] The intention was for this to be underpinned by the new objective test for when an employee can be classified as a casual employee, an effective dispute resolution process and strong anti-avoidance protections.[155] The new framework sought to be quick, flexible and informal, and address the needs of employers and employees.[156] The reforms also aimed to strengthen dispute resolution for employers and employees, including by allowing the FWC to deal with disputes by arbitration and make any orders it considers fair and reasonable.[157]

At the time of introduction, the government stated that the amendments were intended to provide certainty to business, where casual employees remain casual unless they actively choose otherwise, and that employees are able to notify their employer that they wish to be permanent if they believe they no longer meet the casual definition.[158]

The amendments to the CEIS requirements sought to ensure that casual employees receive information about the ability to change or convert to full-time or part-time employment at the relevant points in time an employee may be eligible for the employee choice pathway.[159]

What has happened since commencement

The measure has only been in effect since 26 February 2025 for medium and large businesses, and 26 August 2025 for small businesses, and there is limited data to assess the impact of the changes.

The overall share of casual employees has remained relatively stable since the amendments commenced, with 2.6 million casual employees, or 21.0% of all employees as at February 2026. This is down from 2.7 million casual employees, or 22.5% of all employees at the commencement of the amendments.[160] Prior to COVID-19, casual employment had been stable at around 24–25% for the previous 2 decades.[161]

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[151] WGEA, *Australia's Gender Equality Scorecard: Key results from the Workplace Gender Equality Agency's Employer Census 2024–2025* (Report, November 2025) 24.
[152] ABS, *Characteristics of Employment August 2025* (Catalogue No 6336.0, 12 December 2025).
[153] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 50 [289].
[154] Ibid 57 [302].
[155] Ibid.
[156] Ibid 65 [341].
[157] Ibid 57 [304].
[158] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2023, 6236 (Tony Burke, Minister for Employment and Workplace Relations).
[159] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 77–8 [420].
[160] ABS, *Labour Force, Australia, Detailed* (August 2025).
[161] Ibid.

The August 2025 Characteristics of Employment survey by the ABS was released on 12 December 2025 and found that 73.2% of the employees surveyed who considered their job to be casual preferred casual employment.[162] However, the casual conversion questions are only asked of those that are currently in casual employment, so do not include people who have transitioned from casual to permanent employment, unless they have subsequently returned to casual employment

NES Inquiry

On 27 November 2025, following a referral from the Minister, the House of Representatives Standing Committee on Employment, Workplace Relations, Skills and Training adopted an inquiry into the operation and adequacy of the NES under the FW Act.

The operation of Division 4A – Casual Employment is excluded from the scope of the inquiry on the basis that it would be considered by the Review.[163] This does not prevent the parliamentary inquiry giving broader consideration to interactions between the casual employment provisions and other NES entitlements.

FWC matters

Between 26 February 2025 (when employees of medium and large businesses could access the employee choice pathway) and 31 March 2026, the FWC finalised 30 matters under the employee choice dispute resolution pathway (see Table 1). In the same timeframe, the FWC finalised 15 matters under the casual conversion pathway (see Table 1).

Table 1: relevant pathway in section 66M applications finalised 26 February 2025 to 31 March 2026 (as identified by FWC staff based on information given in application form)

Pathway	From commencement to 30 June 2025	2025–26FY (to end Q3)
Casual Conversion	9	6
Employee choice	4	26
Unknown	1	8
Total	14	40

[162] ABS, *Characteristics of Employment, Australia* (August 2025).
[163] Standing Committee on Employment, Workplace Relations, Skills and Training, Parliament of Australia, *Inquiry into the operation and adequacy of the National Employment Standards,* Terms of Reference.

Fair Work Ombudsman

The FWO has received a low number of enquiries regarding the employee choice provisions.

As at 31 December 2025, the FWO reports that its EAS has received less than 100 enquiries since the new provisions commenced (including about the employee choice pathway and the formal casual conversion provisions).[164]

The low volume may also be due to the other dispute resolution processes available to casual employees, and the transition period for the provisions.

APS employees

To ensure that casual employees in the Australian Public Service (**APS**) have the opportunity to access the employee choice pathway to permanent employment,[165] changes to the *Australian Public Service Commissioner's Directions 2022* (Cth) (the **Directions**) have been made to ensure that appointment to ongoing roles remained based on merit, while also being consistent with the government's secure work agenda.[166] In the APS context, the amendments apply to irregular or intermittent employees. The changes commenced on 26 August 2024, following a period of consultation led by the Australian Public Service Commission (**APSC**) with relevant stakeholders, including Commonwealth public sector agencies and the Community and Public Sector Union (**CPSU**).

The amendments to the Directions ensure eligible APS employees engaged to perform duties that are irregular or intermittent have the opportunity to request to convert to ongoing employment where they believe they no longer meet the definition of casual employee.[167] The new sections apply if an Agency Head receives a written notification (an employee choice notification) under section 66AAB of the FW Act from a person who is engaged as an APS employee for duties that are irregular or intermittent.[168]

The Directions require a merit-based selection process be undertaken where the employee seeks ongoing employment, no longer meets the definition of a casual employee under section 15A, and has not been found suitable for the same or a similar vacancy through a merit-based process in the previous 18 months.[169] The vacancy must be notified in the Public Service Gazette within 3 months of the notification being received.[170] The requirement does not apply where the employee was assessed as unsuitable for a similar vacancy in the 6 months before the notification was received through a recruitment process that met the requirements of the Directions.[171]

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[164] FWO Data, provided 10 March 2026.
[165] APSC, *Casual employment and the Fair Work Act 2009* (Guidance Document, 2024) 7.
[166] APSC (Cth), 'Circular 2023/24: Commencement of amendments to the Australian Public Service Commissioner's Directions 2022' (Web Page, 14 August 2024) <https://www.apsc.gov.au/resources/circulars-guidance-and-advice/circular-202403-commencement-amendments-australian-public-service-commissioners-directions-2022>.
[167] *Australian Public Service Commissioner's Directions 2022* (Cth) s 25A.
[168] Ibid s 25A(1).
[169] Ibid ss 25A(2)–(3).
[170] Ibid s 25A(4).
[171] Ibid s 25A(5).

As at 31 December 2025, 2.6% of APS employees were casual,[172] compared to 3.9% as at 31 December 2024.[173]

In December 2024, there were 7,503 casual employees in the APS, while in December 2025 there were 5,085 casual employees. Of the total number of APS casual employees in 2025, 2,854 were women, and 2,206 were men.

What the Review heard

The Review received substantial stakeholder feedback on this measure, including 32 written submissions on the amendments. Stakeholder views are strongly contrasting, with employer groups generally opposing the amendments and seeking repeal, and unions broadly supportive of the positive impact for casual workers. A further 14 submissions were received on consideration of the measure in the Draft Report.

Definition of casual employment

Multiple employer groups and small-business stakeholders submitted that the changes to the definition of casual employment replaced a contract-centred framework with a more complex assessment focused on the 'real substance, practical reality' of the relationship and concepts such as 'firm advance commitment'. Employer groups argued this increases uncertainty for workforce planning and creates less certainty for genuine regular casual arrangements. ACCI, Retail Drinks Australia (**RDA**), the Australian Hotels Association (**AHA**), and Clubs Australia submitted that the new multifactorial test is overly subjective and reduces certainty for employers.[174] AIG stated that the 'vague definition, and its dependence on potentially contestable and unclear considerations that will need to be applied on a case by case basis is a compliance time bomb that will inevitably create future problems'.[175]

Many employer groups recommended that the definition be repealed and the previous definition be restored, submitting that it is hard to apply and increases the risk of misclassification. ACCI submitted that this is a product of the subjective nature of the multifactorial test and it opens the door to disputes, even when parties agree to a casual engagement relationship.[176] HIA noted that the new procedures and 'anti-avoidance penalties' create a disproportionate risk for good-faith arrangements and may reduce the use of casuals, limiting operational flexibility and opportunities.[177] Unions broadly support the revised definition of casual employment, submitting that it better reflects the real employment relationship. The ACTU supported the revised definition and submitted it is necessary to prevent employment being represented as casual where work is, in reality, ongoing and regular.[178] The Australasian Meat Industry

[172] APSC, *31 December 2025 APS Employment Release* (13 April 2026).
[173] Ibid.
[174] ACCI, Submission No 54 (3 March 2026) 35 [203]–[204]; Clubs Australia, Submission No 28 (3 March 2026) 2; RDA, Submission No 35 (3 March 2026) 2; AHA, Submission No 37 (3 March 2026) 2.
[175] AIG, Submission No 82 (8 March 2026) 10 [44].
[176] ACCI, Submission No 54 (3 March 2026) 35 [204].
[177] HIA, Submission No 20 (2 March 2026) 11.
[178] ACTU, Submission No 67 (6 March 2026) 61.

Employees' Union (**AMIEU**) also supported the new definition, but identified a limitation where workers who never met the definition at engagement must wait 12 months before seeking enforcement or conversion.[179]

In the context of the higher education sector, the Australian Higher Education Industrial Association (**AHEIA**) submitted that section 15A(4) prevents engagement of a casual employee for an entire teaching session and has increased the insecurity of casual academic teaching staff. It submitted that this is a direct, unforeseen and perverse consequence of the amendment.[180]

Employer groups whose members rely on seasonal, project based or demand driven work emphasised the operational importance of casual engagement in construction, agriculture, hospitality, retail, and resources. In general, these stakeholders submitted that regular rostering can still be compatible with genuine casual work but may now be treated as evidence of permanence under the revised framework.[181] The Mining and Energy Union (**MEU**) submitted that the new definition more appropriately reflects the industrial realities in which the definition operates.[182]

Small business

Small-business stakeholders emphasised the practical burden of applying a holistic assessment across multiple staff and over the lifecycle of employment. COSBOA submitted that the new definition represents a fundamental shift and is not appropriate for small business in its current form. COSBOA stated that it does not clearly accommodate regular and systematic engagement patterns in many small businesses such as hospitality, retail, and healthcare, who offer regular shifts to casuals because workers prefer the loading and flexibility, not because employers are avoiding permanency.[183]

The ASBFEO submitted that small business owners are now less certain about employees' status, the cost implications of that status, and the likelihood of change through FWC decisions. It submitted that the amendments place the onus on small businesses who employ workers on a casual basis, who must grapple with the complexity of considering the totality of the employment relationship, involving a range of nuanced considerations applied to multiple staff, and do so throughout the lifecycle of employment.[184]

COSBOA highlighted that the 2025 PEAK Benchmark Research Report, *Beyond Compliance: Measuring the Impact of Recent IR Changes on Small Business*, found that awareness of the definition of casual employment was reported by only 32% of respondents, with 29% not aware and a further 17% having heard of the changes but remaining unsure of how they apply. COSBOA submitted that an unintended consequence is 'compliance anxiety' and perverse hiring behaviour, including hesitancy to offer regular shifts to casuals to avoid triggering conversion obligations.[185] The ASBFEO submitted that all casual

[179] AMIEU, Submission No 56 (4 March 2026) 6 [46].
[180] AHEIA, Submission on Draft Report No 31 (29 May 2026) 3.
[181] AREEA, Submission No 49 (3 March 2026) 4 [6(d)]; NFF, Submission No 7 (25 February 2026) 5; AHEIA, Submission No 73 (6 March 2026) 6.
[182] MEU, Submission No 76 (6 March 2026) 30 [90].
[183] COSBOA, Submission No 45 (3 March 2026) 5 [16]–[18]; COSBOA, Submission on Draft Report No 7 (29 May 2026) 4 [16]–[17].
[184] ASBFEO, Submission No 8 (27 February 2026) 4.
[185] COSBOA, Submission No 45 (3 March 2026) 5 [20].

employees should be excluded from the definition of small business employer. The practical effect of this proposal would be that casual employees are excluded from the count of employee numbers for a small business. The ASBFEO submitted that this would reduce unnecessary complexity for small business employers, without compromising protections or entitlements for their employees.[186]

Employee choice pathway

In relation to the casual conversion pathway, employer groups focused on procedural and administrative demands, response timeframes, and the perceived risk of disputation or penalties if requests are refused or mishandled. COSBOA highlighted that the 21-day response obligation for employee choice notifications, combined with exposure to FWC dispute resolution, can impose a formal human resources process on small business operators who have no human resource function.[187] In its feedback on the Draft Report, COSBOA further submitted that the 21-day response obligation for the employee choice notification pathway remains a significant procedural burden. In a small business context, it submitted that a notification may arrive during a period of owner absence, peak trading, or other operational pressure. COSBOA recommended extending the response period to 42 days for small business employers, or alternatively providing that a failure to respond within 21 days does not constitute deemed acceptance.[188]

RDA submitted that businesses must 'constantly reassess' status and manage conversion notices through a formal process, describing increased administrative burden and legal uncertainty where refusals escalate.[189] It said that the practical effect is reduced flexibility and an increased level of risk.

COSBOA recommended a legislated exemption for regular and systematic casual engagements where, in the preceding 24 months, the employee has declined a written offer of permanent employment or confirmed in writing their preference to remain casual.[190]

Unions broadly supported the amendments, with submissions generally describing it as an important mechanism to move workers from casual to permanent arrangements where work is ongoing. However, unions also identified limitations for accessibility and effectiveness in practice for particular cohorts (for example, workers who did not meet the casual definition at engagement, casual academics in universities, cabin crew engaged through labour hire, and APS employees). The CPSU (PSU Group) expressed concern that the exclusion contained in paragraph 66AAC(4)(c) of the Closing Loopholes No. 2 Act results in a barrier to APS casual conversion due to the merit-based recruitment processes specified in the *Public Service Act 1999* (Cth).[191]

The UWU submitted that the casual conversion pathway is effective but should be amended to allow conversion to a permanent role with hours matching the worker's regular and systematic hours.[192] The ACTU argued that the effectiveness of the employee choice pathway is undermined by the ability of employers to refuse conversion on 'fair and reasonable operational grounds'. It recommended repealing these

[186] ASBFEO, Submission No 8 (27 February 2026) 4.
[187] COSBOA, Submission No 45 (3 March 2026) 5 [21].
[188] COSBOA, Submission on Draft Report No 7 (29 May 2026) 4 [18].
[189] RDA, Submission No 35 (3 March 2026) 2.
[190] COSBOA, Submission No 45 (3 March 2026) 6 [22(a)].
[191] CPSU (PSU Group), Submission No 79 (6 March 2026) 3.
[192] UWU, Submission No 62 (6 March 2026) 20.

refusal grounds, contending that an employee who no longer meets the statutory definition of casual should not be denied conversion because of business impacts arising from the employer's own engagement practices.[193]

The Flight Attendants' Association of Australia (**FAAA**) raised concerns about how the employee choice pathway operates in practice for cabin crew engaged through labour hire.[194] The FAAA highlights that many casual employees in the cabin crew industry fear that any request for conversion to permanent positions places their employment at risk.[195]

The National Aboriginal and Torres Strait Islander Women's Alliance (**NATSIWA**) supported casual conversion protections as an important pathway to income security and cultural, kinship and community responsibilities but cautioned that conversion frameworks must not remove flexibility or expose workers to subtle retaliation.[196] It noted that for Aboriginal and Torres Strait Islander women, the objective is not simply permanency or flexibility in isolation, but a system that provides security without erasing cultural identity and responsibility.[197]

Higher education

While the National Tertiary Education Industry Union (**NTEU**) supports a legislative mechanism for casual employees to seek conversion to more secure forms of employment, it submitted that the current terms of the employee choice pathway create significant barriers to casual academic employees achieving conversion through the framework.[198] The NTEU submitted substantial changes to the employee's terms and conditions would be needed to avoid contravening an applicable fair work instrument once the person becomes full-time or part-time. The NTEU said this operates as a practical bar for many casual academics because casual academic engagements are often teaching-only, whereas continuing (and many fixed-term) academic roles under enterprise agreements commonly require research and administration allocations. Accordingly, conversion would necessarily entail changing duties or allocations, which can enliven the refusal ground under paragraph 66AAC(5)(c). The NTEU also pointed to precedent (for example, *Priest v Flinders University of South Australia* [2022] FWC 478) as illustrating how workload clause requirements (including minimum research allocations) can underpin a refusal, and stated it is not aware of any instance of a casual academic successfully converting under these provisions.

In its feedback on the draft report, the NTEU submitted that ongoing academic employment cannot be teaching only, because academic roles must include capacity for research, scholarship and service, and that this affects the operation of paragraph 66AAC(5)(c) and employers' reliance on paragraph 66AC(4)(b) to refuse conversion applications.[199] It argued that paragraph 66AC(4)(b) is the main reason the employee choice pathway for casual conversion is not working properly in higher education, because it allows an employer to refuse conversion on 'reasonable operational grounds' even where the employee may not meet the legislative definition of a casual employee.[200] The NTEU said this makes the provision

[193] ACTU, Submission No 67 (6 March 2026) 65.
[194] FAAA, Submission No 63 (6 March 2026) 12–13 [72].
[195] Ibid 13 [73].
[196] NATSIWA, Submission No 30 (3 March 2026) 7.
[197] Ibid 8.
[198] NTEU, Submission No 71 (6 March 2026) 6 [30].
[199] NTEU, Submission on Draft Report No 19 (29 May 2026) 3[2]–[14].
[200] NTEU, Submission on Draft Report No 19 (29 May 2026) 3 [15]

'unworkable' in practice and maintained that the appropriate response is repeal of paragraph 66AAC(4)(b), or alternatively amendment of subsection 66AAC(5) so that increases or improvements in entitlements arising from conversion would not constitute fair and reasonable operational grounds for refusal.[201]

While AHEIA stated its firm support for creating new employment pathways that deliver greater security for casual academic staff and improve universities' capacity for workforce planning and teaching delivery, it submitted that there is an absence of legislative conditions that would make this achievable. AHEIA argued that bargaining alone is unlikely to deliver this outcome.[202]

Analysis

The amendment to the definition of casual employment and the employee choice pathway were intended to improve job security, provide greater certainty as to employment status, and expand access to permanent employment for employees who no longer meet the casual definition, while maintaining flexibility and clarity for employers. Stakeholder feedback suggests that views on the extent to which these objectives have been met varies across stakeholder groups and sectors, and that outcomes to date are mixed. These reflections are qualitative and there is limited data to inform the impact of this measure. The feedback is consistent with positions held before the amendments were made.

While the number of casuals has decreased since the measure commenced, it is difficult to attribute this to the measure in isolation. In its feedback on the Draft Report, the Centre for Future Work (**CFW**) provided data that it suggests a statistically significant fall in the number of casuals, including a large drop in the rate of casual employment among fulltime employees since commencement of the measure.[203] However, it also submitted that it remains unclear what proportion of the decline in casuals is due to the casual employment provisions in the Closing Loopholes reforms, and what proportion is due to the labour hire provisions in the Closing Loopholes reforms.[204]

Definition of casual employment

In relation to the revised definition of casual employment, unions consider the reforms to be broadly meeting their intended purpose. They submit that the shift away from a purely contract-centred test toward an assessment of the practical reality of the employment relationship better captures ongoing and regular work that is, in substance, permanent. From this perspective, the amendments have strengthened alignment between legal classification and actual, lived work arrangements. This has reduced the scope for casual engagement to be used where there is, in practice, an expectation of continuing and indefinite work.

However, employer groups and small-business stakeholders widely argue that the reforms have resulted in uncertainty. While the measure was designed to return to the common law approach prior to *Rossato* and provide clarity of status, many employers submit that the multifactorial test has introduced complexity and subjectivity that makes status harder to determine at engagement and over time. Stakeholders argue that

[201] Ibid 3–5.
[202] AHEIA, Submission on Draft Report No 31 (29 May 2026) 4.
[203] CFW, Submission to the Draft Report No 41 (29 May 2026) 3.
[204] Ibid.

reliance on concepts such as 'firm advance commitment' and post-contract conduct creates uncertainty for genuine casual arrangements, particularly where regular rostering is driven by operational need rather than an intention to provide permanent work. On this view, the objective of the measure to provide certainty for business has not been fully realised. It would be beneficial for clearer guidance for employers to be developed, including on applying the 'firm advance commitment' test.

Concerns that the measure creates complexity and uncertainty appear most pronounced among small businesses. Evidence from small business stakeholders suggests that limited awareness of the new definition, combined with the perceived need to continuously assess the totality of the employment relationship, has created compliance anxiety rather than clarity. The ASBFEO recommended excluding all casual employees from the definition of small business employer to reduce unnecessary complexity for small business employers, without compromising protections or entitlements for their employees. Some submissions highlighted potential employer behavioural responses such as hesitancy to offer regular shifts or a preference for shorter engagements. This could suggest that the reforms may, in some cases, be influencing hiring and rostering practices in ways that run counter to the intention of improving job security. This indicates a potential gap between the policy objective and its practical effect for small employers.

No substantive change is needed to the application of the casual definition (and employee choice framework) to small business. As at May 2025, 28.5% of casual employees work for small businesses,[205] and excluding small businesses from the provision would substantially reduce the measure's application across the Australian workforce. However, the evidence received suggests that small businesses would benefit from stronger practical support to understand and meet the requirements in a way that is consistent with the measure's objectives.

Stakeholders in seasonal, project-based and demand-driven industries such as mining and construction raise questions about whether the amendments adequately accommodate the operational realities of genuine casual work. While the measure was intended to preserve flexibility, stakeholders in the mining and construction sectors have submitted that regular and predictable patterns of work may now be treated as indicative of permanence, potentially limiting lawful use of casual engagement. This raises questions about whether the amendments strike the intended balance between job security and flexibility across diverse labour markets. Casual work remains important in seasonal, project-based industries due to the inherently variable demand, the often cyclical nature of the work, weather and safety-related interruptions, and the need to scale workforces up or down at short notice without creating ongoing employment obligations that do not reflect the nature of the work. As such, ensuring that the framework caters for genuine casual employment is important.

Subsection 15A(4) addresses long-term use of casual academics employed in higher education. Consistent with the definition of casual employment, it provides that where a university employs academic or teaching staff for an identifiable teaching period, the employee is not a casual employee. AHEIA submits that the higher education specific restriction in subsection15A(4) operates as a

[205] ABS, *Employee Earnings and Hours* (May 2025), unpublished TableBuilder. In May 2025, ABS data shows that 814,800 casual employees work for small businesses (those with less than 20 employees – which differs from the FW Act definition of less than 15 employees). The total number of casual employees is 2,855,500, which means that 28.5% of casual employees work for small businesses.

regulatory constraint on workforce engagement.[206] The NTEU strongly supports the definition submitting it allows for the assessment that takes proper account of the reality of the employment relationship.[207]

The higher education sector has, over a long period, relied on casual academic teaching roles. Senate inquiries, including the 2022 Senate Select Committee on Job Security and the 2022 Senate Education and Employment References Committee inquiry into unlawful underpayment found that casual academics were routinely used to meet ongoing teaching needs, and often for extended periods. Subsection 15A(4) addresses long-standing structural issues including reliance on casual classifications for semester-based teaching. It is working as intended by requiring assessment of the real nature of teaching work consistent with the Closing Loopholes reforms.

Employee choice pathway

The fundamental principle behind the reform to introduce the employee choice pathway is casual workers who no longer meet the definition of a casual employee should have access to casual conversion. Stakeholders broadly agree that the reforms have simplified the legislative framework by replacing multiple conversion mechanisms with a single, employee-led process. This aligns with the government's stated intention of providing a clear pathway for employees to seek permanent employment while ensuring that casual employees remain casual unless they choose otherwise.

However, employer groups have emphasised the administrative and procedural demands associated with the pathway, particularly the 21-day response timeframe and exposure to dispute resolution. For small businesses and employers without dedicated human resources capability, these requirements are seen as disproportionate and undermine the intended informality and flexibility of the framework. Some stakeholders report that the perceived risk associated with refusal decisions has increased caution and reduced flexibility, suggesting that the pathway may be having indirect effects beyond its core purpose.

While supportive of the pathway in principle, unions raise different concerns about its effectiveness. Several unions argue that the availability to refuse on 'fair and reasonable operational grounds' can undermine the objective of enabling employees who no longer meet the casual definition to access permanency. Submissions from unions indicate that in some sectors such as higher education, the APS, and aviation, employees may be reluctant to exercise the pathway due to fear of adverse employment outcomes. These concerns suggest that the pathway's effectiveness in expanding access to permanent employment may be constrained in certain settings.

It is also important to acknowledge the particular importance of flexibility for Aboriginal and Torres Strait Islander people. In this regard, the insights from NATSIWA are valuable in highlighting that the objective is not simply permanency or flexibility in isolation, but a system that provides security without erasing cultural identity and responsibility. In this context, it is important for employers to recognise and provide access to cultural leave for Aboriginal and Torres Strait Islander employees. The Review acknowledges

[206] AHEIA, Submission No 73 (6 March 2026) 6.
[207] NTEU, Submission No 71 (6 March 2026) 5–6 [27]–[28].

submissions made to the inquiry into the operation and adequacy of the NES,[208] which have called for formal recognition of Aboriginal and Torres Strait Islander Cultural Leave within the NES to be considered in that inquiry.[209]

APS employees

The CPSU (PSU Group) raised concerns that the amendments result in barriers to casual conversion in the APS, due to the merit-based recruitment processes specified in the *Public Service Act 1999* (Cth). It is important that APS casuals are afforded the same rights and pathways as other casual employees under the national system, but this must be balanced with public sector governance requirements and the merit principle for recruitment. Following commencement of the measure, the changes to the Direction's sought to provide that balance by preserving merit-based appointment while enabling access to the employee choice pathway. Despite this, the CPSU (PSU Group) maintains that, in practice, the interaction between the employee-choice pathway and APS merit-based recruitment processes may continue to operate as a barrier to casual conversion for APS employees. There is no evidence or data available to the Review to assess whether or not these barriers are materialising in practice. The Review understands that data and information related to casual conversion in the APS is largely held by each individual Commonwealth agency.

Higher education

Stakeholder submissions from the NTEU and the AHEIA in response to the Draft Report confirm that the employee choice pathway is not operating effectively for casual academic employees and that enterprise bargaining has not resolved these issues. Submissions reflect different views of the cause of the problem and offer incompatible solutions. The NTEU submitted that it is 'not aware of a single instance of a casual academic employee successfully achieving conversion under these provisions.'[210] The NTEU submits that paragraph 66AAC(4)(b) and subsection 66AAC(5) effectively bar casual academic employees from conversion as they provide that an employer may not accept the notification because there are 'fair and reasonable' operational grounds for not accepting the notification and recommended the repeal of the provision. The ACTU and NTEU suggest repealing paragraph 66AAC(5)(c) and replacing it with a new subsection 66AAC(5A) that excludes any substantial changes or impacts from the meaning of paragraph 66AAC(5)(a) if they arise from an improvement in conditions for an employee, or a change or increase in duties.[211] The ACTU submits that this change could apply more generally, given that the challenges the NTEU identifies are likely to apply beyond higher education.[212]

AHEIA considers the existing conversion framework is appropriate given the distinct nature of academic work. While the AHEIA agrees that casual academics cannot meaningfully access conversion, it submits this is a structural constraint predating the Closing Loopholes reforms.[213]

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[208] Standing Committee on Employment, Workplace Relations, Skills and Training, Parliament of Australia, *Inquiry into the operation and adequacy of the National Employment Standards*.
[209] ACTU, Submission No 67, *National Employment Standards Inquiry* (6 March 2026) 47; Indigenous Allied Health Australia, Submission No 53, *National Employment Standards Inquiry* (February 2026) 2.
[210] NTEU, Submission No 71 (6 March 2026) 6 [33].
[211] ACTU, Submission on Draft Report No 33 (29 May 2026) 10; NTEU, Submission on Draft Report No 19 (29 May 2026) 3–4.
[212] ACTU, Submission on Draft Report No 33 (29 May 2026) 10.
[213] AHEIA, Submission on Draft Report No 31 (29 May 2026) 4; AHEIA, Submission No 73 (6 March 2026) 6.

The higher education sector's long-standing reliance on teaching only casual work for specified periods of time sits uneasily with the enterprise agreement workload model which requires research and service for ongoing roles. This misalignment means conversion is theoretically available but practically unattainable.

The Review recognises the current framework is not effective for this cohort of employees. The current enterprise agreement workload structures means that conversion is theoretically available, but in practice it is not attainable. Casual academics are a major group of Australian workers who cannot meaningfully access the employee choice pathway. This is an unintended consequence and requires a structured, tripartite response.

It is further noted the Senate inquiry into higher education workforce issues (the **Sheldon Inquiry**) similarly found entrenched disagreement between universities and the NTEU, continuing reliance on casual labour and the absence of effective mechanisms to resolve structural workforce issues.[214] These findings reinforce the need for a government supported process to assist the parties to reach agreement. The inability of casual academics to access conversion is inconsistent with the intent of the Closing Loopholes amendments which seek to expand access to secure work for employees performing ongoing work.

In their feedback on the Draft Report, both the NTEU and AHEIA clearly state that enterprise bargaining has not resolved these issues.[215] Additionally, the Sheldon Inquiry findings support that there has been an absence of effective measures to resolve structural workplace issues.

The barriers to casual academic conversion are structural and longstanding. As noted in the Draft Report the reforms were intended to expand access to secure work but in higher education the pathway is not functioning as intended.

The Review concludes that casual academic employees currently cannot meaningfully access the employee choice pathway, and that attempts to address this through enterprise bargaining and the sector specific provision in subsection 15A(4) have not resolved the structural barriers. While the NTEU seeks the repeal of paragraph 66AAC(5) and AHEIA seeks to retain it, the core problem is not the legislation itself but a misalignment between teaching only casual roles and duties required of ongoing academic positions. A legislative carveout for higher education would not resolve these underlying structural issues.

A government supported framework could provide the scaffolding in which the parties can negotiate and develop an employment model that enables casual academics to access the conversion pathway as intended. This should involve the tripartite engagement of universities, relevant unions and government representatives, including the Department of Education given its central role in the funding, policy delivery and regulation of the higher education system.

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[214] Parliament of Australia, Education and Employment Legislative Committee, *Quality of governance at Australian higher education providers – final report* (11 December 2025).
[215] AHEIA, Submission on Draft Report No 31 (29 May 2026) 4; ACTU, Submission on Draft Report No 33 (29 May 2026) 10; NTEU, Submission on Draft Report No 19 (29 May 2026) 2 [10].

Findings and recommendations

Except in relation to the casual conversion provisions for higher-education employees, the amendments have been operating appropriately and effectively to date, and no unintended consequences have been identified. However, as the amendments have only been in force for employees of medium and large businesses since 26 February 2025, and employees of small businesses since 26 August 2025, it is challenging to fully assess their effectiveness. More time is needed to observe how employer and employee behaviours continue to adjust, the extent to which the pathway is taken up in practice, and whether emerging implementation issues are addressed through guidance, support and settled interpretation. Given employer concerns about uncertainty created by the amendments, clearer guidance should be developed, including on applying the 'firm advance commitment' test.

The casual conversion employee choice pathway is not available in practice for casual academic employees. There are continued and systemic barriers to casual academic conversion that require a bespoke, tripartite framework that allows a sustainable and workable employment model.

Casuals in the APS should be practically afforded the same rights as other casual employees under the national system, but this must be balanced with public sector governance requirements. There is currently insufficient data to assess the operation of the employee choice pathway, and the Directions, in the APS. Accordingly, there is merit in the APSC collecting and publishing relevant data to assess the operation of the employee choice pathway in the APS, to ensure it continues to work in harmony with the APS merit-based principles while also providing APS casual employees with appropriate opportunities for casual conversion.

Recommendation 7

The Australian Public Service Commission should assess the operation of the employee choice pathway in the Australian Public Service, including the operation of the Australian Public Service Commissioner's Directions, in consultation with the Community and Public Sector Union. As a first step, this should include collection of relevant data from Commonwealth agencies. The data should be made publicly available.

Recommendation 8

a. The government should establish a working group of universities, relevant unions and government representatives from relevant portfolios to develop a working model for academic employment pathways that enables access to casual conversion provisions under the *Fair Work Act 2009*. The working group should report within 12 months of publication of this report.

b. The government should monitor the operation of the employee choice pathway in higher education and provide targeted support to assist parties to reach agreement on an appropriate employment pathway. This could include facilitation, independent analysis and guidance from the Fair Work Commission.

Recommendation 9

The Fair Work Ombudsman should review and update (or develop if necessary) its guidance on applying section 15A, including ensuring the guidance uses plain and clear language and takes into account:

a. the application of the 'firm advance commitment' test

b. providing further examples of common scenarios

c. common questions in applying the definition of casual employee, and

d. regular rostering (including the extent to which this indicates whether an employee is a casual employee).

2.3 Extend the powers of the Fair Work Commission to set minimum standards for 'employee-like' workers

What the measure does

The Closing Loopholes No. 2 Act amended the FW Act and other associated legislation to provide protections for employee-like workers performing digital platform work, including empowering the FWC to make minimum standards and resolve disputes about unfair deactivation.[216]

The amendments commenced on 26 August 2024.[217] Eligible parties could make applications for minimum standards or register collective agreements from this date. Eligible employee-like workers could make unfair deactivation applications from 26 February 2025, after meeting the 6-month regular work eligibility threshold.[218]

Key concepts

The measure introduced 'employee-like worker' as a new category of worker into the FW Act and the concept of 'digital labour platform operator'.

An 'employee-like worker'[219] is a person who:

- performs digital platform work under a services contract to which they are a party (and does not complete any work as an employee)
- performs all or a significant majority of the work under the contract, and
- has 2 or more of the following characteristics:
  - low bargaining power in negotiations in relation to their services contract
  - paid at or below the rate of an employee performing comparable work
  - a low degree of authority over the performance of the work, or
  - any other characteristic prescribed by the regulations.[220]

A 'digital labour platform operator' is the operator of a digital labour platform (for example, a website or app) that enters into or facilitates a services contract under which work is performed by employee-like

[216] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 16.
[217] Ibid s 2(1) item 22.
[218] *Fair Work Act 2009* (Cth) s 536LD(c).
[219] The definition of 'employee-like worker' is set out in s 15P of the *Fair Work Act 2009* (Cth).
[220] Ibid s 15P.

workers.[221] 'Digital platform work' is work performed for payment under a services contract through or by means of a digital labour platform, or that was arranged or facilitated through or by means of a digital labour platform.[222]

Employee-like minimum standards

The measure introduced a new jurisdiction for the FWC to make binding minimum standards orders (**MSOs**)[223] and non-binding minimum standards guidelines in relation to employee-like workers performing digital platform work.[224]

The new jurisdiction introduced a 'minimum standards objective' that the FWC must comply with when performing a function or exercising a power in relation to minimum standards.[225] This objective requires the FWC to take into account the need for an appropriate safety net of minimum standards having regard to certain factors including, but not limited to:

- the need for standards to be clear, fair, and tailored to the relevant industry and type of work[226]
- the need for rates of pay that account for the costs necessarily incurred by workers directly arising from the performance of a services contract,[227] and
- the need to avoid unreasonable adverse impacts on the economy, business costs, productivity, viability or sustainable competition among industry participants.[228]

Employee-like MSOs

The measure enabled a number of parties to apply for an MSO that will cover employee-like workers (**employee-like MSO**)[229] including an organisation entitled to represent an employee-like worker (e.g. a union), an organisation entitled to represent one or more digital labour platform operators, a digital labour platform operator or the Minister.[230] The FWC may also make an employee-like MSO on its own initiative.[231] Before making or varying an employee-like MSO, or deciding not to do so, the FWC must have regard to choice and flexibility in working arrangements and be satisfied that on the whole the class of persons to be included are employee-like workers, there has been genuine engagement with the parties, and the parties have followed the consultation process.[232] The consultation process requires the FWC to publish a notice of intent to make an employee-like MSO along with a draft of the proposed MSO, to enable affected persons to make submissions on the proposed order.[233] The FWC may make any changes it thinks appropriate to a draft employee-like MSO. If the changes are significant, the FWC

[221] Ibid s 15M.
[222] Ibid s 15N.
[223] Ibid s 536JY.
[224] Ibid ch 3A, pt 3A-2; Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 187 [1096].
[225] *Fair Work Act 2009* (Cth) s 536JX.
[226] Ibid ss 536JX(a)(i)–(ii), (vi)–(vii).
[227] Ibid s 536JX(b)(i).
[228] Ibid ss 536JX(c)(i)–(ii), (iv).
[229] Ibid s 536JZ(1).
[230] Ibid s 536JZ(1).
[231] Ibid s 536JY(4)(a).
[232] Ibid s 536K(4). The consultation process is set out in ch 3A, pt 3A-2, div 3, sub-div B of the *Fair Work Act 2009* (Cth).
[233] Ibid ss 536KAA, 536KAB.

must publish an updated notice of intent and revised draft order and follow the consultation process again (with a reasonable period of consultation).[234] In response to an application for an MSO, the FWC may issue or decline to issue the MSO, or make minimum standard guidelines in relation to the workers covered by the application.[235] The FWC may also refuse to consider the application if it is not consistent with a direction of the FWC President about how to prioritise matters.[236]

When making an employee-like MSO, the FWC is guided by content rules, including terms that must be included (coverage and dispute resolution),[237] terms that may be included (including payment terms, deductions, record-keeping, insurance, and delegates' rights),[238] and terms that must not be included (including overtime rates, rostering arrangements, matters of a primarily commercial nature that do not affect the terms and conditions of engagement of employee-like workers covered by the MSO, and a term that would change the form or engagement of status of the worker covered by the MSO).[239]

The FWC may make a determination, on its own initiative or by application, to vary or revoke an employee-like MSO, if the FWC is satisfied that variation or revocation is consistent with the minimum standards objective.[240]

The Minister may make a declaration deferring or suspending an employee-like MSO or part of it, if the Minister considers it is in the public interest to do so.[241] The FWC must then, as soon as practicable, decide whether or not to vary or revoke the employee-like MSO.[242] Before varying or revoking the order, the FWC must also publish a notice of intent and revised draft order for consultation with affected entities.[243]

Contravention of an employee-like MSO is liable to a civil penalty.[244]

Employee-like minimum standards guidelines

The measure allows the FWC to make non-binding minimum standards guidelines for employee-like workers.[245] The parties that may apply for an MSO (see above) may also apply for minimum standards guidelines,[246] and the FWC may also make employee-like worker guidelines on its own initiative.[247]

The FWC must not make employee-like worker guidelines in relation to the same matters in an existing employee-like MSO that covers the same employee-like workers and digital labour platform operators.[248] In response to an application for employee-like worker guidelines, the FWC may refuse to make the

[234] Ibid s 526KAD.
[235] Ibid s 536KG(1).
[236] Ibid s 536KG(2).
[237] Ibid ss 536KH, 536KK.
[238] Ibid s 536KL.
[239] Ibid ss 536KM, 536KMA.
[240] Ibid s 536KQ.
[241] Ibid ss 536KQA, 536KQD.
[242] Ibid s 536KQS.
[243] Ibid ss 536KQW, 536KQX, 536KQY.
[244] Ibid s 536JB.
[245] Ibid ss 536KR(1), 536KU(1)(b).
[246] Ibid s 536KS.
[247] Ibid s 536KR(4)(a).
[248] Ibid s 536KV.

employee-like worker guidelines, make employee-like worker guidelines or, if the FWC considers it appropriate, make an employee-like MSO in relation to the workers covered by the application.[249]

When making employee-like worker guidelines, the FWC is guided by content rules, which are largely equivalent to those for employee-like MSOs.[250]

Specialist Consultative Bodies

Digital Labour Platform Consultative Committee

The measure amended the *National Workplace Relations Consultative Council Act 2002* (Cth) (**NWRCC Act**) to establish the DLPCC,[251] which is a committee of the NWRCC that meets periodically to discuss workplace relations matters relating to digital platform work.[252] The DLPCC is chaired by the Minister, and membership includes representatives of both digital platform workers and digital labour platform operators.[253]

Expert Panel for the Road Transport Industry

The measure established an Expert Panel for the road transport industry (the **FWC Expert Panel**).[254] The FWC Expert Panel performs the functions and exercises the powers of the FWC in relation to particular matters relating to the road transport industry. See Section 2.4 for more information on the FWC Expert Panel.

The FWC President may also direct the FWC Expert Panel to deal with employee-like MSOs, employee-like guidelines and other matters that the FWC President considers might relate to the road transport industry or any other prescribed instrument.[255]

The FWC Expert Panel must comply with the 'road transport objective' when performing a function or exercising a power.[256]

Road Transport Advisory Group

The measure established the Road Transport Advisory Group (**RTAG**), to advise the FWC in relation to matters in the road transport industry, including in relation to employee-like workers performing road transport work.[257] The FWC President must consult the RTAG in determining priorities for the work of the FWC in relation to matters affecting the road transport industry.[258] See Section 2.4 for more information on the RTAG.

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[249] Ibid s 536KU(1).
[250] Ibid ss 536KW(a), 536KX, 536KY. See ss 536KH, 536KL, 536KM, 536KMA for requirements relating to relevant MSOs. Unlike for employee-like MSOs, the employee-like worker guidelines are not required to include a dispute resolution term. See s 536KW(a).
[251] *National Workplace Relations Consultative Council Act 2002* (Cth) ss12A–12H.
[252] Ibid ss 12, 12A, 12B.
[253] Ibid s 12C.
[254] *Fair Work Act 2009* (Cth) s 620(1E).
[255] Ibid s 617(10D).
[256] Ibid ss 40D, 617(10B) note 2.
[257] Ibid s 40E(1). The legislative framework for the RTAG is in ch 1, pt 1-4, div 3 of the *Fair Work Act 2009* (Cth).
[258] Ibid s 40E(4).

Collective agreements

An organisation entitled to represent employee-like workers may make a collective agreement with a digital labour platform operator.[259] Collective agreements may be made in respect of the terms and conditions for performing digital platform work and the manner in which the agreement is to operate.[260]

The process for establishing collective agreements is intended to be more 'light touch' than the process for making MSOs. Broadly, either a business to be covered by the collective agreement or an organisation entitled to represent employee-like workers may initiate a consultation process for the agreement.[261] The FWC may resolve disputes during the agreement-making process.[262] The parties may apply to register a finalised agreement with the FWC.[263] The application must include a declaration that the parties have explained the terms of the agreement and their effect to the employee-like workers, and a description of the explanation.[264] If an MSO covers the same class of employee-like workers as the proposed collective agreement, the application to register the agreement must explain how the terms of the agreement that are also dealt with in the MSO are more beneficial to the employee-like workers.[265]

The FWC must register a collective agreement if it is satisfied, among other things, that the agreement contains a dispute resolution term, a term that provides for its period of operation and that its operation would not be contrary to the public interest.[266] Collective agreements may be subsequently varied or terminated.[267] A person who contravenes a term of a collective agreement may face civil penalties.[268]

Interaction with state and territory laws

Chapter 3A of the FW Act is intended to cover the field in respect of the rights, entitlements, obligations and liabilities that apply to a digital labour platform, an employee-like regulated worker or a party to a services contract, except for certain 'preserved' state and territory laws.[269] Once an employee-like MSO is made, it will exclude preserved state and territory laws entirely for the employee-like workers and digital labour platform operators to whom it applies.[270]

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[259] Ibid s 536MK(2).
[260] Ibid s 536MK(2).
[261] Ibid s 536ML(1).
[262] Ibid s 536MP.
[263] Ibid s 536MR.
[264] Ibid s 536MR(3)(a).
[265] Ibid s 536MR(3)(e).
[266] Ibid s 536MS.
[267] Ibid ss 536MT–536MW.
[268] Ibid s 536JJ.
[269] Ibid s 536JP. Preserved state and territory laws include Chapter 6 of the *Industrial Relations Act 1996* (NSW) and the *Owner Drivers and Forestry Contractors Act 2005* (Vic). Reg 3A.01 of the *Fair Work Regulations 2009* (Cth) lists further state and territory laws that are preserved.
[270] *Fair Work Act 2009* (Cth) s 536JS(1A). An employee-like MSOs would apply subject to a state or territory law that is specified in the FW Regulations. See s 536JS(2).

Unfair deactivation

The Closing Loopholes reforms established a framework for dealing with unfair deactivation of employee-like workers from digital labour platforms.

A person is protected from unfair deactivation if the person is an employee-like worker who performs work through or by means of a digital labour platform, or under a services contract arranged or facilitated through or by means of that platform.[271] The person must have been performing such work on a regular basis for a period of at least 6 months.[272]

A person is unfairly deactivated if the FWC is satisfied that a person has been deactivated from a digital labour platform, the deactivation was unfair (taking into account whether there was a valid reason that related to the person's capacity or conduct) and the deactivation was inconsistent with the *Fair Work (Digital Labour Platform Deactivation Code) Instrument 2024* (**Deactivation Code**).[273] The measure also provided the mechanism for the Minister to make the Deactivation Code, once the Minister is satisfied that there has been appropriate public consultation.[274] The Deactivation Code, which is a legislative instrument, is required to address, among other things, internal processes for digital labour platforms in relation to deactivation, matters that constitute a valid reason for deactivation and rights of response.[275]

A deactivation that occurs because of 'serious misconduct' of the person is not unfair.[276] Serious misconduct includes criminal conduct such as theft, fraud, assault, sexual harassment and causing serious and imminent risk to the health and safety of another person.[277] It is up to the platform to establish on the balance of probabilities that serious misconduct has occurred.[278]

A deactivation is not unfair if modification or suspension of access to the digital labour platform occurred for not more than 7 business days in circumstances where the digital labour platform operator had reasonable grounds to believe that a relevant matter applied.[279] Relevant matters include that the deactivation was necessary for the protection of the health and safety of a user, the deactivated employee-like worker had engaged in fraudulent or dishonest conduct, had not complied with a licensing requirement, or the deactivation was necessary to conduct an investigation and/or refer the matter to a law enforcement agency.[280]

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[271] Ibid s 536LD.
[272] Ibid s 536LD(c); Any time before commencement of the measure is not counted towards the 6-month period – see *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1, item 124.
[273] *Fair Work Act 2009* (Cth) ss 536LF, 536LH(1).
[274] Ibid ss 536LJ(1), (2A).
[275] Ibid s 536LJ(2).
[276] Ibid s 536LH(2); Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 234 [1421].
[277] 'Serious misconduct' is defined in s 12 of the *Fair Work Act 2009* (Cth) to be prescribed by regulations. Reg 1.07 of the *Fair Work Regulations 2009* (Cth) provides that 'serious misconduct' is to have its ordinary meaning and includes examples of serious misconduct; Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 232 [1421].
[278] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–3 cited in *Barber v Commonwealth of Australia as represented by the Department of Parliamentary Services* (2011) 212 IR 1, 33 (Thatcher C, 6 July 2011). 'The standard of proof remains the balance of probabilities but "the nature of the issue necessarily affects the process by which reasonable satisfaction is attained" and such satisfaction "should not be produced by inexact proofs, indefinite testimony, or indirect inferences" or "by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion."'
[279] *Fair Work Act 2009* (Cth) s 536LH(3).
[280] Ibid s 536LH(4).

Eligible employee-like workers may access the FWC's dispute resolution procedures if they believe they have been unfairly deactivated.[281] A person who has been deactivated must apply to the FWC for an order within 21 days of the deactivation taking effect or within such further period as the FWC allows.[282] Only employee-like workers earning below the CHIT (currently $183,100 per year) may seek an order in relation to an unfair deactivation.[283]

If the FWC finds that an employee-like worker was unfairly deactivated, it can order that the platform 'reactivate' the worker.[284] If the FWC makes a 'reactivation' order, and considers it appropriate to do so, it may also make an order requiring the digital labour platform operator or an associated entity to pay an amount for the remuneration lost, or likely to have been lost, because of the deactivation, but must not otherwise order compensation.[285] The FWC must not permit appeals of a decision relating to deactivation unless it is in the public interest.[286]

FWC funding

The FWC was provided $15.1 million over 4 years in 2023–24 (and $4.3 million per year ongoing) to establish the employee-like jurisdiction.[287]

Intention of the measure

The measure intended to provide employee-like workers with fair minimum standards and ensure that they are entitled to greater workplace protections.[288] Prior to the measure, digital platform workers were generally excluded from key workplace protections, including minimum standards such as minimum rates of pay.[289] The measure responded to community concerns raised by several inquiries around workers receiving lower rates of pay than the applicable minimum wage of equivalent employees and being subjected to poor working conditions.[290]

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[281] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 187 [1096].
[282] *Fair Work Act 2009* (Cth) ss 536LU(3)–(4).
[283] Ibid ss 536LU(1)–(2), 15C; *Fair Work Regulations 2009* (Cth), reg 1.08AA.
[284] *Fair Work Act 2009* (Cth) ss 536LQ(1)–(2).
[285] Ibid ss 536LP(3), 536LQ(3)–(4).
[286] Ibid s 536MA.
[287] DEWR, *Mid-Year Economic and Fiscal Outlook 2023–24* (Budget 2023–24 Statement, 13 December 2023) 238.
[288] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 9 [36]–[37]; Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2023, 6237, 6240 (Tony Burke, Minister for Employment and Workplace Relations).
[289] Independent contractors, including digital platform workers, had access to limited dispute resolution avenues for workplace issues under the *Independent Contractors Act 2006* (Cth) and the Australian Consumer Law (Schedule 2, *Competition and Consumer Act 2010* (Cth)).
[290] Senate Select Committee on Job Security, Parliament of Australia, *First interim report* (Report, June 2021); Department of Premier and Cabinet, Parliament of Victoria, The *Report of the Inquiry into the Victorian On-Demand Workforce* (Report, 2020); Select Committee on the impact of technological and other change on the future of work and workers in New South Wales, Parliament of New South Wales, *First report: the gig economy* (Report, April 2022).

The measure was subject to extensive consultation during development, including through consultation papers by DEWR and through the Senate inquiry into the Bill.[291] Consultation involved the government working with employer groups and business, including Uber, Menulog and Doordash, to inform the development of the proposed legislation.[292]

The measure extends access to minimum standards and dispute resolution mechanisms to employee-like workers, while preserving their status as contractors rather than employees. In the Minister's second reading speech, the Minister said:

> *At the moment if you're a worker wanting assistance, you turn up to the Fair Work Commission or the Fair Work Ombudsman and question 1 is: are you an employee? If the answer is yes, the Commission or Ombudsman works out where you fit into the system and a whole host of entitlements and rights follow. If the answer is no, all of those rights fall off a cliff.*
>
> *The amendments in this bill will close the loophole and turn that cliff into a ramp, allowing the Fair Work Commission to make minimum standards orders for workers on digital platforms who do not meet the definition of employee, but nonetheless have low bargaining power, or low authority over their work or comparatively low pay—for example, people doing work via digital platforms in the NDIS, working in aged care, delivering food to people's homes, or transporting us around.*
>
> *In many countries, the answer for these types of workers has been 'just make them an employee'. We are not doing that. We are going to accept the form of engagement. But what we're asking is, within that form of engagement, surely there are some minimum standards that are appropriate.*[293]

The intent of the new unfair deactivation jurisdiction was to establish quick, flexible and informal procedures for the resolution of unfair deactivation claims that address the needs of both digital labour platform operators and employee-like workers.[294] The introduction of this jurisdiction recognised that employee-like workers have the same financial obligations as other workers and should not have their platform access and livelihood unfairly cut off without any chance of redress.[295]

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[291] Senate Standing Committee on Education and Employment Inquiry, Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023.
[292] Tony Burke, 'Closing Loopholes Bill Amendments' (Media Release, 28 November 2023); Tony Burke, 'World-leading legislation to protect gig workers' (Media Release, 31 August 2023).
[293] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2023, 6237 (Tony Burke, Minister for Employment and Workplace Relations).
[294] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 232 [1410].
[295] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2023, 6238 (Tony Burke, Minister for Employment and Workplace Relations).

What has happened since commencement

Minimum standards orders and guidelines

To date, no MSOs or minimum standards guidelines have been made under the employee-like framework. The FWC is currently considering 3 applications for employee-like MSOs made by the TWU. Table 2 sets out details of the 3 applications made by the TWU for employee-like MSOs.

Table 2: MSO applications before the FWC (as at 15 June 2026)

Application	Reference	Application Date	Terms sought	Status
Employee-like minimum standards – 'last-mile' delivery	MS2024/1	28 August 2024	Hourly safety net and per km rates, pay within 21 days of receiving an invoice, reimbursement of tolls, BlueCard training, dispute resolution, delegates rights' (leave, right to represent contractors, consultation, etc.), consultation on major changes, etc. (based on TWU draft order).	Hearing on whether FWC Expert Panel should issue notice of intent to make MSO scheduled for July–August 2026.
Employee-like minimum standards – food and beverage delivery	MS2024/3	28 August 2024	Minimum safety net hourly pay rate for each class of vehicle, personal accident insurance, transparency measures including information for engagement requests, dispute resolution, delegates' rights etc. (based on consent draft order).	TWU, Uber and DoorDash submitted a consent draft order in November 2025. Evidence supporting the draft provided. Hearing on whether FWC Expert Panel should issue notice of intent to make MSO held 11–15 May 2026.
Employee- like minimum standards – passenger transport	MS2025/3	17 December 2025	Safety net rates ensuring cost recovery, rate adjustments, minimum fixed rate per engagement, unpaid annual and personal leave, fatigue breaks, personal injury insurance, BlueCard training, etc. (based on application).	Directions hearing held 17 February 2026. Further directions to be issued in due course.

A separate employee-like MSO application (MS2025/2) covering passenger transportation services through digital rideshare platforms was made in May 2025 but was withdrawn shortly after as it did not meet eligibility requirements.

To inform the first 2 employee-like MSO applications (MS2024/1 and MS2024/3), the first road transport MSO application (MS2024/2) and the first road transport contractual chain orders (**RTCCO**) application (MS2024/4), as well as any other related applications, the FWC undertook and published research projects to assist in informing the FWC's approach to facilitating consultations in relation to the applications (see Section 2.4 for more information on RTCCOs). The research investigated the nature and extent of the workers, sectors and industries affected by the applications.[296]

Road Transport Advisory Group

The FWC President appointed Vice President Ingrid Asbury as RTAG Chair. The RTAG members appointed on 26 August 2024 are Peter Anderson (National Secretary of ARTIO) and Richard Olsen (National President of the TWU). RTAG members hold office for a period not exceeding 3 years and are eligible for reappointment.

The RTAG conducted consultations on the first 2 employee-like MSOs (MS2024/1 and MS2024/3), along with the first 2 road transport applications, following a decision of the FWC that the matters relate to the road transport industry.[297] The RTAG established subcommittees to conduct 6 month consultation processes to advise the FWC on the prioritisation of these matters.[298] Subcommittees considered draft orders, discussed proposed terms and considered draft advice to the RTAG. Meeting records were published on a 'without prejudice' basis and included limited details to preserve the confidentiality of these discussions. Participants had the right to reserve their position on matters discussed in an RTAG subcommittee meeting.[299] The subcommittee processes concluded in August 2025 and provided advice to the FWC President in September 2025.[300] The RTAG reported that generally no consensus positions on prioritisation or on proposed terms of draft MSOs were achieved as part of these subcommittee processes. The RTAG confirmed their view that the MSO applications proceed concurrently.[301]

Unfair deactivation

The Minister made the Deactivation Code, which commenced on 25 February 2025 following a public consultation process on the proposed content of the Deactivation Code.[302]

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[296] FWC, *Information Note – Data on digital platform and road transport workers in Australia* (Report, May 2025); FWC, *Research Reference List* (Report, June 2025); FWC, *Composition and Characteristics of the Last Mile Delivery and Food Delivery Sectors in the Australian Digital Platform Work Economy* (Report, September 2025); and FWC, *Data Profile and mapping of road transport* (Report,1 October 2025).
[297] See Statement [2024] FWC 2438, [17]. 'The FW Act requires the FWC consult the RTAG in relation to MS2024/2 (road transport MSO), while there is no corresponding requirement in relation to MS2024/1 and MS2024/3 being application for employee-like MSOs, given the RTAG has a broad function to 'advise the FWC in relation to matters that relate to the road transport industry and that the applications overlap as to subject matters, my provisional view is that these applications should be referred to the RTAG for advice.'
[298] Individual subcommittees were formed for MS2024/3 (food and beverage delivery) and MS2024/4 (RTCCO), and a joint subcommittee formed for MS2024/1 and MS2024/2 (last-mile delivery).
[299]FWC, Terms of Reference *Road Transport Advisory Group and its subcommittees* (Terms of Reference, December 2024).
[300] RTAG, *Advice to the Fair Work Commission* (Document, September 2025) <https://www.fwc.gov.au/documents/sites/ms2024-1/ms2024-1-ors-advice-rtag-2025-09-01.pdf>.
[301] Ibid.
[302] *Fair Work (Digital Labour Platform Deactivation Code) Instrument 2024*.

From commencement to 31 March 2026, 570 applications for an unfair deactivation remedy were lodged with the FWC. As of 31 March 2026, 264 applications had been withdrawn or discontinued, 53 resolved and 92 dismissed,[303] mostly on jurisdictional grounds. As of 9 June 2026, the FWC made reactivation and lost pay orders in 11 matters.

Five of the 11 matters where the FWC ordered reactivation involved allegations of serious misconduct. In 3 of these matters, the alleged serious misconduct involved behaviour including sexual harassment and assault. The FWC found the deactivations to be unfair as Uber/Uber Eats were unable to put forward sufficient evidence to prove that the applicant had engaged in the alleged conduct.[304] The FWC adopted the *Briginshaw* standard[305] in these matters, a common law principle which requires a higher standard of evidence to meet the balance of probabilities for more serious allegations. The adoption of the standard in unfair deactivation matters was established in *Mohammad Shareef Hotak v Rasier Pacific Pty Ltd* [2025] FWCFB 214, where a FWC Full Bench found that where allegations of serious misconduct are made, the *Briginshaw* standard applies so that findings that a worker engaged in the misconduct alleged are not made lightly.[306]

On 5 June 2026, in response to concerns about sexual harassment by digital platform workers, the Minister amended the Deactivation Code. The amendments sought will provide platforms with greater flexibility in complying with the Code when deactivating workers who are subject to allegations of sexual harassment. The changes, which are limited to sexual harassment matters, provide that:

- in providing information about the reason for the worker's deactivation, platforms only need to specify that there has been a sexual harassment allegation and the general nature of the alleged conduct, and
- platforms may have reasonable grounds to consider a valid reason for deactivation was established if the platform either discussed the allegations with the complainant, or reviewed multiple allegations about separate incidents of sexual harassment by the worker over the past 24 months.

The amendments also listed further examples of valid reasons for deactivation, including if a platform receives multiple allegations that the worker sexually harassed someone over 24 months, or the worker sexually harassed someone while performing digital platform work (including via a different platform). The amendments commenced on 12 June 2026.

The change to the Deactivation Code was made after consultation closed on the Draft Report.

[303] FWC data, provided 5 June 2026.
[304] See *Shahid Mansoor v Rasier Pacific Pty Ltd* [2025] FWC 3111; *Anwar Kareem Al Hussein v Rasier Pacific Pty Ltd* [2025] FWC 3176; *Zeeshan Aslam Khan v Portier Pacific Pty Ltd* [2026] FWC 48.
[305] *Briginshaw v Briginshaw* [1938] 60 CLR 336.
[306] See *Mohammad Shareef Hotak v Rasier Pacific Pty Ltd* [2025] FWCFB 214, [94].

Collective agreements

No collective agreements have been registered with the FWC.

DLPCC

The Minister appointed members representing digital labour platforms and digital platform workers in line with legislative requirements. The DLPCC meets to confidentially discuss workplace relations matters relating to digital platform work. The NWRCC Act requires the DLPCC to meet at least twice a year for the first 2 years, and at least once a year following this.[307]

Building Cooperative Workplaces No. 1 Bill 2026

The Building Cooperative Workplaces No. 1 Bill seeks to amend the FW Act to address stakeholder concerns about the management of unfair deactivation matters in relation to regulated workers, by reducing workload on the FWC and parties involved in matters.

The proposed amendments to section 536LX of the FW Act would empower the FWC to determine unfair deactivation or unfair termination matters relating to contested facts 'on the papers' without conducting either a conference or holding a hearing. This option would be available to the FWC in instances where:

- it appears to the FWC that the matter can be adequately determined in the absence of the parties to the matter; and
- the parties to the matter consent to the FWC making a decision in relation to the matter without conducting a conference or holding a hearing.[308]

The Bill would also amend the Act to allow the FWC to deal with vexatious litigants more effectively.[309] Once an application has been dismissed because it is frivolous, vexatious or has no reasonable prospects of success, a Full Bench may make a 'vexatious proceeding order' which prohibits the applicant from making another application of a specified kind to the FWC without the permission of the FWC. The Bill provides that the FWC must not make a 'vexatious proceedings order' unless the applicant has been given a reasonable opportunity to make submissions and the submissions have been taken into account.[310]

[307] *National Workplace Relations Consultative Council Act 2002* (Cth) s 12G.
[308] Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026 (Cth) sch 1 item 43–44.
[309] Ibid sch 1 items 45.
[310] Ibid sch 1 item 46.

What the Review heard

As part of its consultations, the Review conducted roundtables with business representatives and employee groups in the digital platform economy to discuss matters relating to digital platform workers, including the employee-like framework. The measure was also discussed at the employer and employee roundtables. The Review received 27 submissions from unions, employer groups, digital labour platforms and academics on the measure. A further 22 submissions were received on consideration of the measure in the Draft Report. These measures, including the arrangements for unfair deactivation have received considerable media attention especially in the handling of applications involving allegations of serious misconduct.

In the Draft Report, the Reviewer called for stakeholder views on the following 2 issues related to the unfair deactivation framework:

- whether there are better processes that will still ensure meaningful protections but with greater efficiency, and
- whether the FW Act should be amended to clarify that a deactivation is not unfair where the operator considered on reasonable grounds that a valid reason existed, rather than requiring proof to a judicial standard that the incident occurred.

Stakeholder responses to these 2 issues are discussed below.

Broadly, unions welcomed the amendments to the framework, highlighting early impacts of the measure including active cases, emerging minimum standards outcomes, a growing unfair deactivation caseload and worker reactivations. The ACTU described the amendments as world leading, noting that they establish, for the first time, a 'floor' of minimum standards for platform workers.[311] The ACTU suggested the framework be extended to other cohorts of workers who require access to legally enforceable minimum pay rates and conditions.[312] Employer groups and digital labour platforms raised concerns about the scope of the measure, the composition and role of the RTAG and the handling of unfair deactivation matters.

Minimum standards orders and guidelines

Many stakeholders noted limits on assessing the effectiveness of this part of the framework as no MSOs or guidelines have been made by the FWC to date.

Mixed views were provided on the role of minimum standards guidelines as a non-binding alternative to an MSO. The CFW suggested that the ability for the FWC to issue a non-binding minimum standards guideline rather than a binding order may dilute regulation.[313] Dr Caleb Goods, Associate Professor Alex Veen and Dr Tom Barratt observed that there have been no applications to the FWC to create any minimum standard guidelines or collective agreements, suggesting the review interrogate whether these alternative mechanisms are functioning appropriately.[314] Associate Professor Michael Rawling and Dr Eugene Schofield-Georgeson

[311] ACTU, Submission No 67 (6 March 2026) 46.
[312] Ibid 51–2.
[313] CFW, Submission 66 (6 March 2026) 23 [81].
[314] Caleb Goods, Alex Veen and Tom Barratt, Submission No 9 (27 February 2026) 4.

highlighted the importance of the ability of the FWC to decide to make an order instead of a guideline (where a guideline is applied for) is crucial and should be retained.[315] They argued that if voluntary arrangements are given priority, worker protections could be significantly undermined. The ACTU and TWU recommended that guidelines be limited to supplementation or interpretation of an MSO or RTCCO as they operate, rather than as a replacement or alternative.[316] The ACTU reiterated this view in its feedback on the Draft Report, stating that clarification that the role of the guidelines is to provide supplementary information that can assist parties with understanding MSOs would resolve any potential ambiguity between the 2 instruments and likely see guidelines developed after MSOs are in place.[317]

ACCI submitted that it is not surprising that unions representing employee-like workers have focused their initial attention on MSOs, where their intention is likely to secure new conditions that have binding force.[318] ACCI suggested it may be the case that once MSOs are issued some parties will consider the need for certain matters not covered by an MSO to be subject to guidelines.[319]

Some stakeholders raised concerns about the interaction of MSOs (and RTCCOs) with state and territory legislation. The TWU noted that while the legislation allows the FWC to exclude inconsistent state and territory laws and instruments, the FWC should be required to consider the appropriate scope and coverage of an order, having regard to existing laws or instruments applying to workers. The TWU argued this is necessary where state-based instruments may provide more favourable terms to workers than a proposed order.[320] The ACTU similarly recommended that, in determining the scope of an order, the FWC be required either to exclude workers already covered by more beneficial state based instruments, or take existing state based instruments into account where they provide terms and conditions that are more beneficial than those of the proposed order.[321] Uber submitted that the proposals of the TWU and ACTU would expose a platform operating in multiple jurisdictions to comply with different scope determinations, exclusions and minimum standards depending on which state-based instrument the FWC was required to consider or accommodate. Uber submitted that this would be at odds with the legislative intent in excluding preserved state and territory laws.[322]

In their submission, Dr Goods, Associate Professor Veen and Dr Barratt highlighted that having multiple MSOs with different rules applying to some platforms but not others is likely to cause an uneven playing field, where workers are increasingly performing work interchangeably for the multiple platforms. They suggested the Review consider how the legislation is contributing to complexity in these interactions.[323]

Women's Legal Service NSW (**WLS NSW**) outlined the increasing use of digital platforms in facilitating support work within the care and disability sectors and noted concerns about the efficacy of the measure given there have been no applications for disability and aged care support workers.[324] The Australian Nursing

[315] Michael Rawling and Eugene Schofield-Georgeson, Submission No 17 (6 March 2026) 5.
[316] TWU, Submission No 77 (6 March 2026) 10 [33]; ACTU, Submission No 67 (6 March 2026) 51.
[317] ACTU, Submission on Draft Report No 33 (29 May 2026) 13.
[318] ACCI, Submission on Draft Report No 46,(1 June 2026) 14 [70].
[319] Ibid14 [71].
[320] TWU, Submission No 77 (6 March 2026) 9–10 [29]–[31].
[321] ACTU, Submission No 67 (6 March 2026) 51.
[322] Uber, Submission on Draft Report No 38 (29 May 2026) 10–11.
[323] Caleb Goods, Alex Veen and Tom Barratt, Submission No 9 (27 February 2026) 7.
[324] WLS NSW, Submission No 69 (3 March 2026) 21–2 [63].

and Midwifery Federation (**ANMF**) expressed support for the minimum standards framework and noted its interest in a future potential application covering digital platform providers in the care economy, following the outcomes of the TWU matters.[325]

Dr Goods, Associate Professor Veen and Dr Barratt similarly raised concerns about the lack of MSO applications in the care economy, despite the clear intent of the measure to cover these workers. They suggested that those representing workers in the care sector may lack the resources to make an MSO application, recommending the FWC be encouraged or directed to initiate an MSO in these on-demand gig economy spaces.[326]

In response to the Review's draft recommendation that the government consider the operation of the employee-like framework in the care and disability sectors,[327] the ACTU, Australian Services Union (**ASU**), UWU and ANMF provided further clarification on the lack of MSO applications in these sectors. In general, these unions collectively cited the resource intensive nature of the MSO application process, conflicting priorities of unions in these sectors with other matters progressing through the FWC (including the FWC gender undervaluation review of the Social Community, Home Care and Disability Services Award), and challenges in identifying and accessing workers who engage in care and disability work through digital platforms as reasons for the lack of applications.[328] The ACTU, with support of the UWU, suggested the establishment of pilot information sessions for employee-like workers facilitated by the FWO to explain the jurisdiction and the steps it would take for an MSO to be made.[329] The UWU also suggested the establishment of a FWC advisory body for the care and disability sector, similar to the RTAG.[330] Mable suggested that consideration should be given to the workload of care economy unions at this time, given their involvement in several matters before the FWC.[331]

Road Transport Advisory Group

Some stakeholders, including employer groups and digital labour platforms, were critical of the composition and role of the RTAG in considering MSO applications. ACCI and AIG raised concerns about potential conflicts of interest that arise from having a senior union official participating and advising on applications brought by the same union, which risks reinforcing the position of a single applicant party.[332] In addition, ACCI noted that the subcommittee

[325] ANMF, Submission No 60, *Review of the Closin Loopholes Acts* (5 March 2026) 7 [20].
[326] Caleb Goods, Alex Veen and Tom Barratt, Submission No 9 (27 February 2026) 5–6.
[327] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 102 [Draft Recommendation 12].
[328] ACTU, Submission on Draft Report No 33 (29 May 2026) 14; ASU, Submission on Draft report No 24 (29 May 2026) 1; UWU, Submission on Draft Report No 20 (29 May 2026) 7; ANMF, Submission on Draft Report No 34 (29 May 2026) 5.
[329] ACTU, Submission on Draft Report No 33 (29 May 2026) 14; UWU, Submission on Draft Report No 20 (29 May 2026) 7.
[330] UWU, Submission on Draft Report No 20 (29 May 2026) 7.
[331] Mable, Submission on Draft Report No 26 (29 May 2026) 2.
[332] ACCI, Submission No 54 (3 March 2026) 28 [155]; AIG, Submission No 82 (8 March 2026) 91 [435].

consultation processes undertaken by RTAG on the first 4 applications under the employee-like and road transport framework did not demonstrate that the body constructively assisted the FWC in the discharge of its new road-transport related responsibilities.[333]

AIG reiterated its concerns about RTAG and further submitted in response to the Draft Report that the statutory prioritisation mechanism was ineffective because multiple overlapping applications were being dealt with concurrently, sometimes on very short timetables, which it said impaired parties' ability to participate fairly.[334] In the context of MS2026/1 made by the FWC to address the impacts of fuel price increases (**Fuel Cost Recovery RTCCO**) (see Section 2.4), AIG further submitted that the requirement for the FWC to engage with parties to be covered by proposed orders had not operated effectively in practice, because only a small proportion of affected parties had actually been engaged.[335]

Dr Goods, Associate Professor Veen and Dr Barratt recommended that the desirability of the RTAG weighing in on employee-like MSOs be considered, given the amount of time the RTAG and its subcommittee meetings took in relation to the first MSOs for 'employee-like' workers (MSO2024/1 and MSO2024/3).[336] Their submission also outlined the limited gig worker voice in MSO applications and procedural processes to date. They submitted that while the TWU involved some gig workers in RTAG consultation proceedings, they were a minority voice in proceedings dominated by representations from platforms, employer organisations and the TWU.[337]

AIG submitted that it is too early to assess the RTAG's effectiveness. It raised that RTAG subcommittees were formed on an invitation only basis, with no meaningful criteria in the FW Act to govern the process.[338] AIG acknowledged that the representatives on the various subcommittees were from diverse sectors within the road transport industry, but suggested there should be clear and more meaningful criteria guiding the appointment of potential RTAG members, such as consideration of any potential conflict of interest, a mixture of skills and experience and a composition that minimises even splits on advice.[339] AIG reiterated concerns about the RTAG in its response to the Draft Report, including its involvement in advising on the Fuel Cost Recovery RTCCO, given it is an order relating to an application by the TWU and ARTIO, and called for changes to eligibility and expertise requirements.[340]

Associate Professor Rawling outlined his involvement in the RTAG subcommittee for the food and beverage delivery MSO application (MS2024/3), finding it to have been a positive forum that help narrow down the issue in contention between key stakeholders and their representatives. He also noted that although the RTAG subcommittees reported that there was not any agreement on terms, a consent draft order between the TWU, Uber and DoorDash for MS2024/3 was submitted to the FWC following the process.[341] The TWU

[333] ACCI, Submission No 54 (3 March 2026) 28 [157].
[334] AIG, Submission on Draft Report No 45 (31 May 2026) 17 [93]–[94].
[335] Ibid 17 [97].
[336] Caleb Goods, Alex Veen and Tom Barratt, Submission No 9 (27 February 2026) 6.
[337] Ibid 5.
[338] AIG, Submission No 82 (8 March 2026) 93 [444]
[339] Ibid 93 [444], 96 [457].
[340] AIG, Submission on Draft Report No 45 (31 May 2026) 17 [101]–[103].
[341] Michael Rawling and Eugene Schofield-Georgeson, Submission No 17 (6 March 2026) 4.

similarly provided an example of the positive role that the RTAG played in facilitating the consent position for MS2024/3, and noted that the FWC has ensured the RTAG provisions have operated effectively and have provided sufficient opportunities for consultation.[342]

Unfair deactivation provisions and the Deactivation Code

Stakeholders noted high uptake of the unfair deactivation framework, with some disputes resolved through improved pre-application dialogue.[343] Stakeholders also identified some unintended consequences and proposed improvements to the framework for both employee-like workers and digital labour platforms.

Uber's submission raised concerns that the subjective standard of 'sufficient information' has resulted in inconsistent FWC interpretations, creating compliance challenges across digital operations. Uber argued that these inconsistencies are particularly problematic in sexual misconduct cases. It stated that it frequently uses plain English summaries of the alleged conduct in Preliminary Deactivation Notices to protect the identity of victims.[344] However, Uber referred to *Zeeshan Aslam Khan v Portier Pacific Pty Ltd* [2026] FWC 48 where the FWC ruled that failing to provide specific complaint details meant the driver was not given 'sufficient information', despite Uber's belief that disclosing such details would breach section 17 of the Deactivation Code by jeopardising consumer safety.[345] AIG similarly raised concerns that requirements to provide detailed particulars in serious misconduct matters may have unintended safety and security risks for platform users, and recommended that the Review consider the interaction between the Deactivation Code, serious misconduct and the FWC's application of the *Briginshaw* standard.[346]

The TWU noted the crucial role that the Deactivation Code plays in the unfair deactivation framework, namely providing platforms with a step-by-step process to ensure procedural fairness for the worker in circumstances often involving automated systems and algorithmic decision making and that platforms must only apply a 'reasonable grounds test' when they otherwise comply with the Deactivation Code.[347] The TWU suggested that any recommendations to deal with evidentiary threshold concerns raised by stakeholders may be better addressed by amendments to the Deactivation Code, and not substantive legislative change, to uphold the importance of the Deactivation Code and strict compliance with it.[348] The ACTU similarly cautioned against lowering the evidentiary threshold as it would risk workers losing work on the basis of unfounded allegations, encouraging the government to instead work with platforms to improve their handling of complaints and adherence to the Deactivation Code.[349]

Uber welcomed the Review's draft recommendation to address the management of unfair deactivation matters involving serious misconduct allegations.[350] Uber raised concerns about the subjectivity of the Deactivation Code, stating that it makes compliance difficult for the platform because the FWC's finding

[342] TWU, Submission on Draft Report No 28 (29 May 2026) [17]–[23].
[343] See, for example, TWU, Submission No 77 (6 March 2026) 12 [48].
[344] Uber, Submission No 70 (6 March 2026) 9.
[345] See *Zeeshan Aslan Khan v Portier Pacific Pty Ltd* [2026] FWC 48.
[346] AIG, Submission No 82 (8 March 2026) 104 [492], 105 [498].
[347] TWU, Submission on Draft Report No 28 (29 May 2026) [50].
[348] Ibid [61].
[349] ACTU, Submission on Draft Report No 33 (29 May 2026) 13.
[350] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 102 [Draft Recommendation 10]; Uber, Submission on Draft Report No 38 (29 May 2026) 3.

that absolute or strict compliance with the Code is required means that even the most trivial departure from code requirements will result in non-compliance.[351] It recommended the government urgently amend the Deactivation Code to address operational inefficiencies.[352]

The Women's Service Network (**WESNET**) raised concerns that sexual assault victims would be required to testify in order to meet the probative evidence threshold of the FWC. It referred to 2 FWC cases (*Shahid Mansoor v Rasier Pacific Pty Ltd* [2025] FWC 3111 and *Anwar Kareem Al Hussein v Rasier Pacific Pty Ltd* [2025] FWC 3176) as evidence that only the direct testimony of the victim would meet the 'sufficient information' evidence threshold. It submitted that the practice of requiring sexual assault victims to testify to meet the burden of proof for serious misconduct was concerning, highlighting the detrimental and retraumatising impacts. WESNET suggested a review of evidentiary thresholds may be necessary to consider alternative methods to reach thresholds.[353] In response to the Draft Report, WESNET explicitly recommended an amendment to paragraph 536LF(b) to clarify that a deactivation is not unfair where the operator considered on reasonable grounds that a valid reason existed.[354]

Uber criticised the unfair deactivation framework for importing traditional employment concepts, noting that the procedures established for unfair deactivation fail to reflect the online and flexible nature of the gig economy and are being managed identically to traditional unfair dismissal claims.[355] Uber argued that once a matter falls out of the Deactivation Code (for example, due to a minor procedural flaw), the FWC's task under section 536LH is treated as the same as an unfair dismissal 'valid reason' inquiry under paragraph 387(a) of the FW Act, following the Full Bench approach in *Hotak v Rasier Pacific Pty Ltd* [2025] FWCFB 2014.[356] Uber stated that this imports orthodox unfair dismissal evidentiary requirements (such as proof on the balance of probabilities, an evidentiary onus borne by the platform, and (for serious allegations) application of the *Briginshaw* principle) so that a platform's 'reasonable belief' in what occurred is not enough. Uber contends this is not fit for purpose in deactivation matters because the FWC's approach tends to discount consumer complaints as hearsay (sometimes said to carry 'zero weight' unless the complainant is available for cross-examination),which does not align with the operational realities of the platform and the critical safety and privacy needs of victims.[357]

To ensure that digital platforms have an ability to protect the safety and privacy of platform users and the community, Uber proposed (among other things) that paragraph 536LF(b) be amended to clarify that a deactivation is not unfair if the operator 'considered on reasonable grounds' a valid reason existed. It recommended that to align to the Deactivation Code, the FWC's inquiry should focus on whether the digital labour platform operator had reasonable grounds for their belief, rather than requiring the platform to prove the incident actually occurred to a judicial standard.[358]

[351] Uber, Submission on Draft Report No 38 (29 May 2026) 5.
[352] Ibid 6–7.
[353] WESNET, Submission No 19 (2 March 2026) 1–2.
[354] WESNET, Submission on Draft Report No 14 (29 May 2026) 1.
[355] Uber, Submission No 70 (2 March) 3.
[356] Ibid 10.
[357] Ibid 8.
[358] Ibid 11.

Employer groups and Uber raised concerns about the FWC's case management of unfair deactivation matters. ACCI submitted that requiring threshold jurisdictional issues to be addressed by way of hearing imposes burdens on applicants, respondents and the FWC, and argued that the issues may be more appropriately determined by the FWC on the papers.[359] Similarly, Uber stated that the current procedural framework and FWC practices are misaligned with the nature of the gig economy, raising issues with in-person hearings, denial of representations, procedural inefficiencies and inconsistent case management of matters.[360]

The ACTU recommended amendments to clarify that reactivation prior to a FWC hearing of an unfair deactivation matter does not impact a driver's ability to access a lost pay order, despite no order for compensation being available under subsection 536LP(3).[361] The ACTU also recommended that lost pay orders be available following the suspension (rather than only deactivation) of a worker, noting that platforms often suspend workers for longer than the prescribed 7-day timeframe.[362]

Stakeholders raised concerns around the use of automated allocation practices and decision making by digital labour platforms to manage performance metrics and trigger deactivation decisions, raising concerns around procedural fairness, transparency and reasonableness.[363] JobWatch noted that while the Deactivation Code provides some regulation of automated decision making, the FW Act itself does not presently address or regulate such practices.[364]

WLS NSW submitted that there are unique impacts being felt on highly feminised aged care and disability sectors. It said that the triangular relationship between platforms, clients and carers renders workers more vulnerable to 'dismissal' than deactivation and that awareness of the ability to proactively apply for an MSO is low.[365] WLS NSW submitted that there are no protections for care workers who are dismissed by clients, even though the volume and continuous service period of work performed under the platform would render them eligible for remedies for unfair deactivation under the Deactivation Code.[366]

The TWU submitted that a key reason for the significant number of unfair deactivation applications is due to the lack of information communicated from platforms to workers about the reason for the deactivation, making it difficult for the union to provide industrial advice to their members.[367] Further, the TWU said:

> *many platforms offer customers a refund where the customer provides negative feedback about their experience. In the TWU's experience, in many instances, such a refund is granted within 24 hours of the customer making a complaint about a driver or delivery driver. Customers are rewarded for negative feedback and, at least to our knowledge, are under no obligation to provide further information or verify their feedback. When combined with*

[359] ACCI Submission No 54 (3 March 2026) 29 [164].
[360] Uber Submission No 70 (6 March 2026) 11–12.
[361] ACTU, Submission No 67 (6 March 2026) 50.
[362] Ibid.
[363] Elvio A Sinopoli, Submission No 23 (2 March 2026)10; JobWatch, Submission No 72 (6 March 2026) [46]–[49].
[364] JobWatch, Submission No 72 (6 Match 2026) [50].
[365] WLS NSW, Submission No 69 (3 March 2026) 22 [64].
[366] Ibid 22 [65].
[367] TWU, Submission on Draft Report No 28 (29 May 2026) [65(a)].

> *automated systems and algorithms which flag workers who show a pattern of behaviour based on customer feedback, the process produces a large number of deactivations without a reliable or cogent basis.*[368]

The Review sought stakeholder views regarding improved FWC processes to ensure meaningful protections with greater efficiency under the unfair deactivation framework. In response to this request, the TWU submitted that the FWC be empowered to list an unfair deactivation matter for a compulsory conference at which the FWC is also empowered to compel parties to produce documents and make recommendations. It drew comparison to section 332 of the *Industrial Relations Act 1996* (NSW) which has a similar function. The TWU suggested this approach would allow the FWC to shape expectations of parties at an early stage and minimise work that flows through to full proceedings.[369] Similarly, Dr Elivio A. Sinopoli suggested early dispute resolution should be prioritised for unfair deactivation matters, including workers and platforms being directed to use internal review, conciliation or other appropriate mechanisms before matters escalate further. He noted, however, that this should not displace the role of the FWC in determining complex or serious disputes, such as those involving serious allegations, potential breaches of the Deactivation Code, significant procedural unfairness or questions of interpretation.[370]

The Review also received feedback recommending the FWC should prioritise digital case management processes including through an online triage and mediation process.[371] BCA suggested that the Deactivation Code be amended to allow the FWC to disregard minor or technical defects in deactivation notices where the worker has not been materially disadvantaged, and that preliminary and procedural issues be dealt with by the FWC on the papers.[372]

Employee-like definition and extension of the employee-like framework

Stakeholders raised limitations of the employee-like framework, noting that it only applies to workers engaged through digital labour platform and excludes employee-like workers in other industries. The ACTU, Media, Entertainment and Arts Alliance (**MEAA**), and Professionals Australia recommended expanding the framework to cover low-paid contractors in other sectors, particularly creative and media sectors such as journalism, screen writing, translating and interpreting, regardless of engagement through a digital labour platform.[373] The organisations submitted that reform is needed to address the low pay and insufficient minimum standards for these groups of contractors and freelancers. The CFW similarly supported extending section 15P to other forms of vulnerable, non-digital gig work.[374]

[368] Ibid [65(b)].
[369] Ibid [67]–[71].
[370] Elvio A. Sinopoli, Submission on Draft Report No 17 (29 May 2026) 6.
[371] Anonymous, Submission on Draft Report No 39 (29 May 2026) 1.
[372] BCA, Submission on Draft Report No 18 (29 May 2026) 8.
[373] ACTU, Submission No 67 (6 March 2026) 51; MEAA, Submission No 40 (3 March 2026) 6.
[374] CFW, Submission No 66 (6 March 2026) 23 [78].

In response to the Draft Report, the NSW Small Business Commissioner also expressed support for extension of the employee-like framework to other vulnerable cohorts of independent contractors.[375] Some stakeholders, including AIG, the Centre for Independent Studies (**CIS**), MBA and the Chamber of Commerce and Industry of Western Australia (**CCIWA**), did not support such an extension, with AIG suggesting more examination should be given to whether there are genuine problems for this cohort before a recommendation is made.[376]

Stakeholders also raised concerns with the legislative requirement for a worker to meet 2 out of 3 of the employee-like characteristics in order to be considered employee-like, making it more onerous to prove such requirements and likely limiting the framework's coverage and utility.[377]

Small business

The ASBFEO raised concerns that the employee-like test is complex and produces uncertain outcomes, including requiring compliance with MSOs that may limit business autonomy in responding to rapid technological change.[378] RDA similarly described the test as complex and suggested that minimum standards may constrain small business operations and adaptability.[379]

Analysis

The measure was introduced to provide employee-like workers with fair minimum standards, while maintaining their status as contractors and reflecting the flexible nature of digital platform work. The amendments have only been in operation for a short time, having commenced on 26 August 2024 and the unfair deactivation provisions becoming operational for workers after 6 months eligibility. As the framework is still in its early stages, and processes of the FWC are emerging in practice, it is difficult to assess its full operation and effect.

Minimum standards orders and guidelines

The employee-like minimum standards framework is in its infancy, and based on available evidence, including the current MSO applications before the FWC, is functioning largely as intended. It is clear that the process for MSOs is complex and has been the subject of stakeholder scrutiny, including those covered by the new employee-like framework. However, this reflects both the novelty of the framework and legislative design that prioritises consultation, tailored minimum standards and procedural fairness to the parties involved. These characteristics reflect an ambitious, world-first reform that will require time to mature within the broader workplace relations system.

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[375] NSW Small Business Commissioner, Submission on Draft Report No 5 (26 May 2026) 1; Professionals Australia, Submission on Draft Report (29 May 2026) 1.
[376] AIG, Submission on Draft Report No 45 (31 May 2026) 15; CIS, Submission on Draft Report No 4 (25 May 2026) 3; MBA, Submission on Draft Report No 16 (29 May 2026) 3; CCIWA, Submission on Draft Report No 30 (29 May 2026) 3.
[377] Caleb Goods, Alex Veen and Tom Barratt Submission, Submission No 9 (27 February 2026) 6; CFW, Submission No 66 (6 March 2026) 23 [76].
[378] ASBFEO Submission No 8 (27 February 2026) 4.
[379] RDA, Submission No 35 (3 March 2026) 3.

The FWC has been actively engaging with the new jurisdiction and is progressing multiple applications. The RTAG presents an important but contentious dynamic to the consultation pipeline for MSO applications. Concerns were raised by employer groups about the central role of the RTAG in the making of MSOs, and possible conflict of interest and confidentiality issues that may arise because members of the RTAG (and its subcommittees) may be industry representatives. Conversely, Associate Professor Rawling, a participant in the RTAG subcommittee for the employee-like food and beverage MSO application, provided positive feedback about the subcommittee process, noting that it had contributed to the creation of a consent draft order for that application. In responding to concerns about procedural fairness and conflicts of interest in the consultation process, the FWC President stated that the concerns 'are somewhat misplaced since the RTAG is not a decision-making body under the FW Act',[380] and that President Hatcher is confident that:

> *if a party chooses to provide confidential information to an RTAG subcommittee to aid the consultation process, appropriate procedures (such as the provision of undertakings) will be able to be developed to protect confidentiality. The RTAG does not have the power to compel the production of documents or other information, so no participating party can be forced to disclose confidential information.*[381]

Notwithstanding these early concerns, RTAG's first period of operation suggests it is providing a structured forum for targeted, sector-specific consultation and the development of more informed draft orders. In particular, the subcommittee process appears capable of supporting constructive engagement (including, in some instances, movement towards a consensus draft order), while the FWC retains responsibility for decision-making and can develop appropriate confidentiality safeguards where parties elect to share sensitive information. The role and operation of the RTAG is discussed further in Section 2.4. However, early indications are that its establishment is supporting the practical implementation of these reforms as they bed down across the broader workplace relations system, and contributing to the consultative approach of the framework and tripartite engagement.

Minimum Standards Guidelines

Minimum standards guidelines were intended to operate as a complementary, non-binding option within the broader minimum standards 'toolbox', alongside MSOs and other mechanisms. Despite the legislative intent anticipating a substantive role for guidelines, submissions from stakeholders reflect limited interest in the use of guidelines. Stakeholders have observed that no applications have been made to the FWC for minimum standards guidelines (or collective agreements), and no guidelines have been issued to date. This may indicate that the provisions relating to the guidelines are not currently operating as an effective alternative mechanism in the way contemplated, although it is premature to draw firm conclusions as no instruments have yet been made.

[380] *Statement* [2025] FWC 216, [29].
[381] Ibid.

Stakeholders expressed divergent views about the appropriate role of guidelines in this context. The CFW argued that the availability of non-binding guidelines in place of binding orders may dilute regulation.[382] The ACTU and TWU recommended that guidelines be confined to a supplementary role, limited to the guidance or interpretation of MSOs (and RTCCOs) once made rather than positioned as a standalone alternative.

The intention of minimum standards guidelines is to provide a choice to applicants under the framework to use an alternate instrument to a binding MSO, if that instrument is preferred by parties. At this stage, guidelines have not been the preferred choice of applicants under the framework. However, this does not mean that they would not be utilised in the future.

The interaction between MSOs and minimum standard guidelines should be examined to form a view on whether this element of the framework is functioning as intended or requires refinement. The difference between the legislative intent and stakeholder views should also be further explored.

Care and disability sector

The employee-like framework was clearly intended to cover digital platform workers in the care and disability sectors. Despite the Minister's second reading speech explicitly identifying the National Disability Insurance Scheme (**NDIS**) and aged care platform workers as intended beneficiaries of the measure, no applications have been made.[383]

Concerns raised by stakeholders about a lack of MSO applications in these sectors are important. Stakeholders have noted the resource intensive nature of the MSO application process, and the competing priorities of the unions representing care and disability sector workers since the introduction of the jurisdiction. Stakeholder feedback suggests that this has made it difficult to pursue an MSO application within the sector. Outreach to employee-like workers in these sectors is also difficult for unions and is contributing to the lack of MSO applications at this time.

The reasons for the lack of applications should be interrogated further once more time has elapsed. It will be important to assess whether there are any sector specific dynamics that may be reducing the ability of workers to meet eligibility requirements (for example, meeting 2 out of 3 characteristics for the definition of an 'employee-like' worker) or whether the reliance on proactive applications by registered organisations may be inhibiting any minimum standards orders being made.

WLS NSW suggested that that the triangular relationship between platforms, clients and support workers exposes workers to client-initiated 'dismissal' rather than deactivation, which may be a reason contributing to a lack of deactivation applications in the sector. It is similarly crucial that consideration is given to the lack of unfair deactivation applications for these workers, to ensure that the framework is operating as intended and that eligible workers are not falling outside its practical protections.

[382] CFW, Submission No 66 (6 March 2026) 23 [81].
[383] Commonwealth, Parliamentary Debates, House of Representatives, 4 September 2023, 6237 (Tony Burke, Minister for Employment and Workplace Relations).

Extension of the employee-like framework

The employee-like jurisdiction was deliberately confined to digital platform work to address the growing vulnerability of these workers. However, there is merit in the recommendations put forward by the ACTU, Professionals Australia and MEAA to extend the framework to other cohorts of independent contractors who are experiencing similar conditions of low pay and low bargaining power, in particular workers in the arts sector, journalists and media workers, translators and interpreters, and writers. Early indications are that MSOs will provide a meaningful safety net of protections for digital platform workers that may suit other cohorts of similarly vulnerable independent contractors.

A number of stakeholders argued that the Review's draft recommendation to extend the employee-like framework was outside the scope of the Review.[384] AIG submitted that consideration of the expansion of the framework warrants both caution and more robust consideration than is possible in this Review.[385] The recommendation does not itself propose immediate legislative change. Rather, it identifies a matter arising from the operation and boundaries of the current framework that may warrant further policy consideration which is consistent with the task of examining effectiveness, unintended consequences and possible improvements. In this context, the observation that the current framework may not capture all relevant cohorts does not itself constitute a policy determination, but rather highlights a potential gap for further examination.

Accordingly, the government should consider whether the employee-like framework could be extended to additional cohorts of contractors and freelancers with comparable characteristics and vulnerabilities, where further minimum standards and protections may be beneficial and appropriate.

Unfair deactivation provisions and the Deactivation Code

The unfair deactivation jurisdiction has experienced high utilisation, with a growing caseload and early decisions indicating the jurisdiction is functioning reasonably well with some exceptions outlined below. Applications are being progressed and the FWC has granted effective remedies (including reactivation and, in some cases, lost pay orders). Stakeholder feedback indicates that the framework is providing meaningful protections for employee-like workers, particularly by creating avenues for early resolution and increased dialogue between platforms and unions to resolve disputes around deactivation prior to an application to the FWC.

However, some concerns were raised about the FWC's handling of unfair deactivation matters and case management practices. Uber criticised the use of hearings to determine threshold jurisdictional issues, inconsistent approaches of Commissioners, and procedural inefficiencies such as in-person hearings for basic jurisdictional objections and limits on representation.

Given the numbers of applications filed and noting the resourcing challenges – for the FWC and the platforms – the Review sought the views of platforms, employer organisations, unions and others as to better processes that will still ensure meaningful protections but with greater efficiency. The TWU's

[384] ACCI, Submission on Draft Report No. 46 (4 June 2026) 15 [81]; AIG, Submission on Draft Report No 45 (31 May 2026) 15 [76].
[385] AIG, Submission on Draft Report No 45 (31 May 2026) 15 [76].

proposal for empowering the FWC to mandate compulsory conciliation conferences provided a possible solution to the issues raised by stakeholders surrounding the FWC's handling of unfair deactivation matters. The Review notes that section 592 of the FW Act allows the FWC, for the purpose of performing a function or exercising a power, to direct a person to attend a conference where it may mediate or conciliate the matter.[386] In addition, section 590 allows the FWC to inform itself in relation to any matter it considers appropriate, including by requiring a person to provide copies of documents or records.[387] This also includes specific functions and powers relating to the unfair deactivation framework.

As the framework is in its infancy, it is likely that the FWC will seek to conciliate a greater proportion of unfair deactivation matters as the jurisdiction matures, as it does for other jurisdictions such as unfair dismissal. The FWC already has at its disposal an avenue to mediate an unfair deactivation matter. The powers granted to the FWC under sections 590 and 592 provide a solution to address stakeholder concerns about the FWC's handling of unfair deactivation matters to date, reducing the burden on parties. Having considered the TWU's proposal, mandating conciliation conferences may present certain restrictions on how the FWC determines matters and may also create an increased administrative load for both the FWC and parties.

It is important to consider the broader practices of platforms in contributing to the high number of deactivations and subsequent applications to the FWC. This includes stakeholder comments about the use of automated allocation practices and decision making by digital labour platforms to manage performance metrics and trigger deactivation decisions. JobWatch noted that while the Deactivation Code provides some limited regulation of the use of automated decision making, the FW Act itself does not presently address or regulate such practices. There are several published FWC decisions which include criticism of the internal practices of platforms in their engagement with workers when processing a deactivation.[388] As the operation and implementation of the Deactivation Code is still new, it will be important to continue monitoring how platforms apply the Deactivation Code to their internal practices, to ensure that the use of automated practices does not unfairly disadvantage digital platform workers.

The Building Cooperative Workplaces No. 1 Bill will address some issues in the management of unfair deactivation matters. The Bill will amend the FW Act to empower the FWC to dismiss an unfair deactivation or unfair termination application if the application is frivolous, vexatious, or has no reasonable prospects of success, and to determine certain contested matters 'on the papers' without conducting either a conference or holding a hearing. If enacted, the amendments may address some stakeholder concerns about the management of unfair deactivation matters and reduce the workload on the FWC and parties involved in matters.

In the Draft Report, the Review proposed that the operation of the unfair deactivation framework be reviewed after 12 months. The Review considers that a 2-year review period is more appropriate, having regard to the proposed amendments in the Building Cooperative Workplaces No. 1 Bill, which are expected to play an important role in the management of unfair deactivation matters. This will allow

[386] *Fair Work Act 2009* (Cth) s 592.
[387] Ibid s 590.
[388] See *Abdirahman Ibrahim Derow v Rasier Pacific Pty Ltd* [2025] FWC 2062; *Umair Ayyub v Portier Pacific Pty Ltd t/a Uber Eats* [2026] FWCFB 81.

time for the amendments to take effect in practice and for their impact on the operation and administration of the jurisdiction to be properly assessed.

Serious Misconduct

The emerging cases show that the framework is still being calibrated, particularly in its application to matters involving serious misconduct where evidentiary standards, procedural fairness, privacy and community safety intersect.

Employer groups and Uber raised concerns that the requirement to provide 'sufficient information' to workers prior to deactivation has been interpreted inconsistently by the FWC, noting that this has created compliance uncertainty across large-scale digital operations. These challenges are particularly problematic in serious misconduct cases, especially those involving allegations of sexual misconduct which present heightened risks to community safety. Uber noted the difficulty of providing detailed particulars while simultaneously protecting the identity and safety of complainants.

Early decisions indicate that where serious misconduct is alleged, the FWC has applied the *Briginshaw* standard and, in several matters, ordered reactivation (and in some cases lost pay) because the platform could not present sufficient evidence to prove the alleged conduct occurred. Those matters have included allegations of sexual harassment and assault. Stakeholders have raised concerns that meeting the evidentiary burden in these matters may, in practice, require victim-survivors to participate as witnesses (including being available for cross-examination), which risks re-traumatisation and may deter reporting. This also points to a potential unintended consequence in the current settings. In cases involving serious misconduct allegations that cannot be proven to the *Briginshaw* standard, the availability of reactivation as the primary remedy may inevitably create outcomes with heightened safety risks. These concerns warrant careful handling and highlight that a trauma-informed approach should be prioritised, including considering alternative ways for the FWC to manage these matters while still ensuring procedural fairness for the applicant.

Amendments to the Deactivation Code commenced on 12 June 2026. The amendments are confined to sexual harassment matters and provide platforms with greater flexibility in complying with the Deactivation Code by permitting less detailed disclosure of the allegation, including that there has been a sexual harassment allegation and the general nature of the alleged conduct. These are important changes that go some way to addressing stakeholder concerns about the management of sexual harassment and should better support platforms to comply with the Deactivation Code in relation to sexual harassment matters.

However, the changes are targeted to sexual harassment allegations and do not resolve the more fundamental difficulties that have emerged in the operation of the framework in relation to a broader spectrum of serious misconduct allegations, particularly where evidentiary burdens, trauma-informed handling of complaints, procedural fairness and community safety intersect.

There are practical limits to how far the Deactivation Code can be amended in this area without undermining the procedural fairness that should continue to be afforded to affected drivers. The Deactivation Code still proceeds on the basis that a worker should, subject to safety and privacy constraints, be given sufficient information to understand the allegation, a right to respond, and an opportunity to seek a discussion with a representative of the platform before a final decision is made. Those are core features of the framework and cannot be displaced without materially altering its fairness to workers.

For these reasons, the amendments should be understood as an important first step. While they improve the practical operation of the Deactivation Code in sexual harassment matters, they cannot by themselves resolve the tension between protecting complainants and the community, and preserving procedural fairness for workers facing deactivation. The framework therefore continues to warrant attention.

Further action by the government remains necessary to ensure the framework can manage all serious misconduct allegations in a way that ensures community safety while also maintaining procedural fairness. This should include clarifying the evidentiary threshold in matters involving serious misconduct other than sexual harassment as now defined in the Deactivation Code.

Evidentiary thresholds

In addition to the issues arising in serious misconduct matters, stakeholders raised a broader concern that importing established unfair dismissal evidentiary requirements into a setting deliberately designed to reflect the operational realities of digital platform work risks imposing evidentiary burdens that are difficult to meet in the platform context and undermining the intended balance between procedural fairness and efficient, safety-focused platform operation.

The early experience of the jurisdiction indicates that evidentiary expectations developed in traditional employment settings do not always translate well to platform contexts, particularly where the FWC's approach discounts user complaints as hearsay unless the complainant is available for cross-examination. This approach sits uncomfortably with the policy intent, which contemplates that platform users would not generally expect to be contacted to discuss or substantiate feedback. There is merit in Uber's contention that the current approach is not fit for purpose, and the Review supports consideration being given to aligning the statutory inquiry more closely with the Deactivation Code's 'reasonable grounds' focus. This may mean that subsection 536LF(b) of the FW Act could be amended to clarify that a deactivation is not unfair where the operator considered on reasonable grounds that a valid reason existed, rather than requiring proof to a judicial standard that the incident occurred.

In considering clarifications to the evidentiary threshold, it is important to balance procedural fairness with the risks of reducing protections for workers that may result from a legislative amendment to the evidentiary threshold. It is also important to consider the role that algorithmic management, based on customer feedback, plays in deactivation decisions, and the critical role of the Deactivation Code in ensuring procedural fairness for workers in this context. As a result, any changes to reduce the requirement for a platform to comply with the Deactivation Code should be considered carefully.

Findings and recommendations

Overall, the measure is operating largely as intended in its early phase. The framework has been established, the FWC is progressing multiple applications, and the unfair deactivation jurisdiction is being utilised and is capable of delivering effective remedies in appropriate cases.

However, it remains too early to draw firm conclusions about the effectiveness of the minimum standards framework, noting that no employee-like MSOs or minimum standards guidelines have yet been made and the guideline pathway has not been taken up in practice. It is clear that a preference has been given to MSOs at this stage, likely due to their legally binding nature. The option remains available for eligible parties to pursue guidelines as an alternative.

The unfair deactivation framework is also largely still in its early phase meaning it is too early to draw firm conclusions about the overall effectiveness of its operation. However, stakeholder feedback and early decisions identify concerning implementation issues in matters involving allegations of serious misconduct (including sexual harassment and assault), particularly in relation to evidentiary standards, procedural fairness and the practical handling of complaints. These issues raise acute safety, welfare and trauma-informed practice considerations and warrant prioritised attention.

While the recent Deactivation Code amendments go some way to addressing concerns in sexual harassment matters, they do not cover serious misconduct or fully resolve the tension between community safety, trauma-informed handling of complaints and procedural fairness for affected drivers. Those issues continue to warrant attention.

If enacted, the amendments in the Building Cooperative Workplaces No. 1 Bill should improve the management of unfair deactivation matters by enabling the FWC to dismiss applications that are frivolous, vexatious or have no reasonable prospects of success. The FWC would also be able to determine appropriate contested matters on the papers where the parties' consent and the matter can be adequately determined in that way. The Review notes and supports these proposed changes that should enable more efficient FWC processes and address stakeholder concerns about the management of unfair deactivation matters and reduce the workload on both the FWC and the parties involved.

Recommendation 10

The government should undertake a targeted post-implementation review once the first employee-like minimum standards orders are made and the jurisdiction is more developed, to assess whether the framework is operating as intended in practice (including the operation of the Road Transport Advisory Group as it relates to employee-like minimum standards orders). The review should also consider the unfair deactivation framework (including any amendments made by the Building Cooperative Workplaces No.1 Bill 2026) and the operation of the *Fair Work (Digital Labour Platform Deactivation Code) Instrument 2024*. This review should take place within 2 years of the first orders being made.

Recommendation 11

The government should urgently address the management of unfair deactivation matters involving serious misconduct allegations. This should include considering whether legislative clarification on the evidentiary threshold is necessary.

Recommendation 12

The government should examine the role of minimum standards guidelines within the employee-like framework, including their interaction with minimum standards orders, to ensure they are operating as intended.

Recommendation 13

The government should examine the operation of the employee-like framework in the care and disability sectors (including low uptake of both the minimum standards and unfair deactivation pathways), including whether there are sector specific dynamics or barriers within the care economy inhibiting uptake or whether more time is needed for the minimum standards order regime to develop and become established in practice.

Recommendation 14

The government should consider whether the employee-like framework should be expanded to other cohorts of independent contractors experiencing similar conditions of low pay and low bargaining power, including journalists and media workers, musicians, performers, screen and live performance crew, writers, translators and interpreters.

2.4 Allow the Fair Work Commission to set minimum standards for the road transport industry

What the measure does

The Closing Loopholes No. 2 Act amended the FW Act to provide greater protections for certain independent contractors in the road transport industry to increase the safety, sustainability and viability of the road transport industry. This included empowering the FWC to set minimum standards for road transport contractors and persons in a road transport contractual chain and resolve disputes about unfair termination for road transport contractors.[389]

The amendments commenced on 26 August 2024.[390] Eligible parties could make applications for minimum standards and contractual chain orders and guidelines from this date. Eligible road transport contractors could make unfair termination applications from 26 February 2025, after meeting the 6-month regular work eligibility threshold.

Key Concepts

The measure introduced the concept of a 'regulated road transport contractor' and defined a 'road transport business'.[391]

A 'regulated road transport contractor' is a person who:

- performs work in the road transport industry under a services contract[392] to which they are a party (and does not complete any work as an employee)
- performs all or a significant majority of the work under the contract, and
- is not an employee-like worker.[393]

A 'road transport business' is defined as a person receiving services under a services contract where the contract provides for the performance of work in the road transport industry or is a constitutional corporation, or included in a class of constitutional corporations prescribed by the FW Regulations.[394]

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[389] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch1 pts 16, 16A; Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 187 [1095]– [1096]; Supplementary Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (Cth) 4 [8]–[9].
[390] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 2(1) items 22, 22A.
[391] *Fair Work Act 2009* (Cth) ss 15Q, 15R.
[392] Ibid s 15H.
[393] Ibid s 15Q.
[394] Ibid s 15R.

The 'road transport industry' includes:

- the road transport and distribution industry (excluding transporting or otherwise dealing with livestock)[395]
- the long distance operations in the private road transport industry (excluding transporting or otherwise dealing with livestock)[396]
- the waste management industry[397]
- the cash in transit industry[398]
- the passenger vehicle transportation industry,[399] and
- any other industry prescribed by the regulations.[400]

A 'road transport contractual chain' is defined as a chain or series of contract arrangements:

- under which work is performed for a party to the first contract or arrangement in the chain or series by a regulated road transport contractor or a road transport employee-like worker under a services contract, or by an employee, and
- in which at least one party to the first contract or arrangement in the chain or series is a constitutional corporation.[401]

A person is 'in a road transport contractual chain' if:

- the person is a party (a primary party) to the first contract or arrangement in the road transport contractual chain
- the person is a party (a secondary party) to a subsequent contract or arrangement in the road transport contractual chain, being a contract or arrangement under which work is performed for the secondary party by a regulated road transport contractor or a road transport employee-like worker under a services contract, or by an employee, or
- the person is a regulated road transport contractor or a road transport employee-like worker who performs work under a services contract in the road transport contractual chain.[402]

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[395] Ibid s 15S(1)(a); *Fair Work Act Regulations* (Cth) reg 1.08B(1). See the meaning provided within the Road Transport and Distribution Award 2020, as in force on 1 July 2024.
[396] *Fair Work Act 2009* (Cth) s 15S(1)(b); *Fair Work Act Regulations 2009* (Cth) reg 1.08B(2). See the meaning provided within the Road Transport (Long Distance Operations) Award 2020, as in force on 1 July 2024. The livestock industry has been excluded (see *Fair Work Regulations 2009* (Cth) reg 1.08B).
[397] *Fair Work Act 2009* (Cth) s 15S(1)(c). See the meaning provided within the Waste Management Award 2020, as in force on 1 July 2024. The livestock industry has been excluded (see *Fair Work Regulations 2009* (Cth) reg 1.08B).
[398] *Fair Work Act 2009* (Cth) s 15S(1)(d). See the meaning provided within the Transport (Cash in Transit) Award 2020, as in force on 1 July 2024.
[399] *Fair Work Act 2009* (Cth) s 15S(1)(e). See the meaning provided within the Passenger Vehicle Transportation Award 2020, not including paragraph 4.2(c), as in force on 1 July 2024.
[400] *Fair Work Act 2009* (Cth) s 15S(1)(f).
[401] Ibid s 15RA(1).
[402] Ibid s 15RA(2).

Expert Panel and Road Transport Advisory Group

Expert Panel for the Road Transport Industry

The measure establishes the FWC Expert Panel,[403] consisting of a majority of FWC Members who have knowledge of, or experience in, the road transport industry and chaired by the FWC President, a Vice President or a Deputy President.[404]

The FWC Expert Panel must perform the functions and exercise the powers of the FWC in relation to matters concerning the road transport industry, including:

- making, varying or revoking a modern award that relates to the road transport industry
- making, varying or revoking MSOs (**road transport MSOs**) and minimum standards guidelines (**road transport guidelines**) for regulated road transport contractors and businesses
- making, varying or revoking RTCCOs and road transport contractual chain guidelines (**RTCCG**)
- making suspension or deferral determinations in respect of road transport MSOs or RTCCOs (and any subsequent variation or revocation orders), and
- other instruments that the FWC President considers might relate to the road transport industry.[405]

The FWC President may also direct the FWC Expert Panel to deal with employee-like MSOs, employee-like guidelines and other matters the President considers might relate to the road transport industry or any other prescribed instrument (whether or not the President considers the matter might also relate to another industry or sector).[406]

The measure introduced a 'road transport objective' that the FWC Expert Panel must comply with when performing a function or exercising a power.[407] The road transport objective requires the FWC Expert Panel to take into account the need for an appropriate safety net of minimum standards for regulated road transport workers and employees in the road transport industry, having regard to certain factors including, but not limited to:[408]

- the need for standards that ensure the road transport industry is safe, sustainable and viable[409]
- the need to avoid unreasonable adverse impacts on sustainable competition among road transport industry participants, road transport industry business viability, innovation and productivity, and administrative and compliance costs for road transport industry participants[410]

[403] Ibid s 620(1E).
[404] Ibid ss 620(1E), (1), (2A).
[405] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 191–2 [1126]; *Fair Work Act 2009* (Cth) ss 617(10B), 620(1E).
[406] *Fair Work Act 2009* (Cth) s 617(10D).
[407] Ibid s 40D.
[408] Ibid.
[409] Ibid s 40D(a).
[410] Ibid s 40D(b).

- the need to avoid adverse impacts on the sustainability, performance and competitiveness of supply chains and the national economy,[411] and
- the need for minimum standards in road transport contractual chains.[412]

Road Transport Advisory Group

The measure established the RTAG[413] to advise the FWC in relation to road transport industry matters including, but not limited to:

- the making and varying of modern awards that relate to the road transport industry
- the making and varying of road transport MSOs and guidelines
- the making and varying of RTCCOs and RTCCGs
- the prioritisation by the FWC of matters relating to the road transport industry, and
- such other matters prescribed by the regulations.[414]

The RTAG must be consulted before the FWC Expert Panel can make, vary, revoke, suspend or defer a road transport MSO[415] or a RTCCO.[416] The President of the FWC must also consult RTAG in determining priorities for the work of the FWC in relation to matters affecting the road transport industry.[417]

RTAG members must be persons appointed by the Minister who are members of organisations entitled to represent the industrial interests of road transport contractors and road transport businesses.[418] The FWC President may appoint a member of the FWC Expert Panel as RTAG Chair.[419]

The RTAG may establish subcommittees to advise on matters relevant to the performance of its functions.[420] The RTAG must establish a subcommittee with a majority of owner drivers (or their representatives) if a proposed road transport MSO or a RTCCO will cover owner drivers, or if the FWC proposes to perform a function or exercise a power in relation to a road transport MSO or a RTCCO that has, or may have an effect on owner drivers and that is more than minor or technical.[421] Subcommittees must be chaired by an RTAG member but may include persons who are not RTAG members.[422] The RTAG must consult any relevant subcommittee it has established before providing its advice to the FWC.[423]

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[411] Ibid s 40D(c).
[412] Ibid s 40D(d).
[413] Ibid s 40E(1). The legislative framework for the RTAG is in ch 1, pt 1-4, div 3 of the *Fair Work Act 2009* (Cth).
[414] Ibid s 40E(2).
[415] Ibid ss 536KA(2)(b), 536KQL(1)(b), 536KQQ(1)(b), 536KQS(3)(b).
[416] Ibid ss 536PF(2)(b), 536QD(1)(b), 536QH(1)(b), 536QK(3)(b).
[417] Ibid s 40E(4).
[418] Ibid ss 40F(1)–(2).
[419] Ibid s 40F(6).
[420] Ibid s 40G(1).
[421] Ibid s 40G(3).
[422] Ibid s 40G(2).
[423] Ibid s 40E(3).

Road Transport Minimum Standards

The measure introduced a new jurisdiction enabling the FWC Expert Panel to make binding MSOs or non-binding minimum standards guidelines for regulated road transport contractors.[424] When performing a function or exercising a power under new Part 3A-2, the FWC Expert Panel must comply with both the 'minimum standards objective'[425](see Section 2.3) and the 'road transport objective'.[426]

Road transport MSOs

The measure provides that a number of parties may apply for an MSO including an organisation entitled to represent regulated road transport contractors (for example, a union), an organisation entitled to represent one or more road transport businesses, a road transport business or the Minister.[427] The FWC Expert Panel may also make a road transport MSO on its own initiative.[428]

Before making or varying a road transport MSO, the FWC Expert Panel must have regard to the commercial realities of the road transport industry, be satisfied that it will not unduly affect the viability and competitiveness of owner drivers or other similar persons, ensure there has been genuine engagement with the parties, ensure the RTAG has been consulted and ensure that the parties have followed the consultation process.[429]

The consultation process requires the FWC to publish a notice of intent to make a road transport MSO along with a draft of the proposed MSO, to enable affected entities to make submissions on the order.[430] The FWC Expert Panel may make any changes it thinks appropriate to a draft road transport MSO. If the changes are significant, the FWC Expert Panel must publish a new notice of intent and revised draft order and follow the consultation process again (with a period of consultation to be no shorter than 12 months).[431] In response to an application for a road transport MSO, the FWC Expert Panel may refuse to consider the application, make or decline to make the MSO, or make minimum standard guidelines in relation to the regulated road transport contractors covered by the application.[432]

When making a road transport MSO, the FWC is guided by content rules, including terms that must be included (coverage and dispute resolution)[433] terms that may be included (including payment terms, deductions, record-keeping, insurance, and delegates' rights),[434] and terms that must not be included (including overtime rates, rostering arrangements, matters of a primarily commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by an order, a term that would change the form of the engagement or the status of the worker covered by the MSO, and a matter

[424] Ibid ch 3A, pt 3A-2; Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill (Cth) 2023, 22 [112],187 [1096].
[425] *Fair Work Act 2009* (Cth) s 536JX.
[426] Ibid s 40D.
[427] Ibid s 536JZ(1).
[428] Ibid s 536JY(4)(a).
[429] Ibid s 536K. The consultation process is set out in ch 3A, pt 3A-2, div 3, sub-div D of the *Fair Work Act 2009* (Cth).
[430] Ibid ss 536KB, 536KC.
[431] Ibid s 536KE. Subsection 536JF(3A) notes that the specified day for a road transport MSO to come into operation may be a day not earlier than 6 months after the relevant notice of intent was published if the FWC is satisfied that there are urgent circumstances.
[432] Ibid s 536KG(1).
[433] Ibid ss 536KJ, 536KK.
[434] Ibid s 536KL.

relating to road transport that is otherwise comprehensively dealt with by the Heavy Vehicle National Law or by another law of the Commonwealth, state or territory).[435]

The FWC Expert Panel may make a determination, on its own initiative or by application, to vary or revoke a road transport MSO, if it is satisfied that variation or revocation is consistent with the minimum standards objective and the road transport objective.[436]

The Minister may make a declaration deferring or suspending a road transport MSO or part of it, if the Minister considers it is in the public interest to do so.[437]

The FWC may also defer or suspend a road transport MSO or part of it on application by an organisation entitled to be represented either regulated road transport contractors or road transport businesses covered by the order, or by a road transport business covered by the order.[438] In either case, the FWC must, as soon as practicable, decide whether or not to vary or revoke the road transport MSO.[439] Before varying or revoking the order, the FWC must also publish a notice of intent and revised draft order for consultation with affected entities.[440]

Contravention of a road transport MSO is liable to a civil penalty.[441]

Road transport guidelines

The measure allows the FWC Expert Panel to make non-binding road transport guidelines.[442] A range of parties can apply for road transport guidelines including an organisation entitled to represent regulated road transport contractors (e.g. a union), an organisation entitled to represent one or more road transport businesses, a road transport business or the Minister.[443] The FWC Expert Panel may also make road transport guidelines on its own initiative.[444]

The FWC Expert Panel must not make road transport guidelines in relation to the same matters in an existing road transport MSO that covers the same regulated road transport contractors and road transport businesses.[445] In response to an application, the FWC Expert Panel may decide to not hear the application, make or refuse to make the road transport guidelines, or make a road transport MSO in relation to the contractors covered by the application.[446]

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[435] Ibid ss 536KM, 536KMA, 536KN. A 'regulated worker' is an employee-like worker or a regulated road transport contractor. See s 15G.
[436] Ibid ss 40D, 536KQ.
[437] Ibid ss 536KQA, 536KQD.
[438] Ibid ss 536KQJ, 536KQP
[439] Ibid s 536KQS.
[440] Ibid ss 536KQT, 536KQU, 536KQV.
[441] Ibid s 536JB.
[442] Ibid ss 536KR(1), 536KU(1)(b).
[443] Ibid s 536KS(1).
[444] Ibid s 536KR(4)(a).
[445] Ibid s 536KV.
[446] Ibid s 536KU(1).

When making road transport guidelines, the FWC Expert Panel is guided by content rules, which are largely equivalent to those for road transport MSOs.[447]

Collective agreements

An organisation representing regulated road transport contractors may make a collective agreement with a road transport business.[448] The provisions relating to collective agreements for road transport businesses reflect those applying to digital platform work (see Section 2.3).

Minimum Standards for persons in a Road Transport Contractual Chain

The measure introduces a new jurisdiction enabling the FWC Expert Panel to make binding RTCCOs and non-binding road transport contractual chain guidelines in relation to regulated road transport contractors, road transport employee-like workers[449] and other persons in a road transport contractual chain.[450] In making an RTCCO, the FWC Expert Panel must comply with both the 'minimum standards objective'[451] (see Section 2.3) and the 'road transport objective'.[452]

A road transport contractual chain is a chain or series of contracts or arrangements under which work is performed for a party to the first contract in the chain by a regulated road transport contractor or a road transport employee-like worker ('**road transport contractual chain**') and in which at least one party to the first contract or arrangement is a constitutional corporation.[453] A person is 'in a contractual chain' if they are a party to the first contract in the chain (a primary party), a party to a subsequent contract in the contractual chain (a secondary party), or a regulated road transport contractor or a road transport employee-like worker performing work under a services contract in the contractual chain.[454]

Road Transport Contractual Chain Orders

An application for an RTCCO can be made by a regulated business in a road transport contractual chain (i.e. a digital labour platform operator or road transport business), an organisation entitled to represent persons in the contractual chain (i.e. a union), a person who is a primary party to the first contract in a contractual chain, the Minister or a person or body prescribed by the regulations.[455] The FWC Expert Panel may also make a RTCCO on its own initiative.[456]

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[447] Ibid ss 536KW(b), 536KX, 536KY. See ss 536KJ, 536KL, 536KM and 536KN for requirements relating to relevant MSOs. Unlike for road transport MSOs, the road transport guidelines are not required to include a dispute resolution term. See s 536KW(b).
[448] Ibid s 536MK(3).
[449] Ibid s 15RB.
[450] Ibid ss 536PD(1), 536QP(1).
[451] Ibid s 536NN.
[452] Ibid s 40D.
[453] Ibid s 15RA(1).
[454] Ibid s 15RA(2).
[455] Ibid s 536PE(1).
[456] Ibid s 536PD(3)(a).

Before making or varying a RTCCO, the FWC Expert Panel must:

- ensure there has been genuine engagement with the parties and that the parties have followed the consultation process[457]
- ensure the RTAG has been consulted[458]
- have regard to the commercial realities of the road transport industry, including in relation to different trip and load types[459]
- be satisfied that the order will not unduly affect the viability and competitiveness of road transport businesses, owner drivers or other similar persons[460]
- take into account any current or proposed RTCCOs and MSOs,[461] and
- ensure coverage of the road transport contractual chain order is clear.[462]

In response to an application, the FWC Expert Panel may refuse to consider the application, make or decline to make the RTCCO, or make road transport contractual chain guidelines in relation to the persons covered by the application.[463]

During the consultation process, the FWC Expert Panel must publish a notice of intent to draft a RTCCO and publish the draft RTCCO to enable affected persons to make submissions on the order.[464]

When making an RTCCO, the FWC Expert Panel is guided by content rules, including terms that must be included (coverage, interaction with MSOs and dispute resolution),[465] terms that must not be included (overtime rates, rostering arrangements, a term that would change the form of engagement or status of a worker, WHS matters that are otherwise comprehensively dealt with by a Commonwealth, state or territory law, and matters prescribed by the regulations)[466] and terms that may be included (including payment times, fuel levies, rate reviews, termination and cost recovery).[467]

The FWC Expert Panel may make a determination, on its own initiative or by application, to vary or revoke a RTCCO.[468]

The Minister may, by instrument, defer or suspend a RTCCO or part of it, if the Minister considers it is in the public interest to do so.[469]

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[457] Ibid ss 536PF(2)(a), (c). The consultation process is set out in ch 3B, pt 3B-2, div 2, sub-div C of the *Fair Work Act 2009* (Cth).
[458] Ibid s 536PF(2)(b).
[459] Ibid s 536PF(2)(d).
[460] Ibid s 536PF(2)(e).
[461] Ibid s 536PF(2)(f).
[462] Ibid s 536PF(2)(g).
[463] Ibid s 536PL(1).
[464] Ibid ss 536PF(2)(a),(c), 536PG(1).
[465] Ibid ss 536PM, 536PN, 536PP.
[466] Ibid s 536PR.
[467] Ibid s 536PQ(1).
[468] Ibid ss 536PT(1), (4).
[469] Ibid ss 536PU, 536PX.

The FWC may also defer or suspend an RTCCO or part of it on application by an organisation entitled to represent one or more persons in a road transport contractual chain, a regulated business in the chain, a person who is a primary party to the first contract in the chain or a person or body prescribed by the regulations.[470] In either case, the FWC must, as soon as practicable, decide whether or not to vary or revoke the RTCCO.[471] Before varying or revoking the RTCCO, the FWC must also publish a notice of intent and revised draft order for consultation with affected entities.[472]

Contravention of a RTCCO is liable to a civil penalty.[473]

Road Transport Contractual Chain Guidelines

The same cohort that may apply for a RTCCO may also apply for road transport contractual chain guidelines.[474] The FWC Expert Panel may also make road transport contractual chain guidelines on its own initiative.[475]

In response to an application, the FWC Expert Panel may refuse to consider the application, make or decline to make road transport contractual chain guidelines, or make a RTCCO in relation to the same persons covered by the application.[476]

When making road transport contractual chain guidelines, the FWC Expert Panel is guided by content rules, including terms that must be included (coverage),[477] terms that may be included (including payment times, fuel levies, rate reviews),[478] and terms that must not be included (including overtime rates, rostering arrangements, a term that would change the form of engagement or status of a worker, WHS matters, matters relating to road transport that are otherwise dealt with by the Heavy Vehicle National Law or by another law of the Commonwealth, state or territory, and matters prescribed by the regulations).[479]

Interaction with state and territory laws

Chapters 3A and 3B of the FW Act are intended to cover the field in respect of the rights, entitlements, obligations and liabilities that apply to a regulated business, a regulated worker, a party to a services contract or a person in a road transport contractual chain, except for certain 'preserved' state and

[470] Ibid ss 536QA, 536QF.
[471] Ibid s 536QK.
[472] Ibid ss 536QL, 536QM, 536QN.
[473] Ibid s 536NP.
[474] Ibid s 536QQ. See also s 536JZ.
[475] Ibid s 536QP(2)(a).
[476] Ibid s 536QR(1).
[477] Ibid s 536QU.
[478] Ibid s 536PQ.
[479] Ibid s 536QV.

territory laws.[480] Once a road transport MSO or RTCCO is made, it will prevail over all state and territory laws to the extent of any inconsistency.[481]

Unfair termination

The measure established a framework for the unfair termination of a regulated road transport contractor's services contract.

A person is unfairly terminated if the FWC is satisfied a person was performing work in the road transport industry and was terminated, and the termination was unfair and inconsistent with the *Fair Work (Road Transport Industry Termination Code) Instrument 2024* (**Termination Code**).[482] In considering whether a termination was unfair, the FWC must take into account whether there was a valid reason related to the person's capacity or conduct, whether any relevant processes specified in the Termination Code were followed, and any other matters that the FWC considers relevant.[483]

The amendments allow the Minister to make the Termination Code.[484] The Termination Code, which is a legislative instrument, must deal with what may constitute a valid reason for termination, rights of response, internal processes for road transport businesses in relation to termination, and communication between the contractor and the business in relation to a termination.[485]

A person who has been terminated may apply to the FWC for an order granting a remedy within 21 days of the termination occurring or within such further period as the FWC allows.[486] Only persons whose annual rate of earnings are below the CHIT (currently $183,100 per year)[487] may seek an order in relation to an unfair termination.[488]

If the FWC finds that a regulated road transport contractor was unfairly terminated, it may order that a new services contract be entered into (**reinstatement order**), or the payment of compensation.[489] If the FWC makes a reinstatement order, it may also make an order requiring the road transport business or an associated entity to pay an amount for the remuneration lost, or likely to have been lost, because of the unfair termination.[490] The FWC may only make an order for compensation if it is satisfied that entering into a new services contract would be inappropriate and the order for compensation is appropriate.[491] In assessing the amount of compensation, the FWC must take into account all the circumstances of the case, including the effect on the viability of the business, the amount of remuneration the person would

[480] Ibid ss 536JP, 536NW. Preserved state and territory laws include Chapter 6 of the *Industrial Relations Act 1996* (NSW) and the *Owner Drivers and Forestry Contractors Act 2005* (Vic). Regs 3A.01 and 3B.01 of the *Fair Work Regulations 2009* (Cth) also list further state and territory laws that are preserved.
[481] *Fair Work Act 2009 (Cth)* ss 536JS(1), 536NZ(1). A road transport MSOs or RTCCOs would apply subject to a state or territory law that is specified in the FW Regulations. See ss 536JS(2), 536NZ(2).
[482] Ibid s 536LK.
[483] Ibid s 536LM.
[484] Ibid s 536LN(1).
[485] Ibid s 536LN(2).
[486] Ibid ss 536LU(1), (3)–(4).
[487] *Fair Work Regulations 2009* (Cth) reg 1.08AA
[488] *Fair Work Act 2009* (Cth) ss 536LU(2), 15C.
[489] Ibid ss 536LR(1), 536LT.
[490] Ibid ss 536LS(3)–(4).
[491] Ibid s 536LR(3).

have, or would have been likely to receive, and any misconduct by the person.[492] The compensation amount must not exceed the lesser of either the remuneration the person would have received in the 26 weeks before termination or half the amount of the CHIT.[493]

The FWC must not permit appeals of a decision relating to unfair terminations unless it is in the public interest.[494]

FWC funding

The FWC was provided $3.7 million over 4 years in the 2023–4 Budget (and $0.8 million per year ongoing) to establish the road transport jurisdiction.[495]

Intention of the measure

The measure is intended to provide a framework for the FWC to exercise functions and powers that relate to the road transport industry, including allowing the FWC to set minimum standards for the road transport industry to ensure the industry is safe, sustainable and viable.[496]

In August 2022, an industry roundtable comprising unions, road transport businesses and digital platforms acknowledged the need for reform and endorsed principles for a 'safe, sustainable and fair road transport industry'.[497] The measure was subject to extensive consultation during development, including through consultation papers by DEWR,[498] and considered by the Senate inquiry into the Bill.[499]

The measure addresses long-standing concerns about the operation of contracting arrangements in the road transport industry.[500] At the time, the then Minister expressed concern that the road transport industry was operating 'in a way that is putting businesses, workers and their families under immense financial pressure and undermining the safety, sustainability and viability of the industry'.[501] Concerns about unsustainable business practices in the road transport industry were raised in the Senate Standing Committee on Rural and Regional Affairs and Transport, *Without Trucks Australia Stops: the Development of a Viable, Safe, Sustainable and Efficient Road Transport Industry Report* (**Without Trucks Australia**

[492] Ibid ss 536LT(2)–(4).
[493] Ibid ss 536LT(5)–(6).
[494] Ibid s 536MA.
[495] DEWR, *Mid-Year Economic and Fiscal Outlook 2023–24* (Budget 2023–24 Statement, 13 December 2023) 238.
[496]Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2024, 6237 (Tony Burke, Minister for Employment and Workplace Relations); Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 9 [37].
[497] Road Transport Roundtable August 2022 participants, 'Agreed principles for a safe, sustainable and fair road transport industry', 2022.
[498] DEWR, *Extend the powers of the Fair Work Commission to include 'employee-like' forms of work* (Consultation paper, March 2023); DEWR, *Employee-like forms of work and stronger protections for independent contractors – consultation paper*, (Consultation Paper, April 2023).
[499] Senate Standing Committee on Education and Employment Inquiry, Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023.
[500] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2024, 6238 (Tony Burke, Minister for Employment and Workplace Relations).
[501] Ibid 6237.

Stops Report).[502] The Without Trucks Australia Stops Report raised issues including the lack of minimum standards contributing to inadequate incomes for workers and poor outcomes for road users, long contracting chains resulting in economic pressures flowing down to contractors at the 'bottom' of the chain, and drivers risking their lives and wellbeing without the support of an appropriate regulatory framework.[503]

The provisions contain a number of guardrails to learn from the experience of the Road Safety Remuneration Tribunal (**RSRT**), which operated from 2012 to 2016 as a tribunal responsible for setting enforceable remuneration orders in the road transport industry.[504] The RSRT had been criticised for inadequate industry consultation, overlap with other regulatory frameworks, and concerns that the proposed pay rates it imposed would render owner drivers uncompetitive.[505] The Closing Loopholes measure responded to a range of concerns including notice requirements when making MSOs, ensuring orders will not have an unreasonable adverse impact on the viability or competitiveness of drivers, and ensuring orders are made by a FWC expert panel that has knowledge of, or experience in, the road transport industry.[506]

The amendments provide regulated road transport contractors with greater workplace protections by empowering the FWC to deal with disputes about the unfair termination of a services contract.[507] The new jurisdiction is intended to establish quick, flexible and informal procedures for the resolution of unfair termination claims that address the needs of both the road transport business and regulated road transport contractors.[508]

[502] Senate Standing Committee on Rural and Regional Affairs and Transport, Parliament of Australia, *Without Trucks Australia Stops: the development of a viable, safe, sustainable and efficient road transport industry* (Report, August 2021); House of Representatives, Second Reading Speech, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth), 6238.
[503] Senate Standing Committee on Rural and Regional Affairs and Transport, Parliament of Australia, *Without Trucks Australia Stops: the development of a viable, safe, sustainable and efficient road transport industry* (Report, August 2021) 35, 179. See also recommendations 1 and 2.
[504] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2024, 6238 (Tony Burke, Minister for Employment and Workplace Relations); FWO (Cth), 'Road Safety Remuneration Tribunal' (Web Page) <https://www.fairwork.gov.au/about-us/workplace-laws/legislation-changes/previous-legislation-changes/road-safety-remuneration-system>.
[505] See NFF, *Farmers urge Government to scrap the RSRT* (Media Release, 2016); ATA, *Abolish the Road Safety Remuneration Tribunal* (Media Release, 1 April 2016).
[506] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2024, 6238 (Tony Burke, Minister for Employment and Workplace Relations); Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 192 [1127].
[507] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2024, 6238 (Tony Burke, Minister for Employment and Workplace Relations); Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) [37].
[508] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 31 [171].

What has happened since commencement

Fairer Fuel Act

The *Fair Work Amendment (Fairer Fuel) Act 2026* (Cth) (**Fairer Fuel Act**) commenced on 2 April 2026.[509] The Fairer Fuel Act amended the FW Act to allow the Minister to determine that an application for the making, variation or revocation of a RTCCO is an 'emergency application', having regard to the road transport objective and where the Minister is satisfied that events or circumstances exist that have, or are likely to imminently have, a significant national negative impact on the road transport industry and it is in the public interest to do so.[510] An emergency application allows the FWC to expedite mandatory consultation periods, and allow for a RTCCO to come into operation quickly.[511] The Fairer Fuel Act is intended to support timely regulatory responses to events or circumstances that have or will have a significant national negative impact on the road transport industry, including sharp increases in fuel prices.[512] The amendments only apply to applications made on or after 2 April 2026 to make, vary or revoke RTCCOs.

The Minister made a determination under these provisions on 10 April 2026, allowing the FWC to expedite its consideration of the TWU and ARTIO application to the FWC for an RTCCO (made on 2 April 2026) to address the impacts of fuel price increases (MS2026/1). The Fuel Cost Recovery RTCCO was made on 20 April 2026 and commenced on 21 April 2026.

On 29 May 2026, following the first review of the RTCCO, the FWC published a Statement and Draft variation and Notice of Intent, proposing variations following a review hearing that was conducted on 25 May 2026.[513] The proposed variations are largely technical clarifications, including confirming that obligations apply when rates are adjusted or set in new contracts entered into after March 2026, clarifying the small business exemption and the operation of rate-adjustment provisions, and providing that the obligations in the order will cease only if the weekly average national terminal gate price for diesel remains below $2.00 per litre for 4 consecutive weeks.

Minimum standards and contractual chain orders and guidelines

To date, one RTCCO has been made but no MSOs or minimum standards guidelines have been made under the road transport framework. The FWC is considering one application for a road transport MSO and 3 applications for RTCCOs made by the TWU. Table 3 sets out details of the 5 applications made by the TWU for a road transport MSO and RTCCOs.

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[509] *Fair Work Amendment (Fairer Fuel) Act 2026* (Cth) s 2.
[510] Explanatory Memorandum, Fair Work Amendment (Fairer Fuel) Bill 2026 (Cth) 1; *Fair Work Act 2009* (Cth) s 536PEA(3).
[511] Explanatory Memorandum, Fair Work Amendment (Fairer Fuel) Bill 2026 (Cth) 1.
[512] Ibid 3.
[513] *Application by Transport Workers' Union of Australia and Australian Road Transport Industrial Organisation* [2026] FWCFB 131; FWC, *Notice of Intent and Draft Determination* (MS900102, 29 May 2026).

Table 3: MSO and RTCCO applications before the FWC (as at 15 June 2026)

Application	Reference	Application Date	Example terms sought	Status
Road transport minimum standards – 'last-mile' delivery	MS2024/2	28 August 2024	Hourly safety net rates to be paid at least monthly, toll reimbursement, BlueCard training, dispute resolution delegates' rights (leave, right to represent contractors in consultation, etc.). (Based on draft orders)	Hearing on whether Expert Panel should issue notice of intent to make an MSO scheduled for July–August 2026.
Road transport contractual chains– payment terms	MS2024/4	26 September 2024	Payment within 21 days of the issue of an invoice, annual rate reviews in good faith, dispute resolution. (Based on draft order)	TWU has provided evidence. Submissions from those opposing due by 14 August. Hearing on whether Expert Panel should issue notice of intent to make a RTCCO scheduled for August–September 2026.
Road transport contractual chains – cash in transit	MS2025/1	17 February 2025	Obligations on primary parties to ensure that contracts 'adequately fund' cash in transit work and provide for annual rate reviews. Standards relating to safety, training and industry viability, dispute resolution. (Based on application)	Conferences held in 2025. RTAG advice on priority of matter and views as to disposition of application sought by 1 July 2026.
Road transport contractual chains – concrete cartage	MS2025/4	18 December 2025	Minimum safety net rates, adjustment to cover fuel cost fluctuations, significant obligations on clients to ensure safe, sustainable and viable operations, termination requirements, reasonable minimum vehicle/equipment specifications, training, dispute resolution. (Based on application)	Conferences and submissions made in January 2026. No further directions made.
Road transport contractual chain order – fuel cost recovery	MS2026/1	2 April 2026	Persons in a road transport contractual chain must, within each fortnight (or twice per calendar month) adjust rates by amounts necessary to ensure persons they engage recover the increased cost of fuel.	Order made 20 April 2026 (commenced 21 April 2026). The FWC published a Statement and Draft variation and Notice of Intent on Friday 29 May 2026, following the review hearing on 25 May 2026.

The FWC undertook and published research projects to assist in informing the FWC's approach to facilitating consultation in relation to the first 2 employee-like MSO applications, the first road transport MSO application and the first RTCCO application (see Section 2.3 for further information).

Road Transport Advisory Group

The RTAG conducted consultations on the first 2 applications under the road transport jurisdiction (along with the first 2 employee-like MSOs) which included establishing subcommittees to conduct 6-month consultation processes to advise the FWC on the prioritisation of these matters (the RTAG also provided advice to the FWC Expert Panel on MS2026/1, including convening a subcommittee[514]).

As discussed in Section 2.3 of this Report, the subcommittee processes concluded in August 2025 and provided advice to the FWC President in September 2025. The RTAG reported that no consensus positions on prioritisation or on proposed terms of the draft MSOs/RTCCO were achieved as part of these subcommittee processes. The RTAG confirmed their view that the applications should proceed concurrently.

Unfair termination

The Minister made the Termination Code, which came into effect on 5 December 2024 following a public consultation process on the proposed content of the Code.[515]

From commencement to 31 March 2026, 32 applications for an unfair termination remedy have been lodged with the FWC. As at 31 March 2026, 1 matter was resolved, 6 dismissed and 18 withdrawn or discontinued.[516]

Collective agreements

No collective agreements had been registered with the FWC. One consultation notice for a proposed collective agreement was lodged by the TWU in September 2025 to cover road transport contractors engaged by Team Global Express (except in NSW and Queensland).

Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026

The Building Cooperative Workplaces No. 1 Bill contains road transport related amendments relevant to this Review.

[514] Road Transport Advisory Group, Advice to the Expert Panel: *MS2026/1 – Application by Transport Workers' Union of Australia & Australian Road Transport Industrial Organisation re fuel cost recovery* (16 April 2026).
[515] *Fair Work (Road Transport Industry Termination Code) Instrument 2024* (Cth).
[516] FWC data, provided 5 June 2026.

The Bill would introduce the RTCHIT, which would be an amount prescribed by regulation and apply to regulated road transport contractors rather than the CHIT.[517] The RTCHIT would have no effect if the prescribed amount is lower than the CHIT.[518] Explanatory material accompanying the introduction of the Bill indicates that 'Regulated road transport contractors, particularly long-distance owner drivers, often incur high operating costs that can inflate their overall earnings relative to their take home pay. Establishing a separate income threshold for these contractors … better reflects contractor earnings in the road transport sector…'.[519]The Bill would also amend eligibility thresholds in relation to the RTCHIT:

- For unfair contract term remedies, a regulated road transport contractor would be prevented from making an application for an unfair contract remedy in relation to a services contract unless the sum of the regulated road transport contractor's annual rate of earnings is less than the RTCHIT.[520]
- For the 'opt out' provisions related to the definition of employment, a person must not give the regulated road transport contractor notice that the contractor may give the person an 'opt out notice' unless they consider their earnings for work performed under the relationship exceed the RTCHIT.[521]
- For unfair termination remedies, a regulated road transport contractor would be prevented from making an application unless the sum of the contractor's annual rate of earnings is less than the RTCHIT.[522]
- For unfair termination, the compensation cap for regulated transport workers would be limited to the lesser of half the amount of the RTCHIT or the total amount of remuneration received under the services contract during the 26 weeks immediately before the termination.[523]

The Bill would also amend the *Independent Contractors Act 2006* (Cth) (**IC Act**) to provide that an unfair contracts application by a regulated road transport contractor must not be made unless the sum of the contractor's annual rate of earnings is more than the RTCHIT.[524]

The Bill would empower the FWC to determine unfair deactivation or unfair termination matters relating to contested facts 'on the papers', to dismiss an unfair deactivation or unfair termination application if the application is frivolous, vexatious, or has no reasonable prospects of success, and to issue a 'vexatious proceedings order'[525] (see Section 2.3 for more detail on proposed changes to FWC powers).

The Bill also proposes to entitle members of the RTAG to travel allowance for their duties, and to clarify that they are not otherwise entitled to remuneration or allowances.[526]

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[517] Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026 (Cth) sch 1 item 15. See proposed s15CA.
[518] Ibid sch 1 item 15. See proposed s15CA(2)–(3).
[519] Explanatory Memorandum, Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026 (Cth) 4 [17].
[520] Ibid sch 1 item 18.
[521] Ibid sch 1 items 13–14.
[522] Ibid sch 1 item 17.
[523] Ibid sch 1 item 16.
[524] Ibid sch 2 item 1.
[525] Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026 (Cth) sch 1 pts 7–8.
[526] Ibid sch 1 item 10.

What the Review heard

The Review received 10 submissions from stakeholders on the measure. The Review also conducted in-person roundtables to discuss the measure with employer groups and unions in the road transport industry. As part of its consultations, the Review also met with Senator Glenn Sterle to discuss measures relevant to the road transport industry. A further 9 submissions were received on consideration of the measure in the Draft Report.

Unions supported the measure as promoting a safe, sustainable and viable road transport industry, noting that multiple MSO and RTCCO applications were underway at the time of consultation. Employer groups raised concerns about the scope of the jurisdiction, including its interaction with existing RTCCO applications before the FWC, and with state and territory legislation.

Minimum standards and contractual chain orders

The TWU submitted that the urgent nature of some matters currently before the FWC, such as the cash in transit RTCCO application (MS2025/1), indicates that the framework could be improved by empowering the FWC to make interim orders while the substantive issues in an application are determined.[527] The ACTU submitted that the FWC should be given power to make an MSO or RTCCO to deal with an urgent dispute, which could be time limited with the capacity to extend the operation of the order, citing the cash in transit RTCCO application as an example of an application with significant urgency.[528]

Employer groups raised concerns about the scope and misuse of RTCCOs, noting their capacity to affect broad parts of the workforce and economy. MBA submitted that the provisions are operating beyond the road transport industry and directly impacting the building and construction sector, citing the TWU's RTCCO application in the concrete cartage sector (MS2025/4). It further argued that the scope of RTCCOs is unclear and may extend to matters that the legislation is intended to exclude, such as WHS matters.[529] AIG similarly submitted that the legislative scope of RTCCOs is broad, pointing to RTCCO applications before the FWC that seek commercial terms as an example.[530] In its submission on the Draft Report, AIG reiterated these concerns, noting it is unclear when a party is included in a chain where they may obtain a product or service in circumstances that might result in the performance of a road transport service.[531]

HIA opposed the breadth of the road transport contractual chain definition, arguing that it captures businesses that merely receive goods or deliveries through road transport services, exposing residential builders to potential coverage by a RTCCO. HIA estimated that inclusion of the residential building sector would result in costs of approximately $58,894 per business, as well as average annual wage increases of $403.8M across the contractual chain over a 10 year period.[532] HIA and MBA therefore recommended an explicit exclusion of the building and construction industry from the provisions.[533]

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[527] TWU, Submission No 77 (6 March 2026) 10–11 [35]–[39].
[528] ACTU, Submission No 67 (6 March 2026) 51.
[529] MBA, Submission No 34 (3 March 2026) 22–4.
[530] AIG, Submission No 82 (8 March 2026) 101 [475].
[531] AIG, Submission on Draft Report No 45 (31 May 2026) 18 [105].
[532] HIA, Submission No 20 (3 March 2026) 12; HIA, Submission on Draft Report No 11 (29 May 2026) 4.
[533] Ibid; MBA, Submission No 34 (3 March 2026) 24.

BCA expressed support for the Review's draft recommendation for a targeted post-implementation review once the first road transport minimum standards orders are made but considered that it should be both strengthened and prioritised in the context of the Fuel Cost Recovery RTCCO (MS2026/1) [534]. BCA suggested that the Fuel Cost Recovery RTCCO has exposed significant workability issues and recommended that a review of the road transport framework should include an assessment of supply chain impacts, compliance costs, and other matters.[535]

The TWU suggested in its submission on the Draft Report that the case law developed from the Fuel Cost Recovery RTCCO (MS2026/1) has provided a first step in considering how the RTCCO provisions should be applied. This includes an identification of who is 'in a road transport contractual chain', which may be relevant to other RTCCO matters before the FWC.[536]

AIG is concerned that the new road transport framework risks replicating the former RSRT.[537] NatRoad similarly pointed to the significant financial harm caused by the RSRT, particularly to small businesses in the road transport industry. While it acknowledged that the legislation includes safeguards intended to address those concerns, it submitted that their adequacy cannot be assessed until orders are made and recommended ongoing monitoring.[538]

The CFW submitted that the contractual chain provisions should be extended to other industries experiencing similar conditions such as cleaning, petrol and food retailing, hospitality and mining.[539] Associate Professor Rawling and Dr Schoefield-Georgeson similarly suggested that RTCCOs may be able to serve as a model for the appropriate adaptation and expansion of supply chain regulation in other industries.[540]

Stakeholders made several submissions regarding the RTAG. Section 2.3 of this Report discussed this feedback as it mostly related to the role of RTAG in considering employee-like MSO applications. See Section 2.3 for further discussion.

State and territory interactions

AIG submitted that the preservation of state-based owner-driver laws may result in unpredictable and market distorting consequences, including by creating an uneven playing field between road transport businesses covered only by federal MSOs and those subject to additional state or territory legislation, making compliance difficult.[541] In its submission on the Draft Report, AIG reiterated these concerns, and noted specific concerns about the TWU making various applications to alter contract determinations in NSW in parallel with MSO and RTCCO proceedings in the federal system.[542]

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[534] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 124 [Draft Recommendation 14]; BCA, Submission on Draft Report No 18 (29 May 2026) 10.
[535] BCA, Submission on Draft Report No 18 (29 May 2026) 10.
[536] TWU, Submission on Draft Report No 28 (28 May 2026) [31]–[35].
[537] AIG, Submission No 82 (8 March 2026) 88 [413].
[538] NatRoad, Submission No 36 (3 March 2026) 3–4 [12]–[14].
[539] CFW, Submission No 66 (6 March 2026) 25 [90].
[540] Michael Rawling and Eugene Schofield-Georgeson, Submission No 17 (6 March 2026) 7.
[541] AIG, Submission No 82 (8 March 2026) 99 [465].
[542] AIG, Submission on Draft Report No 45 (31 May 2026) 18 [107]–[108].

As discussed in Section 2.3 of this Report, the TWU raised that while the legislation allows the FWC to exclude inconsistent state and territory laws and instruments, the FWC should be required to consider the appropriate scope and coverage of an MSO or RTCCO, having regard to existing laws or instruments applying to regulated workers. The TWU argues this is necessary where state-based instruments may provide more favourable terms to regulated workers than a proposed MSO or RTCCO.[543]

Unfair termination

As the unfair termination framework has not been tested to the same degree as the unfair deactivation framework for employee-like workers, stakeholders had limited feedback on these provisions.

The TWU submitted that low uptake may be due to the CHIT ($183,100 as of 1 July 2025). The TWU suggested that the CHIT, as currently drafted, takes into account all earnings received by a worker. Road transport contractors incur high operating costs, with substantially lower take-home pay after expenses, meaning they may be excluded from making an unfair termination application because their earnings appear to exceed the threshold.[544]

The ATA also raised concerns about the CHIT's application to the road transport industry in relation to the definition of 'employee' and 'employer' which is discussed further in Section 2.1 of this Report.

Analysis

There are well documented concerns that the road transport industry's low pay, piece rates and long contracting chains have had adverse effects on the safety of drivers and potential harm to other road users. These concerns were reinforced through multiple inquiries and consultations leading up to the Closing Loopholes reforms.

The measure was introduced to provide protections for road transport contractors and to ensure that the road transport industry is safe, sustainable and viable by empowering the FWC to set minimum standards for these workers, and to resolve disputes about unfair termination. The measure aimed to address long-standing concerns about the operation of contracting arrangements in the road transport industry, and followed extensive consultation with industry stakeholders. The amendments have only been in operation for a short time, having commenced on 26 August 2024 and the unfair termination provisions becoming operational for workers after 6 months eligibility. As with the employee-like minimum standards framework, the absence of finalised instruments (other than MS2026/1) at this early stage makes it difficult to draw firm conclusions about operation and impacts, particularly in relation to coverage, content boundaries and compliance settings as they are applied to complex contractual chains.

[543] TWU, Submission No 77 (6 March 2026) 9–10.
[544] TWU, Submission No 77 (6 March 2026) 13 [50]–[51].

There is much cross-over between the minimum standards framework for employee-like workers and the framework for road transport contractors. There is deliberate structural alignment between the road transport minimum standards framework and the employee-like framework (including the shared minimum standards objective, and the use of consultative processes and content limitations). This alignment supports coherence across the reforms, but it also means that several interpretive and implementation issues have developed in parallel. Where relevant, this section cross-refers to Section 2.3 for discussion of common framework features (including the relationship between binding orders and non-binding guidelines) and feedback that principally relates to the RTAG's role across both frameworks.

The Fairer Fuel Act introduced an 'emergency application' mechanism intended to support timely regulatory responses to events with a significant national negative impact on the road transport industry, including the recent sharp increases in fuel prices. An application relating to fuel cost recovery (MS2026/1) was lodged on 2 April 2026 coinciding with commencement of the Fairer Fuel Act, with the Fuel Cost Recovery RTCCO made on 20 April 2026. An assessment of those amendments is outside the scope of this Review and does not affect the assessment of the framework as introduced by the Closing Loopholes No. 2 Act amendments. However, this is a positive example of how the measure is operating flexibly as intended to respond to significant national events, noting there are differing stakeholder perspectives on the Fuel Cost Recovery RTCCO's scope, operation and implementation.

Minimum standards and contractual chain orders

The FWC is currently considering multiple applications for minimum standards and contractual chain orders under the road transport jurisdiction (one application for a road transport MSO and 4 applications for RTCCOs). To date, no orders have been made (other than MS2026/1). This reflects both the novelty of the jurisdiction and the complexity of the matters being advanced through it, including issues of coverage, content of the applications, and the interaction of obligations across contractual chains. Given this, it is unsurprising that the matters are progressing gradually. These issues go directly to the FWC's statutory powers under the new framework. At this stage, sufficient time should be allowed for the FWC to progress these applications and for authoritative guidance to emerge through published instruments and decisions before conclusions are drawn about unintended consequences or whether legislative refinement is required.

Unions raised concerns about the urgency of some matters currently before the FWC and suggested they could be strengthened by enabling interim orders while substantive issues are determined. While urgency can be a feature of disputes in the road transport industry, minimum standards and contractual chain regimes were designed to operate through a consultative, transparent process that enables effected parties to engage on draft instruments and proposed terms.

Employer groups and industry bodies raised concerns about the breadth of the contractual chain provisions, including the potential for a RTCCO application (such as concrete cartage) to affect sectors beyond road transport, and for applications to seek terms characterised as commercial in nature. With an RTCCO now in operation (MS2026/1), these concerns can begin to be assessed in a practical context. However, it remains too early to draw firm conclusions about their extent or materiality. The TWU's

feedback on the Draft Report suggested that the FWC's decision under MS2026/1 provides further clarity on the coverage of the RTCCO framework.[545] As further applications, variations and decisions emerge, clearer legal and practical boundaries are likely to develop through FWC guidance and precedent.

The interaction between MSOs and minimum standards guidelines as they relate to both the employee-like and road transport frameworks is discussed in Section 2.3, and the same policy question arises here: whether (and in what circumstances) guidelines will operate as an effective complementary mechanism, given the primacy of binding instruments once made.

Road Transport Advisory Group

Criticisms were raised regarding the RTAG (also discussed in Section 2.3) relating to its membership and potential conflict of interest. As noted in Section 2.3, much of this feedback arose in the context of the RTAG's role across both employee-like and road transport MSO processes, including the operation of subcommittees and the absence of consensus positions. The legislation was clear in its intent that RTAG membership reflect organisations entitled to represent the industrial interests of the road transport sector, and that the RTAG provide advice to support the FWC's handling and prioritisation of matters. It complements and does not replace consultation mechanisms in the framework.

The establishment of the RTAG and the consultative approach for MSOs and RTCCOs is a deliberate safeguard in response to historical criticisms of the RSRT. A number of stakeholders expressed strong concerns that any approach that might ultimately be seen to replicate the shortcomings of the RSRT should be avoided, including insufficient consultation, adverse impacts on business viability and unintended consequences across supply chains. The structure of the road transport provisions demonstrates an intention to avoid repeating the problems that led to the abolition of the RSRT. The use of the Expert Panel within the FWC, the establishment of the RTAG and its subcommittees, along with consultation requirements and content limitations on both MSOs and RTCCOs all operate to provide appropriate guardrails on orders. In this context, allowing applications to progress through the consultation and decision-making pathway established by the legislation remains important to achieving fit-for-purpose outcomes that can be sustained over time. However, at this time, the establishment of the Expert Panel, RTAG and the consultation requirements appear to be functioning as intended.

At this early stage, while the RTAG continues to engage on current applications and before any road transport instruments have been finalised, it is difficult to assess the practical effect of the RTAG's involvement on the efficiency, quality or acceptance of outcomes. Consistent with the approach in Section 2.3, concerns about the RTAG's operation, including issues of prioritisation and the consultation pipeline, are more appropriately assessed once orders are made and the FWC's approach is more settled in practice.

[545] TWU, Submission on Draft Report No 28 (28 May 2026) [31]–[35].

State and territory interactions

Employer groups raised concerns that the interaction between federal road transport orders and preserved state and territory owner-driver laws may create compliance complexity and uneven competitive conditions. Conversely, unions raised issues about the potential for exclusion of inconsistent state and territory instruments to affect worker outcomes where state-based instruments may provide more favourable terms. The preservation of certain state and territory laws is an intentional feature of the measure's design, and the framework contemplates that, once an order is made, it will prevail over state and territory laws to the extent of inconsistency (subject to preserved laws).

As no road transport MSOs or RTCCOs have been made that interact with state frameworks (other than MS2026/1), it is not clear whether either set of concerns will materialise in practice, including whether differential coverage and compliance burdens will arise across jurisdictions. Ongoing monitoring of the interaction between any future federal instruments and preserved state and territory regimes will be necessary to identify emerging issues and assess whether any policy or legislative response is warranted.

Unfair termination

Stakeholders provided limited feedback on the unfair termination provisions, noting the framework has not been tested to the same degree as the unfair deactivation framework for digital platform work. Early data on unfair termination applications reveals a relatively low uptake (21 applications lodged from commencement to 31 December 2025, with 1 matter resolved, 3 dismissed on jurisdictional grounds and the remainder withdrawn or discontinued). At this stage, it is not clear whether the low uptake reflects limited awareness, industry practices, eligibility settings, or other barriers to engagement, and ongoing monitoring is required to better understand how regulated road transport contractors interact with the jurisdiction.

The TWU's submission raised a specific concern that the CHIT may exclude road transport contractors who incur high operating costs from making an unfair termination application.[546] This is because the threshold is assessed on 'earnings' and there have been no decisions to date on whether 'earnings' under the CHIT takes operating costs into account. As discussed in Sections 2.1 and 2.3, the introduction of the Building Cooperative Workplaces No. 1 Bill will, if enacted, address stakeholder concerns over the current CHIT and its application to the road transport sector. These amendments would introduce a specific RTCHIT and provide that an unfair termination application by a regulated road transport contractor must not be made unless the sum of the contractor's annual rate of earnings is less than the RTCHIT. This would ensure that road transport contractors have equivalent access to the jurisdiction.

[546] TWU, Submission No 77 (6 March 2026) 13 [50]–[51].

Findings and recommendations

Overall, the measure is operating largely as intended in its early phase. The framework has been established, with the legislative process for making road transport MSOs and RTCCOs reflecting the complexities of the road transport industry. The low uptake of the unfair termination jurisdiction will require further monitoring before any conclusions can be reached on its effectiveness.

Noting no orders (other than the Fuel Cost Recovery RTCCO) or guidelines have been made, similarly to the employee-like framework, it remains too early to draw any firm conclusions about the effectiveness of the road transport minimum standards and contractual chain order framework, as well as the guidelines. Sufficient time is required for the FWC to determine applications under the road transport framework and no further amendments are recommended at this time.

The Review supports the proposed RTCHIT introduced in the Building Cooperative Workplaces No. 1 Bill. See Section 2.6 for further discussion.

Recommendation 15

The government should undertake a targeted post-implementation review once the first road transport minimum standards orders and road transport contractual chain orders (other than MS2026/1) are made and the jurisdiction is more developed, to assess whether the framework is operating as intended in practice (including the operation of Road Transport Advisory Group). The review should also consider the unfair termination framework and the limited uptake of this jurisdiction. This review should take place within 2 years of the first orders being made.

Recommendation 16

The government should examine the role of minimum standards and contractual chain guidelines within the road transport framework, including their interaction with minimum standards and contractual chain orders, to ensure they are operating as intended.

2.5 Change the defence to sham contracting

What the measure does

The Closing Loopholes No. 2 Act amended the FW Act to change the defence for an employer who has misrepresented employment as an independent contracting arrangement ('sham contracting') from a test of 'recklessness' to one of 'reasonableness'.[547]

Sham contracting occurs when an employer misrepresents an employee relationship as a contract for services under which the individual is to perform work as an independent contractor.[548]

An employer that is found to have engaged in sham contracting may be liable to pay civil penalties.[549] The measure amends the defence so that an employer will not face a civil penalty if the employer proves that, when the representation was made, they reasonably believed the contract was a contract for services.[550] The burden of proof rests with the employer.[551]

When determining whether an employer's belief was reasonable, a court must have regard to the size and nature of the employer's enterprise.[552] A court may also have regard to any other relevant matters.[553] Other relevant matters may include the employer's skill and experience, the employer's industry, how long the employer has been operating, the presence or absence of human resources specialists, or whether the employer sought legal or other professional advice about the worker's proper classification.[554]

An employer can only rely on the defence once the employer is found to have engaged in sham contracting.[555] If an employer successfully establishes the defence, this does not have the effect of validating the purported contracting arrangement or allowing it to continue. The employer may still be found to have contravened other FW Act provisions relating to the misclassification of the employee as an independent contractor, which may result in a civil penalty and/or a requirement to backpay unpaid entitlements.[556]

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[547] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 9; Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 7 [26].
[548] *Fair Work Act 2009* (Cth) s 357(1).
[549] Ibid ss 357(1), 539(2) item 11A.
[550] Ibid s 357(2).
[551] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 147 [876].
[552] *Fair Work Act 2009* (Cth) s 357(3)(a).
[553] Ibid s 357(3)(b).
[554] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 148 [879].
[555] Ibid 148 [881].
[556] Ibid.

The measure commenced on 27 February 2024 and applies to representations made on or after commencement.[557] A representation may be made at any time during the employment relationship, not only when an employee commences work for the employer.

Intention of the measure

The measure was intended to deter employers from engaging in sham contracting by raising the threshold for establishing the defence,[558] providing further incentives for employers to correctly classify workers to ensure employees receive their proper entitlements.[559] This measure is complemented by increases to civil penalties for contraventions of certain civil remedy provisions, which apply to sham contracting contraventions by a body corporate that is not a small business employer (see Section 4.2).[560]

Prior to the amendment, the defence to sham contracting applied if the employer could prove that, when the representation was made, they did not know, and were not reckless as to whether, the contract was for employment rather than services.[561] The previous defence was seen as ineffective at deterring sham contracting, as it was too easy for an employer to establish that they did not know the true nature of the engagement and did not act recklessly when making the misrepresentation.[562] The new defence provision was intended to enable a court to assess an employer's behaviour according to what the employer reasonably believed, rather than assessing an employer's behaviour only with regards to their subjective reasons for acting.[563]

A number of reports had identified that the 'recklessness' defence was not an effective deterrent against sham contracting and recommended it be changed to a test of 'reasonableness'. This included the 2011–12 post-implementation *Review of the Fair Work legislation*,[564] the Productivity Commission's report on the *Workplace Relations Framework*,[565] and the *Black Economy Taskforce Final Report*.[566] The *Black Economy Taskforce Final Report* noted that its consultations suggested the sham contracting problem was growing, and provided as an example alleged 'contrived business-to-business relationship[s]' in allied health care professions.[567]

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[557] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 2(1) item 11; *Fair Work Act 2009* (Cth) sch 1 cl 112.
[558] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 147 [877].
[559] Ibid 19 [91].
[560] *Fair Work Act 2009* (Cth) s 546(2).
[561] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 147 [875].
[562] Ibid 147 [877].
[563] Ibid.
[564] Ron McCallum, Michael Moore and John Edwards, *Toward more productive and equitable workplaces: An evaluation of the Fair Work legislation* (Report, 3 August 2012) 243.
[565] Productivity Commission, *Workplace Relations Framework* (Productivity Commission Inquiry Report Volume 1 No 76, 30 November 2015) 64.
[566] Black Economy Taskforce, *Black Economy Taskforce Final Report* (Final report, October 2017) 236–7.
[567] Ibid 232.

What has happened since commencement

There have been no decisions applying the amended defence to sham contracting since the measure commenced on 27 February 2024. The FWO updated its education and information materials to reflect the amended defence. The FWO can address sham contracting and misclassification through a range of tools including compliance notices and litigation.

On 13 March 2026 the Australian Taxation Office (**ATO**) and FWO issued a joint media release announcing a 'ramping up' of the agencies' focus on sham contracting with 'community insights and intelligence revealing concerning patterns of behaviour across several industries'.[568] The media release reports that data continues to uncover behaviour in industries including road freight and building and construction that doesn't contractually add up. The joint effort by these regulators highlights that there are implications for both the regulation of the FW Act and ensuring that employers meet their obligations for employees (like paying super and other entitlements) and tax laws.

Following a Road Transport Industry Roundtable on Sham Contracting and the Shadow Economy in November 2025 (see Section 2.1), a further industry roundtable on sham contacting in road transport was held in May 2026, attended by Senator Sterle, leading industry associations, and the FWO, ATO, National Heavy Vehicle Regulator (**NHVR**) and Australian Border Force (**ABF**).[569]

What the Review heard

The Review received 9 submissions from unions and employer groups addressing this measure, including groups representing the road transport industry. Employer groups generally opposed the measure while unions generally supported it. Road transport industry stakeholders raised concerns about sham contracting in the road freight sector and questioned whether the measure is sufficient to address it. As part of consultations, the Reviewer also had meetings with the FWO, ATO and Senator Glenn Sterle to discuss sham contracting. A further 8 submissions addressed the Draft Report's consideration of the measure.

Employer groups

AIG submitted that the measure unfairly imposes costs and legal risks on employers, particularly in the context of the introduction of the new test for determining the ordinary meaning of 'employee'.[570] AIG submitted that the introduction of a new definition of 'employee' meant mistaken misclassification of employees and independent contractors was more likely to occur. It contended that a test of 'reasonable belief' unfairly compelled many organisations to pay for professional and legal advice on that status of their contracting arrangements. AIG also raised concerns that such advice may be rendered obsolete as the new test for an employment relationship means the relationship may change over time.[571]

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[568] FWO and ATO, 'Sham contracting in the spotlight' (Media Release QC106233, 13 March 2026).
[569] James Graham, 'More trucking fleets grounded as crackdown gathers momentum', *Big Rigs* (online, 22 May 2026) <https://bigrigs.com.au/2026/05/22/more-trucking-fleets-grounded-as-crackdown-gathers-momentum/>.
[570] AIG, Submission No 82 (8 March 2026) 78 [375(a)–(b)], 79 [380].
[571] Ibid 79 [378].

AIG and HIA recommended the new 'reasonable belief' test be repealed and the previous test of 'recklessness' be reinstated, with AIG stating the need for the measure had never been established.[572] This view was echoed by MBA, which recommended making the law simpler, clearer and easier to understand to provide certainty and increase compliance.[573]

Both ACCI and MBA submitted that the amendments mean an employer who mistakenly classifies an employee as an independent contractor will be liable to sham contracting penalties.[574] ACCI also noted that the legislation does not require consideration of who initiated the sham contracting arrangement, stating that its members report that workers often initiate contracting arrangements.[575] ACCI submitted that, at this point in time, there is not sufficient evidence to conclude whether or not the measure is operating as intended.[576]

COSBOA submitted that the amended defence is 'a proportionate response to deliberate sham contracting in large enterprise contexts' but that it does not adequately protect small business employers who make errors in good faith.[577] COSBOA also raised concerns about 'double jeopardy' for small businesses found to have misclassified employees, as they may be required to backpay employee entitlements and pay a civil penalty for a sham contracting contravention.[578]

COSBOA recommended that, prior to initiating sham contracting proceedings against a small business, the FWO be required to issue a written compliance notice with a minimum 90-day rectification deadline, except in cases of 'demonstrably deliberate misclassification'.[579] COSBOA also recommended that the FWO publish annual data, disaggregated by employer size, documenting the number of sham contracting investigations and proceedings and penalties awarded, to facilitate an evidence-based assessment of the proportionality of enforcement.[580]

In response to the Review's draft recommendation for the FWO to develop clear guidance on the multifactorial test in the form of a checklist,[581] AIG submitted that the FWO already provides such information, and noted employers can seek additional guidance from the FWO as required.[582] ACCI expressed support for the draft recommendation, subject to the caveat that any such guidance 'should not morph to form part of materials which courts or tribunals reference in determining compliance'.[583] ACCI suggested the FWO should provide a checklist explicitly framed towards enabling employers to satisfy the tests necessary to establish a 'reasonable belief' that they have correctly engaged a worker.[584] COSBOA similarly supported the draft recommendation, and reiterated its position that the FWO should

[572] Ibid 79 [379]; HIA, Submission No 20 (2 March 2026)12–13; HIA, Submission on Draft Report No 11 (29 May 2026) 4.
[573] MBA, Submission No 34 (3 March 2026) 3, 10.
[574] Ibid 9; ACCI, Submission No 54 (3 March 2026) 38 [226].
[575] ACCI, Submission No 54 (3 March 2026) 38 [227].
[576] Ibid 38 [229].
[577] COSBOA, Submission No 45 (3 March 2026) 6 [24]–[25].
[578] Ibid 6 [25].
[579] Ibid 7 [27(a)–(b)].
[580] Ibid 7 [27(c)].
[581] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 132 [Draft Recommendation 16].
[582] AIG, Submission on Draft Report No 45 (31 May 2026) 20 [115]–[117].
[583] ACCI, Submission on Draft Report No 46 (1 June 2026) 18 [98].
[584] Ibid 18 [102].

be required to issue an advisory notice and provide a reasonable period for voluntary rectification before initiating sham contracting proceedings against a small business, except in cases of deliberate misclassification.[585] BCA suggested the guidance materials should be developed with employer input, and cover common commercial arrangements.[586]

Unions

The ACTU submitted it was not aware of any court decisions relating to the amended defence and so it had not identified any unintended consequences. The ACTU did not propose any further reform.[587]

The UWU expressed support for the amended defence but also argued it may be more appropriate to remove the defence entirely, noting it results in proceedings being focused on the employer's state of mind rather than the effect that such a decision had on the worker.[588]

The ACTU expressed concern regarding the Review's draft recommendation for the FWO to develop clear guidance on the multifactorial test in the form of a checklist,[589] suggesting it could undermine the effect of the amendment made to strengthen the defence, which remains untested. The ACTU submitted that allowing a person to satisfy the defence by consulting a checklist 'may serve to "lower the bar" for relying upon the defence, when it has just been raised.'[590]

Road transport stakeholders

As discussed in the Section 2.1, the ATA and NatRoad raised significant concerns about the impact of sham contracting on the road freight sector. The ATA submitted that there has been 'an explosion of sham contracting arrangements across the trucking industry'.[591] NatRoad described sham contracting as a 'systemic problem'.[592] The ATA and NatRoad both submitted that sham contracting arrangements are being used to avoid paying employee entitlements, with significant impacts on competition.[593] These submissions are consistent with the communiqué issued by industry participants at the November 2025 Road Transport Industry Roundtable on Sham Contracting and the Shadow Economy convened by Senator Sterle.[594]

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[585] COSBOA, Submission on Draft Report No 7 (29 May 2026) 5 [20].
[586] BCA, Submission on Draft Report No 18 (29 May 2026) 6.
[587] ACTU, Submission No 67 (6 March 2026) 71.
[588] UWU, Submission No 62 (6 March 2026) 21.
[589] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 132 [Draft Recommendation 16].
[590] ACTU, Submission on Draft Report No 33 (29 May 2026) 17.
[591] ATA, Submission No 46 (3 March 2026) 2 [9].
[592] NatRoad, Submission No 36 (3 March 2026) 4 [17].
[593] Ibid 5 [22]; ATA, Submission No 46 (3 March 2026) 3 [16]–[17].
[594] Senator Glenn Sterle, (Facebook, 14 November 2025) <https://www.facebook.com/SenatorGlennSterle/posts/following-the-roundtable-i-held-in-canberra-last-week-to-discuss-the-effects-tha/1219801019966117/>.

The ATA submitted it believes drivers are actively seeking independent contracting arrangements, and that firms are advertising for 'employees with ABNs'.[595] Some stakeholders suggested that the only legitimately engaged contractor truck drivers are those who own their own truck, and that any independent contracting of drivers who do not own their own truck is *prima facie* sham contracting.

NatRoad submitted that the amended defence has not led to 'real reductions in sham contracting practices in elements of the road transport sector'.[596] NatRoad pointed to the absence of any decisions enforcing the prohibition on sham contracting since the measure commenced and argued it 'does not yet appear to be having any deterrent effect'.[597] The ATA similarly submitted that the change in the defence 'has done little to address sham contracting in the road freight sector'.[598]

In addition to its recommendation to better align the definitions of 'employee' used across different regulatory contexts (e.g. tax law and superannuation), discussed in Section 2.4, the ATA submitted that there should be:

> *a new positive duty for the employer/head contractor, to take proactive steps to apply, assess and document the elements of a multi-factorial test to be applied when assessing the nature of the relationship between the parties.*[599]

The ATA submitted that the positive duty to apply this test would assist in enforcement of the prohibition on sham contracting. The proposed new road transport-specific multifactorial test is set out in Section 2.4.

The ATA recommended that 'the elements of a reasonable multi-factorial test for the road freight sector should be minimally specified under law' and that the duty should 'remain an ongoing proactive duty' for the term of the relationship.[600] The ATA argued that the proposed new multifactorial test could be implemented as a standalone positive duty, or as an element of the sham contracting defence, such that a reasonable belief (for the purposes of subsection 357(2)) 'could only be formed after taking proactive steps to apply, assess and document the elements of a specified multi-factorial test'.[601]

NatRoad submitted that enforcement should be prioritised, recommending a multi-agency approach including the FWO and ATO.[602]

NatRoad also recommended that further educational material for businesses engaging truck drivers would assist in addressing sham contracting. The submission argued that '[i]ndustrial associations can be a productive contributor to the development and circulation of these kinds of resources or education initiatives' and offered NatRoad's assistance in developing these resources through a tripartite process.[603]

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[595] ATA, Submission No 46 (3 March 2026) 3 [17].
[596] NatRoad, Submission No 36 (3 March 2026) 9 [39].
[597] Ibid.
[598] ATA, Submission No 46 (3 March 2026) 4 [20].
[599] Ibid 5 [32].
[600] Ibid 5 [33]–[35].
[601] Ibid 5 [34].
[602] NatRoad, Submission No 36 (3 March 2026) 13 [54].
[603] Ibid 13 [55].

Migrant workers

In response to the Draft Report, the Migrant Justice Institute (**MJI**) submitted that misclassification of migrant workers is prevalent in a range of industries outside of road transport and suggested the FWO should be specifically resourced to detect and address sham contracting in these industries. In relation to the Review's draft recommendation for the FWO to develop guidance on the multifactorial test in the form of a checklist,[604] MJI expressed support but highlighted that the checklist should not function as a safe harbour that shields businesses from accountability for misclassification arrangements and suggested compliance with the checklist should not be treated as sufficient to establish that a belief is reasonable.[605]

Analysis

As discussed above, a number of reports – including the final report of the Black Economy Taskforce – found that sham contracting is a problem and recommended amending the defence to strengthen deterrence.[606] The 2024 National Temporary Migrant Work Survey recently found that 35% of migrant worker respondents had 'worked on an ABN (independent contractor) in their lowest paid job in 2023–24', included high rates of respondents reporting working as an independent contractor in hospitality and retail.[607]

Assessing this measure is challenging because the measure does not expressly prevent sham contracting but describes when an employer can rely on the (now amended) defence to a proven misclassification of an employee as an independent contractor i.e. a sham contracting arrangement.

There have been no cases or court decisions considering the amended defence to sham contracting since it commenced. Further, there is no other evidence indicating that there should be changes to the measure, including returning to the previous 'recklessness' defence or abolishing the defence altogether.

It is too early to assess the effectiveness of the amended defence and its role, if any, of ensuring employers do not misclassify employees.

A number of submissions link the amended defence to the definition of 'employee' and 'employer' (discussed in Section 2.1), pointing to uncertainty about who is or is not an employee. While there may be cases in which it is unclear whether a given worker is an employee or a contractor, and an employer may misclassify workers despite making their best efforts to apply the definition of employee to their circumstances, it is not unreasonable to expect an employer to form a reasonable belief about the nature of an engagement.

Stakeholders such as ACCI have noted that some workers may prefer to be engaged as contractors and may initiate such arrangements by requesting that mode of engagement. The Review heard from a

[604] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 132 [Draft Recommendation 16].
[605] MJI, Submission on Draft Report No 13 (29 May 2026) 5–6.
[606] Black Economy Taskforce, *Black Economy Taskforce Final Report* (Final report, October 2017) 232, 236–7.
[607] Laurie Berg and Bassina Farbenblum, *Off the Books: Inside Australia's Hidden System of Migrant Worker Exploitation* (Report, May 2026) 42–5.

number of stakeholders that purported contracting arrangements may be preferred by workers and/or engagers for a range of reasons, including perceived beneficial tax and superannuation outcomes. While a worker may seek to be engaged as a contractor for their own reasons, there is no obligation on employers to agree to such requests where the arrangement would be unlawful.

COSBOA suggested special consideration for small business employers, noting they may rely on informal guidance,[608] and AIG suggested that the amended defence unfairly compels employers to pay for advice.[609] The amended defence includes a requirement that the courts have regard to the size and nature of the employer's enterprise in determining whether the employer's belief was reasonable.[610] There is no strong evidence to suggest that new subsection 357(3) does not provide sufficient protection for employers, including small business employers, in appropriately scaling the requirements to establish the defence.

Varied feedback was provided on the Review's draft recommendation for the FWO to develop clear guidance on the multifactorial test in the form of a checklist. With respect to stakeholder concerns around ensuring the checklist does not serve as a safe harbour mechanism that shields businesses from accountability, or to 'lower the bar' for the defence, it is important to clarify that the proposed checklist is intended solely as guidance. Its purpose would be to assist workplace participants in correctly assessing the nature of a relationship, not to reduce the evidentiary or legal standard required to establish the defence.

Road transport

It is clear there is a problem with sham contracting in the road transport industry, noting both the concerns raised with the Review directly, as well as concerns raised with relevant regulators. As discussed in Section 2.1, better alignment of the definition of 'employee', particularly in tax and superannuation law, may assist both with employers' understanding of their obligations, and with enforcement. If other regulators – in particular the ATO – were operating under the same definition of 'employee' and 'employer', there would likely be less confusion about what is or is not a legitimate mode of engagement in a particular scenario.

With respect to the stakeholder view that drivers who do not own their truck are *prima facie* (or presumptively) employees, this may not be as clear as some suggest. While a workers' provision and maintenance of tools and equipment is part of the multifactor test for employee status,[611] it is not determinative. As discussed in Section 2.1, each matter turns on its own facts.

Concerns were raised about job advertisements for arrangements that may appear to be prospective sham contracting arrangements. While sham contracting is unlawful, the advertisements are not prohibited. Prohibiting advertisements of this nature may be difficult, as the definition of 'employee' requires an assessment of the true nature of the relationship which, in the case of an advertisement, does not yet exist.

[608] COSBOA, Submission No 45 (3 March 2026) 6 [24]–[25], 7 [27].
[609] AIG, Submission No 82 (8 March 2026) 78 [375(c)].
[610] *Fair Work Act 2009* (Cth) s 357(3).
[611] *Cai (t/as French Accent) v Do Rozario* [2011] FWAFB 8307, [30].

As discussed in Section 2.1, the elements of the 6-point road transport multifactor test proposed by the QTA and ATA in their submissions are substantially similar to the elements of the existing multifactor test for employment status. For that reason, there may be limited utility in incorporating the QTA and ATA proposed test into the statutory scheme. The ATA proposes a positive duty to require the application of the checklist to the relationship, which would be a significant additional regulatory burden for businesses engaging contractors.

However, there would be utility in developing simple guidance on the current multifactor test that businesses engaging workers could apply to satisfy themselves about the nature of the engagement. A checklist could assist businesses to assess the relationship and, if a dispute arises in the future, establish that they had a reasonable belief for the purposes of the sham contacting defence. Such a checklist might also be helpful in other industries with a high risk or incidence of sham contracting, including to address concerns raised about migrant workers in other industries. The identification of other high-risk industries could be informed by community intelligence and data received by regulators.

It is unlikely that any legislative amendments would be required to implement such a checklist. Under the current defence to sham contracting, it is likely that any employer who documents the good faith application of a written checklist at the relevant time would succeed in establishing that their belief was reasonable.

In relation to submissions highlighting the importance of enforcement in addressing sham contracting, the Review notes the FWO, ATO, NHVR and ABF's increased focus on sham contracting in the road transport industry, as highlighted in the FWO and ATO's joint media release and recent media reporting. The Review considers enforcement to be critical to tackling sham contracting, and supports the increased enforcement activity and interagency cooperation.

Findings and recommendations

It is too early to assess the effectiveness of the amended defence to sham contracting and its role, if any, of ensuring employers do not misclassify employees. However, there remains substantial concern around sham contracting in the road transport industry, which further educational and guidance material could address.

Recommendation 17

The Fair Work Ombudsman should develop clear guidance, in the form of a checklist, to assist persons engaging workers to assess the nature of the employment or contracting relationship by applying the multifactor test. This should include the development of industry-specific checklists (including for the road transport industry) to complement industry guidance developed in response to Recommendation 6. The Fair Work Ombudsman should work with relevant employer groups and unions to develop the checklists.

2.6 Give workers the right to challenge unfair contractual terms

What the measure does

The Closing Loopholes No. 2 Act amended the FW Act to establish a new low cost, flexible and informal jurisdiction in the FWC for resolving disputes between independent contractors (earning below the CHIT) and the businesses that engage them about unfair contract terms in services contracts.[612]

The Closing Loopholes No. 2 Act also amended the IC Act so that it continues to provide an avenue for independent contractors earning above the CHIT to seek remedies for unfair contract terms. The IC Act allows the courts to vary the contract, or set aside the whole or part of the contract to address unfair terms.[613]

While some technical differences between the frameworks exist, in effect, the IC Act provisions require the courts to consider disputes relating to service contract terms for high income earners, and the FW Act provisions require the FWC to consider the same type of matters for lower income earners (i.e. those earning *less* than the CHIT).[614]

The measure commenced on 26 August 2024.[615]

Unfair contract terms of service contracts jurisdiction

A party to a services contract or an organisation that represents the industrial interests of a party to a services contract (e.g. a union) may apply to the FWC for an order granting a remedy on the basis that a term of the contract is unfair.[616] An application must not be made unless, in the year the application is made, the sum of the person's annual rate of earnings is less than the CHIT (see Sections 2.1, 2.3 and 2.4 for more detail on the CHIT).[617] The CHIT is currently set at $183,100 as at 15 June 2026.

The FWC may make an order in relation to a services contract if the FWC is satisfied that the services contract includes one or more unfair contract terms which, in an employment relationship, relate to workplace relations matters.[618] In deciding whether to make an order, the FWC must take into account fairness between the parties[619] and may, among other things, consider the following as at the time it considers the application:

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[612] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 16.
[613] *Independent Contractors Act 2006* (Cth) s 16(1).
[614] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 275 [1701].
[615] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 2(1) item 22.
[616] *Fair Work Act 2009* (Cth) s 536ND(1).
[617] Ibid s 536ND(2).
[618] Ibid s 536NA(1).
[619] Ibid s 536NA(3).

- the relative bargaining power of the parties to the services contract
- whether the contract as a whole displays a significant imbalance between the parties' rights and obligations
- whether the term is reasonably necessary to protect the legitimate interests of a party to the contract
- whether the term imposes a harsh, unjust or unreasonable requirement on a party to the contract
- whether the contract as a whole provides for a total remuneration that is less than what an employee or regulated contractor (under an MSO or minimum standards guideline) would receive for performing the same or similar work, and
- any other matter the FWC considers relevant.[620]

If the FWC decides to order a remedy, it may set aside, amend or vary all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter.[621]

The FWC may only grant an appeal if it considers it is in the public interest to do so and the decision is alleged to have involved a significant error of fact.[622]

Contraventions of an order made regarding unfair contractual terms attract a civil remedy.[623]

FWC funding

The FWC was provided $3.194 million over 4 years in the 2023–24 Budget (and $0.4 million per year ongoing from 2027–28).[624]

Intention of the measure

The measure aimed to improve access to justice for independent contractors who believe their contracts contain unfair terms.[625]

The measure intended to address the low bargaining power between independent contractors and principals by providing them with a low-cost, flexible and informal jurisdiction in the FWC for resolving disputes about unfair contract terms in services contracts.[626] The procedures and remedies, and the manner of deciding on and working out such remedies, are intended to uphold the position in *re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95 which ensures that a 'fair go all round' is accorded to both principals and independent contractors.[627]

[620] Ibid s 536NB(1)
[621] Ibid s 536NC.
[622] Ibid s 536NJ.
[623] Ibid s 536NK.
[624] *Mid-Year Economic and Fiscal Outlook 2023–24* (Budget 2023–24 Statement, 13 December 2023) 238.
[625] Treasury, *Jobs and Skills Summit September 2022 – Outcomes* (Paper, September 2022) 6.
[626] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 256 [1566].
[627] Ibid 256 [1567].

The amendments sought to address the view that 'existing protections against unfair contract terms under the [IC Act had] not worked'.[628] The measure is targeted at people with low bargaining power and lower pay for whom the costs of going to court under the IC Act could act as a disincentive or outright bar to seeking a remedy. For those applicants, the lower costs and increased accessibility of the FWC compared to the courts enhances their right to seek an effective remedy.[629]

What has happened since commencement

From commencement to 31 March 2026, the FWC received 13 applications for an unfair contract term remedy. Of these, 3 were resolved, 7 withdrawn or discontinued, and 1 matter was dismissed.[630] The FWC has published 2 of these decisions, one that was discontinued[631] and one that was dismissed as it was outside the jurisdiction.[632] In the discontinued matter, the Full Bench of the FWC held that a claim that a contract is unfair due to missing terms for particular matters (in relation to Uber having a lack of accountability for platform failures or to ensure the platform functions properly), would be insufficient unless it linked to identifiable terms in the services contract.[633]

Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026

The Building Cooperative Workplaces No. 1 Bill contains road transport related amendments relevant to this Review.[634]

The Bill proposes an amendment that would introduce the RTCHIT which would be an amount prescribed by regulation and apply to regulated road transport contractors rather than the CHIT.[635] The RTCHIT would have no effect if the prescribed amount is lower than the CHIT.[636] Explanatory material accompanying the introduction of the Bill indicates that the 'Regulated road transport contractors, particularly long-distance owner drivers, often incur high operating costs that can inflate their overall earnings relative to their take home pay. Establishing a separate income threshold for these contractors … better reflects contractor earnings in the road transport sector…'[637]

See Section 2.4 for more detail on the RTCHIT and its operation across the FW Act.

[628] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2023, 6238 (Tony Burke, Minister for Employment and Workplace Relations).
[629] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 32 [173].
[630] FWC data, provided 5 June 2026.
[631] *Somphong (Em) Thongkhamchanh v Rasier Pacific Pty Ltd* [2025] FWCFB 247.
[632] *Jacqueline Mary Margaret Bowden v Kenneth Brendon Dungan* [2025] FWC 485.
[633] See *Somphong (Em) Thongkhamchanh v Rasier Pacific Pty Ltd* [2025] FWCFB 247.
[634] Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026 (Cth).
[635] Ibid sch 1 item 15. See proposed s 15CA of the *Fair Work Act 2009* (Cth).
[636] Ibid sch 1 item 15. See proposed ss 15CA(2)–(3) of the *Fair Work Act 2009* (Cth).
[637] Explanatory Memorandum, Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026 (Cth) 4 [17].

What the Review heard

The Review received 14 submissions on the measure. Stakeholders had varying views on the measure. Employer groups largely saw the measure as unnecessary and contributing to complexity for employers, while unions expressed support and called for a widening of the provisions. The Review received a further 7 submissions on the Draft Report which addressed the measure.

Employer groups raised concerns about the complexity of having multiple unfair contracts jurisdictions with different functions under various pieces of legislation and queried the need for the new jurisdiction noting its limited uptake. ACCI, AIG and HIA raised concerns that the interaction of new jurisdiction with existing jurisdictions addressing unfair contract terms (e.g. the IC Act and the *Competition and Consumer Act 2010* (Cth) and *Australian Consumer Law*) reduces certainty and stability for business, and risks unnecessary duplication.[638] ACCI submitted that no conclusions could be drawn as to whether the measure is working as intended due to the very low number of applications. It suggested that the low application numbers demonstrate that the measure was unnecessary.[639]

COSBOA noted the measure introduces tribunal oversight of commercial contracts which alters the legal and regulatory landscape for small businesses engaging contractors. It argued the concept of 'unfairness' is not defined with sufficient precision for small businesses to understand what contractual terms are at risk of challenge.[640]

The ACTU raised concerns about the requirement for applications to be made and dealt with on an individual basis, which is ineffective, for example, in instances where there are a large number of individuals that are subject to the same service contract, as is common on digital platforms such as Uber and in the road transport sector. The ACTU, with support from the UWU and TWU, recommended an amendment to allow for applications to be made in respect of a class of services contracts that are alleged to contain an unfair term(s).[641]

NRWC expressed support for the provisions in conjunction with other Closing Loopholes reforms including the definition of 'employer' and 'employee', and minimum standards for employee-like workers, as important for rural women working in independent contracting or informal arrangements, where they may lack access to leave, job security or minimum conditions. It recommended accessible and low-cost avenues to challenge unfair contracts in regional areas, and targeted guidance and outreach to regional workers and small businesses.[642]

[638] ACCI, Submission No 54 (3 March 2026) 33 [187]; AIG, Submission No 82 (8 March 2026) 111 [523]; HIA, Submission No 20 (2 March 2026) 13.
[639] ACCI, Submission No 54 (3 March 2026) 33 [189].
[640] COSBOA Submission No 45 (3 March 2026) 7 [28]–[29].
[641] ACTU Submission No 67 (6 March 2026) 59–60; UWU, Submission No 62 (6 March 2026) 19; TWU, Submission No 77 (6 March 2026) 15 [61].
[642] NRWC, Submission No. 29 (3 March 2026) 8.

Contractor High Income Threshold

The ATA's views on the CHIT are discussed in Section 2.1. The ATA highlighted that road transport contractors face very high operating costs, with labour typically representing only 20% of interstate contractor costs. These operating costs include fuel and other significant investments that are made towards vehicles, trailers or related equipment including for their maintenance. The ATA submitted that this means that road transport contractors are unlikely to meet the threshold, limiting their access to the unfair contracts jurisdiction (as well as unfair termination and opt-out provisions for the definition of employee under section 15AA). The ATA proposed that there be a specific road transport CHIT set at 5 times the employee high income threshold, which in 2025–26 would be $915,000.[643]

The TWU also raised concerns about the CHIT in relation to the unfair termination framework for road transport contractors (see Section 2.4).

In response to the Review's draft recommendation for an amendment to clarify that earnings do not include contractor operating costs under the CHIT,[644] employer groups raised various concerns.[645] AIG suggested that contracting arrangements involving significant sums of money should be appropriately heard in courts rather than a tribunal.[646] Additionally, AIG and ACCI raised practical issues around how the costs would be identified and assessed, where the legislation makes no reference to 'operating costs' and provides no guidance of which types of costs are included and excluded.[647] AIG suggested the recommendation should be amended to be targeted specifically to the road transport industry.[648] In contrast, the TWU and CFW expressed support for the recommendation, with the CFW noting the intent of the Closing Loopholes framework to not favour one business model over another implies that employees and contractors would be treated equally.[649]

Analysis

The measure was introduced to improve access to justice for independent contractors by providing a low-cost avenue in the FWC for independent contractors with lower pay and bargaining power to challenge the terms of their contracts. However, the limited uptake of the jurisdiction to date makes it difficult to assess whether it is operating as intended, and whether there may be merit in recommendations to increase accessibility and coverage of contracts.

Concerns were raised by employer groups about added complexity, and the interaction with other avenues for challenging contractual terms across different jurisdictions. However, on balance, the intent of the measure was clear – to provide a low-cost and accessible avenue for lower-paid workers. The application

[643] ATA, Submission No 46 (3 March 2026) 6 [38]–[41].
[644] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 139 [Draft Recommendation 18].
[645] AIG, Submission on Draft Report No 45 (31 May 2026) 21–2 [122]–[127]; ACCI, Submission on Draft Report No 46 (1 June 2026) 19–21 [109]–[113]; CCIWA, Submission on Draft Report No 30 (29 May 2026) 3.
[646] AIG, Submission on Draft Report No 45 (31 May 2026) 21 [123].
[647] Ibid 21 [124]; ACCI, Submission on Draft Report No 46 (1 June 2026) 20 [111].
[648] AIG, Submission on Draft Report No 45 (31 May 2026) 22 [127].
[649] CFW, Submission on Draft Report No 41 (29 May 2026) 1; TWU, Submission on Draft Report No 28 (29 May 2026) 9 [44].

of the CHIT defines the scope of the jurisdiction by limiting eligibility to genuine independent contractors who are lower paid and lack bargaining power, providing clearer guidance to workers and employers on who may access the regime. Independent contractors earning above the CHIT can seek court-based relief under the IC Act (including to vary or set aside contracts that are unfair and/or harsh). All independent contractors who fall within the definition of a consumer or a 'small business' and who are a party to a 'standard form contract' continue to have access to the existing 'unfair contract' regime under the Australian Consumer Law as a separate pathway for unfair terms in contracts.[650] At this time, there is no evidence to suggest that amendments to the scope of the jurisdiction are needed.

Unions raised concerns that the requirement for applications to be made on an individual basis may limit the effectiveness of the jurisdiction for some cohorts of workers (for example, in sectors such as digital platform work and the road transport industry where standardised service contracts are commonly used across large groups of workers). The ACTU recommended an amendment to permit applications to be made in respect of a class of service contracts.[651]The Review notes that the finding of unfairness in a standardised contract may strengthen an argument for similar variations across all standard contracts used by that business. However, the limited number of matters to date means that this cannot be said with any certainty and the application of this measure to classes of service contracts should be considered once a further review of the provisions has taken place in 2 to 3 years' time.

Contractor High Income Threshold

Stakeholder feedback identified the CHIT as a material concern for the road transport sector, including in relation to access to the unfair contracts jurisdiction under section 536ND of the FW Act. Stakeholders, including the ATA, noted that while eligibility to apply for relief depends on whether a contractor's annual rate of 'earnings' falls below the CHIT, neither section 332 of the FW Act nor the Regulations provided clarity as to whether contractor operating or business costs should be excluded from that assessment. In the absence of judicial consideration of that issue, concern was raised that an interpretation including operating costs within 'earnings' could result in a substantial number of road transport contractors exceeding the threshold notwithstanding comparatively lower net returns, thereby creating uncertainty and potentially discouraging recourse to the jurisdiction.[652] Similar concerns were also raised in relation to equivalent access to unfair termination protections and the operation of the opt-out provisions tied to the definitions of 'employer' and 'employee'.

After the Review's Draft Report was published, the government introduced the Building Cooperative Workplaces No. 1 Bill which, if enacted, would introduce a road transport specific threshold (the RTCHIT). The RTCHIT would address the substance of stakeholder concerns heard by this Review.

The Explanatory Memorandum for the Bill is clear that regulated road transport contractors, particularly long-distance owner drivers, often incur high operating costs that can inflate their overall earnings relative to their take home pay. Establishing a separate income threshold for these contractors that better reflects contractor earnings in the road transport sector will have significant implications for the rights and

[650] *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') pt 2-3.
[651] ACTU, Submission No 67 (6 March 2026) 60.
[652] See, for example, Ibid.

protections to which they are entitled.[653] Additionally, it states that by allowing a more appropriate threshold to be set for this cohort, the amendments improve access to unfair termination and unfair contract protections.[654]

The Review's Draft Report proposed a recommendation to clarify that operating costs are excluded from the interpretation of 'earnings' for the purposes of the CHIT more broadly, on the basis that there appears to be no strong policy reason for the CHIT to be calculated differently for different cohorts of contractors. While employee-like workers and independent contractors outside of the road transport industry may generally have lower operating costs than road transport contractors, such that clarifying that outgoings are not included in 'earnings' may have less practical impact for these cohorts, there may nonetheless be outlying cases where operating costs are material.

However, in light of the government's targeted response to introduce a road transport specific income threshold and noting that concerns about the CHIT from other sectors or cohorts of contractors were not raised with the Review, the Review considers that a recommendation to amend the existing CHIT is not required at this time. Enactment of the RTCHIT should be prioritised, after which the government may wish to consider the appropriateness of the CHIT more broadly.

Findings and recommendations

The limited number of matters means it is too early to assess the measure's effectiveness at this stage. At this time, it appears the amendments have been operating appropriately and effectively, and no unintended consequences have been identified. More time is needed to observe matters and decisions made under the jurisdiction to identify any unintended consequences or areas for improvement.

It is evident that the CHIT may operate to limit regulated road transport contractors' access to the unfair contracts jurisdiction. Stakeholders have identified this cohort as typically incurring high operating costs, which may prevent them from meeting the CHIT eligibility threshold if 'earnings' are interpreted to include business costs. The government is responding to these concerns through the proposed establishment of the RTCHIT. Further consideration of the application of the CHIT could be considered in the recommended review of unfair contracts terms.

Recommendation 18

The new jurisdiction in the Fair Work Commission to resolve disputes about unfair contract terms in services contracts should be further reviewed in 2 to 3 years. As part of this review, consideration should be given to the measure's application to classes of service contracts.

[653] Explanatory Memorandum, Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026 (Cth) 4 [17].
[654] Ibid 4 [18].

2.7 Right to disconnect

What the measure does

The Closing Loopholes No. 2 Act established a right to disconnect for national system employees and employers.[655]

The amendments commenced on 26 August 2024 for non-small business employers and on 26 August 2025 for small businesses (fewer than 15 employees).[656]

The 'right to disconnect'

The amendment provides a principle-based right that ensures an employee may refuse to monitor, read or respond to contact or attempted contact,[657] from an employer or third party (where the contact relates to their work) outside of the employee's working hours, unless the refusal is unreasonable ('the right to disconnect').[658] Prior to the measure, there were no specific legislative provisions in the FW Act regulating out-of-hours contact.

In determining whether a refusal is unreasonable, the following non-exhaustive list of matters must be considered:

- the reason for the contact
- how the contact was made and the level of disruption it causes the employee
- the extent to which the employee is compensated to remain available or work additional hours
- the nature of the employee's role and level of responsibility, and
- the employee's personal circumstances (including family or caring responsibilities).[659]

A failure to monitor, read or respond to contact that is required under a law will be unreasonable.[660]

The right to disconnect does not require or allow any action or omission of action where doing so would, or could reasonably be expected to, prejudice Australia's defence, national security or certain Australian Federal Police (**AFP**) operations.[661] The FWC can dismiss applications which it considers involve defence, national security or certain AFP operations matters.[662] The Director-General of Security and the

[655] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 8.
[656] Ibid s 2(1) item 10; *Fair Work Act 2009* (Cth) sch 1 cl 111D.
[657] References to 'contact' or 'attempted contact' will be referred to collectively as 'contact'.
[658] *Fair Work Act 2009* (Cth) ss 333M(1)–(2).
[659] Ibid s 333M(3).
[660] Ibid s 333M(5).
[661] Ibid s 333S.
[662] Ibid s 333P(4).

Director-General of the Australian Secret Intelligence Service (**ASIS**) may make legislative orders which can exclude the application of the right to disconnect from people carrying out work for them.[663]

The amendment requires the FWC to provide written guidelines on the right to disconnect.[664]

Interaction with Modern Awards and Enterprise Agreements

The measure requires modern awards to include 'a right to disconnect term' that provides for the exercise of an employee's right to disconnect as set out in subsections 333M(1) and (2) of the FW Act.[665] The FWC was required to make determinations varying existing modern awards to include a right to disconnect term before the measure commenced.[666]

The amendment further provides that the statutory right to disconnect will not override a corresponding term in an enterprise agreement where the term is more favourable to the employee.[667]

Dispute resolution, enforcement and remedies

If a dispute arises about the right to disconnect, an employee and employer must first attempt to resolve the matter through discussions at the workplace level.[668] If the dispute is not resolved through these discussions, either party may make an application to the FWC to deal with the dispute or make an order.[669]

If a party makes an application for the FWC to deal with the dispute and is either not seeking, or not solely seeking, a stop order, the FWC must deal with the dispute as it considers appropriate (including by mediation, conciliation, making a recommendation or expressing an opinion) or through arbitration, if the parties agree.[670] The FW Act requires the FWC to start addressing an application within 14 days of it being made,[671] and must deal with the application as soon as reasonably practicable thereafter.[672]

The FWC may make any order ('a stop order') that it considers appropriate (other than for a pecuniary amount) to prevent:

- an employee from continuing to unreasonably refuse to monitor, read or respond to contact, if the FWC is satisfied that an employee has unreasonably refused to relevantly engage with the contact and there is a risk that the employee will continue to do so,[673] or

[663] Ibid ss 333T, 333U.
[664] Ibid s 333W.
[665] Ibid ss 12,149F.
[666] Ibid sch 1 cl 111C.
[667] Ibid s 333M(6).
[668] Ibid ss 333N(1)–(2).
[669] Ibid ss 333N(3)–(4). Section 333R prevents a person from seeking an order for discriminatory or coercive conduct under the *Work Health and Safety Act 2011*(Cth) and equivalent state and territory provisions if they have sought an order to stop refusing contact or to stop taking certain actions from the FWC.
[670] *Fair Work Act 2009* (Cth) s 333V. See also, the legislative note under s 333V.
[671] Ibid s 333P(3)(a).
[672] Ibid s 333P(3)(b).
[673] Ibid ss 333P(1)(a), 333P(2)(a).

- an employer from continuing to require contact or take disciplinary or other action, if the FWC is satisfied that the employee's refusal to monitor, read or respond to contact is not unreasonable.[674]

A breach of the FWC's stop order may give rise to a civil penalty.[675]

The FWC may dismiss an application for a stop order if it considers it frivolous or vexatious.[676] An employer who considers the application frivolous or vexatious may apply to the FWC requesting it consider the stop order application expeditiously and communicate the outcome in a timely way.[677]

The right to disconnect is a workplace right for the purposes of the FW Act's general protections provisions, which, among other things, prohibit employers from taking adverse action against an employee in relation to a workplace right, including the right to disconnect.[678]

On 31 May 2024, the *Fair Work Amendment Act 2024* (Cth) made a subsequent amendment to the right to disconnect provisions to clarify that contravening a FWC order that deals with an employee's right to disconnect would not expose a person to a criminal penalty.[679] The amendment commenced on 26 August 2024, the same day as the right to disconnect provisions in the Closing Loopholes No. 2 Act.[680]

Intention of the measure

The measure was intended to stop 'unpaid overtime for workers through a right to disconnect from unreasonable contact out of hours'.[681]

The amendments to legislate a right to disconnect were moved by the Australian Greens and supported by the government.[682] Greens Senator Barbara Pocock said during debate on the Bill that:

> *the issue of unpaid overtime and of what many people call 'availability creep' is persistent and systemic. It affects workers in all industries and occupations—public and private, all kinds of work—and in organisations both big and small. The proliferation of communication technology in our working lives means that workers are now always contactable workers… What we propose is a reasonable, flexible, workable right—one that is desperately overdue.*[683]

[674] Ibid ss 333P(1)(b)(i)–(ii), 333P(2)(b)–(c).
[675] Ibid ss 333Q, 539(2) item 10E.
[676] Ibid s 333P(4)(a).
[677] Ibid s 333P(5).
[678] Ibid s 333M(4). A person may apply to the FWC to deal with a dispute about an alleged contravention of the general protections provisions in accordance with ss 365, 372.
[679] *Fair Work Amendment Act 2024* (Cth); *Fair Work Act 2009* (Cth) s 675(2)(fa).
[680] *Fair Work Amendment Act 2024* (Cth) s 2.
[681] Tony Burke, 'Workplace loopholes to be closed' (Media Release, 7 February 2024).
[682] Commonwealth, 'Proposed Amendments to the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023', proposed amendments sheet 2361 tabled in the Senate, 7 February 2024.
[683] Commonwealth, *Parliamentary Debates*, Senate, 7 February 2024, 189 (Barbara Pocock).

The *Final Report of the Senate Select Committee on Work and Care* (the **Work and Care Final Report**) recommended amending the FW Act to include an enforceable right to disconnect under the NES, which would give all workers a right to disconnect once their working hours have finished.[684] The Work and Care Final Report described the issue of 'availability creep', where employees are increasingly expected to engage with and complete work outside of work hours.[685] It found that for some workers, 'availability creep was a direct consequence of job insecurity and rostering practices, whereby workers are expected to remain on call and available for extended periods of time in order to secure sufficient paid work'.[686] For many other workers, 'availability creep has been caused by changes in technology that make it possible for them to undertake work tasks outside of the workplace, at any time',[687] blurring the line between flexibility and unreasonable expectations.[688]

Government fact sheets released after passage of the legislation indicate that the right to disconnect 'encourages employers and employees to talk about contact out of hours and set expectations that suit the workplace and the particular role'.[689]

In his second reading speech to the Fair Work Amendment Bill 2024 (Cth), the then Minister stated that the Closing Loopholes right to disconnect provisions 'did not explicitly include criminal penalties, but there's an interaction with section 675(1) of the FW Act, and because of that interaction it's necessary to make a further amendment to rule out criminal penalties'.[690] The amendment made by the *Fair Work Amendment Act 2024* (Cth) ensures that the right to disconnect 'will operate as it should'.[691]

What has happened since commencement

DEWR released a fact sheet in November 2024 for stakeholders on the right to disconnect amendments. It noted that:

> *the right does not prohibit employers from contacting their employees, nor does it prevent employees from contacting one another, including across time zones. Rather, the employee is able to refuse to monitor, read or respond to contact, or attempted contact outside of working hours, when they are not expected to be working or paid to be working, so long as doing so is not unreasonable.*[692]

[684] Senate Select Committee on Work and Care, *Final report* (March 2023) 189.
[685] Ibid 119; Senate Select Committee on Work and Care, *Interim Report* (October 2022) 108.
[686] Senate Select Committee on Work and Care, Commonwealth of Australia, *Final report* (Report, March 2023) 119.
[687] Ibid 119; Senator the Hon Murray Watt, 'Right to disconnect among many increased benefits for workers starting today' (Media Release, 26 August 2024).
[688] Senate Select Committee on Work and Care, Commonwealth of Australia, *Final report* (Report, March 2023) 119.
[689] DEWR, *Closing Loopholes Factsheet, Right to Disconnect* (Factsheet, 2024).
[690] Commonwealth, *Parliamentary Debates,* House of Representatives, 15 February 2024, 983 (Tony Burke, Minister for Employment and Workplace Relations).
[691] Ibid.
[692] DEWR, *Closing Loopholes Factsheet, Right to Disconnect* (Factsheet, 2024).

It also stated that another matter that might be relevant to help determine whether an employee's refusal to respond to contact is unreasonable includes patterns of behaviour.[693]

The FWC published an implementation report on the right to disconnect on 19 July 2024.[694] Education materials, including a short animation, a fact sheet and website materials, were also published prior to the right to disconnect's commencement.[695] In the lead up to 26 August 2025, when the amendments commenced for small business employers and their employees, the FWC published a new fact sheet and social media posts to assist small business employers.[696]

The FWO published website materials, including examples of applying the right in practice, tips for discussing out of hours contact and how existing award terms in different industries may interact with the right to disconnect.[697] The FWO also published videos on the right to disconnect, including for small businesses, people in senior staff roles and on having a conversation about the right to disconnect.[698]

On 23 August 2024, the FWC made determinations varying all 155 modern awards to insert a right to disconnect term.[699] The FWC constituted a Full Bench to consider the matter, which considered proposals and submissions from interested parties. The Full Bench conducted a consultation hearing on 19 June 2024 and considered further submissions on a draft model right to disconnect term.[700] The model award term refers to the statutory right and provides that an employer must not prevent, directly or indirectly, an employee from exercising their right to disconnect.[701] This differs from the statutory provision, which does not impose a similar restriction on employer conduct. The Full Bench noted that the model right to disconnect term is intentionally minimalist, reflecting the novelty of the right to disconnect and the likelihood that future variations to the term in particular awards will be necessary once the issues affecting specific industries and occupations are better understood.[702]

On 21 August 2025, the FWC published a statement inviting submissions on whether it should conduct a review of the model award term and issue guidelines.[703] Submissions closed on 3 October 2025.[704] On 21 November 2025, the FWC published a further statement that it considered there was limited utility in conducting a review or issuing guidelines at that time, as the FWC has not yet considered any test

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[693] Ibid.
[694] FWC, *Annual Report 2024–25* (Report, 2025) 35.
[695] FWC, 'Understanding the new right to disconnect' (YouTube,16 April 2026) <https://www.youtube.com/watch?v=vNFf-GN_DDw>; FWC, 'What is the right to disconnect', (Web Page) <https://www.fwc.gov.au/workplace-disputes/other-workplace-disputes/right-disconnect-disputes/what-right-disconnect>; FWC, '*Understanding the right to disconnect* (26 July 2024).
[696] FWC, *Annual Report 2024–25* (2025) 35.
[697] FWO, 'Right to disconnect' (Web Page) <https://www.fairwork.gov.au/employment-conditions/hours-of-work-breaks-and-rosters/right-to-disconnect>.
[698] FWO, 'Right to disconnect and small business - overview' (YouTube, 2 April 2026) <https://www.youtube.com/watch?v=pI6VP0zSumo&t=8s>; FWO, 'Right to disconnect – having a conversation' (YouTube, 2 April 2026) <https://www.youtube.com/watch?v=w-64AV4Nyuw>; FWO, 'Right to disconnect – senior roles' (YouTube, 2 April 2026) <https://www.youtube.com/watch?v=V3sIGM5KoPw&t=2s>.
[699] *Variation of modern awards to include a right to disconnect term* [2024] FWCFB 338.
[700] Ibid [1]–[2].
[701] See subclause 12A.3 of Clause 12A of the *Business Equipment Award 2020* (the model right to disconnect term). See the FWC's decision in *Variation of modern awards to include a right to disconnect term* [2024] FWCFB 338 for the full right to disconnect model term.
[702] *Variation of modern awards to include a right to disconnect term* [2024] FWCFB 338 [3].
[703] *Variation of modern awards to include a right to disconnect term* [2025] FWCFB 185.
[704] Ibid [3].

cases or resolved any significant disputes regarding the substantive right to disconnect provisions.[705] The FWC noted there was general consensus from parties that made submissions that a review of the model term would be premature.[706] The FWC stated that the appropriate course of action is to revisit whether a review should be conducted in 12 months' time, while noting it may be better positioned to develop guidelines concurrently with a review (if and when that occurs).[707]

The Review is not aware of any significant right to disconnect matters currently being considered by the FWC.

The FWC has not published any decision on the right to disconnect. The tables below reflect FWC data and demonstrate that few applications have been made and even fewer resolved by the FWC.

Table 4: Applications lodged from commencement to 31 March 2026

Application type	2024–25 FY	2025–26 FY (to end Q3)	Total
Application for a stop order – right to disconnect	4	4	8
Application for a stop order and to deal with a dispute about the right to disconnect	1	6	7
Application to deal with a dispute about the right to disconnect	2	0	2
Total	7	10	17

Table 5: Outcome of applications finalised from commencement to 31 March 2026

Application type	Withdrawn/ discontinued	Resolved	Total
Application for a stop order – right to disconnect	6	1	7
Application for a stop order and to deal with a dispute about the right to disconnect	5	1	6
Application to deal with a dispute about the right to disconnect	1	1	2

[705] *Variation of modern awards to include a right to disconnect term* [2025] FWCFB 266 [9].
[706] Ibid [1]. These stakeholders included, among others, the ACTU, ACCI, AIG and COSBOA.
[707] *Variation of modern awards to include a right to disconnect term* [2025] FWCFB 266 [9].

What the Review heard

The Review received 22 submissions addressing the measure, and an additional 7 submissions on the Draft Report's consideration of the measure.

Stakeholder views on the measure were mixed. Unions were generally supportive, while employer groups were more critical. Several submissions were received from both union and employer groups arguing that there is not yet sufficient evidence to determine whether the provisions are operating as intended.[708]

COSBOA noted that less than half of small business employers were aware of the reforms.[709]

AHRI submitted that its research demonstrated that many employers have reported benefits to productivity and employee engagement following the introduction of the right to disconnect:

> *Overall, 58 per cent reported that the legislation had either significantly or somewhat increased employee engagement and productivity, with particularly strong results reported by public-sector employers. Employers also reported improvements in work-life balance and stress levels, and nearly half indicated improved management of urgent or time-sensitive matters outside standard working hours. Focus group participants described clearer expectations, greater awareness among managers, and a cultural shift away from treating all communication as urgent.*[710]

Employer Groups

Employer groups argued the measure created uncertainty for business.[711]

Some employer groups noted the lack of guidance from the FWC was problematic and that the provisions are not necessarily clear in the absence of such guidance. Several submissions highlighted that the amendments created an additional compliance burden and that there was a lack of a clear evidentiary basis demonstrating a material problem.[712] During consultations, employer groups reflected that employers had been required to spend considerable time updating policies and providing training to ensure compliance.

Some submissions argued that the amendments were not necessary because employees were already protected under the FW Act from an employer unreasonably contacting them after hours where this contact leads to unreasonable additional hours being worked.

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[708] ACCI, Submission No 54 (3 March 2026) 44 [272]; AIG, Submission No 82 (8 March 2026) 44 [214]; UWU, Submission No 62 (6 March 2026) 25; Australian Hotels Association, Submission No 37 (3 March 2026) 3; CIS, Submission on Draft Report No 4 (25 May 2026) 6.
[709] COSBOA, Submission No 45 (3 March 2026) 8 [35].
[710] AHRI, Submission No 21 (2 March 2026) 3 [2.4]–[2.5].
[711] See, CCF, Submission No 32 (3 March 2026) 3; COSBOA, Submission No 45 (3 March 2026) 8; RDA, Submission No 35 (3 March 2026) 3; AMIC, Submission No 47 (3 March 2026) 4–5; NFF, Submission No 7 (25 February 2026) 6; AIG, Submission No 82 (8 March 2026) 44 [208], [212]–[213]; CIS, Submission on Draft Report No 4 (25 May 2026) 6.
[712] ACCI, Submission No 54 (3 March 2026) 43 [269]; COSBOA, Submission No 45 (3 March 2026) 9 [38]; AIG, Submission No 82 (8 March 2026) 44 [207]–[208].

AIG submitted that about half of the EU member states, a Canadian province, and the Philippines had introduced a measure comparable to the right to disconnect.[713] AIG noted that reforms in the EU are piecemeal and that there is no best practice model for Australia to adopt. AIG observed that there were also different small business exceptions in different EU states, for example for businesses with less than 10 staff (Portugal), 20 staff (Belgium) or 50 staff (France).[714] AIG further submitted that most EU states that had introduced a right to disconnect had done so through collective agreements, with national laws requiring larger enterprises to address these matters through negotiations with unions, tailored to their individual circumstances.[715]

Uncertainty around when contact is unreasonable

Many employer groups raised uncertainty around the application of the 'unreasonable' test'.[716]

- COSBOA submitted that the 'reasonableness' test, while providing theoretical flexibility, offers insufficient guidance on the specific operational circumstances common to small businesses, particularly in industries where after-hours contact is not a corporate management preference, but an operational necessity.[717]
- RDA submitted that members had reported uncertainty about when after-hours contact is permissible, including whether group messaging for voluntary shift swaps may be seen as unreasonable, and how to balance staffing needs against employee rights.[718]
- The Australian Meat Industry Council (**AMIC**) submitted that the legislation does not clearly resolve how the right intersects with Work Health and Safety duties – particularly psychosocial risk obligations.[719]
- AIG's submission noted that because decisions will turn on individuals' circumstances, industry has experienced confusion and uncertainty on the parameters of the test. It argued that the focus on each employee's individual circumstances means empowering the FWC to provide general 'guidance' on the entitlement is of little utility.[720] AIG called on the Review to consider alternative mechanisms to provide greater certainty about the operation of the provisions.[721]
- CIS submitted that the provisions create significant uncertainty regarding what constitutes reasonable contact, appropriate after-hours communication, and legitimate operational requirements.[722]
- The Civil Contractors Federation (**CCF**) expressed concern that the right to disconnect will create a new category of disputes around 'reasonableness', unless industry-appropriate safe harbours are clarified (e.g., for safety, incident response, or essential public infrastructure works).[723]

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[713] AIG, Submission No 82 (8 March 2026) 45 [216].
[714] Ibid.
[715] Ibid.
[716] See, CCF, Submission No 32 (3 March 2026) 2–3; COSBOA, Submission No 45 (3 March 2026) 8 [36]–[37]; RDA, Submission No 35 (3 March 2026) 3; AMIC, Submission No 47 (3 March 2026) 4; NFF, Submission No 7 (25 February 2026) 6; AIG, Submission No 82 (8 March 2026) 44 [213]; CIS, Submission on Draft Report No 4 (25 May 2026) 6.
[717] COSBOA, Submission No 45 (3 March 2026) 8 [36]–[37].
[718] RDA, Submission No 35 (3 March 2026) 3.
[719] AMIC, Submission No 47 (3 March 2026) 4.
[720] AIG, Submission No 82 (8 March 2026) 44 [213].
[721] Ibid.
[722] CIS, Submission on Draft Report No 4 (25 May 2026) 6.
[723] CCF, Submission No 32 (3 March 2026) 2.

Industry specific challenges

CIS argued that many industries require flexible communication, emergency responsiveness, roster adjustments and after-hours operational coordination to respond quickly to unexpected absences, emergency rostering issues, operational disruptions or urgent customer and safety matters outside ordinary business hours.[724]

Employer groups identified that industries with significant shift-based work and weather-related restrictions were particularly challenged by the lack of guidance on how to address matters like backfilling or engagement on urgent matters, without the contact being unreasonable.

The NFF highlighted that matters like animal welfare emergencies, irrigation breakdowns, biosecurity incidents and weather windows affected farms operational needs and the right increased their compliance challenges and risk of delays in the sector.[725] Similarly, HIA submitted that the weather-dependent, safety-critical and project-sequenced nature of home building work means employers must be able to contact workers and contractors for unavoidable schedule changes, site-safety notifications, and time-critical coordination without risk of breaching the 'unreasonableness' threshold.[726] The CCF also noted that civil works require rapid escalation for safety events, emergency response, weather impacts, and network outages affecting utilities and public roads.[727] RDA submitted that liquor retailers need to contact staff outside rostered hours to fill urgent vacancies or respond to unforeseen circumstances,[728] and the AMIC also noted challenges with addressing shift backfills, particularly in businesses with 24-7 rosters.[729]

The Australian Retail Council noted that the retail industry has implemented the reform without significant disruption to day-to-day business activity and that employers have adjusted communication practices to align with the new requirements. It submitted that the sector's shift-based workforce structure limits exposure to after-hours contact issues.[730]

Interaction with modern award terms

AIG argued that given the statutory right to disconnect, there is no need for awards to also provide for the entitlement, which it submitted creates regulatory duplication and potentially undermines the careful balance struck in the development of the legislative scheme.[731]

AIG further submitted that the model award term provides that 'an employer must not directly or indirectly prevent an employee from exercising their right to disconnect under the Act' but that this is:

[724] CIS, Submission on Draft Report No 4 (25 May 2026) 6.
[725] NFF, Submission No 7 (25 February 2026) 6.
[726] HIA, Submission No 20 (2 March 2026) 14; HIA, Submission on Draft Report No 11 (29 May 2026) 4.
[727] CCF, Submission No 32 (3 March 2026) 2.
[728] RDA, Submission No 35 (3 March 2026) 3.
[729] AMIC, Submission No 47 (3 March 2026) 4.
[730] Australian Retail Council, Submission No 59 (5 March 2026) 4.
[731] AIG, Submission No 82 (8 March 2026) 46 [220].

> *... deeply problematic. If an employer breaches such a term the employer is in breach of the award and may be subject to associated civil penalties. This is at odds with the statutory scheme that deliberately did not impose penalties for such conduct but instead created a dispute resolution procedure. More concerningly, this means that if employers and employees engage with the contemplated dispute resolution procedure contemplated under the statutory provisions dealing with the right to disconnect and the FWC finds that the employer has prevented the exercise of their right to disconnect the employer may be subject to civil penalties. This is not only unfair but fundamentally undermines the utility of the dispute resolution process and the integrity of the legislative scheme's specific adoption of an approach that does not impose pecuniary penalties in relation to the new provisions (in essence, these will apply where an order of the FWC is breached).*[732]

AIG suggested that the penalties might be having a chilling effect on employers seeking to bring matters to the FWC for decision, for fear they will be in breach of the right to disconnect term in the modern award.[733]

AIG also raised concerns about the interaction between the statutory right and terms of a modern award that adapts the right to disconnect term to accommodate for certain necessary out-of-hours contact such as standing by, on call, recall or emergency call in. AIG submitted that the flexibility to support the customisation does not necessarily mean that the statutory right does not nonetheless entitle people to disconnect. In effect, there is a risk that the right to disconnect may permit these employees to disconnect despite receiving entitlements under awards or agreements that assume they are contactable outside of working hours.[734]

HIA argued that the sector-specific carve outs for the right to disconnect in the *Building and Construction General On-site Award 2020* were extremely narrow, untested, and inadequate for the realities of the industry.[735]

Employer group recommendations

Several employer groups recommended the publication of further guidance on the application of the right to disconnect. COSBOA recommended the FWO publish industry-specific guidance covering retail, hospitality, trades, healthcare support, transport, and professional services with worked examples of contact that is and is not protected by the right to disconnect.[736] CIS recommended clearer statutory guidance and stronger recognition of operational realities across different industries and business sizes.[737] The NFF similarly suggested agricultural guidance with worked examples relevant to their industry.[738] The CCF recommended the inclusion of a statutory note or definition clarifying that, in safety-critical industries, contact reasonably required for WHS incidents, emergency response, traffic control changes, or network outages is presumptively 'reasonable'.[739]

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[732] Ibid 46 [222].
[733] Ibid 46 [223].
[734] Ibid 46 [224].
[735] HIA, Submission No 20 (2 March 2026) 14; HIA, Submission on Draft Report No 11 (29 May 2026) 4.
[736] COSBOA, Submission No 45 (3 March 2026) 9 [38]; COSBOA, Submission on Draft Report No 7 (29 May 2026) 5 [24].
[737] CIS, Submission on Draft Report No 4 (25 May 2026) 6.
[738] NFF, Submission No 7 (25 February 2026) 4.
[739] CCF, Submission No 32 (3 March 2026) 3.

AMIC recommended the FWC issue guidelines which categorise contact as ordinarily reasonable and unreasonable, but suggested they should be binding or near-binding. AMIC also suggested legislation or FWC guidance to provide information to employers on satisfying the standards and how to address disputes at the workplace level.[740]

COSBOA recommended a permanent legislative exemption for businesses with fewer than 50 full-time equivalent employees from the right to disconnect, and the introduction of an employee 'opt-in' provision, which allows, by written agreement, reasonable after-hours contact on operational matters like rostering.[741]

The NFF suggested the development of a new unreasonableness test, derived from the 'reasonable person test used by the courts'.[742]

AIG made several recommendations to address the interaction between the right to disconnect in the statute and the award:

- Require the right to disconnect clause in awards to refer only to the statutory right, rather than providing for the entitlements under subsections 333M(1) and (2).
- Amend the FW Act to prevent an employer from being subject to a civil penalty for breaching a right to disconnect award term, or alternatively, prohibiting the awards including right to disconnect provisions.
- Amend the FW Act to ensure right to disconnect terms in awards can identify circumstances in which an employee does not have a right to disconnect (for example, when an employee is required to be 'on call' and is paid an allowance in recognition of that obligation).[743]

AIG also suggested amending the FW Act to introduce an income cap/threshold that excludes higher-earning employees from the operation of the right to disconnect provisions or from access to dispute settlement and the making or enforcement of right to disconnect orders. Alternatively, high-income earners should be permitted to opt out of the right to disconnect through written contractual terms or enterprise agreements.[744]

AIG further recommended amendments that would allow enterprise agreements to exclude, limit or modify the operation of the right to disconnect provisions.[745]

HIA recommended the establishment of a housing sector-specific carve-out through the modern awards framework or, alternatively, improvements to the construction-specific mechanisms within the *Building and Construction General On-site Award 2020* to ensure the right to disconnect provisions operate in a

[740] AMIC, Submission No 47 (3 March 2026) 4–5.
[741] COSBOA, Submission No 45 (3 March 2026) 9 [38(a)–(c)].
[742] NFF, Submission No 7 (25 February 2026) 6.
[743] AIG, Submission No 82 (8 March 2026) 47–8 [230].
[744] Ibid 47 [231]–[233].
[745] Ibid 48 [233].

balanced, practical and safe manner and provides certainty.[746] It also recommended that disputes be assessed against a construction industry operational reasonableness standard, not a generic office-based comparator.[747]

Feedback on draft recommendation

ACCI, HIA and AIG did not oppose[748] the Review's draft recommendation to review the right to disconnect in 2 to 3 years.[749]

HIA expressed concern that sector-specific challenges were acknowledged in the Draft Report but not addressed.[750] It recommended government commit to award variation proceedings in advance of a further review.[751] AIG also argued that particular problems should be addressed by the Review through recommendations to government prior to any future review in 2–3 years[752] In this context, AIG repeated their calls for reforms to be made to the measure, as per their original submission.[753]

AIG noted that the award variation processes available to resolve industry-specific concerns would still be difficult and pursuing these variations would not be feasible for individual employers.[754] AIG reiterated its concerns that employers being subject to a civil penalty for breaching a right to disconnect award term is at odds with the fundamental design of the right to disconnect dispute resolution process.[755]

COSBOA opposed the draft recommendation to further review the right to disconnect in 2 to 3 years, noting no significant matters had come before the FWC for consideration, and that only a small number of applications for disputes and stop orders had been lodged. COSBOA argued the right to disconnect has not generated the workplace conflict that was anticipated, and the existing statutory framework, including the reasonableness test and the FWC's dispute resolution jurisdiction, appears adequate to manage the limited issues that do arise. COSBOA recommended the Review adopt the view that no further review is required unless a material change in circumstances occurs, such as a significant increase in FWC applications or a body of case law reveals operational deficiencies, and continued uncertainty on the 'reasonableness' test should be addressed through guidance.[756]

CIS argued that the conclusions reached about undeveloped jurisprudence and the need for a future review should have led to greater caution regarding the Review's draft conclusions on the effectiveness of the measure.[757]

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[746] HIA, Submission No 20 (2 March 2026) 14.
[747] Ibid.
[748] HIA, Submission on Draft Report No 11 (29 May 2026) 4; AIG, Submission on Draft Report No 45 (1 June 2026) 23 [137]; ACCI, Submission on Draft Report No 46 (1 June 2026) 21 [114]–[115].
[749] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 160 [Draft Recommendation 19].
[750] HIA, Submission on Draft Report No 11 (29 May 2026) 4.
[751] Ibid.
[752] AIG, Submission on Draft Report No 45 (1 June 2026) 23–4 [139]–[146].
[753] Ibid 24 [142]–[146].
[754] Ibid 23 [138].
[755] Ibid 24 [142]–[144].
[756] COSBOA, Submission on Draft Report No 7 (29 May 2026) 5 [21]–[24].
[757] CIS, Submission on Draft Report No 4 (25 May 2026) 6.

Unions

Unions were broadly supportive of the amendment as an important addition for workers but many raised concerns about how the right to disconnect would interact with modern award terms.[758] Unions did not make any further submissions on the Draft Report regarding the right to disconnect measure.

During consultations, union participants reflected that the inclusion of the right to disconnect in legislation has resulted in more bespoke enterprise agreement clauses and more constructive discussions.

In written submissions, the ACTU noted that practical access to the right to disconnect may remain an issue for some workers. It cited a survey of more than 2,000 workers commissioned by HR Platform HiBob, which found that around one-third of workers did not feel confident enough to exercise their right to disconnect in practice.[759]

The UWU noted that the value of the amendment also lies in promoting behavioural and cultural change. It noted that the predictions of catastrophe and significant litigation had not arisen.[760]

Interaction with modern award terms

As with employer groups, several unions raised issues with the statutory right to disconnect and its interaction with particular modern award terms.

The FAAA submitted that the current clauses in the *Aircraft Cabin Crew Award 2020* (**ACCA**) do not sufficiently protect cabin crew from being able to refuse to respond to contact outside of their allocated shifts and/or normal working hours. The FAAA argued that it was difficult to reconcile what may be considered 'reasonable' contact under section 333M of the FW Act with entitlements and conditions under the ACCA, including the absence of an ordinary span of hours, responding to contact on a rostered day off or on home reserve duty. It also submitted that cabin crew may be required to perform unpaid work in the form of reading materials in their own time, without the ability to rely on the right to disconnect.[761]

The ANMF similarly reflected on the incompatibilities between the right to disconnect in the FW Act and certain clauses in the *Nurses Award 2020*.[762] The ACTU's submission agreed with the concerns expressed by the ANMF about the interaction of different award terms, and acknowledged the FWC's statement[763] that the ANMF could make an application to vary the award to address these matters.[764]

The UWU noted that its submission reflects similar concerns raised by the ANMF about the incompatibility of some award provisions (including recall provisions) with the right to disconnect. The UWU argued that

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[758] ANMF, Submission No 60 (5 March 2026) 7 [21]–[24]; FAAA, Submission No 63 (6 March 2026) 13–14 [75]–[83]; CSOA, Submission No 58 (4 March 2026) 5–6 [43]–[44]; ACTU, Submission No 67 (6 March 2026) 89; UWU, Submission No 62 (6 March 2026) 24–5.
[759] ACTU, Submission No 67, citing the Australian HR Institute, 'Quarterly Australian Work Outlook' (June Quarter 2025) 23–9.
[760] UWU, Submission No 62 (6 March 2026) 24.
[761] FAAA, Submission No 63 (6 March 2026) 13–14 [75]–[83].
[762] ANMF, Submission No 60 (5 March 2026) 7 [21]–[25].
[763] *Variation of modern awards to include a right to disconnect term* [2025] FWCFB 266 [10].
[764] ACTU, Submission No 67 (6 March 2026) 89. Unions may apply to the FWC to vary a modern award (see ss 157 and 158 of the *Fair Work Act 2009* (Cth)).

harmonisation of the pre-existing award terms and the legislative right to disconnect could be achieved by requiring employers to take reasonably practicable steps to ensure adequate staffing levels on all shifts based on foreseeable work norms, coupled with the appropriate use of a rostered on-call system.[765]

The Collieries' Staff and Officials Association (**CSOA**) submitted that to the extent that the right to disconnect entitlements are located in modern awards, employees risk having these entitlements eroded or even eliminated through the Guarantee of Annual Earnings (**GOAE**) regime. CSOA argued that the intention behind these reforms was not to exclude workers (such as coal mine workers earning just over the high-income threshold) from exercising the right.[766]

Union group recommendations

The ACTU repeated its recommendation to the FWC's review of the model right to disconnect term, to provide practical guidance to both employers and employees by adding 2 criteria to the 'reasonableness' test.[767] The ACTU submission to the Review argued that subsection 333M(3) should be amended to include 2 additional criteria:

- whether the employee is on approved leave or another authorised absence, and
- the extent to which the employer has made adequate staffing arrangements and planned for workplace fluctuations to minimise the need for out-of-hours contact.[768]

In relation to the first proposed criteria, the ACTU noted the change would not prevent an employer from attempting to contact an employee while they are on leave or another authorised absence, but enables that fact to be explicitly taken into account as a relevant factor. In relation to the second proposed criteria, the ACTU submitted that the right to disconnect is of little or no utility if the workplace is organised in such a way as to be reliant on contacting employees when they are not working in order to function and suggested that this change would require consideration of whether the employer has taken reasonable steps to eliminate or minimise the need to contact the worker when they are not working. These additions were not adopted by the FWC when reviewing the model right to disconnect award term.[769]

The UWU recommended that consideration be given to a method to harmonise pre-existing award provisions providing for recall whilst not on-call with the principles of the right to disconnect.[770]

CSOA recommended the abolition of GOAE contracts. CSOA submitted that GOAE clauses undermine the safety-net of the modern award system and the reforms contained in the Closing Loopholes Acts, including the modern award right to disconnect term.[771]

[765] UWU, Submission No 62 (6 March 2026) 24–5.
[766] CSOA, Submission No 58 5–6 [42]–[44].
[767] ACTU, 'ACTU Submission – Right to Disconnect Term: AM2024/14 - Variation of Modern Awards to include a Right to Disconnect Term', (17 May 2024) [31]–[32] and Annexure A, subclause 3.
[768] ACTU, Submission No 67 (6 March 2026) 90.
[769] Ibid 89–90.
[770] UWU, Submission No 62 (6 March 2026) 25.
[771] CSOA, Submission No 58 (4 March 2026) 5–6 [42]–[44], [48].

Academic stakeholders

Academics broadly supported the measure.[772]

During consultation, academics noted that workplaces are adapting to the provisions, contrary to some initial expectations. Participants suggested that measuring success by reference to disputes and litigation may be crude and not reflect the measure's positive impact, given the intent was for disputes to be resolved at the workplace level. Some participants noted that it was too early to say whether the lack of litigation is indicative of success.

Professor Chris F Wright submitted that the strengthened employee engagement and productivity arising from the reforms were consistent with research from European countries.[773] He noted that, in analysing the impact of right to disconnect legislation in EU member states, Eurofound concluded that workers in companies with a right to disconnect policy were much more likely to report very high job satisfaction and better work/life balance, and were less likely to report health issues, including anxiety, stress and headaches, than workers in companies without such a policy.[774]

Uncertainty around when contact is unreasonable

Professor Alysia Blackham submitted that the effectiveness of the right will hinge on employees' ability to judge when it is 'unreasonable' to refuse contact, but that some of the matters that must be taken into account under the provision effectively require an employee to engage with the contact to determine if they can refuse the contact.[775] Taking the reason for the contact into account when assessing what is 'unreasonable' may therefore 'undermine the sanctity of non-working hours'.[776] To address this issue, Professor Blackham recommended amending paragraph 333M(3)(a) to read:

> *the reason for the contact or attempted contact,* ***if the employee is informed of that reason in advance of contact being made*** *(emphasis added).*[777]

Other stakeholders

NRWC noted that the right to disconnect was particularly important for rural women, who often work in small teams or essential local services where staffing shortages and community expectations can create pressure to be informally 'always on'.[778] Similar to employer groups, it recommended the development of model terms and practical guidance tailored to rural contexts, including information on what constitutes reasonable contact and how on-call arrangements should be structured in small or seasonal workplaces.[779]

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[772] Chris F Wright, Submission No 13 (2 March 2026) 6–7; Alysia Blackham, Submission No 14 (2 March 2026) 2.
[773] Chris F Wright, Submission No 13 (2 March 2026) 6–7. This conclusion comes from research by AHRI, see AHRI (2025) Quarterly Australian Work Outlook – June Quarter 2025. Melbourne: Australian HR Institute. See also Australian HR Institute's research above.
[774] Chris F Wright, Submission No 13 (2 March 2026) 6–7. Referencing research in Eurofound (2023) Right to Disconnect: *Implementation and Impact at Company Level*. Luxembourg: Publications Office of the European Union.
[775] Alysia Blackham, Submission No 14 (2 March 2026) 2.
[776] Ibid.
[777] Ibid 3.
[778] NRWC, Submission No 29 (3 March 2026) 8.
[779] Ibid.

WLS NSW raised concerns about the efficacy of the right to disconnect for part-time and casual workers. Its submission noted that research in the year following the implementation of the right to disconnect found that for every 7 hours of work, part-time employees work for an hour with no pay.[780] The submission noted that unpaid work likely disproportionately impacts women, who are overrepresented in casual employment.[781] WLS NSW recommended that the FWC publish additional guidelines on the right to disconnect.[782]

WLS NSW submitted that in its experience it is difficult to exercise the right to disconnect as a standalone right. It argued that this is reflected in recent case law that sees the right to disconnect raised as ancillary to a claim for adverse action or unfair dismissal.[783] WLS NSW also submitted that the process of requiring an employee to seek a stop order and subsequently to seek enforcement of that order is an avenue that is only available to 'active employees', and provides little incentive to pursue enforcement of the right as it requires ongoing dispute resolution with one's employer which has the potential to render the working relationship untenable.[784]

Case study: Adverse action for exercising a right to disconnect – Mari[785]

Mari worked as an accountant at a mid-tier firm for three years. She was the only woman and parent on her team. Outside of working hours, her colleagues routinely replied to emails and texts. Due to her caring responsibilities, she was unable to keep up with these communications, and as such missed out on promotion opportunities.

Mari raised this with her employer, who stated her refusal to monitor communications outside of work was unreasonable as she was the only staff member who refused, and it hindered the team's ability to progress urgent work. Mari filed a Form F92 and the FWC issued a 'stop order' to her employer.

Mari was no longer required to monitor communications outside of hours but was excluded from important projects and meetings within work hours. Her employer stated that this was because the projects may have required out-of-hours communications to meet urgent deadlines. The workplace culture became so uncomfortable that Mari resigned.

Simon Potts submitted that the right to disconnect introduced dispute and compliance risks for small businesses, despite small businesses not being the primary target of the reforms.[786] He noted that the right to disconnect does not recognise employee-initiated contact outside business hours.[787] He called

[780] WLS NSW, Submission No 69 (3 March 2026) 26–7 [76]–[77].
[781] Ibid 27 [77].
[782] Ibid 30 [82].
[783] Ibid 28 [78].
[784] Ibid 28 [79].
[785] Ibid 28–9 [79].
[786] Simon Potts, Submission No 25 (2 March 2026) 10.
[787] Ibid 9.

for the provisions to be repealed or clearer statutory guidance or the introduction of safe-harbour protections for small businesses acting in good faith. At a minimum, he argued the framework should recognise that workplace responsibilities are reciprocal.[788]

Adrian Boothman submitted that the right to disconnect represents an important cultural and psychosocial safety reform, but argued that defining 'reasonableness' consistently across industries was the challenge and that without clearer interpretive anchors, disputes may shift from work hours to communication behaviour.[789] He noted that based on operational experience, many employers, particularly small and medium businesses, do not possess the internal legal capability to confidently navigate the increased complexity of the right to disconnect reforms.[790] Adrian Boothman agreed with the Review's draft recommendation to further review the legislation once more jurisprudence is available and suggested guidance on operational necessity, genuine emergencies, managerial overreach and mutually agreed flexibility arrangements.[791]

The NSW Small Business Commission submitted that it had received representations from small business operators on their continued uncertainty regarding the scope of the obligations, how the provisions apply in practice within small business environments, and the distinction between reasonable and unreasonable contact outside ordinary working hours.[792] It recommended consideration be given to developing clear, practical, and accessible guidance materials to assist small businesses comply with the right to disconnect.

Analysis

The right to disconnect is a high-level principle designed to drive cultural change in relation to work-related communication outside working hours while still supporting flexibility across different workplaces and roles. The measure received significant media attention during the passage of the Closing Loopholes No. 2 Bill, which generated discussion around its application and differing expectations of its potential effects.

This measure has only been operative since August 2024 and for small business employers since August 2025. The right to disconnect is intended to be an enforceable right where disputes relating to contact outside working hours can be addressed by the FWC if they cannot be resolved at the workplace level. Despite being operative since August 2024, no significant matters have come before the FWC for consideration. There have been no published FWC decisions and only a small number of applications for disputes and stop orders, of which the FWC has resolved 3 as at 31 December 2025 (see Tables 4 and 5 above). The application of the provisions will be clearer once the FWC has published its guidance and when there is a body of case law applying the provisions.[793]

[788] Ibid 10.
[789] Adrian Boothman, Submission No 5 (18 February 2026) 2; Adrian Boothman, Submission on Draft Report No 2 (20 May 2026) 4.
[790] Adrian Boothman, Submission on Draft Report No 2 (20 May 2026) 1–2.
[791] Ibid, 4.
[792] NSW Small Business Commission, Submission on Draft Report No 5 (26 May 2026) 2.
[793] *Fair Work Act 2009* (Cth) s 333V.

The lack of cases does not necessarily suggest there are, or are not, issues with the provisions. The measure sought to prioritise resolution at the workplace level. If this is occurring, it may be the reason for the legislation remaining untested in the FWC. FWC President Hatcher, speaking at the Australian Labour and Employment Relations Association national conference in November 2025, noted that the low level of disputes before the FWC may indicate that employers and employees are handling this issue at a workplace level or alternatively that it was not such a big issue in the first place.[794]

At this early stage, and recognising the lack of FWC decisions on the application of the provisions, the measure appears to be supporting a cultural shift and positive behavioural change in workplaces and has driven more conversations about appropriate contact outside working hours. Evidence provided to the Review suggests the measure has supported improvements in workplace outcomes. Research undertaken by AHRI found that 58% of employers reported that the measure had either significantly or somewhat increased employee engagement and productivity. Employers report improvements in work-life balance and stress levels, and nearly half indicated improved management of urgent or time-sensitive matters outside standard working hours.[795] Unions highlight that the inclusion of the right to disconnect in legislation has resulted in more bespoke enterprise agreement clauses and more constructive discussions during bargaining.

As there is limited information to draw on, it is appropriate for a further review of the measure to be undertaken in another 2 to 3 years. The review should assess the development of FWC jurisprudence, including identifying the boundaries of reasonableness of after-hours contact and identify any industry specific issues. This will allow further time for the development of a body of case law applying the provisions and/or consideration of any further research on the attitudes of employers and employees on the effectiveness of the right and the extent to which cultural change or workplace level conversations have taken place.

At this early stage, some challenges with the measure have emerged. These are discussed below.

Uncertainty around when contact is unreasonable

Many submissions, particularly from employer groups, express uncertainty about what constitutes 'unreasonable contact' under the measure, including how the right is to be applied to particular industries (such as retail, housing and agriculture) and in relation to particular groups of employees (such as shift workers, small business employees, and emergency responders).[796] Different stakeholders submit that the publication of further guidance on the right to disconnect is needed and suggest that this could be

[794] Workplace Express 'Disconnect review delayed, as debate continues', *Workplace Express* (Online, 24 November 2025) <https://www.workplaceexpress.com.au/news/disconnect-review-delayed-as-debate-continues-81082>.
[795] AHRI, Submission No 21 (2 March 2026) 3 [2.4]–[2.5].
[796] CCF, Submission No 32 (3 March 2026) 2–3; COSBOA, Submission No 45 (3 March 2026) 8 [36] 9 [37]; RDA, Submission No 35 (3 March 2026) 3; AMIC, Submission No 47 (3 March 2026) 4; NFF, Submission No 7 (25 February 2026) 6; AIG, Submission No 82 (8 March 2026) 44 [213]; ACTU, Submission No 67 (6 March 2026) 89; NSW Small Business Commission, Submission on Draft Report No 5 (26 May 2026) 2; CIS, Submission on Draft Report No 4 (25 May 2026) 6.

achieved through further FWO,[797] FWC,[798], legislative[799] or unspecified[800] types of guidance. The FWC and the FWO have provided some materials on the application on the right to disconnect, including website materials, YouTube videos and factsheets.[801] In a statement on 21 November 2025, the FWC determined that the provision of guidelines required by the amendments would have little to no utility as the FWC has not yet considered any test cases or resolved any significant disputes regarding the substantive right to disconnect provisions.[802] The FWC determined to revisit the provision of guidelines in 12 months.[803]

The FWC's and FWO's existing materials provide some level of guidance, stating clearly that the right does not prevent an employer from contacting an employee. However, some submissions indicate that there may still be some uncertainty around when employers can contact employees and further guidance may assist in clarifying any uncertainty on this issue and the application of the right more broadly.

Further guidance from the FWC, as required by the amendments, will help to provide clarity and resolve some of the existing uncertainty around the application of the right to disconnect. There remains a risk that uncertainty about the application of the right to disconnect in particular circumstances may deter parties from seeking to enforce it. The FWC remains best placed to provide guidance as, without the benefit of case law, it would be challenging to anticipate all the circumstances that might make a refusal of contact unreasonable.

Interaction with modern award terms in specific industries

A significant number of employer and union submissions raised concerns about the operation of the right in specific industries and its interaction with particular award terms. For example, in aviation and nursing, where there are safety issues and a number of other unique operational needs. These submissions highlight genuine operational complexity but do not oppose the right itself.

AIG submits that there was a risk that the right to disconnect may permit employees to disconnect despite receiving entitlements under the modern award for being contactable outside of working hours.[804] Some unions were concerned that modern award terms would limit employees' ability to exercise the right to disconnect.[805]

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[797] COSBOA, Submission No 45 (3 March 2026) 9 [38(b)]; COSBOA, Submission on Draft Report No 7 (29 May 2026) 5 [24].
[798] WLS NSW, Submission No 69 (3 March 2026) 30 [82]; AMIC, Submission No 47 (3 March 2026) 5.
[799] CFF, Submission No 32 (3 March 2026) 3; AMIC, Submission No 47 (3 March 2026) 5; ACTU, Submission No 67 (6 March 2026) 89–90.
[800] Adrian Boothman, Submission on Draft Report No 2 (20 May 2026) 4.
[801] FWC, 'Understanding the new right to disconnect' (YouTube, 21 August 2024); FWC, 'What is the right to disconnect?, (Web Page) <https://www.fwc.gov.au/workplace-disputes/other-workplace-disputes/right-disconnect-disputes/what-right-disconnect>; FWO, 'Right to disconnect' (Web Page) <https://www.fairwork.gov.au/employment-conditions/hours-of-work-breaks-and-rosters/right-to-disconnect>; FWO, 'Right to disconnect and small business - overview' (YouTube, 9 June 2025); FWO, 'Right to disconnect – having a conversation' (YouTube, 2 April 2026) <https://www.youtube.com/watch?v=w-64AV4Nyuw>; FWO, 'Right to disconnect – senior roles' (YouTube, 2 April 2026) <https://www.youtube.com/watch?v=V3sIGM5KoPw>.
[802] *Variation of modern awards to include a right to disconnect term* [2025] FWCFB 266 [9].
[803] Ibid.
[804] AIG, Submission No 82 (8 March 2026) 46 [225]; AIG, Submission on Draft Report No 45 (1 June 2026) 24 [145].
[805] ANMF, Submission No 60 (5 March 2026) 7 [21]–[25]; UWU, Submission No 62 (6 March 2026) 24–5; FAAA, Submission No 63 (6 March 2026) 13–14 [75]–[83]; ACTU, Submission No 67 (6 March 2026) 89.

The FWC has a legislative remit to resolve uncertainties between the right to disconnect and existing modern award terms in specific industries or occupations, as the FWC both resolves disputes about the application of the statutory right and sets modern award terms. When determining the right to disconnect term for moderns awards, a Full Bench of the FWC noted that the term is intentionally minimalist, reflecting the novelty of the right to disconnect and the likelihood that future variations to the term in particular awards will be necessary once the issues affecting specific industries and occupations are better understood.[806] An employer, employee or union may apply to the FWC to vary a modern award, to address any issue they identify with the operation of the right to disconnect term or other modern award terms.[807] Once modern award terms have been adapted to the right to disconnect, they will provide guidance on when contact in a specific industry or occupation may be considered unreasonable. Employers, employer or employee groups should use award variation processes to resolve industry specific incompatibilities.

Civil penalties for breach of an award term

If an employer breaches the modern award right to disconnect term, the employer may be subject to civil penalties.[808] AIG argues that this is at odds with the statutory scheme, which did not impose penalties for a breach of the statutory right to disconnect, but instead created a dispute resolution procedure. AIG suggests that it is likely civil penalties for breach of a right to disconnect term in a modern award might have a chilling effect on employers seeking to bring dispute resolution matters to the FWC, for fear that a dispute resolution finding in favour of the employee may mean they face civil penalties under the modern award.[809] There is nothing to suggest that it was not the intention of Parliament to require civil penalties be applied to a breach of a modern award term and to introduce a separate statutory dispute resolution procedure, particularly as the introduction of the statutory right to disconnect procedure was likely not intended to suggest an award right to disconnect term should be treated differently to all other award terms.

A civil penalty for a breach of a right to disconnect term in a modern award is intended to penalise the employer for a breach of the right that has already occurred. Civil penalties under modern awards deter employers from breaching minimum legal standards outlined in the award. The deterrence operates both to punish the person who has breached the modern award term and to discourage others from breaching modern award terms. Civil penalties are imposed by the courts.

The statutory right to disconnect, conversely, is intended to support dispute resolution processes and to enable the FWC to issue a stop order to ensure parties comply with the right to disconnect moving forward. The dispute is dealt with by the FWC, which is designed for quick, informal, and inexpensive dispute resolution, and the objective is to resolve the dispute or stop the behaviour. Parties may still face civil penalties for a breach of a stop order, which are imposed by courts.

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[806] *Variation of modern awards to include a right to disconnect term* [2024] FWCFB 338 [3].
[807] Ibid [7]; *Fair Work Act 2009* (Cth) ss 157–158.
[808] *Fair Work Act 2009* (Cth) s 45.
[809] AIG, Submission No 82 (8 March 2026) 46 [223]; AIG, Submission on Draft Report No 45 (31 May 2026) 24 [142]–[146].

It is too early to determine the extent of any interaction between the 2 distinct right to disconnect streams, noting their different objectives and potential outcomes. The Review has not been presented with any evidence of a chilling effect occurring in practice. The interaction between the 2 enforcement streams and any potential chilling effect should be considered in the further review of the right to disconnect measure, when there is more experience with the scheme and a greater number of cases.

The reason for the contact or attempted contact

Subsection 333M(3) lists the matters the FWC must consider when determining whether a refusal of contact or attempted contact is unreasonable.

Paragraph 333M(3)(a) provides that:

> *Without limiting the matters that may be taken into account in determining whether a refusal is unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:*
>
> *(a) the reason for the contact or attempted contact*[810]

Professor Blackham submits that by including within the matters that must be considered in determining unreasonableness 'the reason for the contact or attempted contact', the right to disconnect effectively requires the employee to engage with the contact (for example, to take the call or monitor emails) to determine if they can reasonably refuse to further engage. Professor Blackham argues that this may undermine the sanctity of non-working hours and recommended amending paragraph 333M(3)(a).[811]

The chapeau to subsection 333M(3) clarifies that the factors listed in subsection 333M(3) do no limit 'the matters that may be taken into account'. There is broad discretion in the matters that the FWC may consider and the weight it may attribute to each factor. If, for example, the employee had reason to not engage with the contact, the FWC may consider but not place any weight on the reason for the contact in its assessment of whether refusing to engage with contact was unreasonable. The FWC may also only place weight on the reason for the contact or attempted contact where the employee was aware of the reason for the contact.

Although the factor in paragraph 333M(3)(a) could effectively be weighted by the FWC to ensure an appropriate outcome that protects the essence of the right to disconnect, there is a real concern that the framing of legislation will incidentally and paradoxically encourage workers to believe they need to engage with the contact so they can justifiably disengage with the contact. This would be an adverse outcome, but as no cases have sought to grapple with the legislation and there is no evidence that workers have faced this challenge, it remains a theoretical concern.

[810] *Fair Work Act 2009* (Cth) s 333M(3)(a).
[811] Alysia Blackham, Submission No 14 (2 March 2026) 2.

Findings and recommendations

Early indications are that the measure appears to be supporting positive behavioural change in workplaces and has driven more conversations about appropriate contact outside working hours. However, there is limited information to draw definitive conclusions on the operation and impact of the right to disconnect as no significant cases have been considered by the FWC.

At this early stage, a few issues have emerged, including:

- Operational uncertainty, including what 'unreasonable contact' constitutes in practice and the operation of paragraph 333M(3)(a). Forthcoming FWC guidance will assist in further understanding of the operation of the right to disconnect.
- Interactions between the right to disconnect and specific modern award terms, including the dispute resolution procedure for a breach of the statutory right to disconnect and the separate enforcement stream for a breach of a modern award right to disconnect term. It is too early to determine the practical extent of any potential interaction between these 2 enforcement streams, but award variation processes can be used to resolve industry specific incompatibilities.

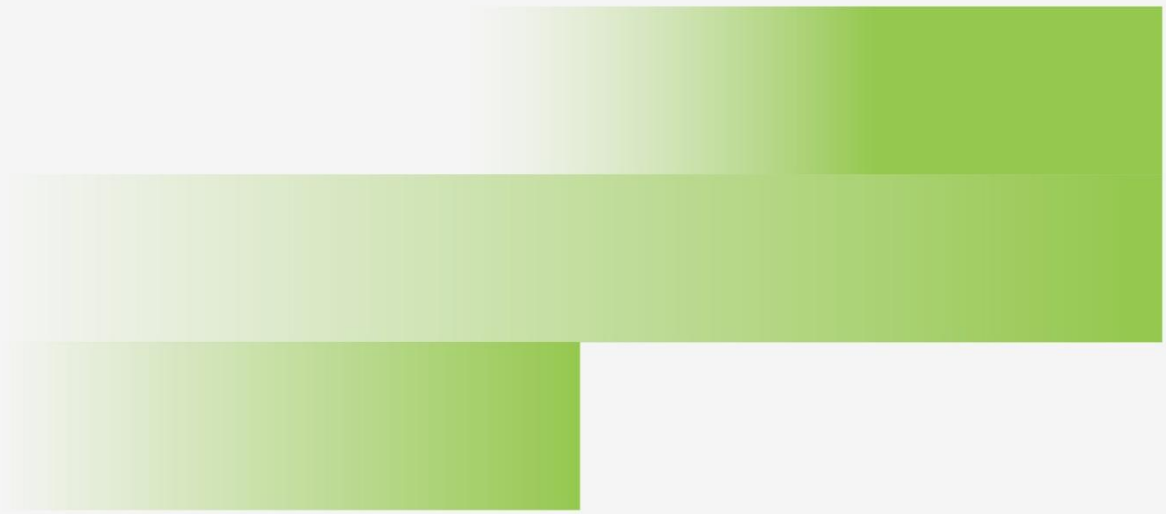
Recommendation 19

A further review of the right to disconnect should occur in 2 to 3 years. The review should have regard to relevant matters, including:

- any Fair Work Commission jurisprudence that has developed, including identifying the boundaries of reasonableness of after-hours contact
- any interaction between the statutory dispute resolution process and the application of civil penalties for a breach of a right to disconnect term in a modern award, and
- any industry specific issues.

Chapter 3

‘Same job, same pay’ and the bargaining framework



3.1 Regulated labour hire arrangement orders

What the measure does

The Closing Loopholes No. 1 Act amended the FW Act to allow the FWC to make a regulated labour hire arrangement order (**RLHAO**), which requires that labour hire employees working for a regulated host be paid at least what they would receive under the host's employment instrument.[812] This measure is also referred to as 'closing the labour hire loophole' or 'Same Job, Same Pay'.[813]

The measure commenced on 15 December 2023 with orders able to come into force from 1 November 2024.[814] The amendments required the FWC to issue guidelines on the operation of RLHAOs by no later than 1 November 2024.[815]

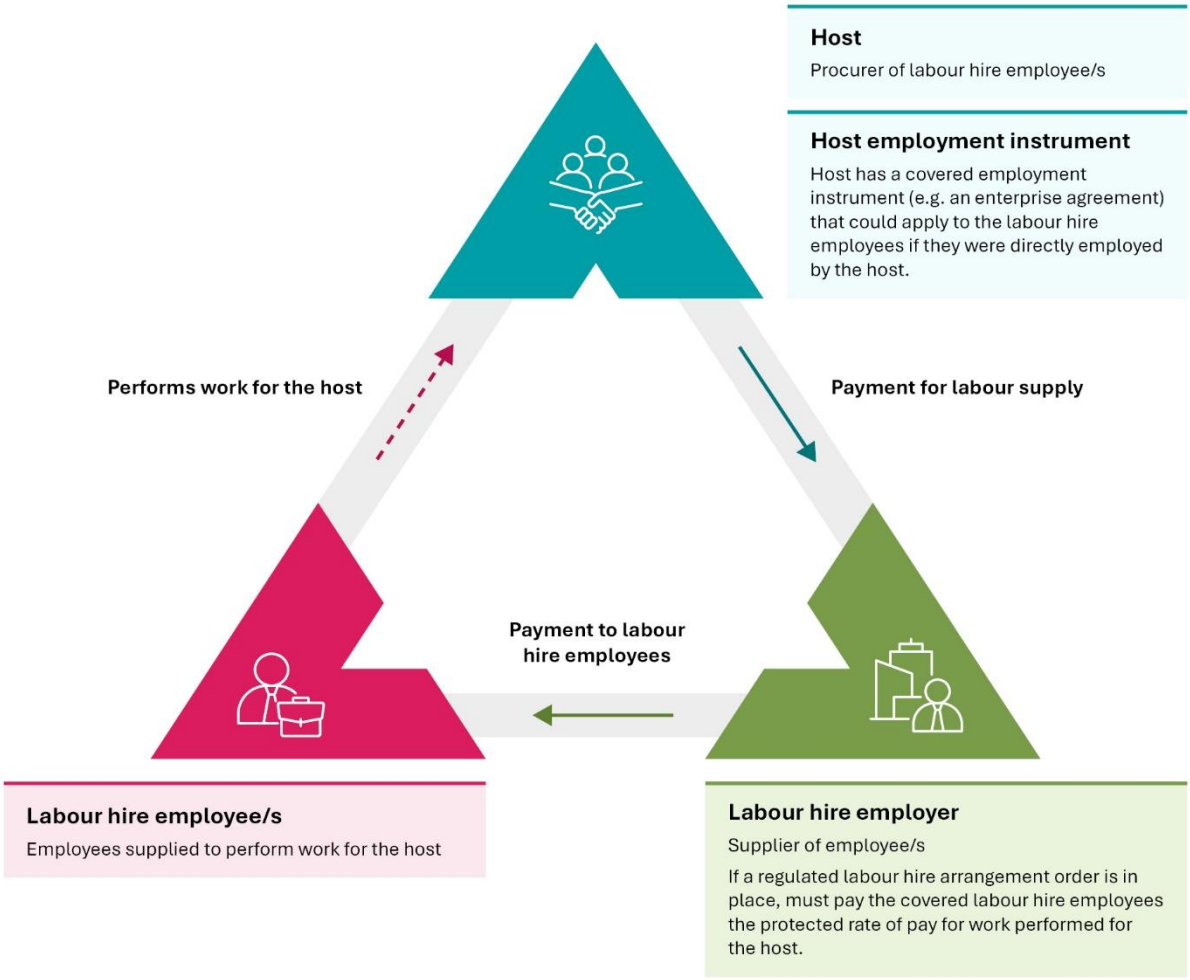
Regulated Labour Hire Arrangement Orders

The amendments allow regulated employees ('labour hire employees'),[816] the regulated host (the 'host'),[817] employees of the host, and an employee organisation (a union) to apply to the FWC for a RLHAO.[818]

Employers (labour hire employers) cannot apply for an order.

[812] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 1 pt 6.
[813] The term 'Same Job, Same Pay' was referred to in the 'Secure Australian Jobs Plan' published by the then Opposition Leader Anthony Albanese, 15 November 2021. DEWR also used that term in the 'Same Job, Same Pay Consultation Paper', published April 2023. When the Closing Loopholes Bill was introduced on 4 September 2023, the measure was called 'Closing the labour hire loophole'. Many stakeholders still use the term Same Job, Same Pay when referring to the measure.
[814] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2(1) item 7; *Fair Work Act 2009* (Cth) s 306E(9)(e)(i)).
[815] *Fair Work Act 2009* (Cth) s 306W.
[816] A regulated employee is a person who is supplied or who will be supplied by an employer to a regulated host (see ibid s 306E(5)).
[817] A host is a business that engages workers through a labour hire employer. 'Regulated host' is defined under s 306C of the FW Act, and includes a constitutional corporation, the Commonwealth or a Commonwealth authority, and a body corporate incorporated in a Territory.
[818] *Fair Work Act 2009* (Cth) s 306E(7).

Figure 1: Regulated labour hire arrangement orders



The FWC must make the RLHAO if it is satisfied that the labour hire employer supplies or will supply their employees to perform work for a host and the host's employment instrument would apply to the labour hire employees if the host were to directly employ them for the work.[819] Work performed for a person includes work performed wholly or partly for the benefit of the person, the enterprise of the person or a joint venture or common enterprise engaged in by the person and other persons.[820]

The FWC cannot make a RLHAO if the host is a small business employer.[821]

The FWC must not make a RLHAO unless it is satisfied that the work is not or will not be for the provision of a service, rather than the supply of labour,[822] having considered the following matters:

[819] Ibid ss 306E(1)(a)–(b).
[820] Ibid s 306D(2).
[821] Ibid s 306E(1)(c).
[822] Ibid s 306E(1A).

- the involvement of the employer supplying the workers in matters relating to the performance of the work
- the extent to which the employer supplying the workers supervises or controls the employees when they perform the work
- the extent to which the supplied employees use or will use systems, plant or structures of the employer to perform the work
- the extent to which either the employer supplying the workers, or another person, is or will be subject to industry or professional standards or responsibilities in relation to the supplied employees, and
- the extent to which the work is of a specialist or expert nature.[823]

Evidence of these matters may weigh in favour of or against an arrangement being for a service rather than the supply of labour. For example, evidence that the employer directs, supervises or controls work being performed rather than the host might weigh in favour of an arrangement being for a service, whereas evidence that the host directs, supervises or controls work might weigh against it being an arrangement for services.[824]

The amendments also prevent the FWC from issuing a RLHAO unless it is satisfied that doing so would be fair and reasonable in all the circumstances, having regard to the following matters:

- the pay arrangements that apply to employees of the host including:
  - whether the employment instrument applies only to a certain class of employees
  - whether the employment instrument has ever in practice applied to an employee at a classification or grade that would be applicable to the labour hire employees, and
  - what the rate of pay applicable to the labour hire employee would be.
- the history of industrial arrangements applying to the host and the labour hire employer
- the relationship between the host and the labour hire employer
- if the work will be principally for the benefit of a joint venture or common enterprise of the host and one or more other persons:
  - the nature of the host's interests in the joint venture or common enterprise, and
  - the pay arrangements that apply to employees of any of the other persons engaged in the joint venture or common enterprise
- the terms and nature of the arrangement under which the work will be performed, including
  - the period it operates or will operate for
  - the location of the work being performed or to be performed
  - the industry in which the host and labour hire employer operate in, and
  - the number of labour hire employees of the labour hire employer performing, or who are to perform, work for the host
- any other matter the FWC considers relevant.[825]

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[823] Ibid s 306E(7A).
[824] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 109 [635].
[825] *Fair Work Act 2009* (Cth) s 306E(8).

The RLHAO must specify the parties covered by the order and when the order comes into force.[826]

On application or on its own initiative, the FWC may also join additional labour hire employers and labour hire employees to the application.[827] It may do this if it is satisfied that the additional labour hire employers supply or will supply the labour hire employees to perform work for the host of the kind the original application contemplated.[828] The additional parties cannot be added to a RLHAO (if made) unless the FWC considers the nature of the arrangement and whether it is fair and reasonable if it were to be extended to this additional cohort.[829]

Once a RLHAO is made, relevant parties have obligations under the provisions. If a RLHAO exists and a new employment instrument that replaces the employment instrument covered by the order commences operation, the host must notify the relevant labour hire employers as soon as practicable.[830] If a RLHAO exists and the host becomes aware that a new labour hire employer will start to supply labour hire employees to perform the kind of work the RLHAO relates to, and the new labour hire employees are not covered by any RLHAO that covers the relevant labour hire employees in relation to performance of that work, the host must apply to the FWC to vary the order to cover the new labour hire employer and employees.[831] The host must notify the new labour hire employer after the application for an order is made.[832]

Protected rate of pay

If a RLHAO is made, the labour hire employer must pay the labour hire employee at no less than the protected rate of pay (**PROP**) for the work performed for the host.[833]

The PROP is the full rate of pay (as defined in the FW Act)[834] that, in effect, would be payable to the labour hire employee if they had been directly employed by the host.[835] The PROP overrides any lower rate of pay in a fair work instrument, employment instrument or employment contract that applies to the labour hire employee.[836] The intention is that the total overall amount paid to the labour hire employee is no less than the PROP.[837]

The FWC can make an alternative PROP order, which specifies how the rate of pay should be calculated.[838] The method for calculating the alternative PROP must be set by reference to the PROP that would apply if an alternative employment instrument applied to the employee.[839] The alternative employment instrument must be an instrument that applies to a related body corporate of the host

[826] Ibid s 306E(9).
[827] Ibid ss 306EA(1)–(2).
[828] Ibid ss 306EA(1)(a)–(b).
[829] Ibid ss 306EA(5)–(6).
[830] Ibid ss 306EC(1)–(2).
[831] Ibid ss 306ED(1)–(2).
[832] Ibid s 306ED(4).
[833] Ibid s 306F(2).
[834] Ibid s 18.
[835] Ibid s 306F(4).
[836] Ibid s 306F(10). Subsections 306F(5)–(9) set out how the PROP applies to casual employees and pieceworkers.
[837] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 117 [684].
[838] *Fair Work Act 2009* (Cth) ss 306M(1)–(2).
[839] Ibid s 306M(3).

or an instrument that applies to the host.[840] The FWC must only make the order if satisfied that it would be unreasonable for the normal PROP to apply and an alternative employment instrument exists, such as where the rate would be insufficient or excessive.[841]

Failure by a labour hire employer to pay the PROP is a civil remedy provision and can attract a fine of 60 penalty units, or 600 penalty units for a serious contravention.[842]

A labour hire employer will not breach the requirement to pay the PROP if they pay the labour hire employee less than the PROP because:

- they rely on incorrect information provided by the host when calculating the rate,[843] or
- they have not been appropriately notified of their involvement in an application for a RLHAO they were joined to, or after a successful tender.[844]

The PROP does not apply to labour hire employees under a training arrangement (for example, an apprentice or trainee contract) in respect of work being performed for the host.[845] The PROP also does not apply to labour hire employees that perform work for the host during a short-term arrangement of no more than 3 months (or as otherwise determined by the FWC).[846] The requirement to pay the PROP will apply if the employee performs work for longer than the 3-month period (or another exempt period specified by a FWC determination).[847]

Dispute resolution and anti-avoidance

The measure inserted processes for dealing with disputes about the quantum of the PROP and whether the employee is being paid in accordance with the PROP.[848] Parties must first attempt to resolve the issues at the workplace level, before they apply to the FWC to arbitrate the dispute.[849] The FWC must first deal with the dispute through other means (for example, mediation, conciliation or providing recommendations) before arbitrating, unless there are exceptional circumstances.[850]

If the dispute proceeds to arbitration, the FWC may deal with it including by making an arbitrated PROP order which determines how the PROP is calculated and that the labour hire employee must be paid in that way.[851] Failing to comply with an arbitrated PROP order constitutes a contravention which is subject to a civil penalty.[852]

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[840] Ibid ss 306M(3)(a)–(b).
[841] *Fair Work Act 2009* (Cth) s 306M(6); Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth)124–5 [726].
[842] *Fair Work Act 2009* (Cth) s 539 item 9A.
[843] Ibid s 306F(3).
[844] Ibid s 306F(3A).
[845] Ibid s 306G(1).
[846] Ibid s 306G(2).
[847] Ibid s 306G(3). See also Subdivision C, which provides for a process for determining an alternative period for short term arrangements.
[848] Ibid s 306P(2).
[849] Ibid ss 306P(3)–(4).
[850] Ibid s 306P(5).
[851] Ibid s 306Q(1).
[852] Ibid s 539 Item 9A.

The Closing Loopholes No. 1 Act also introduced the following anti-avoidance provisions, which are enforceable as civil remedy provisions under the FW Act:

- Where a labour hire employer or host enters, begins or carries out a scheme for the sole or dominant purpose of preventing the FWC from issuing a RLHAO, and the FWC is prevented from making a RLHAO as a result.[853]
- Where a labour hire employer or host enters, begins or carries out a scheme for the sole or dominant purpose of avoiding the application of a RLHAO and, as a result, avoids the application.[854]
- Where a labour hire employer engages successive labour hire employees for less than 3 months (or the applicable period determined by the FWC) to enliven the short-term arrangement exemption and avoid paying the labour hire employees in accordance with the RLHAO.[855]
- Where a host covered by a RLHAO enters into successive short-term labour hire agreements to achieve the result that the labour hire employer does not have to pay the labour hire employees in accordance with the RLHAO.[856]
- Where a labour hire employer covered by a RLHAO dismisses a labour hire employee and engages another person as an independent contractor under a services contract to undertake the same kind of work, to avoid the requirement to pay the PROP.[857]

Intention of the measure

This measure was introduced to prevent the undercutting of bargained wages through the use of labour hire.[858]

Inquiries into the use of labour hire in various industries had found that while many labour hire employers were operating in a fair way, some businesses were using labour hire to undercut employee conditions.[859] Because host enterprise agreements do not generally apply to labour hire workers, this can result in lower pay for some workers who work alongside directly engaged employees.[860]

To reduce administrative impacts on hosts that are small businesses, an exemption was included for small business employers.[861] Labour hire employees under training arrangements were also not required

[853] Ibid s 306S.
[854] Ibid s 306SA.
[855] Ibid s 306T.
[856] Ibid s 306U.
[857] Ibid s 306V.
[858] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 17 [76]–[77].
[859] See, for example, Victorian Inquiry into the Labour Hire Industry and Insecure Work, Parliament of Victoria, *Final Report* (Report, 31 August 2016); Senate Select Committee on Job Security, Commonwealth of Australia, *Third interim report: labour hire and contracting* (Report, November 2021); Senate Standing Committees on Education and Employment, Commonwealth of Australia, *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 Report* (Report, October 2022).
[860] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 17 [76].
[861] Ibid 109 [633].

to be paid the PROP to avoid impacting on training arrangements regulated by state and territory laws[862] and reduce barriers for employers providing training pathways to meet future skills demands.[863]

To avoid impacting labour hire arrangements for surge work,[864] to recognise that business may need to respond quickly to changing demand or deadlines,[865] and to support back-fill arrangements,[866] short-term labour hire arrangements were excepted from the requirement to pay the PROP.

What has happened since commencement

From commencement to 31 March 2026, the FWC has received 200 applications for a RLHAO and has made 110 orders in relation to 130 of these applications (in some cases a single order relates to multiple applications).[867] Unions and self-represented workers have applied for orders across a wide range of industries including mining, aviation, rail, meat processing, automotive, water treatment, warehousing, distribution and public administration. Of the RLHAOs made to date, approximately half of the applications were opposed in some form by the host or labour hire employer – in some cases the making of an order itself was opposed, and in other cases an order's form or timing was disputed.

Based on public reporting, DEWR calculates more than 8,000 workers have benefited from these amendments either directly or indirectly, receiving wage increases of up to $60,000 per year.[868] DEWR notes it is likely that significantly more than 8,000 workers have benefited, as less than half the orders have reported the number of employees that are covered. Direct benefits have been delivered in the form of wage increases resulting from RLHAOs. Indirect benefits have been delivered through agreements between unions, hosts and other labour hire employers, without a RLHAO, to increase labour hire employees' wages.

Examples of RLHAOs delivering significant wage increases for workers are presented below. There are important limitations with the available data. RLHAOs are not required to specify the number of workers covered, or the size of any pay increase. As a result, DEWR has provided the Review with indicative figures compiled using publicly available information. This is likely a significant undercount because, while media outlets reported on most orders made at first, media coverage has reduced as the making of RLHAOs became more commonplace.

[862] Ibid 17 [79].
[863] Ibid 119 [696].
[864] Ibid 17 [78].
[865] Ibid 119–20 [697].
[866] Ibid 119–20 [697].
[867] FWC data, provided 11 June 2026.
[868] DEWR data, provided 5 May 2026.

Examples of RLHAOs delivering significant wage increases for workers

- At 3 of BHP's Bowen Basin Mines in central Queensland, approximately 1,800 mineworkers received average pay rises of up to $30,000 per year.[869]
- Orders covering approximately 90 workers at Stanmore's Poitrel mine in Queensland resulted in significant increases to their pay – up to $60,000 a year in some cases.[870]
- At Qantas Airways, over 400 flight attendants secured pay rises of up to $20,000 a year, and another 350 workers secured pay rises of up to 42%.[871]
- At Glencore's United Wambo Open Cut Mine in New South Wales, 150 workers reportedly stood to receive pay rises of about $35,000 a year.[872]
- In the warehouse sector, workers at a Kmart distribution centre received an increase of up to $12 per hour, and workers at a Metcash distribution centre in Adelaide up to $12,666 per year.[873]

The Review is also aware of employers that have agreed to directly employ workers as an alternative to a RLHAO. For example, the MEU discontinued its application for an order after the host, Thiess, offered the 27 workers direct jobs at its Mount Pleasant coal mine, with a wage increase of more than $30,000.[874] BHP also transitioned 133 workers contracted through its Operations Services entities to direct jobs employed by BHP, for work being conducted at the Olympic Dam polymetallic mine.[875] In aviation, it was reported that the FAAA negotiated significant salary increases and other conditions with Qantas Airways Limited for workers flying long haul, through an enterprise agreement variation rather than applying for a RLHAO.[876]

On 31 October 2024, the FWC published guidelines on the operation of RLHAO, to assist with education and compliance.[877]

The number of RLHAOs applied for and made means that several key provisions have been considered by the FWC and the Federal Court of Australia (**Federal Court**).

[869] MEU, 'MEU wins crucial victory – BHP can't delay Same Job Same Pay' (Media Release, 10 September 2025).
[870] MEU, '$120 million+ in Same Job Same Pay pipeline for mineworkers' (Media Release, 28 October 2024).
[871] Workplace Express, 'Smooth landing for FAAA's Qantas SJSP bids' (online, 18 March 2025) <https://www.workplaceexpress.com.au/news/smooth-landing-for-faaa-s-qantas-sjsp-bids-80279?>.
[872] MEU, '$120 million+ in Same Job Same Pay pipeline for mineworkers' (Media Release, 28 October 2024).
[873] Workplace Express, 'Pay rises in store for on-hire warehouse workers' (online, 26 November 2024) <https://www.workplaceexpress.com.au/news/pay-rises-in-store-for-on-hire-warehouse-workers>.
[874] Workplace Express, 'SJSP case withdrawn after Thiess offers direct jobs' (online, 23 May 2025) <https://www.workplaceexpress.com.au/news/sjsp-case-withdrawn-after-thiess-offers-direct-jobs-63423>.
[875] Workplace Express, 'Volte face as BHP directly employs OS workers' (online, 1 May 2026) <https://www.workplaceexpress.com.au/news/volte-face-as-bhp-directly-employs-os-workers-81509>.
[876] Workplace Express, 'SJSP's shadow crucial to Qantas pay rejig: Union' (online, 14 October 2024) <https://www.workplaceexpress.com.au/news/sjsps-shadow-crucial-to-qantas-pay-rejig-union-63912>.
[877] FWC, *Guidelines for regulated labour hire arrangement orders* (31 October 2024).

Key decisions considering the service contracting exemption

BHP case

The first major decision on the service contractor exemption was the MEU and Australian Manufacturing Workers' Union (**AMWU**) application concerning labour hire workers at BHP's Goonyella Riverside, Peak Downs and Saraji mines (the ***BHP case***).[878] The former Minister intervened in the matter, making a submission on the application of the provisions, and providing relevant legislative history.[879]

The FWC Full Bench held that, when determining whether work is for the provision of a service, the proper approach is to inquire into the purpose or function of the work performed by the regulated employees, consider all of the matters in subsection 306E(7A) as significant, and consider whether the work forms part of an identifiable or discrete service distinct from working in or as part of the business of the host.[880] Applying that approach, the Full Bench found that the work was not performed as part of an identifiable and discrete service[881] and made the RLHAOs sought by the MEU and AMWU.[882]

BHP sought judicial review of the Full Bench's decision in *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194. The Federal Court confirmed that the service contractor exemption is a jurisdictional issue that must be resolved before the FWC can make an order, and that the labour versus provision of service question is one of fact and degree.[883] BHP's application for judicial review was dismissed, and the High Court of Australia later refused special leave to appeal on 9 April 2026.[884]

Poultry processing decision – cleaners

On 17 March 2026, the FWC dismissed an AMIEU application concerning cleaners employed by TCS Pty Ltd at a poultry processing facility in *Application by the Australasian Meat Industry Employees' Union re cleaning work at Bartter Enterprises' poultry processing facility* [2026] FWC 795.[885]

The FWC relied on the fact that TCS had sole responsibility for how work was performed, its employees used TCS systems, plant and structures, TCS was responsible for relevant compliance requirements, and the cleaning work was specialised in nature.[886]

This is the first application dismissed on the basis that a service, rather than labour, was supplied.

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[878] *Applications by the Mining and Energy Union re: Goonyella Riverside Mine, Peak Downs Mine and Saraji Mine* [2025] FWCFB 134.
[879] Murray Watt, Minister for Employment and Workplace Relations, 'Outline of Submissions' (Fair Work Commission, MEU & AMWU applications for regulated labour hire arrangement orders, 9 December 2024).
[880] *Applications by the Mining and Energy Union re: Goonyella Riverside Mine, Peak Downs Mine and Saraji Mine* [2025] FWCFB 134, 19–20 [64].
[881] Ibid 70–1 [267]–[268].
[882] Ibid 90 [345]–[346].
[883] *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194 [40].
[884] *BHP Coal Pty Ltd v Mining and Energy Union* [2026] HCADisp 100.
[885] *Application by the Australasian Meat Industry Employees' Union re cleaning work at Bartter Enterprises' poultry processing facility* [2026] FWC 795, [48]–[50].
[886] Ibid [46].

Poultry processing decision – deboners

In *Application by the Australasian Meat Industry Employees' Union re chicken deboning work at Bartter Enterprises' poultry processing facility* [2026] FWC 873, the FWC reached the opposite conclusion in a separate AMIEU application involving chicken deboners employed by J&T Trade Pty Ltd (**J&T**) at the same poultry processing facility.[887] Although J&T organised, trained, directed and supervised the skilled work,[888] the FWC gave greater weight to factors pointing to labour supply, particularly that J&T did not supply any significant plant, equipment, or structures, and that the deboning work was integrated with employees of the host.[889] The FWC found J&T was supplying labour and made the RLHAO.[890]

The host has appealed the decision, with a Full Bench to hear the appeal on 17 June 2026.[891] That appeal may provide another important piece of guidance, especially on how the FWC should weigh supervision and skill against integration into the host business.

Oil and gas contractor matters

It has been reported that unions have lodged 4 applications involving contractors in the oil and gas sector in the past year, but 3 of these applications have been withdrawn before a decision was issued.[892]

In the remaining matter, the Electrical Trades Union (**ETU**) has applied for orders covering workers employed by a maintenance contractor that performs electrical work at an oil and gas project.[893] The host is expected to argue that it is excluded as a specialist service contractor.[894] This case is likely to provide further guidance on the service contractor exemption.

Decision considering scope of orders

Bengalla Mining and judicial review

In *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53 (***Bengalla Mining***), the FWC Full Bench considered not only whether orders should be made, but also the scope of the order.[895] The respondents argued that an order would give rise to acquisition of property on unjust terms, that it was not fair and reasonable to make the orders because of impacts on enterprise bargaining and commercial arrangements, and that the proposed scope was too broad and should exclude certain groups of employees including trainees and future employees.[896]

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[887] *Application by the Australasian Meat Industry Employees' Union re chicken deboning work at Bartter Enterprises' poultry processing facility* [2026] FWC 873.
[888] Ibid [80].
[889] Ibid.
[890] Ibid [90]–[93].
[891] Workplace Express, 'SJSP freeze bid; Maher keeps IR in SA; & more' (online, 8 April 2026) <https://www.workplaceexpress.com.au/news/briefs-81429>.
[892] David Marin-Guzman, 'New union battleground emerges in oil and gas', Australian Financial Review (online 10 March 2026) <https://www.afr.com/work-and-careers/workplace/new-union-battleground-emerges-in-oil-and-gas-20260310-p5o90b>.
[893] Ibid.
[894] Ibid.
[895] *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53.
[896] Ibid [4].

The FWC Full Bench rejected those arguments. It held that an order would not amount to an acquisition of property,[897] and it was not satisfied that it is not fair and reasonable to make an order despite acknowledging the impact on bargaining and the financial impact.[898] The FWC made the orders to apply to all employees of the labour hire provider performing work at the mine who would, if employed by the host, be covered by the relevant host enterprise agreement.[899]

One of the labour hire providers, Skilled Workforce Solutions, then sought judicial review. The Federal Court found that the FWC had framed the order too broadly compared with the cohort of employees identified in its reasons and supported by the evidence.[900] The Federal Court noted that an order could extend to all employees covered by a host enterprise agreement, but this is dependent on the evidence presented, as the scope of an order needs to be linked to the cohort of employees the FWC is satisfied it can make an order about.[901] Put simply, the FWC defined the regulated labour hire employees in its decision, but then made an order that covered a broader scope of employees.

This decision may result in the FWC making orders that more clearly specify cohorts of regulated employees, and may cause parties to present more detailed factual evidence in applications before the FWC.

Disputes about existing orders

Pre-RLHAO service may be considered when determining the PROP

Since late 2025, disputes have started to arise about the operation of in-force RLHAOs, especially in relation to the PROP.

The first dispute concerned whether the annual incentive bonus under the host enterprise agreement formed part of the PROP. *Teyon Loudon v WorkPac Pty Ltd and Another* [2026] FWCFB 103 (***Loudon***) was an appeal related to whether labour hire employees covered by the RLHAO were entitled to the annual bonus provided under the host enterprise agreement based on their service over the calendar year, including service before the RLHAO took effect. The labour hire employer argued that the obligation only operated prospectively from the commencement of the order.[902]

On 4 May 2026, a Full Bench of the FWC determined that the PROP does need to consider service before the commencement of the RLHAO, noting that an assessment of the PROP 'does not ignore the history, service, attributes, experience and qualifications of the regulated employee or begin with an assumption that the employee is a new starter at the date the regulated labour hire arrangement order comes into operation.'[903] The Full Bench further determined that section 306F does not have retrospective operation merely because it may require past events to be taken into account for the purpose of determining the

[897] Ibid [60].
[898] Ibid [113].
[899] FWC, *Bengalla Mining Company Pty Ltd Regulated Labour Hire Arrangement Order* [LH200021].
[900] *Skilled Workforce Solutions (NSW) Pty Ltd v Mining and Energy Union* [2025] FCAFC 195, [98].
[901] Ibid [101].
[902] *Loudon v WorkPac Pty Ltd trading as WorkPac* [2025] FWC 2554, [4]–[5].
[903] *Teyon Loudon v WorkPac Pty Ltd and Another* [2026] FWCFB 103, [60].

amount of future payments.[904] The decision was remitted to DP Slevin to be resolved in a manner consistent with the Full Bench's conclusions.[905]

The second dispute concerns whether service prior to a RLHAO coming into effect counts for the purpose of determining the applicable rate of pay under a PROP.[906] *Workpac Pty Ltd v Loretta Bennett* [2026] FWCFB 102 (***Bennett***) was an appeal related to whether Ms Bennett's pre-RLHAO service at the mine should be considered when determining the PROP and, as a result, whether she should be paid at the higher rate of the Mineworker Level 2 classification. Ms Bennett argued that prior service was relevant. The labour hire employer contended that only service after the commencement of the order was relevant and the employee should be paid at the lower rate of the Mineworker Level 1 classification.

The Minister intervened in the proceedings, supporting Ms Bennett's contention that prior service and experience should be considered.[907] The Full Bench found that there was no basis to suggest that the rate of pay that 'would be payable' under subsection 306F(4) should be determined by ignoring attributes of the employee simply because they arose from, or were acquired at, a time prior to the RLHAO coming into force.[908]

The effect of both decisions is that service prior to the commencement of a RLHAO is to be considered when determining the PROP.

Labour hire provisions in agreements

In *Aldi Foods Pty Limited As General Partner Of Aldi Stores (A Limited Partnership) T/A Aldi Stores* [2024] FWC 1507, the Shop, Distributive and Allied Employees' Association (**SDA**) argued the *ALDI Derrimut Agreement 2024* included clauses purporting to set a rate of pay for labour hire employees performing work for Aldi under a future RLHAO, and that this was an attempt to circumvent the application of this measure.[909] While the SDA did not argue the clauses were inconsistent with the anti-avoidance provisions for this measure, it did seek to invalidate the clauses for reason of their being 'repugnant to the scheme of the [FW] Act'.[910]

The FWC did not accept the SDA's argument, however it required an undertaking from ALDI that the labour hire clauses be deleted and taken to have no effect, because it found the clauses were not genuinely agreed.[911]

[904] Ibid [62].
[905] Ibid [73]–[75].
[906] *Workpac Pty Ltd v Loretta Bennett* [2026] FWCFB 102.
[907] Ibid [10], [56].
[908] Ibid [59].
[909] *Aldi Foods Pty Limited As General Partner Of Aldi Stores (A Limited Partnership) T/A Aldi Stores* [2024] FWC 1507 [20]–[25].
[910] Ibid.
[911] Ibid [67]–[70].

What the Review heard

There was a large amount of stakeholder feedback on this measure, including on its consideration in the Review's Draft Report, with stakeholders reporting strongly contrasting experiences of the RLHAO framework to date.

Employer groups

Employer submissions generally opposed the measure in whole or part, arguing it went far beyond its intended scope. Submissions on the Draft Report also generally disagreed with the Review's preliminary finding that the measure is operating appropriately and effectively.[912] For example, ACCI submitted that the scheme has expanded beyond its stated intent, with broad coverage and outcomes not limited to the 'same job' or deliberate undercutting of bargained rates in enterprise agreements.[913] The Minerals Council of Australia (**MCA**) argued orders are operating beyond their intended scope, are capturing more than labour hire, and are applying to roles that are not the 'same job'.[914] AIG submitted that the measure was at all points unnecessary, and that any concerns about the use of labour hire to undercut wages in enterprise agreements could have been addressed in host enterprise agreements through 'site rates' or 'jump up clauses'.[915]

Employer groups argued that the measure had significant wage impacts on business and was leading to higher costs due to both wage increases and compliance costs. AIG said that the high wage increases being awarded were at levels that may have adverse and potentially ruinous impacts on labour hire employers and their sustainability.[916] BCA argued that the FWC was taking the view 'that high costs to labour hire employers are an inevitability and casts doubt on whether it would ever be possible for the costs of [an order] to lead to a finding that it is not fair and reasonable to grant the [order].'[917]

The Australian Resources & Energy Employer Association (**AREEA**) highlighted the 'distortion' of the measure on enterprise bargaining dynamics. It argued that employers are increasingly adopting a more defensive bargaining posture, moderating wage outcomes, tightening classification structures and allowances to manage downstream exposure through labour supply arrangements, while unions are seeking to broaden coverage, increase base rates and introduce new allowances with the goal of flowing these through to future orders.[918]

MCA submitted that, based on its analysis of Resources Safety and Health Queensland data, mines with RLHAOs have experienced lower employment growth than comparable mines without orders.[919] MCA contended the Draft Report did not address the impact of the measure on employment growth.[920]

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[912] See, for example, BCA, Submission on Draft Report No 18 (29 May 2026) 5; AIG, Submission on Draft Report No 45 (31 May 2026) 25–6 [147]–[149].
[913] ACCI, Submission No 54 (3 March 2026)14–15 [73]–[86].
[914] MCA, Submission No 51 (3 March 2026) 3.
[915] AIG, Submission No 82 (8 March 2026) 20 [94]–[95].
[916] Ibid 21 [103].
[917] BCA, Submission No 50 (3 March 2026)16, [5.3.2].
[918] AREEA, Submission No 49 (3 March 2026) 12–13 [76]–[81].
[919] MCA, Submission on Draft Report No 42 (29 May 2026) 11.
[920] Ibid.

Unions

The ACTU called the measure 'highly successful' and provided several examples from affiliates of workers gaining large pay increases as a result of an order being made.[921] The ACTU's submission on the Review's Draft Report reiterated its view that the measure has had a positive impact.[922] The MEU, which has been the applicant in over 50 successful applications, resulting in orders covering more than 5,000 workers,[923] estimates that its applications have led to over $140 million in annual pay rises for labour hire workers.[924]

Unions noted that a significant effect of the new provisions has been the increase in direct employment of employees by businesses that had previously used labour hire providers.[925] The MEU also noted that the measure is changing employer behaviour, with a number of employers directly hiring workers.[926]

While unions supported the measure and agreed it was generally appropriate and effective, they also suggested a range of amendments aimed either at protecting the integrity of the RLHAO framework, enhancing its operation, or expanding the scope of the framework.

Other stakeholders

JobWatch, and some community organisations such as NATSIWA, NRWC and WLS NSW, support the measure overall.[927]

Some stakeholders supportive of the measure suggest further reform is necessary, with JobWatch stating that the measure does not address 'the fundamental problem with labour hire – artificial contractual arrangements insulating the host from the worker'.[928] JobWatch argues this in turn facilitates the avoidance of employment obligations including entitlements accrued according to length of service.

NATSIWA noted risks to the effectiveness of the measure, including the need for effective enforcement and the risk of avoidance behaviours such as cycling through short term contracts. NATSIWA recommended consideration of whether anti-avoidance protections are sufficient.[929]

Professor Wright describes the measure as necessary to restore integrity to the bargaining system and prevent undercutting of bargaining outcomes. Professor Wright's submission outlines changes in enterprise bargaining, noting the 'fragmentation' of workplaces and argues that, as business structures and labour markets evolve, the regulatory framework must adapt accordingly.[930]

[921] ACTU, Submission No 67 (6 March 2026) 15–16.
[922] ACTU, Submission on Draft Report No 33 (29 May 2026) 18.
[923] MEU, Submission No 76 (6 March 2026) 10 [21].
[924] Ibid 8 [15].
[925] ACTU, Submission No 67 (6 March 2026) 16.
[926] MEU, Submission No 76 (6 March 2026) 8 [17].
[927] JobWatch, Submission No 72 (6 March 2026) 14; NATSIWA, Submission No 30 (3 March 2026) 3; NRWC, Submission No 29 (3 March 2026) 7; WLS NSW, Submission No 69 (6 March 2026) 13 [38]–[39].
[928] JobWatch, Submission No 72 (6 March 2026) 15.
[929] NATSIWA, Submission No 30 (3 March 2026) 3–4.
[930] Chris F Wright, Submission No 13 (2 March 2026) 5–6.

Adrian Boothman submitted in his feedback on the Draft Report that a further review should consider the unintended impact on labour market flexibility and productivity arising from this measure,[931] while the CIS submitted the Draft Report did not give sufficient consideration to the fact that labour hire arrangements often enable workforces to exist which would otherwise not be economically viable.[932]

'Fair and reasonable' test

Employer groups argued the 'fair and reasonable' test[933] is not operating effectively. AREEA submitted that, in several cases, 'labour hire providers have led detailed evidence of significant financial and commercial impacts flowing from the making of an order' but have not succeeded in arguing that it would not be fair and reasonable for the FWC to make the order.[934] ACCI and MCA similarly pointed to the lack of success of parties in using the test, submitting that, with more than 100 orders made, the fair and reasonable test has not yet prevented the issuing of an order.[935] AREEA recommended the test be amended to 'expressly require the FWC … to consider the commercial viability and financial impact of a proposed RLHAO order on the labour hire employer'.[936] AIG agreed that the criteria for assessing fairness and reasonableness should explicitly include the impacts of cost increases on employers and hosts (and other parties), and also suggested amending the test to require that the FWC be satisfied that it would be fair and reasonable to make the order.[937] The CIS also questioned whether the test is operating as a meaningful constraint, given the number of orders being made that have substantial commercial and operational impacts.[938]

Service contractor exemption

Across all stakeholder groups, the service contractor exemption was a recurring fault line. Employer groups say the service contractor exemption is not operating as intended because the test is subjective, which drives uncertainty, compliance risk, and litigation. For example, ACCI said that 'promised protections for service contractors are not reliable given the FWC can consider any other matters it deems relevant', and that with no legal definition, matters often require lengthy litigation.[939]

Generally, employer groups argued the service contractor test is too vague and can therefore capture genuine service contractors. AREEA noted the government had agreed to amendments to strengthen the service contractor exemption while the Bill was before Parliament, which it was satisfied delivered a clear carve-out for service contractors. However, it argued that the FWC decisions in *Applications by the Mining and Energy Union re: Goonyella Riverside Mine, Peak Downs Mine and Saraji Mine* [2025] FWCFB 188 had the effect of 'significantly raising the evidentiary threshold for service contractors and reintroducing many of the features that AREEA had sought to remove through its negotiations with the Government, undermining the certainty and discipline the exemption was intended to provide'.[940] AREEA

[931] Adrian Boothman, Submission on Draft Report No 2 (20 May 2026) 5–6.
[932] CIS, Submission on Draft Report No 4 (25 May 2026) 4.
[933] *Fair Work Act 2009* (Cth) s 306E(2).
[934] AREEA, Submission No 49 (3 March 2026) 13–14 [88].
[935] ACCI, Submission No 54 (3 March 2026) 14–15 [80]; MCA, Submission No 51 (3 March 2026) 11.
[936] AREEA, Submission No 49 (3 March 2026) 14–15 [94].
[937] AIG, Submission No 82 (8 March 2026) 26.
[938] CIS, Submission on Draft Report No 4 (25 May 2026) 4.
[939] ACCI, Submission No 54 (3 March 2026) 15 [86].
[940] AREEA, Submission No 49 (3 March 2026) 20 [129].

further noted the Federal Court's decision in the *BHP case* did not provide substantive guidance on what is considered labour hire versus service contracting, entrenching uncertainty for employers.[941] MCA similarly argued the decision in the *BHP case* is inconsistent with the government's intention to exclude service contractors and that this is an unintended consequence of the measure.[942]

A common solution proposed by employer groups in their submissions is to amend the FW Act to provide explicit legislative clarity, including clear definitions and an express exclusion for genuine service contracting, so that genuine service provision is not treated as labour hire. For example, MCA proposed the FW Act be amended to include a clear and workable definition of 'labour hire' that does not rely on discretionary factors,[943] while AREEA proposed the statutory test should be exhaustive and determinative, precluding the consideration of other factors.[944] AREEA added that any amendments to restore certainty that service contracting is excluded should make it clear that speculative or opportunistic applications are discouraged.[945]

Employer groups also warned the current settings risk treating genuine subcontracting as labour hire, and say the legislation does not give enough legal certainty that subcontractors are excluded. For example, NECA raised concerns that while it believed the government did not intend to capture subcontracting, this is not explicit in the legislation.[946]

Unions said the service contractor exemption can operate as a practical hurdle or loophole, because employers can run service contracting defences that make the jurisdictional test resource intensive and contribute to delays in getting orders made.[947]

Several unions argued the current exemption settings are too easy to satisfy and should be tightened so only genuinely specialised services are excluded, not ordinary labour supply that should fall within the scheme. For example, the MEU proposed narrowing the exemption to specialised tasks that are not, have not been, and could not be performed by host employees (or related entities).[948] The ACTU similarly recommended tightening the service contractor exemption to apply only to tasks that are 'of a specialised nature when compared to the tasks performed by the host employees, and … tasks of that kind are not, have not been, or could not be performed by employees of the regulated host'.[949] A recurring recommendation was to shift the evidentiary onus onto labour hire employers to prove that it is a service contractor, as they have the specific knowledge about the way the relationship between the employer and host operates.[950]

[941] Ibid 21 [134], [136].
[942] MCA, Submission on Draft Report No 42 (29 May 2026) 7.
[943] MCA, Submission No 51 (3 March 2026) 5.
[944] AREEA, Submission on Draft Report No 47 (29 May 2026) 1–2.
[945] AREEA, Submission No 49 (3 March 2026) 23–4 [156].
[946] NECA, Submission No 3 (2 February 2026) [5].
[947] ACTU, Submission No 67 (6 March 2026) 19; AMWU, Submission No 38 (3 March 2026) [12]–[13].
[948] MEU, Submission No 76 (6 March 2026) 13 [35].
[949] ACTU, Submission No 67 (6 March 2026) 19.
[950] Ibid 6; AMIEU, Submission No 56 (4 March 2026) 1 [4].

Training and short-term exemptions

Several submissions addressed the exemptions for employees in a training arrangement and short-term arrangement (an engagement of 3 months or less).

Unions argued the apprentice, trainee, and training arrangement exemptions create loopholes or incentives to structure work as traineeships to avoid coverage, and proposed removing or repealing these exemptions.[951] In submissions on the Draft Report, the ACTU and other unions reiterated their position in respect of these exemptions.[952] The MEU submitted that trainees engaged through labour hire arrangements are among the most vulnerable workers and are often engaged on lower rates of pay in circumstances where the training component of their arrangement may be minimal or incidental to the work they perform. It included a comparison of 2 job advertisements for the same labour hire employer that it argued demonstrates that traineeships are being used as a vehicle to circumvent the RLHAO framework and pay labour hire workers less than permanently engaged workers.[953] The UWU submitted it has observed a misunderstanding or exploitation of the short-term arrangement exception, providing examples of host employers engaging successive employees for periods of 3 months and removing long-term labour hire employees from sites.[954]

The ETU expressed concern with the pay of apprentices engaged as labour hire through a Group Training Organisation (**GTO**) and suggested it is common for GTO apprentices to be paid substantially less than the directly hired apprentices they are working alongside.[955] The ETU argued it is this difference in pay that the measure was intended to address. The AMWU also expressed concern with the use of the GTO system to pay reduced wages to apprentices.[956]

The ETU acknowledged the basis for excluding trainees and apprentices, as cited in the Review's Draft Report and the Revised Explanatory Memorandum for the Bill, was to avoid impacting upon training arrangements regulated by state and territory laws, and to reduce the barriers to employers providing training pathways.[957] The ETU submitted there would be no impact to the training arrangement purpose, as the training contract describes the requirement to pay wages and conditions by reference to the relevant employment arrangements.[958] In relation to the training pathways purpose, the ETU submitted that employer incentives to hire apprentices would not be impacted by removing the exclusion as apprentice demand is driven by other structural factors, and they are still paid less than fully qualified tradespersons.[959] The AMWU and ETU further submitted there is evidence to suggest that removing the exclusion would address the financial pressures that result in apprentices not finishing their apprenticeships, which would positively impact completion rates.[960]

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[951] ETU, Submission No 12 (2 March 2026) 2–6; AMWU, Submission No 38 (3 March 2026) [6]–[8]; ACTU, Submission No 67 (6 March 2026) 20.
[952] See, for example, ACTU, Submission on Draft Report No 33 (29 May 2026) 18–19; ETU, Submission on Draft Report No 8 (29 May 2026) 3–4.
[953] MEU, Submission No 76 (6 March 2026) 18 [48]–[50].
[954] UWU, Submission No 62 (6 March 2026) 7–8.
[955] ETU, Submission on Draft Report No 8 (29 May 2026) 3–4.
[956] AMWU, Submission on Draft Report No 27 (29 May 2026) 1–3.
[957] ETU, Submission on Draft Report No 8 (29 May 2026) 2.
[958] Ibid 4–5.
[959] Ibid 9.
[960] Ibid 5–7; AMWU, Submission on Draft Report No 27 (29 May 2026) 3–5.

Employer groups on the other hand proposed broader exemption pathways to reduce regulatory impact, such as extending the short-term work exemption to 12 months. CCIWA submitted this would ensure that the majority of true seasonal work is protected and argued this would be reasonable given the level of compliance involved in a RLHAO.[961]

Scope of orders

Many employer groups proposed narrowing the scope of the framework, so that orders are confined to genuinely the same work in substance and classification, and targeted to circumstances involving deliberate undercutting. ACCI submitted that the FWC has made orders even where the host does not currently employ workers in an identical role, which has required employers to calculate the PROP for hypothetical positions, resulting in considerable ambiguity.[962] BCA argued that the provision was drafted to capture *all employees* who could be covered by a host enterprise agreement which has led to broadly drafted classifications in some agreements being inappropriately applied to a labour hire worker that is substantially less skilled.[963] AIG also noted the issue of applying an enterprise agreement to workers it had never contemplated covering, and argued orders should not be available where labour hire workers are not genuinely performing the same duties as a host employee.[964]

AIG also argued that RLHAOs 'should not be available where labour hire arrangements are addressed in a host's enterprise agreement.'[965] AIG submitted that this would be consistent with the objective of encouraging enterprise bargaining, and would 'lead to more suitable, sustainable, fair and equitable arrangements' than would arise from an RLHAO made by the FWC.[966] AIG also submitted that this proposed amendment would provide 'certainty as to projected operating costs.'[967]

BCA argued that a number of orders the FWC has made do not appear to align with the intent of the measure. It referenced an example of 'same job, already paying the same pay' where an order was made despite the labour hire employer already paying staff in accordance with the host's enterprise agreement,[968] and an example of 'same job, more pay for accrued leave' where the FWC made the order despite acknowledging the significant impact on leave liabilities.[969] MCA similarly referred to several orders it argued went beyond providing the same pay for the same job, including an example of labour hire workers receiving increased pay for working additional unsocial hours while not being required to work these hours,[970] and another example where the labour hire company's pay structure that accounts for skills and experience was overridden by that of the host which did not account for these factors.[971]

[961] CCIWA, Submission No 75 (6 March 2026) 22.
[962] ACCI, Submission No 54 (3 March 2026) 15 [81].
[963] BCA, Submission No 50 (3 March 2026) 20.
[964] AIG, Submission No 82 (8 March 2026) 24 [118]–[119].
[965] Ibid 23 [111]; AIG, Submission on Draft Report No 85 (31 May 2026) 25 [156 a].
[966] AIG, Submission No 82 (8 March 2026) 23 [113].
[967] Ibid 23 [114].
[968] BCA, Submission No 50 (3 March 2026)16.
[969] *Application by the Mining and Energy Union re Mount Thorley/Warkworth Mine* [2025] FWC 973.
[970] MCA, Submission on Draft Report No 42 (29 May 2026) 10, referring to the Bengalla Mining decisions.
[971] Ibid, referring to *Application by the Mining and Energy Union re Mount Thorley/Warkworth Mine* [2025] FWC 973.

MCA said that because the legislation does not focus on circumstances where 'undercutting' has occurred, the regime applies whenever a supplied employee is paid less than they would receive under the host's enterprise agreement, regardless of any effect on bargaining power.[972] ACCI submitted that the amendments were not limited to cases of deliberate undercutting as they do not require establishing the employer's purpose or intent.[973] MCA submitted that the application of the framework to scenarios in which bargained wages are not 'deliberately undercut' was contrary to public statements made by the government about the measure.[974]

To mitigate these issues, BCA and AIG recommended confining orders to genuinely the same work in substance and classification,[975] and ACCI proposed limiting orders to genuinely the same work and where there is evidence of deliberate undercutting.[976]

Unions submitted that the current legislation could leave gaps in coverage and enable avoidance where a host engages a new labour hire employer for the same work covered by an existing RLHAO. For example, the UWU said that until the FWC makes a variation to an existing order, employees of the new labour hire provider will not receive the PROP, despite doing the same or substantially similar work to those covered by the order.[977] The UWU supported amendments to broaden practical coverage, including ensuring orders apply to new or future labour hire employers automatically rather than creating temporary loopholes while the host applies for a variation to the order.[978] On the other hand, the MCA argued strongly against the employer variation obligation. It stated it should be abolished, as it forces hosts to continuously monitor suppliers and litigate to bring new suppliers into orders, adding ongoing compliance costs and delays.[979]

Some unions raised concerns with the *Bengalla Mining* decision, in which the Federal Court found that the FWC defined the regulated labour hire employees in its decision, but then made orders that covered a broader scope of labour hire employees. The MEU submitted that the Federal Court's decision introduced significant complexity into the drafting and administration of orders and creates scope for unnecessary fragmentation of the protections available to labour hire employees at a given site.[980] The ACTU and MEU proposed that the scope of orders should default to the full scope of the host employment instrument unless genuine service contracting is established.[981]

Mr Rob Reitano, a barrister who acted for the MEU in the Bengalla Mining judicial review case, submitted that the effect of the decision is that it leaves the option of cheap labour hire open in relation to other classes or cohorts of employees until someone makes an application and an order is made in respect of them, which he likened to a 'leaking bucket'.[982] Mr Reitano proposed that an order should have the exact same scope as the host employment instrument even if at the time the order is made some classifications are not being engaged through labour hire.[983]

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[972] MCA, Submission No 51 (3 March 2026) 16.
[973] ACCI, Submission No 54 (3 March 2026) 15 [82].
[974] MCA, Submission on Draft Report No 42 (29 May 2026) 9.
[975] BCA, Submission No 50 (3 March 2026) 22; AIG, Submission No 82 (8 March 2026) 24 [115]–[119].
[976] ACCI, Submission No 54 (3 March 2026) 15 [82].
[977] UWU, Submission No 62 (6 March 2026) 8.
[978] Ibid 5.
[979] MCA, Submission No 51 (3 March 2026) 24–6.
[980] MEU, Submission No 76 (6 March 2026) 26 [81].
[981] ACTU, Submission No 67 (6 March 2026) 21–2; MEU, Submission No 76 (6 March 2026) 26 [82].
[982] Rob Reitano, Submission No 86 (12 March 2026) [7].
[983] Ibid [8].

Protected rate of pay

Employer groups submitted that the PROP framework is complex to calculate. ACCI pointed to complexity in PROP calculations,[984] the CCF raised the administrative burden of calculating the PROP,[985] and the MCA argued that uncertainty about how to calculate the PROP is increasingly driving disputes after orders have been made.[986] For example, ACCI argues 'Employers remain without guidance on determining the appropriate rate of pay when no direct comparator exists'.[987]

AIG argued that the PROP is unworkable, including because enterprise agreements do not require that each employee is paid the same rate for the same kind of work. AIG submitted that calculating the PROP is 'inappropriate and unworkable in many contexts', including in relation to incentive payments and bonuses, 'loaded' rates that incorporate various loadings, and other allowances and loadings that may be dealt with differently in host agreements and the instrument covering the labour hire employees.[988] AIG proposed amendments to require that the FWC may only make a RLHAO where it is satisfied that the PROP 'can be calculated and applied without ambiguity or uncertainty', and that the FWC should be required to consider whether calculation of the PROP would render the making of the order unreasonable.[989]

MCA expressed concern that in *Bennett*, when making the arbitrated PROP order, the FWC identified its role as determining the most appropriate method of approximating the rate that would be payable if the host agreement applied to the labour hire employee, rather than 'simply identifying the correct rate of pay in the "host" agreement'.[990] MCA contended this approach makes it impossible for employers to calculate the PROP before an arbitrated PROP order is made.[991] AREEA also expressed concern with this decision, and that of *Loudon*, as exposing labour hire employers to retrospective entitlement increases that were not considered when entering into contracts.[992] AREEA supported the FWC developing practical guidance on classification mapping, roster equivalence, and allowance treatment, and also argued for a statutory safe harbour from civil penalties where an employer makes an error when attempting in good faith to determine the PROP.[993]

Employer groups also called for more practical mechanisms and clarity to improve certainty, including clearer rate-setting in orders, improved guidance, and fixes to avoid retrospective liabilities.[994]

The main concern relating to the PROP for unions was addressing tenure-based differentials.[995] The MEU submitted that there is ambiguity in calculating the PROP where the host agreement includes classification progression based on time served at the previous level. It is unclear whether the labour

[984] ACCI, Submission No 54 (3 March 2026) 15 [81].
[985] CCF, Submission No 32 (3 March 2026) 1.
[986] MCA, Submission No 51 (3 March 2026) 3.
[987] ACCI, Submission No 54 (3 March 2026) 15 [81].
[988] AIG, Submission No 82 (8 March 2026) 35–8 [155]–[175].
[989] Ibid 35–40 [154]–[191].
[990] MCA, Submission on Draft Report No 42 (29 May 2026) 10–11.
[991] Ibid.
[992] AREEA, Submission on Draft Report No 47 (29 May 2026) 2.
[993] Ibid.
[994] RCSA, Submission No 64 (6 March 2026) 7–8; AIG, Submission No 82 (8 March 2026) 40.
[995] ETU, Submission No 12 (2 March 2026) 7.

hire employee's service before the commencement of the order should be taken into account.[996] Unions proposed tightening and clarifying how the PROP is set, including linking it to a directly engaged host employee doing equivalent work with equivalent service and skills.[997]

Several unions proposed that as well as pay, the regime should apply to terms and conditions.[998] As currently enacted, the RLHAO framework does not give labour hire employees access to the broader conditions of employment provided by the host or the host enterprise agreement, such as leave entitlements, rostering arrangements, access to consultation processes, or redundancy provisions.[999] The ACTU submission provided an Australian Workers' Union (**AWU**) case study where the different roster patterns between labour hire and direct employees would have meant that despite an order being made to give employees the higher pay, the FWC could not order the more beneficial roster. The result would have been that the labour hire employees would still be cheaper to engage to perform the work because of the additional 36.5 days they would work for the same remuneration as the direct hires.[1000]

The ACTU proposed amendments to extend orders to cover equal access to training, amenities, rostering, host vacancies and any other conditions in the host enterprise agreement that are more favourable, where practicable.[1001]

Delays in making an order

Several unions noted that while uncontested applications can progress in a timely way, contested matters can be delayed. For example, the MEU submitted that on average the 50 matters it has pursued have taken close to 8 months to progress from application to order.[1002] The FAAA noted that while it had managed to secure backpay undertakings for its members in 3 applications, the applications took 4 months to determine.[1003] The AMIEU submitted that respondents can run baseless objections which delay orders being made,[1004] and the ACTU and MEU argued that delays in making orders are not a result of FWC resourcing, but a deliberate tactic by employers to delay pay rises for labour hire employees.[1005] To address these concerns, unions recommended giving the FWC the ability to backdate orders to the date of the application. The AMIEU argued that it is unusual that RLHAOs are not backdated to the date of the application, when considering the approach to backpay in other FW Act matters such those concerning underpayment and unfair dismissal.[1006]

The ACTU and SDA submitted in their feedback on the Draft Report that the FWC should be subject to statutory timeframes within which it must deal with a RLHAO application, with the ACTU suggesting this

[996] MEU, Submission No 76 (6 March 2026) 15 [40].
[997] Ibid 16 [44].
[998] ACTU, Submission No 67 (6 March 2026) 21; MEU, Submission No 76 (6 March 2026) 25 [76]–[78]; AMWU, Submission No 38 (3 March 2026) [15].
[999] MEU, Submission No 76 (6 March 2026) 23 [71].
[1000] ACTU, Submission No 67 (6 March 2026) 22–3.
[1001] Ibid 21.
[1002] MEU, Submission No 76 (6 March 2026) 21 [63].
[1003] FAAA, Submission No 63 (6 March 2026) 11 [61].
[1004] AMIEU, Submission No 56 (4 March 2026) 3 [13].
[1005] ACTU, Submission on Draft Report No 33 (29 May 2026) 20; MEU, Submission on Draft Report No 12 (29 May 2026) 1.
[1006] AMIEU, Submission on Draft Report No 22 (29 May 2026) 1.

could be one month for uncontested applications and 3 months for contested applications.[1007] The MEU also recommended amendments to place the onus of proof on the party arguing an order is not fair and reasonable or that the service contractor exception applies.[1008] Finally, the MEU and AMIEU recommended the Review's final report propose a further review to consider how to address avoidance strategies if these are not otherwise addressed in this Review's recommendations.[1009]

AIG submitted that the FWC should be able to phase in RLHAOs, awarding 'a series of increasing or staggered [PROPs] where found to be necessary to progressively seek equivalence to host enterprise rates.'[1010] AIG submitted that this would minimise impacts on the parties.

The Review's Draft Report recommended monitoring the adequacy of the FWC's resourcing as the RLHAO framework is embedded.[1011] ACCI was neutral on this draft recommendation but noted the adequacy of the FWC's resourcing would not address the core issues with the measure.[1012] AIG opposed the draft recommendation, noting the adequacy of the FWC's resourcing should always be monitored and its view that there is no need to reference the measure specifically.[1013] Unions said in response to the draft recommendation that delays will not be rectified solely by adequate FWC resourcing, noting their submissions that some employers are delaying orders as a tactic.[1014] The SDA submitted the recommendation should be strengthened to committing appropriate resources to the FWC for dealing with the RLHAO applications.[1015]

Industry and cohort-specific feedback

Stakeholders raised a range of industry-specific concerns about how orders operate in practice, particularly where short-term labour demand, complex contracting chains, or coverage gaps create cost and compliance uncertainty.

The NFF expressed concern that labour-hire employers may be required to match enterprise agreement rates, and these increased costs are likely to be passed through to farms. It recommended an agriculture-specific pathway that would recognise the industry's use of short-term engagements, and clearer tests suited to short-duration 'peak' work.[1016]

The FAAA submitted that Australian airlines are increasingly using offshore cabin crew to circumvent the application of the RLHAO framework. It said that these employees are paid significantly less than onshore Australian-based crew to whom a current order applies.[1017]

[1007] ACTU, Submission on Draft Report No 33 (29 May 2026) 20–1; SDA, Submission on Draft Report No 37 (29 May 2026) 3.
[1008] MEU, Submission on Draft Report No 12 (29 May 2026) 1.
[1009] Ibid 2; AMIEU, Submission on Draft Report No 22 (29 May 2026) 1–2.
[1010] AIG, Submission No 82 (8 March 2026) 26 [129]; AIG, Submission on Draft Report No 45 (31 May 2026) 25–6 [156].
[1011] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 191 [Draft Recommendation 21].
[1012] ACCI, Submission on Draft Report No 46 (1 June 2026) 23–4 [125]–[130].
[1013] AIG, Submission on Draft Report No 45 (31 May 2026) 28 [160].
[1014] See, for example, UWU, Submission on Draft Report No 20 (29 May 2026) 7–8.
[1015] SDA, Submission on Draft Report No 37 (29 May 2026) 3.
[1016] NFF, Submission No 7 (25 February 2026) 5–6.
[1017] FAAA, Submission No 63 (6 March 2026) 6 [24].

WLS NSW submitted that the application-based nature of the measure makes it out of reach for the most vulnerable workers who often work in sectors with low union density, such as horticulture and cleaning. It recommended amendments to ensure that all enterprise agreements include a mandatory coverage provision covering 'any worker, including labour hire contractors, doing that classification of work for the host, whether a direct employee or not'.[1018]

NATSIWA welcomed the measure, saying Aboriginal and Torres Strait Islander women are overrepresented in sectors with high reliance on labour hire. It submitted that the Review should assess whether anti-avoidance safeguards are sufficiently robust to prevent indirect circumvention.[1019] NRWC said the measure is particularly important for rural women, who it said are more likely to work in industries 'where labour hire is common and women are often employed in lower-paid, insecure roles'.[1020] NRWC submission recommended the government provide clear guidance and education material for regional employers and workers, and in seasonal and agricultural settings. It also recommended establishing 'simpler and lower-cost pathways to access labour hire orders'.[1021] The Australian Multicultural Women's Alliance (**AMWA**) highlighted that multicultural women are overrepresented in labour hire arrangements and said measures that contribute to secure employment (including labour hire reforms) contribute to the effectiveness of the paid family and domestic violence leave reform.[1022]

Employer groups were generally opposed[1023] to the Review's draft recommendation to improve access to RLHAOs for cohorts of labour hire workers who may not otherwise access the framework, including workers in regional, rural and remote areas, women, First Nations people, people with disability, young workers and migrant workers,[1024] MCA submitted that unions are sufficiently resourced to support eligible workers to pursue RLHAOs and there is no need for the government to promote the uptake of the measure.[1025] In expressing opposition to the draft recommendation, ACCI contended the RLHAOS are already being utilised extensively and in a manner that has expanded beyond the original policy intent.[1026] AIG submitted that the draft recommendation is misplaced as the industry sectors and cohorts of workers that are the subject of the draft recommendation have low enterprise agreement coverage, meaning the RLHAO framework is not available to them.[1027] BCA said it supports education about workplace rights, but expressed concern with promoting applications for RLHAOs 'while the framework remains broad and uncertain'.[1028] While expressing support for this draft recommendation, the CFW submitted that the Review should consider addressing the structural barriers that make accessing RLHAOs difficult for these cohorts, such as the delays in progressing applications and the complexity associated with the service contractor exemption.[1029]

[1018] WLS NSW, Submission No 69 (6 March 2026) 13–14 [40]–[42].
[1019] NATSIWA, Submission No 30 (3 March 2026) 3.
[1020] NRWC, Submission No 29 (3 March 2026) 7.
[1021] Ibid 7.
[1022] AMWA, Submission No 11 (2 March 2026) 4.
[1023] See, for example, ACCI, Submission on Draft Report 46 (1 June 2026) 22 [116]; CCIWA, Submission on Draft Report No 30 (29 May 2026) 3; MCA, Submission on Draft Report No 42 (29 May 2026) 6.
[1024] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 190 [Draft Recommendation 20].
[1025] MCA, Submission on Draft Report No 42 (29 May 2026) 6.
[1026] ACCI, Submission on Draft Report No 46 (1 June 2026) 22 [116]–[124].
[1027] AIG, Submission on Draft Report No 45 (31 May 2026) 26–7 [158]–[159].
[1028] BCA, Submission on Draft Report No 18 (29 May 2026) 5.
[1029] CFW, Submission on Draft Report No 41 (29 May 2026) 7.

The MEU submitted the lack of applications for RLHAOs by low-paid workers in sectors such as cleaning and horticulture is not primarily due to a lack of education, but due to the complex contractual arrangements which exist in these sectors.[1030] The UWU expressed general support for the draft recommendation to improve access to RLHAOs but suggested proactive education and support would not by itself address the issues vulnerable workers have accessing the measure. The UWU recommended instead legislative amendments to provide for automatic coverage for new employers where a host is already subject to a RLHAO (rather than requiring hosts to seek a variation of the order), and to expand the ability to challenge what it describes as the misuse of the short-term exemption.[1031]

The Review also heard in roundtables with representatives of unions that the complex nature of RLHAO applications – which were described as being similar to commercial litigation in scale and complexity – is likely a barrier to some groups of workers and their unions making applications. The process was described as resource-intensive, even for large unions. The recommended cure for this barrier was to shift the onus for making out objections more squarely onto the objecting party.

Application to non-national system hosts

Some unions submitted that they had identified a gap in the legislation where the host is a State public sector employer or local government employer, and does not have a national system 'covered enterprise agreement' in place.[1032] A private submission suggested amendments to overcome this barrier by ensuring the obligations placed on the host by the regulated labour hire arrangements provisions of the FW Act are transferred to the labour hire employer, and that an order can apply to labour hire employers that supply workers to a State public sector body. The ACTU suggested that Commonwealth and state governments work together to ensure that the principle of 'same job, same pay' applies across all jurisdictions.[1033]

Analysis

The core purpose of the measure is to prevent labour hire arrangements that undercut bargained rates in enterprise agreements, such that workers are not receiving the same pay for the same job.[1034] The volume of applications and orders made, and the scale of wage increases in the examples discussed above, demonstrates the strong uptake and material impact of the measure.

In addition to the direct effects of the RLHAOs that have been made, the submissions note a broader 'shadow effect' of this measure. Some businesses have moved more towards direct employment rather than the use of labour hire workers, while others have reportedly agreed wage increases without the need for a RLHAO. Moving to direct employment provides enhanced job security for workers, who not only receive the pay rates under the host enterprise agreement, but also all other conditions such as training, amenities and rostering.

[1030] MEU, Submission on Draft Report No 12 (29 May 2026) 1.
[1031] UWU, Submission on Draft Report No 20 (29 May 2026) 7–8.
[1032] ACTU, Submission No 67 (6 March 2026) 23; Unions WA, Submission No 61 (5 March 2026) 14; ASU, Submission No 81 (6 March 2026) 11–12.
[1033] ACTU, Submission No 67 (6 March 2026) 7.
[1034] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 16 [75].

In developing the legislation, DEWR identified that the measure would be considered effective if there is an observable increase in wages paid to labour hire employees.[1035] On the available evidence, reported wage uplifts have been substantial, including increases of up to $60,000 per year in the mining industry; $20,000 per year in aviation; and up to $12,666 in warehousing and distribution.[1036] As the FAAA noted, these increases have been life-changing for many workers, supporting basic living costs such as food, rent and mortgage repayments, maintaining a car, and meeting caring responsibilities. The FAAA reported that some cabin crew no longer need secondary employment to make ends meet.[1037]

In December 2025, 351,000 people had a job in labour supply services, constituting 2.3% of all employed people in Australia.[1038] The proportion of labour hire workers as a share of all employed people had been rising steadily from 2.1% in 2014, reaching 2.7% in 2021, before declining to 2.3% in 2025.[1039] It is difficult to determine the extent to which this decline is a result of this measure, the casual employment changes discussed in section 2.2, or other factors.[1040]

MCA presented data it says demonstrates a negative impact on employment growth at surface coal mines in Queensland.[1041] However, the Review is not convinced that the MCA analysis is applicable to the broader mining sector, or the Australian labour market more broadly. The MCA's analysis is based on 29 mines in Queensland, and assumes the cause of different employment growth rates among those mines is the RLHAO measure. There could be other factors that explain these effects, such as sample size, differences between mine life cycles or capital investment. While growth in main jobs[1042] filled has slowed in the mining industry since December 2024 (approximately when the first RLHAOs came into effect), the mining industry's share of main jobs filled has maintained its relative share pointing to a slowdown more broadly across the Australian labour market.[1043]

Around 50% of all orders made have been in the mining industry, including 8 of the first 10 applications lodged. This is unsurprising. The Senate Select Committee on Job Security devoted a chapter in its third interim report to workforce arrangements in the mining sector, and found there was a trend towards using

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[1035] DEWR, *Impact analysis equivalent - Closing the Labour Hire Loophole, 'Additional Analysis',* (2023).
[1036] MEU, '$120 million+ in Same Job Same Pay pipeline for mineworkers' (Media Release, 28 October 2024); Workplace Express, 'Smooth landing for FAAA's Qantas SJSP bids' (online, 18 March 2025) <https://www.workplaceexpress.com.au/news/smooth-landing-for-faaa-s-qantas-sjsp-bids-80279>; Workplace Express, 'Pay rises in store for on-hire warehouse workers' (online, 26 November 2024) <https://www.workplaceexpress.com.au/news/pay-rises-in-store-for-on-hire-warehouse-workers>.
[1037] FAAA, Submission No 63 (6 March 2026) 5 [18].
[1038] ABS (Cth), *Labour Hire Workers December 2025* (Web Page, 10 April 2026) <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/labour-hire-workers/dec-2025>.
[1039] Ibid.
[1040] There are issues in accurately capturing labour hire data, with the ABS stating 'the multi-party nature of labour hire work makes it one of the more challenging arrangements to produce statistics on, compared with more common employer-employee relationships and self employment.'; ABS (Cth), *Labour Hire Workers December 2025* (Web Page, 10 April 2026) <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/labour-hire-workers/dec-2025>.
[1041] MCA, Submission on Draft Report No 42 (29 May 2026) 11.
[1042] A main job is 'the main activity carried out by an employed person.': ABS (Cth), 'Labour Account Australia methodology' (Web Page, 5 June 2026) <https://www.abs.gov.au/methodologies/labour-account-australia-methodology/mar-2026>.
[1043] ABS, *Labour Account Australia March 2026* (Catalogue No 6150.0.55.003, 5 June 2026).

labour hire with lower pay and conditions than directly employed workers.[1044] Meat work, warehousing and distribution, and aviation round out the top 4 industries utilising orders.

Table 6: Number of orders made by industry, to 31 December 2025

Industry	Number of orders made
Mining	54
Meat work	17
Warehousing and distribution	12
Aviation	6
Railway	4
Production and distribution	2
Public administration	2
Pharmaceutical	1
Automotive	2
Aged care	1
Building, metal and civil construction	1
Retail	0
Vehicle	1
Water treatment	1
Total	104

Source: Table prepared using published regulated labour hire arrangement orders

The increase in wages paid to labour hire employees outlined above supports the conclusion that the measure is operating as intended. Nevertheless, stakeholders raised a number of operational, practical and potential legal issues. Stakeholders raised many concerns with how the measure is operating and what they perceive to be unintended consequences, and proposed amendments to address these.

[1044] Senate Select Committee on Job Security, *Third interim report: labour hire and contracting* (2021).

The FWC and the courts are actively working through the boundaries of the scheme, and guidance on how the provisions operate is accumulating quickly. For example:

- Service contractor boundary cases (*BHP case*; poultry processing decisions; oil and gas contractor matters) are clarifying the jurisdictional authority and providing early guidance.
- Cases related to scope issues (*Bengalla Mining*) show decisions are being corrected, with the Federal Court providing guidance on how to specify covered employees.
- PROP calculation issues are emerging but are being shaped through early decisions.

No systemic failure has been demonstrated. There is no compelling evidence that the legislation is malfunctioning or incapable of being interpreted coherently. At this early stage the system is functioning as intended, albeit with predictable early friction around the boundaries of the scheme.

Employer groups and unions have strong but opposing views. Employer groups submit that legislative amendments are required to limit the operation of the measure, while unions submit that amendments are needed to correct deficiencies in the scheme and increase access to RLHAOs. Applications and disputes are being considered by the FWC and the courts, and these cases will help clarify the operation of the measure. Specific issues, such as the service contracting exemption and how the PROP is to be calculated, have been clarified in important decisions as recently as May 2026. While the Review is not convinced that amendments are required immediately, it notes ongoing stakeholder concerns and finds that it would be appropriate to review the practical operation of the measure when further jurisprudence is available.

'Fair and reasonable' test

Employer groups submitted that the 'fair and reasonable' test is not operating effectively, including where labour hire providers have provided detailed evidence of significant financial and commercial impacts associated with the making of an order. The FWC has so far not dismissed an application on the basis that it would not be fair and reasonable to make an order. This suggests the test is being applied with a high threshold for refusal. Employer groups submit that the financial or commercial impacts of a RLHAO (including on margins or contract viability) should be explicitly considered as part of the 'fair and reasonable' test. It is clear that many RLHAOs will have financial or commercial impacts on labour hire employers and/or hosts, as they require workers to be paid more than they would otherwise be paid.

On the available evidence, the current test does not raise implementation concerns and is consistent with the policy intent of the measure, namely, to prevent bargained wages from being undercut through the use of labour hire.

Service contractor exemption

Multiple employer stakeholders argued that genuine service contracting arrangements may be captured, and that the legislation does not provide sufficient legal certainty that service contracting arrangements are excluded. Employer groups are concerned about uncertainty as to whether specific arrangements fall within or outside the scheme, noting that the test is multifactorial and that the FWC may place different weight on different considerations. As a result, employers submit that outcomes may be difficult to predict and are likely to depend on the facts of each case. The FWC is expected to consider the substance of the arrangement over its form, applying the statutory factors on a case-by-case basis.

The available case law provides limited but developing guidance on the application of the service contracting exemption. One application for a RLHAO has been dismissed on the basis that the arrangement was properly characterised as service contracting.[1045] Other matters appear to be closer 'boundary' cases in which the FWC is clarifying the limits of its jurisdiction and providing early indicators of how the framework may be applied, including in sectors such as resources, poultry processing, and oil and gas.[1046]

Some employers, particularly within the construction industry, have raised specific concerns that genuine subcontracting arrangements could be treated as the supply of labour. HIA provided an example of a builder covered by an enterprise agreement engaging a bricklaying subcontractor that operates as a genuine independent business. The concern raised is that the FWC could determine the arrangement to be a regulated labour hire arrangement because the bricklayer performs work on the builder's site and performs the 'same work' as the builder's direct employees.[1047]

The statutory framework requires the FWC to consider all relevant factors in subsection 306E(7A), including matters such as the extent of the host's involvement in the arrangement and the extent to which the host directs, supervises, or controls the workers. These factors provide a mechanism for the FWC to distinguish genuine subcontracting from labour hire based on the practical reality of the relationship.

Notably, to date there have been no orders made in respect of labour hire employers or other persons asserting they are subcontractors, and there has only been one order in the construction industry, involving riggers and crane operators on a gold mine.[1048] Given the absence of any orders involving claimed subcontracting arrangements (including in construction), it is premature to propose legislative amendments to address this issue. The current approach, which requires the FWC to assess the substance of arrangements against the statutory factors, is still being tested and clarified through early decisions.

While a number of employer group submissions recommend that there should be a clear statutory definition of 'labour hire' and of 'service contractor', this could open the way for the development of contractual arrangements specifically designed to avoid the making of a RLHAO. This was not the intention of the measure. It is appropriate that the FWC consider the substance of arrangements in determining whether the service contractor exemption applies.

[1045] *Application by the Australasian Meat Industry Employees' Union re cleaning work at Bartter Enterprises' poultry processing facility* [2026] FWC 795.
[1046] See, for example, *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194.
[1047] HIA, Submission No 20 (2 March 2026) 16.
[1048] *Application by Construction, Forestry and Maritime Employees Union* [2025] FWC 3154.

Training and short-term exemptions

Several unions called for the repeal of the training exemption, arguing that some employers are structuring work as traineeships to avoid engaging the provisions. Allegations that employers may be using training arrangements to avoid paying the PROP are concerning, particularly given that workers in these arrangements, such as apprentices, are often young and new to the workforce. Unions also argue that removing the training exemption would not impact employer demand for apprentices and the increased wages that would flow from RLHAOs may support improved completion rates.

The purpose of the exemption is to avoid impacting upon training arrangements regulated by state and territory laws,[1049] and to reduce the barriers to employers providing training pathways to meet future skills demands.[1050]

Apprenticeships are a key mechanism for skill development for many occupations and are crucial to supporting the future workforce. Apprenticeships seek to 'ensure Australia has workers with the trade and technical skills needed to meet the nation's economic priorities and social equity objectives and to provide secure, well-paid work and career advancement.'[1051] However, apprenticeship completion rates have been in steady decline over several years.[1052] Accordingly, no recommendation is made to amend the training exemption from the requirement to pay the PROP, as such a change may have implications for participation in training pathways that contribute to Australia's future skills needs. The proposed further review will have the opportunity to consider in greater detail how extending RLHAOs would impact on apprenticeship completion rates and whether there is a sound policy justification for removing the apprentice and trainee exemption.

In relation to employer proposals to extend the default short-term work exemption of 3 months to 12 months, the host, labour hire employer, or a labour hire employee performing work for the host (or an organisation entitled to represent any of these) can make an application to the FWC for a determination that:

- there is no exemption period[1053]
- there is a specified exemption period of less than or more than 3 months,[1054] or
- there is a recurring extended exemption period.[1055]

To date there have been no applications to the FWC for a determination to remove, change or make the exemption period recurring. Given the absence of any such determinations, it is premature to propose legislative amendments to address this issue. The proposed further review should consider the broader implications of altering the short-term work exemption, or removing it as has been proposed by some unions.

[1049] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 17 [79].
[1050] Ibid 119 [696].
[1051] DEWR, *Strategic Review of the Australian Apprenticeship Incentive System - Skills for tomorrow: Shaping the future of Australian apprenticeships, Final Report* (2024).
[1052] Ibid.
[1053] *Fair Work Act 2009* (Cth) s 306J(a).
[1054] Ibid ss 306J(b)–(c).
[1055] Ibid s 306K.

Scope of orders

At the employer group roundtables and in some submissions, a number of employer groups commented that RLHAOs should only be available if there is a comparator employee at the host business. For example, the MCA submitted that the FWC has made orders even when the host does not employ workers in the same job but could do so at some stage in the future.[1056] It argued that this requires employers to calculate the PROP for hypothetical roles that do not exist, which it said creates significant uncertainty. This goes to the question of what constitutes the 'same job'.

The language in paragraph 306E(1)(b) requires only consideration of whether a covered employment instrument that applies to the host would apply to the labour hire employees if the host were to employ them to perform work of that kind. In effect, where an enterprise agreement makes provision for the relevant role, the rates set out in that agreement should apply to labour hire employees performing that work. This goes to the intention of the measure, to prevent undercutting of bargained entitlements. If a host has bargained for an agreement that provides for a particular rate of pay for a particular type of role, labour hire employees *prima facie* should not be paid less than that rate for that type of work – whether or not the host employs anybody to perform that type of work.

While some submissions referred to the government's previous statements about the measure to argue that it was only intended to apply in cases where there was a direct employee working alongside the labour hire employee, the explanatory materials for the legislation are clear that the intention was to avoid the undercutting of bargained rates of pay. This explanatory material was provided to the Parliament to inform its consideration of the legislation.

Several employer groups also argued that orders should be limited to cases of 'deliberate undercutting'. While the degree of 'deliberateness' will vary, the use of labour hire workers to perform the same work as direct employees, or work that direct employees could perform, but at lower rates of pay, is itself evidence of undercutting. Whether the undercutting is deliberate does not change the fact that it may have the effect of undercutting bargained rates of pay. The explanatory material accompanying the legislation is instructive, providing that: '[s]everal inquiries have shown that labour hire is used in a range of industries *with the result of undercutting bargained rates* [emphasis added].'[1057] The measure is explicitly said to be mitigating an outcome (the undercutting of bargained rates), not deterring deliberate misconduct. There is no reason to restrict the measure to instances in which the undercutting can be shown to be deliberate.

With respect to submissions that RLHAOs should not be available where the host's enterprise agreement includes a labour hire term, the Review considers that it would be contrary to the intent of the measure to provide this specific exemption. Such an exemption may create a perverse incentive for a host and its employees to make an agreement that pays labour hire employees less, with a trade-off of improvements in pay for direct employees. The proposed anti-avoidance measure does little to assuage these concerns.

[1056] MCA, Submission No 51 (3 March 2026) 3.
[1057] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 17 [76].

Submissions from unions and other parties such as Mr Reitano, raised concerns about the Bengalla Mining Federal Court decision, contending that it permits the continued use of lower-paid labour hire until an application is made, which Mr Reitano characterised as a 'leaking bucket'.[1058] This outcome reflects a deliberate policy design rather than a legislative defect. While early consultation in 2023 proposed an automatic application of the 'same job, same pay' measure to all labour hire employees,[1059] the government adopted an application-based framework in response to employer feedback, with the FWC being responsible for making RLHAOs.

On review, the decision is not as concerning as suggested. The Federal Court clarified that the FWC must ensure consistency between the cohort of labour hire employees identified in its reasoning as the 'regulated employees' satisfying paragraph 306E(1)(a), and those specified in the resulting order.[1060] In practical terms, the decision confirms that the scope of RLHAOs is shaped by the evidence of how the labour hire workforce is defined, rather than by enterprise agreement coverage alone. The court further noted that the FWC may be satisfied, where supported by evidence, that a labour hire employer supplies all categories of employees covered by a host enterprise agreement. In the matter in question, however, no such evidence was presented.

These concerns do have some foundation. Hosts may continue to engage lower-paid labour hire employees for classifications not covered by an order, and where no application has been made. This does not point to the need for a legislative amendment to automatically align RLHAOs with host enterprise agreement coverage. Instead, it underscores the importance of applicants clearly identifying and substantiating the labour hire roles sought to be covered by an order.

Similar concerns about access were raised by WLS NSW, which noted that the application-based framework may limit effectiveness in sectors with low union density.[1061] The application-based structure was a conscious decision of Parliament. The impact analysis explains that this approach was intended to shield host and labour hire employers from unnecessary administrative burden in industries where labour hire does not, or does not often, undermine bargained wages, without the need to exclude whole sectors of the economy from the scheme.[1062]

Protected rate of pay

Employer submissions regarding the complexity and administrative burden associated with calculating the PROP are acknowledged. Enterprise agreements often contain intricate remuneration structures, including incentives, loadings, allowances, penalty rates and other payments, all of which must be taken into account when determining the PROP.

Notwithstanding these challenges, Part 2-7A includes mechanisms to assist labour hire employers in calculating the PROP and to provide safeguards in certain circumstances. Where a labour hire employer reasonably considers that it does not have sufficient information to determine the PROP for one or more

[1058] Rob Reitano, Submission No 86 (12 March 2026) [7].
[1059] DEWR, *Same Job, Same Pay Consultation Paper* (2023) 10.
[1060] *Skilled Workforce Solutions (NSW) Pty Ltd v Mining and Energy Union* [2025] FCAFC 195 [91]–[103], [127]–[133].
[1061] WLS NSW, Submission No 69 (6 March 2026) 13 [40].
[1062] DEWR, *Impact analysis equivalent - Closing the Labour Hire Loophole, 'Additional Analysis',* (2023) 38.

labour hire employees, it may request the required information from the host in writing.[1063] The host is required to provide this information as soon as reasonably practicable.[1064] In addition, the FWC has jurisdiction to deal with disputes about the PROP, including through mediation, arbitration, and by making an arbitrated PROP that specifies how the rate is to be calculated.[1065]

Unions called for amendments to clarify that the PROP is the rate applicable to comparable work under the host instrument, without reference to tenure-based distinctions or hypothetical commencement dates. Recent decisions of the FWC Full Bench have determined that service prior to the commencement of a RLHAO should be considered when calculating the PROP. Despite PROP calculation issues emerging, they are being shaped through early decisions of the FWC.

Several unions proposed that the regime should extend beyond pay to also cover other terms and conditions of employment. However, it appears to be a deliberate policy choice that the measure is confined to the full rate of pay, and nothing is before the Review that would justify re-consideration at this time. Looking at the intent of the measure, which is to prevent undercutting of bargained wages in a way that is workable, legally contained and proportionate, without fundamentally restructuring the labour hire model, the inclusion of conditions would go beyond the stated policy intent.

Delays in making an order

Several unions proposed amendments to permit RLHAOs to operate retrospectively from the date an application is made. The legislation does not provide for backdating, with orders instead taking effect on the day they are made, or a later specified day.[1066]

Union submissions highlighted the practical disadvantage arising from delays between the lodgement of an application and the making of an order, regardless of whether those delays are attributable to FWC processes or the contested nature of the application. The MEU submitted that orders were taking an average of around 8 months to be made,[1067] while DEWR's internal analysis indicates an average timeframe of approximately 7 months from application to order. In cases involving significant wage increases, this delay can result in workers foregoing substantial earnings, potentially amounting to tens of thousands of dollars. Unions submitted that these delays are a tactic on the part of employers, in some cases saving them substantial sums of money during the period between when applications and orders are made, and that empowering the FWC to backdate orders to the date of the application would address this issue.

The Review has not reached any conclusions about these claims but acknowledges the potential practical disadvantage. It is possible that the making of orders will become faster as the scheme is more embedded, and as the FWC and courts provide greater clarity on the operation of the provisions. It is not unusual that early applications are more contested, as parties seek to test the various elements of the framework.

[1063] *Fair Work Act 2009* (Cth) s 306H(2).
[1064] Ibid s 306H(3).
[1065] Ibid s 306P.
[1066] Ibid s 306E(9)(e).
[1067] MEU, Submission No 76 (6 March 2026) 21 [63].

The proposed future review will be an opportunity to consider in greater detail whether allowing the backdating of RLHAOs is necessary, as the application and consideration process is further bedded down. It is appropriate that the FWC's resourcing and processes be reviewed alongside the broader operation of the measure in this context, to ensure any barriers to making orders in a timely manner are addressed.

Industry and cohort-specific issues

The NFF recommended the creation of an agriculture-specific pathway, and raised concerns about RLHAOs creating cost shocks and administrative complexity in the agriculture sector due to its heavy reliance on short-term work, particularly during harvest and other peak periods.[1068] As mentioned above, the short-term work exemption would also exclude any seasonal work of less than 3 months from being subject to a RLHAO, and hosts, labour hire employers and labour hire employees performing work for the host may apply to the FWC for an extension of this exemption. In addition, the majority of agricultural workers are not covered by an enterprise agreement and are therefore not able to be covered by a RLHAO.[1069]

There have not been any applications for a RLHAO in the agriculture, forestry and fishing industry, which means there is no case law demonstrating systemic misapplication of the measure in the industry. The evidence available to the Review does not indicate a need for legislative change but suggests it would be beneficial to monitor the impact of the RLHAO framework on the agriculture sector.

The FAAA raised concerns that airlines are increasingly using offshore cabin crew to circumvent the application of the FW Act and related legislative protections under Australian law.[1070] While restructuring operations to avoid the making or application of a RLHAO may be captured under the anti-avoidance provisions, it appears from the FAAA's submission that this issue is broader and goes beyond the scope of the Review. The government should monitor this issue.

NATSIWA suggested the Review assess whether anti-avoidance safeguards are sufficiently robust.[1071] At present, these provisions have not been engaged. This issue should be monitored, both with respect to potential avoidance behaviour to frustrate the making or application of RLHAOs, and potential efforts to avoid applications being made in the first place. In both cases, it is too early to amend the framework to address these potential issues. As discussed above, applications and orders are being made, suggesting any problems that do exist may be isolated. Ongoing monitoring should look out for specific cohorts of workers who may be missing out on the benefits of the measure.

[1068] NFF, Submission No 7 (25 February 2026) 5, 7.
[1069] DEWR estimate using ABS *Labour force, Australia, Detailed*, February 2026; *The Household, Income and labour Dynamics in Australia (HILDA) Survey* all waves. An estimated 10.4% of agricultural employees were covered by an enterprise agreement over 2021–22 to 2024–25.
[1070] FAAA, Submission No 63 (6 March 2026)6 [24]–[28].
[1071] NATSIWA, Submission No 30 (3 March 2026) 3.

Community sector stakeholders raised issues around vulnerable workers not being able to access the measure due to it being application-based. These stakeholders noted that certain cohorts of vulnerable workers are disproportionately employed in insecure arrangements such as labour hire. For example, AMWA pointed to the overrepresentation of multicultural women in labour hire arrangements.[1072] NRWC said that women in regional and remote areas are more likely to be employed in insecure arrangements and that there was a need for 'clear guidance and educational material' and a 'simpler low-cost pathway'.[1073]

As discussed above, the application-based nature of the measure was a deliberate policy choice, and this is reflected in the legislation. There is no strong case before the Review to recommend a change to that position. However, the exploitation of vulnerable workers and their ability to access the RLHAO framework is an issue to be taken seriously, especially given that vulnerable workers are more likely to be employed in labour hire arrangements.

The Review's Draft Report recommended the government should ensure that non-legislative supports, such as education, outreach, and simplified application pathways, are developed to assist vulnerable workers to access the RLHAO framework.[1074] Employer groups queried the need for further supports and raised concerns that such education and outreach might lead to an increased volume of applications. Unions questioned whether further education and outreach would be effective in supporting vulnerable workers to access RLHAOs. Having regard to the feedback on the Draft Report, the Review considers it is appropriate not to focus on supports for one measure but recommend broader consideration of supports for vulnerable and hard to reach workers (see Recommendation 3). The proposed further review at Recommendation 20 should also include consideration of the substantive issues that impact access to RLHAOs for workers, including the issue of appropriate supports.

Application to non-national system hosts

Some union submissions identified that labour hire arrangements are excluded from the operation of the RLHAO framework where the host is not a national system employer and there is no covered employment instrument in place.[1075] While some submissions propose legislative fixes for this issue, the Review suggests that due to the complexities involved in the interaction of state and national systems, the better approach would be for the Commonwealth and state governments to work together to ensure the principles of 'same job, same pay' are realised consistently.

[1072] AMWA, Submission No 11 (2 March 2026) 4.
[1073] NRWC, Submission No 29 (3 March 2026) 7.
[1074] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 190 [Draft Recommendation 20].
[1075] ACTU, Submission No 67 (6 March 2026) 23; ASU, Submission No 81 (6 March 2026) 11–12.

Findings and recommendations

The measure is broadly operating appropriately, and consistent with its stated intent to prevent labour hire arrangements from undercutting bargained enterprise agreement rates. The volume of applications and the scale of wage adjustments demonstrate strong early uptake and material impact. The system is still being bedded down, and the FWC and the courts are actively working through the boundaries of the framework. The interpretation of the legislation is being clarified through appeals, which is normal for a new jurisdiction. There is no compelling evidence that the legislation is not functioning as intended or is incapable of being interpreted coherently. The system is functioning, albeit with predictable early friction.

No legislative amendments are recommended at this time, however a future review is recommended to ensure the measure continues to operate as intended, and to consider whether legislative amendments are required to address specific issues. The future review would be informed by further jurisprudence on the interpretation of the legislation.

In particular, the future review of the measure should include consideration of:

- the application of the service contractor exemption
- the appropriateness and parameters of the training and short-term work exemptions
- any difficulties for parties in calculating the PROP
- delays in the making of orders, and whether measures to incentivise parties settling matters are appropriate
- the interaction of the framework with labour hire terms in agreements, and
- the operation of the anti-avoidance provisions.

Recommendation 20



The government should conduct a targeted review of the regulated labour hire arrangement orders framework to ensure it operates as intended and without undue delays.

3.2 Workplace determinations

What the measure does

The Closing Loopholes No. 2 Act amended the FW Act to require that a term of an intractable bargaining workplace determination, other than wage increase terms, must be no less favourable than a term of the enterprise agreement that deals with the matter, for each of those employees and their bargaining representatives.[1076]

The measure commenced on 27 February 2024.[1077]

Intractable bargaining declarations and intractable bargaining workplace determinations

Intractable bargaining declarations (**IBDs**) and intractable bargaining workplace determinations (**IBWDs**) were introduced to the FW Act by *the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**) and replaced the former serious breach declaration and bargaining workplace determination framework. IBDs support parties who have been bargaining without resolution, by allowing parties to apply to the FWC for an IBD.[1078]

An IBD can be issued from 9 months after the nominal expiry of an existing agreement or after bargaining commenced, where:

- the FWC has dealt with the dispute in accordance with section 240, which provides for the FWC to assist in resolving the dispute
- there are no reasonable prospects of an agreement being reached, and
- it is reasonable in all the circumstances to make the IBD.[1079]

If it makes an IBD, the FWC may require a post-declaration negotiation period to give parties a further chance to settle outstanding issues.[1080] The FWC must issue an IBWD as quickly as possible after either the post-declaration negotiation period or the making of the IBD.[1081]

[1076] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 5A; *Fair Work Act 2009* (Cth) s 270A.
[1077] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 2(1) item 6A.
[1078] *Fair Work Act 2009* (Cth) s 234.
[1079] Ibid ss 235(1)–(2).
[1080] Ibid s 235A.
[1081] Ibid s 269.

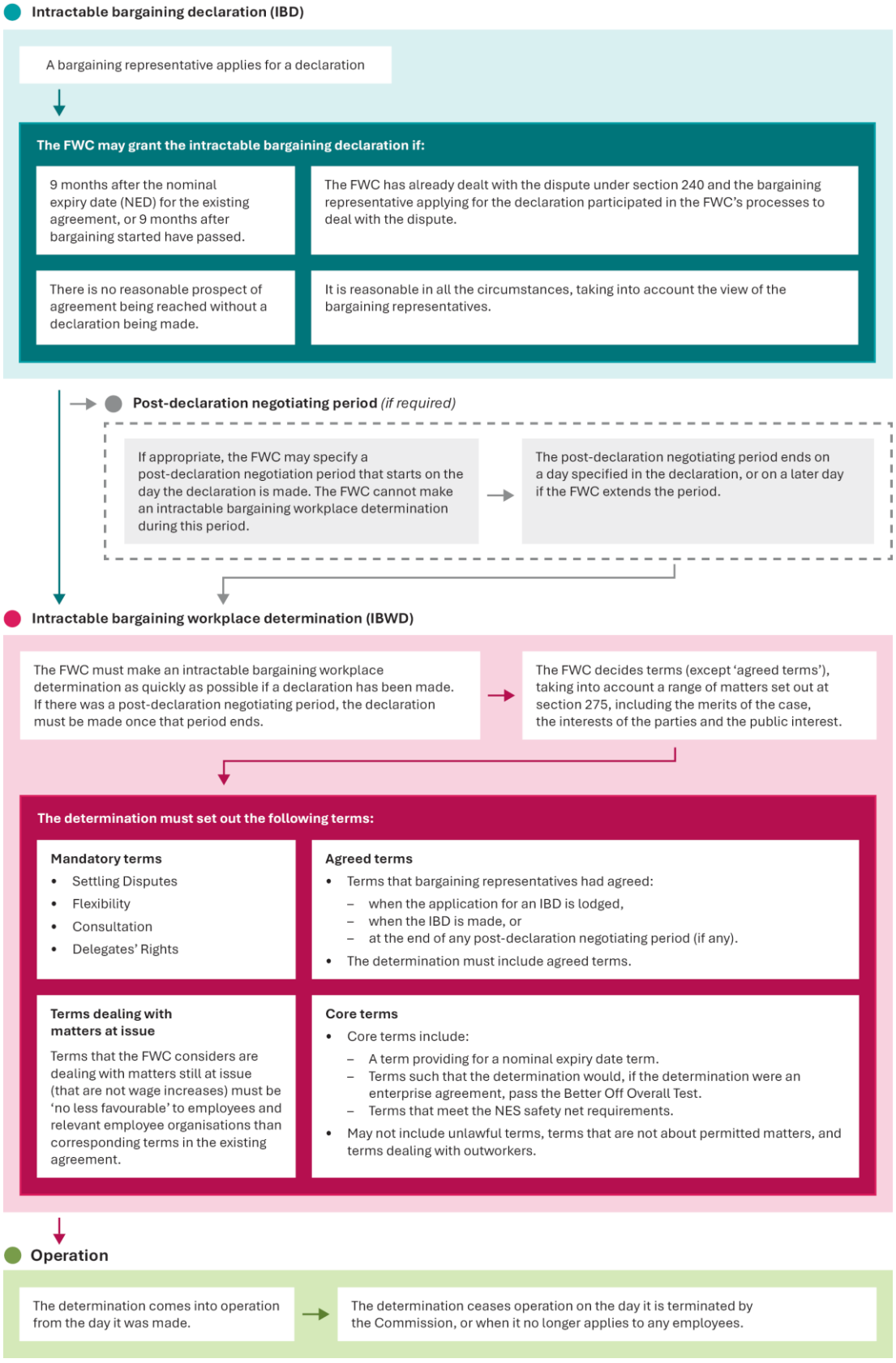
An IBWD replaces what would have been the enterprise agreement that the parties were bargaining for, setting terms and conditions of employment, and must include agreed terms, terms dealing with matters at issue, core terms and mandatory terms.[1082] Mandatory terms include dispute resolution, flexibility, consultation and delegate's rights terms.[1083] Terms relating to settling disputes, flexibility or consultation do not need to be determined by the FWC if the FWC is satisfied an agreed term to be included in the IBWD, if it were a term in an enterprise agreement, would meet specified requirements.[1084] Where the parties have not agreed a term relating to flexibility or consultation, the IBWD must include the model flexibility term or the consultation term, respectively.[1085] A determination is required to pass the Better Off Overall Test (**BOOT**), as if it had been an enterprise agreement.[1086]

The FWC is required to take into account a number of factors when deciding which terms to include in an IBWD, including:

- the merits of the case
- the interests of the employers and employees who will be covered by the determinations
- the significance of any arrangements or benefits in an enterprise agreement that applies to any of the employers in respect of any of the employees
- the public interest
- how productivity might be improved in the enterprise/s concerned
- the extent to which the conduct of the bargaining representatives was reasonable during bargaining
- the extent to which the bargaining representatives have complied with the good faith bargaining requirements, and
- incentives to continue to bargain at a later time.[1087]

[1082] Ibid ss 270(1)–(3).
[1083] Ibid s 273.
[1084] Ibid ss 273(3)–(5). For instance, under subsection 273(3), a IBWD does not need to include a term that provides a procedure for settling disputes if the FWC is satisfied an agreed term of the determination would satisfy paragraphs 186(6)(a) and (b) (which deal with terms in enterprise agreements about settling disputes).
[1085] Ibid ss 273(4)–(5).
[1086] Ibid s 272(4)
[1087] Ibid s 275.

Figure 2: Process for making of an IBD and IBWD



The 'no less favourable' test and 'agreed terms' amendments

The Closing Loopholes No. 2 amendment introduced new section 270A to ensure the FWC, when considering terms that have not been agreed by parties and are not a wage increase term, only includes terms in the IBWD, that are no less favourable than the equivalent term in an enterprise agreement that applies to one or more employees immediately before the determination is made. Unlike the BOOT, this test is not an overall assessment of the outcomes from the IBWD as a whole and instead requires consideration on a term-by-term basis. The amendment does not prevent parties from agreeing to less favourable terms during bargaining, as the measure does not affect the terms that have been agreed prior to the end of the negotiation period.[1088]

The Closing Loopholes No. 2 Act also made amendments to the definition of 'agreed term' for an IBWD. Before the amendments, an 'agreed term' was a term that bargaining representatives had agreed should be included in the agreement as at the time the IBD was made, or if a post-declaration negotiation period for the IBWD was set, at the end of that period. The amendments expanded 'agreed terms' by also including terms that bargaining representatives had agreed to at the time the application for the IBD is made.[1089] Additional terms may become 'agreed terms' at each step.[1090] Once a term is an agreed term, it remains an agreed term and cannot later become a term dealing with a matter still at issue or be left out of the determination.[1091]

These amendments apply in relation to determinations made before and after commencement of these Closing Loopholes No. 2 provisions, including those where parties had applied for an IBD before the provisions had commenced or obtained an IBWD.[1092]

Intention of the measure

This measure was introduced by former Greens member, Adam Bandt MP, and was supported by the government,[1093] to ensure that employees and their representatives would be no worse off compared to their previous enterprise agreement in intractable bargaining and to address the unforeseen consequence of the SJBP amendments – the incentivising of 'holding out' for an arbitral outcome from intractable bargaining processes.[1094]

The then Minister for Employment and Workplace Relations supported the amendments moved by Mr Bandt, indicating that the amendments effectively reintroduced a concept that existed before the arbitration principles in the SJBP Act were introduced, in which the old agreement would just remain in place, and that these amendments would mean that 'we don't end up in a worse situation than that'.

[1088] Ibid s 274(2).
[1089] Ibid s 274(3).
[1090] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 103 [600].
[1091] *Fair Work Act 2009* (Cth) ss 270(2), 274(2)–(3).
[1092] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 18 div 5 items 110–111.
[1093] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2023, 8709–11(Adam Bandt).
[1094] Ibid 8710–11.

The Minister went on to say that he was aware of employer groups providing bargaining advice that tried to push matters to arbitration for the purposes of having conditions go backwards and that the amendments in the Closing Loopholes No. 2 Act sought to address this issue.[1095]

Explanatory material similarly makes it clear that amendments were meant to ensure that when the FWC makes an IBWD, the FWC cannot include terms dealing with matters still at issue which are less favourable to employees and employee organisations than terms dealing with the same matter in an existing enterprise agreement.[1096] The purpose of the amendments was to ensure that, unless otherwise agreed, terms for employees and employee organisations cannot go backwards under an IBWD.[1097]

The amendments to the 'agreed terms' provision aimed to support rights in work by ensuring that terms that are agreed during bargaining are reflected in an IBWD.[1098] It sought to ensure that bargaining representatives cannot retract their agreement to proposed terms once an IBD application is made.[1099] If a bargaining representative sought to retract their agreement to a term at an earlier stage or resisted agreeing to a term in an attempt to have the matter determined by the FWC, they may fail to meet their good faith bargaining obligations under the FW Act.[1100]

What has happened since commencement

Secure Jobs Better Pay Review

In considering the amendments made by the SJBP Act, the SJBP Review considered it necessary to also consider the subsequent amendments to the intractable bargaining framework made by the Closing Loopholes No. 2 Act.[1101]

The SJBP Review noted that unions were highly supportive of the Closing Loopholes No. 2 amendments, and employer groups highly critical.[1102] The review noted that the ACTU considered the reforms protected terms and conditions but ensured that intractable bargaining remained a measure of last resort.[1103] The ACTU highlighted several 'perceived risks' about incentivising arbitrated outcomes and listed disincentives for proceeding to arbitration, including the delay in achieving wage increases, the resourcing cost of arbitration and the restrictions on an IBWD addressing dispute resolution clauses.[1104]

[1095] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2023, 8711 (Tony Burke, Minister for Employment and Workplace Relations).
[1096] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth)16 [73].
[1097] Ibid 16 [73].
[1098] Ibid 16 [74].
[1099] Ibid 103 [601].
[1100] Ibid 103–4 [601].
[1101] Mark Bray and Alison Preston, *Secure Jobs, Better Pay Review – Final Report* (Report, 31 March 2025) 139.
[1102] Ibid 146–9.
[1103] Ibid 147.
[1104] Ibid 150.

The SJBP Review also noted that many employers recommended the repeal of the 'no less favourable' test. Some employer groups recommended adjustments to the operation of the 'no less favourable' test, such as:

- allowing terms of the agreement to be no worse off than either 'a term of the enterprise agreement that deals with the matter *or a term within a comparable modern award*' (Australian Retailers Association, emphasis added)
- adjusting the test to require a holistic review of employees being 'no worse off' rather than an assessment on a term-by-term basis (AHEIA), and
- adjusting the test to ensure that agreements can incorporate flexibility and above-award trade-offs that support productivity improvements (Clubs Australia).[1105]

The SJBP Review final report noted that the reviewers were not convinced section 270A was having the intended consequence of focusing the minds of all parties to reach compromise.[1106] The SJBP Review declined to make a recommendation, finding that the amendments required further consideration in tribunal decisions and applications before the law could be viewed as fully tested.[1107]

IBDs and IBWDs

Between 1 July 2022 and 31 March 2026, there have been 34 applications for an IBD. Of those, 27 matters have completed – 13 applications for IBD have been withdrawn or discontinued, 10 IBWDs were made and 4 IBDs were not made.[1108]

Table 7: IBD applications made before and after CL amendments by applicant type

Applicant	Prior to CL amendments[1109]	From commencement[1110]	Total
Employer	6	7	**13**
Individual	–	3	**3**
Union	4	14	**18**
Total	**10**	**24**	**34**

[1105] Ibid 148.
[1106] Ibid 150.
[1107] Ibid.
[1108] FWC data, provided 5 June 2026 for the period of 1 July 2022 – 31 March 2026.
[1109] The period of 1 July 2022 – 26 February 2024, noting amendments commenced 27 February 2024.
[1110] The period of 27 February 2024 – 31 March 2026, noting amendments commenced 27 February 2024.

Figure 3: IBD Outcomes

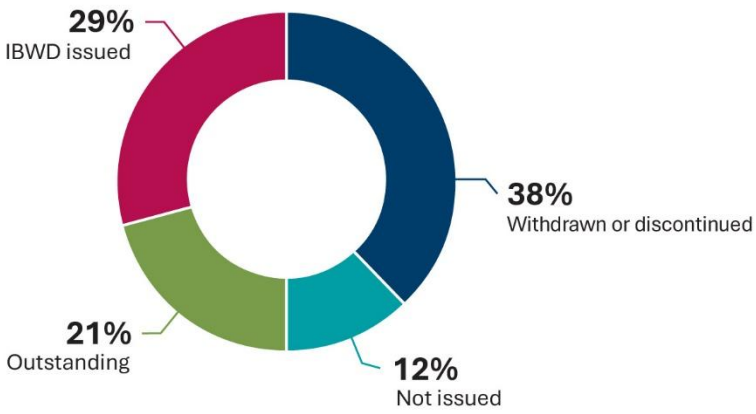


Table 8: Number of IBD and enterprise agreements applications since 2022–23

	2022–23 FY	2023–24 FY[1111],	2024–25 FY	2025–26 FY (end of Q2)	Total of applications
Application to the FWC for an IBD[1112]	1	11	12	5	29
Applications for enterprise (single and multi) agreements	3,892	4,494	4,058	2,249	14,693

Case law

The FWC has considered both the general IBD and IBWD framework as well as the Closing Loopholes No. 2 amendments in a number of cases.

[1111] SJBP amendments to IBD and IBWD commenced on 6 June 2023 and the Closing Loopholes No. 2 amendments commenced on 27 February 2024.
[1112] *Fair Work Act 2009* (Cth) s 234.

The following outlines significant decisions or commentary since commencement of the framework:

***United Firefighters Union of Australia v Fire Rescue Victoria* [2024] FWCFB 43**

The United Firefighters Union of Australia (**UFUA**) applied for an IBD in respect of bargaining with Fire Rescue Victoria (**FRV**) for the proposed Fire Rescue Victoria, United Firefighters' Union Operational Staff Agreement 2022. The IBD was made.

The UFUA considered that all matters were agreed terms, excluding terms involving increases to wages and increases to allowances. FRV held that they had no agreed terms, as terms that had been agreed 'in-principle' were still subject to overall agreement under the package and Victorian Government approval. The UFUA responded by suggesting FRV had erred in their understanding of the legislation because a term agreed was always still subject to a ballot so a form of absolutely final agreement was not necessary to enliven the 'agreed terms' provisions.

The FWC determined that what is 'agreed' requires consensus between the parties and is assessed objectively. It considered that formal or legalistic agreement wasn't needed but there still needs to be agreement as to what goes in the final agreement, and reserving one's position (such as in the use of an 'agreed in-principle' caveat) is indicative of a lack of agreement. Using the term 'agreed in-principle' does not necessarily preclude the finding that it is not still an agreed term. Rather, 'the search for an agreed term is for agreement in substance not form'.[1113]

The FWC held that there were no agreed terms, as the Victorian Government reserved the right to settle terms and this had been known to the UFUA.[1114]

To date, the FWC has not issued the IBWD in this matter.

[1113] *United Firefighters' Union of Australia v Fire Rescue Victoria T/A FRV* [2024] FWCFB 43, 28–9 [141]–[149].
[1114] Ibid 31 [158]–[159], 33 [175], 34 [179].

***Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* [2024] FWCFB 305 (*Unanderra*).**

The IBWD arose from the approval for an IBD in respect of employees of Cleanaway who work at its Unanderra depot and who are covered by the Unanderra EA. Disputed terms for FWC consideration included ordinary hours of work, dispute resolution procedures, wages, redundancy, classifications and nominal expiry of the agreement.

A Full Bench of the FWC held:

- all bargaining representatives, even if they are not actively participating, must agree to terms for the terms to be considered 'agreed terms'.[1115]
- the 'no less favourable' test meant no 'less advantageous' or beneficial for the current cohort of employees and affirmed that the test did not apply to wage increase terms.[1116]

The FWC also held, in accordance with *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2000] HCA 16, that the Commonwealth could not empower the FWC to include within a IBWD a dispute resolution procedure that empowers arbitration of a decision with the consent of the parties. As a result, section 270A could not be applied to require the dispute resolution clause proposed by Cleanaway be no less favourable.[1117]

[1115] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* [2024] FWCFB 305, 8 [9].
[1116] Ibid 31 [137], 32 [139].
[1117] Ibid 38–9 [172]–[175].

***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2025] FWCFB 285 (*Endeavour Energy*)**

On 6 November 2024, the FWC made an IBD in relation to the proposed Endeavour Energy Enterprise Agreement 2023. After obtaining an IBD, a Full Bench of the FWC issued a decision on the matters still at issue.

Endeavour submitted that the unions had 'failed to engage meaningfully in bargaining' and that their maintenance of a wage claim was done in an effort to achieve a better arbitrated outcome. The FWC did not find this borne out, and held they were not required to make concessions.[1118] Endeavour also made submissions that union representatives had told employees that they can't really lose anything because of the 'no less favourable' test so they would go to the Commission. The FWC considered it was likely that employees had exchanged views between themselves that they had 'nothing to lose' by pursuing an IBD but did not consider they reached this view because of statements made by union officials.[1119]

The Full Bench held that there was no agreed consultation term.[1120] Endeavour argued that the FWC was required to insert the model consultation term, in accordance with subsection 273(5). The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) argued that the model terms were inferior to the 2021 enterprise agreement so would be subject to the 'no less favourable' test provided at section 270A.[1121]

The FWC considered that subsection 270(1) was clear on the requirement to include the model terms in an IBWD but that '*s.270A is limited to a 'a term that is included in the determination to comply with subsection 270(3). However, the requirement to include mandatory terms, such as the consultation term, is found in s.270(1)(c), not s.270(3) of the FW Act'*.[1122] The FWC considered the effect of section 270A is therefore to exclude agreed terms, core terms and the mandatory terms.[1123] It noted that had there been a tension between subsection 270(5) and section 270A, they would have found that subsection 270(5) prevailed as it is more specific than section 270A.[1124]

[1118] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2025] FWCFB 285, 35–6 [190]–[195].
[1119] Ibid 36–7 [196]–[206].
[1120] Ibid 41 [225].
[1121] Ibid [227]–[229].
[1122] Ibid 42 [233].
[1123] Ibid 42 [234].
[1124] Ibid 43 [237].

***The Association of Professional Engineers, Scientists and Managers, Australia v Ulan West Operations Pty Ltd* [2025] FWC 1806**

The Association of Professional Engineers, Scientists and Managers, Australia (otherwise known as Professionals Australia) applied for an IBD in respect of the proposed agreement to cover Deputies employed by Ulan West Operations Pty Ltd at the Ulan West coal mine in regional NSW. Parties broadly agreed that the bargaining was intractable, but Ulan West did not support the IBD.

In submissions to the FWC, Ulan West argued that it was not reasonable in all the circumstances to grant the IBD. It submitted that 'the legislative intent behind the introduction of the intractable bargaining regime was not to cover or assist employees in the position of the Deputies. The introduction of the intractable bargaining regime was driven by a desire to seek to improve real wage growth and rebalance bargaining'.[1125]

Additionally, Ulan West submitted that IBDs are not meant to support those who fail to obtain their bargaining goals and should not be used to force an agreement be made as it remains their right to not make an agreement. It submitted the FWC should weigh the strategic purpose of seeking an IBD against the reasonableness of the FWC assisting the applicant to get an outcome that couldn't be achieved in bargaining, and that it was inappropriate to apply for a IBD if the intention was largely to improve their bargaining position in a post-declaration bargaining period.[1126]

Deputy President Easton said:

> *the introduction of the intractable bargaining regime changed the dynamics of enterprise bargaining. The amendments introduced an available strategy for bargaining representatives to withhold consent or support for a proposed agreement in the hope of a better result in arbitration via the intractable bargaining route. This change is clearly intentional and a measure that assists those with weaker bargaining power to secure an agreement.*[1127]

DP Easton determined that it was not reasonable in the circumstances to make the IBD, for several reasons, which included that 'despite the genuine and earnest attempts by the bargaining representatives to bridge the gap, neither bargaining party was prepared to fully accommodate the concerns of the other party or, more precisely, accommodate the other party's concern enough to convince them to make an agreement'.[1128]

[1125] *The Association of Professional Engineers, Scientists and Managers, Australia v Ulan West Operations Pty Ltd* [2025] FWC 1806,10 [34(g)].
[1126] Ibid 9–11 [32]–[36].
[1127] Ibid 18 [57].
[1128] Ibid 26–7 [108].

***The Association of Professional Engineers, Scientists and Managers, Australia v Ulan West Operations Pty Ltd* [2025] FWCFB 264 (*Ulan West*)**

On appeal, a majority of the Full Bench indicated that the Deputy President had misunderstood the intention of the legislation.[1129] They indicated that the scenario outlined was the inverse of what was intended by Parliament because it aimed to provide incentive for parties to bargain constructively and:

> *intended that the intractable bargaining regime would provide more ready access to arbitration to encourage and support genuine bargaining at the enterprise level. If one bargaining representative has an incentive to hold out for the status quo, that has the potential to undermine bargaining. The intractable bargaining provisions increase the risk that comes with holding out for no agreement, relative to the risk of making an agreement. To avoid the opposite incentive arbitration must also carry risk, relative to reaching agreement. If both of these alternatives – holding out for status quo, or holding out for an arbitrated outcome – carry sufficient risk relative to reaching agreement, that can encourage bargaining as a rational course of action for all involved.*[1130]

They highlighted the discretionary power to make a determination, even if all elements are present to make the determination.

The majority also indicated that the bargaining style envisioned by the DP would be a factor relevant to the assessment of reasonableness for the purposes of paragraph 235(2)(c). They concluded the DP erred in his formation of his opinion.[1131]

Australian Rail, Tram and Bus Industry Union v Qube Logistics (Rail) Pty Ltd Trading AS Qube Logistics [2025] FWC 1283 (Qube Logistics)

The Australian Rail, Tram and Bus Industry Union (**RTBU**) submitted an application to the FWC to obtain an IBD. Qube submitted that making an IBD would reward the RTBU for 'running down the clock' and that issuing the IBD would be contrary to the objects of promoting enterprise-level bargaining.[1132]

The FWC considered that conduct of the parties is a relevant consideration as to whether it is reasonable to make a declaration but did not accept RTBU had run down the clock. In reaching this conclusion, they considered the other surrounding behaviour was not aimed to stop bargaining.[1133] The FWC issued the IBD.

[1129] *Association of Professional Engineers, Scientists and Managers, Australia v Ulan West Operations Pty Ltd* [2025] FWCFB 264, 19 [69].
[1130] Ibid 19 [70].
[1131] Ibid 20 [72].
[1132] *Australian Rail, Tram and Bus Industry Union v Qube Logistics (Rail) Pty Ltd Trading AS Qube Logistics* [2025] FWC 1283, 25 [145]–[147].
[1133] Ibid 27 [153]–[155].

What the Review heard

A number of submissions raised the workplace determination amendments passed in the Closing Loopholes No. 2 Act and also provided feedback on draft recommendations from the Draft Report. The positions taken were largely consistent with the feedback provided to the SJBP Review and reflected the significance of the reforms and their impact on the drivers of behaviour within the bargaining framework, a fundamental part of Australia's workplace relations system.

Employer groups

Employer groups were opposed to the amendments.

Bargaining incentives

Many employer groups highlighted that the amendment fundamentally altered the bargaining system by changing the incentive to bargain.[1134] AREEA, AHEIA and ACCI submitted that symmetrical exposure to risk incentivised agreement or compromise, as the alternative was less certain or a potentially disadvantageous outcome in arbitration.[1135] In preserving conditions or establishing a 'statutory floor', the amendments removed the symmetry of risk.[1136] Similarly, AIG, BCA and CCIWA submitted that unions are not incentivised to agree any terms but are instead incentivised to wait the 9 months necessary to apply for an IBD because the FWC cannot reduce the favourability of unagreed terms.[1137] AIG highlighted that the changes to the 'agreed term' definition also creates an incentive for parties to not reach agreement on any matter until all matters are agreed.[1138] AHEIA also suggested that the incentive to negotiate more significant structural reform to an enterprise agreement is reduced.[1139] AREEA noted that the original SJBP Act amendments established the intractable bargaining framework with mutual risk and the Closing Loopholes No. 2 amendment has dismantled the symmetry.[1140]

ACCI and MCA submitted that the changes will have an effect on parties' bargaining strategy, including incentivising unions to seek unreasonable, larger and broader claims, not offer concession and arbitrate without risk.[1141] BCA remarked on the changed bargaining dynamics and the likely effect on bargaining strategy.[1142] AREEA submitted that the use of arbitration as a bargaining strategy was becoming clearer in the case law[1143] and pointed to *Endeavour Energy*, suggesting the Commission recorded evidence of unions

[1134] BCA, Submission No 50 (3 March 2026) 30; ACCI, Submission No 54 (3 March 2026) 42 [253]; MCA, Submission No 51 (3 March 2026) 34; AREEA, Submission on Draft Report No 47 (1 June 2026) 5; MIAL, Submission on Draft Report No 23 (29 May 2026) 4–5.
[1135] AREEA, Submission No 49 (3 March 2026) 24 [161]–[162]; AHEIA, Submission No 73 (6 March 2026) 3; ACCI, Submission on Draft Report No 46 (1 June 2026) 25 [142]–[143]
[1136] AREEA, Submission No 49 (3 March 2026) 24 [161]–[163]; AHEIA, Submission No 73 (6 March 2026) 3; ACCI, Submission on Draft Report No 46 (1 June 2026) 25 [143]–[144]
[1137] AIG, Submission No 82 (8 March 2026) 58 [277]–[278]; CCIWA, Submission No 75 (6 March 2026) 17; BCA, Submission No 50 (3 March 2026) 31.
[1138] AIG, Submission No 82 (8 March 2026) 58 [278].
[1139] AHEIA, Submission No 73 (6 March 2026) 3.
[1140] AREEA, Submission on Draft Report No 47 (1 June 2026) 5.
[1141] ACCI, Submission No 54 (3 March 2026) 42 [253]–[257]; MCA, Submission No 51 (3 March 2026) 35–6; ACCI, Submission on Draft Report No 46 (1 June 2026) 25–26 [144]–[145].
[1142] BCA, Submission No 50 (3 March 2026) 32.
[1143] AREEA, Submission No 49 (3 March 2026) 24 [164]; AREEA, Submission on Draft Report No 47 (1 June 2026) 4.

maintaining high wage claims as lowering them would risk a worse arbitration outcome.[1144] Similarly, ACCI has suggested that there is evidence of the IBD framework being used strategically, by maintaining ambit claims during negotiations because there are no 'downsides' to arbitration.[1145] AREEA suggested that parties would only become more strategic with using IBDs and IBWDs as a threat or 'destination'.[1146]

ACCI and MCA argued that the 'no less favourable' test reinstates a line-by-line approach that government had previously recognised was unsuitable in the context of the BOOT.[1147] ACCI, MCA and AHEIA suggested that 2 inconsistent standards now apply – the BOOT for mutually agreed terms and the 'no less favourable' test for those that are not.[1148]

Although not directly relevant to the Closing Loopholes amendments, AIG noted that the amendments were more damaging when considered alongside the recent SJBP amendment to curtail access to the previous 'nuclear' option of enterprise agreement termination. It highlighted that this former provision incentivised parties to reach agreement and helped resolve intractable bargaining.[1149] ACCI also highlighted that other reforms, such as constraints on agreement termination and the availability of backpay, have compounded the effects of the measure and reduced the levers to ensure timely agreement in bargaining.[1150] BCA highlighted that the FWC's inclination to order backpay in IBWDs also removed a key lever to put pressure on bargaining completion.[1151]

Some submissions suggested that the amendments are inconsistent with the objects of the FW Act or the government's intention for the measure. AIG suggested that seeking to preserve the status quo does not reflect the FW Act's aim of 'achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action'.[1152] In MCA's view, the government did not intend for the amendments to have the effect that one class of litigants would never be worse off.[1153] Additionally, MCA submitted that an unintended consequence of the amendment was to undermine the original intent of the SJBP reforms.[1154]

ACCI expressed concern about 'in principle' agreements being captured as 'agreed terms', particularly because formalities may not be needed to establish an 'agreed term' and because the FWC will determine matters on its unique circumstances.[1155] ACCI and MCA suggested employers could be less likely to offer concessions in negotiations, to avoid them being captured as 'agreed terms'.[1156]

[1144] AREEA, Submission No 49 (3 March 2026) 25 [173].
[1145] ACCI, Submission on Draft Report No 46 (1 June 2026) 26 [146].
[1146] AREEA, Submission No 49 (3 March 2026) 26 [178].
[1147] ACCI, Submission No 54 (3 March 2026) 42 [258]; MCA, Submission No 51 (3 March 2026) 36.
[1148] ACCI, Submission No 54 (3 March 2026) 42 [259]; MCA, Submission No 51 (3 March 2026) 36; ACCI, Submission on Draft Report No 46 (1 June 2026) 28 [168].
[1148] ACCI, Submission No 54 (3 March 2026) 42 [259]; MCA, Submission No 51 (3 March 2026) 36; ACCI, Submission on Draft Report No 46 (1 June 2026) 28 [168]; AHEIA, Submission on Draft Report No 31 (29 May 2026) 6. See *Fair Work Act 2009* (Cth) s 275(e).
[1149] AIG, Submission No 82 (8 March 2026) 58 [279].
[1150] ACCI, Submission on Draft Report No 46 (1 June 2026) 26 [147]
[1151] BCA, Submission No 50 (3 March 2026) 36–7.
[1152] AIG, Submission No 82 (8 March 2026) 4; *Fair Work Act 2009* (Cth) s 3(f).
[1153] MCA, Submission No 51 (3 March 2026) 34.
[1154] MCA, Submission on Draft Report No 42 (29 May 2026) 16–17.
[1155] ACCI, Submission No 54 (3 March 2026) 42 [261]–[262].
[1156] Ibid 42 [260]; MCA, Submission No 51 (3 March 2026) 36.

Implications of the reforms

Employer groups also raised potential longer-term impacts of the amendments.

- Several employer groups indicated the changes would have an impact on productivity.[1157] ACCI stated that the amendments weaken the connection between remuneration and productivity.[1158] BCA noted that the FWC is required to take into account how productivity might be improved in the enterprise when deciding which terms to include in an IBWD,[1159] but the effect of this requirement has been substantially curtailed by the measure.[1160]
- COSBOA highlighted that wages and conditions set without regard to what a small business could commercially sustain could be 'catastrophic'.[1161]
- Some stakeholders stated that the amendments prevent employers from discontinuing terms and conditions in an enterprise agreement that are no longer sustainable.[1162] AHEIA suggested that the general preservation of conditions would also result in a dampening effect on wage outcomes as a result of a more limited capacity to pay workers and that enterprise agreements could become static like enterprise awards.[1163]
- BCA suggested that the amendments constrained the FWC's capacity to support the modernisation of workplace arrangements.[1164]
- National Fire Industry Association (**NFIA**) and AIG expressed concern that employers would become more disincentivised to initiate bargaining.[1165]

Submissions also identified potential industry specific impacts:

- In the energy and resources sector, AREEA suggested that labour costs are finalised during the period when investment decisions are made, so without the scope to trade against other terms that do not affect operational reality, wage and condition decisions made 'mid-cycle' can affect project viability and may become a benchmark for other groups across the sector.[1166] It expressed concern about limited opportunity to remove outdated safety conditions for more modern settings.[1167]
- In the construction sector, HIA suggested that small builders would be incentivised to accept inferior terms to avoid arbitration.[1168]
- In the higher education sector, AHEIA suggested that the uncoupling of wage growth from productivity could result in changes like redundancy and changes to course offerings.[1169]

[1157] AIG, Submission No 82 (8 March 2026) 58 [283]; CCIWA, Submission No 76 (6 March 2026) 17.
[1158] ACCI, Submission No 54 (3 March 2026) 42 [251]; ACCI, Submission on Draft Report No 46 (1 June 2026) 26 [149].
[1159] See *Fair Work Act 2009* (Cth) s 275(e).
[1160] BCA, Submission No 50 (3 March 2026) 35–6.
[1161] COSBOA, Submission No 45 (3 March 2026) 12 [49]–[50].
[1162] AIG, Submission No 82 (8 March 2026) 58 [276]; NFIA, Submission No 33 (3 March 2026) 8; ACCI, Submission on Draft Report No 46 (1 June 2026) 26 [149].
[1163] AHEIA, Submission No 73 (6 March 2026) 3–4.
[1164] BCA, Submission No 50 (3 March 2026) 30.
[1165] NFIA, Submission No 33 (3 March 2026) 8; AIG, Submission No 82 (8 March 2026) 58 [281].
[1166] AREEA, Submission No 49 (3 March 2026) 26 [180]–[181], [183].
[1167] Ibid 26 [182].
[1168] HIA, Submission No 20 (2 March 2026) 16.
[1169] AHEIA, Submission No 73 (6 March 2026) 4.

MCA, CCIWA and HIA expressed disappointment that the reforms shift bargaining from attempting genuine negotiations to FWC arbitration.[1170] CCIWA consider bargaining should only involve an arbitrator as a measure of last resort.[1171]

Employer group recommendations

Most employer groups recommended the repeal of section 270A.[1172] Some secondary alternatives were also suggested:

- AIG suggested that the SJPB amendments relating to termination of agreements needed to be more nuanced and balanced.[1173]
- NFIA and COSBOA recommended that the reforms be adjusted to allow the FWC to consider viability and industry context when making workplace determinations.[1174]
- AHEIA recommended restore the FWC's ability to holistically consider the matter, guided by the objects of the FW Act, productivity and fairness.[1175]

BCA recommended the FWC be prevented from ordering back pay in IBWDs.[1176]

AREEA suggested that the FW Act be amended to clarify the status and treatment of terms in the intractable bargaining process to reduce tactical disputes on what has been 'agreed', reduce informal discussions being weaponised and restore confidence in good faith bargaining not being penalised.[1177]

AREEA also recommended the government require regular public reporting on IBD and IBWD usage and outcomes, including volume, timeframes, wage and cost outcomes, backpay and sectoral and workforce impacts.[1178]

Feedback on draft recommendations

AIG, Maritime Industry Australian Ltd (**MIAL**), BCA and MCA submitted that proposed legislative guardrails on IBDs[1179] was an acknowledgement of the issues raised, with some expressing support for the recommendation but indicating it would not be sufficient on its own.[1180] ACCI supported the legislative guardrails on IBDs, highlighting that it is proportionate, would restore a degree of friction to

[1170] HIA, Submission No 20 (2 March 2026) 16; CCIWA, Submission No 75 (6 March 2026) 17; MCA, Submission No 51 (3 March 2026) 35.
[1171] CCIWA, Submission No 75 (6 March 2026) 17.
[1172] AIG, Submission No 82 (8 March 2026) 59; AREEA, Submission No 49 (3 March 2026) 30 [213]–[214]; HIA, Submission No 20 (2 March 2026) 16; CCIWA, Submission No 75 (6 March 2026) 18–9; BCA, Submission No 50 (3 March 2026) 37; ACCI, Submission No 54 (3 March 2026) 43 [264]; MCA, Submission No 51 (3 March 2026) 37; AHEIA, Submission No 73 (6 March 2026) 5.
[1173] AIG, Submission No 82 (8 March 2026) 59.
[1174] NFIA, Submission No 33 (3 March 2026) 8; COSBOA, Submission No 45 (3 March 2026) 13 [55b].
[1175] AHEIA, Submission No 73 (6 March 2026) 5.
[1176] BCA, Submission No 50 (3 March 2026) 37.
[1177] AREEA, Submission No 49 (3 March 2026) 30 [215]–[216].
[1178] Ibid 30 [217]–[219].
[1179] Susan Booth, *Closing Loopholes, an independent statutory review* – Draft Report – May 2026 (15 May 2026) 212 [Draft Recommendation 22].
[1180] AIG, Submission on Draft Report No 45 (31 May 2026) 28 [163]; MIAL, Submission on Draft Report No 23 (29 May 2026) 3–4; BCA, Submission on Draft Report No 18 (29 May 2026) 4; MCA, Submission on Draft Report No 42 (29 May 2026) 17.

the process and would reinforce the expectation that parties exhaust reasonable avenues to reach agreement before arbitration is reached.[1181] AIG indicated the guardrails should be prerequisites for obtaining an IBD, rather than only being considerations.[1182] COSBOA broadly supported the introduction of legislative guardrails on IBDs but reiterated the need for small business viability assessments.[1183]

Employer groups repeated their calls for the repeal of section 270A.[1184]

AHEIA opposed the introduction of guardrails as redundant and harmful.[1185] It highlighted that the FW Act already has the means to address 'holding out' behaviour and behaviour that falls short of good faith bargaining.[1186] HIA submitted that guardrails would not address disincentivising negotiation and that such an approach would be structurally unsuitable for the building industry.[1187]

Employer groups opposed the Review's draft recommendation to extend the 'no less favourable' test to mandatory terms in an IBWD.[1188] ACCI and CCIWA reiterated their concerns about the effect of the 'no less favourable' test on incentivising bargaining and suggested that it should instead be repealed.[1189] AREEA and CCIWA contended that such an amendment would preserve the distortions provided for by the amendment, which would compound the policy error, rather than correct it.[1190] AHEIA argued that if the draft recommendation was adopted, legacy procedural provisions could be preserved in arbitrated outcomes, entrenching the complexity that generates disputes and compliance issues.[1191] BCA argued that the mandatory terms should be treated differently, as IBDs are already subject to model term defaults and the extension of 270A to mandatory terms risks extending the 'no less favourable' test to terms rarely at issue in bargaining, potentially locking in inappropriate procedural terms.[1192]

MIAL also noted some ongoing concern about the meaning of 'agreed terms' and recommended that the Review seek to address the concerns of employer groups.[1193]

[1181] ACCI, Submission on Draft Report No 46 (1 June 2026) 25, 26–27, [136], [152], [158]–[159].
[1182] AIG, Submission on Draft Report No 45 (31 May 2026) 29 [165].
[1183] COSBOA, Submission on Draft Report No 7, (29 May 2026) 6 [25]–[28].
[1184] MCA, Submission on Draft Report No 42 (29 May 2026) 19; BCA, Submission on Draft Report No 18 (29 May 2026) 4; AIG, Submission on Draft Report No 45 (31 May 2026) 28 [161]; AHEIA, Submission on Draft Report No 31 (29 May 2026) 7; ACCI, Submission on Draft Report No 46 (1 June 2026) 28 [161]; AREEA, Submission on Draft Report No 47 (1 June 2026) 5.
[1185] AHEIA, Submission on Draft Report No 31 (29 May 2026) 5.
[1186] Ibid.
[1187] HIA, Submission on Draft Report No 11 (29 May 2026) 5.
[1188] Susan Booth, *Closing Loopholes, an independent statutory review* – Draft Report – May 2026 (15 May 2026) 213 [Draft Recommendation 23]; CCIWA, Submission on Draft Report No 30 (29 May 2026) 3–4; AREEA, Submission on Draft Report No 47 (1 June 2026) 4–5; MIAL, Submission on Draft Report No 23 (29 May 2026) 3–4; BCA, Submission on Draft Report No 18 (29 May 2026) 4; AIG, Submission on Draft Report No 45 (31 May 2026) 29 [167]; ACCI, Submission on Draft Report No 46 (1 June 2026) 28 [160].
[1189] ACCI, Submission on Draft Report No 46 (1 June 2026) 28–9 [163]–[177]; CCIWA, Submission on Draft Report No 30 (29 May 2026) 3–4.
[1190] AREEA, Submission on Draft Report No 47 (1 June 2026) 5; CCIWA, Submission on draft report No 30 (29 May 2026) 3.
[1191] AHEIA, Submission on Draft Report No 31 (29 May 2026) 8.
[1192] BCA, Submission on Draft Report No 18 (29 May 2026) 4.
[1193] MIAL, Submission on Draft Report No 23 (29 May 2026) 4.

Unions

Unions were supportive of the Closing Loopholes No. 2 Act amendments, with some suggesting additional amendments necessary to address outcomes they considered were not intended by government.

Bargaining incentives

The ACTU submitted that the amendments are necessary to protect employees.[1194] The UWU stated that the 'no less favourable' test is an effective safeguard against backsliding of conditions, which had occurred in early intractable bargaining decisions. It noted that the 'agreed terms' amendment prevents relitigating already agreed terms so that the FWC can focus on genuinely unresolved issues.[1195] The Victorian Branch of the United Firefighters Union of Australia (**UFU**) submitted that the laws also provided an opportunity for unions without sufficient density or ability to take industrial action (such as emergency services personnel) to seek a resolution to enterprise bargaining disputes.[1196]

The NTEU submitted that the reforms promote effective enterprise bargaining and highlighted that employer groups have previously sought to utilise arbitration in the intractable bargaining framework to reduce existing entitlements.[1197] It highlighted that the introduction of the 'no less favourable' test improved employer groups willingness to bargain, and noted it intended to continue to avoid intractable bargaining avenues.[1198]

The ACTU highlighted that intractable bargaining provisions have a confined role in the broader bargaining system and that they offer significant disincentives for both unions and employers to enter into intractable bargaining.[1199] It pointed to the low number of bargaining disputes that have relied upon the intractable bargaining framework to resolve matters compared to the number of single enterprise agreements lodged in 2024–25.[1200] The NTEU also noted it had reached agreement on 12 higher education enterprise agreements since commencement without resorting to intractable bargaining processes.[1201] The UWU argued that concerns about unions 'holding out' are illusory because of the low number of matters that reach intractable bargaining processes, and employer concerns are, in reality, related to the removal of the ability to unilaterally terminate enterprise agreements and that the 'no less favourable' test was introduced to prevent employer groups from seeking similar 'distorted outcomes in bargaining' through arbitration.[1202]

During the employee group roundtable, unions indicated they were incentivised to avoid intractable bargaining processes because normal bargaining processes (rather than arbitration) allowed them to better ensure the priorities and outcomes sought by their members were reflected in bargaining outcomes.

[1194] ACTU, Submission No 67 (6 March 2026) 84.
[1195] UWU, Submission No 62 (6 March 2026) 24.
[1196] UFU, Submission No 80 (6 March 2026) 3 [7]–[8].
[1197] NTEU, Submission No 71 (6 March 2026) 2 [7]–[11].
[1198] Ibid 2–3, [7], [12]–[13].
[1199] ACTU, Submission No 67 (6 March 2026) 85–6.
[1200] Ibid.
[1201] NTEU, Submission No 71 (6 March 2026) 3 [16].
[1202] UWU, Submission on Draft Report No 20 (29 May 2026) 8.

The NTEU argued that that unions remain incentivised to bargain because the 'no less favourable' test only applies to unagreed terms.[1203] Terms that can improve productivity can be negotiated in the course of bargaining, particularly if associated benefits are passed on to employees in the form of salaries and other improvements.[1204]

Union recommendations

The ACTU, ANMF, UFU and NTEU recommended amendments to address the decision made by the FWC in *Endeavour Energy*[1205] which found that where a model term is an unagreed matter, the FWC must insert the model term rather than the potentially more beneficial term that the 'no less favourable' test would have required be made in the IBWD.[1206]

The ACTU submitted that there is no sound policy basis for treating model terms differently from other terms when applying the 'no less favourable' test. The UFU and the ANMF agreed that this was not the intended effect of the Closing Loopholes amendments.[1207] The UFU indicated that the relevant provision should be amended to ensure minimum terms do not replace stronger terms and employers do not seek to remove long standing protections to better their overall position.[1208]

The ACTU recommended that section 270A could be amended by introducing a new subsection as follows:

> *A mandatory term that is included in the determination to comply with subsection 270(1)(c) and section 273, and that deals with a particular matter, must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter.*[1209]

The UFU recommended defining 'agreed term' and including terms 'agreed in principle' in the definition.[1210] This would ensure employer groups could not seek to bring all provisions to the FWC for arbitration.[1211]

The UFU also recommended inserting a provision to enable parties to an IBD or an IBWD to apply for a variation to the IBD or IWBD, if legislative amendments are made during or after intractable bargaining.[1212] The UFU consider this would enable parties to apply to address a loophole in the intractable bargaining legislation that is later rectified through amendment but has resulted in a loss in conditions or protections in the meantime. The UFU highlight that their union may be subject to the *Endeavour Energy*[1213] loophole relating to dispute resolution and consultation clauses.[1214]

[1203] NTEU, Submission No 71 (6 March 2026) [14].
[1204] Ibid 3 [15].
[1205] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Endeavour Energy* [2025] FWCFB 285.
[1206] NTEU, Submission No 71 (6 March 2026) 4 [17]–[20]; ACTU, Submission No 67 (6 March 2026) 86; UFU, Submission No 80 (6 March 2026) 6 [14], 10 [23]; ANMF, Submission No 60 (5 March 2026) 6 [17]–[18].
[1207] ANMF, Submission No 60 (5 March 2026) 6 [17]; UFU, Submission No 80 (6 March 2026) 10 [26]; UFU, Submission on Draft Report No 29 (29 May 2026) 2 [8].
[1208] UFU, Submission No 80 (6 March 2026) 10 [24]–[25].
[1209] ACTU, Submission No 67 (6 March 2026) 86; ACTU, Submission on Draft Report No 33 (29 May 2026) 22.
[1210] UFU, Submission No 80 (6 March 2026) 11 [31]; UFU, Submission on Draft Report No 29 (29 May 2026) 3 [10].
[1211] UFU, Submission No 80 (6 March 2026) 11 [31].
[1212] Ibid 12 [32].
[1213] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Endeavour Energy* [2025] FWCFB 285.
[1214] UFU, Submission No 80 (6 March 2026) 8 [16]–[18].

The UFU also recommended amendments to allow the FWC to revoke the intractable bargaining application if it considers it cannot make an IBWD with terms consistent with the 'no less favourable' test.[1215] UFU noted that this would address concerns arising from *Unanderra*,[1216] in which the TWU lost access to their right to arbitrate disputes in the FWC because the FWC determined that it could not authorise the imposition of a compulsory arbitration clause that parties did not consent to.[1217]

Feedback on draft recommendations

The ACTU recommended that the Review not proceed with the proposed recommendation to introduce legislative guardrails on IBDs.[1218] It raised concerns that the proposed amendment might result in employers having more grounds to oppose an IBD.[1219] The ACTU encouraged the Review to consider that the intractable bargaining framework addressed a long-standing gap in the legislation which had enabled employers to avoid concluding an agreement.[1220]

The UWU, UFU and ACTU considered the amendment unnecessary, noting that an IBD has only been sought in 0.2% of enterprise agreement negotiations that have occurred in the last 4 years.[1221]

ANMF submitted it has observed employers have been more willing to negotiate efficiently since the commencement of the reforms and that the draft recommendation to introduce guardrails may provide employers further grounds to oppose applications and delay bargaining.[1222]

Unions showed broad support[1223] for the Review's draft recommendation to extend the 'no less favourable' test to mandatory terms.[1224] The UWU suggested the adoption of the proposed wording provided in the ACTU's submission.[1225] The UFU was supportive of the draft recommendation but suggested that mandatory terms must be explicitly no less favourable than corresponding terms in the predecessor enterprise agreement and called for a mechanism to vary existing workplace determinations so that they can meet that standard.[1226] The UFU also suggested clarification of the FW Act – particularly sections 270A and 273 – to ensure the extent of section 270A's application to the dispute resolution provision (in light of constitutional limitations) is clear in the legislation.[1227]

[1215] Ibid 13 [34]–[35].
[1216] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd (t/a Cleanaway Operations Pty Ltd)* [2024] FWCFB 305.
[1217] UFU, Submission No 80 (6 March 2026) 6 [14].
[1218] ACTU, Submission on Draft Report No 33 (29 May 2026) 23.
[1219] Ibid.
[1220] Ibid.
[1221] Ibid; UWU, Submission on Draft Report No 20 (29 May 2026) 8; UFU, Submission on Draft Deport No 29 (29 May 2026) 2 [5].
[1222] ANMF, Submission on Draft Report No 34 (29 May 2026) 5–6 [14].
[1223] ANMF, Submission on Draft Report No 34 (29 May 2026) 6; NTEU, Submission on Draft Report No 19 (29 May 2026) 5 [6]; UWU, Submission on Draft Report No 20 (29 May 2026) 8; ACTU, Submission on Draft Report No 33 (29 May 2026) 23; UFU, Submission on Draft Report No 29 (29 May 2026) 3 [9].
[1224] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 213 [Draft Recommendation 23].
[1225] UWU, Submission on Draft Report No 20 (29 May 2026) 8. See ACTU, Submission No 67 (6 March 2026) 10.
[1226] UFU, Submission on Draft Report No 29 (29 May 2026) 2–4 [2], [6]–[10], [15].
[1227] Ibid 3–5 [10]–[13] [16]-[22].

Analysis

The measure introduced section 270A to ensure a non-wage increase term that remains unagreed is no less favourable than the equivalent term in an enterprise agreement, and amended subsection 274(3) to adjust the meaning of an 'agreed term'. The measure operates alongside other key intractable bargaining provisions:

- sections 235 and 235A, which provide for when a IBD can be made and under what circumstances, including the matters the FWC must be satisfied of before making the IBD, and
- sections 269, 270 and 275, which provide for the making of the IBWD, including factors the FWC must take into account in deciding the terms of the IBWD.

Operation and effectiveness of the 'no less favourable' test

The intractable bargaining amendments, particularly the 'no less favourable' test, have been polarising. AIG submits that, '[i]n a crowded field of problematic amendments, this provision has resulted in the most violent alarm, and frankly dismay among employers'[1228] while the NTEU submits that 'the reforms promote effective enterprise bargaining and highlighted that employer groups have previously sought to utilise arbitration in intractable bargaining framework to reduce existing entitlements'.

Intractable bargaining matters are a tiny proportion of matters dealt with under the FW Act, yet many employer groups suggest that the measure inappropriately affects bargaining dynamics, benchmarks certain entitlements and has the potential to prevent modernisation and reform. Most employer groups recommend adjusting or abolishing the 'no less favourable' test. Some propose amendments that would allow the FWC to consider alternative factors or the adoption of a more holistic assessment of whether employees are no worse off overall, rather than a term-by-term assessment.

The task of the Review is not to consider the appropriateness of the policy behind the measure, but to consider whether the operation of the amendments is appropriate and identify any unintended consequences.[1229] The intention of the amendment indicates that the purpose of the amendments was to ensure that, unless otherwise agreed, terms for employees and employee organisations cannot go backwards under an IBWD.[1230] Section 270A was intended as a protective mechanism, to ensure involuntary arbitration did not undermine employees' baseline bargaining position. The 'no less favourable' test in section 270A constrains the FWC's capacity to reduce existing conditions and strengthens employee protections in the context of intractable bargaining.

[1228] AIG, Submission No 82 (8 March 2026) 57 [274].
[1229] DEWR, *Closing Loopholes Review – Terms of Reference* (Departmental document, 5 December 2025).
[1230] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 16 [73].

The concerns of employer groups about the reforms having set a 'floor' through the 'no less favourable' test, applied in limited circumstances, is an intended feature of the reforms. Parliament's intention for the measure was to ensure employees do not end up in a worse position compared to the existing enterprise agreement. Section 270A is operating to give effect to the intention.

Intractable bargaining in the context of the Fair Work Act

The Closing Loopholes amendments to intractable bargaining do not operate in isolation. Just as the SJBP Review considered section 270A, this review considers how the 'no less favourable' test operates in its context.

Ulan West demonstrates that the intention of the 'no less favourable' test has been unclear and illustrates both the challenges of intractable bargaining and a possible way forward to address an unintended consequence.

At first instance, Deputy President Easton suggested that the intractable bargaining regime intentionally altered bargaining dynamics by creating a viable strategy for a bargaining representative to withhold consent in the hope of achieving a better outcome through arbitration.[1231] The Deputy President considered this shift deliberate and beneficial to parties with weaker bargaining power. The Full Bench rejected that interpretation[1232] and held that this view was the inverse of Parliament's intention. The Full Bench emphasised that the intractable bargaining regime was designed to increase the risk associated with holding out for no agreement, and to ensure that reaching agreement through bargaining remains the rational and preferred course for all parties.[1233]

As the Full Bench notes, incentivising intractable bargaining processes for employees and their representatives is inconsistent with the objects of the FW Act, which include achieving productivity and fairness through enterprise-level collective bargaining and good-faith bargaining.[1234] If a bargaining representative perceives arbitration as a safe or even preferable pathway—because the 'no less favourable' test prevents any regression—then the incentive to genuinely bargain may be weakened. This is the opposite of what Parliament intended and an unintended consequence of the amendment.

To support the balancing of bargaining incentives, give better effect to the intentions of Parliament, and address the unintended consequence, more can be done to prioritise and incentivise enterprise-level agreement making and reduce any incentive to utilise intractable bargaining processes.

[1231] *The Association of Professional Engineers, Scientists and Managers, Australia v Ulan West Operations Pty Ltd* [2025] FWC 1806, [57].
[1232] *Association of Professional Engineers, Scientists and Managers, Australia v Ulan West Operations Pty Ltd* [2025] FWCFB 264, [69].
[1233] Ibid [70].
[1234] *Fair Work Act 2009* (Cth) s 3(f).

Supporting the operation of section 235

Section 235 sets out the matters which the FWC must be satisfied before issuing an IBD, however, these requirements do not currently adequately incentivise genuine bargaining nor address incentives to hold out for the status quo. The Review recommends the introduction of a legislated list of factors that the FWC must consider before making an IBD to address these risks. The factors should ensure that a balance is struck to discourage strategic delay and preserve genuine bargaining. Such an amendment would better give effect to Parliament's intention in introducing section 270A.

Cases have begun to come before the FWC that argue an IBD should not be made where parties 'held out' for intractable bargaining processes or it would be contrary to the objects of the Act.[1235] In *Qube Logistics*, the FWC held that the conduct of the parties during bargaining is relevant to the making of an IBD.[1236] In *Ulan West* the Full Bench noted that

> *if a bargaining representative adopted the type of strategy envisaged...* [holding out for an IBWD]*, that factor is likely to be relevant to the assessment of reasonableness for the purposes of paragraph 235(2)(c). If an applicant has not participated genuinely or constructively in bargaining, that might support a finding ...to not make a declaration*.[1237]

The proposed amendment would codify the factors the FWC has already begun to identify as relevant considerations in upholding the intention of the measure. For example, these factors could include:

- whether parties have engaged in genuine and constructive bargaining
- whether parties held out for intractable bargaining processes, in anticipation of a more favourable arbitrated outcome, and
- whether the conduct of the parties was consistent with the objectives of the FW Act, including achieving productivity and fairness through an emphasis on enterprise-level bargaining underpinned by good faith bargaining.

These factors would guide the FWC's considerations about whether it is reasonable in all the circumstances to make the IBD (see paragraph 235(2)(c)).

The proposed amendment would provide a counterbalance to the risk the 'no less favourable' test incentivises IBD and IBWD processes, while maintaining the intention of the Closing Loopholes amendments on the intractable bargaining framework. It would drive appropriate behaviour during bargaining, with parties knowing these matters will be considered by the FWC.

[1235] See, for example *Australian Rail, Tram and Bus Industry Union v Qube Logistics (Rail) Pty Ltd Trading AS Qube Logistics* [2025] FWC 1283, [147].
[1236] Ibid [153].
[1237] *Association of Professional Engineers, Scientists and Managers, Australia v Ulan West Operations Pty Ltd* [2025] FWCFB 264, [71].

The ACTU submits that codifying additional factors in section 235 risks creating new grounds on which employers may resist a declaration. The ACTU emphasised that the broader intractable bargaining framework, as introduced by the SJBP Act, rebalanced bargaining dynamics by addressing a long-standing gap in the legislation which enabled employers to terminate agreements after the nominal expiry date and provided a more balanced mechanism for resolving disputes. The Review acknowledges this intention and agrees the framework has strengthened the position of employees in protracted negotiations; but the Review does not consider the proposed amendment would diminish the core policy intent of the intractable bargaining framework. Codifying the matters the FWC can consider is necessary to ensure a consistent application of the intractable bargaining framework.

Employer groups have broadly indicated their support for the draft recommendation but continue to call for the repeal of section 270A and, failing that, they urge the Review to go further than just recommending guardrails. As noted above, the Review considers section 270A gives effect to its stated intent, and does not require repeal on the grounds that it has adjusted the framework to benefit employees.

The Review does not consider that additional time or further case authority will shed more light on the unintended consequence already identified. An amendment is necessary to provide guardrails to ensure the primacy of enterprise bargaining within the IBD context and certainty for parties. The proposed amendment will ensure section 270A's protective mechanism operates in a way that does not incentivise holding out for the status quo or risk undermining bargaining.

The SJBP Review observed that it was not convinced section 270A was having the intended effect of focusing the minds of all parties on reaching compromise. The Review is similarly not persuaded that section 270A, in the absence of such guardrails, will achieve its intended purpose of concentrating the minds of all parties on reaching compromise.

The recommended amendment underlines the primacy of enterprise-level, good faith bargaining, reduces the risk of strategic delay by any party and aligns the operation of section 235 with both the objects of the Act and the protective mechanism in section 270A.

Mandatory terms

Unions sought to highlight to the Review that the exclusion of mandatory terms from the 'no less favourable' test was unintended. In *Endeavour Energy*, the FWC noted that section 270A affects a term included in an IBWD to comply with subsection 270(3), rather than mandatory terms which must be included in accordance with 270(1)(c).[1238] As a result, a mandatory term that must be included in the IBWD does not need to meet the 'no less favourable' test introduced by section 270A.

[1238] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2025] FWCFB 285, [233].

This outcome appears to be unintended as there is no sound policy basis for distinguishing mandatory terms from other terms (noting the legal limitations outlined in the next paragraph). Adoption of the relevant terms in the mandatory terms section should be subject to the same test for other terms affected by section 270A or otherwise as agreed by the parties. This would reduce the risk of intractable bargaining diminishing existing terms that may be better suited to a particular industry or enterprise. In amending the provisions, further consideration should be given to whether the unintended exclusion of mandatory terms from the application of the 'no less favourable' test has resulted in IBWDs being made that fall short of a 'no less favourable' mandatory term, and if so, whether it is appropriate to include a legislated means for parties to seek the variation of their IBWD's to meet the intended policy outcome.

As noted in *Unanderra*, the Commonwealth's legislative power 'does not extend to empowering the FWC to include within a workplace determination a dispute resolution procedure that empowers the FWC to arbitrate a dispute absent the consent of the parties.'[1239] Section 270A will continue to have no effect on this provision to that extent. The government may wish to consider whether additional amendments to section 273 are necessary to ensure the effect of section 270A on dispute resolution is clear on the face of the FW Act.

Agreed terms

The measure's amendment to the meaning of 'agreed terms' received submissions from the UFU which recommended the inclusion of terms that had been 'agreed in principle'. The UFU highlighted the importance of preventing employers from avoiding agreeing to terms as a bargaining strategy. Incentivisation of 'holding out' bargaining strategies were a contemplated concern that led to the measure. Mr Bandt's comments during debate noted that employer groups had recommended 'holding out' for FWC arbitration as a bargaining strategy.

The core of UFU's submissions – being the behaviours or strategies of bargaining parties, such as 'holding out' for intractable bargaining processes or refusing to intentionally agree any term as a strategy – are matters that could be addressed through the adoption of the recommendation discussed above.

There is limited jurisprudence on agreed terms, particularly in relation to the amendment to expand 'agreed terms' to include terms agreed at the time of application. It is possible that expanding the meaning of 'agreed terms' to include terms agreed in principle may ultimately frustrate bargaining processes, which would be contrary to the objects of the FW Act. At this stage, no further amendment is warranted.

[1239] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* [2024] FWCFB 305 [174].

Findings and recommendations

Ensuring employees do not end up in a worse position compared to an existing enterprise agreement is an intended feature of the measure. The provisions are operating to give effect to Parliament's intention.

Introducing a legislated list of factors that the FWC must consider before making an IBD would underline the primacy of enterprise-level, good faith bargaining, and reduce the risk of strategic delay by any party. It would align the operation of section 235 with both the objects of the Act and the protective mechanism in section 270A.

The exclusion of mandatory terms from the 'no less favourable' test appears to be unintended.

Recommendation 21

Section 235 of the *Fair Work Act 2009* should be amended to provide a legislated set of guardrails that must be considered by the Fair Work Commission before an intractable bargaining declaration can be made.

Recommendation 22

The *Fair Work Act 2009* should be amended to ensure that mandatory terms to be included in an intractable bargaining workplace determination must be no less favourable to each employee and their representatives, than a term of the enterprise agreement that deals with the matter.

3.3 Fair Work Commission preparing enterprise agreement model terms

What the measure does

The Closing Loopholes No. 2 Act amended the FW Act to transfer responsibility for preparing and issuing the model enterprise agreement terms for flexibility, consultation and dispute resolution, and the model dispute resolution term for copied State instruments (**the model terms**), from the Minister to the FWC.[1240]

The measure commenced on 26 February 2025.[1241]

Model terms

All enterprise agreements are required to contain terms relating to flexibility, consultation and dispute resolution, and copied State instruments must contain a dispute resolution term.[1242]

Model terms act as guidance for bargaining parties by providing an example of a term that meets the FW Act requirements.[1243] The model flexibility and consultation terms for enterprise agreements and the dispute settlement term for copied State instruments also operate as a safety net[1244] because the model term will be taken as a term of the agreement or instrument if that agreement or instrument does not contain a term on these topics, or where the existing term does not meet the requirements of the FW Act.[1245] The dispute resolution model term will not automatically be taken as a part of the enterprise agreement but if an enterprise agreement does not include a dispute resolution term or if an existing term does not meet the FW Act's requirements, the FWC may either refuse to approve the agreement or approve the agreement with undertakings if a satisfactory undertaking is given.[1246]

The model terms do not override flexibility, consultation and dispute resolution terms agreed to by the parties if the agreed term meets the requirements of the FW Act.[1247]

[1240] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 5.
[1241] Ibid s 2(1) item 6.
[1242] *Fair Work Act 2009* (Cth) ss 186(6), 202(1), 205(1), 768BK(1). A copied State instrument is an instrument that 'copies' the terms of a state award or agreement. It applies to employees transferring from a state to a national system employer.
[1243] Explanatory Memorandum, Fair Work Bill 2008 (Cth) 412 [2731].
[1244] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 16 [70]; FWC, *Background Paper – Model terms for enterprise agreements* (Report,17 September 2024) 9 [18], 11 [29], 12 [36].
[1245] Fair Work Act 2009 (Cth) ss 202(4), 205(2), 768BK(1).
[1246] FWC, *Background Paper – Model terms for enterprise agreements,* (Report, 17 September 2024) 12 [37]; *Fair Work Act 2009* (Cth) ss 186(6), 190.
[1247] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 16 [70].

The model flexibility term for enterprise agreements must enable employers and employees to agree to an individual flexibility arrangement that varies the effect of the agreement to meet the genuine needs of both parties.[1248]

The model consultation clause for enterprise agreements must require the employer to consult employees about a major workplace change that is likely to have a significant effect on the employees, or a change to their regular roster or ordinary hours of work.[1249]

The model dispute resolution term for enterprise agreements must provide for a procedure that allows the FWC or a person independent of the parties to settle disputes about the agreement or the NES.[1250]

The model dispute resolution term for copied State instruments must provide for a procedure for settling disputes about matters arising under the instrument.[1251]

Transfer of responsibility for making of model terms to the FWC

The measure provided a Full Bench of the FWC with the power to issue determinations that make or vary the model terms.[1252] The FWC must take into account a range of matters when issuing a determination, including whether the term is broadly consistent with comparable modern award terms, best practice workplace relations, the objects of the Act, whether all persons and bodies have had a reasonable opportunity to be heard and make submissions, and any other matters the FWC considers relevant.[1253] The FWC must also consider additional matters specific to certain model terms.[1254]

Determinations made under these provisions are legislative instruments.[1255]

[1248] *Fair Work Act 2009* (Cth) ss 202(1)(a), (6)(a). The model flexibility term must also comply with the flexibility requirements under the FW Act, including, amongst other things, that the individual flexibility arrangement (IFA) be only about permitted matters, not include unlawful terms, be genuinely agreed to, ensure the employee is better off overall, and allow the IFA to be terminated within 28 days, see section 203.
[1249] Ibid ss 205(1), (1A), (4)(a).
[1250] Ibid ss 186(6), 737(2)(a).
[1251] Ibid ss 768BK(1), (1A).
[1252] Ibid ss 202(5), 205(3), 616(4A), 737(1), 768BK(1A).
[1253] Ibid ss 202(6)(b), 205(4)(b), 737(2)(b), 768BK(3).
[1254] For the model consultation clause, whether the term would, or likely would, have the effect of an objectionable emergency management term, see ss 205(4)(b)(iv), 195A(1)(a)–(d). For the model dispute resolution term in enterprise agreements and the model dispute resolution term in copied State instruments, whether the term would ensure that if the FWC or an independent person arbitrate a dispute, they deal with the dispute only in the manner permitted by the dispute resolution term and any decision is consistent with the FW Act or a fair work instrument, see ibid ss 737(2)(b)(iv), 768BK(3)(d), 739(3)–(6), 740(3)–(4).
[1255] Ibid ss 202(7), 205(6), 737(3), 768BK(4).

Intention of the measure

The measure intended to require the FWC to determine, as Australia's expert and independent workplace relations tribunal, the model terms.[1256] This reform aligned responsibility for issuing model terms for enterprise agreements with the FWC's existing responsibility for issuing model terms for modern awards.[1257]

The requirement for the FWC to consider, among others, 'best practice' workplace relations and whether all persons and bodies have had a reasonable opportunity to be heard is intended to maintain the ongoing relevance of the model terms and facilitate greater public consultation in the determination process.[1258]

The delayed commencement of the measure sought to allow sufficient time to constitute a Full Bench (or Full Benches) to determine the model terms, hear and consider submissions, and make the relevant determinations.[1259]

What has happened since commencement

On 17 September 2024, the FWC President announced the commencement of a major case to consider the content of the new model terms.[1260] The FWC engaged in a consultative process and sought stakeholder feedback before issuing a decision.[1261] The FWC conducted consultations with peak councils from 14–28 October 2024 and invited submissions by 1 November 2024 and submissions in reply by 22 November 2024.[1262]

Draft model terms were released on 20 December 2024 to allow for further consultation.[1263]

[1256] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 16 [15], 95 [524], 96 [534], 96 [539].
[1257] Ibid 95 [524], 98 [557].
[1258] Ibid 16 [71].
[1259] Ibid 95 [525].
[1260] *Model terms for enterprise agreements and copied State instruments* [2025] FWCFB 39, [4]; *Model terms for enterprise agreements and copied State instruments* [2024] FWC 2520.
[1261] *Model terms for enterprise agreements and copied State instruments* [2025] FWCFB 39, [6]–[8]; FWC (Cth), 'Model terms for enterprise agreements and copied State instruments' (Web Page) <https://www.fwc.gov.au/hearings-decisions/major-cases/previous-major-cases/model-terms-enterprise-agreements-and-copied-state-instruments>.
[1262] *Model terms for enterprise agreements and copied State instruments* [2024] FWC 2676; *Model terms for enterprise agreements and copied State instruments* [2025] FWCFB 39, [7]–[9]; FWC (Cth), 'Model terms for enterprise agreements and copied State instruments' (Web Page) <https://www.fwc.gov.au/hearings-decisions/major-cases/previous-major-cases/model-terms-enterprise-agreements-and-copied-state-instruments>.
[1263] *Model terms for enterprise agreements and copied State instruments* [2025] FWCFB 39, [11].

On 20 February 2025, the Full Bench issued a decision and 4 determinations finalising the new model terms, which were to operate from 26 February 2025.[1264] In its decision, the Full Bench determined to give further consideration to the question of when the consultation obligation for major workplace change should be triggered under the model consultation clause, when a 'definite decision' has been made, as currently exists, or when an employer is proposing to introduce such a change.[1265] On 12 March 2026, the Full Bench issued a statement of its intention to revisit this issue in 2027 '[i]n light of the Commission's other workload and priorities' and invited interested parties to raise the issue in application if they seek the FWC to consider the question at an earlier time.[1266]

What the Review heard

The Review received 9 submissions addressing the measure, and an additional 2 submissions on the Review's Draft Report provided feedback on this measure. Employer groups raised a range of concerns about the measure, and broader concerns about the model terms framework, while unions were mostly supportive.

Employer groups

NFIA submitted that it supports the use of model terms in principle but raised concerns that the current approach risks adding unnecessary complexity if model terms are highly technical, numerous, or not clearly integrated into a simplified bargaining framework.[1267] NFIA also submitted that its members found model terms and accompanying materials difficult to interpret without professional assistance.[1268]

AIG noted that the amendment affords the FWC a wide-ranging discretion to determine the content of the model terms that is fettered by few guardrails.[1269] It criticised the absence of a requirement for the FWC to take into account the impact that the model terms would have on employers (including in relation to employment costs, regulatory burden, productivity and efficiency) and highlighted the lack of clarity about matters that must be considered, including what 'best practice workplace relations as determined by the FWC' might mean (noting that the term 'best practice workplace relations' is not defined in the FW Act).[1270] It argued that given the model terms' purpose was to act 'as a safety net', it would not be appropriate for the model terms to reflect best practice or to be overly prescriptive.[1271]

[1264] FWC (Cth),'New model terms for enterprise agreements made' (Web Page); Ibid. Determination – Model Consultation Term for enterprise agreements - PR784578; Determination – Model Flexibility Term for enterprise agreements – PR784579; Determination – Model Disputes Term for enterprise agreements - PR784580; Determination – Model Disputes Term for copied State instruments - PR784583.
[1265] *Model terms for enterprise agreements and copied State instruments*, [2025] FWCFB 39, [96]–[105].
[1266] *Model terms for enterprise agreements and copied State instruments* [2026] FWCFB 55, [5]–[6].
[1267] NFIA, Submission No 33, *Review of the Closing the Loopholes Acts* (3 March 2026) 8.
[1268] Ibid.
[1269] AIG, Submission No 82 (8 March 2026) 55 [262].
[1270] Ibid 55–6 [262]–[263], 56 [267].
[1271] Ibid 55 [260], 55–6 [263]–[264].

AIG also submitted that the former model terms reflected long-standing test case standards in various ways, and that the measure risks the creation of new model terms that deviate from the balance previously struck, often where the FWC or one of its predecessors has given careful and detailed consideration to the operation of the relevant clause.[1272]

NFIA and COSBOA recommended that the FWC provide clearer guidance and templates written in plain English about model terms for enterprise agreements.[1273] NFIA further recommended that the FW Act contain a statement that the use of model terms or FWC-endorsed templates provide a strong presumption of compliance for the purposes of enterprise agreement approval.[1274]

AIG recommended the FW Act be amended to ensure that the exercise of the FWC's discretion in relation to the model terms be guided by additional criteria, including the interests of and impact on employers, as this would reflect the approach taken in other parts of the FW Act (e.g. the requirement to consider the modern awards objective).[1275] AIG also recommended the requirement to consider 'best practice workplace relations' be removed, and the FWC be required to consider the need to encourage collective bargaining. [1276]

Employer group views on the broader model terms framework

Some employer groups raised concerns with the model terms framework more broadly, including concern about model terms being included in enterprise agreements without the consent of the parties.

COSBOA expressed concerned with the ability for model terms to be incorporated into enterprise agreements that are renewed or rolled over as this could require alternative standards without active employer awareness or consent.[1277] COSBOA also noted that model terms may depart from modern award conditions in ways that would increase small business compliance obligations,[1278] and argued that if model terms introduce obligations not present in the relevant modern award, such as expanded consultation requirements or new dispute resolution procedures, small businesses with existing enterprise agreements will face unanticipated compliance gaps.[1279]

COSBOA recommended that model terms not impose obligations on small businesses that exceed the standard in the modern award unless parties have expressly agreed to those terms.[1280]

[1272] Ibid 56 [265]–[267].
[1273] COSBOA, Submission No 45 (3 March 2026) 11 [47]; NFIA, Submission No 33, *Review of the Closing the Loopholes Acts* (3 March 2026) 8.
[1274] NFIA, Submission No 33, *Review of the Closing the Loopholes Acts* (3 March 2026) 8.
[1275] AIG, Submission No 82 (8 March 2026) 56–7 [269]–[271]; AIG, Submission on Draft Report No 45 (31 May 2026) 29 [169].
[1276] AIG, Submission No 82 (8 March 2026) 57 [271]; AIG, Submission on Draft Report No 45 (31 May 2026) 29 [169].
[1277] COSBOA, Submission No 45 (3 March 2026)11 [46]
[1278] Ibid 11 [44].
[1279] Ibid 11 [46].
[1280] Ibid 11 [47a].

COSBOA also recommended that where an enterprise agreement is renewed or rolled over, any new model terms should be taken to be automatically included without additional administrative burdens like submissions or undertaking requirements and be separately disclosed to the employer with a minimum 90-day lead time before they take effect.[1281]

HIA opposed providing the FWC with the power to prepare model terms, arguing that the setting of model terms undermines the flexibility that is supposed to be a key advantage of enterprise bargaining over awards and is a 'one size fits all' approach that does not reflect operational realities (particularly in the residential building sector).[1282] It argued that the existence of model terms risks becoming de facto mandatory through FWC approval pressure. HIA recommended that it be made explicit that model terms are optional guidance and that departure from the model terms would not constitute grounds for not approving an enterprise agreement.[1283]

Unions

Unions were supportive of the measure, although AMIEU noted its support was caveated on the FWC issuing model terms that are in line with community expectations and provide appropriate enforcement rights.[1284] Unions did not provide feedback on the Draft Report that related to this measure.

Unions highlighted the value of the measure. ANMF submitted that the amendment is achieving its objective by modernising and revisiting the model terms.[1285] The ACTU also submitted that the FWC's updates, though minor, were important because they bring the model terms more in line with contemporary industrial standards and expectations.[1286] The ACTU noted that the FWC's open, consultative approach is aligned with the objects of the FW Act and is an improvement on the previous legislative approach.[1287]

The UWU expressed concern that without regular review and clearer guidance, the model terms may unintentionally entrench minimum standards and create a ceiling that limits progressive improvement of flexibility, consultation, and dispute resolution terms in enterprise agreements.[1288]

AMWU and the UWU recommended the FWC should review the model terms regularly to reflect contemporary best practice,[1289] with AMWU suggesting a review be undertaken every 4 years (or earlier on the FWC's own initiative)[1290] and the UWU recommending a statutory requirement for review every 2 years.[1291]

[1281] Ibid [47b].
[1282] HIA, Submission No 20 (2 March 2026) 15; HIA, Submission on Draft Report No 11 (29 May 2026) 5.
[1283] HIA, Submission No 20 (2 March 2026) 3,15; HIA, Submission on Draft Report No 11 (29 May 2026) 5.
[1284] AMIEU, Submission No 56 (4 March 2026) 6 [51].
[1285] ANMF, Submission No 60 (5 March 2026) 6 [15].
[1286] ACTU, Submission No 67 (6 March 2026) 81.
[1287] Ibid 82.
[1288] UWU, Submission No 62 (6 March 2026) 23.
[1289] AMWU, Submission No 38 (3 March 2026) [23]; UWU, Submission No 62 (6 March 2026) 23.
[1290] AMWU, Submission No 38 (3 March 2026) [24].
[1291] UWU, Submission No 62 (6 March 2026) 23.

The UWU recommended clearer legislative guidance to confirm that model terms operate as minimum standards to address its concern that employers will interpret model terms as setting the maximum standard.[1292]

Analysis

The measure is important in ensuring the ongoing relevance of the model terms as well as facilitating greater public consultation in the determination process. By transferring responsibility for the making of model terms, the measure aligns the responsibility for issuing of model terms for enterprise agreements with the FWC's existing responsibility for issuing model terms for modern awards.

NFIA and COSBOA call for clearer guidance and templates written in plain English about model terms for enterprise agreements.[1293] The change in responsibility for issuing model terms does not inherently indicate that new or additional guidance is necessary. Submissions have not identified confusion about any model term issued by the FWC that would indicate a need for the FWC to issue further guidance.

AIG suggests additional 'guardrails' for the FWC[1294] to ensure appropriate matters are considered, including the impact that the model terms would have on employers, and the need to encourage collective bargaining. AIG also suggests removing the requirement to consider 'best practice workplace relations as determined by the FWC' because this lacks clarity.[1295]

The FWC is well suited to be given broad discretion when determining the model terms as it has expert and technical knowledge of contemporary workplace relations and operates independently of political processes. The public consultation requirement helps to ensure that the FWC's judgement is supplemented by a range of different stakeholder submissions and keeps the model terms contemporary and responsive to the needs of users. No evidence has been put before the Review that suggests that the FWC did not engage with a relevant consideration during consultations or when the FWC finalised the new model terms on 20 February 2025.

AIG argues that the purpose of the model terms are to act 'as a safety net' so it is not appropriate for the model terms to reflect best practice or to be overly prescriptive.[1296] The UWU also recommends clear legislative guidance be provided to confirm that the model terms operate only as minimum requirements.[1297] Characterising model terms as setting minimum standards misconstrues the purpose of a model term. Model terms allow employers and employees to refer to the model term for guidance during the bargaining process. Model terms may be included in an enterprise agreement or adapted to the bargaining parties' particular circumstances. Model terms act as a 'safety net' to the extent that they ensure a compliant term, which has been developed with the understanding of best practice workplace

[1292] Ibid.
[1293] COSBOA, Submission No 45 (3 March 2026) 11 [47]; NFIA, Submission No 33, *Review of the Closing the Loopholes Acts* (3 March 2026) 8.
[1294] AIG, Submission No 82 (8 March 2026) 56 [269]; AIG, Submission on Draft Report No 45 (1 June 2026) 29 [169].
[1295] AIG, Submission No 82 (8 March 2026) 56 [269]; AIG, Submission on Draft Report No 45 (1 June 2026) 29 [169].
[1296] AIG, Submission No 82 (8 March 2026) 56 [263]–[264].
[1297] UWU, Submission No 62 (6 March 2026) 23.

relations, is included in an enterprise agreement or a copied State instrument.[1298] In its decision to issue the model terms, the FWC determined that 'best practice workplace relations' refers to achieving the best results or reflecting the best of current practice evident across industry, and that the FWC should deploy its own expertise and experience in assessing this.[1299] In this context, it would not be appropriate to produce materials suggesting 'model terms' are a minimum requirement.

Concerns raised by employer groups about the broader model terms framework, including issues related to model terms being included in enterprise agreements without the consent of bargaining parties, are beyond the scope of the Review. The measure did not change how the model terms are applied, only the entity that is responsible for preparing and issuing them.

At this early stage, no evidence has been put to the Review to justify a statutory requirement for periodic review of the model terms. The FWC has indicated that, because of resourcing pressures, it cannot revisit the question of when the consultation obligation for major workplace change should be triggered under the model consultation term until 2027. The FWC has indicated it remains open to consideration of model terms matters raised by relevant parties and will do so if necessary.[1300] For the model terms to remain current, reflect best practice workplace relations, and ensure all persons have a reasonable opportunity to be heard, the FWC should be appropriately resourced to undertake this task.

Findings and recommendations

The amendments have been operating appropriately and effectively to date, and no unintended consequences have been identified.

The Review emphasises the importance of ensuring the FWC has the capacity to update the model terms as necessary and is appropriately resourced to undertake this task.

[1298] *Fair Work Act 2009* (Cth) ss 202(4), 205(2), 768BK(1).
[1299] *Model terms for enterprise agreements and copied State instruments* [2025] FWCFB 39, [61]–[62].
[1300] *Model terms for enterprise agreements and copied State instruments* [2026] FWCFB 55, [5]–[6].

3.4 Conciliation conference orders

What the measure does

The Closing Loopholes No. 1 Act amended subsection 409(6A) of the FW Act to provide that each bargaining representative who applies for a protected action ballot order (**PABO**) to allow for a ballot on taking industrial action must not contravene an order made under section 448A that relates to the PABO.[1301]

Section 448A, introduced by the SJBP Act, requires the FWC to order bargaining representatives for a proposed agreement to attend a mediation or conciliation conference ('compulsory conciliation conference') once a PABO has been made in relation to the proposed enterprise agreement.[1302] This amendment was intended to de-escalate disputes by providing an opportunity for parties to further negotiate and potentially resolve, or at least reduce, matters in dispute before protected industrial action is taken.[1303] Prior to the Closing Loopholes amendment, each bargaining representative of an employee that would be covered by the agreement was required to attend the compulsory conciliation conference for subsequent employee claim action to be protected.

The measure, read with section 448A, has the effect of requiring only the bargaining representatives who applied for the PABO to attend the compulsory conciliation conference for subsequent employee claim action to be protected. If any other bargaining representative fails to attend the conference, this will not render subsequent employee claim action unprotected.

The amendments also clarify that an employer organising or engaging in employer response action in response to industrial action authorised by a protected action ballot, and any bargaining representative of the employer, must attend the conciliation conference for subsequent employer response action to be protected.[1304]

The amendments commenced on 15 December 2023.[1305]

Intention of the measure

The measure addresses the unintended consequences identified by the FWC's Full Bench in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) v Nilsen (NSW) Pty Ltd* [2023] FWCFB 134 (***Nilsen***). In *Nilsen*, the Full Bench noted that subsection 409(6A) suggested employee claim action would only be protected industrial action if each bargaining representative of an employee who would have been covered by the proposed

[1301] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 1 pt 14A.
[1302] *Fair Work Act 2009* (Cth) s 448A(1).
[1303] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 47 [268].
[1304] *Fair Work Act 2009* (Cth) s 411(3).
[1305] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2(1) item 20A.

enterprise agreement had attended the compulsory conciliation conference.[1306] This meant that non-compliance with a section 448A order by one or more employee bargaining representatives could result in any subsequent employee claim action being unprotected – for both those represented by the non-complying bargaining representative and for others participating in the action.[1307]

What has happened since commencement

Since 6 June 2023 the FWC's attendance questions indicate that not all bargaining representatives attended a conference in 5 to 7% of applications.

Table 9: Response to attendance question in section 437 applications lodged from 6 June 2023 – 30 June 2025, where a conference was held.

Period	Attendance rate (% yes of total applications where activity was completed)	Was the conference attended by all bargaining representatives that were ordered to attend?	
		Yes	No
6 June 2023 – 14 December 2023	95%	328	17
15 December 2023 – 30 June 2024	94%	314	19
1 July 2024 – 30 June 2025	93%	486	36

The SJBP Review considered section 448A and the previous version of subsection 409(6A). That review noted the unintended consequence of subsection 409(6A) as well as the amendments in Closing Loopholes No. 1 to address those unintended consequences,[1308] but did not make comment on the effect of the Closing Loopholes amendments.

The SJBP Review focused primarily on the requirement for compulsory conciliation conferences, noting that the conferences had 'caused some unease'.[1309] The SJBP review noted that AIG and ACCI were broadly supportive of compulsory conciliation conferences but highlighted that agreement between parties to not attend conciliation conferences could not be addressed because the FWC lacked discretion to dispense with the requirement.[1310] Unions, AREEA and some academics were more

[1306] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) v Nilsen (NSW) Pty Ltd* [2023] FWCFB 134, [68].
[1307] Ibid [69]; Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 47 [69].
[1308] Mark Bray and Alison Preston, *Secure Jobs, Better Pay Review – Final Report* (Report, 31 March 2025) 152 [15.2.2.].
[1309] Ibid 152 [15.2].
[1310] Ibid 153 [15.2.3].

critical of the changes, and suggested they were unnecessary, an additional hurdle, and did not improve resolution of issues.[1311]

The SJBP Review found merit in compulsory conciliation conferences but agreed it would be appropriate for there to be discretion to dispense with the requirement. The SJBP Review recommended that section 448A of the FW Act be amended to provide the FWC with discretion not to conduct a conference if there is agreement of relevant bargaining representatives (recommendation 7).[1312] The SJBP Review further noted that consideration should be given to which bargaining representatives the FWC should seek agreement from when exercising discretion not to conduct a conference.[1313] The SJBP Review accepted that this may not be all bargaining representatives but did not provide any further detail.[1314]

The SJBP Review's recommendations are under consideration by government.

What the Review heard

The Review received 6 submissions on this measure but did not receive any feedback on the Draft Report that related to this measure. The majority of those submissions related more to the introduction of compulsory conciliation conferences (the introduction of section 448A by the SJBP Act), rather than the Closing Loopholes No. 1 amendment to require only the bargaining representatives who applied for the PABO to attend the compulsory conciliation conference.

Generally, the submissions of unions aligned with their views expressed to the SJBP Review.

The ACTU welcomed the amendments to subsection 409(6A) but highlighted that compulsory conciliation conferences remained the substantial issue.[1315] The ASU and AMIEU argued that compulsory conciliation conferences had no utility and should be repealed.[1316] Both the ACTU and UWU submitted that compulsory conciliation conferences require considerable resourcing from the FWC and all bargaining parties, with little corresponding benefit.[1317] The UWU supported the measure, but reaffirmed its submission to the SJBP Review that compulsory conciliation conferences could be removed, or scheduled only with bargaining parties' consent.[1318]

The ASU argued that existing good faith bargaining obligations and the FWC's discretionary conciliation powers already provide adequate mechanisms to encourage agreement without exposing workers to the risk of losing statutory rights.[1319]

[1311] Ibid.
[1312] Ibid 155 [15.3].
[1313] Ibid.
[1314] Ibid.
[1315] ACTU, Submission No 67 (6 March 2026) 35–6.
[1316] AMIEU, Submission No 56 (4 March 2026) 5 [38]; ASU, Submission No 81 (6 March 2026) 13.
[1317] ACTU, Submission No 67 (6 March 2026) 36; UWU, Submission No 62 (6 March 2026) 15.
[1318] UWU, Submission No 62 (6 March 2026) 15.
[1319] ASU, Submission No 81 (6 March 2026) 13.

The ACTU welcomed the SJPB Review recommendation to provide the FWC with discretion to dispense with compulsory conciliation conferences if all relevant bargaining representatives agree.[1320] However, it reiterated that any amendment to section 448A would need to address situations involving numerous bargaining representatives who cannot all agree on participation in a conference. In submissions to the SJBP Review, the ACTU proposed the FWC be given discretion to decide whether to order a conference and determine attendance based on its assessment of the views of all bargaining representatives involved in the negotiations.[1321]

In the Review's roundtable consultations, some unions indicated support for conferences where all parties consent to and see benefit in conciliation but indicated the benefit depended on the relevant FWC Commissioner's approach, with some engaging substantively in the process and others treating it as more of a procedural process.

Only a few submissions from employer groups raised this measure.

AIG acknowledged the subsection 409(6A) amendment but indicated it did not propose any changes at this stage.[1322] HIA did not oppose the requirement for the FWC to make orders compelling parties to attend conciliation conferences. However, it expressed concern that conciliation may pressure parties into positions during bargaining and create a 'resourcing disparity for small builders without dedicated HR/IR departments', potentially disadvantaging small businesses who cannot match union legal resources.[1323]

Analysis

The amendment to ensure that only bargaining representatives who applied for the PABO must attend the compulsory conciliation conference to protect subsequent employee claim action has been largely uncontroversial.

No submissions were received suggesting that the Closing Loopholes No. 1 Act amendment has not had its intended effect, was inappropriate, or has resulted in unintended consequences. The measure addressed the outcome identified in *Nilsen* by preventing a technicality from affecting protected industrial action and providing an appropriate protective outcome for bargaining representatives and the employees they represent.

The measure has had little impact on the number of conferences where not all bargaining representatives attended (see Table 9 above). Since 6 June 2023 the FWC's attendance questions indicate that not all bargaining representatives attended a conference in 5 to 7% of applications.

[1320] ACTU, Submission No 67 (6 March 2026) 36–7.
[1321] Ibid.
[1322] AIG, Submission No 82 (8 March 2026) 59 [284].
[1323] HIA, Submission No 20 (2 March 2026) 15.

The primary focus of stakeholder feedback has been on the earlier SJBP reforms to introduce the requirement for the FWC to make an order directing the bargaining representatives to attend a compulsory conciliation conference if they made a PABO relating to a proposed enterprise agreement. These amendments have already been thoroughly considered in the SJBP Review, with recommendations issued to government for consideration. Stakeholders have not raised new concerns about the operation of the provisions, nor has there been a substantive shift in the operation of the provisions that would require further consideration of those amendments.

Findings and recommendations

The measure has been operating appropriately and effectively to date, and no unintended consequences have been identified. The Review notes that the amendments made by the SJBP Act were considered by the SJBP Review, with recommendations made to government for consideration

3.5 Enabling multiple franchisees to access the single-enterprise stream

What the measure does

The Closing Loopholes No. 2 Act amended the FW Act to allow multiple franchisees of the same franchisor, or related bodies corporate of the same franchisor, or any combination (**franchisees**)[1324] to voluntarily make a single-enterprise agreement.[1325] Franchisees retain the ability to bargain for single-enterprise agreements on a franchisee-by-franchisee basis, or make a multi-enterprise agreement if they satisfy the requirements to bargain together.[1326]

Under the FW Act, bargaining for a single-enterprise agreement is limited to a single employer or 'related employers'.[1327] The measure amended the definition of 'related employers' to include franchisees.[1328] This allows franchisees to bargain together as related employers without needing to demonstrate that they are engaged in a common enterprise.[1329]

The FW Act also allows 2 or more employers that are not all 'related employers' to make a multi-enterprise agreement.[1330] The measure added franchises as an additional class of employers that may make a multi-enterprise agreement, as they would otherwise be excluded from accessing multi-enterprise bargaining pathways by the amended definition of 'related employers'.[1331] Consequently, franchisees may continue to bargain for a multi-enterprise agreement.

Under the SJBP Act, bargaining representatives could apply to add employers to an authorisation, but if they had fewer than 20 employees the employer's consent was required to be added to the authorisation.[1332] This had the effect of limiting the circumstances under which franchisees, often small businesses, could be compelled to bargain together.

The measure commenced on 27 February 2024.[1333]

[1324] 'Franchisees' for the purposes of these amendments are defined in s 172(5A). 'Multiple franchisees' are 'employers [that] carry on similar business activities under the same franchise', see ss 172(5A)(c).
[1325] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 3.
[1326] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 5 [12].
[1327] *Fair Work Act 2009* (Cth) s 172(2).
[1328] Ibid s 172(5A)(c).
[1329] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 85 [461].
[1330] *Fair Work Act 2009* (Cth) s 172(3).
[1331] Ibid ss 172(3), (3A).
[1332] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 48 [274]–[275].
[1333] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 2(1) item 4.

Intention of the measure

The measure is intended to strengthen the ability of franchisees and their employees to bargain by facilitating franchisees' access to the single-enterprise agreement stream.[1334] It sought to ensure franchisees and their employees have more options when bargaining and to allow employees of franchisees to access a more straightforward bargaining stream.[1335]

The explanatory material for the measure notes that while the single interest employer stream is available, access to the stream may be dependent on the number of employees within each franchisee when a bargaining representative applies for the authorisation, which may have a limiting effect on access for employees of a franchisee that falls below the threshold.[1336] The amendments removed this barrier by allowing access to the single-enterprise stream.

The measure allows franchisees to bargain for and make a single-enterprise agreement as a single enterprise, including access to all mechanisms available under the FW Act relating to single-enterprise bargaining.[1337] A single-enterprise agreement is made where a majority of employees who vote approve the agreement.[1338] Unlike in multi-enterprise bargaining, approval by a majority of employees of each employer is not required.[1339] Bargaining representatives in the single-enterprise agreement stream are also able to obtain a majority support determination where a majority of employees who would be covered by the agreement wish to bargain.[1340]

What has happened since commencement

The Review is aware of one single-enterprise agreement that has been approved covering 2 or more franchisees since the measure came into effect. On 5 April 2024, the FWC approved the *Subway Bridge Street Pty Ltd and Canerambl Pty Ltd Enterprise Agreement 2023*.[1341] The employers are franchisees of the Subway sandwich chain and operate stores in Queensland.

Other multiple franchisee single-enterprise agreements may have been approved since the measure commenced, but this is difficult to verify as the available data does not distinguish these from approvals of other single-enterprise agreements.

[1334] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 15 [65].
[1335] Ibid 48 [273].
[1336] Ibid 48 [274]–[275].
[1337] Ibid 85 [461].
[1338] *Fair Work Act 2009* (Cth) s 182(1).
[1339] Ibid s 182(2).
[1340] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 85 [461].
[1341] *Canerambl Pty Ltd T/A Subway, Subway Bridge Street Pty Ltd T/A Subway* [2024] FWCA 1235, [16].

What the Review heard

The Review received limited stakeholder feedback on this measure, with 5 submissions addressing it and one submission providing feedback on the Review's Draft Report in relation to this measure.

Employer groups generally acknowledged the merit of letting franchisees bargain together, with CCIWA supporting the amendments and AIG noting the stated intentions of the measure are positive.[1342] AIG emphasised safeguards that preserve options, choice and voluntarism and stressed that these intentions need to continue to be realised.[1343]

HIA noted that franchise arrangements are uncommon in the building sector but warned against the broader precedent of treating separate businesses as a single enterprise, including potential future expansion beyond franchise relationships.[1344]

COSBOA raised concerns that bargaining outcomes could be commercially unsustainable for small franchise operators, and that these franchisees may lack the resources and expertise needed to participate in bargaining. To address this, COSBOA recommended the FWC be required to conduct a commercial viability assessment of a proposed multi-franchisee agreement, and that the franchisor be required to confirm to the FWC that the proposed agreement is consistent with the franchise model, before certification.

In response to the Review's Draft Report, COSBOA submitted that although the Draft Report acknowledged its concerns about small businesses not having adequate resources to participate meaningfully in bargaining, it did not offer a recommended remedy.[1345] COSBOA re-iterated its recommendation that small business franchisees be entitled to free FWC-funded bargaining advisory support through negotiations, as a way to address this concern.[1346]

The ACTU supported the measure, noting the risks in franchise settings, including vulnerable and casual workforces, and that employees may work for their employer for a short period. It proposed strengthening worker protections in this stream by extending mechanisms such as employee organisation consent and voting request order processes to franchisee single-enterprise agreements.[1347]

[1342] CCIWA Submission No 75 (6 March 2026) 15; AIG, Submission No 82 (8 March 2026) 50 [242].
[1343] AIG, Submission No 82 (8 March 2026) 50 [242].
[1344] HIA, Submission No 20 (2 March 2026) 15.
[1345] COSBOA, Submission on Draft Report No 7 (29 May 2026) 6 [29].
[1346] Ibid; COSBOA, Submission No 45 (3 March 2026) 9–10 [40]–[41].
[1347] ACTU, Submission No 67 (6 March 2026) 75.

Analysis

The measure was a minor amendment to make sure that franchisees can access the full range of bargaining streams under the FW Act. It made practical changes to ensure that if franchisees want to bargain together, they can access a stream where they do not need to apply to the FWC for an authorisation (which is required in the single-interest bargaining stream) and can vote together as a single cohort. Most stakeholders that addressed the measure generally agree with its intent and did not identify any unintended consequences.

While the ACTU notes that franchise settings can involve more vulnerable and casual workforces, it would be premature for the Review to recommend changes before the measure has been applied more broadly and its practical effects are clear. The ACTU's recommendations were also made in its submission to the Senate inquiry into the Closing Loopholes No. 2 Bill, and the Parliament did not adopt them. There is no strong evidence to recommend a change to these provisions.

COSBOA's concerns about franchisees lacking the resources and capability to engage meaningfully in bargaining, to the extent that they are borne out, would appear to be applicable to any small business (not only franchisees) engaging in bargaining. The Parliament has not chosen to exempt small business operators from the enterprise bargaining system. Small business operators are able to seek advice or assistance in bargaining, including from employer organisations with workplace relations expertise.

With respect to COSBOA's concern about bargaining outcomes potentially being unsustainable for franchisors who are bound by franchise agreements, these are again concerns that may apply to many businesses engaging in bargaining, although franchisees may be more commercially constrained than many employers. These commercial constraints are among the considerations a business makes when joining a franchise network. COSBOA's recommended remedies would effectively give the franchise agreement, and the franchisor entity, a kind of veto over an agreement negotiated between employees and employers. It may also incentivise the development of franchise agreement terms specifically aimed at defeating bargaining outcomes.

Findings and recommendations

The amendment has been operating appropriately and effectively to date, and no unintended consequences have been identified.

3.6 Transitioning from multi-enterprise agreements

What the measure does

The Closing Loopholes No. 2 Act introduced provisions to facilitate the transition from a single interest employer agreement or a supported bargaining agreement (**the old multi-enterprise agreement**) that has not passed its nominal date, to a single-enterprise agreement provided employees would be better off overall under the single-enterprise agreement.[1348]

Several amendments were made to the FW Act to ensure the bargaining framework facilitates this option.

The measure commenced on 27 February 2024.[1349]

Transitioning to a single-enterprise agreement

Only one enterprise agreement may apply to an employee at a time.[1350]

The Closing Loopholes No. 2 Act made amendments that meant where the old multi-enterprise agreement applies to an employee for particular employment, and a single-enterprise agreement comes into operation that covers that employment, the single-enterprise agreement will apply, and the old multi-enterprise agreement will cease to apply to that employment.[1351]

Bargaining for a single-enterprise agreement

Under the FW Act, a bargaining representative of an employee may apply to the FWC for a majority support determination where a majority of employees want to bargain with their employer to make a single-enterprise agreement but the employer has not yet agreed to bargain or initiated bargaining.[1352]

The FWC may also make a scope order under the FW Act where a bargaining representative is concerned that bargaining is not proceeding efficiently or fairly because the proposed single-enterprise agreement will not cover the appropriate employees or will cover employees that it is not appropriate to cover.[1353]

[1348] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 4.
[1349] Ibid s 2(1) item 5.
[1350] *Fair Work Act 2009* (Cth) s 58.
[1351] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 86 [467]; *Fair Work Act 2009* (Cth) ss 58(4)–(5).
[1352] *Fair Work Act 2009* (Cth) s 236.
[1353] Ibid s 238.

This measure prevents applications for majority support determinations and scope orders being made in respect of a proposed single-enterprise agreement where the agreement would cover at least one employee who is already covered by an old multi-enterprise agreement that has not nominally expired.[1354] As a result, bargaining representatives cannot compel bargaining for a single-enterprise agreement while the old multi-enterprise agreement remains within its nominal term and in operation.[1355]

Where the parties do agree to bargain, they will have access to existing bargaining dispute applications under section 240 of the FW Act.[1356]

Voting on an agreement

Ordinarily for a single-enterprise agreement, the employer that will be covered by a proposed single-enterprise agreement may request, without the consent of the unions, the employees who are employed at the time and who will be covered by the proposed agreement to approve the agreement by voting for it.[1357]

The Closing Loopholes No. 2 Act introduced new section 180B, which requires an employer to have obtained the written agreement of all unions to which the old multi-enterprise agreement applies before requesting employees vote to approve the proposed single-enterprise agreement.[1358] Where failure to provide written agreement by a union is unreasonable in the circumstances, the FWC has the power to make a voting request order to permit the employer to put the agreement to a vote.[1359]

Ensuring a single-enterprise agreement satisfies the better off overall test

To approve an enterprise agreement, the FWC must be satisfied that a proposed agreement passes the BOOT.[1360] Before the measure was introduced, the BOOT was satisfied if each award covered employee, and each prospective award covered employee, would be better off overall if the agreement applied than if the relevant modern award applied, whether or not the agreement was a multi-employer or single-enterprise agreement.[1361]

[1354] Ibid ss 236(1A), 238(1).
[1355] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 93 [514].
[1356] Ibid 93 [514].
[1357] *Fair Work Act 2009* (Cth) s 181.
[1358] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 87 [472]; Ibid s 180B(2).
[1359] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 93 [518]; *Fair Work Act 2009* (Cth) ss 240A(4), 240B(a).
[1360] *Fair Work Act 2009* (Cth) ss 186(2)(d), 193, 193A. The BOOT is not applied to a greenfield agreement under s 193(1).
[1361] Ibid s 193(1)(a).

The measure modified the operation of the BOOT when transitioning from an old multi-enterprise agreement to a single-enterprise agreement. For transitioning employees, the BOOT is assessed by reference to the old multi-enterprise agreement, rather than the relevant modern award.[1362] In this context, a single-enterprise agreement will pass the BOOT in relation to these employees where they are better off overall under the proposed single-enterprise agreement than under the old multi-enterprise agreement.

Intention of the measure

The measure is intended to enable single-enterprise agreement making by allowing employers and their employees to transition from a single interest employer agreement or supported bargaining agreement to a single-enterprise agreement prior to the agreement's nominal expiry date, enabling the parties to negotiate terms and conditions that suit their specific circumstances.[1363]

These amendments protect employees by ensuring the terms and conditions under a single-enterprise agreement are better off overall than the old multi-enterprise agreement.[1364]

What has happened since commencement

The Review is not aware of any single-enterprise agreements that have been made covering employers and employees who were covered by a multi-enterprise agreement that had not yet passed its nominal expiry date. The FWC has not made any decisions under this measure.

What the Review heard

The Review received limited stakeholder feedback on this measure, with 5 submissions addressing it. Two submissions on the Review's Draft Report included feedback on the measure.

Employer groups supported the ability to transition from a multi-enterprise agreement to a single-enterprise agreement but argued the process is too restrictive. In particular, they opposed the requirement that written agreement is obtained from each relevant union, and that the BOOT is benchmarked against the multi-enterprise agreement rather than the relevant award.[1365]

AIG submitted that it was 'not appropriate' for employers and employees to be 'prevented from negotiating a single-enterprise agreement while covered by an in-term multi-enterprise agreement [prior to the Closing Loopholes No. 2 Act amendments], and expressed support for the measure insofar as it provides a pathway out of the multi-enterprise stream.[1366]

[1362] Ibid ss 193(1)(b), (1A), 193A.
[1363] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 15 [67].
[1364] Ibid 15 [68].
[1365] See, for example, AIG, Submission No 82 (8 March 2026) 51 [245]–[248]; HIA, Submission No 20 (2 March 2026) 15; COSBOA, Submission No 45 (3 March 2026) 10 [42]–[43].
[1366] AIG, Submission No 82 (8 March 2026) 51 [245].

AIG further argued that the requirements to obtain written agreement from unions before the proposed new agreement is put to a vote, and the assessment of the single enterprise agreement against the existing multi-enterprise agreement (rather than the relevant award), are 'unjustifiably restrictive' and at odds with the objects of the FW Act.[1367] AIG submitted that the test for approval of the proposed single enterprise agreement should be the BOOT assessed against the relevant award and said that if a proposed single-enterprise agreement is not favourable to employees or does not reflect their priorities, the employees will not vote for the agreement.[1368]

AIG noted that, if unions unreasonably fail to agree, the employers can apply to the FWC for a voting request order to enable the employer to put the agreement to a vote but there is no guidance provided to the FWC in the FW Act as to when unions' failure to agree is unreasonable. AIG recommended this requirement be removed.[1369] Alternatively, AIG recommended that an employer that has notified relevant unions of the proposed vote should be able to proceed with voting if no reply is received within a prescribed period.[1370] AIG argued that under the current settings, unions have no incentive to agree to or prioritise responding to an employers' written request, and that it was impractical to expect employers to seek permission from all relevant union parties if the employer had never dealt with said parties before.[1371]

In its feedback on the Draft Report, AIG noted the Review's contention that it is appropriate for the proposed single enterprise agreement to be assessed against the existing multi-enterprise agreement because the latter would still be in operation. AIG submitted this was not a sufficient justification to depart from the practice of assessing the proposed single-enterprise agreement against the BOOT, as other scenarios exist where an in-term enterprise agreement can be varied or replaced and still be assessed against the award.[1372]

HIA supported what it referred to as a practical exit path from multi-enterprise agreements that no longer suit business operations but raised concerns about procedural complexity.[1373] COSBOA also supported the ability to transition but noted that the process is resource intensive for small businesses. COSBOA proposed the FWC establish a streamlined low-cost transition pathway for small businesses seeking to transition from a multi-enterprise agreement.[1374]

The ACTU supported the mechanism and associated safeguards but identified what it describes as a gap in how the BOOT applies to employees who are not yet employed but are within the foreseeable scope of the enterprise agreement. For an existing employee covered by a multi-employer agreement, the BOOT is assessed against that agreement, but for reasonably foreseeable employees the BOOT is assessed only against the award.[1375]

[1367] AIG, Submission No 82 (8 March 2026) 51 [248]–[249]; AIG, Submission on Draft Report No 45 (31 May 2026) 31 [178].
[1368] AIG, Submission No 82 (8 March 2026) 52 [252], 54 [256]–[258].
[1369] AIG, Submission No 82 (8 March 2026) 52 [251].
[1370] Ibid 52–3 [255].
[1371] Ibid.
[1372] AIG, Submission on Draft Report No 45 (31 May 2026) 32 [187]–[188].
[1373] HIA, Submission No 20 (2 March 2026) 15.
[1374] COSBOA, Submission No 45 (3 March 2026) 10 [43].
[1375] ACTU, Submission No 67 (6 March 2026) 75.

Feedback on draft recommendations

In respect of the Review's draft recommendation that a further review of this measure should occur in 2 to 3 years,[1376] ACCI did not oppose the recommendation but noted its position that reviews should take place at the point when quantitative and qualitative evidence is available to facilitate a meaningful examination of the operation of the legislation.[1377] AIG reiterated its recommendations for legislative change and argued that, because the current provisions will have the effect of discouraging employers from seeking to transition from a multi-enterprise agreement, the fact that the provisions have not been used is not a reason to defer consideration of amendments.[1378]

Analysis

The Review is not aware of any applications to transition from a multi-enterprise agreement to a single-enterprise agreement. There is also currently no evidence of unintended consequences at this stage, although the Review notes that potential concerns have been raised.

While acknowledging AIG's contention that the lack of use of the provisions may be because the provisions discourage employers from seeking to transition, the Review has taken a cautious approach to recommending amendments to provisions that have not yet been tested. This is why the Review has recommended greater flexibility in the timing of future legislative review provisions (see Recommendation 1 in Section 1.1), and why the Review has recommended further review of this measure in 2 to 3 years.

Employer groups and the ACTU each raised very different concerns with the apparent inconsistencies in the application of the BOOT, compared with how the BOOT is applied in assessing other proposed agreements. The crucial difference in these instances is that the proposed single-enterprise agreement is replacing a multi-enterprise agreement that has not yet reached its nominal expiry date. In this context, it is appropriate that the BOOT is assessed against the old multi-enterprise agreement (as opposed to the relevant award), ensuring existing employees are no worse off than they would be if they continued to be covered by that agreement.

AIG points out that, in other circumstances in which an agreement is to be replaced before its nominal expiry date, the test is the BOOT assessed against the award. While enabling employers to transition to a single-enterprise agreement supports the concept that bargaining at the single-enterprise level is the preferred form of bargaining, there should not be incentives for employers to transition from multi-enterprise agreements in order to reduce wages and conditions. The requirement to seek union agreement, and the assessment of the new single-enterprise agreement against the old multi enterprise agreement, are safeguards against this. With respect to the ACTU's concerns, given this application of the BOOT appears to be aimed at ensuring the employees covered by the old multi-enterprise agreement are

[1376] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 234 [Draft Recommendation 24].
[1377] ACCI, Submission on Draft Report No 46 (1 June 2026) 29–30 [178]–[184].
[1378] AIG, Submission on Draft Report No 45 (31 May 2026) 32 [190]–[193].

not made worse off, it is appropriate that the BOOT is only assessed in this way for the existing employees. The 'gap' the ACTU identifies appears to be the result of a deliberate policy decision, rather than an oversight.

The employer groups' and ACTU's respective concerns about the novel application of the BOOT were also raised in their submissions to the Senate inquiry into the Bill. Noting the concerns raised above, it would be premature to propose amendments to this measure now, when no applications have been made to date. This novel application of the BOOT should be monitored for any unintended consequences in the coming years.

Findings and recommendations

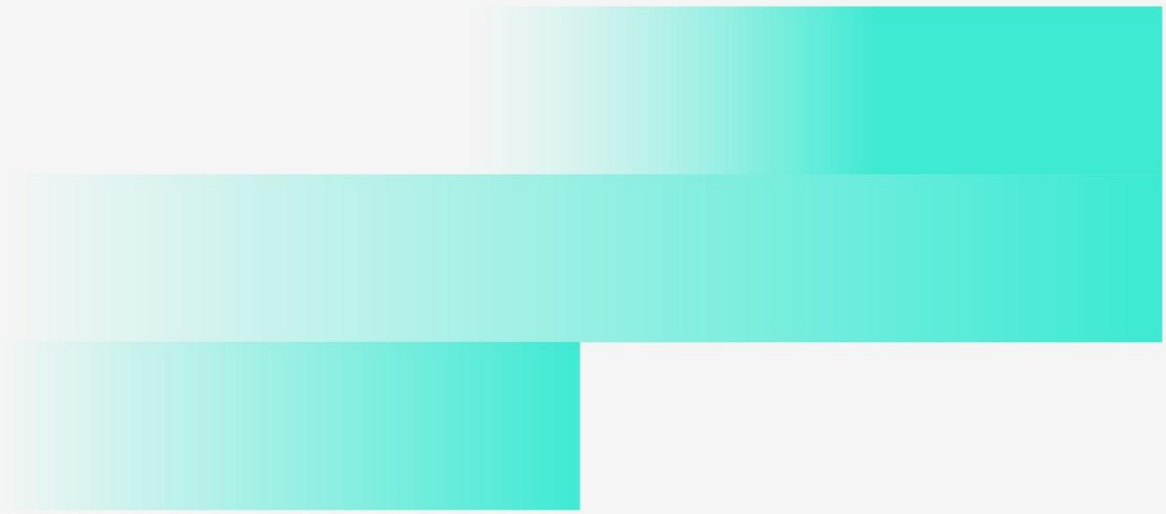
As no applications have been made, it is too early to assess the operation of these amendments. This measure should be reviewed in 2 to 3 years' time.

Recommendation 23

A further review of the transitioning from multi-enterprise agreements measure should occur in 2 to 3 years. The review should have regard to any uses of this measure, or Fair Work Commission jurisprudence that has developed.

Chapter 4

Protecting workers and strengthening enforcement



4.1 Criminalising wage theft

What the measure does

The Closing Loopholes No.1 Act introduced a new criminal offence for intentional underpayment of an amount that an employer is required to pay 'to, on behalf of, or for the benefit of, an employee' (the wage theft offence).[1379] Before this measure, sanctions for the underpayment of employee wages and entitlements were limited to civil penalties and other orders (such as compensation orders) under various civil remedy provisions in the FW Act.

The measure allows the FWO to enter cooperation agreements with employers who come forward to report their conduct that might amount to wage theft.[1380] It also allows the Minister to declare a Voluntary Small Business Wage Compliance Code (**Voluntary Code**), which protects small business employers who have complied with the Voluntary Code from being referred by the FWO for criminal prosecution in relation to an underpayment.[1381]

The new offence and the Voluntary Code commenced on 1 January 2025.[1382]

Interaction of the wage theft offence and increase in civil penalties for wage underpayment

The Closing Loopholes No. 2 Act amended the civil penalty regime in the FW Act to strengthen the graduated enforcement framework, including to increase the maximum civil penalties for wage underpayment and non-compliance with other workplace obligations.[1383] The wage theft offence and the changes to the civil penalties framework need to be considered together as the measures complement one another in deterring and addressing wage underpayment.

The amendment to the definition of a 'serious contravention' in the civil remedy provisions from the previous threshold of 'knowing and systematic' to the threshold of 'knowing or reckless' was also made to provide a graduated enforcement framework for wage underpayments.[1384] The civil 'serious contravention' represents a mid-tier sanction for underpayments, with the most severe intentional conduct being covered by the wage theft offence.[1385]

Further description and details of the civil penalty regime is dealt with in Section 4.2.

[1379] *Fair Work Act 2009* (Cth) s 327A; *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 1 pt 14.
[1380] *Fair Work Act 2009* (Cth) s 717B.
[1381] Ibid s 327B.
[1382] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2(1) item 18.
[1383] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 11.
[1384] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 155 [918].
[1385] Ibid 153 [910].

The wage theft offence

An employer commits the wage theft offence if:

- the employer is required to pay an amount to, on behalf of, or for the benefit of, an employee under the FW Act, a fair work instrument or transitional instrument[1386]
- the employer engages in conduct,[1387] and
- the conduct results in a failure to pay the required amount.[1388]

If the employee or employer is only covered by the FW Act because of a state's referral of powers, the offence will not cover amounts required to be paid in respect of superannuation, long service leave, or paid leave that the employee was entitled to take by reason of being a victim of crime, for jury service, or for emergency service duties.[1389]

The measure only captures intentional wage theft. The prosecution will have to prove beyond reasonable doubt that the defendant intentionally engaged in the relevant conduct and that the defendant intended that their conduct would result in a failure to pay the required amount.[1390] Underpayments that are accidental, inadvertent or based on a genuine mistake are not captured.[1391]

There is a 6-year limitation period for bringing a proceeding after the commission of the offence.[1392]

[1386] *Fair Work Act 2009* (Cth) s 327A(1)(a).
[1387] Ibid s 327A(1)(c).
[1388] Ibid s 327A(1)(d).
[1389] Ibid ss 30C, 30D, 30M, 30N, 327A(2). For completeness, amounts that are to be paid in respect of 'ordinary' employee entitlements (wages, penalty and overtime rates, allowances, paid leave such as annual or personal leave) are covered under the offence.
[1390] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 168 [981], [983].
[1391] Ibid 168 [985].
[1392] *Fair Work Act 2009* (Cth) s 327C(2).

Employers convicted of wage theft may be subject to the following penalties:

Table 10: Penalties for wage theft offence

Category	Condition	Maximum penalty (as of 2025–26)[1393]
Body corporate or the Commonwealth[1394]	If the court can determine the underpayment amount (the difference between the required and actual amount paid) [1395]	Higher of: 3 times the amount of the underpayment, or $8.25 million
	If the court cannot determine the underpayment amount	$8.25 million
Individual	Imprisonment option	Up to 10 years imprisonment, pecuniary penalty, or both
	If the court can determine the underpayment amount	Higher of: 3 times the amount of the underpayment, or $1.65 million
	If the court cannot determine the underpayment amount	$1.65 million

Cooperation Agreements

The Closing Loopholes No. 1 Act also introduced a cooperation agreements framework for individuals or employers who self-report conduct that could be a criminal underpayment to the FWO, to request to enter a cooperation agreement with the FWO.[1396] The 'safe harbour' operates by preventing the FWO from referring any conduct covered by a cooperation agreement for criminal prosecution.

The FWO is required to consider a number of factors such as cooperation, the nature and level of detail of the disclosure, history of compliance and the nature and gravity of the conduct, when deciding whether to enter into a cooperative agreement.[1397]

A cooperation agreement does not prevent the FWO from instituting or continuing civil proceedings in relation to the conduct, or from referring conduct engaged in by any other person in relation to a possible criminal offence to the CDPP or AFP.[1398] It also does not prevent another person with standing (such as the affected employees or an employee organisation) from instituting or continuing civil proceedings.

If the FWO is satisfied that a small business employer has complied with the Voluntary Code, the FWO must not enter into a cooperation agreement with a small business employer in relation to that conduct.[1399]

The Closing Loopholes No.1 Act also included provisions to support the making, varying, withdrawal and termination of cooperation agreements.[1400]

[1393] The value of a Commonwealth penalty unit is $330 as at 15 June 2026.
[1394] *Fair Work Act 2009* (Cth) s 794B(3).
[1395] Ibid s 327A(7).
[1396] Ibid ss 717A, 717B.
[1397] Ibid s 717B(2).
[1398] Ibid s 717A(2).
[1399] Ibid s 327B(2)(b).
[1400] Ibid ss 717C–717F.

Voluntary Small Business Wage Compliance Code

The measure allows the Minister to declare a Voluntary Code[1401] which was a pre-condition to the commencement of the criminal offence.[1402] The FWO developed the Voluntary Code in 2024 through a tripartite process, and it commenced on 1 January 2025.[1403]

If the FWO is satisfied that a small business employer has complied with the Voluntary Code, the FWO must not refer the relevant conduct for prosecution.[1404] Compliance with the Voluntary Code does not affect the power of a Fair Work Inspector to institute civil proceedings regarding the conduct or give notice regarding compliance.[1405]

Functions of the FWO

The Closing Loopholes No. 1 Act amended the functions of the FWO to include a statutory requirement for the publication of a compliance and enforcement policy, including guidelines relating to the circumstances in which the FWO will or will not accept or consider accepting undertakings, or enter or consider entering into cooperation agreements.[1406] The FWO's practice was to publish its compliance and enforcement policy before the measure commenced, but it was not a statutory requirement.

The functions of the FWO already included the ability to investigate any act or practice that may be contrary to the FW Act.[1407] The measure amended the FWO's investigative functions to ensure the FWO can investigate a 'related offence provision' such as being an accessory after the fact, or attempting to commit, aiding and abetting, counselling, procuring or conspiring to commit the offence.[1408] The measure also extended relevant compliance powers to Fair Work Inspectors to support their role in investigating a related offence provision.[1409]

Evidence of alleged wage theft

The measure made amendments to 'turn off' certain immunities conferred by the FW Act for 2 classes of documents – an employee record and a copy of a payslip.[1410] This means that the privilege against self-incrimination is abrogated in relation to those types of documents. The FWO would not be prevented from tendering evidence of employee records or payslips, produced by notice or other coercive process, against an individual for alleged wage theft.[1411]

[1401] Ibid s 327B(1).
[1402] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2 (1) item 18.
[1403] *Voluntary Small Business Wage Compliance Code Declaration 2024* (Cth) s 2;
FWO, *Office of the Fair Work Ombudsman Annual Report 2024–2025* (Annual Report, 30 September 2025) 30.
[1404] *Fair Work Act 2009* (Cth) s 327B(2)(a).
[1405] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 171 [1008]; *Fair Work Act 2009* (Cth) s 327B(4).
[1406] *Fair Work Act 2009* (Cth) s 682(1)(da).
[1407] Ibid s 682(1)(c).
[1408] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 165 [965] 172 [1014]; *Fair Work Act 2009* (Cth) s 12.
[1409] Ibid 173 [1020]–[1021].
[1410] *Fair Work Act 2009* (Cth) ss 713(4), 713A(2).
[1411] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 173 [1024].

Liability for bodies corporate and Australian governments

The Closing Loopholes No. 1 Act amended the FW Act so that the attribution rules for criminal responsibility in Part 2.5 of Chapter 2 of the Criminal Code apply to a body corporate for the new wage theft offence or a related offence provision.[1412]

FWO funding

The FWO received $49.5 million over 4 years from 2023–24, including $11 million per year ongoing, to implement the new wage theft offence.[1413] With this funding, the FWO established its Criminal Investigations Branch to prepare for the commencement of the offence and lead the agency's criminal investigation function. As at 31 December 2025, the budgeted staffing level for the branch was 16.7 ASL. As well as recruiting and training staff, the FWO has used the funding to invest in physical and information technology infrastructure that meets a criminal standard for management of evidence, develop and build a case management system and secure platform, and make operational investments.[1414]

The CDPP also received funding to consider referrals and prosecute where appropriate, to provide 'foundational legal advice' to the FWO, and training for investigators and lawyers.[1415]

Intention of the measure

Criminalising wage theft was intended to help promote a robust 'compliance culture' in relation to workplace laws across Australia[1416] and offer a stronger deterrent for wage underpayment.[1417] The measure aims to 'encourage compliance with the relevant workplace laws and further deter wrongdoing, particularly when the conduct is intentional'.[1418]

The measure responded to the recommendation of several inquiries including the Migrant Workers' Taskforce (**MWT**)[1419] and the Senate inquiry into Unlawful Underpayment of Employees' Remuneration (**UUER**)[1420] which recommended the introduction of a criminal offence for wage theft to further deter wage underpayments. The Final Report of the MWT noted migrant workers in Australia on a temporary basis are 'particularly vulnerable to unscrupulous practices at work,'[1421] and found that 'criminal sanctions to tackle serious and systemic underpayment of workers, would usefully form part of the regulatory toolkit' given non-compliance with laws relating to underpayment was 'widespread.'[1422]

[1412] *Fair Work Act 2009* (Cth) ss 793(3A), (4).
[1413] DEWR (Cth), *Portfolio Additional Estimates Statements 2023–24* (Budget 2023–24 Portfolio Additional Estimates Statements, 8 February 2024) 145 table 1.2.
[1414] FWO information provided 8 May 2026.
[1415] CDPP (Cth), *Additional Estimates Statements* (Budget 2023–24 Portfolio Additional Estimates Statements, 8 February 2024) 181 [3.2.1].
[1416] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 21 [103].
[1417] Tony Burke, 'Albanese Labor Government to criminalise wage theft' (Media Release, 3 September 2023).
[1418] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 21 [101].
[1419] MWT, *Report of the Migrant Workers' Taskforce* (Report, 7 March 2019) 10.
[1420] Senate Economics References Committee, Commonwealth of Australia, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Report, 30 March 2022) 138.
[1421] MWT, *Report of the Migrant Workers' Taskforce* (Report, 7 March 2019) 13.
[1422] Ibid 87.

The Senate UUER inquiry similarly noted that women, migrant workers, young workers, First Nations people and regional, rural, and remote workers are particularly vulnerable to underpayment.[1423] Both inquiries noted the difficulty of quantifying the extent of underpayments but highlighted significant underpayment cases and the extent of non-compliance with the FW Act in making their recommendations.

The cooperation agreements framework and the Voluntary Code were included to address concerns raised by employer groups about the potential scope of the offence and the need for additional safeguards. The cooperation agreements framework provides a person with the opportunity to access 'safe harbour' from potential criminal prosecution if they self-report their conduct to the FWO.[1424] The Voluntary Code is intended to provide assurance to small business employers that they will not be referred by the FWO for criminal prosecution, if they take appropriate steps to comply with the law.[1425]

The Closing Loopholes No. 2 Act also strengthened the civil compliance and enforcement framework in the FW Act by increasing maximum penalties available for contraventions of underpayment-related civil remedy provisions.

What has happened since commencement

Since the commencement of the wage theft offence, the FWO has assessed 42 matters for possible investigation and, from these matters, has commenced 6 investigations. As at 2 June 2026, the FWO has advised there are 5 active investigations underway. There have not been any referrals to the CDPP for prosecution. In addition to the 5 active investigations underway, the FWO is assessing a further 12 matters for possible investigation.[1426]

In addition to the development of the Voluntary Code and making the required updates to the agency's compliance and enforcement policy, the FWO also developed educative materials to support community understanding of the wage theft offence. This includes a guide to paying employees correctly and a guide to cooperation agreements, along with articles on the FWO's website explaining the operation of the offence. The FWO has also undertaken a communications campaign on the new laws and the regulator's new and updated resources.

There have been no cooperation agreements made, or notices of decision in relation to compliance with the Voluntary Code.[1427]

[1423] Senate Economics References Committee, Commonwealth of Australia, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Report, 30 March 2022) 30–3.
[1424] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 174 [1026].
[1425] Commonwealth, *Parliamentary Debates,* House of Representatives, 4 September 2023, 6236 (Tony Burke, Minister for Employment and Workplace Relations); Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 171 [1004].
[1426] FWO information provided 4 June 2026.
[1427] FWO information provided 8 May 2026.

Senate Education and Employment References Committee inquiry into wage theft

On 24 March 2026, an inquiry into the wage theft offence was referred to the Senate Education and Employment References Committee by Senator Payman.[1428] The terms of reference for that inquiry specify that it will examine the extent to which the wage theft framework under the FW Act, and the operation of the offence has resulted in a reduction of wage theft in Australia, and any other related matter.[1429] Submissions closed on 23 April 2026, a public hearing was held on 4 May 2026, and the inquiry is due to report on 18 June 2026.

What the Review heard

The Review received 25 submissions addressing this measure, with strongly divergent views about the need for the offence, and its impact. A further 15 submissions on the Draft Report addressed the measure.

Employer groups raised concerns about the measure, including whether it was needed, that it risks criminalising payroll errors and good faith mistakes, and that regulatory complexity rather than deliberate misconduct is a key driver of non-compliance.[1430] Submissions from unions, academics, and community organisations were generally supportive of the measure and generally considered that, while it was still early, it was an important addition to the regulatory framework to strengthen deterrence.[1431] Some unions raised practical concerns about the interaction between civil and criminal enforcement pathways.[1432]

The Review's draft recommendation for a targeted further review of the operation of the wage theft offence[1433] was generally supported by unions. Employer group positions were varied. Both unions and employer groups provided feedback on the scope, timing and nature of a future review. Other stakeholders were, for the most part, either supportive or neutral about a further review. Stakeholders also provided feedback on other draft recommendations relating to this measure.

Employer groups

Submissions from employer groups questioned the need for the wage theft offence and suggested it is too early to assess the effectiveness of the measure.[1434] ACCI submitted there is insufficient evidence to determine whether the wage theft offence is working as intended. ACCI also noted that the limited

[1428] Commonwealth, *Parliamentary Debates,* Senate, 25 March 2026, 24 (Fatima Payman).
[1429] Parliament of Australia, 'Wage theft' (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Wagetheft>.
[1430] See, for example, AIG, Submission No 82 (8 March 2026) 117–18 [549]–[559]; HIA, Submission No 20 (2 March 2026) 18.
[1431] See, for example, ACTU, Submission No 67 (6 March 2026) 12–13; Michael Rawling and Eugene Schofield-Georgeson, Submission No 17 (2 March 2026) 8; WLS NSW, Submission No 69 (6 March 2026) 10–11 [28]–[33].
[1432] See, for example, SDA, Submission No 48 (3 March 2026) 2; ASU, Submission No 81 (6 March 2026) 14.
[1433] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 256 [Draft Recommendation 25].
[1434] See, for example, AIG, Submission No 82 (8 March 2026) 118 [559]; ACCI, Submission No 54 (3 March 2026) 11 [50]; HIA, Submission No 20 (2 March 2026) 18.

number of investigations suggests the extent of any potential criminal conduct does not justify the offence.[1435] AIG and HIA both recommended repealing the wage theft offence as it has the effect of criminalising non-compliance that occurs due to regulatory complexity.[1436]

Employer groups also highlighted that the complexity of the system is a key cause of non-compliance, and submitted that employee entitlements should be simplified in order to address underpayment.[1437] For example, AIG recommended that an inquiry be referred to the Productivity Commission 'into the challenges of complying with modern award terms, the NES and legislative provisions dealing with record keeping and payment of wages.'[1438] AIG also recommended a process be put in place to 'facilitate the FWC and registered associations taking action to rectify ambiguities or uncertainties in award terms and to simplify their provisions'.[1439] BCA also recommended a program of simplification of modern awards.[1440]

In response to the Draft Report, BCA submitted that any further review of the operation of the wage theft offence 'should also expressly examine award complexity, compliance costs and the serious contravention test, as these issues will be central to whether the wage theft and civil penalty framework operates proportionately in practice.'[1441]

Employer groups expressed concern with the scope of conduct covered by the offence and suggested that one-off underpayments or late payments should not be subject to prosecution.[1442] ACCI submitted that the operation of the wage theft offence should be reviewed in this context[1443] while AIG recommended amendments so that the offence only applies to the intentional, permanent deprivation of entitlements and not to intentional late payments that are later rectified.[1444] HIA also recommended amendments so the offence only applies to underpayments that are deliberate, repeated, and systemic, with a safe harbour provided for good faith errors that occur due to regulatory complexity.[1445] The CCF recommended a safe harbour should be provided for employers that adopt robust payroll governance.[1446]

Employer groups also recommended reviewing the operation of cooperation agreements and the Voluntary Code.[1447] ACCI submitted the Voluntary Code in its current state does not provide any additional protections for small businesses.[1448] RDA recommended the Voluntary Code be updated to clarify that promptly corrected unintentional errors will not trigger a criminal investigation.[1449]

[1435] ACCI, Submission No 54 (3 March 2026) 11–12 [51]–[56].
[1436] AIG, Submission No 82 (8 March 2026) 117–18 [549]–[559]; HIA, Submission No 20 (2 March 2026) 18; HIA, Submission on Draft Report No 11 (29 May 2026) 5–6.
[1437] AIG, Submission No 82 (8 March 2026) 117–8 [549]–[559]; AIG, Submission on Draft Report No 45 (31 May 2026) 33 [194]–[199]; AHEIA, Submission on Draft Report No 31 (29 May 2026) 10.
[1438] AIG, Submission No 82 (8 March 2026) 115 [546].
[1439] Ibid 116 [546].
[1440] BCA, Submission No 50 (3 March 2026) 5; BCA, Submission on Draft Report No 18 (29 May 2026) 11.
[1441] BCA, Submission on Draft Report No 18 (29 May 2026) 11.
[1442] AIG, Submission No 82 (8 March 2026) 122–3 [582]–[590]; ACCI, Submission No 54 (3 March 2026) 12 [56]; HIA, Submission No 20 (2 March 2026) 18; MTAA, Submission on Draft Report No 15 (29 May 2026) 1–2.
[1443] ACCI, Submission No 54 (3 March 2026) 12 [56].
[1444] AIG, Submission No 82 (8 March 2026) 124 [597].
[1445] HIA, Submission No 20 (2 March 2026) 18; HIA, Submission on Draft Report No 11 (29 May 2026) 5–6.
[1446] CCF, Submission No 32 (3 March 2026) 4.
[1447] ACCI, Submission No 54 (3 March 2026) 11–12 [55]; RDA, Submission No 35 (3 March 2026) 2.
[1448] ACCI, Submission No 54 (3 March 2026) 11–12 [55].
[1449] RDA, Submission No 35 (3 March 2026) 2.

AIG submitted that the framework for corporate attribution of liability for the wage theft offence provides that intent can be established through a corporation's deficient compliance culture, resulting in corporate liability potentially being attributed where the conduct has been, in AIG's view, negligent rather than intentional (for example, in circumstances where an underpayment occurs because of inadequate governance or payroll controls).[1450] AIG argued this is inconsistent with the objective of the wage theft offence, being to only address intentional conduct. AIG recommended amendments to either clarify that establishing intent for corporations requires proof of board or managerial authorisation of the contravening conduct, or provide a due diligence defence. Such a defence could be available where bodies corporate making genuine attempts at maintaining a sufficient compliance culture and governance systems are not considered to have intended for an underpayment to occur.[1451]

AIG also expressed concern with the amendments allowing employee records and payslips that a person has been compelled to provide to be used as evidence in criminal prosecutions of the wage theft offence.[1452] AIG argues that the possibility of an employer or individual being required to provide evidence for their own prosecution undermines the administration of justice and equality guarantees provided in Article 14 of the United Nations International Covenant on Civil and Political Rights (**ICCPR**). AIG disagreed with the position in the Statement of Compatibility with Human Rights for the Closing Loopholes Bill[1453] that the limits on these rights were 'reasonable, necessary and proportionate'.[1454] AIG recommended amendments to provide that compelled employee records and copies of payslips cannot be used, directly or indirectly, in criminal prosecutions.[1455]

HIA submitted that there is a 'real risk of constitutional double jeopardy, for example, with respect to state-based wage theft criminal laws in Queensland, Victoria, and Western Australia.'[1456]

Feedback on draft recommendations

In response to the Review's draft recommendation for a targeted further review of the operation of the wage theft offence,[1457] AIG suggested the timing of such a review should depend on prosecutions, and be subject to consultation with stakeholders and relevant agencies.[1458] AIG opposed the draft recommendation's description of the recommended review as 'early', and the inclusion of 'evidence' and 'prosecutorial pathways' in the proposed scope. AIG instead suggested the recommended further review should consider 'the impacts of compliance measures on business investment, confidence to employ, business growth, business closures / insolvencies, and fairness to all parties.'[1459] AHEIA supported the recommended further review.[1460]

[1450] AIG, Submission No 82 (8 March 2026) 120–2 [570]–[581].
[1451] Ibid 120–2 [570]–[581], 124 [597].
[1452] Ibid 118–20 [560]–[569].
[1453] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 38 [210]–[214].
[1454] AIG, Submission No 82 (8 March 2026) 118–20 [560]–[569]; Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 38 [210]–[214].
[1455] AIG, Submission No 82 (8 March 2026) 124 [597].
[1456] HIA, Submission on Draft Report No 11 (29 May 2026) 5.
[1457] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 256 [Draft Recommendation 25].
[1458] AIG, Submission on Draft Report No 45 (31 May 2026) 34–5 [200]–[209].
[1459] Ibid 34 [200].
[1460] AHEIA, Submission on Draft Report No 31 (29 May 2026) 9.

As discussed above, BCA recommended the proposed further review should consider award complexity, and whether the cooperation agreement provisions 'provide sufficient certainty and incentive for larger employers to self-identify, disclose, cooperate and remediate underpayments at scale, particularly where underpayments arise across complex awards, enterprise agreements, payroll systems and jurisdictions.'[1461]

ACCI opposed the draft recommendation for a further review of the offence, suggesting that the limited number of investigations to date calls into question the prevalence of intentional underpayment.[1462] ACCI submitted that the proposed further targeted review would be premature, and that a 'review conducted at this stage would necessarily be limited in its utility and may risk drawing conclusions on an incomplete foundation'.[1463]

Several employer groups raised concerns about the further review considering 'whether unions could work with the FWO to identify criminal wage theft and underpayment'.[1464] AHEIA opposed 'any proposal to allow unions or other industrial parties to refer alleged wage theft matters directly to the CDPP or AFP.'[1465] Submissions on the Draft Report emphasised that unions can already refer suspected underpayments to the FWO, and that no further expansion of union involvement in taking action on underpayments is required.[1466]

AIG opposed the Review's draft recommendation for the Minister to require the FWO to report annually on activities related to wage theft,[1467] arguing existing reporting is sufficient and noting the FWO's good working relationship with employers and unions to make information available.[1468] ACCI did not oppose the draft recommendation, but advocated for caution in interpreting any reports given limited activity to date.[1469]

Employer groups' views on the Review's draft recommendation for the government to consider options to allow employees to recover unpaid entitlements despite any criminal investigation or prosecution underway[1470] were mixed. ACCI opposed the draft recommendation, arguing this would raise 'significant legal and procedural concerns' and questioning how such a process would avoid prejudicing criminal investigation or prosecution.[1471] AIG stated it 'may warrant further consideration', but noted the importance of ensuring there is no prejudice to criminal proceedings, including where an employer does not rectify underpayments prior to criminal proceedings.[1472]

[1461] BCA, Submission on Draft Report No 18 (29 May 2026) 11.
[1462] ACCI, Submission on Draft Report No 46 (1 June 2026) 31–2 [185]–[189].
[1463] Ibid 31 [188].
[1464] See, for example, BCA, Submission on Draft Report No 18 (29 May 2026) 11–12; CCIWA, Submission on Draft Report No 30 (29 May 2026) 4; AIG, Submission on Draft Report No 45 (31 May 2026) 35 [209]; ACCI, Submission on Draft Report No 46 (1 June 2026) 31–2 [189]; MCA, Submission on Draft Report No 42 (29 May 2026) 5.
[1465] AHEIA, Submission on Draft Report No 31 (29 May 2026) 9–10.
[1466] The Review notes that the relevant point in draft recommendation 25 referred only to unions' potential role in identifying criminal wage theft and underpayment – there was no suggestion of consideration of unions undertaking criminal prosecutions.
[1467] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 257 [Draft Recommendation 26].
[1468] AIG, Submission on Draft Report No 45 (31 May 2026) 35–6 [210]–[211].
[1469] ACCI, Submission on Draft Report No 46 (1 June 2026) 32 [190]–[192].
[1470] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 257 [Draft Recommendation 27].
[1471] ACCI, Submission on Draft Report No 46 (1 June 2026) 32 [193]–[195].
[1472] AIG, Submission on Draft Report No 45 (31 May 2026) 36 [214]–[217].

In response to the Review's draft recommendations about the development of practical compliance tools to help employers meet their obligations,[1473] BCA expressed support but submitted that, without award simplification, these tools would risk 'becoming another layer of interpretation rather than addressing the source of compliance risk.'[1474] HIA also submitted that software 'does not detract from' the risk of genuine errors in 'immensely complex and multifaceted calculation of wages under the [Building and Construction General] On-site Award.'[1475] BCA argued that '[g]ood faith reliance on FWO guidance or tools should be relevant to any enforcement, penalty or "reasonable belief" assessments.'[1476] ACCI and AIG emphasised the importance of consultation with industry in the development of tools and resources.[1477]

Unions

Submissions from unions addressing this measure supported it as a key measure to address intentional wage theft.[1478]

The ACTU submitted that criminalising wage theft was 'a necessary reform to tackle a systemic problem'[1479] but the fact that it had only been in operation since 1 January 2025 meant it was too soon to examine its overall impact in deterring wage theft.[1480] This view was also reflected by the UWU. The UWU recommended a further review of the wage theft provisions in 2 years.[1481] The ACTU emphasised that 'stolen wages trap workers in poverty and deny them the ability to buy the basic necessities they need to live'[1482] and cited recent research from Melbourne Law School's Centre for Employment and Labour Relations Law (**CELRL**), that found wage exploitation was prevalent among young workers.[1483]

The CELRL's 2025 report, '*Underpaid and Overlooked: The Wage Crisis Facing Young Workers in Australia*' reported on findings of a survey of 2,814 workers under 30, and found that:

- 33% had been paid $15 per hour or less (compared with the adult National Minimum Wage at the time of $24.95 per hour).
- 17.9% had not been paid for all work completed.
- 9.5% had been given food or products instead of being paid in money.
- 8% had been forced to return some or all of their pay to their employer.[1484]

[1473] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 258 [Draft Recommendations 28 and 29].
[1474] BCA, Submission on Draft Report No 18 (29 May 2026) 11.
[1475] HIA, Submission on Draft Report No 11 (29 May 2026) 5.
[1476] BCA, Submission on Draft Report No 18 (29 May 2026) 11.
[1477] ACCI, Submission on Draft Report No 46 (1 June 2026) 33 [203]–[207]; AIG, Submission on Draft Report No 45 (31 May 2026) 37 [219].
[1478] ACTU, Submission No 67 (6 March 2026) 12–13; UWU, Submission No 62 (6 March 2026) 7; AMIEU, Submission No 56 (4 March 2026) 1 [3]; FAAA, Submission No 63 (6 March 2026) 11 [66]; SDA, Submission No 48 (3 March 2026) 2; ASU, Submission No 81 (6 March 2026) 5, 14.
[1479] ACTU, Submission No 67 (6 March 2026) 12.
[1480] Ibid 13.
[1481] UWU, Submission No 62 (6 March 2026) 7.
[1482] ACTU, Submission No 67 (6 March 2026) 12.
[1483] John Howe and Tom Dillon, *Underpaid and Overlooked: The Wage Crisis Facing Young Workers in Australia* (Final Report of the Fair Day's Work Project, July 2025) 3.
[1484] Ibid 12–13.

The AMIEU and the FAAA welcomed the introduction of the measure.[1485] The AMEIU submitted that if it uncovered an instance of intentional wage theft, supported by sufficient evidence, it would refer the case to the CDPP or the AFP.[1486] The FAAA submitted that, while it had not taken any action against airlines to date, it viewed the measure as a 'productive step' to encourage airlines to further invest in their payroll systems.[1487]

The SDA and the ASU both welcomed the measure but flagged general concerns with workers' access to remedies, and the interaction between civil and criminal enforcement pathways for wage theft.[1488] The SDA submitted that more action was required to provide workers with affordable and efficient access to remedies where they were not afforded their lawful entitlements.[1489]

The ASU submitted that the measure 'sends a strong message that deliberate wage theft is a serious offence'.[1490] However, it raised concerns that the initiation of criminal prosecutions may hinder workers' timely access to justice, in the event of a stay on related civil proceedings to avoid prejudice to the accused. The ASU reported that this concern had led it to be cautious about referring matters for criminal prosecution to the FWO.[1491] It submitted that:

> *while criminal prosecution plays a vital role in deterring egregious conduct, civil enforcement remains the most direct and efficient mechanism for recovering unpaid wages. The pursuit of criminal accountability must not come at the expense of workers' ability to access civil justice in a timely manner.*[1492]

The ASU recommended that the government prioritise worker restitution and the coordination of civil and criminal enforcement to ensure the measure operates effectively and does not cause delay for workers' access to civil remedies.[1493]

Union feedback on the Draft Report supported, or did not oppose, the draft recommendations relating to this measure.[1494] In the context of draft recommendations about the provision of additional guidance and compliance tools for employers, the UWU submitted that the Review should 'also consider what additional support can assist workers and their unions in addressing prevention of "inadvertent" wage theft.'[1495]

[1485] AMIEU, Submission No 56 (4 March 2026) 1 [3]; FAAA, Submission No 63 (6 March 2026) 11 [66].
[1486] AMIEU, Submission No 56 (4 March 2026) 1 [3].
[1487] FAAA, Submission No 63 (6 March 2026) 11 [66].
[1488] SDA, Submission No 48 (3 March 2026) 2; ASU, Submission No 81 (6 March 2026) 14.
[1489] SDA, Submission No 48 (3 March 2026) 2.
[1490] ASU, Submission No 81 (6 March 2026) 14.
[1491] Ibid.
[1492] Ibid.
[1493] Ibid 5.
[1494] ACTU, Submission on Draft Report No 33 (29 May 2026) 28–9; UWU, Submission on Draft Report No 20 (29 May 2026) 8–9.
[1495] UWU, Submission on Draft Report No 20 (29 May 2026) 9.

Other stakeholders

The ASBFEO submitted that the measure is a source of concern and uncertainty for small business and contended that 'underpayment of wages is often due to unintentional error rather than through malicious intent.'[1496] The ASBFEO described the Voluntary Code and the complementary FWO Guide to self-auditing your business as 'valuable sources of assurance and guidance for small businesses' but contended they did not sufficiently mitigate uncertainty and recommended changes to both.[1497] The ASBFEO recommended clarifying the nature of the Voluntary Code, saying the name implies it imposes additional obligations, rather than functioning as an opt-in tool that it is. The ASBFEO also suggested adding guidance, including illustrative case studies, on what amounts to intentional and unintentional misconduct.[1498] It recommended the FWO collaborate with the FWC and other relevant agencies to convert the Guide to self-auditing your business from a 'static document' to a 'fully interactive decision-support tool' with the capacity to:

- integrate legislative amendments, FWC decisions and best practice updates in real time
- link to single-touch payroll reporting to enable employers to more efficiently provide information for a self-audit, and
- coach employers through administrative actions and complicated entitlement calculations.[1499]

In a letter to the Review dated 1 May 2026, the ASBFEO, Lynda McAlary-Smith, added further detail to these recommendations for resources to support small business employers to comply with their obligations.[1500] These recommendations include the FWC and FWO making 'modern award wage rates more accessible to small businesses directly through their business management software' (including through Application Programming Interfaces (**APIs**)).[1501] The letter noted that the FWC makes information in its Modern Awards Pay Database available via an API, allowing software developers to draw on this information for integration into their products and services,[1502] and that the FWO's online Pay and Conditions Tool assists employers to find the right award and pay rate for their employees.[1503] The ASBFEO also recommended improvements to education and resources to increase understanding and trust in the Fair Work agencies.[1504]

Two submissions from individuals also raised concerns that the measure had led to increased employer risk aversion, pointing to the limited administrative resources of small businesses.[1505] CIS also submitted that the Review's draft recommendations proposing additional guidance materials and compliance tools[1506] would not address the underlying issues of complexity in the workplace relations system,

[1496] ASBFEO, Submission No 8 (27 February 2026) 5–6.
[1497] Ibid 6.
[1498] Ibid.
[1499] Ibid.
[1500] Letter from Lynda McAlary-Smith, ASBFEO to Susan Booth (1 May 2026) 1.
[1501] Ibid.
[1502] Ibid, citing FWC (Cth) 'Modern Awards Pay Database API' (Web Page) <https://www.fwc.gov.au/work-conditions/awards/modern-awards-pay-database/modern-awards-pay-database-api>.
[1503] Letter from Lynda McAlary-Smith, ASBFEO to Susan Booth (1 May 2026) 1, citing FWO (Cth), 'The P.A.C.T Pay and Conditions Tool' (Web Page) <https://calculate.fairwork.gov.au/>.
[1504] Letter from Lynda McAlary-Smith, ASBFEO to Susan Booth (1 May 2026) 2.
[1505] Adrian Boothman, Submission No 5 (18 February 2026) 1; Simon Potts, Submission No 25 (2 March 2026) 10–11.
[1506] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 258 [Draft Recommendations 28 and 29].

and the impacts that increased penalties have on employers' decision-making.[1507] CIS suggested a narrower criminal threshold for the offence, stronger safe harbour protections, and simplified modern award structures to address regulatory complexity.[1508]

Academics submitted that the measure is a necessary response to a serious, widespread problem.[1509] Professor Wright submitted that the measure should be considered within the context of a 'steady rise' in wage theft in the 2000s and an 'explosion' in the 2010s due to 'cracks in the regulatory framework.'[1510] He said that more time is required to assess the impact of this measure but research findings suggest that, taken together with other Closing Loopholes reforms, it has the potential to 'reduce the scope for business to compete by undercutting rather than being more productive and innovative.'[1511] Professor Wright submitted that wage theft has increased in prevalence in recent decades, coinciding with what he describes as 'the imposition of legal restrictions on unions' workplace access.'[1512] Associate Professor Rawling and Dr Schofield-Georgeson jointly submitted that, while prosecutions were not expected to occur often, the offence empowered regulators by expanding 'last resort' enforcement options. They recommended the government consider legislative amendments to enhance co-operation between unions and the FWO in enforcing underpayment claims.[1513]

Circle Green, while expressing support for the new offence, questioned whether the new offence and increased civil penalties would be effective in minimising the risk of exploitation of migrant workers.[1514] Circle Green submitted that migrant workers are particularly vulnerable to wage theft and recommended the government insert a requirement into the FW Act for employers to provide workers with a 'Statement of Working Conditions' upon commencement setting out key details such as the job title, relevant workplace instrument and the employer's ABN.[1515]

WLS NSW also supported the introduction of the new offence, while noting that it was too soon to assess the effectiveness of the measure.[1516] It submitted that migrant women, women with a disability, First Nations women, young women, older women, and women from culturally and linguistically diverse backgrounds were at particular risk of being underpaid.[1517] WLS NSW recommended the measure should be complemented by further reforms to support these cohorts to seek redress, including the establishment of a dedicated wage theft tribunal and the provision of increased resourcing for regulators and employers to proactively detect wage theft and calculate underpayments.[1518]

[1507] CIS, Submission on Draft Report No 4 (25 May 2026) 5–6.
[1508] Ibid.
[1509] Chris F Wright, Submission No 13 (2 March 2026) 4; Michael Rawling and Eugene Schofield-Georgeson, Submission No 17 (2 March 2026) 8.
[1510] Chris F Wright, Submission No 13 (2 March 2026) 4.
[1511] Ibid 9.
[1512] Ibid 4.
[1513] Michael Rawling and Eugene Schofield-Georgeson, Submission No 17 (2 March 2026) 8.
[1514] Circle Green, Submission No 65 (6 March 2026) 8.
[1515] Ibid, citing MJI, *All Work, No Pay – Improving the legal system so migrants can get the wages they are owed* (June 2024) 32.
[1516] WLS NSW, Submission No 69 (6 March 2026) 10 [28], [31].
[1517] Ibid 10 [29].
[1518] Ibid 10–11 [32].

JobWatch submitted that the new offence is likely to deter underpayments, but raised concerns about a loss of employee agency due to the lack of a clear pathway for employees to initiate prosecutions, and the risk of delays in employees recovering wages due to stays in civil proceedings.[1519] It also submitted that the 'double layers of discretion' (FWO's discretion to refer matters for prosecution, and prosecuting authorities' discretion about whether to prosecute) means prosecutions are likely to occur infrequently.[1520] JobWatch recommended enabling employees to raise complaints about intentional underpayment with the AFP directly, the dedication of further resourcing for prosecuting underpayment and amendments to prevent stays on civil proceedings being issued purely due to the initiation of criminal proceedings.[1521] It suggested concerns about prejudice could be addressed through alternative means such as barring evidence obtained in civil proceedings from being used in criminal prosecutions.[1522]

NATSIWA supported the new offence. It noted that Aboriginal and Torres Strait Islander women were 'disproportionately represented in low-paid, feminised and insecure sectors' and contended that culturally safe and trusted reporting pathways were necessary to ensure accessibility of the measure.[1523] It also highlighted the impact of 'cultural load' or the 'unrecognised and uncompensated labour undertaken by Aboriginal and Torres Strait Islander employees' to provide cultural advice, guidance and mentorship to non-Indigenous colleagues, represent the 'Indigenous perspective' in meetings and policy processes, and contribute to Reconciliation Action Plan and reconciliation processes.[1524]

NATSIWA recommended strengthening partnerships with Aboriginal Community Controlled Organisations (**ACCOs**) and considering formal referral pathways between ACCOs and enforcement agencies, community-based early intervention mechanisms and providing funding for culturally safe advisory services.[1525] It also stressed the importance of proactive compliance in high-risk sectors to avoid placing an undue reporting burden on those least well-placed to commence complaints.[1526]

NRWC supported the new offence, noting the importance of strengthened compliance and enforcement powers for women in rural areas who may have less access to job opportunities. It noted that rural women were 'more likely to work in small businesses, seasonal industries and insecure roles where underpayment and informal arrangements are more common'.[1527] NRWC also stressed the reputational risks associated with reporting exploitation in tight-knit, small communities.[1528] NRWC recommended implementing 'targeted regional enforcement strategies, confidential reporting pathways suited to small labour markets, and dedicated education and outreach for rural employers and workers in sectors with high levels of insecure and seasonal employment.'[1529]

[1519] JobWatch, Submission No 72 (6 March 2026) 5 [11]–[12].
[1520] Ibid.
[1521] Ibid 5–6 [13].
[1522] Ibid.
[1523] NATSIWA, Submission No 30 (3 March 2026) 6.
[1524] Ibid 9–10.
[1525] Ibid 13.
[1526] Ibid 7, 12.
[1527] NRWC, Submission No 29 (3 March 2026) 7.
[1528] Ibid.
[1529] Ibid.

Feedback on draft recommendations

Feedback from other stakeholders on the Review's draft recommendations was mixed.

MJI expressed support for the draft recommendations for a further review, FWO reporting, and addressing delayed wage recovery.[1530] MJI suggested the proposed FWO reporting should include, where available, disaggregated data on enforcement involving visa holders.[1531] MJI also suggested the proposed further review should include evaluation of the proportion of FWO investigations and enforcement actions involving visa holders and referrals received from migrant-focused community legal centres and unions.[1532]

Labour law academic Irene Nikoloudakis submitted that the draft recommendation for a further review[1533] should be amended to provide greater flexibility for when the proposed review should occur, noting there may still be insufficient evidence to assess the effectiveness of the offence if the review is required to occur within one year of the publication of the Final Report.[1534] The CFW submitted there remains contention about the role of unions in FW Act enforcement, and in this context suggested that the recommendation for a further review be amended to provide for a broader consideration of the issue.[1535]

Analysis

The new wage theft offence commenced on 1 January 2025 and deals with the most serious cases of underpayments involving deliberate misconduct. In the context of other reforms, intentional wage theft sits at the apex of a graduated enforcement framework, complemented by significantly increased civil penalties to address underpayments. The framework provides a suite of tools for the regulator to educate, encourage voluntary compliance, deter recklessness and prosecute intentional non-compliance.

The FWO's Compliance and Enforcement Policy sets out the public interest factors the agency considers in deciding whether to commence civil proceedings or refer conduct for criminal prosecution. These factors include whether the employer sought and relied on expert or professional advice, whether there is evidence of deliberate or reckless conduct, and whether the contraventions have been admitted and are being fixed.[1536]

Small business employers are provided additional assurance that they cannot be referred for criminal prosecution if the FWO is satisfied that they have complied with the Voluntary Code, and provision is made for employers to self-report non-compliance and enter into a cooperation agreement to remedy the underpayment. While some stakeholders have called for additional layers of assurance for employers, this must be balanced against the need to deter intentional underpayment and impose appropriately serious consequences for such conduct where it occurs.

[1530] MJI, Submission on Draft Report No 13 (29 May 2026) 6–7.
[1531] Ibid 6.
[1532] Ibid 7.
[1533] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 256 [Draft Recommendation 25].
[1534] Irene Nikoloudakis, Submission on Draft Report No 43 (29 May 2026) 1–2 [4]–[11].
[1535] CFW, Submission on Draft Report No 41 (29 May 2026) 6.
[1536] FWO, *Compliance and Enforcement Policy* (Policy Document, April 2025) 16 <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.

The FWO has established a dedicated Criminal Investigations Branch and is progressing criminal investigations and assessing new matters and investigations. Since 1 January 2025 it has assessed 42 matters for potential investigation into suspected criminal conduct, with 5 ongoing operations investigating suspected criminal conduct, and a further 12 matters under assessment to consider progression to criminal investigation.[1537]

The FWO emphasises that criminal investigations of this nature are complex. They can involve obtaining evidence from vulnerable workers, investigating complex business structures and deliberate concealment. Additionally, criminal investigations require consideration of statutory immunities, and a high evidentiary threshold to prove intention. This means that early progress is necessarily cautious.

No referrals have been made to the CDPP or the AFP, and no prosecutions have commenced. No cooperation agreements have been entered into, and no small business employer has sought protection under the Voluntary Code.

Constraints on early assessment of this measure

In contrast to other Closing Loopholes amendments, this measure does not provide the Review with early indicators of possible effectiveness or unintended consequences. Criminal wage theft investigations, and similar investigations involving increased civil penalties, are confidential during the investigation phase. This is an inherent feature of criminal law enforcement, reflecting the safeguards required to preserve the integrity of an investigation.

Need for further review

The absence of prosecutions is not, some 16 months after it has been operating, evidence that the measure is ineffective. It reflects the early stages of implementation, and complexity of criminal enforcement. At the same time, the limited enforcement data does present a challenge to this Review in assessing whether the measure is operating as intended. This Review cannot presently assess the effectiveness of the measure nor identify any unintended consequences.

To address this challenge and decide whether the measure is operating as intended, and whether there are any unintended consequences, a further review should be conducted within 1 year of the publication of this report. This will be more than 2 and a half years since the offence commenced, and will allow time for matters to progress beyond assessment and investigation to potential prosecutions.

Some submissions on the Review's Draft Report argue the Review should not make presumptions about the timing of a further review, and that the timing should depend on whether there have been prosecutions or decisions to inform a further review. Given the available evidence on the prevalence of wage theft (discussed below), this Review considers that, if there have still not been any prosecutions within a year of publication of this report, this should be addressed in the review of the matters listed in

[1537] FWO information provided 4 June 2026.

Recommendation 24 below, particularly 'assess the effectiveness and timeliness of the criminal wage theft offence and civil penalty regime in deterring and remedying underpayments'.

Scale and nature of wage underpayment

Some stakeholders submitted that the prevalence of wage theft has been exaggerated or is not sufficiently severe to warrant the introduction of the offence. While precise estimates of the amount of underpayment (and particularly deliberate underpayment) are not available, credible reports over a number of years highlight that it is a significant problem in the Australian labour market.

Data from the 2024 Household, Income and Labour Dynamics in Australia (**HILDA**) survey indicates that 11.5% of all employees appeared to be being paid less than the National Minimum Wage.[1538] A 2023 Grattan Institute analysis of ABS data estimated that 'between 3 per cent and 9 per cent of all employees in Australia are paid below the national minimum wage'.[1539] The Grattan Institute report also estimated that 'in 2022, between 5 per cent and 16 per cent of employed recent migrants – or 27,000 to 82,000 people – were paid below the national minimum wage'.[1540]

Data limitations and differences across sources mean that estimates of below-National Minimum Wage pay should not be taken as evidence of legal non-compliance.

The 2024 National Temporary Migrant Work Survey found that 36% of respondents reported that in their lowest paid job they earned less than the National Minimum Wage, and 65% were paid less than their minimum entitlements under the FW Act.[1541] The survey found that 'almost a quarter [of migrant employees] were short-changed by at least $10 per hour'.[1542]

Two Senate inquires in recent years have made findings that wage theft represents a significant problem for vulnerable workers and is carried out in an intentional manner in many industries.[1543] For example, the 2022 Senate UUER inquiry noted 'underpayment is most common where workers have the least power' and that insecure work was directly linked to underpayment 'reflecting the power imbalance between employer and worker.'[1544] This inquiry noted 'mounting evidence' of 'widespread' wage theft in higher

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[1538] DEWR analysis of DSS and Melbourne Institute of Applied Economic and Social Research, *The Household, Income and labour Dynamics in Australia (HILDA) Survey, RESTRICTED RELEASE 24 (Waves 1-24)* (Dataset, 22 December 2025), provided 17 April 2026. This estimate of workers receiving less than the National Minimum Wage may underestimate the prevalence of underpayments due to the inclusion of payments such as penalty rates in the earnings data used which is not included in the National Minimum Wage; it excludes employees that are short stay (less than 12 months) migrants; and does not consider the various awards and collective agreements minimum rates of pay which are above the National Minimum Wage.
[1539] Grattan Institute, *Short-changed: How to stop the exploitation of migrant workers in Australia* (Report, 23 May 2023) 13.
[1540] Ibid.
[1541] Laurie Berg and Bassina Farbenblum, *Off the Books: Inside Australia's Hidden System of Migrant Worker Exploitation* (Report, May 2026) 33–4.
[1542] Ibid 11.
[1543] Senate Economics References Committee, Commonwealth of Australia, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Report, 30 March 2022) 5 [1.21], [1.23], 29 [2.1]; Senate Education and Employment References Committee, Commonwealth of Australia, *Wage theft? What wage theft?!: The exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies* (Report, November 2018) 8 [2.26], 25 [3.64].
[1544] Senate Economics References Committee, Commonwealth of Australia, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Report, 30 March 2022) 29 [2.1]–[2.2].

education, retail, hospitality, horticulture and franchise-heavy sectors, and said that 'in many industries, underpayment is deliberate and systematic, and often normalised, especially for migrant workers.'[1545]

The FWO's work in compliance and enforcement cannot identify all, or even most, possible examples of wage theft and underpayment. The Review considers that cooperation between unions and the FWO could assist identification of underpayment. Taken together with changes to right of entry provisions to investigate underpayments (discussed in Section 4.4), cooperation between unions and the FWO will also assist in identifying wage theft and underpayment.

Some stakeholders express concern about unions being involved in identifying underpayments in connection with the wage theft offence. The Review considers that it is both appropriate, and consistent with the traditional role of unions, that they be understood as part of the system that identifies non-compliance. It is also appropriate that only the CDPP or AFP can commence proceedings in relation to the wage theft offence, as set out in the legislation. When unions identify wage underpayments that they consider serious enough to warrant consideration of criminal investigation, it is appropriate that these matters be reported to the FWO.

Unintentional underpayments, one-off underpayments and late payments

A number of stakeholders raised concerns that the provision criminalises 'complexity errors', pointing to the overall complexity of workplace relations laws.[1546] These submissions do not make clear how the risk of prosecution for inadvertent errors arises, noting the framing of the offence, safe harbour mechanisms (the Voluntary Code for small business, and cooperation agreements) and guidance that the offence is for intentional underpayments. Because intention must be proved, unintentional underpayments and one-off mistakes do not meet the fault elements of the offence. A fault element of intention is a high threshold for the prosecution to meet. For comparison, there are Commonwealth offences in other areas which criminalise reckless conduct. As defined by the Commonwealth Criminal Code, a person is reckless if he or she is aware of a substantial risk that a circumstance exists or will exist, or a result will occur, and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.[1547]

With respect to the potential investigation and prosecution of unintentional underpayments and late payments, regulator and prosecution policies are relevant. The FWO's Compliance and Enforcement Policy provides that 'referrals will generally be reserved for the most serious conduct, including where there is a greater need for specific or general deterrence than civil litigation',[1548] and the public interest factors the FWO considers in determining whether to refer conduct to the CDPP include the 'nature, seriousness and

[1545] Ibid 5 [1.21]–[1.23].
[1546] See, for example, HIA, Submission No 20 (2 March 2026) 18; NFF, Submission No 7 (25 February 2026) 4–5; NECA, Submission No 3 (2 February 2026) 3.
[1547] *Criminal Code Act 1995* (Cth) s 5.4.
[1548] FWO, *Compliance and Enforcement Policy* (Policy Document, April 2025) 20. <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.

circumstances of the alleged contraventions'.[1549] The CDPP's Prosecution Policy also provides that a prosecutor must consider whether 'the public interest requires a prosecution to be pursued.'[1550]

Parliament has previously considered and rejected limiting the offence to systematic patterns of conduct.[1551] Excluding late payments would also create practical problems including defining when lateness becomes non-payment. In any event, both the FWO and CDPP emphasise that criminal referrals and prosecutions are reserved for the most serious conduct, guided by public interest factors such as the nature and gravity of the alleged contraventions, which provide additional safeguards.

The Review concludes that employers will not be referred or prosecuted, much less convicted, for unintentional underpayments, payroll errors, or payments that are late and swiftly rectified. In the context of the evidence discussed above about the prevalence of underpayment, the fact that there have been no prosecutions commenced indicates the FWO, as a criminal regulator, is taking an appropriately measured approach to using its new powers.

The Review also concludes that there is no risk of employers being prosecuted under state and Commonwealth laws for the same conduct. In addition to the general level of assurance provided by the FWO and CDPP policies discussed above, Commonwealth legislation specifically provides that a person cannot be punished twice for the same conduct.[1552]

Employer concerns about complexity

Notwithstanding the Review's conclusion that employers will not be prosecuted for inadvertent non-compliance, employer submissions consistently argue that regulatory complexity remains a barrier to compliance, especially for small business. While complexity cannot explain all underpayments (criminal or civil), it does remain a genuine concern for many employers. The context has been changed by Closing Loopholes amendments: the wage theft offence has been introduced, and civil penalties have increased the consequences of non-compliance, and there is room for further investment to assist with compliance with these new measures. However, the underlying complexity, the obligation to pay wages properly and in a timely way, is unchanged.

[1549] Ibid 16.
[1550] CDPP, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* (Policy Document, 19 July 2021) 5 [2.8]. <https://www.cdpp.gov.au/system/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf>.
[1551] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) (SAJER Bill). The SAJER Bill (as introduced) would have created a Commonwealth criminal offence for underpayments, that would have applied to underpayments that were part of a 'systematic pattern of underpaying one or more employees'. The schedule containing the offence provisions was removed before the Bill passed the Parliament in March 2021.
[1552] *Crimes Act 1914* (Cth) s 4C.

Assistance to avoid genuine mistakes of underpayments would address 2 important goals of these measures:

- employees being properly paid, on time, without recourse to enforcement, and
- removing the ability for deliberate (and therefore intentional) underpayers to hide behind the complexity narrative.

For small business employers, this measure appears to remain a significant concern, with commentary that these measures have led to employer risk aversion, particularly with the limited administrative resources of small business employers. While recognising that the Voluntary Code and the FWO's Guide to self-auditing your business[1553] are valuable sources of assurance, and that additional funding was provided to the FWO to support small businesses through the EAS,[1554] small business employers and their advocates seek further support, particularly in the form of decision-support tools.[1555]

Further support for employers, and in particular small business employers, in meeting their workplace relations obligations, may complement the wage theft offence by driving improved employer compliance. Technologically-enabled supports in particular have the potential to provide up-to-date, relevant information to employers, for example through integration with payroll software. While these tools still require an employer to provide the correct inputs, and in some cases there may be difficulties in interpretation, further integration of authoritative, up-to-date information into business software and systems presents an opportunity to make compliance easier for employers.

Several stakeholders submitted that this Review should recommend a process of simplification of workplace relations requirements (and in particular of award entitlements). This is outside the scope of the Review, which is about the amendments made by the Closing Loopholes Acts (and a further review of the PFDVL Act). As such, this Review makes no finding or recommendation about broader simplification of entitlements under awards, agreements, or the NES.

Corporate criminal liability

Corporate criminal liability for the wage theft offence is provided for under the Commonwealth Criminal Code. It was submitted that corporate criminal liability should require 'proof of intention through board/high managerial authorisation', or alternatively that a due-diligence defence should be available.[1556]

There is virtue in retaining the standard, or default, threshold for attributing corporate liability for Commonwealth offences. The Commonwealth Criminal Code provides that intention can be attributed to a body corporate that expressly, tacitly, or impliedly authorised or permitted the commission of the offence. This authorisation or permission may be established by reference to the culture of the body corporate that directed, encouraged, tolerated or led to the non-compliance.[1557] Bodies corporate

[1553] FWO, *Guide to self-auditing your business* (Guide, July 2025) <https://www.fairwork.gov.au/sites/default/files/migration/712/guide-to-self-auditing-your-business.pdf>.
[1554] Tony Burke, 'Closing Loopholes' (Media Release, 7 December 2023).
[1555] ASBFEO, Submission No 8 (27 February 2026) 6; COSBOA, Submission No 45 (3 March 2026) 16–17 [75]–[78].
[1556] AIG, Submission No 82 (8 March 2026) 122 [580]–[581].
[1557] *Criminal Code Act 1995* (Cth) sch 1 ss 12.3(1)–(2).

should be aware of the kinds of actions they should take to ensure their corporate culture does not encourage or tolerate the intentional underpayment of employees' entitlements. This understanding is essential to the wage theft offence achieving its intended outcome of deterring underpayments.

Use and derivative use immunity for compelled records

The FWO compels the production of employee records and payslips as part of investigating the potential underpayment of employees, which may result in civil or criminal proceedings depending on the conduct of the contravening employer.

Subsection 713(2) and section 713A provide immunities for individuals against having records or documents produced compulsorily under paragraph 709(d) and subsection 712(1) used against them in prosecutions (with some exceptions, such as prosecution for providing false or misleading documents or for obstructing Commonwealth officials). The Closing Loopholes No. 1 Act amended these provisions to provide that the immunities do not apply to employee records made under section 535 or employee payslips. AIG submits these amendments are not 'reasonable, necessary or proportionate'.[1558]

There is a principled justification for treating the specified employee records and payslips differently to other compelled records and documents. Under the FW Act an employer is required to make and keep these records[1559] (and is required by the FW Regulations to make copies available to the employee on request)[1560], and to provide payslips to employees upon payment.[1561] The explanatory materials make clear that this is the reason these records 'should be able to be tendered as evidence before a court, including criminal proceedings.'[1562] Employee records made under section 535, and payslips are not privileged material in any sense, and so it is reasonable to exclude them from the immunities provided for other kinds of records and documents. Even if these kinds of records and payslips were included in the immunities there would be nothing preventing an employee or former employee from requesting them and providing them to the FWO or a prosecuting authority.

Broadly speaking, the FWO's powers with respect to the gathering and use of compelled records are comparable to those of other corporate regulators such as the Australian Securities and Investment Commission (**ASIC**). ASIC is empowered to compel the production of various types of records in its regulatory capacity.[1563] Subject to some exceptions,[1564] these records can then be used as evidence in criminal proceedings. The fact these records may be incriminating is not a reasonable excuse for not producing them.[1565]

[1558] AIG, Submission No 82 (8 March 2026) 118–19 [563]–[564].
[1559] *Fair Work Act 2009* (Cth) s 535.
[1560] *Fair Work Regulations 2009* (Cth) reg 3.42.
[1561] *Fair Work Act 2009* (Cth) s 536.
[1562] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 173 [1024].
[1563] *Australian Securities and Investments Commission Act 2001* (Cth) ss 30, 33.
[1564] Ibid ss 68(2)–(3), noting the immunity from use in criminal proceedings only applies in respect of the individual's 'signing' of a record, and not to the use of the record itself).
[1565] Ibid s 68(1).

In the context of the FWO's dual civil and criminal jurisdiction, and noting the centrality of employee records and payslips in establishing whether an underpayment has occurred, it is reasonable for the FWO to be permitted to use compelled records of this kind in proceedings in both civil and criminal jurisdictions.

Delayed wage recovery

Some union and community group submissions reflect on the challenges criminal prosecution may create for employees who have been underpaid.[1566] This relates to access to remedies, and the interaction between civil and criminal enforcement pathways for pursuing wage underpayments. There are concerns that initiation of a criminal prosecution may hinder employees' timely access to justice, in the event of a stay on related civil proceedings to avoid prejudice to the accused in the criminal prosecution. It was noted that, while criminal prosecution plays a vital role in deterring egregious conduct, civil enforcement remains the most direct and efficient mechanism for recovering unpaid entitlements. Although it is too early to make any conclusions on this point, the Review notes caution among employee groups about referring potential criminal conduct for investigation because of the risk of delaying recovery of unpaid entitlements.

Findings and recommendations

Wage underpayment is a serious issue in Australian workplaces and needs to be addressed. Deterring deliberate underpayment is an important part of addressing it. So too is assisting employers to understand and meet their obligations, and providing pathways for employees to recover underpaid entitlements.

It is some 16 months since the wage theft provisions commenced. This is still an early stage in development of a major change, especially given the high-stakes criminal consequences of the measure. The absence of prosecutions is not, of itself, evidence that the measure is ineffective: it reflects the early stages of implementation and the complexity of criminal investigation and enforcement.

The FWO is applying a high degree of care in assessing potential criminal offences. The Review concludes this is appropriate given both the seriousness of criminalisation, and the consequences of ill-considered or hasty prosecutions that are unsuccessful. The fact that there are 5 active investigations, and a further 12 matters under assessment, indicates a proportionate and appropriately cautious approach. Matters that do not meet the criminal standard are being referred internally within the FWO for potential civil enforcement action.

The tiered enforcement model, with criminal liability for intentional underpayments operating alongside strengthened civil penalties, establishes a graduated enforcement framework.

[1566] SDA, Submission No 48 (3 March 2026) 2; ASU, Submission No 81 (6 March 2026) 14; JobWatch, Submission No 72 (6 March 2026) 5 [11]–[13].

No legislative amendments to the core offence provisions are recommended at this stage. The measure aligns with recommendations from multiple enquiries, providing a deterrent for wage theft, and sits at the apex of a graduated enforcement framework.

More time is needed to allow investigation and prosecution systems to fully develop and for cases to be referred and then progress to a prosecution. To address these challenges and fully examine whether the measure is operating as intended and whether there are any unintended consequences, a targeted early review should be conducted within 1 year.

Recommendation 24

The government should undertake a targeted review of the operation of the wage theft offence and changes to the civil penalties framework within 1 year of publication of this report (which will be approximately 2 and a half years after the offence commenced). The review should consider the operation of the offence provisions and the appropriateness of the Fair Work Ombudsman's powers, as well as the Voluntary Small Business Wage Compliance Code and cooperation agreement provisions.

The targeted review should:

- assess the effectiveness and timeliness of the criminal wage theft offence and civil penalty regime in deterring and remedying underpayments
- examine unintended consequences for employees and employers
- assess requirements for further legislative or administrative refinements about evidence, interagency data-sharing and prosecutorial pathways
- review the adequacy of resourcing, capability, interagency coordination and infrastructure supporting enforcement
- consider interactions with other workplace relations reforms including changes to the civil penalty framework, and any impediments to recovery of underpayments, and
- consider whether unions could assist the Fair Work Ombudsman to identify criminal wage theft and underpayment.

Need for systematic reporting

The FWO is charged with investigation of conduct that might lead to criminal charges. It is natural and proper that it does not disclose cases under investigation or details of referrals for prosecution. To do otherwise might interfere with future legal proceedings and cause injustice to the accused or victims of wage theft, undermining the intent of the measure.

However, improved transparency about the systems and processes of investigation and referral for prosecution is required to build confidence in the measure's implementation. The Minister has the power under section 685 of the FW Act to direct that specified reports be provided to her relating to the FWO's functions. The Review considers such reports made at least annually will enhance accountability to the executive government and inform further review of the measure's effectiveness and unintended consequences.

Recommendation 25



The Minister for Employment and Workplace Relations should require the Fair Work Ombudsman to report annually on its activities relating to wage theft and civil remedies for underpayment. The standalone report should be published to enhance transparency.

The Fair Work Ombudsman's report should be required to include:

- any investigations and enforcement work about criminal wage theft (see sections 327A– 327D)
- referrals made for prosecution
- civil proceedings for underpayments, and
- systemic underpayment and wage theft compliance issues identified through its functions in Part 4-1 and Part 5-2.

Delayed wage recovery

The risk of delayed recovery of wages and other entitlements while criminal proceedings are underway has led to union and employee caution about referring potential criminal conduct for investigation and potential prosecution. Although relying on civil proceedings is likely to lead to quicker access to recovery of entitlements, it may undermine the central purpose of the wage theft provisions, which is deterrence. A process or mechanism allowing recovery of entitlements during criminal investigation or prosecution should only be put in place once suitable arrangements to avoid prejudicing criminal process are developed.

Recommendation 26



The government should consider options to allow employees to recover unpaid entitlements despite any criminal investigation or prosecution that may be underway. This should include consideration of a mechanism to allow civil recovery proceedings without prejudicing any criminal prosecution.

Consequences of the introduction of the tiered enforcement model

The introduction of the wage theft offence, together with the increases to civil penalties for contraventions of underpayment-related provisions, has not resulted in greater complexity within the workplace relations system. However, the measures have increased the consequences for employers that incorrectly pay their employees. While penalties are appropriate to deter non-compliance with the FW Act, they will not drive compliance in isolation.

Employers require additional support, including practical compliance tools, to understand and comply with their wage payment obligations. This need is particularly acute for small business employers, who face significant compliance burdens without the resources available to larger employers. Additional supports will assist with ensuring employees are paid correctly, and expose employers who hide behind the complexity argument.

Recommendation 27

The Fair Work Ombudsman should be funded to develop further practical compliance tools to help employers comply with their wage payment obligations. This should be done in conjunction with the Fair Work Ombudsman's Advisory Group and should include the expanded development of digital tools, including interactive calculators and decision support systems.

Recommendation 28

The government should work with industry to develop compliance tools that integrate with employer payroll software.

Recommendation 29

The Fair Work Ombudsman should further promote the support available to small business employers, including through the Fair Work Ombudsman's Infoline, Small Business Showcase and Employer Advisory Service.

4.2 Changes to Fair Work Act civil penalties framework

What the measure does

The Closing Loopholes No. 2 Act amended the civil penalty regime in the FW Act to strengthen the graduated enforcement framework, including to increase the maximum civil penalties for wage underpayment and non-compliance with other workplace obligations.[1567]

The graduated enforcement framework establishes a range of civil penalties for contraventions and serious contraventions based on the nature of the conduct. The most severe intentional conduct is also captured by the new criminal offence of intentional wage theft (see Section 4.1).

The changes to maximum civil penalties, non-compliance with a compliance notice, and the threshold for a serious contravention, commenced on 27 February 2024.[1568]

The changes to penalties calculated by reference to the amount of the underpayment commenced on 1 January 2025, which coincided with commencement of the new wage theft offence.[1569]

'Selected civil remedy provisions'

Under the FW Act, certain courts may order an individual who has contravened a civil remedy provision pay up to the maximum pecuniary penalty for the contravention listed in the penalties table[1570], and for a body corporate no more than 5 times the penalty units[1571] listed in the penalties table.[1572]

The measure introduced the definition of a 'selected civil remedy provision', which included certain existing civil remedy provisions in the table in subsection 539(2).[1573] The measure amended the maximum penalties for bodies corporate that are not small business employers by:

- Increasing maximum civil pecuniary penalties for a contravention of a 'selected civil remedy provision' by 5 times.[1574]

[1567] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 11.
[1568] Ibid s 2(1) item 13.
[1569] Ibid s 2(1) item 15.
[1570] *Fair Work Act 2009* (Cth) s 539(2).
[1571] *Crimes Act 1914* (Cth) s 4AA(1). A penalty unit is $330. This amount is indexed every 3 years, and will be indexed on 1 July 2026.
[1572] *Fair Work Act 2009* (Cth) s 546(2).
[1573] Ibid s 12. 'Selected civil remedy provisions' are defined as the provisions referred to in column 1 of item 1, 2, 3, 4, 5, 7, 8, 9, 10, 10A, 11A, 29, 29AA, 29A, 32, 33, 33A or 34 in the table in s 539(2).
[1574] Ibid s 546(2AA).

- Enabling the maximum penalty for the contravention of a 'selected civil remedy provision' that is 'associated with an underpayment amount'[1575] to be the greater of 3 times the underpayment amount or the maximum pecuniary penalty specified by the FW Act.[1576]

Table 11: The application of the maximum civil penalties relating to provisions that became 'selected civil remedy provisions' prior to and after CL amendments[1577]

Category	Persons	Prior to CL amendments	From commencement[1578]
Contravention of a civil remedy provision that became a 'selected civil remedy provision'[1579]	Individual	60 PUs	60 PUs
	Small business employer	300 PUs	300 PUs
	Medium or large body corporate	300 PUs	1,500 PUs
Contravention of a civil remedy provision that became a 'selected civil remedy provision', where the contravention is associated with an underpayment[1580]	Individual	60 PUs	60 PUs
	Small business employer	300 PUs	300 PUs
	Medium or large body corporate	300 PUs	1,500 PUs or 3x underpayment amount (whichever is greater)[1581]

Serious contraventions

The measure made amendments to the serious contraventions regime so that it applies to contraventions of relevant provisions that are done knowingly or recklessly, and removed the requirement that a breach must be part of a systematic pattern of conduct.[1582] A person is reckless as to whether a contravention

[1575] Ibid ss 12, 546A.
[1576] Ibid s 546(2A). Note this is only available where the applicant opts to have the maximum penalty calculated based on a multiple of the underpayment amount.
[1577] This table does not address scenarios where the contravention is a 'serious contravention'. See Table 12.
[1578] Note increases to civil penalties expressed in penalty units commenced 27 February 2024. Penalties of 3 times the amount of the underpayment commenced on 1 January 2025. See *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 2(1) items 13, 15.
[1579] *Fair Work Act 2009* (Cth) s 546(2AA).
[1580] Ibid ss 546(2A), 546A.
[1581] Penalty of 3 times the amount of the underpayment only applies if the applicant seeks this type of penalty.
[1582] *Fair Work Act 2009* (Cth) s557A(1)(b); Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 155 [918]. Under the *Fair Work Act 2009* (Cth), a 'serious contravention' may also be one which is done 'knowingly'. The Closing Loopholes No. 2 Act did not amend this limb of the test.

would occur if the person is aware of a substantial risk that a contravention would occur and, having regard to the circumstances known to the person, taking the risk was unjustifiable.[1583]

Table 12: The application of the maximum civil penalties for a 'serious contravention' to provisions which became 'selected civil remedy provisions' prior to and after CL amendments

Category	Persons	Prior to CL amendments	From commencement
Serious contravention of a civil remedy provision (which become a 'selected civil remedy provision')[1584]	Individual	600 PUs	600 PUs
	Small business body employer	3,000 PUs	3,000 PUs
	Medium or large body corporate	3,000 PUs	15,000 PUs
Serious contravention of a civil remedy provision that became a 'selected civil remedy provision', where the contravention is associated with an underpayment[1585]	Individual	600 PUs	600 PUs
	Small business employer	3,000 PUs	3,000 PUs
	Medium or large body corporate	3,000 PUs	15,000 PUs or 3x underpayment amount (whichever is greater)

Non-compliance with a compliance notice

The measure increased the maximum civil penalty for non-compliance with a compliance notice[1586] from 30 penalty units to 60 penalty units (for an individual).[1587] Non-compliance with a compliance notice was also listed as a 'selected civil remedy provision' under the amendments, thereby attracting higher maximum penalties for bodies corporate that are not small business employers.[1588]

[1583] *Fair Work Act 2009* (Cth) s 557A(2).
[1584] Ibid ss 546(2AA), 557A.
[1585] Ibid ss 546(2A), 546A.
[1586] Ibid ss 716(2), (5). An inspector may give a person notice requiring the person to take specified action to remedy the direct effects of a contravention or to produce reasonable evidence of the persons compliance with the notice.
[1587] Ibid s 539(2) item 33.
[1588] Ibid ss 12 (definition of 'selected civil remedy provision'), 539(2) item 33.

Table 13: The maximum civil penalties for failure to comply with a FWO compliance notice prior to and after the CL amendments

Category	Persons	Prior to CL amendments	From commencement
Failure to comply with a FWO compliance notice[1589]	Individual	30 PUs	60 PUs
	Small business employer	150 PUs	300 PUs
	Medium or large body corporate	150 PUs	1,500 PUs

Intention of the measure

Increasing the maximum civil penalties for underpayment-related contraventions was intended to reduce the underpayment of workers by setting maximum penalties high enough to deter non-compliance with the FW Act.[1590]

This measure was introduced as part of the government's election commitment to implement the recommendations of the MWT's final report.[1591] The report highlighted the prevalence of underpayments and indicated that existing penalties were insufficient to deter non-compliance, and recommended aligning penalties with those in other business and consumer law frameworks.[1592]

Reducing the threshold for proving 'serious contraventions' from the previous threshold of 'knowing *and* systematic' contraventions to 'knowing *or* reckless' contraventions was made to provide a graduated enforcement framework for wage underpayments. This more effectively recognises the spectrum of conduct that may be involved in underpayments and ensure appropriate penalties available.[1593] The civil 'serious contravention' represents a mid-tier sanction, with the most severe intentional conduct being covered by the new criminal offence for intentional wage theft (see Section 4.1).[1594]

The increase to maximum civil penalties does not apply to individuals or small business employers. The government agreed to these crossbench amendments in the Senate.[1595]

[1589] Ibid ss 716(5), 539(2) item 33.
[1590] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 153 [908].
[1591] Ibid 153 [909].
[1592] MWT, *Report of the Migrant Workers' Taskforce* (Report, 7 March 2019) 85–8.
[1593] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 155 [918].
[1594] Ibid 153 [910].
[1595] Commonwealth, 'Proposed Amendments to the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023'. Detail – Jacqui Lambie Network and Senator David Pocock, Senate, Sheet 2365 (7 February 2024).

What has happened since commencement

The Review is not aware of any judgments or penalty orders that have applied the increased maximum civil penalties for underpayments. As at 8 May 2026, the FWO had not yet sought pecuniary penalties in litigation in relation to a selected civil remedy provision, nor had it applied for civil penalties of 3 times the amount of the underpayment.[1596]

The FWO's website sets out the maximum civil penalty amounts and the circumstances in which the FWO will initiate civil litigation (which is also part of the FWO's Compliance and Enforcement Policy).[1597] As discussed in Section 4.1, the FWO has also developed and improved its educational resources since the passage of the Closing Loopholes Acts to support employer understanding and compliance, including of the new measures introduced by those Acts.

The new threshold for 'serious contraventions' has been engaged in several cases involving underpayments, but with no substantive discussion of the reforms.[1598]

The higher maximum penalty for contravening a compliance notice has been applied in at least 2 cases, *Fair Work Ombudsman v Um* [2025] FedCFamC2G 1755 (***FWO v Um***) and *Fair Work Ombudsman v Armstrong* [2025] FedCFamC2G 1756 (***FWO v Armstrong***). In both matters, the court ordered the contravening employer to pay the employee their owed wages and entitlements, and to pay a penalty for the employer's failure to comply with the compliance notice.[1599] In each case, the maximum penalty was 60 penalty units, or $18,780 (for an individual). In *FWO v Um* the court imposed a penalty of 60% of the maximum, with a further 15% discount for cooperation.[1600] In *FWO v Armstrong*, the court imposed a penalty of 50% of the maximum, with a further 15% discount for cooperation and partial rectification of the owed entitlements.[1601] In determining the appropriate penalty in *FWO v Armstrong*, the court acknowledged the employer's failure to comply with the notice was ongoing, showed a disregard for their obligations, and had resulted in the employee being deprived of their entitlements for an extended period.[1602]

What the Review heard

The Review received 12 submissions addressing this measure. Business and employer groups were critical of increasing civil penalties, which they submit were already sufficiently high to deter non-compliance. Regulatory complexity is considered the primary cause of employers not meeting

[1596] FWO information provided 8 May 2026.
[1597] FWO (Cth), 'Litigation' (Web Page) <https://www.fairwork.gov.au/about-us/compliance-and-enforcement/litigation>.
[1598] See, for example, *Ingleton v Boswell* [2025] FedCFamC2G 977; *Mazi v Elizabeth Andrews Pty Ltd (No 2)* [2025] FedCFamC2G 1992.
[1599] *Fair Work Ombudsman v Um* [2025] FedCFamC2G 1755, [2]–[4]; *Fair Work Ombudsman v Armstrong* [2025] FedCFamC2G 1756, [2]–[4].
[1600] *Fair Work Ombudsman v Um* [2025] FedCFamC2G 1755, [93]. The maximum penalty has since increased to $19,800 due to the changing value of a penalty unit.
[1601] *Fair Work Ombudsman v Armstrong* [2025] FedCFamC2G 1756, [85]–[87]. The maximum penalty has since increased to $19,800 due to the changing value of a penalty unit.
[1602] Ibid [69]–[83].

their obligations. Unions and the community sector were supportive of the measure and saw the increased civil penalties as an appropriate disincentive to underpaying workers and improve compliance. A further 9 submissions on the Draft Report addressed the measure.

Feedback on the Review's draft recommendation for the FWO to publish guidance on fault elements[1603] was consistent with feedback on several draft recommendations discussed in the previous section on wage theft: employer groups said additional guidance material would not address the complexity of the system, while the ACTU emphasised the importance of strong consequences for underpayment. There were no objections to the draft recommendation to amend the penalties for contraventions of subsection 66MA(8) and sections 359B and 359C.[1604]

Employer groups

AIG submitted that the increases to civil penalties were unnecessary as most underpayments occur due to regulatory complexity,[1605] and recommended monitoring the effects of increased civil penalties on businesses to ensure fairness to all parties.[1606] ACCI and BCA questioned the need for increased penalties and noted the issue of complexity.[1607] ACCI further noted that potential liability associated with penalties is discouraging business growth.[1608] ACCI, AIG and BCA suggested the focus should be on reducing regulatory complexity and supporting businesses to better understand their obligations, rather than on increasing penalties.[1609] These stakeholders recommended modern awards be reviewed with a view to simplifying them,[1610] with BCA recommending the FWC or FWO create 'clear and unambiguous pay rules for all modern awards, informed by a tripartite process'.[1611]

In response to the Review's draft recommendations about the publication of additional or improved guidance materials,[1612] employer groups emphasised that while guidance is useful it does not resolve the complexity of employer obligations.[1613] AIG also noted the limitations on FWO guidance, because the FWO's role is not to determine the law or employer liabilities, and legal distinctions such as the difference between mistakes, recklessness, and knowing contraventions are fact-dependent and determined by courts.[1614]

[1603] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 267–8 [Draft Recommendation 31].
[1604] Ibid 268–9 [Draft Recommendation 32].
[1605] AIG, Submission No 82 (8 March 2026) 125 [600].
[1606] Ibid 125 [604].
[1607] ACCI, Submission No 54 (3 March 2026) 38 [223]; BCA, Submission No 50 (3 March 2026) 40.
[1608] ACCI, Submission No 54 (3 March 2026) 38 [223].
[1609] Ibid; AIG, Submission No 82 (8 March 2026) 126 [605]; BCA, Submission No 50 (3 March 2026) 40.
[1610] ACCI, Submission No 54 (3 March 2026) 38 [224]; AIG, Submission No 82 (8 March 2026) 126 [605].
[1611] BCA, Submission No 50 (3 March 2026) 40.
[1612] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 258, 268 [Draft Recommendations 28, 29 and 31].
[1613] BCA, Submission on Draft Report No 18 (29 May 2026) 11; AIG, Submission on Draft Report No 45 (31 May 2026) 38 [223]–[225].
[1614] AIG, Submission on Draft Report No 45 (31 May 2026) 38 [227].

HIA submitted that the amended definition of 'serious contravention', together with the increased penalties for wage underpayment-related contraventions, are a disproportionate response to the conduct being addressed.[1615] NECA submitted that the compliance burden for small and medium electrical contractors is significant, noting 'heightened civil and criminal penalties … apply irrespective of intent or good faith compliance', and that 'uncertainty, rather than deliberate non-compliance, is the dominant risk'.[1616] HIA also noted that for small builders the increased maximum civil penalties created a disproportionate exposure to liability.[1617] MBA similarly submitted that 'increased penalties for businesses simply do not work as a method to enhance legislative compliance', arguing that making laws simpler to understand would increase compliance.[1618]

Unions

The ACTU submitted that a hybrid approach of criminal and civil penalties is appropriate, and that for civil penalties to increase compliance they must be set at a high enough rate to disincentivise contravening behaviour.[1619] The ACTU noted that previous civil penalties were not sufficiently high to achieve this deterrent effect, with several recent and significant underpayment cases showing that many employers see underpayments or 'wage theft' as simply a cost of doing business.[1620] The UWU supported the increases to civil penalties under this measure, while noting that the recency of the amendments makes it difficult to assess their success.[1621]

Other stakeholders

NRWC expressed support for the measure, noting that together with other compliance and enforcement reforms, including the new criminal offence for intentional wage theft, these changes were particularly important for rural women whose working arrangements can make it difficult to report exploitation.[1622] NRWC recommended enhanced reporting and enforcement strategies in regional areas and small labour markets, and dedicated education and outreach for workers and employers in rural areas and in insecure or seasonal sectors.[1623]

[1615] HIA, Submission No 20 (2 March 2026) 19.
[1616] NECA, Submission No 3 (2 February 2026) 3.
[1617] HIA, Submission No 20 (2 March 2026) 19; HIA, Submission on Draft Report No 11 (29 May 2026) 6.
[1618] MBA, Submission No 34 (3 March 2026) 10.
[1619] ACTU, Submission No 67 (6 March 2026) 67–8.
[1620] Ibid.
[1621] UWU, Submission No 62 (6 March 2026) 20–1.
[1622] NRWC, Submission No 29 (3 March 2026) 7.
[1623] Ibid.

Analysis

This measure strengthened the civil penalty regime by increasing maximum penalties for contraventions of underpayment-related civil remedy provisions and revising the definition of a serious contravention to knowing or reckless. The measure also introduced a new 'benefit obtained' penalty method for underpayment-related contraventions.

To date, the FWO has indicated no proceedings have been commenced relying on the revised serious contravention threshold, and it has not yet sought pecuniary penalties in matters that would attract the increased civil penalties for non-small business bodies corporate.[1624]

The FWO suggests that complex civil matters typically take time to reach the courts. Identifying conduct occurring after commencement, gathering evidence, assessing prospects and preparing for proceedings contribute to cause this delay. At the same time, the FWO reports a significant increase in self-reporting by employers including large corporates and not-for-profits.[1625] This trend predates the reforms but appears to have accelerated since their introduction.

The fact that civil matters have not yet reached the courts limits the Review's ability to assess the effectiveness of the measure and any unintended consequences. Therefore, the recommended targeted review of the wage theft offence (see Recommendation 24) should also assess this measure, ensuring that the graduated enforcement framework is effective and consider any unintended consequences.

In their submissions, several employer groups argued that underpayments primarily occur due to regulatory complexity, and in this context, they questioned the effectiveness of increasing civil penalties.[1626] As was discussed in Section 4.1, there are recent examples of employer non-compliance that courts in civil matters have described as deliberate, or intentional. It should also be noted that recent significant underpayment cases have involved payments below the national minimum wage.[1627] These underpayments cannot easily be attributed to complexity within the system, noting the minimum wage figure can easily be found through various plain-English resources. This suggests there is a role for deterrence in preventing underpayment of entitlements.

The Review notes that this measure has not changed underlying complexity: it has changed the penalty regime that applies to underpayments with increased consequences. It is therefore reasonable to provide appropriate support for employers, so they improve systems and practices and avoid non-compliance.

[1624] FWO information provided 8 May 2026.
[1625] Ibid.
[1626] AIG, Submission No 82 (8 March 2026) 125 [600]; ACCI, Submission No 54 (3 March 2026) 38 [223]; BCA, Submission No 50 (3 March 2026) 40.
[1627] See, for example, *Fair Work Ombudsman v Blue Sky Kids Land Pty Ltd (in liq) (No 3)* [2024] FCA 785.

Appropriateness of civil penalty levels

In determining whether the level of civil penalties is appropriate, it is useful to compare the FW Act civil penalties with civil penalties in other Commonwealth laws. The MWT recommended 'that the general level of penalties for breaches of wage exploitation related provisions in the FW Act be increased to be more in line with those applicable in other business laws, especially consumer laws.'[1628]

The closest comparators are the Australian Competition and Consumer Commission (**ACCC**) and ASIC. Maximum civil penalties for contraventions of the *Competition and Consumer Act 2010* (Cth) and Australian Consumer Law, administered by the ACCC, are the greater of:

- $100,000,000
- if the court can determine the value of the 'reasonably attributable' benefit obtained, 3 times that value, or
- if the court cannot determine the value of the 'reasonably attributable' benefit, 30% of the corporation's adjusted turnover during the breach turnover period for the contravention.[1629]

Maximum civil penalties available to ASIC in enforcing the *Corporations Act 2001* (Cth) for bodies corporate are the greater of:

- 50,000 penalty units (currently $16.5 million)
- 3 times the benefit obtained and detriment avoided, or
- 10% of annual turnover, capped at 2.5 million penalty units (currently $825 million).[1630]

In this context, there is no strong case to be made that maximum civil penalties in the FW Act are excessive. Maximum penalties are available in response to the most serious contraventions.

When determining the penalty to be imposed for a contravention of a civil remedy provision, the courts have regard to the context in which the contravention has occurred, along with the need for specific deterrence (to the person committing future contraventions) and general deterrence (to others committing these contraventions).

[1628] MWT, *Report of the Migrant Workers' Taskforce* (Report, 7 March 2019) 88.
[1629] ACCC (Cth), 'Fines and penalties' (Web Page) <https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties>.
[1630] ASIC (Cth), 'Fine and penalties' (Web Page) <https://www.asic.gov.au/about-asic/asic-investigations-and-enforcement/fines-and-penalties/>.

Inconsistent penalties for new civil remedy provisions

The selected civil remedy provision amendments do not apply uniformly to relevant pecuniary penalties.

The Closing Loopholes No. 2 Act introduced the following penalty provisions (see Section 2.2 for further details on the casual employment provisions):

- subsection 66MA(8), which penalises the contravention of an arbitration order regarding disputes about casual employment
- section 359B, which prohibits the dismissal or threat to dismiss an employee in order to reengage them as a casual employee doing the same work, and
- section 359C, which prohibits statements to non-casual employees that the employer knows is false and is said to persuade or influence an employee to enter into a contract for casual work doing substantially the same work.

These provisions are not included in the selected civil remedy provisions, so the pecuniary penalty reforms provided by this measure (see Table 11 and 12) do not apply to them. Instead, the amendments set the penalty unit for these provisions at 300 penalty units.[1631] As a result, the following pecuniary penalties apply:

- For individuals – 300 penalty units.
- For small business bodies corporate – 1,500 penalty units.
- For all other bodies corporate – 1,500 penalty units.[1632]

This approach appears inconsistent with the reforms made by this measure and may be an oversight. It is further noted the explanatory materials do not suggest that this was the intended approach. The intention in setting high penalties was deterrence, but in failing to list these provisions as selected civil remedy provisions:

- the relief provided to small business through the small business exception on pecuniary penalty multipliers is not available for these measures, and
- the penalty for individuals is inappropriately high, compared to other penalty provisions and their respective penalty units.

When considering the type of matters that are included in the selected civil remedy provisions and the significance of the penalties set for these provisions, these provisions could appropriately sit within the selected civil remedy provision definition. The Review notes these provisions have not been used to date.

[1631] *Fair Work Act 2009* (Cth) s 539(2) items 5AAA, 11B.
[1632] See paragraph 546(2)(a) of the *Fair Work Act 2009* (Cth), which sets individual rates at the PU limit, and paragraph 546(2)(b) which sets the penalty unit amount for bodies corporate as 5 times the listed PU rate.

Findings and recommendations

The strengthened civil penalty framework, based on a graduated enforcement model, has the potential to provide an appropriate response for the vast majority of underpayments, including serious, repeated or reckless contraventions. The civil penalties regime is an important measure to deter and address non-compliance. No legislative amendments to the core civil penalty provisions are recommended at this stage. Without any matters proceeding to the courts, it is too early to tell if the strengthened civil penalty regime is operating as intended. The review of the operation of the wage theft offence (see Recommendation 24 in Section 4.1) should include consideration of the changes to the civil penalties framework, as criminal and civil provisions work together to deter non-compliance.

As discussed in the previous section, the strengthening of the compliance and enforcement framework (including the criminal offence and civil penalties) has not increased legal complexity, but instead increased the consequences of non-compliance. However, it should be acknowledged that, in some cases, employers do face significant compliance burdens. Employers should have access to clear and practical tools to assist them in meeting their legal obligations. Assistance should prevent inadvertent breaches, reduce concern about genuine mistakes and ultimately ensure employees are properly paid.

Small business employers in particular need tailored assistance with compliance. While maximum civil penalties for selected civil remedy provisions were not increased for small business employers, changes to the serious contravention and the increase to maximum penalties for non-compliance with a compliance notice do apply. For contraventions of civil remedy provisions, there is no equivalent to the Voluntary Code to provide assurance to employers that if they take certain steps they will not face penalties.

Recommendations 27 and 28 (that the FWO should develop practical compliance tools, and that government should work with industry to develop digital compliance tools that integrate with employer payroll software) are also relevant to this measure.

Recommendation 30

The Fair Work Ombudsman should publish clear guidance explaining the distinctions between inadvertent underpayments or mistakes, recklessness, and contraventions that are done knowingly.

An unintended consequence of the reforms across the Closing Loopholes legislation appears to be the exclusion of subsection 66MA(8) and sections 359B and 359C from the definition of 'selected civil remedy provision'. Instead, these provisions impose higher penalties that are inconsistent with other equivalent provisions.

Recommendation 31

The *Fair Work Act 2009* should be amended to reduce the penalties for contraventions of subsection 66MA(8) and sections 359B and 359C in line with other equivalent civil remedy provisions, and these 3 provisions should be added to the definition of 'selected civil remedy provision'.

4.3 Clarifications to the operation of a Fair Work Ombudsman compliance notice

What the measure does

The Closing Loopholes No. 2 Act amended the FW Act to clarify that a compliance notice issued by a Fair Work Inspector (an inspector) can require the recipient of the notice to calculate and pay the amount of any underpayment that is owed to an employee.[1633]

It also clarified the types of orders the Federal Court or Federal Circuit and Family Court of Australia may make, by amending the non-exhaustive list of orders set out in the FW Act.[1634] As a result, the FW Act explicitly allows the courts to issue an order requiring a person comply in part or wholly with a notice (other than an infringement notice) given to them by an inspector or the FWO, if satisfied that a person has contravened, or proposed to contravene, a civil remedy provision.[1635]

By way of background, under the FW Act an inspector may issue a compliance notice requiring a person to take specified action to remedy the effects of a contravention of a workplace law, as an alternative to applying to a court in relation to the contravention.[1636] Compliance notices outline the alleged contravention(s), what the person must do to fix the issue, how to apply to have the notice reviewed by a court, and what happens if the person does not comply.[1637] Failing to comply with a compliance notice – either by not taking the specific actions to remedy the contravention, and/or not providing reasonable evidence of compliance, is a contravention of the FW Act and the person may be liable to pay a civil penalty.[1638]

The measure commenced on 27 February 2024.[1639]

[1633] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 12.
[1634] *Fair Work Act 2009* (Cth) s 545(2)(d).
[1635] *Fair Work Act 2009* (Cth) s 545(2)(d); Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 159 [936].
[1636] *Fair Work Act 2009* (Cth) s 716(2)(a).
[1637] Ibid s 716(3).
[1638] Ibid ss 716(2), (5).
[1639] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 2(1) item 16.

Intention of the measure

The amendment to clarify what an inspector may require in a compliance notice was intended to ensure that there should be 'no "unnecessary legislative or administrative barriers" to the effective use of compliance notices.'[1640] The MWT Report had noted there was uncertainty as to whether the FWO must prove the contravention and quantify the underpayment before it can issue a compliance notice.[1641] The amendment clarifies the operation of compliance notices to explicitly reference that it may include the requirement for a person 'to calculate and pay the amount of any underpayment'.[1642]

The measure expressly set out the FWO's existing practice of issuing compliance notices requiring recipients to calculate and pay the amount owed to an employee. When those notices were not complied with, the FWO regularly applied for, and was granted, orders requiring a person to take the steps specified in the compliance notice. The intention of the measure was to clarify the statutory basis for these practices.[1643]

What has happened since commencement

From 27 February 2024 (when the measure commenced) to 4 June 2026, the FWO has recorded:

- 98 compliance notice-related penalty decisions
- $2,387,686 in compliance notice-related penalties, and
- 62 court orders to comply with a compliance notice or calculate the underpayment involved.[1644]

Some compliance notices considered in these decisions may have been issued before the measure commenced. The amendments that clarify the orders courts can make would apply to these matters, but the amendments that clarify that compliance notices can require recipients to calculate and pay amounts owed would only apply to notices issued after commencement.

[1640] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 159 [940]; MWT, *Report of the Migrant Workers' Taskforce* (Report, 7 March 2019) 90.
[1641] MWT, *Report of the Migrant Workers' Taskforce* (Report, 7 March 2019) 90.
[1642] *Fair Work Act 2009* (Cth) s 716(2)(a).
[1643] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) [935]–[939].
[1644] FWO data, provided 5 June 2026.

What the Review heard

The Review received 2 submissions substantively addressing this measure. HIA submitted that it does not oppose the measure but recommended that section 716 of the FW Act be amended to clarify that compliance notices should not require 'payment of disputed amounts under threat of penalties without genuine dispute resolution.'[1645]

The ACTU submitted that it supported the measure and was not aware of any related judicial decisions. As a result, it said it had been unable to identify any unintended consequences associated with the amendments and recommended no further changes.[1646]

The Review did not receive any further feedback on this measure in submissions on the Draft Report.

Analysis

HIA submits that 'small builders must have the ability to dispute notices based on differing award interpretations without accruing penalties during the dispute process.'[1647] Existing provisions in the FW Act already provide that a person receiving a compliance notice may apply to a court for a review of the notice,[1648] and that an inspector must not apply to a court in relation to a contravention that is the subject of a compliance notice that has not been withdrawn and complied with, or if the person receiving the notice has applied for review of the notice.[1649] Penalties do not 'accrue' during the review process, nor while the compliance notice is on foot.

In fact, a compliance notice provides an opportunity for a person to remedy contraventions without the FWO pursuing a civil penalty. Compliance notices cannot apply penalties, the FWO cannot pursue civil penalty proceedings while a compliance notice is on foot, and a person who complies with a notice is not taken to have admitted to the contravention, nor to have been found to have committed the contravention.[1650]

HIA suggests that dispute resolution should be used to resolve disputed underpayments. This is outside of the scope of the Review, and the protections for employers with respect to compliance notices currently in the FW Act reflect the Parliament's intention.

Findings and recommendations

The amendment has been operating appropriately and effectively to date, and no unintended consequences have been identified.

[1645] HIA, Submission No 20 (2 March 2026) 17.
[1646] ACTU, Submission No 67 (6 March 2026) 71.
[1647] HIA, Submission No 20 (2 March 2026) 17.
[1648] *Fair Work Act 2009* (Cth) s 717.
[1649] Ibid s 716(4A).
[1650] Ibid s 716(4B).

4.4 Strengthening right of entry to investigate underpayments

What the measure does

The Closing Loopholes No. 2 Act amended the FW Act to expand the grounds on which registered organisations (e.g. unions) can seek an exemption certificate from the FWC to enter a workplace without giving advance notice to investigate suspected underpayments affecting a member.[1651]

The pre-existing right of entry provisions in the FW Act regulate the rights of officials of registered organisations who hold a FW Act entry permit ('permit holder') to enter workplaces or business premises to investigate suspected contraventions of the Act and for discussion purposes.[1652] To enter a workplace and investigate a suspected contravention, a permit holder must reasonably suspect a contravention has occurred or is occurring[1653] and comply with other obligations under the FW Act.[1654] The right is subject to the permit holder giving the occupier and any affected employer at least 24 hours' notice of the entry.[1655] The FWC may issue an exemption certificate to the permit holder to waive the notice period obligations.[1656] Before the amendments, the FWC was only able to issue exemption certificates if it reasonably believed that the advance notice of the entry might result in the destruction, concealment or alteration of relevant evidence.[1657]

The Closing Loopholes No. 2 Act expanded the grounds on which an exemption certificate could be issued to circumstances in which the FWC:

- is satisfied that the suspected contravention or contraventions forming the basis of the entry involve the underpayment of wages, or other monetary entitlements, of a member the organisation is entitled to represent and who works on the premises, and
- reasonably believes advance notice of entry would hinder an effective investigation into the suspected contravention or contraventions.[1658]

[1651] *Fair Work Act 2009* (Cth) s 519(1)(b)(ii).
[1652] Ibid pt 3–4 ss 12, 512.
[1653] Ibid s 481(3).
[1654] See, for example, Ibid ss 486–493.
[1655] *Fair Work Act 2009* (Cth) ss 487(1)(a), (3).
[1656] Ibid s 519.
[1657] This is currently reflected in *Fair Work Act 2009* (Cth) ss 519(1)(b)(i).
[1658] *Fair Work Act 2009* (Cth) s 519(1)(b)(ii); *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 item 122.

This measure also added to the FWC's previously existing powers to restrict the rights exercisable by an organisation or permit holder if satisfied that they have misused those rights.[1659] Amendments were made to make it clear that the FWC may take action by:

- requiring that some or all of the exemption certificates that might be issued on the grounds of suspected underpayment be subject to certain conditions,[1660] and
- banning the issue of exemption certificates on the grounds of suspected underpayment in relation to an organisation or specified permit holders.[1661]

The measure also made amendments to other right of entry provisions, including to:

- allow the FWC to impose conditions on an entry permit, as an alternative to revoking or suspending an entry permit under section 510 of the FW Act.[1662]
- extend the existing prohibition[1663] on hindering or obstructing permit holders exercising their rights so that it also prohibits improper conduct.[1664] Improper conduct covers a wider range of conduct than intentionally hindering or obstructing and may include, depending on the circumstances, swearing, making offensive, racist, sexist or homophobic comments, or acting in a physically aggressive or intimidatory manner towards a permit holder.[1665]

Existing right of entry safeguards under the FW Act continue to operate under the provisions, including restrictions on the unauthorised use or disclosure of information, the prohibition on hindering or obstructing any other person, the obligation to comply with work health and safety requirements that apply in the workplace, and the prohibition on entering any part of a premises that is used mainly for residential purposes.[1666]

The amendments commenced on 1 July 2024.[1667]

[1659] *Fair Work Act 2009* (Cth) s 508.
[1660] *Fair Work Act 2009* (Cth) s 508(2)(da); *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 item 113.
[1661] *Fair Work Act 2009* (Cth) s 508(2)(ea); *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 item 114.
[1662] *Fair Work Act 2009* (Cth) ss 510(1), (5)–(6); *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1, items 115–121. The circumstances listed under subsection 510(1) include a permit holder: contravening provisions relating to misrepresentation, and use and disclosure of information, disqualification from exercising or applying for a right of entry, being ordered to pay a pecuniary penalty under the FW Act, or in seeking to exercise a right of entry under a State and Territory OHS law that was not authorised by that law.
[1663] *Fair Work Act 2009* (Cth) s 502(1).
[1664] Ibid ss 481, 483A, 484, 492, 500, 502; *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 items 104–112; Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 149 [883].
[1665] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 149 [886].
[1666] *Fair Work Act 2009* (Cth) ss 491, 493, 500–504.
[1667] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 2(1) item 12.

Intention of the measure

The measure is intended to help permit holders to quickly investigate suspected wage underpayments so that employers cannot take action to conceal underpayments.[1668]

The expansion of the grounds for granting an exemption certificate reflects that the bar for obtaining it was 'high, so rarely used'[1669] prior to the measure. The amendments adjusted this to 'enhance access to the workplace for permit holders'.[1670] This enhanced access is intended to facilitate permit holders' ability to interview relevant people and inspect relevant documents and records.[1671] The broad intent of the measure is to help facilitate early detection of wage underpayments.[1672] Then Minister for Employment and Industrial Relations said of the amendments upon their introduction:

> *there can be cases where the paperwork is impeccable but wage theft is occurring. For example, if a worker is being directed to clock off but is still required to work after that, you will only uncover this by attending without notice.*[1673]

The other amendments made by this measure are intended to protect permit holders against people acting in an improper manner towards them[1674] and safeguard against the misuse of the expanded grounds for issue of an exemption certificate.[1675]

The amendment to section 502 is intended to bring the prohibition in line with the similar prohibition in section 500, which prohibits permit holders from hindering or obstructing others while exercising their entry permit rights.[1676]

What has happened since commencement

Since the measure commenced, the FWC has not received any applications for an exemption certificate under section 519 of the FW Act.[1677] The FWC reports that the most recent application was received in December 2018.[1678]

[1668] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 41 [234].
[1669] Ibid 19–20 [92].
[1670] Ibid [95].
[1671] Ibid [260].
[1672] Commonwealth, *Parliamentary Debates,* House of Representatives, 4 September 2023, 6235–6 (Tony Burke, Minister for Employment and Workplace Relations).
[1673] Ibid 6236.
[1674] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 46 [261].
[1675] Ibid 150 [890]–[891].
[1676] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 150 [887].
[1677] FWC data, provided 5 June 2026.
[1678] Ibid.

What the Review heard

The Review received 13 submissions addressing this measure. Academics, the community sector and unions were supportive of the measure and saw it as an important tool for strengthening compliance and protecting workers' rights.[1679] Employer groups were generally critical of the measure.[1680]

The Review received 6 submissions providing feedback on the Review's Draft Report in relation to this measure. These included additional context about the measure or concerns about the future use of right of entry to investigate underpayments. There was no significant concern with the draft recommendation to amend Form 2 in the FW Regulations.[1681] Some employer groups reiterated their earlier submissions calling for the measure to be repealed, or amendments to the operation of the right of entry.

The ACTU submitted that, as a matter of principle, permit holders should be able to enter premises without notice for the purpose of investigating underpayment, and the amendment to make it easier to obtain an exemption certificate was appropriate.[1682] It said the measure complemented other Closing Loopholes reforms including introducing a criminal offence for wage theft and increasing civil penalties for underpayments.[1683]

The ACTU attributed historically low uptake of exemption certificates to the 'very high bar' set by the previous requirement to show that there was a risk of evidence being altered, destroyed or concealed. The ACTU noted that uptake did not appear to have increased since the amendment and suggested this may be because consideration of whether prior notice would hinder an effective investigation is still required.[1684] The ACTU noted this requirement was a parliamentary amendment and not part of the original proposal, and recommended its removal.[1685]

Concerns raised by employer groups included the risk of misuse of exemption certificates for purposes other than addressing underpayment, insufficient evidentiary thresholds and the potential impacts on worksite safety and small business operations.[1686] COSBOA submitted that short notice or unannounced union right of entry visits were materially more disruptive for small businesses as compared to large businesses, and had the potential to 'effectively halt operations' during the visit.[1687] It noted that, in some cases, the business owner may be the only individual present who can answer questions, locate records or

[1679] Chris F Wright, Submission No 13 (2 March 2026) 4; Michael Rawling and Eugene Schofield-Georgeson, Submission No 17, (2 March 2026) 8; NRWC, Submission No 29 (3 March 2026)7; ACTU, Submission No 67 (6 March 2026) 78; UWU, Submission No 62 (6 March 2026) 22; and AMIEU, Submission No 56 (4 March 2026) 6 [50].
[1680] AIG, Submission No 82 (8 March 2026) 127 [611]; NECA, Submission No 3 (2 February 2026) 6; CCF, Submission No 32 (3 March 2026) 2; COSBOA, Submission No 45 (3 March 2026) 14 [63]; MIAL, Submission No 26 (3 March 2026) 8–9 [4.4]; HIA, Submission No 20 (2 March 2026) 19.
[1681] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 278 [Draft Recommendation 33].
[1682] ACTU, Submission No 67 (6 March 2026) 78.
[1683] Ibid.
[1684] *Fair Work Act 2009* (Cth) ss 519(1)(b)(ii).
[1685] ACTU, Submission No 67 (6 March 2026) 79.
[1686] NECA, Submission No 3 (2 February 2026) 6; CCF, Submission No 32 (3 March 2026) 2; COSBOA, Submission No 45 (3 March 2026) 14 [62]–[63]; MIAL, Submission No 26 (3 March 2026) 8–9 [4.4]; HIA, Submission No 20 (2 March 2026) 19.
[1687] COSBOA, Submission No 45 (3 March 2026) 14 [62].

manage disrupted customer service and workflow.[1688] It also raised concerns about 'strategic entry during peak business periods'[1689] and contended there was a risk that the expanded right of entry may be 'used as a general organising tool in industries where union membership is low and small business employment is prevalent'.[1690] COSBOA recommended a minimum notice period of no less than 48 hours for right of entry to investigate underpayment in small businesses, and that 'the FWO, rather than union officials, be the primary mechanism for investigating suspected underpayments in small business workplaces.'[1691]

CIS submitted that expanded entry rights for permit holders can 'increase workplace disputation, operational disruption, compliance burdens and legal uncertainty' and that these impacts were especially significant for small and medium sized enterprises without dedicated industrial relations resources.[1692] The CCF raised concerns about the impact of unannounced entry to worksites on high-risk work sequencing, safety briefings and traffic management.[1693]

AIG submitted that exemptions providing entry without prior notice should be granted on 'a strictly exceptional basis, carefully scrutinised and considered'.[1694] It said that a 'reasonable belief that advance notice of the entry given by an entry notice would hinder an effective investigation into a suspected contravention or contraventions' was not a sufficiently high threshold. AIG and HIA argued that the need for the amendment was not established during the legislative process and questioned why suspicions of underpayment could not be addressed by the FWO rather than union entry.[1695] AIG further submitted there was a lack of clarity around the relevant thresholds such as 'reasonable belief' and 'suspected underpayment', and inadequate consideration was given to section 557 of the FW Act which provides a reverse onus of proof in circumstances where an employer has not provided employment records.[1696] AIG and HIA recommended the measure be repealed.[1697]

Some academics saw the measure as a welcome and necessary amendment to provide unions with the tools to tackle underpayment.[1698] Professor Wright submitted that 'legal restrictions on union activity directly contributed to the rise in reported cases of wage theft'.[1699] He cited his research with Associate Professor Stephen Clibborn which recorded a gradual rise in reported wage theft in the 2000s and an 'explosion' in the 2010s.[1700] Associate Professor Rawling and Dr Schofield-Georgeson also reflected this view in their joint submission, saying unions' ability to address underpayment had been hampered by resourcing, structural issues and a need to improve collaboration with the FWO.[1701]

[1688] COSBOA, Submission on Draft Report No 7 (29 May 2026) 7 [31].
[1689] COSBOA, Submission No 45 (3 March 2026) 14 [63].
[1690] COSBOA, Submission on Draft Report No 7 (29 May 2026) 7 [32].
[1691] Ibid 7 [33].
[1692] CIS, Submission on Draft Report No 4 (25 May 2026) 6.
[1693] CCF, Submission No 32 (3 March 2026) 2.
[1694] AIG, Submission No 82 (8 March 2026)127 [611].
[1695] Ibid 127 [612]; HIA, Submission No 20 (2 March 2026) 19.
[1696] AIG, Submission No 82 (8 March 2026) 127 [613].
[1697] Ibid 127 [614]; HIA, Submission No 20 (2 March 2026) 19; AIG, Submission on Draft Report No 45 (31 May 2026) 39 [230]; HIA, Submission on Draft Report No 11 (29 May 2026) 6.
[1698] Michael Rawling and Eugene Schofield-Georgeson, Submission No 17 (2 March 2026) 8.
[1699] Chris F Wright, Submission No 13 (2 March 2026) 4.
[1700] Ibid, citing Stephen Clibborn and Chris F Wright, 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?' (2018) 29(2) *Economic and Labour Relations Review*, 207–27.
[1701] Michael Rawling and Eugene Schofield-Georgeson, Submission No 17 (2 March 2026) 8.

NRWC submitted that the Closing Loopholes reforms to enhance compliance and enforcement, including enabling permit holders to seek an exemption certificate to investigate suspected underpayment, were important for women in rural areas who were more likely to experience underpayment and insecure work, and face increased barriers reporting exploitation.[1702]

The UWU noted that the explanation of section 502 of the FW Act in the associated form in the FW has not been updated to reflect the Closing Loopholes No. 2 amendments to section 502.[1703] At present, the form says that section 502 requires an occupier of a premises, an affected employer or other person to 'not intentionally hinder or obstruct a permit holder'.[1704] The UWU submitted that a more accurate explanation of section 502, as amended, would describe this requirement as an obligation to 'not intentionally hinder or obstruct a permit holder, or act in an improper manner'.[1705]

Feedback on draft recommendations

The UWU was supportive[1706] of the Review's draft recommendation to amend Form 2 in Schedule 3.3 to the FW Regulations to align with the explanation of section 502 of the FW Act.[1707] The UWU submitted that the draft recommendation 'clarifies protections for permit holders who are exercising rights in accordance with Part 3-4 from improper conduct by others'.[1708]

ACCI submitted that it did not oppose the draft recommendation to amend Form 2. It acknowledged the recommendation aimed to provide consistency between the FW Regulations and the FW Act, however it noted that the need for this correction was 'reflective of broader concerns regarding the drafting and implementation of recent amendments.'[1709] HIA submitted that the draft recommendation was 'a minor technical correction' that does not address concerns around misuse of right of entry.[1710]

Analysis

A number of employer groups submitted that this measure should be repealed, on the grounds that the case for the reform was weak, and there were risks of misuse of exemption certificates. It is important that suspected wage underpayments can be promptly and effectively investigated, including by union officials. Employer groups' concerns about the risk of misuse of these provisions have so far not been borne out. There have been no applications for exemption certificates since the amendments commenced almost 2 years ago, and so none have been granted. However, the application process for an exemption certificate, together with the powers provided to the FWC to restrict their use, would appear to provide appropriate safeguards to their misuse.

[1702] NRWC, Submission No 29 (3 March 2026) 7.
[1703] UWU, Submission No 62 (6 March 2026) 22.
[1704] *Fair Work Regulations 2009* (Cth) reg 169.
[1705] UWU, Submission No 62 (6 March 2026) 22.
[1706] UWU, Submission on Draft Report No 20 (29 May 2026) 9.
[1707] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 278 [Draft Recommendation 33].
[1708] UWU, Submission on Draft Report No 20 (29 May 2026) 9.
[1709] ACCI, Submission on Draft Report No 46 (1 June 2026) 36 [228]–[231].
[1710] HIA, Submission on Draft Report No 11 (29 May 2026) 6.

COSBOA's recommendation that minimum notice periods of no less than 48 hours apply to small businesses amounts to a recommendation to exempt small businesses from this measure, as the measure is to expand the circumstances in which a permit holder can enter a workplace without notice. This would not be consistent with the intent of the measure to help permit holders to quickly investigate suspected wage underpayments wherever they occur, so that employers cannot take action to conceal underpayments.[1711] Providing a minimum of 48 hours' notice of entry to investigate underpayment would directly contradict this intent, as the standard notice period is 24 hours. It would also provide small businesses with double the amount of notice for right of entry in the case of suspected underpayment, as compared to right of entry exercised on other grounds.

Unions submit that the lack of applications is evidence that the threshold for an exemption certificate is too high. However, there is no specific evidence before the Review of instances in which an exemption certificate would appear to be warranted, but the statutory threshold prevented its issue. Nor have any applications been rejected for failing to meet the threshold.

The inconsistency noted by the UWU between amended subsection 502(1) of the FW Act and the relevant wording in Form 2, Schedule 3.3 in the FW Regulations, does appear to be an oversight. Form 2 otherwise imports the wording of sections 500, 501 and 503 of the FW Act respectively, including the words 'or act in an improper manner' in section 500.

Findings and recommendations

The amendments are consistent with the policy intention to improve the effectiveness of underpayment investigations, while maintaining safeguards for employers. There have been no exemption certificates issued to date, and therefore no unintended consequences have been identified. The measure includes appropriate safeguards to protect against misuse of entry permits.

The inconsistency of the wording in Form 2 with the relevant section of the FW Act should be addressed.

Recommendation 32

Form 2 in Schedule 3.3 to the *Fair Work Regulations 2009* should be amended to align with the explanation of section 502 of the *Fair Work Act 2009* (as amended by the Closing Loopholes No. 2 Act), by including the words 'or act in an improper manner'.

[1711] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 41 [234].

4.5 Providing stronger protections against discrimination, adverse action and harassment

What the measure does

The Closing Loopholes No. 1 Act amended the FW Act to include 'subjection to family and domestic violence' as a protected attribute in provisions that prevent discriminatory conduct.[1712]

The measure commenced on 15 December 2023.[1713]

Prohibited discrimination on the basis of 'subjection to family and domestic violence'

The FW Act contains a range of protections against discriminatory conduct, including:

- A prohibition on a modern award including terms that discriminate against an employee because of a protected attribute.[1714]
- A prohibition on an enterprise agreement including terms that discriminate against an employee because of a protected attribute.[1715]
- A prohibition on an employer taking adverse action against a person who is a current or prospective employee because of a person's protected attribute.[1716]
- A requirement that the FWC must take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of a protected attribute when they are performing functions or exercising powers under the FW Act.[1717]
- A prohibition on an employer terminating an employee's employment because of their protected attribute.[1718]

[1712] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 1 pt 8.
[1713] Ibid s 2(1) item 10.
[1714] *Fair Work Act 2009* (Cth) s 153(1).
[1715] Ibid s 195(1)
[1716] Ibid s 351(1).
[1717] Ibid s 578(c).
[1718] Ibid s 772(1)(f).

Breaching the prohibition on taking adverse action against a person or terminating an employee because of a protected attribute may be subject to civil penalties.[1719] However, paragraph 351(2)(a) provides that the prohibition on adverse action under subsection 351(1) does not apply to action that is not unlawful under any anti-discrimination law in force where the action is taken.[1720]

'Protected attribute' is the term used to refer to several attributes that are listed under the above anti-discrimination provisions in the FW Act. Prior to the Closing Loopholes amendment, this list included race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The Closing Loopholes No. 1 Act amended these protections to include 'subjection to family and domestic violence' in the existing list of protected attributes, to prevent employers discriminating against employees who have been, or continue to be, subjected to FDV.[1721] The provision is limited in its application to victim-survivors and does not apply to perpetrators of FDV.[1722]

Meaning of 'family and domestic violence'

For the purpose of the measure, family and domestic violence (FDV) has the meaning provided for in subsection 106B(2) and is violent, threatening or other abusive behaviour by a close relative[1723] of a person, a member of a person's household, or a current or former intimate partner of a person, that:

- seeks to coerce or control the person, and
- causes the person harm or to be fearful.[1724]

See Chapter 6 'Paid Family and Domestic Violence Leave' for more information on the definition.

[1719] Ibid s 539 items 11, 35.
[1720] Ibid s 351(2)(a). 'Anti-discrimination law' includes the *Age Discrimination Act 2004*; the *Disability Discrimination Act 1992*; the *Racial Discrimination Act 1975*; the *Sex Discrimination Act 1984*; the *Anti-Discrimination Act 1977* of New South Wales; the *Equal Opportunity Act 2010* of Victoria; the *Anti-Discrimination Act 1991* of Queensland; the *Equal Opportunity Act 1984* of Western Australia; the *Equal Opportunity Act 1984* of South Australia; the *Anti-Discrimination Act 1998* of Tasmania; the *Discrimination Act 1991* of the Australian Capital Territory; the *Anti-Discrimination Act 1992* (NT), see s 351(3).
[1721] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 1, items 94–98; Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 7 [24].
[1722] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 143–4 [859].
[1723] A 'close relative' is defined under section 106B(3) of the *Fair Work Act 2009 (Cth)* as another person who is a member of the first person's immediate family; or is related to the first person according to Aboriginal or Torres Strait Islander kinship rules.
[1724] Explanatory memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) 7 [40].

Intention of the measure

The measure intended to strengthen the FW Act's discrimination framework to protect employees subjected to FDV.[1725]

It gives effect to Australia's commitments under ILO Convention 190 and in doing so, sought to:

- ensure the right to equality and non-discrimination for employees experiencing FDV by establishing a new protected attribute within the FW Act for employees who have been, or continue to be, subjected to FDV,[1726] and
- recognise the effects of FDV and mitigate its impact in the world of work by preventing discrimination against employees subjected to FDV and improving those employees' options for recourse when such discrimination does occur in the workplace.[1727]

The measure also reflects the government's commitment to the National Plan to End Violence against Women and Children 2022–2032 (the **National Plan**), which aims to promote recovery for victim-survivors, including 'rebuilding of a victim-survivor's life, their ability to return to the workplace and community, as well as obtaining financial independence and economic security'. The National Plan notes '[e]ffective processes and policies can also enable employees experiencing gender-based violence to seek support and receive assistance from their employers'. The amendments support the National Plan's aims by preventing discrimination against employees and prospective employees subjected to FDV and allowing a victim-survivor to seek civil remedy where they do experience discrimination.[1728]

The measure aligns the FW Act with other state and territory anti-discrimination laws that afford similar protection[1729] and complements the introduction of 10 days of paid FDVL for all employees.[1730]

What has happened since commencement

There is limited data to assess the operation of this measure.

There has been one case that has considered 'subjection to FDV' as a protected attribute. In *Kandel v Hammondcare* [2026] FedCFamC2G 141, the court held that the fact the applicant was the subject of an application for an apprehended domestic violence order did not attract protection from adverse action under either section 340 or section 351 of the FW Act, and in particular did not amount to the protected attribute of 'subjection to FDV' in section 351.[1731] The general protections claim was dismissed

[1725] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 143 [856].
[1726] Ibid 145 [872].
[1727] Ibid 145–6 [873].
[1728] Ibid 145 [870].
[1729] Ibid 143 [859].
[1730] See *Fair Work Amendment (Family and Domestic Violence Leave) Act 2024* (Cth) and Chapter 6 of this Report.
[1731] *Kandel v Hammondcare* [2026] FedCFamC2G 141, [26].

as having no reasonable prospects, with the court indicating that any complaint about the fairness of the dismissal process itself belonged in the unfair dismissal jurisdiction rather than being recast as adverse action based on a protected attribute.[1732]

The FWO and FWC do not routinely collate information relevant to the measure as part of their standard reporting.

What the Review heard

The Review received 12 submissions addressing the measure. Stakeholders generally welcomed the measure and noted that it complements the introduction of paid FDVL (see Chapter 6). However, some stakeholders raised concerns about the measure's coverage and interaction with state and territory legislation.

A further 4 submissions on the Draft Report addressed the measure, with unions supporting the Review's draft recommendation (discussed below) and employer groups opposing it.

Coverage

WLS NSW submitted that the measure excludes women who experience sexual violence outside of intimate or family relationships. It noted that working women who experience sexual harassment, sexual assault or image-based abuse by a coworker or acquaintance, and who subsequently experience discrimination, adverse action, or harassment because of their subjection to that sexual violence, are not protected where the perpetrator is not an intimate partner or family member.[1733]

Circle Green expressed concern that the measure does not extend to labour hire workers, contractors or employee-like workers. It recommended the wording of section 351 be amended to align with section 340 of the FW Act, which provides broader protections against adverse action taken for exercising a workplace right, and applies to labour hire workers, contractors and employee-like workers.

The UWU recommended that the FW Act include reproductive health as a protected attribute in all relevant sections.[1734]

[1732] Ibid [24].
[1733] WLS NSW, Submission No 69 (6 March 2026) 16 [49].
[1734] UWU, Submission No 62 (6 March 2026) 14.

Interaction with discrimination legislation

Several stakeholders raised concerns regarding inconsistencies between the FW Act and state and territory discrimination legislation.[1735]

The ACTU highlighted that paragraph 351(2)(a) of the FW Act, which provides that protections contained in subsection 351(1) do not apply to action that is 'not unlawful under any anti-discrimination law in force in the place where the action is taken', has been interpreted by the FWC and courts to mean that only conduct expressly prohibited by state or territory anti-discrimination legislation is actionable under section 351. It argued that this interpretation limits access to protections where 'subjection to FDV' is not a protected attribute under relevant state or territory laws. As several jurisdictions do not include FDV as a protected attribute, the ACTU recommended amendments to subsection 351(2) to clarify that only conduct expressly sanctioned by anti-discrimination legislation is 'not unlawful' for the purposes of that provision.[1736]

The UWU and ASU also supported amendment to paragraph 351(2)(a) to make clear that the provision preserves the operation of relevant anti-discrimination legislation irrespective of whether a state law does the same, to ensure adverse action protections operate consistently.[1737]

Circle Green raised concerns that because neither the *Equal Opportunity Act 1984* (WA) nor the *Sex Discrimination Act 1984* (Cth) prohibits discrimination based on subjection to FDV, paragraph 351(2)(a) of the FW Act prevents WA workers from pursuing general protections claims on that basis. It also submitted that affected workers may be forced to choose between a general protections claim about a workplace right, like paid FDV leave, and an unlawful termination claim on the basis of discrimination because of subjection to FDV, neither of which captures the full range of discriminatory conduct. It also submitted that where discrimination does not involve dismissal, there may be no effective avenue for redress for a WA worker who is discriminated against because of subjection to FDV.[1738]

Stakeholders provided mixed feedback on the Review's draft recommendation to amend the FW Act to make it clear that paragraph 351(2)(a) applies only to conduct expressly authorised or exempted by applicable state or territory anti-discrimination law relating to 'subjection to family and domestic violence'.

The UWU and ACTU welcomed the recommendation, however suggested it should be broadened out to apply to all other protected attributes to remove inconsistency.[1739] ACCI opposed the recommendation, and suggested it would depart from the established general protections framework and extend the operation of the framework beyond the boundaries of existing anti-discrimination law in states and territories.[1740] AIG suggested there has been no material change or new evidence since the SJBP Review to support this Review's draft recommendation.[1741]

[1735] Ibid 14; Circle Green, Submission No 65 (6 March 2026) 2–3; WLS NSW Submission No 69 (6 March 2026) 16 [48]; ACTU, Submission No 67 (6 March 2026) 33; ASU, Submission No 81 (6 March 2026) 9.
[1736] ACTU, Submission No 67 (6 March 2026) 33.
[1737] ASU, Submission No 81 (6 March 2026) 9; UWU, Submission No 62 (6 March 2026) 14.
[1738] Circle Green, Submission No 65 (6 March 2026) 3
[1739] UWU, Submission on Draft Report No 20 (29 May 2026) 11; ACTU, Submission on Draft Report No 33 (29 May 2026) 30;
[1740] ACCI, Submission on Draft Report No 46 (1 June 2026) 37 [238].
[1741] AIG, Submission on Draft Report No 45 (31 May 2025) 40 [235].

Small Business

COSBOA submitted that the reverse onus of proof in general protections matters creates significant legal exposure for small business, particularly those without human resources support. It noted low awareness of the measure and uncertainty about obligations, which increases risk of non-compliance. COSBOA also stated that the cost of defending a general protections claim can be substantial for small businesses.[1742]

NRWC submitted that rural women often work in small or familial workplaces where there are limited employment alternatives, and where reporting misconduct can carry greater social and economic risks. It recommended consideration of a confidential advice complaint pathway, targeted training and resources for small and regional employers, and improved access to early dispute resolution services.[1743]

Subjective-objective model

Associate Professor Rawling and Dr Schofield-Georgeson expressed concern with current judicial interpretations that allow employers to avoid liability by asserting subjective alternative reasons for adverse action or discrimination. They highlighted that earlier judicial interpretations favoured a 'subjective-objective' test, assessing the employer's stated reasons through the court's objective scrutiny. Associate Professor Rawling and Dr Schofield-Georgeson outlined that although this approach aligns with section 360 of the FW Act, it was 'read down' by the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Gregory Paul Barclay & Anor* [2012] HCA 32 which has since been followed by the courts.

Associate Professor Rawling and Dr Schofield-Georgeson recommend Part 3-1 of the FW Act be amended to mirror the approach taken by NSW in codifying the 'subjective-objective approach' into the *Industrial Relations Act 1996* (NSW). This approach presumes that an employee or prospective employee was victimised for a prohibited reason, unless the employer can satisfy the NSW IR Commission that the alleged reason was not a substantial and operative cause of the action, taking into account both conscious and unconscious factors.[1744]

Analysis

The inclusion of 'subjection to FDV' as a protected attribute recognises the effects of FDV on victim-survivors and its impact in the workplace. The amendments strengthened the general protections framework under the FW Act and complement the introduction of paid FDVL. However, it is clear that the measure has inconsistent application across Australian jurisdictions, which means it may not be achieving its stated intent.

[1742] COSBOA, Submission No 45 (3 March 2026) 13 [57]–[59].
[1743] NRWC, Submission No 29 (3 March 2026) 8.
[1744] Michael Rawling & Eugene Schofield-Georgeson, Submission No 17 (2 March 2026) 10.

Application across Australian jurisdictions

There was a clear legislative intention to strengthen protections under the FW Act in support of the National Plan. In this context, stakeholder concerns about the operation of the 'not unlawful' exception in paragraph 351(2)(a) raise fundamental questions as to whether the measure is operating as intended. It is relatively clear that the 'not unlawful' exception, as currently interpreted by the courts, would result in uneven and inconsistent application of the measure across Australian jurisdictions.

The amendments prohibit an employer from taking adverse action against an employee or prospective employee because of a protected attribute. However, paragraph 351(2)(a) provides that this prohibition does not apply to adverse action that is 'not unlawful under any anti-discrimination law in force in the place where the action is taken'.[1745]

The 'not unlawful' exemption was intended to specifically incorporate exceptions in other anti-discrimination laws into the FW Act. For example, the Explanatory Memorandum to the Fair Work Bill 2008 says:

> *The exception in paragraph 351(2)(a) ensures that action authorised by or under a State or Territory anti-discrimination law (defined in subclause 351(3)) is not adverse action under subclause 351(1). This would occur, for example, where the action is exempt from being discrimination because it was taken to protect the health and safety of people at a workplace (see the relevant exemption in section 108 of the Anti-Discrimination Act 1991 (Qld)).*[1746]

However, the courts have interpreted the 'not unlawful' exemption to apply to adverse action because of a protected attribute only if the relevant state or territory anti-discrimination law makes discrimination on the basis of the same protected attribute unlawful. This was the finding of the Full Federal Court in *Construction, Forestry, Maritime, Mining and Energy Union v Quirk* [2023] FCAFC 163 (***Quirk***), noting that this interpretation was consistent with several previous Federal Court decisions.[1747]

This means the prohibition against adverse action because of an employee or prospective employee's subjection to FDV does not apply to employers and employees in New South Wales, Victoria, Western Australia or Tasmania, as their anti-discrimination laws do not prohibit discrimination on the ground of 'subjection to FDV'.

Courts and the FWC have taken the view that employees who cannot make a general protections application due to being dismissed because of a protected attribute not covered in their state or territory's anti-discrimination law, can instead make an unlawful termination application.[1748] This means an employee whose employment has been terminated because of subjection to FDV in New South Wales, Victoria,

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[1745] *Fair Work Act 2009* (Cth) s 351(2)(a).
[1746] Explanatory Memorandum, Fair Work Bill 2008 (Cth) 230 [1429].
[1747] *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27; *Rumble v Partnership (t/as HWL Ebsworth Lawyers)* [2019] FCA 1409; *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (In Liq)* (No 4) [2021] FCA 124. Noting that these decisions were all decision of a single judge, *Quirk* is the current authority as a decision of the Full Court (Rares ACJ, Katzmann and Colvin JJ).
[1748] *Construction, Forestry, Maritime, Mining and Energy Union v Quirk* [2023] FCAFC 163, [314]; *McIntyre v Special Broadcasting Services Corporation t/a SBS Corporation* [2015] FWC 6768.

Western Australia or Tasmania could make an unlawful termination application to the FWC, despite that attribute not being protected in those states' anti-discrimination laws. This is due to the different constitutional foundations of the unlawful termination provisions in the FW Act on the one hand and the general protection provisions on the other. However, as submitted by Circle Green, this is of no utility to employees where discrimination does not involve a dismissal.

The application of *Quirk* and its impact on the protected attributes introduced in the SJBP Act (gender identity, intersex status and breastfeeding) was discussed in Chapter 29 of the SJBP Review.[1749] The SJBP Review did not make any recommendations to address the consequences of *Quirk*, but noted the Australian Law Reform Commission has recommended the government review the impact of the exception in paragraph 351(2)(a).[1750]

The concerns raised by stakeholders, including the ACTU's proposal to amend subsection 351(2), have merit. Workers across the country should have equal access to protection against adverse action based on subjection to FDV regardless of the state or territory they are employed in. A targeted amendment to restore nationally consistent operation of the measure would be appropriate. The FW Act should be amended to clarify the operation of the 'not unlawful' exception in paragraph 351(2)(a), so that it only applies to conduct that is expressly authorised or exempted by applicable state or territory anti-discrimination law that relates to 'subjection to FDV'. It should not be enlivened only because a jurisdiction's anti-discrimination statute does not prohibit discrimination on the basis of 'subjection to FDV'.

Submissions on the Draft Report presented a range of views on the draft recommendation. This included support for the complete removal of paragraph 351(2)(a), a narrower amendment so that protection is available for FDV-related discrimination regardless of state or territory anti-discrimination coverage, or that the matter should be left for further consideration consistent with the observations in the SJBP Review.

The SJBP Review's position was that Commonwealth and state and territory governments should work together to ensure there is alignment and maximum effectiveness of anti-discrimination protections, particularly when considering adding any new protected attributes.[1751] This conclusion suggests there should be change to address the gap rather than no change is needed. It is clear that despite subjection to FDV being a protected attribute under the general protections framework for 2 and half years, issues surrounding inconsistencies between the FW Act and state and territory discrimination legislation persist. It has been open to relevant states to amend their anti-discrimination legislation to include family and domestic violence, but this has not occurred to date. Consistent with the measure's intent and to give effect to Australia's commitments under ILO Convention 190, the government should address the issue through amendments to the FW Act to ensure it applies consistently to workers across Australia. This recommendation would ensure that individual workers across Australia are able to benefit from the Closing Loopholes measure. Consultation on the amendment could include state and territory workplace relations ministers and/or the Standing Committee of Attorneys-General if needed.

[1749] Mark Bray and Alison Preston, *Secure Jobs, Better Pay Review – Final Report* (Report, 31 March 2025) 253.
[1750] Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report, 21 March 2024) 189 [7.11], 261 [9.47].
[1751] Mark Bray and Alison Preston, Secure Jobs, Better Pay Review – Final Report (Report, 31 March 2025) 254.

Further, unlike the SJBP Review, this Review was expressly tasked with assessing the Closing Loopholes measure as well as the effectiveness of the PFDVL Act. The effectiveness of the paid FDV leave entitlement is diminished in jurisdictions where subjection to FDV is not a recognised attribute under local anti-discrimination law. In those jurisdictions, employees who experience adverse action – including refusal of paid FDVL – cannot bring a complaint on the basis of subjection to FDV. These provisions in the FW Act are intended to work with and be reinforced by state and territory anti-discrimination frameworks. That intention is not realised in New South Wales, Victoria, Western Australia or Tasmania. The proposed amendment addresses this unintended consequence.

The need to ensure effective protection for workers experiencing FDV was strongly supported by all stakeholders. The Review is satisfied that the urgency of the issue, real and serious risks associated with FDV, and the difficulty of progressing reform in other avenues justifies a clear targeted recommendation to resolve this gap. The proposal to extend the proposed amendment to other attributes is outside the scope of this Review.

Other issues

COSBOA raised concerns about the practical operation of the framework for employers, including the reverse onus of proof in general protections matters, the potential legal exposure arising from low awareness of the measure, and the cost of defending claims. These concerns relate to the general protections framework more broadly, rather than the inclusion of subjection to FDV as a protected attribute, and are largely out of scope of the Review.

WLS NSW submitted that the measure should be extended to women who experience sexual violence outside of intimate or family relationships. Similar submissions were made in relation to the paid FDVL entitlement, and are discussed in Chapter 6.

Stakeholders also raised concerns relating to the unique experiences of rural women. These concerns are indicative of the underlying social stigma surrounding FDV, and indicate a need for greater awareness, training and resources to assist employers and employees navigate these matters. These matters are discussed in further detail in Chapter 6.

While some stakeholders advocated for extending the reach of the protections to additional cohorts, including contractors and employee-like workers, based on the evidence available to the Review, there is not a strong basis to recommend further expansion at this stage. Expanding coverage would introduce a system-wide change to the general protections framework, which is outside the scope of the Review.

At this time, it is appropriate to prioritise implementation and improve awareness-raising efforts including through targeted education, training and practical guidance to address stigma, improve understanding of the operation of the protection and support culturally safe and accessible workplace responses (including in regional, rural and remote contexts) (see Recommendation 48 in Chapter 6).

Findings and recommendations

The measure is largely operating appropriately and effectively, consistent with its stated intent to strengthen the FW Act's discrimination framework to protect employees subjected to FDV. However, an unintended consequence has been identified in relation to the operation of the 'not unlawful' exception in paragraph 351(2)(a) where, in practice, the application of the measure is inconsistent across Australian jurisdictions. Targeted amendments should be made in relation to paragraph 351(2)(a) to ensure a nationally consistent approach.

Recommendation 33

The *Fair Work Act 2009* should be amended to make it clear that paragraph 351(2)(a) applies only to conduct that is expressly authorised or exempted by applicable state or territory anti-discrimination law that relates to 'subjection to family and domestic violence' rather than being enlivened merely because a jurisdiction's anti-discrimination statute does not prohibit discrimination on that ground.

4.6 Enhancing delegates' rights

What the measure does

The Closing Loopholes No. 1 Act amended the FW Act to:

- provide specific rights for 'workplace delegates' to represent the industrial interests of the members of the employee organisation they represent or persons eligible to be members ('members'), and
- require the inclusion of a delegates' rights term in modern awards, new enterprise agreements and new workplace determinations.[1752]

These provisions commenced on 15 December 2023.[1753]

The Closing Loopholes No. 2 Act extended these rights to employee-like workers (see Section 2.3) and regulated road transport contractors (see Section 2.4) who are workplace delegates ('regulated worker delegates').[1754] These provisions commenced on 26 August 2024.[1755]

Workplace delegate

The measure defined a 'workplace delegate' as a person appointed, or elected, in accordance with the rules of an employee organisation (such as a union), to be a delegate or representative for members of the organisation working in a particular enterprise, or performing work for, or arranged or facilitated by, a 'regulated business'.[1756]

A 'regulated business' is a digital labour platform operator or road transport business'.[1757]

Delegates' rights term

The measure required the FWC to insert a 'delegates' rights term' into:

- all modern awards by 30 June 2024, with the term coming into effect from 1 July 2024.[1758]
- all enterprise agreements put to a vote on or after 1 July 2024.[1759]
- all workplace determinations made on or after 1 July 2024.[1760]

[1752] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 1 pt 7; Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 134 [792].
[1753] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* s 2(1) item 7.
[1754] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 7.
[1755] Ibid s 2(1) item 9.
[1756] *Fair Work Act 2009* (Cth) s 350C(1).
[1757] Ibid s 15F.
[1758] Ibid s 149E, sch 1 cl 94–95.
[1759] Ibid s 205A; sch 1 cl 96.
[1760] Ibid ss 273(6) and (7); sch 1 cl 97.

A 'delegates' rights term' is a term of a fair work instrument (such as a modern award, enterprise agreement, workplace determination, MSO or RTCCO) that provides for the exercise of the rights of a workplace delegate.[1761]

Enterprise agreements and workplace determinations must include a delegates' rights term that is no less favourable than the delegates' rights term in one or more modern awards that cover a workplace delegate.[1762] If an enterprise agreement contains a proposed delegates' rights term that is less favourable than a term in a relevant modern award, then the enterprise agreement term has no effect and the applicable modern award term, as determined by the FWC, is taken to be a term of the enterprise agreement.[1763] If the modern award term is taken to be a term of the enterprise agreement, the FWC must note in its decision approving the agreement that the term is included.[1764]

Workplace delegates' rights

The measure provided certain rights to workplace delegates.

A workplace delegate is entitled to:

- represent the industrial interests of members, including in disputes with the employer or regulated business[1765]
- reasonable communication with members in relation to their industrial interests[1766]
- reasonable access to the workplace facilities in relation to regulated workers and the workplace and workplace facilities in relation to employees, if access is for the purposes of the industrial interests of members,[1767] and
- reasonable access to paid time, during normal working hours, for the purposes of related training, for employee workplace delegates not employed by a small business.[1768]

The size and nature of the enterprise or regulated business, the resources of the employer or the regulated business, and the facilities available must be considered when determining what is 'reasonable' communication, access to facilities and paid time for training.[1769] Where an employer complies with a delegates' rights term in a fair work instrument, the employer is taken to have complied with the workplace delegates' rights listed above.[1770]

[1761] Ibid s 12.
[1762] Ibid ss 205A, 201(1A), 273(6)–(7).
[1763] Ibid s 205A(2).
[1764] Ibid s 201(1A). The modern award term that applies at the time of agreement approval continues to apply even if the modern award is subsequently amended. See *Fair Work Act 2009* (Cth) s 205A(3).
[1765] Ibid s 350C(2).
[1766] Ibid s 350C(3)(a).
[1767] Ibid ss 350C(3)(b)(i)–(ii).
[1768] Ibid s 350C(3)(b)(iii).
[1769] Ibid s 350C(5).
[1770] Ibid s 350C(4).

General protections

The measure introduced general protections for workplace delegates.[1771] General protections laws protect employees and others from having harmful (adverse) action taken against them for a prohibited reason. The amendments prohibit an employer or associated regulated business[1772] from:

- unreasonably failing or refusing to deal with a delegate[1773]
- knowingly or recklessly making a false or misleading representation to a delegate,[1774] or
- unreasonably hindering, obstructing or preventing the exercise of a delegate's rights (including the statutory rights in the FW Act or rights under a fair work instrument).[1775]

The burden of proving that the conduct is not unreasonable lies with the employer or associated regulated business.[1776] A breach of these protections may give rise to a civil penalty.[1777]

Intention of the measure

The measure is intended to support and strengthen the ability of workplace delegates to perform their role in the workplace by ensuring they have substantive rights to represent the industrial interests and concerns of themselves and their fellow workers.[1778] It also sought to provide a new general protection for workplace delegates to facilitate the exercise of these rights.[1779] Before the measure, there was limited legislative protection for workplace delegates performing their role within a workplace, which could have an impact on how effectively they could perform it.[1780]

By providing explicit rights for workplace delegates, the measure sought to empower other workers to raise workplace concerns and improve their ability to cooperatively resolve any disputes that may arise.[1781]

The measure provided for modern awards, enterprise agreements and workplace determinations to include a delegates' rights term detailing the specific requirements for various industries, occupations and workplaces,[1782] allowing workplace delegates' rights to be tailored to particular industries and enterprises.[1783]

[1771] Ibid s 350A(1), 350B(1).
[1772] An 'associated regulated business' is a regulated business that engaged the workplace delegate under a services contract, or arranged for, or facilitated entry into, the services contract under which the workplace delegate performs work. See *Fair Work Act 2009* (Cth) s 350B(5).
[1773] *Fair Work Act 2009* (Cth) ss 350A(1)(a), 350B(1)(a).
[1774] Ibid ss 350A(1)(b), 350B(1)(b).
[1775] Ibid s 350A(1)(c), 350B(1)(c).
[1776] Ibid ss 350A(3), 350B(3).
[1777] Ibid ss 350A(1), 350B(1), 539(2).
[1778] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 7 [23], 18 [84].
[1779] Ibid 134 [791].
[1780] Ibid 18 [84], 45 [255].
[1781] Ibid 18 [86].
[1782] Ibid 7 [23].
[1783] Ibid 18 [85].

The exclusion of the paid time right for regulated worker delegates to undertake training related to their workplace delegate role recognises that regulated workers often perform 'task' based commitments within clearly defined parameters (such as making a delivery) compared to many traditional employee relationships with routine 'shifts', time-based work or regular and systematic working hours.[1784]

What has happened since commencement

On 28 June 2024, the FWC varied all 155 modern awards to insert a delegates' rights term and confirmed a 12-month review.[1785] On 18 September 2024, the Construction, Forestry and Maritime Employees Union (**CFMEU**), CEPU and the MEU collectively filed 2 judicial review applications in the Federal Court seeking to quash the FWC's award variation orders for 9 modern awards, arguing that the FWC impermissibly imposed limitations on workplace delegates' rights. Employer organisations, including AIG, MBA, and the MCA opposed the applications.

On 17 December 2025, the Full Federal Court handed down its decision and determined the FWC impermissibly limited the statutory rights of workplace delegates by:

- inserting a term which only allowed workplace delegates to represent the employees of their employer, rather than all employees in an enterprise eligible to be members of their organisation
- only providing for the right to communicate with workers for the purpose of representing their industrial interests, rather than about their industrial interests in general, and
- making the rights subject to the workplace delegate's compliance with their duties and obligations as an employee and requiring the delegate not to hinder, obstruct or prevent work being exercised (without including the filter of reasonableness provided in the legislation).[1786]

On 23 January 2026, in response to the Federal Court's judgement, the FWC varied all modern awards to include the new delegates' rights term with an effective date of 1 July 2024.[1787] Under the revised delegates' right model award term, workplace delegates must:

- comply with the reasonable policies and procedures of the employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and use of ICT resources, and
- not obstruct eligible workers from exercising their rights to freedom of association.

The revised modern award delegates' rights term entitles workplace delegates to represent all eligible workers (defined as members and potential members who work in a particular enterprise) who wish to be represented by the workplace delegate, including labour hire workers. Workplace delegates are entitled to communicate with workers 'in relation to' their industrial interests (rather than 'for the purposes of representing industrial interests').

[1784] Ibid 141 [849].
[1785] *Variation of modern awards to include a delegates' rights term* [2024] FWC 1699.
[1786] *Construction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187.
[1787] *Variation of delegates' rights term in modern awards* [2026] FWCFB 5.

Additionally, the terms apply a 'reasonableness filter' to how delegates meet their obligations as employees when exercising their entitlements as delegates, consistent with the statutory right. It means that, other than in the reasonable exercise of their entitlements, workplace delegates must:

- comply with their duties and obligations as an employee, and
- not hinder, obstruct or prevent the normal performance of work.

The Federal Court decision also has implications for subsequent enterprise agreement bargaining as parties must ensure that their proposed delegates' rights term meets the revised award term. Under the amendments, if the delegates' rights term in an enterprise agreement is less favourable than the delegates' rights term in the relevant award, the agreement term has no effect and the award term is taken to be a term of the agreement.[1788]

When approving the *Genesis Cancer Care QLD Pty Limited Radiation Therapists Enterprise Agreement 2024*[1789] (the **Genesis Cancer Care agreement**) the FWC considered the application of the 'no less favourable test' provided for in new subsection 205A(2). In that matter, the proposed agreement would have provided delegates 3 days' paid leave during each financial year, the FWC decision provided:

> *Noting that there is a benefit of 5 days that will be granted under the Award and only 3 days under the Agreement, the term in the Agreement is initially less beneficial in this regard than the Award. The Act does not provide for the terms to be compared on a global basis or over the life of the Agreement. On that basis, where any aspect of the term is less beneficial, the Act provides that [the FWC] must apply the modern award term (the whole term in the Agreement has no effect and the most favourable whole term in any of the relevant modern awards, is taken to be a term of the Agreement).*
>
> *In circumstances where the Agreement does not contain a delegates' rights term that is, in all respects, no less favourable than the modern award, pursuant to s.205A, the term in the relevant modern award will apply and the delegates' rights term in the Agreement at clause 41 will have no effect.*[1790]

The AMIEU is currently seeking to establish that, in application of this measure, its delegates are entitled to attend and address staff inductions, post communications on company notice boards, and conduct member meetings in lunchrooms at their workplace (a large abattoir).[1791] This case will test the practical aspects of delegates' rights and provide guidance to stakeholders. The matter remains before the court.

[1788] *Fair Work Act 2009* (Cth) s 205A(2).
[1789] *Genesis Cancer Care QLD Pty Limited Radiation Therapists Enterprise Agreement 2024* [2025] FWCA 1047.
[1790] Ibid [7]–[8].
[1791] *Australasian Meat Industry Employees' Union v Teys Australia Beenleigh Pty Ltd* QUD411/2025.

What the Review heard

The Review received a large amount of stakeholder feedback on this measure, with 27 written submissions addressing it. A further 17 submissions on the Draft Report addressed this measure. Employer groups were generally critical of the measure, with many opposing the delegates' rights amendments in whole. For example, AIG argued the measure is an 'unjustified radical expansion of union rights that are already proving costly and disruptive for employers',[1792] and ACCI described it as 'unreasonable and unwarranted'.[1793] Unions and academics were positive about the measure, with the FAAA describing it as 'a major step forward in providing a safety net of protection for union members seeking to represent the industrial interests of their colleagues.'[1794]

Employer groups

Overall, employer groups submitted that expanded workplace delegates' rights create uncertainty, increased costs and operational disruption.[1795] Employer groups reported uncertainty about how specific elements of the measure operate in practice, such as the operation of the paid training entitlement, especially in multi union workplaces.[1796] ACCI and the MCA raised concerns that there are no restrictions on the number of delegates a union can appoint at a particular workplace.[1797] COSBOA raised concerns with costs relating to paid training, especially for smaller businesses.[1798] COSBOA submitted that in a small business, delegates exercising their representational rights could lead to operational disruptions, and recommended a reduced award entitlement of 2 days paid leave for delegates in businesses with fewer than 50 staff and that the FWC 'develop small business-specific delegate arrangements as a model term that reflects the operational realities of small workplaces'.[1799] Employer groups were also concerned expanded delegates' rights will increase disputes, leading to site disruption and affecting operational efficiency and productivity.[1800]

Unions

Unions were supportive of the measure. The ACTU submitted that workplace delegates are a critical mechanism for ensuring that workers can exercise their lawful right to collective representation[1801] and stated it has seen a significant increase in participation in delegates training since the measure commenced.

[1792] AIG, Submission No 82 (8 March 2026) 60 [292].
[1793] ACCI, Submission No 54 (3 March 2026) 20 [111].
[1794] FAAA, Submission No 63 (6 March 2026) 12 [67].
[1795] BCA, Submission No 50 (3 March 2026) 24–6; HIA, Submission No 20 (2 March 2026) 20; MIAL, Submission No 26 (3 March 2026) 7 [3.5].
[1796] AREEA, Submission No 49 (3 March 2026) 9 [47]–[52]; ACCI, Submission No 54 (3 March 2026) 19 [107].
[1797] ACCI, Submission No 54 (3 March 2026) 20 [115]; MCA, Submission No 51 (3 March 2026) 28.
[1798] COSBOA, Submission No 45 (3 March 2026) 15 [67].
[1799] Ibid 15 [67]–[69].
[1800] AREEA, Submission No 49 (3 March 2026) 10 [55]; HIA, Submission No 20 (2 March 2026) 20.
[1801] ACTU, Submission No 67 (6 March 2026) 24.

The ACTU said that, as there have been few decisions clarifying the scope of the new entitlements, it may be too early to make a full assessment of how the measure is operating. However, it did identify 3 possible issues which it argued require legislative amendments to address.[1802] The first relates to whether 'reasonable communication' includes the ability to communicate directly with members and other eligible persons (which is the subject of a Federal Court case currently on foot).[1803] The second is a possible gap where a workplace delegate's employer may be prohibited from preventing the workplace delegate from engaging in reasonable communication with other employees, but the employers of those other employees may nevertheless be able to restrict or prevent that communication. The third issue relates to the operation of section 205A. These issues are explored further below.

Other stakeholders

Two academics and the CFW were in broad agreement that this measure is important to protect workers' rights and address employer non-compliance. The CFW submitted that 'improving delegates' rights can be seen as providing a proper basis for the exercise of basic rights for employees' and as a 'mechanism for improving co-operation, communication and the introduction of productivity-enhancing technology'.[1804] Professor Wright similarly described the measure as 'a necessary step' in addressing employer non-compliance,[1805] and Associate Professor Rawling and Dr Schofield-Georgeson described the measure as contributing to protecting minimum standards and recommended these rights be codified in legislation.[1806]

Delegates' rights award term

Employer groups submitted that the Federal Court's decision to overturn the FWC's modern awards delegates' rights term[1807] created further uncertainty. BCA submitted the decision overturned the FWC's attempts to strike a balance of interests between employers and workplace delegates in the setting of delegates' rights terms for modern awards.[1808] ACCI argued that the changes create uncertainty about what is reasonable, allow workplace delegates to represent all employees in an enterprise including labour hire, and challenge the traditional principle that workplace delegates are employees foremost.[1809] Several employer groups also raised the issue of retrospective application of the revised award term from 1 July 2024, with ACCI saying this exposed businesses to compliance problems for past practices and forces retrospective corrections.[1810]

AIG expressed particular concern with the changes to clause XA.9(a) of the first modern award term (corresponding to XX.9 in the revised award term) resulting from the Federal Court's decision.[1811] Two of the requirements that apply to workplace delegates in exercising their entitlements under the delegates' rights term were made subject to the caveat 'other than in the reasonable exercise of those

[1802] Ibid 26–9.
[1803] *Australasian Meat Industry Employees' Union v Teys Australia Beenleigh Pty Ltd* QUD411/2025.
[1804] CFW, Submission No 66 (6 March 2026) 26–7 [97]–[98].
[1805] Chris F Wright, Submission No 13 (2 March 2026) 4.
[1806] Michael Rawling and Eugene Schofield-Georgeson, Submission No 17 (2 March 2026) 12–13.
[1807] *Construction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187.
[1808] BCA, Submission No 50 (3 March 2026) 24, 6.2
[1809] ACCI, Submission No 54 (3 March 2026) 19 [106]–[107].
[1810] Ibid 19 [107].
[1811] AIG, Submission No 82 (8 March 2026) 66 [324]–[328].

entitlements'.[1812] These requirements are to 'comply with their duties and obligations as an employee', and to 'not hinder, obstruct or prevent the normal performance of work'.[1813] AIG submitted that there will be differing interpretations of what is a reasonable exercise of delegates' rights, which will result in disputes or inappropriate employee action.[1814] BCA contended that this element of the revised term has the effect of challenging the notion that workplace delegates 'are employees first, and union representatives second',[1815] while ACCI expressed concern with the revised term allowing for the 'interference with normal work where characterised as reasonable'.[1816]

Short of the suggestion to repeal or wind back the measure more broadly, employer stakeholders also recommended amending the FW Act to:

- Narrow the scope of delegates' rights by confining them to employees of the delegate's own employer, rather than extending across multiple employers at a site.[1817]
- Enable the FWC to make a clearer, more balanced model delegates' rights award term with clear limits and clarification on training ratios, or clarify this in the legislation directly.[1818]
- Enable the FWC to tailor terms to industry circumstances.[1819]
- Ensure that rights must be exercised consistently with the employee's primary duty to perform work and comply with lawful and reasonable directions.[1820]

The Review's Draft Report recommended the government should further review this measure to assess whether it is operating as intended in practice.[1821] COSBOA opposed a further review as unnecessary, noting the measure has been in operation for a sufficient period to assess its impact.[1822] AIG also opposed a further review and argued the issues flowing from the Federal Court's decision to quash the FWC's original modern awards delegates' rights term should be addressed urgently. AIG and AREEA reiterated that the FWC's original approach to the delegates' rights term should be restored,[1823] or at a minimum the AIG argued the FWC should be empowered to set the parameters of the delegates' rights term at a more practical level.[1824] MCA argued the Federal Court's decision is inconsistent with the government's intent to allow for the FWC to set appropriate constraints on delegates' rights, and that the FW Act should be amended to address the issue.[1825] HIA called for an independent inquiry into the measure with particular attention to the Federal Court's decision and its implications.[1826]

[1812] *Variation of delegates' rights term in modern awards* [2026] FWCFB 5, Attachment 3 [XX.9(b)].
[1813] Ibid Attachment 3 [XX.9(b)(i)–(ii)].
[1814] AIG, Submission No 82 (8 March 2026) 66 [324].
[1815] BCA, Submission No 50 (3 March 2026) 25.
[1816] ACCI, Submission No 54 (3 March 2026) 18–9 [103]–[105].
[1817] AREEA, Submission No 49 (3 March 2026) 27–8 [196].
[1818] ACCI, Submission No 54 (3 March 2026) 21 [119]; NECA, Submission No 3 (2 February 2026) 3.
[1819] MBA, Submission No 34 (3 March 2026) 21.
[1820] BCA, Submission No 50 (3 March 2026) 26.
[1821] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 302 [Draft Recommendation 35].
[1822] COSBOA, Submission on Draft Report No 7 (29 May 2026) 7 [34].
[1823] AIG, Submission on Draft Report No 45 (31 May 2026) 42 [244]–[245]; AREEA, Submission on Draft Report No 47 (29 May 2026) 3–4.
[1824] AIG, Submission on Draft Report No 45 (31 May 2026) 41–2.
[1825] MCA, Submission on Draft Report No 42 (29 May 2026) 13–14.
[1826] HIA, Submission on Draft Report No 11 (29 May 2026) 6.

ACCI submitted it does not oppose a further review, but emphasised the importance of that review giving consideration to the impact of the measure on business operations, productivity, and workplace dynamics, while also suggesting it would be beneficial to conduct the review sooner.[1827] MBA also submitted that where a further review is proposed that it should have regard to the objects of the FW Act and the impact on productivity and small businesses.[1828] BCA supported a further review while also stating this does not replace the immediate need to clarify the operation of the measure.[1829]

The UWU argued that enterprise agreements made between 1 July 2024 and 25 January 2025 may contain deficient delegates' rights terms as a result of the Full Federal Court later determining that the modern awards delegates' rights term the FWC made on 28 June 2024 impermissibly limited the statutory rights of workplace delegates. The UWU recommended a legislative fix be considered.[1830] The ACTU and its affiliates also noted they are considering other implications of the Full Federal Court decision, including in the context of enterprise agreements approved under the quashed term.[1831]

Interaction between the award term and agreement or workplace determination terms

The ACTU, AMWU, ANMF and UWU all submitted that section 205A should be amended to ensure that an enterprise agreement term providing for delegates' rights is not rendered wholly ineffective if it is in any way less favourable than the award term.[1832] The UWU argued the FWC's application of section 205A has in some instances resulted in reducing particular workplace delegates' rights that had already been bargained for.[1833] The UWU's proposed solution is to allow the FWC to replace the less favourable part of the enterprise agreement term only, and retain the remainder of the bargained term. UWU described this as the FWC being able to 'cure those specific provisions to the extent of any deficiency'.[1834] The UWU provided several examples (including the Genesis Cancer Care agreement discussed above) of enterprise agreement terms providing for paid training days for delegates which have been rendered ineffective through the operation of subsection 205A(2), with the whole of the relevant award term taken to be a term of the agreement instead.[1835] The ACTU recommended that 'the award term is taken to be a term of the enterprise agreement in addition to, and not in substitution for, any entitlements otherwise conferred by the agreement'.[1836] AMWU recommended amendments permitting the FWC 'to exercise its discretion in inserting parts of the model term and severing unfavourable parts of the negotiated term to preserve the negotiated clause where possible'.[1837]

[1827] ACCI, Submission on Draft Report No 46 (1 June 2026) 37–8 [242]–[250].
[1828] MBA, Submission on Draft Report No 16 (29 May 2026) 3.
[1829] BCA, Submission on Draft Report No 18 (29 May 2026) 13.
[1830] UWU, Submission No 62 (6 March 2026) 10.
[1831] ACTU, Submission No 67 (6 March 2026) 30.
[1832] Ibid 29; AMWU, Submission No 38 (3 March 2026) 6–7 [21]–[22]; ANMF, Submission No 60 (5 March 2026) 4–5 [8]–[13]; UWU, Submission No 62 (6 March 2026) 11.
[1833] UWU, Submission No 62 (6 March 2026) 11.
[1834] Ibid 11–13.
[1835] UWU, Submission No 62 (6 March 2026) 11.
[1836] ACTU, Submission No 67 (6 March 2026) 29.
[1837] AMWU, Submission No 38 (3 March 2026) 6–7 [22].

In response to the Review's draft recommendation to amend the FW Act to address interactions between the modern awards delegates' rights term and enterprise agreements or workplace determinations,[1838] the ACTU, NTEU, and UWU expressed support.[1839] The UWU submitted that its support for the aspect of the recommendation concerning workplace determinations was on the understanding that the amendments should result in the more favourable of the agreed or award clauses being retained.[1840] The ANMF also expressed support for this draft recommendation and the Review's draft recommendation for a further review of the measure.[1841]

AIG submitted the modern awards delegates' rights term needs to be fixed before consideration is given to amending the FW Act to address interactions between the award term and enterprise agreements or workplace determinations.[1842] AIG further contended that the FWC should be empowered to determine, on balance, whether the enterprise agreement term is better or more suitable than the award term, and if so, to approve the enterprise agreement term in its entirety rather than taking the most expansive aspects of both the award and enterprise agreement term.[1843] ACCI opposed the draft recommendation and suggested it would undermine enterprise bargaining.[1844] Similar to AIG, ACCI submitted that the preferred approach should be to consider the enterprise agreement term holistically as this allows for appropriate trade-offs across clauses within the term.[1845] MCA also opposed this draft recommendation on the basis that it would prevent parties from agreeing to enterprise agreement terms that may include more reasonable limits on delegates' rights,[1846] while CCIWA opposed it on the basis that it would limit parties' ability to bargain on terms and undermine the holistic assessment of agreements.[1847] BCA expressed support for the draft recommendation while emphasising that for workplace determinations the agreed term should be preserved to the greatest extent possible while ensuring the minimum requirements are met.[1848]

Reasonable communications

The ACTU and the Finance Sector Union (**FSU**) submitted that employers are attempting to limit the means by which delegates' rights can be can be included in enterprise agreements.[1849] The FSU submitted that because many workers in the finance sector work from home, FSU officials are 'generally unable to access these workers face-to-face' through right of entry – meaning delegates' rights to communicate are particularly important in its sector.[1850]

[1838] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 302 [Draft Recommendation 36].
[1839] ACTU, Submission on Draft Report No 33 (29 May 2026) 24–7; NTEU, Submission on Draft Report No 19 (29 May 2026) 5 [7]; UWU, Submission on Draft Report No 20 (29 May 2026) 9.
[1840] UWU, Submission on Draft Report No 20 (29 May 2026) 9.
[1841] ANMF, Submission on Draft Report No 34 (29 May 2026) 4 [8].
[1842] AIG, Submission on Draft Report No 45 (31 May 2026) 42 [246].
[1843] Ibid 42 [247].
[1844] ACCI, Submission on Draft Report No 46 (1 June 2026) 38–9 [251]–[260].
[1845] Ibid.
[1846] MCA, Submission on Draft Report No 42 (29 May 2026) 6.
[1847] CCIWA, Submission on Draft Report No 30 (29 May 2026) 4.
[1848] BCA, Submission on Draft Report No 18 (29 May 2026) 13.
[1849] ACTU, Submission on Draft Report No 33 (29 May 2026) 24–7; FSU, Submission on Draft Report No 40 (29 May 2026) 3–5.
[1850] FSU, Submission on Draft Report No 40 (29 May 2026) 3.

The ACTU, ANMF, and FSU provided examples of employers imposing what the unions consider to be unreasonable restrictions on delegates' right to communicate with a member or potential member.[1851] These included instances where delegates have either been refused or had access revoked to the required IT permissions to email employees about a bargaining process or to provide union updates,[1852] or employer executives having access to the delegates' electronic communications.[1853]

The ACTU recommended amendments to the FW Act to provide that the right to reasonable communication includes the right to communicate directly and without being monitored by the employer, which it suggested would resolve ambiguity.[1854] ANMF also recommended amendments to clarify the specific parameters of reasonable communication, which it suggested should acknowledge the widespread practice of working from home and hybrid workplaces.[1855]

Reasonable access to delegate training

AREEA submitted that there is uncertainty in how the right to reasonable access to delegate training operates in multi-union workplaces, for example on offshore vessels, on which it said there may be approximately 50 employees on board, represented by a number of different unions.[1856] The NFF also submitted that the paid training entitlement 'may increase procedural requirements for small employers that do not have HR teams.'[1857]

In its submission on the Review's Draft Report, AREEA expressed concern that the issue had not been considered or specifically mentioned in the draft recommendation for a further review of the measure.[1858] MIAL submitted that the entitlement 'fails to grasp the nuances of specific industries', and that there is likely to be 'significant arguments around what constitutes "reasonable"'.[1859] MIAL also submitted that the Draft Report did not engage sufficiently with the operation of the paid training entitlement and suggested this should be further reviewed with urgency.[1860]

The CFW said that the FWC's model delegates' rights term's provision for 5 days of paid time for initial training 'appears in line with common practice in agreements and old awards, but the provision of only one day paid leave per year in the second and subsequent years does not.'[1861] The CFW also argued the provision of paid time for one delegate per 50 eligible workers fails to account for workplaces with a higher ratio of delegates.[1862]

[1851] ACTU, Submission on Draft Report No 33 (29 May 2026) 24–7; ANMF, Submission on Draft Report No 34 (29 May 2026) 4; FSU, Submission on Draft Report No 40 (29 May 2026) 3–5.
[1852] ACTU, Submission on Draft Report No 33 (29 May 2026) 24–7; FSU, Submission on Draft Report No 40 (29 May 2026) 3–5.
[1853] ACTU, Submission on Draft Report No 33 (29 May 2026) 24–7; ANMF, Submission on Draft Report No 34 (29 May 2026) 4.
[1854] ACTU, Submission on Draft Report No 33 (29 May 2026) 27–8.
[1855] ANMF, Submission on Draft Report No 34 (29 May 2026) 4–5.
[1856] AREEA, Submission No 49 (3 March 2026) 10–11 [59].
[1857] NFF, Submission No 7 (25 February 2026) 6.
[1858] AREEA, Submission on Draft Report No 47 (29 May 2026) 4.
[1859] MIAL, Submission No 26 (3 March 2026) 7 [3.6].
[1860] MIAL, Submission on Draft Report No 23 (29 May 2026) 3.
[1861] CFW, Submission No 66 (6 March 2026) 27 [99].
[1862] Ibid.

Adverse action protections

The AMWU expressed concern that the protections for workplace delegates from interference when performing their role only extend to employer action that is actually taken, whereas general protections against adverse action apply to action that is planned or threatened.[1863] AMWU recommended amendments to protect delegates' rights from employer action that is planned or threatened. AMWU also recommended extending delegates' rights to include reasonable access to:

- information about the workplace and workforce to better represent member and prospective members' interests
- paid time, during normal working hours, to represent the interests of members, and/or prospective members, to the employer and/or to industrial tribunals if necessary, and
- paid time, during normal working hours, to attend inductions of new employees and discuss workplace relations matters with them.[1864]

Analysis

Employer groups submit that workplace delegates' enhanced representational rights create uncertainty, increased costs, and operational disruption, while unions submit that they are a critical mechanism for ensuring workers are able to exercise their lawful right to collective representation, including representation on safety and compliance matters. Academics have also been generally supportive of the measure. Noting the FWC has only recently corrected its modern awards delegates' rights term to reflect the scope of these rights, it is too soon to assess the full impact of this measure on workplaces, and these impacts should continue to be monitored over time. In relation to COSBOA's suggestion that paid training leave in the delegates' rights award term be capped at 2 days per calendar year for businesses with fewer than 50 staff, the Review notes that small business employers[1865] are exempt from providing paid time for training.[1866]

The new rights for workplace delegates in the FW Act are specified at a principles level, with the intention that additional detail would be provided for in modern awards and enterprise agreements.[1867] Unions and employer groups have respectively recommended expanding or confining these new representational rights. In the absence of evidence to suggest the measure is not operating as intended, there is no strong case for the Review to recommend legislative change with respect to the scope of these workplace delegates' rights at this stage. Employees, employers and their representatives can have recourse to negotiate for delegates' rights terms in agreements, which also provides for the tailoring of terms to specific industry and workplace contexts. In addition, parties can apply to the FWC to vary the delegates' rights term in specific awards to tailor the term to the relevant context.[1868] The courts have also started to consider the scope of workplace delegates' rights,[1869] and it is expected this will continue.

[1863] AMWU, Submission No 38 (3 March 2026) [18].
[1864] Ibid 6 [20].
[1865] As defined in s 23 of the *Fair Work Act 2009* (Cth), a small business employer is an employer with fewer than 15 employees.
[1866] *Variation of modern awards to include a delegates' rights term* [2024] FWC 1699, Attachment 3 [XX.8].
[1867] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 138 [826]–[827].
[1868] *Variation of modern awards to include a delegates' rights term* [2024] FWC 1699, [2].
[1869] See, for example, *Australasian Meat Industry Employee' Union v. Teys Australia Beenleigh Pty Ltd* QUD411/2025.

Employer groups raise concerns with both the substance of, and uncertainty caused by, the Federal Court's decision to quash the FWC's modern awards delegates' rights term. It is acknowledged that the process of varying modern awards to replace the quashed delegates' rights term would have caused uncertainty for employers in understanding their obligations under this measure. Following the outcome of the Federal Court decision, and the FWC having issued its corrective decision and determinations varying all modern awards, employers should now have greater certainty regarding the operation of this measure.[1870]

Employer groups also raise concerns with the retrospective application of the revised modern award delegates' rights term, with ACCI suggesting it exposes businesses to compliance problems for past practices and forces retrospective corrections.[1871] In its updated decision, the FWC acknowledged related concerns with retrospective liability that had been raised by the MCA, but suggested that this was a theoretical concern that was unlikely to arise in a practical sense.[1872] Similarly, there has not been any evidence provided to the Review of a practical risk of an employer being found retrospectively liable for contravening the revised award term.

The Federal Court found that the first (now quashed) modern award delegates' rights term impermissibly confined the scope of workplace delegates' rights provided for in the FW Act.[1873] Employer group submissions recommend amendments to the FW Act to provide for the scope of workplace delegates' rights to be consistent with the quashed term and allow the FWC to make a term of this kind, as they consider the revised term to have made the scope of workplace delegates' rights too broad.[1874] The Federal Court's decision determined the FWC's first modern award delegates' rights term impermissibly limited the statutory rights of workplace delegates. At this stage there is no evidence before the Review that supports legislative amendments to narrow the scope of workplace delegates' rights consistent with the quashed delegates' rights term.

Interaction of exercise of delegates' rights with duties and obligations as an employee

Some employer groups submit that the revised modern award delegates' rights term has the effect of prioritising the exercise of workplace delegates' representational rights ahead of the performance of work, while others contend it creates confusion as to when an exercise of these representational rights is permitted. These submissions point to the change in clause XA.9(a) of the first modern award delegates' rights term, which corresponds to clause XX.9(a) and (b) of the amended term. The original and amended clauses are as follows:

[1870] *Variation of delegates' rights term in modern awards* [2026] FWCFB 5.
[1871] ACCI, Submission No 54 (3 March 2026) 19 [107].
[1872] *Variation of delegates' rights term in modern awards* [2026] FWCFB 5, [35]–[36].
[1873] *Construction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187.
[1874] ACCI, Submission No 54 (3 March 2026) 18–19 [103]–[107], 21 [119]; AIG, Submission No 82 (8 March 2026) 60–9 [290]–[336]; AREEA, Submission No 49 (3 March 2026) 9–10 [47]–[52]; BCA, Submission No 50 (3 March 2026) 24 [6.2], 26 [6.3].

Clause in first (now quashed) modern award delegates' rights term

XA.9

(a) A workplace delegate's entitlements under clause XA are subject to the conditions that the workplace delegate must, when exercising those entitlements:

(i) comply with their duties and obligations as an employee;

(ii) comply with the reasonable policies and procedures of the employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources;

(iii) not hinder, obstruct or prevent the normal performance of work;

(iv) not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association.[1875]

Clause in amended modern award delegates' rights term

XX.9

(a) A workplace delegate's entitlements under clause XX are subject to the conditions that the workplace delegate must, when exercising those entitlements:

(i) comply with the reasonable policies and procedures of the employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources;

(ii) not hinder, obstruct or prevent eligible workers exercising their rights to freedom of association.

(b) When exercising any entitlements under clause XX, a workplace delegate must, other than in the reasonable exercise of those entitlements:

(i) comply with their duties and obligations as an employee; and

(ii) not hinder, obstruct or prevent the normal performance of work.[1876]

The effect of dividing subclause XX.9 into 2 paragraphs and adding the chapeau to paragraph (b) in the revised award term is that the term no longer requires workplace delegates, when reasonably exercising their rights under the delegates' rights term, to comply with their duties and obligations as an employee,

[1875] *Variation of modern awards to include a delegates' rights term* [2024] FWC 1699, Attachment A [XA.9].
[1876] *Variation of delegates' rights term in modern awards* [2026] FWCFB 5, Attachment 3 [XX.9].

and not hinder, obstruct or prevent the normal performance of work. Instead, workplace delegates must comply with their duties and obligations as an employee and not hinder, obstruct or prevent the normal performance of work other than in the reasonable exercise of their workplace delegates' entitlements.

It is to be expected that, in some instances, when a workplace delegate is exercising their workplace delegates' rights they would be undertaking activities against the preferences of their employer. In this context, it is not reasonable to have a workplace delegate's rights be subject in absolute terms to their duties and obligations as an employee. The revised award term has the effect that inconsistency with these duties and obligations is acceptable only where the exercise of the workplace delegate's rights is reasonable. This does not alter the inherent requirements for an employee to perform work for the employer. While the question of what amounts to a reasonable exercise of delegates' rights will depend on the individual circumstances, this does not warrant legislative amendments that have the effect of altering the revised term in respect of when representational rights can be exercised. Workplace rights, entitlements and obligations being subject to a reasonableness standard is commonplace in the Fair Work system, including in awards.

Enterprise agreements made while previous awards term was in place

The UWU raised issues about enterprise agreements made between 1 July 2024 to 25 January 2025 that may include deficient delegates' rights terms. This is a matter that could be considered further by the FWC. The Review recognises that the FWC is best placed to consider questions about whether the modern award delegates' rights term, which may have been read into enterprise agreements in certain circumstances, is the now superseded term or the current term.

Award term replaces less favourable agreement terms in their entirety

Several unions recommend subsection 205A(2) be amended to ensure that an enterprise agreement term providing for workplace delegates' rights is not replaced in its entirety if it is in any way less favourable than the modern award term.[1877] The displacement of bargained-for delegates' rights terms, even if the term is more favourable in some respects, where the term is in any way less favourable than the relevant award term is inconsistent with the apparent intent of ensuring the award term is a 'floor' below which delegates' rights cannot sink. The FW Act's objective of emphasising enterprise-level bargaining[1878] suggests that it was not the intention to circumvent agreed upon terms which may well represent a term which is more favourable to workplace delegates in most respects than the 'floor'. Instead, the intention was to ensure only that a term that does not reach the requisite minimum

[1877] ACTU, Submission No 67 (6 March 2026) 29; AMWU, Submission No 38 (3 March 2026) 6–7 [21]–[22]; ANMF, Submission No 60 (5 March 2026) 4–5 [8]–[13]; UWU, Submission No 62 (6 March 2026)11–13.
[1878] *Fair Work Act 2009* (Cth) s 3(f).

standard provided is replaced to the extent that it is inconsistent with the delegates' rights term. Where a deficiency in an enterprise agreement term providing for delegates' rights can be rectified without rendering the rest of the term inoperable, such as severing terms, it would be reasonable to provide a mechanism to allow this, rather than replacing the entire bargained term with the modern award term.

The range of amendments to subsection 205A(2) proposed in submissions demonstrates that there would be many ways to provide such a mechanism. In addition to the recommendations provided in submissions, existing provisions of the FW Act may also provide a model. For example, section 191A provides a framework for the FWC to approve an enterprise agreement with amendments to address FWC concerns that the agreement does not meet the BOOT requirements.[1879] This framework allows the FWC to specify the amendment required and approve the agreement if satisfied the amendment addresses the concerns, subject to consultation with the bargaining parties and their representatives.[1880] Alternatively, sections 190 and 191 could offer a model, in which the FWC approves an agreement with undertakings from the employer (or employers) covered by the agreement.

Award term replaces less favourable workplace determination terms in their entirety

In specific circumstances, the FWC may determine the terms and conditions of employment for employees either through an industrial action related workplace determination[1881] or an IBWD[1882] ('workplace determinations') (see Section 3.2 for further information on IBWDs). Unlike the operation of section 205A in the case of agreement approvals, the FWC has significant flexibility to make a delegates' rights term in a workplace determination under subsection 273(7).

Under subsections 267(2) and 270(2), an 'agreed term' must be included in workplace determinations. A 'delegates' rights term' is a mandatory term of a workplace determination under section 273. Subsections 273(6)–(7) provide that workplace determinations must include a delegates' rights term, and that this term 'must not be less favourable than the delegates' rights term in any modern award that covers a workplace delegate to whom the determination applies'.[1883] There is some textual uncertainty about how the requirements of the mandatory delegates' rights term at subsection 273(7) interacts with a term agreed by parties, including where a term is more favourable to workplace delegates in some respects and less favourable in others, than the delegates' rights term in the relevant modern award or awards. To that extent, the FW Act should be amended to ensure clarity for the parties.

[1879] Ibid s 191A.
[1880] Ibid s 191A.
[1881] Ibid ss 266–8.
[1882] Ibid ss 269–71.
[1883] Ibid ss 273(6)–(7).

Reasonable communications

Unions submitted examples of employers restricting the methods by which delegates can communicate with members and potential members, particularly in dispersed workplaces, including by restricting access to electronic communication methods. The importance of electronic communication has increased alongside the significant rise in people working from home following the COVID-19 pandemic. Limiting electronic communication may effectively remove the ability to communicate with many workers in any capacity. The examples provided are potentially unreasonable restrictions on a delegate's right to communicate with workers, including those working from home. While some of these issues may be resolved through the FWC and the courts, as disputes about the boundaries of the existing legislation and delegates' rights term work through the system, methods of reasonable communication should accommodate the diversity of modern workplaces.

The recommended further review of this measure should consider whether FW Act amendments are required to ensure undue restrictions are not placed on the method of delegates communicating with eligible workers, including those working from home and in hybrid workplaces.

Reasonable access to delegate training

Unions report an increase in participation in delegates' training since the commencement of the measure, while employer groups suggest clarity is required regarding the operation of the right to reasonable access to delegate training, particularly in multi-union workplaces. Employer groups raise concerns with uncertainty around the entitlement to reasonable access to paid time for related training, for example in multi-union workplaces. COSBOA also expressed concern with the impost of allowing delegates to attend paid training on businesses with fewer than 50 full-time equivalent employees.[1884] The operation of the paid training entitlement should be considered further by the further review (Recommendation 34).

Adverse action protections

AMWU recommends legislative amendments to delegates' protections against adverse action, to include action that is planned or threatened, rather than only extending to action that is actually taken.[1885] AMWU submits that this would make the delegates' protections consistent with those provided for adverse action more generally.[1886] Parliament had the opportunity to consider this issue through the Senate inquiry into the Closing Loopholes Bill and determined not to amend the protections.[1887]

Action by an employer which obstructs a workplace delegate may be prohibited under the specific delegates' protections and the adverse action protections generally.[1888]

[1884] The Review notes that, under the FW Act, the entitlement to reasonable access to paid time for delegate training does not apply to delegates employed by small business employers (as defined).
[1885] AMWU, Submission No 38 (3 March 2026) 5–6 [18].
[1886] Ibid.
[1887] See, for example, AMWU submission to the Senate Education and Employment Legislation Committee inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, 12 [39].
[1888] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 34 [188].

Findings and recommendations

The measure is a deliberate and substantial strengthening of workplace representation. It replaces previously limited legislative protections for workplace delegates when performing their representative roles.

It is too early to tell whether the measure is operating as intended in practice. Although the measure commenced in December 2023 and August 2024, the practical operation of the new rights is still emerging. The FWC has only recently corrected the modern awards delegates' rights term in January 2026 following the Full Federal Court's finding that the earlier term 'impermissibly limited' the statutory rights of workplace delegates.[1889] Submissions from both unions and employer groups indicate ongoing uncertainty about how the new rights will operate at the workplace level. Additionally, the 'reasonableness filter' has not yet been tested. These issues are likely to require further clarification through case law and FWC decisions.

There are already FWC decisions clarifying the interaction between award-based delegates' rights terms and enterprise agreements, and additional matters are before the courts. Over time, these decisions should address a number of the uncertainties raised by stakeholders.

Given the early stage of implementation, the recent correction of the award terms, and developing case law on the 'reasonableness filter', a further review should be undertaken in 2 to 3 years.

There is a risk of unintended consequences arising from the operation of subsections 205A(2). This provision may displace an entire bargained enterprise agreement term with the modern award term. Overriding enterprise agreement terms that are more favourable in most respects, simply because one element is less favourable than the award, undermines the role and incentives of enterprise bargaining. The operation of subsections 205A(2) should be addressed to avoid this unintended consequence. More could be done to better clarify how mandatory terms and agreed terms interact in relation to the delegates' rights term in respect of workplace determinations.

[1889] *Variation of delegates' rights term in modern awards* [2026] FWCFB 5; *Construction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187 [104].

Recommendation 34

The government should further review the delegates' rights amendments to assess whether they are operating as intended in practice. This review should take place in 2 to 3 years.

The further review should consider:

- whether the entitlement to reasonable communications with members and potential members requires amendments to adequately provide for electronic communications for workers working from home and in hybrid workplaces, and
- the operation of the right to reasonable access to delegate training.

Recommendation 35

The *Fair Work Act 2009* should be amended to:

a. provide that, where a delegates' rights term in a proposed enterprise agreement is less favourable to the workplace delegate than the applicable award term in some respects, but more favourable in other respects, the award term only replaces the agreement term to the extent of any deficiency, and

b. in respect of workplace determinations, clarify the interaction between agreed terms and the mandatory delegates' rights term under subsection 273(7).

4.7 Withdrawal from amalgamations

What the measure does

The Closing Loopholes No. 2 Act repealed amendments made to the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020* (Cth) (the **2020 Act**) relating to the withdrawal of constituent parts from amalgamated organisations and largely reinstated the provisions applicable before the 2020 Act.[1890]

The RO Act ensures that registered employer and employee organisations are representative of and accountable to their members and are able to operate effectively[1891] by requiring them to meet certain standards in order to access rights and privileges under the RO Act and FW Act.[1892] The RO Act sets out processes for 2 or more registered organisations to amalgamate, as well as processes for them to withdraw from past amalgamations so that constituent parts (for example, branches, divisions or parts of an organisation) can become standalone registered organisations.[1893]

The 2020 Act, among other things,[1894] enabled the FWC to accept applications for a withdrawal ballot made more than 5 years after the relevant amalgamation occurred, if the FWC was satisfied it was appropriate by having regard to certain matters including whether the organisation had a record of not complying with workplace or safety laws and the constituent part had not contributed to that record.[1895] Under these provisions the Mining and Energy Division successfully withdrew from the then CFMMEU[1896] to form the MEU.[1897] A member of the Manufacturing Division of the CFMEU also applied for a ballot for it to withdraw from the CFMEU but was unsuccessful due to the FWC finding that it lacked the jurisdiction to approve the application as the Manufacturing Division did not become a part of the CFMEU as a result of an amalgamation.[1898]

[1890] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 pt 13.
[1891] *Fair Work (Registered Organisations) Act 2009* (Cth) s 5(3)(a).
[1892] Ibid s 5(2).
[1893] Ibid ch 3.
[1894] For instance, it also broadened the definition of 'separately identifiable constituent part' (a part of an organisation capable of de-merging), and made technical amendments to the conduct of ballots, the proposed name and rules of the relevant organisations involved, the FWC's power to accept undertakings and the transfer of members at the conclusion of the de-merger process.
[1895] *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020* (Cth) sch 1 item 20; Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Bill 2020 (Cth) [26]–[34]. For completeness, the amendments also removed the expanded definition of 'separately identifiable constituent part' which were originally made so withdrawal processes were accessible to more parts of an amalgamated organisation, and made further minor or technical amendments about, for instance, the conduct of ballots, membership and undertakings.
[1896] Prior to 1 December 2023, the CFMEU was named the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU).
[1897] *Application by Grahame Patrick Kelly* [2023] FWCFB 33, [27]; *Application by Grahame Patrick Kelly* [2023] FWCFB 64, [59]. See also final orders made by the Federal Court in *Grahame Patrick Kelly & Ors v CFMEU* (NSD1120/2023).
[1898] *Application by Michael O'Connor for withdrawal from amalgamated organisation* [2023] FWCFB 8, [31].

By repealing the majority of the 2020 amendments and reinstating the pre-2020 Act provisions, the Closing Loopholes No. 2 amendments prevented applications for a withdrawal of the amalgamation outside the standard 2 to 5 year limitation period and restored the definition of which parts of an amalgamated organisation can apply for withdrawal.

The measure took effect on 27 February 2024.[1899]

Intention of the measure

The measure was intended to remove 'the instability and uncertainty that has been brought about by the 2020 amendments'.[1900]

The measure intended to provide a 'reasonable opportunity' for members of a constituent part of an amalgamated organisation with a connection to a previously de-registered organisation to de-merge within a period of 2 to 5 years after the relevant amalgamation occurred and removed the ability to make an application after 5 years.[1901] The measure 'did not preclude members from forming, joining or seeking the registration of trade unions and employer organisations subject to the requirements of the RO Act and the rules of those organisations'.[1902]

What has happened since commencement

No applications have been made to withdraw from amalgamations since the commencement of the Closing Loopholes No. 2 amendments.

In July 2024 the government passed the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2024* (Cth) (the **2024 Act**), which was specifically targeted to allow the Manufacturing Division of the CFMEU to apply for a ballot to withdraw from the CFMEU. This legislation was required because the FWC had determined that the Manufacturing Division did not become a part of the CFMEU as a result of an amalgamation, so was not able to access the withdrawal from amalgamation processes.[1903] Additionally, any relevant application would have fallen outside the 5-year limit for applications re-established by the Closing Loopholes No. 2 amendments.

[1899] *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 2(1) item 17.
[1900] Revised Explanatory Memorandum Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 46 [264].
[1901] Ibid 46 [265], 160 [942].
[1902] Ibid 46 [265].
[1903] *Application by Michael O'Connor for withdrawal from amalgamated organisation* [2023] FWCFB 8, [27], [31]–[39].

Following the passage of the 2024 Act, the FWC approved the application for a ballot to withdraw the Manufacturing Division from the CFMEU[1904] and members voted to withdraw and form the Timber, Furnishing and Textiles Union (**TFTU**).[1905] Demerger processes were finalised, and the TFTU was registered on 17 April 2026.[1906]

Since the measure commenced, the CFMEU Construction and General Division (C&G Division) was placed into administration (see Section 5.8 for further information on the allegations against the CFMEU and administration of the C&G Division).

What the Review heard

The Review received minimal feedback from stakeholders on this measure, with only 3 submissions discussing the amendments. The Review received no feedback on its consideration of the measure in the Draft Report.

The ACTU acknowledged the use of the 2020 provisions by former Divisions of the CFMEU and noted that there had been no further withdrawal applications beyond the 5-year limit. The ACTU submitted it did not consider any need for further reform.[1907]

AIG noted it does not seek to revisit these amendments, or propose changes to them, at this stage.[1908]

HIA opposed the amendments. It suggested the repeal of the 2020 amendments makes it harder for workers to leave unions or employee organisations to form separate organisations. It indicated that the amendments restrict worker choice and democratic rights within the union movement and strengthened existing union structures while reducing accountability and transparency.[1909]

Analysis

The Closing Loopholes No. 2 amendments restore the provisions and position under the RO Act that limit the time period and parts of registered organisations that can seek approval from the FWC to conduct a ballot and facilitate their members voting on withdrawal from an amalgamation. The measure sought to 'address the instability' brought about by the 2020 Act.

[1904] *Application by Michael O'Connor - withdrawal from amalgamated organisation - Construction, Forestry and Maritime Employees Union - Manufacturing Division* [2025] FWCFB 14.
[1905] Kace O'Neill, 'Manufacturing division overwhelmingly votes to split from 'lawless' CFMEU', *HR Leader* (online 15 April 2025) <https://www.hrleader.com.au/law/26715-manufacturing-division-overwhelming-votes-to-split-from-lawless-cfmeu?highlight=WyJjZm1ldSJd>.
[1906] See final orders made by the Federal Court in *Michael O'Connor v CFMEU & Anor* (VID1464/2025).
[1907] ACTU, Submission No 67 (6 March 2026) 83.
[1908] AIG, Submission No 82 (8 March 2026) 71 [342].
[1909] HIA, Submission No 20 (2 March 2026) 17.

The low number of submissions on this measure indicate that the Closing Loopholes No. 2 amendments to repeal changes made by the 2020 Act have been largely accepted by both unions and employer groups. The views expressed by the ACTU and AIG suggest that there are generally no operational concerns with the reinstated limitation period, and there have not been any unintended consequences or potential improvements identified by these stakeholders.

While the 2024 Act was introduced into Parliament shortly after the passage of the Closing Loopholes No. 2 amendments, this was targeted legislation to facilitate the withdrawal of the Manufacturing Division from the CFMEU. Targeted legislation was required to address the issue of how the Manufacturing Division was established, noting that the FWC had found that the provisions that ordinarily support ballots for withdrawal from amalgamations were not available.

Members retain an avenue to pursue alternative representation where withdrawal from an amalgamation is no longer possible due to the legislative time limitations. The repeal of the 2020 Act does not prevent members who do not wish to remain in a particular union from otherwise forming, joining or seeking registration of a trade union or employer association. The 2024 Act demonstrates that where organisations seek to withdraw from amalgamations in circumstances not provided for by legislation, the government retains the power to introduce legislation in support of demerging if appropriate.

Findings and recommendations

The measure is operating appropriately and effectively. No unintended consequences have been identified.

4.8 Addressing anomalous consequences of small business redundancy exemption in insolvency contexts

What the measure does

The Closing Loopholes No. 1 Act amended the FW Act to address an anomaly in the operation of the small business redundancy exemption in insolvency contexts which meant that if an employer became insolvent and downsized to the point of meeting the small business definition in the FW Act (i.e. less than 15 employees) the remaining employees lost their legal entitlement to redundancy pay due to the small business exclusion.[1910]

The measure commenced on 15 December 2023.[1911] The measure does not apply if the employee was terminated before 15 December 2023 or if the employer became a small business employer by virtue of other terminations before 15 December 2023.[1912]

Small business exclusion

The FW Act provides that an employee is not entitled to redundancy pay by their employer if they are a small business employer at the time of giving notice of termination or at the time of the employee's termination.[1913] An employer meets the small business definition where they are a national system employer and employ fewer than 15 employees.[1914] This exemption relieves small businesses of any NES redundancy pay obligations, which are considered to be a large contingent liability for small business employers, and encourage small businesses to offer employment opportunities.[1915]

The exclusion also resulted in employees not being eligible to receive redundancy benefits under the FEG scheme.[1916] The FEG scheme is a legislative safety net for employees who have had their employment terminated due to their employer entering liquidation or bankruptcy and whose entitlements cannot be paid by the employer or from another source.[1917] The FEG scheme allows eligible employees to make a claim for unpaid entitlements, including redundancy pay.[1918] As employees affected by the anomaly were not entitled to receive redundancy pay from their employer, they were not entitled to claim any redundancy benefits under the *Fair Entitlements Guarantee Act 2012* (Cth) (**FEG Act**).

[1910] *Fair Work Act 2009* (Cth) s 121; *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 1 pt 2.
[1911] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2(1) item 3.
[1912] Ibid sch 1 pt 15 item 92.
[1913] *Fair Work Act 2009* (Cth) ss 119, 121(1).
[1914] Ibid s 23(1).
[1915] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 14 [62].
[1916] See *Fair Entitlements Guarantee Act 2012* (Cth) s 10(1)(d), which would not have been met due to the operation of section 121(1).
[1917] DEWR (Cth), 'Fair Entitlements Guarantee' (Web Page, 26 March 2026) <https://www.dewr.gov.au/fair-entitlements-guarantee>.
[1918] *Fair Entitlements Guarantee Act 2012* (Cth) ss 6(5), 10(1).

Certain small business to pay redundancy pay

The Closing Loopholes No. 1 Act inserted subsection 121(4) into the FW Act to remedy this anomaly, by requiring small business employers to pay redundancy pay to terminated employees if they were not required to pay redundancy pay by virtue of being a small business, the employer has become a small business through the termination of employees, the employer is bankrupt or in liquidation (other than only because of a members voluntary winding up), and the terminations occurred:

- on or within the 6-month period before the employer became bankrupt or went into liquidation, or
- on or within the 6-month period before an insolvency practitioner was appointed (if relevant), or
- on or within the 6-month period of the first insolvency practitioner being appointed, if multiple insolvency practitioners were appointed, or
- due to the insolvency of the employer.[1919]

The measure does not change how the small business redundancy exemption applies to ongoing, solvent businesses who are not experiencing liquidation or bankruptcy.[1920]

The measure also repealed the definition of 'appointment' at section 12 of the FW Act and replaced it with a new definition of 'insolvency practitioner'.[1921] This definition is consistent with the definition of 'appointment' in section 5 of the FEG Act.[1922]

Intention of the measure

The amendment was to address the anomaly where an employer became a small business employer during the insolvency process, and some employees lost their legal entitlement to redundancy pay. This outcome also affected employees' ability to claim under FEG.[1923] It was intended to address inequitable financial outcomes for employees, including those who remain employed to assist with the orderly wind-down of an insolvent business, and support the more efficient conduct of external administrator, controller and bankruptcy trustee appointments.[1924]

[1919] *Fair Work Act 2009* (Cth) s 121(4)(a).
[1920] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 81 [440].
[1921] *Fair Work Act 2009* (Cth) s 12.
[1922] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 81 [443].
[1923] Ibid 15 [64].
[1924] Ibid 14 [63], 81 [441]–[442].

What has happened since commencement

On 1 September 2025, the FWC President commenced proceedings on the FWC's own initiative to deal with inconsistency and ambiguity (which arose as a result of the measure's introduction[1925]) in award-specific redundancy provisions in 6 identified modern awards:

- *Joinery and Building Trades Award 2020*
- *Mannequins and Models Award 2020*
- *Manufacturing and Associated Industries and Occupations Award 2020*
- *Sugar Industry Award 2020*
- *Textile, Clothing, Footwear and Associated Industries Award 2020*
- *Timber Industry Award 2020*[1926]

On 24 November 2025, the President of the FWC determined to vary the awards to clarify that employees are entitled to redundancy pay in the circumstances provided for by subsection 121(4) of the FW Act. [1927] The variations operate from 1 December 2025.[1928]

Since commencement of the measure, and as at 11 June 2026, DEWR reports that the measure has preserved redundancy pay for an additional 109 FEG claimants (with an average payment of $18,409.28 per claimant).

What the Review heard

The Review received limited feedback from stakeholders on the measure. The Review received no feedback on its consideration of the measure in the Draft Report.

The ACTU and UWU expressed support for the amendments, noting the change prevents employers from avoiding redundancy pay by downsizing shortly before insolvency.[1929] The UWU highlighted the measure's importance for supporting employees to access redundancy payments and the FEG scheme.[1930] The AMIEU suggested the reforms should go further to entirely remove the small business redundancy exclusion.[1931]

[1925] *Review of industry-specific small business redundancy provisions in certain modern awards* [2025] FWC 3506, [2].
[1926] Ibid.
[1927] Ibid [6], [8], [10].
[1928] Ibid [11].
[1929] ACTU, Submission No 67 (6 March 2026) 34; UWU, Submission No 62 (6 March 2026) 15.
[1930] UWU, Submission No 62 (6 March 2026)15.
[1931] AMIEU, Submission No 56 (4 March 2026) 5 [37].

HIA and RDA opposed the measure. HIA suggested the amendments reflect a fundamental misunderstanding of small business insolvency in that businesses who have become insolvent do not have funds to meet their debts.[1932] It indicated the measure could incentivise businesses to trade while insolvent or engage in phoenixing behaviours. HIA suggested the FEG already provides support for affected workers.[1933]

RDA suggested that the increased redundancy liabilities resulting from the amendment may accelerate insolvency and reduce capacity for responsible winding-down by the business.[1934] It recommended greater transitional support or clearer guidance to assist small business employers navigating financial distress.[1935]

Although not relevant to the measure, the AMIEU also recommended the repeal of the 'ordinary and customary turnover of labour' exemption that currently applies to the entitlement of an employee to be paid redundancy pay if they are terminated because the employer no longer requires the job be done.[1936]

Analysis

The measure is important to ensure that employees are not disadvantaged for remaining employed by a business that downsizes in an insolvency context, and retain their right to redundancy pay. To support the intention of the measure, the FWC updated 6 modern awards to remove any uncertainty or ambiguity about employees' entitlement to redundancy pay in the circumstances provided for by subsection 121(4).

While there is no available data on instances where this measure has been used to receive redundancy payments directly from the employer, it is clear that the amendment has had its intended effect having preserved redundancy pay for additional claimants under the FEG scheme. This demonstrates the real life impact the measure has had on affected employees.

The continuation of this measure is in line with its intent, which is to ensure that employers are required to pay employees' redundancy payments, even if they become a small business but were not a small business prior to insolvency. Without addressing this loophole, these employees would lose their legal entitlement to redundancy pay and also, if needed, access to the FEG scheme as a safety net of last resort for unpaid entitlements. Although some submissions sought to suggest the measure could have unintended consequences, like incentivising insolvent trading, phoenixing, faster insolvency and reduced winding-up capacity, no evidence of such risks have been provided. On the contrary, it is more likely that employees will be willing to support orderly winding-up processes because they will not lose their legal entitlement to redundancy entitlement.

[1932] HIA, Submission No 20 (2 March 2026) 17.
[1933] Ibid.
[1934] RDA, Submission No 35 (3 March 2026) 3.
[1935] Ibid.
[1936] AMIEU, Submission No 56 (4 March 2026) 5 [37].

AMIEU recommended the small business exemption be abolished in its entirety and redundancy payments be provided to employees working in any small business. The small business exemption is a long-standing feature of the FW Act aimed at encouraging employment by small businesses by relieving them of NES redundancy pay obligations, which can be a significant contingent cost of employing staff.[1937] Noting the important role of small businesses as an employer in the Australian labour market, and the express intention of the government, no further changes need to be made to limit the small business exemption for redundancy provisions.

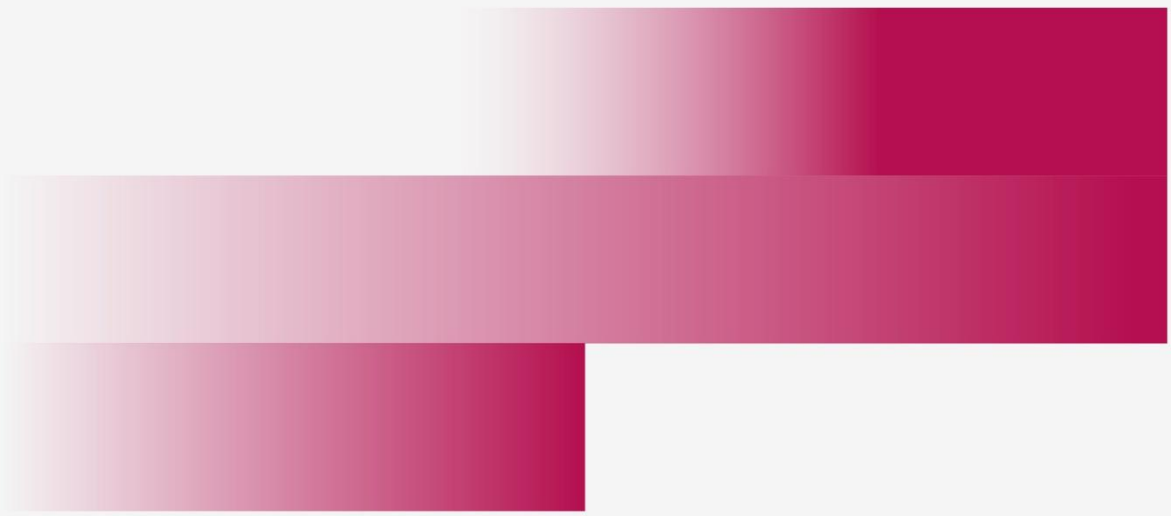
Findings and recommendations

The amendments have been operating appropriately and effectively to date, and no unintended consequences have been identified.

[1937] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth)14 [62].

Chapter 5

Safe workplaces



5.1 Industrial manslaughter

What the measure does

The Closing Loopholes No. 1 Act amended the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) to introduce a new standalone industrial manslaughter offence to apply in the Commonwealth jurisdiction.[1938]

The industrial manslaughter offence commenced on 1 July 2024.[1939]

The WHS framework

WHS in Australia is legislated and regulated separately by each of Australia's state, territory and Commonwealth jurisdictions. WHS laws are largely harmonised across jurisdictions through a set of uniform laws, known as the model WHS laws, which have been adopted by all jurisdictions except Victoria, which has similar laws in place. The model WHS laws comprise the model WHS Act, model WHS Regulations and model WHS Codes of Practice[1940] and have been adopted by the Commonwealth, with minor jurisdictional adaptions.[1941] The model WHS laws are maintained by SWA, an independent tripartite statutory body, through a process involving all jurisdictions as well as employer and worker representatives.

The WHS Act imposes a primary duty on a 'person conducting a business or undertaking' (**PCBU**) to ensure, so far as is reasonably practicable, the health and safety of workers while they are at work and that the health and safety of other persons – such as visitors, customers or bystanders – are not put at risk by work carried out as part of the business or undertaking.[1942] An 'officer' of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation.[1943] Workers must take reasonable care for their own health and safety and that of others.[1944]

Industrial manslaughter

The measure inserted new section 30A, establishing the offence of industrial manslaughter.[1945]

[1938] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 4 pt 1.
[1939] Ibid s 2(1) item 27.
[1940] SWA, 'Legislation' (Web Page) <https://www.safeworkaustralia.gov.au/law-and-regulation/legislation>.
[1941] Ibid.
[1942] *Work Health and Safety Act 2011* (Cth) s 19.
[1943] Ibid s 27(1).
[1944] Ibid s 28.
[1945] Ibid s 30A.

The offence of industrial manslaughter is committed by a PCBU or its officer if the person:

- has a health and safety duty
- intentionally engages in conduct that breaches the health and safety duty
- the conduct causes[1946] the death of an individual, and
- the person was reckless or negligent as to whether the conduct would cause the death of an individual.[1947]

The maximum penalty for the offence of industrial manslaughter is 25 years imprisonment for an individual[1948] or $18 million for a body corporate or the Commonwealth.[1949]

If a court is not satisfied that a person is guilty of industrial manslaughter, it may convict the person of a Category 1 or 2 offence,[1950] regardless of whether the limitation period for prosecution of the alternative offence has elapsed.[1951]

Jurisdictions were able to develop their own provisions in accordance with the model WHS laws. In July 2023, the *Model Work Health and Safety Legislation Amendment (Offences and Penalties) 2023* amended the model WHS Act to include a jurisdictional note and model penalties for the offence of industrial manslaughter.[1952] The amendments to the model WHS Act provided that the offence would 'address conduct by a person that represents a gross deviation from the reasonable standard of care resulting in a work-related fatality' and recommended a maximum penalty of 20 years imprisonment or $18 million.[1953]

Prior to the amendment, the most serious Commonwealth WHS offence available was a Category 1 offence (see Section 5.2 for more information on penalties for Category 1 offences). This offence could be applied in cases where a death occurred,[1954] but it was not designed to exclusively address incidents resulting in a fatality.

[1946] Conduct causes a death if the conduct substantially contributes to the death. See subsection 30A(2) of the *Work Health and Safety Act 2011* (Cth).
[1947] *Work Health and Safety Act 2011* (Cth) s 30A(1).
[1948] Ibid.
[1949] Ibid.
[1950] Ibid s 30A(4).
[1951] Ibid s 30A(5).
[1952] SWA (Cth), 'Model Work Health and Safety Legislation Amendment (Offences and Penalties) 2023' (Web Page, 27 July 2023) <https://www.safeworkaustralia.gov.au/doc/model-work-health-and-safety-legislation-amendment-offences-and-penalties-2023>.
[1953] Model Work Health and Safety Legislation Amendment (Offences and Penalties) 2023 (Cth) sch 1 item 23.
[1954] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 307 [1889].

Intention of the measure

The measure is intended to align Commonwealth WHS laws with the model WHS Act.[1955] The specific industrial manslaughter offence responded to 'genuine community concern that the WHS framework requires stronger penalties for the most egregious breaches of WHS duties that result in workplace fatalities'.[1956] The offence reflects recommendation 23b of the *Review of the Model Work Health and Safety Laws – Final Report* (**Boland Review**), and recommendation 13 of the *They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* Senate Inquiry (**Industrial Deaths Senate Inquiry**).[1957]

The maximum monetary penalty of $18 million for bodies corporate reflects the seriousness of the offence and is consistent with the penalty for industrial manslaughter in the model WHS Act.[1958] The penalty intended to provide a clear and effective punishment that acts as a deterrent against breaching WHS duties.[1959] The maximum penalty of 25 years imprisonment for an individual reflects the penalty for manslaughter in the Commonwealth Criminal Code, rather than the penalty recommended in the model WHS Act.[1960] Applying the approach to maximum penalties for comparable offences in the Commonwealth Criminal Code is consistent with *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[1961]

What has happened since commencement

The Review is not aware of any significant decisions or other developments related to this measure but notes the Best Practice Review being undertaken by SWA will report back to WHS Ministers in mid-2026 (see Section 5.8 for more details on the Best Practice Review).

All state and territory jurisdictions have introduced an industrial manslaughter offence to implement the model WHS Act jurisdictional note. There have been a number of prosecutions of industrial manslaughter under state and territory laws. See 'Analysis' below for more information on some of these cases.

[1955] Ibid 307 [1888].
[1956] Ibid 307 1889].
[1957] Ibid 307 [1888]. See Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* (2018); Marie Boland, *Review of the Model Work Health and Safety Laws – Final Report* (Report, December 2018) 124.
[1958] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 310 [1907].
[1959] Ibid.
[1960] Ibid 310 [1906]; *Criminal Code Act 1995* (Cth) sch 1 s 115.2.
[1961] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth); Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2024).

What the Review heard

The Review received 7 submissions addressing the industrial manslaughter measure, one of which was private, and a further 6 submissions on the Draft Report addressed the measure.

Unions and NRWC broadly supported the measure and viewed it as an important step in strengthening worker safety through deterrence and accountability.[1962] The ACTU expressed strong support for an 'outcome based' offence to sit alongside and complement the existing 'risk based' offences.[1963] It submitted that the amendments marked a systemic shift in how the country views employers' responsibility for the safety of workers, and how courts address the loss of life in Australian workplaces. The ACTU and UWU highlighted that the inclusion of the industrial manslaughter offence was critical to ensuring an effective deterrent exists for employers within the WHS framework, as well as affording justice to families of those killed in the workplace.[1964]

HIA submitted that the inclusion of the industrial manslaughter offence was out of step with the principle that the duty to provide a safe workplace rests on all people in the workplace and inconsistent with the overall objective of safety legislation to prevent, rather than punish, workplace deaths.[1965] It noted that no data has been provided to demonstrate the effectiveness of the measure, with only a low number of successful prosecutions across all jurisdictions.[1966] HIA stated that the penalties are excessive and potentially business-ending, with a disproportionate risk burden on small business owners who may be dissuaded from participation in the construction industry.[1967] It argued that the industrial manslaughter offence should be a criminal law matter.[1968]

As part of consultations, the Review met with Comcare, to understand the implementation of the measures since they came into effect. Comcare noted that there has been increased engagement from PCBUs on WHS issues which may indicate an appreciation of the possibility that individuals might be held liable for industrial manslaughter and that it is not just an 'operational matter' for the PCBU.

The Review also met with the Family and Injured Workers Advisory Committee (the Advisory Committee) (see Section 5.4 which discusses the Advisory Committee). The Advisory Committee emphasised the importance of the industrial manslaughter offence for addressing workplace fatalities. One member of the Advisory Committee suggested that the penalties provided for in the WHS Act should be the minimum penalties imposed for a breach of the offence, and early plea discounts should be removed.

[1962] NRWC, Submission No 29 (3 March 2026) 8–9; AMIEU, Submission No 56 (4 March 2026) 6 [42]; CPSU (PSU Group), Submission No 79 (6 March 2026) 9–10; UWU, Submission No 62 (6 March 2026) 16; ACTU, Submission No 67 (6 March 2026) 41–3.
[1963] ACTU, Submission No 67 (6 March 2026) 42.
[1964] Ibid; UWU, Submission No 62 (6 March 2026) 16.
[1965] HIA, Submission No 20 (2 March 2026) 21.
[1966] Ibid; HIA, Submission on Draft Report No 11 (29 May 2026) 7.
[1967] HIA, Submission No 20 (2 March 2026) 21.
[1968] Ibid; HIA, Submission on Draft Report No 11 (29 May 2026) 7.

Feedback on the Draft Report

ACCI, the UWU and the ACTU[1969] supported the Review's draft recommendation to establish an evaluative framework to better determine the impact of the industrial manslaughter offence on deterrence, workplace safety culture and the prevention of workplace fatalities.[1970] The UWU noted that union involvement in the establishment of the framework will be critical and argued that the recommendation should be amended to reflect this consultation requirement.[1971]

Employer group feedback of the draft recommendation was mixed. ACCI agreed with the finding in the Draft Report that there is limited data regarding the operation of the offence in the Commonwealth jurisdiction, and no established evidence base as to its effectiveness in driving deterrence or broader safety outcomes. ACCI submitted that it 'particularly supports the development of an evaluative framework given ongoing discussions regarding the potential harmonisation of industrial manslaughter provisions across jurisdictions.'[1972] HIA submitted that conclusive data is needed to support the effectiveness of existing industrial manslaughter penalties in reducing workplace fatalities and improving workplace health and safety, as well as the need for proportionality in their application.[1973] COSBOA submitted that while it did not oppose the policy intent behind the industrial manslaughter provisions, it expressed concern about the proportionate application of these provisions to small businesses, where the PCBU is often personally exposed.[1974]

SWA highlighted the potential for the proposed evaluation framework's scope to be extended nationally, as industrial manslaughter provisions are a harmonised aspect of the model WHS laws.[1975] SWA noted that there may be an opportunity for it to contribute to the development of the evaluation framework, including by supporting data collection and reporting activities, as it collects and publishes national work-related fatalities data, including Commonwealth fatalities data, and a range of other information about regulatory enforcement including prosecution data across jurisdictions.[1976]

Analysis

Stakeholders did not provide evidence of any unintended consequences associated with the introduction of industrial manslaughter within the Commonwealth jurisdiction. There is nothing to suggest that amendments to the provisions are required, other than to note that the penalty for industrial manslaughter should be indexed (see Section 5.2 for further discussion and recommendation).

[1969] ACTU, Submission on Draft Report No 33 (29 May 2026) 30; UWU, Submission on Draft Report No 20 (29 May 2026) 10; ACCI, Submission on Draft Report No 46 (1 June 2026) 40 [261]–[264].
[1970] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report* – May 2026 (15 May 2026) 318 [Draft Recommendation 37].
[1971] UWU, Submission on Draft Report No 20 (29 May 2026) 10.
[1972] ACCI, Submission on Draft Report No 46 (1 June 2026) 40 [263].
[1973] HIA, Submission on Draft Report No 11 (29 May 2026) 7.
[1974] COSBOA, Submission on Draft Report No 7 (29 March 2026) 8.
[1975] SWA, Submission on Draft Report No 48 (28 May 2026) 1–2.
[1976] Ibid.

The measure ultimately had 2 thematic aims:

- ensure the most egregious breaches involving workplace fatalities were appropriately prosecuted, and
- deter non-compliance with WHS laws or, put another way, improve safety culture within PCBUs.

In 2024, there were 188 workers who died from traumatic injuries while working.[1977] This was a decrease from 200 worker fatalities in 2023.[1978] The data does not specify the number of fatalities in the Commonwealth jurisdiction. Since commencement, there have been no prosecutions in the Commonwealth jurisdiction.

The data and lack of Commonwealth prosecutions constrain the Review's ability to draw any conclusions about the offence's operation within the Commonwealth WHS framework, however, the industrial manslaughter provisions across jurisdictions are largely harmonised.[1979] The prosecutions in other jurisdictions provide some assurance that the provisions within the WHS Act can support prosecutions of industrial manslaughter. For example, Queensland has recorded successful prosecutions of industrial manslaughter offences since commencement in 2017.[1980] In *R v Brisbane Auto Recycling Pty Ltd & Ors* [2020] QDC 113, in which the company was fined $3 million for a fatal crush incident, the court stated that a 'lesser penalty would not adequately punish Brisbane Auto Recycling Pty Ltd or serve to adequately deter others'.[1981] In *R v Jeffrey Owen* [2022] QDCSR 168, which involved a fatality arising from unsafe forklift unloading of heavy equipment, the PCBU received a custodial sentence (5 years, suspended after 18 months), with sentencing noting the importance of denunciation and general deterrence in circumstances of grossly unsafe practice resulting in death.[1982]

The absence of a prosecution and decrease in fatalities could indicate that safety culture has improved, and the laws (in combination with other state and territory laws) have had a deterrent effect. It could also reflect the fact that the Commonwealth is a small jurisdiction[1983] and workplace fatalities are infrequent events. Although anecdotal evidence from the regulator suggests that it is influencing safety culture, there is no strong evidence to confirm this, but equally there is no evidence to the contrary. Other than the data available on workplace fatalities generally and SWA's submission highlighting that it monitors prosecutions, it is unclear if SWA or regulators are collecting data or monitoring whether industrial manslaughter (or other laws intending to affect safety culture through deterrence) is having a deterrent effect.

[1977] SWA, *Key Work Health and Safety Statistics Australia* (2025).
[1978] SWA, *Key Work Health and Safety Statistics Australia* (2024).
[1979] See, for example, Part 2A of the *Work Health and Safety Act 2011* (Qld), which provides for the Queensland industrial manslaughter offence.
[1980] For example, *R v Brisbane Auto Recycling Pty Ltd & Ors* [2020] QDC 113; *R v Jeffrey Owen* [2022] QDCSR 168.
[1981] *R v Brisbane Auto Recycling Pty Ltd & Ors* [2020] QDC 113, [132].
[1982] Transcript of Proceedings, *R v Jeffrey Owen* (District Court of Queensland, Cash J, 25 March 2022) 3, 20–35.
[1983] The Commonwealth jurisdiction is largely limited to the Commonwealth itself and certain self-insured licensees (e.g. Cleanaway, Commonwealth Bank, Startrack and John Holland), see Safety, Rehabilitation and Compensation Commission (Cth) 'List of current and former self-insured licensees' (Web Page, 11 August 2025) <https://www.srcc.gov.au/current-self-insurers/list-of-current-and-former-self-insurers>.

The Commonwealth should seek to establish an evaluative framework to better determine the impact of this measure on deterrence, workplace safety culture and the prevention of workplace fatalities. Linking into existing data collection methods and identifying other indicators of safety culture or effects of deterrence could assist further assessments of success and the necessity of further reform.

This Review is tasked with considering the Commonwealth WHS law amendments. The Commonwealth WHS jurisdiction is small and distinct, encompassing the Defence Force, policing agencies, and other large complex organisations. In this context there would be benefit in developing an evaluative framework specific to this jurisdiction. The Commonwealth would benefit from tripartite consultation with SWA in developing this work.

Although it is beyond the remit of this Review, there may be benefit in government considering whether there is broader value in evaluative frameworks for other deterrence/safety culture related laws beyond the Closing Loopholes amendments.

Findings and recommendations

Although anecdotal evidence from the regulator suggests that the measure is having a deterrent effect and positively influencing safety culture, there is currently no evidence base to confirm this at this stage.

Recommendation 36

The Commonwealth should establish an evaluative framework to better determine the impact of the industrial manslaughter offence on deterrence, workplace safety culture and the prevention of workplace fatalities in its jurisdiction, and consult with Safe Work Australia's tripartite membership to inform this work.

5.2 Increased penalties and indexation mechanism

What the measure does

The Closing Loopholes No. 1 Act amended the WHS Act to increase criminal and civil WHS penalties consistent with the model WHS laws and established an indexation mechanism for those penalties.

The measure commenced on 15 December 2023.[1984]

Penalties

The Closing Loopholes No. 1 Act amended the WHS Act to provide for 3 tiers of penalties:

- Categories 1 to 3 (criminal; see Table 14)[1985]
- Tiers A to I (criminal; see Table 15)[1986]
- WHS civil penalty tiers 1 to 4 (civil; see Table 16)[1987]

It also increased the penalty amounts for existing offences under the WHS Act by 39.03%, reflecting the average increase in penalty units for non-WHS offences across all jurisdictions since the WHS Act penalties were introduced in 2011.[1988]

Penalties in the WHS Act are largely criminal. Excluding industrial manslaughter, categories 1 to 3 attract the most significant penalties as they penalise a breach of a health and safety duty. Category 1 offences relate to negligent or reckless conduct that exposes an individual to a risk of death or serious injury or illness,[1989] Category 2 offences relate to a failure to comply with health and safety duty that exposes an individual to a risk of death or serious illness[1990] and Category 3 offences relate only to a failure to comply with a health and safety duty.[1991] Tiers A to I cover all other WHS-related offences under the WHS Act[1992] and reflect a variety of penalty amounts commensurate with the significance of a breach.[1993]

[1984] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2(1) item 28.
[1985] *Work Health and Safety Act 2011* (Cth) ss 31–33.
[1986] Ibid sch 4 cl 2.
[1987] Ibid sch 4 cl 3.
[1988] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 322 [1961].
[1989] *Work Health and Safety Act 2011* (Cth) s 31.
[1990] Ibid s 32.
[1991] Ibid s 33.
[1992] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 322–3 [1965].
[1993] For instance, failure to comply with a prohibition notice attracts an A Tier penalty (s 197), failure to consult, so far as is reasonably practicable, with workers who are or are likely to be directly affected by a WHS matter is a Tier C penalty (s 47(1)), failure to notify the regulator of a notifiable incident immediately after becoming aware that the incident arose from conduct of the PCBU is a Tier D penalty (s 38(1)) and failure to maintain a list of health and safety representatives for each work group of workers and ensuring it is displayed in a way that is accessible to workers is a Tier H penalty (s 74(1)).

Although most increases reflected the model law penalty rates, the measure increased the penalty for a Category 1 offence (negligence or reckless conduct) to a higher amount than the model WHS laws rate[1994] to better align it with the penalties for the industrial manslaughter offence (see Section 5.1).

Table 14: Category 1 to 3 (criminal)

Category [1995]	Individual who commits an offence as a PCBU or an officer of a PCBU	An individual who commits an offence	A body corporate
Category 1	$3,000,000	$1,500,000	$15,000,000
Category 2	$418,000	$209,000	$2,090,000
Category 3	$140,000	$70,000	$700,000

Table 15: Tiers A to I (criminal)

Tier[1996]	An individual who commits an offence	A body corporate
Tier A	$139,000	$695,000
Tier B	$70,000	$350,000
Tier C	$28,000	$140,000
Tier D	$14,000	$70,000
Tier E	$8,400	$42,000
Tier F	$7,000	$35,000
Tier G	$5,000	$25,000
Tier H	$2,800	$14,000
Tier I	$1,700	$8,500

Civil penalties apply to certain breaches of obligations under the WHS Act (e.g. non-compliance with WHS entry permit provisions). These breaches fall under the WHS civil penalty tiers 1 to 4.[1997]

[1994] *Work Health and Safety Act 2011* (Cth) sch 4 cl 1. Under the model WHS Act, the maximum penalty for an individual as a PCBU or an officer of a PCBU is $2,085,000, the maximum penalty for an individual otherwise is $1,042,000 and the maximum penalty for a body corporate is $10,425,000.
[1995] *Work Health and Safety Act 2011* (Cth) sch 4 cl 1.
[1996] Ibid sch 4 cl 2.
[1997] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 322–3 [1965].

Table 16: Tiers 1 to 4 (civil)

WHS civil penalty tier[1998]	An individual who commits an offence	A body corporate
Tier 1 – Civil Penalty	$28,000	$140,000
Tier 2 – Civil Penalty	$14,000	$70,000
Tier 3 – Civil Penalty	$7,000	$35,000
Tier 4 – Civil Penalty	$2,800	$14,000

Indexation

The Closing Loopholes No. 1 Act introduced an indexation mechanism to allow the penalty amounts set for the 3 types of penalties to be indexed for the year commencing 1 July 2024 and every year thereafter, in line with the national consumer price index (**CPI**).[1999] The indexation mechanism does not apply to the penalty for the new industrial manslaughter offence (see Section 5.1), which is set under section 30A of the WHS Act and does not fall into one of the 3 penalty types.

The regulator, Comcare, is required to make a notifiable instrument each year giving notice of the indexed penalty amounts, as soon as practicable following the publication of the March quarter CPI data.[2000]

Intention of the measure

The Closing Loopholes No. 1 Act provided an opportunity for the government to implement the model WHS laws to ensure appropriate sanctions were in place for breaches of WHS laws. Penalties, which had remained unchanged since their introduction in 2011, were amended in the model WHS laws, and gave effect to recommendation 22 of the Boland Review:

- *amend the penalty levels in the model WHS Act to reflect increases in consumer price index and in the value of penalty units in participating jurisdictions since 2011, and*
- *review the increased penalty levels as part of future reviews of the model WHS Act and model WHS Regulations to ensure they remain effective and appropriate.*[2001]

In line with the Commonwealth's commitment to harmonise its WHS laws with model WHS laws, the government reflected those amendments in its WHS Act.[2002]

[1998] *Work Health and Safety Act 2011* (Cth) sch 4 cl 3.
[1999] Ibid sch 4 cl 4. Note if the amount of a penalty calculated for a year is less than the amount applied in the previous year, then the amount for the previous year continues to apply.
[2000] Ibid sch 4 cl 6.
[2001] Marie Boland, *Review of the Model Work Health and Safety Laws – Final Report* (Report, December 2018) 117.
[2002] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 322 [1960].

The penalty and indexation amendments also sought to strengthen the offences in the WHS Act, 'providing greater deterrence for poor safety management in workplaces and non-compliance with the WHS Act.[2003]

Regarding the increase in penalties for Category 1 offences, the departure from the model WHS Act was made to ensure the coherence of the Commonwealth WHS offence penalty scheme.[2004] As workplace fatalities can be prosecuted either under the industrial manslaughter offence, or as a Category 1 offence, it was appropriate to align Category 1 penalties with the penalties for the industrial manslaughter offence.[2005] The change sought to ensure the penalty is sufficient to deter and punish the most egregious breaches[2006] and address community concern that the most serious breaches causing workplace fatalities should carry tougher penalties.[2007]

The purpose of introducing an indexation mechanism was to ensure penalties remain effective and maintain their real value over time.[2008]

What has happened since commencement

The Review is not aware of any significant decisions or other developments related to this measure, but notes generally the Best Practice Review of the model WHS Act and Regulations currently being undertaken by SWA.

In accordance with legislative requirements, Comcare has issued an annual instrument, with the first instrument commencing on 1 July 2024 providing for the updated penalties for the WHS Act.[2009]

As at 15 June 2026, the penalty amounts are set out in the *Work Health and Safety (Public Notification of Indexed Penalty Amounts) Notifiable Instrument 2025* (Cth).

What the Review heard

The Review received 5 submissions that addressed this measure, one of which was private. A further 3 submissions on the Draft Report addressed this measure.

The ACTU, UWU, and CPSU (PSU Group) expressed support for the measure.[2010] The ACTU submitted that strong criminal penalties are essential for deterrence, and indexation is crucial for ensuring that

[2003] Ibid 26 [137], 27 [140].
[2004] Ibid 322 [1962].
[2005] Ibid 322 [1962].
[2006] Ibid 323 [1970].
[2007] Ibid 307 [1889].
[2008] Ibid 26 [139], 322 [1960].
[2009] See *Work Health and Safety (Public Notification of Indexed Penalty Amounts) Notifiable Instrument 2024* (Cth) s 2; *Work Health and Safety (Public Notification of Indexed Penalty Amounts) Notifiable Instrument 2025* (Cth).
[2010] ACTU, Submission No 67 (6 March 2026) 43; UWU, Submission No 62 (6 March 2026) 16; CPSU (PSU Group), Submission No 79 (6 March 2026) 9–10.

penalties preserve their real value over time and were not rendered an ineffective regulatory tool by inflation.[2011] The ACTU submitted that:

> *meaningful penalties are essential to ensuring that breaches of work health and safety laws are treated with the seriousness they warrant, particularly where conduct exposes workers to the risk of death or serious injury…Together, increased and indexed penalties reinforce the primacy of worker health and safety, promote compliance, and support a culture in which preventing harm is a core legal and moral obligation of employers.*[2012]

HIA submitted that it opposed the increases to WHS-related penalties, and that the five-fold increase to the Category 1 offence was not supported by evidence that higher penalties were effective for decreasing safety incidents. It questioned generally whether data was available to demonstrate that higher penalties improved compliance and decreased critical safety incidents.[2013]

COSBOA noted that it does not object to the policy intent of the WHS penalty increases. However, it expressed concern about the 'proportionate application' of the measure and other workplace safety measures addressed in Chapter 5, noting that in small businesses PCBUs are often personally exposed.[2014]

Feedback on draft recommendations

The ACTU, UWU and CFW supported[2015] the Review's draft recommendation to amend the WHS Act to address the non-indexation of the financial penalty for industrial manslaughter.[2016]

ACCI opposed this draft recommendation on the basis that it does not accept that further penalty increases are necessary to safeguard the effectiveness of the WHS framework.[2017] ACCI submitted that effective compliance is more appropriately facilitated through 'clarity, guidance and a regulatory framework that is proportionate and capable of being applied with certainty.'[2018] ACCI argued that the limited data and lack of prosecutions for industrial manslaughter in the Commonwealth jurisdiction means that it would be premature to apply indexation to the penalty and increase the penalty commensurably. It also submitted that, in the context of this limited data, the draft recommendation to extend the indexation mechanism to the Commonwealth industrial manslaughter offence[2019] appeared to be inconsistent with the approach taken in draft recommendation 37[2020] of the Draft Report to establish

[2011] ACTU, Submission No 67 (6 March 2026) 43.
[2012] Ibid.
[2013] HIA, Submission No 20 (2 March 2026) 22.
[2014] COSBOA, Submission on Draft Report No 7 (29 May 2026) 8 [39].
[2015] ACTU, Submission on Draft Report No 33 (29 May 2026) 30–1; UWU, Submission on Draft Report No 20 (29 May 2026) 10; CFW, Submission on Draft Report No 41 (29 May 2026) 1.
[2016] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 324 [Draft Recommendation 38].
[2017] ACCI, Submission on Draft Report No 46 (1 June 2026) 40 [265]–[266]; Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 324 [Draft Recommendation 38].
[2018] ACCI, Submission on Draft Report No 46 (1 June 2026) 41 [269].
[2019] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 324 [Draft Recommendation 38].
[2020] Ibid 318 [Draft Recommendation 37].

an evaluative framework to better determine the impact of the offence on deterrence, workplace safety culture and prevention of workplace fatalities.[2021]

Analysis

The submissions did not provide any evidence of negative effects of the measure, nor any unintended consequences associated with the penalty amounts or provide a rationale to counter the importance of aligning the penalties in the Commonwealth WHS laws with the model WHS laws.

The exclusion of industrial manslaughter penalties from the indexation mechanism appears to be an oversight and there are no explanatory materials to suggest otherwise. Its exclusion is inconsistent with the aim of ensuring penalties maintain their real value and act as a deterrent. Parliament intended for there to be significant alignment between industrial manslaughter and Category 1 offences, because workplace fatalities could be prosecuted under either offence.[2022]

The inconsistency created by Category 1 offence penalties being subject to indexation while the industrial manslaughter penalty is not, should be addressed. A failure to ensure industrial manslaughter is indexed would have the unintended consequence that a Category 1 offence will soon have a higher monetary penalty than the more egregious industrial manslaughter offence.[2023]

Findings and recommendations

Industrial manslaughter penalties should be indexed to ensure the penalty framework remains an adequate reflection of the seriousness of the offence.

Recommendation 37

The *Work Health and Safety Act 2011* should be amended to:

a. extend the penalty indexation mechanism introduced by the Closing Loopholes No. 1 Act to include the financial penalty for the industrial manslaughter offence, and

b. increase the financial penalty for industrial manslaughter to ensure it is set at the rate it would have been, had indexation applied from commencement.

[2021] ACCI, Submission on Draft Report No 46 (1 June 2026) 40–1 [267]–[268].
[2022] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 322 [1962].
[2023] As at the date of this report, the industrial manslaughter penalty for a body corporate is $18,000,000 and the Category 1 penalty for a body corporate is $17,034,000. See s 30A(1) of the *Work Health and Safety Act 2011* (Cth) and sch 1, table 1 item 1 of *Work Health and Safety (Public Notification of Indexed Penalty Amounts) Notifiable Instrument 2025* (Cth).

5.3 Criminal liability for bodies corporate, public authorities and the Commonwealth and other matters

What the measure does

Closing Loopholes No.1 Act amended the WHS Act to strengthen and modernise the framework for attributing criminal liability, and clarified the criminal liability of officers under a Category 1 offence.[2024] The corporate criminal responsibility amendments align the Commonwealth WHS regime with recent changes to the model WHS laws and reflect contemporary principles of corporate criminal responsibility.

Prior to the amendments, corporate criminal responsibility for WHS offences was determined by the Criminal Code.[2025] The measure disapplied the Criminal Code[2026] and established a WHS-specific framework for attributing criminal responsibility to bodies corporate, public authorities and the Commonwealth for breaches of WHS duties.

The measure commenced on 15 December 2023.[2027]

Bodies corporate

The measure amended the WHS Act to set out how the physical and fault elements of an offence may be attributed to a body corporate.[2028]

The physical element of an offence is taken to have been committed by a body corporate where the conduct is engaged in by:

- the board of directors (the body, whatever it is called, exercising the executive authority of the body corporate)[2029]
- an authorised person (an officer, employee or agent acting within their actual or apparent authority),[2030] or
- persons acting at the direction of the board of directors or authorised person.[2031]

[2024] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 4 pt 3.
[2025] *Criminal Code Act 1995* (Cth) pt 2.5.
[2026] *Work Health and Safety Act 2011* (Cth) s 12F(4).
[2027] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2(1) item 28.
[2028] *Work Health and Safety Act 2011* (Cth) ss 244–244E.
[2029] Ibid ss 244, 244A(a).
[2030] Ibid ss 244, 244A(b).
[2031] Ibid s 244A(c).

For fault elements other than negligence, a body corporate will be taken to have the relevant state of mind if the conduct was authorised (expressly or impliedly) by the board or an authorised person, or if a corporate culture existed that directed, encouraged, tolerated or led to the contravention.[2032] Factors relevant to showing the existence of corporate culture include whether authority or permission to engage in similar conduct has been given previously by a corporate officer,[2033] or whether the person who engaged in the relevant conduct reasonably believed or expected it would have been authorised or permitted by a corporate officer.[2034]

For negligence, the amendments adopt the negligence test set out in section 5.5 of the Criminal Code[2035] and permit negligence to be attributed to a body corporate by aggregating the conduct of multiple employees, agents or officers.[2036] Negligence may also be established where the conduct was substantially attributable to inadequate management, supervision or control, or a failure to provide adequate systems for conveying relevant information.[2037]

The Commonwealth and public authorities

The measure replaced the previous criminal liability provisions for the Commonwealth with a new framework modelled off the corporate criminal responsibility for bodies corporate, with modifications to reflect the structure and nature of the Commonwealth.[2038]

The physical element of an offence is taken to have been committed by the Commonwealth where the conduct is engaged in by:

- an executive of an agency of the Commonwealth (the person or body, whatever the person or body is called, exercising the executive authority of the agency)[2039]
- an authorised person (an officer, employee or agent of the Commonwealth acting within the officer's, employee's or agent's actual or apparent authority),[2040] or
- persons acting at the direction of the executive or authorised person.[2041]

[2032] Ibid s 244B.
[2033] Ibid s 244B(4), meaning, of a body corporate, an officer of the body corporate within the meaning of s 9 of the *Corporations Act 2001* (Cth).
[2034] *Work Health and Safety Act 2011* (Cth) s 244B(3).
[2035] Ibid s 244BA(1).
[2036] Ibid s 244BA(2).
[2037] Ibid s 244BA(3).
[2038] Ibid ss 245–245E.
[2039] Ibid ss 245, 245A(a).
[2040] Ibid ss 245, 245A(b).
[2041] Ibid s 245A(c).

For fault elements other than negligence, the Commonwealth will be taken to have the relevant state of mind if the conduct was authorised (expressly or impliedly) by an executive, an authorised person, or if a corporate culture existed that directed, encouraged, tolerated or led to the contravention.[2042] Factors relevant to showing the existence of corporate culture include whether authority or permission to engage in similar conduct have been given previously by an officer of the agency,[2043] or whether the person who engaged in the relevant conduct reasonably believed or expected it would have been authorised or permitted by an officer of the agency.[2044] Amendments made relating to negligence of bodies corporate are duplicated for the Commonwealth with appropriate adaptions.[2045]

The amendments also provide that criminal liability for a public authority is attributed in the same manner as for other bodies corporate.[2046]

Defences

The amendments preserve specific defences that apply in certain circumstances, including where the duty-holder can demonstrate that reasonable precautions were taken to prevent the conduct,[2047] or that the offence arose from a reasonable mistake of fact coupled with appropriate preventative systems.[2048]

Category 1 offence

The measure amends the Category 1 offence provision to clarify that an officer of a PCBU commits a Category 1 offence where their conduct, without reasonable excuse, is negligent or is reckless and exposes an individual to whom the PCBU owes a WHS duty to a risk of death, serious injury or illness.[2049]

Intention of the measure

The measure intended to support attribution of criminal liability to the Commonwealth and bodies corporate. The Commonwealth as a PCBU undertakes its work and activities through agencies. Without these provisions, the prosecution of the Commonwealth as a large, dispersed entity would be very difficult.[2050]

[2042] Ibid s 245B.
[2043] Ibid s 245, meaning a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of the agency.
[2044] Ibid s 245B(3).
[2045] Ibid s 245BA.
[2046] Ibid s 251.
[2047] Ibid ss 244B(2), 245B(2).
[2048] Ibid ss 244C, 245C.
[2049] Ibid s 31(1).
[2050] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 319 [1947].

The amendments reflect the Commonwealth's commitment to implement recent model WHS law changes into legislation covering the Commonwealth jurisdiction.[2051] The model law amendments were based on Part 2.5 of the Criminal Code with modifications to reflect recommendations of the Australian Law Reform Commission's *Corporate Criminal Responsibility Final Report* (**ALRC Report**), tabled in Parliament on 31 August 2020.[2052] The ALRC Report identified that existing attribution frameworks did not adequately reflect organisational blameworthiness or contemporary corporate structures, and supported aggregation concepts to address situations where decisions and implementation are dispersed across organisational hierarchies.[2053] Central to its recommendations was the expansion of attribution beyond senior officers, the aggregation of conduct and states of mind across individuals, and the recognition of corporate culture as a basis for criminal responsibility.[2054]

What has happened since commencement

The Review is not aware of any significant cases where the corporate criminal liability provisions have been in issue within the Commonwealth jurisdiction, or in any other jurisdiction which has implemented the model laws.

What the Review heard

Stakeholder engagement on the measure was limited, with 3 submissions received (one of which was private). The Review received no feedback on its consideration of the measure in the Draft Report.

The ACTU supported the measure and commented that it provides greater clarity and certainty about liability for serious WHS breaches.[2055] It submitted that clear criminal responsibility is critical to effective enforcement and accountability and ensures that those with genuine control over workplace safety cannot avoid responsibility through legal or corporate technicalities.[2056] The UWU submitted that the measure has limited application as it applies only to the Commonwealth public sector.[2057]

Analysis

The criminal liability provisions strengthen and modernise the Commonwealth WHS regime by embedding a clearer attribution framework for bodies corporate, public authorities and the Commonwealth. It provides for liability aggregation that better reflects contemporary organisational decision-making and dispersed responsibility. The measure helps reduce opportunities by bodies corporate and the Commonwealth to avoid liability through delegation or fragmentation of responsibility.

[2051] Ibid 11 [45].
[2052] Ibid 314 [1926].
[2053] Australian Law Reform Commission, *Corporate Criminal Responsibility – Final Report* (Report, April 2020) 231 [6.44].
[2054] Ibid 227–31 [6.36]–[6.46].
[2055] ACTU, Submission No 67 (6 March 2026) 43.
[2056] Ibid.
[2057] UWU, Submission No 62 (6 March 2026) 16.

Stakeholders have not identified any concerns with the measure's operation or effectiveness, and have not identified any unintended consequences. The Review is not aware of any relevant matters where the criminal liability provisions in the Commonwealth, or any other jurisdiction which has adopted the provisions, have been the subject of consideration. There is nothing to suggest the provisions are not operating to strengthen the WHS offences and penalties framework, as intended.

The Review notes that the Closing Loopholes No.1 Act introduced different tests for establishing corporate criminal liability under the wage theft offence and under the WHS Act. The wage theft offence applies 'Part 2.5—Corporate criminal responsibility' of the Criminal Code to establish corporate criminal liability (see Section 4.1),[2058] whereas corporate criminal liability under the WHS Act, is based on Part 2.5 of the Criminal Code but has been modified to include a definition of 'authorised person' which allows for the conduct of officers, employees and agents acting within their actual or apparent authority to be attributed to a body corporate.[2059] This is broader than the approach under Part 2.5 of the Criminal Code which provides for attribution of the actions of 'high managerial agents' to a body corporate. A 'high managerial agent' is a senior person within an organisation whose conduct could be fairly assumed to represent the body corporate's policy.[2060]

Findings and recommendations

The amendments have been operating appropriately and effectively to date, and no unintended consequences have been identified.

[2058] *Fair Work Act 2009* (Cth) s 793.
[2059] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 314 [1926].
[2060] Ibid.

5.4 Establishment of the Family and Injured Workers Advisory Committee

What the measure does

The Closing Loopholes No. 1 Act provided for the establishment of the Advisory Committee within 12 months from commencement of the relevant Part of the Act, to provide bereaved families and seriously injured workers and their families with a forum to advise on the needs of people affected by serious work-related incidents, like industrial deaths or a serious injury or illness.[2061]

The Advisory Committee is able to:

- give advice and make recommendations to the Minister administering the WHS Act about the needs of persons affected by serious work-related incidents,[2062] and
- give advice about, and contribute to, the development and review of Comcare, Australian Maritime Safety Authority (**AMSA**) and National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) policies, practices and strategies for liaising with, and providing information to, persons affected by serious work-related incidents.[2063]

The Advisory Committee is required to have a minimum of 5 members comprising 2 co-chairs and at least 3 other members.[2064] The first co-chair and the remaining 3 members must have lived experience as:

- a person who has, or has had, a serious injury or illness that arose out of the conduct of a business or undertaking
- a family member or carer of a person who has died or been seriously injured as a result of the conduct of a business or undertaking, or
- a person affected, directly or indirectly, by a serious work-related incident suffered by another person.[2065]

The second co-chair is not required to have lived experience but is required to have experience relating to trauma and group facilitation.[2066] If the Minister appoints more than the minimum number of members, they may also appoint a person with relevant skills and experience in relation to trauma and grief.[2067]

[2061] *Work Health and Safety Act 2011* (Cth) sch 2 cl 3B.
[2062] Ibid sch 2 cl 3C(a).
[2063] Ibid sch 2 cl 3C(b)–(d).
[2064] Ibid sch 2 cl 3D.
[2065] Ibid sch 2 cl 3E(5).
[2066] Ibid sch 2 cl 3E(5)–(6).
[2067] Ibid sch 2 cl 3E(7).

This measure also provides for:

- Remuneration, allowances, resignation and termination of members, and non-member involvement in meetings.[2068]
- Obligations for members to disclose any interests that conflict or could conflict with the proper performance of their functions.[2069]
- Regulations to be made to, among other things, provide additional functions for the Advisory Committee and set meeting procedures.[2070]

On behalf of the Secretary of DEWR, the department ensures the committee has the administrative and other support necessary to perform its functions efficiently and effectively.[2071]

The measure commenced on 15 December 2023.[2072]

DEWR funding

DEWR received $1.5 million over 4 years in the 2024–25 Budget and ongoing funding of $0.37 million to cover remuneration of Advisory Committee members, travel costs, secretariat support, and project expenses.[2073] Members are entitled to daily fees and travel allowance under the *Remuneration Tribunal (Remuneration and Allowances for Holders of Part time Public Office) Determination 2025* (Cth) and *Remuneration Tribunal (Official Travel) Determination 2025* (Cth).

Intention of the measure

The establishment of the Advisory Committee implemented recommendations from the Industrial Deaths Senate Inquiry[2074] and is consistent with the SWA *National Principles to support families following an industrial death*.[2075]

It was intended that the Advisory Committee would provide a representative forum for people with lived experience of serious work-related incidents to share their perspectives, give advice and make recommendations to the Minister about the needs of persons affected by workplace incidents involving

[2068] Ibid sch 2 ss 3F–3J, 3M–3N.
[2069] Ibid sch 2 ss 3K–3L.
[2070] Ibid sch 2 s 3Q.
[2071] Ibid sch 2 s 3R.
[2072] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2(1) item 30.
[2073] DEWR, *Portfolio Budget Statements 2024–25 Budget Related Paper No. 1.6 Employment and Workplace Relations Portfolio* (Budget 2024–25 Portfolio Budget Statement, 14 May 2024) 18.
[2074] Senate Education and Employment References Committee, Parliament of Australia, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* (Report, October 2018).
[2075] SWA (Cth), *National Principles to support families following an industrial death* (Resource, 21 May 2021).

death, serious injury or illness. Advice to regulators would be about their engagement with persons and families affected by serious work-related incidents, and the development of relevant policies and strategies.[2076]

Other states and territories, including Queensland[2077] and Victoria,[2078] have similarly constituted bodies. The Review understands that consideration was given to the other state and territory bodies and their operation in the development and make-up of the Advisory Committee.

What has happened since commencement

The Advisory Committee was established on 29 November 2024 with the appointment of 2 co-chairs and 4 members. This met the legislative requirement for establishment of the committee within 12 months of commencement of the legislation.

At the date of this report, the committee currently has 3 members, including the second co-chair. DEWR has indicated that 2 members and the first co-chair resigned from the Advisory Committee effective 7 August 2025, 21 December 2025 and 27 March 2026. A process to identify potential new members is currently under consideration.

In its first year of operation, the Advisory Committee has finalised Terms of Reference to support its governance arrangements,[2079] has commenced development of its first workplan for the 2025–26 financial year, participated in consultation for SWA's Best Practice Review of the model WHS laws, and made a submission to the independent review of the *Safety, Rehabilitation and Compensation Act 1988* (the **SRC Act Review**).[2080]

The Advisory Committee's Terms of Reference include additional guidance on the role of the committee and clarify that it has no role in directing the government or regulators, advising on individual matters or advising on broader WHS or industrial relations policy. The Terms of Reference also provide that meetings will be held a minimum of 4 times per year, outline quorum requirements (noting particularly that both co-chairs and at least half the other committee members must be in attendance), and that the Advisory Committee will develop its annual forward workplan each financial year.

[2076] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 330 [2006].
[2077] Work Safe (Qld), 'Consultative Committee for Work-Related Fatalities and Serious Incidents' (Web Page, 26 September 2023) <https://www.worksafe.qld.gov.au/about/who-we-are/workplace-health-and-safety-queensland/work-health-and-safety-board-and-committees/consultative-committee-for-work-related-fatalities-and-serious-incidents-members>.
[2078] Department of Treasury and Finance (Vic), 'Workplace Incidents Consultative Committee' (Web Page, 13 April 2026) <https://www.dtf.vic.gov.au/workplace-incidents-consultative-committee>.
[2079] DEWR, 'Terms of Reference – Family and Injured Workers Advisory Committee', (Web page, 5 September 2025) <https://www.dewr.gov.au/work-health-and-safety/resources/terms-reference-family-and-injured-workers-advisory-committee>.
[2080] Family and Injured Workers Advisory Committee, Submission, *Review of the Safety, Rehabilitation and Compensation Act 1988* (17 April 2025).

DEWR provides secretariat support to the Advisory Committee. The secretariat has experience in trauma-informed facilitation and support. As set out in the committee's Terms of Reference, the secretariat's responsibilities include:

- Supporting the co-chairs to give effect to their roles, including supporting the management of governance and legal matters and training needs.
- Assisting the Advisory Committee to manage its budget.
- Settling meeting agendas in consultation with the co-chairs.
- Drafting meeting papers, minutes and inviting guests on behalf of the Advisory Committee.
- Managing meeting logistics, including travel for members and venue arrangements.
- Taking minutes and performing other administrative tasks.
- Liaising with the Minister's office, Commonwealth regulators and other interested parties on behalf of the Advisory Committee.
- Supporting the management of the department's WHS obligations in relation to the Advisory Committee.

For the first year of the committee's operation, DEWR procured an independent psychology service to be available for private and confidential discussions with Advisory Committee members both before, during and after meetings. Committee members provided feedback that this in-person support was not required and, in consultation with members, was replaced by access to DEWR's Employee Assistance Program.

The Advisory Committee has established a code of conduct for itself, outlining the standards of behaviour expected of members, and completed a psychosocial risk assessment to identify hazards arising from the work and control measures to address those hazards. DEWR has provided the Advisory Committee with guidance on how to reflect trauma-informed practice in their work, and information about the operation of government, including how decisions are made.

Members agreed to undertake a 12-month review of the Terms of Reference, providing an opportunity for both the Advisory Committee and DEWR to formally evaluate the committee's operations. This is intended to occur once new appointments to the Advisory Committee have been made.

The Advisory Committee has met with the Minister but has not provided formal advice or recommendations. The Advisory Committee has not yet met or provided advice to Commonwealth regulators.

No regulations have been made to support the operation of the Advisory Committee.

What the Review heard

As part of consultations, the Review met with available Advisory Committee members to understand their views and experience, and government agencies (Comcare and SWA) that have engagement with the Advisory Committee. The Review also met with the DEWR secretariat.

The Review received 4 submissions that specifically raised this measure and 3 submissions on its consideration of the measure in the Draft Report.

Advisory Committee members

The Review met with the committee's co-chairs[2081] and one of the members. During the meeting, they conveyed views from another member who was unable to attend.

Members shared in that meeting that they considered the Advisory Committee necessary to enable them to advocate for policy reform to better support the needs of persons and families affected by serious workplace incidents. However, members also indicated that while they appreciated that the Advisory Committee was still in the development phase, it was not fully living up to their expectations for the advisory body. Members identified a number of challenges relating to their functions, operations, and membership which are summarised below.

Functions

Some members indicated disappointment and frustration that the committee's advisory function is limited to the Commonwealth jurisdiction although they did agree that a Commonwealth-specific committee is still necessary. Members emphasised that they saw value in a national body that could connect with equivalent committees in each jurisdiction to share ideas, align advocacy, and support a harmonised approach to affected persons and their needs.

Members provided different views on the scope of the Advisory Committee's functions. One member considered the functions are too broad and noted that providing advice to AMSA and NOPSEMA would be an overly significant undertaking. In contrast, another member considered that the functions are too limited, noting that specific projects to support families of workers who had died as a result of the conduct of a PCBU had fallen outside the committee's scope. One member suggested that the Advisory Committee's role regarding workers' compensation and rehabilitation needs clarification, as the establishing legislation is silent on these matters.

[2081] Since the time of meeting, one of the co-chairs has resigned.

Operations and governance

Some members indicated that the Advisory Committee operated with unnecessary formality, for example, in the development of its workplan, agendas, and minutes. Members' unfamiliarity with formal government meeting processes and terminology was highlighted and the support provided by the secretariat for members was appreciated. Advisory Committee members emphasised that, as they are selected based on lived experience rather than government or academic backgrounds, this could be better reflected in the committee's processes and governance materials.

Committee members suggested government should provide more support for research and preparatory work for meetings, as members are not always equipped to undertake those elements of the work. Members raised the frequency of meetings (4 times a year) was insufficient and suggested additional informal meetings between the formal sessions to assist them to fulfil the work plan. Members agreed the Advisory Committee's membership should be expanded to improve flexibility and ensure meetings can reliably reach quorum. One member noted the need for co-chair acting arrangements to ensure meetings can proceed when a co-chair is unexpectedly unavailable.

Membership

Members reflected on the inherent challenges of a lived-experience advisory body and its ability to fully reflect the experiences of families and injured workers. Contributions are often grounded in deeply personal experiences and can present psychosocial risks for both those sharing and those hearing traumatic information. Members emphasised that because the Advisory Committee must discuss members' experiences to identify improvements to systems and processes, members should have the capacity to participate safely.

Members also noted that the Advisory Committee's membership brings different interests and priorities. They highlighted that family members affected by a workplace death have different experiences of policies, systems and processes than those personally injured in, or caring for someone after, a serious work-related incident. This has led to challenges managing and supporting psychosocial risks and also impacted the ability to reach consensus on committee priorities and positions. It was suggested that subcommittees based on experience types could be established. However, members expressed mixed views on the value of subcommittees and whether they would add to workload concerns or resolve the identified challenges when the broader committee reconvened to endorse or approve a subcommittee's position.

Advisory Committee members suggested they could be involved or assist with future appointment processes to assess if prospective members are ready for involvement in the committee and supported a trial period to test suitability. Some also argued the Advisory Committee should consist solely of people with lived experience, noting that discussing reform should include only those with shared experiences, particularly because their experiences may have led them to mistrust government.

One member urged consideration of recommendations to improve the systems and processes impacting those with lived experience. They highlighted ongoing challenges with Commonwealth agencies meaningfully engaging with rehabilitation processes and warned that poor post-incident support can lead to significant secondary harm.

Safe Work Australia and Comcare

SWA observed that it was aware the Advisory Committee was still a relatively new committee, and its members had previously raised issues such as jurisdictional limits, uncertainty around coverage in workers' compensation matters, and inability to advocate for individuals. SWA observed that regulators have improved family and injured-worker engagement over the past decade through initiatives like family liaison officers. It observed challenges with understanding government constraints and suggested that the Advisory Committee's objectives could be reconsidered, including looking at greater investment in research and other engagement and support tools which might lead to practical outcomes for families.

Comcare noted that the Advisory Committee is still developing its role, membership, and ways of working. It highlighted risks common to lived-experience advisory bodies, including re-traumatisation and challenges for participants early in recovery, and suggested safeguards used in other advisory committees could be considered, such as minimum time-since-event requirements, real-time clinical support, and trauma-informed facilitation.

Submissions

Employee groups were supportive of the measure.[2082] The ACTU and CPSU (PSU Group) highlighted that the measure is an important mechanism to support workers and their families with experience of serious workplace injuries, illnesses or fatalities to provide advice to government, and essential to supporting improvements to the WHS framework.[2083]

HIA was not supportive of the measure. HIA acknowledged the value in structured consultation forums to improve safety but expressed concern that the body was duplicative of existing forums, such as existing tripartite systems where unions are represented[2084] and could be used to advance union or political agendas. HIA indicated the Terms of Reference should be more limited, to ensure that the Advisory Committee does not have a broader role on advocating for WHS policy. It recommended the Advisory Committee should have balanced representation of employer and employee groups.[2085]

[2082] ACTU, Submission No 67 (6 March 2026) 43–4; CPSU (PSU Group), Submission No 79 (6 March 2026) 9–10; UWU, Submission No 62 (6 March 2026) 16.
[2083] ACTU Submission No 67 (6 March 2026) 43–4; CPSU (PSU Group) Submission No 79 (6 March 2026) 9–10.
[2084] HIA, Submission No 20 (2 March 2026) 23.
[2085] Ibid 23–4.

Feedback on draft recommendations

The ACTU and the CPSU (PSU Group) were supportive[2086] of the draft recommendations.[2087] The CPSU noted that consideration of any changes to the Advisory Committee should be done in consultation with the Advisory Committee members.[2088] It also noted that the recommendations should be informed by trauma-informed professional guidance.[2089]

ACCI did not oppose the draft recommendations.[2090] It noted the absence of employer representation on the Advisory Committee and suggested that if the composition of the committee was reviewed, consideration should be given to employer representation as WHS matters operate in a tripartite system.[2091]

Analysis

The Advisory Committee is a commendable initiative and an important addition to the WHS landscape at the federal level to better understand the impact of workplace fatalities and injuries on individuals and families and ensure their experiences can inform policies and procedures that will affect others.

In 2024, there were 188 work-related fatalities in Australia.[2092] Since 2014, the national fatality rate has decreased by 24%, however it has remained relatively steady in recent years.[2093] While efforts continue to improve workplace safety, if fatality rates remain steady, approximately 188 families a year will engage with government and non-government stakeholders about a workplace fatality. In 2023–24, 146,700 serious claims for workers compensation were made, with a median time of 7.4 weeks of work lost.[2094] From the accounts of people with lived experience, engaging with government systems about a workplace fatality during a period of grief or seeking to lodge a workers compensation claim and undergo rehabilitation processes, can be confusing, challenging, upsetting and traumatic. By involving people with lived experience (and who have perspectives on the impact of regulators' systems, policies, and processes) advisory committees can help regulators improve their engagement with affected persons by considering and adopting appropriate suggestions.

The members of the Advisory Committee are passionate, invested and knowledgeable and have made contributions to the committee while it has been in its establishment phase. In its first 12 months of operation, the Advisory Committee has had significant establishment work to complete. The committee has also made submissions to the SRC Act Review, which involved sharing its perspectives, giving advice and making recommendations for the ultimate benefit of the government and the Australian community.

[2086] ACTU, Submission on Draft Report No 33 (29 May 2026) 32; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 10.
[2087] Susan Booth, *Closing Loopholes, an independent statutory review* – Draft Report – May 2026 (15 May 2026) 340 [Draft Recommendations 39–41].
[2088] CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 10.
[2089] Ibid.
[2090] ACCI, Submission on Draft Report No 46 (1 June 2026) 41–42 [271]–[277].
[2091] Ibid 41 [273].
[2092] SWA (Cth), 'Key Work Health and Safety Statistics Australia 2025' (Web Page, 16 October 2025) <https://data.safeworkaustralia.gov.au/insights/key-whs-statistics-australia/latest-release>.
[2093] Ibid.
[2094] Ibid.

The Advisory Committee has not yet provided advice to the regulators or the Minister, but it is not unusual for a new committee to take some time to finalise establishment processes. As it moves from its establishment phase, there will be a heightened need for the Advisory Committee to be able to deliver advice to government in accordance with its intended purpose. The Advisory Committee is now turning its focus to determining its core priorities, including what advice it wishes to provide to regulators and the Minister. Regulators and the government should also equally be turning their mind to considering how to proactively engage with the Advisory Committee, particularly as they progress policy changes or consider reforms.

The Review notes 3 of the 6 members of the Advisory Committee have resigned. The resignations, including from a co-chair, suggest that the body could do more to support members to give effect to the committee's intended aims – that people who had experienced the outcomes of serious work-related incidents, including serious injury, illness or death, can provide advice to government and influence relevant policies and procedures related to engaging with lived-experienced individuals.

Members have outlined several challenges, including dissatisfaction with the committee's remit, difficulty with the formality of a government committee and the possibility of traumatisation from committee discussions, which have affected its operation and ability to deliver advice. However, as a collective, the committee did not have a consistent view on whether the challenges they were experiencing required significant reform or were reflective of 'teething issues' a newly established body could work through with time and effort. Consideration should be given to member feedback to determine whether there are options to better support members to provide advice to government, noting that members did acknowledge the work and support of the secretariat over the committee's establishment phase.

Functions/remit of the Advisory Committee

The Advisory Committee considers that in some respects the remit for the body is too limited (i.e. limited to advising in relation to the Commonwealth jurisdiction and the pursuit of particular projects being outside scope), and that in other respects, the remit is too wide (i.e. advising AMSA and NOPSEMA). HIA also highlighted concerns that the remit is too wide and allowed advocates to provide advice on generalised WHS policy.

The remit for the Advisory Committee is appropriately set, based on the intentions of government and the WHS framework. The Commonwealth has a limited jurisdiction and is only able to establish a body that supports WHS and workers compensation advice to the Commonwealth. Providing advice only to the Minister and Comcare (and not AMSA and NOPSEMA) would also be inconsistent with the broader aim of the amendments to ensure that relevant regulators that may engage with lived-experience persons have the benefit of their advice.

The members of the Advisory Committee are well placed to provide their unique perspectives and views in relation to their lived experience and, where appropriate, their experiences can be reflected in the Commonwealth's initiatives or inform the Commonwealth's work with SWA. The Terms of Reference, as agreed by the Advisory Committee, make it clear that it is not a function of the Advisory Committee to provide broader WHS advice to government. That broader advisory role is undertaken through a tripartite model is the appropriate forum for considering reforms of the WHS framework.

A member also noted the role of the Advisory Committee to consider issues related to rehabilitation and compensation is not explicitly mentioned in the legislation and they recommended it should be clarified so there is no uncertainty about the committee's remit. The legislative remit to encompass advice on 'the needs of persons affected by serious work-related incidents' seems sufficient to demonstrate that safety, rehabilitation and compensation are broadly encompassed. If uncertainty exists in the remit, the secretariat could provide additional support and information to the members to clarify this.

The Advisory Committee highlighted that some members saw value in a national body to share ideas and align advocacy. The current format of the Advisory Committee does not prohibit members from liaising or working with other state or territory advisory committees in due course, particularly because this could support the depth and breadth of advice provided within the Commonwealth jurisdiction. No legislative amendments are needed to facilitate this long-term goal.

It is unfortunate that some members do not consider they were aware of the remit of the body before they accepted their positions. Future recruitment processes for members are an opportunity to consider what information and briefings may assist prospective members to understand the Advisory Committee's role and its operations, including supports for members. The role of co-chairs in supporting briefings of incoming members should also be considered.

Operations, governance and membership

The Advisory Committee members are recruited for their own lived experience and, depending on their individual circumstances, their understanding and experience of government processes and committees may often be limited. Some of the members are particularly focused on WHS frameworks and criminal prosecutions, while others are engaged on the rehabilitation and compensation processes for injured or ill workers. The role also carries with it an expectation to share deeply personal experiences in order to develop and deliver beneficial advice to government and regulators.

This has led to the following issues:

- Processes can be overly formal and challenging to engage with for individuals without committee or government experience, which can create stress and frustration for those members.
- Prioritisation and consensus may be challenging to reach, as not all topics or areas for discussion will reflect all members' lived experience. Turning their lived experience into advice is challenging.
- Depending on members' individual experiences and circumstances, membership on the Advisory Committee may have the potential to intensify trauma or cause vicarious trauma through the sharing of lived experiences.

Relatedly, members are concerned with ensuring consideration is given to whether members are ready to be part of the Advisory Committee, as a means of addressing the number of resignations and trauma risks.

The Advisory Committee and the secretariat have sought to address these issues through the provision of advice and supports, like counselling, but some members have indicated that these issues continue despite members' and the secretariat's best efforts. The fundamental challenges that have been identified are ultimately structural issues that exist as a result of both the Advisory Committee's core purpose and its format.

The formality of the Advisory Committee exists both because it is set in legislation (for example, provisions govern the appointment, leave, invitations for other participants and voting) and because of processes and procedures the Advisory Committee has established through its Terms of Reference (for example, quorum, attendance, and meeting regularity requirements). While some features of the committee's governance arrangements are important to recognise and facilitate its status and role, it is likely that some of the processes and procedures that currently apply could be adapted or removed because they add unnecessary formality or inflexibility not suited for this particular and unique advisory body. Further consultation with members on what processes and systems are working well or not provides an opportunity to review governance arrangements, including any changes to the Terms of Reference, to better support the work of the Advisory Committee.

The Advisory Committee members are not necessarily experienced in the operation of committee processes, including how to advise government or regulators about their lived experience. All efforts should be made by the secretariat to bridge any inexperience in delivering advice to government or regulators through additional guidance and support. Further resources could be developed to help them translate their lived experience into advice to government, including how to turn lived experience into a policy idea that has relevant application to people who might have similar lived experience. The secretariat should seek to bridge any gap between the ideas and the delivery of advice of the members by preparing materials for them, where possible.

The Advisory Committee includes members with different lived experiences, and as a result they have different interests in different legislative schemes and systems (for example, family members of people who have died in a work-related incident may be more focused on the WHS Act and prosecutions of a PCBU's conduct). Members' experiences are generally unique to themselves, and their views may but will not necessarily be representative of a broader cohort of lived experience persons. As a result, members may join the Advisory Committee and grapple with prioritising or giving advice on matters that are not related to their lived experience. The potential for different voices on the Advisory Committee means that the consensus-seeking process it is predicated on may create difficulties for individual members not familiar with this type of body. Subcommittees were identified as a possible solution by some members, however this would not necessarily resolve the issue if a whole-of-committee consensus position is still required. Consideration should be given to the committee's processes for prioritisation, agreeing and providing advice, to ensure that government and the regulators can have the benefit of all members' lived experience and expertise.

Members also expressed a desire to see only lived-experience people on the Advisory Committee. The membership of other non-lived experience members is set in the legislation, which means there is always the possibility one of the co-chairs and the 'trauma and grief member' will not have lived experience. This has not occurred to date. The provision for non-lived experience membership is likely to have been included to better support the Advisory Committee with the exact formal processes that have been confusing to members, so the composition of lived and non-lived experience members may be a relevant consideration in the broader challenges identified with formality. The Review considers

inclusion of employer representatives on the Advisory Committee would not be consistent with the intention of the committee is to receive advice from people with lived experience. Existing tripartite forums can support WHS and workers compensation consultation and the Review also notes that government can undertake broader public consultations when needed, which may enable it to hear the experience of a broader set of workers, families and employers.

The nature of the Advisory Committee means care must be taken to be trauma-informed and have appropriate supports. The Review notes arrangements to address psychosocial hazards have been put in place but the possibility that members will not be ready to engage with its processes or experience trauma during engagement remains. The formalised nature of the committee means that there is less flexibility to opt in and out of engagement than might be desirable. Members have suggested that the risks could be better identified and managed if members were involved in recruitment processes or if trial periods were supported. However, recovery from trauma is an individual process and experience, and trauma can resurface at any time. It would not be appropriate for current members to 'vet' new members or have them placed on trial periods as they are not best placed to make this assessment for another individual. Although addressing the risks of trauma is complex, the value of the Advisory Committee's work means that all efforts should continue to be made to ensure appropriate supports are given.

The government should consider what further measures or amendments could be advanced to address the formal nature, structure and risk of trauma inherent in the Advisory Committee and implement those changes as soon as possible. Further consideration should focus on seeking to better enable lived-experience persons, with little experience engaging with government, to provide advice on their unique experiences while minimising their risks of trauma and the practical burden of membership. The government should be guided by relevant trauma-informed and co-design principles in considering how to address the identified issues[2095] and consider appropriate monitoring and evaluation mechanisms.

The Advisory Committee and secretariat are working together regularly to address challenges that arise. They have a feedback loop that is working to continually improve the operation of the Advisory Committee within its current structure and operations. The Secretary of DEWR has ultimate responsibility for ensuring the Advisory Committee has the necessary and other support to ensure it can perform its functions correctly.[2096] The Advisory Committee members may benefit from further annual engagement with the Secretary, to ensure they are able to provide advice and feedback directly on the committee's operations. This may assist both DEWR and the Advisory Committee to consider the longer-term, structural needs of the committee.

Although the Review was encouraged by some Advisory Committee members to consider the substantive reforms necessary to address the issues the committee is experiencing, this would be outside the Review's Terms of Reference. The members speak passionately about the reforms they would like to see to the system and are ready to offer considerable insight into where more could be done to improve systems to reduce impacts on people with lived experience and better facilitate their needs.

[2095] See, for example, Australian Institute of Family Studies (Cth), *Principles for doing trauma-informed research and program evaluation* (Practice Guide, August 2024) Figure 1 <https://aifs.gov.au/resources/practice-guides/principles-doing-trauma-informed-research-and-program-evaluation>.
[2096] *Work Health Safety Act 2011* (Cth) sch 2 cl 3R.

Findings and recommendations

The Advisory Committee is an important addition to the WHS system and it is still a relatively new body. The remit for the Advisory Committee is appropriately set, based on the intentions of government and the WHS framework.

However, its operations and structure do not adequately support members to give effect to the intended outcome – delivery of lived experience advice to regulators and the Minister. The Advisory Committee's governance processes can be overly formal and challenging to engage with for individuals without committee or government experience, and translating lived experience into advice to government is challenging. Prioritisation and consensus may be challenging to reach, as not all topics or areas for discussion will reflect all members' lived experience. Membership on the Advisory Committee may have the potential to intensify trauma or cause vicarious trauma.

Recommendation 38



The Department of Employment and Workplace Relations should consider what further measures or amendments could be advanced to address the formal nature, structure and risk of trauma inherent in the Family and Injured Workers Advisory Committee by reviewing the committee's governance processes and any other relevant matters, and implement necessary changes as soon as possible.

Recommendation 39



The Department of Employment and Workplace Relations secretariat to the Family and Injured Workers Advisory Committee should develop further guidance to help Advisory Committee members translate their lived experience into structured advice to government.

Recommendation 40



The Secretary of the Department of Employment and Workplace Relations should meet with the Family and Injured Workers Advisory Committee annually, to ensure feedback on the operation of the Advisory Committee can be provided directly.

5.5 Streamlining PTSD workers' compensation claims for first responders

What the measure does

The Closing Loopholes No.1 Act amended the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**) to introduce a rebuttable presumption that post-traumatic stress disorder (**PTSD**) suffered by first responders and members of a class of employees (as declared by the Minister) was contributed to, to a significant degree, by their employment.[2097]

Before the measure, first responders diagnosed with PTSD were required to prove that their employment significantly contributed to their condition when making a workers' compensation claim.

Under the amendments, if a first responder or a member of a declared class of employees is diagnosed with PTSD, the employee's employment is taken to have contributed, to a significant degree, to the development of the PTSD, unless the contrary is established.[2098] The standard of proof that applies in determining whether the contrary has been established is the balance of probabilities (more likely than not).[2099] Establishing the contrary is based on the determining authority having relevant evidence or information that contradicts or nullifies the requirements of the provisions. Where the contrary is established, the employee's employment as a first responder will not be taken to have contributed, to a significant degree, to the onset or aggravation of the PTSD.[2100]

To have the benefit of the presumption, the employee must have been diagnosed by a legally qualified medical practitioner or psychologist in accordance with relevant diagnostic criteria, and have been employed as a first responder or member of a declared class of employees before symptoms of PTSD became apparent.[2101]

The amendments defined a 'first responder' to include an AFP Commissioner, Deputy Commissioner or employee, a firefighter, an ambulance officer, an emergency services communications officer, a member of an emergency service (within the meaning of the *Emergencies Act 2004* (ACT)), the Australian Border

[2097] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 3 pt 1; *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 7(11), (13), (13A).
[2098] *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 7(11).
[2099] *Freeman and Military Rehabilitation and Compensation Commission (Compensation)* [2016] AATA 741 [98].
[2100] Comcare, *Comcare Scheme Guidance – Post Traumatic Stress Disorder Suffered by Certain Employees* (Policy Document, March 2024) <https://www.comcare.gov.au/sites/default/files/docs/src-act-ptsd-employees-mar-2024.pdf>.
[2101] *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 7(11).

Force Commissioner or an APS employee in the Australian Border Force.[2102] The Minister may declare a class of employees which has the benefit of the presumption, if the Minister is satisfied that the incidence of PTSD among that class of employees is significantly greater than among the general public.[2103]

The amendments commenced on 15 December 2023[2104] and the presumption only applies to injuries sustained after commencement of the provisions. [2105] Injuries predating the commencement of the amendments still require first responders to prove their work contributed to their PTSD.

Intention of the measure

The measure was intended to improve the physical and mental health outcomes of first responders by simplifying access to workers compensation in relation to PTSD.[2106] It aimed to remove barriers that first responders face when making workers' compensation claims and provide a less onerous claims process for workers suffering from PTSD.[2107]

The 2019 Senate Education Employment References Committee Report, *The people behind 000: mental health of our first responders* (the **Triple Zero Report**), described the workers' compensation system as adversarial, seemingly predicated on minimising accepted claims and as having the potential to aggravate mental health injuries and impede recovery.[2108] The amendments address the concerns raised in the Triple Zero Report and are consistent with its recommendation.[2109]

The amendments also reflect epidemiologist Professor Tim Driscoll's advice in his December 2021 review of SWA's *Deemed Diseases List*, which recommended that PTSD be listed as a deemed disease for police officers, ambulance officers including paramedics, and firefighters.[2110]

[2102] Ibid s 7(13).
[2103] Ibid s 7(13A).
[2104] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2(1) item 26.
[2105] Ibid sch 3 pt 1 item 3.
[2106] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 27 [145].
[2107] Replacement Supplementary Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 5 [11].
[2108] Senate Education and Employment References Committee, Commonwealth of Australia, *The people behind 000: mental health of our first responders* (Report, February 2019) [4.2], [4.76].
[2109] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 10 [43].
[2110] Ibid.

What has happened since commencement

Comcare reports that, as at 31 December 2025, 84 claims have been determined under the PTSD presumption.[2111] Of those claims:

- 68 claims were from premium payer first responders (with 61 of these claims made by AFP first responders).
  - 66 of these claims were accepted and 2 rejected – a 97.06% acceptance rate.
- 16 claims were from ACT Government first responders.
  - All of these claims were accepted – a 100% acceptance rate.

Comcare reports first responders are making claims sooner, with the current average from date of injury to the date of a claim being received being 110.5 days.[2112] The current average from claim compliance to a first decision by Comcare is 30.2 days. However, the time taken to determine claims has not significantly improved consistently across the pre and post reform periods, with the current average to Key Performance Indicator (KPI) determination (with deduction of any paused determination periods in accordance with the SRC Act) being 22.5 days.[2113]

Since the measure commenced, Comcare has developed specific guidance for treating practitioners and claims managers on the claims management requirements that were introduced. This guidance is intended to support consistent application of the presumption and appropriate claims handling practices.

As at 15 June 2026, the Minister has not declared a class of employees to be covered by the presumption.

Review of the SRC Act

In December 2025, the SRC Act Review report, *Getting the Best Outcomes for Injured and Ill Workers* was published. The SRC Act Review considered the presumptive liability amendments made in Closing Loopholes No. 1.[2114] A number of submissions to the SRC Act Review noted the importance of the presumptive liability provisions with several stakeholders proposing improvements to the provisions.

The UFUA argued that the term 'first responder' should be reserved for individuals repeatedly exposed to traumatic events. It suggested that a qualifying period based on cumulative trauma exposure may be appropriate. The UFUA also supported expanding presumptive coverage to other psychological injuries arising from repeated trauma, provided there is sufficient evidence.[2115]

[2111] Comcare data, received 16 February 2026.
[2112] Comcare data, received 28 April 2026.
[2113] Ibid.
[2114] Justine Ross, Robin Creyke and Gregory Isolani, *A comprehensive review of the Safety, Rehabilitation and Compensation Act -Getting the Best Outcomes for Injured and Ill Workers* (Report, 25 September 2025) 145.
[2115] Ibid 148.

The CPSU (PSU Group) highlighted that 'its members, when deployed to disaster-affected areas, face trauma similar to that experienced by first responders, and considered the presumption should be extended to such persons'.[2116] The AFP Association and others called for the presumption to be made retrospective.[2117]

Recommendation 11 of the SRC Act Review proposed that the PTSD presumption be extended to all workers covered by the Comcare scheme who are deployed in disaster-affected areas when a national emergency is declared under the *National Emergency Declaration Act 2020* (Cth).[2118]

The SRC Act Review also noted the following:

- Establishing an evidence base for incidence of PTSD in workers deployed in disaster-affected areas may be inherently challenging, despite this evidence being necessary for the exercise of the Ministers power to declare this cohort.[2119]
- PTSD may not be the only psychological condition that warrants a presumption. The Minister or governing board should have the power to extend it to other psychological conditions if appropriate, and supported by evidence.[2120]
- A qualifying period would not be appropriate, because unlike certain other diseases where risk increases with cumulative exposure, PTSD may result from a single traumatic incident. [2121]
- Retrospective application would create significant challenges, including because retrospective liability could have significant financial impacts on liable parties that have not had an opportunity to assist the person with treatment, rehabilitation and return to work. These persons are not excluded from compensation for their PTSD and may still claim through the ordinary process.[2122]

The government is currently considering the SRC Act Review report's recommendations.

What the Review heard

The Review received 5 submissions (one of which was private) on this measure, with all stakeholders generally supporting the amendments as an important step in improving the claims process for first responders. Two further submissions on the Draft Report addressed the measure.

The AFP reported that, where the presumption applies to PTSD for eligible first responders, claims are being processed more quickly on average and are accepted at higher rates than comparable PTSD claims where the presumption does not apply. For claims made by AFP employees between the measure's commencement and 11 February 2026, where the nature of the injury was PTSD, the AFP submitted that 93% of eligible claims were accepted, compared to 86% of claims where the presumption did not apply

[2116] Ibid.
[2117] Ibid 149.
[2118] Ibid 150.
[2119] Ibid 148.
[2120] Ibid 148–9.
[2121] Ibid 149.
[2122] Ibid.

due to the date of injury. Of claims eligible for the presumption, the AFP stated it was rebutted in only 4% of claims. The AFP's view is that the increased claims acceptance rate and reduction in processing times suggests that the provision is achieving its intended purpose. It also noted that the amendments had an impact on its Comcare premium, with a loading being added to its annual premium for 2024–25 and 2025–26 following the introduction of the presumption.[2123]

The ACTU and CPSU (PSU Group) advocated for an expansion of the cohort of individuals covered by the presumptive liability, to all workers covered by the SRC Act. The ACTU submitted that many workers covered by the SRC Act face frequent traumatic and vicarious exposure in their duties, outside of discrete emergency response situations. The ACTU described this exposure as occurring in customer-facing, assessment, regulatory and specialist roles, including work involving threats, violence, and distressing material.[2124] The CPSU (PSU Group) provided evidence of members' exposure to traumatic material and experiences in APS roles:[2125]

> *'A customer was threatening to throw themselves off a bridge while on the phone with me. They wanted to carve my name into their chest beforehand so people would know who was to blame.'*
>
> *'Exposed to step by step recollections of severe sexual assaults, gang violence, familial violence'*
>
> *'I was exposed to the description of a violent murder…the image played over and over in my head'*
>
> *'…a strong sense of fear I could lose my life" (in relation to an incident at work)'*

Both the ACTU and CPSU (PSU Group) argued that the current list of cohorts is too narrow and the provisions should allow presumptive liability to be accepted for those workers who are exposed to a stressor or stressors that would satisfy criterion A of the DSM-V diagnostic criteria for PTSD.[2126]

In response to the Draft Report, the ACTU and CPSU (PSU Group) acknowledged improvements made but reiterated their support for further expansion of presumptive PTSD to apply to all workers who fall under the SRC Act.[2127] The ACTU argued it is well substantiated that earlier engagement with injured workers is generally associated with better outcomes in workers' compensation matters, demonstrating that presumptive liability can simplify access to compensation and support earlier intervention. The ACTU suggested that concerns regarding potential resourcing and premium impacts should be addressed alongside, rather than in place of, policy reform aimed at improving equitable access to compensation.[2128]

[2123] AFP, Submission No 85 (12 March 2026) 1.
[2124] ACTU, Submission No 67 (6 March 2026) 41.
[2125] CPSU (PSU Group), Submission No 79 (6 March 2026) 11.
[2126] ACTU, Submission No 67 (6 March 2026) 41; CPSU (PSU Group), Submission No 79 (6 March 2026) 12.
[2127] ACTU, Submission on Draft Report No 33 (29 May 2026) 31; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 10.
[2128] ACTU, Submission on Draft Report No 33 (29 May 2026) 31.

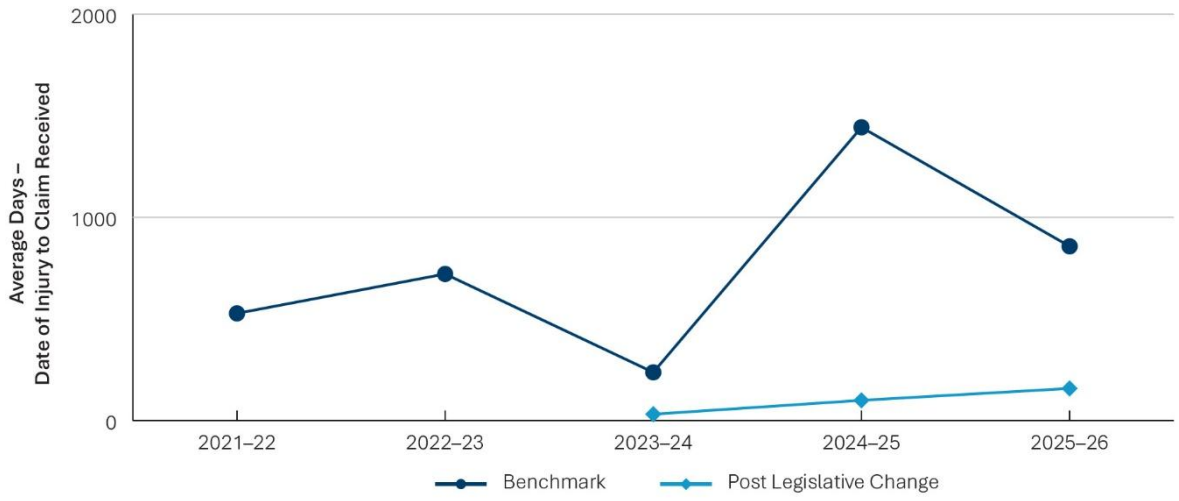
Comcare

As part of consultations, the Review met with Comcare to understand the operation and implementation of the amendments since they came into effect.

Comcare reported that claim volumes have not significantly increased since the presumption was introduced. The claims received have been broadly consistent with expected cohorts and diagnoses, and Comcare has not observed claims outside what it would ordinarily anticipate for PTSD among first responders. Comcare also noted that its current data does not indicate a need to extend the presumption to additional classes of employees at this stage. Comcare reports that it regularly reviews data related to accepted PTSD claims and occupation type. Other than first responders already covered by the presumption, Comcare advises that there is no occupation with a high prevalence of PTSD claim lodgement and/or acceptance that indicates an extension of the presumption would be required at this point in time.

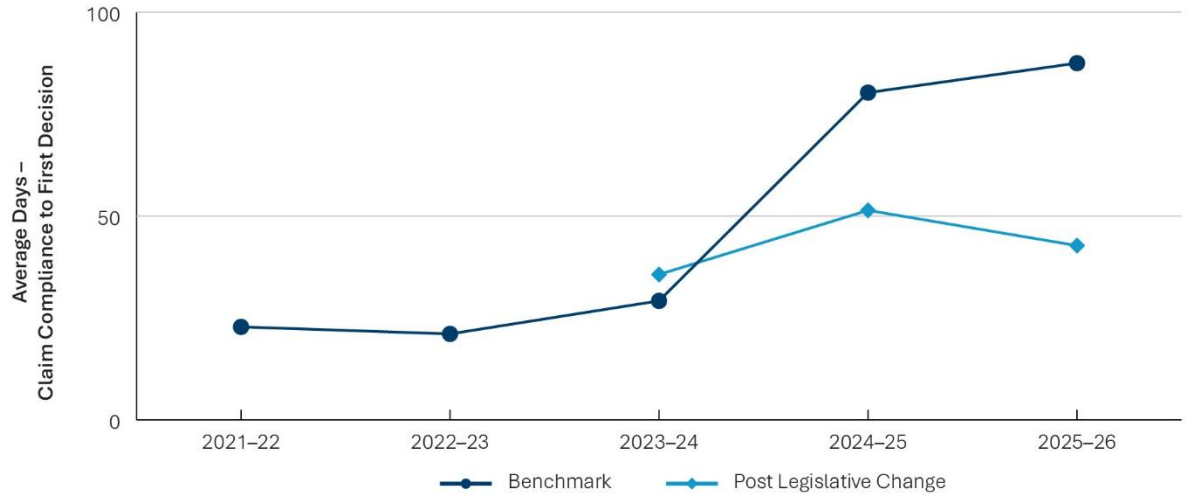
Comcare observed that since the presumption has commenced, claims are being lodged sooner after the date of injury (see Figure 4). There has also been a decrease in the average number of days from claim compliance to a first decision by Comcare (see Figure 5). The time taken to determine claims has not consistently improved (see Figure 6)

Figure 4: Average days between the date of injury and the date of lodgement of a claim with Comcare.



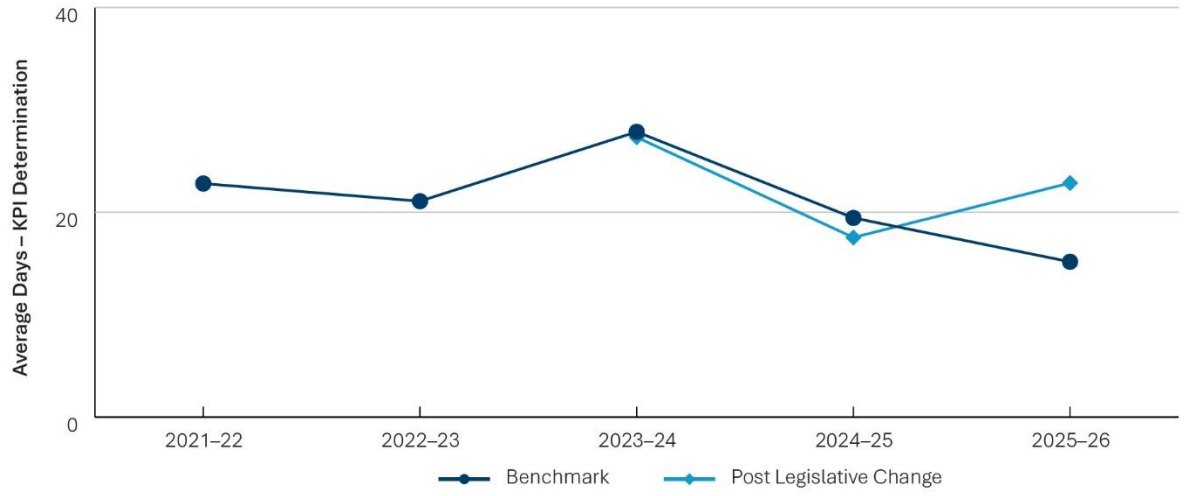
Source: Unpublished Comcare data provided 28 April 2026.

Figure 5: Average days between the date a claim is compliant to first decision.



Source: Unpublished Comcare data provided 28 April 2026.

Figure 6: Average days – KPI Determination



Source: Unpublished Comcare data provided 28 April 2026.

Comcare noted that earlier engagement with injured workers is generally associated with better outcomes in workers' compensation matters which, in its view, aligns with the policy intent of the amendments. Comcare noted that although it may be too early to assess whether the presumption has led to improved long-term outcomes for workers with PTSD, the removal of the burden of proof on claimants has reduced the adversarial nature of the claim process and improved interactions between claim managers and workers.

Comcare Scheme Management is working closely with Comcare Claims Management to promote the use of fact sheets that help first responders with PTSD submit timely and successful claims, and to identify opportunities to support streamlined claim administration processes. Comcare reports that it is also engaging with the ACT Government to understand their claims experience and explore opportunities to share learnings to improve outcomes for first responders with PTSD.

Comcare reported that most scheme employers have been supportive of the changes and indicated that it is continuing to monitor the operation of the measure as implementation progresses, including claim trends and outcomes.

Analysis

It is encouraging to see stakeholders' support for the PTSD presumptive liability framework. It is clear that stakeholders care deeply about ensuring that first responders do not face barriers in receiving the support they need when suffering PTSD related to their employment. Comcare's observation that a reduction in the time between the date of injury and the lodgement of a claim is a key indicator of improved scheme performance is positive, as earlier intervention and engagement with injured workers is generally associated with better outcomes in workers' compensation schemes.

The Review agrees with Comcare that it is too early to assess whether the presumption has led to improved long-term outcomes for first responders with PTSD. However, there does appear to be a trend for decreasing claim timeframes and a positive cultural shift towards making the scheme more easily accessible and less adversarial for workers. A reduction in the time between the date of injury and the lodgement of a claim, as reported by Comcare, provides strong evidence that the measure is operating as intended to simplify access to workers compensation in relation to PTSD. These developments may indicate that the amendments are supporting the scheme to achieve positive long-term outcomes for first responders.

It is clear that the first responder cohort currently covered by the PTSD presumption is experiencing simplified access to workers compensation in relation to PTSD. Ongoing monitoring of Comcare's claims caseload will be important to ensure it is able to support efficient claims processing and continued streamlined access to the scheme for first responders. The Review notes that Comcare is actively working on ways to assist first responders with PTSD to submit timely and successful claims and identify opportunities to support streamlined claim administration processes. This is important to ensure that Comcare determines claims in as timely a manner as possible.

The Review received submissions advocating for expansion of the cohort eligible for the presumption, and acknowledges the concerns raised regarding workers whose roles are not currently covered. Many roles covered by the SRC Act may face traumatic and vicarious exposure through routine duties, not solely through discrete frontline incidents, and it is clear that a wide range of workers may experience trauma in the course of their employment. At this stage, however, Comcare's data does not demonstrate a sufficient basis to extend the presumption to additional occupations. The measure is directed to improving physical and mental health outcomes for first responders by simplifying access to workers' compensation for PTSD.[2129] Consistent with this intent, the amendments are deliberately confined to that cohort. This is not to say this cannot be reviewed in the future but at this stage, the measure is operating as intended.

The Review notes that the wider the cohort, the more likely decision-makers may confront scenarios where PTSD arises from mixed causes. If there are claims that may involve mixed causes, this could increase reliance on rebuttal processes and dispute resolution, particularly where non-occupational trauma histories are present, as the factual basis for the onset or aggravation of PTSD may not be as easily determined. This may run contrary to the intention of the measure to streamline and simplify the claims process. The Review considers that a declaration to expand the eligible cohort may be appropriate once more time has elapsed to allow stakeholders the opportunity to better determine the impacts of the measure.

It is noted that the expansion to the cohort of workers captured under the presumption would have potential resourcing implications for Comcare and organisations covered by the scheme. As highlighted by the AFP, an expansion of workers covered by the Scheme may result in increases to Comcare premiums. Potential resourcing requirements should be considered by government alongside any future decision to expand the measure to other cohorts.

Findings and recommendations

The amendments have been operating appropriately and effectively to date, and no unintended consequences have been identified.

[2129] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 27 [145].

5.6 Comcare Guide

What the measure does

The Closing Loopholes No.1 Act amended the SRC Act to require Comcare, in consultation with the Safety, Rehabilitation and Compensation Commission (the **SRC Commission**), to prepare a written document to be called the *Guide for Arranging Rehabilitation Assessments and Requiring Examinations* (the **Guide**) which must be complied with when deciding whether to arrange rehabilitation assessments or require examinations.[2130]

The amendments commenced on 14 June 2024.[2131] The Guide commenced on 18 September 2024.[2132]

Rehabilitation Assessments and Independent Medical Examinations

Under the SRC Act, when an employee suffers an injury resulting in incapacity for work or an impairment, the rehabilitation authority may, at any time, and shall on the written request of the employee, arrange for an assessment of the employee's capability to undertake a rehabilitation program (the **rehabilitation assessment**).[2133] A rehabilitation assessment may be undertaken on the basis of existing information, including information provided by the employee's treating practitioner, and does not necessarily require the employee to undergo an examination.[2134] This assessment is undertaken by a legally qualified medical practitioner nominated by the rehabilitation authority, a suitably qualified person (other than a medical practitioner) nominated by the rehabilitation authority, or a panel of the above nominees.[2135]

The rehabilitation authority (generally the employer) may require the employee to undergo a rehabilitation examination (the **rehabilitation examination**).[2136] The person or persons who carry out the examination must give the rehabilitation authority a written assessment of the employee's capability to undertake a rehabilitation program.[2137] The relevant authority (which may be Comcare or a self-insured licensee)[2138] may also require an employee undergo an examination by a legally qualified medical practitioner if a notice of injury or loss has been given to the authority, or the employee has made a claim for compensation (the **compensation examination**).[2139]

[2130] *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 36(3A), 57(1A), 57A(1).
[2131] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2(1) item 26A.
[2132] *Safety, Rehabilitation and Compensation Act 1988 – Guide for Arranging Rehabilitation Assessments and Requiring Examinations 2024* (Cth) s 2.
[2133] *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 36(1).
[2134] *Safety, Rehabilitation and Compensation Act 1988 – Guide for Arranging Rehabilitation Assessments and Requiring Examinations 2024* (Cth) sch 1 s 2.
[2135] *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 36(1)–(2).
[2136] Ibid s 36(3).
[2137] Ibid s 36(8).
[2138] Ibid s 4(1) (definition of 'relevant authority').
[2139] Ibid s 57(1).

The rehabilitation examination and the compensation examination are referred to collectively as Independent Medical Examinations (**IME**s).

Introduction of the Guide

The Closing Loopholes No. 1 Act required the development of a guide for the rehabilitation authority and the relevant authority to consider whether a rehabilitation assessment or an IME is necessary.[2140] In deciding whether to require a rehabilitation assessment or IME, the rehabilitation authority and the relevant authority must comply with the Guide.[2141]

The object of the Guide is to support ethical, transparent and accountable decision making in relation to arranging a rehabilitation assessment of an employee under subsection 36(1) or requiring an employee to undergo a rehabilitation examination under subsection 36(3) or a compensation examination under subsection 57(1), including appropriate consideration of the employee's personal circumstances.[2142]

The amendments outline that the Guide must, among other matters:

- provide, for the purposes of a rehabilitation assessment or examination of an employee, that:
  - information in relation to the employee should be sought from the employee's treating practitioner, and
  - the employee's treating practitioner and the information provided by the treating practitioner should be relied on as much as possible before a referral is made to an independent medical practitioner, or other qualified person, in relation to the employee
- specify the circumstances in which it is appropriate to require an employee to undergo a rehabilitation assessment or examination
- specify limitations on the frequency and number of rehabilitation assessments or examinations that an employee may be required to undergo, and
- specify the qualifications of the person or panel of persons who may conduct a rehabilitation assessment or an IME of an employee.[2143]

The Guide may also provide for any other relevant matter.[2144]

The Minister must approve the Guide.[2145] Once approved, the Guide is a legislative instrument.[2146]

[2140] Ibid s 57A(1).
[2141] Ibid ss 36(3A), 57(1A).
[2142] Ibid s 57A(2).
[2143] Ibid s 57A(3)(a)–(d).
[2144] Ibid s 57A(4).
[2145] Ibid s 57A(6).
[2146] Ibid s 57A(7)–(8).

Amendments to the definition of 'determination'

The Closing Loopholes amendments also provide that decisions made under section 57 are 'determinations' for the purposes of section 60.[2147] This means that a decision to require a compensation examination is a determination under the SRC Act.

A claimant, the Commonwealth, or a Commonwealth authority may request that a determining authority reconsider a determination. The determining authority also has the power to reconsider such a decision on its own motion. The resulting reconsideration decision is then a decision reviewable by the Administrative Review Tribunal.[2148]

Intention of the measure

This measure was made to improve the experience of employees engaging with the Comcare claims process by providing guidance on when the employer or Comcare is arranging rehabilitation assessments or IMEs. This includes seeking the employee's views of the selected practitioner and frequency of examinations. Before the measure, there was no comprehensive, legislatively mandated guidance for the decision-maker on the considerations for requiring a rehabilitation assessment or IME.[2149]

New subsection 57A(2) provides that the object of the Guide is to support ethical, transparent and accountable decision making in relation to arranging rehabilitation assessments or examinations of an employee, including appropriate consideration of the employee's personal circumstances.[2150]

What has happened since commencement

Development of the Guide

In 2024, Comcare led the development of the Guide and undertook consultations with a range of stakeholders including the SRC Commission, and employer and employee representatives.[2151] On 5 September 2024, the Minister approved the Guide.

[2147] *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 60(1) (definition of 'determination'); *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 3 pt 2 s 9.
[2148] Replacement Supplementary Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 13 [63]; *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 62–4.
[2149] Although former subsection 57(6) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth), now repealed, provided some limited guidance on the frequency of medical examinations under section 57.
[2150] *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 57A(2).
[2151] Explanatory Statement, Safety, Rehabilitation and Compensation Act 1988 – Guide for Arranging Rehabilitation Assessments and Requiring Examinations 2024 (Cth) 2–3.

The Guide commenced on 18 September 2024 and applies to rehabilitation assessments and IMEs that are the subject of determinations made on or after 30 October 2024.[2152] The 6-week period between commencement and the 'application date' provided rehabilitation and relevant authorities with a transition period before the new procedures commenced.[2153]

Comcare has published a number of education materials about the Guide to assist claims managers and treating practitioners apply the Guide consistently and appropriately,[2154] and continues to engage with stakeholders on the operation of the Guide.

What the Guide says

Part 1 of the Guide, which applies to rehabilitation assessments and rehabilitation examinations, outlines steps for arranging a rehabilitation assessment, including at what point a rehabilitation examination is appropriate to request. Part 2 of the Guide, which applies to compensation examinations, outlines steps to determine whether it is appropriate to request a compensation examination, and the steps that should be undertaken in that request.

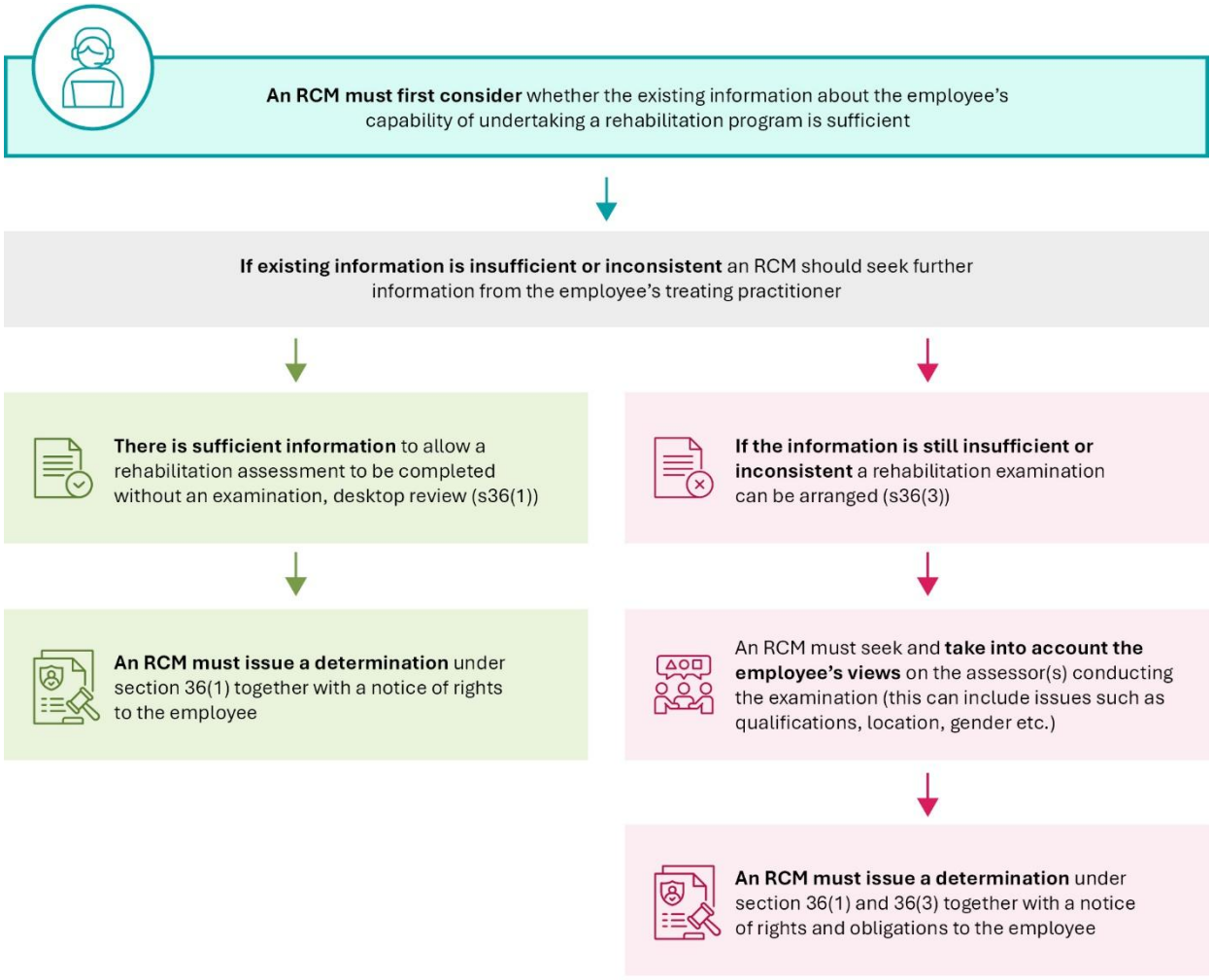
For either a rehabilitation assessment or an IME, the Guide requires the relevant authority to ensure that all avenues for required medical information have been considered including from the employee's treating practitioner. The Guide also sets out notice periods for consultation and responses,[2155] an employee's right to have a support person,[2156] access to IME reports,[2157] the requirement to provide information that would assist a person to seek reconsideration or review of a determination,[2158] and frequency of IMEs of no more than once every 6 months subject to specific exceptions.[2159]

[2152] *Safety, Rehabilitation and Compensation Act 1988 – Guide for Arranging Rehabilitation Assessments and Requiring Examinations 2024* (Cth) ss 2, 4 (definition of 'application date').
[2153] Explanatory Statement, Safety, Rehabilitation and Compensation Act 1988 – Guide for Arranging Rehabilitation Assessments and Requiring Examinations 2024 (Cth) 10 [38].
[2154] For rehabilitation authorities and relevant authorities: Comcare, *Guide for Arranging Rehabilitation Assessments and Requiring Examinations 2024 – An overview for rehabilitation case managers* (Guide, September 2024); Comcare, *Guide for Arranging Rehabilitation Assessments and Requiring Examinations 2024 – An overview for claims managers* (Guide, September 2024). For employees: Comcare, *Guide for Arranging Rehabilitation Assessment and Requiring Examinations 2024 – An overview for employees about independent medical examinations* (Guide, September 2024); Comcare, *Guide for Arranging Rehabilitation Assessments and Requiring Examinations 2024 – An overview for employees about rehabilitation assessments* (Guide, September 2024).
[2155] A written notice of a determination requiring a rehabilitation examination or IME must generally be given at least 14 days before the examination, unless a shorter period is agreed by the employee. *Safety, Rehabilitation and Compensation Act 1988 – Guide for Arranging Rehabilitation Assessments and Requiring Examinations 2024* (Cth) sch 1 ss 5(3)(a), 11(3)(a)–(b).
[2156] *Safety, Rehabilitation and Compensation Act 1988 – Guide for Arranging Rehabilitation Assessments and Requiring Examinations 2024* (Cth) sch 1 s 3(5).
[2157] Ibid sch 1 s 13(4).
[2158] Ibid sch 1 ss 5(1)–(2), 11(1)–(2); *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 38(2), 62(2).
[2159] *Safety, Rehabilitation and Compensation Act 1988 – Guide for Arranging Rehabilitation Assessments and Requiring Examinations 2024* (Cth) sch 1 ss 6, 12.

Stop-clock provisions

The Guide links requests for further medical evidence from treating practitioners to the operation of stop-clock provisions in the *Safety, Rehabilitation and Compensation Regulations 2019* (Cth) (**SRC Regulations**), under which specified periods are excluded from claim determination timeframes while information is being obtained.[2160]

Figure 7: Section 36 rehabilitation assessment and examination process



Note: Examinations can be no more often than every 6 months unless certain criteria apply

[2160] Ibid s 11(1); *Safety, Rehabilitation and Compensation Regulations 2019* (Cth) s 11A(3).

Figure 8: Section 57 medical examination process



Note: Examinations can be no more often than every 6 months unless certain criteria apply

Review of the SRC Act

The SRC Act Review considered Comcare's claims administration process, and how it could be improved to achieve better outcomes for injured workers and other scheme participants. As part of its consideration of how the decision-making process could be improved, the SRC Act Review considered the Guide and determined it was too early to assess its effect or recommend change. The SRC Act Review noted that the effectiveness of the Guide would be considered by the Closing Loopholes Review, and recommended no change pending the outcome of that Review. The SRC Act Review considered that, following the Closing Loopholes Review, the Guide might require amendment to improve its effectiveness and worker experience, in light of effects on claim timeliness and outcomes.[2161]

[2161] Justine Ross, Robin Creyke and Gregory Isolani, *A comprehensive review of the Safety, Rehabilitation and Compensation Act – Getting the Best Outcomes for Injured and Ill Workers* (Report, 25 September 2025) 48, 252–3. See recommendation 56.

What the Review heard

The Review received 9 submissions on this measure, 5 of which were private. Unions were supportive of the Guide but noted some ongoing issues. Employers and employer groups also generally supported the intent of the Guide but raised concerns about its operation in practice, particularly the administrative burden imposed by the new requirements. One additional submission on the Draft Report addressed the measure.

Unions

Unions supported the Guide, saying it improves worker participation in the claims process and clarity for employers. The ACTU and CPSU (PSU Group) noted a decline in compensation examinations since the Guide commenced and described this as a positive outcome.[2162] The ACTU said:

> *requiring injured workers to undergo regular and repeated medical examinations and assessments, without a clinical need, puts workers under unnecessary stress, and recounting events surrounding illness or injury to medical practitioners can retraumatise workers. We believe this guide is contributing to better decisions about when it is appropriate for a worker to undergo a medical examination or not.*[2163]

The CPSU (PSU Group) reported increased engagement by Comcare with injured workers' treating practitioners and employers has been a positive outcome. It also noted it had not seen a significant number of worker requests for review.[2164]

Concerns were raised by the ACTU and the CPSU (PSU Group) that, despite positive impacts of the Guide, challenges with interpreting the 'stop-clock' provisions remain.[2165]

In response to the Draft Report, the CPSU (PSU Group) welcomed the draft recommendation that Comcare work with relevant employer groups and unions in reviewing the Guide.[2166]

Employers and employer groups

Employers and employer groups supported the Guide's intent but raised concerns about increased administrative burden and operational impacts. For example, the requirements to seek information from treating practitioners, consult employees on assessor choice, and comply with prescribed timeframes can cause delays and operational difficulties.[2167] A stakeholder noted that requiring written responses, rather than verbal engagement such as case conferences, may complicate rehabilitation processes that are time-sensitive and fluid.

[2162] ACTU, Submission No 67 (6 March 2026) 41; CPSU (PSU Group), Submission No 79 (6 March 2026) 10.
[2163] ACTU, Submission No 67 (6 March 2026) 41.
[2164] CPSU (PSU Group), Submission No 79 (6 March 2026) 10.
[2165] Ibid; ACTU, Submission No 67 (6 March 2026) 41.
[2166] CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 10.
[2167] SRCLA, Submission No 57 (4 March 2026) 2; Anonymous Submission No 27 (3 March 2026) 1.

While there was support for clear timeframes for determining initial claims and reconsiderations, stakeholders reported that the 'stop-clock' provisions have extended timeframes in practice, and recommended removing them, with the expectation that statutory timeframes would be met whenever possible.

Employers and employer groups provided examples of delays occurring when treating practitioners did not respond within required timeframes or provided only limited information that did not materially assist decision-making.[2168] The Safety Rehabilitation and Compensation Licensees Association (**SRCLA**) submitted that the impacts of delays or lack of practitioner input is particularly pronounced for psychiatric injuries where delays or uncertainty in the process may exacerbate symptoms and hinder recovery.[2169] Other stakeholders suggested the required timeframes hinder early intervention and timely access to treatment. The Review heard this is particularly problematic when a treating practitioner is relatively new to the file and may not yet have a clear understanding of the worker's long-term recovery trajectory.

It was submitted that the minimum periods for requesting information from treating practitioners and notification requirements under the Guide have created delays and inefficiencies during Administrative Review Tribunal processes and in implementing rehabilitation programs, which hinders effective claim and rehabilitation management.

It was noted that proposed medical examiner's appointment slots often lapse during consultation periods, requiring new dates to be sourced and proposed, sometimes repeatedly. These delays flow through to determination making timeframes, particularly when timely or substantive input from treating practitioners is required but not provided.

Despite these concerns, employers and employer groups generally acknowledged the Guide has improved clarity around the distinction between the rehabilitation assessment and IMEs, and supported more structured engagement with workers. The focus on obtaining up-to-date medical evidence before proceeding with assessments and IMEs is seen as a positive development, though consultation and time-based requirements were raised as often being too rigid where urgency, risk, or clear clinical need exists. The SRCLA submitted legislated processes for organising rehabilitation assessments and IMEs are overly prescriptive, complex and duplicative, particularly in relation to worker consultation timeframes and documentation.[2170] It stated that, in practice, the Guide has created a rigid and lengthy process that is difficult to apply efficiently in real-world scenarios.[2171]

Employers and employer groups also reported challenges meeting statutory timeframes, difficulties securing early access to rehabilitation and return to work support, and difficulties with the requirement to advise employees that a support person may attend all or part of an IME in some clinical contexts such as psychiatric assessments. Stakeholders suggested that alternative support options should be considered, such as support before and after IMEs.

[2168] SRCLA, Submission No 57 (4 March 2026) 2; Anonymous Submission No 27 (3 March 2026) 1.
[2169] SRCLA, Submission No 57 (4 March 2026) 2.
[2170] Ibid 1–2.
[2171] Ibid 2.

Determinations under section 60

Feedback from employers and employer groups supported the amendment to include section 57 determinations as reviewable determinations, noting that it improved worker review rights, but recommended further clarification about whether routine administrative adjustments, such as appointment rescheduling, require new determinations. Employer groups said the change has increased complexity, uncertainty and administrative burden. These stakeholders recommended legislative amendments to clarify when administrative changes do not give rise to a need for new determinations.

It was also submitted that clarification is required for how an employees' right to seek review of a section 57 determination interacts with the ability to suspend compensation payments when a worker fails to attend or obstructs an IME without reasonable excuse.[2172] Similar concerns were raised that it is often unclear whether a refusal to attend a compensation examination IME should be managed by suspending compensation under subsection 57(2) or treated as a reconsideration request requiring the worker to be invited to lodge a formal reconsideration.[2173] Stakeholders submitted that this ambiguity causes delays and inconsistent approaches.[2174]

Comcare

As part of consultations, the Review met with Comcare to understand the operation and implementation of the measure.

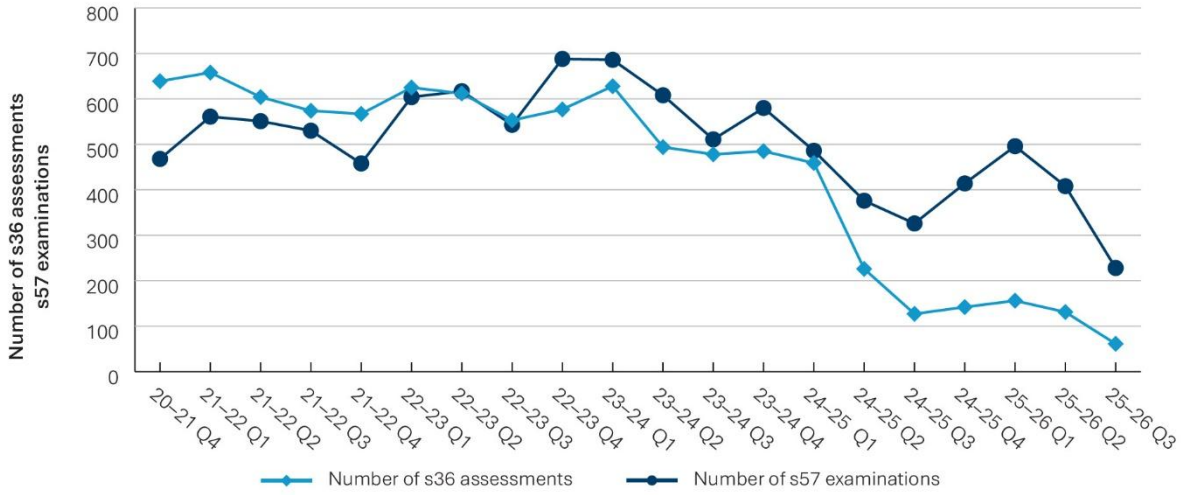
Comcare noted that while the Guide was developed within tight timeframes, it undertook extensive consultation with stakeholders during its development, and affected parties were broadly aware of the changes prior to implementation. Comcare noted that most of the principles reflected in the Guide align with Comcare's existing scheme guidance on IMEs.[2175]

Data provided to the Review by Comcare indicates that there has been a significant reduction in the use of IMEs and rehabilitation assessments since the Guide commenced, particularly in relation to psychological injury claims. For the reporting period for Quarter 3 of 2025–26 (1 January 2026 to 31 March 2026),[2176] Comcare reported:

- A reduction of 87.7% in the number of rehabilitation assessments[2177] (see Figure 9).
- A reduction of 62.5% in the number of compensation examinations[2178] (see Figure 9).

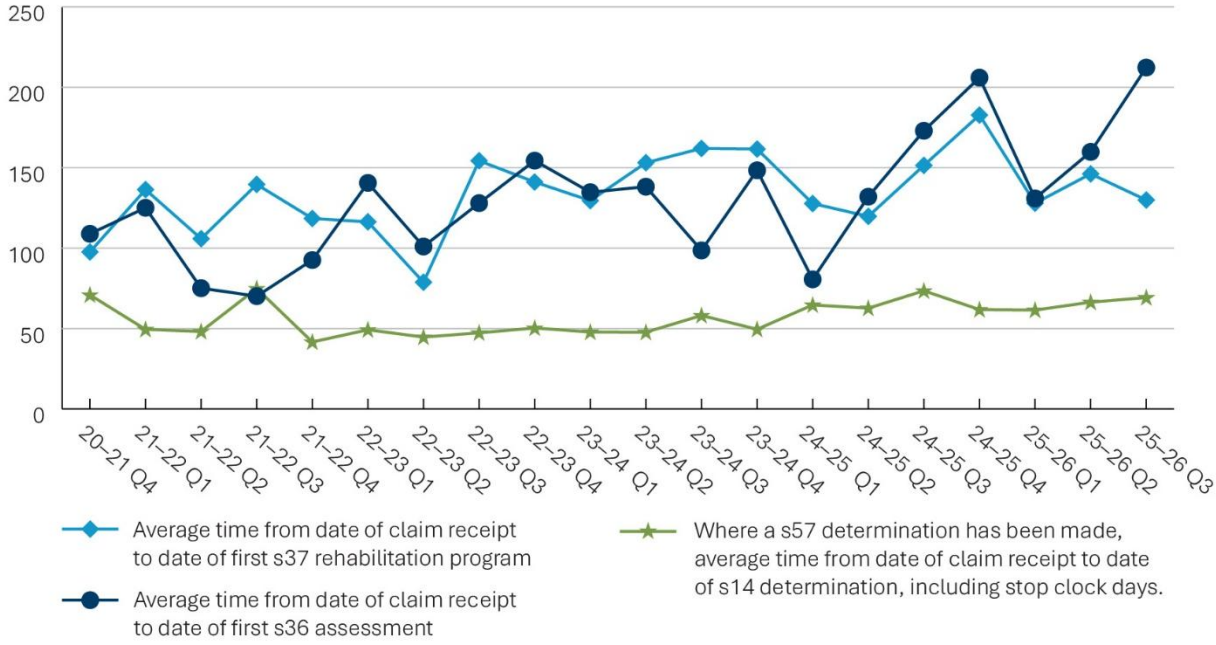
[2172] *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 57(2).
[2173] Anonymous, Submission No 16 (2 March 2026) 1.
[2174] Ibid.
[2175] Comcare, *Scheme Guidance – Section 57 Power to require a medical examination under the Safety, Rehabilitation and Compensation Act 1988* (Cth) (Guide, October 2024).
[2176] Measures are compared against Q2 2023–24, which predates the Guide's introduction. Q2 2024–25, is not a reliable baseline for evaluation as the Guide had already commenced. Comcare data, received 28 April 2026.
[2177] 61 assessments in Q3 2025–26, down from 494 assessments in Q2 2023–24; a decrease of 433 assessments. Comcare data, provided 28 April 2026.
[2178] 28 examinations in Q3 2025–26, down from 608 examinations in Q2 2023–24; a decrease of 380 examinations. Comcare data, provided 28 April 2026.

Figure 9: Volume of rehabilitation assessments and compensation examinations received by Comcare.



Source: Unpublished Comcare data provided 28 April 2026.

Figure 10: Impact of the Guide on timeliness of decision making.



Source: Unpublished Comcare data provided 28 April 2026.

Comcare is closely monitoring the ongoing impact of the Guide, including whether reduced reliance on IMEs correlates with changes in claim acceptance rates, potential effects on scheme liabilities (particularly for mental injury claims), and return-to-work outcomes.

Where a determination under section 57 has been made, average time from date of claim receipt to date of section 14 determination (including stop clock days) has increased by 45.1% from Quarter 2 of 2023–24 (when the Guide commenced) to Quarter 3 of 2025–26.[2179]

Comcare provided the Review with survey data from Claims Manager Forums held in March and April 2025, to assess awareness and use of the Guide.[2180] As the Guide commenced on 18 September 2024, it had only been in effect for approximately 6 months at the time of the surveys.

The results showed high awareness, with 97% of surveyed Rehabilitation Case Managers (**RCM**) aware of the Guide's requirements for arranging rehabilitation assessments and examinations, and 91% of compensation claims managers aware of the requirements for compensation examinations.[2181]

For RCM respondents, 78% reported unintended consequences, citing increased paperwork, greater administrative burden, and additional red tape when engaging workplace rehabilitation providers.[2182]

Respondents were also asked whether the Guide had improved ethical, transparent and accountable decision making for rehabilitation and compensation processes. For rehabilitation processes under section 36 of the SRC Act, 6% of RCM respondents strongly agreed and 12% agreed that decision-making had been improved. For compensation processes under section 57, 22% of claims managers agreed, with no respondents strongly agreeing.

Feedback from survey respondents included:[2183]

> *'The guide has introduced an additional level of complexity, in that challenges to the arranging of a 57 assessment now have the potential to delay access to time critical assessment.'*
>
> *'The Guide puts a stronger emphasis on input from the treaters, and also the documentation of considerations before proceeding with a rehabilitation assessment. This assists transparent and accountable decision making.'*
>
> *'It allows the employee to voice their concerns and ensures that they have a good understanding of the S36 process.'*
>
> *'The guide has increased the onus on an RCM to engage with an employee to discuss the need for a section 36 assessment. This had helped with improving relationships on some occasions. However overall the observation is early engagement of a workplace rehabilitation provider, building that strong rapport between the WRP and the employee, and obtaining information from the treating practitioner is delayed by the new guide.'*

[2179] Comcare data, received 28 April 2026. Changed from 47.7 days (Q2 2023–24) to 69.2 days (Q3 2025–26).
[2180] There were 2 surveys conducted. One survey was completed only by Rehabilitation Case Managers to evaluate the awareness and use of 'the Guide' in relation to section 36 – there were 73 respondents to this survey. The other survey was undertaken by all attendees those who registered for the Claims Manager Forum held on 13th March 2025 (313 people registered for the forum and 222 of these attended) – there were 27 respondents to this survey.
[2181] Comcare survey data provided 30 March 2026. Of the claims managers that completed the survey, 26% were from self-insured licensees, 57% from the Commonwealth sector and 17% were third party managers.
[2182] Comcare survey data, provided 30 March 2026.
[2183] Ibid.

'I don't feel there's been enough time to gauge whether the decision making process has benefited from this amendment. However, the administrative burden on the employer has increased considerably.'

Analysis

The Guide commenced on 18 September 2024 and has been operating for approximately 21 months. Stakeholder views on the operation of the measure are mixed, though there is general support for its intent.

Unions express strong support for the Guide and report early benefits for members, including improved worker participation and a decline in unnecessary IMEs. These impacts are in line with the intent of the measure which was to improve the experience of employees engaging with the claims process.

Employers and employer groups note that the Guide is difficult to apply in practice, but acknowledge some benefits including improved clarity around the distinction between rehabilitation assessments and IMEs and a focus on obtaining up-to-date medical evidence before proceeding with assessments. However, prescribed steps and minimum timeframes are reported to cause delays, with processes viewed as overly prescriptive, complex and duplicative, particularly in relation to consultation and documentation requirements.

Unions and employer stakeholders both recommend greater flexibility, including streamlined pathways where a worker consents, clarification that routine administrative changes do not require new determinations, and clearer circumstances in which IMEs may proceed during reconsideration or without treating practitioner input to avoid delay. While some stakeholders welcomed improved review rights for workers, others noted that this has increased complexity.

Comcare reports early implementation outcomes consistent with the measure's intent. Comcare data provided to the Review indicates a reduction in the use of rehabilitation assessments and IMEs since the Guide commenced, particularly for psychological injury claims. Comcare reports it has not identified unintended consequences for the scheme to date. However, data from the surveys undertaken by Comcare indicates that more time is needed to assess the operation of the Guide and whether it is improving ethical, transparent and accountable decision making.

The SRC Act Review considered the Guide and concluded that it was too early to assess effectiveness or recommend change to the Guide, noting that this Review would consider effectiveness.[2184] Based on the current evidence base, it continues to be too early to make a full assessment as the Guide has only operated for a limited period.

[2184] Justine Ross, Robin Creyke and Gregory Isolani, *A comprehensive review of the Safety, Rehabilitation and Compensation Act – Getting the Best Outcomes for Injured and Ill Workers* (Report, 25 September 2025) 48, 252–3.

The available evidence suggests that the measure is improving the experience of employees engaging with Comcare claims. The Guide has improved accountability, worker participation, reduced the use of unnecessary IMEs, introduced stronger procedural requirements that promote transparency, and strengthened reliance on treating practitioners. While Comcare reports no unintended consequences of the measure to date, other stakeholders have identified credible implementation impacts on timeliness and administrative effort, particularly where prescribed timeframes interact with clinical urgency, appointment availability and treating practitioner responsiveness. These are legitimate concerns for stakeholders in the day-to-day application of the Guide.

At this stage, the issues identified support continued monitoring and targeted refinement over time, rather than a conclusion that the Guide is not working. When reviewing the Guide for further refinement, attention should be focused on ensuring that the statutory timeframes for assessments and IMEs are appropriate and there is flexibility in the processes to expedite assessments or IMEs with the consent of the employee. Consideration should also be given to how to manage the impacts of treating practitioners delaying the provision of information.

Findings and recommendations

Early evidence and data support that the measure is operating as intended. The Guide has improved accountability, worker participation, reduced unnecessary IMEs, and strengthened reliance on treating practitioners. There are some concerns relating to implementation and operational issues, which should be monitored and addressed as necessary by Comcare.

Recommendation 41

Comcare should review the *Guide for Arranging Rehabilitation Assessments and Requiring Examinations* and undertake further stakeholder consultation on its effectiveness within 1 to 2 years. Comcare's review could consider:

- Opportunities for streamlined pathways where a worker consents.
- Clarification that routine administrative changes (such as rescheduling) do not require new determinations.
- The interaction between the stop clock provisions and clinical urgency.
- How to manage delays in treating practitioner responses.

In consulting stakeholders, Comcare should work with relevant employer groups and unions.

5.7 Amendments to the Asbestos Safety and Eradication Agency Act 2013

What the measure does

The Closing Loopholes No. 1 Act expanded the functions of the Asbestos Safety and Eradication Agency (**ASEA**) to include coordinating action on silica safety and silica-related diseases.[2185] This included responsibility for awareness raising, research, reporting and providing advice to the government on silica.[2186] ASEA's existing responsibility for preparing a National Strategic Plan for asbestos was extended to also require the development of a dedicated National Strategic Plan for silica.[2187] Until these amendments, ASEA had only been responsible for coordinating action on asbestos safety and asbestos-related diseases.

To support the expansion of ASEA, the following changes were made:

- ASEA was renamed the Asbestos and Silica Safety and Eradication Agency (**ASSEA**).[2188]
- The governing legislation was retitled the Asbestos and Silica Safety and Eradication Agency Act 2013 (**ASSEA Act**).
- The Asbestos Safety and Eradication Council, which advises the Chief Executive Officer (CEO) and the Minister on the Agency's functions, was renamed the Asbestos and Silica Safety and Eradication Council (**ASSEC**).[2189]
- ASSEC membership was expanded to include an additional member representing the interests of workers in Australia, additional member representing the interests of employers in Australia and an additional member with expertise in asbestos safety, asbestos-related diseases, silica safety or silica-related diseases.[2190]
- ASSEA was required to report annually to Commonwealth, state and territory Ministers on the Silica National Strategic Plan (**SNSP**).[2191]

[2185] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 2 pt 1.
[2186] *Asbestos and Silica Safety and Eradication Agency Act 2013* (Cth) s 8.
[2187] Ibid ss 5B, 8(1)(b).
[2188] Ibid s 6.
[2189] Ibid s 28.
[2190] Ibid s 31(d)–(ea).
[2191] Ibid s 8A (3)–(4).

Amendments were also made to improve the operation of ASSEA's legislative framework:

- The objects of the ASSEA Act were clarified by addressing both ASSEA's new role in silica and noting its coordinating and awareness raising responsibilities.[2192]
- The functions of ASSEA were amended to clarify and build on existing functions, including by ensuring ASSEA can provide advice to the Minister at its discretion, not only when requested.[2193]
- ASSEA's CEO was given the power to obtain information in support of certain agency functions.[2194]
- The asbestos National Strategic Plan was defined less prescriptively. This flexibility is replicated in the requirements for the silica National Strategic Plan.[2195]
- Eligibility to be appointed as the Chair, members representing workers or employers, or the two general members was expanded to include people with an asbestos or silica related disease or people who have lived experience as a family member, advocate, or carer supporting a person who has had an asbestos or silica related disease.[2196]

The amendments also included a requirement to review the agency and its role 5 years after commencement.[2197]

The measure commenced on 15 December 2023.[2198]

ASSEA funding

The government provided ASSEA with $4.2 million in additional funding over 4 years from 2023–24, and $1.1 million per year ongoing, acknowledging the importance of appropriate funding in conjunction with the amendments to achieve the recommendations of the NDDT.[2199]

[2192] Ibid s 2A.
[2193] Ibid s 8(1).
[2194] Ibid s 14A.
[2195] Ibid ss 5A–5B.
[2196] Ibid s 32(3).
[2197] Ibid s 47.
[2198] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2 item 25.
[2199] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 10 [41], 293 [1802]; Australian Government, Budget Paper No 2: Budget Measures 2023–24 (9 May 2023) 37, 104.

Intention of the measure

The measure was to increase focus on silica-related diseases and to implement a coordinated nation-wide governance model for dealing with silica-related diseases, in response to the recommendations made by the National Dust Disease Taskforce (**NDDT**) in its 2021 report.[2200]

The NDDT identified an increasing risk of silicosis in Australia, particular among those working with engineered stone. It highlighted an urgent need for coordinated national action to reduce the rates of silica-related diseases. In its final report, the NDDT recommended the establishment of a 'cross-jurisdictional governance mechanism to improve communication and information sharing, coordinate responses, and report on progress'.[2201]

The amendments also sought to implement recommendations of the 2019 review of ASEA's role and functions, to clarify the agency's relationship with the National Strategic Plan (recommendation 2), clarify the agency's role (recommendation 3) and enhance the agency's functions (recommendation 4).[2202]

What has happened since commencement

Silica National Strategic Plan and other initiatives

Since commencement, ASSEA has developed the first Silica National Strategic Plan (SNSP) 2024–2030, which sets out how Commonwealth and state and territory governments will work together to prevent exposure to respirable crystalline silica in Australian workplaces, with the intention of eliminating silica-related diseases.[2203]

[2200] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 10 [40]–[41].
[2201] Department of Health, *National Disease Dust Taskforce – Final Report to the Minister for Health and Aged Care* (Report, June 2021) 12 [7].
[2202] DEWR, *Review of the Asbestos Safety and Eradication Agency's Role and Functions – Final Report* (Report, November 2019); Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 294 [1813], 297 [1837].
[2203] Asbestos and Silica Safety and Eradication Agency, *Silica National Strategic Plan 2024–30* (2024).

Figure 10: An extract from the Silica National Strategic Plan



With the SNSP approved in late November 2024, ASSEA commenced promoting the SNSP and its expanded role at conferences, stakeholder meetings and events. A stocktake of existing awareness and guidance materials was undertaken, which helped develop a new website (silicasafety.gov.au). ASSEA also established a new Silica Advisory Committee that includes representatives from WHS regulators, industry bodies, unions, researchers, health professionals and victim support groups. These activities complemented a broader

government awareness approach, which included grants to employers and employer groups and promotion of the new silica regulations and the ban of engineered stone.[2204] The transitional implementation report for the SNSP was presented to Ministers and published on 24 March 2026.[2205]

ASSEA is also undertaking several research projects aligned with its actions under the SNSP, including the Silica Awareness Survey to understand how Australians perceive and respond to the risks of respirable crystalline silica exposure which will inform the development of a national awareness campaign. ASSEA is also reviewing the adequacy of labels and Safety Data Sheets for products containing respirable crystalline silica and researching the potential adverse effects to human health posed by exposure to silica nanoparticles.

Other relevant developments

On 1 July 2024, the Commonwealth and all states and territories implemented amendments to the model WHS Regulations to make it an offence for a PCBU to carry out, or to direct or allow a worker to carry out, work involving the manufacture, supply, processing or installation of engineered stone benchtops, panels or slabs.[2206] From 1 January 2025, the importation of engineered stone benchtops, panels and slabs has also been prohibited, unless the CEO of ASSEA grants permission to do so.[2207] To support the public's understanding of these requirements, ASSEA has produced guidance materials which are available on its website.

What the Review heard

The Review received 3 submissions on this measure and did not receive any submissions on the Draft Report that related to this measure. The ACTU and UWU supported the expansion of ASSEA's functions to include silica-related diseases.[2208] HIA noted its support for initiatives that genuinely improve workplace safety but stated that potential impacts on businesses should be minimised. HIA submitted that it should continue to sit on ASSEA committees to ensure the residential building industry remains properly represented.[2209]

ASSEA indicated the amendments were generally working well. The agency noted that information maturity in relation to silica awareness is progressing, but it is still early days and more work is to be done. ASSEA expects pressure on its resourcing for education and engagement activities to increase as awareness of silica and silica-related diseases extends beyond engineered stone to other industries and the general public more broadly.

[2204] ASSEA, 'National Silica Awareness' (Web Page) <https://www.asbestossafety.gov.au/silicasafety/our-work/national-silica-awareness>.
[2205] Asbestos and Silica Safety and Eradication Agency, *Inaugural Silica National Strategic Plan 2024–30 – Transitional Implementation Report* (Report, March 2026).
[2206] *Model Work Health and Safety Regulations (Engineered Stone) Amendment 2024* (Cth) reg 529D; See the Commonwealth's implementation of the model laws at *Work Health and Safety Amendment (Penalties and Engineered Stone and Crystalline Silica Substances) Regulations 2024* (Cth) sch 2 pt 8A.
[2207] *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 5M.
[2208] ACTU, Submission No 67 (6 March 2026) 44; UWU, Submission No 62 (6 March 2026) 16.
[2209] HIA, Submission No 20 (2 March 2026) 24.

ASSEA noted that its legislated functions enable it to give effect to its role and the objectives of government. It highlighted that its coordination, research and data functions were critical to support the implementation and evaluation of the SNSP.

ASSEA highlighted the role of the ASSEC in its successful operation. It noted that the current composition of ASSEC's membership was effective to support ASSEA's objectives, but that it would also benefit from the inclusion of First Nations representation and expertise.

Analysis

ASSEA's new focus on silica and silica-related disease is essential to address the concerning increase in silicosis and other silica-related diseases in Australia and to ensure all workers in Australia have a healthy and safe working environment. ASSEA is adapting to its new role, having completed and now implementing the SNSP. The amendments are clear and support ASSEA to address the risks of silicosis in Australian workplaces.

A statutory review of ASSEA's ongoing role and functions is required 5 years from commencement (December 2028).[2210] ASSEA's processes and governance arrangements in relation to silica-related diseases will be more mature and the effectiveness of the measures will be clearer at that time. This future review will be in a better position to determine if it is necessary to more specifically include ASSEA's evaluation functions under the legislation. It will also be well placed to holistically consider ASSEC's membership against the agency's ongoing role and goals.

ASSEA is responsible for a significant safety initiative, with an effective doubling of work, but as at 30 June 2025, it is staffed with only 20 employees.[2211] Ongoing monitoring of ASSEA's ability to undertake its functions should be undertaken to ensure it is able to support the necessary stages of the SNSP and address the changes in community awareness and relationship to silica and silica-related diseases.

Findings and recommendations

The amendments have been operating appropriately and effectively to date, and no unintended consequences have been identified.

To fully realise the aims of the amendments, the government should monitor ASSEA's funding. At this stage, ASSEA is able to give effect to its functions within its resourcing. However, this should be considered further by the 2028 statutory review of ASSEA's ongoing role and functions, when the first SNSP is further progressed and the agency will be in a better position to consider whether additional funding is needed to support engagement, education or research initiatives.

[2210] *Asbestos and Silica Safety and Eradication Agency Act 2013* (Cth) s 47.
[2211] ASSEA, *Annual Report 2024–25* (Report, 7 October 2025) 35.

5.8 Entry to assist health and safety representatives

What the measure does

The Closing Loopholes No. 1 Act amended the FW Act to allow officials of registered organisations (such as unions) (**officials**) to enter workplaces to assist health and safety representatives (**HSR**s) where they do not hold a FW entry permit.[2212]

The amendments came into effect on 15 December 2023.[2213]

The model WHS framework and Fair Work Act entry permits

To understand the measure and whether it is operating as intended, it is important to consider the operation of the model WHS framework (as implemented by most jurisdictions) and its interaction with the FW Act entry permit system.

The model WHS framework for HSRs

HSRs are workers elected by their colleagues to represent them in WHS matters in the workplace.[2214] HSRs may exercise certain powers and functions for the work group (workers who share similar work conditions), including investigating complaints from members of the work group and inquiring into anything that appears to be a risk to the health and safety of workers in the work group.[2215]

An HSR may request any person assist (the **assistant**) in the exercise of their functions or powers.[2216] For example, an HSR might ask for an electrician, an engineer, a health and safety manager, a hearing specialist or an occupational health nurse to be present to give advice on technical health or safety matters. In some cases, an HSR may ask for someone with appropriate experience and knowledge from their relevant union to assist them.[2217]

[2212] *Fair Work Act 2009* (Cth) s 494(4).
[2213] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 2(1) item 22A.
[2214] Model Work Health and Safety Bill 2025 (Cth) ss 60, 68(1)(a).
[2215] Ibid s 68(1)(c)–(d).
[2216] Ibid s 68(2)(g).
[2217] Replacement Supplementary Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 9 [29].

Fair Work Act entry permits and its relationship with WHS entry permits

The FW Act requires a union official to hold a permit (a FW Act entry permit) issued under the FW Act to exercise a '**State or Territory OHS right**'.[2218] A State or Territory OHS right is a right conferred by a '**State or Territory OHS law**' prescribed by the FW Regulations. The FWC can issue a FW Act entry permit to an official if the FWC is satisfied that the official is a fit and proper person to hold the entry permit.[2219] This creates a 'minimum standard' framework for state and territory WHS laws on right of entry as the model WHS laws allow jurisdictions to set alternative WHS permit processes that may not require certain 'minimum standards' be met, such as a fit and proper person test.

Where a person is ineligible for a FW Act entry permit or a permit under a state or territory law, they cannot obtain a WHS entry permit, which is also required under the model laws, to enter a workplace to investigate a contravention of the relevant WHS Act.[2220]

The FW Act requires the FW Act entry permit holders to comply with certain obligations when exercising right of entry powers.[2221]

The FW Act does not require officials to obtain a FW Act entry permit to enter a workplace for the Commonwealth WHS jurisdiction as it is not prescribed by the FW Regulations. Instead, the Commonwealth relies on the WHS Act to set the requirement to obtain a WHS permit. The WHS Act requires an official to have a FW Act entry permit to enter a workplace[2222] and consequently, to have satisfied the fit and proper person test.[2223]

The model WHS Act does not require union officials to hold either a WHS or FW Act entry permit to assist an HSR.

The Closing Loopholes Amendment

The Closing Loopholes No. 1 Act amended the FW Act to remove the requirement for an official of a registered organisation assisting an HSR on request under a provision of a State or Territory OHS law to hold a FW Act entry permit.[2224] As a result, officials are subject to the same entry requirements as any other person who is requested to assist an HSR.

[2218] *Fair Work Act 2009* (Cth) s 494(1). There are constitutional limitations on the meaning and application of a 'State or Territory OHS right', see subsection 494(2).
[2219] *Fair Work Act 2009* (Cth) s 512.
[2220] Model Work Health and Safety Bill 2025 (Cth) ss 124, 133.
[2221] See *Fair Work Act 2009* (Cth) pt 3–4.
[2222] *Work Health and Safety Act 2011* (Cth) s 124.
[2223] Ibid s 133.
[2224] *Fair Work Act 2009* (Cth) s 494(4).

The application of other obligations under sections 495 to 498 of the FW Act were disapplied by the amendment so that they no longer apply for officials when they are assisting an HSR, but would continue to apply to an official acting in another capacity. As a result, officials assisting an HSR:

- Are not required to give written notice within 24 hours of attending a premises to inspect or otherwise access an employee's record.[2225]
- Are not restricted by conditions imposed on their FW Act entry permit.[2226]
- Are not required to produce their entry permit when requested by the occupier of the relevant premises.[2227]
- Are not required to limit their exercise of a State or Territory OHS right to working hours.[2228]

The exemption from holding a FW Act entry permit for HSR assistants does not apply to sections 499 to 504 of the FW Act and has the effect of overriding some of those provisions' application only to permit holders.[2229] This means that certain obligations for FW Act entry permit holders apply to any official exercising a State or Territory OHS right (for example, when assisting an HSR) as follows:

- Officials are prevented from exercising a State or Territory OHS right (for example assisting an HSR) unless they comply with reasonable OHS compliance requests by the occupier of the premises.[2230]
- Officials assisting HSRs must not intentionally hinder or obstruct any person or act in an improper manner.[2231]
- A person must not refuse or unduly delay entry onto premises by an official assisting an HSR. This requirement is to operate as if the entry entitlement was authorised by Part 3-4 (Right of Entry).[2232]
- A person must not intentionally hinder or obstruct an official assisting an HSR or otherwise act in an improper manner, as if assisting an HSR was authorised by Part 3-4 (Right of Entry).[2233]
- Officials assisting HSRs must not take action with the intention of giving the impression (or being reckless about the impression) that the doing of a thing is authorised when not so authorised in that role.[2234]
- A person is prevented from the use or disclosure of information or a document obtained in giving assistance to an HSR (except to the extent that it is related to the exercise of powers or functions of the HSR), subject to exceptions set out in section 504.[2235]

The amendment had no effect on the existing requirements for officials to obtain permits to exercise powers under the WHS Act.

[2225] Ibid ss 494(4), 495(1).
[2226] Ibid ss 494(4), 496.
[2227] Ibid ss 494(4), 497.
[2228] Ibid ss 494(4), 498.
[2229] Ibid s 494(5)(a).
[2230] Ibid ss 494(5), 499.
[2231] Ibid ss 494(5), 500.
[2232] Ibid ss 494(5), 501.
[2233] Ibid ss 494(5), 502.
[2234] Ibid ss 494(5), 503.
[2235] Ibid ss 494(5), 504.

The Closing Loopholes No.1 Act required that the Minister cause a review of the measure no later than 9 months after the amendments commenced, to be completed within 6 months.[2236]

Intention of the measure

In 2017, *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89 (***Powell***)[2237] held that entry to assist an HSR amounted to the exercise of a State or Territory OHS right under section 494 of the FW Act.[2238] Officials were required to hold a FW Act entry permit to exercise a State or Territory OHS right, which was taken to include not only rights flowing from the official's permit, but also any other rights that could conceivably be a state and territory OHS right, including an HSR's right to seek assistance from a union official.[2239] Mr Powell, a CFMEU official who did not hold an entry permit at the time, argued that under paragraph 58(1)(f) of the *Occupational Health and Safety Act 2004* (Vic) (**Vic OHS law**) he did not need a permit for this purpose, as he was assisting the HSR and it was the HSR, rather than himself, that was exercising the OHS right. The court highlighted that making a distinction between HSR assistants and other union permit processes was likely to create practical confusion that could lead to allegations of trespass.[2240]

The measure was intended to 'implement Recommendation 8 of the Boland Review (and reverse the effect of *Powell*), subject to appropriate safeguards imposed by the FW Act'.[2241] By empowering officials of registered organisations without a FW Act entry permit to enter workplaces to provide assistance on request from an HSR, the measure was aimed at 'improving HSRs' access to appropriate assistance [to] help them better discharge their statutory functions, leading to better health and safety outcomes at their workplaces'.[2242]

Before *Powell*, the prevailing understanding had been that union officials were not required to hold a FW Act entry permit when assisting an HSR as union officials would not be exercising powers related to a FW Act or WHS entry permit.[2243]

In 2018 Marie Boland conducted the Review of the Model WHS laws (Boland Review)[2244] in which she reflected on the *Powell* decision and recommended that:

> *Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the Fair Work Act or another industrial law, taking into account the interaction between Commonwealth, state and territory laws.*[2245]

[2236] *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) s 4A(1), (3)–(4).
[2237] *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89.
[2238] Ibid [59].
[2239] Ibid.
[2240] Ibid [58].
[2241] Replacement Supplementary Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 9 [32].
[2242] Ibid 4 [8].
[2243] Ibid 9 [30].
[2244] Marie Boland, *Review of the Model Work Health and Safety Laws – Final Report* (Report, December 2018).
[2245] Ibid 68.

The Boland Review indicated that

> *... the rights of an HSR to bring in a person with appropriate experience and knowledge to assist them should not be restricted if that person is also a union official. In practice, persons assisting an HSR will not necessarily be union officials... However, in some cases, an HSR may ask for someone with appropriate experience and knowledge from their relevant union to assist them.*[2246]

The Boland Review also highlighted that union officials are unlikely to require a WHS entry permit to enter a workplace in their HSR assistant capacity, because access to a workplace by an assistant under the model WHS laws is not a WHS right of entry matter that would require a WHS entry permit.[2247]

What has happened since commencement

The SJBP Review

This measure was also referred to the SJBP Review for consideration.[2248]

The SJBP Review heard from employer groups that they were concerned the provisions were inappropriate and might be misused by union officials.[2249] Employer groups highlighted that the amendment circumvents the 'fit and proper' test requirement associated with obtaining a FW Act entry permit, and that the civil penalties associated with the additional protections applied to sections 499 to 504 may not operate as a strong enough deterrent.[2250] The MCA suggested that the amendments exceeded the intention of the Boland recommendation because the assumption inherent in the recommendation was that union officials would hold some qualifications to enter a site with the aim of assisting an HSR.[2251]

The SJBP Review noted that most employer association submissions recommended the repeal of the amendment. Maritime Industry Australia suggested a revoked permit should exclude the official from being able to assist an HSR and ACCI suggested that the training required for officials with permits should be expanded to include information on HSRs.[2252]

The SJBP Review also heard from unions who were supportive of the amendments. Their submissions highlighted protective clauses in WHS legislation that addressed concerns raised about undermining safety in workplaces.[2253]

The SJBP Review considered there was a shortage of evidence on whether misuse is occurring and, if so, how widespread the problem is. It highlighted that steps to address misuse had been implemented since commencement, including placing the Construction and General Division (**C & G Division**) of the CFMEU

[2246] Ibid 67.
[2247] Ibid.
[2248] Mark Bray and Alison Preston, *Secure Jobs, Better Pay Review – Final Report* (Report, 31 March 2025) 11.
[2249] Ibid 305–6.
[2250] Ibid 306.
[2251] Ibid 307.
[2252] Ibid.
[2253] Ibid.

and all its branches into administration. As a result, the SJBP Review did not feel it could appropriately assess the consequences of the amendments.[2254]

The SJBP review recommended that:

> *The Australian Government should monitor Health and Safety Representative assistants accessing workplaces without right of entry permits and take immediate action to address any indications of misuse, particularly in the building and construction industry.*[2255]

As at 15 June 2026, the government has not yet responded to the SJBP Review.

The CFMEU Administration and the Watson Reports

In July 2024, serious allegations of criminal conduct, corruption and disregard for workplace laws by officials and associates of the CFMEU's C & G Division were raised,[2256] which led to government legislation enabling the Division to be placed into administration.[2257] The legislation was described as necessary to end ongoing dysfunction and enable the Division to act in accordance with Australian laws, including workplace laws. [2258] The scheme commenced on 23 August 2024.

In July 2025 the then Administrator, Mr Mark Irving KC, released a report by Mr Geoffrey Watson SC detailing investigations into the CFMEU's Queensland operations. The report described industrial prosecutions between 2018 and 2021 against the CFMEU involving misuse of right of entry powers, including failures to present entry permits, giving false statements about having a permit, or manufacturing disputes to affect or shut down operations.[2259] A further report released in February 2026[2260] detailed serious corruption in the nomination of delegates and HSRs, with Mr Watson SC noting:

> *The types of people who were forced onto unwilling contractors [as delegates and HSRs] were not only unskilled and untrained but had personal histories and abuse problems which made them highly unsuited and undesirable for appointment. Those appointed included dangerous criminals, killers, drug dealers, and violent bikies. Their presence made the sites less safe.*[2261]

To the Review's knowledge, the Watson Reports have not identified specific instances of HSR assistant misconduct or misuse of these provisions.

[2254] Ibid 308.
[2255] Ibid 19, 308.
[2256] Revised Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Administration) Bill 2024 (Cth) 2 [10], 6 [22].
[2257] *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth).
[2258] Revised Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Administration) Bill 2024 (Cth) 4 [11].
[2259] Geoffrey Watson, *Violence in the Queensland CFMEU* (Report, 17 June 2025) 36–7 [231]–[245].
[2260] Geoffrey Watson, *Rotting from the Top – The CFMEU in Victoria During the Setka Era* (Report, 27 January 2026).
[2261] Ibid 33 [214].

The Victorian Independent Review of Employee Representatives

The Victorian Government has commissioned an independent review into the powers and supports for employee representatives under its OHS law. Under his Terms of Reference the Reviewer, Mr Eugene White, will have regard to contemporary issues and challenges relevant to employee representation in occupational health and safety, in the context of changes in working relationships and workplaces over the past 20 years since the OHS Act was legislated, including the ongoing health and safety challenges prevalent in high-risk industries.[2262]

In Mr White's interim report published in December 2025, he noted that:

> *A number of employer representatives, including the [Master Builders Association of Victoria] and AIG, raised concerns about the type of person who is able to attend the workplace to assist HSRs. In Victoria, anyone is able to assist an HSR, but the employer may refuse access if they consider the person lacks sufficient OHS knowledge. They suggested that if a person has had an entry permit denied or revoked, they should be restricted from entering a worksite to assist an HSR. They recommended that I consider options to close what they describe as a loophole. The [Master Builders Association of Victoria] also recommended that an HSR should provide at least twenty-four hours but no more than fourteen days' notice before the entry of an assistant.*[2263]

The model WHS Best Practice Review

In September 2024, WHS ministers asked SWA to undertake the Best Practice Review to ensure the model WHS laws provide the highest level of protection for workers.[2264] The Best Practice Review will examine Australia's WHS laws, assess jurisdictional deviations from the model WHS legal framework, and consider relevant reviews and inquiries to develop recommendations.

SWA consulted stakeholders between September 2025 and March 2026 and received some submissions relating to HSR assistant provisions. HIA noted its concerns about the advancement of right of entry powers with amendments related to HSR duties. It noted concern with Queensland's laws allowing HSRs to accompany and be assisted by WHS entry permit holders and that it effectively increased access unions have to the workplace.[2265]

MBA submitted to the Best Practice Review that the measure inappropriately allows union officials who have lost their permit for bad behaviour to exert inappropriate industrial pressure. MBA suggested the reforms were an admission that union officials with right of entry permits lack WHS experience or expertise to assess hazards or risks.[2266] It indicated that it was nonsensical that the rules apply to unions

[2262] Victorian Government, 'Independent Review of Employee Representatives - Terms of Reference' (Web Page, 8 April 2026) <https://www.vic.gov.au/independent-review-employee-representatives-terms-reference>.
[2263] Eugene White, *Independent Review of Employee Representatives – Interim Report* (Report, December 2025) 74 [210].
[2264] SWA (Cth), 'Best Practice Review' (Web Page, 2025) <https://consult.swa.gov.au/best-practice-review>.
[2265] HIA, Submission No 108, *Best Practice Review of the Model Work Health and Safety Laws* (3 November 2025) 13.
[2266] MBA, Submission, *Best Practice Review of the Model Work Health and Safety Laws* (3 November 2025) 30.

if they request access but not if an HSR invites them. MBA recommended that any entry by a union official in the construction industry should be accompanied by an inspector of the relevant regulatory body and that only union officials who are 'fit and proper' persons should be entitled to exercise the right of entry permitted by a relevant permit.[2267]

In submissions to SWA's Best Practice Review, the CFMEU C & G Division (under administration) recommended that the WHS laws be amended to 'recognise that union representatives can assist HSRs where requested by the HSR and remove the onerous provisions in s.68(3A) and (3B)'.[2268] A final report will be provided to WHS ministers in August 2026.[2269]

What the Review heard

A number of stakeholder submissions addressed the measure, both in initial submissions as well as feedback on the Draft Report. Stakeholder views were largely consistent with the submissions made to the SJBP Review. Employer groups continue to oppose the amendments, while unions continue to be supportive of the amendments.

Employer groups

Most employer group submissions highlighted the history of HSR assistant and delegate position misuse in the construction and building industry and suggested that the potential for misuse remained.[2270] ACCI reported an increase in instances where entry has been sought under the guise of assisting an HSR but was for other, non-safety related matters.[2271] It indicated some of those reports relate to officials without a permit. ACCI suggested that delay and disruption on-site are outcomes of disputes relating to an HSR bringing an assistant.[2272] BCA noted that the employment of former CFMEU officials in other unions presented risks of misbehaviour extending beyond the construction and building industry.[2273]

BCA and MCA submitted that in removing the requirement to have a FW Act entry permit, there was no need for union officials assisting an HSR to undertake the fit and proper person test.[2274] BCA acknowledged that the FW Act permit process had still resulted in people with criminal convictions being given permits, but nonetheless, officials should be fit and proper.[2275] MBA noted that other obligations associated with the FW Act entry permit, such as notice of entry requirements, are not required for officials assisting HSRs. This results in WHS laws regulating the conduct, but it submitted that the obligations under WHS laws are less stringent than the requirements imposed by the FW Act permit system.[2276]

[2267] Ibid 30–1.
[2268] CFMEU, Submission, *Best Practice Review of the Model Work Health and Safety Laws* (12 November 2025) 4.
[2269] SWA, 'Best Practice Review' (Web Page, 2025) <https://consult.swa.gov.au/best-practice-review>.
[2270] AIG, Submission No 82 (8 March 2026) 72–5 [349]–[360]; HIA, Submission No 20 (2 March 2026) 22; BCA, Submission No 50 (3 March 2026) 27–8; MCA, Submission No 51 (3 March 2026) 31–2; HSE Direct, Submission No 10 (1 March 2026) 3; HIA, Submission on Draft Report No 11 (29 May 2026) 7; MCA, Submission on Draft Report No 42 (29 May 2026) 15; MBA, Submission on Draft Report No 19 (29 May 2026) 13–14.
[2271] ACCI, Submission No 54 (3 March 2026) 24 [138]; ACCI, Submission on Draft Report No 46 (1 June 2026) 42 [281].
[2272] ACCI, Submission No 54 (3 March 2026) 26 [144].
[2273] BCA, Submission No 50 (3 March 2026) 28.
[2274] Ibid 27–8; MCA, Submission No 51 (3 March 2026) 31; MCA, Submission on Draft Report No 42 (29 May 2026) 15.
[2275] BCA, Submission No 50 (3 March 2026) 28.
[2276] MBA, Submission No 34 (3 March 2026) 19; MBA, Submission on Draft Report No 19 (29 May 2026) 11–14.

Some employer groups considered the purpose of the amendments was misaligned with the original intent of the legislation. AIG and ACCI sought to highlight that the HSR assistant provisions were intended to support individuals with expertise, and ACCI suggested that union officials may not have expertise relevant to assisting an HSR.[2277] ACCI further submitted that the intention behind the amendments was not aligned with the FW Act because the Act was clearly aiming to ensure union officials entering workplaces had a permit to do so.[2278] MBA suggested the policy intent of requiring unions obtain FW Act entry permits was intended, and that this was clear from the *Powell* decision.[2279]

AIG submitted that the Boland Review recommendation, which was identified as a reason for the amendment, is irrelevant in a contemporary, post-CFMEU revelations, context.[2280] HIA suggested that the reforms are out-of-step with recent WHS framework initiatives or developments, including Victoria's independent review of employee representatives under the Victorian OHS law.[2281]

MBA highlighted the delineation of roles under each function can be hard to grapple with, particularly where the assistant stops providing a supportive role and instead seeks to exercise their right of entry powers.[2282] ACCI indicated that the amendments have caused employers to undertake significantly more training on how to address the differences between entry under an entry permit and entry to assist an HSR, and have created more confusion and risk of disputes.[2283]

Employer groups also sought to contextualise existing settings to suggest the amendments were unnecessary or could be repealed. AIG noted that HSRs could seek to rely on representatives that already have an entry permit for assistance.[2284]

Employer groups almost universally recommended the amendments be repealed.[2285] Some considered that the provisions created a new loophole, rather than closing one.[2286] Failing repeal, both MBA and HIA suggested that amendments should be made to require persons assisting HSRs to be limited to only those with specific technical knowledge or particular expertise.[2287] AIG recommended that CFMEU officials removed from their position should be ineligible from assisting an HSR.[2288]

[2277] AIG, Submission No 82 (8 March 2026) 75 [360c]; ACCI, Submission No 54 (3 March 2026) 74 [136].
[2278] ACCI, Submission No 54 (3 March 2026) 22–4 [122]–[135].
[2279] MBA, Submission No 34 (3 March 2026) 18; MBA, Submission on Draft Report No 19 (29 May 2026) 12.
[2280] AIG, Submission No 82 (8 March 2026) 73 [356]–[358].
[2281] HIA, Submission No 20 (2 March 2026) 22.
[2282] MBA, Submission No 34 (3 March 2026) 19.
[2283] ACCI, Submission No 54 (3 March 2026) 24 [137].
[2284] AIG, Submission No 82 (8 March 2026) 75 [360a].
[2285] MBA, Submission No 34 (3 March 2026) 20; AIG, Submission No 82 (8 March 2026) 75 [361]; ACCI, Submission No 54 (3 March 2026) 26 [145b]; MCA, Submission No 51 (3 March 2026) 32; HIA, Submission No 20 (2 March 2026) 22.
[2286] MBA, Submission on Draft Report No 19 (29 May 2026) 4; MCA, Submission on Draft Report No 42 (29 May 2026) 15.
[2287] HIA, Submission No 20 (2 March 2026) 22; MBA, Submission No 34 (3 March 2026) 20; HIA, Submission on Draft Report No 11 (29 May 2026) 7.
[2288] AIG, Submission No 82 (8 March 2026) 75 [361]; AIG, Submission on Draft Report No 45 (31 May 2026) 43 [250].

Feedback on draft recommendations

In response to the Review's Draft Report, employer groups broadly reiterated that the amendments should be repealed due to concerns of misuse.[2289] Employer groups had mixed views on the Report's draft recommendations to monitor the operation of HSR assistant provisions[2290] and to provide targeted and accessible training concerning HSR assistant roles and responsibilities.[2291]

HIA expressed concern that the draft recommendations would provide a further veil under which abuse could continue because abuse of the provisions was due to permit holders being aware of the tolerance levels of the system.[2292] MIAL submitted that it is clear the provisions have already failed to strike an appropriate balance.[2293]

Monitoring

In the absence of repeal of the amendments, ACCI and AIG signalled their support for formal monitoring of the HSR assistant provisions, with ACCI describing it as 'a necessary minimum step'.[2294] ACCI noted that a structured approach to data collection would have WHS regulators collect, analyse and share information about disputes relating to HSR assistant entry, refusals of entry (and the grounds), instances of alleged misuse of the provisions and evidence of inappropriate conduct related to the provisions, and ensure employer groups capture on the ground-experiences by consulting with employer groups.[2295]

BCA and MCA considered the monitoring of HSR assistant provisions would not be adequate but did not express opposition to the Review's draft recommendation.[2296] BCA suggested the Review should also recommend a federal entry permit requirement and a strengthened fit and proper person test for all persons entering workplaces.[2297] MBA indicated their support for the draft recommendation but noted that HSR assistants are not required to be identified prior to their coming on site and as a result, data collection would prove difficult in practice.[2298] AIG suggested the draft recommendation be amended to include a reporting requirement to both NWRCC and SWA annually.[2299]

[2289] HIA, Submission on Draft Report No 11 (29 May 2026) 7; MCA, Submission on Draft Report No 42 (29 May 2026) 6; AIG, Submission on Draft Report No 45 (31 May 2026) 43 [250]; ACCI, Submission on Draft Report No 46 (1 June 2026) 42 [279].
[2290] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 383 [Draft Recommendation 43].
[2291] Ibid 383 [Draft Recommendation 44].
[2292] HIA, Submission on Draft Report No 11 (29 May 2026) 7.
[2293] MIAL, Submission on Draft Report No 23 (29 May 2026) 4.
[2294] ACCI, Submission on Draft Report No 46 (1 June 2026) 42 [279]–[282]; AIG, Submission on Draft Report No 45 (31 May 2026) 43 [250]–[251].
[2295] ACCI, Submission on Draft Report No 46 (1 June 2026) 42–43 [283]–[284].
[2296] MCA, Submission on Draft Report No 42 (29 May 2026) 6; BCA, Submission on Draft Report No 18 (29 May 2026) 13.
[2297] BCA, Submission on Draft Report No 18 (29 May 2026) 13.
[2298] MBA, Submission on Draft Report No 16 (29 May 2026) 3.
[2299] AIG, Submission on Draft Report No 45 (31 May 2026) 43 [251].

Education and Training

COSBOA supported the draft recommendation for targeted and accessible training regarding HSR assistant provisions, noting the need for practical guidance for small businesses delivered by trusted sources.[2300] BCA supported targeted and accessible education but noted that 'education is not a substitute for threshold safeguards'.[2301]

ACCI supported the draft recommendation for targeted and accessible training but submitted that training should be determined by the employer and at arm's length from unions to ensure the training is balanced, workplace appropriate and directed to the proper discharge of health and safety functions, rather than the advancement of industrial interests.[2302]

AIG signalled opposition to the draft recommendation for targeted training, on the grounds that further education alone is an inadequate response to the issue.[2303] MCA submitted that education would not deter those people who would abuse HSR assistant powers, as it said was demonstrated by officials of certain unions.[2304]

MBA signalled their support for the draft recommendation but noted that training of unidentifiable HSR assistants would be hard in the absence of a regulatory requirement.[2305]

Unions

The ACTU noted the amendment removed barriers preventing HSRs from accessing support and assistance in the workplace in a timely fashion.[2306] The ACTU and UWU noted that timely assistance is vital to ensuring safety issues are addressed urgently, especially in high-risk sectors.[2307] The UWU also noted that HSRs are not often well trained,[2308] and the amendment simplified experiences for HSRs by not requiring them to understand entry permit requirements.[2309] The UWU and SDA highlighted that the amendments ultimately support HSRs to obtain help without delay or hinderance.[2310] The ACTU considered that more time is needed to fully understand the impacts of the amendment in the community, particularly in respect of misuse.[2311] The UWU and SDA also noted the current protections in WHS legislation to address any concerns that do arise.

The ACTU submitted that affiliates reported no issues or adverse consequences from the amendments.[2312]

[2300] COSBOA, Submission on Draft Report No 7 (29 May 2026) 8 [40].
[2301] BCA, Submission on Draft Report No 18 (29 May 2026) 13.
[2302] ACCI, Submission on Draft Report No 46 (1 June 2026) 43–44 [287]–[293].
[2303] AIG, Submission on Draft Report No 45 (31 May 2026) 43–4 [250]–[252].
[2304] MCA, Submission on Draft Report No 42 (29 May 2026) 6.
[2305] MBA, Submission on Draft Report No 16 (29 May 2026) 3.
[2306] ACTU, Submission No 67 (6 March 2026) 37; ACTU, Submission on Draft Report No 33 (29 May 2026) 32.
[2307] ACTU, Submission No 67 (6 March 2026) 37; UWU, Submission No 62 (6 March 2026) 15; ACTU, Submission on Draft Report No 33 (29 May 2026) 32; UWU, Submission on Draft Report No 20 (29 May 2026) 10.
[2308] UWU, Submission No 62 (6 March 2026) 15.
[2309] Ibid.
[2310] Ibid 15–16; SDA, Submission No 48 (3 March 2026) 10; UWU, Submission on Draft Report No 20 (29 May 2026) 10.
[2311] ACTU, Submission No 67 (6 March 2026) 38; ACTU, Submission on Draft Report No 33 (29 May 2026) 32.
[2312] ACTU, Submission No 67 (6 March 2026) 38.

Feedback on draft recommendations

The UWU[2313] expressed caution at the Review's draft recommendation to monitor the operation of HSR assistant provisions.[2314] The UWU submitted that the concerns raised by employer groups about the provisions circumventing the 'fit and proper person' test should be rejected and that the balance between ensuring safety and preventing misuse has already been achieved.[2315]

The ACTU noted that no evidence of misuse had been identified to the Review and, as such, the provision should be subject to further review on the same terms as any other Closing Loopholes measure.[2316] The ACTU recommended that the measure be reviewed in 2–3 years as part of other reviews proposed in the Draft Report.[2317]

The ACTU and UWU expressed broad support for the draft recommendation regarding targeted and accessible training on HSR assistant provisions[2318] on the basis that unions are consulted on the development of training programs and noted they had delivered training to HSRs.[2319]

Other stakeholders

NWRC indicated support for the amendments, noting that rural women are exposed to safety risks arising from working in isolated and understaffed workplaces. It recommended that more be done to improve HSR support, including inspection processes, in remote areas.[2320]

SWA noted in their feedback on the Draft Report the concern raised by stakeholders in this Review about the broader WHS framework and confirmed that it is examining HSRs and entry permit holders as a part of the Best Practice Review.[2321]

SWA welcomed the draft recommendation for government to work with WHS regulators to deliver targeted and accessible training on HSR assistant provisions to HSRs and PCBUs. It suggested that the recommendation be directed at SWA to deliver, noting efforts to harmonise laws across all jurisdictions and SWA's existing material on worker representation and participation published on their website.[2322]

[2313] UWU, Submission on Draft Report No 20 (29 May 2026) 10.
[2314] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 383 [Draft Recommendation 43].
[2315] UWU, Submission on Draft Report No 20 (29 May 2026) 10.
[2316] ACTU, Submission on Draft Report No 33 (29 May 2026) 32.
[2317] Ibid.
[2318] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 383 [Draft Recommendation 44].
[2319] UWU, Submission on Draft Report No 20 (29 May 2026) 10; ACTU, Submission on Draft Report No 33 (29 May 2026) 32–3.
[2320] NRWC, Submission No 29 (3 March 2026) 8–9.
[2321] SWA, Submission on Draft Report No 48 (28 May 2026) 2.
[2322] Ibid.

Broader concerns with HSR and right of entry frameworks

Although the reforms did not affect the appointment of HSRs, some employer groups pointed to Mr Watson SC's report about the CFMEU's inappropriate appointment of HSRs in the construction industry.[2323] In consultations, employer groups also noted the safety risks of having people ill-suited to support WHS on site.[2324] MBA noted that WHS entry permit processes have often been used to inappropriately access a site for non-WHS matters.[2325] MCA and BCA submitted that there had been a general increase in entry to sites in more recent times.[2326]

ACCI submitted that existing dispute resolution provisions have been insufficient to address the practical issues that arise from the amendments, including disruptions and delays.[2327] It also suggested broader reforms should be made to the WHS laws to:

- Criminalise the exploitation of workplace rights for non-safety purposes.
- Require prior written notice of entry except where the permit holder has reasonable concern there has been a breach of the Act and the contravention gives rise to a serious risk to work health and safety emanating from an immediate or imminent exposure to harm.[2328]

MCA suggested that the fit and proper person test should be strengthened to address the revelations about the CFMEU, as well as the misuse of HSR and right of entry powers.[2329]

HSE Direct raised concerns generally with the requirement in WHS laws to hold a reasonable suspicion of a contravention to enter the workplace. It submitted that it is easy for a union permit holder to identify a WHS issue so they can enter the property and disrupt the site for industrial purposes.[2330] HSE Direct suggested a number of amendments, including amendments to require a WHS permit holder to articulate in writing the suspicion and its relevance to the entry.

NRWC recommended additional guidance on WHS risks particularly related to gender, such as lone work, poorly fitted equipment, harassment and fatigue.[2331]

Analysis

The measure codifies a longstanding principle in the WHS framework – elected HSRs are able to request the assistance of an official of a registered organisation without the procedural constraints of the FW Act entry permit regime.

[2323] ACCI, Submission No 54 (3 March 2026) 25 [140]–[142]; BCA, Submission No 50 (3 March 2026) 27–8; MCA, Submission No 51 (3 March 2026) 31; MCA, Submission on Draft Report No 42 (29 May 2026) 15.
[2324] Roundtable discussions 18 February 2026.
[2325] MBA, Submission No 34 (3 March 2026) 19; MBA, Submission on Draft Report No 19 (29 May 2026) 11–13.
[2326] BCA, Submission No 50 (3 March 2026) 28; MCA, Submission No 51 (3 March 2026) 32.
[2327] ACCI, Submission No 54 (3 March 2026) 25–6 [144].
[2328] Ibid 26 [145c].
[2329] MCA, Submission No 51 (3 March 2026) 32; MCA, Submission on Draft Report No 42 (29 May 2026) 15; See also BCA, Submission on Draft Report No 18 (29 May 2026) 13.
[2330] HSE Direct, Submission No 10 (1 March 2026).
[2331] NRWC, Submission No 29 (3 March 2026) 9.

In 2017, the Full Federal Court of Australia's decision in *Powell* held that all union officials asked to assist an HSR in the execution of their duties needed a FW Act entry permit.[2332] The 2018 Boland Review subsequently recommended legislative correction to realign the FW Act with what was understood to be WHS norms.[2333]

The Explanatory Memorandum reinforces this intention and notes that the measure strengthens HSRs' ability to access appropriate expertise to better discharge their functions and support health and safety outcomes within their organisation.[2334]

The measure gives effect to 2 key operational changes:

- it disapplies the general requirement for an official of an organisation to hold a FW Act permit before exercising a State or Territory OHS right under subsection 494(1) of the FW Act, and
- for those that do hold a WHS permit, it disapplies FW Act requirements for permit holders when they are assisting an HSR.[2335] This includes removing the obligation to give written notice to the occupier of the premises and any affected employer 24 hours before exercising a State or Territory OHS right to inspect or access employee records.[2336]

These operational changes are deliberate features of the amendment. They are consistent with Parliament's intention and are not anomalies. They reflect the unique character of WHS interventions, requiring both immediacy and flexibility.

Unions are generally supportive of the amendments, emphasising the significant safety value of the provisions. The ACTU, UWU and SDA note that timely assistance is vital, especially in high-risk sectors,[2337] especially for HSRs who are often not well trained.[2338] The ACTU considers more time is needed to fully understand the impacts of the amendment in the community, especially in respect of any potential misuse.[2339]

However, employer groups raise concerns that the amendment may create opportunities for misuse and recommend the amendment is repealed. For example, ACCI suggests that officials are entering on the grounds of assisting an HSR but are instead there to undertake industrial activities.[2340] Employer groups also cite the serious allegations against the CFMEU as a reason the amendment is inappropriate,[2341] although

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[2332] *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89 [58]–[59].
[2333] Replacement Supplementary Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 9 [32]; Marie Boland, *Review of the Model Work Health and Safety Laws – Final Report* (Report, December 2018).
[2334] Replacement Supplementary Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 4 [7]–[8].
[2335] *Fair Work Act 2009* (Cth) s 494(4).
[2336] Ibid s 495(1).
[2337] ACTU, Submission No 67 (6 March 2026) 37; UWU, Submission No 62 (6 March 2026) 15–16; SDA, Submission No 48 (3 March 2026) 10; ACTU, Submission on Draft Report No 33 (29 May 2026) 32; UWU, Submission on Draft Report No 20 (29 May 2026) 10.
[2338] UWU, Submission No 62 (6 March 2026) 15.
[2339] ACTU, Submission No 67 (6 March 2026) 38; ACTU, Submission on Draft Report No 33 (29 May 2026) 32.
[2340] ACCI, Submission No 54 (3 March 2026) 24 [138]; ACCI, Submission on Draft Report No 46 (1 June 2026) 42 [281].
[2341] See, for example, AIG, Submission No 82 (8 March 2026) 73 [356]–[358]; MBA, Submission on Draft Report No 19 (29 May 2026) 4; HIA, Submission on Draft Report No 11 (29 May 2026) 7.

many of these submissions rely on misconduct of HSRs rather than assistants. AIG argues that HSRs could rely on existing permit holders instead of allowing officials without permits to assist.[2342]

The Review is not aware of, and has not received, any evidence to confirm whether misuse of the HSR assistant provisions is occurring and, if so, its prevalence. Submissions to the Review have focused on inappropriate right of entry generally or allegations against construction industry HSRs, rather than on misuse of the HSR assistant provisions. Excluding the CFMEU, 9 of the other largest unions combined recorded only 37 breaches of industrial laws in the 5 years prior to the CFMEU's administration in June 2024.[2343] The low number of breaches suggests that general misbehaviour among unions is not widespread.

Employer groups also raise concerns relating to the broader WHS framework. MBA submits that WHS entry permit processes have been used to inappropriately access a site for non-WHS matters.[2344] ACCI highlights that the dispute resolution processes are insufficient to address the practical issues that arise from the amendments.[2345] MCA raised similar concerns during the SJBP Review.[2346] MBA and HIA suggest that amendments should be made to require persons assisting HSRs to be limited to only those with specific technical knowledge or particular expertise.[2347] These are matters more appropriately considered in specific reviews of the WHS framework, including the Best Practice Review or the Victorian Independent Review of Employee Representatives currently being undertaken. SWA has confirmed to the Review that HSRs and WHS permit holders are being considered in the Best Practice Review.

SWA is also currently undertaking work on developing a proposal for referring disputes about WHS matters to a specialist tribunal, modelled on the Queensland approach. [2348] SWA's *Improving dispute resolution under the model work health and safety laws* discussion paper indicates that the Queensland model ensures that if a dispute relating to HSR requests for a person assisting to access the workplace, any party may ask the regulator to appoint an inspector or refer the issue to the Queensland Industrial Relations Commission.[2349] If adopted, SWA's proposal is likely to help to more expeditiously address and resolve concerns about the potential overreach and the misuse of the HSR assistant provisions.

Achieving balance between safety and overreach

The amendment's purpose is to enhance safety. The challenge is to preserve its WHS benefits while addressing concerns about potential overreach.

[2342] AIG, Submission No 82 (8 March 2026) 75 [360a].
[2343] Mark Bray and Alison Preston, *Secure Jobs, Better Pay Review – Final Report* (Report, 31 March 2025) 305, citing Mark Irving, *First Bi-Annual Report of the CFMEU Administrator* (Report, 2025) 8 [30].
[2344] MBA, Submission No 34 (3 March 2026) 19; MBA, Submission on Draft Report No 19 (29 May 2026) 13.
[2345] ACCI, Submission No 54 (3 March 2026) 25–6 [144].
[2346] MCA, Submission No 32, *Review of the Fair Work Amendment (Secure Jobs, Better Pay) Act and Part 16A of the Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (November 2024) 29.
[2347] HIA, Submission No 20 (2 March 2026) 22; MBA, Submission No 34 (3 March 2026) 20; MBA, Submission on Draft Report No 19 (29 May 2026) 14.
[2348] SWA, *Best Practice Review of the model Work Health and Safety laws* (Consultation Summary, March 2026) 10.
[2349] Ibid 13.

The model WHS Act provisions already include protections from misuse that a PCBU can rely on, and which are designed to avoid the concerns about misuse raised by stakeholders:

- A PCBU is not required to allow access to a person assisting an HSR if the assistant's WHS entry permit has been revoked, is suspended, or the assistant is disqualified from holding a WHS permit.[2350]
- An HSR must give at least 24 hours' notice of the assistant's proposed entry to both the PCBU and the person with management or control of the workplace.[2351] The model WHS Regulations require the notice be given in writing, include the full names of the HSR and assistant, the date and location of entry, and state why the assistant's entry is necessary.[2352] If the assistant has held or currently holds a WHS entry permit, the notice must also include the assistant's union and include a declaration by the assistant that the permit has not been revoked, is not suspended, and that they are not disqualified from holding a WHS entry permit.[2353]
- A PCBU may refuse access to an assistant on reasonable grounds,[2354] including where the assistant has previously intentionally and unreasonably delayed, hindered or obstructed any person, disrupted work, or otherwise acted improperly (for example undertaking industrial action or unrelated union business).[2355]
- Inspectors are able to assist with issues related to an assistant's access.[2356]

The model WHS laws notice provisions have not been widely adopted so have little impact on preventing potential misuse.

Steps to address alleged misuse had been implemented since commencement of the measure, including placing the C & G Division of the CFMEU into administration. In the then Administrator's Third Bi-Annual Report, he noted that the Administration has 'shed what courts before the Administration described as a lawless model of behaviour'.[2357] The then Administrator noted that over 2026, the union would 'renew its capacity to service the OHS needs of workers'.[2358]

The SJBP Report recommended additional monitoring, and the ACTU has echoed this recommendation in its first submission to this Review.[2359] This is an appropriate means of seeking to identify whether the balance between ensuring safety and avoiding overreach is being struck. As noted, there is very limited data or evidence to identify how often HSR assistant provisions are used, whether disputes arise, whether misuse is occurring and, if so, what the frequency of disputes or misuse is. Collection of information or data in this space would be challenging, as the information on entry would be held entirely at the

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[2350] Model Work Health and Safety Bill 2025 (Cth) s 71(4).
[2351] Ibid s 68(3A)–(3B).
[2352] Ibid reg 20A(1).
[2353] Ibid reg 20A(2).
[2354] Ibid s 71(5).
[2355] Explanatory Memorandum, Model Work Health and Safety Bill 2023 34 [312]. Comcare, the Commonwealth WHS regulator, also notes that refusing to participate in a normal visitor induction or wear appropriate PPE, not holding an adequate security clearance for access to the site, failing to comply with security protocol at the workplace and failing to comply with WHS instruction so far as reasonably practicable as reasons for validly refusing an HSR assistants access to the site. See Comcare, *HSR Handbook – a guide for Health and Safety Representatives in the Commonwealth work health and safety jurisdiction* (2024) 13.
[2356] Model Work Health and Safety Bill 2025 (Cth) s 160(b)(ii).
[2357] Mark Irving, *Third Bi-Annual Report of the CFMEU Administrator* (Report, 11 March 2026) 1 [1]–[2].
[2358] Ibid 8 [29].
[2359] Mark Bray and Alison Preston, *Secure Jobs, Better Pay Review – Final Report* (Report, 31 March 2025) 20; ACTU, Submission No 67 (6 March 2026) 38.

workplace level by PCBUs and HSRs, and information about disputes are likely to be held by WHS regulators or industrial courts and tribunals. Any information held by the regulators would be indicative only of the instances of misuse and fail to provide a complete picture of the operation of the provision. More consideration is needed to identify how best to collect data on these provisions that supports monitoring that goes beyond anecdotal evidence. If implemented, dispute resolution processes in WHS jurisdictions relating to HSR assistant provisions may support the monitoring of these provisions. Government should work with all relevant stakeholders, including states and territories, to identify how best to collect, analyse and utilise relevant data in policy making.

Collecting, analysing and utilising information on usage of HSR assistant provisions is intended to normalise business-as-usual evaluative practices on legislation by government. This is an appropriate response as the provision is operating as intended and there is a lack of evidence on misuse.

The model WHS laws, the FW Act provisions about FW Act entry permits and the interactions with the WHS entry permit framework are complex. Union officials that might be asked to assist HSRs may not fully understand the scope of their powers (or their limitations) compared to the powers they may exercise when entering a workplace as a FW Act and/or WHS permit holder. HSRs are also not necessarily well trained, and as a result may seek to rely on union officials to assist them to give effect to their roles.

Further targeted education and training would help to prevent or reduce uncertainty and potential conflict about the scope, limitations or application of HSR assistants' rights at a workplace.

Training to support HSRs to understand their obligations has previously been progressed by government through the HSR Train-the-Trainer Program. The program equipped 100 participants to upskill HSRs to identify and support management of psychosocial hazards in the workplace. It comprised 6 eLearning modules, supported by trainer guides, fact sheets and case studies, followed by three-day face-to-face workshops delivered nationally between February and June 2025. The program was accessed by HSR training providers and other professionals responsible for delivering HSR and WHS training, including employee representatives, government and WHS professionals.

Further education and training targeted at prospective assistants (including union officials) and HSRs on assistant provisions would benefit people who intend to access or provide this support. Education and training should canvass:

- understanding the boundaries of the assistance function,
- consequences of inappropriate behaviour when assisting the HSR, and
- for union officials that may also be assistants, the WHS and FW Act entry permit systems, as distinct from the assistant entry provisions, including provisions which still apply for FW Act permit holders.

Additionally, there should be training and education for PCBUs to support their understanding on their current rights in respect of HSR assistants, which should canvass:

- relevant WHS provisions relating to refusing HSR assistant entry, and
- the role of the regulators, including inspectors, in supporting issue resolution.

Tripartite processes should underpin the development and delivery of training and education, which are intended to benefit all state and territory jurisdictions. SWA is best placed to support this work, noting ongoing efforts to maintain harmonised approaches across jurisdictions and that SWA has mechanisms to support tripartite engagement. Unions identified that they should be involved in the development and delivery of relevant education and training for HSRs and assistants, while employer groups highlighted that employers should be delivering training and education. Both groups would be critical in supporting both the development and delivery of education and training.

To ensure training is appropriately adapted and reflects the variety of people who might assist an HSR, the materials should be customised for each role, short and publicly accessible. Government should seek to benchmark the current familiarity with these laws in advance of preparing the training and review the outcomes of the training, including whether it has addressed the risk of misuse, at an appropriate time after training has been adopted.

Findings and recommendations

This amendment is operating as intended. There is no evidence at this stage to justify amendments to the operation of the provision. The government should further preserve the measure's WHS benefits while addressing concerns about potential overreach.

Recommendation 42

The government should monitor the operation of the health and safety representative assistant provisions to identify whether the balance between ensuring safety and preventing potential misuse of the provision has been struck.

Recommendation 43

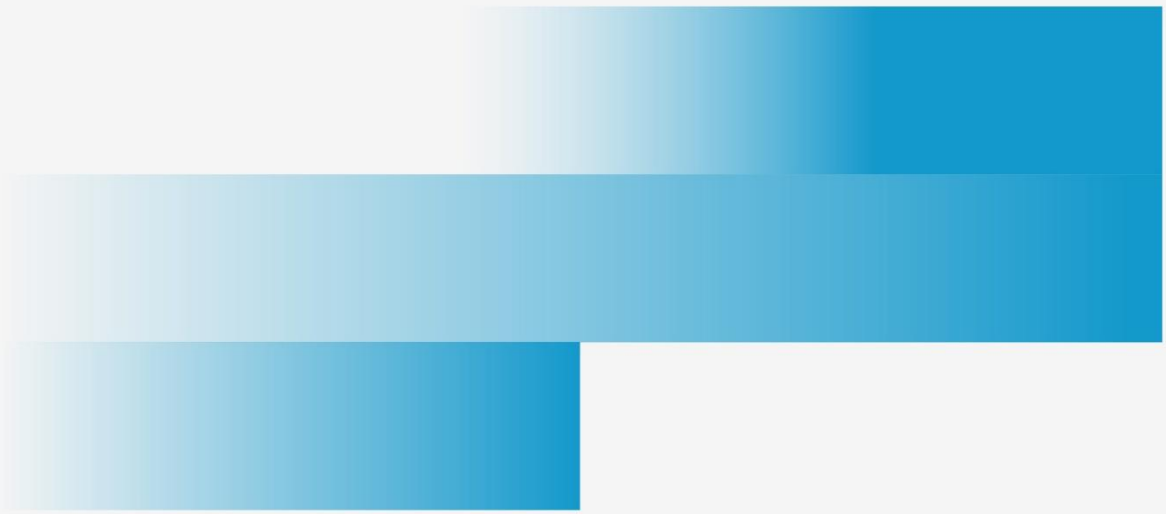
Safe Work Australia should work with work health and safety regulators, employer groups and unions to develop and deliver targeted and easily accessible education and training for:

- health and safety representatives and health and safety representative assistants (including union officials), to understand their roles and responsibilities under both the Work Health and Safety Acts and *Fair Work Act 2009*, and
- persons conducting a business or undertaking, to understand their obligations and existing right to refuse entry of health and safety representative assistants in certain circumstances.

The success of the education and training in addressing the risk of misuse should be evaluated.

Chapter 6

Paid family and domestic violence leave



6.1 Paid family and domestic violence leave

The PFDVL Act introduced 10 days paid FDVL into the NES and required a review of the entitlement approximately 12 months after it commenced. A review was conducted by Flinders University and delivered to government in August 2024 (**the PFDVL Review**).

The PFDVL Review acknowledged stakeholder suggestions for reform, however ultimately found that not enough time had passed and more time should be given for workplaces to implement, embed and become more familiar with the entitlement before any reform was considered. In the Australian Government Response to the PFDVL Review, the government agreed and committed to further consideration of the entitlement as part of the Closing Loopholes Review. The Review has undertaken a further review of the paid FDVL entitlement, in accordance with that commitment.

The Terms of Reference outline that the further review of the PFDVL Act requires consideration of the effectiveness of the amendments made by the PFDVL Act, taking into account the PFDVL Review and its finding that more time was needed for employers and employees to experience the existing entitlement before any further calls for reform were progressed.

Since the PFDVL Review, employers and employees have had almost a further 2 years' experience with the entitlement, and progress has been made to implement the recommendations of the PFDVL Review. Despite this, the Review has heard that ongoing challenges with the entitlement (including low awareness, understanding and uptake of the entitlement) persist. The Review has built on the findings of the PDFVL Review and considered whether further, including legislative, reforms should be progressed.

Family and domestic violence

FDV is a major and prevalent issue in Australia. One in 5 adults (21% or 4.2 million adults) have experienced violence, emotional or economic abuse by a cohabiting partner since the age of 15.[2360] FDV disproportionally affects women with 27% or 2.7 million women having experienced FDV since the age of 15.[2361] In Australia in 2024–2025, 1 woman was killed every 11 days by an intimate partner, and domestic homicide victims made up 41% of all homicide victims.[2362]

[2360] ABS, 'Personal Safety, Australia, 2021–22 Financial Year' (Web Page) <https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>, data released on 15 March 2023.
[2361] Ibid.
[2362] AIHW (Cth), 'Domestic homicide' (Web Page, 23 April 2026) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/domestic-homicide>.

FDV can take many forms – sexual, physical, emotional, technological, economic and financial. It can be experienced as threats, assault, abuse, neglect or harassment. A key factor in FDV is the role of coercive control. Coercive control is a common dynamic of FDV, where perpetrators exert power and dominance over victim-survivors using patterns of abusive behaviours over time that create fear and deny liberty and autonomy.[2363] It can often involve the use of many different types of abusive behaviours, including physical and non-physical behaviours, in a methodical and deliberate way to exert power and dominance.[2364]

FDV can escalate quickly or over a longer period of time. It can also be difficult to identify, because behaviours like coercive control may only be visible to the perpetrator and victim-survivor.[2365] FDV can have long-lasting impacts on an individual's physical and mental health as well as their economic and social wellbeing, or can be fatal.

There are a wide range of relationships through which FDV can manifest. FDV is most frequently perpetrated by a partner (spouses, de facto partners or other intimate partners) with both women and men in Australia more likely to have experienced FDV by an intimate partner than by other family members.[2366] FDV can be perpetrated by other family members, including parents, siblings, step-family members, grandparents, children and other family and kinship relationships.[2367]

FDV is experienced differently in different cohorts. For example:

- 2 in 3 First Nations people aged 15 and over, who had experienced physical harm in the last 12 months, reported the perpetrator was a family member.[2368]
- Experiences of violence from an intimate partner or parent since the age of 15 were more common among adults with disability (21% and 5.2% respectively) than adults without disability (13% and 3.0%, respectively), with the highest proportions among those with severe or profound disability (29% and 6.7%, respectively).[2369]
- Women from culturally and linguistically diverse backgrounds face additional concerns, for example in relation to visa status, with over 40% of women on temporary visas who sought support for FDV threatened with withdrawal of visa support.[2370]

[2363] Commonwealth of Australia, Attorney-General's Department, *National Principles to Address Coercive Control in Family and Domestic Violence* (September 2023) 1.
[2364] Ibid 1–2.
[2365] Ibid 1.
[2366] 23% (2.3 million) of women and 7.3% (693,000) of men had experienced FDV by an intimate partner compared with 8.1% (806,000) of women and 5.9% (561,000) of men who experienced FDV by other family members, see ABS, 'Personal Safety, Australia, 2021–22 Financial Year' (Web Page) <https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>, data released on 15 March 2023.
[2367] AIHW (Cth), 'Family and Domestic Violence' (Web Page, 24 November 2023) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/family-domestic-violence#what>.
[2368] ABS, *National Aboriginal and Torres Strait Islander Health Survey Methodology* (2018–19).
[2369] AIHW (Cth), 'People with Disability' (Web Page, 24 February 2026) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/population-groups/people-with-disability>.
[2370] Marie Segrave, *Temporary Migration and Family Violence: An analysis of victimisation, vulnerability and support* (Report, September 2017).

- 61% of LGBTIQA+ individuals report they had experienced intimate partner violence (**IPV**)[2371], with cisgender men the most common perpetrator (57% of incidents).[2372]
- Young women are more at risk of experiencing sexual violence and harassment, and physical and sexual IPV compared to older women.[2373]
- 1 in 6 women (18%, or 1.7 million) and 1 in 9 men (11%, or 1.0 million) in 2021–22 had experienced abuse before the age of 15. 989,000 women and 788,000 men had experienced childhood physical abuse, with the most common perpetrator of the first incident being a family member, with the majority involving a parent.[2374]
- People with disability are more likely to be victim-survivors of FDV and sexual violence than people without disability, and women with a disability are about 3 times as likely to experience intimate partner violence as a man with a disability.[2375]

Impact of FDV

FDV can and does impact people from all walks of life, but predominantly affects women and children, and is primarily perpetrated by men.[2376] FDV can have serious and long-term impacts including physical, emotional, psychological, social and economic impacts.[2377]

A 2015–2016 KPMG report, commissioned by the Department of Social Services (**DSS**) estimated that, in 2015–16, violence against women cost Australia an estimated $22 billion.[2378] KPMG noted that First Nations women, women with disability, pregnant women, and women experiencing homelessness were underestimated in the available data, which may add another $4 billion to the estimate.[2379]

[2371] The National Plan notes that '**intimate partner violence**, also commonly referred to as '**domestic violence**', refers to any behaviour within an intimate relationship (including current or past marriages, domestic partnerships or dates) that causes physical, sexual or psychological harm. This is the most common form of violence against women. Intimate partner violence can also occur outside of a domestic setting, such as in public and between 2 people who do not live together'. DSS, *The National Plan to End Violence against Women and Children 2022–2032* (Report, 2022) 37.
[2372] AIHW (Cth), 'LGBTIQA+ People' (Web Page, 30 July 2025) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/population-groups/lgbtiqa-people>.
[2373] AIHW (Cth), 'Young Women' (Web Page, 24 February 2026) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/population-groups/young-women>.
[2374] AIHW (Cth), 'Children and Young People' (Web Page, 23 April 2026) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/population-groups/children-and-young-people>.
[2375] AIHW (Cth), 'People with Disability' (Web Page, 24 February 2026) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/population-groups/people-with-disability>.
[2376] AIHW (Cth), 'Family, domestic and sexual violence' (Web Page, 29 May 2026) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/family-domestic-violence>; AIHW (Cth), 'Who uses violence?' (Web Page, 30 July 2025) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/understanding-fdsv/who-uses-violence>.
[2377] Anne Summers, *The Choice – Violence or Poverty: Domestic violence and its consequences in Australia today* (Report, July 2022).
[2378] AIHW (Cth), 'Economic and Financial Impacts' (Web Page, 24 February 2026) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/economic-financial-impacts>.
[2379] Ibid.

FDV can have serious and long-lasting impacts on women's health in Australia. Loxton et al found that women in Australia who had lived with IPV were more likely to report poorer mental health, physical function and general health, and higher levels of bodily pain.[2380] The Australian Institute of Health and Welfare (**AIHW**) estimates that, in 2024, if no females aged 15 and over had experienced intimate partner violence, the disease burden due to homicide and violence would be reduced by 49%.[2381]

The impact of FDV can greatly affect a person's employment and financial and housing stability:[2382]

- Women who had experienced IPV in the last 5 years reported higher rates of financial stress.[2383] Of these women, 44% had cash flow problems (compared with 7.2% who had not experienced IPV) and 30% could not raise $2,000 within a week (compared with 7% who had not experienced IPV).[2384]
- Approximately 64% (or 867,000) of women left their home when their relationship with a violent partner ended and, of those, 69% (597,000) left either property or assets behind.[2385]
- 1.5 million Australian women have experienced violence by a previous partner. Of these 1.5 million women, 23% took time off work as a result of the violence (noting a further 28.8% of women were not in work at the time of the violence). This proportion increases where the victim-survivor has dependent children.[2386]

'The Cost Report' by Professor Anne Summers AO noted that 'in 2021–22, women who experienced partner violence or abuse … in the last five years were less likely to be employed (76.1%) than women who had never experienced this violence or abuse (81.4%)'.[2387] It also highlighted a sharp decline in wages for women who experience physical violence, with an average loss of $3,180 in annual salary, representing a 9.1% decline from pre-violence earnings.[2388]

Restricting victim-survivors from being able to work or earn money is a common form of economic abuse. Perpetrators may use tactics such as stalking, disruptive behaviours (for example, excessive contact at work, sabotaging access to public or private transport) or engaging in public abuse and intimidating colleagues to influence a victim-survivor's ability to engage in and retain their employment.

[2380] Deborah Loxton, et al, 'Intimate Partner Violence Adversely Impacts Health over 16 Years and across Generations: A Longitudinal Cohort Study' (2017) 12(6) PLOS ONE e0178138 <https://doi.org/10.1371/journal.pone.0178138>.
[2381] AIHW (Cth), 'Family, domestic and sexual violence – Health Outcomes' (Web Page, 30 January 2026) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/health-outcomes>.
[2382] Ibid.
[2383] AIHW (Cth), 'Economic and Financial Impacts' (Web Page, 24 February 2026) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/economic-financial-impacts>.
[2384] Ibid.
[2385] Ibid.
[2386] Anne Summers, Thomas Shortridge, Kristen Sobeck, *The Cost of Domestic Violence to Women's Employment and Education* (Report, 28 February 2025) 45.
[2387] Ibid 31.
[2388] Ibid 34.

Economic security is a significant factor in both enabling women to leave violent and abusive relationships, and in supporting women to not return to violent relationships. Having 'no money/financial support' was the 4th highest reason given by women who had returned to a violent partner (21.5% of respondents),[2389] following wanting to work things out, the former partner promising to stop assaults and/or threats and still loving their former partner.[2390]

Addressing FDV

The *National Plan to End Violence against Women and Children 2022–2032* (**the National Plan**)[2391] outlines governments' commitment and pathway for eliminating gender-based violence with the shared vision to eliminate gender-based violence in Australia in one generation.[2392] The *Our Ways – Strong Ways – Our Voices: National Aboriginal and Torres Strait Islander Plan to End Family, Domestic and Sexual Violence 2026–2036*, which runs in parallel with the National Plan, is a standalone plan to ensure real and lasting change for First Nations women and children and realise a future free from violence.[2393] Paid FDVL is one of many initiatives which aim to support the achievement of these goals.

FDV is not only a criminal, physical and social issue, but also an economic and workplace issue.[2394] The workplace plays a key role in preventing and responding to FDV by providing space in which victim-survivors can be supported to identify and address FDV. Secure employment plays a fundamental role in providing economic protection, through both job security and financial security, enabling women to escape and remain free from violent and abusive relationships.

What the measure does

The PFDVL Act introduced 10 days paid FDVL into the NES.

Prior to the introduction of paid FDVL, the NES had included 5 days of unpaid family and domestic violence leave.[2395] In this context, FDV was limited to violent, threatening and abusive behaviour by a close relative of an employee. In 2021, the FWC commenced a review of unpaid family and domestic violence leave (**FWC 2021 Review**), to consider the adequacy of the unpaid leave. The FWC 2021 Review found that 'financial circumstances of employees who have experienced FDV may make it impracticable for them to access the existing unpaid entitlement'.[2396]

[2389] ABS, 'Personal Safety, Australia, 2021–22 Financial Year' (Web Page) <https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>, data released on 15 March 2023.
[2390] Ibid.
[2391] DSS, *The National Plan to End Violence against Women and Children 2022–2032* (Report, 2022).
[2392] Ibid 14.
[2393] DSS, *Our Ways – Strong Ways – Our Voices: National Aboriginal and Torres Strait Islander Plan to End Family, Domestic and Sexual Violence 2026–2036* (Report, 2026) 33.
[2394] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2022, 176 (Tony Burke, Minister for Employment and Workplace Relations).
[2395] Introduced to the NES in 2018.
[2396] *Family and Domestic Violence Leave Review 2021* [2022] FWCFB 2001 [78].

The entitlement commenced on 1 February 2023 for national system employees,[2397] 1 August 2023 for small business employees,[2398] and 9 September 2024 for non-national system employees.[2399]

The entitlement

The PFDVL Act amended the FW Act to provide an entitlement to 10 days of paid FDVL, available in full at the start of each 12-month period.[2400] In line with the previous unpaid entitlement, the leave does not accumulate from year to year, is available to full-time, part-time, and casual employees and can be taken in a continuous period or separate periods, including periods of less than a day.[2401]

The PFDVL Act expanded the definition of FDV to include violent, threatening or abusive behaviours by a current or former intimate partner, or a member of the employee's household, in addition to a close relative.[2402] An intimate partner includes people who have an ongoing sexual relationship, regardless of their co-habitation or duration of their relationship.[2403] References to a member of a household can include people cohabitating, such as a housemate or extended family member.[2404]

FDV is defined for the purposes of the entitlement as violent, threatening or other abusive behaviour by a close relative of a person, a member of a person's household, or a current or former intimate partner of a person, that:

- seeks to coerce or control the person, and
- causes the person harm or to be fearful.[2405]

The definition of 'close relative', which remained unchanged as a result of the amendments, is a person who is a member of a person's immediate family, or a person related under Aboriginal or Torres Strait Island kinship rules.[2406] 'Immediate family' of a person means a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the person, or a child, parent, grandparent, grandchild or sibling of a person's spouse or de facto partner.[2407]

[2397] *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) s 2(1) item 2; *Fair Work Act 2009* (Cth) sch 1 cl 52.
[2398] *Fair Work Act 2009* (Cth) sch 1 cl 52.
[2399] Ibid sch 1 cl 54.
[2400] Ibid s 106A(1).
[2401] Ibid ss 106A(2)–(4).
[2402] Ibid s 106B(2).
[2403] Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) 7 [41].
[2404] Ibid 8 [42].
[2405] Ibid 7 [40].
[2406] *Fair Work Act 2009* (Cth) s 106B(3).
[2407] Ibid s 12.

Subsection 106B(1) of the FW Act provides that to access paid FDVL:

- the employee must be experiencing FDV[2408]
- the employee must need to do something to deal with the impact of the FDV,[2409] and
- it is impractical for the employee to do that thing outside their work hours.[2410]

The amendments also replaced the examples of actions that could be covered, listing matters like attending counselling and attending appointments with medical, legal and financial professionals.[2411] They also make clear that attending court hearings is an example of dealing with FDV violence, whether or not the hearing is urgent.[2412]

The PFDVL Act inserted a new provision to provide that when a non-casual employee takes paid FDVL, it needs to be paid at the employee's full rate of pay, calculated as if they had not taken leave, and should include any additional loadings or penalties the employee would have otherwise received.[2413] Casual employees must also be paid their full rate of pay, worked out as if they had worked hours they had been 'rostered'.[2414] 'Rostering' for this purpose is where an employee has accepted an offer to work those hours.[2415] The employer does not need to provide paid FDVL if a casual employee takes leave at a time when they are not rostered.

The PFDVL Act also provided a pathway for employers, employees or their representatives to seek a determination from the FWC to vary enterprise agreements made prior to the introduction of the amendment which provide lesser entitlements to paid FDVL to make the enterprise agreement consistent with the NES entitlement.[2416]

Obligations for employers and employees

An employee must notify their employer they are taking paid FDVL as soon as practicable and advise how long they will take or expect to take leave.[2417] An employer can, but does not have to, require that the employee provide evidence that would satisfy a reasonable person that the criteria for accessing the leave under subsection 106B(1) are met.[2418] In the paid FDVL context, the evidence would need to support that they are experiencing family violence, the leave is taken to do something to deal with the impact of the violence, and it is impractical for them to do so outside their work hours.

[2408] Ibid s 106B(1)(a).
[2409] Ibid s 106B(1)(b).
[2410] Ibid s 106B(1)(c).
[2411] Ibid s 106B(1)(note 1).
[2412] Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) 7 [39].
[2413] *Fair Work Act 2009* (Cth) s 106BA(1)(a); Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) 8 [49].
[2414] *Fair Work Act 2009* (Cth) s 106BA(1)(b).
[2415] Ibid s 106BA(2).
[2416] Ibid sch 1 sub-cl 53(1).
[2417] Ibid ss 107(1)–(2).
[2418] Ibid s 107(3)(d).

Employers must take steps to ensure information provided to the employer when giving notice or evidence is treated confidentially, so far as is reasonably practicable.[2419] The PFDVL Act also introduced a requirement that employers not use the information for anything other than satisfying themselves that paid FDVL could be accessed, other than with the employee's consent.[2420] The provision made it explicit that the employer could not use the information to take adverse action against the employee.[2421] The confidentiality requirement does not preclude the employer from doing something otherwise required by law or necessary to protect the life, health or safety of the employee or another person.[2422]

The PFDVL Act also introduced a prohibition on employers including information prescribed by the regulations in relation to paid FDVL on payslips.[2423] Subsequently, the SJBP Act introduced further amendments to require employers to positively comply with any requirements prescribed by the regulations in relation to the reporting on paid FDVL[2424] and to clarify that a payslip was not considered false or misleading by complying with the regulations.[2425]

The PFDVL Act also made amendments to provide that if an employee takes paid personal/carer's leave and the leave taken involves a period of paid FDVL the employee is taken not to be on paid personal/carer's leave for that period.[2426]

Amendments supporting extension of paid FDVL to non-national system employees via ILO Convention (No. 190)

The PFDVL Act extended the entitlement to paid FDVL to non-national system employees. A national system employee is an individual employed by a national system employer, such as a constitutional corporation, the Commonwealth or employers in territories.[2427] Those falling outside the national system include some state public service employees. To ensure non-national system employees can access the entitlement, new Division 2A of Part 6-3 was introduced to extend provisions relating to paid FDVL to apply as if a reference to a national system employee is a reference to a non-national system employee.[2428]

State or territory laws that provide employee entitlements in relation to FDV are not excluded and continue to apply to non-national system employees where they provide more beneficial employee entitlements than the extended paid FDVL provisions.[2429]

[2419] Ibid s 106C(1).
[2420] Ibid s 106C(2).
[2421] Ibid s 106C(2).
[2422] Ibid ss 106C(3)–(4).
[2423] Ibid s 536(2)(c).
[2424] Ibid s 536(2)(d).
[2425] Ibid s 536(3A).
[2426] Ibid s 98(2).
[2427] Ibid ss 13–14.
[2428] Ibid s 757B(1).
[2429] Ibid s 757E.

The extension to non-national system employees commenced on 9 September 2024, shortly after ILO Convention No. 190 came into force for Australia.[2430]

Intention of the measure

The introduction of 10 days paid FDVL was a 2022 election commitment to help employees experiencing FDV to remain in work, maintain their financial security and access relevant services.[2431] The amendment intended to recognise that, as well as being a criminal justice and social issue, FDV is an economic and workplace issue as well.

The amendment recognises financial insecurity is a barrier to leaving violent situations, where victim-survivors risk unemployment, financial hardship, or homelessness. Financial security provided by secure employment can offer a means out of violent situations. The amendment also supports maintaining employment, financial security and access to relevant services[2432] which provides independence, social networks and support, and increased self-esteem for victim-survivors.[2433]

After the passage of the legislation, the then Minister for Employment and Workplace Relations noted the legislation ensures that no worker should have to choose between their safety and their income.[2434] The entitlement intended to provide financial support to assist employees to manage the consequences of FDV and engage in processes aimed at preventing future violence, such as attending counselling sessions and other support services.[2435]

Expanding the definition of FDV to include conduct of an employee's current or former intimate partner or a member of an employee's household, recognised that Australians are living in a more diverse range of non-traditional living situations.[2436]

The FWC 2021 Review of unpaid family and domestic violence leave found it had limited utility for victim-survivors who can face 'acute' financial circumstances.[2437] The FWC indicated that paid FDVL is a 'critical mechanism for employees to maintain their employment and financial security, while dealing with the effects of FDV'.[2438]

[2430] ILO Convention No.190 is the first international treaty to affirm the right of all workers to a workplace free from violence and harassment. It establishes a global framework for prevention and response, applying across all sectors and employment types. Key provisions include a broad definition of violence and harassment, protection for all workers, including those in non-traditional roles, recognition of the 'world of work' as encompassing online and non-physical environments and a requirement for governments to implement comprehensive, gender-responsive measures. *Convention Concerning the Elimination of Violence and Harassment in the World of Work* (No. 190), adopted 21 June 2019, 108th ILC session (entered into force 25 June 2021).
[2431] Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) 1.
[2432] Ibid.
[2433] Ibid [5].
[2434] Tony Burke, 'Closing loopholes so workers don't have to choose between their safety and their pay' (Media Release,19 October 2023).
[2435] Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) 3 [15].
[2436] Ibid 7 [43].
[2437] *Family and Domestic Violence Leave Review 2021* [2022] FWCFB 2001 [678].
[2438] Ibid [782].

The introduction of 10 days paid FDVL also sought to align the NES with the practices of many Australian employers who already provided paid FDVL through enterprise agreements or workplace policies.[2439]

The amendments demonstrated an intention to address the financial security of employees taking paid FDVL by requiring employers to provide employees, as far as possible, with the same remuneration they would have received had they not taken the leave.[2440]

Amendments relating to payslips were made to address concerns raised in the 2022 Senate Standing Committee on Education and Employment inquiry into the PFDVL Bill (**2022 Senate Committee Inquiry**). The 2022 Senate Committee Inquiry raised particular concerns about the safety and privacy of victim-survivors if their payslips showed they were accessing paid FDVL. Amendments made via the PFDVL Act and SJBP Act were intended to ensure the safety and privacy of employees accessing paid FDVL.[2441]

The delayed commencement for small businesses was intended to allow additional time to prepare for the change and recognised the unique position of small business employers who may lack specific human resource and payroll support.[2442]

What has happened since commencement

Amendments to the FW Regulations 2009

In February 2023, amendments were made to the FW Regulations to require that payslips not show the usage or outstanding balance of paid FDVL.[2443] Instead, employers are required to reflect payment of paid FDVL as performance of ordinary hours or another kind of payment related to the performance of work or, where requested by the employee, another type of leave (excluding paid FDVL).[2444]

Introduction of 'subjection to FDV' as a protected attribute in the FW Act

The Closing Loopholes No. 1 Act amended the FW Act to include 'subjection to family and domestic violence' as a protected attribute in provisions that prevent discriminatory conduct. The measure relies on the meaning of FDV provided for in subsection 106B(2). See Section 4.5 for more information on the measure.

[2439] Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) 1.
[2440] Ibid 8 [49]; Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2022, 176 (Tony Burke, Minister for Employment and Workplace Relations).
[2441] Senate Education and Employment Legislation Committee, Commonwealth of Australia, *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022* [Provisions] (Report, September 2022) 23–25.
[2442] Explanatory Memorandum, Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth), 10 [58].
[2443] *Fair Work Regulations 2009* (Cth) reg 3.47.
[2444] Ibid reg 3.48.

2024 Independent Review of the PFDVL Act amendments

The PFDVL Act required an independent review of the PFDVL Act amendments to determine if they were operating effectively.[2445] The review was also required to consider the operation of the entitlement, including its impact on small businesses, sole traders and people experiencing FDV and consider quantitative and qualitative data.[2446] The review was required to start as soon as practicable, 12 months from the commencement of the amendments establishing paid FDVL (being 1 February 2024), and be delivered to government within 3 months of the review's commencement.[2447]

On 15 May 2024, Flinders University commenced the PFDVL Review.[2448] To support the PFDVL Review's consideration of qualitative and quantitative data, DEWR commissioned the Behavioural Economics Team of the Australian Government (**BETA**) to gather data and information from victim-survivors, employers and members of the Australian workforce.[2449] The project, undertaken from December 2023 to April 2024, intended to provide the PFDVL Review with insights on use of the leave and the influence of the entitlement on workplace attitudes to victim-survivors.[2450] BETA's analysis included surveys of Australians, employers and victim-survivors as well as in-depth interviews with victim-survivors and business owners.[2451]

The PFDVL Review also consulted stakeholders to help understand the impacts of the reforms on certain cohorts. A formal consultation process was held from 15 May to 7 June 2024, and involved individuals, employers, union representatives, academics and other organisations engaging through roundtable discussions, written submissions and an online survey.[2452]

The final report of the PFDVL Review was provided to government on 30 August 2024 and was tabled in both houses of Parliament on 9 October 2024.[2453]

[2445] *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) s 4(1).
[2446] Ibid ss 4(2)–(3).
[2447] Ibid ss 4(4)–(5).
[2448] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024); Australian Government, *Australian Government Response to the Independent Review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 (Cth)* (Report, February 2025) 4.
[2449] Australian Government, *Australian Government Response to the Independent Review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 (Cth)* (Report, February 2025) 4; See BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) for the comprehensive report BETA prepared and which was considered by the PFDVL Review.
[2450] Australian Government, *Australian Government Response to the Independent Review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 (Cth)* (Report, February 2025) 4.
[2451] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) 41.
[2452] Ibid viii.
[2453] Australian Government, *Australian Government Response to the Independent Review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 (Cth)* (Report, February 2025) 4.

Key findings and recommendations

The PFDVL Review made 12 findings and 5 recommendations to government.

The reviewers found that the paid FDVL entitlement was operating as intended, suggesting 'victim-survivors who have used the entitlement largely find it effective in enabling them to take steps to ensure their safety without jeopardising their income or employment, in line with the policy intent'.[2454] The reviewers similarly found that the entitlement was having positive impacts on workplace culture[2455] and there was strong support for the entitlement across stakeholder groups.[2456]

The PFDVL Review suggested that the parameters of the leave entitlement are appropriately set but argued that not enough time had passed to allow for a full understanding of the entitlement's operations and impacts,[2457] particularly for small business employers due to the delayed commencement of this measure for small business.[2458]

It was noted that utilisation of the leave was low, which in turn contributes to uncertainty in how the entitlement operates and the impacts it may have.[2459] The PFDVL Review also found that casual employees were less aware of, and less likely to access, paid FDVL.[2460] The review highlighted the challenges with providing the entitlement to casuals, particularly in relation to the requirement that the casual employee must have been rostered to be able to access paid FDVL.[2461] Awareness of the entitlement was highlighted as especially important for casual employees given the precarity of casual employment, the overrepresentation of women in the casual workforce, and no access to other forms of paid leave.[2462]

The PFDVL Review suggested that low awareness, uncertainty about evidence or other requirements, concerns about privacy and confidentiality, and the impact of social stigma were all likely to play a role in the underutilisation of the entitlement.[2463]

[2454] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) viii.
[2455] Ibid 76; BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 4.
[2456] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) 76; BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 4.
[2457] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) 78–83.
[2458] Ibid 81–3.
[2459] Ibid 83–6.
[2460] Ibid 90–1.
[2461] Ibid 90–1.
[2462] Ibid ix.
[2463] Ibid ix, 91–2, 94–5.

Key Data

- 91% of the 46 surveyed leave users who had accessed the entitlement reported paid FDV leave helped them maintain their income and 89% said it helped them maintain employment.[2464]
- Leave users accessed the leave to arrange for their own safety (41%), arrange for their child's safety (43%), access police services (39%), access medical services (22%) and access legal services (24%).[2465]
- 58% of businesses and 39% of victim-survivors surveyed were aware of paid FDVL (although only 20% of casually employed victim-survivors were aware of the entitlement), but only two-thirds of employers (or 66%) reported that they offered 10 or more days.[2466]
- 49% of victim-survivors who knew about paid FDVL did not access it, despite indicating it would have benefited them.[2467]
- 38% of victim-survivors reported suffering no negative consequences from accessing the leave but around a quarter considered accessing the leave resulted in exclusion, discrimination and a reduction in trust from their management, 17% considered accessing the leave resulted in impacts on their income (such as reduced hours) and 15% considered accessing the leave resulted in their termination or a request to resign.[2468]
- Only 46% of victim-survivors were aware the leave could be used for relocating and only 52% knew it could be used to access counselling.[2469]
- 14% of surveyed employers had denied a request for leave, with larger businesses (21%) more likely to deny leave than small (11%) or micro (4%) businesses.[2470]

The PDFVL Review considered that particular groups including First Nations peoples, workers from CALD communities, workers living and working with disability, workers from LGBTIQA+ communities, and employees in regional, rural and remote locations, faced additional barriers to accessing the entitlement.[2471]

[2464] BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 4.
[2465] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) 41.
[2466] Ibid 43; BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 13–14.
[2467] BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 20.
[2468] Ibid 35–6.
[2469] Ibid 48.
[2470] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) 84.
[2471] Ibid 91–2.

The PDFVL Review also considered that support for employers implementing the entitlement, particularly with regard to interpreting and applying evidentiary, confidentiality and privacy requirements, remained a concern for small businesses.[2472] It suggested that despite investment from government, there was further scope for revision and targeted support for small business employers. The review also noted the importance of further embedding and integrating paid FDVL into the workplace relations system.[2473]

The PFDVL Review acknowledged that paid FDVL is only one of a range of strategies for addressing FDV in Australia.[2474] The reviewers suggested that integrating paid FDVL within broader community actions is critical to achieving the objective of ending gender-based violence in a generation.[2475]

The PFDVL Review noted that, during their consultation, several stakeholders had put forward recommendations to the review for changes to the entitlement's operation. Suggestions for reform included increasing the quantum of leave, amending evidence requirements, and expanding access to the leave for victim-survivors who have experienced any form of sexual violence.[2476] However, the reviewers determined that more time and experience with the existing legislative provisions was required to inform a more considered view on any potential reforms.[2477]

The review made 5 recommendations to government (see Table 17).[2478]

[2472] Ibid x, 87–8.
[2473] Ibid x.
[2474] Ibid ix.
[2475] Ibid.
[2476] Ibid 79–81.
[2477] Ibid 79.
[2478] Ibid xi.

Table 17: PFDVL review recommendations

No.	Text
1	Ongoing evaluation and stakeholder consultation is needed to develop the evidence base on FDV leave. As familiarity with the entitlement increases, continued opportunities for stakeholder engagement are important to inform proposals for further reform.
2	Existing resources should be improved and promoted, with a particular focus on small business and resources that speak to employees, including: • Reconsider and revise existing Government resources with a particular focus on areas of uncertainty including the interpretation of evidence requirements, management of confidentiality, and application of the entitlement to casual employees and employees requesting leave to care for others. • Relaunch and invest in continuing development of www.10daysfdvleave.com, the 'one-stop shop' hub for small business. • Consider targeting information through identified channels of communication that are regularly accessed by small business owners and in the community (e.g. social media). • Consider ways to normalise FDV leave within the context of broader workplace relations messaging.
3	Harness the intelligence and advocacy of unions, employer representatives and small business peak bodies to continue training and awareness-raising initiatives and report back to Government on progress and emerging barriers.
4	Any response by Government to enhance resources should tap into existing distribution networks and focus on priority groups of employees including: • casual workers • First Nations and CALD workers • LGBTQIA+ workers • people living and working with disability • workers in regional, rural and remote communities.
5	Initiatives to improve awareness and access to FDV leave must be integrated with broader community efforts to address FDV and gender inequality. For example: • Education and training initiatives for first responders (and services that commonly interact with FDV victim-survivors) should include information on workplace entitlements and supports. • Community actions to further the objectives of the National Plan should continue to recognise the role of the workplace in addressing and responding to FDV. • Attention to issues of national consistency and importance, including a harmonised legislative definition of FDV, should continue to be prioritised.

Australian Government response

On 25 February 2025, the government response agreed to all recommendations and provided a thematic blueprint for integrated action to address the recommendations.[2479] Since the Australian Government Response was published, DEWR, the FWO and other relevant government agencies have progressed the commitments made in the response:

Table 18: Commitments and actions from the Australian Government response

Commitment	Progress
Promoting paid FDVL through relevant training programs funded by the Commonwealth for first responders who commonly interact with those at risk of or experiencing FDV.	DSS has supported Commonwealth-funded providers such as Lifeline Australia (which delivers DV-alert training), and Gender and Disaster Australia (which delivers Lessons in Disaster training) to include information on paid FDVL in their training materials for frontline workers who work with individuals experiencing, or at risk of, FDV.
Revisiting and promoting existing FWO resources including continued promotion and distribution of FWO resources	The FWO has provided information and promoted guidance on paid FDVL through social media, email, communications campaigns, webinars, presentations, speeches and engagements. The FWO has also promoted relevant online learning courses that include information on paid FDVL (e.g. Difficult Conversations in the Workplace) through social media channels and webinars.
Revisiting and promoting existing resources for small businesses such as the small business website, 10dayspaidFDVLeave.com.au.	Transitioning Well was procured by DEWR to further develop, promote and maintain the 10dayspaidFDVLeave.com.au website, initially created for the introduction of the entitlement in 2022. This included updating information and developing new resources, such as a guide for casuals and a conversation simulation focused on evidence and confidentiality. There has been ongoing paid promotion of the website, with the latest significant campaign in October 2025 delivering over 1.3 million impressions from the Meta campaign, and nearly 700,000 users reached. Between July 2023 and April 2026, the website has been viewed 84,017 times by 58,763 users. Further promotion of the 'Small Business, Big Impact' podcast, a 10-episode series on FDV, with each episode running for 10–20 minutes has been undertaken.

[2479] Australian Government, *Australian Government Response to the Independent Review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 (Cth)* (Report, February 2025).

Commitment	Progress
Further considering resources to target priority groups, with the FWO to consider, in consultation with First Nations organisations and peoples, developing a paid FDVL resource for First Nations communities, and government investigating how supports can integrate cultural considerations for CALD employees.	FWO updated existing material and developed new material relating to priority cohorts. Promotional activities undertaken by the FWO have focused on reaching priority cohorts. This has included webinars targeting First Nations and casual workers and events/presentations/forums targeting CALD and young workers. The FWO continues to assess and evolve content and education offerings. It is consulting First Nations stakeholders about further education needs, opportunities and resources.
Furthering casual awareness and uptake through incorporating information into new casual FAQs being developed, incorporation of the entitlement into the Casual Employment Information Statement (CEIS), and further review of resources and promotion at forums with industries likely to have casual employees.	The FWO has updated the CEIS (as well as the Fair Work Information Statement) to include references to paid FDVL. The FWO has also published the 'Your Guide to Casual Employment' which includes information on casual employees' entitlement to paid FDVL.
Working with unions and employer groups to further promote and facilitate employer and employee implementation of the leave, including identifying opportunities through the Productivity and Education Training Fund to deliver on the findings of the Review.	DEWR has engaged with NWRCC members for reflections on initiatives to improve awareness and access to the leave. DEWR continues to support this work through working with the Productivity, Education and Training Fund recipients to identify opportunities to improve awareness and access to the entitlement and associated supports.
Continuing engagement with state and territory governments to progress harmonisation of definitions and concepts related to gender-based violence.	Government is working towards this commitment.
Furthering understanding of utilisation through exploring opportunities with relevant data sources, including the WGEA annual census, to support evaluation of paid FDV leave.	Government is working towards this commitment.
Further consideration and evaluation of the entitlement as part of the Closing Loopholes Review.	The entitlement has been considered as part of this Review.

Workplace Gender Equality Scorecard

The WGEA releases an annual scorecard on the state of workplace gender equality in Australia. The information and data included in the scorecard is based on the Gender Equality Reports which are completed by employers with over 100 employees.[2480] The Scorecard reports on several gender equality indicators, such as workforce gender composition, remuneration between women and men and employee consultation.

'Gender equality indicator 4 – Flexible working arrangements, parental leave and support for carers' tracks how businesses support employees experiencing domestic or family violence. The 2024–2025 Scorecard shows that 89% of employers now have a policy or strategy to support employees experiencing family or domestic violence for their workplace.[2481] The Scorecard also reports that 98% of employers surveyed provided access to paid FDVL.[2482] While this was an increase from 2023–2024, which reported 95%,[2483] it shows a level of non-compliance with the NES requirement to provide this leave.[2484]

FWO engagement

The FWO provides education, assistance, advice and guidance to employers and employees on paid FDVL. The FWO's assistance commenced under the Small Business Assistance Package, which allocated $2.2 million over 4 years in the October 2022 budget for the FWO to assist small businesses to understand and implement the employee entitlement to 10 days of paid FDVL. Under the Small Business Assistance Package, the FWO updated materials and developed new resources in consultation with small business, advocacy and employee representatives. In 2023, the FWO undertook 2 paid communications campaigns related to the PFDVL Act that targeted non-small business employers and small business employers.

The FWO continues to undertake activities including providing education and guidance on its website, managing Fair Work Infoline enquiries, providing dispute assistance, providing written advice to small business employers through the EAS, and undertaking communications and engagement activities.

As at 31 December 2025, the FWO's webpage on paid FDVL has been viewed over 364,000 times. Social media posts between November 2024 and October 2025 (since the delivery of the PFDVL Review) have made over 6.3 million impressions.

[2480] WGEA, *Australia's Gender Equality Scorecard Key results from the Workplace Gender Equality Agency's Employer Census 2024–25* (Report, November 2025) 12.
[2481] Ibid 73.
[2482] Ibid 74.
[2483] WGEA, *Australia's Gender Equality Scorecard Key results from the Workplace Gender Equality Agency's Employer Census 2023–24* (Report, November 2024) 48.
[2484] The 2024–2025 census was noted by WGEA as specifically highlighting that providing paid FDVL is a legal requirement, and that the question employers answer in the census specifically states employers should answer 'yes' if they provide 10 days leave as per the legal requirement. See WGEA, *Australia's Gender Equality Scorecard Key results from the Workplace Gender Equality Agency's Employer Census 2024–25* (Report, November 2025) 74.

Table 19: Number of visits to the FWO webpage on family and domestic violence leave

Fairwork.gov.au – webpage	2023–24	2024–25	2025–26 to 31 Dec 2025
Family and domestic violence leave – FWO	169,989	135,901	58,152

Table 20: Number of enquiries and disputes FWO have assisted with regarding family and domestic violence leave

FWO enquiries and disputes	2023–24	2024–25	2025–26 to 31 Dec 2025
Customer Enquiries	525	643	385
% of enquiries from employees and employers	Employees – 54% Employers – 46%	Employees – 60% Employers – 40%	Employees – 68% Employers – 32%
Disputes completed	16	35	34

The FWO also provides specific advice to employers and employees through its Infoline service and EAS. As shown in the data above, there has been an increase in the share of enquiries being received originating from employees, and an increase in disputes raised with the FWO.

NES Inquiry

As noted in Chapter 1, an inquiry into the operation and adequacy of the NES under the FW Act is underway. Matters relating to paid FDVL were excluded from the inquiry given the entitlement was considered during the PFDVL Review and has been further considered within this Review.[2485]

What the Review heard

During roundtable consultations with academics, employer groups, and employee groups, the Review sought views on how the entitlement is working and what further changes or improvements should be made. Additionally, the Review held a dedicated roundtable on paid FDVL, which was attended by several academics and community organisations, including women's peak groups and working women's centres, with an interest in paid FDVL.

The Review received 26 written submissions providing feedback and insights on the operation of the entitlement and 15 submissions on the Draft Report that addressed the measure. Many stakeholders, including unions, community organisations and academics recommended further changes and

[2485] Standing Committee on Employment, Workplace Relations, Skills and Training, Parliament of Australia, *Inquiry into the Operation and Adequacy of the National Employment Standards* (Terms of Reference).

improvements to the entitlement and its implementation. Employer groups broadly argued against any changes to the entitlement at this stage, but were supportive of further awareness raising initiatives and data collection.

Broad support for the entitlement

Stakeholders expressed almost universal support for the 10 days paid FDVL entitlement.[2486] The ASU and CPSU (PSU Group) highlighted that they had long campaigned to have the entitlement established.[2487] Many stakeholders outlined the positive benefits the entitlement provides to victim-survivors, including that it:

- Ensures victim-survivors do not need to choose between safety and financial security.[2488]
- Enables victim-survivors to take steps to address FDV that they might not otherwise have taken.[2489]
- Sends the message that workplaces and the community stand alongside victim-survivors.[2490]
- Improves attitudes on FDV.[2491]
- Opens conversations for employees and their employers about safety and other supports.[2492]
- Confirms FDV is not just a criminal justice or social justice issue, but also an economic and workplace issue.[2493]
- Helps to destigmatise and normalise talking about FDV.[2494]
- Supports job retention, which provides benefits like valuable networks, support, self-confidence and improved esteem.[2495]

Unions noted that the entitlement has allowed unions to more easily negotiate and secure additional entitlements, protections and supportive arrangements through collective bargaining to support employees experiencing FDV and other forms of gender-based violence, which improve on the baseline entitlement in the NES.[2496] The ASU noted that some employers were now providing more than the

[2486] Circle Green, Submission No 65 (6 March 2026) 10; ASU, Submission No 81 (6 March 2026) 5; CPSU (PSU Group), Submission No 79 (6 March 2026) 5; NATSIWA, Submission No 30 (3 March 2026) 8; The Pharmacy Guild of Australia, Submission No 41 (3 March 2026) 3; SDA, Submission No 48 (3 March 2026) 7; ACCI, Submission No 54 (3 March 2026) 45 [275]; HIA, Submission No 20 (2 March 2026) 24; ACTU, Submission No 67 (6 March 2026) 93.
[2487] ASU, Submission No 81 (6 March 2026) 5; CPSU (PSU Group), Submission No 79 (6 March 2026) 5.
[2488] UWU, Submission No 62 (6 March 2026) 25; ASU, Submission No 81 (6 March 2026) 5–6; ACTU, Submission No 67 (6 March 2026) 93.
[2489] ASU, Submission No 81 (6 March 2026) 6; ACTU, Submission No 67 (6 March 2026) 94.
[2490] ASU, Submission No 81 (6 March 2026) 6; ACTU, Submission No 67 (6 March 2026) 95.
[2491] ACTU, Submission No 67 (6 March 2026) 94.
[2492] Ibid 95; ASU, Submission No 81 (6 March 2026) 6–7.
[2493] CPSU (PSU Group), Submission No 79 (6 March 2026) 6.
[2494] ACTU, Submission No 67 (6 March 2026) 94–5.
[2495] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 3.
[2496] ACTU, Submission No 67 (6 March 2026) 94–5.

minimum statutory obligations as well as providing proactive support.[2497] The SDA noted it had secured clauses in enterprise agreements for casuals that addressed the 'rostering' issues it identified with the statutory entitlement.[2498] The ACTU suggested government should consider ways of promoting the success of bargaining for more paid FDVL.[2499]

Some stakeholders suggested no further changes were needed to the entitlement. NECA agreed with the PFDVL Review's assessment that the reform was working as intended.[2500] AIG and RDA also expressed support for the PFDVL Review's conclusions, but indicated that insufficient time had passed to determine if further changes to the entitlement were necessary.[2501] HIA cautioned against additional reforms because the entitlement has been operating for only a short period.[2502] HIA also considered that no further changes were warranted until data is available that could properly assess the effectiveness of further reforms.[2503]

Monitoring and evaluation

Some stakeholders recommended undertaking further monitoring and evaluation of the reforms.[2504] Stakeholders also discussed the need to both balance the safety and privacy of victim-survivors and build an evidence base about whether the leave is working as intended.[2505]

The AMWA suggested introducing a consistent, longitudinal data collection framework that publishes anonymised and disaggregated data to support evidence based-policy.[2506] It suggested that monitoring should occur across industries and jurisdictions to track patterns of paid FDVL by sector and employment type, retention and re-employment outcomes, indirect discrimination or retaliation associated with leave usage and reliance on unpaid leave where paid leave thresholds are exceeded.[2507]

Dr Mihajla Gavin, Professor Kantha Dayaram and Dr Renata Casado noted that 'accurate monitoring of the entitlement is currently constrained by structural and administrative factors'.[2508] They also suggested the collection and reporting of paid FDVL data should be routine and systemic to evaluate long-term outcomes, impacts and barriers. Dr Gavin, Professor Dayaram and Dr Casado noted confidentiality is critical for safeguarding victim-survivors, but also suggested that 'current practices can obscure actual uptake and make it difficult to assess whether the entitlement is reaching those it is designed to support'.[2509]

[2497] ASU, Submission No 81 (6 March 2026) 7–8.
[2498] SDA, Submission No 48 (3 March 2026) 11–12.
[2499] ACTU, Submission No 67 (6 March 2026) 101.
[2500] NECA, Submission No 3 (2 February 2026) 5.
[2501] AIG, Submission No 82 (8 March 2026) 128 [615]; RDA, Submission No. 35 (3 March 2026) 3.
[2502] HIA, Submission No 20 (2 March 2026) 24.
[2503] HIA, Submission on Draft Report No 11 (29 May 2026) 8.
[2504] Circle Green, Submission No 65 (6 March 2026) 10–11; AMWA, Submission No 11 (2 March 2026) 7; Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 6.
[2505] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 6.
[2506] AMWA, Submission No 11 (2 March 2026) 7–8.
[2507] Ibid.
[2508] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 6.
[2509] Ibid.

The Working with Women Alliance (**WWWA**) recommended that government report on the initiatives committed to in the Australian Government Response to the PFDVL Review and what progress has been made.[2510]

Circle Green recommended a further review of the legislation be conducted in 2–3 years.[2511]

Feedback on the draft recommendation to monitor and report on paid FDVL

Stakeholders were generally supportive of, or unopposed to, regularising the collection of evaluative data about paid FDVL.[2512] The ACTU, CPSU (PSU Group), WWWA and Dr Gavin, Professor Dayaram and Dr Casado submitted that ongoing monitoring would help to understand things like awareness and the effectiveness of the measure.[2513] The ACTU also highlighted that it could support further consideration of appropriate quantum for the entitlement.[2514] ACCI submitted that collecting qualitative and quantitative data was necessary, as reasons for underutilisation of paid FDVL remain uncertain without a comprehensive and reliable evidence base.[2515] ACCI submitted that the Draft Report overstated conclusions on uptake of the leave and that the PFDVL Review considered that evidentiary requirements, privacy concerns and social stigma could not be attributed to uptake issues without national data.[2516]

Several stakeholders made submissions about the type of data that should be collected and how this should be done in future. The following data points were suggested:

- Uptake within organisations, including average usage.[2517]
- Whether additional leave was needed and, if so, what other type of leave was utilised or whether leave was not accessed.[2518]
- Reasons for failing to utilise available leave.
- Barriers employees experienced to access paid FDVL.[2519]
- Information gaps, confusion or uncertainty experienced by employers regarding requests to use paid FDVL.[2520]

[2510] WWWA, Submission No 44 (3 March 2026) 5.
[2511] Circle Green, Submission No 65 (6 March 2026) 10–11.
[2512] ACTU, Submission on Draft Report No 33 (29 May 2026) 33–34; Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 5; UWU, Submission on draft report No 20 (29 May 2026) 10–11; AIG, Submission on Draft Report No 45 (31 May 2026) 45 [253]; WWWA, Submission on Draft Report No 10 (29 May 2026) 4; Transitioning Well and HR Legal, Submission on Draft Report No 6 (29 May 2026); ASU, Submission on Draft Report No 24 (29 May 2026) 2; CPSU (PSU), Submission on Draft Report No 25 (29 May 2026) 5; ACCI, Submission on Draft Report No 46 (1 June 2026) 44 [294]; CFW, Submission on Draft Report No 41 (29 May 2026) 1; ANMF, Submission on Draft Report No 34 (29 May 2026) 6 [16]; SDA, Submission on Draft Report No 37 (29 May 2026) 5.
[2513] ACTU, Submission on Draft Report No 33 (29 May 2026) 33–34; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 5; WWWA, Submission on Draft Report No 10 (29 May 2026) 4; Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 5.
[2514] ACTU, Submission on Draft Report No 33 (29 May 2026) 33–34.
[2515] ACCI, Submission on Draft Report No 46 (1 June 2026) 44 [295]–[299].
[2516] Ibid 44 [295].
[2517] WWWA, Submission on Draft Report No 10 (29 May 2026) 4; ACTU, Submission on Draft Report No 33 (29 May 2026) 34.
[2518] ACTU, Submission on Draft Report No 33 (29 May 2026) 34.
[2519] Ibid.
[2520] Ibid.

- Employer and employee experiences of the leave.[2521]
- Organisations that have paid FDVL policies.[2522]
- Rates of workplace training on responsibilities related to FDV.[2523]

WWWA recommended that the data should be capable of providing information on how cohorts vulnerable to FDV particularly utilise paid FDVL.[2524] Dr Gavin, Professor Dayaram and Dr Casado recommended against the introduction of targets.[2525]

Unions emphasised that data collection should uphold workers privacy and confidentiality.[2526]

Several stakeholders also noted that ABS, WGEA or BETA survey structures could be utilised.[2527] WWWA recommended that the WGEA data be expanded to better identify who is non-compliant with providing the entitlement and regulatory action should occur in those instances.[2528]

Uptake of paid FDVL

Awareness and utilisation

Many stakeholders suggested that uptake of paid FDVL is low.[2529]

Stakeholders consistently raised a lack of awareness and understanding of the entitlement among both employers and employees as a reason for low uptake.[2530] WLS NSW submitted that the uptake was impacted by stigma, fear of disclosure, confidentiality concerns, inconsistent employer processes and onerous evidence requested by employers (see below on 'Evidence and notice requirements').[2531] Dr Gavin, Professor Dayaram and Dr Casado agreed that stigma and confidentiality were deterrents to uptake (see sections on 'Stigma and Adverse Action' and 'Privacy and Confidentiality' for more detail).[2532]

ACCI suggested the measure is not working as intended because of low uptake, which it attributed to inadequate education and accessible information.[2533] Dr Gavin, Professor Dayaram and Dr Casado highlighted that organisations rarely promote the leave and information is often buried in policy

[2521] ACCI, Submission on Draft Report No 46 (1 June 2026) 44 [299].
[2522] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 5.
[2523] Ibid.
[2524] WWWA, Submission on Draft Report No 10 (29 May 2026) 4.
[2525] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 5.
[2526] ACTU, Submission on Draft Report No 33 (29 May 2026) 33; UWU, Submission on Draft Report No 20 (29 May 2026) 11; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 5.
[2527] ACTU, Submission on Draft Report No 33 (29 May 2026) 33; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 5.
[2528] WWWA, Submission on Draft Report No 10 (29 May 2026) 4.
[2529] Renata Casado, Kantha Dayaram and Mihajla Gavin, *A review of the effectiveness of paid family and domestic violence leave entitlement since its implementation as a National Employment Standard in Australia – multi-stakeholder and lived experience perspectives* (Research Report, December 2025) 4; WLS NSW, Submission No 69 (6 March 2026) 3–4 [11]; ACCI, Submission No 54 (3 March 2026) 45 [275]; Adrian Boothman, Submission No 5 (18 February 2026) 2.
[2530] NRWC, Submission No 29 (3 March 2026) 4; ASBFEO, Submission No 8 (27 February 2026) 6–7.
[2531] WLS NSW, Submission No 69 (6 March 2026) 3–4 [11].
[2532] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 4–5.
[2533] ACCI, Submission No 54 (3 March 2026) 45 [276].

materials.[2534] The ACTU noted that unions play a key role in helping to raise awareness for these entitlements and helping individuals understand their entitlement.[2535]

Many stakeholders emphasised the additional barriers to access for priority cohorts, such as those in insecure work (i.e. casuals), migrants, First Nations people, LGBTIQA+ employees, people with disability, and those in rural and remote areas.[2536] NATSIWA highlighted uptake is impacted by confidentiality concerns in small and regional communities, the connections employers might have in the community and the perceived risks inherent in taking action.[2537]

To improve awareness of the entitlements, NRWC recommended human resource systems should more clearly display leave types, including paid FDVL.[2538]

Case Study – a contact call centre worker's experience of paid FDVL[2539]

Joan had been working at a call centre for 2 years when she suffered debilitating physical injuries caused by her partner in a domestic violence incident. Joan was hospitalised and took a combination of personal and sick leave. Joan did not feel comfortable disclosing the nature of her injury to her employer at the time.

A couple of months after the incident, management advised Joan that her absences were becoming an issue for the company. Joan disclosed that she experienced domestic violence and was needing to attend frequent medical appointments, and that she would need to work from home as she experienced intense bowel issues and migraines caused by prolonged exposure to violence and a spinal injury.

Three weeks later, management pulled Joan into a meeting and advised her that they were planning on terminating her employment because of excessive leave being taken by Joan. Joan had no performance issues and had followed all the internal processes to access her leave.

The ASU was able to avoid this outcome for their member, however what followed was almost a year of fighting to keep Joan working from home and allowances for her to take time off to treat her health conditions. In the end, Joan was dismissed due to excessive unpaid leave.

Joan has no doubt in her mind that the real reason that management was unwilling to support her during the most difficult time in her life, was because of the stigma connected to people who experience family and domestic violence.

The most relevant cause of action (being discrimination against people who experience FDV) is unavailable to Joan.

[2534] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 4.
[2535] ACTU, Submission No 67 (6 March 2026) 96.
[2536] Circle Green, Submission No 65 (6 March 2026) 5; NATSIWA, Submission No 30 (3 March 2026) 8–9.
[2537] NATSIWA, Submission No 30 (3 March 2026) 8.
[2538] NRWC, Submission No 29 (3 March 2026) 5.
[2539] ASU, Submission No 81 (6 March 2026) 7–8.

Stigma and adverse action

A number of stakeholders noted that victim-survivors continue to face stigma in the workplace and beyond, which impacts their ability and willingness to disclose their experiences of FDV for the purposes of using the entitlement and seek support within the workplace.[2540] Dr Gavin, Professor Dayaram and Dr Casado noted that 'victim-survivors frequently reported anxiety about how accessing leave would affect their reputation, career progression, or relationships with colleagues'.[2541] NRWC noted that stigma is particularly pronounced in rural, regional and remote communities because privacy is limited and social networks are interconnected.[2542] Some stakeholders referred to privacy and confidentiality solutions to address the fears and impacts of stigma (see below section 'Privacy and Confidentiality').[2543]

Stakeholders also noted that employees may fear further repercussions, such as job loss or reduction in hours or repercussions in their personal life, such as perpetrator retaliation or, for victim-survivors from migrant communities, loss of visas.[2544] Dr Gavin, Professor Dayaram and Dr Casado highlighted that adverse action and discriminatory practices as a result of accessing the leave remain a risk, with a subject in the study they conducted stating the following:

> *I've been repeatedly knocked back for positions, and the last time I tried to get a position … the panel was told, not to give me the job. I was unreliable. All of this sort of stuff. The damage had been done. So, there's not actually anything on paper that I'm aware of, like I've never had a performance management meeting, but I've got a big black mark on my name*[2545]

AMWA recommended that consideration be given to aligning migration policy with the paid FDVL reforms, to decouple visa dependency from specific employers, thereby reducing the chilling effect on women seeking to exercise employment rights.[2546]

The CPSU (PSU Group) recommended that employers be required to acknowledge and take into account FDV if workplace attendance or performance is affected.[2547]

In roundtable discussions stakeholders also suggested that workplace culture strongly influences the willingness to disclose FDV in the workplace, and the workplace's ability to manage other sensitive issues signals whether disclosures will be treated safely and respectfully.

[2540] WLS NSW, Submission No 69 (6 March 2026) 5–6 [18]; Renata Casado, Kantha Dayaram and Mihajla Gavin, *A review of the effectiveness of paid family and domestic violence leave entitlement since its implementation as a National Employment Standard in Australia – multi-stakeholder and lived experience perspectives* (Research Report, December 2025) 15.
[2541] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 5.
[2542] NRWC, Submission No 29 (3 March 2026) 4.
[2543] See, for example, AMWA, Submission No 11 (2 March 2026) 6–7.
[2544] AMWA, Submission No 11 (2 March 2026) 5.
[2545] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 5.
[2546] AMWA, Submission No 11 (2 March 2026) 6.
[2547] CPSU (PSU Group), Submission No 79 (6 March 2026) 7.

Case study – workplace support for vulnerable workers[2548]

A frontline worker and union member assisted a client experiencing FDV working as a factory hand and who was not an Australian citizen. Prior to the NES entitlement, the client would have had no support to get out, as she was not eligible for Centrelink entitlements and had limited access to temporary accommodation or government support. The client was afraid she would lose her job, but spoke to her direct manager, who was very supportive and assisted the worker to access paid FDVL, commencing the following day. The manager had previously had several requests and so was familiar with the process. The client took 10 days' paid leave, and because she did not have to worry about any interruptions to her income, was able to move house, leave the violent situation and re-establish herself.

Identifying FDV, eligibility and appropriate uses of the leave

While it was broadly acknowledged that FDV is a highly complex and pervasive issue, in roundtable discussions stakeholders noted that there continued to be a general lack of knowledge about what constitutes FDV. Dr Gavin, Professor Dayaram and Dr Casado noted that participants in their study lacked knowledge on the impact FDV can have on a person financially, spiritually, psychologically, emotionally, and culturally.[2549]

The CPSU (PSU Group) submitted that some members have received pushback for seeking access to paid FDVL when the perpetrator is not a domestic partner, due to a lack of awareness about the possible breadth of FDV.[2550] Similarly, stakeholders noted that the long term impacts of FDV can be underestimated, and that victim-survivors can experience ongoing, long-term harm after leaving a relationship that can be challenging to overcome.[2551]

ACCI submitted that challenges with uptake can be understood within the context of employers having to navigate many workplace reforms, and that the entitlement has a number of unique features, such as application to casuals, that are not readily comparable to other leave entitlements.[2552]

WWWA noted that the discretionary nature of the current framework leads to inconsistency. It noted employers may view certain uses of leave such as for attending counselling or taking time to manage the impacts of FDV as unreasonable.[2553] The CPSU (PSU Group) highlighted that often access comes down to an individual manager or HR's understanding of the entitlement and FDV generally.[2554] Some stakeholders reported that employers have at times taken a narrow view of what is considered an FDV-related activity,

[2548] ACTU, Submission No 67 (6 March 2026) 93–4.
[2549] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 7.
[2550] CPSU (PSU Group), Submission No 79 (6 March 2026) 8.
[2551] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 6.
[2552] ACCI, Submission on Draft Report No 46 (1 June 2026) 47 [319]–[321].
[2553] WWWA, Submission on Draft Report No 10 (29 May 2026) 5.
[2554] CPSU (PSU Group), Submission No 79 (6 March 2026) 7.

that is limited to crisis situations.[2555] For example, stakeholders reported in roundtable discussions that employers have not provided the leave when it was intended to be used for court proceedings, property disputes or securing safe housing, as these were not considered necessary to address immediate safety concerns. Dr Gavin, Professor Dayaram and Dr Casado noted that an assumption has formed that FDV leave can or should only be requested and granted at a crisis point, which overlooks the ongoing needs and ways leave can assist in recovery.[2556] The CPSU (PSU Group) noted that managers may also query the duration of the leave, and seek to limit its use without understanding the toll addressing FDV issues may have on an employee.[2557]

Some stakeholders also raised concerns about a general lack of understanding of when employees can use paid FDVL, including uncertainty about how long after an incident of FDV the entitlement can be used.[2558] Stakeholders suggested that a lack of awareness about the specific situations in which the leave can be accessed has resulted in the use of personal leave, despite the entitlement to paid FDVL.

Case Study – purpose for accessing paid FDVL

Barbara was a permanent full-time employee who was experiencing ongoing issues with requesting flexible working arrangements and FDV leave from her employer.

When Barbara requested FDV leave, her employer made it difficult for Barbara to do so, such as by requiring specific details of her medical appointments to justify her taking FDV leave. Barbara also wished to take FDV leave when dealing with the emotional impacts of the FDV. For example, Barbara did not feel that she could return to work after a psychologist appointment where she dealt with the impacts of the FDV, as she would feel exhausted and drained.

However, as the current legislation does not specifically provide for the use of FDV leave to deal with the emotional and physical impacts of FDV that render an individual unfit to work, Barbara used her annual leave for this purpose.

Stakeholders generally recommended clearer guidance, including additional examples, to assist with a more consistent understanding and interpretation of acceptable uses of the leave. The ACTU, CPSU (PSU Group) and WWWA suggested including more examples of appropriate uses of leave in section 106B, with a particular focus on the leave being accessed to support physical and emotional recovery from FDV.[2559] Circle Green suggested the provision be amended to expressly allow leave for emotional and physical impacts that render someone unfit for work.[2560] Similarly, WWWA suggested that the provisions should explicitly acknowledge that the leave applies to 'managing and surviving

[2555] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 5; ACTU, Submission No 67 (6 March 2026) 96.
[2556] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 5–6.
[2557] CPSU (PSU Group), Submission No 79 (6 March 2026) 7–8.
[2558] CCIWA, Submission No 75 (6 March 2026) 24.
[2559] CPSU (PSU Group), Submission No 79 (6 March 2026) 9; ACTU, Submission No 67 (6 March 2026) 103–4; WWWA, Submission No 44 (3 March 2026) 5.
[2560] Circle Green, Submission No 65 (6 March 2026) 10.

experiences of DV'.[2561] CCIWA recommended that the FW Regulations be amended to provide additional guidance on when paid FDVL can be accessed, to make it clear whether requests can be made years after an individual has experienced FDV.[2562]

Privacy and confidentiality

Some stakeholders noted that confidentiality continues to be a concern for many employees, and serves as a barrier to victim-survivors accessing the leave.[2563] As noted in 'Awareness and utilisation', concerns are heightened in small workplaces, or in regional and remote areas, where there may be smaller networks and information may follow victim-survivors between employers.[2564] Similar concerns were shared by the AMWA, who note that '[i]n small businesses, family-run enterprises or tight-knit community workplaces, confidentiality risks are amplified' and '[i]n these contexts, disclosure may expose women to social, cultural or economic retaliation'.[2565] The AMWA noted that for migrant women, workplace protections intersect with visa conditions, and that visa dependency can discourage leave uptake and reduce confidence in exercising workplace rights.[2566]

WWWA highlighted that small and micro businesses face implementation challenges because a worker may be required to disclose directly to an owner, relative, or another person with whom they have close day-to-day contact, and privacy can be difficult to preserve in those settings. The risks for victim-survivors associated with disclosure may be significantly heightened as a result. It suggested that this can result in a scenario where there is a legislated, but no practical, entitlement. WWWA suggested that government should facilitate access in these settings and suggested that doing so would improve uneven access in the same way that government's role in paid parental leave did.[2567]

The CPSU (PSU Group) recommended employer confidentiality obligations relating to an employee's FDV experience and circumstances be prescribed, including that disclosure should only be on a 'needs to know' basis and in limited situations.[2568] The ACTU similarly suggested that '[t]here is a need for employers, small businesses and workers to be educated about the confidentiality requirements to ensure that all employers are aware of their obligations, and that workers have confidence that those obligations will be met'.[2569]

During Review roundtable discussions, unions also noted concerns about how employers are recording paid FDVL within payroll systems and on payslips, reiterating that perpetrators engaging in financial abuse may use these to identify use of the leave.

[2561] WWWA, Submission No 44 (3 March 2026) 5.
[2562] CCIWA, Submission No 75 (6 March 2026) 24.
[2563] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 5; WLS NSW, Submission No 69 (6 March 2026) 6 [19]; ACTU, Submission No 67 (6 March 2026) 97.
[2564] NRWC, Submission No 29 (3 March 2026) 4; NATSIWA, Submission No 30 (3 March 2026) 8.
[2565] AMWA, Submission No 11 (2 March 2026) 4.
[2566] Ibid.
[2567] WWWA, Submission on Draft Report No 10 (29 May 2026) 8.
[2568] CPSU (PSU Group), Submission No 79 (6 March 2026) 9.
[2569] ACTU, Submission No 67 (6 March 2026) 98.

Feedback on the draft recommendation to improve uptake by amending the test

Stakeholders had mixed feedback on the Review's draft recommendation to amend and simplify the paid FDVL entitlement and make corresponding changes to the evidence requirement provisions.[2570]

Unions, community groups and other stakeholders either supported the draft recommendation[2571] or its intent.[2572] The ACTU agreed with the Draft Report that the current formulation of the entitlement could be contributing to low uptake of the entitlement and onerous and intrusive requests for evidence.[2573] The ACTU and the CPSU (PSU Group) submitted that simplifying the entitlement may overcome some of the barriers that victim-survivors face in accessing paid FDVL and would address concerns raised about a narrow reading of the provision taken by employers.[2574]

Unions and community groups submitted, however, that the wording used in the draft recommendation might lead employers to take a more narrow interpretation or stringent approach to the entitlement than intended,[2575] resulting in a restrictive reading of the provision as limited to addressing immediate needs.[2576] Some unions made specific recommendations on alternative language that would support the intended broad scope of activities the entitlement can be used for or suggested consultation on the specific language of any amendments, to avoid unintended risks.[2577] The ACTU submitted that the entitlement would still benefit from a guidance note of illustrative examples.[2578]

Employer groups did not support amending the entitlement.[2579] ACCI, AIG and COSBOA suggested that the draft recommendation would expand the entitlement beyond its current scope.[2580] AIG submitted that the entitlement is a safety net for 'some-FDV-related matters' and is not 'open-ended'.[2581] COSBOA indicated the amendment would have direct operational and cost implications for small business.[2582] AIG and ACCI also expressed concern that the amendment would introduce more uncertainty and contestability to the test[2583] and that it would be subjective and hard to administer.[2584]

[2570] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 429, 444 [Draft Recommendation 46].
[2571] ASU, Submission on Draft Report No 24 (29 May 2026) 2; ANMF, Submission on Draft Report No 34 (29 May 2026) 6 [17]; SDA, Submission on Draft Report No 37 (29 May 2026) 5; CFW, Submission on Draft Report No 41 (29 May 2026) 1;
[2572] ACTU, Submission on Draft Report No 33 (29 May 2026) 34–5; UWU, Submission on Draft Report No 20 (29 May 2026) 10–11; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 5–6; WWWA, Submission on Draft Report No 10 (29 May 2026) 4.
[2573] ACTU, Submission on Draft Report No 33 (29 May 2026) 35.
[2574] Ibid; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 6.
[2575] ACTU, Submission on Draft Report No 33 (29 May 2026) 35–6; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 6; UWU, Submission on Draft Report No 20 (29 May 2026) 11; ASU, Submission on Draft Report No 24 (29 May 2026) 2.
[2576] WWWA, Submission on Draft Report No 10 (29 May 2026) 5.
[2577] ANMF, Submission on Draft Report No 34 (29 May 2026) 6 [17]; ACTU, Submission on Draft Report No 33 (29 May 2026) 35–6; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 6.
[2578] ACTU, Submission on Draft Report No 33 (29 May 2026) 36.
[2579] See, for example, AIG, Submission on Draft Report No 45 (31 May 2026) 45 [254].
[2580] ACCI, Submission on Draft Report No 46 (1 June 2026) 45 [302]–[303]; AIG, Submission on Draft Report No 45 (31 May 2026) 47 [275]; COSBOA, Submission on Draft Report No 7 (29 May 2026) 8–9 [42].
[2581] AIG, Submission on Draft Report No 45 (31 May 2026) 47 [275].
[2582] COSBOA, Submissions on Draft Report No 7 (29 May 2026) 8–9 [42].
[2583] AIG, Submission on Draft Report No 45 (31 May 2026) 45 [257].
[2584] ACCI, Submission on Draft Report No 46 (1 June 2026) 45 [304]–[306].

ACCI and AIG both submitted that the entitlement was intended to be a minimum safety net for employees to manage the immediate impacts of FDV[2585] and ACCI suggested the proposed change would risk it becoming a discretionary leave category.[2586] AIG cited the 2018 process for creating the initial award term, which focused on immediate impacts of FDV and queried the appropriateness of departing from this agreed intention.[2587] AIG also opposed any amendment because this was not recommended by the 2024 PFDVL Review and submitted that no new evidence was available to suggest a change in position was warranted.[2588]

AIG and COSBOA suggested that many of the concerns the draft recommendation was seeking to address could be addressed through further guidance, education and promotion of the current entitlement.[2589] AIG considered the approach to the draft recommendation was inconsistent with the approach the Draft Report took to the Closing Loopholes Act measures and the Terms of Reference generally.[2590]

Evidence and notice requirements

Evidence requirements were a key issue raised by stakeholders during the initial roundtable meetings, with stakeholders identifying that evidentiary burdens were often difficult for victim-survivors to meet and could retraumatise individuals.

Stakeholders reported that some employers are imposing excessive, onerous or intrusive evidentiary demands that can be difficult for a worker to access or provide.[2591] The ACTU and ASU noted that there have been instances reported of employers rejecting legitimate forms of evidence, such as a letter from a FDV service provider, and that the types of evidence being requested by employers contains personal and distressing information.[2592] WLS NSW noted there is a 'very broad spectrum of what employers consider to be evidence that would satisfy a reasonable person' and that employers appear to have 'unilateral discretion' to decide when evidence is required and the type and amount of evidence needed.[2593] WWWA similarly submitted that the concept of 'reasonable' produces significant inconsistency across workplaces.[2594] Stakeholders also noted that some employers, in addition to seeking evidence that is unreasonably burdensome, are requesting these high levels of evidence on numerous occasions.[2595] WWWA noted that evidence requirements can create direct safety risks as accessing services can leave 'traces' that can be found by perpetrators.[2596] Transitioning Well and HR Legal submitted that feedback they had received from practitioners indicated that overly burdensome or intrusive evidence practices can deter uptake, particularly when people fear not qualifying for the leave or they fear further disclosure.[2597]

[2585] Ibid 45 [307]–[308]; AIG, Submission on Draft Report No 45 (31 May 2026) 46 [265].
[2586] ACCI, Submission on Draft Report No 46 (1 June 2026) 45 [307]–[308].
[2587] AIG, Submission on Draft Report No 45 (31 May 2026) 46 [262]–[263].
[2588] Ibid 45 [255].
[2589] Ibid 46–7 [269], [282]–[284]; COSBOA, Submission on Draft Report No 7 (29 May 2026) 9 [43].
[2590] AIG, Submission on Draft Report No 45 (31 May 2026) 46 [259]–[261].
[2591] ACTU, Submission No 67 (6 March 2026) 96; ASU, Submission No 81 (6 March 2026) 8; WWWA, Submission No 44 (3 March 2026) 3; SDA, Submission No 48 (3 March 2026) 9.
[2592] ACTU, Submission No 67 (6 March 2026) 96; ASU, Submission No 81 (6 March 2026) 8.
[2593] WLS NSW, Submission No 69 (6 March 2026) 6–7 [21]–[24].
[2594] WWWA, Submission on Draft Report No 10 (29 May 2026) 5.
[2595] ACTU, Submission No 67 (6 March 2026) 97.
[2596] WWWA, Submission on Draft Report No 10 (29 May 2026) 5.
[2597] Transitioning Well and HR Legal, Submission on Draft Report No 6 (29 May 2029) 3.

Case Study – evidence requirements

Lovisa experienced family violence by her sibling. Her sibling's child experienced similar violence and was placed with Lovisa indefinitely. Around the time of the violence and the placement of Lovisa's niece in her care, Lovisa applied to take paid FDVL. Although Lovisa's employer granted this request, and permitted Lovisa to take five additional days of paid family and domestic violence leave above and beyond the legal entitlement, the employer first required Lovisa to provide a daily breakdown of what she needed to attend to on each day of leave and how it was connected to her and her niece's experiences of family violence. The detailed information Lovisa's employer required from her created a barrier to Lovisa accessing paid family and domestic violence leave. The evidence requested was far beyond what was needed to satisfy a reasonable person of her eligibility for the leave and compounded the traumatic impacts of Lovisa's experience of family violence.

Stakeholders highlighted differences in how different cohorts or communities addressed FDV and disclosures. NATSIWA noted that demands for documentary evidence do not always reflect the lived reality of Aboriginal and Torres Strait Islander women, and that in remote areas formal materials like police reports might be hard to access. NATSIWA submitted that safety planning can often be informal and evidentiary requirements need to reflect this.[2598] The AMWA noted that in migrant communities, disclosures of FDV can occur indirectly and through coded language, and community groups and faith leaders are often involved in responding before formal policing or medical systems.[2599] It highlighted that cultural disclosures should be legitimised through trauma-informed and cultural sensitive practices.[2600]

The ACTU and other stakeholders identified that employers are not always aware that requiring evidence is optional.[2601] WWWA indicated that, in practice, employers frequently request evidence as a default position and that victim-survivors face intrusive questions if evidence is not provided.[2602] WLS NSW suggested that 'employers are not aware that the evidentiary requirements are only enlivened if evidence is required by the employer'.[2603] At roundtable meetings, stakeholders also noted that information available on the FWO's website may currently imply there is a minimum evidentiary threshold for granting the leave.

[2598] NATSIWA, Submission No 30 (3 March 2026) 9.
[2599] AMWA, Submission No 11 (2 March 2026) 6.
[2600] Ibid 6–7.
[2601] ACTU, Submission No 67 (6 March 2026) 97; WLS NSW, Submission No 69 (6 March 2026) 6 [21]; WWWA, Submission No 44 (3 March 2026) 3.
[2602] WWWA, Submission on Draft Report No 10 (29 May 2026) 6.
[2603] WLS NSW, Submission No 69 (6 March 2026) 6 [21].

The ASBFEO noted that small businesses considered the notice process was unclear.[2604] WLS NSW also raised concerns with the notice and evidence requirements imposed under the FW Act that may require victim-survivors to justify why they need to undertake activities during work time.[2605] It recommended simplifying requirements so that victim-survivors only need to disclose that they are experiencing FDV and require leave to deal with its impacts, without having to justify why this cannot be done outside of working hours.[2606]

Stakeholders made several recommendations relating to evidence requirements:

- WLS NSW recommended that section 107 of the FW Act be amended to clearly set out the circumstances in which employers can require evidence of FDV.[2607]
- WWWA and NRWC suggested removing evidentiary requirements for accessing the leave altogether.[2608] WWWA considered it is not trauma-informed to require evidence be provided[2609] and NRWC submitted there should be a presumption in favour of granting FDV leave without evidence.[2610]
- Other stakeholders, including the ACTU and Dr Gavin, Professor Dayaram and Dr Casado, suggested guidance be developed to clarify acceptable forms of evidence that are reasonable, unintrusive, accessible for workers, and support a trauma-informed approach to documentation.[2611]
- The CPSU (PSU Group), ANMF, SDA, ACTU and WWWA suggested that once an employee has established their experience of FDV, further evidence should not be required for subsequent leave occasions. Evidence could be valid for a set period, such as 12 months.[2612]
- NATSIWA suggested that evidence requirements should be flexible.[2613]

[2604] ASBFEO, Submission No 8 (27 February 2026) 6.
[2605] WLS NSW, Submission No 69 (6 March 2026) 5–6 [16]–[20].
[2606] Ibid 6 [20].
[2607] Ibid 8 [24].
[2608] WWWA, Submission No 44 (3 March 2026) 3; WWWA, Submission on Draft Report No 10 (29 May 2026) 5–6; NRWC, Submission No 29 (3 March 2026) 5–6.
[2609] WWWA, Submission on Draft Report No 10 (29 May 2026) 5.
[2610] NRWC, Submission No 29 (3 March 2026) 5–6.
[2611] ACTU, Submission No 67 (6 March 2026) 96–7; Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 7–8.
[2612] CPSU (PSU Group), Submission No 79 (6 March 2026) 9; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 7; ANMF, Submission on Draft Report No 34 (29 May 2026) 6 [18]; ACTU, Submission on Draft Report No 33 (29 May 2026) 37–8; SDA, Submission on Draft Report No 37 (29 May 2026) 5; WWWA, Submission on Draft Report No 10 (29 May 2026) 4.
[2613] NATSIWA, Submission No 30 (3 March 2026) 9.

Feedback on the draft recommendation to improve uptake by adjusting evidence requirements

Stakeholders were broadly supportive of the Review's draft recommendation to amend the FW Act to clarify examples of the types of evidence that might be appropriate to request.[2614] Stakeholders made the following further submissions in respect of the draft recommendation:

- CPSU (PSU Group), ANMF, ACTU and WWWA suggested that in addition to statutory declarations and letters or referral notes from support services, medical certificates should also be identified as acceptable forms of evidence.[2615]
- The UWU, AIG and ACCI urged that any list of acceptable evidence provided for in the provision be non-exhaustive.[2616]
- ACCI suggested that clarification of acceptable evidence in legislation should not displace the current 'reasonable person' test and should act only as guidance, submitting that the amendment should seek to support current evidentiary requirements.[2617]
- ACCI and AIG suggested that the former note associated with the model award term, which provided a suggestive list of acceptable forms of evidence, be 'reflected' or 'recalled' in the legislation. That list identified documents from police, a court, a family violence support service or a statutory declaration.[2618]
- The ACTU recommended that the FW Act be amended to clarify that only one type of evidence from the listed examples should be required that would satisfy a 'reasonable person'. It submitted this would support employee control of the type of evidence provided and reduce unnecessary requests from employers for other types of evidence.[2619]

Stakeholders were broadly supportive of the Review's draft recommendation for the FWO to reissue guidance on paid FDVL evidentiary requirements.[2620]

[2614] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 430, 444 [Draft Recommendation 47]; CFW, Submission on Draft Report No 41 (29 May 2026) 1; ASU, Submission on Draft Report No 24 (29 May 2026) 2;
[2615] CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 7; ANMF, Submission on Draft Report No 34 (29 May 2026) 6 [18]; ACTU, Submission on Draft Report No 33 (29 May 2026) 38; WWWA, Submission on Draft Report No 10 (29 May 2026) 4.
[2616] UWU, Submission on Draft Report No 20 (29 May 2026) 11; AIG, Submission on Draft Report No 45 (31 May 2026) 48 [287]; ACCI, Submission on Draft Report No 46 (1 June 2026) 46 [310].
[2617] ACCI, Submission on Draft Report No 46 (1 June 2026) 46 [309]–[313].
[2618] AIG, Submission on Draft Report No 45 (31 May 2026) 48 [288]; Ibid 46 [311].
[2619] ACTU, Submission on Draft Report No 33 (29 May 2026) 38.
[2620] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 430, 444 [Draft Recommendation 48]; COSBOA, Submission on Draft Report No 7 (29 May 2026) 8 [41]; ACCI, Submission on Draft Report No 46 (1 June 2026) 46 [314]; AIG, Submission on Draft Report No 45 (31 May 2026) 48 [289]; Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 2; ACTU, Submission on Draft Report No 33 (29 May 2026) 38, ANMF, Submission on Draft Report No 34 (29 May 2026) 6–7 [18]–[19]; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 7; SDA, Submission on Draft Report No 37 (29 May 2026) 5; UWU, Submission on Draft Report No 20 (29 May 2026) 11; ASU, Submission on Draft Report No 24 (29 May 2026) 2; Transitioning Well and HR Legal, Submission on Draft Report No 6 (29 May 2029) 3.

ACCI and AIG considered guidance would assist employers to better understand their discretion in requesting evidence.[2621] ACCI submitted that FWO material should also have particular regard to practical challenges faced by employers, and the material should be clear and practical.[2622] Dr Gavin, Professor Dayaram and Dr Casado submitted that there was value in resources covering evidence-based case examples or scenarios, information on what constitutes 'reasonable' regarding evidence, as well as information on when the entitlement can be accessed.[2623]

Unions recommended that the FWO guidance should also be updated to reflect the challenges victim-survivors might experience in seeking to obtain evidence and how this can be a barrier to accessing leave and reduce the safety of victim-survivors.[2624] The SDA recommended a greater emphasis in the draft recommendation on trauma-informed practices, including best practice examples. It highlighted that the emphasis in the guidance should be on primarily supporting the employee.[2625]

Transitioning Well and HR Legal considered the recommended focus on trauma-informed approaches was appropriate, as it helps practical implementation.[2626]

As noted under 'Feedback on the draft recommendation to improve uptake by amending the test' the Review's Draft Report recommended amendments to the test for the paid FDVL entitlement and subsequent amendments to the evidentiary obligation's provisions under section 107.

ACCI suggested that the proposed amendment to the evidentiary requirements would compound issues with subjectivity, as removing requirements to demonstrate the nature of the activity will limit employers' ability to assess the credibility of employees' requests.[2627] AIG also submitted it would create ambiguity, reduce accountability, increase disputation and require significant additional training of employers.[2628]

AIG submitted that the 2024 PFDVL Review did not consider it necessary to recommend changes to the evidentiary requirements and that that there is no reason to depart from the approach in this Review in favour of 'an employee's word'.[2629]

[2621] ACCI, Submission on Draft Report No 46 (1 June 2026) 46–7 [315]–[316]; AIG, Submission on Draft Report No 45 (31 May 2026) 48 [289].
[2622] ACCI, Submission on Draft Report No 46 (1 June 2026) 46–7 [315]–[316].
[2623] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 4.
[2624] ACTU, Submission on Draft Report No 33 (29 May 2026) 38–9, ANMF, Submission on Draft Report No 34 (29 May 2026) 6–7 [18]–[19]; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 7.
[2625] SDA, Submission on Draft Report No 37 (29 May 2026) 5.
[2626] Transitioning Well and HR Legal, Submission on Draft Report No 6 (29 May 2029) 4.
[2627] ACCI, Submission on Draft Report No 46 (1 June 2026) 45 [305].
[2628] AIG, Submission on Draft Report No 45 (31 May 2026) 47 [278]–[281].
[2629] Ibid 47–48 [283]–[286].

Employers – Impacts and capability

The Pharmacy Guild of Australia, Adrian Boothman and the ASBFEO highlighted the regulatory burden on small businesses.[2630] The Pharmacy Guild of Australia noted many small businesses do not have a human resources team or support to implement the measure.[2631] AIG noted that employers are not FDV experts, and are anxious about their ability to properly respond to employees experiencing FDV.[2632] AIG suggested there is a role for ongoing training and awareness to better support businesses.[2633]

During the Review roundtable discussions, community group stakeholders also suggested that employers, particularly small and micro businesses, consider conversations relating to FDV to be a specialist capability and that they are not equipped to have these conversations with their employees. It was noted that employers should be able to manage these conversations, and that employer associations were well equipped to assist with training and guidance on having these conversations.

During employer group consultations, stakeholders noted that some employers had experienced challenges with recording the entitlement in payroll and HR systems while complying with payslip and confidentiality requirements. Feedback received by employer groups and shared in these forums indicated that payroll systems were largely ill-equipped to handle the unique requirements of the leave, and re-configuration had been required, which was difficult and costly.

Several stakeholders raised concerns with employer capability and confidence to manage disclosures of FDV in the workplace. The ASU suggested that some employers, particularly small businesses, take the approach that the issue is beyond the scope of their role as an employer, which is not consistent with a trauma-informed approach, and could stigmatise FDV and isolate the employee.[2634] COSBOA also noted confidence challenges in its submission, and suggested that employers could be supported with simple scripts and better information on how to address the outcomes of the leave being taken.[2635]

Embedding FDVL within safety-focused frameworks

Dr Gavin, Professor Dayaram and Dr Casado recommended a more proactive responsibility for workplaces in responding to FDV and suggested that such a response should be centred around, and in, WHS and harm prevention in the workplace frameworks.[2636] They referenced the DVFREE support system in place in New Zealand, which supports workplaces to have employees with specialist training in response to FDV to receive workplace accreditation.[2637] They highlighted that further education is needed for business about FDV as a psychosocial hazard so that workplaces appreciate their responsibility to address it.[2638]

[2630] The Pharmacy Guild of Australia, Submission No 41 (3 March 2026) 4; ASBFEO, Submission No 8 (27 February 2026) 6–7; Adrian Boothman, Submission No 5 (18 February 2026) 2.
[2631] The Pharmacy Guild of Australia, Submission No 41 (3 March 2026) 4.
[2632] AIG, Submission No 82 (8 March 2026) 130 [629].
[2633] Ibid.
[2634] ASU, Submission No 81 (6 March 2026) 8.
[2635] COSBOA, Submission on Draft Report No 7 (29 May 2026) 9 [44].
[2636] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 7.
[2637] Ibid.
[2638] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 4–5.

The AMWA also suggested that workplaces should embed FDV entitlements within a broader ecosystem of safe workplace culture, particularly the positive duty against workplace harassment and gender-based discrimination, to allow for safe disclosures by women and strong regulator oversight.[2639]

The ASBFEO suggested that small businesses have raised concerns about how privacy obligations related to this entitlement were to be addressed consistently with WHS laws.[2640]

Guidance, education and training

There was considerable consensus among stakeholders that further education, guidance and training is needed to support both awareness and utilisation of the entitlement, as well as understanding of the specific requirements of the legislation.[2641]

The ACTU highlighted that further guidance and education should focus on evidence, challenges with accessing evidence and confidentiality obligations.[2642] The ACTU also submitted that training is required to ensure employers are fully aware of their obligations as well as how to respond to requests appropriately and sensitively.[2643] Dr Gavin, Professor Dayaram and Dr Casado argued that greater capacity-building around administering paid FDVL is needed within workplaces, including small businesses, and recommended that mandated training be developed, particularly for workplace leaders and managers.[2644] They identified that limited familiarity with FDV and the entitlement was a significant barrier to uptake and considered education programs, particularly focused on supporting workplaces to structurally address FDV, are necessary to address the barrier.[2645]

Some stakeholders highlighted the need for targeted education. Stakeholders noted the importance of education and awareness campaigns focusing on assisting diverse employees and those who are most at risk of experiencing FDV and/or who experience additional barriers to accessing supports in the workplace.[2646] Unions and community organisations particularly stressed that awareness campaigns should be 'culturally appropriate'.[2647] Particular cohorts identified by stakeholders included First Nations women, women with a disability, migrant women, women in precarious or unstable employment, and women in regional, remote and rural areas.[2648]

NATSIWA submitted that employers should receive culturally informed guidance to ensure that leave processes do not inadvertently expose women to further risk of traumatisation.[2649] The AMWA noted the importance of providing information through trusted community channels to ensure messages reach

[2639] AMWA, Submission No 11 (2 March 2026) 3–4.
[2640] ASBFEO, Submission No 8 (27 February 2026) 6–7.
[2641] ASU, Submission No 81 (6 March 2026) 9; SDA, Submission No 48 (3 March 2026) 9; Ibid 6; ACTU, Submission No 67 (6 March 2026) 97.
[2642] ACTU, Submission No 67 (6 March 2026) 97–98.
[2643] Ibid 98–100.
[2644] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 7–8.
[2645] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 3–4.
[2646] ACTU, Submission No 67 (6 March 2026) 100; WLS NSW, Submission No 69 (6 March 2026) 8 [25]; NRWC, Submission No 29 (3 March 2026) 5.
[2647] NRWC, Submission No 29 (3 March 2026) 5; AMWA, Submission No 11 (2 March 2026) 5; NATSIWA, Submission No 30 (3 March 2026) 9.
[2648] WLS NSW, Submission No 69 (6 March 2026) 8 [25].
[2649] NATSIWA, Submission No 30 (3 March 2026) 9.

women in culturally resonant, relational and context-specific ways.[2650] NRWC recommended engaging with trusted regional networks such as chambers of commerce or local councils to help distribute targeted information.[2651] The ASU, RDA and the ASBFEO noted the need for education and guidance materials specific to small businesses, to ensure awareness of the entitlement and their obligations, and how to assist victim-survivors in the workplace.[2652]

Employer groups, unions, academics and community organisations all noted, to differing degrees, that employers and the workplace have a role to play in supporting victim-survivors who have experienced or are experiencing FDV.[2653] ACCI suggested that employer representative bodies adopt a more proactive and structured role in promoting awareness of, and reducing stigma associated with, paid FDVL.[2654] ACCI also suggested there may be opportunities for the development and delivery of targeted training programs, and noted it would welcome further collaboration with government to further develop and refine the scope and content of such training initiatives.[2655] AIG also noted the role of employer organisations, highlighting the existing role of some employer organisations in training and circulating compliance information on paid FDVL to employers.[2656] The SDA submitted that there are instances in which employers fail to include information on the online portals used by staff, and recommended a requirement that employers include information on paid FDVL where they provide information on leave.[2657]

AIG acknowledged that there are opportunities to build on existing education efforts and provide further support to employees experiencing FDV. It suggested government could facilitate further training and guidance, combining the technical workplace relations expertise of employer organisations with expertise or input from parties or organisations focused on FDV.[2658] The ACTU also supported this position suggesting that 'government should fund further education, training and awareness building activities that are developed and rolled out by both unions and employer organisations, to ensure effective implementation of the entitlement'.[2659]

[2650] AMWA, Submission No 11 (2 March 2026) 4–5.
[2651] NRWC, Submission No 29 (3 March 2026) 5.
[2652] ASU, Submission No 81 (6 March 2026) 9; ASBFEO, Submission No 8 (27 February 2026) 6; RDA, Submission No. 35 (3 March 2026) 3.
[2653] AIG, Submission No 82 (8 March 2026) 129 [624]; ACTU, Submission No 67 (6 March 2026) 95–6; Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 3–4; ACCI, Submission No 54 (3 March 2026) 45 [278].
[2654] ACCI, Submission No 54 (3 March 2026) 45 [278].
[2655] Ibid 45 [278]–[279].
[2656] AIG, Submission No 82 (8 March 2026) 129 [622].
[2657] SDA, Submission on Draft Report No 37 (29 May 2026) 6.
[2658] AIG, Submission No 82 (8 March 2026) 129 [622]–[626].
[2659] ACTU, Submission No 67 (6 March 2026) 100.

Feedback on draft recommendation relating to guidance and education

Stakeholders were broadly supportive[2660] of the Review's draft recommendation to improve awareness-raising efforts and develop and deliver additional educative materials on FDV and the entitlement.[2661]

Several submissions recommended that additional cohorts should be identified for particular attention, including:

- young workers,[2662] who are often engaged in casual employment or other insecure forms of work, and may be less familiar with identifying FDV but still experience family violence via a partner or a parent
- LGBTIQA+ employees,[2663] who face disproportionate rates of FDV, and may face further stigma and barriers to access, and
- workers with a disability,[2664] who face disproportionate rates of violence and are overrepresented in insecure employment.

WWWA highlighted that intersectional approaches should be adopted, noting victim-survivors might be vulnerable on multiple metrics.[2665]

AIG suggested that the Review should consider highlighting that government, employer groups and unions could develop core or generic materials with FDV specialist organisations as they have the relevant expertise for their members, and then work with community groups to customise materials for various cohorts, before returning to government, employer groups, unions and FDV expert peaks for final review.[2666]

ACCI submitted that adequate resourcing for employer groups is necessary[2667] and AIG submitted that funding should be additional to what it already receives.[2668]

[2660] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 2; SDA, Submission on Draft Report No 37 (29 May 2026) 5; WWWA, Submission on Draft Report No 10 (29 May 2026) 6; ANMF, Submission on Draft Report No 34 (29 May 2026) 7 [20]; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 8; ASU, Submission on Draft Report No 24 (29 May 2026) 2; UWU, Submission on Draft Report No 20 (29 May 2026) 11; ACTU, Submission on Draft Report No 33 (29 May 2026) 39; COSBOA, Submissions on Draft Report No 7 (29 May 2026) 8 [41]; ACCI, Submission on Draft Report No 46 (1 June 2026) 47 [317]–[322]; AIG, Submission on Draft Report No 45 (31 May 2026) 49 [292]; Transitioning Well and HR Legal, Submission on Draft Report No 6 (29 May 2029) 3.
[2661] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 435, 445 [Draft Recommendation 49].
[2662] SDA, Submission on Draft Report No 37 (29 May 2026) 5; WWWA, Submission on Draft Report No 10 (29 May 2026) 6; ANMF, Submission on Draft Report No 34 (29 May 2026) 7 [20]; ACTU, Submission on Draft Report No 33 (29 May 2026) 39.
[2663] WWWA, Submission on Draft Report No 10 (29 May 2026) 6; ANMF, Submission on Draft Report No 34 (29 May 2026) 7 [20]; ACTU, Submission on Draft Report No 33 (29 May 2026) 39.
[2664] Ibid.
[2665] WWWA, Submission on Draft Report No 10 (29 May 2026) 6.
[2666] AIG, Submission on Draft Report No 45 (31 May 2026) 49–50 [292]–[297].
[2667] ACCI, Submission on Draft Report No 46 (1 June 2026) 47 [317], [322].
[2668] AIG, Submission on Draft Report No 45 (31 May 2026) 49 [293].

Some stakeholders provided suggestions on information that the materials or training should cover, or how the material should be framed. For instance:

- Transitioning Well and HR Legal submitted that their experience contributing to the 10DaysPaidFDVLeave.com.au website taught them that guidance should include 'in-practice tools' that provide real time, stepped through, practical and scenario-based advice to reduce inadvertent missteps, and specific guidance should be developed for casuals.[2669]
- COSBOA recommended that materials particularly support small business in having confident conversations with victim-survivor employees, including practical scripts, confidentiality protocols and information on temporary staffing.[2670] Transitioning Well and HR Legal indicated that a focus on a 'simple, guided' approach for small business would also help larger business.[2671]
- The ACTU noted that resources should be produced in different languages and a range of formats to support accessibility.[2672] The SDA noted that outreach should include traditional and social channels.[2673]
- Dr Gavin, Professor Dayaram and Dr Casado suggested that the recommended training should address psychosocial hazards of FDV and that peak WHS organisations like SWA should be engaged to support these outcomes.[2674] SWA submitted that it would welcome the opportunity to support implementing the draft recommendation, noting its continued efforts to support PCBUs to understand FDV as a WHS issue.[2675]

Transitioning Well and HR Legal suggested that the role of 10DaysPaidFDVLeave.com.au had already contributed to improved awareness and could be built on by transitioning it from an information-based resource to 'in-practice' tool'. It recommended government consider how the website's current status as a supportive resource could be further developed.[2676]

Quantum of leave

Several union and community group stakeholders highlighted that while the 10-day entitlement is considered a strong first step, it is often insufficient for victim-survivors. Dr Gavin, Professor Dayaram and Dr Casado noted that unpaid leave was also being used by victim-survivors, with 39% of surveyed respondents indicating that additional unpaid leave was needed.[2677] The ACTU noted that, on average, it takes 141 hours to leave a violent relationship, which equates to approximately 17 days.[2678]

[2669] Transitioning Well and HR Legal, Submission on Draft Report No 6 (29 May 2029) 1–2.
[2670] COSBOA, Submission on Draft Report No 7 (29 May 2026) 9 [44].
[2671] Transitioning Well and HR Legal, Submission on Draft Report No 6 (29 May 2029) 2.
[2672] ACTU, Submission on Draft Report No 33 (29 May 2026) 39.
[2673] SDA, Submission on Draft Report No 37 (29 May 2026) 5.
[2674] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 3–4.
[2675] SWA, Submission on Draft Report No 48 (28 May 2026) 2.
[2676] Transitioning Well and HR Legal, Submission on Draft Report No 6 (29 May 2029) 4.
[2677] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 5.
[2678] ACTU, Submission No 67 (6 March 2026) 101.

The UWU, CPSU (PSU Group), ANMF and Circle Green all advocated for the quantum of leave to be increased to 20 days per year.[2679] Additionally the UWU and CPSU (PSU Group) recommended that the provisions be amended to allow for employees to draw on future allocations of paid FDVL if their initial entitlement has been fully utilised.[2680]

The ACTU noted that regularising data collection was an important first step to assist with identifying whether the entitlement's quantum was sufficient.[2681]

Work types

Coverage for non-employees

Several stakeholders, including WWWA, raised concerns with a lack of access to paid FDVL for those who are in non-traditional employment, such as employee-like workers[2682] and contractors.[2683] WWWA highlighted that these workers have unequal access to support, which does not align with the intent to ensure paid FDVL is a core workplace protection.[2684]

Unions, including the UWU, the ANMF and the ACTU recommended extension of the entitlement to employee-like workers.[2685] The ANMF noted that such an amendment would ensure members working in the gig economy are able to maintain their income while dealing with FDV, and it is essential the entitlement is available to as many workers as possible, regardless of their work arrangements.[2686] The ACTU suggested that a first step to extending the entitlement to employee-like workers could occur through MSOs.[2687] The ACTU submitted that the Review should recommend the FW Act be amended to clarify that MSOs can include an entitlement to paid FDVL and that doing so does not change the form or engagement status of the worker for the purposes of section 536KM.[2688] It suggested this approach would address vulnerabilities of the increasingly feminised employee-like workforce. The ACTU submitted this is within the scope of the Review because the 2022 PFDVL Bill Senate Report noted both the government's commitments to regulating 'employee-like' forms of work (which the ACTU notes has now occurred through the passage of the Closing Loopholes No.2 Act) and that there was merit in examining extensions of this leave to other groups at a later time.[2689]

[2679] UWU, Submission No 62 (6 March 2026) 26–7; CPSU (PSU Group), Submission No 79 (6 March 2026) 8; ANMF, Submission No 60 (5 March 2026) 9 [32]–[33]; Circle Green, Submission No 65 (6 March 2026) 10; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 10; ANMF, Submission on Draft Report No 34 (29 May 2026) 7 [23].
[2680] UWU, Submission No 62 (6 March 2026) 27; CPSU (PSU Group), Submission No 79 (6 March 2026) 8; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 10.
[2681] ACTU, Submission on Draft Report No 33 (29 May 2026) 33.
[2682] See Section 2.3 for information and discussion on employee-like workers and the impact of the Closing Loopholes reforms on these workers.
[2683] WWWA, Submission No 44 (3 March 2026) 5.
[2684] Ibid.
[2685] UWU, Submission No 62 (6 March 2026) 26; ANMF, Submission No 60 (5 March 2026) 10 [34]; ACTU, Submission No 67 (6 March 2026) 101–2.
[2686] ANMF, Submission No 60 (5 March 2026) 10 [34].
[2687] ACTU, Submission No 67 (6 March 2026) 102.
[2688] ACTU, Submission on Draft Report No 33 (29 May 2026) 41–2.
[2689] Ibid.

WWWA suggested that 'working arrangements continue to evolve, government should take a more comprehensive approach to examining how core safety-net entitlements, including protections relevant to family and domestic violence, can be extended or adapted so that employee-like workers receive meaningful and equitable protection in practice'.[2690]

NRWC suggested creating a government-administered national scheme for employees who cannot access the leave from their employer because of their employment type.[2691]

Casual employment

Stakeholders reported that casual workers were generally less aware of their entitlements, and had lower awareness, understanding and uptake of paid FDVL.[2692] Dr Gavin, Professor Dayaram and Dr Casado noted that casual employees may face additional barriers to accessing paid FDVL because they are concerned about retaliatory reduction in shifts, reputational damage, or dismissal.[2693] The AMWA noted that there may be particular impacts for migrant women who tend to be more reliant on casual income.[2694] WWWA expressed concern that the low uptake for casuals indicated the reforms were not working for that cohort.[2695]

Stakeholders noted that victim-survivors who are casually employed are more likely to arrange work around their personal obligations and decline or otherwise indicate they are unavailable to take shifts instead of taking leave.[2696] The ASU observed that this is more likely to create financial instability, which exacerbates or prolongs the incidence of FDV.[2697] To address challenges associated with 'rostering', and fully realise the aims of providing casuals with the entitlement, the ACTU, CPSU (PSU Group) and SDA recommended the entitlement allow casuals to utilise the leave even if not rostered, with pay set according to their average hours over the last 3 months.[2698] Dr Gavin, Professor Dayaram and Dr Casado also recommended flexible leave calculation methods to facilitate better uptake by casuals.[2699]

The AMWA highlighted that other Closing Loopholes reforms, including the casual employment definition and employee choice pathways, wage theft, sham contracting, 'same job, same pay' and minimum standards for regulated workers, are likely to assist at a structural level, to reduce insecure work as a form of violence prevention.[2700]

[2690] WWWA, Submission on Draft Report No 10 (29 May 2026) 8.
[2691] NRWC, Submission No 29 (3 March 2026) 6.
[2692] ACTU, Submission No 67 (6 March 2026) 102; Renata Casado, Kantha Dayaram and Mihajla Gavin, *A review of the effectiveness of paid family and domestic violence leave entitlement since its implementation as a National Employment Standard in Australia – multi-stakeholder and lived experience perspectives* (Research Report, December 2025) 14.
[2693] Renata Casado, Kantha Dayaram and Mihajla Gavin, *A review of the effectiveness of paid family and domestic violence leave entitlement since its implementation as a National Employment Standard in Australia – multi-stakeholder and lived experience perspectives* (Research Report, December 2025) 14.
[2694] AMWA, Submission No 11 (2 March 2026) 4–5.
[2695] WWWA, Submission No 44 (3 March 2026) 3–4.
[2696] ASU, Submission No 81 (6 March 2026) 7; SDA, Submission No 48 (3 March 2026) 7.
[2697] ASU, Submission No 81 (6 March 2026) 7.
[2698] ACTU, Submission No 67 (6 March 2026) 103; CPSU (PSU Group), Submission No 79 (6 March 2026) 9; SDA, Submission No 48 (3 March 2026) 7–8.
[2699] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 8.
[2700] AMWA, Submission No 11 (2 March 2026) 4.

Some stakeholders expressed concerns about the entitlement being available to casual employees. Simon Potts, a small business employer, noted that the cost must be accounted for regardless of whether the leave is used, and that there is no additional income to offset it being payable to staff.[2701] The Pharmacy Guild recommended that the paid FDVL entitlement for casuals be repealed, on the basis that the casual loading sufficiently remunerates casual employees.[2702] It also noted that the entitlement is inconsistent with the FWC 2021 Review findings and suggested the leave should be accrued, similar to annual leave.[2703]

Feedback on the draft recommendation relating to casuals

Stakeholder feedback was mixed on the Review's draft recommendation for the government to further consider how to address casual uptake, including by considering rostering practices.[2704]

Unions, including the SDA, ACTU, ANMF and CPSU (PSU Group), welcomed the recommendation but suggested the Review should go further by adopting their initial suggestions to include a provision that supports casual employees to access paid FDVL when they are not rostered, based on an average of their last 3 months' of work.[2705] ASU advised that barriers arise from structural challenges, such as employment insecurity, not merely the design of the entitlement.[2706] The CFW and WWWA also noted their support for this draft recommendation.[2707]

ACCI opposed the draft recommendation, arguing it is based on 'the premise that low uptake of paid family and domestic violence leave by casual employees reflects deficiencies in the structure or operation of the entitlement…[and] that premise is not established on the available evidence' and that it does not support the conclusion that leave uptake is attributable to rostering practices.[2708]

ACCI noted the 2024 PFDVL Review did not identify a causal link between uptake and the entitlement's design. ACCI instead suggested that other factors, such as limited awareness, informational barriers and the characteristics of casual employees, including that casual workers may be less likely to be in relationships requiring the use of the leave, contribute to uptake challenges.[2709] ACCI also noted that subjection to FDV was recently introduced as a protected attribute, which has sought to mitigate adverse action risks and address potential deterrents to use of the leave.[2710] ACCI suggested that a more robust evidence base be established before considering any reform.[2711]

[2701] Simon Potts, Submission No 25 (2 March 2026) 12–13.
[2702] The Pharmacy Guild of Australia, Submission No 41 (3 March 2026) 3–4.
[2703] Ibid.
[2704] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 438, 445 [Draft Recommendation 50].
[2705] CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 8–9; ANMF, Submission on Draft Report No 34 (29 May 2026) 7 [21]; SDA, Submission on Draft Report No 37 (29 May 2026) 5–6; ACTU, Submission on Draft Report No 33 (29 May 2026) 40–1.
[2706] ASU, Submission on Draft Report No 24 (29 May 2026) 2.
[2707] CFW, Submission on Draft Report No 41 (29 May 2026) 1; WWWA, Submission on Draft Report No 10 (29 May 2026) 6.
[2708] ACCI, Submission on Draft Report No 46 (1 June 2026) 48–49 [323]–[324], [331].
[2709] Ibid 48 [325]–[329].
[2710] Ibid 48–49 [330].
[2711] Ibid 49 [332].

AIG cautioned against assuming paid FDVL is underutilised, noting that there is no target for casual uptake.[2712] AIG also noted its opposition to leave entitlements in instances where an employee is not rostered, and to revisiting the means of calculating the entitlement for casuals. AIG argued that providing for leave without being rostered is a matter for individual employers to manage through bargaining, and is not appropriate for the NES, which operates as a minimum safety net.[2713]

Definitions and eligibility

Stakeholders highlighted several concerns about legislative definitions, including their interpretation, and the effects on eligibility for victim-survivors.

Expanding who can constitute a perpetrator of FDV

Broadening the definition of who can be considered a perpetrator of FDV under the FW Act was discussed by several stakeholders.

WLS NSW suggested that expanding the definition of who can be a perpetrator of FDV for leave purposes to include former household members would ensure victim-survivors are not discouraged from escaping violent situations due to loss of access to the entitlement.[2714] It suggested that:

> *A woman who has escaped the shared household where she was experiencing violence by a housemate may not be eligible for paid family and domestic violence leave if her employer applies a strictly literal reading of section 106B(2) on the basis that the perpetrator is no longer a member of her household and is not otherwise captured by the definition.*[2715]

Stakeholders noted it was important that cultural and kinship relationships beyond those in First Nations communities be included, acknowledging the broad cultural diversity within Australia. Dr Gavin, Professor Dayaram and Dr Casado quoted a trade union representative as stating: 'We did have an affiliate who reported that their member was refused access to the leave by the employer on the basis that it was a cultural kinship relationship and a non indigenous cultural kinship relationship'.[2716]

The ACTU and CPSU (PSU Group) both recommended expanding the definition of 'close relative' in subsection106B(3) to include a person's aunt or uncle, a person's former intimate partner's immediate family, and someone related to the person according to ethnic, religious or cultural kinship rules.[2717]

CCIWA also suggested that the definition be amended to explicitly exclude perpetrators from accessing paid FDV leave.[2718]

[2712] AIG, Submission on Draft Report No 45 (31 May 2026) 50 [298]–[299].
[2713] Ibid 50–1 [303].
[2714] WLS NSW, Submission No 69 (6 March 2026) 4–5 [12]–[15].
[2715] Ibid 4 [14].
[2716] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 6.
[2717] ACTU, Submission No 67 (6 March 2026) 104–5; CPSU (PSU Group), Submission No 79 (6 March 2026) 9.
[2718] CCIWA, Submission No 75 (6 March 2026) 24–5.

Feedback on the draft recommendation to expand who constitutes a perpetrator of FDV

Feedback was mixed on the Review's draft recommendation to amend the FW Act to expand the definition of who can be considered a perpetrator under the entitlement.[2719] Unions, academics and community groups were supportive of the draft recommendation.[2720]

Employer groups were opposed to the draft recommendation.[2721]

Both ACCI and AIG expressed concerns about operationalising the draft recommendation.[2722] ACCI submitted that the change could add uncertainty to the entitlement and suggested that the definition of a perpetrator as amended through the PFDVL Act appropriately balanced 'accessibility and workability' and reflected modern relationships.[2723] ACCI also submitted that the changes would introduce more indeterminate boundaries, and reduce consistency in application of the entitlement by including relationships that may be 'remote in time, attenuated in nature, or defined by subjective or culturally-specific criteria'.[2724] AIG submitted that the list of additional perpetrators did not support operationalisation, including because of evidence requirements.[2725] It expressed its view that coverage of 'family relationships based on ethnic, religious or cultural kinship rules' would be particularly challenging to implement.[2726]

AIG submitted that paid FDVL was not intended to address all instances of FDV, and that the current limitations should be retained because it had been based on arbitrated engagement with the FWC, and that updating materials on the change would be burdensome.[2727]

ACCI submitted employers should not need to 'assume responsibility for complex, highly contextual social issues beyond what is reasonably capable of being administered in a workplace'.[2728] It further submitted that the proposed recommendation was in opposition to the objectives of the NES, which is a minimum safety-net which balances the needs of employees and the practical and economic realities faced by employers, in a manner that supports productive workplaces and ensures simplicity and certainty.[2729]

[2719] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 441, 446 [Draft Recommendation 51].
[2720] ACTU, Submission on Draft Report No 33 (29 May 2026) 41; ANMF, Submission on Draft Report No 34 (29 May 2026) 7 [22]; SDA, Submission on Draft Report No 37 (29 May 2026) 6; UWU, Submission on Draft Report No 20 (29 May 2026) 11; CPSU (PSU Group), Submission on Draft Report No 25 (29 May 2026) 9; ASU, Submission on Draft Report No 24 (29 May 2026) 2; WWWA, Submission on Draft Report No 10 (29 May 2026) 5; Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 2.
[2721] ACCI, Submission on Draft Report No 46 (1 June 2026) 49 [333]; AIG, Submission on Draft Report No 45 (31 May 2026) 51 [305].
[2722] ACCI, Submission on Draft Report No 46 (1 June 2026) 49–50 [337], [341]; AIG, Submission on Draft Report No 45 (31 May 2026) 51–2 [306], [309]–[312].
[2723] ACCI, Submission on Draft Report No 46 (1 June 2026) 49–51 [334]–[337], [344].
[2724] Ibid 49–50 [337], [341].
[2725] AIG, Submission on Draft Report No 45 (31 May 2026) 52 [309].
[2726] Ibid 52 [310]–[312].
[2727] Ibid 51 [305]–[306].
[2728] ACCI, Submission on Draft Report No 46 (1 June 2026) 50 [342].
[2729] Ibid 50 [340]–[341].

AIG suggested that the government should consider the proposed extension further, with engagement from peak representatives. It submitted that this would allow for proper scrutiny of the proposed change and for the 'pros and cons' to be considered.[2730]

Adjusting the definition of FDV

The UWU, CPSU (PSU Group), ACTU and ANMF raised issues with the current definition of FDV in the FW Act, which requires the violent, threatening or otherwise abusive behaviour to both seek to coerce or control the person and cause the person harm or to be fearful.[2731]

Submissions recommended that the 'and' in the current definition be replaced with an 'or', to remove the 'double threshold'.[2732] The ACTU and CPSU (PSU Group) noted that this change would better reflect the definition of FDV in the *Family Law Act 1975* (Cth),[2733] as well as recommendations of the PFDVL Review which suggested greater integration including through consistency across legislative definitions related to FDV.[2734]

Feedback on the draft recommendation to adjust the definition of FDV

Stakeholders were divided on the Review's draft recommendation to amend the FW Act to replace the 'and' with an 'or' in the definition of FDV.[2735] The draft recommendation was supported by unions, including express feedback from the ACTU, ASU, CPSU, ANMF, and other stakeholders like WWWA and Dr Gavin, Professor Dayaram and Dr Casado.[2736]

ACCI and AIG opposed the draft recommendation.[2737] ACCI were concerned implementing the recommendation would lead to adopting the Family Law Act definition in totality and suggested that this definition was overly broad for what it saw as the intended limited FDV matters for which employers are to provide paid FDVL.[2738] ACCI implied that 'economic or financial abuse' is not currently covered by the FW Act definition.[2739] Both ACCI and AIG also submitted that the Family Law Act definition was not appropriate or relevant in the employment law context.[2740] AIG argued that the definition used in the Family Law Act is intended to support more discretion and have a 'precautionary and preventative'

[2730] AIG, Submission on Draft Report No 45 (31 May 2026) 51–2 [307]–[308].
[2731] *Fair Work Act 2009* (Cth) s 106B(2).
[2732] UWU, Submission No 62 (6 March 2026) 26; CPSU (PSU Group), Submission No 79 (6 March 2026) 9; ACTU, Submission No 67 (6 March 2026) 104; ANMF, Submission No 60 (5 March 2026) 11 [39].
[2733] See section 4AB of the *Family Law Act 1975* (Cth); ACTU, Submission No 67 (6 March 2026) 104; CPSU (PSU Group), Submission No 79 (6 March 2026) 9.
[2734] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) 93–5.
[2735] Susan Booth, *Closing Loopholes, an independent statutory review – Draft Report – May 2026* (15 May 2026) 442 446 [Draft Recommendation 52].
[2736] ACTU, Submission on Draft Report No 33 (29 May 2026) 41; ASU, Submission on Draft Report No 24 (29 May 2026) 2; CPSU (PSU), Submission on Draft Report No 25 (29 May 2026) 9; ANMF, Submission on Draft Report No 34 (29 May 2026) 7 [22]; WWWA, Submission on Draft Report No 10 (29 May 2026) 7; Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission on Draft Report No 21 (29 May 2026) 2.
[2737] ACCI, Submission on Draft Report No 46 (1 June 2026) 51 [346; AIG, Submission on Draft Report No 45 (31 May 2026) 52 [313].
[2738] ACCI, Submission on Draft Report No 46 (1 June 2026) 51–52 [346]–[353].
[2739] Ibid 51 [347]–[348].
[2740] Ibid 51–2 [349], [354]–[355]; AIG, Submission on Draft Report No 45 (31 May 2026) 53–5 [315], [325]–[327].

focus which is 'not relevant in the application of PFDVL by employers'.[2741] AIG noted the FWC considered the previous Family Law Act definition of FDV and did not adopt it[2742] and argued such decisions should be retained and respected.[2743]

AIG also cited concerns that employers have built their systems, education and training around a relatively consistent definition of FDV that has existed for the last 8 years, and promoting this change would be challenging.[2744] It also highlighted that no impact assessment of the change had been done to determine its effect and suggested this be done before a change is made.[2745]

Sexual and broader gender-based violence

Some stakeholders strongly advocated for the expansion of the leave entitlement to victim-survivors of sexual violence that is not currently covered by the provisions (i.e. outside of the domestic or family context).[2746]

The ASU noted that victim-survivors of sexual violence perpetrated by acquaintances, strangers, or others outside the familial or domestic sphere do not have access to the same entitlements for paid leave.[2747] It argued that it is inequitable that 'these individuals face additional challenges in taking the necessary time off work to address trauma, seek medical and psychological care, and pursue legal action' but do not have access to the leave.[2748] Violet Co Legal & Consulting noted it was a significant omission from the current entitlement and suggested that 'the current operation of the amendments is not appropriate nor effective for victim-survivors of sexual violence, as the majority of sexual violence occurs outside the domestic context, yet they are not provided the opportunity to heal or access justice'.[2749]

WWWA, the UWU, CPSU (PSU Group) and ANMF further suggested access to the entitlement should be extended to employees who experience any form of gender-based violence, including sexual violence.[2750] The ANMF noted that its 'members regularly experience workplace violence that can often be gendered in nature, and this amendment would enable appropriate recovery from incidents that can be complex and traumatic'.[2751]

WWWA disagreed with the Draft Report's assessment that extending the entitlement to sexual violence would, in effect, create a new leave entitlement and argued that it is within the scope of the Review.[2752]

[2741] AIG, Submission on Draft Report No 45 (31 May 2026) 53 [315].
[2742] Ibid.
[2743] Ibid 54 [322].
[2744] Ibid 54 [319]–[320].
[2745] Ibid 53–4 [314], [318].
[2746] ASU, Submission No 81 (6 March 2026) 9; Violet Co Legal & Consulting, Submission No 84 (10 March 2026) 1; CPSU (PSU Group), Submission No 79 (6 March 2026) 8; WWWA, Submission No 44 (3 March 2026) 4; ANMF, Submission on Draft Report No 34 (29 May 2026) 7 [23]–[24].
[2747] ASU, Submission No 81 (6 March 2026) 9.
[2748] Ibid.
[2749] Violet Co Legal & Consulting, Submission No 84 (10 March 2026) 1.
[2750] UWU, Submission No 62 (6 March 2026) 26; CPSU (PSU Group), Submission No 79 (6 March 2026) 8; ANMF, Submission No 60 (5 March 2026) 10 [35]; ANMF, Submission on Draft Report No 34 (29 May 2026) 7 [23]; WWWA, Submission on Draft Report No 10 (29 May 2026) 7.
[2751] ANMF, Submission No 60 (5 March 2026) 10 [35].
[2752] WWWA, Submission on Draft Report No 10 (29 May 2026) 7.

It suggested the distinctions drawn were arbitrary given the overlapping impacts and reasons for needing leave for FDV and sexual violence. WWWA argued that the exclusion of sexual violence more broadly was inconsistent with the National Plan.[2753]

Caring for and supporting victim-survivors

Many stakeholders recommended extending the paid FDVL entitlement to those who are caring for, supporting or otherwise assisting victim-survivors of FDV. The SDA noted that many victim-survivors require a support person for activities like court proceedings or hospital and medical appointments, as well as help caring for children, and that extending access would be highly beneficial to them.[2754] The SDA provided several examples of how access to leave for those supporting or caring for a victim-survivor has been addressed in enterprise agreements.[2755]

The CPSU (PSU Group), ACTU and ANMF suggested that extension of the entitlement should be limited to immediate family of, and those with cultural or kinship ties to, the victim-survivor.[2756] The SDA, UWU and WWWA suggested the extended leave entitlement should be available to anyone providing support to a victim-survivor.[2757]

The ACTU noted that making the entitlement accessible to those supporting their immediate family through FDV would deepen its broad social efficacy, dramatically increase the quality of support available to victim-survivors, and broaden the support network available.[2758] WWWA also noted that '[e]xpanding eligibility in this way would promote trauma-informed, community-centred responses and ensure workplaces better reflect the realities of how FDV affects and is addressed within society'.[2759] WWWA also noted that extending the entitlement would recognise that safety and recovery are made possible through the practical support of others and would promote a trauma-informed and community-centred approach to addressing FDV.[2760]

Funding models

Simon Potts submitted that the entitlement should be funded directly by government or via a pooled funding mechanism, similar to the government paid parental scheme.[2761]

During roundtable discussions, other stakeholders suggested a universal scheme be adopted, particularly to support those in non-traditional employment types like contractors or employee-like workers, and those facing additional barriers to access, such as those in micro-businesses or family-owned businesses.

[2753] Ibid.
[2754] SDA, Submission No 48 (3 March 2026) 8.
[2755] Ibid 13–15.
[2756] CPSU (PSU Group), Submission No 79 (6 March 2026) 8; ACTU, Submission No 67 (6 March 2026) 103; ANMF, Submission No 60 (5 March 2026) 10 [36]; ANMF, Submission on Draft Report No 34 (29 May 2026) 7 [23]–[24].
[2757] SDA, Submission No 48 (3 March 2026) 8; UWU, Submission No 62 (6 March 2026) 26; WWWA, Submission No 44 (3 March 2026) 4; SDA, Submission on Draft Report No 37 (29 May 2026) 6; WWWA, Submission on Draft Report No 10 (29 May 2026) 7–8.
[2758] ACTU, Submission No 67 (6 March 2026) 103.
[2759] WWWA, Submission No 44 (3 March 2026) 4.
[2760] WWWA, Submission on Draft Report No 10 (29 May 2026) 7–8.
[2761] Simon Potts, Submission No 25 (2 March 2026) 12–13.

Analysis

Since its inception, including during this Review, paid FDVL has received broad in-principle support from stakeholders, including unions, employer groups, academia and community groups. While views differ on specific aspects of how the entitlement operates, it is generally seen as beneficial and a central part of workplace responses to addressing the impact of FDV and supporting employees who are experiencing or have experienced FDV.

The PFDVL Review made a range of recommendations aimed at strengthening the evidence base, improving and targeting resources, increasing awareness and normalisation of paid FDVL, leveraging stakeholder networks, and integrating workplace entitlements into broader, inclusive and nationally consistent efforts to address FDV. Many of these recommendations have been, or are being, progressed by government.

Paid FDVL is critical to supporting victim-survivors of FDV and is an important workplace response to FDV. The Review considers the entitlement, when utilised, is effective in supporting victim-survivors to address the impacts of FDV without having to make a choice between their safety and their job and financial security. However, a range of barriers to strong utilisation of the entitlement remain, particularly for priority groups. Additional work is needed to increase awareness and address implementation challenges.

Although the PFDVL Review suggested that the parameters of the leave entitlement appear to be appropriately set, it argued that insufficient time had elapsed to understand the entitlement's operations and impacts, and that further stakeholder engagement was important to inform proposals for further reform. Stakeholders have submitted to this Review many of the same concerns raised with PFDVL Review, including that there is scope for legislative reform to ensure the entitlement better meets the needs of victim-survivors. The Review considers that some of the barriers to uptake of the entitlement may result from the entitlement's legislative parameters and that improvements could be made to the entitlement that would better support achieving the government's objectives in introducing paid FDVL.

Monitoring and reporting

There is currently no ongoing means of tracking or monitoring paid FDVL, including its usage and effectiveness. As a result, there is very limited quantitative data about the usage of paid FDVL. This has been a significant limitation for the Review.

Commencing in late 2023 the BETA, in partnership with DEWR, conducted research to understand the impact of the new entitlement. BETA conducted a survey of 594 victim-survivors, interviews with 22 victim-survivors, a survey of 1,437 employers, interviews with 15 employers and a survey of 3,008 Australian workers.[2762]

[2762] BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 4.

As noted above, the BETA research supported the PFDVL Review's consideration of the entitlement and provided a helpful baseline for understanding the operation of the measure. However, the survey is not an ongoing initiative. A key challenge of this Review is reliance on BETA data to give insight into the implementation and uptake of paid FDVL, noting that there have been no major sources of additional data made available since the 2024 PFDVL Review.

Another limitation is the infrequency of data collection related to FDV in general. For example, the ABS's Personal Safety Survey (**PSS**), which provides insights and data on the rates and impacts of physical and sexual assault, family and domestic violence, economic and emotional abuse, stalking, sexual harassment, and childhood abuse, occurs every 4 to 5 years. The most recent PSS was released in March 2023 and related to data collected in 2021–22.

Ongoing monitoring of the paid FDVL framework is essential to track its usage and effectiveness. The government should regularise the collection of evaluative data about paid FDVL, including usage and sentiments about the leave type, to ensure it can best identify whether the measure is operating effectively. Ongoing monitoring and evaluation will help better understand the trends over time and, as recommended by some stakeholders, allow government to identify if additional changes are needed to improve uptake, address emerging issues with the operation of the measure and adjust the entitlement to give effect to the intention of the reform.[2763] Information or data could be collected on the following to support ongoing monitoring and evaluation of the entitlement:

- Uptake by victim-survivors, including average usage of paid FDVL and if it was supplemented with another type of leave.
- Reasons for victim-survivors failing to utilise available leave, including whether awareness, stigma, or privacy concerns impacted use.
- Any confusion, uncertainty or information gaps experienced by employers regarding requests to use paid FDVL.
- Training and guidance provided by employers about FDV and paid FDVL.
- Employer and employee experiences of the leave.
- Any other barriers victim-survivors experience in accessing paid FDVL.

Tracking uptake would provide a clearer idea about whether the quantum of leave available is satisfactory and allow policy makers to consider if it should be increased (see section on 'Quantum of Leave' below).

[2763] See, for example, AIG, Submission No 82 (8 March 2026) 130 [631].

The government should determine the best means of collecting data that allows for tracking of trends and changes in the use and operation of paid FDVL. The Review notes the following data collection mechanisms that government may like to consider further:

- Replicating the BETA surveys and interviews recurrently.
  - Utilising similar or identical data points would have the advantage of comparing like-for-like data and tracking trends and changes.
- Introducing new data points to the ABS PSS.
- Introducing new data points to the WGEA annual employer survey of employers.
  - This survey currently seeks data from employers with over 100 employees on how they support employees experiencing FDV, including those who offer paid FDVL in line with the legislative requirements.

Utilising surveys such as these would ensure that the privacy, confidentiality and safety of victim-survivors is maintained while still ensuring valuable information is be collected.

Recommendation 44

The government should regularise the collection of evaluative data about paid family and domestic violence leave, including usage, barriers to usage, employer familiarity with the entitlement, awareness raising efforts by employers and sentiments about the leave type, to ensure it can best identify whether the measure is operating effectively and whether further reforms are necessary to give effect to the intention of the measure.

Uptake of paid FDVL

Despite the prevalence of FDV in Australia, uptake of the paid leave remains low. BETA's analysis indicated that of the 128 victim-survivors that had been surveyed, only 16 (13%) had taken paid leave.[2764] 49% of victim-survivors who knew about paid FDVL did not access it, despite indicating it would have benefited them.[2765] Stakeholders submitted to this Review that uptake of the leave has not noticeably increased over the course of its operation, despite continued efforts to raise awareness about the entitlement.

Low uptake can be attributed to a combination of forces that have the effect of restricting workers from taking leave they are entitled to access. This includes a limited understanding of what constitutes FDV, low awareness of the availability of paid FDVL leave, and unfamiliarity or uncertainty about who can access the leave and what it can be used for. Stigma around disclosing experiences of FDV can also limit uptake, particularly when employees are required to discuss personal circumstances or provide evidence

[2764] BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 16.
[2765] Ibid 20.

demonstrating their experience of FDV and the reasons for access. Additional issues include concerns about breaches of confidentiality and fears about adverse consequences from using the leave, including stalled career progression, reduced opportunities or shifts, and termination or pressure to resign. Further factors that may contribute to low uptake are discussed below.

While the measure has been a positive change for victim-survivors, low uptake suggests it is not operating as effectively as it could. In establishing paid FDVL, it was clear that government sought to support victim-survivors to take the time they needed to address FDV, without being at a financial disadvantage or affecting their job security. Many victim-survivors are choosing to not utilise the entitlement, which is likely impacting on their safety and financial security. This lack of use also fails to reduce absenteeism or address the lost productivity caused by FDV.[2766] Additional work is necessary to address the barriers to uptake, to ensure the measure is working as intended.

Misunderstandings on FDV and paid FDVL

As noted above, the ongoing lack of awareness about what paid FDVL can be used for (including what FDV is) has been a significant contributing factor to uptake levels. Unions and community groups submitted to this Review that there is a general perception that the leave is to be used for the most significant, urgent and immediate needs of a person experiencing FDV (e.g. reporting matters to the police, moving out of home) and others considered it was intended to support engagement with 'formal processes' (e.g. reporting matters to the police, seeking medical care, attending court). Employer groups made submissions indicating they consider these are the intended limitations of the entitlement. Stakeholders noted that some employers have denied access or had challenges with correctly implementing the entitlement due to perceptions that paid FDVL only applies to intimate partner violence, and some have denied leave for activities such as attending court proceedings, property disputes or securing safe housing. Employees were also likely to misunderstand or not be aware what the leave could be used for. BETA's data suggests that only 46% of victim-survivors were aware the leave could be used for relocating and only 52% knew it could be used to access counselling.[2767]

The legislation does not support these interpretations. Paid FDVL is accessible to an employee who is experiencing FDV who 'needs to do something to deal with the impacts of FDV' and who cannot otherwise do that thing outside of work hours.[2768] There are a vast number of activities that could be undertaken to deal with the impacts of FDV, including 'formal processes' and addressing immediate needs, as well as practical activities like moving houses, seeking support from family members or friends or mentally or physically recovering from the violence, in whatever manner is required by the victim-survivor. Inherent to the framing of this leave type is providing a significant amount of flexibility on the reasons for needing leave. This reflects the spectrum of how FDV is experienced. As noted above, the entitlement was intended to support employees to manage the consequences of FDV and engage in processes aimed at preventing future violence, such as attending counselling sessions and other support services.

[2766] *Family and Domestic Violence Leave Review 2021* [2022] FWCFB 2001 [76].
[2767] BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 48.
[2768] *Fair Work Act 2009* (Cth) s 106B(1).

The legislation provides a non-exhaustive list of examples of what paid FDVL can be used for, but as observed in submissions, the examples are particularly limited and focused on engagement with community services, as opposed to other activities that may be undertaken.[2769] It is feasible that the list of non-exhaustive examples is being seen by employers and employees as sanctioned reasons to access the leave and, conversely, the absence of particular reasons as an indication it is not an appropriate use.

To better support victim-survivors in accessing the entitlement, and to support employers to understand their obligations under legislation, some stakeholders have recommended clearer guidance, including additional examples to assist a more consistent understanding and interpretation of acceptable uses of the leave. In particular, stakeholders recommended that examples focused on recovery from the physical and emotional effects of FDV are needed. Although guidance in these circumstances is generally of assistance to employers, there continues to be issues of employer interpretation even where activities are explicitly included as appropriate uses of the leave.

Stigma

Stigma, embarrassment and fear also continue to disincentivise employees from seeking access to paid FDVL. Of the 573,600 women who have experienced violence by a previous partner and did not seek advice or support, 29% indicated their reason for not doing was shame or embarrassment.[2770] FDV is a sensitive and challenging issue to discuss with friends and family, let alone to raise in the context of a workplace. People become concerned about the implications of disclosing FDV within their workplace and anticipate adverse action or other impacts on their experience of work. Stigma is intensified in small communities and social groups. In the paid FDVL context, stigma and embarrassment manifests both in overcoming internalised stigma to be able to request paid FDVL and in engaging in the process to request paid FDVL, where intrusive questions and requests for evidence might be raised by employers.

Privacy and discrimination

Privacy is a key concern of victim-survivors in requesting paid FDVL and when providing evidence. Concerns about privacy and confidentiality in the workplace create a barrier to accessing the leave. While the FW Act includes provisions to support maintenance of privacy and confidentiality, victim-survivors maintain concerns that details about the FDV they are experiencing, or even that they are experiencing FDV, will be shared in the workplace or within their community and impact their work relationships and career progression. This is particularly prevalent in workplaces that are small or family businesses or in regional, rural or remote communities.

The risks associated with a privacy or confidentiality breach are real. Around a quarter of victim-survivors surveyed by BETA considered accessing the leave resulted in exclusion, discrimination and a reduction in trust from their management, and 15% considered accessing the leave resulted in their termination or a

[2769] Ibid s 106B(1) Note 1 provides a list of non-exhaustive examples of appropriate uses for accessing the leave including 'arranging for the safety of the employee or a close relative (including relocation), attending court hearings, accessing police services, attending counselling and attending appointments with medical, financial or legal professionals.'
[2770] ABS, 'Partner Violence, 2021–22 Financial Year' (Web Page) <https://www.abs.gov.au/statistics/people/crime-and-justice/partner-violence/latest-release#data-downloads>, data released on 22 November 2023.

request to resign.[2771] Dr Gavin, Professor Dayaram and Dr Casado's submission highlights that adverse action and discriminatory practices as a result of accessing the leave remain a real risk for victim-survivors, and disclosing FDV and accessing leave to address it can harm professional reputations and limit opportunities.[2772]

While victim-survivors need to disclose that they are experiencing FDV in order to access paid FDVL (and employers may seek evidence of this), more needs to be done to reduce the perceived and actual risks associated with a privacy breach.

Evidence requirements

The impact of providing evidence on victim-survivors is a key concern of several stakeholders. Concerns about evidence were equally prominent in the PFDVL Review.

The evidentiary requirements for this leave do not appear to be well understood by employers with the Review receiving a number of submissions and case studies highlighting issues with the level and frequency of evidence requested. Although there is no legislated requirement for employers to receive evidence in order to approve or provide access to the entitlement, employers are still requiring evidence and, in some instances, they considered it was necessary to do so, despite employers having complete discretion regarding evidence requests.[2773] While it is entirely within the right of employers to request evidence, this can be challenging and traumatic for the victim-survivor. This is particularly so as legislation provides that victim-survivors must comply with evidence requirements under section 107 of the FW Act if their employer does request evidence, and there are no protections for victim-survivors where providing evidence that fully complies with those conditions is not feasible. The FWO's information on paid FDVL evidentiary requirements may reinforce the misunderstanding that evidence is required.[2774]

When employers seek evidence, they are also doing so in ways may be inconsistent with the legislation or, where consistent with the legislation, are onerous and intrusive. Stakeholders provided this Review, as well as the PFDVL Review, with concerning examples of employers:

- Rejecting legitimate forms of evidence, such as letters from FDV legal services organisations.
- Requesting evidence that is onerous to collect.
- Requesting information well beyond the requirements to substantiate FDV and the need to take leave, often requiring specific details or overly personal information.
- Requesting new evidence for each occasion leave is sought.
- Requesting types of evidence which provide third-party verification of FDV (such as police reports, FDV service provider letters of referral etc).

[2771] BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 35–6.
[2772] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 5.
[2773] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) 60.
[2774] FWO (Cth), 'Notice and evidence for family and domestic violence leave' (Web Page) <https://www.fairwork.gov.au/leave/family-and-domestic-violence-leave/notice-and-evidence-for-family-domestic-violence-leave>.

Evidentiary requirements can present a barrier for victim-survivors who might otherwise access and benefit from paid FDV leave.[2775] BETA found that evidentiary requirements were a challenge, with victim-survivors surveyed citing difficulty with gathering evidence. Further to this, some victim-survivors surveyed by BETA indicated that they had not taken the leave, anticipating there would be challenges with gathering evidence.

Expectations to collect onerous levels of evidence, 'accredited' evidence, or detailed evidence fail to appreciate the reality of FDV and the sometimes-insurmountable challenges posed by collecting evidence. Requiring personal or sensitive information has the capacity to further traumatise victim-survivors and create further barriers to victim-survivors accessing the entitlement.

Paid FDVL was intended to make escaping violence easier for victims, acknowledging the difficulty victim-survivors face in disclosing FDV and leaving abusive situations. Paid FDVL also supports victim-survivors taking actions to address FDV and its impacts, such as appearing before a court.[2776] The practical implementation of the measure risks re-traumatisation of victim-survivors through the evidence requirements and policies imposed by employers, and is having an effect on uptake of the leave type. The risks of re-traumatisation and disincentivising the uptake of paid FDVL are unintended consequences of the measure.

The PFDVL Review did not make specific recommendations related to evidence reform and instead suggested that existing resources should be improved and promoted, with a focus on areas of uncertainty including the interpretation of evidence requirements (amongst others). It suggested that examples of suitable evidence could be broadened to demonstrate the range of acceptable forms of evidence, including more informal forms of evidence. Although work has progressed to better clarify evidence requirements,[2777] stakeholder feedback has been that these efforts have not noticeably changed employer behaviour or reduced the burden on victim-survivors. The ongoing concern with evidence even after the PFDVL Review suggest that there is still more to do to ensure that employers and employees understand their obligations and/or rights in relation to requesting and providing evidence.

Ultimately, more is needed to:

- help employers understand, and adopt the approach that they do not need to seek evidence to approve paid FDVL, and
- where evidence is required – minimise the burden on victim-survivors to provide evidence that may feel intrusive, risk traumatisation and be overly onerous to obtain for the purposes of accessing paid FDVL.

[2775] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) 59.
[2776] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 July 2022, 176 (Tony Burke, Minister for Employment and Workplace Relations).
[2777] This has included a conversation simulation on 10dayspaidFDVleave website that focuses on concerns around confidentiality and evidence, as well as further review by the FWO regarding their guidance. Transitioning Well, 'Conversation Simulations: Discussions at the Workplace with an Employee Experiencing Family and Domestic Violence' (Web Page) <https://smallbusiness.10dayspaidfdvleave.com.au/support-and-resources/conversation-simulations/>.

The following options for addressing concerns were raised either in this Review or the PFDVL Review:

- Amend the FW Act to remove any evidentiary requirements to access paid FDVL.
- Amend the FW Act to set out the circumstances in which employers can require evidence.
- Amend guidance to explicitly clarify that that evidence is not required by the Act, and that the FW Act permits employers to exercise their discretion in requesting evidence.
- Set out, through guidance, what acceptable forms of evidence are reasonable, unintrusive, accessible for workers, and support a trauma-informed approach.
- Enable a 'one time only' evidence requirement for victim-survivors so that they do not need to provide evidence for each instance of leave.

Stakeholders also noted that it would be preferable if evidence is requested and required once, rather than for each occasion.

Amending the entitlement

The Review considers that there is benefit in government considering options to amend and simplify the current paid FDVL entitlement to remove limitations which result from the current test under subsection 106B(1) for accessing paid FDVL.

The current test in subsection 106B(1) requires that an employee be experiencing FDV, must need to do something to deal with the impact of the FDV, and for it to be impractical for the employee to do this outside of work hours. The Review recommends the current test should be replaced with a clearer test that ensures the entitlement is available where an employee needs to take leave from work to deal with the impact of FDV, including circumstances where the employee needs to take steps to manage, respond to, or recover from the impacts of FDV.

The current test and the practical challenges it presents

Submissions to this Review suggest that the current legislative construction of the test is not consistently understood to encompass the wide range of activities that can fall within having to 'do something to deal with the impact' of FDV.

Subsection 106B(1) was developed in 2018 by the FWC in consultation with employer and employee groups. Since 2018, community understanding of FDV and its impacts on victim-survivors has evolved, including recognition of coercive control and non-physical forms of abuse and patterned features of FDV. There is also greater emphasis on trauma informed, victim-centred responses that minimise stigma and unnecessary disclosure, and increased recognition of diverse and intersecting victim-survivor experiences. There is also greater operational experience of the practical issues associated with the uptake of paid FDVL and significant experience now with how it has been used by victim-survivors.

The Review considers that changes to the legislative settings could better reflect the scope of the entitlement and ensure that it is available where an employee experiencing FDV needs to take leave from work to deal with the impact of FDV, including circumstances where the employee needs to take steps to manage, respond to, or recover from the impacts of FDV.

Although the legislation does not restrict the activities for which paid FDVL may be used, the requirements in paragraphs 106B(1)(b) and (c) impose practical limitations in operation. Managing and dealing with the impacts of FDV can involve a very wide range of activities, reflecting the multifaceted nature of FDV. However, the limited understanding of both FDV and paid FDVL impacts on employers' ability to appreciate the breadth of reasons for which leave can be accessed.

In practice, stigma (both internalised and externalised), a lack of many employers' familiarity with FDV and paid FDVL, and the general expectation for employees to provide evidence means the current test, particularly the requirements in paragraphs 106B(1)(b) and (c), is likely to be retraumatising and disincentivising uptake for victim-survivors.

The non-exhaustive list of examples in the legislative note is intended to support interpretation of paragraph 106B(1)(b) and help employers understand the types of matters the leave could be used for. Some submissions suggest the lack of clarity about the entitlement could be addressed by providing more extensive examples in the legislative note on paragraph 106(1)(b) to show what is meant by 'to deal with the impact of the family and domestic violence'. The current list is focused on activities with a connection to formal FDV processes rather than 'impacts', which may be reinforcing the narrow view of the legislation. See 'Understanding of FDV, paid FDVL and trauma-informed engagement' for more information on the Review's findings and recommendation on understandings of FDV and paid FDVL.

Evidentiary requirements are also tied to the test for paid FDVL. Paragraphs 106B(1)(b) and (c), together with section 107, underpin many of the intrusive and unreasonable evidence requirements reported by stakeholders. Section 107 provides that, if requested by the employer, an employee must provide evidence that they are experiencing FDV, that the leave will be taken to 'do something to deal with the impact of the family and domestic violence' and that 'it is impractical for the employee to do that thing outside the employee's work hours'.[2778] To satisfy the evidence requirements, employees may be expected to disclose detailed information about the impacts of the FDV, the specific action that the employee needs to take, how that action relates to the FDV, the timing of the action, and why alternative timing is not feasible such as safety or personal constraints. The 'reasonable person' test for this provision does not prevent an unnecessary amount of detail being provided to an employer, because both section 107 and paragraphs 106B(1)(b) and (c) inherently require a significant level of detail to access the leave type.

By comparison, to access paid personal leave under the FW Act, if requested by the employer, an employee must provide evidence that they are 'not fit for work because of a personal illness, or personal injury, affecting the employee'.[2779] The evidentiary requirements are narrow and functional, with the employer only needing to be satisfied that the employee is unfit for work due to an illness or injury. Importantly, the employer does not need to know the nature, cause or circumstances of the illness or injury and the employee is not required to explain what they are doing while on leave. Stakeholders have recommended that the Review contemplate amendments to ensure that evidence is only required once and that it apply for a set period of time. Such a reform would not be possible under the current formulation of the test because paragraphs 106B(1)(b) and (c) require evidence of the activity

[2778] *Fair Work Act 2009* (Cth) ss 107(3)(d), 106B(1)(b)–(c).
[2779] Ibid ss 97(a), 107.

the victim-survivor needs to do and that this is impractical to do outside of work hours. This is an assessment that can only be made for each instance of leave requested, and requires new evidence be provided each time the employer requests it.

The value of amending the entitlement

The Review considers that amending the entitlement could address the uncertainty created by the construction of the current provision and the limitations which result from the interactions between subsection 106B(1) and paragraph 107(3)(d).

Evidence of the impacts of FDV that require a victim-survivor to take leave are unnecessary, as the impacts of FDV on victim-survivors are well known. FDV affects all aspects of a person's life, and can affect someone physically, psychologically, culturally, financially, and spiritually. Access to paid FDVL should not be limited to being able to demonstrate specific activities or timing constraints. Simplifying access to the entitlement would reduce the prohibitive effect of stigma and disclosure, address privacy risks, improve understanding of the entitlement, and minimise evidentiary challenges.

The government should consider other models when designing a simplified entitlement. For example, the Review notes that New Zealand provides access to 10 days paid leave if an employee or their child has been affected by family violence,[2780] and employees do not need to disclose or demonstrate what the leave is being used for. Employees are only required to disclose or provide evidence that they (or their child) is experiencing FDV.[2781]

Amending the entitlement would also likely reduce the embarrassment and stigma that employees feel in disclosing sensitive information and reduce some of the fears employees have raised about confidentiality. Although employees would need to identify they are affected by FDV to receive the entitlement, employers would have less reason to seek, and less entitlement to obtain specific details about the FDV and what is being done by the employee to address its impacts. If requested, employees would still be required to provide evidence, but this would not need to include information about what the employee is doing and why it cannot be done outside hours. It would, in particular, reduce the need to disclose specifics or details about police engagement, counselling access, court processes, mental health impacts, and safety planning. This would also reduce the risk of perpetrators, particularly in small communities, accessing information that would enable them to intervene in or prevent plans to escape from FDV. The amendment could also reduce unnecessary repeated requests for evidence and the risk of further traumatisation, as the evidence provided could cover a period of time rather than a specific activity (in a similar way to personal leave).

Amending the entitlement may also reduce the need for employers to have a detailed understanding of the impacts of FDV in order to be satisfied that the use of the entitlement meets statutory requirements (see 'Partnership in addressing awareness and understanding issues' below, on other tools to better support education on FDV and paid FDVL). It may also facilitate a better understanding among employers on what the entitlement is intending to encompass.

[2780] Employment New Zealand, 'Taking family violence leave' (Web Page, December 2025) <https://www.employment.govt.nz/leave-and-holidays/family-violence-leave/taking-family-violence-leave>.
[2781] Ibid.

There will be benefit in significantly reducing the complexity of the provision for both employers and employees. Disclosure and substantiation of FDV can be practically challenging, stigmatising, retraumatising and increase the risk of privacy breaches (including those that endanger victim-survivors). Employers have reported significant difficulty with determining how to best support employees in these circumstances, and how to navigate sensitive conversations. Feedback from stakeholders was that these conversations are not always handled as well as they could be (see section on 'Partnership in addressing awareness and understanding issues' below, on supporting employers to have sensitive conversations on paid FDVL).

The Review has heard from stakeholders on the importance of consulting on any options, including draft amendments, to ensure there are no unintended consequences. In considering how best to amend and simplify the entitlement and the corresponding evidentiary requirements to address the findings of this Review, the government should consult with employer representatives, unions and family and domestic violence experts.

Recommendation 45

The government, in consultation with employer representatives, unions and family and domestic violence experts, should consider:

- options to amend and simplify the paid family and domestic violence leave entitlement to ensure that it is accessible where an employee needs to take leave from work to deal with the impact of family and domestic violence, including circumstances where the employee needs to take steps to manage, respond to, or recover from the impact of family and domestic violence, and
- aligning evidentiary requirements with the simplified approach to ensure they do not create additional barriers to access.

Evidentiary requirements

Clarifying evidentiary obligations through guidance has not sufficiently addressed stakeholder concerns, as the nuance that evidence is only required if requested, in accordance with section 107 of the FW Act, has been lost. For example, the information on paid FDVL on the FWO's website contains no explicit statement that evidence is only required if requested, and instead includes statements such as:

- 'The employee needs to give their employer the required notice and evidence'.[2782]
- 'An employer can ask their employee for evidence that shows the employee took the leave to deal with family and domestic violence'.[2783]

[2782] FWO (Cth), 'Taking family and domestic violence leave' (Web Page) <https://www.fairwork.gov.au/leave/family-and-domestic-violence-leave/taking-family-domestic-violence-leave>.
[2783] FWO (Cth), 'Notice and evidence for family and domestic violence leave' (Web Page) <https://www.fairwork.gov.au/leave/family-and-domestic-violence-leave/notice-and-evidence-for-family-domestic-violence-leave>.

While the guidance available online highlights employers' ability to require evidence, stakeholders raised some concerns that the guidance does not adequately integrate a trauma-informed approach. For example, the FWO's guidance notes that employers can ask victim-survivors to 'provide evidence for as little as one day or less off work'[2784] with no discussion that this may place undue pressure on people experiencing FDV. The FWO material helpfully points to appropriate types of evidence, where it is requested, but the material does not support the application of judgment to when it is appropriate or necessary to ask for more or less information.

Additional changes on the face of the legislation could further assist employers and employees to understand the evidence requirements and how they could operate in practice. More could be done to support both employers and employees to understand what could be appropriately requested and how to apply paragraph 107(3)(d), where evidence is requested by an employer. The model term, on which both the previous unpaid and paid FDVL entitlements were based, provided more comprehensive guidance on evidence. The model term noted that '[d]epending on the circumstances such evidence may include a document issued by the police service, a court or a family violence support service, or a statutory declaration'.[2785] When unpaid FDVL was introduced to the FW Act in 2018, the evidence requirements were tied to those already provided for at section 107, which meant that the guiding notes on acceptable forms of evidence were not included in the legislation.[2786] Introducing a non-exhaustive list resembling the list provided for in the previous model award term, as well as other generally acceptable forms of evidence like medical certificates, could help reduce possible disputation on appropriate evidence and simplify interactions.

Recommendation 46

The *Fair Work Act 2009* should be amended to clarify the types of evidence, such as statutory declarations, medical certificates or documents from support services, that could meet evidentiary requirements if requested by employers.

[2784] Ibid.
[2785] *4 yearly review of modern awards – Family and Domestic Violence Leave* [2018] FWCFB 3936, Attachment A, X.6 (b).
[2786] Explanatory Memorandum, Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 (Cth) 4 [27], [42]–[44]. Section 107 of the FW Act was amended to note at paragraph 107(3)(d) that the evidence is for unpaid family and domestic violence leave, and the employee has met the requirement specified in paragraph 106B(1)(a)—the leave is taken for the purpose specified in paragraph 106B(1)(b), and the requirement specified in paragraph 106B(1)(c) is met.

Recommendation 47

The Fair Work Ombudsman should reissue guidance that supports employers to understand:

a. their discretion in requesting evidence for accessing the entitlement

b. the challenges victim-survivors may have obtaining evidence, and

c. how to approach assessing whether it is reasonable to request evidence, what evidence is reasonable to request, what evidence might satisfy a 'reasonable employer', and how to engage with employees when requesting evidence in a trauma-informed and practical manner.

Awareness

A key factor influencing uptake of paid FDVL is awareness of the entitlement. Stakeholders consistently note that there is low awareness in both employers and employees about the availability of paid FDVL. BETA found that only 58% of surveyed employers and 39% of surveyed victim-survivors were aware of the entitlement.[2787] Only 20% of casually employed victim-survivors were aware of the entitlement.[2788] When employers are aware of the leave type, they rarely promote it.[2789]

The PFDVL Review recommended improving and promoting the existing resources and guidance on paid FDVL to improve awareness, understanding and uptake of the entitlement, including for priority groups. See 'Partnership in addressing awareness and understanding issues' for more information on efforts from government to improvise awareness of paid FDVL. No data is available to this Review to determine if those efforts have significantly improved awareness of the leave type. Despite the awareness raising efforts to date, stakeholders continue to call for further awareness raising initiatives suggesting this remains an area of ongoing need.

Understanding of FDV, paid FDVL and trauma-informed engagement

Awareness of paid FDVL without a sound understanding of FDV, the entitlement itself, or how to engage with employees seeking to use the leave type will only cause confusion for both employers and employees, risk re-traumatisation of victim-survivors or limit uptake of the entitlement. The Review has received submissions that report that interactions with employers on the entitlement have occasionally resulted in further traumatisation or negative outcomes in the workplace. This is particularly concerning given the impact that such negative experiences may have on the same or other individuals' seeking the leave or other accommodations in the workplace relating to the experience of FDV.

A concern raised in this Review by community and employer groups has been the capacity of employers to respond in an informed and appropriate manner to disclosures of FDV in the workplace. This is particularly relevant for small businesses which may not have the HR and legal support to understand

[2787] BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 13.
[2788] Ibid 14.
[2789] Mihajla Gavin, Kantha Dayaram and Renata Casado, Submission No 24 (2 March 2026) 4.

their obligations. BETA's survey similarly found that employers often felt ill-equipped to deal with sensitive conversations and disclosures of FDV from employees.[2790]

Employers responding appropriately to disclosures of FDV is very important for establishing or continuing a relationship based on trust. Trust and the existing relationship between a victim-survivor and their manager is a key factor in whether victim-survivors approach their employer and/or manager to access the leave. BETA's survey found a correlation between victim-survivors' rating of trust in their manager and the uptake of leave, with those who accessed the leave rating their manager as more trustworthy.[2791]

In a tripartite system, all actors are responsible for ensuring employers and employees understand these concepts and are confident in their ability to apply the entitlements correctly so that the stigma associated with accessing the entitlement is reduced. Employers do not have to have extensive training to have appropriate conversations, but they do require a level of understanding on how best to hold these conversations without retraumatising the victim-survivor.

WHS integration

Stakeholders recommend a broader commitment from employers to address FDV as a psychosocial hazard within the WHS framework, with responsibility placed on employers to proactively manage the risks rather than relying on workers to seek support. In this context, stakeholders see paid FDVL as a tool within the broader system for proactively managing the safety risks posed by FDV.

The WHS framework already requires PCBUs to ensure the safety of workers, so far as is reasonably practicable.[2792] Gender-based discrimination and FDV can be a serious threat to WHS, affecting victims, co-workers and customers. FDV is a WHS issue to the extent that it creates a risk to workers' health and safety while at work, or if the health and safety of other persons is put at risk from work carried out as part of the conduct of the business or undertaking.[2793]

It is possible that employers have not fully appreciated that:

- FDV is a hazard that employers may need to address as a WHS issue and to give effect to their WHS obligations, and
- paid FDVL may be a tool to assist in mitigating or minimising the risks faced by employees at work.

[2790] BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 30.
[2791] Ibid 21.
[2792] See subsection 19(1) of the model WHS laws.
[2793] SWA, *Family and domestic violence at work* (Fact Sheet, December 2023) 1.

Partnership in addressing awareness and understanding issues

Government should continue efforts and initiatives that raise awareness of paid FDVL and seek to educate employees and employers about FDV, paid FDVL and communicating sensitively and supportively with their employees. Government should partner with relevant employer, employee and community organisations to better target relevant communities and minority groups. Government should work with these external stakeholders to identify the appropriate resources and training needed, support

the development of the relevant resources and training, and assist with identifying and reaching the relevant communities. Awareness raising and imparting an appropriate level of understanding about FDV, paid FDVL and sensitive conversations are separate but related initiatives, so consideration will need to be given to how best to achieve both.

FDV can affect any employee and employer, so materials must be accessible and understandable to workers and businesses generally. In developing awareness-raising, guidance, education and training materials, government and stakeholders should also continue to focus on vulnerable cohorts of workers, including:

- Casual employees – Casual employees are eligible for paid FDVL but they have far less awareness of their entitlement to paid FDVL compared to other employees. This may be due in part to their general lack of leave entitlements and lower connection to the workplace. Women are particularly represented in the casual cohort and are more likely to experience FDV.
- CALD and migrant community employees – CALD communities have greater barriers to accessing and understanding paid FDVL, including identifying FDV behaviours, overcoming what may be more significant cultural and community stigma, fears about FDV affecting visa and immigration status and lower English skills.
- First Nations employees – First Nations communities face disproportionately high rates of FDV, shaped by the ongoing impacts of colonisation, intergenerational trauma, systemic disadvantage, housing insecurity, and over-policing.[2794] First Nations employees may face greater barriers to accessing and understanding paid FDVL because of social or cultural connections between employers and extended family and kinship networks that heighten fears around disclosure. Evidence requirements may not reflect the lived experience of First Nations victim-survivors' approach to addressing FDV.
- Regional, rural or remote employees – These employees face particular barriers to access and understanding of paid FDVL because concerns around disclosure and stigma are heightened in smaller communities and there are less services available to support victim-survivors address FDV and/or escape violent relationships.
- Young workers – Young workers are often engaged in casual employment or other insecure forms of work. Young people may also have less understanding of FDV, but still be subject to FDV in their intimate or familial relationships. By virtue of being new to the workforce, they may be unfamiliar with their entitlements at work, as well as relevant employer obligations.

[2794] NATSIWA, Submission No 30 (3 March 2026) 8.

- LGBTIQA+ employees – LGBTIQA+ employees are similarly vulnerable to FDV, either within intimate partner relationships, or within their family unit. They can experience unique types of abuse related to their sexual or gender identity and face significant stigma or misconceptions about the experience of FDV in their specific communities.[2795]
- Workers with a disability – One in 5 employed people with a disability need at least one day off per week, with over 50% of this cohort engaging in casual or part-time working arrangements,[2796] and are particularly vulnerable to FDV because they may rely on their perpetrator for assistance or support.

The resources need to both reflect the experiences and barriers faced by these cohorts and also be accessible to the people they are intended to support. For example, materials are needed to support employers to understand how to better engage with First Nations employees, who might face additional barriers, but also need to reach First Nations employees themselves so they are aware of, and understand, FDV and paid FDVL. Guidance and resources should be made available in other languages and appropriate formats, to help promote the availability of the leave in CALD communities and ensure people with disabilities have resources they can use.

Employers, employer groups, unions, organisations with FDV expertise, and community organisations have an important role to play in raising awareness of the entitlement and understanding their role in implementation of the measure. In consultations, these groups highlighted their valuable networks with the relevant communities – these networks offer a mechanism that can be utilised to support the education of general outreach staff that may interact with victim-survivors and their employers, as well as the victim-survivors and the employers themselves. Additionally, these stakeholders are well placed to support adaption of the resources to the audience's needs. It will be a matter for government to determine how best to work with partner organisations to consult on, design and raise awareness of the relevant educative materials, but the Review notes that FDV is a cross-cutting issue that goes beyond workplace relations, and expertise and organisations with appropriate networks will need to support the development and awareness-raising work associated with this recommendation.

Support needs to be provided to employers to ensure they have the confidence to address FDV in the workplace if and when it arises, and to appreciate their WHS obligations might extend beyond providing paid FDVL. The further guidance and training must address concerns about workplace responses and provide employers with the tools to provide trauma-informed responses to FDV. Trauma-informed care and practice is a strength-based framework that involves recognising, understanding, and responding to the effects of trauma on survivors. The emphasis of this is on the physical, emotional, and psychological safety and wellbeing of victim-survivors. Trauma-informed responses have a strong focus on understanding trauma and its impacts, building safety and trust, providing choice and collaboration to empower people and respecting diversity. Employer resources should:

[2795] AIHW (Cth), 'LGBTIQA+ people' (Web Page, 30 July 2025) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/population-groups/lgbtiqa-people>.
[2796] AIHW (Cth), 'People with disability in Australia' (Web Page, 23 April 2024) <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/employment/employment-participation-needs-and-challenges>.

- provide guidance about FDV generally, including recognising the signs of FDV and the ways in which FDV can manifest and be experienced
- educate managers and HR on recognising and responding to those affected by FDV
- educate employers about paid FDVL, including the evidence requirements for paid FDVL (see Recommendation 47 above on evidentiary guidance)
- educate businesses on how to establish clear policies and processes on FDV, that include information about how confidentiality and privacy will be maintained
- introduce trauma-informed practice and provide guidance on giving effect to a trauma-informed response to FDV and requests for paid FDVL, including management strategies and worked-examples and practical tips on how to have sensitive conversations, and
- address how to continue working and supporting someone experiencing or recovering from FDV, including addressing possible performance challenges.

Appropriate customisation to the needs of small business would also be appropriate.

Small businesses would particularly benefit from these resources, noting they have less access to HR and legal support, and might be unable to access professional development to support their engagement with FDV and paid FDVL. Small businesses already have several resources available to them to support their engagement with victim-survivors, including information on the entitlement, conversation simulations and advice for engaging with employees.[2797] The additional resources would be in addition to, or require updates to, these existing resources.

The resources should frame FDV and paid FDVL as sitting within the WHS ecosystem, highlighting employer obligations to proactively engage with the possible risks to their staff members whilst at work and how those risks can be addressed. SWA is well placed to assist with supporting resources and training adapted to these messages.

Resources and guidance that can promote appropriate responses to FDV disclosures may help build trust and transparency within workplaces, which may, in turn, influence victim-survivors' willingness to seek assistance.

Without limiting the types of resources or training that government and partners identify will best support the implementation of the recommendation, the Review suggests additional guidance materials, and a free, regularly accessible training program should be particularly considered.

[2797] Transitioning Well, Family + Domestic Violence Paid Leave for Small Business (Web Page) <https://smallbusiness.10dayspaidfdvleave.com.au/>.

Recommendation 48

Government, employer, employee and community organisations (including family and domestic violence organisations) should partner together to improve awareness-raising efforts and develop and deliver additional materials and training seeking to educate employees and employers about family and domestic violence and paid family and domestic violence leave. This should include supporting employers to understand their proactive work health and safety obligations relating to family and domestic violence and have practical trauma-informed conversations about family and domestic violence and paid family and domestic violence leave with their employees.

a. The government should ensure that employer, employee and community organisations are funded to undertake this work.

b. The awareness-raising initiatives and educative materials should seek to support workers in insecure and low paid work, with a particular focus on casuals.

c. The awareness-raising initiatives and educative materials should be customised to support vulnerable cohorts, including culturally and linguistically diverse and migrant employees, First Nations employees, LGBTIQA+ employees, employees with disability, young employees, and regional, rural, and remote employees.

d. The educative materials for employers should particularly seek to support small business.

Quantum of leave

In both this Review and the PFDVL Review, stakeholders have called for a 10 day increase to the quantum of paid FDVL to take the total to 20 days. Stakeholders suggest that the current 10-day entitlement is insufficient for victim-survivors to adequately address the FDV they have or are experiencing and take actions to re-establish themselves. Some stakeholders also recommend that victim-survivors should be allowed to draw on future years' allocations. The Review, noting the limitation raised in the above Monitoring and Evaluation section, does not consider that there is a sufficient evidence base to indicate that the quantum of paid FDVL currently available is too low and should be raised. The regular collection of data to support evaluation of the entitlement (Recommendation 44) would assist in better understanding whether the quantum of leave is sufficient.

Casual employment

Paid FDVL is available to casual employees. Women who are experiencing or have experienced FDV are more likely to be employed in casual work than those with no experience with FDV.[2798] The PFDVL Review and BETA research found that casual employees are less aware of, and less likely to access, paid FDV leave. For example, only 20% of casually employed victim-survivors surveyed by BETA were aware of

[2798] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 July 2022, 176–7 (Tony Burke, Minister for Employment and Workplace Relations).

the entitlement.[2799] To address this, the PFDVL Review recommended resources be improved and promoted, with a particular focus on casual employees. Despite its availability and efforts to improve awareness since the PFDVL Review, the low uptake and understanding about the availability of the leave to casuals continues to be of concern and more needs to be done to better support casual employees. For the entitlement to have the intended effect of economically supporting victim-survivors to address the impacts of FDV, it is important people experiencing FDV are not disincentivised or otherwise prevented from accessing an entitlement available to them.

Through this Review, several barriers to casual employees accessing the entitlement have been highlighted. Barriers to access are often heightened for casual employees. Structural challenges, such as the precarious nature of casual work and the risk of not being rostered could compound the effects of stigma, discrimination and reputational damage which further disincentivise uptake. The demographic of people more likely to be employed in casual work might have other vulnerabilities that affect their uptake of the leave type.

Unlike other employment types, paid leave is a new entitlement for casual employees and the cultural shift that comes with it may still be in the process of becoming normalised. Casual employees may be less aware of their entitlements and rights at work, or be less willing to invoke them where they believe it could impact their future shifts or employment.[2800] This lack of awareness or unwillingness to use their entitlements is often related to the nature of employment relationship, where casuals have no firm advance commitment of ongoing work from their employer.

As highlighted earlier in this chapter, and as advocated for by employer groups, additional work should be done to continue to educate casuals about the availability of paid FDVL as well as the reasons they do not need to rearrange their work roster to avoid conflicts with things they must do to address the impacts of FDV on their lives (see Recommendation 48).

Casuals may face more significant repercussions for seeking or accessing paid FDVL, including reductions in shifts, removal from rosters, or even dismissal. Where casuals access paid FDVL, they may not be placed back on the roster to ensure they are not owed paid FDVL. There are legislative protections that may apply in these circumstances, such as protections against adverse action for exercising or proposing to exercise the workplace right to take paid FDVL (see, for instance, Section 4.5), however the Review understands this is still a concern for casual employees and their representatives.

Another barrier that might be impacting uptake is the behaviours of employees themselves. Stakeholders highlight that casual employees tend to arrange their work availability around commitments and obligations in their personal life or reject shifts they know they may be unavailable for.[2801] However, the entitlement only allows casual employees to receive paid FDVL based on the hours they would have

[2799] BETA, *Family and domestic violence leave: Research findings for the Independent Review of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Report, August 2024) 13–14.
[2800] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) 90–1; Renata Casado, Kantha Dayaram and Mihajla Gavin, *A review of the effectiveness of paid family and domestic violence leave entitlement since its implementation as a National Employment Standard in Australia – multi-stakeholder and lived experience perspectives* (Research Report, December 2025) 14.
[2801] ASU, Submission No 81 (6 March 2026) 7; SDA, Submission No 48 (3 March 2026) 7.

worked during the period for which they were rostered. An employee is only considered to be rostered if they have accepted an offer to work the rostered period.[2802] Where a victim-survivor has declined an offer to work a rostered shift, or has not been rostered because they are generally unavailable or the employer does not want to provide paid FDVL, the casual employee has no ability to access paid FDVL. As a result, victim-survivors may be placed or be placing themselves in more financially precarious situations to address the impacts of FDV, despite the availability of paid FDVL.

Some stakeholders highlighted that barriers to rostering could be addressed by allowing casuals who have not been rostered to access paid FDVL, by calculating the entitlement based on an average number of hours worked within a defined timeframe. This type of entitlement is included in assorted enterprise agreements, which demonstrates that it is possible for employers to support such arrangements. Some enterprise agreements average hours worked over 3, 6 or 12 months or by designating a set number of hours of leave (for example, payment for 5 hours) to be provided on days not rostered.[2803] For example, the *Hungry Jack's National Enterprise Agreement 2024* includes the following:

Hungry Jack's National Enterprise Agreement 2024

40.3 Casual employees are entitled to paid family and domestic violence leave when:

(a) They are unable to attend a rostered shift due to the impact of family and domestic violence; or

(b) They decline a shift, offered during a period in which they would otherwise be available, due to the impact of family and domestic violence; or

(c) They inform the Employer that they are unable to accept any shifts for a defined period due to the impact of family and domestic violence leave.

40.4 Payment in respect to clause 40.3(c) above, will be calculated by way of reference to the average number of shifts and hours worked by the employee each week for the previous 3 months, up until the expiration of the days set out in the NES.

It remains unclear whether further reforms are needed (such as to support confidence around protections against adverse action or to address possible rostering practices) and if there are factors that, if addressed, would have a positive impact on improving uptake.

Government should give further consideration to identifying the specific barriers impacting on casual uptake of paid FDVL and how these could be decreased through further intervention, including reform. Appropriate consideration should be given to the matters stakeholders have identified as drivers of low uptake. Improved data collection (Recommendation 44) may also be able to support appropriate

[2802] *Fair Work Act 2009* (Cth) ss 106BA(2)–(3)
[2803] SDA, Submission No 48 (3 March 2026) 11–12.

implementation of this recommendation. In considering how to address identified barriers faced by casual employees, government should consider whether proposals to amend the entitlement to address rostering practices are appropriate and would support meaningful access to the entitlement.

Recommendation 49

The government, in consultation with employer representatives, unions and family and domestic violence experts, should further consider the reasons for low uptake of paid family and domestic violence leave among casual employees. This should include considering all relevant factors, including awareness, job insecurity, evidentiary practices, and workplace rostering arrangements, to identify practical options to ensure casual employees can meaningfully access the entitlement.

Employee-like workers

The Closing Loopholes reforms introduced protections for employee-like workers performing digital platform work, including empowering the FWC to make minimum standards (see Sections 2.3 and 2.4 for more information).

Some stakeholders submitted to the Review that the paid FDVL entitlement should be extended to employee-like workers, with the ACTU suggesting that a first step could be through MSOs.[2804] However, it is possible that a paid FDVL term would not be permissible as it might be regarded as changing the form of employment. The 'employee-like' reforms are intended to support minimum standards for employee-like workers without fundamentally changing the nature of their engagement or removing the flexibility of platform-based work.[2805] Employee-like workers remain contractors and are therefore not entitled to employee entitlements such as leave. While certain minimum standards can be set for employee-like workers performing digital platform work through an MSO, MSOs cannot include terms that would change the form of the engagement or the status of the worker covered by the MSO, including terms that deem the worker to be an employee.[2806] It remains unclear whether a requirement to pay FDVL would be one of these prohibited terms.

At its core, the question remains whether the entitlement is one that an 'employee-like' worker should have access to, which is outside the scope of this Review. However, this may become an increasingly important question as the cohort of 'employee-like' workers grow and the employee-like framework matures. The extension of the entitlement to casual workers might support an argument to extend the entitlement as casual employees, like contractors, are not generally entitled to leave but can access paid FDVL. However, in the case of casuals, it is clear the entitlement did not inherently alter the nature of the engagement but instead reflected a necessary adaption to address the significant issues presented by FDV in our community.

[2804] ACTU, Submission No 67 (6 March 2026) 102.
[2805] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 215 [1294].
[2806] *Fair Work Act 2009* (Cth) s 536KM(1)(d).

Further detailed consideration by government is needed as to whether the inherent character of the 'employee-like' work could be retained while providing access to paid FDVL, particularly as the employee-like framework develops. This should be considered further in the recommended further review of the employee-like framework (see Section 2.3, Recommendation 10).

Definitions and eligibility

Expanding who constitutes a perpetrator of FDV

Throughout the consultation process, stakeholders raised concerns with the limited list of perpetrators for the purpose of accessing paid FDVL under the FW Act.

The current definition of FDV at subsection 106B(2) of the FW Act, includes 'violent, threatening or other abusive behaviour **by a close relative of a person, a member of a person's household, or a current or former intimate partner of a person** that seeks to coerce or control the person and causes the person harm or to be fearful' (emphasis added).

A 'close relative' is a member of the person's immediate family or one who is related according to Aboriginal or Torres Strait Islander kinship rules.[2807] An 'immediate family member' is a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the person, or a child, parent, grandparent, grandchild, or sibling of a spouse or de facto partner of the person. This definition of immediate family is used elsewhere in the FW Act in relation to personal/carer's leave, compassionate leave and flexible working arrangements.[2808]

Various stakeholders have called for a broadening of the definition to include:

- family members according to ethnic, cultural or religious kinship rules
- a person's aunt or uncle
- a person's former intimate partner's immediate family, and
- former members of a household.

Extended family members or former immediate family members can be a perpetrator in their own right. They can also facilitate another perpetrator in committing FDV. The *National Principles to Address Coercive Control in Family and Domestic Violence* recognise that perpetrators can co-opt others, including family members, to work together to exert power and dominance over victim-survivors or otherwise reinforce the main perpetrators.[2809] For example, the parents of a perpetrator who has separated from the victim-survivor may be perpetrators in their own right where they monitor and report on the actions and movements of the victim-survivor or deliver coercive communications or threats.

[2807] Ibid s 106B(3).
[2808] Ibid ss 65, 97, 104(1)(a), 105.
[2809] Commonwealth of Australia, Attorney-General's Department, *National Principles to Address Coercive Control in Family and Domestic Violence* (September 2023) 10.

Inclusion of family members according to ethnic, cultural or religious kinship rules may also be relevant in communities where lateral violence[2810] may be used to target individuals, families, or other groups. Lateral violence often occurs when a number of people work together to attack or undermine another individual, families or a group.[2811] Perpetrators may pressure or manipulate family members or other parts of a kinship structure to target a victim-survivor.[2812] First Nations communities would currently be able to access paid FDVL to address lateral violence by virtue of the inclusion of kinship rules within the FDV definition, but other CALD communities, who may also be particularly vulnerable to lateral violence, are only covered to the extent their kinship relationships fall within the current criteria.

Including former members of a household could also help to ensure that victim-survivors that leave a household to escape FDV perpetrated against them by a household member who is not a close relative or current or former intimate partner will still be eligible to access the entitlement. Under the current provisions there is a risk that a victim-survivor who no longer lives with the former household member (including where they left housing in order to secure their own safety) cannot access the entitlement. This is despite the risk that FDV could continue to be perpetrated against them and they could continue to need to do something to address the impacts of FDV.

Having heard of gaps in coverage of FDV perpetrators, the Review considers that the scope of who can be considered a perpetrator for the purposes of paid FDVL should be expanded to encompass the full range of family and domestic relationships in a contemporary context. The following cohorts should be included:

- Extended family members (including aunts, uncles, cousins).
- Former immediate family members for both the victim-survivor and their former spouse or de facto partner (including persons who are no longer immediate family members as a result of separation, such as former step-children).
- Family members according to ethnic, religious or cultural kinship rules.
- Former members of a person's household.

Government should consult with employers, employees and FDV experts to ensure the provision is clear and operationalised. It would be detrimental to both employers and employees if access was unclear and disputation over eligibility occurred during a challenging time in a victim-survivors life.

Broadening of the cohort of perpetrators that is covered has occurred before, and demonstrates that it is not beyond employer groups and unions to, through gradual legislative change, strike the balance between accessibility and operational workability. As ACCI identified, the 2018 Full Bench 4 yearly review of modern awards originally considered that a domestic relationship between 2 housemates was 'too broad', but legislative change has since successfully integrated this relationship into the definition of FDV. ACCI and

[2810] Lateral violence, described as intra-racial conflict or internalised colonialism, is a product of complex historical, cultural and social dynamics and discrimination. See Australian Human Rights Commission, Social Justice Report 2011, Chapter 2: Lateral violence in Aboriginal and Torres Strait Islander communities (Report, October 2011) 50–98.
[2811] Commonwealth of Australia, Attorney-General's Department, *National Principles to Address Coercive Control in Family and Domestic Violence* (September 2023) 13. Relevant behaviours include gossiping, bullying, shaming, family feuding or social exclusion.
[2812] Ibid.

AIG argue that legislative expansions shift undue burdens onto employers to address the societal issue of FDV, but the National Plan states that 'addressing violence against women and children requires the support of the whole community, with businesses and the corporate sector playing a vital role'.[2813]

The Review notes that amending the definition of FDV would have an effect on other provisions in the FW Act which utilise the concept (see, for instance, Section 4.5 on subjection to FDV as a protected attribute) Further consideration should be given to the impacts of expanding the definition of FDV on other provisions in the FW Act, including whether it is also appropriate for the FDV definition to be expanded for those purposes.

Recommendation 50

The government should consider, in consultation with employer representatives, unions and family and domestic violence experts, amending the *Fair Work Act 2009* to allow victim-survivors to access paid family and domestic violence leave where the following cohorts of persons are perpetrating family and domestic violence:

a. Extended family members (including aunts and uncles).
b. Former immediate family members for both the victim-survivor and their former spouse or de facto partner.
c. Family relationships based on ethnic, religious or cultural kinship rules.
d. Former members of a person's household.

Adjusting the definition of FDV

The current definition of FDV requires that the violent, threatening, or abusive behaviour by a perpetrator both 'seeks to coerce or control the person **and** causes the person harm or to be fearful' (emphasis added).[2814] Several stakeholders noted that this created a 'double threshold' of conditions for people experiencing FDV to meet before being able to access the leave entitlement. Submissions recommended that the 'and' in this definition be replaced with 'or', which would remove the double threshold and better reflect the definition in the *Family Law Act 1975* (Cth).[2815]

The double threshold reflects the unpaid FDVL provisions and was based on the FDV definition developed by the FWC in 2018 for use in modern awards.[2816] In the development of the definition of FDV, it was acknowledged that there is no single agreed definition of 'family violence', 'domestic violence' or 'family and domestic violence'.[2817] Despite the definition being agreed to through the 2018 process, stakeholders

[2813] DSS, *The National Plan to End Violence against Women and Children 2022–2032* (Report, 2022) 96.
[2814] See *Fair Work Act* 2009 (Cth) s 106B(2).
[2815] See *Family Law Act 1975* (Cth) s 4AB(1). For the purposes of the *Family Law Act 1975* (Cth), family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the *family member*), or causes the family member to be fearful.
[2816] *4 yearly review of modern awards – Family and Domestic Violence Leave* [2018] FWCFB 3936, Attachment A, X2.
[2817] *4 yearly review of modern awards – Family and Domestic Violence Leave* [2018] FWCFB 1691, [69].

have raised concerns through the PFDVL Review and this Review about the use of this definition instead of the definition used in the *Family Law Act 1975* (Cth).[2818]

The National Plan, which outlines the commitment of the Australian and state and territory governments to eliminate gender-based violence in a generation, notes that definitions of gender-based violence are a whole-of-system issue.[2819] It provides that 'nationally consistent definitions should be used to inform and support program design, public and private sector policies, as well as legislation across states and territories to ensure that all people in Australia have equal access to support and justice.'[2820]

There is merit in working towards greater national consistency of definitions of FDV, as is promoted under the National Plan. While the majority of FDV cases may involve a victim-survivor both being subject to control or coercion, and cause a person to be fearful or harmed, such a change can provide a more accessible entitlement to those who need it, reduce confusion and allow for greater alignment with the *Family Law Act 1975* (Cth) definition. This change would reduce the need for victim-survivors to explain how violence is perpetrated against them and how it impacts on them. It would also be consistent with the recommendations of the PFDVL Review, which recommended greater integration with other broader policy, systems and practices, including legislative definitions,[2821] noting misalignment may remain an ongoing issue for state and territory legislation.

As an amendment to the definition would have an impact on other parts of the FW Act which draw on the definition, and is related to the proposed amendment of the entitlement in Recommendation 45, the amendment to the definition should be considered by government, in consultation with unions, employer groups and FDV experts.

Recommendation 51

In considering options to amend and simplify the entitlement (Recommendation 45) the government should also consider amending the definition of 'family and domestic violence' in the *Fair Work Act 2009* to align it with the *Family Law Act 1975* by providing that family and domestic violence is behaviour that 'seeks to coerce or control the person' or 'causes the person harm or to be fearful'.

Sexual and broader gender-based violence

Several stakeholders advocate for paid FDVL to be extended to those who have experienced sexual violence or other forms of gender-based violence perpetrated by a person outside of the domestic or family context. These stakeholders note that the lack of coverage is inconsistent with the National Plan and creates inequity, with victim-survivors of sexual violence facing additional barriers and challenges in taking time away from work to access services or otherwise address their needs after experiencing violence.

[2818] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024).
[2819] DSS, *The National Plan to End Violence against Women and Children 2022–2032* (Report, 2022) 36.
[2820] Ibid 37.
[2821] Ibid 93–95.

During the passage of the PFDVL Act, the inclusion of sexual violence beyond the current level of coverage was raised by the Australian Greens, which recommended the PFDVL Review consider expanding the entitlement to include sexual violence in all forms.[2822] The government noted this recommendation, highlighting the PFDVL Review would be capable of considering definitional issues.[2823] The PFDVL Review did not recommend changes to the current remit of the leave type, but noted the possible benefits of further research on how best to support the needs of employees who experience non-FDV-related sexual violence.[2824] The Review understands that this research has not been undertaken to date.

A significant proportion of sexual violence is committed outside of the FDV context, and by both perpetrators known or unknown to victims. All victim-survivors of sexual violence deserve support to recover and seek justice. However, extending leave to victim-survivors of sexual violence would be inconsistent with the stated intent of the entitlement – to support victims-survivors who have experienced FDV. An expansion to include sexual violence would effectively be the creation of a new type of leave, which is beyond the scope of this Review.

Caring for and supporting victim-survivors

Some stakeholders recommend the extension of paid FDVL to those who are caring for, supporting or otherwise assisting victim-survivors of FDV. They note that care, support or assistance is important for victim-survivors and providing leave to those who are supporting another in addressing the impacts of FDV would deepen paid FDVL's broad social efficacy and increase the quality of support available to victim-survivors.[2825]

While extending the provisions of paid FDVL to those caring for, supporting or otherwise assisting a victim-survivor would likely produce benefits for these employees and victim-survivors, the intention of paid FDVL was to provide direct support to individuals who themselves have experienced FDV. The proposed change would amount to a new leave type, which is beyond the scope of this Review.

Findings and recommendations

There are currently no ongoing mechanisms for monitoring paid FDVL. Ongoing monitoring of the paid FDVL framework is essential to track its usage and effectiveness.

[2822] Senate Education and Employment Legislation Committee, Commonwealth of Australia, *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022* [Provisions] (Report, September 2022) 42 [1.17].
[2823] Australian Government, *Australian Government Response to the Senate Standing Committee on Education and Employment report: Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 [Provisions]* (February 2024) 5.
[2824] Kate Seymour et al, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 – Final Report* (Report, 9 October 2024) 80.
[2825] ACTU, Submission No 67 (6 March 2026) 103.

Recommendation 44

The government should regularise the collection of evaluative data about paid family and domestic violence leave, including usage, barriers to usage, employer familiarity with the entitlement, awareness raising efforts by employers and sentiments about the leave type, to ensure it can best identify whether the measure is operating effectively and whether further reforms are necessary to give effect to the intention of the measure.

Uptake of paid FDVL has remained low. There are a number of factors and barriers to access that may be influencing this including an ongoing lack of understanding about what paid FDVL can be used for, what FDV entails, stigma associated with disclosing subjection to FDV or accessing paid FDVL, privacy concerns and evidence requirements.

Evidence requirements are at risk of retraumatising victim-survivors when requests are excessive and/or repeated, onerous, or intrusive. The risks of re-traumatisation and disincentivising the uptake of paid FDVL are unintended consequences of the measure. Simplifying the entitlement may meaningfully reduce the actual and perceived barriers currently faced by victim-survivors.

Recommendation 45

The government, in consultation with employer representatives, unions and family and domestic violence experts, should consider:

- options to amend and simplify the paid family and domestic violence leave entitlement to ensure that it is accessible where an employee needs to take leave from work to deal with the impact of family and domestic violence, including circumstances where the employee needs to take steps to manage, respond to, or recover from the impact of family and domestic violence, and
- aligning evidentiary requirements with the simplified approach to ensure they do not create additional barriers to access.

Recommendation 46

The *Fair Work Act 2009* should be amended to clarify the types of evidence, such as statutory declarations, medical certificates or documents from support services, that could meet evidentiary requirements if requested by employers.

Recommendation 47

The Fair Work Ombudsman should reissue guidance that supports employers to understand:

a. their discretion in requesting evidence for accessing the entitlement

b. the challenges victim-survivors may have obtaining evidence, and

c. how to approach assessing whether it is reasonable to request evidence, what evidence is reasonable to request, what evidence might satisfy a 'reasonable employer', and how to engage with employees when requesting evidence in a trauma-informed and practical manner.

A lack of awareness and understanding about FDV and paid FDVL continues to be a concern. Employers, employer groups and unions have an important role to play in raising awareness of the entitlement and understanding their role in implementation of the measure, and should be involved in supporting further efforts to raise awareness. Efforts should focus on supporting employer (particularly small business) and employee (particularly people in insecure and low paid work types or who are members of vulnerable cohorts) awareness and understanding of FDV and paid FDVL. These initiatives need to be embedded into WHS responses and trauma-informed.

Recommendation 48

Government, employer, employee and community organisations (including family and domestic violence organisations) should partner together to improve awareness-raising efforts and develop and deliver additional materials and training seeking to educate employees and employers about family and domestic violence and paid family and domestic violence leave. This should include supporting employers to understand their proactive work health and safety obligations relating to family and domestic violence and have practical trauma-informed conversations about family and domestic violence and paid family and domestic violence leave with their employees.

a. The government should ensure that employer, employee and community organisations are funded to undertake this work.

b. The awareness-raising initiatives and educative materials should seek to support workers in insecure and low paid work, with a particular focus on casuals.

c. The awareness-raising initiatives and educative materials should be customised to support vulnerable cohorts, including culturally and linguistically diverse and migrant employees, First Nations employees, LGBTIQA+ employees, employees with disability, young employees, and regional, rural, and remote employees.

d. The educative materials for employers should particularly seek to support small business.

Casual employee uptake of the entitlement is particularly low and further work is needed to better understand the extent of barriers facing casual employees, and identify reforms to address those barriers.

Recommendation 49

The government, in consultation with employer representatives, unions and family and domestic violence experts, should further consider the reasons for low uptake of paid family and domestic violence leave among casual employees. This should include considering all relevant factors, including awareness, job insecurity, evidentiary practices, and workplace rostering arrangements, to identify practical options to ensure casual employees can meaningfully access the entitlement.

Further consideration should be given to expanding the definition of FDV used in the FW Act to capture a broader cohort of perpetrators who are within a victim-survivor's household and family, and further align relevant definitions within the FW Act with other Commonwealth legislation.

Recommendation 50

The government should consider, in consultation with employer representatives, unions and family and domestic violence experts, amending the *Fair Work Act 2009* to allow victim-survivors to access paid family and domestic violence leave where the following cohorts of persons are perpetrating family and domestic violence:

a. Extended family members (including aunts and uncles).
b. Former immediate family members for both the victim-survivor and their former spouse or de facto partner.
c. Family relationships based on ethnic, religious or cultural kinship rules.
d. Former members of a person's household.

Recommendation 51

In considering options to amend and simplify the entitlement (Recommendation 45) the government should also consider amending the definition of 'family and domestic violence' in the *Fair Work Act 2009* to align it with the *Family Law Act 1975* by providing that family and domestic violence is behaviour that 'seeks to coerce or control the person' or 'causes the person harm or to be fearful'.

Appendices

Appendix 1 – Glossary

Stakeholders (who made written submissions to the Review)

Term	Meaning
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFP	Australian Federal Police
AHEIA	Australian Higher Education Industrial Association
AHA	Australian Hotels Association
AHRI	Australian HR Institute
AIG	Australian Industry Group
AMIC	Australian Meat Industry Council
AMIEU	Australasian Meat Industry Employees' Union
AMWA	Australian Multicultural Women's Alliance
AMWU	Australian Manufacturing Workers' Union
ANMF	Australian Nurses and Midwifery Federation
AREEA	Australian Resources & Energy Employer Association
ARTIO	Australian Road Transport Industrial Organisation
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASU	Australian Services Union
ATA	Australian Trucking Association
AWU	Australian Workers' Union
BCA	Business Council of Australia
CCF	Civil Contractors Federation
CEPU	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
CCIWA	Chamber of Commerce and Industry of Western Australia
CFW	Centre for Future Work
Circle Green	Circle Green Community Legal
CIS	Centre for Independent Studies
COSBOA	Council of Small Business Organisations Australia
CSOA	Collieries' Staff and Officials Association
CPSU (PSU Group)	Community and Public Sector Union (PSU Group)
CPSU (SPSF Group)	Community and Public Sector Union (State Public Services Federation Group)
ETU	Electrical Trades Union

Term	Meaning
FAAA	Flight Attendants' Association of Australia
FSU	Finance Sector Union
HIA	Housing Industry Association
MBA	Master Builders Australia
MJI	Migrant Justice Institute
MCA	Minerals Council of Australia
MEAA	Media, Entertainment and Arts Alliance
MEU	Mining and Energy Union
MIAL	Maritime Industry Australian Ltd
MTAA	Motor Trades Association of Australia
NatRoad	National Road Transport Association
NATSIWA	National Aboriginal and Torres Strait Islander Women's Alliance
NECA	National Electrical and Communications Association
NFF	National Farmers' Federation
NFIA	National Fire Industry Association
NRWC	National Rural Women's Coalition
NTEU	National Tertiary Education Industry Union
QTA	Queensland Trucking Association
RDA	Retail Drinks Australia
SDA	Shop, Distributive and Allied Employees' Association
SRCLA	Safety Rehabilitation and Compensation Licensees Association
SWA	Safe Work Australia
TWU	Transport Workers' Union
UFU	The Victorian Branch of the United Firefighters Union of Australia
UWU	United Workers Union
WESNET	The Women's Service Network
WLS NSW	Women's Legal Service NSW
WWWA	Working with Women Alliance

Other

Term	Meaning
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
Advisory Committee	Family and Injured Workers Advisory Committee
AMSA	Australian Maritime Safety Authority
APSC	Australian Public Service Commission
APS	Australian Public Service
ASEA	Asbestos Safety and Eradication Agency
ASIC	Australian Securities and Investment Commission
ASSEA	Asbestos and Silica Safety and Eradication Agency
ASSEA Act	*Asbestos and Silica Safety and Eradication Agency Act 2013* (Cth)
ASSEC	Asbestos and Silica Safety and Eradication Council
ATO	Australian Taxation Office
Best Practice Review	*Best Practice Review of the Model Work Health and Safety Laws*
BETA	Behavioural Economics Team of the Australian Government
Boland Review	Review of the Model Work Health and Safety Laws – Final Report
BOOT	Better Off Overall Test
Building Cooperative Workplaces No. 1 Bill	Workplace Relations Legislation Amendment (Building Cooperative Workplaces No. 1) Bill 2026 (Cth)
CALD	Culturally and linguistically diverse
CDPP	Commonwealth Director of Public Prosecutions
CEIS	Casual Employment Information Statement
CFMEU	Construction, Forestry and Maritime Employees Union
CHIT	Contractor high income threshold
Closing Loopholes Acts	The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth)
Closing Loopholes No. 1 Act	*Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth)
Closing Loopholes No. 2 Act	*Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth)
DEWR	Department of Employment and Workplace Relations
Deactivation Code	*Fair Work (Digital Labour Platform Deactivation Code) Instrument 2024*
DLPCC	Digital Labour Platform Consultative Committee
The Directions	*Australian Public Service Commissioner's Directions 2022*
DSS	Department of Social Services
EAS	Employer Advisory Service

Term	Meaning
Fairer Fuel Act	*Fair Work Amendment (Fairer Fuel) Act 2026* (Cth)
FDV	Family and domestic violence
FDVL	Family and domestic violence leave
Federal Court	Federal Court of Australia
FEG	Fair Entitlements Guarantee
FEG Act	*Fair Entitlements Guarantee Act 2012* (Cth)
FW Act	*Fair Work Act 2009* (Cth)
FW Regulations	*Fair Work Regulations 2009* (Cth)
FWC	Fair Work Commission
FWC Expert Panel	Expert Panel for the road transport industry
FWO	Fair Work Ombudsman
GOAE	Guarantee of Annual Earnings
Guide	Guide for Arranging Rehabilitation Assessments and Requiring Examinations
HILDA	Household Income and Labour Dynamics in Australia
HSR	Health and Safety Representative
IBDs	Intractable bargaining declarations
IBWDs	Intractable bargaining workplace determinations
IC Act	*Independent Contractors Act 2006* (Cth)
ILO	International Labour Organisation
IMEs	Independent medical examinations
Industrial Deaths Senate Inquiry	*They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* Senate Inquiry
Minister	Minister for Employment and Workplace Relations
MSOs	Minimum standards orders
MWT	Migrant Workers' Taskforce
National Plan	National Plan to End Violence against Women and Children 2022–2032
NES	National Employment Standards
NOPSEMA	National Offshore Petroleum Safety and Environmental Management Authority
NWRCC	National Workplace Relations Consultative Council
NWRCC Act	*National Workplace Relations Consultative Council Act 2002* (Cth)
OHS	Occupational health and safety
PABO	Protected action ballot order
Paid FDVL	Paid family and domestic violence leave entitlement
PCBU	Person conducting a business or undertaking

Term	Meaning
PFDVL Act	*Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth)
PFDVL Review	Independent review of the operation of the paid family and domestic violence leave entitlement in the *Fair Work Act 2009* (Cth)
PROP	Protected rate of pay
PTSD	Post-traumatic stress disorder
RCM	Rehabilitation Case Managers
Rehabilitation assessment	An assessment of an employee's capability of undertaking a rehabilitation program arranged by the rehabilitation authority under section 36(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) in circumstances where an employee suffers an injury resulting in incapacity for work or an impairment.
Rehabilitation examination	An examination required by a rehabilitation authority under section 36(3) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth).
Compensation examination	A medical examination required under section 57(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth).
RLHAO	Regulated labour hire arrangement order
RO Act	*Fair Work (Registered Organisations) Act 2009* (Cth)
RSRT	Road Safety Remuneration Tribunal
RTAG	Road Transport Advisory Group
RTCCO	Road transport contractual chain order
SAJER Act	*Fair Work (Supporting Australia's Jobs and Economic Recovery) Amendment Act 2021* (Cth)
SAJER Bill	*Fair Work (Supporting Australia's Jobs and Economic Recovery) Bill 2021* (Cth)
SJBP Act	*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)
SJBP Review	Secure Jobs Better Pay Act Review
SRC Act	*Safety, Rehabilitation and Compensation Act 1988* (Cth)
SRC Act Review	*Independent review of the Safety, Rehabilitation and Compensation Act 1988* (Cth)
SRC Commission	Safety, Rehabilitation and Compensation Commission
SRC Regulations	*Safety, Rehabilitation and Compensation Regulations 2019* (Cth)
Termination Code	*Fair Work (Road Transport Industry Termination Code) Instrument 2024*
TFTU	Timber, Furnishing and Textiles Union
UFUA	United Firefighters Union of Australia
Voluntary Code	Voluntary Small Business Wage Compliance Code
WGEA	Workplace Gender Equality Agency
WHS	Work health and safety
WHS Act	*Work Health and Safety Act 2011* (Cth)

Appendix 2 – Terms of Reference

Context

During the 47th Parliament (2022–2025), the Australian Government secured the passage of significant reforms to Australia's workplace relations laws to close loopholes and improve fairness and safety in the workplace.

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Closing Loopholes Act) and *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Closing Loopholes No. 2 Act) were passed by the Parliament and received Royal Assent on 14 December 2023 and 26 February 2024 respectively. A list of the measures in this legislation is at **Attachment A**.

The *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Family and Domestic Violence Leave Act) provides ten days paid family and domestic violence leave in a 12-month period for full-time, part-time and casual employees.

Statutory Review

The Closing Loopholes Act and the Closing Loopholes No. 2 Act (the Closing Loopholes legislation) require the Minister for Employment and Workplace Relations to initiate a statutory review to be undertaken within 2 years of commencement.

- Section 4 of the Closing Loopholes Act requires the Minister to cause a review of the operation of the amendments made by the Act to commence by 15 December 2025.
- Section 4 of the Closing Loopholes No.2 Act requires the Minister to cause a review of the amendments made by the Act, including but not limited to the new jurisdictions relating to regulated workers and the right to disconnect to commence by 27 February 2026.

Both Acts require that:

- the persons who conduct the review must give the Minister a written report of the review within 6 months of the commencement of the review
- the Minister must cause a copy of the report of the review to be tabled in each House of the Parliament within 15 sitting days after the Minister receives it.

The Family and Domestic Violence Leave Act was reviewed in line with its statutory requirements in 2024, and in its response to that review the government committed to further review of the Act.

Conduct of the review

The Government has decided the statutory reviews of the Closing Loopholes legislation will be conducted together as a joint review (the Closing Loopholes Review). The review will also cover the Family and Domestic Violence Leave Act as agreed in the *Australian Government Response to the Independent Review of the operation of the paid family and domestic violence leave entitlement in the* Fair Work Act 2009 *(Cth)*.

The Closing Loopholes Review will be led by an independent reviewer appointed by the Minister for Employment and Workplace Relations (the Minister). The Department of Employment and Workplace Relations will provide secretariat support to the review.

The Closing Loopholes Review will commence by 15 December 2025. Without limiting the matters that may be considered, the review must:

- consider whether the operation of the amendments is appropriate and effective
- identify any unintended consequences of the amendments
- consider whether further amendments to the Fair Work Act 2009, or any other legislation, are necessary to improve the operation of the amendments or rectify any unintended consequences that are identified.

The review must also further consider the effectiveness of the amendments made by the Family and Domestic Violence Leave Act, taking into account the 2024 independent statutory review of this Act which found that while the entitlement is operating as intended, more time was needed for employers and employees to experience the existing entitlement before further calls for reform were progressed.

The review must provide a document setting out preliminary findings and draft recommendations to the Minister on or before 15 May 2026. The preliminary findings and draft recommendation/draft report are to be published for stakeholder comment. A final Report is to be delivered to the Minister on or before 15 June 2026.

In conducting the Closing Loopholes Review, the reviewer will consider any relevant qualitative and quantitative research.

The review must be informed by stakeholder perspectives, which may include expert advice, and stakeholders must be given an opportunity to provide submissions and evidence on the matters to be considered by the review. Submissions to the review will be published where appropriate, or unless parties request that their submissions remain confidential.

The final Report must detail the reviewer's findings and recommendations about each of the matters to be considered by the review.

Publication

The Minister must cause a copy of the report of the review to be tabled in each House of the Parliament within 15 sitting days after the Minister receives the report.

Attachment A: Measures contained in Closing Loopholes legislation

Closing Loopholes Act

- Compliance and enforcement: Criminalising wage theft
- Regulated labour hire arrangement orders (Closing the labour hire loophole)
- Enhancing delegates' rights
- Provide stronger protections against discrimination, adverse action and harassment
- Addressing anomalous consequences of the small business redundancy exemption in insolvency contexts
- Conciliation conference orders
- Entry to assist Health and Safety Representatives
- Amendments to *Asbestos Safety and Eradication Agency Act 2013*
- Amendments to the *Safety Rehabilitation and Compensation Act 1988*
- Industrial manslaughter and other work, health and safety reforms

Closing Loopholes No. 2 Act

- Extend the powers of the Fair Work Commission to set minimum standards for 'employee-like' workers
- Allow the Fair Work Commission to set minimum standards to ensure the road transport industry is safe, sustainable and viable
- Give workers the right to challenge unfair contractual terms
- Amending the definition of casual employee and providing the employee choice pathway
- Compliance and enforcement: Civil penalties and sham contracting
- Meaning of 'employee' and 'employer' in the *Fair Work Act 2009*
- Enabling multiple franchisees to access the single enterprise agreement stream
- Strengthening right of entry to investigate underpayments
- Fair Work Commission preparing enterprise agreement model terms
- Transitioning from multi-enterprise agreements
- Repeal de-merger from registered organisations amalgamation provisions
- Workplace determinations
- Right to disconnect

Appendix 3 – Stakeholder consultation

Written submissions received

11 submissions were private

Number	Stakeholder
1	Private
2	Private
3	National Electrical and Communications Association
4	DoorDash
5	Adrian Boothman (CPHR)
6	Robert Paturzo-Elliott
7	National Farmers' Federation
8	Australian Small Business and Family Enterprise Ombudsman
9	Dr Caleb Goods, Association Professor Alex Veen & Dr Tom Barratt
10	HSE Direct
11	Australian Multicultural Women's Alliance
12	Electrical Trades Union
13	Professor Chris F Wright
14	Professor Alysia Blackham
15	Private
16	Private
17	Associate Professor Michael Rawling and Dr Eugene Schofield-Georgeson
18	Restaurant & Catering Industry Association
19	The Women's Service Network
20	Housing Industry Association
21	Australian HR Institute
22	Anonymous
23	Dr Elvio A. Sinopoli
24	Dr Mihajla Gavin, Professor Kantha Dayaram and Dr Renata Casado
25	Simon Potts
26	Maritime Industry Australia Ltd
27	Anonymous
28	Clubs Australia
29	National Rural Women's Coalition

Number	Stakeholder
30	National Aboriginal and Torres Strait Islander Women's Alliance
31	Private
32	Civil Contractors Federation
33	National Fire Industry Association
34	Master Builders Australia
35	Retail Drinks Australia
36	National Road Transport Association
37	Australian Hotels Association
38	Australian Manufacturing Workers' Union
39	Private
40	Media, Entertainment & Arts Alliance
41	The Pharmacy Guild of Australia
42	Private
43	Private
44	Working with Women Alliance
45	Council of Small Business Organisations Australia
46	Australian Trucking Association
47	Australian Meat Industry Council
48	Shop, Distributive and Allied Employees' Association
49	Australian Resources & Energy Employer Association
50	Business Council of Australia
51	Minerals Council of Australia
52	Motor Trades Association of Australia
53	Private
54	Australian Chamber of Commerce and Industry
55	Amplify Alliance Australia
56	Australasian Meat Industry Employees' Union
57	Safety, Rehabilitation and Compensation Licensees Association
58	Collieries' Staff and Officials Association
59	Australian Retail Council
60	Australian Nursing & Midwifery Federation
61	UnionsWA
62	United Workers' Union
63	Flight Attendants' Association of Australia
64	Recruitment, Consulting and Staffing Association

Number	Stakeholder
65	Circle Green Community Legal
66	Centre for Future Work
67	Australian Council of Trade Unions
68	SA Unions
69	Women's Legal Service NSW
70	Uber
71	National Tertiary Education Industry Union
72	Job Watch Inc
73	Australian Higher Education Industrial Association
74	NSW Small Business Commissioner
75	Chamber of Commerce and Industry of Western Australia
76	Mining and Energy Union
77	Transport Workers' Union of Australia
78	Private
79	Community and Public Sector Union (PSU Group)
80	United Firefighters Union
81	Australian Services Union
82	Australian Industry Group
83	Private
84	Violet Co Legal & Consulting
85	Australian Federal Police
86	Rob Reitano

Written submission received to the Draft Report

2 submissions were private

Number	Stakeholder
1	Robert Paturzo-Elliott
2	Adrian Boothman
3	Private
4	Centre for Independent Studies
5	NSW Small Business Commission
6	Transitioning Well and HR Legal
7	Council of Small Business Organisations Australia
8	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia /Electrical Trades Union
9	National Farmers' Federation
10	Working with Women Alliance
11	Housing Industry Association
12	Mining and Energy Union
13	Migrant Justice Institute
14	The Women's Service Network
15	Motor Trades Association of Australia
16	Master Builders Australia
17	Dr. Elvio A. Sinopoli
18	Business Council of Australia
19	National Tertiary Education Industry Union
20	United Workers Union
21	Dr Mihajla Gavin, Professor Kantha Dayaram and Dr Renata Casado
22	Australasian Meat Industry Employees Union
23	Maritime Industry Australia Ltd
24	Australian Services Union
25	Community and Public Sector Union (CPSU PSU Group)
26	Mable Technologies
27	Australian Manufacturing Workers' Union
28	Transport Workers' Union
29	United Firefighters Union
30	Chamber of Commerce and Industry of Western Australia
31	Australian Higher Education Industrial Association

Number	Stakeholder
32	Professionals Australia
33	Australian Council of Trade Unions
34	Australian Nursing and Midwifery Federation
35	Australian Meat Industry Council
36	Media, Entertainment & Arts Alliance
37	Shop, Distributive and Allied Employees' Association
38	Uber
39	Anonymous
40	Finance Sector Union
41	Centre for Future Work
42	Minerals Council of Australia
43	Irene Nikoloudakis
44	Private
45	Australian Industry Group
46	Australian Chamber of Commerce and Industry
47	Australian Resources & Energy Employer Association
48	Safe Work Australia
49	Community and Public Sector Union (SPSF Group)

Roundtables (February 2026)

Road transport industry business representatives (13 February)

Attendees
Australian Road Transport Industrial Organisation
Australian Trucking Association
National Road Freighters Association
Queensland Trucking Association

Road transport industry worker representatives (13 February)

Attendees
Transport Workers' Union

Family and domestic violence leave stakeholders (16 February)

Attendees
Australian Multicultural Women's Alliance
Dr Mihalja Gavin
National Foundation of Australian Women
National Rural Women's Coalition
Working with Women Alliance
Working Women's Centre Australia (National Body)
Working Women's Centre South Australia

Employer representatives (19 February)

Attendees
Australian Chamber of Commerce and Industry
Australian Higher Education Industrial Association
Australian Industry Group
Australian Meat Industry Council
Business Council of Australia
Civil Contractor Federation Australia
Council of Small Business Organisations Australia
Housing Industry Association
Master Builders Australia
Minerals Council of Australia
National Farmers' Federation
Recruitment, Consulting and Staffing Association

Unions and employee representatives (20 February 2026)

Attendees
Australian Council of Trade Unions
Australian Institute of Marine and Power Engineers
Australian Manufacturing and Workers' Union
Australian Nursing and Midwifery Federation
Australian Services Union
Communications, Electrical and Plumbing Union
Community and Public Sector Union
Flight Attendants' Association of Australia
Health Services Union
Media, Entertainment & Arts Alliance
Mining and Energy Union
National Tertiary Education Union
Rail, Tram and Bus Union
Shop, Distributive and Allied Employees' Association
Transport Workers' Union
United Workers Union
The Victorian Branch of the United Firefighters Union of Australia

Gig industry business representatives (23 February)

Attendees
Australian Chamber of Commerce and Industry
Australian Industry Group
DiDi
DoorDash
Hireup
Mable
Uber

Gig industry worker representatives (23 February)

Attendees
Australian Council of Trade Unions
Australian Nursing and Midwifery Federation
Australian Writers Guild
Media, Entertainment and Arts Alliance
Professionals Australia
Transport Workers' Union

Academics (24 February)

Attendees
Dr Tom Barratt
Professor Alysia Blackham
Dr Caleb Goods
Associate Professor Tess Hardy
Professor Shae McCrystal
Dr Adriana Orifici
Professor Emeritus David Peetz
Professor Marilyn Pittard
Dr Michael Rawling
Dr Eugene Schofield-Georgeson
Associate Professor Chris F Wright
Associate Professor Alex Veen

Draft Report roundtables (May 2026)

Family and domestic violence leave (22 May)

Attendees
Australian Chamber of Commerce and Industry
Australian Council of Trade Unions
Australian Industry Group
Australian Nurses and Midwifery Federation
Australian Services Union
Circle Green Community Legal
Council of Small Business Organisations Australia
Dr Mihajla Gavin
Finance Sector Union
Shop, Distributive and Allied Employees' Association
Working with Women Alliance
Women's Legal Services NSW

Union and employee representatives (25 May)

Attendees
Australian Council of Trade Unions
Australian Manufacturing Workers' Union
Australian Nursing and Midwifery Federation
Australian Services Union
Communications, Electrical and Plumbing Union/Electrical Trades Union
Community and Public Sector Union
Flights Attendants Association of Australia
Finance Sector Union
Health Services Union
Media, Entertainment and Arts Alliance
National Tertiary Education Union
Shop, Distributive and Allied Employees' Association
Transport Workers' Union
United Firefighters Union
United Workers Union

Employer representatives (26 May)

Attendees
Australian Chamber of Commerce and Industry
Australian Higher Education Industrial Association
Australian Industry Group
Australian Meat Industry Council
Business Council of Australia
Civil Contractors Federation Australia
Council of Small Business Organisations Australia
Didi
Housing Industry Association
Mable
Master Builders Australia
Minerals Council of Australia
Motor Trades Association of Australia
National Farmers' Federation
National Road Freighters Association
Queensland Trucking Association
Recruitment, Consulting & Staffing Association
Uber
Victorian Transport Association/Australian Road Transport Industrial Organisation

Additional stakeholder meetings

Commonwealth agencies
Asbestos and Silica Safety and Eradication Agency
Australian Public Service Commission
Australian Small Business and Family Enterprise Ombudsman
Australian Taxation Office
Comcare
Fair Work Commission
Fair Work Ombudsman
Safe Work Australia

Other
Australasian Meat Industry Employees' Union
Australian Resources & Energy Employer Association
Fair Work Ombudsman Advisory Group
Family and Injured Workers Advisory Group
Mining and Energy Union
Rideshare representatives (Uber and DiDi)
Senator Glenn Sterle