



Hot Topic Briefs

Questions on Notice

Workplace Relations

Hot Topic Briefs

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2022 - 2023 Budget Estimates
SB22-001574

Issue: Secure Jobs, Better Pay
Contact: Martin Hehir, Deputy Secretary
Ph: 02 6121 7328

Key Points

- The Government is committed to restoring fairness and prosperity in Australia's workplace relations system, so it can sustain employee wellbeing, wages growth and high productivity.
- The Government is taking action to improve workplace conditions, wages and security – including to safeguard high economic growth and support Australians to afford increasing costs of living – by implementing its commitments taken to the election and resulting from the Jobs and Skills Summit.
 - A summary and status of all commitments is at **Background**.
- The Government is implementing the majority of its commitments with legislative amendments to the *Fair Work Act 2009*, currently before the Parliament in the Secure Jobs Better Pay Bill 2022. The Bill and associated funding will:

Boost bargaining and workplace relationships by:

- ensuring the process for agreement terminations is fit for purpose and fair
- sunseting 'zombie agreements', which are legacy agreements still in existence from 2009
- improving access to single and multi-employer agreements
- removing unnecessary complexity and making the Better Off Overall Test simple, flexible and fair
- increasing the capacity of the Fair Work Commission to proactively help workers and businesses reach agreements
- funding the Fair Work Commission to provide proactive support for workers and businesses – in particular small business – to reach agreements
- funding employer representatives and unions to improve safety, fairness and productivity in workplaces.

Improve job security and gender equity by:

- including gender equity and job security as objects of the Act
- limiting the use of fixed-term contracts to genuine fixed-term arrangements
- introducing a statutory equal remuneration principle
- creating two new expert panels in the Fair Work Commission, supported by a dedicated research unit, to inform and improve

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the Commission's capacity to assess pay equity claims and help address the workforce challenges in the care and community sector

- prohibiting pay secrecy clauses.

Improve workplace conditions and protections by:

- providing stronger access to flexible working arrangements
- providing stronger protections against workplace discrimination for the protected attributes of gender identity, intersex status and breastfeeding
- implementing recommendation 28 of the Respect@Work Report to expressly prohibit sexual harassment in the Act and allow disputes to be pursued through the Fair Work Commission
- prohibiting jobs being advertised with below-minimum rates of pay
- enhancing small claims to enable unpaid entitlement recovery by increasing the limit that can be awarded in small claims proceedings from \$20,000 to \$100,000 and enabling the Court to award filing fees.
- improving workers' compensation outcomes for firefighters by amending the firefighter provisions in the *Safety, Rehabilitation and Compensation Act 1988* to update the list of work-related cancers and extend coverage to volunteer firefighters in the ACT.

Restore balance to workplace relations institutions by:

- abolishing the Australian Building and Construction Commission and transferring its functions to the Fair Work Ombudsman
 - abolishing the Registered Organisations Commission and transferring its functions to the Fair Work Commission.
- Consultation on the package has occurred since August 2022 with a range of stakeholders through the Jobs and Skills Summit process, bilateral and small group consultations, a confidential written submission process, meetings of the National Workplace Relations Consultative Council and meetings between industrial relations Ministers as well as state and territory officials.

Key Data

See **SB22-001581** (Wages growth) and **SB22-001582** (Insecure work).

Financial impacts

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- The Government is providing a **total of \$160.4 million** in funding over the forward estimates for measures in the Bill and to support implementation of the Secure Jobs, Better Pay package.
 - This funding includes **\$111.6 million** over the forward estimates for measures in the Secure Jobs Better Pay Bill:
 - **\$69.9 million** for the Fair Work Ombudsman to regulate workplace laws in the building and construction industry, following the abolition of the Australian Building and Construction Commission.
 - **\$15.1 million** for the Fair Work Commission and Fair Work Ombudsman to tackle sexual harassment in the workplace. This reflects the Government's commitment to implement all recommendations of the Respect@Work Report.
 - **\$20.2 million** for the Fair Work Commission to establish the Pay Equity Expert Panel, Care and Community Sector Expert Panel, and a specialised research unit.
 - **\$6.4 million** for the courts to implement the enhanced small claims process, and to conduct a review to identify further reform opportunities.
- and a further **\$48.8 million** over the forward estimates to support implementation of the package:
 - **\$32.0 million** to ensure there are properly funded working women's centres in every state and territory. These centres provide information, advocacy, advice and assistance to women on workplace issues – including workplace sexual harassment.
 - **\$7.9 million** for the Fair Work Commission to provide proactive support for workers and businesses – in particular small business – to reach agreements.
 - **\$8.9 million** to provide support to employer representatives and unions to improve safety, fairness and productivity in workplaces.
- Significantly, abolishing the Australian Building and Construction Commission will **save the Budget \$130.9 million** over the forward estimates, **reducing the total cost of the package to \$29.5 million** over the forward estimates.
- The Budget also provides **\$3.4 million** to support small businesses to understand and deliver the entitlement to 10 days of paid family and domestic violence leave (once legislated and in force).

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SB22-001574**Research**

- NIL

Media***Delivering Secure Jobs, Better Pay and a Fairer System – Media Release, 27 October 2022***

The Minister acknowledges the introduction of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 into Parliament, which will deliver on commitments made at the election and the Jobs and Skills Summit, and commits to a second tranche of legislation next year to deliver on further commitments.

<https://ministers.dewr.gov.au/burke/delivering-secure-jobs-better-pay-and-fairer-system>

Secure Jobs and Better Pay in the Budget – Media Release, 25 October 2022

The Minister outlines the measures contained in the Federal October 2022-23 Budget to get wages moving again, ensure safer, fairer and more secure workplaces – while driving economic growth.

<https://ministers.dewr.gov.au/burke/secure-jobs-and-better-pay-budget>

New ABS Labour Force Figures – Media Release, 20 October 2022

New labour force figures released by the Australian Bureau of Statistics show that unemployment remains steady at 3.5%. The Minister notes that Australians are not seeing wage increases despite high employment and emphasises the Government's commitment to improve wages.

<https://ministers.dewr.gov.au/burke/new-abs-labour-force-figures-2>

Secure Jobs, Better Pay Bill – Media Release, 19 October 2022

The Minister confirmed the Government will introduce legislation next week to deliver on a range of workplace relations election commitments and outcomes from the Jobs and Skills Summit.

<https://ministers.dewr.gov.au/burke/secure-jobs-better-pay-bill>

Modernising workplace relations laws to get wages moving again – Media Release, 2 September 2022

The Minister commits to implement commitments and deliver change.

<https://ministers.dewr.gov.au/burke/modernising-workplace-relations-laws-get-wages-moving>

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SB22-001574*

Last Cleared By	Martin Hehir
Date Last Cleared	27 October 2022

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Background

The table below outlines the implementation status of the Government's commitments.

- The Government's election commitments were set out in Labor's Secure Australian Jobs Plan and Fair Pay and Conditions for Working Women policies.
- The outcomes of the Jobs and Skills Summit are published on Treasury's website [SB22-001580 refers].

Election commitments:

Commitment	Implementation status	HTB with more detail
Make A Submission To The Fair Work Commission's Aged Care Work Value Case In Support Of A Wage Increase For Aged Care Workers	Submission delivered in the first week of Government	N/A
Abolish the Registered Organisations Commission (ROC) and Transfer Its Functions	Before Parliament in the Secure Jobs, Better Pay Bill 2022	N/A
Abolish the Australian Building and Construction Commission (ABCC) and the Code for the Tendering and Performance of Building Work 2016	Before Parliament in the Secure Jobs, Better Pay Bill 2022, bringing a net save of \$61.1 million to the Budget from 2022-23 over the forward estimates	SB22-001536
Standing Up for Casual Workers	Underway	N/A
Limiting the Use of Fixed-Term Contracts	Before Parliament in the Secure Jobs, Better Pay Bill 2022	N/A
Include Gender Equity and Job Security as Objects of the Fair Work Act	Before Parliament in the Secure Jobs, Better Pay Bill 2022	SB22-001579
Legislating a Statutory Equal Remuneration Principle	Before Parliament in the Secure Jobs, Better Pay Bill 2022	SB22-001579
Prohibit Pay Secrecy Clauses	Before Parliament in the Secure Jobs, Better Pay Bill 2022	SB22-001579
Establish Two New Fair Work Commission Expert Panels	Before Parliament in the Secure Jobs, Better Pay Bill 2022, with \$20.2 million	SB22-001579

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	announced in the 2022-23 Budget to support this measure over the forward estimates	
Criminalising Wage Theft and Other Enhancements to the Compliance and Enforcement Framework in the Fair Work Act	Underway	SB22-001633
Safe from Workplace Sexual Harassment – Working Women's Centres	\$32.0 million announced in the 2022-23 Budget over the forward estimates to support working women's centres	N/A
Enhancing Small Claims Procedures to Enable Unpaid Entitlement Recovery	Before Parliament in the Secure Jobs, Better Pay Bill 2022, with \$6.4 million announced in the 2022-23 Budget to support this measure over the forward estimates	SB22-001633
Implement Recommendation 28 of the Respect@Work Report	Before Parliament in the Secure Jobs, Better Pay Bill 2022, with \$15.1 million announced in the 2022-23 Budget to support this measure over the forward estimates	SB22-001575
Paid Family and Domestic Violence Leave	Before Parliament, in the Paid Family and Domestic Violence Leave Bill 2022, with \$3.4 million announced in the 2022-23 Budget over the forward estimates to support small businesses to understand and deliver the new entitlement (once legislated)	SB22-001577
Further Compliance and Enforcement Reforms	Prohibition for job advertisements below the minimum rate is before Parliament in the Secure Jobs, Better Pay Bill 2022 Other reforms - underway	SB22-001633

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Include a Right to Superannuation in the National Employment Standards	Underway	N/A
Extend the Powers of the Fair Work Commission to Include 'Employee-Like' Forms of Work	Underway	SB22-001576
Same job, same pay	Underway	SB22-001578
Extend the Fair Entitlements Guarantee (FEG) to Migrant Workers	Underway	N/A
Labour hire regulation	Underway	N/A
Consult on a Portable Entitlements Scheme	Underway	N/A
Further Work Health and Safety Reforms to Implement the Remaining Boland Recommendations (Including Industrial Manslaughter)	Underway	N/A

Jobs and Skills Summit Outcomes:

Commitment	Implementation status	
Ensure the Process for Agreement Terminations is Fit for Purpose and Fair	Before Parliament in the Secure Jobs, Better Pay Bill 2022	SB22-001538 & SB22-001537
Sunset 'Zombie Agreements'	Before Parliament in the Secure Jobs, Better Pay Bill 2022	SB22-001538 & SB22-001537
Improving Access to Single and Multi-Employer Agreements	Before Parliament in the Secure Jobs, Better Pay Bill 2022	SB22-001677 & SB22-001537
Remove Unnecessary Complexity and Make the Better Off Overall Test Simple, Flexible and Fair	Before Parliament in the Secure Jobs, Better Pay Bill 2022	SB22-001537
Increase the Capacity of the Fair Work Commission to Proactively Help Workers and Businesses Reach Agreements	Before Parliament in the Secure Jobs, Better Pay Bill 2022	SB22-001537
Bargaining Support for Small Businesses	\$7.9 million announced in the 2022-23 Budget over the forward estimates for the Fair Work Commission to provide proactive support for workers and businesses – in particular small business – to reach agreements	SB22-001537
Provide Proper Support for Employer Representatives and Unions to Improve Safety, Fairness and Productivity in Workplaces	Before Parliament in the Secure Jobs, Better Pay Bill 2022	SB22-001537

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Provide Stronger Access to Flexible Working Arrangements	Before Parliament in the Secure Jobs, Better Pay Bill 2022	SB22-001579
Stronger Protections for Workers	Before Parliament in the Secure Jobs, Better Pay Bill 2022	N/A
Consider How to Best Help Employer Representatives and Unions to Improve Safety, Fairness and Productivity in Workplaces	\$8.9 million announced in the 2022-23 Budget over the forward estimates to provide support to employer representatives and unions to improve safety, fairness and productivity in workplaces	N/A
Provide Stronger Access to Unpaid Parental Leave	Underway	SB22-001579
Establish a National Construction Industry Forum	Underway	N/A
Consider Options to Support the Fair Work Commission Build Cooperative Workplace Relationships	Initial thinking	N/A
Ensure Workers Have Reasonable Access to Representation to Address Genuine Safety and Compliance Issues at Work	Initial thinking	N/A
Consider Possible Improvements to Modern Awards and the National Employment Standards	Initial thinking	N/A
Amend Relevant Legislation to Give Workers the Right to Challenge Unfair Contractual Terms	Initial thinking	N/A
Initiate a Detailed Consultation and Research Process on the Concept of a Living Wage	Initial thinking	N/A
Initiate a Detailed Consultation and Research Process Considering the Impact of Workplace Relations Settings on Work and Care, Including Childcare	Initial thinking	N/A
Consider Allowing the Fair Work Commission to Set Fair Minimum Standards to Ensure the Road Transport Industry is Safe, Sustainable and Viable	Initial thinking	N/A

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SB22-001537

Issue: Enterprise bargaining reforms
Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

- The Government's reforms to enterprise bargaining deliver on immediate actions agreed at the Jobs and Skills Summit.
- The reforms implement the following immediate actions:
 1. Ensures all workers and businesses can negotiate in good faith for agreements that benefit them, including small businesses, women, care and community services sectors, and First Nations people.
 2. Ensures workers and businesses have flexible options for reaching agreements, including removing unnecessary limitations on access to single and multi-employer agreements.
 3. Allows businesses and workers who already successfully negotiate enterprise-level agreements to continue to do so.
 4. Removes unnecessary complexity for workers and employers, including making the Better Off Overall Test simple, flexible and fair.
 5. Gives the Fair Work Commission the capacity to proactively help workers and businesses reach agreements that benefit them, particularly new entrants, and small and medium businesses.
 6. Ensures the process for agreement terminations is fit for purpose and fair, and sunsets so called 'zombie' agreements.

1. Ensure all workers and businesses can negotiate in good faith for agreements that benefit them (Job Summit Outcome)

- This outcome is being met in a number of ways, including by:
 - Amending the Fair Work Act to remove barriers to the existing low-paid bargaining stream to encourage further multi-enterprise bargaining within industries with historically low wages and that face barriers to bargaining effectively (renamed the Supported Bargaining stream).
 - Increasing the capacity of the Fair Work Commission to help employers and employees resolve intractable bargaining disputes through arbitration by introducing a new intractable bargaining determination.
 - Increasing the support the Fair Work Commission can provide to bargaining parties through its cooperative workplaces

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program (which is voluntary) [see support for small business outcome below for Budget measure details].

- Across all bargaining streams, the Bill amends the existing content rules to allow enterprise agreements to include terms relating to special measures to address gender and other forms of inequality. This will help to encourage equality in employment.
 - In *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* [2016] FWCFB 2894 a Full Bench of the Fair Work Commission suggested that special measures were – at least in some circumstances – not a matter pertaining to the relationship of employer and employee.

2. Ensures workers and businesses have flexible options for reaching agreements, including removing unnecessary limitations on single and multi-employer bargaining (Job Summit Outcome)

- To ensure workers and businesses have flexible options for reaching agreements under the Fair Work Act the Bill will:
 - remove barriers to the existing low-paid bargaining stream, which will become the 'supported bargaining' stream;
 - increase access to, and simplify the process for, bargaining for a single-interest agreement under the existing framework; and
 - rename the existing multi-employer agreement stream as the 'cooperative workplaces' bargaining stream, which will remain voluntary and have the benefit of additional support from the Fair Work Commission's co-operative workplace program where requested.
- Protected industrial action will be available under all bargaining streams except the Cooperative Workplaces Bargaining Stream. The amendments in the Bill include additional safeguards for industrial action, including:
 - the requirement for the parties to attend Fair Work Commission conciliation before a protected action ballot is finalised, and
 - the requirement for 120 hours' notice for industrial action in the single-interest and supported bargaining streams.

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2022 - 2023 Budget Estimates
SB22-001537**3. Allow businesses and workers who already successfully negotiate enterprise-level agreements to continue to do so (Job Summit Outcome)**

- Employers and employees that negotiate single enterprise-level agreements will continue to be able to do so and will not be able to be brought into the single-interest bargaining stream or supported bargaining stream without their consent if their single enterprise agreement has not passed its nominal expiry date. For the supported bargaining stream, an exception to this rule occurs where the single-enterprise agreement was made for the main purpose of avoiding being included in an authorisation.
- The Secure Jobs, Better Pay Bill will remove the need for a majority support determination where employers and employees are bargaining for a proposed single-enterprise agreement (other than in the single-interest stream) that would replace an existing agreement (also not single-interest) that has expired within the past 5 years and is substantially similar in scope to the previous agreement.

4. Make the Better-Off-Overall-Test (BOOT) simple, flexible and fair (Job Summit Outcome)

- The Secure Jobs, Better Pay Bill will:
 - require the Fair Work Commission to give consideration to the views of the bargaining representatives, when applying the BOOT
 - apply the BOOT as a global assessment (i.e. not a line-by-line comparison between the proposed agreement and relevant modern award)
 - require the Commission to only have regard to patterns or kinds of work, or types of employment, that are reasonably foreseeable at the test time
 - enable the Commission to directly amend or excise a term in an agreement that does not otherwise meet the BOOT, and
 - enable the BOOT to be reassessed if there has been a material change in working arrangements or the relevant circumstances were not properly considered during the approval process (reconsideration process).
- The Bill will also simplify agreement pre-approval requirements and strict timeframes by replacing them with one broad requirement for the Fair Work Commission to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement. The requirement to provide

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the NERR and wait at least 21 days before voting on a proposed agreement will be retained for single-enterprise agreements (excluding single-interest employer agreements).

5. *Increase the capacity of the Fair Work Commission to proactively help workers and businesses reach agreements (Job Summit Outcome)*

- The Bill also amends the Fair Work Act to increase the capacity of the Fair Work Commission to settle bargaining disputes.
- Conciliation and arbitration will be available on application by a single bargaining representative for intractable disputes.
- Before making an intractable bargaining declaration, the Fair Work Commission must be satisfied that:
 - the Fair Work Commission has dealt with the dispute under section 240 and the applicant participated in the processes to deal with the dispute; and
 - there is no reasonable prospect of agreement being reached; and
 - it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.
- Intractable bargaining declarations are not available in relation to greenfields agreements or cooperative workplaces stream agreements.
- Expanding the Fair Work Commission's powers to compulsorily arbitrate agreements will provide bargaining parties an alternate mechanism to progress bargaining to a conclusion, with arbitrated outcomes decided by an independent third-party.
- On 9 September 2022, the Productivity Commission released its draft report considering Australia's Maritime Logistics System. It found that more effective remedies are needed to limit unreasonably protracted bargaining and industrial action.

6. *Ensure the process for agreement termination is fit for purpose and fair, and sunset so called 'zombie' agreements (Job Summit Outcome)*

Agreement termination

- The Bill will amend the termination provisions of the Fair Work Act to provide that the Fair Work Commission must terminate an agreement that has passed its nominal expiry date if:

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- the continued operation of the agreement would be unfair to employees; or
- the continued operation of the agreement would pose a significant threat to the viability of the employer's business, and various other requirements and safeguards are met, including that employer(s) have provided a guarantee of termination entitlements; or
- the agreement does not cover any employees and is not likely to cover any employees in the future.
- In addition, when considering whether to terminate the agreement, the Fair Work Commission must have regard to whether bargaining is occurring and, if so, whether termination would adversely affect the bargaining position of the employees that will be covered by the enterprise agreement.
- Opposed (or unilateral) termination applications in relation to agreements which continue to cover employees must be heard by a Full Bench of the Fair Work Commission.

Sunset 'zombie' agreements

- Zombie agreements refers to agreements made prior to the commencement of the *Fair Work Act 2009* and during the bridging period of 1 July 2009 to 31 December 2009, which were not tested against the modern safety net. As such, they often provide less favourable terms and conditions than modern awards, and continue to operate unless replaced or terminated.
- Under these reforms, zombie agreements will automatically terminate 12 months after the commencement of the provisions.
- This reform provides a limited ability for parties to preserve a zombie agreement for periods of up to 4 years if the Fair Work Commission is satisfied of certain conditions, or that it is reasonable in the circumstances.

Bargaining support for small businesses (Job Summit Outcome)

- The Government will provide additional funding to the Fair Work Commission of \$7.9 million over the forward estimates, and ongoing funding of \$2.1 million per year from 2026-27, to provide specific Small Business Bargaining Support to simplify the agreement making process and increase the use of enterprise agreements by small business.
- This additional funding will increase the Fair Work Commission's capability to offer improved and earlier assistance to parties in enterprise bargaining, with measures to enhance the Fair Work

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Commission's education and outreach services targeted to the needs of small business employers in different sectors.

Key Data

- In Australia, the share of employees who have had their pay set by an enterprise agreement has declined significantly, from 43.4 per cent in 2010 to 35.1 per cent in 2021.
- Analysis from the department shows that as at 31 March 2022 only around 14.7 per cent of employees are covered by current enterprise agreements, down from 24.9 per cent as at 31 March 2010.

Research

- OECD research¹ also shows that the uptake of enterprise bargaining by small businesses is more likely to be higher in countries with multi-employer bargaining helping ensure worker representation is more accessible in the workplace.
- Improved access to enterprise bargaining for small business can help drive wage outcomes, particularly given bargained outcomes for small business employees are 74 per cent² higher than for small business employees on awards.

Last Cleared By	Martin Hehir
Date Last Cleared	28 October 2022

¹ OECD 2019, Negotiating Our Way Up – Collective Bargaining in a Changing World of Work.

² ABS, Employee Earnings and Hours, non-managerial employees.

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2022 - 2023 Budget Estimates
SB22-001538

Issue: Agreement termination and sunseting zombie agreements
Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

- The Government's reforms to enterprise bargaining deliver on immediate actions agreed at the Jobs and Skills Summit:
 - ensuring the process for agreement termination is fit for purpose and fair, and
 - sunseting legacy, or so called 'zombie', agreements.

Agreement Termination

- The Government intends to close loopholes that can lead to wages going backwards. In some cases, applying to terminate existing agreements can lead to worse outcomes for employees.
- If an agreement has passed its nominal expiry date, a party covered by the agreement (i.e., an employer, employee or union) can apply to the Fair Work Commission to terminate the agreement.
- Applications by employers to have agreements terminated, without the support of employees, can leave employees subject to the relevant Modern Award, potentially resulting in significantly lower rates of pay and conditions.
- An employer applying to terminate an agreement, or threatening to terminate an agreement, can severely undermine ongoing negotiations for a new enterprise agreement as employees can feel forced to accept less favourable terms and conditions.
- The 2015 Full Federal Court decision in *Aurizon*¹ effectively lowered the bar for employers to apply to terminate an enterprise agreement during ongoing bargaining negotiations. Prior to the *Aurizon* decision, the Fair Work Commission was reluctant to terminate a nominally expired agreement while bargaining negotiations were ongoing.²

¹ *CEPU v Aurizon Operations Ltd* [2015] FCAFC 126; see also *Re Aurizon Operations Ltd* [2015] FWCFB 540.

² *Re Tahmoor Coal Pty Ltd* [2010] FA 6468.

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2022 - 2023 Budget Estimates
SB22-001538***What the Government is doing***

- The Government will amend section 226 of the Fair Work Act to provide that the Fair Work Commission can only terminate an agreement that has passed its nominal expiry date if:
 - continued operation of the agreement would be unfair to employees, or
 - where the agreement does not cover any employees and is not likely to cover any employees in the future, or
 - continued operation of the agreement poses a significant threat to the viability of the employer's business, termination would likely reduce the number of terminations of employees as a result of redundancy, insolvency or bankruptcy and the employer provides a guarantee of termination entitlements to the Fair Work Commission, which would preserve certain agreement termination entitlements that are more beneficial than the award for a period of up to 4 years (in circumstances where a termination of employment occurs because redundancy, insolvency or bankruptcy).
- In addition, if bargaining is occurring, the Fair Work Commission must have regard to whether terminating the agreement would adversely affect the bargaining position of the employees that will be covered by the proposed enterprise agreement.
- Non-consent termination applications that continue to cover employees must be heard by a Full Bench of the Fair Work Commission.
- The Fair Work Commission must also consider the views of the employers, employees and employee organisations covered by the agreement.

If asked: The Government describes these as 'unilateral terminations', is it possible for an employer to unilaterally terminate an enterprise agreement?

- If an agreement has passed its nominal expiry date a single party covered by the agreement (i.e., an employer, employee or union) can apply to the Fair Work Commission under section 225 to terminate the agreement.
- Under existing provisions, the Fair Work Commission must apply the test in section 226 and terminate the agreement if it:
 - is satisfied that it is not contrary to the public interest to do so, and

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- considers it is appropriate to terminate the agreement taking into account all the circumstances including:
 - views of employees, each employer and union covered by the agreement, and
 - the circumstances of the employees, employers and organisations including the likely affect termination will have on them.

If asked: By how much can employees be left worse-off if they revert to the Modern Award?

- This will depend on the individual enterprise agreement and how it compares with the relevant modern. It will be a matter of assessing the wages and conditions an employee receives through their existing enterprise agreement and comparing that against the underpinning award for that employee's respective industry.
- The department is aware of reports that suggest an employee's wages and conditions could be reduced by up to 40 per cent in some cases. For example, in the *Griffin Coal* case in Collie, Western Australia it was reported that 70 workers reverted from their existing enterprise agreement to the *Black Coal Award* resulting in a 43 per cent pay cut.

If asked: How can applications to terminate an agreement undermine negotiations for a new enterprise agreement?

- Some employers appear to have utilised the application process to undermine ongoing bargaining negotiations as a way to resolve a bargaining deadlock.
- In late 2021 and early 2022 protracted bargaining on Australia's ports lead to three employers – Patrick Terminals, Smit Lamnalco and Svitzer – applying to terminate their enterprise agreements.
- In relation to the Patrick Terminals termination application, bargaining had commenced in September 2020 and concluded in March 2022, after the application to terminate was made but prior to the Fair Work Commission issuing a decision. Unions said termination could cut the pay of some wharfies by up to 50%.

In its draft report issued on 9 September 2022 – *Lifting productivity at Australia's container ports: between water, wharf and warehouse* – the Productivity Commission said that the fact that termination was pursued three times in recent negotiations is "further evidence" in support of the need for additional mechanisms to help parties reach agreement.

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2022 - 2023 Budget Estimates
SB22-001538**Background on letter to the Fair Work Commission**

- On 2 September 2022 the Minister wrote to the President of the Fair Work Commission advising of the outcomes of the Jobs and Skills Summit (**refer SB22-001700**).
- The Minister's letter was a courtesy to notify the President of several agreed outcomes from the Summit, including progressing changes to bargaining, increased tripartism, improved good faith negotiation, and new rules for agreement terminations.
- The letter sought to inform the President of key policy outcomes and intentions directly relevant to the Fair Work Commission's work and functions.
- It is usual practice for the Minister to advise the Fair Work Commission of relevant aspects of the Government's policy agenda. The Minister has also recently written to the Fair Work Commission regarding other relevant policy issues, such as the Government's paid family and domestic violence leave reforms.
- In all instances, the Minister has not sought to give any directions to the FWC President contrary to section 583 of the *Fair Work Act 2009* (Fair Work Act), which provides that the President is not subject to direction by or on behalf of the Commonwealth.
- Similarly, the Minister has not sought to improperly influence any members of the Fair Work Commission in contravention of section 674(5) of the Fair Work Act in his communications with the President.

Departmental involvement

- On 1 September 2022, the department was asked to prepare a letter to the President outlining the outcomes of the Jobs and Skills Summit. A draft letter was prepared and settled within the Department and then provided to the Minister for consideration on 2 September 2022.
- The Workplace Relations Legal Division of the department prepared the draft letter for the Minister's consideration, cognisant of the requirements of the Fair Work Act.

If asked: Is the Minister intervening in the Sydney Trains dispute?

- The Minister has not intervened in the Sydney Trains dispute.
- The department is aware of public comments by NSW Government Ministers regarding the Sydney Trains matter and the Minister's letter to President Ross (**see background**)

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- The Minister's letter to President Ross acknowledged that the Commission would apply the relevant legislative test to applications to terminate an agreement made prior to amendments being enacted.

If asked: How widespread is the problem? How often are employers applying to terminate an agreement during bargaining?

- It is difficult to obtain data on how often employers are applying to terminate an agreement during bargaining.
- The department did some analysis on data for the financial year 2020–21 and found that:
 - 267 applications to terminate a nominally expired agreement were lodged with the Fair Work Commission
 - 207 of those applications resulted in a decision, of which 13 were opposed. Of the total applications to terminate lodged, 195 were terminated, 7 were not terminated (i.e. the Fair Work Commission did not agree to terminate) and the remaining were either administratively dismissed under s.587 (5) or were withdrawn or discontinued (60).

*If asked: In light of the recent decision in *Tuftex Carpets Pty Ltd v CFMEU* decision, where the application to terminate the existing agreement was rejected during ongoing bargaining negotiations, is there still a need to amend existing legislation?*

- The Government is aware of the *Tuftex* decision. In *Tuftex*, the Fair Work Commission decided to not terminate the existing agreement. In deciding to not terminate the agreement, the Fair Work Commission considered a variety of factors:
 - If the agreement was to be terminated, then the employer would have sought to abandon ongoing bargaining negotiations, effectively requiring bargaining to start from scratch.
 - The financial viability of the employer.
 - The impact on the employees regarding job security as redundancy provisions afforded to them under their existing agreement would no longer apply.
 - The tools available to the union to fulfil its representative role.
- While the *Tuftex* matter is an example of where the agreement was not terminated, of agreements, such as in *Aurizon* were terminated. For this reason the Government has proposed changes to the legislation.

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2022 - 2023 Budget Estimates
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- ‘Zombie’ agreement is a common term used to describe collective or individual agreements made pre-*Fair Work Act 2009* (Fair Work Act) or under transitional laws. For sunseting purposes, this also includes enterprise agreements made under the Fair Work Act during the ‘bridging period’ from 1 July to 31 December 2009.
 - These agreements have been preserved under the *Fair Work Act (Transitional Provisions and Consequential Amendments) Act 2009*.
- These agreements have passed their nominal expiry date but continue to operate until they are terminated or replaced.
- When approved, zombie agreements were not measured against the Modern Award. While a zombie agreement applies, the Modern Award will not apply.
- Employees covered by zombie agreements are often left worse-off as only the base rate of pay in a zombie agreement needs to meet the base rate of pay in the relevant Modern Award. Other conditions such as penalty rates and allowances may not apply or otherwise fall below award standards.
- Some employers gain an unfair advantage over competitors under zombie agreements as they incur lower wage expenses compared to an employer paying employees Award pay rates.
- There is no way of measuring exactly how many zombie agreements continue to operate and how many employees they may cover.

What the Government is doing

- The Government will amend the law to sunset ‘zombie’ agreements 12 months after the amending legislation commences operation.
- There may be some legitimate reasons why a ‘zombie’ agreement should continue in operation beyond the sunset date. The Fair Work Commission will be empowered to extend the sunset date of collective ‘zombie’ agreements for up to a further 4 years if:
 - employees are better off overall under the zombie agreement when compared with the modern award
 - bargaining for a replacement agreement is occurring or
 - satisfied it is reasonable in all the circumstances to extend the sunset date.
- This extension could happen on multiple occasions, provided the test was satisfied on each occasion.

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SB22-001538*If asked: When and how will all 'zombie' agreements sunset?*

- Zombie agreements will automatically cease to operate (sunset) 12 months after the amending act commences operation or when the applicable extension period ends.
- The options for parties covered by a zombie agreement that will sunset will be to bargain for a replacement agreement that would be subject to the better-off-overall-test or revert to the minimum terms and conditions of the relevant Modern Award.
- Employers will be required to write to affected employees within 6 months after commencement advising them they are covered by a zombie agreement and that the agreement will sunset 12 months after the commencement of the Act unless an application to extend the agreement is made.
- Anyone covered by a zombie agreement will be able to apply to the Fair Work Commission to preserve the agreement for a period no longer than four years if:
 - employees covered by the zombie agreement are better off overall under the agreement when compared with the modern award (considered on an overall basis, rather than for individual employees), or
 - bargaining for a replacement agreement is occurring, or
 - it is reasonable in the circumstances to do so.

If asked: Will employers be disadvantaged if zombie agreements sunset?

- Some employer groups have expressed concern that if zombie agreements sunset there will be administrative burdens such as changing their payroll system. The Government has been clear on its intention to sunset zombie agreements.
- Legislation was also introduced by the former government to sunset zombie agreements on 1 July 2022.
- Employers will have 12 months after commencement to make the necessary arrangements before zombie agreements sunset.
- In some circumstances it may be appropriate to extend a zombie agreement for a further period. This might occur where the parties are engaged in enterprise bargaining for a replacement agreement or it is otherwise reasonable in the circumstances. Applications to extend a zombie agreement for up to 4 years on each occasion will be determined by the Fair Work Commission.

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2022 - 2023 Budget Estimates
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- In 2020-21, a total of 267 applications to terminate a nominally expired enterprise agreement were lodged with the Fair Work Commission, with 207 of those applications resulting in a decision.
- Of the 267 applications, analysis shows that only seven applications were lodged by an employee or union.

Zombie agreements

- In September 2019, the department estimated that 300,000 to 450,000 employees could still be covered by zombie agreements with 95 per cent of those workers in the private sector.

Research

- Nil

Media**Agreement Termination**

- ***The Hon Tony Burke MP Speech – Australian Industry Group***

The Minister for Employment and Workplace Relations spoke to the Australian Industry Group on 8 August 2022 regarding workplace relations. The Minister stated agreement termination can cause wages to go backwards and exemplified how Svitzer is seeking to terminate an agreement covering tugboat operators which could result in pay cuts to the workforce of 40 per cent or more. ([Speech - Australian Industry Group, Canberra | Ministers' Media Centre \(dewr.gov.au\)](#))

Last Cleared By	Martin Hehir
Date Last Cleared	07 November 2022

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BACKGROUND

Agreement termination

Applying to terminate agreements without the support of employees can lead to significant reduction in wages and conditions and can undermine negotiations when bargaining for a new agreement.

Legislation (agreement termination)

Under section 225 of the Fair Work Act, if an enterprise agreement has passed its nominal expiry date, the employer or employers, an employee, or an employee organisation covered by the agreement may apply to the Fair Work Commission to terminate the agreement.

Once an application is lodged, under section 226 of the Fair Work Act, the Fair Work Commission must terminate the agreement if it is satisfied that it is not contrary to the public interest to do so, and it is appropriate to terminate the agreement taking into account all the circumstances including the views and likely effect that termination will have on the employees, each employer and union covered by the agreement.

Case law (agreement termination)

Since the 2015 Full Bench decision in *Aurizon*,³ the approach taken to unilateral termination and ongoing bargaining has substantially changed. In *Aurizon*, the Fair Work Commission terminated twelve nominally expired enterprise agreements and noted that “*there is nothing inherently inconsistent with the termination of an enterprise agreement that has passed its nominal expiry date and the continuation of collective bargaining in good faith for an agreement*”⁴.

In *Aurizon*, unions claimed that there was a reduction in a number of entitlements including those related to no forced redundancy and relocation, free rail passes, dispute procedures, drug and alcohol testing, internal vacancies and rostered days off arrangements. To offset the impact of termination on entitlements, *Aurizon* provided undertakings to preserve wages and allowances entitlements for 6 months from the date of termination or until commencement of a new agreement.

Example (agreement termination)

The department is aware of formal applications to terminate, and the Fair Work Commission upholding termination in the cases of *Aurizon*⁵ and *Griffin Coal*⁶. In *Griffin Coal*, 70 workers covered by the enterprise agreement were reported to have reverted to award conditions after termination, resulting in employee wages reducing by 43 per cent.

³ [2015] FWCFB 540.

⁴ Ibid [158].

⁵ [2015] FWCFB 540.

⁶ [2016] FWCA 2312.

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In the maritime industry, the department is aware of applications being lodged to terminate existing enterprise agreements. It was reported that unions estimated that if termination were to occur then wages could be cut by up to 50 per cent.

In the aviation industry, the department is aware of an application which was lodged with the Fair Work Commission to terminate the existing enterprise agreement for long-haul flight attendants. Approximately 97.5 per cent of eligible employees were reported to have voted no against the employer's proposed agreement terms. Following this, the employer sought to apply to the Fair Work Commission to terminate the existing agreement which would result in employees reverting to the Modern Award and it was reported this would have resulted in a 37 per cent pay cut.

Comments by NSW Government ministers (agreement termination)

On 4 September, Damien Tudehope, NSW Minister for Finance and Employee Relations was quoted as saying⁷:

"The brazen intervention of Labor into the Fair Work Commission to support the rail unions and their political campaign of rolling strikes is a disgrace."

"Tony Burke's 'wink and a nod' letter to the Fair Work Commission president is all about pressuring the commission to kick the rail dispute as far down the road as possible so he can legislate to give the unions even more power."

Sunsetting Zombie Agreements

Agreements preserved under the *Fair Work Act (Transitional Provisions and Consequential Amendments) Act 2009* include:

- collective agreement-based transitional instruments:
 - collective agreements
 - workplace determinations;
 - preserved collective State agreements;
 - pre-reform certified agreements;
 - old IR agreements;
 - section 170MX awards.
- Individual agreement-based transitional instruments:
 - Individual transitional employment agreements (ITEAs);
 - Preserved individual State agreements;
 - Australian Workplace Agreements (AWAs)
 - Pre-reform AWAs.
- Division 2B State employment agreements (both individual and collective)

The Fair Work Commission in two cases recently compared rates of pay between the Agreement and Award in two termination applications.

⁷ The Guardian, NSW says federal Labor's 'brazen intervention' in rail dispute could constitute 'improper influence', Michael McGowan and Paul Karp, 4 September 2022

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In *Empire Holdings Pty Ltd t/a Empire Hotel and Cloudland*⁸, the Fair Work Commission considered rates of pay under the relevant agreement and under the Modern Award.

The agreement column is the rate paid for all hours of work for casual employees, including on weekends and on public holidays, while the Award, 'Saturday', 'Sunday' and 'Public Holidays' column demonstrate what a casual employee would receive if they were covered under the 'Award'.

Casual Position	Agreement	Award	Saturday	Sunday	Public holidays
Bar attendant	\$27.96	\$27.15	\$32.58	\$38.01	\$54.30
Bar attendant - senior	\$28.92	\$28.08	\$33.69	\$39.31	\$56.15
Cleaner	\$27.96	\$26.15	\$31.38	\$36.61	\$52.30
F&B attendant introductory	\$26.17	\$25.41	\$30.50	\$35.58	\$50.83
F&B attendant	\$26.93	\$26.15	\$31.38	\$36.61	\$52.30
minimum					

In *Application by Henry Thom*⁹ the Fair Work Commission noted that Sunday rates for a casual Level 1 employee covered by the agreement amounted to a loss to the employee of more than \$11 per hour, when compared to the Award. On public holidays, the loss to a casual Level 1 employee was in excess of \$26 per hour.

⁸ [2022] FWCA 62.

⁹ [2022] FWCA 1543.

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Issue: Wage theft, compliance and enforcement reforms in the Secure Jobs, Better Pay Bill

PBS Pg No.

PAES Pg No.

Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

- In line with its election commitments, the Government is proposing reforms to the workplace compliance and enforcement framework in the Fair Work Act to deter and punish non-compliance by employers, and to make it easier for employees to seek redress.
- A first tranche of immediate reforms is in the Secure Jobs, Better Pay Bill. A further tranche of compliance and enforcement reforms will be introduced in the future and include the Government's election commitment to criminalise wage theft, as set out in the *Secure Australian Jobs Plan*.
- In *Labor's Plan to Build a Stronger Pacific Family*, the Government committed to implement all recommendations of the Migrant Workers' Taskforce. The immediate reforms in the Secure Jobs, Better Pay Bill are a first step in the Government's implementation of these recommendations, with further implementation of the Taskforce's recommendations to follow in a future package of reforms.

If asked: why isn't the wage theft offence and/or increased civil penalties in the Secure Jobs, Better Pay Bill?

- The Government's commitment to criminalise wage theft included a commitment to consult with unions, employer groups, and states and territories, including those states with existing wage theft offences.
- The Government has committed to not "watering down" any state wage theft laws, as currently exist in Queensland and Victoria.
- The Department has been consulting on the parameters of a wage theft offence to ensure it does not undermine existing state-based protections and will operate effectively. It is important that those consultations continue and that the time is taken to get the provisions right.
- This includes an examination of the existing civil penalty regime for underpayment to ensure a criminal offence sits sensibly in the framework. Reforms to the civil penalty regime need to be considered alongside the criminal offence to ensure a logical and graduated penalty scheme.

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- In order to provide adequate time for consideration and consultation, the offence and commensurate changes to the civil penalty regime will be introduced to the Parliament in a future tranche of reforms.
- The Government is committed to immediate reform where possible to address underpayment of workers, while also laying the groundwork for future reforms. This is reflected in the compliance and enforcement measures in the Secure Jobs, Better Pay Bill.

Immediate reforms in Secure Jobs, Better Pay Bill

In order to effectively deter underpayments and ensure that workers are paid correctly, the Government is proposing to prohibit employers from advertising jobs with rates of pay that would breach the Fair Work Act or a fair work instrument.

- This is in line with Recommendation 4 of the Migrant Workers' Taskforce.
- The Government is also proposing to require advertisements of piecework to include either: a periodic rate of pay to which the pieceworker would be entitled, or a statement that a periodic rate of pay applies. For example, pieceworkers employed under the Horticulture Award are now entitled to a minimum hourly rate.
- Where underpayments do occur, it is also important to have a fast and low-cost avenue to enable workers to recover unpaid entitlements. The Bill will enable the Government to take immediate steps to address the Taskforce's call for the Government to enhance the use of small claims processes under the Fair Work Act.
- Specifically, the Government announced in the 2022-23 Budget context that it will implement and fund reforms to make existing small claims process in the courts (federal, and state and territory) more accessible:
 - increasing the cap on small claims recovery from \$20,000 to \$100,000, through the Secure Jobs, Better Pay Bill, to enable a greater number of workers to benefit from this mechanism, and
 - clarifying the courts' ability to award filing fees as costs to successful small claims applicants to reduce the disincentive effect that these fees may otherwise have on applicants.
- As recommended by the Migrant Workers' Taskforce, the Government also announced, in the 2022-23 Budget context, that it will conduct a review into the effectiveness of the Fair Work Act small claims process.
 - Among other potential reforms, the review will consider the merits of non-judicial processes to handle small claims, in line with concerns raised in the Migrant Workers' Taskforce Report and

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- Underpayment Inquiry Report relating to the complexity and financial cost of litigating small claims matters before the courts.
- Recommendation 12 of the Migrant Workers' Taskforce report called on the Government to commission a review of the process to examine how it could become a more efficient avenue for wage redress for migrant workers.
 - The examination of non-judicial small claims processes also provides an opportunity to consider the recommendation of the Senate Economics Committee, in its *Unlawful underpayment of employees' remuneration*, to establish a dedicated small claims tribunal.
 - The Government's total investment in small claims related measures amounts to \$7.9 million over the forward estimates.
 - (if raised) The net impact on the underlying cash balance (UCB) is \$6.4 million, after accounting for \$1.5 million in estimated additional administered revenue from filing fees for small claims matters.

Future reforms – wage theft offence

- The wage theft reforms are being designed to signal to employers the expectation that compliance with workplace entitlement laws should be an integrated and continuous part of their payroll process, and an ongoing priority for their business.
- The Government has committed to consulting with a range of stakeholders, including states and territories, to develop a national wage theft system that does not cover a narrower range of misconduct than existing state and territory laws.

Future reforms – complementary reforms to civil penalties regime

- The Government is also proposing additional reforms to the existing civil penalties regime in the Fair Work Act. These reforms are intended to ensure an appropriate sliding scale of civil and criminal penalties can be applied in line with the seriousness of an employer's conduct, and ensure the FWO has a suite of civil and criminal penalties available to be used to deter and respond to underpayments.

Research

- The Household, Income and Labour Dynamics in Australia Survey has suggested approximately 9.9 per cent of adult employees were paid less than the adult national minimum wage in 2018.

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- Several reports from recent parliamentary and other inquiries (including the Underpayment Inquiry Report, the Senate Select Committee on Job Security Report, and the Migrant Workers' Taskforce Report) have received compelling evidence about the ongoing prevalence of underpayment and the spectrum of non-compliant employer behaviour, from inadvertent to deliberate and systematic.
- This evidence demonstrates a need to improve the workplace compliance and enforcement system, to which these compliance and enforcement reforms are directed.

Media

Last Cleared By	Martin Hehir
Date Last Cleared	26 October 2022

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2022 - 2023 Budget Estimates
SB22-001575

Issue: R@W – prohibition on workplace sexual harassment
PBS Pg No. TBC
Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

- The Government is committed to implementing all 55 recommendations of the Respect@Work report and ensuring there are strong, effective protections against sexual harassment in the workplace.
- The Minister is working closely with the Attorney General and other colleagues to deliver on this commitment.
- Recommendation 28 calls for the Fair Work Act to be amended to explicitly prohibit sexual harassment in the workplace.
- This recommendation is being implemented in the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022. The Bill includes a prohibition on sexual harassment in the workplace.
- The prohibition is accompanied by a new dispute resolution process, allowing the Fair Work Commission to deal with disputes through conciliation, mediation or consent arbitration.
- Under the Bill the current stop sexual harassment order jurisdiction of the Act is merged into the new prohibition provisions.
- The amendments aim to increase protections against workplace sexual harassment and give workers a new way to deal with sexual harassment complaints.
- The 2022-23 October Budget included \$15.1 million in funding over four years from 2022-23 for the Fair Work Commission (\$12 million) and Fair Work Ombudsman (\$3.1 million) to support implementation of Recommendation 28, with ongoing funding of \$3.8 million per year from 2026-27.

If asked about Working Women's Centres and ILO C190

- Recommendation 49 is being implemented through the Funding for Working Women's Centres measure announced in the October 2022-23 Budget, which provides \$30.2 million over four years, with \$8 million per year ongoing from 2026-27. This is in addition to \$1.8 million in funding for the NT and Qld Working Women's Centres announced in the March 2022-23 Budget.
- Work is ongoing to implement recommendation 15 – ratification of the ILO Convention 190 on Violence and Harassment. This is expected to

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occur by mid-2023 in accordance with usual treaty ratification processes.

If asked for an update on other outstanding Respect@Work legislative recommendations

- The remaining outstanding legislative recommendations of the Respect@Work Report are being implemented by the Attorney-General through the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022.

Key Data

- In addition to the human, social and emotional cost, workplace sexual harassment is estimated to cost the Australian economy \$3.8 billion a year in lost productivity, staff turnover, absenteeism and other impacts.¹
- The Respect@Work Report found:
 - one-third (33%) of people had experienced workplace sexual harassment in the last five years
 - 23% of women and 16% of men, had experienced workplace sexual harassment in the last 12 months, and
 - workers aged 18–29 years experienced higher rates of sexual harassment than other age groups (45% said they had been sexually harassed in that period).

Research

NIL

Media

Last Cleared By	Martin Hehir
Date Last Cleared	05 October 2022

¹ Deloitte Access Economics, The Economic Costs of Sexual Harassment in the Workplace (Final Report, February 2019)

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SB22-001575**BACKGROUND**

- In 2018, the previous government funded the Australian Human Rights Commission to undertake a National Inquiry into Sexual Harassment in Australian Workplaces. The Inquiry's final report – the Respect@Work Report released on 5 March 2020 – found that sexual harassment is a pervasive and widespread issue across Australian society. The Report made 55 recommendations.
- The Sex Discrimination and Fair Work (Respect at Work) Bill 2021 implemented the following recommendations related to the Fair Work System:
 - Recommendation 29 – by clarifying that the Fair Work Commission may make orders to stop sexual harassment in the workplace, and
 - Recommendation 30 – by clarifying that sexual harassment can be a valid reason for dismissal under the Fair Work Act.
- Recommendation 31 was also implemented in 2021 through amendments to the Fair Work Regulations, which included sexual harassment occurring in connection with employment in the definition of 'serious misconduct'.
- A further three Fair Work recommendations have not yet been fully implemented:
 - Recommendation 15: The Australian Government ratify International Labour Organisation Convention 190 (Violence and Harassment Convention) (ratification expected in 2023) – This is being progressed with ratification likely to occur in mid-2023.
 - Recommendation 28: The Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the Sex Discrimination Act, is expressly prohibited – This is being progressed through the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.
 - Recommendation 49: Provide increased and recurrent funding to working women's centres to help vulnerable workers who experience sexual harassment, including establishing or working women's centres in jurisdictions where they do not currently exist – This is being progressed through the Funding for Working Women's Centres measure announced in the October 2022-23 Budget, which provides \$30.2 million over four years (and \$8 million per year ongoing). A further \$1.8 million in funding for the NT and Qld Working Women's Centres announced in the March 2022-23 Budget, is being redirected to support this measure. Consultation on a new governance and funding model to support this recommendation will commence shortly.

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2022 - 2023 Budget Estimates
SB22-001536

Issue: Abolition of the ABCC
Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

- The Government has committed to abolishing the Australian Building and Construction Commission and the *Code for the Tendering and Performance of Building Work 2016* (Building Code) in full, to align construction workers rights with other workers.
 - The Government introduced a Bill to achieve this on 27 October 2022.
- The Minister amended the Building Code in July 2022 to only cover those matters required by the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act) and to provide for transitional arrangements.
- The Government also announced additional resourcing for the Fair Work Ombudsman to regulate the *Fair Work Act 2009* (Fair Work Act) across the entire building and construction industry on 25 October 2022, including:
 - 80 ASL per year, with 66.7 pro-rata in 2022–23
 - \$69.9 million over the Forward Estimates from 2022–23.

Legislation to abolish the ABCC

- The Government's Secure Jobs Better Pay Bill will:
 - repeal the legislative provisions that provide for the Australian Building and Construction Commission and the Building Code
 - repeal the additional penalty provisions under the BCIIP Act such as unlawful picketing and unlawful industrial action
 - retain provisions in relation to the Federal Safety Commissioner
 - rename the Act as the *Federal Safety Commissioner Act 2022*
 - provide transitional arrangements including to ensure the Fair Work Ombudsman can take responsibility for existing Australian Building and Construction Commission Court cases that are on foot.

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2022 - 2023 Budget Estimates
SB22-001536**Resourcing for the Fair Work Ombudsman*****Will the Fair Work Ombudsman have adequate resources to regulate the building and construction industry?***

- The Government is providing the Fair Work Ombudsman with extensive resourcing to regulate the entire building and construction industry, comprising:
 - 80 ASL per year, with 66.7 pro-rata in 2022–23
 - \$69.9 million over the Forward Estimates from 2022–23
- The Fair Work Ombudsman will leverage its data and intelligence-led approach to effectively regulate the Fair Work Act in the building and construction industry.
- The Australian Building and Construction Commission dedicated a large proportion of its resources to matters that are no longer required by the Government, such as regulating the Building Code.

Interim Building Code

- The Interim Building Code commenced on 26 July 2022.
- The Interim Building Code removes a range of matters, including:
 - restrictions on enterprise agreement clauses that deal with issues such as safety, apprentice ratios and same job, same pay
 - duplication of matters already covered by the Fair Work Act and other Commonwealth, state and territory laws, for example, the Competition and Consumer Act and work health and safety laws.
- The Interim Building Code only retains elements necessary to meet the current legislative requirements and to retain existing exemptions.

Consultation

- This is an election commitment.
- The Government has consulted stakeholders on implementation of its decision to abolish the Australian Building and Construction Commission and repeal the Building Code.
- The Minister raised the commitment with employers and the states and territories on:
 - 5 July – Commonwealth, State and Territory Workplace Relations Ministers

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- 19 July – National Workplace Relations Consultative Council participants:
 - Housing Industry Association
 - Australian Chamber of Commerce and Industry
 - Business Council of Australia
 - Australian Resources and Energy Employer Association
 - Master Builders Australia
 - Australian Industry Group
 - Council of Small Business Organisations Australia.
- The Minister's office and the department had further conversations with employers on:
 - 9 August – the Australian Constructors Association
 - 10 August – the Australian Industry Group
 - 11 August – the Australian Chamber of Commerce and Industry and Master Builders Australia
 - 15 August – the National electrical and Communications Association
 - 16 August – the Civil Contractors Federation and with the Housing Industry Association.

Consultation with the ABCC

- The department has held regular meetings with the Australian Building and Construction Commission, including:
 - weekly meetings between the Secretary, senior officials from policy, corporate and legal areas within the department, the Australian Building and Construction Commissioner and his senior staff, since 2 August 2022
 - regular meetings between the Deputy Secretary, Workplace Relations and the Australian Building and Construction Commissioner since 21 May 2022
 - ad-hoc engagement with the Australian Building and Construction Commissioner's office as required.

Key data***Money returned to workers and subcontractors***

- Since 2 December 2016, the Australian Building and Construction Commission recovered around \$5.9 million for workers.

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- Since July 2019, \$14.1 million has been paid to subcontractors following intervention by the Australian Building and Construction Commission.
- In 2021–22 alone, the Fair Work Ombudsman recovered \$532 million for workers.

Safety

- The latest Safe Work Australia data shows that the construction industry accounted for the third-highest number of fatalities (at 36) in 2020, behind transport, postal and warehousing (49) and agriculture, forestry and fishing (46).

Industrial disputes

- Levels of industrial action across all industries are at all-time lows.
- The most recent data from the Australian Bureau of Statistics shows the construction industry accounted for 7.3 working days lost per 1,000 employees in comparison to 19.3 for all industries (over the year to the June quarter 2022).

Productivity

- Productivity Commission data shows that Labour Productivity in the construction industry declined during the operation of the Australian Building and Construction Commission as follows:
 - down 2.4 per cent in 2017–18
 - down 2.6 per cent in 2018–19
 - down 2.6 per cent in 2019–20.

Media***Master Builders report on cost blowouts if the ABCC is abolished***

- Master Builders Australia commissioned a report by Ernst and Young which claims there could be a '\$47.5' billion cost to the national economy if the Government abolishes the Australian Building and Construction Commission (<https://www.masterbuilders.com.au/Newsroom/New-modelling-shows-that-abolishing-the-ABCC-could>).
- Ernst and Young's report has been criticised in the media including in a report commissioned by the Construction, Forestry, Maritime, Mining and Energy Union, which raised concerns about the 'validity or reliability' of data in the report which was drawn from a survey of 49

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participants (<https://cg.cfmeu.org/news/master-builders%E2%80%99-abcc-report-exposed-worthless>).

Last Cleared By	Martin Hehir
Date Last Cleared	25 October 2022

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2022 - 2023 Budget Estimates
SB22-001677

Issue: Bargaining – multi-employer agreements
Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

- As an immediate action of the Jobs and Skills Summit, the Government committed to ensuring workers and businesses have flexible options for reaching agreements, including removing unnecessary limitations on access to single and multi-employer agreements.
- To ensure workers and businesses have flexible options for reaching agreements, the Secure Jobs, Better Pay Bill will vary the existing multi-employer bargaining streams by:
 - increasing access and simplifying the process for bargaining for a single interest employer agreement under the existing framework
 - remove barriers to the existing low-paid bargaining stream, which will become the 'supported bargaining' stream, and
 - rename the existing multi-employer bargaining stream as the 'cooperative workplaces' bargaining stream, which will remain voluntary and have the benefit of additional support from the Fair Work Commission's co-operative workplace program.

Single Interest Bargaining Stream

What happens now?

- Currently, single interest employer authorisations under section 247 of the Fair Work Act allow access to multi-employer bargaining for a limited range of employers that are closely related, are government-funded and have a history of bargaining together (e.g. independent schools and public hospitals).
- To get a single-interest employer authorisation, a group of employers (other than franchisees) must obtain:
 - a Ministerial declaration that the employers may bargain together; and
 - a single interest employer authorisation from the Fair Work Commission.
- Franchisees do not need to obtain a Ministerial declaration but must obtain a single interest authorisation from the Fair Work Commission.
- In deciding whether to make a declaration, the Minister must take into account:
 - the history of bargaining of each of the relevant employers;

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- the interests that the relevant employers have in common, and the extent to which those interests are relevant to whether they should be permitted to bargain together;
- whether the relevant employers are governed by a common regulatory regime;
- whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with its employees;
- the extent to which the relevant employers operate collaboratively rather than competitively;
- whether the relevant employers are substantially government funded; and
- any other matter the Minister considers relevant.
- In deciding whether to issue an authorisation, the Fair Work Commission must be satisfied that the employers:
 - have agreed to bargain together; and
 - were not coerced to agree to bargain together.
- The limits of the current provisions are evidenced in there having been – on average - only 5 applications for Ministerial declarations and approximately 10 applications for single interest employer authorisations made per year.
- Protected industrial action is currently available when bargaining under a single interest employer authorisation.
- Conciliation/arbitration – under section 240 of the Fair Work Act, a single bargaining representative for a proposed enterprise agreement may apply to the Fair Work Commission for it to deal with a dispute about the agreement, and access to arbitration is by consent of all parties. Arbitration may also occur where industrial action is terminated by the Fair Work Commission or a serious breach declaration has been made.

What is proposed

- The Bill will:
 - Remove the requirement to obtain a Ministerial declaration.
 - Remove unnecessary criteria and instead require the Fair Work Commission to be satisfied that:
 - the employers have clearly identifiable common interests (e.g. geographical location, regulatory regime or nature of the enterprise)
 - the group of employees who will be covered by the agreement was fairly chosen

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- the employers and the bargaining representatives of the employees have had an opportunity to express their views on the authorisation to the Fair Work Commission
 - the authorisation is not contrary to the public interest, and
 - at least some of the employees to be covered by the agreement are represented by an employee organisation.
- Entry to bargaining – Employers could be compelled to enter the stream only if the relevant employees agree by majority vote that they wish to bargain in the stream and all the above requirements are met.
- Small business of less than 15 employees will be exempt from being compelled into this stream.
- Bargaining representatives who have a history of repeated non-compliance with the Fair Work Act could be excluded for the purposes of the agreement by order of the Fair Work Commission, by application of bargaining representatives or its own motion.
- Employers will be able to ‘opt-out’ of the stream if the Fair Work Commission is satisfied that it is no longer appropriate for the employer to be covered because of a change in the employer’s circumstances.
- Protected industrial action – Will be permitted under the Single Interest Bargaining Stream, subject to a successful protected action ballot; a mandatory requirement for the parties to attend Fair Work Commission conciliation to minimise the likelihood of industrial action being taken; and the provision of 120 hours’ notice to provide employers adequate time to put in place contingencies.
- Conciliation/arbitration – The Fair Work Commission will be able to direct attendance of persons at conferences, issue recommendations, require the provision of information and other procedural directions as part of its powers under section 240. The Fair Work Commission will also be able to arbitrate an intractable dispute on application by a single bargaining representative if satisfied that there is no reasonable prospect of agreement being reached and it is reasonable in all the circumstances. The applicant will also have to have participated in the Fair Work Commission’s processes under section 240 and the Fair Work Commission would have the discretion to require the parties to enter a post-declaration negotiating period to try to reach agreement without arbitration.
- Coverage once an agreement is made – Employers could voluntarily apply to be covered by an existing single interest agreement where the relevant employees of the employer have agreed by majority vote, and the employers:

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- are part of the same franchise; or
- have clearly identifiable common interests and it is not contrary to the public interest.
- Non-consenting employers (excluding small business employers with fewer than 15 employees) could also be brought into an existing single-interest agreement if the relevant employees are not covered by an in-term enterprise agreement and a majority of employees support being covered by the agreement.

If asked: How will small businesses be protected from being forced into multi-employer bargaining by powerful unions?

- Employers with fewer than 15 employees will be exempt from the process that provides for employers to be compelled to enter the single-interest bargaining stream or to be brought under an existing single-interest bargaining agreement.

Supported Bargaining Stream

What happens now?

- The Fair Work Act currently includes a special multi-enterprise bargaining stream for low-paid employees who historically have not had access to collective bargaining or who face substantial difficulty in bargaining at the enterprise level.
- The low-paid bargaining stream has not met its objective to encourage and facilitate bargaining for low-paid workers. There have been 4 applications for an authorisation and only 1 granted.
- Currently, in considering whether it is in the public interest to make a low-paid authorisation, the Commission must take into account the following matters related mainly to historical and current collective bargaining:
 - whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level
 - the history of bargaining in the industry in which the employees who will be covered by the agreement work
 - the relative bargaining strength of the employers and employees who will be covered by the agreement
 - the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to the relevant industry and community standards, and

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- the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.
- The Commission must also take into account the following matters related broadly to the likely success of collective bargaining:
 - whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprise to which the agreement relates
 - the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process
 - the views of the employers and employees who will be covered by the agreement
 - the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement
 - the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that would:
 - cover that employer, and
 - not cover the other employers specified in the application.
- Protected industrial action is **not** currently available when bargaining for a low-paid bargaining agreement.
- For low-paid bargaining, a single bargaining representative may apply to the Fair Work Commission to deal with a dispute under section 240 of the Fair Work Act.
- In addition, where a low-paid authorisation is in operation, the Fair Work Commission may, on its own initiative, provide assistance to facilitate bargaining.

What is proposed

- The Government is removing barriers to the low paid bargaining stream and renaming the stream as the 'supported bargaining stream'. For access to the stream, the current tests for entry would be largely replaced. The FWC will need to be satisfied that it is appropriate for the employers and employees to bargain together, having regard to the following.

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- the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector).
- whether the employers have clearly identifiable common interests (e.g. geographical location, nature of enterprises, government funding).
- whether the likely number of bargaining representatives would be manageable.
- any other matter the Fair Work Commission considers relevant.
- At least some of the employees to be covered by the agreement must be represented by a registered organisation.
- Bargaining representatives who have a history of repeated non-compliance with the Fair Work Act are not counted for this purpose and are not permitted to enter the stream.
- Entry to bargaining – the Fair Work Commission issues a *Supported Bargaining Authorisation* on application by a bargaining representative (employee or employer) or an employee organisation that is entitled to represent relevant employees' industrial interests. However, employers with a current single enterprise agreement that has not passed its nominal expiry date cannot access this stream unless the Fair Work Commission is satisfied that the agreement was made to avoid bargaining in the stream.
- Protected industrial action – will be permitted subject to a successful protected action ballot; a mandatory requirement for the parties to attend Fair Work Commission conciliation to minimise the likelihood of industrial action being taken; and the provision of 120 hours' notice to provide employers adequate time to put in place contingencies.
- Conciliation / arbitration – On application, the Fair Work Commission will be able to order attendance of persons at conferences, issue recommendations, require the provision of information and make other procedural directions to attempt to resolve the dispute under their powers in section 240. The Fair Work Commission will also be able to arbitrate an intractable dispute on application by a single bargaining representative if satisfied that there is no reasonable prospect of agreement being reached and it is reasonable in all the circumstances. The applicant would also have to have participated in the Fair Work Commission's processes under section 240 and the Fair Work Commission would have the discretion to require the parties to enter a post-declaration negotiating period to try to reach agreement without arbitration.
- Coverage once an agreement is made – Employers could voluntarily apply to be covered by an existing agreement where the relevant

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employees have agreed (by a majority of those who vote) and the usual requirements for being included in an authorisation are met. Alternatively, an employee organisation may apply to the FWC for a variation of a supported bargaining agreement to cover an additional employer and their employees, where it can satisfy the FWC that a majority of those employees want to be covered by the agreement, and it is appropriate for the employer to be added.

- Employers with a current single enterprise agreement that has not passed its nominal expiry date cannot be included in this stream (unless the main reason for making the single enterprise agreement was to avoid being specified in an authorisation).

Cooperative Workplaces Bargaining Stream

What happens now

- Under the existing multi-enterprise bargaining stream, a group of employers may voluntarily decide to bargain together. There is no protected industrial action permissible or access to bargaining orders. Dispute resolution is by consent only.

What is proposed

- The Government proposes to rename the existing multi-enterprise bargaining stream as the Cooperative Workplaces Bargaining Stream, which will be particularly attractive to small businesses, given it will remain voluntary.
- The Cooperative Workplaces Bargaining Stream will:
 - be open to all employers, regardless of business size
 - require at least some of the employees involved in the bargaining to be represented by an employee organisation
 - be voluntary, with bargaining parties able to freely enter and exit the stream before an agreement is finalised.
- Protected industrial action will **not** be available when bargaining for a cooperative workplaces agreement.
- The Fair Work Commission cannot issue orders, mandate conciliation, or arbitrate an outcome, other than with the consent of all parties (consistent with the requirements for the existing multi-employer stream).
- Parties will have access to additional support to make an agreement through the Fair Work Commission's cooperative workplaces program, upon request.

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- OECD research¹ shows that countries that enable both single and multi-employer bargaining have lower wage inequality and higher employment, particularly for vulnerable groups such as women, and those in temporary or part-time work.
- OECD research² also shows that the uptake of enterprise bargaining by small businesses is more likely to be higher in countries with multi-employer bargaining.

Media and commentary

- Will increased multi-employer bargaining increase costs for business, drive up wages with no productivity returns and cause more industrial action?
 - Removing unnecessary limitations on multi-employer bargaining and improving bargaining access to low-paid sectors will improve equality and inclusivity for significant sectors of the economy that currently have limited access to bargaining.
 - OECD research shows that countries that enable both single and multi-employer bargaining have lower wage inequality and higher employment, particularly for vulnerable groups; and the uptake of enterprise bargaining by small businesses is likely to be higher with multi-employer bargaining.
 - The proposed reforms to protected industrial action, particularly the requirement to attend conciliation while a protected action ballot is conducted, are expected to reduce the likelihood of industrial action.
- Will allowing industrial action as part of multi-employer bargaining risk significant disruption and costs to business across a sector or industry?
 - The Government's reforms strike a careful balance.
 - For multi-employer bargaining, employees can only take industrial action after:
 - a successful protected action ballot
 - having participated in mandatory conciliation with the Fair Work Commission, and
 - giving the employer 120 hours' notice of the action.

¹ OECD 2018, The role of collective bargaining systems for labour market performance; OECD 2020, Can collective bargaining help close the gender wage gap for women in non-standard jobs?

² OECD 2019, Negotiating Our Way Up – Collective Bargaining in a Changing World of Work.

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- There is also an enhanced dispute resolution process available through the Intractable Bargaining Provisions. It allows for a single bargaining representative to apply for arbitration if the parties have completed the Section 240 process with the Fair Work Commission and the parties are unlikely to reach agreement.

Is multi-employer bargaining anti-competitive?

- Multi-enterprise bargaining among competitors has been an established part of the workplace relations system for many years.
- The wages and conditions of employees are only two of many factors that businesses may compete over.
- Negotiating employment terms and conditions has always been excluded from most of the anti-competitive conduct provisions of the Competition and Consumer Act 2010, given that labour markets are not in all respects comparable to other product or service markets—a point recognised by the Productivity Commission in its inquiry into the Workplace Relations Framework:
 - In part, industrial law may be separated from competition law because it has ethical and social dimensions at its heart, to a greater extent potentially than the business-to-business aspects of competition law.³
- Complying with competition law was never intended to come at the detriment of employee's wages and conditions.

Last Cleared By	Martin Hehir
Date Last Cleared	07 November 2022

³ Competition Policy Review Final Report (Harper Review 2014-15), page 386.

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Issue: **Migrant workers – including Migrant Workers’ Taskforce recommendations**

PBS Pg No.

Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

- The Government’s *Plan to Build a Stronger Pacific Family* and *Secure Australian Jobs Plan* include commitments to tackle the exploitation and mistreatment of temporary migrant workers.
 - *Labor’s Plan to Build a Stronger Pacific Family* committed to implement recommendations of the Migrant Workers’ Taskforce (the Taskforce).
 - *Labor’s Secure Australian Jobs Plan* committed to make wage theft a crime, noting that migrant workers were among the groups who are disproportionately impacted by it.
- Such behaviour denies workers their lawful entitlements and right to decent working conditions.
- Such behaviour also undermines Australia’s reputation as a safe place to work and study, including the attractiveness of Australia’s Pacific labour mobility schemes. Further, it leads to an uneven playing field between those employers who do the right thing, and those who do not.
- Migrant workers are entitled to the same workplace rights and protections as Australian citizens and permanent residents, including those under the *Fair Work Act 2009*.
- The Taskforce delivered its report in March 2019, making 22 recommendations. Since its election the Government is considering these recommendations and actions taken to date to inform its reform agenda.
- In this portfolio, the Government has already taken action, with the Government announcing funding to enhance small claims procedures in the 2022-23 Budget as well as legislative reforms that it will take forward in its Secure Jobs, Better Pay Bill.
- The Employment and Workplace Relations portfolio is responsible or shares responsibility for 17 of the 22 recommendations. The Department chairs the Migrant Workers Inter-Agency Group, the group charged with whole-of-government oversight of implementation progress. This fulfils recommendation 1.

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- The Taskforce made recommendations encompassing issues such as:
 - the Fair Work Act legal framework
 - regulatory and law enforcement functions
 - labour hire
 - measures to more quickly identify and rectify migrant worker exploitation
 - exploitation practices in the provision of accommodation
 - education and awareness.
- **Attachment A** lists each of the recommendations and portfolio responsibility:
 - questions about recommendation 2 should be directed to the Fair Work Ombudsman and the Department of Home Affairs
 - questions about recommendations 15-17 should be directed to the Department of Education
 - questions about recommendations 19 and 20 should be directed to Home Affairs.
- Actions that have been taken on recommendations to date include:
 - establishing the Migrant Workers Inter-Agency Group to maintain whole-of-Government oversight of implementation progress (recommendation 1)
 - implementing initiatives to enhance migrant workers' awareness of workplace rights and entitlements, including through information provided in visa grant notices (recommendation 2)
 - improving and expanding education materials for migrant workers, including dedicated resources on the FWO and Study in Australia websites (recommendations 2, 15, 16 & 17)
 - working with states and territories to comprehensively map the levers to combat accommodation exploitation at all levels of government (recommendation 18)
 - implementing outcomes from a review of the Fair Work Ombudsman and Department of Home Affairs Assurance Protocol, and monitoring its operation (recommendation 21)
 - building the evidence base through investments in data collection and compilation (recommendation 22).

Secure Jobs, Better Pay

- The Government is currently developing a legislative package to deliver on commitments taken to the election, including to implement

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further recommendations of the Migrant Workers' Taskforce. Within this portfolio, the package of reforms will include measures to address outstanding recommendations of the Taskforce, including:

- prohibition on advertising jobs with rates of pay that would breach the Fair Work Act (recommendation 4)
- improvements to the small claims process (recommendation 12).
- Other recommendations of the Taskforce are under active consideration by the Government, to inform future legislative and policy proposals.
 - This includes recommendations relating to criminalise wage theft and raising civil penalties for wage exploitation (see also **SB22-001633 – Wage theft, compliance & enforcement reforms**).

Budget measures supporting implementation

- The Government has committed \$7.9 million in the October 2022-23 Budget context, to enhance the use of small claims procedures as a fast and low-cost avenue for workers to recover unpaid entitlements. This includes:
 - approximately \$7.7 million for the Federal Circuit and Family Court of Australia to account for an expected increase in its workload, following an increase on the cap for small claims recovery from \$20,000 to \$100,000, and
 - approximately \$200,000 to enable the Department to conduct a review into the effectiveness of the Fair Work Act small claims process, as recommended by the Taskforce (recommendation 12).
 - **(if raised)** The net impact of the small claims measures on the underlying cash balance (UCB) is \$6.4 million, after accounting for \$1.5 million in estimated additional administered revenue from filing fees for small claims matters.
- See also **SB22-001633 – Wage theft, compliance & enforcement reforms** for further information.

Response to Senate Standing Committee Report: Unlawful Underpayment of Employees' Remuneration

- The Government is carefully considering the Committee's Report and will formally respond in accordance with the usual practice.
- The Government will pursue measures to introduce a criminal offence for wage theft and strengthen penalties for employers who

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systematically underpay and exploit workers, consistent with recommendations of this Report.

- ***(If asked about recommendation 5 to establish a small claims tribunal)*** The Government has announced, in the 2022-23 Budget context, that it will conduct a review of the effectiveness of the Fair Work Act small claims process in 2023. The review will enable consideration of the merits of small claims mechanism beyond the courts, such as for example establishing a dedicated small claims tribunal.
 - Establishing a dedicated tribunal warrants careful consideration, to account for any costs and complexities involved in such a proposal.

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Key Data

- The Household, Income and Labour Dynamics in Australia (HILDA) Survey found that approximately 9.9% of adult employees were paid less than the adult national minimum wage in 2018.
- The Grattan Institute has calculated (based on 2016 census data) that temporary migrants make up 7% of the Australian workforce.

Research

- Several reports from recent parliamentary and other inquiries (including the Underpayment Inquiry Report, the Senate Select Committee on Job Security Report, and the Migrant Workers' Taskforce Report) have received compelling evidence about the ongoing prevalence of underpayment and the spectrum of non-compliant employer behaviour, from inadvertent to deliberate and systematic.
- This evidence demonstrates a need to improve the workplace compliance and enforcement system, to which this suite of reforms is directed.

Media

- ***Skilled migrant workers speak up about sponsorship visa exploitation and workplace sexual harassment, 13 September 2022***

The ABC published an online article about the exploitation of skilled visa holders, noting the power imbalance in the program creates fertile ground for exploitation. This article references an open letter signed by community legal centres on 31 August 2022 ([Skilled migrant workers speak up about sponsorship visa exploitation and workplace sexual harassment](#)).

The letter was addressed to the Prime Minister, the Treasurer, and Ministers Gallagher, Burke, Rishworth, O'Connor, O'Neil and Husic. It called for the Government to make the following reforms:

- criminalise wage theft and implement a quick, efficient, accessible and low-cost dispute resolution mechanism
- eliminate sham contracting by amending the Fair Work Act to create a presumption of employment relationship
- improve the definition of 'casual employee' in the Fair Work Act
- increase whistle blower protections

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- extend of the Fair Entitlements Guarantee scheme to temporary visa holders and include superannuation in the scheme ([20220831 Letter re Jobs Summit](#)).

An open letter was also written to Labor Party while they were in Opposition (dated 9 May 2022) by community organisations (including legal service providers, churches and other advocacy organisations). It made some of the same recommendations, and was signed by some of the same organisations, as the August 2022 letter.

Union head demands default membership for skilled migrants, 1 August 2022

The Sydney Morning Herald reported on a proposal by the Australian Workers' Union (AWU) to give all skilled migrants default union membership as part of their employment conditions, though workers would have the right and opportunity to opt-out. The AWU said it would take the demand to the Jobs and Skills summit ([Union head demands default membership for skilled migrants](#)).

- ***Australia is bringing migrant workers back – but exploitation is still rampant. Here are 3 changes needed now, 16 May 2022***

The Conversation published an article written by two academics in the migration space (Berg & Farbenblum) noting the urgent need to take action to address the ongoing problem of workplace exploitation with the return of migrant workers in ever increasing numbers ([Australia is bringing migrant workers back – but exploitation is still rampant. Here are 3 changes needed now](#)).

Last Cleared By	Martin Hehir
Date Last Cleared	27 October 2022

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2022 - 2023 Budget Estimates
SB22-001634**BACKGROUND**

- The Migrant Workers' Taskforce made 22 recommendations aimed at addressing the exploitation of migrant workers in Australia.
- The Joint Standing Committee on Migration Final Report of the Inquiry into the Working Holiday Maker Program (November 2020) recommended the Government expedite implementation of the recommendations.
- On 18 March 2021, reforms to the *Fair Work Act 2009* that would have addressed 6 recommendations were removed from the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 during Senate debate.
- On 1 September 2021, the Select Committee on Temporary Migration recommended the Australian Government, as a priority, implement a National Labour Hire Licensing Scheme (as recommended by the Taskforce).
- On 24 November 2021, the Migration Amendment (Protecting Migrant Workers) Bill 2021, containing amendments that would address two recommendations, was introduced in the House of Representatives. The Bill lapsed once Parliament was prorogued for the Federal election. The Department of Home Affairs is progressing work on these two recommendations in collaboration with the Department of Employment and Workplace Relations.

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Attachment A: SB22-001634

Migrant Workers' Taskforce recommendation		Lead agency/ies
1	Establish a whole of government mechanism to further the work of the Migrant Workers' Taskforce (MWT) following its completion	DEWR
2	Develop a whole of government approach to information and education needs of migrant workers	FWO, Home Affairs
3	Amend legislation to clarify that temporary migrant workers in Australia are entitled to workplace protections under the <i>Fair Work Act 2009</i>	DEWR
4	Amend legislation to prohibit persons from advertising jobs with pay rates that would breach the Fair Work Act	DEWR
5	Increase the general level of penalties for breaches of wage exploitation related provisions in the Fair Work Act to align with applicable penalties in other business laws	DEWR
6	Introduce criminal sanctions for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic.	DEWR
7	Give courts specific power to make additional enforcement orders, including adverse publicity and banning orders, against employers who underpay migrant workers.	DEWR
8	Amend the Fair Work Act to adopt model provisions relating to enforceable undertakings and injunctions contained in the <i>Regulatory Powers (Standard Provisions) Act 2014</i> (Cth).	DEWR
9	Provide the Fair Work Ombudsman with the same information gathering powers as other business regulators.	DEWR
10	Consider whether the Fair Work Ombudsman requires further resourcing, tools and powers to undertake its functions under the Fair Work Act, with regard to: <ul style="list-style-type: none"> a) encouraging vulnerable workers to approach FWO for assistance b) balancing FWO's enforcement and education functions c) whether name of FWO should be changed to reflect regulatory role d) getting redress for workers, incl. use of compliance notices and whether they are fit for purpose. e) opportunities for wider application of infringement notices f) recent allocations of additional funding. 	DEWR
11	Consider additional avenues to hold individuals and businesses to account for their involvement in breaches of workplace laws: <ul style="list-style-type: none"> a) extend accessorial liability provisions to cover where businesses contract out services b) amend the Fair Work Act to provide that the FWO can enter into compliance partnership deeds and that they are transparent 	DEWR
12	Review the Fair Work Act small claims process to examine how it can become a more effective avenue for wage redress for migrant workers	DEWR
13	Extend access to the Fair Entitlements Guarantee (FEG) program to migrant workers	DEWR
14	Establish a National Labour Hire Registration Scheme	DEWR
15	Improve the assistance provided by education providers to international students by raising awareness of workplace rights	Education
16	Improve the assistance provided by education providers by providing assistance for international students in dealing with workplace issues	Education
17	Improve the assistance provided to international students by developing best practice guidelines for educational institutions	Education
18	Consider accommodation exploitation of migrant workers, particularly Working Holiday Makers, through Commonwealth, state and territory government discussions	DEWR
19	Consider developing legislation so that a person who knowingly unduly influences, pressures or coerces a temporary migrant worker to breach a condition of their visa is guilty of an offence.	Home Affairs
20	Explore mechanisms to exclude employers who have been convicted by a court of underpaying temporary migrant workers from employing new temporary visa holders for a specific period.	Home Affairs
21	The Fair Work Ombudsman and the Department of Home Affairs undertake a review of the Assurance Protocol within 12 months.	Home Affairs, FWO
22	Give greater priority to build an evidence base and focus on existing research capacity on areas affecting migrant workers: <ul style="list-style-type: none"> a) Identify mechanisms for education providers to collect data about student visa holders' workplace experiences b) Conduct regular surveys of overseas students that include workplace experience c) Support Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) agriculture labour data collection work 	DEWR, Education, DAWE

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SB22-001543

Issue: Seacare
Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

- An independent review into the Seacare scheme to ensure that arrangements for those captured by the scheme are contemporary, fit for purpose and sustainable has been finalised.
- The department is in the process of briefing the Minister on the outcomes of the review.
- The Government will consider the outcomes of the review in due course.

Challenges facing the Seacare Scheme

- Workers' compensation and work health and safety
 - Since the Seacare scheme commenced in 1993 there have been substantial changes in Australia's work health and safety (WHS) and workers' compensation arrangements, but the scheme has not kept pace with these changes.
 - WHS arrangements under the *Occupational Health and Safety (Maritime Industry) Act 1992* (OHS(MI) Act) are out of step with Australia's harmonised laws, and updates to Australia's workers' compensation systems have not been reflected in the Seacare scheme.
- Insurance
 - Employers covered by the scheme must hold appropriate workers' compensation insurance policies.
 - The Seacare insurance market has declined, with some employers now unable to find viable insurance due to insurance companies exiting the market.
 - The department understands that approximately one third of the scheme employers' policies expired in April 2022, and that about 80 per cent of the remaining policies expired in July 2022.
 - In addition, the Seacare Authority (Authority) is required to take out insurance for liabilities against the Safety Net Fund (established under the Seafarers Act) above the prescribed amount for a single event (\$1 million).
 - The Fund covers compensation claims where a 'default event' occurs in relation to an employer (for example,

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where an employer ceases to exist and is unable to meet its liabilities under the Seafarers Act).

- The limited insurance market has resulted in the Authority not being able to find viable insurance for the fund upon expiry of its previous policy on 31 March 2022.
- As a result, the Government would assume responsibility for any workers' compensation claims that exceed the Fund's reserves.
- The scheme also has complex coverage provisions. Regulatory overlap with state and territory schemes and limited insurance availability has led to uncertainty for some employers raising questions about the viability of the scheme.

Review of the Seacare Scheme

- On 1 April 2022, the department engaged Finity Consulting Pty Ltd (Finity) to conduct an independent review of the Seacare scheme. The review was requested by the former government and its terms of reference were agreed by the then Minister for Industrial Relations.
- The purpose of the review was to review the Seacare scheme to ensure that arrangements for those captured by the scheme are contemporary, fit for purpose and sustainable.
 - This includes ensuring there are effective and sustainable WHS and workers' compensation entitlements, protections, and obligations in place for employees and employers covered by the scheme.
- During the review, Finity conducted extensive consultations with stakeholders on key issues and potential solutions, including with members of the Authority (comprised of union and employer representatives).
- On 5 September 2022, Finity provided its final report to the department, and was subsequently provided to the Seacare Authority.
- The department is currently considering the final report.

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2022 - 2023 Budget Estimates
SB22-001543**Research**

- NIL

Media

- NIL

Last Cleared By	Martin Hehir
Date Last Cleared	07 November 2022

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2022 - 2023 Budget Estimates
SB22-001543**BACKGROUND**

- The Seacare scheme is established by the Seafarers Rehabilitation and Compensation Act 1992 (Seafarers Act) and the Occupational Health and Safety (Maritime Industry) Act 1992 (OHS(MI) Act) as well as the Seafarers Rehabilitation and Compensation Levy Act 1992 and the Seafarers Rehabilitation and Compensation Levy Collection Act 1992.
- Seacare is a national work health and safety and workers' compensation scheme which applies to approximately 3,900 maritime industry employees.
- The scheme has contested coverage provisions but generally captures prescribed vessels with a majority Australian crew that are engaged in interstate trade or commerce, as well as vessels operating within the Northern Territory. Several exemptions and declarations are currently in place to provide clarity regarding scheme coverage for the maritime industry.

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SB22-001637

Issue: WR Appointments – recent developments
Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

Abolishment of the Australian Building and Construction Commissioner and Registered Organisations Commissioner positions

- The Government has introduced legislation to abolish the ABCC and the ROC. This includes abolishing the positions of the Australian Building and Construction Commissioner and the Registered Organisations Commissioner.
- Termination of the appointments of relevant statutory office holders will occur in accordance with the relevant Remuneration Tribunal Determinations regarding compensation for loss of office.

Have any recent appointments to the Fair Work Commission been made?

- The current Government has made three appointments to the Fair Work Commission:
 - Bernadette O'Neill and Peter Hampton were appointed as Deputy Presidents on 27 October 2022. Both were Commissioners before these appointments; and
 - The appointment of Commissioner Michelle Bissett expired on 1 November 2022. On 27 October 2022, the Governor General appointed Ms Bissett as Acting Commissioner for a 12-month term commencing 2 November 2022.
- Since the last Estimates hearings, Mr Paul Schneider commenced as Commissioner on 2 May 2022, having been appointed by the former Minister for Industrial Relations, Senator the Hon Michaelia Cash.

How are appointments to the Fair Work Commission made?

- The *Fair Work Act 2009* sets out the legal requirements for appointments to the FWC.
- To be appointed, the Minister must be satisfied that the candidate has the relevant statutory qualifications.
 - For example, for a Commissioner, the Minister must be satisfied that the nominee has knowledge of, or experience in workplace relations, law, business, industry or commerce (s 627(3)).
 - For the President, the Minister must be satisfied that the person:

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SB22-001637

- a) is or has been a Judge of a court created by the Parliament (other than the Federal Circuit and Family Court of Australia); or
- b) is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:
 - i. workplace relations;
 - ii. law;
 - iii. business, industry or commerce.
- Cabinet considers nominations, and if Cabinet agrees, the nomination is provided to the Governor-General for consideration.

The President of the FWC has just resigned, what is the Government doing about filling this vacancy?

- The President's resignation will take effect from midnight Friday 18 November 2022.
- The *Fair Work Act 2009* provides that the Governor-General may appoint a Vice President to act as the President during any vacancy in the office of President.

Framework for dealing with complaints about members of the FWC

- The President of the FWC has statutory responsibility to ensure the FWC performs its functions and exercises its powers in a manner that serves the needs of employers and employees.
- The Fair Work Act also provides that the President may deal with complaints about the performance of a member's duties and take measures to maintain public confidence in the FWC (s 581A).
- The FWC is an independent tribunal, and decisions are made at arm's length from Government. It operates in a framework that allows for decisions to be reviewed and errors to be corrected.

Can the President refer complaints about FWC members to the Minister?

- Under the Fair Work Act, after dealing with a complaint, the President must, in some circumstances, then refer the matter to the Minister (s 581A(4)).
 - The President must be satisfied that one or more of the circumstances that gave rise to the complaint have been substantiated and that Parliament should consider whether to call for the termination of the appointment of the FWC member.

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2022 - 2023 Budget Estimates
SB22-001637***Can the Minister deal with complaints about FWC members?***

- If a complaint is made to the Minister about the performance by an FWC Member of his or her duties, the Minister may handle the complaint for the purpose of considering whether Parliament should consider whether to call for the termination or suspension of the member's appointment (s 641A).

Comcare CEO resignation

- On 23 March 2022, Ms Susan Weston PSM advised the former Minister for Industrial Relations that she had written to the Governor-General to resign as CEO of Comcare, with effect from 30 April 2022.
- Ms Weston had foreshadowed her intention to resign in February 2022, after which a selection panel was formed and the position was advertised in the national press.
 - The role was advertised in March 2022 in the *Australian Financial Review* and *The Weekend Australian*, and online in *Workplace Express*, *LinkedIn*, *Seek*, *the National Indigenous Times*, *APSJobs* and the Attorney-General's Department statutory appointments website.
- As a result of the Federal election, and the Government going into caretaker, the process to select a new Comcare CEO was suspended.
- The department has briefed the Minister for Workplace Relations, the Hon Tony Burke MP, regarding the vacant CEO position.
- The department has re-commenced a merit-based selection exercise.
- An appointment has not yet been made to this office.
- If there is a vacancy, the Deputy CEO acts as the CEO of Comcare, unless the Governor-General has appointed someone else to act: *Safe, Rehabilitation and Compensation Act 1988 s 79*.
 - Mr Aaron Hughes, Deputy CEO of Comcare, has been acting in the Comcare CEO role since 1 May 2022.
- Ms Weston also resigned as Deputy Chairperson of the Seafarers Safety, Rehabilitation and Compensation Authority and as member of the Military Rehabilitation and Compensation Commission, both with effect from 30 April 2022.
 - Mr Hughes has been appointed on a short-term basis to these positions, noting that the Minister for Veterans' Affairs makes the appointment to the Military Rehabilitation and Compensation Commission.

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2022 - 2023 Budget Estimates
SB22-001637***Appointments to the National Workplace Relations Consultative Council***

- On 1 June 2022, the Hon Tony Burke MP, became ex-officio Chair of the National Workplace Relations Consultative Council (NWRCC) following his appointment as Minister for Employment and Workplace Relations.
- On 19 July 2022, the Minister, re-appointed the following members to the NWRCC each for a 2-year term:
 - Benjamin Davies, Business Council of Australia
 - Gerard Dwyer, Australian Council of Trade Unions (ACTU)
 - Benjamin Rogers, National Farmers' Federation; and
 - Denita Wawn, Master Builders Australia.
- On the same day, the Minister appointed Ms Jo-anne Schofield as one of 7 members nominated by the ACTU.
 - Ms Schofield replaces outgoing member Ms Susan Hopgood who resigned from the Council earlier this year.
- On 28 July 2022 the Minister invited Ms Alexi Boyd (Council of Small Business Organisations) and Mr Michael Kaine (ACTU / Transport Workers Union) as additional representatives.
- There are several upcoming expiring appointments on the NWRCC, for which nominations have been received. The department is briefing the Minister to seek approval for appointments to be made.

Expiring appointments on the Board of Safe Work Australia

- There are 3 vacancies on the Board of Safe Work Australia.
- The appointments of Mr Darren Kavanagh, the Western Australia representative, Ms Jodie Deakes, the Queensland representative, and Mr Andrew Dettmer, one of two ACTU representatives, expired in late July.
- Nominations have been received in relation to these expired appointments.
- On 19 September 2022, the Minister appointed Mr Kavanagh and Mr Liam O'Brien (ACTU, to replace Mr Dettmer) each for a short-term period of 3 months.
- The department is briefing the Minister in relation to the nominees for the substantive vacancies.

Last Cleared By	Martin Hehir
Date Last Cleared	07 November 2022

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2022 - 2023 Budget Estimates
SB22-001700

Issue: Fair Work Commission correspondence
Contact: Martin Hehir
Ph: (02) 6121 7328
Deputy Secretary
Workplace Relations Group

Key Points

- On 2 September 2022 the Minister wrote to the President of the Fair Work Commission advising of the outcomes of the Jobs and Skills Summit (**Attachment A**).
- The Minister's letter was a courtesy to notify the President of several agreed outcomes from the Summit, including progressing changes to bargaining, increased tripartism, improved good faith negotiation, and new rules for agreement terminations.
- The letter sought to inform the President of key policy outcomes and intentions directly relevant to the Fair Work Commission's work and functions.
- It is usual practice for the Minister to advise the Fair Work Commission of relevant aspects of the Government's policy agenda. The Minister has also recently written to the Fair Work Commission regarding other relevant policy issues, such as the Government's paid family and domestic violence leave reforms.
- In all instances, the Minister has not sought to give any directions to the FWC President contrary to section 583 of the *Fair Work Act 2009* (Fair Work Act), which provides that the President is not subject to direction by or on behalf of the Commonwealth.
- Similarly, the Minister has not sought to improperly influence any members of the Fair Work Commission in contravention of section 674(5) of the Fair Work Act in his communications with the President.

Departmental involvement

- On 1 September 2022, the department was asked to prepare a letter to the President outlining the outcomes of the Jobs and Skills Summit. A draft letter was prepared and settled within the Department and then provided to the Minister for consideration on 2 September 2022.
- The Workplace Relations Legal Division of the department prepared the draft letter for the Minister's consideration, cognisant of the requirements of the Fair Work Act.

Research

- NIL

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2022 - 2023 Budget Estimates
SB22-001700**Media**

- ***NSW government to investigate federal minister's letter to Fair Work Commission, ABC, 4 September 2022***

The ABC reported that the New South Wales government is investigating whether the federal government is trying to improperly influence the Fair Work Commission after Minister Burke wrote to the President stating the government's intention to make legislative changes which would limit an employer's ability to terminate enterprise agreements.

The state's Liberal Minister for Employee Relations, Damien Tudehope, reportedly labelled the Minister's letter a "disgrace" and a "brazen intervention of Labor".

(<https://www.abc.net.au/news/2022-09-04/nsw-government-investigates-tony-burke-letter-fair-work-tribunal/101404618>)

- ***Industrial Relations Minister Tony Burke under increasing pressure over potential intervention in crippling rail strikes, Sky News, 4 September 2022***

Sky News reported that, following the Minister's letter to the Fair Work Commission, Shadow employment minister Senator the Hon Michaelia Cash accused the Albanese Government of emboldening the union movement amid a crippling dispute between rail workers and the NSW government.

Skills Minister Brendan O'Connor reportedly denied this on the basis that Minister Burke's letter was related to the rail dispute and said it was purely designed to flag the government's intent.

(<https://www.skynews.com.au/australia-news/politics/industrial-relations-minister-tony-burke-under-increasing-pressure-over-potential-intervention-in-crippling-rail-strikes/news-story/77875902d569335a519aea68b7751340>)

Other documentation

- The department has also recently responded to two Parliamentary Questions on Notice (PQ No. 229 and 230) from Senator the Hon Michaelia Cash in relation to meetings and communications between the Minister and the Fair Work Commission since the Minister's swearing in (**Attachment B and Attachment C**).

Last Cleared By	Martin Hehir
Date Last Cleared	07 November 2022

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2022 - 2023 Budget Estimates
SB22-001700**BACKGROUND**

- Since Minister Burke's swearing in, the department has been aware of a number of formal communications between the Minister and the Fair Work Commission:
 - 16 June 2022 – letter to President Ross regarding paid family and domestic violence leave reforms (**Attachment D**).
 - 17 June 2022 – letter in reply from President Ross seeking further information on the timetable for the introduction of the reforms (**Attachment E**).
 - 28 June 2022 – letter to President Ross advising that the reforms would be introduced early in the sitting period commencing 26 July (**Attachment F**).
 - 2 September 2022 – letter to President Ross advising of the outcomes of the Jobs and Skills Summit (as detailed under 'Key Points').
- Additionally, on 29 June 2022 the Minister attended a morning tea to meet and thank staff working on the issues related to the paid family and domestic violence leave case before the Commission. The Minister also met with President Ross on the same day.

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The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Minister for the Arts
Leader of the House

The Hon Justice Iain Ross AO
President
Fair Work Commission
PO Box 1994
MELBOURNE VIC 3000

via email: chambers.ross.j@fwc.gov.au

Dear President Ross

The Jobs and Skills Summit held this week brought together unions, employers, civil society and government to discuss our shared economic challenges and immediate and long-term solutions. There was a strong focus on how the workplace relations system can boost job security and real wages as well as ensuring workplaces are safe, fair and productive.

All parties at the summit acknowledged the work of the Fair Work Commission in achieving these goals. With respect to bargaining in particular, parties noted their desire for enhanced engagement from the Commission to proactively help workers and businesses reach agreements that benefit them.

Other commitments included business, unions and Government working proactively together to strengthen tripartism and constructive social dialogue in Australian workplace relations and working proactively together to revitalise a culture of creativity, productivity, good faith negotiation and genuine agreement in Australian workplaces.

A further commitment given in connection with the summit was that the Government would seek to legislate to ensure the process for enterprise agreement termination is fit for purpose and fair. The Government's reforms will be aimed at limiting the circumstances in which employers can apply unilaterally to the Commission for termination of an agreement where termination would result in reducing employees' entitlements. The Government is concerned by the practice of some employers threatening to terminate agreements as a bargaining tactic.

I am conscious that there is always the possibility that some employers may seek to terminate agreements prior to any amendments being enacted and acknowledge that the Commission will always consider the range of issues required by s226 before terminating an agreement, including that it is not contrary to the public interest to do so, as well as the likely effect termination will have on employees and employers.

My Department will commence detailed consultation on matters arising out of the Jobs and

Parliament House, Canberra ACT 2600

Skills Summit next week with a view to developing amendments to the *Fair Work Act 2009* as soon as possible.

Yours sincerely



THE HON TONY BURKE MP

2 / 9 / 2022

cc NWRCC members.



MINISTER REPRESENTING THE MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS

Senate

Parliamentary Question

Question Number: 229
Question Date: 23 August 2022
Table Office Due date: 22 September 2022

Senator Michaelia Cash asked the Minister representing the Minister for Employment and Workplace Relations in writing, on 23 August 2022:

1. What meetings has the Minister had, or the Minister's office, since the Minister's swearing in, with the:

- (a) President of the Fair Work Commission; and/or
- (b) any Vice Presidents of the Fair Work Commission; and/or
- (c) the General Manager of the Fair Work Commission; and/or
- (d) any other member of the Fair Work Commission.

2. In relation to each meeting:

- (a) who initiated the meeting; can a copy of correspondence to all attendees and other invitees; including but not limited to email, instant messages (for example text messages, WhatsApp, etc.) or by letter be provided;
- (b) where was the meeting held;
- (c) was there an agenda for the meeting:
 - i. if not, why not, and
 - ii. if yes, can a copy be provided;
- (d) were minutes of the meeting taken:
 - i. if not, why not, and
 - ii. if yes, can a copy be provided;
- (e) did any departmental officials attend the meeting:
 - i. please provide the names and titles of any officials above SES level.
 - ii. please provide any notes taken by departmental attendees, the Minister or the Minister's office.
- (f) can copies of any internal or external departmental correspondence relating to this meeting be provided;
- (g) can any briefing notes from the department to the Minister's office about this meeting be provided; and
- (h) can copies of any correspondence between the department and the Minister's office about this meeting; including but not limited to email, instant messages (for example text messages, WhatsApp, etc.) or by letter be provided.

Minister representing the Minister for Employment and Workplace Relations has provided the following answer to the Senator's question:

On 29 June 2022, the Hon Tony Burke MP, Minister for Employment and Workplace Relations attended a morning tea to meet and thank staff working on the issues related to the paid family and domestic violence leave case. The Minister also met with President Ross on 29 June 2022.

The Department of Employment and Workplace Relations has advised that it has not attended, or provided any briefing notes for any meetings between the Minister, or the Minister's office, and members of the Fair Work Commission since the Minister's swearing in.



MINISTER REPRESENTING THE MINISTER FOR
EMPLOYMENT AND WORKPLACE RELATIONS

Senate

Parliamentary Question

Question Number: 230
Question Date: 23 August 2022
Table Office Due date: 22 September 2022

Senator Michaelia Cash asked the Minister representing the Minister for Employment and Workplace Relations in writing, on 23 August 2022:

1. What communication has the Minister or his office had, since the Minister's swearing in, with the:
 - (a) President of the Fair Work Commission; and/or
 - (b) any Vice Presidents of the Fair Work Commission.
 - (c) the General Manager of the Fair Work Commission; and/or
 - (d) any other member of the Fair Work Commission.
2. In what form did this communication occur; including but not limited to email, instant messages (for example text messages, WhatsApp, etc.) or by letter. Can a copy of this communication be provided.

Minister representing the Minister for Employment and Workplace Relations has provided the following answer to the Senator's question:

The Department of Employment and Workplace Relations has advised that it is aware of several communications between the Minister, or the Minister's office, and members of the Fair Work Commission since the Minister's swearing in. These communications are set out in the following table:

What communication has the Minister or his office had, since the Minister's swearing in, with the: (a) President of the Fair Work Commission; and/or (b) any Vice Presidents of the Fair Work Commission. (c) the General Manager of the Fair Work Commission; and/or (d) any other member of the Fair Work Commission.	In what form did this communication occur; including but not limited to email, instant messages (for example text messages, WhatsApp, etc.) or by letter.	Can a copy of this communication be provided
Correspondence with President Ross regarding family and domestic violence leave	Letter, 16 June 2022	Yes. A copy of the letter is publicly available on the Fair Work Commission website: www.fwc.gov.au/hearings-decisions/major-cases/family-and-domestic-violence-leave-review-2021
Correspondence with President Ross regarding family and domestic violence leave	Letter, 17 June 2022	Yes. A copy of the letter is attached.
Correspondence with President Ross regarding family and domestic violence leave	Letter, 28 June 2022	Yes. A copy of the letter is publicly available on the Fair Work Commission website: www.fwc.gov.au/hearings-decisions/major-cases/family-and-domestic-violence-leave-review-2021
Correspondence with President Ross regarding outcomes of the Jobs and Skills Summit	Letter, 2 September 2022	This letter has been widely reported in the media.



Minister for Employment and Workplace Relations

Reference: MS22-000434

The Hon Justice Iain Ross AO
President
Fair Work Commission
PO Box 1994
MELBOURNE VIC 3001

By email: Chambers.Ross.j@fwc.gov.au

Dear Justice Ross

I am writing in response to the Full Bench decision of 16 May 2022 in the Fair Work Commission's Family and domestic violence leave review 2021.

I want to thank the Fair Work Commission and the stakeholders who have engaged in the review for the work undertaken to progress this critically important issue. The Government is committed to providing the national leadership and investment needed to help end family, domestic and sexual violence.

Consistent with the commitments made in the Government's Secure Australian Jobs Plan, the Government intends to introduce 10 days paid family and domestic violence leave into the National Employment Standards as soon as possible.

Yours sincerely

A handwritten signature in black ink that reads "Tony Burke".

THE HON TONY BURKE MP



*Australia's National Workplace
Relations Tribunal*

17 June 2022

The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Parliament House
CANBERRA ACT 2600

The Honourable
Justice Iain Ross AO

By Email: Tony.Burke.MP@aph.gov.au

Dear Minister,

Family and domestic violence leave review 2021

I refer to your letter dated 16 June 2022 in response to the Commission's Family and Domestic Violence Leave (FDV) decision ([2022] FWCFB 2001).

Thank you for confirming that the Government intends to introduce 10 days paid family and domestic violence leave into the National Employment Standards.

Following receipt of your letter, the Full Bench dealing with the Commission's Family and Domestic Violence Leave review issued a statement (attached) varying the directions as follows:

1. The parties are to formulate a draft model FDV leave term based on our provisional views in Chapter 8.4. The formulation of such a draft term will be without prejudice to a parties' ability to challenge any of our provisional views. The proposed draft model terms are to be filed by 4:00pm ~~Friday 17 June 2022~~ Friday 1 July 2022;
2. The parties are to confer and submit draft directions in respect of the finalisation of these proceedings. Such directions are to:
 - (i) provide an opportunity for the parties to express a view on the draft model FDV leave terms proposed by other parties and the provisional views we express about the content of that term; and
 - (ii) provide the Commonwealth Government an opportunity to clarify its intentions regarding any amendment to the NES, should it choose to do so.

The draft directions are to be filed by no later than 4:00pm Friday 1 July 2022.

Given that the parties to the Commission's FDV leave review are currently preparing a draft model FDV leave term in accordance with our directions, I would be grateful if you could

provide a timeframe for the introduction of the new FDV leave entitlement. This will assist the Commission in determining whether further variations to the directions are necessary and will avoid putting the industrial parties to the effort of preparing a draft term in accordance with the Commission's directions which may ultimately be unnecessary.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'J. Ross', with a stylized flourish at the end.

JUSTICE IAIN ROSS AO
President



The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Minister for the Arts
Leader of the House

Reference: MS22-000543

The Hon Justice Iain Ross AO
President
Fair Work Commission
PO Box 1994
MELBOURNE VIC 3001

By email: Chambers.Ross.j@fwc.gov.au

Dear Justice Ross

I am writing in response to your letter of 17 June requesting a timeframe for the introduction of legislation to include 10 days paid family and domestic violence in the National Employment Standards.

The Government is currently scheduling its legislative program for the upcoming sitting period and it is expected that legislation to implement this commitment would be introduced early in the sitting period beginning on 26 July 2022.

I would like to reiterate my thanks to the Commission and the stakeholders who have engaged in this review.

Yours sincerely

A handwritten signature in blue ink that reads "Tony Burke".

THE HON TONY BURKE MP

28/6/2022

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2022 - 2023 Budget Estimates
SB22-001576

Issue: Minimum standards for employee-like workers
Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

Election commitment – ‘Employee-like’ forms of work

- Under the Secure Australian Jobs Plan, the Government committed to empower the Fair Work Commission to inquire into and set minimum standards for workers in ‘employee-like’ forms of work, including the gig economy.
 - The intention of this measure is to ensure workers who are in forms of work that are characteristic of employment, but not considered employees, have a safety net of minimum entitlements and protections.
 - It is also intended to ensure Australia’s workplace relations system reflects the modern economy and keeps pace with emerging forms of work.
- The department is consulting stakeholders on implementation of this commitment.
 - Stakeholders’ views have been sought on the scope of the measure, the kinds of minimum standards that should be adopted, the nature of the Fair Work Commission’s standard-setting process, and potential other functions of the Commission, including those relating to dispute resolution.
 - While scope is a matter for consultation, it is expected that this measure will go beyond the rideshare and food delivery sectors of the gig economy.
 - Given the similarity of characteristics of ‘employee’ like workers with common law employees, whether there should be a definition of employee in the *Fair Work Act 2009* is also being considered as part of this consultation process.
 - The consultation process is also being used to inform next steps on the Jobs and Skills Summit outcomes in relation to unfair contracts and considering allowing the Fair Work Commission to set minimum standards for the road transport industry more generally.
 - Since 26 August 2022, the department has met with approximately 50 representatives of unions, employer organisations, industry groups, gig economy platforms, academics and state and territory governments over the course of more than 30 individual meetings.

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2022 - 2023 Budget Estimates
SB22-001576

- The department will continue to meet with stakeholders over the coming months as it supports the Government to settle key aspects of this commitment.
- The department is working to have draft legislation ready in the first half of 2023, noting timing of introduction of any legislation is a decision for the Government.

Jobs and Skills Summit outcomes

- The Jobs and Skills Summit resulted in two related outcomes that the Government would, in consultation with unions and business, undertake further work on:
 - amend relevant legislation to give workers the right to challenge unfair contractual terms, and
 - consider allowing the Fair Work Commission to set fair minimum standards to ensure the road transport industry is safe, sustainable and viable.
- In the lead up to the Summit, on 29 August 2022, the Minister for Employment and Workplace Relations convened a Road Transport Industry Roundtable.
 - The Roundtable was attended by representatives of unions, industry associations, gig platforms, large road transport employers and academics.
 - Attendees agreed the 'Agreed Principles for a Safe, Sustainable and Fair Road Transport Industry'. This formed the basis for the Jobs and Skills Summit outcome.
- As both of these measures relate to independent contractors, the department is seeking stakeholders' views on the scope of these measures as part of the same consultation process on the 'employee-like' forms of work election commitment.

Queensland Government laws on independent courier drivers

- On 23 June 2022, the Queensland Government introduced the Industrial Relations and Other Legislation Amendment Bill 2022 (the Bill) into the Queensland Parliament.
 - Among other things, the Bill includes a new Chapter 10A that empowers the Queensland Industrial Relations Commission to set minimum standards for 'independent courier drivers'.
 - The new jurisdiction is based on the similar scheme in New South Wales, though extends to gig economy workers, like those engaged in food delivery.
- On 24 June 2022, the Queensland Minister for Industrial Relations, the Hon Grace Grace MP, requested the Minister for Employment and

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Workplace Relations grant an exemption under the *Independent Contractors Act 2006* to allow the laws to operate from the date of proclamation.

- The *Independent Contractors Act 2006* operates to exclude state and territory laws providing employment-type entitlements to independent contractors, unless an exemption has been granted.
- The matter is currently under review by Government.

Key Data

- According to the Australian Bureau of Statistics, there are just over 1 million people who are considered to be independent contractors in their main job (ABS, Characteristics of Employment, August 2021).
 - This is 7.8 per cent of the total workforce, a rate that has remained relatively stable over the past decade.
- There is no national dataset on the gig economy, with estimates as to its size varying greatly.
 - A study commissioned as part of the 2019 Inquiry into the Victorian On-demand Workforce found that 7.1 per cent of respondents had performed work facilitated by a platform in the last 12 months.
 - The Australian Bureau of Statistics has developed a new survey module on 'digital platform work and workers'. The survey is currently being trialled in the monthly Labour Force Survey, before being rolled out in 2023-24. On 14 October 2022, the Australian Bureau of Statistics released its methodology and a consultation paper to help inform the next phase of this project.
- According to the Australian Bureau of Statistics, there were 260,800 workers in the 2-digit Road transport industry, 71.5 per cent of which were employees (ABS, Characteristics of Employment, August 2021).

Research

- The field of research on the gig economy is growing – both in Australia and overseas – though findings are mixed. For example, there is research to suggest the positive impact of the gig economy on national economies and for workers, while other research documents the negative treatment of workers and the need for reform.
 - In 2021-22, the Senate Select Committee on Job Security examined at-length issues relating to the gig economy and received evidence from a wide range of sources as to its positive and negative impacts and the need for reform.

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- Over the past few years, stakeholders have put forward a range of views on how to best regulate the gig economy. There is no specific research on the case for an independent standards-setting tribunal for the gig economy, though some researchers have recently drawn positive correlations between the intent behind the former Road Safety Remuneration Tribunal and the need to set enforceable standards for workers who are not employees. [See for example, Dr Michael Rawlings and Professor Joellen Riley Munton from the University of Technology Sydney's report "Proposal for legal protections of on-demand gig workers in the road transport industry", January 2021.]
- Research exists on safety in the road transport industry over the last few decades – including the evaluations of the former Road Safety Remuneration Tribunal – which the department will draw on when considering the proposal to empower the Fair Work Commission to set minimum standards for the road transport industry.

Media

- There has been media interest in the Government's intention to regulate the gig economy.
 - Most media attention has been conjecture on the scope of the Fair Work Commission's new jurisdiction, stakeholders' positions, and the Government's commitment for reform.
- The Transport Workers' Union has run a 'Safe Rates' campaign since the Road Safety Remuneration Tribunal was abolished in 2016 urging the Government to establish a new independent tribunal to set standards for the road transport industry. It is only recently that employers and industry have also publicly called for such a body.

Last Cleared By	Martin Hehir
Date Last Cleared	25 October 2022

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2022 - 2023 Budget Estimates
SB22-001577

Issue: Paid Family Domestic Violence Leave
Contact: Martin Hehir, Deputy Secretary
Ph: 02 6121 7328

Key Points

- The Government's ***Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022*** passed the Parliament on 27 October 2022 with support from the Opposition, Australian Greens and other members of the crossbench.
- The existing 5 days' unpaid family and domestic violence leave minimum entitlement under the National Employment Standards (NES) will be replaced with 10 days' paid leave in a 12-month period.
- The entitlement takes effect on 1 February 2023 for employees of businesses other than small business employers and 1 August 2023 for employees of small businesses.
- The new paid leave entitlement:
 - is paid at the employee's full rate of pay – including components like loadings and penalties the employee would have received for the hours they would have worked had they not taken the leave,
 - extends the definition of family and domestic violence to include:
 - conduct of a member of an employee's household, and
 - conduct of current or former intimate partners who do not meet the definition of de facto partner and do not live in the same household.
 - will extend to all Australians when the International Labour Organization Convention (No. 190) concerning Violence and Harassment comes into force for Australia.
- The amendments retain some aspects of the existing unpaid leave entitlement, which:
 - applies to all employees, including full-time, part-time and casual employees, and
 - is available in full on commencement of employment or commencement of the amendments for existing employees.

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2022 - 2023 Budget Estimates
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- The Small Business Assistance package announced in the Budget, provides **\$3.4 million over four years** to deliver a range of holistic supports to help small businesses implement paid family and domestic violence leave. This funding will support:
 - Updates to resources and increased workplace relations advice and education from the Fair Work Ombudsman.
 - Funding to support peak bodies develop tailored workplace relations guidance and support.
 - Commissioning an independent review to assess support to small business and the effectiveness of the legislation.
- In addition, specialist family and domestic violence information, support and training will be also available to small businesses through the existing 1800RESPECT and DV-Alert programs, so they can assist victim-survivors access support services.
- Together, these measures will ensure small business can access the right advice at the right time to provide the best support to their employees experiencing family and domestic violence.
- The department will continue consulting government agencies National Women's Alliances, First Nations stakeholders, small business peak bodies, unions and payroll providers on implementation of the entitlements and the Small Business Assistance Package.

Independent review of the entitlement

- The legislation requires an independent review to be conducted into the operation of the amendments. The review must:
 - assess operation of the amendments
 - consider the impact on small businesses, sole traders and people experiencing family and domestic violence
 - consider both quantitative and qualitative research
 - commence as soon as practicable 12 months from the commencement of Schedule 1 of the Bill on 1 February 2023.
 - provide a written report to the Minister within 3 months of commencement of the review, and
 - table that report in both Houses of parliament within 15 sitting days of that House from the report being given to the Minister.

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2022 - 2023 Budget Estimates
SB22-001577**Regulation Impact Statement**

- The need for paid family and domestic violence leave was subject to extensive consideration by a Full Bench of the Fair Work Commission through its *Family and domestic violence leave review 2021*.
- The Full Bench considered evidence and analysis about providing paid family and domestic violence leave under the award safety net, including considering evidence on the proposed extension of paid leave to casual employees.
- On this basis, the department certified the Fair Work Commission's independent review of family and domestic violence leave as process and analysis equivalent to a Regulation Impact Statement.
- The department estimates the regulatory burden for implementing the Government's policy commitment will be minor, on the basis that the proposal replaces the existing NES entitlement to unpaid family and domestic violence leave.
- The department estimates the total regulatory cost to businesses of \$6.4 million over 10 years, mainly to ensure systems and record keeping of paid family and domestic violence leave balances for all eligible employees are compliant with the new NES standard.
 - The department identified business-as-usual and direct financial costs to businesses arising from the introduction of a paid leave entitlement. These costs were excluded in accordance with the Regulatory Burden Measurement framework.

Key Data*Cost of family and domestic violence on the economy*

- Family and domestic violence already has a substantial cost for victim-survivors and their workplaces.
 - Employers bear significant costs of family and domestic violence in the form of reduced productivity caused by absenteeism, recruitment and retraining costs.
 - The cost of violence against women and children in Australia was estimated \$26 billion per year, including costs relating to health services, criminal justice and lost productivity (KPMG, 2015–16).
 - Flinders University estimates the impact of family and domestic violence costs employers up to \$2 billion per year.

Utilisation of the leave entitlement is expected to be low

- Expert evidence provided to the Full Bench estimates less than one per cent of employees would access a paid family and domestic violence leave entitlement. For example:

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- Dr Stanford of the Centre for Future Work and the Australia Institute estimated between 0.23 and 0.46 per cent of all employees per year would utilise paid family and domestic violence leave, and
- The Victorian Government provided evidence that an average of 0.3 per cent of employees, in three of their largest departments with over 20,000 employees, accessed paid family and domestic violence leave in the past year.

Cost of the leave entitlement is expected to be low

- Based on the anticipated utilisation rate, the cost of the family and domestic violence leave entitlement is estimated to be much lower than the cost of FDV to the economy.
 - Professor Duncan estimated the total annual cost to employers of providing 10 days paid family and domestic leave to award-covered employees (including casuals) would be between \$13.1 million and \$34.3 million per annum.
 - Dr Stanford estimated the cost across the entire Australian workforce (including casuals) range from less than \$100 million per year to \$200 million per year with a high-end utilisation rate.
 - This evidence was heard during the Fair Work Commission review process and was based on the ACTU proposal to provide 10 days paid leave to all employees under awards including casuals. No contradictory economic evidence was produced by other parties in the review.
- In their submission to the Education and Employment Legislation Committee Inquiry, Dr Stanford estimated the incremental wage payouts to workers on domestic violence leave associated with the universal extension of the entitlement are equivalent to less than less than one-fiftieth of one percent of existing payrolls (0.02 percent).

Research

Fair Work Commission Case

- In 2021, the Commission launch a review of family and domestic violence leave in modern awards and the NES. The Commission's extensive review examined submissions from a range of sources.
- In its **16 May 2022** decision, the Full Bench expressed a *provisional view* that it is necessary to include an entitlement in awards for 10 days paid family and domestic violence leave per year for full-time and part-time employees.

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2022 - 2023 Budget Estimates
SB22-001577**Education and Employment Legislation Committee Inquiry**

- On 4 August 2022 the Senate referred the bill to the Education and Employment Legislation Committee for inquiry and report by **1 September 2022**.
- The Committee recommended the Senate pass the Bill and that the Government commission an independent review of the provisions 18 months after commencement in February 2023.

Media

- On 27 October 2022, **Minister for Employment and Industrial Relations the Hon Tony Burke MP** said: *“Family and domestic violence leave has to be a universal entitlement. Women can be victims of domestic violence no matter what job they work, how long they’ve been in that job, what sort of agreement they’re on or how many hours a week they work. In fact, women who are experiencing family and domestic violence are more likely to be employed in casual and insecure work. We can’t leave them behind. Violence doesn’t discriminate – and neither should the law.”*
- During Senate consideration on 26 October 2022, while ultimately supporting passage of the bill, the **Opposition** raised concerns about:
 - impact on small and family business and importance of having information and supports available to small business
 - lack of access to the entitlement for sole traders
 - application of the leave provisions for casual employees, and
 - mandatory reporting obligations when employers hear a disclosure of domestic violence.

Last Cleared By	Martin Hehir
Date Last Cleared	28 October 2022

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2022 - 2023 Budget Estimates
SB22-001577**BACKGROUND*****Fair Work Commission Full Bench process***

- The Fair Work Commission Full Bench commenced a review of family and domestic violence leave (FDV) in modern awards in April 2021.
- In its **16 May 2022** decision, the Full Bench expressed a *provisional view* that it is necessary to include an entitlement in awards for 10 days paid FDV leave per year for full-time and part-time employees.
- The *provisional view* was that the paid leave entitlement should accrue progressively, be subject to a yearly 'cap' of 10 days and be paid at the employee's base rate of pay and should not apply to casuals at this time.

Timeline of interactions with the Fair Work Commission and the Minister

- The **16 May 2022**, decision provided the Commonwealth an opportunity to clarify its intentions regarding any amendment to the NES, should it choose to do.
- On **16 June 2022**, Minister Burke wrote to the President indicating the Government's intent to introduce 10 days paid family and domestic violence leave into the NES as soon as possible.
- In a Statement of **16 June 2022**, the Full Bench sought clarification from the Government of its proposed timeframe for introducing legislation.
- On **28 June 2022**, Minister Burke wrote to the President advising the Government's intention to introduce 10 days' paid FDV leave into the National Employment Standards early in the sitting period beginning 26 July 2022.
- On **30 June 2022**, the Full Bench vacated directions for parties to submit draft model family and domestic violence leave terms. The matter has been listed for mention in early August 2022 so parties can express views on whether further steps need to be taken in the proceedings.
- On **28 July 2022**, the Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 was introduced to the Parliament.
- In a Statement of **11 August 2022**, the Full Bench indicated it did not propose to take any further steps in relation to the paid FDV leave review at this time.

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Issue: Same Job, Same Pay
Contact: Martin Hehir, Deputy Secretary
Ph: 02 6121 7328

Key Points

- The Government's Secure Australian Jobs Plan includes a commitment to ensuring that workers in labour hire or other employment arrangements such as outsourcing receive no less pay than directly engaged employees performing the same work.
- The Government intends to introduce legislation to implement the 'same job, same pay' election commitment in 2023.
- The department has undertaken an initial round of consultation with a range of stakeholders including unions, employer groups, and employers. These sessions were broad-ranging and focused on the current uses of labour hire and views on threshold issues around this policy.
 - A list of stakeholder consultations is at **Attachment A**.
- Issues discussed to date broadly include:
 - the scope of the policy including definitions such as 'labour hire'
 - worker entitlements, including the operation and application of enterprise agreements and ways to identify a comparator to determine the 'same job, same pay' entitlement
 - the rights and obligations of businesses including labour hire and hosts
 - the potential impact on business, industry, the labour market and the economy.
- In addition, the Government has committed to implementing a national approach to labour hire regulation as part of its Plan to Build a Stronger Pacific Family election commitment.

IF NEEDED

- Consultations on the Same Job, Same Pay policy were initial consultations that were designed to allow the department to gain a better understanding of current business operations and workforce arrangements, including the use of labour hire.
- Attendees were not advised that the meetings were in-confidence or that the contents of the discussion could not be disclosed.

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SB22-001578**Department submission to Senate Standing Committee on Education and Employment inquiry into the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022**

- The Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (the Bill) was introduced by Senator Malcolm Roberts (Pauline Hanson's One Nation Party) in February 2022 and restored to the Notice Paper on 27 July 2022.
- The Bill was referred to the Senate Standing Committee on Education and Employment for inquiry. The Committee held a public hearing on 5 October 2022, but the department was not called to appear.
- The Committee handed down its report on 24 October 2022. The Government, Coalition and Greens' Senators recommended that the Bill not be passed. They referred to concerns raised by stakeholders about the Bill, including its limited scope and the lack of clarity concerning its key provisions and definitions.
- The Government supported the broad aim of the Bill and noted the consultation process that is currently underway in relation to the 'same job, same pay' election commitment.
- The department made a submission to the inquiry on 13 September 2022. The submission provided:
 - an overview of the Government's election commitments relevant to the Bill;
 - data on the use of labour hire in the Australian labour market; and
 - international examples of 'same job, same pay' regulation.
- A copy of the submission is at **Attachment B**.

Key Data

- The Australian Bureau of Statistics (ABS) advises that *Characteristics of Employment* is the best long-standing source of information on labour hire as a working arrangement.
- The ABS *Characteristics of Employment* shows that in 2020:
 - there were 112,600 employees registered with and paid by a labour hire firm
 - the median hourly earnings for all labour hire employees registered with and paid by a labour hire firm is \$32.70 per hour compared to \$36.00 per hour for all employees. (However, note that this data does not account for other factors that affect

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earnings such as classification, workplace settings, age, location, experience, etc.)

- Other key data is set out in the department's submission to the inquiry at **Attachment B**.

Research

International examples

- There are international precedents of 'same job, same pay' regulation.
- For example, a number of European countries have implemented regulation to ensure that temporary agency workers (the term used by the European Union for labour hire workers) receive the same pay and conditions as employees directly engaged by the same business.
- In 2008, the European Union issued a Directive on Temporary Agency Work (2008/104/EC) which has been implemented by member states such as Ireland, Germany and the Netherlands, as well as the United Kingdom.
- The department will consider international examples of 'same job, same pay' regulation in the policy development process.

Media

- An ABC Four Corners program focussed on the situation at Qantas and highlighted the Government's 'same job, same pay' election commitment ('Flight Risk: the inside story of the chaos at Qantas' aired 5 September 2022).
- On 14 October 2022, Workplace Express reported on stakeholder consultations that had taken place on workplace relations matters including the 'same job, same pay' policy. It reported that the Minerals Council of Australia (MCA) told the Senate's Education and Employment Legislation Committee on 5 October 2022 that the Department had asked the MCA "not to make public statements about the 'same job, same pay' policy while ... participating with the consultation process."
 - This instruction was not given to the MCA, nor any other stakeholder involved in the 'same job, same pay' consultation process.

Last Cleared By	Martin Hehir
Date Last Cleared	27 October 2022

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Attachment A – Record of consultations

Date	Stakeholder
28 July 2022	Minerals Council of Australia (MCA) <ul style="list-style-type: none"> • BHP • Glencore Australia • Newcrest Mining • Peabody Energy • Rio Tinto • Thiess • Yancoal Australia • Anglo American • Mitsubishi Development
29 July 2022	BHP
5 August 2022	Australian Public Service Commission Department of Finance
8 August 2022	Victorian Government
8 August 2022	ACT Government
8 August 2022	Pacific Australia Labour Mobility (PALM) Scheme
9 August 2022	Recruitment, Consulting and Staffing Association (RCSA)
10 August 2022	RegTech Awards Compliance Strategic Working Group
12 August 2022	Department of Finance
16 August 2022	Peak employer groups <ul style="list-style-type: none"> • Australian Resources and Energy Employer Association (AREEA) • National Farmers' Federation (NFF) • Australian Constructors Association (ACA) • Master Builders Association (MBA) • Australian Industry Group (Ai Group) • Australian Chamber of Commerce and Industry (ACCI)

Date	Stakeholder
17 August 2022	Business Council of Australia (BCA) <ul style="list-style-type: none">• BHP• Compass Group• Corrs Chamber Westgarth• Programmed Skilled Workforce• Qantas• Woolworths• RCSA
24 August 2022	Australian Council of Trade Unions (ACTU)
9 September 2022	Qantas



Australian Government
Department of Employment
and Workplace Relations

Inquiry into the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022

Submission of the Department of
Employment and Workplace Relations to the
Senate Education and Employment
Legislation Committee

September 2022

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The Government's election commitments on labour hire	3
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Table 1: Trends in labour hire employees, <i>Characteristics of Employment</i> , 2008 to 2020.....	5
Table 2: Characteristics of labour hire employees, 2020	5
Table 3: Labour Supply Services <i>Jobs in Australia</i> , 2011-12 to 2018-19	6
International examples of 'same job, same pay' regulation	7

Inquiry into the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022

Introduction

The Department of Employment and Workplace Relations has portfolio responsibility for the *Fair Work Act 2009* (Fair Work Act) and for implementing the *Secure Australian Jobs Plan* announced by the Australian Government before the 2022 Federal Election. Most relevantly, the *Secure Australian Jobs Plan* stated that the Government will ensure that workers employed through labour hire or other employment arrangements such as outsourcing will not receive less pay than workers employed directly.

The Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (the Bill) was introduced by Senator Malcolm Roberts in February 2022 and restored to the Notice Paper on 27 July 2022.

The Explanatory Memorandum for the Bill states “Where there has been a failure of balanced market power this new provision can be employed to restore fairness.” This aligns with the policy intent of the Government’s ‘same job, same pay’ election commitment – to restore fairness between labour hire and directly engaged workers.

This submission provides an overview of the Government’s election commitments relevant to the Bill and includes other background information such as data on use of labour hire in the Australian labour market and international examples of ‘same job, same pay’ regulation.

The Government’s election commitments on labour hire

Under the Fair Work Act, a labour hire employee and a directly employed employee may be engaged under different industrial instruments, which can result in workers who are on the same job site and undertaking the same work receiving different wages and entitlements.

In 2021, the Senate Select Committee on Job Security heard evidence of labour hire and other non-standard arrangements having a range of negative impacts, such as being misused to undercut the pay and conditions of directly employed employees and limiting workers’ ability to exercise their rights in the workplace. As noted by the Senate Select Committee, ‘evidence indicates that, in many cases, a host’s enterprise agreement does not apply to their labour hire workers, resulting in differential treatment between these individuals and those directly employed by the host.’¹

The Senate Select Committee also noted a considerable body of research into the safety and health implications of the utilisation of labour hire and other types of temporary and insecure arrangements in the mining industry. These included a higher incidence of fatalities, poorer physical and mental health and a poorer knowledge of, and access to, regulatory employment rights.²

¹ Senate Select Committee on Job Security, Parliament of Australia, *Third interim report: labour hire and contracting* (Report, November 2021), [2.80].

² Senate Select Committee on Job Security, Parliament of Australia, *Third interim report: labour hire and contracting* (Report, November 2021), [2.103].

Under the *Secure Australian Jobs Plan*, the Government has committed to delivering more secure jobs, better pay and a fairer workplace relations system. This includes ensuring that labour hire workers, and workers engaged under other non-standard arrangements such as outsourcing, receive no less than directly engaged employees performing the same work.

The Government has acknowledged there are legitimate uses for labour hire, such as instances where employers need to use labour hire to provide surge capacity or provide important expertise that is not available within its own workforce. Businesses across all sectors of the economy can utilise labour hire to complement their existing workforce with specialist skills on a short-term basis. However, the Government is committed to ensuring that labour hire is not misused to undercut the pay and conditions of directly engaged employees performing the same work regardless of the industry in which they work.

The Government is currently undertaking a consultation process to inform the implementation of the 'same job, same pay' principle, recognising the complexities of this measure. The Government is consulting with a range of stakeholders including unions, employer groups, and employers with a view to introducing legislation in the first half of 2023. The Government is consulting on a broad range of issues, including the scope of the reform, the various definitions of 'labour hire', worker entitlements, comparators, the operation and application of enterprise agreements, the rights and obligations of businesses, including labour hire and hosts, and the potential impact on business, industry, the labour market and the economy.

In addition, the Government has committed to implementing a national approach to labour hire regulation as part of its *Plan to Build a Stronger Pacific Family* election commitment. A nationally consistent approach to labour hire regulation will help to protect workers by promoting greater compliance with workplace and other relevant laws by labour hire companies.

Labour hire in the Australian labour market

The Australian Bureau of Statistics (ABS) provides a range of data related to labour hire work, workers and businesses. Consistent with advice from the ABS, *Characteristics of Employment* is the best long-standing source of information on labour hire as a working arrangement.³ Like the Labour Force Survey data, *Characteristics of Employment* describes how Australians are working at a single point in time.

Table 1 shows the overarching trend and incidence of labour hire employees. Table 2 details various characteristics of labour hire employees.

³ "The best source of information on labour hire as a working arrangement in Australia is the annual *Characteristics of Employment* supplement. This provides information on whether employees were registered with a labour hire firm or an employment agency, and also whether they were paid by a labour hire firm or an employment agency." (Select Committee on Job Security, Answers to Questions on Notice, ABS – Answers to written questions on notice from Senator Sheldon, 22 November 2021, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Additional_Documents?docType=Answer%20to%20Question%20on%20Notice).

Table 1: Trends in labour hire employees, *Characteristics of Employment*, 2008 to 2020

	2008	2011	2014	2016	2018	2020
Employees registered with a labour hire firm	218,300	228,800	376,000	403,600	399,800	339,400
(% all employees)	(2.5%)	(2.5%)	(3.9%)	(4.1%)	(3.8%)	(3.3%)
Employees registered with and paid by a labour hire firm	131,400	141,700	113,100	119,300	126,300	112,600
(% all employees)	(1.5%)	(1.5%)	(1.2%)	(1.2%)	(1.2%)	(1.1%)

Sources: ABS, *Forms of Employment*, November 2011, 2008-2011; ABS, *Characteristics of Employment*, August 2014 – August 2020, 2014-2020, published data. These data are collected alongside the Labour Force Survey and describe the labour market at a single point in time, in respect of a specific week.

Notes: Data for 2008 and 2011 are for November, data for 2014-2020 are for August. Labour hire data are not reported every year.

Table 2 below shows the median hourly earnings for all labour hire employees registered with and paid by a labour hire firm is \$32.70 per hour compared to \$36.00 per hour for all employees (however, note that this data does not account for other factors that affect earnings such as classification, workplace settings, age, location, experience, etc.).⁴

Table 2: Characteristics of labour hire employees, 2020

	Employees registered with and paid by a labour hire firm	Employees registered with a labour hire firm	All employees
Gender			
Male	64.9%	57.4%	50.4%
Female	35.1%	42.6%	49.6%
Full-time or part-time			
Full-time	83.3%	64.1%	67.4%
Part-time	21.2%	36.5%	32.5%
Employment status			
Casual*	85.9%	66.4%	21.9%
Permanent**	14.1%	33.6%	78.1%
Length of time with employer			
Under 12 months	61.8%	53.6%	18.3%
12 months or more	38.2%	46.4%	81.7%
Median hourly earnings			
All employees	\$32.70	\$33.20	\$36.00

⁴ ABS, *Characteristics of Employment*, August 2020, published data and unpublished TableBuilder.

Source: ABS, *Characteristics of Employment, August 2020*, published data and unpublished TableBuilder.

Notes: * 'Employees without paid leave entitlements' is used by the ABS as the primary measure of casual employees. *** Employees with paid leave entitlements' is used by the ABS to define permanent employees.

Labour hire data can also be sourced from the ABS *Jobs in Australia* publication. However, due to the different methodology and scope of the underlying data sources, there are key differences between the household survey-based *Characteristics of Employment* estimates and the administrative data-based *Jobs in Australia* estimates. The ABS is developing a dedicated Labour Hire page on the ABS website, which will be released by the end of 2022, to provide clear and coherent information on labour hire employment in Australia.

Data from the latest *Jobs in Australia* publication are shown in Table 3.⁵ Using this publication, labour hire employees are identified by reference to the main activity of their employer/business, which in this case is Labour Supply Services.⁶

Table 3: Labour Supply Services *Jobs in Australia*, 2011-12 to 2018-19

	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
People employed in Labour Supply Services* (% all persons)	271,319 (2.1%)	258,125 (2.0%)	270,742 (2.1%)	277,907 (2.1%)	288,672 (2.2%)	313,834 (2.3%)	359,872 (2.6%)	381,075 (2.7%)
Jobs in Labour Supply Services** (% all jobs)	584,311 (3.2%)	540,623 (3.0%)	563,460 (3.1%)	586,707 (3.2%)	599,399 (3.2%)	660,318 (3.4%)	766,211 (3.9%)	797,712 (4.0%)

Source: ABS, *Jobs in Australia*, 2011-12 to 2018-19, unpublished TableBuilder, Labour Supply Services as defined using ANZSIC Class 7212.

Notes: *Refers to people employed in Labour Supply Services at any point in the year in their main job. **A person can hold several jobs during the year, either concurrently or consecutively.

The key technical differences between the *Characteristics of Employment* data and the *Jobs in Australia* data are summarised below.

- There are limited demographic or employee characteristics information from *Jobs in Australia* (limited to the small selection of characteristics available from tax data).
- The *Jobs in Australia* data are cumulative for the financial year, rather than for a reference week (as in *Characteristics of Employment*). It captures employed people who worked in Labour Supply Services at any time during the year and so numbers will be higher than those in *Characteristics of Employment*.

⁵ The next release is scheduled for 8 November 2022.

⁶ Labour Supply Services includes contract labour service, labour on-hiring service, labour staffing service, labour supply service and temporary labour hire service. This includes the administrative and support staff of labour hire firms as well as labour hire employees.

- The *Jobs in Australia* jobs data are affected by job switching and multiple-job-holding: a person can have several jobs throughout the year with one or many employers, some of which may be held concurrently with others.⁷ This will mean higher numbers than in *Characteristics of Employment* which counts people.
- *Jobs in Australia* data of labour hire employees include those who are identified by reference to the main activity of their employer/business, which in this case is Labour Supply Services. This includes both labour hire workers and the administrative and support staff of labour hire businesses.
- *Jobs in Australia* data include labour hire employees who are short-term non-residents in the country, as well as owner managers, including independent contractors, coded to Labour Supply Services. These workers are all out of scope of *Characteristics of Employment* and so are not included in that data.

International examples of ‘same job, same pay’ regulation

There are international precedents of ‘same job, same pay’ regulation. For example, a number of European countries have implemented regulation to ensure that temporary agency workers (the term used by the European Union for labour hire workers) receive the same pay and conditions as employees directly engaged by the same business.

In 2008, the European Union issued a Directive on Temporary Agency Work (2008/104/EC) which has been implemented by member states such as Ireland, Germany and the Netherlands, as well as the United Kingdom. The Agency Workers Regulations 2010 Guidance, published by the Department for Business, Energy and Industrial Strategy, provides extensive guidance on the implementation of the United Kingdom’s *Agency Workers Regulations 2010*.⁸

Biggs and Toms (2015) produced a conference paper examining the influence of the *Agency Workers Regulations 2010* on the UK Economy:⁹

- The Paper did not find that there had been a reduction in agency worker utilisation or an increase in sub-12-week placements that mean the agency worker does not satisfy the qualification period for equal treatment.
- Quantitative data relating to rates of pay for agency workers with tenure of 12 weeks or more suggested that systemic avoidance by employers of the Regulations was unlikely to occur. The authors also referred to their interviews with recruitment consultants who stated a willingness to comply with the Regulations, and data about agency worker utilisation and tenure.
- Data showed significant wage increases for agency workers with tenure of 12 weeks or more.

⁷ *Jobs in Australia* will capture additional people job-switching due to the longer time period, but it only counts each person once.

⁸ Department for Business, Energy and Industrial Strategy (2019) *Agency Workers Regulations 2010 Guidance*, Gov.uk website, accessed 6 September

⁹ Biggs, D and Toms, S (2015) *The Agency Workers Directive and its Influence on the UK Economy*, CIPD Applied Research Conference 2015, accessed 5 September 2022.

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Issue: Gender Equity
PBS Pg No.
Contact: Martin Hehir, Deputy Secretary
Ph: 02 6121 7328

Key Points

- The gender pay gap, calculated from average weekly ordinary full-time earnings, is 14.1% (ABS Average Weekly Earnings, May 2022):
 - This is up slightly from 13.8% in November 2021
 - The gender pay gap has steadily declined over time, however, has remained roughly between 14% and 19% for the last two decades.
- The Government is committed to closing the gender pay gap and addressing gender inequity through a range of measures to make the workplace relations system fairer for women.
- It is strengthening the Fair Work Commission's ability to order pay increases for workers in low paid, female dominated industries by:
 - Making gender equity an object of the Fair Work Act, a Modern Awards Objective, and a Minimum Wages Objective
 - Introducing a statutory Equal Remuneration Principle to guide the way the Fair Work Commission considers pay equity cases, and
 - Establishing two new Expert Panels in the Fair Work Commission – one for Pay Equity and one for the Care and Community Sector to provide the Commission with the expertise it needs to effectively deal with gender equity and care and community sector matters.
- The Fair Work Act will also be amended to promote pay transparency by prohibiting pay secrecy clauses, so that employees have the right to disclose their pay if they want to.
- As an outcome of the Jobs and Skills Summit, the Fair Work Act will be amended to provide stronger access to flexible working arrangements and unpaid parental leave so families can better share work and caring responsibilities.

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- The Government has also committed to amending the Fair Work Act to provide stronger access to unpaid parental leave. This will align with changes to the Paid Parental Leave scheme, administered by the Department of Social Services, that will come into effect between 1 July 2024 and 1 July 2026.
- As a longer-term measure the Government will initiate a detailed consultation and research process considering the impact of workplace relations settings (such as rostering arrangements) on work and care, including childcare.

Gender Equity Measures in the Secure Jobs and Better Pay Bill

Making gender equity an object of the Fair Work Act

- The Government will implement this commitment by amending the objects of the Fair Work Act, and the modern awards and minimum wage objectives, to include gender equity as a foundational element of workplace relations framework in Australia.
- The Fair Work Commission will be required to take gender equity into account when dealing with modern awards, and to take gender equity into account when reviewing and setting minimum wages.
- When considering gender equity, the Commission will consider not only the effect on pay equity and equal remuneration, but also gender-based undervaluation of work and workplace conditions that facilitate women's full economic participation.

Equal Remuneration Principle

- The existing equal remuneration provisions in the Fair Work Act are not operating as intended, as they are interpreted by the Fair Work Commission as requiring a male comparator, which is often not available.
- In implementing its election commitment, the Government will amend the equal remuneration provisions to specify that the requirement for a male comparator is not required, and to allow the Commission to consider whether the work has been historically undervalued based on gender.
- The amendments will also ensure that when deciding work value cases (which vary modern award minimum wages), the Commission's assessment of work value is free of gender-based assumptions or biases and considers whether historically the work has been undervalued because of such assumptions.

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- \$20.2 million over four years has been provided to the Fair Work Commission to establish two new Expert Panels in the Fair Work Commission backed by a dedicated research unit, consistent with the Government's commitment.
 - This is an ongoing measure and includes funding for 4 full-time Commissioners, each supported by an Associate, with a research unit of 10 ASL supporting the Panels.

Table 1: Budget allocation for Expert Panels (\$millions)

2022-23	2023-24	2024-25	2025-26	Total
\$3.5m	\$6.2m	\$5.3	\$5.3	\$20.2

- A Pay Equity Expert Panel will be constituted to hear equal remuneration and work value applications. It will include members with qualifications in relevant fields, such as gender pay equity and anti-discrimination.
- A Care and Community Sector Expert Panel will be constituted to hear award variation applications that relate to the care and community sector. It will include experts in the care industry to ensure the Commission has the expertise and knowledge to deal with emerging workforce challenges and improve conditions for Australia's fastest growing workforce.
- A joint Pay Equity and Care and Community Sector Expert Panel will be constituted where an application is relevant to the work of both the Pay Equity and Care and Community Sector panels.
- The research unit, under the direction of the President and Expert Panels, will add to the Commission's body of knowledge and help support the work of the Panels.

Gender Equity Measures from the Jobs and Skills Summit***Right to request flexible working arrangements***

- Currently anyone can request flexibility, but certain employees have a statutory entitlement to request flexible working arrangements under the Fair Work Act. This is to support employees who are parents or carers of a child of school age or younger, carers, persons with a disability, aged 55+ or experiencing family or domestic violence.
- An employer may only refuse a formal request for flexible working arrangements if they have reasonable business grounds.

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- However, the Fair Work Act contains minimal guidance on how employers must respond to a request. There is also no appeal or enforcement mechanism available to most employees.
- While the Fair Work Commission has inserted a model procedure for responding to flexible work requests into modern awards, this entitlement is not available to all national system employees.
- The Secure Jobs, Better Pay Bill will strengthen the right to request flexible working arrangements, which will assist employees to negotiate workplace flexibilities that suit both them and their employer. It will also make it easier for employees to get help if they cannot agree an arrangement with their employer. This will be done by:
 - including a new statutory procedure for dealing with requests at the workplace level (adopting the existing Model Term in modern awards). This procedure will require employers to discuss a request made under section 65 with the employee and genuinely try to reach an agreement before responding to the request. If an agreement cannot be reached, the employer will be required to provide a written refusal letter, which must include the business ground for the refusal; and
 - allowing the Fair Work Commission to arbitrate disputes about flexible working arrangements (in addition to its existing powers to mediate or conciliate).
- The new statutory procedure for dealing with requests at the workplace level legislates business-as-usual behaviour for most businesses as it implements the substance of the model provision from modern awards in the National Employment Standards.
- Arbitration is generally used as a last resort and requests for the FWC to deal with disputes are expected to remain low. Its presence will incentivise employers to make a meaningful attempt at reconciling a suitable flexible working arrangement.
- Increasing the uptake of flexible work will assist employees to maintain employment with their employers, ensuring they retain skills and experience, which benefits both the employee and employer.

Unpaid parental leave

- The Government has committed to amending the unpaid parental leave (UPL) provisions in the Fair Work Act to better support parents to balance and share work and caring responsibilities.

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- Current UPL provisions make it difficult for employees to jointly share care responsibilities and gradually return to work after the birth or adoption of their child without losing their right to UPL.
 - The current UPL provisions provide an entitlement to 12 months UPL, with up to 30 days that can be taken flexibly. Employee couples cannot take UPL concurrently, apart from 8 weeks that may be taken concurrently in minimum 2-week blocks.
- The Government has announced amendments to modernise and improve flexibility of the Paid Parental Leave scheme that will start to take effect from 1 July 2024. Amendments will be made to align UPL with the changes to Paid Parental Leave, by increasing the amount of UPL that can be taken flexibly and removing restrictions on employee couples taking concurrent leave.
- The department will work with the Department of Social Services (which is responsible for the Paid Parental Leave scheme) to ensure UPL and Paid Parental Leave are best-aligned to support working parents.

Key Data

- Currently, Australia's national gender pay gap is 14.1 per cent.
- The national gender pay gap is calculated by WGEA using the latest data from the Australian Bureau of Statistics (ABS).
- As of May 2022, women's average weekly ordinary full-time earnings across all industries and occupations were \$1,609.00 compared to men's average weekly ordinary full-time earnings of \$1,872.90. This means that on average, women earned \$263.90 less than men a week.

Full-Time, Average Weekly Ordinary Time Earnings, May 2022

Men (\$/week)	Women (\$/week)	All (\$/week)	Pay gap (\$/week)	Pay gap (%)
\$1,872.90	\$1,609.00	\$1,769.80	\$263.90	14.1%

Source: ABS, Average Weekly Earnings, May 2022, seasonally adjusted.

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- The gender pay gap is persistent, complex and influenced by several interrelated factors. For example:
 - Men do less and women do more unpaid care and domestic labour – women are more likely than men to have more career interruptions and work reduced hours to perform unpaid caring and domestic work (refer WGEA (2016) Unpaid Care Work and the Labour Market).
 - Industries and occupations are segregated – the majority of Australian employees work in industries dominated by one gender. Only 46.5% of employed Australians work in gender mixed organisations (refer WGEA (2019) Gender Segregation in Australia's Workforce Fact Sheet).
 - Women work fewer paid hours than men – as at May 2021, full-time non-managerial men worked more ordinary time hours per week (2.3 hours) than women (ABS Employee Earnings and Hours, May 2021).
 - There are inequities in education, work experience, and seniority – differing levels of qualifications, training, tenure and experience contribute to a skills differential between men and women (refer KPMG (2022) She's Priced(less): The economics of the gender pay gap).
 - Discrimination remains – when the contribution of the above factors to the gender pay gap are taken into account and a gap still remains, gender discrimination may be the reason (KPMG (2022) She's Priced(less): The economics of the gender pay gap).

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Last Cleared By	Martin Hehir
Date Last Cleared	25 October 2022

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2022 - 2023 Budget Estimates
SB22-001579**BACKGROUND****Fair Work Act Framework*****Pay equity***

- The FW Act provides two avenues to advance gender-based pay equity claims:
 - Equal Remuneration Orders (EROs) (Part 2-7, section 302) may be sought to ensure that there is equal remuneration for men and women workers for work of equal or comparable value. EROs can be used to secure above award pay increases aligned more closely with bargained or market rates and effect pay rates set in all industrial instruments.
 - Award variation applications (sections 156 - 158) may be brought to increase minimum award wages on work value grounds, including gender undervaluation.
- The FW Act also includes provisions dealing with discrimination, including:
 - Provisions prohibiting discriminatory terms in modern awards and enterprise agreements (sections 153, 194 and 195).
 - Provisions prohibiting adverse action being taken for a discriminatory reason or termination of employment on discriminatory grounds (section 351 and paragraph 772(1)(f)).

Right to request flexible working arrangements

- Section 65 of the Fair Work Act prescribes the method for making and responding to requests for flexible working arrangements. An employee may only make a request if the employee:
 - has completed at least 12 months of continuous service with the employer immediately before making the request; or
 - is a regular casual employee of the employer who, immediately before making the request, has been employed on that basis for a sequence of periods of employment during a period of at least 12 months and has a reasonable expectation of continuing employment on a regular and systematic basis.
- Employees can make a request for flexible working arrangements if any of the circumstances listed under section 65(1A) apply to them, namely if the employee:
 - is the parent, or has responsibility for the care, of a child who is school age or younger;
 - is a carer (within the meaning of the Carers Recognition Act 2010 (Cth));
 - has a disability;
 - is 55 or older;
 - is experiencing violence from a member of the employee's family; or
 - provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.
- Section 65 of the Fair Work Act requires that:
 - the request must be in writing and set out the details of the change sought and the reasons for the change;
 - an employer must respond to the employee's request in writing within 21 days, stating whether or not the request is granted; and

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- an employer may refuse the request only on reasonable business grounds, and if the employer refuses the request, must provide written details of the reasons for the refusal.

Right to request flexible working arrangements – dispute resolution

- Section 44(1) of the Fair Work Act provides that an employer must not contravene a provision of the NES. An employer who does so may be liable to a civil remedy order, such as a pecuniary penalty order. However, section 44(2) of the Fair Work Act specifically provides that an order cannot be made in relation to the refusal of a request under section 65(5) on reasonable business grounds. This means that an employer's decision to refuse a request on reasonable business grounds cannot be subject to court challenge.
- In addition, the Fair Work Commission may only deal with a dispute about whether an employer had reasonable business grounds to refuse a request for flexible working arrangements under section 65(5) if the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the Commission dealing with the matter.

Relevant inquiries

Productivity Commission Inquiry into Carer Leave

- The Productivity Commission is undertaking an inquiry to examine the potential impact of amending the National Employment Standards to provide for a minimum statutory entitlement to extended unpaid carer's leave for national system employees providing informal care to older people who are frail and living at home.
- The Productivity Commission is due to release a draft report in **January 2023**.

Senate Inquiry into Work and Care

- The Senate Select Committee on Work and Care (chaired by Senator Barbara Pocock, Australian Greens) is inquiring into the impact that combining work and care responsibilities has on the wellbeing of workers, carers, and those they care for. The committee will consider evidence on the extent and nature of work and care arrangements, the adequacy of current support systems, and effective work and care policies and practices in place in Australia and overseas.
- The Committee published its interim report on **18 October 2022**.
- The interim report included the following recommendations relevant to the workplace relations system:
 - **Recommendation 2**
The committee recommends that the Australian Government develop an analysis of care work classifications and wage structures to systematically address underpayments and lift wages in the care sector. Such an analysis should: consider the variability and value of work across the care sector; establish the interrelationships across care types; and recognise the inherent value of care work.
 - **Recommendation 3**
The committee recommends that the Australian Government amend the Fair Work Act 2009, including section 65 of that Act, to:
 - make the right to request flexible work available to all workers and to remove the stigma attached to its use when confined to carers;
 - replace the 'reasonable business grounds' provision at section 65(5) under which employers can refuse a flexible working

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- arrangement, with refusal only on the grounds of 'unjustifiable hardship';
- introduce a positive duty on employers to reasonably accommodate flexible working arrangements;
- require consultation with workers about flexibility requests; and
- revise sections 738 and 739 of the Act to introduce a process of appeal to the Fair Work Commission, for decisions made by employers under section 65 refusing to allow flexible work arrangements on the grounds of unjustifiable hardship, or on 'reasonable business grounds'.
- **Recommendation 4**
The committee recommends that the Department of Employment and Workplace Relations investigate legislative reforms to the Fair Work Act 2009 and any other associated workplace laws, to enact a 'right to disconnect' from work. This right should:
 - enable and support productive work from home and flexibility of work;
 - protect the right of workers to disconnect from their job outside of contracted hours and to enforce this right with their employer;
 - place a positive duty on employers to reasonably accommodate the right wherever possible; and
 - allow employees to appeal to the Fair Work Commission where the right is not being enacted by employers.
- **Recommendation 5**
The committee recommends that the Australian Government amend the Fair Work Act 2009 to provide improved rostering rights for employees, and in particular working carers, by:
 - ensuring employers implement rostering practices that are predictable, stable and focused on fixed shift scheduling (for example, fixed times and days); and
 - amending section 145A of the Act to require employers genuinely consider employee views about the impact of proposed roster changes, and take the views of the employee, including working carers, into consideration when changing rosters and other work arrangements.

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Agency	Issue
Workplace Gender Equality Agency (WGEA)	Promoting and improving gender equality in Australian workplaces in accordance with the <i>Workplace Gender Equality Act 2012</i> e.g. through reporting frameworks to develop industry benchmarks.
Office for Women	Works across government to deliver policies and programs to advance gender equality. Responsible for implementing: <ul style="list-style-type: none"> • Gender responsive budgeting • National Strategy to achieve gender equality • Women's Economic Security Taskforce • Public gender pay gap reporting commitments
Department of Employment and Workplace Relations (Employment and Workforce Group)	Women's participation in the labour market.
Department of Education	Early childhood and childcare subsidy
Australian Public Service Commission	Addressing the gender pay gap in the public service

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Issue: Wages growth
Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

Government action:

- The Government has committed to growing wages and driving productivity:
 - In the Government's first week it made a **submission to the Annual Wage Review arguing that wages of low-paid workers shouldn't go backwards**. The Commission delivered a 5.2 per cent increase to the national minimum wage and 4.6 per cent increase for all other award wages, subject to a \$40 per week minimum. This benefited up to 2.7 million employees.
 - The Government has also made a **submission to the Fair Work Commission calling for a pay increase for all aged care workers**.
 - The Government is pursuing **gender equity and women's economic security** with plans to:
 - make gender pay equity an object of the *Fair Work Act*
 - introduce a statutory Equal Remuneration Principle to help guide the way the Commission considers equal remuneration and work value cases, and
 - set up two new Expert Panels for Pay Equity and Care & Community Sector.
 - The Government has committed to **getting bargaining moving again** to ensure it is a key enabler of productivity growth, which will lead to sustainable wages growth.
 - The Government has also committed to:
 - ensuring fair minimum standards for gig workers.
 - ensuring workers employed by labour hire get the same pay as directly employed workers for the same job, and
 - limit the ability of employers to threaten to unilaterally cancel an enterprise agreement as a way to cut pay and conditions.

Recent wages growth:

Quarterly results

- Over the June quarter 2022, the Wage Price Index (WPI) increased by 0.7 per cent, equal to the increase of 0.7 per cent in the March quarter 2022.

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- Private sector WPI increased by 0.7 per cent, equal to the increase over the March quarter 2022.
- Public sector WPI increased by 0.6 per cent, equal to the increase over the March quarter 2022.

Annual results:

- Over the year to the June quarter 2022, the WPI increased by 2.6 per cent compared to 2.4 per cent over the year to the March quarter 2022 and 1.7 per cent over the year to the June quarter 2021.
 - Private sector WPI increased by 2.7 per cent compared to 2.4 per cent over the year to the March quarter 2022.
 - Public sector WPI increased by 2.4 per cent compared to 2.2 per cent over the year to the March quarter 2022.
- As noted by Michelle Marquardt, head of Prices Statistics at the Australian Bureau of Statistics (ABS): *“After three quarters of consistent wage growth, driven mostly by wage rises across the private sector, the annual rate of growth was 2.6 per cent. This is the highest annual rate of wages growth since September 2014.”*

Table 1: Wage Price Index by sector, June quarter 2022

	Quarterly change (%)			Annual change (%)		
	Private	Public	All	Private	Public	All
Sep-21	0.6	0.6	0.6	2.4	1.6	2.2
Dec-21	0.7	0.7	0.7	2.4	2.1	2.3
Mar-22	0.7	0.6	0.7	2.4	2.2	2.4
Jun-22	0.7	0.6	0.7	2.7	2.4	2.6

Real Wages Growth

- The latest data from the Australian Bureau of Statistics (ABS) show that annual real wages have been in decline since December 2021 (when real wages decreased by 1.2 per cent over the year).
- Over the year to the June quarter 2022, real wages decreased by 3.3 per cent.
- The decline in real wages is in large part due to higher levels of inflation. The **Consumer Price Index (CPI) increased by 6.1 per cent** over the year to the June quarter 2022.
 - Latest CPI data shows an increase of 7.3 per cent over the year to the September quarter 2022.
 - Comparative wages data will be released on 16 November 2022.

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- The above average rise in inflation is due to a range of international factors, such as the war in Ukraine and supply chain disruptions, and domestically, natural disasters and the strength of the home-building sector.
- The 2022-23 Budget forecasts that inflation will peak in December this year, before falling in 2023 and gradually returning to within the Reserve Bank's inflation target (of between 2-3 per cent) by 2024-25.
- The Budget states that *"the expected pick up in nominal wages and forecast easing in inflation over the course of the next 2 years is expected to result in real wages beginning to modestly rise by the end of 2023-24."*

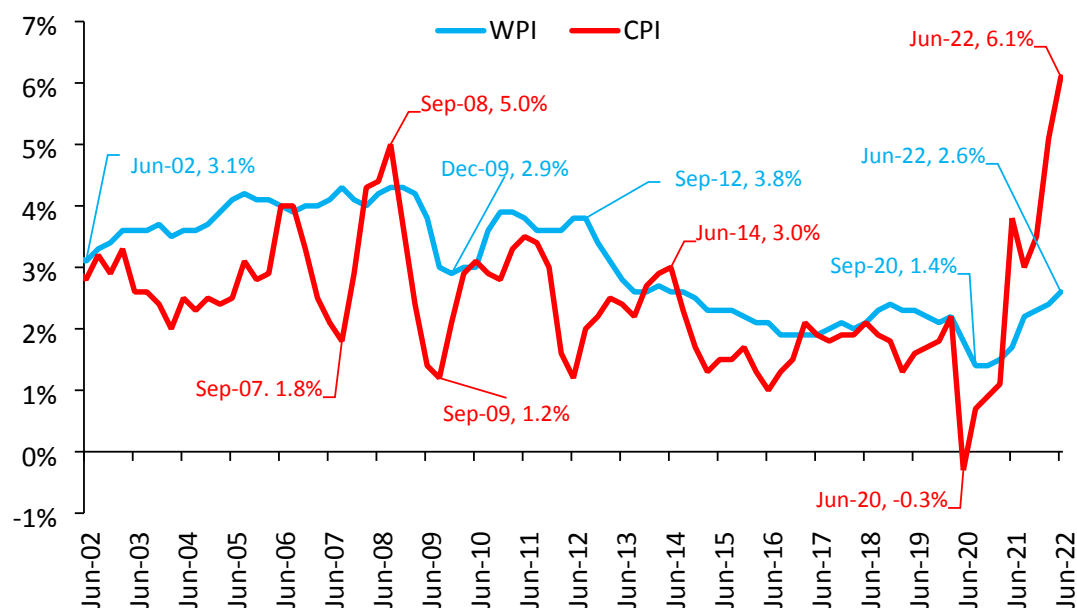
Table 2: Government forecasts of wages growth and inflation (percentage growth)

	2021-22 (actual)*	2022-23	2023-24	2024-25	2025-26
Wage Price Index	2.6	3 ³ / ₄	3 ³ / ₄	3 ¹ / ₄	3 ¹ / ₂
Consumer Price Index	6.1	5 ³ / ₄	3 ¹ / ₂	2 ¹ / ₂	2 ¹ / ₂
Calculated real wages growth based on actuals/forecasts					
Real Wages Growth	-3.3	-2	¹ / ₄	³ / ₄	1

Source: Wage Price Index (WPI) and Consumer Price Index (CPI) forecasts are from the 2022-23 Budget. Real wages growth has been calculated based on the WPI and CPI forecasts. Forecasts are through the year growth to the June quarter. *These are actual figures using ABS, *Wage Price Index*, and ABS, *Consumer Price Index*.

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2022 - 2023 Budget Estimates
SB22-001581**Key Data****Chart 1: Wage Price Index and Consumer Price Index, June 2002 to June 2022**

Sources: ABS, Wage Price Index, June 2022, ABS, Consumer Price Index, June 2022.

Table 3: Annual growth, per cent, September 2020 to June 2022

	WPI	CPI	Real wages growth
Sep-20	1.4	0.7	0.7
Dec-20	1.4	0.9	0.6
Mar-21	1.5	1.1	0.4
Jun-21	1.7	3.8	-2.1
Sep-21	2.2	3.0	-0.8
Dec-21	2.3	3.5	-1.2
Mar-22	2.4	5.1	-2.6
Jun-22	2.6	6.1	-3.3
Sep-22	TBC 16/11	7.3	TBC 16/11

Sources: ABS, Wage Price Index, June 2022, seasonally adjusted data; ABS, Consumer Price Index, September 2022.

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2022 - 2023 Budget Estimates
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		1 year (%)	Highest annual growth* since	5 years (%)	10 years (%)
Wage Price Index (WPI) (to June 2022)	Private	2.7	September 2014 (total only)	2.1	2.2
	Public	2.4		2.2	2.4
	Total	2.6		2.1	2.2
Average Annualised Wage Increases (AAWI)^a (to June 2022)	Private	2.7	June 2019 (total only)	2.8	3.0
	Public	2.5		2.4	2.8
	Total	2.6		2.6	2.9
Average Earnings National Accounts (AENA)^b (to June 2022)	Total	3.4	March 2021	2.6	2.0
Average Weekly Ordinary Time Earnings (AWOTE)^c (to May 2022)	Total	1.9		2.8	2.8
Median earnings^d (to August 2021)	Total	4.3	2020	3.7	2.9
Australian public service median wage (non-SES)^e (to December 2021)		3.0		N/A	N/A
National Minimum Wage (NMW) rate^f (July 2022)		5.2	2006	3.2	3.0
Real wage growth^g (to June 2022)		-3.3		-0.5	-0.1
Consumer Price Index (to September 2022)		7.3	June 1990	2.9	2.3
Employee Living Cost Index (to June 2022)		4.6	March 2011	1.9	1.6

* to one decimal place, based on published calculations where available; no date is given if previous period was higher

a) AAWI refers to average annualised wage increase in federally registered enterprise agreements. The figures in the table are for agreements approved during 1, 5 and 10 year periods to 31 June 2022 (i.e. average wage increase for all approved agreements over specified period).

b) AENA refers to Average Earnings in the National Accounts, it is average compensation per employee, seasonally adjusted.

c) AWOTE is the average weekly ordinary time earnings for full-time adult employees from ABS Average Weekly Earnings.

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- d) Median earnings for employees (excluding Owner Managers of Incorporated Enterprises) from ABS Characteristics of Employment.
- e) The APS median base wage; refers to all non-SES employees.
- f) Since 1 July 2022, the NMW rate has been \$812.60 per week, or \$21.38 per hour. In the past the Fair Work Commission has increased all award classification wages and the national minimum wage by both percentage and dollar amounts. In the years in which the Commission has awarded a dollar increase, award classification wages would have increased by different percentage amounts.
- g) Real wage growth refers to the Wage Price Index deflated by the Consumer Price Index.

Research

- NIL

Media

Reserve Bank of Australia (RBA), Statement on Monetary Policy, August 2022

- *“The tight labour market is expected to result in stronger wages growth over the period ahead, but growth in labour costs is expected to be below the rate of inflation for a time.”*
- *“An increasing share of firms in liaison and business surveys have reported that they are paying larger wage increases this year, including because of the recent decision by the Fair Work Commission on minimum and award rates of pay.”*
- *“Recent high inflation outcomes have also been a factor in some recent wage negotiations.”*
- *“Broader measures of labour income growth are expected to increase faster than the Wage Price Index over the forecast period, as workers switch jobs in pursuit of higher pay and employers use non-wage remuneration such as bonuses to attract and retain staff.”*

Reserve Bank of Australia (RBA), Statement by Philip Lowe, Governor: Monetary Policy Decision, 6 September 2022

- *“Wages growth has picked up from the low rates of recent years and there are some pockets where labour costs are increasing briskly.”*

Last Cleared By	Martin Hehir
Date Last Cleared	27 October 2022

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2022 - 2023 Budget Estimates
SB22-001581**BACKGROUND*****Annual Wage Review***

- On 15 June 2022, the Fair Work Commission announced a 5.2 per cent increase to the National Minimum Wage, and a 4.6 per cent increase to all award wages, subject to a \$40 per week minimum increase.
 - The increase took effect for the National Minimum Wage and most award wages on 1 July 2022, and on 1 October 2022 for awards in the aviation, tourism and hospitality sectors.
- For the National Minimum Wage, the decision translated to an increase of \$1.05 per hour.
- This decision was handed down after the Government argued that the wages of the lowest paid workers in Australia should not go backwards, in recognition of the disproportionate impact this group is facing due to the rising cost of living.
- For more information, please refer to EC22-009584 Annual Wage Review.

Aged Care Submission

- On 8 August 2022, the Government made a submission to the Aged Care work value case before the Fair Work Commission. This submission outlined support for an increase in the wages of aged care workers.
- The modern award minimum wage for a Certificate III-qualified aged care personal care worker is \$24.76 per hour. This significantly undervalues the complexity and demands of care work.
- Any increase in the wages of aged care workers will assist in closing the gender pay gap as 86 per cent of direct residential aged care workers are women.

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2022 - 2023 Budget Estimates
SB22-001582

Issue: Insecure work
Contact: Martin Hehir
Ph: 02 6121 7328
Deputy Secretary

Key Points

- The Government is committed to facilitating a labour market with secure jobs and better pay.
- Measures to achieve this include:
 - making **job security** an object of the Fair Work Act
 - legislating an **objective, fair definition of casual worker**
 - addressing **key issues with labour hire arrangements and fixed-term contracts**
 - giving the Fair Work Commission expanded powers to **set minimum pay and conditions for gig workers** and
 - acting as a **model employer** and emphasising secure work in Government contracts with companies through a Secure Australian Jobs Code.
- Increasing job security and therefore job quality has a range of positive impacts. OECD research (OECD, 2015, Measuring and Assessing Job Quality: The OECD Job Quality Framework) shows the benefits both for workers and more broadly across the economy as:
 - stronger links between employers and employees leading to higher staff retention, increased investment in education and training, and improved productivity
 - financial freedom (for example, the increased likelihood of being approved for a bank loan) and
 - improved health outcomes (which has a direct impact on public health expenditure).
- Across the workforce, there are a substantial number of workers engaged in less secure forms of work:
 - There are 2.7 million **casual employees** (23.5 per cent of all employees) who do not have paid leave entitlements [August 2022]
 - nearly 704,000 casual employees have regular working arrangements (guaranteed minimum hours each week and either earnings or hours that don't vary each week)
 - just over 1 million are **independent contractors** (or 7.8 per cent of the total workforce) most of whom have no paid leave entitlements [August 2021]

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- 404,800 employees (3.8 per cent of all employees) are working on **fixed term contracts** [August 2021]
 - 19.5 per cent of these (79,100) are long-term workers on rolling fixed-term contracts (have been with employers for more than 2 years with a contract length of 2 years or less)
- 112,600 employees are **registered with and paid by a labour hire firm** (1.1 per cent of all employees) [August 2020]
 - 85.9 per cent of these (96,700) are casual employees with no paid leave entitlements
- 250,000 people are estimated to be **working in the gig economy** [2019] and
- 898,900 Australians are **working more than one job** [June 2022].

Key Data

Casual employees

- In August 2022, there were 2.7 million casual employees (23.5 per cent of all employees). These are employees without paid leave entitlements.
- There were 703,800 casual employees that had regular working arrangements (guaranteed minimum hours each week and either earnings or hours that don't vary each week). This is almost 1 in 3 (30.7 per cent) of casual employees (August 2020).
- Of this group, nearly 2 in 3 (449,700) have been with their employer for over a year.
 - The majority of these casual employees are women and are most likely to be found in the Retail trade, Health care and social assistance, and Accommodation and food services industries.
 - Around 240,000 have been with their employer working regular working arrangements for over 2 years.
- Almost one third (31.6 per cent) of casual part-time workers reported underemployment (August 2021).

Independent contractors

- There are approximately 1 million independent contractors (7.8 per cent of the total workforce).
- Most independent contractors do not have paid leave entitlements – they are people who operate their own business and contract to perform services for others without having the legal status of an employee.

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- Many digital platforms in the gig or on-demand economy engage workers as independent contractors rather than employees. (but not all independent contractors are gig workers.)

Gig economy

- The gig economy is growing, but it remains difficult to quantify.
- A recent study indicated that gig workers are more likely to live with disability, be temporary residents and have minimal superannuation contributions (Victorian Government, 2020).
- Also, women engaged in the gig economy generally receive lower hourly rates than their male counterparts and are more likely to participate in work traditionally dominated by women such as in clerical and data entry, and caring services. (Victorian Government, 2020).
- See also **SB22-001576** Minimum standards for employee-like workers.

Fixed term contractors

- 404,800 employees (3.8 per cent of all employees) are working on fixed term contracts.
- Of these, almost one-quarter (23.6 per cent) self-reported having no paid leave entitlements.
- More than half (58.3 per cent) of employees engaged on fixed-term contracts are female.
- Almost half (47.3 per cent) of employees engaged on fixed-term contracts work in either the Education and training industry (28.5 per cent) or the Public administration and safety industry (18.8 per cent).
- 162,400 (around 40 per cent) of fixed-term contractors have been with their employer for 2 or more years.
- There are 79,100 long-term workers on rolling fixed-term contracts (19.5 per cent of all fixed-term contractors).

Labour hire

- 112,600 employees are registered with and paid by a labour hire firm (1.1 per cent of all employees).
- 85.9 per cent of employees paid by a labour hire firm are casual employees with no paid leave entitlements.
- 83.3 per cent of employees paid by a labour hire firm are full time.
- 61.8 per cent of employees paid by a labour hire firm have been with their employer for less than 12 months.
- Median hourly earnings for employees paid by a labour hire firm are 10 per cent lower than median hourly earnings for all employees.
- See also **SB22-001578** Same Job, Same Pay.

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2022 - 2023 Budget Estimates
SB22-001582**Multiple job holders**

- The number of Australians working more than one job has increased by 104,700 (13.2 per cent) since March 2020 and currently stands at 898,900 – the highest number on record (since 1994).
- The rate of multiple job holding (as a share of employed persons) is currently 6.5 per cent, the highest on record.

Research

- OECD, 2015, Measuring and Assessing Job Quality: The OECD Job Quality Framework
- Victorian Government, 2020, Report of the Inquiry into the Victorian On-Demand Workforce

Media

- **ALP focus to fall on ‘cancer’ of gig work, 25 August 2022** The federal government is preparing a sweeping expansion of the nation’s industrial relations system, declaring Uber-style labour contracts a ‘cancer’ on the economy and launching talks with major players on how to extend traditional employee rights to gig workers. ([Gig economy reform set to be undertaken by Labor; Tony Burke calls contracts ‘cancer’ \(smh.com.au\)](#))
- **Joyce hopes for progress on bargaining reforms at summit, 25 August 2022** Asked how the Albanese Government’s pledge to introduce ‘same job, same pay’ for labour hire workers, [Joyce] said that Qantas is ‘obviously like everybody talking to the government about it’. (Workplace Express)
- **Uber and the Transport Workers Union strike deal that lays foundation for the future of gig workers, 29 June 2022** Uber and the Transport Workers Union (TWU) have signed an agreement that will protect the flexibility of gig workers and support the creation of minimum standards and benefits for those working in the on-demand economy. ([UBER AND TWU STRIKE DEAL THAT LAYS FOUNDATION FOR THE FUTURE OF GIG WORKERS – Transport Workers’ Union](#))

Last Cleared By	Martin Hehir
Date Last Cleared	30 September 2022

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