Secure Jobs, Better Pay **Review**

Draft Report

31 January 2025

Emeritus Professor Mark Bray and Professor Alison Preston

Disclaimer

This document uses unit record data from the Household, Income and Labour Dynamics in Australia (HILDA) Survey. The unit record data from the HILDA Survey was obtained from the Australian Data Archive, which is hosted by The Australian National University. The HILDA Survey was initiated and is funded by the Australian Government Department of Social Services (DSS) and is managed by the Melbourne Institute of Applied Economic and Social Research (Melbourne Institute). The findings and views based on the data, however, are those of the authors and should not be attributed to the Australian Government, DSS, the Melbourne Institute, the Australian Data Archive or The Australian National University and none of those entities bear any responsibility for the analysis or interpretation of the unit record data from the HILDA Survey provided by the authors.

Contents

Overview

Chapter 1. Introduction

This Review Panel was tasked with considering the appropriateness, effectiveness and consequences (intended or otherwise) of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Secure Jobs, Better Pay Act) reforms and whether any further amendments are required to improve their operation. The Panel was also asked to consider Part 16A of Schedule 1 to *the Fair Work Legislation Amendment (Closing Loopholes Act) 2023* (Cth) (Closing Loopholes Act).

This draft report reflects the considerations of the Review Panel thus far and provides an opportunity for stakeholders to provide feedback on the preliminary findings and recommendations.

This introductory chapter is designed to assist readers to understand the draft report as a whole. Towards this end, it begins by exploring two contexts that proved influential: the highly adversarial environment in which the Review was undertaken; and the limited time and data available to assess the amendments. The chapter then provides an overview of the Review Panel's approach, a brief preview of the main findings and a summary of the report's structure.

1.1 The impact of adversarialism on the Review

Australia has an adversarial system of industrial relations and politics. In this context, Australian governments make choices about the 'correct' balance to be struck in industrial relations legislation – choices that reflect, amongst other things, the government's perceptions of the current state of play in industrial relations and its policy preferences.

The history of the *Fair Work Act 2009* (Cth) reflects this tradition, with ongoing attempts by governments to find balance (or 'fairness') between productivity and workers' rights, individual and collective flexibility and control, and the genuine needs of employers and employees.[1] The first review of the Fair Work Act (conducted by the distinguished reviewers Professor Emeritus Ron McCallum AO, Dr John Edwards and the Hon Michael Moore), for example, noted that for 'well over a century Australians have debated what is the right legal framework for wages, working conditions and employment'.[2]

The Secure Jobs, Better Pay reforms continue this tradition. The Review Panel found a divergence of opinion – strongly held and forcefully expressed – between the major stakeholders over whether the amendments represent the 'right' balance.

The choices made by the Australian Government were welcomed by some. In particular, the amendments were lauded by the Australian Council of Trade Unions as a 'critical and welcome measure to get wages moving in this country',[3] while most unions responded to it positively.

---

[1] A detailed recent history of the workplace relations settings that led to the Labor government's introduction of the Fair Work Act in 2009 is set out in M Bray and A Stewart, 'What is Distinctive about the Fair Work Regime?' (2013) 26(1) *Australian Journal of Labour Law* 21.

[2] R McCallum, M Moore and J Edwards, 'Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation' 2012 < https://oia.pmc.gov.au/sites/default/files/posts/2012/08/03-Final-Fair-Work-PIR-for-publication-20120802.pdf>.

[3] Australian Council of Trade Unions submission, 4.

Community sector representatives also welcomed the (then) Bill as an 'opportunity to strengthen the industrial relations system for community organisations and their workforces, improving the pay, conditions and quality of employment in the sector'.[4]

Others, especially employer representatives, were far more negative, suggesting the provisions would lead to 'reduced productivity, industry-wide strikes, lengthy delays, surging costs, falling revenue, job losses and foregone opportunities.'[5]

In this way, the adversarial – often mutually hostile – attitudes and policy positions revealed by the stakeholder submissions are typical of 'the Australian way'. More importantly, they also had an major impact on this Review. Adversarialism makes independent assessments – like the one contained in this report – more difficult. When parties disagree, they tend not to trust each other. The sharing and analysis of information is incomplete and tends to favour one side while ignoring the other. The exchanges in the Review process tended, therefore, to be 'zero sum games' rather than the mutual gains ventures that are often evident when transparency and shared learning creates added value for all.

1.2 The impacts of limited time and data on the Review

The limited time available for the Review can be seen in its background. The Secure Jobs, Better Pay Act received royal assent on 6 December 2022. Section 4 of the Act mandated that a review start within 2 years (see the Terms of Reference in Appendix 7). The various provisions of the Act, however, commenced operation at different times. Some provisions began operation immediately, but others (as mentioned throughout the report) commenced on 6 March 2023, 6 June 2023 and even 6 December 2023.[6]

Part 16A of Schedule 1 to the Closing Loopholes Act, which addresses right of entry provisions in the Fair Work Act authorising union representatives to gain greater access to workplaces without the usual permissions relevant under the Fair Work Act, commenced on 15 December 2023. This amending legislation also contained a requirement for a review to start within two years, but it mandated that the review of Part 16A commence within just 9 months.

The period between the conduct of the Review and the commencement of parts of the legislation was therefore brief. This had consequences for the data that was available from independent agencies and made it particularly challenging to assess whether the amendments were having their intended effect or not. This can be seen in two ways. First, routine data reported by government agencies – like the Australian Bureau of Statistics (ABS), the Department of Employment and Workplace Relations (DEWR), the Fair Work Ombudsman (FWO) and the Fair Work Commission (FWC) – is subject to understandable time lags. ABS data on methods of pay setting, for example, are only gathered and published bi-annually, making their most recent data applicable to May 2023. Data on collective agreements published by DEWR from the Workplace Agreements Database was also subject to time lags, resulting in only 7 quarters (1¾ years) being available before the completion of this report. These time delays meant that much quantitative data was often not up to date. Sometimes, as-yet unreported or other quantitative data was provided by the agencies, but this could not always meet requirements.

[4] Australian Council of Social Service submission, 2.
[5] Minerals Council of Australia submission, 2.
[6] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) s 2.

Similarly, an important source of qualitative data was the decisions of tribunals (like FWC) or courts (like the Federal Court), but these were often not finalised before completion of the Review. They usually require the initiation of disputes by affected individuals or organisations, which invariably (and properly) follow procedures. They also involve prospects of appeal. These decisions are often necessary in setting the ground rules on how the amendments operate in practice beyond the boundaries of the specific disputes.

Second, the Review Panel was mostly unable to systematically consider the impact on individual workplaces where there had not been legal proceedings, disputes or other regulatory action. In these situations, changes flow from voluntary compliance with the amendments. These 'shadow effects', such as an employer taking additional steps to protect workers from sexual harassment, are part of the ultimate goal of the legislative provisions. The law enables and influences changes in behaviour. It also carves out definitions of unacceptable behaviour, including by providing avenues for remedy.

To comprehensively determine the effectiveness of legal change, therefore, the Review Panel ideally assesses the nature and extent of behaviour that sits between the enabled and the prohibited (i.e. voluntary compliance). Given the time available to conduct this Review, the required systematic and 'scientifically reliable' surveys of workplaces were not completed.

In the absence of independent data, the Review relied on the views of stakeholders, who reported feedback on the amendments they had received from their members. However, this data was rarely reported in ways that were as rigorous as might have been hoped for a significant undertaking like this Review. For example, it was often not revealed how many members had provided such feedback or how statistically representative the sample was; the form of the feedback reported; or the exact wording of questions to which members were responding, despite an express request from the Review Panel in its call for submissions.

Moreover, in the absence of independent data, the stakeholders often filled in data gaps with opinions about what they considered was 'likely' to happen, based on their experiences, expectations or beliefs. Given the adversarialism discussed above, the data that was reported in this way by stakeholder groups ran the dangers of being incomplete and unreliable.

1.3 Review background

On 2 October 2024 the Minister for Employment and Workplace Relations, Senator the Hon Murray Watt, announced the appointment of Emeritus Professor Mark Bray and Professor Alison Preston to conduct an independent review of the Secure Jobs, Better Pay Act and of the amendments made by Part 16A of Schedule 1 to the Closing Loopholes Act.

A secretariat was appointed within DEWR to assist the Review Panel in undertaking its review. The Panel is grateful to the secretariat for their assistance in undertaking this large task. Any views expressed in this report are those of the Review Panel.

The draft report was delivered to Minister Watt on Friday 24 January 2025 and then edited. It was published on the Review's website on Monday 3 February 2025.

1.3.1 Terms of Reference

The Review's Terms of Reference are available at Appendix 7.

1.3.2 Consultation

The Panel conducted consultation with key stakeholders. The commencement of the Review was announced by Minister Watt on 2 October 2024 and interested parties were encouraged to engage with the reviewers and provide their perspectives.

On 18 October 2024 a call for submissions was made and interested parties were encouraged to provide evidence to the Review. The deadline for written submissions was 29 November 2024.

Over 3 days covering Wednesday 30 October 2024 to Friday 1 November 2024 the Panel held a series of meetings and roundtable consultations with peak employer groups, unions and academics.

Appendix 8, 'Stakeholder input', provides a list of all the submissions received and consultations that were conducted.

In response to the request from the Review Panel, 47 submissions were received, 46 of which were published on the Review website. The Panel held consultations with major stakeholders prior to receiving submissions and again when developing the report and recommendations. The Panel expresses its gratitude to the stakeholders for their contributions.

1.3.3 Approach to the Review

The Review Panel has sought to undertake an evidenced-based analysis of the legislative changes, comparing their effects with the Australian Government's stated intent.

The analysis incorporates data and statistics from sources, including the ABS, the FWC, the FWO, DEWR, and the Household Income and Labour Dynamics Australia (HILDA) Survey. It also draws on academic research, case law and additional evidence such as case studies submitted or discussed during consultations.

Given the contested nature of much of the subject matter, the Review Panel has assessed available evidence and offered independent insights based on the panel members' expertise and experience.

1.3.4 Limitations

The Review Panel has made use of all available evidence to reach the findings outlined in this report. However, data limitations and the impact of subsequent amending Acts have made it difficult to reach definitive conclusions on some measures. The Review Panel has also been cautious about delineating the impact of the amendments from the impact of the broader context, including global economic forces. To address the availability of data for future reviews and evidence-based policymaking, the Review Panel considers improvements necessary in data for the workplace relations system.

1.3.5 Preview of the findings

The Review Panel has found that the Secure Jobs, Better Pay reforms are, on the whole, achieving the Australian Government's intent, operating appropriately and effectively and with minimal unintended consequences.

A number of stakeholders note the timing of the Review, claiming it is too soon and there is insufficient time for the impact of the amendments to be fully assessed. Stakeholders such as Maritime Industry Australia Ltd, Chamber of Commerce and Industry of Western Australia,

Australian Resources & Energy Employer Association, Australian Chamber of Commerce and Industry (ACCI) and Law Council of Australia submit that a further review of the provisions should be undertaken in due course. ACCI suggest that a subsequent review of the Secure Jobs, Better Pay Act should occur in 2 years' time.

The Review Panel acknowledges that several provisions are yet to be tested. For example, in relation to the bargaining amendments, it may be 4 years until the bargaining cycles have concluded and the impacts of the reforms are understood. Similarly, important test case decisions by tribunals and/or courts leave key provisions unresolved.

Given the above, the Review Panel recommends that the Australian Government ensure that there is a regular collection of suitable data necessary to monitor developments in the workplace relations system. Efforts should focus, in particular, on the collation of data suitable for a detailed and rigorous analysis of:

- the new pay transparency laws
- the use of fixed-term contracts, including their length, frequency of renewals, context for why they are used, the application of various exceptions in practice and the experience of individuals on fixed-term contracts
- the mechanism used to commence bargaining in all matters
- the type of multi-employer agreement (i.e. cooperative workplace agreement, supported bargaining agreement or single interest employer agreement) and the size of the employer the agreement relates to
- the incidence and coverage of enterprise agreements that have nominally expired more than 5 years ago and identification of the wages and conditions under these instruments as compared to the applicable modern awards
- the effect of collective bargaining on gender equality
- the application and impact of the amendments prohibiting employer advertisements with pay rates that would contravene the Fair Work Act in practice
- the use of the right of entry amendments (from the Closing Loopholes Act).

The Review Panel also recommends a subsequent review of the Secure Jobs, Better Pay Act amendments once the gaps in the data have been addressed and additional evidence is available. The Panel acknowledges that, in some cases where new data is sought, it may not be possible to make historical comparisons. To allow sufficient time for data to be collected and for the amendments to play out, the Review Panel considers a subsequent review should occur in 2 to 3 years' time.

Draft Recommendation 1: The Australian Government should undertake a further review into operation of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* in 2 to 3 years' time. The Government should consult with stakeholders to determine the most appropriate timeframe for a further review.

Further recommendations are listed in Chapter 2 of this report.

1.3.6 The structure of the report

The Review Panel identified 4 key aspirations of the Australian Government's Secure Jobs, Better Pay reforms, which correspond broadly with the 4 main parts of this report:

- Integrating institutions
- Advancing wages
- Closing the gender pay gap and improving gender equality
- Improving job security.

Each of the 4 parts of the report has a separate introductory chapter focusing on the main themes.

To ensure consistency, each chapter begins with the amendments themselves and then data and analysis is divided into three sections: one addressing quantitative data, another focusing on qualitative data (including case studies and decisions), and a third presenting insights from stakeholders and submissions. If no quantitative or qualitative data is available, this will be noted.

The remainder of the report is organised as follows:

2. Recommendations

Part 1. Institutional integration

3. Introduction to Part 1
4. Abolition of ABCC
5. Establishment of NCIF
6. Abolition of ROC
7. Additional registered organisations enforcement options

Part 2. Bargaining and agreements

8. Introduction to the bargaining and agreements chapters
9. Initiating bargaining
10. Cooperative workplaces
11. Supported bargaining
12. Single interest employer authorisations
13. Excluded work
14. Bargaining disputes
15. Industrial action
16. Enterprise agreement approval
17. Better off overall test
18. Dealing with error in enterprise agreements
19. Varying enterprise agreements to remove employers and their employees
20. Termination of agreements
21. Sunsetting of 'zombie' agreements

Part 3. Job security and gender equality

22. Context for the Job Security & Gender Equality amendments
23. Paid family and domestic violence leave
24. Objects of the Fair Work Act
25. Equal remuneration
26. Expert panels

Chapter 2. Draft recommendations

Draft Recommendation 1: The Australian Government should undertake a further review into operation of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* in 2 to 3 years' time. The Government should consult with stakeholders to determine the most appropriate timeframe for a further review.

Institutions

Draft Recommendation 2: The National Construction Industry Forum (NCIF) continue its work developing and implementing the Building and Construction Industry sector Blueprint to bring cultural change to the industry.

Draft Recommendation 3: The Australian Government consider utilising the NCIF as a model tripartite forum to advise the Australian Government on other industries.

Draft Recommendation 4: The Australian Government consult, including with the General Manager of the Fair Work Commission (FWC), to consider whether penalty amounts payable under Infringement Notices are proportionate to the contraventions that are subject to an Infringement Notice under the *Fair Work (Registered Organisations) Act 2009*.

Bargaining and agreements

Draft Recommendation 5: The FWC should publish guidance to assist employers understand their obligations after receiving a written request to bargain under s 173(2A) of the Fair Work Act. This guidance material should include a template written request for bargaining representatives. The template written request should outline, amongst other matters, the requirement for employers to issue a notice of employee representational rights (NERR) within 14 days of receiving the request and details of known bargaining representatives.

Draft Recommendation 6: The mandatory conciliation conference in s 448A of the Fair Work Act should be amended to provide the FWC with the discretion not to conduct a conference if there is agreement of relevant bargaining representatives.

Draft Recommendation 7: The Australian Government amend the Fair Work Act to ensure the statement of principles on genuine agreement is a complete statement of the matters FWC must consider in relation to whether a proposed enterprise agreement has been genuinely agreed. This should include, at least, removing duplication of requirements in s 180(5) and s 188(4A) of the Fair Work Act and the Statement of Principles on Genuine Agreement.

Draft Recommendation 8: The FWC regularly engage with its Enterprise Agreements and Bargaining Advisory Group to review and advise on the operation of the Statement of Principles of Genuine Agreement to ensure it is operating appropriately and effectively.

Job security and gender equality

Draft Recommendation 9: The Review Panel encourages the FWC to continue its program of work to advance gender equality, particularly by addressing the low pay in other female dominated sectors (beyond care work), and to set out broader principles for identifying and addressing work value and gender undervaluation.

Draft Recommendation 10: The FWC continue to support parties and facilitate proceedings to address gender undervaluation, including through its gender pay equity unit undertaking research and gathering evidence to support future work value proceedings.

Draft Recommendation 11: The Australian Government take steps to advise the FWC and stakeholders of its position on funding for the outcomes of FWC reviews to address gender undervaluation at the earliest opportunities.

Draft Recommendation 12: The Australian Government should actively monitor bargaining outcomes in sectors that receive significant increases to modern award rates of pay due to gender undervaluation. This monitoring is essential to ensure that these increases lead to sustained improvements in pay equity and do not result in unintended changes in wage-setting practices within enterprise agreements.

Draft Recommendation 13: The Australian Government amend the Fair Work Act at s 620(1)(b) to include gender pay equity as an additional area of expertise when appointing Expert Panel Members to the Annual Wage Review Expert Panel.

Draft Recommendation 14: The Fair Work Act should be amended to provide the FWC President with greater discretion in determining when a Care and Community Sector Expert Panel is required.

Draft Recommendation 15: The Australian Government should undertake further research and consider whether it is appropriate to extend the protected attributes in the Fair Work Act to cover perimenopause and menopause, as well as other reproductive health issues.

Draft Recommendation 16: The Australian Government should reconsider the approach to limiting the use of fixed term contracts. The Review Panel is seeking stakeholder views on the following options:

- amending the existing framework to make the limitation and current exceptions more readily applicable in practice (for example, by increasing the years/renewals threshold or clarifying the Australian Government funding exception), or
- introducing a principles-based framework into the Fair Work Act with specific limitations and exemptions primarily determined through the FWC (further consideration would need to be given to technical aspects of implementation including application to award/agreement free employees).

Miscellaneous

Draft Recommendation 17: Consistent with recommendations 9, 10 and 11 of the Department of Employment and Workplace Relations' Review of the Fair Work Act Small Claims Procedure:

- 9. The Government should undertake further work to consider whether additional funding is required for legal assistance in small claims matters, to enable:
    a. the establishment of duty lawyer services
    b. the provision of targeted community legal education initiatives, and
    c. legal assistance providers to assist and represent more workers.
- 10. Once data on the effects of the increased monetary cap becomes available, the Department of Employment and Workplace Relations should consider whether any

additional changes to the small claims procedure under the *Fair Work Act 2009* are necessary.

- 11. Noting differing views about the potentially complementary nature of extending small claims jurisdiction to a tribunal and establishing an industrial court, it is recommended that Government consider these options further and determine which option, if any, to pursue. In progressing the selected policy, stakeholder feedback, including that received as part of the Small Claims Review, should be considered.

Draft Recommendation 18: The Fair Work Ombudsman (FWO) should engage with job advertising platforms and other technology stakeholders to ensure that all job advertisements include accurate and lawful information, supported by the FWO's public education initiatives and materials.

Draft Recommendation 19: The FWC should implement an automatic language translation tool on its website (as used by the FWO) and the Australian Government should investigate whether such tools could be used to translate materials into First Nations languages.

Part 1. Institutions

The Secure Jobs, Better Pay amendments include 2 major institutional changes and consequential amendments: first, the winding up of the Australian Building and Construction Commission and its integration (mainly) with the Fair Work Ombudsman; and, second, the winding up of the Registered Organisations Commission, its administrative integration with the Fair Work Commission and the transfer of its powers to the General Manager as a regulator.

Chapter 3 provides an introduction to this Part on institutions that identifies and briefly introduces 2 themes found by the Review Panel to lie behind these amendments: the primary theme of institutional integration; and a secondary theme of advancing a more conciliatory regulatory style.

These themes reflect policy choices of government, which in turn flow from what government sees as the weaknesses of the policy options implemented by previous governments; namely, institutional separation and a more confrontational regulatory style respectively.

In this way, this introduction is designed to explore the rationales behind the institutional changes delivered by the Secure Jobs, Better Pay amendments and to anticipate the results of the institutional changes that follow.

Chapter 3. Introduction to Part 1

There is a long history of specialist and industry-specific regulation within Australian industrial relations. There have been corresponding longstanding debates over whether regulation should be dealt with by integrated institutional arrangements or those that recognise the special circumstances of industries or industrial matters. These debates have been shaped not only by politics – for example, one government reversing the policy decisions of a previous government – but also by differing perspectives among stakeholders, including employer groups, unions and policy experts.

For example, the Committee of Review into Australian Industrial Relations Law and Systems (Hancock Inquiry) – an independent review that reported in April 1985 – identified a wide range of specialist institutional arrangements operating at the time, including those responsible for industrial relations in the Australian Capital Territory, the maritime industry, the waterside industry, Commonwealth projects, flight crew officers, the coal mining industry, academic salaries and the federal public sector, amongst many others.[7] That inquiry advocated the integration of most of these specialist tribunals/agencies into the 'mainstream' associated with the Australian Conciliation and Arbitration Commission – an outcome achieved through the *Industrial Relations Act 1988* (Cth).

Subsequently, varying levels of separation and integration of specialist tribunals have occurred for decades, including:

- in the 1990s and 2000s, the separation of agencies from the Australian Industrial Relations Commission, and later Fair Work Australia (FWA) and the Fair Work Commission (FWC), to regulate industrial relations in specific industries (especially building and construction)[8] and specific industrial matters (e.g. the approval of workplace agreements through the Workplace Authority[9] and to determination of minimum wages through the Australian Fair Pay Commission)[10]
- in the early 2010s, the integration of specialist agencies, such as the abolition of the Office of the Employment Advocate and the Australian Fair Pay Commission into the then FWA and now the FWC
- in the early 2010s to 2022, the separation again of specialist agencies regulating registered organisations (i.e. the Registered Organisations Commission (ROC)) and the building and construction industry (i.e. the Australian Building and Construction Commission (ABCC)).

[7] KJ Hancock, *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (AGPS, Canberra, 1985) 414–439; see also J Romeyn, 'The Role of Specialist Tribunals' (1986) 28(1) *Journal of Industrial Relations* 3–23.
[8] See Forsyth, A., Gostencnik, V., Ross, I. and Sharard, T. *Workplace relations in the building and construction industry*, LexisNexis Butterworths (2007), Chatswood, N.S.W.
[9] Australian Government 'Work Choices: Employee collective agreements' (2025): <https://www.aph.gov.au/~/media/Estimates/Live/eet_ctte/estimates/bud_0607/dewr/w098-07att8.ashx>.
[10] Waring, P., de Ruyter, A., and Burgess, J. 'The Australian Fair Pay Commission: Rationale, Operation, Antecedents and Implications', (2006) 16(2) *The Economic and Labour Relations Review*, 127-146.

To generalise across the decades, the reasons behind increased separation in institutional arrangements have varied from case to case,[11] but the 2 principal factors involve combinations of the following:[12]

- the *Constitution*, so that a number of early specialist tribunals were established not under the conciliation and arbitration powers of the *Constitution* but under other powers, such as the interstate trade or the foreign affairs powers. The *Constitution*, however, became less important after the move to a dominant reliance of the corporations power under the Work Choices amendments – a move that was confirmed by the High Court in 2006
- high levels of industrial disputation in specific industries, which meant that they represented either political 'problems' for governments or they provided governments with the opportunity to use separation to gain political 'advantages'.

The issue of institutional separation/integration has again been raised through the Secure Jobs, Better Pay amendments, which have integrated the previously separate ABCC and ROC within 'mainstream' institutions: the FWO and FWC respectively. The then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, for example, in the second reading speech for the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Secure Jobs, Better Pay Bill), stated that the ABCC and the ROC were 'ineffective and discredited institutions, more concerned about prosecuting workers and their representatives than tackling rampant wage theft or addressing workplace safety, or educating and promoting good workplace relations'. He went on to anticipate institutional integration:

> This bill [i.e. the Secure Jobs, Better Pay amendments] will abolish the ABCC and the Registered Organisations Commission. The Fair Work Ombudsman will be the workplace relations regulator for all industries and the general manager of the Fair Work Commission will be the regulator on registered organisations.

This Panel broadly supports integration rather than separation, for reasons similar to those articulated by Hancock et al.[13] First, there is the observation that an integrated system (rather than a fragmented one) is more likely to be accepted and especially understood by the industrial relations parties and the community more generally. Second, integration encourages consistency and equity in outcomes. Third, there is the admirable objective of administrative efficiency, which is likely to be greater under an integrated system.

An additional – fourth – reason goes well beyond the Hancock Inquiry report by focusing on the political advantage perceived to flow from the choice between institutional integration and separation. More specifically, there seems little doubt that between 2005 and 2020 institutional separation was preferred for the regulation of the building and construction industry because government saw advantage in separation. Integration of the industry under the Secure Jobs, Better Pay amendments suggests a different political assessment.

---

[11] J Romeyn, 'The Role of Specialist Tribunals' (1986) 28(1) *Journal of Industrial Relations* 3–23.
[12] KJ Hancock, *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (AGPS, Canberra, 1985).
[13] KJ Hancock, *Australian Industrial Relations Law and Systems: Report of the Committee of Review* (AGPS, Canberra, 1985) 416–417.

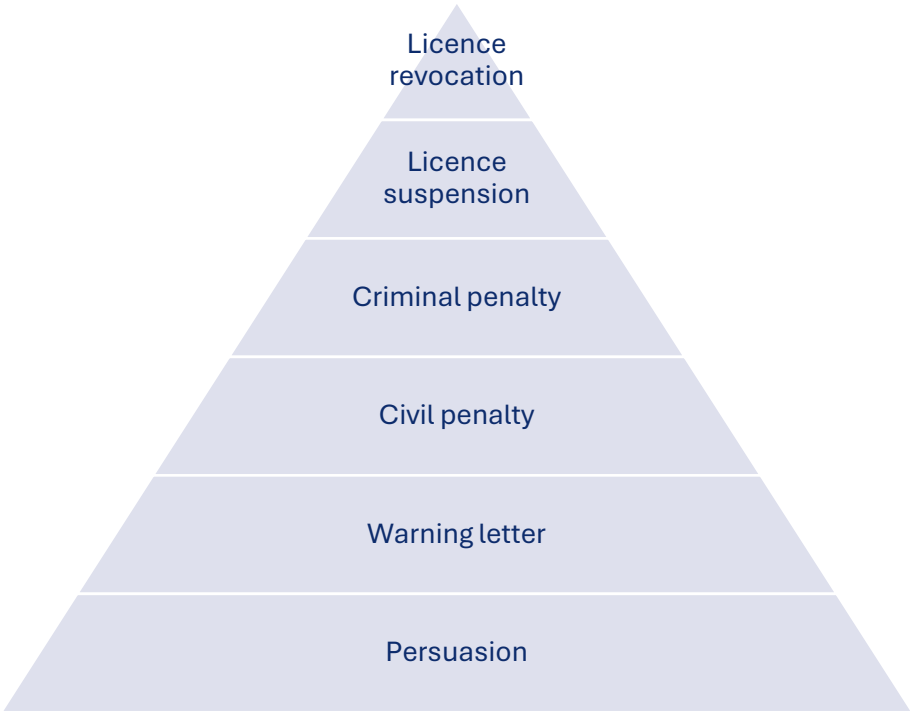
Beyond the broad rationale of integrating institutional arrangements with the 'mainstream', governments of different political persuasions have associated institutional arrangements with the adoption of specific 'regulatory strategies'; indeed, governments have generally indicated their preferred regulatory strategies through the legislative provisions governing them and, to a lesser extent, the individuals that governments appoint to lead regulatory institutions.

Gunningham provides a good overview of the development of ideas about regulatory strategies.[14] He says that early thinking tended to identify 2 broad strategies used by regulatory authorities: 'punish' or 'persuade'. Under the former, emphasis was given to 'a confrontational style of enforcement and sanctioning of rule-breaking behaviour',[15] while the latter emphasised 'cooperation rather than confrontation and conciliation rather than coercion'.[16] Broadly, the unresolved problem of this analysis was that the 2 strategies were considered alternative extremes rather than complementary components of a single regulatory effort. It is not an 'either/or' situation.

Ayres and Braithwaite's notion of 'responsive regulation' was subsequently considered an attempt to overcome this weakness, especially by developing the concept of an 'enforcement pyramid' (see Figure 1).[17] In this pyramid, the most common regulatory responses by agencies (at the base of the pyramid) were persuasion or warnings, directions and negotiated outcomes. As the regulatory agency worked up the pyramid towards less common strategies, the strategies became increasingly punitive, emphasising civil and then criminal penalties and finally reaching licence revocation or 'incapacitation' at the top.

[14] N Gunningham, 'Enforcement and Compliance Strategies' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2011) 120–145.
[15] N Gunningham, 'Enforcement and Compliance Strategies' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2011) 121.
[16] N Gunningham, 'Enforcement and Compliance Strategies' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2011) 121.
[17] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

Figure 1: The enforcement pyramid



Source: Ayres and Braithwaite.[18]

The advantage of this 'responsive' approach is the recognition it gives to the possibility of the same agency advancing different strategic responses to address different types of problems. This type of analysis therefore tends to focus attention on attributes of the regulatory problems.

An alternative explanation of regulatory choice focuses on the attributes of the Australian governments establishing the legislative base for regulation or for the regulatory agency itself. This approach to explanation – which overlaps with some of the factors discussed above as explaining the choice between institutional integration versus institutional separation – suggests that decisions about the most appropriate regulatory strategy for addressing different problems were influenced by the political judgements made by governments. In other words, it might be expected – other things being equal – that governments would choose regulatory strategies that they thought would bring them advantage.

[18] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 35.

Chapter 4. Abolition of the Australian Building and Construction Commission

This chapter follows the abolition of the Australian Building and Construction Commission (ABCC) and its integration into the Fair Work Ombudsman (FWO), exploring the connection with the 2 themes highlighted in the previous chapter; namely, institutional integration and regulatory strategies.

4.1 Amendments and intent

The Secure Jobs, Better Pay Act abolished the commercial building and construction industry-specific regulator, the ABCC. The Secure Jobs, Better Pay Act also repealed the Code for the Tendering and Performance on Building Work 2016 (Building Code). Regulatory responsibility for oversight of the building and construction sector was reintegrated into the FWO.

4.1.1 Secure Jobs, Better Pay amendments

Part 3 of Schedule 1 of the Secure Jobs, Better Pay Act:

- abolished the ABCC by repealing relevant the parts of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (BCIIP Act)
- repealed the Building Code
- removed provisions for higher penalties for building industry participants and the broader circumstances in which they apply
- provided for transitional arrangements for the abolition of the ABCC, including transferring investigations and pending court proceedings to the FWO.[19]

Provisions relating to the Work Health and Safety Accreditation Scheme and Office of the Federal Safety Commissioner were retained in a renamed Act, the *Federal Safety Commissioner Act 2022* (Cth).[20]

These amendments commenced on 6 February 2023.

While many of the FWO's powers are the same as or similar to those of the former ABCC, not all the powers of the ABCC are available to the FWO. Key differences in the powers of the agencies are outlined below.

First, there were differences between the agencies' powers to issue notices. The FWO can apply to the Administrative Review Tribunal for a 'FWO notice', which is a written notice that may require a person to provide information, produce documents or attend and answer questions relevant to the investigation.[21] The ABC Commissioner had a generally similar power to apply to an Administrative Appeals Tribunal presidential member for an examination notice.[22]

A key difference between FWO notices and examination notices is that the FWO can only issue a FWO notice in relation to a defined set of suspected contraventions of the Fair Work Act, a fair work instrument or a safety net contractual entitlement.

---

[19] Fair Work Amendment (Secure Jobs, Better Pay) Bill 2023, Statement of Compatibility with Human Rights, pp vi and vii.
[20] Fair Work Amendment (Secure Jobs, Better Pay) Bill 2023, Statement of Compatibility with Human Rights, p vii.
[21] *Fair Work Act 2009* (Cth) s 712AA (2).
[22] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 61B.

The FWO notices must relate directly or indirectly to underpayments, unreasonable deductions or requirements on employees to spend or pay amounts paid or payable, unfair dismissal, bullying, workplace sexual harassment, unlawful discrimination, National Employment Standards (NES) contraventions, underpayment of entitlements under a minimum standards order or road transport contractual chain order, unfair deactivation of an employee-like worker or unfair termination of a regulated road transport contractor, or coercion of an employee by an employer.[23]

In contrast, the ABC Commissioner could issue an examination notice if they believed on reasonable grounds the person had 'information or documents relevant to an investigation… into a suspected contravention by a building industry participant of the BCIIP Act or a designated building law'.[24]

Second, the FWO's power to issue a compliance notice is limited to certain entitlement-related provisions (among others, a provision of the NES, a term of a modern awards or enterprise agreements, a term of a workplace determination, a term of a national minimum wage order, or a term of an equal remuneration order (ERO)),[25] whereas the ABCC power to issue a compliance notice was broader and related to contraventions (directly or indirectly) of the BCIIP Act, a designed building law or the Building Code that related to building work.[26]

Third, there were also differences between the power of FWO and ABC inspectors to enter premises. FWO inspectors cannot enter part of a premises that is used for residential purposes unless they reasonably believe the work is being performed on that part of the premises.[27] ABC inspectors had broader powers to enter premises, with limitation if some parts of the premises were used for residential purposes.[28] The ABC inspectors could enter residential premises if they had a reasonable belief that building work was being performed on that part of the premises.

Fourth, the ABC Commissioner could also intervene in civil proceedings that arose under the BCIIP Act or a designated building law, involved a building industry participant or building work, and were in the public interest.[29] The ABC Commissioner could also intervene or make submissions in a matter before the FWC that arises under the Fair Work Act involving a building industry participant or building work.[30]

In contrast, while the Minister for Employment and Workplace Relations can intervene in matters that arise under the Fair Work Act or make submissions before the FWC in certain circumstances, the FWO cannot.[31]

There were other differences between ABCC and FWO powers. For example, the ABC Commissioner could publish details of noncompliance if they believed it was in the public interest to do so.[32] Further, the BCIIP Act also did not excuse a person from giving information on the ground that to do so would contravene another law (although if the person gave

[23] *Fair Work Act 2009* (Cth) s 712AA.
[24] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 61B.
[25] *Fair Work Act 2009* (Cth) s 716(1).
[26] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 99.
[27] *Fair Work Act 2009* (Cth), s 708.
[28] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 72.
[29] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 109.
[30] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 110(1).
[31] *Fair Work Act 2009* (Cth) s 569.
[32] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 108.

information under an examination notice, they were protected from liability for contravening the other law).[33]

The Secure Jobs, Better Pay amendments also aligned penalty provisions for the commercial building and construction sector with the Fair Work Act penalty regime.

For many contraventions, the Fair Work Act prescribes maximum penalties of 300 penalty units for bodies corporate ($99,000), compared to 1,000 penalty units for bodies corporate ($330,000) applicable for certain contraventions under the repealed BCIIP Act. For similar civil penalty provisions which appeared in both Acts – for example, coercion in relation to allocation of duties, etc.;[34] coercion in relation to making, varying, terminating, etc enterprise agreements;[35] taking action against a building employer due to coverage by particular instruments;[36] and hindering or obstructing authorised officers[37] – the maximum penalties were higher for bodies corporate under the BCIIP Act.

The Fair Work Act also does not include a civil penalty in relation to engaging in or organising unlawful industrial action and engaging in unlawful picketing. These were contraventions under the BCIIP Act that each attracted civil penalties of 1,000 penalty units for bodies corporate ($330,000).[38]

The penalty for failing to comply with a FWO notice is a civil penalty under the Fair Work Act,[39] while under the BCIIP Act failing to comply with an examination notice was a criminal offence with up to 6 months' imprisonment and/or up to a maximum of 30 penalty units.[40]

4.1.2 Intent of Secure Jobs, Better Pay amendments

The Secure Jobs, Beter Pay amendments intended to reintegrate the ABCC and regulatory responsibility for the commercial building and construction sector into the FWO. The then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, stated in the second reading speech for the Secure Jobs, Better Pay Bill that '[t]his bill will abolish the ABCC [and the ROC]. The Fair Work Ombudsman will be the workplace relations regulator for all industries'.

The Minister had previously stated that '[b]uilding workers should be subject to the same laws and regulations as all other workers'; however, the Building Code meant that 'construction employers and workers on Government-funded building sites have been subject to restrictions that don't apply to people in other industries'.[41]

This aspect of the Secure Jobs, Better Pay amendments was strongly opposed. In the dissenting report of the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, employer groups asserted

---

[33] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 102; *Fair Work Act 2009* (Cth) s 713.
[34] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 52; *Fair Work Act 2009* (Cth) s 355.
[35] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 54; *Fair Work Act 2009* (Cth) s 343(1).
[36] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 55; *Fair Work Act 2009* (Cth) s 354(1).
[37] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 78; *Fair Work Act 2009* (Cth) s 707A.
[38] *Building and Construction (Improving Productivity) Act 2016* (Cth) ss 46, 47.
[39] *Fair Work Act 2009* (Cth) s 712B.
[40] *Building and Construction (Improving Productivity) Act 2016* (Cth) s 62.
[41] The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Restoring Equal Rights for Construction Workers' (Media Release, 24 July 2024) <https://ministers.dewr.gov.au/burke/restoring-equal-rights-construction-workers>.

that the ABCC had ensured the rule of law and driven cultural change in the industry.[42] They also noted that higher penalties should remain.[43]

The dissenting report also stated that the FWO is not a like-for-like replacement for the ABCC and is not the best equipped or resourced agency to apply the law on building and construction sites. Concern with lower maximum penalties for building and construction participants was also noted.[44] The Review Panel notes that submissions by employer groups to the Review made similar points about the FWO's appropriateness for regulating the sector.[45]

In addition to reintegrating commercial building and construction into the broader regulatory framework of the FWO, the Australian Government intended for a more collaborative and conciliatory approach to be taken in regulating the sector.

In the second reading speech, the then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, described the ABCC (and ROC) as 'ineffective and discredited institutions, more concerned about prosecuting workers and their representatives than tackling rampant wage theft or addressing workplace safety, or educating and promoting good workplace relations'.[46]

When the Building Code was amended in July 2022, the then Minister for Employment and Workplace Relations also described the ABCC as having been 'set up by the Liberals and Nationals to discredit and dismantle unions and undermine the pay, conditions and job security of ordinary Australian workers'.[47]

4.2 Impact and issues

The FWO has had responsibility for enforcing the Fair Work Act in the building and construction sector and investigations of alleged contraventions since 10 November 2022.[48] Responsibility for existing litigation matters transferred to the FWO from 6 February 2023. The Review Panel notes that the FWO's functions more broadly are to provide education, assistance, advice and guidance to employers and employees; promote and monitor compliance with workplace laws; and take appropriate enforcement action.[49]

---

[42] Senate Education and Employment Legislation Committee, Parliament of Australia, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions]* (Report, 2022) 82.
[43] Senate Education and Employment Legislation Committee, Parliament of Australia, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions]* (Report, 2022) 82.
[44] Senate Education and Employment Legislation Committee, Parliament of Australia, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions]* (Report, 2022) 82.
[45] See for example, submissions by Housing Industry Association (HIA) 3, Business Council of Australia (BCA) 16, Australian Resources & Energy Employer Association (AREEA), Minerals Council of Australia (MCA) 26, Master Builders Australia (MBA) 6, 8 and Ai Group 122, 124.
[46] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 October 2022 (Tony Burke, Minister for Employment and Workplace Relations) 2183.
[47] The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Restoring Equal Rights for Construction Workers' (Media Release, 24 July 2024) https://ministers.dewr.gov.au/burke/restoring-equal-rights-construction-workers.
[48] Fair Work Ombudsman (FWO) submission, Senate Education and Employment Legislation Committee, Parliament of Australia, Inquiry into Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions] p 3 <https://www.fairwork.gov.au/sites/default/files/2022-11/fwo-submission-secure-jobs-better-pay-november-2022.pdf>.
[49] *Fair Work Act 2009* (Cth) s 682.

The FWO received additional funding of $69.9 million over 4 years in the October 2022–23 federal budget to more comprehensively regulate the Fair Work Act in the commercial building and construction industry.[50]

In response to changing government priorities and the referral of ABCC powers, in 2022 the FWO also set up an Industrial Compliance Branch to deliver industrial compliance work, including (but not limited to) the building and construction sector.[51]

Since 13 July 2024 there have also been a series of media allegations relating to alleged criminality and corruption in the Construction and General Division of the Construction, Forestry and Maritime Employees Union (CFMEU). This has resulted in the Construction and General Division of the CFMEU being placed into administration on 23 August 2024 for up to 5 years.[52] At the request of the then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, the FWO is also undertaking an investigation into the CFMEU, and the Australian Federal Police is separately assisting to address the allegations.

4.2.1 Quantitative evidence

To understand impacts of the amendments, the Review Panel has been assisted by data from the FWO and other publicly available information. The Review Panel has considered data relating to wage recoveries and compliance and enforcement to indicate work in the sector.

The Review Panel notes that the FWO data in relation to the building and construction sector that is discussed in this report covers the entire building and construction sector, not only the commercial building and construction sector. In addition, the available data for ABCC activities is more limited than that available for the FWO. These matters make a direct comparison between FWO and ABCC data difficult.

The construction sector is over-represented in requests for assistance (RfAs) to the FWO. The construction sector employs around 9% of the Australian workforce[53] and accounted for 14% of disputes received by the FWO in 2023–24.[54] The FWO notes this is 'in part due to rapidly growing employment numbers (including apprenticeships and trainees) in recent years'.[55]

---

[50] Employment and Workplace Relations Portfolio, *Portfolio Budget Statements 2022–23* (Budget Related Paper No 1.6, 2022) 188.
[51] KPMG, *Review of the Office of the Fair Work Ombudsman* (Report, 2023) 26 <https://www.dewr.gov.au/workplace-relations-australia/resources/review-office-fair-work-ombudsman>.
[52] Fair Work Commission, *General Manager's Statement: Administration of the CFMEU Construction and General Division* (3 October 2024) <https://www.fwc.gov.au/documents/consultation/gm-statement-cfmeu-2024-10-03.pdf>; The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Taking Action to Clean Up the Construction Industry' (Media Release, 17 July 2024) <https://ministers.dewr.gov.au/burke/taking-action-clean-construction-industry>; Fair Work Ombudsman, Role *of CFMEU Administrator* (3 October 2024) <https://www.fairwork.gov.au/newsroom/news/role-of-cfmeu-administrator>.
[53] Information provided to the Review by the Fair Work Ombudsman (FWO); data sourced by the FWO from Australian Bureau of Statistics.
[54] Data provided by the FWO to the Review.
[55] FWO, *Annual Report 2023–24* (Report, 2024) 32.

Table 1: FWO requests for assistance completed in the building and construction sector, 2020–21 to 2024–25 (to 31 October 2024)

Financial year	**2020–21**	**2021–22**	**2022–23**	**2023–24**	**2024–25 to 31 Oct**	**Total**
Number of requests for assistance completed	2,350	2,436	2,068	2,509	938	10,301

Source: Data provided to the Review by the FWO.

The FWO's wage recoveries from 2020–21 to 2024–25 (to 31 October 2024) for the building and construction sector are outlined in Table 2. The Panel notes the FWO has had responsibility for the sector since 10 November 2022 (over 4 months into the 2022–23 financial year). In the period from 10 November 2022 to 31 October 2024, the FWO recovered $8,770,086 in wages and entitlements for workers in the building and construction sector.

Table 2: FWO recoveries for the building and construction sector 2020–21 to 2024–25 (to 31 October 2024)

Financial year	**2020–21**	**2021–22**	**2022–23**	**2023–24**	**2024–25 to 31 Oct**	**Total**
Total recoveries	$2,552,141	$2,177,692	$4,215,968	$3,031,089	$1,322,197	$ 13,299,087

Source: Data provided to the Review by the FWO.

Publicly available information shows the ABCC's total wage recoveries were 'more than $5.7 million' over the 5 years and 7 months from December 2016 to 30 June 2022.[56] The ABCC notes that this included $2.5 million in 2021–22, which was an 'increase of more than 182% from the previous reporting period'.

The FWO's compliance and enforcement work in the building and construction sector is shown in Table 3, which includes the number of investigations undertaken, matters completed, and enforcement tools used by the FWO in the building and construction sector from 2020–21 to 2024–25 (to 31 October 2024). This includes litigations, which the FWO undertakes where appropriate (generally in response to serious, significant and/or systemic noncompliance) and where it is in the public interest.[57]

[56] Australian Building and Construction Commission, *Annual Report 2021–22* (Report, 2022), Message from the Commissioner <https://www.transparency.gov.au/publications/attorney-general-s/australian-building-and-construction-commission/australian-building-and-construction-commission-annual-report-2021-22/introduction/message-from-the-commissioner>.
[57] Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 15 <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.

Table 3: FWO building and construction sector industry data

	2020–21	2021–22	2022–23	2023–24	2024–25 to 31 Oct
Number of investigations	411	627	547	627	147
Number of compliance notices issued	252	367	363	390	57
Number of infringement notices issued	39	45	64	60	13
Number of enforceable undertakings	–	–	–	–	–
Number of litigations	5	16	18	10	6
Total court-ordered penalties	$121,958	$73,574	$1,095,603	$1,349,578	$552,968
Total matters completed overall	2,428	2,482	2,089	2,543	954

Source: Data provided by the FWO.

The ABCC's investigations commenced and finalised between 2018–19 and 2022–23 are outlined below in Table 4 below.

Table 4: ABCC building and construction sector industry data

Financial year	2018–19	2019–20	2020–21	2021–22	2022–23 (to 30 June 2023)
Investigations commenced	206	162	117	164	30
Investigations finalised	216	147	134	171	78

Source: ABCC annual reports 2018–19, 2019–20, 2020–21, and 2021–22; FWO, *Annual Report 2022–23*.

Between 2020–21 and 2024–25 (to 31 October 2024), the FWO commenced 55 litigations and secured $1,833,103 in court-ordered penalties in the building and construction sector. This includes part of the period in which the FWO has been responsible for the entire building and construction sector.

From 2 December 2016 to the end of the 2021–22 financial year, the ABCC had finalised 110 court proceedings and imposed a total of $17,330,718 in court-ordered penalties.[58] The ABCC finalised a further 8 proceedings in 2022–23.[59]

[58] Australian Building and Construction Commission, *Annual Report 2021–22* (Report, 2022) vii, viii.
[59] Fair Work Ombudsman, *Annual Report 2022–23* (Report, 2023) 72.

The ABCC had a key performance indicator (KPI) relating to physical site visits. The ABCC exceeded this KPI, undertaking 1,326 site visits in 2021–22,[60] 1,543 in 2020–21,[61] 1,371 in 2019–20,[62] and 1,382 in 2018–19.[63]

Court proceedings and wage matters were also transferred from the ABCC to the FWO, with the FWO taking carriage of all ABCC court proceedings on 6 December 2022. This resulted in 41 matters being transferred from the ABCC to the FWO.[64] Of these matters, 39 matters have been finalised (of which 9 have been wholly discontinued by the FWO) and 2 remain before the courts as of 22 November 2024. Of the transferred cases that have been finalised, the FWO has recovered penalties that total $3,668,466.

In addition to these court proceedings, 31 matters relating to wages and entitlements were transferred to the FWO from the ABCC. 30 of these matters have been finalised, resulting in $85,428.11 recovered.

4.2.2 Qualitative evidence

The FWO released a new Compliance and Enforcement Policy in January 2025 which guides the agencies fulfillment of its compliance and enforcement functions and use of compliance and enforcement powers.[65] The Compliance and Enforcement Policy outlines the FWO's compliance and enforcement regulatory model, which is driven by the 'Compliance Triangle', as seen in Figure 2 below.

[60] Australian Building and Construction Commission, *Annual Report 2021–22* (Report, 2022) 11.
[61] Australian Building and Construction Commission, *Annual Report 2021–22* (Report, 2022) 'Results' <https://www.transparency.gov.au/publications/attorney-general-s/australian-building-and-construction-commission/australian-building-and-construction-commission-annual-report-2020-21/part-2-%E2%80%93-annual-performance-statement/results>.
[62] Australian Building and Construction Commission, *Annual Report 2019–20* (Report, 2020) 'Results' <https://www.transparency.gov.au/publications/attorney-general-s/australian-building-and-construction-commission/australian-building-and-construction-commission-annual-report-2019-20/part-2---annual-performance-statement/results>.
[63] Australian Building and Construction Commission, *Annual Report 2018–19* (Report, 2019) 'Results' <https://www.transparency.gov.au/publications/attorney-general-s/australian-building-and-construction-commission/australian-building-and-construction-commission-annual-report-2018-19/part-2---annual-performance-statement/results>.
[64] Fair Work Ombudsman, *Annual Report 2023–24* (Report, 2024) 45.
[65] Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 1 <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.

Figure 2: The FWO's Compliance Triangle[66]

In this regulatory model, the majority of requests for assistance are responded to through the FWO providing information, education and advice to 'support cooperation between parties' and 'encourage voluntary compliance'.[67] Through its advice and education function, the FWO raises stakeholder awareness of rights and obligations under workplace law, promotes engagement at the workplace-level, and 'builds capabilities that sustain compliance'.[68]

The second largest number of requests for assistance fall in the middle tier, under which the FWO undertakes guided compliance (usually following an investigation).[69] This most commonly involves the FWO issuing compliance notices but can involve use of other enforcement tools such as contravention letters.[70]

The smallest number of requests for assistance fall into the 'enforced compliance' tier of the triangle, which deals with significant noncompliance that warrants a stronger enforcement response, such as litigation.[71]

In response to taking on responsibility for the commercial building and construction sector, the FWO has 'published [its] tailored industry information with pathways to other relevant information across the website', 'made changes across [its] website to promote important information for the industry and to ensure relevant information is easy to find' and 'updated existing [web] information with comprehensive industry-specific information'.[72] The FWO has

[66] Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 7 <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.
[67] Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 8 <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.
[68] Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 8 <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.
[69] Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 9 <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.
[70] Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 9 <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.
[71] Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 10 <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.
[72] Fair Work Ombudsman, *Annual Report 2022–23* (Report, 2023) 38.

conducted user testing to ensure the information meets the needs of industry employers and employees.[73]

In December 2023 the FWO launched a dedicated section of their website, 'Find help for building and construction industry', which contains information on understanding the building and construction industry (and which awards apply), entitlements and allowances under the Building and Construction Award, apprentice entitlements in the industry, and workplace protections.[74] The FWO updated their dedicated existing website information and resources to ensure they provide appropriate information for the whole building and construction industry.[75]

The FWO is engaging directly with the construction industry on an ongoing basis regarding the changes to its role enforcing the Fair Work Act in the commercial building and construction sector. In 2023–24 the FWO had 'focused on resetting expectation and standards of behaviour within the industry – particularly within the education space … and engagement with key stakeholders' such as though the Building and Construction Reference Group.[76]

The FWO's October 2023 Regulator Statement of Intent indicated a shift towards tripartism, collaboration and engagement in their approach to regulation and building a culture of compliance.[77] [78] This led to the development of tripartite advisory and priority sector reference groups.[79] One such reference group relevant to this review is the building and construction industry sector reference group, which was established in early 2024. The reference group helps to ensure regular communication with stakeholders on industry issues; opportunities to seek input on FWO advice, education resources and activities; and identifying opportunities and initiatives to promote compliance.[80]

On 13 July 2024 a joint media investigation by the *Australian Financial Review*, the *Age*, the *Sydney Morning Herald* and *60 minutes* alleged criminality and corruption on Australian Government and state government funded projects,[81] including accusations of corruption, intimidation and threats of violence in Victoria, Tasmania, New South Wales, Queensland and Western Australian branches of the Construction and General Division of the CFMEU. They have also alleged criminals were acting as CFMEU delegates on Australian and state government funded projects, particularly in Victoria.

On 23 August 2024, in response to these allegations,[82] the Australian Government placed the Construction and General Division of the CFMEU and all of its branches into administration for

---

[73] Fair Work Ombudsman, *Annual Report 2022–23* (Report, 2023) 38.
[74] Fair Work Ombudsman, *Annual Report 2023–24* (Report, 2024) 32.
[75] Fair Work Ombudsman, *Annual Report 2023–24* (Report, 2024) 33.
[76] Fair Work Ombudsman, *Annual Report 2023–24* (Report, 2024) 45.
[77] Fair Work Ombudsman, *Statement of Intent* (2023)1, 4 <https://www.fairwork.gov.au/sites/default/files/2023-12/fwo-regulator-statement-of-intent-2023.pdf>.
[78] The Statement of Intent outlines how the Fair Work Ombudsman (FWO) will meet expectations in the Fair Work Act and Ministerial Statement of Expectations to the FWO (24 October 2023). The Statement of Expectations also outlined the FWO should embrace tripartism, collaboration and engagement.
[79] Fair Work Ombudsman, *Annual Report 2023–24* (Report, 2024) 18.
[80] Fair Work Ombudsman, *Engagement and Collaboration* (Web Page, n.d.) < https://www.fairwork.gov.au/about-us/engagement-and-collaboration>.
[81] See e.g. 'Building Bad', *AFR* (online, 17 July 2024) <https://www.afr.com/topic/building-bad-6gug>; N McKenzie, D Marin-Guzman and B Schneiders, 'Bikies, Underworld Figures and the CFMEU Takeover of Construction", *AFR* (online, 13 July 2024).
[82] The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Taking Action to Clean Up the Construction Industry' (Media Release, 17 July 2024) <https://ministers.dewr.gov.au/burke/taking-action-clean-construction-industry#:~:text=The%20number%20one%20job%20of,these%20issues%20and%20we%20are>.

a period of up to 5 years.[83] The administration is aimed at 'ensuring that the Construction and General Division and its Divisional branches return to a position where they are democratically controlled and operate effectively and lawfully in the interests of members'.[84]

In response to these allegations, the former Minister for Employment and Workplace Relations, the Hon Tony Burke MP, also wrote to the Fair Work Ombudsman, Anna Booth, on 17 July 2024 requesting the FWO investigate alleged serious misconduct within the branches of the Construction and General Division of the CFMEU.[85] [86]

On 16 October 2024 the Minister for Employment and Workplace Relations, Senator the Hon Murray Watt, commented that the 'FWO's report [relating to the investigations into the CFMEU requested by the then Minister] complements the ongoing work being done by the administrator of the union' and that there were 42 ongoing investigations. Of note, 9 of these were on foot prior to the Minister's request.

4.2.3 Stakeholder views

In their submissions to the Review, stakeholders expressed a range of views on the abolition of the ABCC and the transfer of responsibility for the commercial building and construction sector.

Employee organisations expressed support for the amendments.

Unions submitted that the ABCC was politically motivated and ineffective. The Australian Council of Trade Unions (ACTU) stated that the ABCC was a 'highly politicised organisation'. It also stated that the ABCC 'did nothing to uncover or investigate the recent issues identified in the Construction and General Division (C&G) of the CFMEU, now being handled by the Administrator'.[87]

The Construction and General Division of the CFMEU stated the ABCC and Building Code were 'an ideologically driven and authoritarian organisation focused almost exclusively on de-unionising the construction industry', citing cases brought against the Construction and General Division of the CFMEU by the ABCC.[88] It also argued 'construction workers did not have the same rights as other workers.'[89]

---

[83] *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth); Fair Work Commission, *General Manager's Statement – Administration of the CFMEU Construction and General Division* (3 October 2024) <https://www.fwc.gov.au/documents/consultation/gm-statement-cfmeu-2024-10-03.pdf>; The Hon Tony Burke MP, The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Taking Action to Clean Up the Construction Industry' (Media Release, 17 July 2024) <https://ministers.dewr.gov.au/burke/taking-action-clean-construction-industry#:~:text=The%20number%20one%20job%20of,these%20issues%20and%20we%20are>; Fair Work Ombudsman, *Role of CFMEU Administrator* (Web Page, 3 October 2024) <https://www.fairwork.gov.au/newsroom/news/role-of-cfmeu-administrator>.

[84] Fair Work Commission, *General Manager's Statement – Administration of the CFMEU Construction and General Division* (3 October 2024) <https://www.fwc.gov.au/documents/consultation/gm-statement-cfmeu-2024-10-03.pdf>.

[85] Fair Work Ombudsman, *Fair Work Ombudsman Statement on the CFMEU* (Media Release, 18 July 2024) <https://www.fairwork.gov.au/newsroom/media-releases/2024-media-releases/july-2024/20240718/FWO-statement-on-CFMEU-media-release>.

[86] The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Taking Action to Clean Up the Construction Industry' (Media Release, 17 July 2024) <https://ministers.dewr.gov.au/burke/taking-action-clean-construction-industry#:~:text=The%20number%20one%20job%20of,these%20issues%20and%20we%20are>.

[87] Australian Council of Trade Unions (ACTU) submission, 6.

[88] CFMEU Construction and General Division submission, 2–3.

[89] CFMEU Construction and General Division submission, 3.

The CFMEU also argued the ABCC failed to address endemic issues in the industry, such as 'wage theft, sham contracting and work health safety issues'. The Construction and General Division of the CFMEU also submitted that the ABCC only ran 3 cases against employers to recover unpaid wages, did not pursue any sham contracting matters and only commenced 3 prosecutions of employers.[90] It cited PwC modelling from 2019 that found the construction industry made up 10% of the national workforce but almost 25% of estimated annual underpayments of workers.[91]

Employer groups were critical of the abolition of the ABCC and called for the ABCC and the Building Code to be re-established. There was a common sentiment that a specialised regulator such as the ABCC is needed to regulate the building and construction sector.

Employer groups expressed significant concern about adverse impacts arising from the abolition of the ABCC. In particular, employer groups were concerned with a perceived lack of enforcement and oversight of the activities of the CFMEU. Ai Group stated that the ABCC was abolished in the face of entrenched unacceptable CFMEU conduct.[92] The Business Council of Australia (BCA) noted the need for industry-specific solutions, stating that 'at the heart of these problems is the systemic culture of lawbreaking and recidivism of the … construction and general division of the CFMEU' and that '[c]ourts have found that the CFMEU has repeatedly and deliberately breached industrial legislation, undertaking disruptive, threatening, and abusive behaviour towards employers and employees'.[93]

The Housing Industry Association (HIA) argued the abolition of the ABCC has resulted in a regulatory gap at the time allegations about the CFMEU have come to light and highlighted contraventions by the union since 2003, 'resulting in over $24 million in penalties, and $4 million ordered against office holders, employees, delegates and members'.[94] MCA argued the abolition of the ABCC has weakened union accountability.[95] Master Builders Australia (MBA) argued that the abolition of the ABCC and Building Code has led to the return of 'historical unlawful and anti-productive practices, leaving the industry without the necessary protections or an effective regulator to assist them enforce their rights'.[96]

The Australian Resources & Energy Employer Association (AREEA) argued that the abolition of the ABCC led to the Australian Government needing to place the Construction and General Division of the CFMEU into administration.[97] Master Electricians Australia (MEA) believes that cultural change within the CFMEU now depends solely on its administrator and that reinstating the ABCC would likely result in changed behaviour.[98]

Many employer groups argued the FWO is not an effective replacement for the ABCC. MBA said it believes issues in the industry have been made worse by the FWO not being an effective replacement for the ABCC, noting the FWO had not filed a new case against the CFMEU following the ABCC's abolition and discontinued or partially discontinued 12 of the 41 cases

[90] CFMEU Construction and General Division submission, 3–4.
[91] CFMEU Construction and General Division submission, 3, citing Fair Work Ombudsman, *National Building and Construction Industry Campaign 2014/15* (Report, 2015).
[92] Ai Group submission, 123.
[93] Business Council of Australia (BCA) submission, 16.
[94] Housing Industry Association (HIA) submission, 1.
[95] Minerals Council of Australia (MCA) submission, 7.
[96] Master Builders Australia (MBA) submission, 9.
[97] Australian Resources & Energy Employer Association (AREEA) submission, 20.
[98] Mining and Energy Union (MEA) submission, 1–2.

transferred from the ABCC.[99] It also stated the FWO does not have the appropriate resources or powers to effectively regulate widely known industry problems.[100]

The Australian Chamber of Commerce and Industry (ACCI) also noted comments by Judge Vasta in relation to the 'partial discontinuation of a matter where it [the FWO] abandoned "the most serious"[101] claim involving threats of violence and corruption allegations.'[102] Judge Vasta stated that 'there may be a perception that the FWO had not complied with the obligations as a model litigant' and that:

> the perception may very well be that the FWO has, by its own actions, not lived up to its purpose. Whilst it must treat all victims equally and all perpetrators equally, the perception here may very well be an Orwellian one; that is, that some victims, and some perpetrators, are more equal than others.

MBA argued that studies have identified an adverse impact on construction costs and the national housing crisis.[103] For example, MBA cited a finding that the cost of a 2-bedroom apartment increased by 33% and up to 96 days per year were lost, and other analysis that the amendments added 10% to the cost of construction of an apartment.[104]

Ai Group and HIA recommended that, if the ABCC is not to be re-established, there should be a dedicated division within the FWO with responsibility for regulating the building and construction sector and with the necessary resourcing and powers to regulate the sector. MBA noted the need for the 'full range' of ABCC powers, including 'unlawful picketing, coercion, compulsory examination and investigations powers and increases in penalties for such conduct'.[105, 106]

4.3 Findings and recommendations

The Review Panel considers that the amendments abolishing the ABCC and the transfer of responsibilities for the regulation of the commercial building and construction sector to the FWO are operating as intended.

The Review Panel considers that the amendments have achieved their intent of making the commercial building and construction sector subject to the same laws and regulations as other sectors. The amendments have also resulted in the reintegration of the sector with the broader regulatory framework overseen by the FWO.

The Review Panel notes that this may provide the opportunity for a more balanced industrial relations framework for employers and workers in the industry. While the industry has

[99] Master Builders Australia (MBA) submission, 8.
[100] Master Builders Australia (MBA) submission, 6.
[101] *Fair Work Ombudsman v Construction, Forestry and Maritime Employees Union (M1 Yatala Exit 41 Case)* [2024] FedCFamC2G 340, 126.
[102] Australian Chamber of Commerce and Industry (ACCI) submission, 58.
[103] Master Builders Australia (MBA) submission, 7–8.
[104] D Marin-Guzman, 'CFMEU Deal Helps Add 10pc to Apartment Costs', *AFR* (online, 10 July 2024); M Bleby, 'New Union Wage Agreements to Drive Construction Costs Higher, RLB says', *AFR* (online, 6 February 2024); D Marin-Guzman, 'Secret Union Push for 26pc Pay Rise to Spike Building Costs', *AFR* (online, 8 March 2024).
[105] Ai Group submission, 127.
[106] Housing Industry Association (HIA) submission, 3.

substantial ongoing issues with noncompliance (by unions *and* employers), this framework may provide the opportunity to begin to address these issues.

The Review Panel notes that the qualitative and quantitative evidence reveals the different regulatory approaches of the ABCC and the FWO to the building and construction sector (and in the case of the FWO more broadly).

The Review Panel believes that the number of litigations undertaken by the ABCC and associated court-ordered penalties sought in response to noncompliance in the sector indicates the ABCC's approach to regulation had a strong focus on litigation. Although the ABCC had other compliance and enforcement tools at its disposal, this focus is a key difference between the approach of the 2 regulators.

The FWO's approach uses its suite of enforcement tools to respond to noncompliance (where appropriate) and uses non-punitive compliance tools, such as compliance notices (as seen in the data in Table 3). These tools require a person to take action to remedy noncompliance, such as rectifying underpayments, without admitting to or being found to have committed contraventions.[107] The FWO has also issued infringement notices in response to contraventions, which require a person to pay a penalty for contraventions. If a person complies with an infringement notice, they are not taken to have admitted to the contravention.[108]

The Review Panel notes that, from 2022–23 to 2024–25 (to 31 October 2024), the FWO commenced 2,359 investigations. Over a similar period, between 2018–19 to 2022–23, the ABCC commenced 679 investigations and finalised 746 investigations. The Review Panel notes that, while the FWO therefore undertook more investigations in the sector than the ABCC over a similar period of time, the FWO has had broader responsibility for the entire building and construction sector since 10 November 2022, while the ABCC's investigations were limited to the commercial building and construction sector.

The Review Panel notes that the FWO's wages recoveries for the building and construction sector have been higher than the ABCC's recoveries over a shorter period of time. These may be indicative of a more 'balanced approach' to noncompliance by employers and employee organisations in the sector. However, again the Review Panel notes the limitations of this data comparison, as the FWO's recoveries cover the entire building and construction sector (while the ABCC's were limited to commercial building and construction). The Review Panel also acknowledges that FWO's recoveries from wage matters transferred from the ABCC are a small portion of its overall building and construction recoveries.

The Review Panel also contends that the large increase in wage recoveries by the ABCC in 2021–22 may be seen in the context of social and political pressure on the ABCC to recover more wages during the period in which the Australian Government had committed to abolishing the agency.

The Review Panel notes that there are long-term and systemic issues with noncompliance in the sector. The Review Panel notes concerns of employer groups in submissions to this Review

[107] Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 12 <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.
[108] Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 13 <https://www.fairwork.gov.au/sites/default/files/migration/725/compliance-and-enforcement-policy.pdf>.

relating to the powers and penalties in the Fair Work Act. This includes the HIA's comments that the amendments 'reduce the disincentives to engage in such behaviour and are being pursued despite the fact the current penalties are apparently insufficient to deter union misconduct'.[109] However, the Review Panel has not been presented with or seen evidence that the regulatory approach of the ABCC or the powers and penalties that were available to that agency necessarily resulted in greater compliance in the commercial building and construction sector.

The Review Panel also notes that the administrator of the Construction and General Division of the CFMEU has significant powers to address noncompliance, including powers to suspend, remove, expel or disqualify a member or office holder;[110] undertake investigations; terminate employment or refer conduct to other government bodies. The Review Panel believes that these powers provide a pathway to respond to noncompliance by the Construction and General Division of the CFMEU during the administration and while the National Construction Industry Forum (NCIF) develops the Building and Construction Industry Blueprint (discussed in section 5.2.2 of this report) with the aim of effecting cultural change within the industry.

The Review Panel believes that the building and construction sector needs cultural and behavioural change to begin to address systemic noncompliance. In this, the Review Panel again notes the work of the NCIF, as explored in section 5.2.2 of this report below and related recommendations.

In this context, the Review Panel also notes the broad approach of the FWO to building cooperation and tripartism as set out in the Regulator Statement of Intent. The Review Panel also notes that, while the FWO takes appropriate enforcement action in line with its compliance and enforcement policy, it also has a focus on behavioural and cultural change to drive workplace relations compliance.

As such, at this stage, the Review Panel does not make any recommendations relating to the abolition of the ABCC.

[109] Housing Industry Association (HIA) submission, 7.
[110] *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) inserted s.323B into the *Fair Work (Registered Organisations) Act 2009* (Cth).

Chapter 5. Establishment of National Construction Industry Forum

The Secure Jobs, Better Pay Act established the National Construction Industry Forum (NCIF) from 1 July 2023. Members of the NCIF were initially announced on 23 July 2023 and membership was expanded in September 2024.

The NCIF is a tripartite body that provides advice to government on a broad range of issues in relation to work in the building and construction industry. In this way, the NCIF links with the theme of these amendments towards a more conciliatory approach to the building and construction industry than recent Coalition governments.

In announcing the inaugural members, the Minister for Employment and Workplace Relations noted that the NCIF was an outcome of the Jobs and Skills Summit that 'brought together business, unions and governments to talk about shared challenges facing our economy – including workplaces in the building and construction industry'.[111] He also noted that at the Jobs and Skills Summit '[w]e agreed to work together, taking a tripartite approach – a principle of equal and shared collaboration between governments, unions and industry – on matters that affect workers and businesses' and that the NCIF will do this.[112] The Minister noted that 'as a priority the Forum will look at issues around gender equity, particularly the recruitment and retainment of women workers'.[113]

5.1 Amendments and intent

This section provides an outline of the amendments in the Secure Jobs, Better Pay Act that established the NCIF.[114] It also provides information on the intent of the changes.

5.1.1 Secure Jobs, Better Pay amendments

The Secure Jobs, Better Pay Act amended the Fair Work Act by inserting new Part 6-4D of Chapter 6 to establish the NCIF.

Section 789GZD of the Fair Work Act sets out the function of the NCIF as follows:

> 789GZD Function of the Forum
>
> (1) The function of the National Construction Industry Forum is to provide advice to the Government in relation to work in the building and construction industry.
>
> (2) The matters in relation to which the Forum may provide advice include, but are not limited to, the following:

[111] The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Appointments to the National Construction Industry Forum' (Media Release, 23 July 2023) <https://ministers.dewr.gov.au/burke/appointments-national-construction-industry-forum>.
[112] The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Appointments to the National Construction Industry Forum' (Media Release, 23 July 2023) <https://ministers.dewr.gov.au/burke/appointments-national-construction-industry-forum>.
[113] The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Appointments to the National Construction Industry Forum' (Media Release, 23 July 2023) <https://ministers.dewr.gov.au/burke/appointments-national-construction-industry-forum>.
[114] *Fair Work Act 2009* (Cth) Part 6-4D.

(a) workplace relations;

(b) skills and training;

(c) safety;

(d) productivity;

(e) diversity and gender equity;

(f) industry culture.

(3) Matters for advice may be:

(a) raised by the Government; or

(b) agreed between the members of the Forum.

Section 789GZE of the Fair Work Act outlines the membership of the NCIF and provides:

789GZE Membership

(1) The members of the National Construction Industry Forum are:

(a) the Minister; and

(b) the Infrastructure Minister; and

(c) the Industry Minister; and

(d) the members appointed by the Minister.

(2) The Minister must appoint:

(a) one or more members who have experience representing employees in the building and construction industry; and

(b) an equal number of members who have experience representing employers in the building and construction industry, including at least one member who has experience representing contractors in the building and construction industry, and one member with experience in small to medium sized enterprises in the residential building sector.

(3) The Minister may appoint any other person.

The Secure Jobs, Better Pay Act also established the mechanical provisions for the NCIF, including the chair;[115] frequency and procedure for meetings;[116] confidentiality;[117] travel

[115] *Fair Work Act 2009* (Cth) s 789GZG.
[116] *Fair Work Act 2009* (Cth) s 789GZH.
[117] *Fair Work Act 2009* (Cth) s 789GZJ.

allowance for members;[118] and the substitution,[119] resignation[120] and termination of appointment of members.[121]

5.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of establishing the NCIF was to give 'further opportunities for industry participants to organise and have their views heard by government'.[122]

The establishment of the NCIF was an outcome of the Australian Government's Jobs and Skills Summit. One of the outcomes for immediate action from the summit was to 'establish a tripartite National Construction Industry Forum to constructively address issues such as mental health, safety, training, apprentices, productivity, culture, diversity and gender equity in the industry'.[123]

The Australian Government has stated that it views the NCIF and tripartism as important factors in driving long-term change in the construction sector and improving industry culture.[124]

The use of a tripartite group to encourage cooperation in the building and construction industry and engage stakeholders in advice to the Australian Government is consistent with the different forms of regulation theme outlined in the introduction to this chapter.

5.2 Impact and issues

This section sets out relevant quantitative and qualitative evidence on the NCIF, as well as an outline of the stakeholder views.

5.2.1 Quantitative evidence

The NCIF has held 3 meetings as at the time of publication of this report.[125] These are addressed in section 5.2.2 of this report.

5.2.2 Qualitative evidence

On 23 July 2023 the then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, announced the appointment of 12 representatives to the NCIF from:

- Housing Industry Association (HIA)
- National Electrical and Communications Association (NECA)
- Dexus Funds Management and the Property Council of Australia
- Australian Owned Contractors
- Australian Constructors Association (ACA)

---

[118] *Fair Work Act 2009* (Cth) s 789GZM.
[119] *Fair Work Act 2009* (Cth) s 789GZK.
[120] *Fair Work Act 2009* (Cth) s 789GZN.
[121] *Fair Work Act 2009* (Cth) s 789GZQ.
[122] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, p xliv.
[123] Australian Government, *Jobs and Skills Summit: Outcomes* (September 2022) 6 <https://treasury.gov.au/sites/default/files/inline-files/Jobs-and-Skills-Summit-Outcomes-Document.pdf>.
[124] The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Appointments to the National Construction Industry Forum' (Media Release, 23 July 2023) <https://ministers.dewr.gov.au/burke/appointments-national-construction-industry-forum>; The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Blueprint for the Future: A Building and Construction Industry that Works for Everyone' (Media Release, 23 July 2024) <https://ministers.dewr.gov.au/burke/appointments-national-construction-industry-forum>.
[125] Department of Employment and Workplace Relations, *National Construction Industry Forum* (Web Page, n.d.) <https://www.dewr.gov.au/australian-building-and-construction-industry/national-construction-industry-forum>.

- Roberts Co.
- Construction, Forestry, Maritime, Mining and Energy Union (CFMEU)
- Australian Workers' Union (AWU)
- Australian Manufacturing Workers' Union (AMWU)
- Electrical Trades Union (ETU).[126]

The NCIF held its first meeting on 20 October 2023, and meetings have subsequently been held on 23 February 2024 and 16 October 2024. The NCIF has established 2 subcommittees – the Gender Equity Subcommittee (which considers gender equity in the construction sector) and the Financial Viability Subcommittee (which considers financial viability in the construction sector).[127] The terms of reference for the NCIF largely reflect the legislative requirements of the NCIF.[128] They were endorsed by NCIF members on 20 October 2023.

In September 2024 the Minister for Employment and Workplace Relations, Senator the Hon Murray Watt, announced that the NCIF would be 'reinvigorated' to change the culture of the construction industry and to build cooperation, not conflict, and an industry that works for everyone.[129] He also announced the NCIF membership would be broadened through the addition of Master Builders Australia (MBA) and the Civil Contractors Federation.[130]

On appointment, the Civil Contractors Federation noted they were 'pleased to have been appointed to the NCIF' and '[b]ringing together all key construction stakeholders must be the starting point for the Australian Government to advance necessary reforms that are urgently needed'.[131] MBA noted that their appointment to the NCIF was a positive step in tackling key industry challenges. It stated that '[i]t's important that all key stakeholders are around the table to discuss and progress reforms in relation to the massive issues facing the industry' and '[t]his is the opportunity for meaningful and positive change in the industry'.[132]

An NCIF meeting was subsequently held, on 16 October 2024, that discussed collaboratively identifying the key challenges for the sector and using that to underpin a Building and Construction Industry Blueprint (Blueprint) that will '[i]dentify and prioritise the industry's key

[126] The Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Appointments to the National Construction Industry Forum' (Media Release, 23 July 2023) <https://ministers.dewr.gov.au/burke/appointments-national-construction-industry-forum>.
[127] Department of Employment and Workplace Relations, 'National Construction Industry Forum Meeting' (Communiqué, 23 February 2024) <https://www.dewr.gov.au/download/16165/national-construction-industry-forum-meeting-communique-23-february-2024/36568/national-construction-industry-forum-meeting-communique-23-february-2024/pdf>.
[128] Department of Employment and Workplace Relations, *Terms of Reference for the National Construction Industry Forum* (Web Page, 8 November 2023) <https://www.dewr.gov.au/australian-building-and-construction-industry/resources/terms-reference-national-construction-industry-forum>.
[129] Senator the Hon Murray Watt, Minister for Employment and Workplace Relations, 'Address to the National Press Club' (Speech, National Press Club, 18 September 2024) <https://ministers.dewr.gov.au/watt/address-national-press-club>.
[130] Senator the Hon Murray Watt, Minister for Employment and Workplace Relations, 'Address to the National Press Club' (Speech, National Press Club, 18 September 2024) <https://ministers.dewr.gov.au/watt/address-national-press-club>.
[131] Civil Contractors Federation, 'CCF Appointment to the National Construction Industry Forum' (Media Release, 19 September 2024) <https://www.civilcontractors.com/ccf-appointment-to-national-construction-industry-forum/>.
[132] Master Builders Australia, 'Appointment to the National Construction Industry Forum' (Media Release,18 September 2024) <https://masterbuilders.com.au/appointment-to-national-construction-industry-forum/>.

challenges and develop a staged workplan for the Forum to consider appropriate solutions'.[133] This will include the issue of industry culture.[134] The Blueprint will be developed within 6 months (from October 2024) and will complement existing work underway.

On 21 November 2024 the Minister for Employment and Workplace Relations, Senator the Hon Murray Watt, announced that the Australian Government had appointed Dr Rod Harrison, a former Deputy President of the Australian Industrial Relations Commission and the NSW Industrial Relations Commission, to assist members with developing the Blueprint.[135]

Minister Watt also noted that the NCIF 'agreed that real long-term change must come from, and be driven by, the building and construction industry itself, with the support of government' and reinforced that, to meet the objectives of creating lasting and tangible change within the industry, cooperation is required.[136] Minister Watt noted that '[w]orking together to address the persistent challenges facing [the] industry is key to ensuring it is an industry that works for everyone'.[137]

To these ends, the Review Panel notes former Deputy President Harrison's experience in promoting cooperation on large-scale construction projects in the Hunter region. The Review Panel is not privy to any future outcomes of the NCIF relating to the Blueprint; however, it believes this experience, which includes using the Fair Work Commission (FWC) to provide onsite industrial relations leadership and discipline amongst the parties on large projects, offers great potential.[138]

5.2.3 Stakeholder views

Employee organisations did not provide any views on the NCIF in their submissions to the Review.

Employer associations provided mixed views on the NCIF. In their submission, HIA and the Australian Chamber of Commerce and Industry (ACCI) were supportive of the NCIF; however, they did not see it as a replacement for an industry-specific regulator. Rather, they see the NCIF as an institution that would work well in parallel with the ABCC and Building Code.[139] [140]

---

[133] Department of Employment and Workplace Relations, 'National Construction Industry Forum Meeting: Blueprint for the Future – A Building and Construction Industry that Works for Everyone' (Communiqué, 16 October 2024) <https://www.dewr.gov.au/download/16552/national-construction-industry-forum-meeting-communique-16-october-2024/38397/national-construction-industry-forum-meeting-communique-16-october-2024/pdf>.
[134] Department of Employment and Workplace Relations, 'National Construction Industry Forum Meeting: Blueprint for the Future – A Building and Construction Industry that Works for Everyone (Communiqué, 16 October 2024) <https://www.dewr.gov.au/download/16552/national-construction-industry-forum-meeting-communique-16-october-2024/38397/national-construction-industry-forum-meeting-communique-16-october-2024/pdf>.
[135] Senator the Hon Murray Watt, Minister for Employment and Workplace Relations, 'IR Expert Appointed to Deliver Construction Industry Blueprint' (Media Release, 21 November 2024) <https://ministers.dewr.gov.au/watt/ir-expert-appointed-deliver-construction-industry-blueprint>.
[136] Ministers for Employment and Workplace Relations Portfolio, 'Blueprint for the Future: A Building and Construction Industry that Works for Everyone'(Joint Media Release, 16 October 2024) <https://ministers.dewr.gov.au/watt/blueprint-future-building-and-construction-industry-works-everyone>.
[137] Ministers for Employment and Workplace Relations Portfolio, 'Blueprint for the Future: A Building and Construction Industry that Works for Everyone'(Joint Media Release, 16 October 2024) <https://ministers.dewr.gov.au/watt/blueprint-future-building-and-construction-industry-works-everyone>.
[138] M Bray, J Macneil and A Stewart, *Cooperation at Work: How Tribunals Can Help Transform Workplaces* (Federation Press, 2017) Ch 7.
[139] Housing Industry Association (HIA) submission, 7–8.
[140] Australian Chamber of Commerce and Industry (ACCI) submission, 98.

In contrast, Ai Group submitted that it was at best premature to form a view on the effectiveness on the NCIF.[141] It stated that, given the CFMEU's behaviour, current workplace relations laws (including those that established the NCIF) are blatantly inadequate for addressing issues in the construction industry.[142]

MBA stated that the NCIF was welcomed by industry and noted its appointment to the NCIF and the development of the industry Blueprint.[143] It recommended the NCIF remain in operation and '[t]hat Government ensure necessary and appropriate funding appropriations are given to the Forum, to enable and support its work and functions'.[144]

It is telling that there is not significant criticism of the NCIF by stakeholders. The tripartite approach of the NCIF is key to building working relationships in the building and construction sector, understanding issues faced by the sector and providing advice to government. This is seen in the development of the Blueprint, which will bring together the sector to drive much-needed long-term change in the industry.[145]

5.3 Findings and recommendations

The Review Panel finds that the Secure Jobs, Better Pay amendments that establish the NCIF are working as intended.

The NCIF is still in its infancy, so evidence is limited as to any impact on the building and construction industry. However, the Review Panel is encouraged by the work of the NCIF in attempting to drive cultural change and cooperation in the industry, including the development of the Blueprint and the appointment of Dr Rod Harrison to assist with its development.

The Review Panel agrees that a tripartite approach is key to building cooperation, understanding issues and providing advice to government on the sector. The Review Panel considers that the NCIF has the potential to drive a more conciliatory approach by all industry participants and to drive broader cultural change in the industry.

The Review Panel is further encouraged by the lack of significant criticism for the NCIF. Given the broad issues in the sector and history of adversarialism in the sector, this indicates broad support for the NCIF.

The Review Panel finds that the NCIF is operating as intended and is an appropriate institution to drive tripartism and cultural change.

The Review Panel makes 2 recommendations in relation to the NCIF.

Draft Recommendation 2: The NCIF continue its work developing and implementing the Building and Construction Industry sector Blueprint to bring cultural change to the industry.

[141] Ai Group submission, p 114.
[142] Ai Group submission, p 115.
[143] Master Builders Australia (MBA) submission, p 3.
[144] Master Builders Australia (MBA) submission, p 20.
[145] Ministers for Employment and Workplace Relations Portfolio, 'Blueprint for the Future: A Building and Construction Industry that Works for Everyone' (Joint Media Release, 16 October 2024) <https://ministers.dewr.gov.au/watt/blueprint-future-building-and-construction-industry-works-everyone>.

Draft Recommendation 3: The Australian Government consider utilising the NCIF as a model tripartite forum to advise the Australian Government on other industries.

Chapter 6. Abolition of the Registered Organisations Commission

Part 1 of Schedule 1 to the Secure Jobs, Better Pay Act abolished the Registered Organisations Commission (ROC) and transferred the regulatory powers and functions of the Registered Organisations Commissioner to the General Manager of the Fair Work Commission (FWC) from 6 March 2023.

This returns to the position as it existed prior to the establishment of the ROC on 1 May 2017.

This Review Panel acknowledges that the Secure Jobs, Better Pay amendments discussed in this report form part of a broader political debate over how federally registered employee associations (unions) and employer associations registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act) are regulated. This Review Panel focuses appropriately on the limited scope of the Review which includes the effectiveness, appropriateness and any unintended consequences of the 2022 Secure Jobs, Better Pay amendments.

6.1 Amendments and intent

The amendments had the practical consequence of transferring powers and functions of the former ROC to the FWC.

6.1.1 Secure Jobs, Better Pay amendments

Many of the Secure Jobs, Better Pay amendments substitute the various references to the ROC and its Commissioner with the FWC and its General Manager in both the RO Act and the Fair Work Act.

However, the Secure Jobs, Better Pay Act made substantive amendments to the functions of the General Manager under s 329A of the RO Act, inserting a new function in s 329A(2). Section 329A provides:

> 329A Functions of the General Manager
>
> (1) The General Manager has the following functions:
>
> (a) to promote:
>
> (i) efficient management of organisations and high standards of accountability of organisations and their office holders to their members; and
>
> (ii) compliance with financial reporting and accountability requirements of this Act;
>
> including by providing education, assistance and advice to organisations and their members;
>
> (b) to monitor acts and practices to ensure they comply with the provisions of this Act providing for the democratic functioning and control of organisations;

(c) to do anything incidental to or conducive to the performance of any of the above functions.

Note: Section 657 of the Fair Work Act sets out the General Manager's powers.

(2) In performing functions and exercising powers under this Act, the General Manager must seek to embed within organisations a culture of good governance and voluntary compliance with the law.

The Secure Jobs, Better Pay Act also gave the General Manager new powers to issue infringement notices and enter into enforceable undertakings, which are discussed in the following chapter.

These amendments commenced on 6 March 2023.

6.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of these provisions was to move the regulatory role of the ROC, which was claimed to be an ineffective and discredited institution, into the FWC and give the General Manager the overt function to seek to embed by way of education good governance practices into registered organisations.

As discussed above in the ABCC chapter in Part 1 of this report, the then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, in the second reading speech for the Secure Jobs, Better Pay Bill stated that the ABCC and the ROC were 'ineffective and discredited institutions'.[146] He also claimed they were 'more concerned' with 'prosecuting workers and their representatives than tackling rampant wage theft or addressing workplace safety, or educating and promoting good workplace relations'.[147] This aligns with the theme of different regulatory approaches.

In relation to the General Manager's additional function in s 329A(2) of the RO Act, the revised Explanatory Memorandum stated that the intention of the new function was to 'ensure that the General Manager considers education when performing functions under the RO Act'.[148]

The broader policy intent described in the Explanatory Memorandum for the abolition of the ROC (and also the ABCC) was aimed at '[r]estoring fairness and integrity to workplace relations institutions'.[149] The Australian Labor Party (ALP) opposed the establishment of the ROC on each occasion a Bill for its creation has been before parliament. Further, after the establishment of the ROC, ALP policy committed to abolishing it, including in its 2022 policy platform. This aligns with the theme of institutional integration.

[146] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 2183 (Tony Burke, Minister for Employment and Workplace Relations).
[147] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 2183 (Tony Burke, Minister for Employment and Workplace Relations).
[148] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, para 18.
[149] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, Outline, p iii.

6.2 Impact and issues

Since the passing of the amendments, the General Manager has taken on the functions of the ROC and established renewed regulatory functions within the operations of the FWC.

6.2.1 Quantitative evidence

The FWC *Annual Report 2022–23* stated that:[150]

> On 6 March 2023, the functions of the Registered Organisations Commissioner were transferred to the General Manager of the Commission. Between 6 March 2023 and 30 June 2023, we received 472 matters relating to these transferred functions.

Prior to the transfer of any workload from the ROC to the FWC, the FWC *Annual Report 2021–22* disclosed that 211 applications had been lodged under the RO Act.[151] The FWC *Annual Report 2022–23* disclosed that 143 lodgements under the RO Act.[152] One formal investigation under the RO Act was transferred from the ROC to the FWC.[153]

The FWC *Annual Report 2023–24* is informative, as it covers the first full year following the ROC's abolition and discloses that the FWC handled 1,618 lodgements pertaining to the RO Act.[154]

The increase of 1,475 lodgements in the annual report following the abolition of the ROC compared to prior to its abolition is indicative of the high volume of routine work the ROC performed under RO Act, which transferred to the FWC. That work is substantially made up of applications and lodgements of paperwork that registered organisations are required to lodge with the regulator to be compliant with the RO Act.

The FWC reported in its *Annual Report 2022–23* that 33 major education activities were completed, which appears generally comparable to the number of educational activities that were being undertaken by the ROC. In its *Annual Report 2023–24* the FWC reported that 21 major education activities were completed and separately reported a further 17 education activities under the RO Act.[155] Table 5 shows the number of major education activities undertaken by the ROC and the FWC.

[150] Fair Work Commission, *Annual Report 2022–23* (Report, 2023) 22.
[151] Fair Work Commission, *Annual Report 2021–22* (Report, 2022) Table C1, 60.
[152] Fair Work Commission, *Annual Report 2022–23* (Report, 2023) Table C1, 66.
[153] Fair Work Commission, *Annual Report 2022–23* (Report, 2023) 70.
[154] Fair Work Commission, *Annual Report 2023–24* (Report, 2024) Table C1, 65.
[155] Fair Work Commission, *Annual Report 2023–24* (Report, 2024) Table C1, 65.

Table 5: Major education activities undertaken Registered Organisations Commission and Fair Work Commission

Number of major education activities targeted at organisations and their members by annual report			
Institution	Year	Number completed	Source
ROC	2018–19	22	Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2018–19*
ROC	2019–20	36	Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2019–20*
ROC	2020–21	34	Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2020–21*
ROC	2021–22	34	Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2021–22*
FWC / ROC	2022–23	33	Fair Work Commission, *Annual Report 2022–2023*
FWC	2023–24	21	Fair Work Commission, *Annual Report 2023–24*

Note: ROC: Registered Organisations Commission; FWC: Fair Work Commission.

Source: Annual reports of the Fair Work Ombudsman and Registered Organisations Commission Entity period 2018–19 to 2021–22 and annual reports of the FWC, period 2022–23 to 2023–24.

The FWC website maintains a list of all concluded and current formal inquiries and investigations since 2011. The list includes those commenced by the FWC prior to the ROC's establishment, transferred to the ROC, commenced while the ROC was in operation, and transferred back to the FWC; and any that have been commenced since the ROC was abolished. The ROC commenced 16 inquiries or investigations related to conduct in employer associations and 20 into unions (or a reporting unit of a union), according to the current and concluded 'inquiries and investigations' listed on the FWC's website.[156]

As at 17 January 2025 the FWC, while regulator (prior to 1 May 2017 and since 6 March 2023 combined), had commenced inquiries or investigations into 4 employer associations and 37 into unions (or a reporting unit of a union), according to analysis of the current and concluded 'inquiries and investigations' listed on the FWC's website.[157]

As at 17 January 2025 the General Manager has commenced 2 court proceedings since the abolition of the ROC.[158]

By way of a general comparison, the ROC only commenced 5 civil penalty court proceedings during its entire period of operation (from 1 May 2017 to 6 March 2023), according to the 'Completed Federal Court proceedings' summary information on the FWC's website.[159] Table 65 in Appendix 5 shows the Federal Court proceedings commenced by the regulator.

Two court proceedings had been commenced by the ROC and transferred to the General Manager as the applicant on 6 March 2023.

One of those court proceedings, *Fair Work Commission v Australian Workers' Union* [2023] FCA 1642, concluded (on 21 December 2023) with an agreed penalty of $290,000 which was imposed on the Australian Workers' Union (AWU), with the AWU expressing contrition and agreeing to publish a joint statement acknowledging the contraventions and the importance of

[156] Fair Work Commission, *Inquiries, Investigations and Litigation* (Web Page, n.d.).
[157] Fair Work Commission, *Inquiries, Investigations and Litigation* (Web Page, n.d.).
[158] Fair Work Commission, *Inquiries, Investigations and Litigation* (Web Page, n.d.).
[159] Fair Work Commission, *Inquiries, Investigations and Litigation* (Web Page, n.d.).

compliance.[160] The AWU admitted to 27,140 contraventions in relation to its keeping of its register of members, reporting of member numbers and failure to remove members from its register of members.[161]

In the other proceeding General Manager of the *Fair Work Commission v Smyth*,[162] the application was dismissed by the Court (on 28 March 2024) in relation to a technical point on the timeframe of the conduct having elapsed under s 320 of the RO Act. [163]

One investigation transferred from the ROC to the General Manager led to the General Manager determining to commence Federal Court proceedings on 23 August 2024.[164]

The General Manager has also taken an active role as the regulator where appropriate. In response to the widespread media reporting of misconduct at the Construction, Forestry and Maritime Employees Union (CFMEU) in 2024 (which has been collectively referred to as the 'Building Bad' series of media reporting),[165] the General Manager sought to place the CFMEU Construction and General Division in administration to address mounting compliance concerns connected with the CFMEU.

The FWC's media release of 2 August 2024 stated:[166]

> The Fair Work Commission's General Manager, Murray Furlong, has today initiated proceedings in the Federal Court under s.323 of the *Fair Work (Registered Organisations) Act 2009* (RO Act) to appoint an independent administrator for the Construction and General Division of the Construction, Forestry and Maritime Employees Union (CFMEU).
>
> ...
>
> As part of the commitment to being an open and transparent regulator, the Fair Work Commission's General Manager is establishing a Building and Construction Industry Committee. The committee will report to the General Manager. The Administrator will also be required to meet with the General Manager regularly throughout the administration to report on the scheme's progress.

Ultimately, parliament legislated a process to facilitate the appointment of an administrator of the CFMEU Construction and General Division, and the General Manager's court proceedings were withdrawn on 4 September 2024. [167] The administrator's role was to ensure that this division and its branches operate lawfully and effectively in the members' interests, and the administrator may refer complaints to a law enforcement agency or regulator.[168]

---

[160] *General Manager of the Fair Work Commission v Australian Workers' Union* [2023] FCA 1642.
[161] *General Manager of the Fair Work Commission v Australian Workers' Union* [2023] FCA 1642.
[162] *Fair Work Commission v Smyth* [2024] FCA 304.
[163] *General Manager of the Fair Work Commission v Smyth* [2024] FCA 304.
[164] *General Manager of The Fair Work Commission v Diana Asmar & Ors,* VID835/2024.
[165] 'Building Bad', *AFR* (online, 17 July 2024).
[166] Fair Work Commission, Application for Appointment of Independent Administrator for CFMEU (Media Release, 2 August 2024).
[167] Also listed on the FWC Website, FWC litigation page Inquiries, investigations and litigation.
[168] Fair Work Ombudsman, *Role of CFMEU Administrator* (Web Page, 16 January 2025).

In a further media release of 23 August 2024 the General Manager stated:[169]

> in accordance with the provisions of the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024*, the Construction and General Division of the Construction, Forestry and Maritime Employees Union (CFMEU) has been placed under administration for up to five years.
>
> ...
>
> Today I have signed an instrument to appoint Mr Mark Irving KC as Administrator.

6.2.2 Qualitative evidence

The Review Panel has not identified qualitative evidence in the form of major cases from a court or tribunal that would suggest the abolition of the ROC and re-establishment of the General Manager as regulator has not been effective or appropriate. Also, there is no qualitative evidence to indicate that the Secure Jobs, Better Pay Act amendments have led to unintended consequences that would require redress by way of findings and further recommendations in this chapter.

However, one way the Review Panel can consider the operation of amendments is to look at the actions the General Manager has taken since the abolition of the ROC and the approach taken to regulate registered organisations.

While the regulatory statements presented by the ROC when it was in operation and the current approach by the General Manager demonstrate a generally similar approach to regulatory compliance, there are some observable distinguishing factors. These can perhaps be attributed to the approach taken by the agency head.

On 22 May 2024 the General Manager published a new Compliance and Enforcement Policy (Compliance Policy) which emphasised cooperation with registered organisations, stating:[170]

> There are common interests shared by the registered organisations and the General Manager to:
>
> - enhance the democratic functioning of registered organisations
> - empower registered organisations to achieve voluntary compliance effectively and efficiently
> - enable high levels of ongoing compliance, transparency and accountability of registered organisations to their members
> - minimise unnecessary red tape and barriers to achieving compliance

[169] Fair Work Commission, Appointment of Independent Administrator, CFMEU (Construction and General Division), 23 August 2024 < https://www.fwc.gov.au/appointment-independent-administrator-cfmeu-construction-and-general-division>.
[170] Fair Work Commission, *Compliance and Enforcement Policy* (2024) 4.

- actively encouraging and supporting members to confidently participate in the running of their organisations.

These common interests are at the centre of the General Manager's approach to compliance and enforcement.

The Compliance Policy stated the General Manager aims to work closely with registered organisations. Under the heading 'Cooperation and working closely together', it outlines the General Manager's approach:[171]

> We will seek to foster a regulatory environment which encourages organisations to cooperate and genuinely engage in self-reporting to secure voluntary compliance, in order to experience improved outcomes that are faster and more cost effective for the organisation and their members.

The General Manager has taken strong steps towards engagement and creating a cooperative regulatory environment. In February 2023, for example, prior to the transfer of the ROC to the FWC, the General Manager established a Registered Organisations Commission Transitional Advisory Committee (ROCTAC) including senior representatives from the Australian Council of Trade Unions (ACTU), Australian Chamber of Commerce and Industry (ACCI) and Ai Group.[172]

In March 2023, shortly after functions had transferred to the FWC, the General Manager commissioned former FWC tribunal members to undertake an external review of registered organisations governance and compliance (the External Review).[173] The purpose of the External Review was to assist the General Manager to align their priorities, objectives and role as regulator following the abolition of the ROC.

The External Review was presented to the General Manager on 21 August 2023 and made 25 recommendations, which included some recommendations for legislative amendment. The External Review stated:[174]

> It is important that in performing their functions under the Act, the General Manager and the staff in the ROSB [Registered Organisations Services Branch] have regard to the underlying purpose of the regulatory scheme. This is not to achieve 'compliance for compliance's sake' but to protect the interests of members of registered organisations (ROs) by:
>
> - ensuring that organisations registered are representative of and accountable to their members;
>
> - ensuring that organisations are run democratically;

[171] Fair Work Commission, *Compliance and Enforcement Policy* (2024) 5.
[172] Fair Work Commission, *General Manager Response to External Review* (Report) 1. See: < https://www.fwc.gov.au/about-us/news-and-media/news/registered-organisations-governance-compliance-external-review-final>.
[173] Fair Work Commission, *Terms of Reference – Registered Organisations Governance and Compliance External Review* (n.d.)
[174] Jonathan Hamberger and Anna Booth, *Registered Organisations Review Report* (Report, 2023).

- ensuring that organisations are able to operate effectively;
- encouraging members are able to participate in the affairs of their organisation;
- ensuring that financial reporting is in a form that assists members; and
- organisations are managed efficiently.

The focus on protecting the members' interests needs to be reflected in the Branch's planning.

The General Manager published a response to the External Review which focused not only on the powers and functions transferred by the Secure Jobs, Better Pay Act but also the operation of the Registered Organisations Services Branch (ROSB) in the FWC, more generally.[175] In it the General Manager outlined measures to be taken in response to the External Review and described 'a permanent advisory group, the Registered Organisations Advisory Committee (ROAC) … to provide advice and assistance to the Commission'.[176]

The General Manager also initiated a compliance practitioners' reference group (CPRG) to consult on technical matters which meets quarterly.[177] It aims 'to provide timely feedback on compliance-related issues affecting registered organisations, their members, branches and officers'.[178]

The General Manager also engages through a 'General Manager's Listen and Learn' program which registered organisations can nominate to participate in.[179] The FWC stated that the program is 'a way for us to learn more about the day-to-day experiences of compliance officers working in registered organisations'.[180]

Among other steps taken in 2023, in April the General Manager released an interim Compliance and Enforcement Policy.

The General Manager also produced an 'Interim Registered Organisations Engagement and Education Strategy' for the period July to September 2023.[181] It stated that the FWC had maintained continuity with the ROC's previous educative program engagement with stakeholders and committed 'to making it easy for registered organisations to comply with their

[175] Fair Work Commission, General Manager Response to External Review Report (Report). See: < https://www.fwc.gov.au/about-us/news-and-media/news/registered-organisations-governance-compliance-external-review-final>.
[176] Fair Work Commission, General Manager Response to External Review Report (Report) 3. See: < https://www.fwc.gov.au/about-us/news-and-media/news/registered-organisations-governance-compliance-external-review-final>.
[177] Fair Work Commission, *Compliance Practitioners Reference Group* (Web Page, n.d.).
[178] Fair Work Commission, *Compliance Practitioners Reference Group* (Web Page, n.d.).
[179] Fair Work Commission, *Our Listen and Learn Program* (Web Page, n.d.)
[180] Fair Work Commission, *Our Listen and Learn Program* (Web Page, n.d.).
[181] Fair Work Commission, *Interim Registered Organisations Engagement and Education Strategy, July – September 2023* (2023).

statutory obligations, and to regularly engage with industry groups and stakeholders to achieve this'.[182]

On 6 March 2024 the General Manager produced a 12 Month Review 'of [the FWC's] work supporting registered organisations' which stated:[183]

> Since 6 March 2023, we have successfully transitioned former Registered Organisations Commission (ROC) staff and operational systems. We have undertaken an external governance and compliance review, significantly improved timeliness of entry permit and rule alterations applications and initiated or completed more than 30 projects to enhance service delivery. Throughout this time, we have continued to provide seamless service and assistance to registered organisations.

The General Manager's 12 Month Review stated in respect to the 'transition' and the establishment of the ROSB in the FWC:[184]

> As a result of careful planning ahead of 6 March 2023, we were able to transfer the ROC's people and systems to the Commission with minimal interruption. Registered organisations received uninterrupted services during this time to ensure they could continue to comply with their obligations under the *Fair Work (Registered Organisations) Act 2009* (the RO Act). In July 2023, with the team successfully transferred and operating well, we established the Registered Organisations Services Branch (ROSB). We did this by consolidating the Commission's Registered Organisations (Registration, Permits and Rules) Section with the former ROC team.

In relation to how the General Manager had progressed with the recommendations of the External Review, the General Manager stated in the 12 Month Review that:[185]

> In my response to the review (published on 28 September 2023), I committed to progress each of the approximately 25 recommendations. I am pleased to advise that every recommendation has now either been completed or significant action taken towards implementation or delivery.
>
> I noted at the time that some of the recommendations from the review would require legislative change. My powers are confined to the functions prescribed by the RO Act. Information has been provided to the Department of Employment and Workplace Relations for their consideration as the agency responsible for policy across this portfolio of government.

---

[182] Fair Work Commission, *Interim Registered Organisations Engagement and Education Strategy, July – September 2023* (2023).
[183] Fair Work Commission, *Registered Organisations Functions: 12 Month Review* (Report, 2024).
[184] Fair Work Commission, *Registered Organisations Functions: 12 Month Review* (Report, 2024) 2.
[185] Fair Work Commission, *Registered organisations Functions: 12 Month Review* (Report, 2024) 4.

6.2.3 Stakeholder views

In submissions to the Review, employee organisations, the ACTU and the Law Council of Australia provided positive feedback on the abolition of the ROC.

Generally, the submissions indicated that the abolition of the ROC, transferal of powers to the FWC (including the inclusion of infringement notice and enforceable undertakings powers) have not been particularly contentious as implemented in practice.

The United Workers Union (UWU) stated:[186]

> The abolition of the ROC and transference of the regulatory powers and functions of the Commissioner to the General Manager of the FWC is supported by UWU as a positive development. Registered organisations such as UWU continue to have the same reporting and compliance obligations as they did under the *Fair Work (Registered Organisations) Act 2009*. However, the changed regulatory approach means that the FWC and Fair Work Ombudsman (FWO) are more appropriately focused on ensuring and supporting compliance, and more willing to engage and listen to unions.

The ACTU stated:[187]

> [The ROAC and CPRG] have been useful and are supported by the ACTU.
>
> ...
>
> The General Manager has also published a new Compliance and Enforcement Policy for registered organisations which sets out a commitment to providing a positive regulatory culture through a focus on assistance, education and collaboration.
>
> The ACTU is supportive of the stated new focus and ACTU affiliates have reported general improvements in the accessibility, advice and assistance provided by the regulator. Affiliates have reported amongst other things:
>
> - An approach characterised by a substantially less accusatory and combative 'policing' of union activity.
> - A more constructive and less punitive approach to accidental administrative error or omissions in reporting.
> - Improved consultation around issues affecting registered organisations.
> - A greater emphasis on education and providing assistance to unions to achieve best practise compliance.

[186] United Workers Union (UWU) submission, p 42.
[187] Australian Council of Trade Unions (ACTU) submission, p 31.

- A useful and overdue streamlining of administrative processes and improved timeliness with respect to right of entry permits and governance training.

Overall, the ACTU believes that the change of approach has assisted affiliates to pursue better governance and voluntary compliance with the FW(RO) Act.

Further, to be able to report positive feedback from a significant number of affiliates at the same time the regulator remains notably active in the investigative and compliance space demonstrates what appears to be an improvement in the sophistication of the approach of the regulator. It is our view that the positive steps that appear to have been taken to move away from 'gotcha moment' regulatory enforcement to a greater focus on the primary goals of the regulation of registered organisations are directly attributable to the changes made by SJBP Act.

The Law Council of Australia stated that '[f]eedback received from our membership is that this has been a positive operational change, and we welcome what appears to be an enhanced consultative approach by the Commission as a result'.[188]

The Australian Resources & Energy Employer Association (AREEA) stated that there is now a single body for regulation of registered organisations:[189]

> AREEA has historically been agnostic on the need for a separate body to regulate registered organisations such as trade unions. Arguably the ROC has had little impact on the militancy and persistent lawbreaking of unions such as the CFMEU.
>
> ...
>
> Transferring the ROC functions and powers to the FWC means there is now a single body with regulatory responsibilities for registered organisations, provided it is appropriate [sic] resourced.

AREEA also advocated for registered organisations to be regulated by ASIC:[190]

> For the record, AREEA's longstanding position has been that all Registered Organisations should fall under the jurisdiction of the *Corporations Act 2001* and regulated by the Australian Securities and Investment Commission (ASIC). Many unions and registered employer groups are large multi-million-dollar businesses. It makes little sense for such organisations to be subject to their own set of rules and held to a lesser standard of governance and transparency than other Australian business.

[188] Law Council of Australia submission, p 1.
[189] Australian Resources & Energy Employer Association (AREEA) submission, p 20.
[190] Australian Resources & Energy Employer Association (AREEA) submission, p 20.

HIA made similar recommendations that governance requirements for unions mirror the obligations under the *Corporations Act 2001*.[191]

6.3 Findings and recommendations

The Review Panel finds that the amendments have been effective and appropriate. The Review Panel has not identified unintended consequences that would lead to specific recommendations. The transfer of the regulatory powers and functions of the ROC to the General Manager of the FWC from 6 March 2023 appears to have worked successfully.

The Review Panel finds these amendments have enabled the General Manager to adopt a different regulatory approach to the ROC as the regulator of registered organisations.

The available qualitative evidence suggests that the General Manager is committed to engagement, consultation and addressing compliance using a variety of methods, including the CPRG and advisory ROCTAC, and has embraced a regulatory approach that can be differentiated from the ROC.

The Review Panel makes no recommendations regarding the abolition of the ROC.

[191] HIA submission, p 3.

Chapter 7. Additional registered organisations enforcement options

These amendments operate in conjunction with the abolition of the Registered Organisations Commission (ROC) discussed in the preceding Chapter 6 of this report. The Secure Jobs, Better Pay Act introduced 2 new regulatory enforcement options into the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act).

Where noncompliance has been identified, the amendments provide the General Manager with the power to issue infringement notices and enter into enforceable undertakings. These are new enforcement powers that the ROC did not have access to under previous legislation.

7.1 Amendments and intent

The new powers operate under the RO Act in conjunction with and by reference to the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (Regulatory Powers Act). All of the existing enforcement options that the ROC had under the RO Act continue, including the options to make inquiries,[192] conduct investigations[193] and commence proceedings.[194]

7.1.1 Secure Jobs, Better Pay amendments

Part 2 of Schedule 1 to the Secure Jobs, Better Pay Act added ss 316A and 316B to the RO Act. Section 316A of the RO Act contains a list of 64 provisions of the RO Act and includes 9 provisions in the *Fair Work (Registered Organisations) Regulations 2009* (RO Regulations) which can be 'subject to an infringement notice'.[195]

The Attorney-General's Department stated guidance is that infringement notices are 'generally issued for minor matters where a high volume of contraventions are expected'.[196]

The Secure Jobs, Better Pay amendments use of the standard framework in the Regulatory Powers Act.

The Secure Jobs, Better Pay amendments allow the General Manager or their delegate to accept an enforceable undertaking under Part 4 of Chapter 10 of the RO Act and Part 6 of the Regulatory Powers Act.

These amendments commenced on 6 March 2023.

7.1.2 Intent of Secure Jobs, Better Pay amendments

As part of the integration of the ROC with the Fair Work Commission (FWC), the intent of these provisions was to give the General Manager a wider range of regulatory options similar to those of other regulators.[197]

---

[192] *Fair Work (Registered Organisations) Act 2009* (Cth) s 330.
[193] *Fair Work (Registered Organisations) Act 2009* (Cth) s 331 and also protected disclosure investigations under Part 4A of the Act.
[194] *Fair Work (Registered Organisations) Act 2009* (Cth) Ch 10, Pt 2.
[195] *Fair Work (Registered Organisations) Act 2009* (Cth) s 316A.
[196] Attorney-General's Department, *Infringement Notices* (Web Page, n.d.).
[197] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, p 21, para 89.

The revised Explanatory Memorandum noted that, while the ROC had 'general powers to undertake investigations to secure compliance with the RO Act, they do not have many of the compliance and enforcement tools that comparable Commonwealth regulators have'.[198]

The Explanatory Memorandum also explained that 'with more enforcement tools to choose from, the new regulator would have a greater ability to choose an appropriate enforcement tool to match the circumstances of each case'.[199]

Infringement notices are intended to be a flexible compliance option for regulators.

They are intended to be 'generally issued for minor matters where a high volume of contraventions are expected, such as failing to comply with reporting obligations, failing to respond to a notice or failing to provide information'.[200] They are also intended to 'provide an effective administrative mechanism to regulate these matters'.[201]

In contrast to infringement notices, the compliance concerns that enforceable undertakings can apply to are not defined by a limited list of certain provisions. They are entered into voluntarily by a party with the General Manager. If contravened they may be enforced in court.

7.2 Impact and issues

These amendments do not appear to have had a significant impact on the regulation of registered organisations.

The inference that might be drawn is that the amendments have not had a significant impact on the way registered organisations are regulated over the nearly 2 years these provisions have been in operation.

7.2.1 Quantitative evidence

As at 17 January 2025 the FWC had issued no infringement notices and 2 enforceable undertakings to registered organisations.

The first enforceable undertaking (dated 13 September 2024) was made with the Transport Workers' Union of Australia (TWU), which entered into the undertaking as a result of noncompliance by its Victoria–Tasmania Branch.[202] The TWU admitted that its conduct was likely to have amounted to a contravention of s 230(2)(b) of the RO Act for each of the 5,765 former members it failed to remove from its register of members.[203]

The second enforceable undertaking (dated 21 December 2023) was made with the Community and Public Sector Union (CPSU) regarding the Western Australian Prison Officers' Union (WAPOU) Branch, SPSF Group.[204] The CPSU admitted that between 2016 and 2020 its WAPOU Branch conducted at least 15 elections for its office holders in a manner that was not permitted

[198] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, p 21, para 89.
[199] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, p 21, para 89.
[200] Attorney-General's Department, *Infringement Notices* (Web Page, n.d.).
[201] Attorney-General's Department, *Infringement Notices* (Web Page, n.d.).
[202] Transport Workers Union, *Undertaking to the General Manager of the Fair Work Commission* (September 2024).
[203] Transport Workers Union, *Undertaking to the General Manager of the Fair Work Commission* (September 2024).
[204] Community and Public Sector Union, *Undertaking to the General Manager of the Fair Work Commission* (December 2023).

by the CPSU's rules. In doing so the WAPOU Branch contravened provisions of the RO Act, including s 189, which requires that elections for offices are to be conducted by the Australian Electoral Commission (AEC).

The penalty amounts that the General Manager must include on an infringement notice are calculated by reference to the Regulatory Powers Act, and the General Manager has no discretion to alter those fixed penalty amounts.

By way of example, various civil penalty provisions in the RO Act, which could be subject to an infringement notice and with which registered organisations regularly must comply, include ss 172, 189, 230, 233, 237, 253, 254, 256, 265, 266, 268, 293C, 293J and 293K of the RO Act. These provisions relate to the reporting and maintenance of financial, membership and other records, elections, auditors or reporting units, removal of offices from the register of members, annual reporting of information, office holder change notifications and office holder remuneration disclosures, and related party financial disclosures.

The penalty amount that the General Manager must include on an infringement notice to a registered organisation (as a body corporate) for these, and many other (but not all), of the infringement notices for contravening conduct that occurred after 7 November 2024, would be $19,800 per contravention.

7.2.2 Qualitative evidence

Stakeholder engagement raised a question in relation to whether the infringement notice penalty amount that is calculated by reference to the Regulatory Powers Act is proportionate to contravening conduct which is potentially subject to an infringement notice under s 316A of the RO Act.

The FWC's Compliance Policy set out how the General Manager would regulate registered organisations and outlined 'how new enforcement powers granted to the General Manager in March 2023' under the Secure Jobs, Better Pay Act would be used.[205] The FWC has also published guidance material on its website and in its Compliance and Enforcement Policy.[206]

The Secure Jobs, Better Pay infringement notice amendments were not entered into in a new jurisdiction or in a vacuum. Past regulators have successfully prosecuted contraventions and had penalties ordered in the Federal Court for contraventions of the same provisions that can now be subject to an infringement notice, indicating that there is precedent which tends to suggest the potential amount of those penalties.

7.2.3 Stakeholder views

Few of the submissions to the Review made mention of the General Manager 's adoption of the ROC's regulatory regime or new enforcement powers.

The Minerals Council of Australia (MCA) stated that 'Unions must be better regulated to prevent corruption and abuses.'[207]

---

[205] Fair Work Commission, New Compliance and Enforcement Policy for Registered Organisations Published (Media Release, 22 May 2024).
[206] Fair Work Commission, *Infringement Notices* (Guidance Note GN 056, 17 November 2023); Fair Work Commission, *Enforceable Undertakings* (Guidance Note GN 055, 17 November 2023); Fair Work Commission, *Compliance and Enforcement Policy* 15–17.
[207] Minerals Council of Australia (MCA) submission, 7.

The United Workers Union (UWU) stated the 'additional enforcement options, such as enforceable undertakings, has helped the parties to save costs on compliance'.[208]

The Australian Council of Trade Unions (ACTU) states that it sees 'the introduction of enforceable undertakings as a positive change to the regulation of registered organisations.'[209]

7.3 Findings and recommendations

The Review Panel finds mixed evidence relating to the effectiveness of the amendments.

The Review Panel finds that the power of the General Manager of the FWC to issue enforceable undertakings is operating as intended, with the General Manager having issued 2 enforceable undertakings since the provisions came into effect on 6 March 2023.

However, the Review Panel finds that the infringement notices power is not operating as effectively as it could. The General Manager of the FWC has not issued an infringement notice between 6 March 2023, when the provisions came into effect, and 17 January 2025.

The Review Panel notes that an impediment to wider use of this sanction appears to be the scale of penalties, which is beyond the discretion of the General Manager. For example, for a registered organisation's paperwork-based error, such as missing a timeframe to lodge prescribed information in relation to an election to be conducted by the AEC (under s.189 of the RO Act), the infringement notice penalty amount is $19,800 per alleged contravention. The Review Panel considers that this seems disproportionate to the conduct and alleged contravention they seek to address. These penalties may also be disproportionate compared to penalties for less serious conduct under other provisions of the RO Act. The Review Panel makes a recommendation in relation to this.

Draft Recommendation 4: The Australian Government consult, including with the General Manager of the Fair Work Commission (FWC), to consider whether penalty amounts payable under Infringement Notices are proportionate to the contraventions that are subject to an Infringement Notice under the *Fair Work (Registered Organisations) Act 2009*.

[208] United Workers Union (UWU) submission, p 42.
[209] Australian Council of Trade Unions (ACTU) submission, p 33.

Part 2. Bargaining and agreements

Chapter 8. Introduction to the bargaining and agreements

8.1 Introduction

Central to the Secure Jobs, Better Pay amendments – and therefore to this Review – are 2 objectives: the need to 'get wages back on track' and to advance 'gender equality'. Collective bargaining, which is the focus of this part of the Review, is considered by the government to be a key mechanism by which both objectives can be achieved. Put another way, it is assumed that expanding the incidence and coverage of collective bargaining will increase wages and improve gender equality.

This introduction provides background that confirms both the validity and urgency of these objectives. The evidence is partly historical, showing a serious decline of wages in Australia over recent decades and how it corresponds with significant decreases in the incidence and coverage of collective bargaining. The introduction is also partly comparative, in that it demonstrates the distinctiveness of the Australian system and shows the close correspondence in other countries between high wages and gender equality, on the one hand, and the high incidence and coverage of collective bargaining, on the other.

Before embarking on these historical and comparative tasks, there are some important definitional issues to clarify. The Review's Terms of Reference use the term 'enterprise bargaining', whereas the title of this chapter and its content indicate a preference for the broader term 'collective bargaining'. Collective bargaining includes specific forms, like single-enterprise bargaining and multi-employer bargaining. Even here there are at least 2 sources of definitional confusion, both emanating from the Act itself. First, the definition of a 'single enterprise' is contested – it can range from small organisations surrounding owner–managers to large corporations, encompassing multiple workplaces or franchisees. Second, the Fair Work Act's approach to this topic technically makes the term 'collective agreement-making' more accurate, since some collective agreements at the level of the single enterprise are made without 'bargaining'.[210] The term 'collective bargaining', however, is widely used by practitioners and scholars alike and will be used here.

Finally, collective bargaining is surprisingly complicated. Consequently, when describing trends in collective bargaining in Australia (and elsewhere), there is a need to focus on its various 'dimensions'.[211] In particular, this chapter examines 5 dimensions of collective bargaining, which are defined in Table 6. These dimensions of collective bargaining are especially useful for understanding long-term trends within a country and comparisons of national systems of collective bargaining across nations. Why? The dimensions of collective bargaining help to overcome the complexity – and the related confusion – in historical or legal accounts by highlighting the 'big picture' of what the law means. They also help to identify the distinctiveness of collective bargaining in one country at any one time. Together, the dimensions produce a more complete and realistic picture of collective bargaining.

---

[210] K Walpole, 'The Fair Work Act: Encouraging Collective Agreement-making But Leaving Collective Bargaining to Choice' (2015) 25(3) *Labour and Industry* 205–218; M Bray, P Waring, R Cooper and J Macneil, *Employment Relations: Theory and Practice* (4th ed, McGraw-Hill, 2018) 380–381.

[211] There are several additional dimensions of collective bargaining that are widely acknowledged in the literature (e.g. the 'structure' and 'scope' of bargaining; see M Bray, P Waring, R Cooper and J Macneil, *Employment Relations: Theory and Practice* (4th ed, McGraw-Hill, 2018) 381–382), but these are not discussed here because they have no direct linkage with the Secure Jobs, Better Pay amendments.

Table 6: The dimensions of collective bargaining

Dimension	Definition
Status	The degree of formality in bargaining and/or agreements, which is heavily influenced by the law.
Level	The degree of aggregation in bargaining and/or agreements, which indicates the degree of centralisation or decentralisation.
Parties or agents	Employers or employees (and/or the individuals or organisations that represent them) in the bargaining or agreement.
Incidence and coverage	The number of collective agreements at various levels and the proportions of the workforce covered by them.
Outcomes	The procedures or substantive content of agreement, including wages, working conditions, industrial disputes, shares of national income and productivity.

8.2 Collective bargaining before the Fair Work Act 2009

Before the 1990s, collective bargaining was common in Australia, but it took place as part of a system of compulsory conciliation and arbitration.[212] Collective bargaining came in 2 forms:[213]

- 'within' the system of conciliation and arbitration, as part of the complex process by which awards were made and varied
- 'outside' the system, focused on creating wages and working conditions that were superior to those embedded in awards.

Both these forms of collective bargaining were relatively informal and 'under the shadow' of the industrial tribunals, since awards were the formal mechanisms determining wages and working conditions. Collective bargaining brought a degree of flexibility and decentralisation to a system that was mostly centralised, although the importance of decentralised collective bargaining varied over time and across industries.[214] Unions were the sole employee representatives that were engaged with employers in making collective agreements. Satisfaction with this pre-1990 regime was broadly confirmed by the Hancock Report and new legislation passed by parliament in 1988.

The period between 1988 and the enactment of the Fair Work Act in 2009, however, saw Australian labour law change dramatically, respectively producing 3 defining statutes: the *Industrial Relations Reform Act 1993* (Cth); the *Workplace Relations Act 1996* (Cth); and the *Workplace Relations (Work Choices) Amendment Act 2005* (Cth).

There were some similarities between the labour law regimes resulting from these legislative changes, especially relating to collective bargaining as a process for determining wages and

[212] The following historical account draws heavily on M Bray and J Macneil, 'Reforming Collective Bargaining' in K Hancock and R Lansbury (eds), *Industrial Relations Reform: Looking to the Future* (Federation Press, 2016) 105–131.
[213] See D Yerbury and J Isaac, 'Recent Trends in Collective Bargaining in Australia' (1971) 103(5) *International Labour Review* 431–452.
[214] K Hancock, *Committee of Review into Australian Industrial Relations Law and Systems, Report* (AGPS, 1985); K Hancock, 'Reforming Industrial Relations: Revisiting the 1980s and 1990s' in K Hancock and R Lansbury (eds), *Industrial Relations Reform: Looking to the Future* (Federation Press, 2016) 16–39.

working conditions. For example, in contrast to the pre-1990s period, each regime saw collective bargaining as a formal process for determining wages and working conditions, albeit just one amongst several different formal processes (others including award-making and individual bargaining). Both sides of politics broadly considered that collective bargaining should be decentralised to at least the enterprise level. Interestingly, both the Labor and Coalition governments also supported a combination of union and non-union forms of collective bargaining, albeit for different reasons.[215] Finally, both sides expected enterprise agreements to replace awards rather than supplement them, even if the relationship between collective agreements and minimum standards provided in awards varied according to the government in power.[216]

Despite these similarities, it is differences between these 3 labour law regimes that are most often emphasised because each regime embodied different ideas held by the political parties about how to govern Australian industrial relations. Much of this disagreement focused on the respective roles of unions and industrial tribunals.[217] Particularly important were differences over the priority given to collective bargaining compared to other processes and the legal rules governing collective bargaining.[218] There was little doubt, for example, that the 1993 amendments privileged collective bargaining undertaken between employers and unions, while the 2005 Work Choices amendments (and, to a lesser extent, the *Workplace Relations Act 1996*) privileged individual and non-union collective processes.

8.3 Collective bargaining under the Fair Work Act, 2009–2022

Following this turbulent 20-year period, the Fair Work Act was established by the Rudd-led Labor government in 2009. From the beginning, however, the Fair Work Act was 'peculiar',[219] bringing an unusual mixture of continuity and change, individualism and collectivism, voluntarism and compulsion.

Despite the political differences between the major political parties, for example, the originating Fair Work Act continued a number of features from the preceding Work Choices regime, including provisions restricting industrial action, union right of entry and freedom of association.[220] Moreover, between 2009 and 2022, the originating Act was amended only 17 times and the fundamentals of the legislation – and, in particular, the regulation of collective bargaining – remained essentially the same.

---

[215] S McCrystal and M Bray, 'Non-Union Agreement-Making in Australia in Comparative and Historical Context' (2021) 41(3) *Comparative Labor Law and Policy Journal* 753–788.

[216] Central to the relationship between agreements (collective and individual) and awards was another uniquely Australian institution: the no-disadvantage test. First introduced in 1992 and subsequently modified many times, it was supposed to ensure that agreements did not take wages and conditions below those contained in minimum standards (see e.g. C Sutherland, 'Making the "BOOT" Fit: Reforms to Agreement-Making from Work Choices to Fair Work' in A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, (Federation Press, 2009) 99–119; M Bray, P Waring. R Cooper and J Macneil, *Employment Relations: Theory and Practice* (4th ed, McGraw-Hill, 2018) 360–362.

[217] See CF Wright and C McLaughlin, 'Trade Union Legitimacy and Legitimation Politics in Australia and New Zealand' (2021) 60(3) *Industrial Relations* 338–369.

[218] M Bray and A Stewart, 'What is Distinctive About the Fair Work Regime?' (2013) 26(1) *Australian Journal of Labour Law* 20–49.

[219] M Bray and A Stewart, 'What is Distinctive About the Fair Work Regime?' (2013) 26(1) *Australian Journal of Labour Law* 20–49.

[220] A Stewart and A Forsyth, 'The Journey from Workchoices to Fair Work', in A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, (Federation Press, 2009)1-19.

This legislative stability, however, was not the result of political consensus between the major political parties over industrial relations. They continued to disagree significantly on how the labour market should be regulated.[221] Rather, stability reflected 2 key elements. First, there seemed to be an unwillingness on both sides to engage in further reform: Labor governments introduced only a few amendments to the Act before they lost power in 2013, most of these amendments representing the less controversial recommendations of the major review of the Act in 2012.[222] Later, Coalition governments rarely sought to raise industrial relations issues or amend the legislation, apparently because they were cautious about the negative political consequences they experienced in the 2007 election. Second, the relative legislative stability also reflected political deadlock, in which neither Labor governments (2007–2013) nor Coalition governments (2013–2022) had the capacity to unilaterally amend the Act without majority numbers in both houses of federal parliament.

8.3.1 Status

The formal status of collective bargaining under the Fair Work Act continued the post-1993 tradition, in which collective bargaining had become closely regulated by the law. Employers were legally obliged to recognise employee bargaining representatives in the making of collective agreements. The parties to bargaining and their representatives needed to abide by extensive procedural rules, which were mostly supervised by the Fair Work Commission (FWC). Collective agreements, which were the outcome of collective bargaining, gained legally binding status only after being approved by the FWC. One of the key requirements for the approval of collective agreements was that they passed a quite technical and legalistic test – in the form of a 'no disadvantage test' or its equivalent. Finally, the capacity of the parties to take industrial action during collective bargaining was strictly limited by the law.[223]

The formal status of collective bargaining was reinforced by the attitudes and behaviours of the parties; what Pohler called the 'social norms' surrounding collective bargaining.[224] In Australia, with a strong adversarial tradition in industrial relations and in politics, the law was considered vital by all parties, as it deeply influenced their behaviours in the bargaining process.[225] Moreover, whenever the parties to bargaining were dissatisfied with some aspect of bargaining, they frequently chose not to change their behaviours but instead focused their energies on seeking to change the law. This legal strategy took 2 main forms. First, the parties engaged in political lobbying, aiming to change legislation.[226] Second, in the event of being unable to change the legislation, the parties often sought to change the law in another way – that is, by launching litigation in courts and tribunals. Some commentators argued that success in these legal actions between 2012 and 2022 led to changes in the law of collective bargaining that

---

[221] R Cooper, and B Ellem, 'Fair Work and the re-regulation of collective bargaining', (2009) 22(3) *Australian Journal of Labour Law*, 284-305.
[222] See R McCallum, E Moore, and J Edwards, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra (2012).
[223] S McCrystal, 'Why Is It So Hard to Take Lawful Strike Action in Australia?' (2019) 61(1) *Journal of Industrial Relations* 129–144.
[224] D Pohler, 'Collective Bargaining' in A Wilkinson et al. (eds), *The Routledge Companion to Employment Relations* (Routledge, 2018) 235–250.
[225] See e.g. Forsyth et al. 2012; A Pekarek, I Landau, P Gahan, A Forsyth and J Howe, 'Old Game, New Rules? The Dynamics of Enterprise Bargaining under the Fair Work Act' (2017) 59(1) *Journal of Industrial Relations* 44–64; B Creighton, C Denvir, R Johnstone, S McCrystal and A Orchiston, *Strike Ballots, Democracy, and the Law* (Oxford University Press, 2020).
[226] See e.g. Forsyth 2021; P Sheldon and L Thornthwaite, 'Employers' Associations in Australia' in L Gooberman and M Hauptmeier (eds), *Contemporary Employer' Organisations: Adaptation and Resilience* (Routledge, 2022) 139–158.

advantaged employers, contributed to significant declines in the incidence and coverage of collective agreements, and ultimately prompted the legislative amendments that are the subject of this Review.[227]

In many countries, and at different times in Australia, these aspects of collective bargaining were not as formally or legally regulated as they were under the Fair Work Act. The classic comparative example of collective bargaining without extensive legal regulation was the 'voluntarist' system in the United Kingdom before the 1980s.[228] Denmark,[229] New Zealand[230] and Ireland[231] also have bargaining systems that are significantly less legalistic than Australia's. Collective bargaining in Australia was certainly far less formal and legalistic before the 1990s.

The formal status of the collective bargaining in Australia under the Fair Work Act can therefore be considered 'distinctive'.[232] This begs the question of why. Two factors may be part of the explanation. The first is historical: the state has been central to economic development generally, and industrial relations more specifically, since the establishment of European settlement in Australia.[233] The entrenchment of enterprise bargaining as a system during the 1990s arguably represented a move away from the state – promoted by the popularity of neoliberal ideas and policy frameworks – but perhaps the form of enterprise bargaining was inevitably influenced by the long history of state regulation in Australia.

A second potential factor is the intense adversarialism of industrial relations and politics in Australia: when the main parties – both industrial relations and political – distrust each other, they tend to seek highly prescriptive rules to regulate behaviours. This adversarialism was evident during the 19th century, most conspicuously in the great strikes of the 1890s, but it was somewhat hidden during much of the 20th century by the broad policy consensus over the necessity of compulsory conciliation and arbitration. Adversarialism re-emerged from the 1980s onwards[234] and became entrenched in the formal foundations of industrial relations as they were reformed from the 1990s onwards.

8.3.2 Level

Conceptually, the level of collective bargaining focuses on the degree of aggregation, which varies from the individual workgroup through to a workplace or enterprise to the industry or a whole nation. The dominant level of collective bargaining in Australia under the Fair Work Act was undoubtedly the single enterprise, which made Australia's collective bargaining system highly decentralised. Over the decade preceding the amendments (i.e. 2013–2022), data from the Department of Employment and Workplace Relations (DEWR) Workplace Agreements Database (WAD) indicates that in the federal system multi-employer agreements represented

---

[227] See e.g. A Forsyth, 'Ten Years of the Fair Work Act: (More) Testing Times for Australia's Unions' (2020) 33(1) *Australian Journal of Labour Law* 122–138; Forsyth & McCrystal 2023.
[228] See e.g. A Flanders, 'The Tradition of Voluntarism' (1974) 12(3) *British Journal of Industrial Relations* 352–370.
[229] Andersen 2024.
[230] E Rasmussen, M Bray and A Stewart 'What Is Distinctive About New Zealand's Employment Relations Act 2000?' (2019) 29(1) *Labour & Industry* 52–73.
[231] W Roche and T Gormley 'The Durability of Coordinated Bargaining: Crisis, Recovery and Pay Fixing in Ireland' (2020) 41(2) *Economic and Industrial Democracy* 481–505.
[232] M Bray and A Stewart, 'What is Distinctive about the Fair Work Regime?' (2013) 26(1) *Australian Journal of Labour Law* 21.
[233] S Bell and B Head 'Australia's Political Economy: Critical Themes and Issues' in S. Bell & B. Head (eds), *State, Economy and Public Policy in Australia*, Oxford University Press (1994), Melbourne: 1-24.
[234] See e.g. CF Wright and C McLaughlin, 'Trade Union Legitimacy and Legitimation Politics in Australia and New Zealand' (2021) 60(3) *Industrial Relations* 338–369.

only 0.5% of all new agreements approved in the period and 3.4% of the total number of employees covered. This meant that over the 2013–2022 period single-enterprise agreements respectively accounted for 99.5% of all new agreements and 96.6% of the employees covered by those agreements.

Table 7: New single-enterprise and multi-enterprise agreements approved 2013-2022

Years	New single-enterprise agreements approved		New multi-enterprise agreements approved	
	Number approved	Number of employees covered	Number approved	Number of employees covered
2013–2022	46,848	6,943,262	213	240,865

Source: See Appendix 2.

This decentralisation partly resulted from the Fair Work Act itself, which strongly supported bargaining at the level of the single enterprise and made bargaining above this level more difficult. For example, one of the 'Objects' of the Act was 'achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action' (s 3(f)). There was also a prohibition against industrial action in support of 'pattern bargaining' or other types of bargaining above the level of the single enterprise; as one well-informed commentator said, 'Under the FW Act lawful strike action may only be taken against an employer in support of claims to be in a proposed single-enterprise agreement'.[235]

The originating *Fair Work Act 2009* actually included provisions that were designed to encourage multi-employer bargaining in some circumstances (see the former sections in Part 2-4, Division 10, of the Act). These provisions, however, failed to achieve this purpose.[236] Perhaps most conspicuously, the provisions that were designed to assist low-paid workers to improve their situations through multi-employer bargaining (i.e. the low-paid stream) failed after 'narrow' interpretations by the FWC made it difficult to meet entry requirements.[237] These legislative provisions remained the same until the Secure Jobs, Better Pay amendments.

At the same time, beyond the law, the parties mostly supported decentralisation. Employers and the Coalition political parties, for example, were deeply and continuously committed to bargaining being confined to the single enterprise. The enthusiasm of employers was partly driven by what they saw as better outcomes of single-enterprise bargaining, but it was also motivated by the process that gave them control of most of the key decisions. As McCrystal recently stated:[238]

[235] S McCrystal, 'Why is it So Hard to Take Lawful Strike Action in Australia?' (2019) 61(1) *Journal of Industrial Relations* 132; see also *Fair Work Act 2009* (Cth) s 409(1).
[236] Regulation Impact Statement, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), 16.
[237] F McDonald, S Charlesworth and C Brigden, C. 'Access to Collective Bargaining for Low-Paid Workers' in S. McCrystal, B. Creighton & A. Forsyth (eds), *Collective Bargaining under the Fair Work Act*, Federation Press, Sydney (2018): 206-227.
[238] S McCrystal 'Avoiding collective bargaining under the Fair Work Act 2009 (Cth): making collective agreements without unions and the impact of recent Reforms', (2024) *Labour and Industry*, p4 <DOI: 10.1080/10301763.2024.2439108>.

> Employers are responsible for initiating agreement-making and advising employees of their rights to be represented in bargaining (even where required to bargain under the Act), explaining the effect of a proposed agreement to employees, conducting a vote of employees to make an agreement, and lodging the agreement with the FWC for approval … While unions can also perform some of these functions, they are not necessary or required for any of them.

In 2019 a columnist at *The Australian* newspaper warned Australian employers not to forget how the Fair Work Act had benefited them:[239]

> The Fair Work Act has been in place for a decade and consider what it has bequeathed. Stability, years and years of moderate wage growth, declining industrial disputation over the longer term, private sector union membership at an all-time low, and an enterprise bargaining system (thankfully) shrinking by the day.

The preferences of unions and the Australian Labor Party (ALP) were more varied. The ALP remained committed to the single enterprise as the 'primary' level of bargaining under the Fair Work Act. Unions, however, were less impressed with single-enterprise bargaining, recognising that it had contributed to declining union membership and resources.[240] Their preference was for various forms of multi-employer bargaining. Union agitation about this matter was especially strong during its 'Change the Rules' campaign leading up to the 2019 federal election – a campaign that, amongst other things, advocated the revision of the Fair Work Act's treatment of single-enterprise collective bargaining and the expansion of multi-employer bargaining.[241]

The highly decentralised approach towards collective bargaining situated Australia at an extreme amongst other countries, where multi-employer bargaining was far more common.[242] Moreover, international agencies, like the OECD, previously supporters of highly decentralised collective bargaining (or even no collective bargaining at all), have in recent years reversed this position and begun to advocate more centralised bargaining arrangements, like multi-employer collective bargaining.[243]

8.3.3 Parties or agents

The individuals or organisations representing employees and employers in collective bargaining (i.e. the 'bargaining agents') under the Fair Work Act between 2009 and 2022 were distinctive

---

[239] K Grace Kelly, 'The IR System Isn't Broken, So it Doesn't Need to be "Fixed"', *The Australian*, 13–14 July, 22.
[240] A Forsyth, 'Ten Years of the Fair Work Act: (More) Testing Times for Australia's Unions' (2020) 33(1) *Australian Journal of Labour Law* 122–138.
[241] M. Bray, J. Macneil and L. Spiess 'Annual Review of Unions and Collective Bargaining 2018', (2019) 61(3) *Journal of Industrial Relations*, 357-81; J. Macneil, M. Bray and L. Spiess 'Unions and Collective Bargaining in 2019', (2020) 62(3) *Journal of Industrial Relations*, 380–402.
[242] The comparison of collective agreement making and its outcomes between Australia's highly decentralised bargaining system and the many other countries with more centralised systems is, of course, complicated. The point at present is that multi-employer bargaining is not uncommon in other countries and it often leads to better (rather than worse) performance outcomes: see e.g. Grimshaw et al. 2024.
[243] OECD *Negotiating our Way Up: Collective Bargaining in a Changing World of Work*, OECD (2019), Paris; G Hutchens 'The world is shifting to multi-employer bargaining. Will Australia fail to follow?', ABC News, 13 November 2022: www.abc.net.au/news/world-is-shifting-to-multi-employer-bargaining-will-australia/101646706.

(both historically within Australia and internationally) in several ways. First, employers were legally obliged to recognise the bargaining representatives nominated by their employees; such recognition was not unusual historically, either in Australia or in other countries.[244] The form of legal recognition, however, was exceptional because it rested on individual legal rights to achieve collective ends. This came through the original Fair Work Act obliging employers who voluntarily wished to initiate collective bargaining to notify all individual employees to be covered by the agreement of their right to nominate a bargaining agent; this agent could be their union, an individual or even themselves. Once representatives had been nominated, the employer was obliged to 'bargain in good faith' with those nominated representatives. The only circumstances in which an employer could be compelled to initiate bargaining was when a bargaining representative went to the FWC and won either a Majority Support Determination or a scope order.[245]

Second, employee representation was not confined to unions. Non-union employee representation came in 2 ways: individual employees nominating themselves or other individuals as their bargaining agents; and employers completing an enterprise agreement – with or without any bargaining with employee representatives – and then directly gaining consent from employees.[246] Both non-union forms of representation were unusual internationally and historically within Australia.[247]

Third, where unions represented employees in bargaining in Australia, it usually came in some combination of full-time officials employed by unions and part-time union delegates employed within workplaces by employers. The mixture of these 2 forms of representation varied over time and according to circumstances.

Fourth, employers also had a legal right under s 176(1) of the Fair Work Act to appoint (in writing) a representative to bargain on their behalf, which could be the employer itself, a consultant or a lawyer, who is also covered by the resulting agreement.

Fifth, under the Fair Work Act, bargaining representatives did not legally become parties to any collective agreement resulting from the bargaining process. Rather, except for 'greenfields agreements', all collective agreements were made by one or more employers and their employees.[248] If bargaining representatives wished to be considered as 'covered' by the agreement (and thereby enjoy the limited legal privileges that such coverage brought), they had to apply to and be approved by the FWC under s 183 of the Fair Work Act. This legal situation was unusual historically within Australia and compared to most other countries.

Finally, the role of 'third parties' in collective bargaining has been vital but frequently neglected in the research literature, in Australia and internationally. In particular, Australian industrial

---

[244] See e.g. R Cooper and B Ellem, '"Less Than Zero": Union Recognition and Bargaining Rights in Australia 1996–2007' (2011) 52(1) *Labour History* 49–69.
[245] A Forsyth, J Howe, P Gahan and I Landau, 'Establishing the Right to Bargain Collectively in Australia and the UK: Are Majority Support Determinations under Australia's Fair Work Act a More Effective Form of Union Recognition?' (2017) 46(3) *Industrial Law Journal* 335–365.
[246] R Read, 'The Role of Trade Unions and Individual Bargaining Representatives: Who Pays for the Work of Bargaining?' in S McCrystal et al. (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018) 69–92; K Walpole, 'The Fair Work Act: Encouraging Collective Agreement-making But Leaving Collective Bargaining to Choice' (2015) 25(3) *Labour and Industry* 205–218.
[247] S McCrystal and M Bray, 'Non-Union Agreement-Making in Australia in Comparative and Historical Context' (2021) 41(3) *Comparative Labor Law and Policy Journal* 753–788.
[248] *Fair Work Act 2009* (Cth) ss172(2) and 172(3).

tribunals were central under the original Fair Work Act, although their role was quite different from the historical conciliation and arbitration system.[249] On the one hand, tribunal members rarely decided *substantive* terms in collective agreements; the only exceptions were 'workplace determinations', which were made unilaterally by the FWC. These determinations, however, were only made when employers and employee representatives (usually unions) were unable to agree amongst themselves and consequent industrial action was likely to cause significant economic distress.[250] The FWC's role, however, was extensive (and internationally unusual) in its procedural supervision of bargaining and its approval of subsequent agreements.[251]

These features of the agents/parties under the collective bargaining provisions of the Fair Work Act are important because several of them were changed by the Secure Jobs, Better Pay amendments.

8.3.4 Incidence and coverage

The significant declines of both the incidence and coverage of collective bargaining/agreements during the 2009–2022 period led directly to the 2022 legislative amendments. In the period immediately after the passing of the Fair Work Act, however, there was a shared belief – amongst Labor and Coalition politicians, union and employer representatives, and academic and media commentators alike – that the Fair Work Act would bring greater collectivisation and expanded collective bargaining, although they differed considerably in the desirability of the expected resurgence of collective bargaining.[252]

The language used by the stakeholders to express these positions with respect to the new Fair Work Act was remarkably similar to the words and reactions of the same groups to the Secure Jobs, Better Pay amendments. To cite just a few who were cited in Bray and Macneil,[253] the Labor Minister responsible for the original Fair Work Act, the Hon Julia Gillard, claimed the statute would 'deliver a system that has at its heart bargaining in good faith at the enterprise level, as this is essential to maximise workplace cooperation, improve economic productivity and create rising national prosperity'. Union leaders 'welcomed the dawning of a new era' and were 'determined to use the Act to protect workers' rights and spread collective bargaining'. In contrast, employer leaders described the Act, especially the primacy it gave to collective bargaining, as bringing 'the biggest increase in union power since Federation' and ensuring that 'the pendulum has swung too far towards unions.'

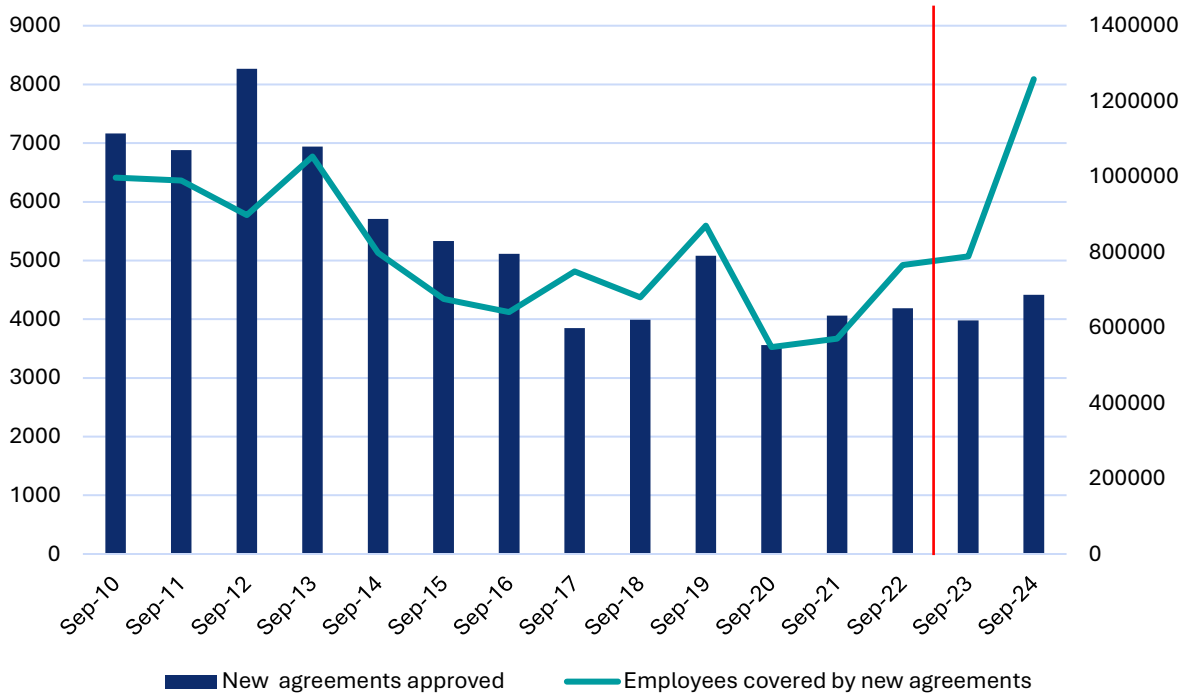
Measures of the incidence and coverage of collective agreements in the years immediately after the *Fair Work Act 2009* initially showed increases. Figure 3 shows the number of new agreements approved annually between the September quarters of each year. The approval of new 'enterprise agreements' (collective agreements) reached a high of 8,265 between October 2011 and September 2012, with an annual average (between October 2009 and September 2012 inclusive) of 7,437 – far above the 1998–2009 average. The coverage of these new

---

[249] M Bray and J Macneil, 'Still Central: Change and Continuity in Australia's Major Industrial Tribunal', (2023) 54(4–5) *Industrial Relations Journal* 359–376.
[250] S McCrystal, 'Why Is It So Hard to Take Lawful Strike Action in Australia?' (2019) 61(1) *Journal of Industrial Relations* 129–144.
[251] M Bray and J Macneil, 'Still Central: Change and Continuity in Australia's Major Industrial Tribunal', (2023) 54(4–5) *Industrial Relations Journal* 359–376.
[252] See e.g. M Bray and J Macneil, 'Still Central: Change and Continuity in Australia's Major Industrial Tribunal', (2023) 54(4–5) *Industrial Relations Journal* 359–376; Todd 2011.
[253] M Bray and J Macneil, 'Reforming Collective Bargaining' in K Hancock and R Lansbury (eds), *Industrial Relations Reform: Looking to the Future* (Federation Press, 2016) 108–110.

agreements went over 1 million employees in 2013, with an annual average (between October 2009 and September 2013 inclusive) of 984,507. Again, this was well over the long-term average of around 780,000 between 1998 and 2008.[254]

Figure 3: Number of new agreements approved and number of employees covered, 2009–2024, annual to September quarter



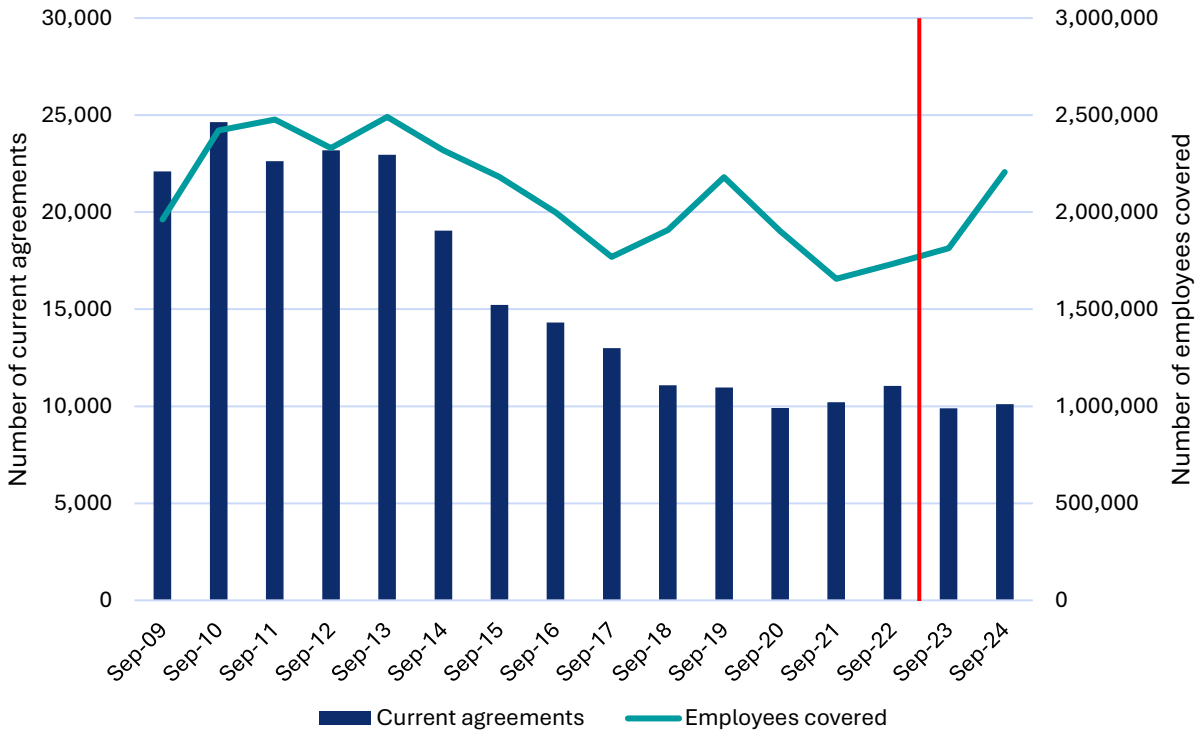
Source: DEWR Workplace Agreements Database.

Alt-text: A combination chart. The bars show the number of new approved agreements between the October 2009 and September 2024 and the line shows number of employees covered by these new agreements. Between October 2022 and September 2023 a total of 3,978 new agreements were approved across all sectors (LHS axis) covering 788,393 employees. In the period October 2023 to September 2024 a total of 4417 new agreements had been approved covering 1,258,322 employees, representing the highest coverage by new agreements since 2010.

Alternatively, data on 'current' agreements at the end of each September quarter (see Figure 4) show similar, but also slightly different, trends. The number of current agreements reached a peak of 24,046 in September 2010, while the number did not decline below 20,000 until September 2014; during the 5-year period from September 2009 to September 2013 inclusive, the annual average was 23,104. The number of employees covered by these current agreements peaked in September 2013 period at 2,490,652, while the annual average over the 6-year period between September 2010 and September 2015 was 2,369,941.[255]

[254] M Bray and J Macneil, 'Reforming Collective Bargaining' in K Hancock and R Lansbury (eds), *Industrial Relations Reform: Looking to the Future* (Federation Press, 2016) 111–112.
[255] Note only data as at the last day of September in each year has been compared.

Figure 4: Number of current enterprise agreements and the employees covered by them, 2009–2024, end of September



Source: DEWR Workplace Agreements Database.

Alt-text: A combination chart. The bars shows the number of current agreements on the last day of September between 2009 to 2024 and the line shows number of employees covered by these agreements. In September 2023 the number of current agreements was equal to 9,889. This was below the number in September 2022, equal to 11,054. The coverage, however, increased between these 2 periods, from 1.7 million in September 2022 to 1.8 million in September 2023. In September 2024 the number of current agreements was equal to 10,113 and the coverage was equal to 2,206,033 workers. The previous highest coverage was at September 2013 (equal to 2.49 million workers).

The Australian Council of Trade Unions (ACTU) expressed its satisfaction with these early developments and contrasted them with previous legal regimes:[256]

> The Fair Work Act places collective bargaining at the core of the Australian industrial relations system, in stark contrast to Work Choices that sought to undermine collective agreements, leaving workers to fend for themselves.

After 2012, however, the incidence and coverage of collective agreements declined precipitously. This can be seen in the data for "new enterprise agreements", which are summarised in Figure 3 and also reported in Appendix 2. The total number of new collective agreements fell by 49% from 8,265 in the year ending in the September quarter of 2012 to 4,187 over the same four-quarterly period in 2022, although it had reached lower annual number in some earlier years. The number of employees covered by these new agreements fell by 46%

[256] cited in Bray & Macneil: 109.

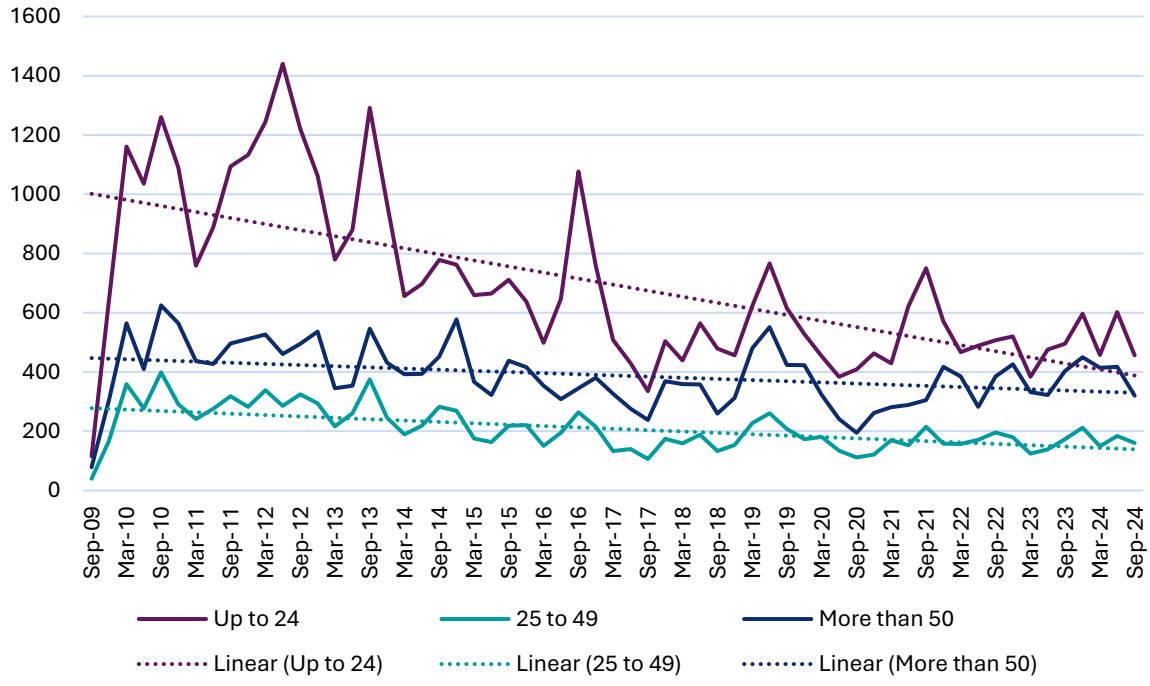
from 1,053,681 in the four quarters to September 2013 to a low of 571,102 in 2021, although coverage had begun to increase in the year to the September quarter in 2022.

The decline is also evident in the "current" enterprise agreements (Figure 4). The number of agreements fell by 57% from 22,957 at the end of the September quarter of 2013 to a low of 9,912 at the end of the same quarter in 2020, although the number increased in the following two years. The coverage of these current agreements fell by 30% from 2,490,652at the end of September in 2013 to 1,732,829 at the end of September in 2022.

The disaggregation of the decline in the incidence and coverage of enterprise agreements also reveals important trends, in that it:

- was most significant in the private sector and less dramatic in the public sector[257]
- was fairly consistent (at least in percentage terms) between union and non-union agreements[258]
- varied by size of agreement,[259] with smaller agreements falling further and faster than large agreements (see Figure 5).[260]

Figure 5: Trends in enterprise agreement approvals by agreement size, Australia, 2009–2024



Source: DEWR Workplace Agreements Database.

[257] A Pennington, *On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector* (Centre for Future Work, Australia Institute, 2018) <https://australiainstitute.org.au/wp-content/uploads/2020/12/Collective-Bargaining-On-the-Brink-WEB.pdf>; BCA 2021.
[258] M Bray, S McCrystal and L Spiess, 'Why Doesn't Anyone Talk About Non-union Collective Agreements?' (2020) 62(5) *Journal of Industrial Relations* 784–807.
[259] BCA 2021.
[260] Note that the WAD measures only the number of employees covered by collective agreements (agreement size) and not the size (in terms of employment) of the enterprise covered by the agreement.

Alt text: A line chart showing the number of enterprise agreements approved in each quarter from September 2009 to September 2024, by the size of the employee cohort covered by the agreement. In the September quarter 2024 there were 186 enterprise agreements approved that covered fewer than 10 employees, 268 that covered 10 to 24 employees, 161 that covered 25 to 49 employees, 123 that covered 50 to 99 employees and 197 that covered more than 100 employees.

In summary, by the time of the passing of the Secure Jobs, Better Pay amendments in late 2022, evidence of the decline in the incidence and coverage of collective agreements since 2012 was compelling. Many commentators suggested that this decline was associated with – if not caused by – the provisions of the Fair Work Act.

8.3.5 Outcomes

The decline in the incidence and coverage of collective agreements coincided with a number of key economic outcomes. This section will focus on 3: wages; wages and productivity; and shares of national product.

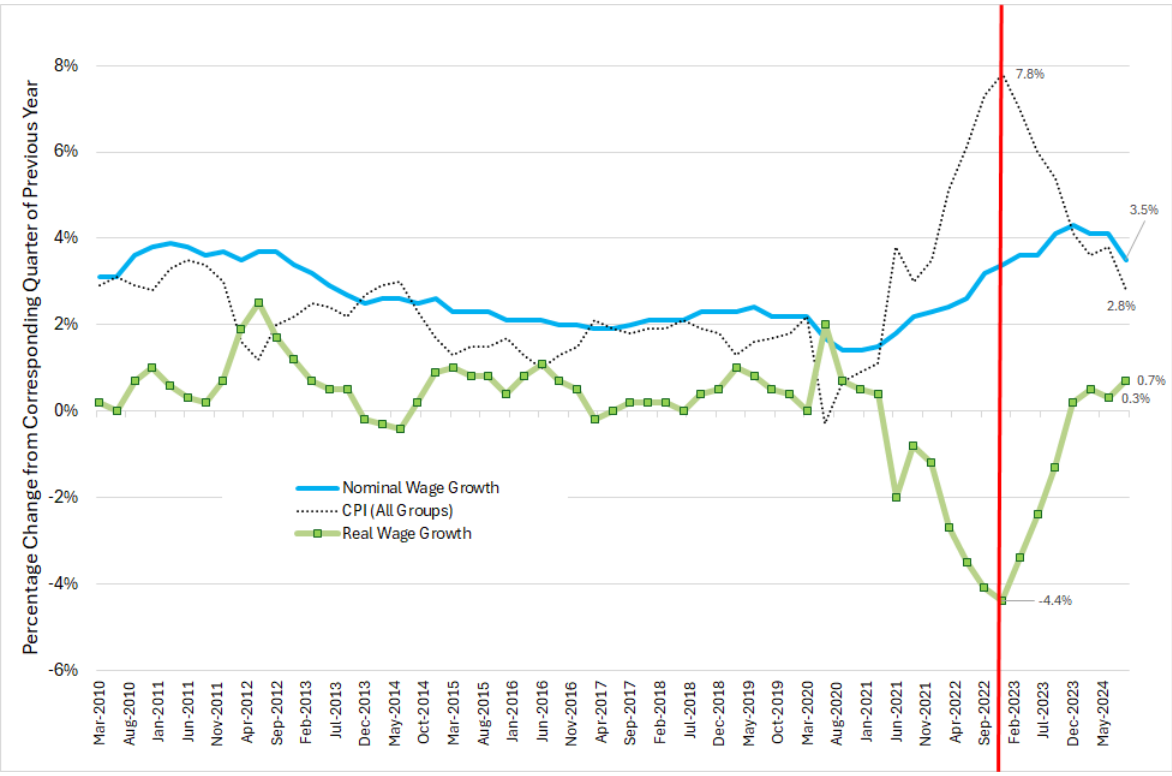
8.3.5.1 Wages

The first, and most important, is wages. As Statistical Appendix 1 shows, wage levels and growth may be measured in various ways. Two measures will be used here: the Wage Price Index (WPI) and Average Annual Wage Increases (AAWI).

Using the WPI, Figure 6 shows that *nominal* wage growth (all industries) was basically stagnant between the March quarter 2013 and the December quarter 2019. Over this period, it averaged 2.3%, each quarter, falling to 1.7% over 2020 (the COVID-19 period).

Real wage growth (nominal wage growth adjusted for inflation, the consumer price index (CPI)) was equal to 0.4% between 2013 and 2019 and rose to 0.8% in 2020 (when the CPI fell). As inflation picked up after COVID-19, real wage growth turned negative until the time when the Secure Jobs, Better Pay amendments were passed in December 2022.

Figure 6: Nominal and real wage growth in Australia, March 2010 to September 2024



Notes:

1. ABS 6345.0 Wage Price Index, Australia. Table 1, Total hourly rates of pay excluding bonuses, original.

2. ABS 6401.0 Consumer Price Index, Australia. Tables 1 and 2, All groups CPI Australia, original.

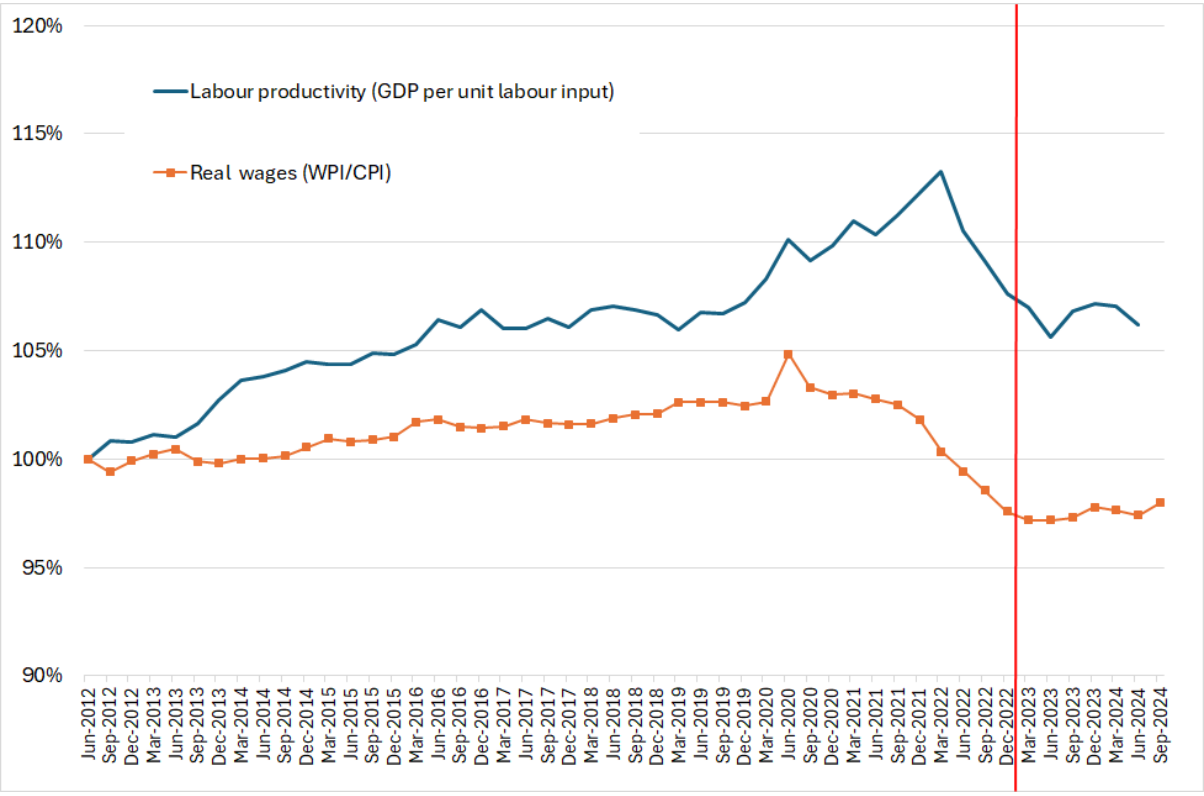
3. Real wages derived by subtracting the CPI from the WPI which measures nominal wage growth.

A second measure of wage growth came through the WAD's data on the AAWI in enterprise agreements; in other words, it measures only nominal (and not real) wage increases and it does not measure wage increases for awards or individual arrangements. This data generally shows that, between September 2021 and the December 2022 quarter, the AAWI of new approved agreements was relatively static. Over the same period, the AAWI of current agreements also remained static.

8.3.5.2 Wages and productivity

A key point about this account of wage growth (and decline) is that real wages were not increasing in line with trends in labour productivity. This is graphically illustrated in Figure 7 below. Using indices of wages and labour productivity, based on progress after 2012, Figure 7 shows that between the March quarter 2013 and the December quarter 2019 real wages increased by 2.2%, while labour productivity increased by 6.0%. Moreover, at the time of the Secure Jobs, Better Pay amendments, new wages had reached a low point, well below real wages in 2012.

Figure 7: Real wage and productivity growth, 2012 to 2024



Notes:

1. Indexed to June 2012.

2. Labour productivity measures gross domestic product (GDP) per unit labour input. It is derived by dividing seasonally adjusted GDP chain volume measures (National Accounts, ABS Cat No 5206.0, Table 1, series A2304402X) with information on seasonally adjusted total hours actually worked in all jobs from the Labour Account (ABS 6150.0.55.003, Table 1, series A85389483J).

3. WPI data source: ABS 6345.0 Wage Price Index, Australia. Table 1, Total hourly rates of pay excluding bonuses, original. CPI data source: ABS 6401.0 Consumer Price Index, Australia. Tables 1 and 2, All groups CPI Australia, original.

4. The red vertical line shows when the Secure Jobs, Better Pay Act came into effect.

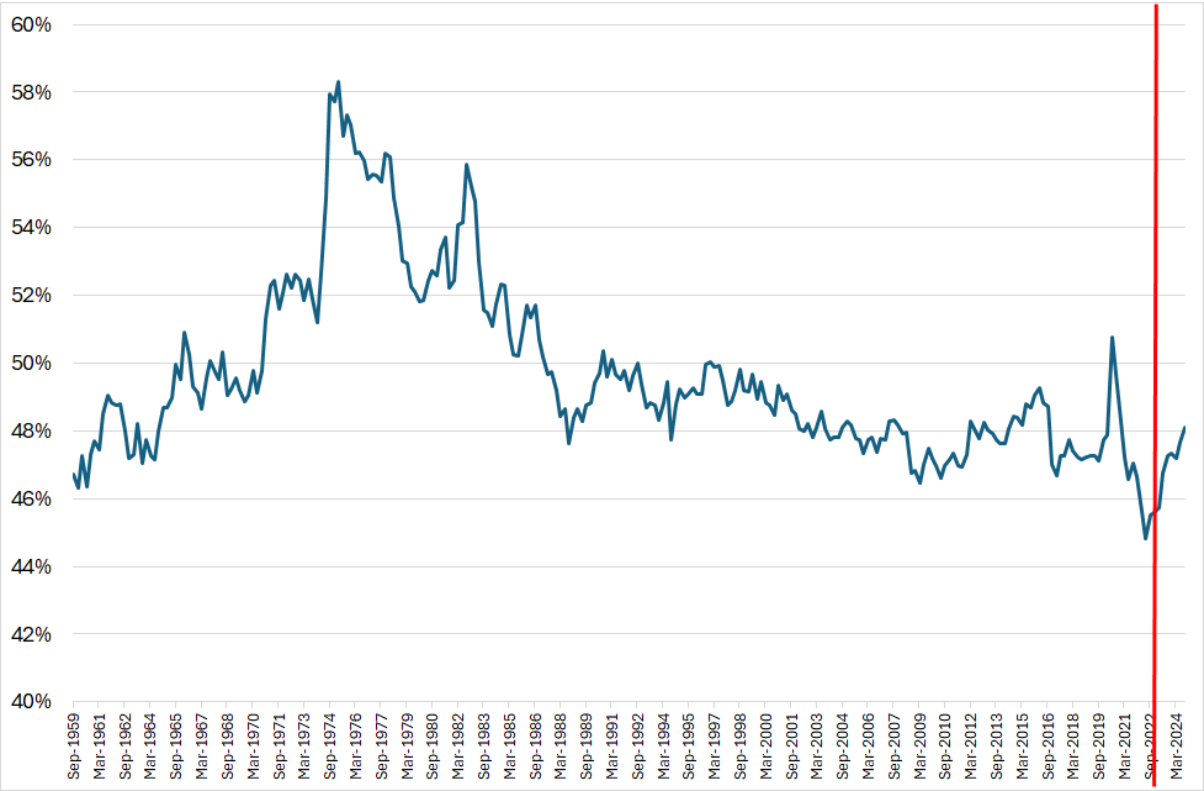
8.3.5.3 Shares of national product

Another indicator of economic outcomes is the labour share (LS) of gross domestic product (GDP) – the proportion of total economic output that is received as compensation by paid employees.[261] Drawing on Australia's National Accounts, the LS is estimated by dividing total compensation of employees (which includes wages, salaries and other benefits such as superannuation contributions by employers) by GDP. The Australian Bureau of Statistics (ABS) series extends back to September 1959. Figure 8 shows that the LS reached its highest peak in March 1975 at 58.3% and since then there has been a long-term decline in the share. It reached its lowest point in the June 2022 quarter at 44.8%. In the period March 2013 to December 2019, it declined by 0.3 percentage points and averaged 47.8% over the period.

[261] For a more detailed discussion of labour compensation as a share of GDP see J Stanford, 'The Declining Labour Share in Australia: Definition, Measurement, and International Comparisons' (2018) 81 *Journal of Australian Political Economy* 11–32.

The surge to 51% in the June 2020 quarter was caused by COVID-19. Between March 2020 and June 2020, GDP declined by 7.2%. Total employee compensation fell by 1.6% over the same period.

Figure 8: Labour compensation as a share of GDP, September 1959 to September 2024



Notes:

1. Source: ABS 5206.0 Australian National Accounts, Table 7 (Income from GDP, current prices).

2. Share is derived by dividing Series ID: A2303359K (compensation of employees) by series ID A2304418T (Gross Domestic Product (GDP), seasonally adjusted.

3. The red vertical line shows when the Secure Jobs, Better Pay Act came into effect.

8.3.5.4 Pre-Secure Jobs, Better Pay amendments – conclusions

In summary, according to these measures, the economic situation of Australian workers declined during the period between 2012 and 2022. This coincided closely with the decline of collective bargaining.

The causes of this long-term decline in the economic situation of workers are undoubtedly complicated and include factors such as the market power of firms.[262] Many commentators, however, also attribute the decline to legal and institutional factors, especially the decline of collective bargaining.[263]

[262] D Shubhdeep, J Eechout, P Aseem and W Lawrence, 'What Drives Wage Stagnation: Monopsony or Monopoly?' (2022) 20(6) *Journal of the European Economic Association* 2181–2225.
[263] See e.g. Isaac 2018; A Stewart, J Stanford and T Harding (eds) *The Wages Crisis in Australia* (University of Adelaide Press, 2018) <https://www.adelaide.edu.au/press/ua/media/621/uap-wages-crisis-ebook.pdf>; BCA, *The State of Enterprise Bargaining in Australia* (Business Council of Australia, 2019) <https://www.bca.com.au/the_state_of_enterprise_bargaining_in_australia>; Stanford et al. 2021.

Whatever the cause, the urgency of the problem and the need for change were undeniable.

8.4 Developments in collective bargaining resulting from the Secure Jobs, Better Pay amendments, 2022–2024

The amendments to the law surrounding collective bargaining and collective agreements emanating from the Secure Jobs, Better Pay Act in December 2022 are described in some detail in the following chapters, as are some of the effects of those amendments. This section instead focuses, first, on the 'big picture' by locating amendments within the dimensions of bargaining identified above in subsection 8.4.1. This helps to give an understanding of the intentions behind the amendments. The argument is that the collective bargaining amendments were intended to expand the incidence and coverage of collective bargaining. Moreover, this expansion of bargaining was intended to increase the wages received by Australian workers and improve the economic situation of those workers.

The second and third subsections below then start to summarise the effects – as opposed to the intentions – of the amendments. In other words, they ask whether the incidence and coverage of collective agreements have increased since the passing of the amendments (section 8.4.2) and whether there has there been some improvement in the economic situation of Australian workers (section 8.4.3). In this way, not only does this section summarise the 'big picture' but it also avoids the repetition across chapters of data on bargaining and wages outcomes.[264]

8.4.1 The status, level and agents of the amendments

Locating the amendments within the 3 dimensions of collective bargaining (discussed above) helps to give an understanding of the intentions behind them.

8. 4.1.1 Status

The Secure Jobs, Better Pay amendments mostly aim to reduce the barriers to collective agreement making created by excessive legal regulation, although some potentially work in the opposite direction. For example, amendments like those focused on the requirements for agreement approval (see Chapter 16), the Better Off Overall Test (BOOT) (see Chapter 17) and the capacity of the FWC to deal with errors (see Chapter 18) and vary enterprise agreements (see Chapter 19) aim to simplify legal procedures for bargaining. They thereby encourage the making and expand the coverage of more single-enterprise collective agreements.

At the same time, the legislative provisions specifying 3 types of multi-employer bargaining, each with different procedural rules (see Chapters 10 to 12), potentially add to the legal rules governing the making of those agreements. Each of the 3 forms of multi-employer bargaining has different procedural rules, which must be digested and accommodated.

8.4.1.2 Level

The amendments reinforce the highly decentralised nature of Australia's system of collective bargaining in at least 2 ways. First, as Minister Burke said in his second reading speech to parliament in December 2022, single-enterprise bargaining remains the government's preferred model, because it promotes improved productivity.

[264] It should also be noted that the issue of 'productivity' is treated separately in an Appendix.

Second, many of the amendments are explicitly aimed at breaking down some of the regulatory barriers that were considered to be preventing the single-enterprise bargaining and the making of more agreements at that level. Amendments focused on initiating bargaining (Chapter 9), resolving bargaining disputes (Chapter 14), restricting the termination of existing agreements (Chapter 20) and sunsetting 'zombie' agreements (Chapter 21) mostly seek to increase the number and effectiveness of single-enterprise collective agreements.

At the same time, however, other amendments aim to create – or reinvigorate – 3 types of multi-employer bargaining, which represent collective bargaining 'above' the level of the single enterprise. These amendments are justified mostly by the contribution that multi-employer bargaining can make towards expanding the coverage of bargaining but also the contribution they can make towards more equitable outcomes, in terms of higher wages for workers and greater gender equality.

This attempt to revive multi-employer bargaining is part of a renewed interest internationally in multi-employer bargaining.[265] This seems, however, to be a matter of considerable controversy amongst Australian stakeholders. Many unions support it, while many employers oppose it. Opposition brings the danger that new barriers will be placed in the way of those seeking to negotiate multi-employer agreements.

8.4.1.3 Agents

The amendments have little to say *directly* about who negotiates single-enterprise collective agreements. Non-union agreements remain largely untouched, as Professor McCrystal has recently observed.[266] Moreover, individual employees retain their capacity to nominate themselves or non-union agents to represent them in bargaining, while the making of collective agreements still rests with a ballot, which is organised by employers and explained to voters by employers.

It is arguable, however, that some amendments *indirectly* seek to influence the 'who' question with respect to single-enterprise bargaining. Amendments such as those developing new rules that ensure that agreements are 'genuinely agreed' by those voting in the ballots (see Chapter 16) have the potential to reduce the number of non-union agreements and eliminate the insidious practice of 'small cohort' agreements.

Union representation is likely to be encouraged by their new capacity to initiate bargaining in some circumstances (see Chapter 9) and the new limitations on employers unilaterally applying for the termination of agreements during the bargaining period (see Chapter 20).

Finally, there is little doubt that amendments focusing on multi-employer bargaining seek to ensure that unions play a greater role in representing workers. The authorisation of multi-employer bargaining and the approval by the FWC of the resulting multi-employer agreements mandate that unions must be part of proceedings, even if non-union bargaining representatives can still take part (see Chapters 11 and 12).

8.4.2 The incidence and coverage of collective agreements

Have the amendments been effective in achieving their goal of increasing the incidence and coverage of collective agreements? The first answer is that the data available to assess this

[265] See e.g. OECD 2019; Sisson 2024; Grimshaw et al. 2024; A Kent, 'New Zealand's Fair Pay Agreements: A New Direction in Sectoral and Occupational Bargaining' (2021) 31(3) *Labour & Industry* 235–254.
[266] See McCrystal 2024.

question is insufficient. Not only have many of the relevant amendments been in operation for shorter periods than the legislation itself but there are also time lags that mean that data is not up to date. The WAD, gathered and published by the DEWR, is a vital data source, but there have been only 7 quarters of data (that is, less than 2 years) on trends in enterprise bargaining since the amendments passed parliament. Given that the duration of most enterprise agreements is around 3 years, many agreements have not even been renewed under the new legislative provisions.

Perhaps more disturbingly, the data published by the ABS on the coverage of bargaining is only gathered and published every 2 years and the most recent data applies to August 2023. So these data shortages mean it is still too early to be sure.

This said, the data that is available suggests modest increases during 2023 and 2024 in the incidence of collective agreements and especially in their coverage. Given the importance of these data and their relevance to many of the chapters in Part 2, this section will explore them in some detail. In an effort to overcome the fluctuating numbers in the quarterly data, especially for new agreements, the analysis focuses as much as possible on data aggregated over four quarters.

First, in terms of 'new' collective agreements approved by the FWC since the amendments were passed by parliament:

- In the year to September 2023 (September 2022 to September 2023), the annual total number of new approved agreements declined by 5% to 3,978. However, in the September 2023 to September 2024 period, the number of new agreements increased by 11% to 4,417.
- Corresponding with the periods outlined above, the total number of employees covered by new collective agreements declined by 3% to 788,393 by September 2023 and in the September 2023 to September 2024 period increased by a remarkable 60% to 1,258,322.

Second, in terms of 'current' agreements, each 12-month period since the amendments came into operation can be summarised as follows:

- The total number of current agreements declined by 10.5% to 9,889 between September 2022 and September 2023 and then increased by 2% to 10,113 between September 2023 and September 2024.
- Their corresponding coverage saw a decline of 5% in the 12 months to September 2023 to 1.8 million and then a 22% increase (to 2.2 million) in the 12 months to September 2024.

The overall conclusion from these sources is that the incidence and coverage of collective bargaining, especially coverage, has increased markedly since the passing of the amendments. In the 2 years (24 months) from September 2022 to September 2024 there was a 27% increase in the number of employees covered by a collective agreement, consistent with the intentions of the amendments. These conclusions are supported by less complete data provided in subsequent chapters by agencies like the FWC and more anecdotal evidence provided by stakeholders. To repeat, though: these trends are very formative due to the limited time period involved, and definitive evidence is not yet available.

8.4.3 Outcomes

The increase in the incidence and coverage of collective agreements coincided with a number of key economic outcomes. This section will focus on 2: wages; and shares of national product.

8.4.3.1 Wages

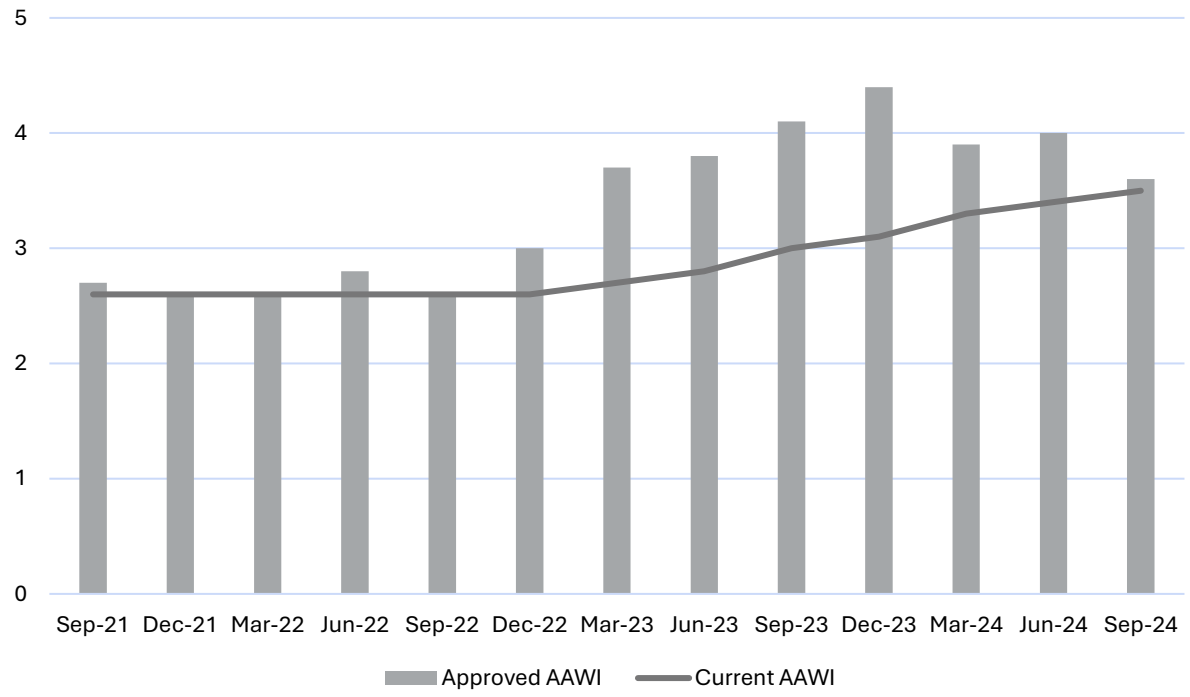
An account of the wage trends begins with data on the WPI. As shown at the right-hand side of Figure 6 above (in section 8.3.5.1 Wages above), *nominal* wages increased after the amendments from 3.2% annual rate in the December quarter of 2022 to peak at 4.3% annual rate in 2023. Thereafter, the annual rate of increase decreased steadily to 3.5% in the September quarter of 2024.

More importantly, over the same period, *real* wages gradually increased each quarter after the amendments from an annual low of –4.4% in the December quarter of 2022 until they exceeded price rises at the end of 2023. According to the latest data, real wages increased by 0.7% through the year to the September quarter 2024. These amount to modest real wage increases, but they suggest that the intentions of the amendments were achieved, although it took several quarters to reach positive – if still small – real wage increases above the inflation rate.

Another measure of wages comes from the WAD, particularly the analyses of AAWIs contained in enterprise agreements. Figure 9 below summarises the trends. With respect to new agreements by the FWC each quarter, the AAWIs grew steadily to reach highs over 4% in late 2023, to be followed by slight decreases during the 3 quarters of 2024.

In terms of real AAWIs, the quarterly trends for new agreements show a marked increase commencing in the December 2022 quarter and peaking in the December 2023 quarter. The trend for current agreements has also increased over that period, steadily climbing to a peak in the latest available data – for the September 2024 quarter.

Figure 9: Quarterly Average Annual Wage Increase (AAWI) (%) for approved and current agreements, 2021 to 2024



Source: Trends in Federal Enterprise Bargaining, September quarter 2024, Chart 2.

Alt text: A combination chart with bars showing the AAWI for new agreements approved in each quarter and a line showing the AAWI for all agreement current on the last day of each quarter. The AAWI for agreements approved in the September quarter 2024 was 3.6%, while the AAWI for agreement current as at 30 September 2024 was 3.5%.

8.4.3.2 Wages and productivity

Despite the real wage increases in 2024, shown in section 8.3.5.2 above, wages and productivity continue to lie 2% below the level of real wages in June 2012. Moreover, despite the recent declines in labour productivity, it was still well above its level of June 2012 and the gap between labour productivity and real wages remained significant. In this way, any increase in real wages prompted by the Secure Jobs, Better Pay amendments has not been able to overcome the previous declines. Whether real wages continue to rise and the gap reduce remains to be seen.

8.4.3.3 Shares of national product

The data on shares of national income provided (in section 8.3.5.3 above) in Figure 8: Labour compensation as a share of GDP show (at the right-hand side) that labour's share rose steadily after the amendments from a low of 44.8% in the June 2022 quarter to 48% in the September quarter of 2024 (the latest data available).

8.5 Conclusions

This introductory chapter sets the scene for the more detailed assessment of specific amendments about bargaining and agreements in the chapters. It suggests 3 main conclusions.

First, the decline in collective bargaining between 2012 and 2022 was significant and it occurred at the same time as there was a serious deterioration in the economic circumstances of Australian workers. Government action was necessary.

Second, the main intentions of the bargaining and agreement amendments in the Secure Jobs, Better Pay Act were to reverse the decline in collective bargaining and to increase wages.

Third, the evidence about whether these intentions were realised is weak because of insufficient time elapsing since the amendments, but the early signs are positive: collective bargaining is increasing, especially the coverage of collective agreements, and wages (and other indicators workers' economic circumstances) have started to improve.

Chapter 9. Initiating bargaining

Part 15 of Schedule 1 to the Secure Jobs, Better Pay Act establishes a new method for initiating bargaining in limited circumstances. The substantive content of this chapter therefore focuses mainly on the question of bargaining representatives (especially unions) being empowered to commence bargaining for recently expired agreements.

9.1 Amendments and intent

The amendments introduce a new mechanism to commence the bargaining process (the first subsection) before the intent behind them is discussed (the second subsection).

9.1.1 Secure Jobs, Better Pay amendments

The Secure Jobs, Better Pay Act amends Division 3 of Part 2-4 of the Fair Work Act in relation to 'initiating bargaining' for a replacement single-enterprise agreement. Specifically, via the Secure Jobs, Better Pay Act, 2 new sections (ss 173(2)(aa) and 173(2A)) have been introduced into the Fair Work Act:

> (2) The ***notification time*** for a proposed enterprise agreement is the time when:
>
> (a) the employer agrees to bargain, or initiates bargaining, for the agreement; or
>
> (aa) the employer receives a request to bargain under subsection (2A) in relation to the agreement; ...
>
> (2A) A bargaining representative of an employee who will be covered by a proposed single - enterprise agreement (other than a greenfields agreement) may give the employer who will be covered by the proposed agreement a request in writing to bargain for the proposed agreement if:
>
> (a) the proposed agreement will replace an earlier single - enterprise agreement (the earlier agreement) that has passed its nominal expiry date; and
>
> (b) a single interest employer authorisation did not cease to be in operation because of the making of the earlier agreement; and
>
> (c) no more than 5 years have passed since the nominal expiry date; and
>
> (d) the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement.

Generally, an employer that will be covered by a proposed agreement must take all reasonable steps to give notice of the right to be represented during bargaining to all employees.[267] The notice must be given at various specified times called the 'notification time'. If an employer receives a request to bargain from a bargaining representative under s 173(2A), and if the request is valid, the employer is then obligated to issue a notice of employee representational rights (NERR) to all employees to be covered by the proposed single-enterprise agreement. The notice must be issued as soon as practicable but no later than 14 days after the notification time (s 173(3) of the Fair Work Act).[268]

The amendments commenced on 7 December 2022.

9.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of the Secure Jobs, Better Pay amendments was to streamline the process for initiating bargaining where the statutory criteria are met, thereby promoting the incidence and coverage of collective agreements.

As noted in Chapter 8, the Australian collective bargaining regime prior to the amendments was unusual, internationally, in that employers had so much power over the bargaining process, including initiating bargaining, issuing NERRs, explaining the likely effects of the new agreement and running the ballots.[269] If an employer exercised its power not to commence bargaining over a replacement agreement, the only recourse employees had was to seek a majority support determination (MSD) or a 'scope' order from the Fair Work Commission (FWC).[270]

Case examples (described below) show instances where employers used this power to operate under agreements that had long since become outdated in that rates had fallen below the base rates in awards.[271] The ongoing use of expired agreements is also thought to be a major factor contributing to a decline in the number of 'active' agreements in recent years. As the Business Council of Australia (BCA) noted in a 2019 report on enterprise bargaining in Australia, 'some employers and employees are choosing not to renegotiate agreements that have lapsed, but are still operational'.[272]

Relatedly, the amendments also seek to 'deliver on the Jobs and Skills Summit outcome of removing unnecessary limitations on access to enterprise agreements by reducing barriers to commencing bargaining'[273] and deliver some bargaining power back to employees and unions.[274]

---

[267] *Fair Work Act 2009* (Cth) s 173(1).
[268] *Fair Work Act 2009* (Cth) s 173(3).
[269] See also S McCrystal, 'Avoiding Collective Bargaining under the *Fair Work Act 2009* (Cth): Making Collective Agreements Without Unions and the Impact of Recent Reforms' (2024) *Labour and Industry* doi: 10.1080/10301763.2024.2439108; U Chaudhuri and T Sarina, 'Employer-Controlled Agreement-Making: Thwarting Collective Bargaining Under the Fair Work Act' [2018] ELECD 1756; S McCrystal, B Creighton and A Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018) 138.
[270] A Forsyth and S McCrystal, *Reforming Australian Bargaining and Strike Laws to Maximise Worker Power* (2023) 1110.
[271] S McCrystal, 'Avoiding Collective Bargaining under the *Fair Work Act 2009* (Cth): Making Collective Agreements Without Unions and the Impact of Recent Reforms' (2024) *Labour and Industry* doi: 10.1080/10301763.2024.2439108; *Awx Pty Ltd & Aws Staff Pty Ltd* [2023] FWCFB 262.
[272] Business Council of Australia, *The State of Enterprise Bargaining in Australia* (2021) 7.
[273] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [752]134.
[274] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [221] xlii.

9.2 Impact and issues

The appropriateness and effectiveness of these amendments can be assessed through analysis of 3 types of data: quantitative data, qualitative data where available, and the views expressed by stakeholders.

9.2.1 Quantitative evidence

There is a dearth of data specifically on how bargaining is initiated and the question of who initiates bargaining. The Review Panel makes a recommendation below that this gap be filled by expanding the data gathered and published by DEWR's WAD.

Although the WAD does not collect and report on the mechanism used to commence bargaining for all agreements, the WAD has collected information on the number of agreements where bargaining commenced under s 173(2A) of the Fair Work Act for agreements with a notification time on or after 7 December 2022 (when the provisions commenced). The data shows that 3.93% of agreements, or 187 agreements, approved from the first quarter of 2023 to the third quarter of 2024 commenced bargaining through a written request pursuant to the initiating bargaining provisions (in s 173(2A) of the Fair Work Act).[275]

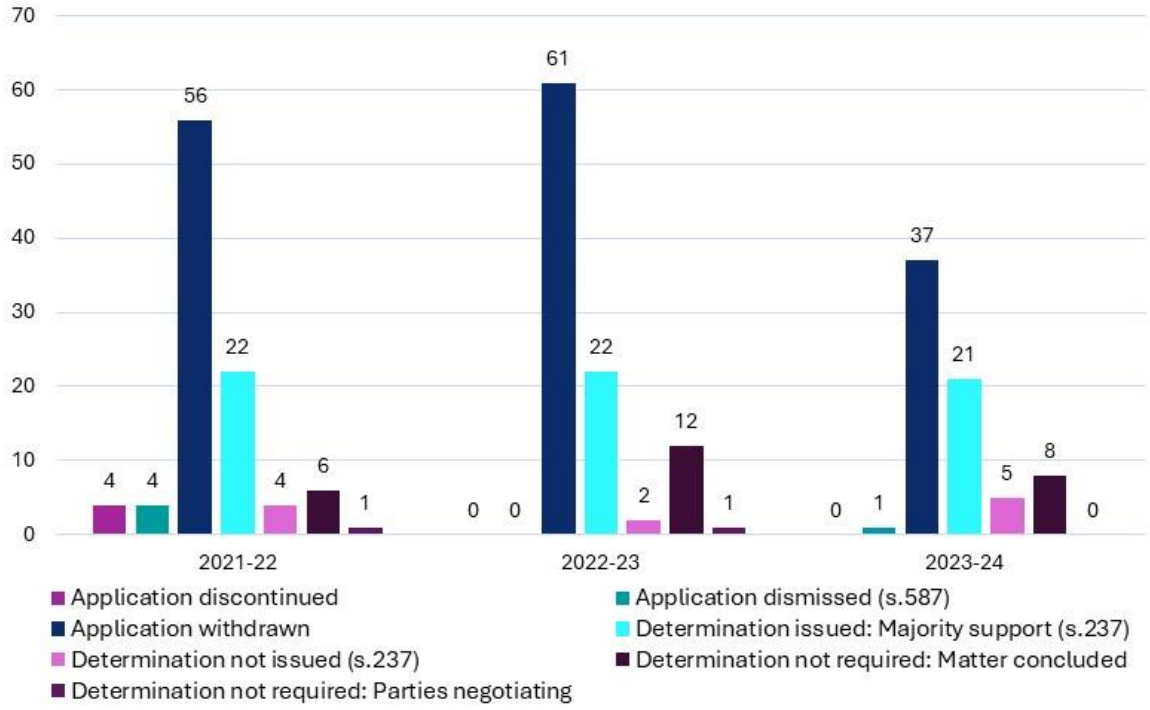
There also are other types of data that might more indirectly help to assess the question: the incidence and coverage of collective agreements and the number of majority support determinations (MSDs) sought by the bargaining parties and then issued by the Fair Work Commission (FWC).

First, trends since the commencement of the amendments in collective agreements have already been considered earlier in this report (see Chapter 8). The conclusion reached was that there have been modest increases in the number and especially the coverage of agreements. While these trends may be the result of multiple factors in addition to the amendments about initiating bargaining, these increases at least suggest some success in achieving the intent.

Second, there are trends in relation to the number of applications for and approvals of MSDs. The data available from the FWC in Figure 10 shows that the number of MSD approval applications was largely the same for 2021–22 and 2022–23 at 97 and 98, respectively; however, it reduced by 26.5% to 72 in 2023–24. While applications in total have decreased, so has the rate at which applications were withdrawn and dismissed. Therefore, while applications to approve MSDs have decreased, the number approved has remained stable.

[275] Data from the Workplace Agreements Database, Department of Employment and Workplace Relations; for agreements with a notification time on or after 7 December 2022.

Figure 10: Outcomes (#) of majority support determination (s 236) applications, 2021–22 to 2023–24



Source: Review analysis of data provided by the FWC, July 2021 – June 2024.

Alt text: A clustered column chart showing the outcomes from majority support determination (MSD) applications for the 2021–22, 2022–23 and 2023-24 financial years. In 2023–24 total MSD applications received was equal to 72. This compares with 98 in 2022–23 and 97 in 2021–22. The number of MSDs issued is constant across the financial years.

9.2.2 Qualitative evidence

There are no major court or tribunal decisions directly considering the operation of the initiating bargaining reforms.

Media reporting, however, pointed to 2 significant enterprise agreements which have been negotiated and approved due to initiating bargaining provisions within the Secure Jobs, Better Pay Act. On 3 May 2024 the FWC approved the *Coles Retail Enterprise Agreement 2024*, which covers over 92,500 employees.[276] On 19 October 2023 the FWC approved the *ANZ Enterprise Agreement 2023–2027,* which covers more than 20,000 staff.[277] The passage of both

[276] *Application by Coles Supermarkets Australia Pty Ltd* (2024) FWCFB 250; A Thompson, 'Supermarket Giant Coles Forced to Bargaining Table Under New IR Laws' *Sydney Morning Herald* (online, 6 January 2023) <https://www.smh.com.au/politics/federal/supermarket-giant-coles-forced-to-bargaining-table-under-new-ir-laws-20230105-p5cah6.html>.

[277] *Application by Australian and New Zealand Banking Group Limited* (2023) FWCA 3477; D Marin-Guzman, 'ANZ Returns to Bargaining Over Pay for the First Time in Seven Years' *AFR* (online, 6 February 2023) <https://www.afr.com/work-and-careers/workplace/anz-returns-to-bargaining-over-pay-for-the-first-time-in-seven-years-20230206-p5ci6q>.

agreements has been attributed to employees and bargaining representatives utilising the new initiating bargaining provisions.[278]

As well, on 13 May 2024 the FWC issued a decision in relation to bargaining at Sephora Australia Pty Ltd (*Sephora*).[279] While *Sephora* is a case about good faith bargaining requirements of the Fair Work Act (and to that extent is not directly relevant here), it identified a potential operational issue with the initiating bargaining amendments.

Briefly, Sephora and its employees were covered by an enterprise agreement that nominally expired in January 2019. The Shop, Distributive and Allied Employees Association (SDA) issued a written request for bargaining to replace this agreement by making a written request in accordance with s 173(2A) of the Fair Work Act.[280] Sephora was required to, but for presently irrelevant reasons did not, issue a NERR within 14 days of this request.[281] Some months later, Sephora purported to commence bargaining with employees but, again for reasons not directly relevant, the SDA did not receive the NERR. The SDA only became aware of the renegotiation of the agreement shortly before employees were about to vote to approve the proposed agreement. That vote was successful and the agreement between Sephora and its employees was approved by the FWC, despite an appeal by the SDA.

The relevance of Sephora for present purposes is that it highlights a potential lack of knowledge about the significance of the written request to bargain. The Review Panel considers that *Sephora* supports recommendations to improve the operation of the amendments (see below).

9.2.3 Stakeholder views

The views of stakeholders tend to be polarised, dividing between opposition to the amendments among employer representatives and support for them among unions.

Employers generally called for the repeal of the amendments or, failing that, further reforms. The Chamber of Commerce and Industry of Western Australia (CCIWA), for example, calls on the Review Panel to 'recommend the repeal of the provisions that provide employee associations powers to initiate bargaining without majority support determinations'.[282] Similar sentiment was expressed by the Chamber of Minerals and Energy of Western Australia (CMEWA),[283] the Australian Resources & Energy Employer Association (AREEA),[284] the Minerals Council of Australia (MCA),[285] the Australian Chamber of Commerce and Industry (ACCI),[286] Clubs Australia,[287] Maritime Industry Australia Ltd[288] and the BCA.[289]

---

[278] 'Secure Jobs Made ANZ Deal Possible: FSU' *Workplace Express* (online, 28 July 2023) <https://www.workplaceexpress.com.au/news/secure-jobs-made-anz-deal-possible-union-62535>.
A Thompson, 'Supermarket Giant Coles Forced to Bargaining Table Under New IR Laws' *Sydney Morning Herald* (online, 6 January 2023) <https://www.smh.com.au/politics/federal/supermarket-giant-coles-forced-to-bargaining-table-under-new-ir-laws-20230105-p5cah6.html>.
[279] *Shop, Distributive and Allied Employees Association* [2024] FWC 1225 [11].
[280] *Shop, Distributive and Allied Employees Association* [2024] FWC 1225 [15].
[281] *Shop, Distributive and Allied Employees Association* [2024] FWC 1225 [16].
[282] Chamber of Commerce and Industry, Western Australia (CCIWA) submission, 12.
[283] Chamber of Minerals & Energy of Western Australia submission, 1.
[284] Australian Resources and Energy Employer Association submission, 8.
[285] Minerals Council of Australia submission, 6.
[286] Australian Chamber of Commerce and Industry submission, 20.
[287] Clubs Australia submission, 3.
[288] Maritime Industry Australia Ltd submission, 12.
[289] Business Council of Australia submission, 12.

Master Builders Australia (MBA) submitted that:[290]

> the provisions in practice have simply handed unions powers to decide when bargaining commences irrespective of the views of workers. This has only undermined, or detracted from, the rights of employees to make their own decisions as to when, or if, to commence bargaining for a new agreement. The provisions in practice do not actually require involvement of an employee as a precondition for a union to initiate bargaining and in fact limits the rights for workers to initiate bargaining unless agreed by their union.

The BCA submitted that:[291]

> [the amendment] has been used to compel negotiations in highly paid sectors without any evidence of majority support from employees to be covered by a proposed EA, such as in the iron ore mining sector in the Pilbara.
>
> There are other reasons why the operation of this provision is not appropriate. This includes, that there may be valid reasons why an employer has chosen not to commence bargaining for a replacement agreement at a certain time. This could be that the employer is awaiting the outcome of tenders or contract renewals, broader business reviews and labour requirement projections, economic or profit forecasts or data, or a multitude of other reasons that could impact the terms and conditions it can offer employees or agree to as part of bargaining. Forcing employers to the table at this stage cannot be conducive to the efficient conduct of good-faith bargaining and is a waste of the productive resources of all parties concerned.

The Council of Small Business Organisations Australia (COSBOA) asserted that 'unions now possess authority beyond their representative constituency, with the Act enabling union-initiated bargaining prior to demonstrable majority employee support'.[292]

The general employer response is that MSDs are a suitable mechanism through which bargaining representatives may seek to initiate bargaining and that the new provisions are not required. According to the BCA:[293]

> Bargaining representatives could already compel bargaining where they obtained a majority support determination (MSD), a comparatively straightforward process requiring the bargaining representative to show that the majority of the employees who are to be covered by the proposed EA want to bargain.

[290] Master Builders Association submission, 19.
[291] Business Council of Australia submission, 13.
[292] COSBOA submission, 4.
[293] Business Council of Australia submission, 13.

The Ai Group also recommended repeal of the amendments. If the Review Panel is not agreeable to recommending a repeal of the provisions, the Ai Group proposed that the 5-year period at s 173(2A)(c) be reduced to 3 years.[294]

Unions submitted that the initiating bargaining amendments were welcomed and had, as intended, helped streamline the bargaining process and removed a barrier to collective bargaining.

The United Workers Union (UWU), for example, submitted that 'Removing MSD requirements has facilitated the spread of collective bargaining and acted to increase wages and improve job security'.[295]

The Australian Workers' Union (AWU) noted that:[296]

> [The] reform provides a significant avenue in which the AWU can stimulate enterprise and industry-level bargaining, overcoming circumstances where, especially within the mining industry, employers, by refusing to bargain, could ensure that wages and conditions remained static.

The Mining and Energy Union (MEU) similarly supported the amendments submitting they provide a 'sensible alternate to the lengthy and complex' MSD process, citing success working with AWU to commence bargaining in the Pilbara.[297] The Community and Public Sector Union (CPSU) also raised positive sentiments, asserting it led to a 'prompt commencement of agency level bargaining and service wide bargaining'.[298]

In terms of 'issues', the Australian Council of Trade Unions (ACTU) noted that s 173(2A)(d) constrains the employee request to bargain to situations where 'the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement'. Their concern is that this could limit the availability of access to bargaining for a replacement agreement where a different scope is sought (e.g. combining 2 agreements). The UWU similarly submitted that s 173(2A)(d) could constrain access to bargaining if the replacement agreement was likely to cover additional workers.[299]

The ACTU also proposed that the new initiating bargaining provisions be extended to multi-employer agreements.[300]

9.3 Findings and recommendations

There is limited data on which the Review Panel may draw to assess the impact of these reforms. However, the Review Panel notes that WAD data collected for agreements with a notification time on or after 7 December 2022 indicates that the initiating bargaining provisions have been used in a small proportion of agreements (3.93% of total agreements approved, or in 187 agreements). Having considered the Australian Government's legislative intent (to

[294] Australian Industry Group Submission, 15.
[295] United Workers Union submission, 32.
[296] Australian Workers Union submission, 1.
[297] Mining and Energy Union submission, 8.
[298] Community and Public Sector Union submission, 7.
[299] United Workers Union submission, 32.
[300] Australian Council of Trade Unions submission, 81.

streamline bargaining and reduce barriers to collective bargaining) and the early evidence, which shows the provisions are being used, the Review Panel concludes that the amendments have so far been effective.

While the Review Panel notes the employer requests that an MSD be sought where employers do not agree to bargain, the Review Panel has declined to support this request. An MSD is not always a straightforward exercise and, in some cases, where it is opposed may impose administrative burden on unions and employees.[301] Moreover, it would be unacceptable to return to pre-existing provisions that gave employers an uneven power to avoid the renewal of agreements. Such a recommendation would go against the intent of the legislation.

The Review Panel has similarly declined to support the Ai Group recommendation that the window for an expired agreement be reduced from 5 to 3 years from the nominal expiry date. There is no evidence in support of an equally arbitrary 3- rather than 5-year window.

The ACTU has recommended that s 173(2A)(d) be changed to permit employee representatives to initiate bargaining for a replacement single-enterprise agreement that would cover additional workers. This broadens the scope of the legislation and potentially opens up disputes about whether the agreement was a true replacement agreement or a new agreement. The Review Panel, therefore, has not supported this request.

The Review Panel finds that data on who initiates bargaining is weak, with few cases on the issue having been decided to date. This has led to views being substituted by opinions about the future rather than interpreting objective evidence.

The Review Panel acknowledges there is limited data collected and reported on in relation to the mechanism used to commence bargaining, including who initiates bargaining under the provisions in s 173(2A) of the Fair Work Act. The Review Panel recommends that information on the mechanism to commence bargaining in all matters should be collected in advance of a further review (see Draft Recommendation 1).

The *Sephora* case highlights the lack of knowledge about the significance of the written request to bargain under s 173(2A) of the Fair Work Act. To improve the operation of the amendments, the Review Panel considers that further guidance should be published to support employers who receive a written request to bargain to understand their obligations following the request.

Draft Recommendation 5: The FWC should publish guidance to assist employers understand their obligations after receiving a written request to bargain under s 173(2A) of the Fair Work Act. This guidance material should include a template written request for bargaining representatives. The template written request should outline, amongst other matters, the requirement for employers to issue a notice of employee representational rights (NERR) within 14 days of receiving the request and details of known bargaining representatives.

[301] Australian Council of Trade Unions submission, 96.

Chapter 10. Cooperative workplaces

Part 23 of Schedule 1 to the Secure Jobs, Better Pay Act concerns cooperative workplace agreements. This is therefore the first of 3 chapters about multi-employer bargaining. Cooperative workplace agreements are a form of voluntary multi-employer agreement.[302] The Fair Work Act has always permitted voluntary multi-employer bargaining, although the amendments have renamed it the 'cooperative workplace bargaining stream' and slightly revised the conditions under which they are made. This section considers the changes to the cooperative workplace bargaining stream.

10.1 Amendments and intent

Amendments to the cooperative workplace bargaining stream and the intent behind them are generally uncontroversial. The amendments largely replicate the existing voluntary multi-employer bargaining framework.

10.1.1 Secure Jobs, Better Pay amendments

This stream of multi-employer agreements is governed by various provisions of the Fair Work Act. Bargaining in the renamed cooperative workplace bargaining stream, like the previous multi-employer bargaining stream, is voluntary. The 'compulsory' aspects of the bargaining framework are generally not available during bargaining in this stream. Protected industrial action cannot be taken during the bargaining process in relation to a proposed cooperative workplace agreement.[303] The Fair Work Commission (FWC) can assist parties to resolve bargaining disputes by conciliation and arbitration but only with the agreement of all bargaining representatives.[304] Workplace determinations are not available in the cooperative workplace bargaining stream.

Unlike the previous voluntary multi-employer bargaining stream, the cooperative workplace bargaining stream requires involvement of an employee organisation. In determining whether to approve a cooperative workplace agreement the FWC:[305]

> (2A) … must be satisfied that at least some of the employees covered by the agreement were represented by an employee organisation in relation to bargaining for the agreement.

These amendments commenced on 6 June 2023.

The Secure Jobs, Better Pay amendments also inserted provisions that require employee organisations to consent to employers requesting employees vote on a proposed multi-employer agreement[306] and provisions to vary an agreement to add or remove an employer and their employees. These amendments are discussed in Chapters 10 and 11 on multi-employer bargaining.

---

[302] *Fair Work Act 2009* (Cth) s 12.
[303] *Fair Work Act 2009* (Cth) s 437(2)(b).
[304] *Fair Work Act 2009* (Cth) s 240(3)–(4).
[305] *Fair Work Act 2009* (Cth) s 186(2A).
[306] *Fair Work Act 2009* (Cth) s 180A.

10.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of these provisions was to enhance access to enterprise bargaining by providing an option for employees and employers to reach agreements and help overcome the difficulty that some smaller businesses can have in bargaining for a new agreement.

The then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, stated in the second reading speech for the Secure Jobs, Better Pay Bill that 'the cooperative bargaining stream reframes and retains the existing multi-employer stream in the Fair Work Act; and is open to all businesses'.[307] The stream was expected to be 'particularly attractive to small businesses'.[308] The Minister also stated that '[i]t's entirely voluntary' and there is 'no industrial arbitration in that stream' and that '[c]onciliation and arbitration are by consent'.[309] He also stated that '[b]argaining assistance form the Commission can be accessed on the request of the parties'.[310]

10.2 Impact and issues

This section will consider the effect of the amendments since commencement. In addition to analysis of bargaining trends and outcomes in Chapter 8 of this report, the effectiveness or otherwise of these amendments can be assessed through a consideration of the use and coverage of cooperative workplace agreements, decisions of courts and tribunals and the views of stakeholders.

10.2.1 Quantitative evidence

Between 6 June 2023 and 30 September 2024, the FWC approved 28 multi-employer agreements.[311] These multi-employer agreements covered approximately 84,771 employees.[312] It was noted, however, that some of these multi-employer agreements would have been made prior to 6 June 2023 and therefore were approved under the previous multi-employer provisions in the Fair Work Act.

The Review Panel notes that there is limited data available in relation to the 'type' of multi-employer agreement (i.e. cooperative workplace agreement, supported bargaining agreement and single-interest employer agreement) and makes a recommendation further below that this information is captured and reported on.

10.2.2 Qualitative evidence

As at 17 January 2025, the Review Panel is aware of only 3 applications to approve a variation of a cooperative workplace agreement (made under s 216CA of the Fair Work Act).[313] Each of the variations was approved by the FWC.

---

[307] Commonwealth, *Parliamentary Debates,* House of Representatives, 27 October 2022, 2181 (Tony Burke, Minister for Employment and Workplace Relations).
[308] Regulation Impact Statement, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, 33.
[309] Commonwealth, *Parliamentary Debates,* House of Representatives, 27 October 2022, 2181 (Tony Burke, Minister for Employment and Workplace Relations).
[310] Commonwealth, *Parliamentary Debates,* House of Representatives, 27 October 2022, 2181 (Tony Burke, Minister for Employment and Workplace Relations).
[311] DEWR WAD data to 30 September 2024.
[312] DEWR WAD data to 30 September 2024.
[313] *Application by Inner West Community Enterprises Limited T/A Seddon Community Bank* [2024] FWCA 2835; *Application by Break O'Day Community Financial Services Ltd & Cardwell & District Community Enterprises Limited*

The first 2 cases are *Application by Inner West Community Enterprises Limited T/A Seddon Community Bank (Seddon Community Bank)*[314] and *Application by Break O'Day Community Financial Services Ltd & Cardwell & District Community Enterprises Limited and Others*.[315] These cases relate to the FWC's approval of the variation, under ss 216C and 216CA of the Fair Work Act, of the Bendigo Community Bank Cooperative Workplace Agreement 2023–2026 (Bendigo Community Bank Agreement) to add Inner West Community Enterprises Limited and 16 other employers and their relevant employees to the agreement.[316] The FWC was satisfied that the relevant employers took all reasonable steps to explain the varied terms of the agreement to the affected employees as required under s 216CAA of the Fair Work Act. The FWC found that the matters in s 216CB of the Fair Work Act were all satisfied, as each employer had an opportunity to express their views on the variation,[317] the majority of relevant affected employees voted to vary the Bendigo Community Bank Agreement,[318] and it was a genuinely agreed and in the public interest to approve the variation.[319]

Another case that the FWC approved to vary an enterprise agreement was in *Application by Our Lady Of Sion College Ltd T/A Our Lady Of Sion College*.[320] On 9 May 2024 the FWC approved the variation of the Catholic Education Multi-Enterprise Agreement 2022: Diocese of Ballarat, Diocese of Sandhurst, Archdiocese of Melbourne and Lavalla Catholic College, Traralgon (Catholic Education Multi-Employer Agreement 2022) to add Our Lady of Sion College and its relevant employees to the multi-employer agreement. The FWC found that the requirements under ss 216C, 216CA, 216CAA and 2166AB of the Fair Work Act were met. The relevant parties to this agreement provided the FWC information confirming that there was no supported bargaining authorisation or single-interest employer authorisation in place[321] and they had the opportunity to express their views.[322]

10.2.3 Stakeholder views

Stakeholders had limited views in relation to cooperative workplace agreements reflecting its less contentious status. To the extent that stakeholders expressed opinions on their operation, as opposed to noting what the amendments did, they are discussed below.

---

and Others [2024] FWCA 3687; *Application by our Lady of Sion College Ltd T/A Our Lady of Sion College* [2024] FWCA 1690.

[314] *Application by Inner West Community Enterprises Limited T/A Seddon Community Bank (Seddon Community Bank* [2024] FWCA 2835.

[315] *Application by Break O'Day Community Financial Services Ltd & Cardwell & District Community Enterprises Limited and Others* [2024] FWCA 3687.

[316] *Application by Inner West Community Enterprises Limited T/A Seddon Community Bank (Seddon Community Bank)* [2024] FWCA 2835 [1]; *Application by Break O'Day Community Financial Services Ltd & Cardwell & District Community Enterprises Limited and Others* [2024] FWCA 3687 [3].

[317] *Application by Inner West Community Enterprises Limited T/A Seddon Community Bank (Seddon Community Bank)* [2024] FWCA 2835 [13]; *Application by Break O'Day Community Financial Services Ltd & Cardwell & District Community Enterprises Limited and Others* [2024] FWCA 3687 [18].

[318] *Application by Inner West Community Enterprises Limited T/A Seddon Community Bank (Seddon Community Bank)* [2024] FWCA 2835 [14]; *Application by Break O'Day Community Financial Services Ltd & Cardwell & District Community Enterprises Limited and Others* [2024] FWCA 3687 [19].

[319] *Application by Inner West Community Enterprises Limited T/A Seddon Community Bank (Seddon Community Bank)* [2024] FWCA 2835 [16]; *Application* by *Break O'Day Community Financial Services Ltd & Cardwell & District Community Enterprises Limited and Others* [2024] FWCA 3687 [21]-[22].

[320]*Application by Our Lady Of Sion College Ltd T/A Our Lady Of Sion College* [2024] FWCA 1690.

[321] *Application by Our Lady Of Sion College Ltd T/A Our Lady Of Sion College* [2024] FWCA 1690 [5]–[6].

[322] *Application by Our Lady Of Sion College Ltd T/A Our Lady Of Sion College* [2024] FWCA 1690 [13].

The United Workers Union (UWU) was supportive of the cooperative workplace bargaining stream but proposed that amendments should be made to ensure workers are able to take protected industrial action in this stream. They submit that this is consistent with Australia's international obligations.[323]

The Australian Council of Trade Unions (ACTU) and UWU submitted that consideration should be given to permitting some level of FWC support to continuing cooperative bargaining processes, including through amendments to the Fair Work Act to permit a bargaining representative, without agreement of all bargaining representatives, to refer bargaining disputes to the FWC for assistance and making bargaining orders available.[324]

The ACTU also submitted that the drafting of the variation process and requirements for multi-employer agreements is complex and should be rectified. It is proposed that the provisions be redrafted to clearly state the requirements to be met to successfully vary agreements.[325]

Generally, employer groups noted there has been limited uptake of bargaining under the cooperative workplace stream. Ai Group noted, '[t]o date, there appears to have been little interest amongst employers, unions and employees in cooperative workplace agreements, outside of the banking and finance industry'.[326] The Australian Retailers Association noted the 'demand does not exist' for the cooperative bargaining stream within the retail sector, 'at least not as of yet'.[327]

Ai Group noted that the provisions are working as intended.

10.3 Findings and recommendations

The Review finds the amendments relating to cooperative workplace agreements are appropriate and effective and there is no evidence before the Review Panel to suggest there are any unintended consequences.

The Review Panel does not recommend further amendments to permit bargaining representatives to refer bargaining disputes to the FWC for assistance without the agreement of other bargaining representatives. It is clear that the intention of the stream is to be voluntary and cooperative. The amendments proposed would not be consistent with that intended purpose.

For the same reason, the Review Panel is not agreeable to recommending that industrial action be permitted in the cooperative workplaces bargaining stream. Where bargaining has broken down, bargaining representatives have options available under the bargaining framework to assist to progress bargaining.

While the Review Panel sympathises with the views of the ACTU about the complexity of drafting of some provisions (see comments on the 'status' of bargaining in chapter 8), the Review Panel does not recommend specific drafting changes at this time.

---

[323] United Workers Union submission, 41–42.
[324] ACTU submission, 100.
[325] ACTU submission, 100.
[326] AI Group submission, 72.
[327] ARA submission, 8.

The Review Panel notes the limitations in the data available on multi-employer agreements. In particular, there is limited data on the type of multi-employer agreement and the size of the business the agreement applies to. The Review Panel is therefore unable to conclude whether small businesses are using the cooperative workplaces stream. The Review Panel recommends that data on the type of multi-employer agreement (i.e. cooperative workplace agreement, supported bargaining agreement and single interest employer agreement) and the size of the employer the agreement relates to should be collected in advance of a further review (see Draft Recommendation 1).

Chapter 11. Supported bargaining

This is the second of the Review chapters about forms of multi-employer bargaining introduced by Part 20 of Schedule 1 to the Secure Jobs, Better Pay Act. Supported bargaining is a form of multi-employer bargaining directed at 'employees and employers who may have difficulty bargaining at the single-enterprise level'.[328] The supported bargaining stream is a 'modification … rather than a complete innovation'[329] of what had been, up to the amendments, the low-paid bargaining stream.

11.1 Amendments and intent

This section outlines the amendments that renamed the 'low-paid bargaining stream' the 'supported bargaining stream'. It also discusses the intent behind these changes.

11.1.1 Secure Jobs, Better Pay amendments

Divisions 7 and 9 of Part 2-4 of the Fair Work Act concerns supported bargaining. The Secure Jobs, Better Pay Act renamed the previous 'low-paid bargaining stream' the 'supported bargaining stream'.

Following the Secure Jobs, Better Pay amendments, and amongst other things, the Fair Work Commission (FWC) must make a supported bargaining authorisation (i.e. authorise bargaining in the supported bargaining stream) if it is satisfied that it is 'appropriate for the employers and employees … to bargain together'.[330] In determining whether it is satisfied that it is 'appropriate', the FWC must have regard to:[331]

> (i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and
>
> (ii) whether the employers have clearly identifiable common interests; and
>
> (iii) whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and
>
> (iv) any other matters the FWC considers appropriate.

The FWC must also be satisfied that at least some of the employees are represented by an employee organisation.[332] That is, union involvement in supported bargaining is mandatory.

The Fair Work Act does not define 'clearly identifiable common interests' but provides examples that may be relevant to determining common interest as including:[333]

---

[328] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) [921] 160.
[329] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [20].
[330] *Fair Work Act 2009* (Cth) s 243(1)(b).
[331] *Fair Work Act 2009* (Cth) s 243(1)(b).
[332] *Fair Work Act 2009* (Cth) s 243(1)(c).
[333] *Fair Work Act 2009* (Cth) s 243(2).

(a) a geographical location;

(b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;

(c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

The FWC must also make a supported bargaining authorisation if the application specifies employees in an industry, occupation or sector declared by the Minister for Employment and Workplace Relations.[334]

The FWC must not make a supported bargaining authorisation in relation to an employee covered by a 'single-enterprise agreement that has not passed its nominal expiry date'[335] or that would cover employees in relation to 'general building and construction work'.[336]

These amendments commenced on 6 June 2023.

While not a part of the Secure Jobs, Better Pay amendments, it is helpful to note that the supported bargaining stream, as did the low-paid bargaining stream before it, provides for special FWC assistance powers.[337] These are:[338]

FWC's assistance

(2) The FWC may, on its own initiative, provide to the bargaining representatives for the agreement such assistance:

(a) that the FWC considers appropriate to facilitate bargaining for the agreement; and

(b) that the FWC could provide if it were dealing with a dispute.

Note: This section does not empower the FWC to arbitrate, because subsection 595(3) provides that the FWC may arbitrate only if expressly authorised to do so.

FWC may direct a person to attend a conference

(3) Without limiting subsection (2), the FWC may provide assistance by directing a person who is not an employer specified in the authorisation to attend a conference at a specified time and place if the FWC is satisfied that the person exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement that the participation of the person in bargaining is necessary for the agreement to be made.

[334] *Fair Work Act 2009* (Cth) s 243(2A).
[335] *Fair Work Act 2009* (Cth) 243A(1).
[336] *Fair Work Act 2009* (Cth) 243A(4).
[337] *Fair Work Act 2009* (Cth) s 246.
[338] *Fair Work Act 2009* (Cth) s 246.

(4) Subsection (3) does not limit the FWC's powers under Subdivision B of Division 3 of Part 5-1.

11.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of amending the low-paid bargaining stream to the supported bargaining stream was to remove 'barriers to access the existing low-paid bargaining stream'.[339] In this way, it would contribute to the increased number and especially the coverage of collective bargaining. The amended stream was intended to operate similarly to the low-paid bargaining process while overcoming problems with access to the stream.[340]

The previous low-paid bargaining stream was largely seen as unsuccessful.[341] In its more than 10 years of operation, only 5 applications to bargain in the low-paid paid bargaining stream were made. A single application was successful.[342] The last application to be determined under this stream was over a decade ago and was unsuccessful.[343]

The early application of the low-paid provisions in Fair Work Australia and then FWC lead to a strong focus on the history of bargaining in the industry and the relative bargaining strength of employers and employees.[344] While one authorisation was granted, no multi-employer agreements were made in the stream.[345] A significant limitation on the effectiveness of the low-paid stream was onerous criteria to receive authorisation to bargain in the stream.

Removing barriers to accessing the stream, with a corresponding increase in access to the stream, was intended to contribute to 'closing the gender pay gap and improving wages and conditions in [low-paid sectors], which have not been able to successfully bargain at the enterprise level'.[346]

The intended beneficiaries of the stream were identified as including those employers and employees 'in low paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively'[347] and 'employees and employers who may face barriers to bargaining, such as employees with a disability and First Nations employees.'[348]

---

[339] Commonwealth, *Parliamentary Debates,* House of Representatives, 27 October 2022, 2181 (Tony Burke, Minister for Employment and Workplace Relations).
[340]Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [922] 160.
[341] See e.g. F Macdonald, S Charlesworth and C Brigden, 'Access to Collective Bargaining for Low-Paid Workers' in S McCrystal, B Creighton and A Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018) 206.
[342] *Application by United Workers' Union & Australian Workers' Union of Employees, Queensland* [2011] FWAFB 2633.
[343] *Application by United Voice* [2014] FWC 6441.
[344] See e.g. *United Voice* [2014] FWC 6441 and *Australian Nursing and Midwifery Federation v IPN Medical Centres Pty Limited and Ors* [2013] FWC 511.
[345] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [20].
[346] Commonwealth, *Parliamentary Debates,* House of Representatives, 27 October 2022, 2181 (Tony Burke, Minister for Employment and Workplace Relations).
[347] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [921] 160.
[348] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [921] 160.

11.2 Impact and issues

This section will consider the effect of the supported bargaining amendments since commencement. In addition to analysis of bargaining trends and outcomes in Chapter 19, the effectiveness or otherwise of these amendments can be assessed through a consideration of decisions of courts and tribunals and the views of stakeholders.

11.2.1 Quantitative evidence

Since commencement, there have been few instances of supported bargaining. The Review Panel is aware of 7 applications for a supported bargaining authorisation. As at 17 January 2025, 5 supported bargaining applications had resulted in an authorisation being granted. The remaining applications are ongoing.

Table 8: Supported bargaining authorisations granted by the Fair Work Commission as of 17 January 2025

Matter	Industry/sector	Decision issued	Outcome
United Workers' Union, Australian Education Union and Independent Education Union of Australia [2023] FWCFB 176	Early childhood education and care	27 September 2023	Authorisation granted
Australian Municipal, Administrative, Clerical and Services Union v Australian Capital Territory Council of Social Services Inc T/A ACTOSS and Others [2024] FWC 2306	Social and community services	7 August 2024	Authorisation granted
Australian Municipal, Administrative, Clerical and Services Union v Inner Melbourne Community Legal Inc T/A Inner Melbourne Community Legal, Young People's Legal Rights Centre Inc T/A Youthlaw [2024] FWC 2491	Community legal	16 September 2024	Authorisation granted
The Independent Education Union of Australia & The United Workers' Union v Aberdare Pre School Inc and Others [2024] FWC 2583	Early childhood education and care	23 September 2024	Authorisation granted
The Health Service Union & The Australian Education Union v Alkira Disability Services Ltd T/A Alkira Centre and Others [2024] FWC 2713	Disability	3 October 2024	Authorisation granted

The Review Panel notes that these applications were not opposed by the employers named in the application.[349]

As at 17 January 2025 the FWC has approved one supported bargaining agreement (see discussion below).[350]

On 28 January 2025, the FWC approved 33 applications to vary a supported bargaining agreement to add employers and their employees to its coverage.[351]

11.2.2 Qualitative evidence

Despite the small number of cases brought to FWC so far, the FWC has, through its early decisions, issued guidance on the proper interpretation and application of the amended provisions.

The first application for a supported authorisation was a joint application of the United Workers' Union (UWU), the Australian Education Union (AEU) and the Independent Education Union of Australia. It was not opposed by the employers who would be covered by the proposed agreement. The application concerned a proposed supported bargaining agreement in the early childhood education and care sector. The Australian Chamber of Commerce and Industry, Ai Group and the Australian Council of Trade Unions were permitted to make submissions by the FWC.

On 27 September 2023, the Full Bench of the FWC granted the authorisation (i.e. permitted multi-employer bargaining between the named employers and their employees).[352] A number of matters arising from the decision are worth noting.

First, the Full Bench of the FWC noted that the 'principal contextual consideration'[353] in its construction and application of the amended provisions was the modification of the existing provisions 'with the objective of rendering the scheme more accessible and therefore more widely-used'.[354] The FWC dismissed a submission by Ai Group that the FWC should not 'lightly' find that it is appropriate to make a supported bargaining authorisation. In FWC's view, to do so would 'likely … defeat or at least hinder the achievement of the apparent statutory intention'.[355]

Second, in considering the interpretation of the meaning of 'prevailing rates of pay' and 'low rates of pay', the Full Bench of the FWC held that the term is generally concerned with whether employees in the industry or sector (which necessarily extends beyond the employees covered

[349] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176.
[350] *Application by United Workers' Union* [2024] FWCFB 455.
[351] *Application by Nest Employee Services Pty Ltd T/A Nido Early School* [2025] FWCA 282.
[352] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176.
[353] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [20].
[354] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [20].
[355] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [40].

by the application) are predominantly paid at or close to the relevant award rates of pay.[356] This follows from the fact that these represent the 'lowest rate legally available to pay'.[357]

Third, the Full Bench of the FWC stated that the expression 'common interests' is one of wide import and takes its ordinary meaning, extending to 'any joint, shared, related or like characteristics, qualities, undertakings or concerns as between the relevant employers'.[358] That the common interest must be clearly identifiable means they must be 'plainly discernible or recognisable, but need not be self-evident'.[359]

Fourth, the Full Bench of the FWC held that a manageable collective bargaining process is one that is 'workable or tractable'[360] and only concerned with scenarios that are 'probable to happen – not what may possibly happen'.[361] The inquiry is directed to a collective bargaining process and not the outcome of bargaining such that the prospect of agreement being reached is irrelevant.

Fifth, the Full Bench of the FWC determined it would not engage with submissions that 'did not relate to the present application and were highly hypothetical in nature' and that these submissions should be considered in future applications if they are of relevance.[362] And, finally, the Full Bench of the FWC considered it weighed in favour of granting that the authorisation would be consistent with the object of the Fair Work Act concerned with the promotion of gender equality[363] and the object of the supported bargaining provisions to support effective bargaining.[364]

On 10 December 2024, the Full Bench of the FWC approved the first supported bargaining agreement, which now operates in the early childhood education and care sector (the ECEC Agreement).[365] The ECEC Agreement commenced on 17 December 2024 and will nominally expire on 30 November 2026. The UWU, the AEU and the Independent Education Union of Australia participated in bargaining and are covered by the ECEC Agreement.

In its reasons for approving the ECEC Agreement, the FWC noted that the agreement, at that time, covered 60 employers and approximately 12,000 employees.[366] Bargaining for the agreement was undertaken with significant assistance from the FWC, including approximately

---

[356] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [31].
[357] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [31].
[358] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [34].
[359] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [34].
[360] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [36].
[361] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [36].
[362] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [36].
[363] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [55].
[364] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 [56].
[365] *Application by United Workers' Union* [2024] FWCFB 455.
[366] *Application by United Workers' Union* [2024] FWCFB 461 [2].

20 conferences[367] and, it seems, significant goodwill between all bargaining parties.[368] Bargaining was significantly assisted by the direct participation of the Australian Government, meaning the process was a 'helpful forum'[369] for direct liaison between bargaining representatives and the Australian Government allowing the Australian Government an insight into the real-time progress of the process.

The Review Panel notes that the initial authorisation for this bargaining included an additional 4 employers and their employees. In its approval decision, the Full Bench of the FWC noted that these employers did not put the agreement to a vote of their employees because of a change in their circumstances since the authorisation was made.[370]

The ECEC Agreement includes substantial pay increases of 10% of the applicable award rate in the first year of operation and an additional 5% in the second year. This increase is supported by a financial commitment by the Commonwealth as the majority funder of the early childhood education and care sector. The Early Childhood Education and Care Worker Retention Payment commenced on 2 December 2024.

As noted above, on 28 January 2025 the FWC approved 33 variation applications to add employers and their employees to the coverage of the ECEC agreement.[371] The applications were made by the 33 employers seeking to be covered by the agreement '…on the basis that it has been agreed with their relevant employees that they should be covered by the ECEC agreement.'[372] Media reports that the 33 employers added to the coverage of the agreement represent around 20,000 employees.[373]

On 5 August 2024 the Shop, Distributive and Allied Employees Association applied for a supported bargaining authorisation relating to a proposed agreement to cover 14 McDonald's franchisees in South Australia.[374] The employers who would be covered by the proposed supported bargaining agreement do not consent to the authorisation being made. Among other issues, it appears to be in dispute whether the employers have clearly identifiable common interests because of each other's material differences such as structures, sizes, operations, geographical location (which impacts labour), and type of restaurant (i.e. freestanding, in-store, drive-through).[375] The matter is ongoing.

The Australian Council of Trade Unions (ACTU) has been granted permission to intervene in the proceedings.

The Review Panel notes that the FWC's assistance powers provided by s 246 of the Fair Work Act have not been tested and so conclusions cannot be drawn about their limitations or effectiveness at this time.

[367] *Application by United Workers' Union* [2024] FWCFB 461 [18].
[368] *Application by United Workers' Union* [2024] FWCFB 461 [21].
[369] *Application by United Workers' Union* [2024] FWCFB 461 [20].
[370] *Application by United Workers' Union* [2024] FWCFB 461 [21].
[371] *Application by Nest Employee Services Pty Ltd T/A Nido Early School* [2025] FWCA 282.
[372] *Application by Nest Employee Services Pty Ltd T/A Nido Early School* [2025] FWCA 282 [10].
[373] Workplace Express, 'Swift approval for expanded multi-employer deal' (29 January 2025).
[374] Form F82 submitted by Shop, Distributive and Allied Employees Association, filed 5 August 2024.
[375] McDonald's Outline of Submissions, p 3, filed on 15 November 2024, Matter Number B2024/992.

11.2.3 Stakeholder views

Union views were supportive of the amendments to the previously 'unusable' low-paid bargaining stream. The ACTU submitted that early indications are that the amendments are working as intended and already surpassed the results of the low-paid bargaining stream.[376] The UWU, one of the significant forces behind bargaining in the early childhood education and care sector, submitted that the reforms have been 'highly effective' in increasing wages and addressing gender inequality.[377] The IEU also submitted that the reforms to remove barriers to accessing the stream have been beneficial.[378]

The ACTU, supported by the UWU, proposed that the Review Panel consider 3 recommendations to amend:

- the objects of the Fair Work Act to no longer preference single enterprise level bargaining
- the variation of authorisation provisions to permit a union to remove an employer from a supported bargaining authorisation by application to the FWC[379]
- the provisions to permit employers covered by an in-term single-enterprise agreement to be added to a supported bargaining authorisation by consent.

The UWU also proposed that subsequent bargaining in the supported bargaining stream should be simplified by permitting bargaining to be initiated by written notice and/or for FWC to be required to issue subsequent authorisations that have substantially similar coverage.

In relation to the first proposed recommendation, the ACTU raised a concern about the continued preference in the Fair Work Act for enterprise-level collective bargaining. While it has so far not been a barrier to the operation of the supported bargaining reforms, the ACTU's concern is about the potential for this focus to operate as an unintended barrier in future. The UWU submitted that this potential issue could be addressed by permitting unions to request the FWC to require an agreement to be put to vote in certain circumstances.

The ACTU raised the potential for a procedural or logistical difficulty with putting multi-employer agreements to a vote where one (or more) employers do not agree. The ACTU submitted that this has been demonstrated in one matter already and was 'highly disruptive to the efficiency of the bargaining process'.[380] The Review Panel has not been provided the details of this case.

In relation to the third proposal, the ACTU submitted that there is no reason as a matter of principle why this should not be permitted to occur.[381] The UWU provided its experience that it was not able to include early childhood education and care employers in the initial ECEC authorisation because they were already covered by in-term single enterprise agreements.[382]

Some employers have pointed to the limited number of applications – and, in particular, contested applications – that have been before the FWC for consideration. Consistent with an overarching theme for multi-employer bargaining, employer views were generally consistent that any multi-employer bargaining should only be possible with employer consent. In addition,

[376] ACTU submission, 92.
[377] UWU submission, 36.
[378] IEU submission, 6.
[379] ACTU submission, 92–93; UWU submission, 39–40.
[380] ACTU submission, 93.
[381] ACTU submission, 93.
[382] UWU submission, 38

some employer associations proposed further amendments aimed at reinforcing that single-enterprise bargaining is the principal form of bargaining under the Fair Work Act.

The Business Council of Australia submitted that, should supported bargaining remain compellable, the criteria for entry should be tightened to limit the stream to those sectors that are substantially funded by governments.[383] The Australian Retailers Association questioned the lack of consent in the supported bargaining stream which they assert 'undermines the rationale of the required changes being to also assist employers who may have difficulty bargaining at the single-enterprise level'.[384] The Minerals Council of Australia,[385] Ai Group and Australian Chamber of Commerce and Industry[386] similarly proposed that the stream be further amended to more closely define it as applicable to low paid industries, including appropriate definitions.

Professor Rae Cooper submitted that the supported bargaining stream holds the potential to enhance job security, wages, and conditions for low-paid women.[387] In Professor's Rae's opinion, the ECEC Agreement is a prime example of the stream facilitating an alignment between funding structures and bargaining to improve job quality and equity outcomes.

11.3 Findings and recommendations

The progress of this form of multi-employer bargaining has clearly been slow. There have been only a small number of applications for supported bargaining authorisations and only one agreement finalised and approved. It is also questionable whether large numbers of applications and/or approvals will be forthcoming given the significant conditions that must be met if authorisations are to succeed, bargaining is to produce agreements and agreements are to be approved.

These observations, however, need to be tempered by the successes that have occurred in a relatively short period of time. The first major decision by the FWC on authorisations and agreement approval under these reforms, in the early childhood education and care sector, has usefully established many of the ground rules that will operate elsewhere and the case will undoubtedly have a significant effect on a highly feminised and low-paid sector like early childhood education and care. The early signs here suggest it is achieving is intent.

In so far as the particular intention of reforms to the supported bargaining stream was to reduce barriers to access a form of low-paid bargaining, the Review Panel finds that the signs are, so far, positive. This observation is strengthened by efforts by the FWC, unions and at least some employers to use awards to advance the wages of the low-paid and to narrow the gender wage gap.

At a higher level, the gradual development of this form of bargaining could well reinforce the Review Panel's previous findings about the growth of collective bargaining, especially the coverage of agreements. It is, however, still too early to draw a direct causal link between these reforms and their effect on closing the gender pay gap and improvements to wages and conditions.

[383] BCA submission, 11.
[384] ARA submission, 9.
[385] MCA submission, 6.
[386] ACCI submission, 44.
[387] R Cooper submission, 2.

The Review Panel does not share the concern of some stakeholders that further amendments are needed to the scope of the stream. While the Review Panel agrees that there have been limited decisions to date, it appears that the FWC is performing the role in the supported bargaining process that was intended.

The Review Panel acknowledges that the ongoing matter in relation to McDonald's franchises in South Australia may, in future, require further consideration about the intended scope of the supported bargaining stream. However, until such time as the FWC has considered the evidence in that matter, it is premature to consider further changes.

The Review Panel does not make any recommendations at this time.

Chapter 12. Single-interest employer authorisations

This is the third chapter on multi-employer bargaining. In this case, the amendments relevant to single-interest bargaining were introduced through Part 21 of the Secure Jobs, Better Pay Act. The single-interest employer bargaining steam is a form of multi-employer bargaining which seeks to support 'employers with clearly identifiable common interests to bargain together' for a single-interest employer agreement.[388]

12.1 Amendments and intent

The amendments will be briefly summarised and then the intent behind them will be explored.

12.1.1 Secure Jobs, Better Pay amendments

Prior to the Secure Jobs, Better Pay amendments, franchisees and employers who met specified criteria regarding their common interests could bargain together under the single-interest employer stream. Employers who were not franchisees were required to obtain a declaration from the Minister for Employment and Workplace Relations to bargain under this stream.[389]

Division 10 of Part 2-4 of the Fair Work Act concerns the new provisions relating to single-interest employer authorisations. The Secure Jobs, Better Pay amendments intended to '[remove] the limits on access to single-interest employer authorisations and [simplify] the process for obtaining them, and facilitating bargaining by':

- removing the requirement for 2 or more employers with common interests who are not franchisees to obtain a ministerial declaration before applying for a single-interest employer authorisation
- providing for employee bargaining representatives to apply for a single-interest employer authorisation to cover 2 or more employers, subject to majority support of the relevant employees
- permitting employers and employee bargaining representatives to apply to vary a single-interest employer authorisation to add or remove the name of an employer from the authorisation, subject to meeting specified requirements
- permitting employers and employee organisations to apply to the Fair Work Commission (FWC) for approval of a variation to extend coverage of an existing single-interest employer agreement to a new employer and its employees, subject to meeting specified requirements.[390]

Employers that will be covered by a proposed enterprise agreement that will cover 2 or more employers, or a bargaining representative of an employee who will be covered by the agreement, can apply for a single-interest employer authorisation.[391]

The FWC must make a single-interest employer authorisation if an application has been made and it is satisfied that the requirements set out in s 249 of the Fair Work Act are met. These requirements include that:

---

[388] Revised Explanatory Memorandum, Fair Work Amendment (Secure Jobs, Better Pay) Bill 2023 xii.
[389] *Fair Work Act 2009* (Cth) s 247 (6 December 2022), later amended by *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*.
[390] Revised Explanatory Memorandum, Fair Work Amendment (Secure Jobs, Better Pay) Bill 2023 [1006] 173.
[391] *Fair Work Act 2009* (Cth) s 248.

- at least some of the employees that will be covered are represented by an employee organisation (s 241(1)(b)(i) of the Fair Work Act)
- the employers and the bargaining representatives of their employees have had the opportunity to express to the FWC their views (if any) on the authorisation (s 249(1)(b)(ii) of the Fair Work Act), and
- the employers meet franchisee requirements or have clearly identifiable common interests, as they:
    - carry on similar business activities under the same franchise and are either franchisees or related bodies corporate of the same franchisor (or a combination of these) (s 249(2) of the Fair Work Act), or
    - have clearly identifiable common interests with the other employers, it is not contrary to the public interest to make the authorisation, and the employers' operations and business activities are reasonably comparable (s 249(3), 249(1)(b)(vi) of the Fair Work Act), and
- the additional requirements set out below are met.

If the application was made by 2 or more employers, the employers must have agreed to bargain together, and no person coerced, or threatened to coerce, any of the employers to agree to bargain together.

There are specific requirements if the application was made by a bargaining representative. The FWC must be satisfied that each employer either has consented to the application or the following applies:

- the employer employed at least 20 employees at the time the application for authorisation was made (s 249(1)(1B)(a) of the Fair Work Act)
- the employer has not made an application for a single-interest employer authorisation that has not yet been decided in relation to the employees that will be covered (s 249(1)(1B)(b) of the Fair Work Act)
- the employer is not named in a single-interest employer authorisation or supported bargaining authorisation in relation to the employees that will be covered by the agreement (s 249(1)(1B)(c) of the Fair Work Act)
- a majority of employees who will be covered by the agreement want to bargain for the agreement (s 249(1)(1B)(d) of the Fair Work Act)
- the employer and employees are not covered by an enterprise agreement that has not passed its nominal expiry date at the time FWC will make the authorisation (ss 249(1)(1B)(e)) and 249(1D) of the Fair Work Act)
- the employer and an employee organisation that is entitled to represent the industrial interests of employee(s) that will be covered have not already agreed in writing to bargain for a proposed single-enterprise agreement that would cover the same (or substantially the same) employees (s 249 (1D)(b) of the Fair Work Act).

Section 251 of the Fair Work Act contains provisions for the variation of a single-interest employer authorisation to remove or add employers.

Subject to meeting specified requirements, the Secure Jobs, Better Pay Act inserted new Subdivision AD into Division 7 of Part 2-4 of the Fair Work Act to permit employers and employee organisations to apply to the FWC for approval of a variation to extend the coverage

of an existing single-interest employer agreement to a new employer and its employees. An application may be made either jointly by an employer and their employees or by an employee organisation covered by a single-interest employer agreement.[392]

The FWC must approve a variation if various requirements are met that are similar to those for making an authorisation, including that employers and employee organisations have had the opportunity to express their views and the common interest and franchisee requirements.[393]

These amendments commenced on 6 June 2023.

The *Fair Work Legislation (Closing Loopholes No. 2) Act 2023* (Cth) (Closing Loopholes No. 2 Act) made some further amendments to the provisions relating to the single-interest employer bargaining stream. While these amendments are not within the scope of our Review, the amendments are worth noting, as they affect the operation of the Secure Jobs, Better Pay amendments. The Closing Loopholes No. 2 Act changes will be the subject of the review of that legislation.

The Closing Loopholes No. 2 Act amended the Fair Work Act to allow franchisees of a common franchisor to access the single-enterprise agreement stream, without removing their ability to bargain for a multi-employer agreement. Consequently, the amendments provide that multiple franchisees can choose to bargain for either a single-enterprise agreement or a multi-employer agreement.[394]

The Closing Loopholes No. 2 Act also amended the Fair Work Act by introducing 'special rules' allowing single-enterprise agreements to replace single-interest employer agreements and supported bargaining agreements respectively that have not passed their nominal expiry dates.[395] The amendments modified the application of the Better Off Overall Test (BOOT) for single-interest employer agreements and supported bargaining agreements, requiring them to be assessed against the multi-employer agreement rather than the relevant modern award.[396]

12.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of the Secure Jobs, Better Pay amendments was to respond to the 'unnecessary limits' of the single-interest bargaining stream prior to the amendments.[397] It was further intended that this stream would lead to increases in collective bargaining coverage, if not number of collective agreements, which would in turn assist in increasing wages and narrowing the gender gap.

Historically, the previous authorisation process for single-interest bargaining was viewed as difficult to access, containing 'unnecessary red tape'.[398] A significant barrier was the requirement for employers to obtain a ministerial declaration to bargain together if the employer was not a franchisee.

---

[392] *Fair Work Act 2009* (Cth) s 216DB.
[393] *Fair Work Act 2009* (Cth) s 216DC.
[394] *Fair Work Act 2009* (Cth) ss 172(3), 172(3A), 172(5A).
[395] *Fair Work Act 2009* (Cth) ss 58(4)-58(5).
[396] *Fair Work Act 2009* (Cth) ss 193(1)(b),193(1A).
[397] Regulation Impact Statement, Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 16.
[398] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 2183 (Tony Burke, Minister for Employment and Workplace Relations).

The Regulation Impact Statement to the Secure Jobs, Better Pay Bill notes the consequent challenges, evidenced by the fact that 'only five applications for Ministerial declarations and 10 applications for single-interest employer authorisations are made per year on average'.[399] It also notes that 'it is unclear on what basis the single-interest stream provides such strict entry rules, particularly given the largely unrestricted provisions under the multi-employer agreement stream'.[400]

The then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, noted in the second reading speech for the Secure Jobs, Better Pay Bill the intention of the amendments to the single-interest stream, stating:[401]

> we want to see businesses competing on quality, on innovation, on product and service offerings – not on who can pay the lowest wage. If we are going to get wages moving, we need to stop the race to the bottom.

12.2 Impact and issues

This section will consider the effect of the amendments since commencement. In addition to earlier analysis of broader trends in collective bargaining and wage data (see Chapter 8), the effectiveness or otherwise of these amendments can be assessed through a quantitative account of the number of single-interest bargaining applications and approvals, a qualitative consideration of decisions of courts and tribunals, and the views of stakeholders.

12.2.1 Quantitative evidence

Since commencement, there have been few instances of bargaining under the single-interest employer stream and therefore quantitative data is limited.

As of 17 January 2025, the FWC has issued 19 single-interest employer authorisations. The Review Panel is aware of 2 single-interest employer agreements that have been subsequently approved by the FWC.[402]

In terms of variations to agreements already made, as at 17 January 2025 the FWC has approved 3 variation applications to add an employer and employees to a single-interest employer agreement (3 applications heard together).[403] The Review Panel is not aware of any approved applications to vary a single interest authorisation.

---

[399] Regulation Impact Statement, Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 16.
[400] Regulation Impact Statement, Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 16.
[401] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 2181 (Tony Burke, Minister for Employment and Workplace Relations).
[402] *Nurses and Midwives (Victorian Public Sector) Single Interest Employer Agreement 2024–2028*; *AMWU On-Site Construction HVAC Workers NSW Enterprise Agreement 2023–2027*.
[403] [2024] FWCA 4601.

Table 9: Single-interest employer authorisations made (as at 17 January 2025)

Matter	Industry/sector	Date authorisation made	Outcome
Association of Professional Engineers, Scientists and Managers, Australia v Great Southern Energy Pty Ltd T/A Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd [2024] FWCFB 253	Black coal mining	23 August 2024	Authorisation issued. The Review Panel notes the decision has been appealed and proceedings are currently before the Federal Court.
'Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers' Union (AMWU) [2024] FWC 395	Air conditioning or ventilation	13 February 2024	Authorisation issued. Agreement approved on 14 June 2024.
Independent Education Union of Australia v Catholic Education Western Australia Limited and Ors [2023] FWCFB 177	Education (schools) and related services	28 September 2024	Authorisation issued.
Australian Education Union [2023] FWC 3034	Education and training (TAFE)	28 November 2023	Authorisation issued.
Victorian Hospitals' Industrial Association v Australian Nursing and Midwifery Federation and Health Services Union [2024] FWC 482	Health and welfare services	6 March 2024	Authorisation issued. Agreement approved on 8 November 2024.
Victorian Hospitals' Industrial Association v Association of Professional Engineers, Scientists and Managers, Australia [2024] FWC 776	Health care	2 April 2024	Authorisation issued.
Lutheran Education SA, NT and WA Inc [2024] FWC 1405	Education (schools)	30 May 2024	Authorisation issued.
CPSU, the Community and Public Sector Union [2024] FWC 1402	State government (arts sector)	3 June 2024	Authorisation issued.
Acacia Avenue Preschool Association Inc & Ors (As Represented by Early Learning Association Australia Inc/ T/A Early Learning Association Australia) v Australian Education Union (Victorian Branch) and the Union Workers Union [2024] FWC 1447	Early childhood education	3 June 2024	Authorisation issued.
Victorian Hospitals' Industrial Association [2024] FWC 1563	Health care (dental)	19 June 2024	Authorisation issued.
Roman Catholic Church Trust Corporation of The Archdiocese of Hobart T/A Catholic Education Tasmania and Others [2024] FWC 1746	Education	5 July 2024	Authorisation issued.
Catholic Church Endowment Society Inc T/A Catholic Education (South Australia) [2024] FWC 1993	Education	31 July 2024	Authorisation issued.

Hungry Jack's Pty Ltd T/A Hungry Jack's [2024] FWC 2275	Fast food	9 September 2024	Authorisation issued.
Australian Municipal, Administrative, Clerical and Services Union v Central Goldfields Shire Council, Ararat Rural City Council [2024] FWCFB 444	Local government	27 November 2024	Authorisation issued.
Application by Tyndale Group Of Christian Schools Limited T/A Tyndale Group Of Christian Schools & Tyndale Christian School – Salisbury East Inc T/A Tyndale Christian School – Salisbury East and Others - [2024] FWC 3199	Education (schools)	3 December 2024	Authorisation issued.
Australian Rail, Tram and Bus Industry Union v Sydney Trains & NSW Trains [2024] FWC 3419	Public transport	6 December 2024	Authorisation issued.
Application by Victorian Hospitals' Industrial Association T/A Victorian Hospitals' Industrial Association [2024] FWC 3427	Health care (dental)	17 December 2024	Authorisation issued.
Application by Annie Dennis Children's Centre Inc. and Others [2025] FWC 143	Early childhood education	15 January 2025	Authorisation issued.
Victorian Hospitals' Industrial Association on behalf of Albury Wodonga Health and Others [2025] FWC 96	Health	17 January 2025	Authorisation issued.

12.2.2 Qualitative evidence

Despite the relatively small number of matters dealt with by the FWC so far, the FWC has, through its early decisions, issued guidance on the proper interpretation and application of the amended provisions.

First, on 28 September 2023, the Full Bench of the FWC made a single-interest employer authorisation for 10 Catholic education employers in Western Australia to bargain together.[404] This case was the first consideration of amendments made by the Secure Jobs, Better Pay Act in relation to single-interest bargaining by parties' agreement.

The class of employees to be covered included all support/operations/general staff working in schools registered under the *School Education Act 1999* (WA); and/or long day care, occasional care, childcare centres, day-care facilities, out of school hours care, kindergartens and preschools, and early childhood intervention programs.

The Full Bench of the FWC was satisfied the requirements under s 249 of the Fair Work Act were met and discussed the interpretation of 'common interests' under the Secure Jobs, Better Pay amendments. Each employer had 'common interest', as they were principally engaged in the provision of primary and/or secondary education in a school setting, and there was

[404] *Independent Education Union of Australia v Catholic Education Western Australia Ltd* [2023] FWCFB 177.

commonality between parties as to geography,[405] coverage under specific legislation[406] or industrial instruments,[407] and funding processes.

This authorisation has been extended until 28 March 2025.[408]

Second, on 23 August 2024, the Full Bench of the FWC issued a single-interest employer authorisation (Authorisation) to 3 employers (Whitehaven Coal Mining, Peabody Energy and Ulan Coal Mines) who engaged employees in the black coal mining industry in New South Wales.[409] The Authorisation was refused in respect of Delta Coal, as the Full Bench found that they did not have clearly identifiable common interest with the other 3 employers.[410]

This case was the first significant contested single-interest employer authorisation application.[411]

The Full Bench considered the following issues when issuing the Authorisation to Whitehaven Coal Mining, Peabody Energy and Ulan Coal Mines and found that:[412]

- a majority of the affected employees who would be covered by the agreement wanted to bargain for the agreement (Issue 1)
- each of the employers have 'clearly identifiable common interests' when considering their terms and conditions of employment and the regulatory environment they operate in (Issue 2)[413]
- it was 'not contrary to the public interest' to make the authorisation (Issue 3)
- the operations and business activities of each employer were 'reasonably comparable' with the other employers that would be covered by the agreement (Issue 4).

On 20 September 2024 Whitehaven Coal Mining, Peabody Energy and Ulan Coal Mines lodged a Federal Court appeal and the matter is listed for a hearing in March 2025.[414]

---

[405] *Independent Education Union of Australia v Catholic Education Western Australia Ltd* [2023] FWCFB 177 [30]: the schools operate in Western Australia.
[406] *Independent Education Union of Australia v Catholic Education Western Australia Ltd* [2023] FWCFB 177 [30]: the operators of the schools are registered under the *School Education Act 1999* (WA).
[407] *Independent Education Union of Australia v Catholic Education Western Australia Ltd* [2023] FWCFB 177 [30]: the employer of one or more employees to whom the *Education Services Schools) General Staff Award 2020* applies.
[408] Independent Education Union of Australia Order PR778679, 29 August 2024.
[409] *Association of Professional Engineers, Scientists and Managers Australia v Great Southern Energy Pty Ltd t/as Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd* [2024] FWCFB 253.
[410] *Association of Professional Engineers, Scientists and Managers Australia v Great Southern Energy Pty Ltd t/as Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd* [2024] FWCFB 253 [671].
[411] *Association of Professional Engineers, Scientists and Managers Australia v Great Southern Energy Pty Ltd t/as Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd* [2024] FWCFB 253 [12].
[412] *Association of Professional Engineers, Scientists and Managers Australia v Great Southern Energy Pty Ltd t/as Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd* [2024] FWCFB 253 [59].
[413] *Association of Professional Engineers, Scientists and Managers Australia v Great Southern Energy Pty Ltd t/as Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd* [2024] FWCFB 253 [492].
[414] *Peabody Energy Australia Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia & Ors*, 20 September 2024 [NSD1320/2024].

Third, the FWC approved a second application for a single-interest employer authorisation, by agreement.[415] The application was made by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, known as the Australian Manufacturing Workers' Union, and was approved on 13 February 2024.[416]

The authorisation was in respect of bargaining for a proposed multi-employer agreement to cover employees (including apprentices and trainees) who work in connection with the installation, major modernisation, servicing, repair or maintenance of air conditioning or ventilation.[417]

The FWC relied and drew upon the principles in *IEU v CEWA*[418] in its decision, finding the employers had 'common interests' and the requirements under the Fair Work Act for a single-interest employer authorisation were met. When considering 'common interests', the FWC looked at the recognisable, related or like characteristics of each employer and the joint or shared concerns in relation to the heating, ventilation and air conditioning industry.[419]

12.2.3 Stakeholder views

Stakeholders expressed a range of views on the amendments to the single-interest employer bargaining stream.

Unions broadly submit that the amendments to the stream have been positive but recommend further amendments to improve them. Specifically, the Australian Council of Trade Unions (ACTU) noted that the reforms did not undermine enterprise bargaining, and that 'use of multi-employer bargaining streams has been cautious and targeted'.[420] However, it also noted that it hold concerns the '"escape ramp" to single enterprise bargaining is too generous to employers who wish to frustrate the collective wishes of a legitimate bargaining cohort'.[421]

The ACTU argued multi-employer bargaining would be more efficient for workers in small businesses, which have traditionally encountered barriers in engaging in bargaining.[422]

The ACTU made recommendations relating to considering issues that are preventing the amendments effectiveness, including relating to expanding coverage of single-interest employer authorisations in franchise operations 'to cover brand outlets where the operator and employer is the franchisor', providing a mechanism to resolve deadlocks where an employer covered by an authorisation refuses to submit the agreement to a vote where others do not, and fast-tracking re-initiation of bargaining after a single-interest employer agreement has passed its nominal expiry date.[423]

---

[415] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU)* [2024] FWC 395 [17].
[416] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU)* [2024] FWC 395 [1] and [49].
[417] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU)* [2024] FWC 395 [48].
[418] *Independent Education Union of Australia v Catholic Education Western Australia Ltd* [2023] FWCFB 177.
[419] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU)* [2024] FWC 395 [34]–[35].
[420] ACTU submission, 24.
[421] ACTU submission, 95.
[422] ACTU submission, 95–96.
[423] ACTU submission, 95–96.

The United Workers Union (UWU) recommended removing the requirement for unions to demonstrate majority employee support where an employer opposes a single-interest employer authorisation application to encourage utilisation of the stream.[424] The ACTU also recommended consideration of this requirement.[425]

UWU recommended allowing employers and employees 'to obtain a single interest employer authorisation irrespective of business size, common interest or similarity in business or operations if they genuinely consent to the authorisation being granted'.[426] The IEU also argued for removing the common interest requirement 'where there is a history of multi-enterprise agreements with the same or similar employers.'[427]

The Independent Education Union (IEU) also recommended removing 'restriction' on the stream in s 250(3)(c).[428] It stated that it sees 'no reason … where the industrial parties have a standing agreement to bargain together for a multi-enterprise agreement, why bargaining under the cooperative stream and single enterprise stream should be able to commence well in advance of bargaining in the single interest employer agreement stream due to restrictions in s 250(3)(c)'.[429]

Employer associations were largely critical of the amendments to the single-interest employer bargaining stream.

Employer groups were critical of the ability for employers to be compelled to bargain in the single-interest employer authorisation stream and for employers and their employees to be added to single-interest employer agreements without the employer's consent.[430] [431] [432] They recommended this stream be repealed or by employer consent only.[433] [434] [435] The Chamber of Commerce and Industry of Western Australia recommended allowing employers to pull out and negotiate a single-enterprise agreement at any time.[436]

The Pharmacy Guild stated that consent is a fundamental tool in bargaining and 'arbitrary clauses deter employers from engaging in bargaining'.[437] They also noted that until the parameters of the stream are defined by 'test cases', the impact of the changes will be unclear.[438]

Many employer groups also argued that the single-interest stream would negatively impact productivity, with the Business Council of Australia claiming this would result from removing the ability to negotiate enterprise-appropriate agreements.[439] The Council of Small Business Organisations Australia (COSBOA) also added criticism of the impact on small business to the

[424] UWU submission, 40–41.
[425] ACTU submission, 96.
[426] UWU submission, 40.
[427] IEU submission, 7.
[428] IEU submission, 7.
[429] IEU submission, 7.
[430] Ai Group submission, 2.
[431] ACCI submission, 49.
[432] AREEA submission, 2.
[433] Ai Group submission, 2.
[434] ACCI submission, 49.
[435] AREEA submission, 2.
[436] CCI WA submission, 9.
[437] Pharmacy Guild Submission, 4.
[438] Pharmacy Guild Submission, 3.
[439] BCA submission, 7.

criticism of the impact of productivity.[440] COSBOA further recommended businesses of up to 50 full-time equivalent employees be excluded from the single-interest stream.[441]

There was significant criticism from employer groups representing mining industry employers, who argued for the single-interest stream to be abolished.[442] [443] [444] The Minerals Council of Australia (MCA) argued 'multi-employer bargaining is inappropriate for the mining industry due to … current successful workplace arrangements' and noted negative consequences for investment from industrial relations uncertainty and industrial action.[445]

MCA cited the recent test case covering New South Wales coal creating a precedent in which the common interest test can be met by employers mining the same commodity in the same state as 'opening the door to industry-wide "bargaining" and … strikes – a return to 1970s-style industrial confrontation and disruption'.[446] Whitehaven Coal also argued the stream would have a negative impact on productivity and competitiveness and that the reforms are built on a model of workplace conflict and reduce operational flexibility.[447]

If the stream is not abolished, Whitehaven Coal argued it should be voluntary with consent between employers, employees and registered organisations; and for strengthening majority support requirements and clarifying tests to avoid unintended consequences; and 'removing the rebuttal presumptions, so that the onus is on the union making the authorisation'.[448] The Chamber of Minerals and Energy of Western Australia proposed the 'repeal of multi-employer bargaining except in low paid industries'.[449]

Ai Group submitted that the amendments increase union bargaining power and lower employer and individual employee rights. It also argued for preserving the emphasis on enterprise-level collective bargaining in the object of the Fair Work Act,[450] proposed substantial amendments to s 249(1) of the Fair Work Act relating to when the FWC must make an authorisation and s 249(3A) relating to common interests; and deletion of the rebuttable presumption at s 249(1AA) and (3AB).[451] They also recommended removing what they refer to as the union veto in s 216EB(d) of the Fair Work Act and amending when the FWC must approve variation of a multi-enterprise agreement.

MIA Ltd criticised the complexity of the single-interest employer authorisation requirements.[452] It also noted issues with competitors bargaining collectively (particularly around creating similar operating costs), that the practicalities of multi-employer bargaining may cause delays, and that this could result in industrial action across large parts of the industry.[453]

---

[440] COSBOA submission, 1.
[441] COSBOA submission, 5.
[442] MCA submission, 5.
[443] Whitehaven Coal submission, 7.
[444] CME WA submission, 1. Note: if not abolished, the CME WA proposed the single interest stream remain for low-paid industries.
[445] MCA submission, 6
[446] MCA submission, 5
[447] Whitehaven Coal submission, 7.
[448] Whitehaven Coal submission, 8.
[449] CME WA submission, 1.
[450] Ai Group submission, 36
[451] Ai Group submission, 69–70.
[452] MIA Ltd submission, 8.
[453] MIA Ltd submission, 9.

MIA Ltd noted it has not yet observed significant practical implications of the amendments and pointed to pattern agreements in the construction industry establishing the 'industry standard' that multi-employer agreements aim to achieve. It noted previous concerns about small and medium enterprises being drawn into pattern agreements; however, they state this has been prevented by the threshold in the amendments.

On the other hand, the Australian Retailers Association was positive about the amendments, noting clarity provided by providing franchisees can bargain as one unit rather than individually and that, while they were enabled previously by legal precedent, the change removes ambiguity.[454]

Citing the linking of multi-employer and single-employer agreements in Denmark, Professor David Peetz submitted that Australia's 'new arrangements' remain unusual internationally due to workers not being eligible for a multi-employer agreement if their workplace has or is bargaining for an enterprise agreement.[455] Professor Peetz also noted that this means Australian unions aiming for a 'multi-employer agreement' are attempting to organise workplaces without an enterprise agreement that are commonly non-unionised.[456]

12.3 Findings and recommendations

There is insufficient data to make a definitive finding on whether the single-interest employer bargaining stream is operating as intended. There have been few instances of bargaining under the single-interest employer stream and only two single-interest employer agreements have been approved.

Consequently, the Review Panel considers it is too early to draw any significant conclusions about the amendments to the single-interest employer stream. The stream should be given the opportunity to develop further before any amendments are considered by the Australian Government.

The Review Panel notes that there remain extensive requirements that need to be met in order to successfully obtain a single-interest employer authorisation or vary a single-interest employer agreement to add an employer and employees. The Review Panel also notes that, while the broader amendments to the stream are intended to enhance its use, these requirements are intended to ensure that the stream is restricted to appropriate employers. The Review Panel cannot draw conclusions on these requirements at this point due to limited evidence.

The Review Panel does not share the concern of some stakeholders that further amendments are needed to stem the scope of the stream. The Review Panel acknowledges the limited evidence in relation to these amendments but considers many of the submissions to be 'highly hypothetical' in nature.

At this time, the Review Panel does not have any evidence before it that indicates the changes to the single-interest employer bargaining stream are or will negatively impact productivity, the labour market, or employers. The Review Panel also notes that the international experience points to potential economic benefits.

---

[454] ARA submission, 8.
[455] Professor D Peetz submission, 6.
[456] Professor D Peetz submission, 6.

The Review Panel does not make any recommendations at this time.

Chapter 13. Excluded work

Part 23A of Schedule 1 to the Secure Jobs, Better Pay Act inserted provisions to the multi-employer bargaining framework in the Fair Work Act to exclude potential coverage of 'general building and construction work'.

13.1 Amendments and intent

This section briefly provides an overview of the amendments themselves and then explores the intentions behind them.

13.1.1 Secure Jobs, Better Pay amendments

The provisions about 'excluded work' have been inserted into the Fair Work Act in various places. When considering the approval of a multi-employer agreement (other than a greenfields agreement), the Fair Work Commission (FWC) must be satisfied that the agreement does not cover employees in relation to general building and construction work.[457] Similarly, the FWC cannot vary a multi-employer agreement if the variation would result in the agreement covering such work.[458]

General building and construction work is extensively defined in the Fair Work Act.[459] Primarily, building and construction work is work that is done onsite in the 'general building and construction industry' and the 'civil construction industry' as those industries are defined in the Building and Construction General On-site Award 2020.[460] The Fair Work Act includes a further definitional list of work that is not building and construction work (e.g. work done in the metal and engineering construction industry as defined in the Building and Construction General On-site Award 2020).[461]

The exclusion is supported by other ancillary restrictions. In a similar fashion, the FWC also cannot make[462] or vary[463] a supported bargaining authorisation; vary a supported bargaining,[464] single-interest employer[465] or a cooperative workplace agreement;[466] or make[467] or vary[468] a single-interest employer authorisation if it would result in the authorisation or agreement covering employees in relation to general building and construction work. The reason, according to the Revised Explanatory Memorandum, is to remain consistent with the 'exclusion of general building and construction work from coverage by a multi-enterprise agreement'.[469]

---

[457] *Fair Work Act 2009* (Cth) s186(2B).
[458] *Fair Work Act 2009* (Cth) s186, 211(3A).
[459] *Fair Work Act 2009* (Cth) s 23B.
[460] *Fair Work Act 2009* (Cth) s 23B(1)(a).
[461] *Fair Work Act 2009* (Cth) s 23B(1)(b).
[462] *Fair Work Act 2009* (Cth) s 243A(4).
[463] *Fair Work Act 2009* (Cth) s 244(4).
[464] *Fair Work Act 2009* (Cth) s 216AB(2).
[465] *Fair Work Act 2009* (Cth) s 216DC(4).
[466] *Fair Work Act 2009* (Cth) s 216CB(2).
[467] *Fair Work Act 2009* (Cth) s 249A.
[468] *Fair Work Act 2009* (Cth) s 251A.
[469] Regulation Impact Statement, Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [1097].

13.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of the Secure Jobs, Better Pay amendments was to ensure that the building and construction industry would be excluded from multi-employer bargaining.

In his second reading speech, the then Minister stated that ongoing consultation with business and unions led the Australian Government to support amendments so that 'multi-employer bargaining is not extended to industries in which it is neither appropriate nor necessary – in particular, commercial construction'.[470]

The statement of compatibility with human rights in the Revised Explanatory Memorandum notes that:[471]

> [W]hile work that is general building and construction work is excluded from coverage by a multi-enterprise agreement (other than a greenfields agreement), this would not in any way limit the ability of employees who perform general building and construction work to choose to join a trade union, nor limit the right of the union to represent the employee in bargaining for a single-enterprise agreement or in dispute resolution processes.

13.2 Impact and issues

While there has been significant discussion in recent times about behaviour in the commercial building and construction industry, specific consideration of the provisions to exclude general building and construction work from multi-employer enterprise agreements has been limited.

13.2.1 Quantitative evidence

The Review Panel is not aware of any significant quantitative data in relation to these amendments.

13.2.2 Qualitative evidence

The Review Panel is aware of one matter that has considered the scope and application of the excluded work provisions.

In *Application by CPSU, the Community and Public Sector Union* (3 June 2024)[472] the FWC considered whether the employees[473] concerned perform work onsite in the general building and construction industry according to clause 4 of the Building and Construction General On-Site Award 2020 (BCG On-Site Award).[474] The FWC found that the employees did not perform work onsite in the general building and construction industry because the employees work in the arts and entertainment industry; the work is not performed on a building and construction site and relates to exhibitions and gallery spaces; and it does not involve construction, alteration, extension, restoration, repair, demolition or dismantling of building and structures, or installation of fittings and services (clause 4.3 BCG On-Site Award). The FWC was satisfied

[470] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 2181 (Tony Burke, Minister for Employment and Workplace Relations).
[471] Regulation Impact Statement, Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [232] xliv.
[472] *CPSU, the Community and Public Sector Union* [2024] FWC 1402.
[473] *CPSU, the Community and Public Sector Union* [2024] FWC 1402 [30]–[31]: the employees concerned were employed as carpenters, painters, electricians, plumbers and exhibition craftspersons.
[474] *CPSU, the Community and Public Sector Union* [2024] FWC 1402 [1].

that the agreement would not cover employees in relation to general building and construction work.[475]

13.2.3 Stakeholder views

Apart from broader concerns relating to the building and construction industry, Ai Group submitted that the exclusion from multi-employer bargaining is important and should be retained, 'particularly given the unlawful and inappropriate conduct of the Construction, Forestry and Maritime Employees Union (CFMEU) which led to the union being placed into administration'.[476] Master Builders Australia stated that it 'welcomed the operation of Part 23A', but it argued it has not prevented 'the use of pattern union agreements with restrictive conditions and clauses that give unions unfettered control of operational matters'.[477]

No other stakeholders made a submission in relation to these provisions.

13.3 Findings and recommendations

The Review Panel has made findings (in Chapters 4 & 5) in relation to amendments impacting the regulation of the building and construction industry more broadly.

The Review Panel has not identified any unintended consequences of the amendments to date. This finding must be understood in the context of limited data and consideration of the amendments, particularly in the broader discussion about the building and construction industry that has immediately preceded this report. In particular, it is possible in the future a form of multi-employer bargaining may become a realistic, even desirable, part of large-scale construction projects.

The Review Panel does not make any recommendations at this time.

[475] *CPSU, the Community and Public Sector Union* [2024] FWC 1402 [36].
[476] Ai Group submission, 74.
[477] MBA submission, 3.

Chapter 14. Bargaining disputes

Part 18 of Schedule 1 to the Secure Jobs, Better Pay Act changed the way the Fair Work Commission (FWC) can deal with bargaining disputes by introducing provisions relating to intractable bargaining declarations (IBD) and intractable bargaining workplace determinations (IBWD).

14.1 Amendments and intent

Prior to the Secure Jobs, Better Pay amendments, the FWC only had limited power to resolve bargaining disputes, 'if all parties agree[d] to the Fair Work Commission making a decision'.[478] The effect of this limitation was said to be that 'parties … [were] not incentivised to bargain reasonably with one another, which can lead to protracted disputes.'[479]

In addition to this (limited) power to resolve bargaining disputes (mostly by conciliation),[480] the FWC was limited to resolving bargaining disputes through a process of serious breach declarations and bargaining-related workplace determinations.[481] In the Revised Explanatory Memorandum, it was stated that 'these provisions have not been effective in assisting parties to resolve bargaining disputes.'[482]

14.1.1 Secure Jobs, Better Pay amendments

The Secure Jobs, Better Pay Act amendments inserted, into Subdivision B of Division 8 of Part 2-4 of the Fair Work Act, provisions that allow a bargaining representative to apply to the FWC for an IBD for a proposed enterprise agreement (other than a greenfields agreement). An application for an IBD cannot be made in relation to a cooperative workplace agreement, although it can for the other 2 forms of multi-employer bargaining (i.e. supported bargaining and single-interest bargaining).[483]

Relevantly, the FWC may make an IBD in relation to a proposed enterprise agreement if an application has been made and it is after the 'minimum bargaining period'.[484]

The end of the minimum bargaining period is set out in s 235(5) of the Fair Work Act:

> (a) if one or more enterprise agreements (the ***existing agreements***) apply to any of the employees that will be covered by the proposed agreement – the later of the following:

[478] Senate Education and Employment Committee, Parliament of Australia, Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, Submission of the Department of Employment and Workplace Relations, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions] Submission No. 49, (November 2022) 18.
[479] Senate Education and Employment Committee, Parliament of Australia, Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, Submission of the Department of Employment and Workplace Relations, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions] Submission No. 49, (November 2022) 18.
[480] See *Fair Work Act 2009* (Cth) s 240.
[481] See also the FWC's power to make industrial action related workplace determinations: *Fair Work Act 2009* (Cth) s 266.
[482] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [826].
[483] *Fair Work Act 2009* (Cth) s 234(2).
[484] *Fair Work Act 2009* (Cth) s 235(1).

(i) the day that is 9 months after the nominal expiry date for that existing agreement, or the latest nominal expiry date for those existing agreements;

(ii) the day that is 9 months after the day bargaining starts, as worked out under subsection (6); or

(b) the day that is 9 months after the day bargaining starts, as worked out under subsection (6)."[485]

The day bargaining starts for a proposed agreement is set out in s 235(6) of the Fair Work Act:

(a) if a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the proposed agreement – the day that the authorisation first comes into operation; or

(b) otherwise – the notification time for the proposed agreement.[486]

Prior to making an IBD, the FWC must be satisfied that:[487]

(a) the FWC has dealt with the dispute about the agreement under section 240 and the applicant participated in the FWC's processes to deal with the dispute; and

(b) there is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and

(c) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

An IBD may specify a post-declaration negotiating period where the FWC considers it appropriate to do so.[488] During the post-declaration negotiating period the FWC cannot make an IBWD but it may provide other assistance to resolve the bargaining dispute, such as conciliation.[489] If it considers it appropriate to do so and taking in account the views of any bargaining representatives, the FWC may extend the post-declaration negotiating period.[490]

If the FWC has made an IBD, the FWC must make an IBWD 'as quickly as possible' (subject to any post-declaration negotiating period).[491] An IBWD can only be made by a Full Bench of the FWC.[492]

Once made, an IBWD provides terms and conditions for employees to whom it applies.

[485] *Fair Work Act 2009* (Cth) s 235(5).
[486] *Fair Work Act 2009* (Cth) s 235(6).
[487] *Fair Work Act 2009* (Cth) s 235(2).
[488] *Fair Work Act 2009* (Cth) s 235A.
[489] *Fair Work Act 2009* (Cth) Note to s 235A(1).
[490] *Fair Work Act 2009* (Cth) s 235A(2).
[491] *Fair Work Act 2009* (Cth) s 269.
[492] *Fair Work Act 2009* (Cth) s 616(4).

The Secure Jobs, Better Pay Act introduced provisions which specify the terms that an IBWD must include – namely, agreed terms and core or mandatory terms.[493] Importantly, s 270(3) of the Fair Work Act provides:[494]

> (3) The determination must include the terms that the FWC considers deal with the matters that were still at issue:
>
> (a) if there is a post-declaration negotiating period under section 235A for the declaration concerned – after the end of that period; or
>
> (b) otherwise – after making the declaration.

In deciding which terms to include in an IBWD, s 275 of the Fair Work Act sets out the factors that the FWC must take into account.

The Secure Jobs, Better Pay amendments commenced on 6 June 2023.

While the amendments made by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2023* (Cth) (Closing Loopholes No. 2 Act) are not strictly within the scope of this Review, it is necessary to consider these subsequent amendments to the intractable bargaining framework when reviewing the operation of the Secure Jobs, Better Pay amendments.

The Closing Loopholes No. 2 Act inserted s 270A into the Fair Work Act, which provides a restriction on FWC's ability to decide terms to deal with matters at issue:[495]

> Terms dealing with matters at issue
>
> (1) This section applies if, immediately before the determination is made, an enterprise agreement applies to one or more employees who will be covered by the determination.
>
> (2) A term that is included in the determination to comply with subsection 270(3), and that deals with a particular matter, must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter.
>
> (3) If a term to be included in the determination is not less favourable to a class of employees to which a particular employee belongs, the FWC is entitled to assume, in the absence of evidence to the contrary, that the term is not less favourable to the employee.
>
> (4) Subsection (2) does not apply to a term that provides for a wage increase.

[493] *Fair Work Act 2009* (Cth ss 270-274.
[494] *Fair Work Act 2009* (Cth) s 270(3).
[495] *Fair Work Act 2009* (Cth) s 270A.

The amendment relating to s 270A of the Fair Work Act is referred to as the 'not less favourable amendment'.

In addition, the Closing Loopholes No. 2 Act expanded the definition of agreed terms by adding into s 274(3) of the Fair Work Act the following (the 'agreed terms amendment'):[496]

> Agreed term for an intractable bargaining workplace determination
>
> ...
>
> (3) An **agreed term** for an intractable bargaining workplace determination is:
>
> (a) a term that the bargaining representatives for the proposed enterprise agreement concerned had agreed, at the time the application for the intractable bargaining declaration concerned was made, should be included in the agreement; and
>
> (b) any other term, in addition to a term mentioned in paragraph (a), that the bargaining representatives had agreed, at the time the declaration was made, should be included in the agreement; and
>
> (c) if there is a post-declaration negotiating period for the declaration – any other term, in addition to a term mentioned in paragraph (a) or (b), that the bargaining representatives had agreed, at the end of the period, should be included in the agreement.
>
> Note: The determination must include an agreed term (see subsection 270(2)).

The Closing Loopholes No. 2 Act changes commenced operation on 27 February 2024.

14.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of these provisions was said to be to 'support the Jobs and Skills Summit outcome of giving the FWC the capacity to proactively help workers and businesses reach agreements that benefit them'.[497]

The then Minister stated in the second reading speech for the Secure Jobs, Better Pay Bill that the amendments included a stronger role for the FWC and that:[498]

> The bill will allow the Fair Work Commission to resolve intractable disputes through arbitration, where there is no reasonable prospect of agreement being reached.

The intent of these amendments was 'to provide a strong incentive for good-faith negotiations, reduce the time for enterprise agreements to be finalised and allow for quicker resolution of

[496] *Fair Work Act 2009* (Cth) s 274(3).
[497] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [790] 143, [827].
[498] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 2180 (Tony Burke, Minister for Employment and Workplace Relations).

intractable disputes.'[499] Ultimately, the amendments were intended to 'get wages moving … not to find an opportunity for certain employers … to game the system and find ways to get conditions to go backwards'.[500]

These amendments included s 274(3) of the Fair Work Act, which sought to make sure terms that were agreed prior to the application for an IBD could not be 'unagreed'.

The 'not less favourable' amendment was intended to address an 'unforeseen consequence' of the Secure Jobs, Better Pay amendments[501] – in particular, that the provision incentivised employers to 'wait out negotiating periods … to get the claims arbitrated and get the same result via a backdoor way' and by purportedly closing 'the loophole … that, if you end up in arbitration, you can't go backwards'.[502]

14.2 Impact and issues

The IBD provisions and how they operate have been subject to considerable attention since their introduction, including concerns they have been used as a bargaining tactic and that, with their use, bargained terms and conditions that had previously been agreed were being 'unagreed'.

14.2.1 Quantitative evidence

The FWC *Annual Report 2022–23* stated that the FWC received one application for an IBD, which was later discontinued.[503]

In the FWC's *Annual Report 2023–24*, it noted that it had received 11 applications for an IBD.[504]

As at 17 January 2025, the FWC had issued 9 IBDs and 2 IBWDs since the amendments commenced on 6 June 2023.

Table 10 contains a list of all intractable bargaining declarations (made by the FWC under s 234 of the Fair Work Act) between the commencement of the amendments on 6 June 2023 and 17 January 2025.

[499] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 2180 (Tony Burke, Minister for Employment and Workplace Relations).
[500] Commonwealth, Parliamentary Debates, House of Representatives, 27 October 2022, 2180 (Tony Burke, Minister for Employment and Workplace Relations).
[501] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2023, 8711 (Adam Bandt).
[502] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2023, 8711 (Adam Bandt).
[503] Fair Work Commission, *Annual Report 2022–23* (Report, 2023) 28.
[504] Fair Work Commission, *Annual Report 2023–2024* (Report, 2024) 63, table C1.

Table 10: Intractable bargaining declarations made as of 17 January 2025

Date of decision	Decision	Outcome	Subject companies
24 December 2024	*Transdev Sydney Pty Ltd & Great River City Light Rail Pty Ltd v Australian Rail, Tram and Bus Industry Union* [2024] FWC 3594	Declaration made	Australian Rail, Tram and Bus Industry Union
12 November 2024	*Australian Salaried Medical Officers Federation v Australian Capital Territory as represented by Canberra Health Services* [2024] FWC 3117	Declaration made	ACT Government
6 November 2024	*CEPU and Others* [2024] FWC 3063	Declaration made	Endeavour Energy Network Management Pty Ltd
14 October 2024	*NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid v CEPU, MEU, ASU, CPSU, and Professionals Australia* [2024] FWC 2841	Declaration made	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), Mining and Energy Union (MEU), Australian Municipal, Administrative, Clerical and Services Union (ASU), Community and Public Sector Union (CPSU), and Professionals Australia
27 September 2024	*Terminals Pty Ltd T/A Quantem Bulk Liquid Storage & Handling v United Workers' Union* [2024] FWC 2707	Declaration made	United Workers' Union
15 March 2024	*Network Aviation Pty Ltd as Trustee for The Network Trust T/A Network Aviation Australia v Australian Federation of Air Pilots, Australian and International Pilots Association & Transport Workers' Union of Australia* [2024] FWC 685	Declaration made	Australian Federation of Air Pilots, Australian and International Pilots Association, and Transport Workers' Union of Australia
7 March 2024	*Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (Unanderra) [2024] FWCFB 127	Declaration made	Cleanaway Operations Pty Ltd (Unanderra)

12 January 2024	*Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd* [2024] FWC 91	Declaration made	Cleanaway Operations Pty Ltd (Erskine Park)
4 October 2023	*United Firefighters' Union of Australia v Fire Rescue Victoria* [2023] FWCFB 180	Declaration made	Fire Rescue Victoria

Table 11 contains a list of all IBWDs (made by the FWC under s 269 of the Fair Work Act) since the provisions commenced.

Table 11: Intractable bargaining workplace determinations made as of 17 January 2025

Date of decision	Decision	Outcome	Subject companies
4 September 2024	*Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd (Unanderra)* [2024] FWCFB 305	Determination made	Cleanaway Operations Pty Ltd (Unanderra)
26 June 2024	*Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd (Erskine Park)* [2024] FWCFB 287	Determination made	Cleanaway Operations Pty Ltd (Erskine Park)

14.2.2 Qualitative evidence

The FWC has considered the intractable bargaining provisions introduced by the Secure Jobs, Better Pay Act in a number of decisions, including what constitutes an 'agreed term', where there is 'no reasonable prospect of agreement' and the 'not less favourable' provisions. The following section discusses four FWC decisions.

First, the applicant (UFU) and the respondent (FRV) are currently covered by the *Fire Rescue Victoria Operational Employees Interim Enterprise Agreement 2020*. On 4 October 2023, a Full Bench of the FWC made an IBD, with the post-negotiating period ending on 18 October 2023. The Full Bench was required to make an IBWD 'as quickly as possible' under s 269 of the Fair Work Act.[505]

[505] *United Firefighters' Union of Australia v Fire Rescue Victoria T/A FRV* [2024] FWCFB 43 [3].

One of the prerequisites in making an IBWD was any 'agreed terms' under s 274 of the Fair Work Act.[506] On 5 February 2024, the Full Bench determined that there were no 'agreed terms' within the meaning of this section.

In interpreting s 274(3), the Full Bench drew the following conclusions:

- The meaning of 'agreed' is not defined under the Fair Work Act and should take its ordinary meaning. This ordinary meaning 'requires there to be a consensus or meeting of the minds between the parties about the subject matter of the said agreement'.[507]
- Despite the changes made by the Secure Jobs, Better Pay amendments, the meaning of 'agreed' has not changed throughout the Fair Work Act or in related legislation such as the *Competition and Consumer Act 2010* (Cth).[508]
- Any matters 'agreed' to 'in principle' or 'subject to' certain terms or limitations are 'strongly indicative that those matters would not be "agreed" for the purpose of s 247(3)'.[509]

The Full Bench held that any terms that FRV 'agreed' to at the relevant time, that being the end of the post-declaration negotiating period, were in-principle and not agreed terms for the purpose of s 247(3). As such, the 'bargaining parties did not make any "agreed terms" for the proposed enterprise agreement'.[510]

Second, the decision in *Chief Commissioner of Victoria Police t/as Victoria Police v Police Federation of Australia & Ors* (3 January 2025)[511] demonstrates the circumstances in which the FWC will consider there is no reasonable prospect of agreement.[512] The FWC rejected an IBD where bargaining was over a 'long and difficult' period. However, the employer had taken a contentious proposal off the table and continued to make various concessions, leading the FWC to determine that there was room for further bargaining.

Third, the relates to *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd t/as Cleanaway Operations Pty Ltd (Erskine Park)*[513]. The Erskine Park matter was the first IBWD made by the FWC under s 269 of the Fair Work Act.

On 12 January 2024, the Full Bench of the FWC issued an IBD in relation to the *Cleanaway Erskine Park Drivers Enterprise Agreement 2022*.[514] As required by s 269 of the Fair Work Act, the Full Bench of the FWC had to make an IBWD dealing with unresolved matters during bargaining. The 2 major issues in question were the quantum of pay increases and arrangements regarding ordinary hours.[515]

On 12 June 2024, the Full Bench granted an IBWD and considered the framework of s 275 in granting the IBWD, with particular focus on s 275(ca), which was a provision introduced by the

---

[506] *United Firefighters' Union of Australia v Fire Rescue Victoria T/A FRV* [2024] FWCFB 43 [4], [19].
[507] *United Firefighters' Union of Australia v Fire Rescue Victoria T/A FRV* [2024] FWCFB 43 [141].
[508] *United Firefighters' Union of Australia v Fire Rescue Victoria T/A FRV* [2024] FWCFB 43 [139], [141].
[509] *United Firefighters' Union of Australia v Fire Rescue Victoria T/A FRV* [2024] FWCFB 43 [147]-[148].
[510] *United Firefighters' Union of Australia v Fire Rescue Victoria T/A FRV* [2024] FWCFB 43 [167]-[168].
[511] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd t/as Cleanaway Operations Pty Ltd (Erskine Park)* [2025] FWC 1.
[512] *Application by Chief Commissioner of Victoria Police t/as Victoria Police* [2025] FWC [86].
[513] [2024] FWCFB 287.
[514] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd* [2024] FWC 91.
[515] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (Erksine) [2024] FWCFB 287 [22].

Secure Jobs, Better Pay Act. The Full Bench additionally noted, however, that they were not limited in only assessing the requirements under s 275 but could assess 'any other relevant considerations in the circumstances of the particular case'.[516]

In terms of the hours of work issue, the Full Bench determined that Cleanaway could roster ordinary hours of work on the weekend, with the ability of employees to opt out of weekend work.[517] With regard to pay increases, the Full Bench awarded staged pay increases from 1 July 2023 until 1 September 2026.[518]

The Full Bench also discussed the requirement of terms being 'not less favourable' under s 270(3), introduced by the Secure Jobs, Better Pay Act. They considered various terms by reference to the '2020 Erskine Park EA', such as the ordinary hours provisions and weekend penalty rates. They found such terms 'not less favourable to each of the employees covered by the determination'.[519]

The IBWD was made on 26 June 2024.

Fourth, there is *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (Unanderra).[520] On 10 July 2024, a Full Bench of the FWC handed down its second IBWD decision in relation to the *Cleanaway Solid Waste Services (C&I) Wollongong Enterprise Agreement 2020* (Unanderra Agreement). This decision relates to the IBD issued by the FWC on 7 March 2024.

This decision was important for 2 primary reasons. On the one hand, this was the first occasion where the FWC confirmed *all* bargaining representatives (including non-actively participating individual bargaining representatives) must agree to terms for them to be 'agreed terms'.[521]

On the other hand, the Full Bench considered s 270A, and in particular the meaning of the phrase 'not less favourable' under s 270A(2). The Full Bench interpreted the provision to mean 'less advantageous' or 'less beneficial',[522] but it does not apply to a term of the workplace determination that provides for a wage increase.[523]

In terms of the proposed agreement, the Full Bench held that the ordinary hours terms were 'less favourable' to the relevant employees compared to the Unanderra Agreement, as the latter entitled employees to overtime pay. Conversely, the Full Bench held the 'not less favourable' provisions could not empower the FWC to impose a compulsory arbitration clause on a non-consenting party.[524]

---

[516] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (Unaderra) [2024] FWCFB 287 [170].
[517] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (Unaderra) [2024] FWCFB 287 [206].
[518] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (Unaderra) [2024] FWCFB 287 [236].
[519] *Application by Transport Workers' Union of Australia* (179V) [2024] FWCFB 287, [205].
[520] [2024] FWCFB 305.
[521] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (Unaderra) [2024] FWCFB 305 [9].
[522] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (Unaderra) [2024] FWCFB 305 [137].
[523] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (Unaderra) [2024] FWCFB 305 [139].
[524] *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* (Unaderra) [2024] FWCFB 305 [175].

In addition to these four cases, the following matter provides an example where an employer made an application for an intractable bargaining declaration, but the application did not proceed, as the parties continued negotiations and were able to reach an agreement. Virgin Australia Regional Airlines Pty Ltd t/as Virgin Australia Regional Airlines (VARA) applied for an IBD in relation to a proposed enterprise agreement, which would replace the *Virgin Australia Regional Airlines Aircraft Engineers (Western Australia) Enterprise Agreement 2017*.

A significant issue between VARA and the Australian Licensed Aircraft Engineers Association (ALAEA) (with the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU) intervening) was the requirement under s 235(2)(b) of the Fair Work Act that there be 'no reasonable prospect of agreement being reached' between the parties before granting the intractable bargaining declaration, with both sides disagreeing on this point. VARA pointed to the bargaining history of both sides since its commencement in about August 2020,[525] whereas ALAEA pointed to continued negotiation between parties to show an agreement could be reached.[526]

On 20 July 2023, VARA's legal representatives informed the FWC that VARA wished to discontinue the application because, relevantly, it was 'prepared to put a revised agreement to a vote of employees.'[527] ALEA did not oppose. As a result, the matter was discontinued.[528]

On 13 September 2023, the FWC approved the *Virgin Australia Regional Airlines Aircraft Engineers (Western Australia) Enterprise Agreement 2023*.[529] ALAEA is noted in the FWC decision as a bargaining representative covered by the agreement. The agreement operated from 20 September 2023, with a nominal expiry date of 30 June 2025.

14.2.3 Stakeholder views

The amendments relating to bargaining disputes received considerable attention and were divergent. Views expressed by the stakeholders ranged from support for the amendments to calls for the repeal of the bargaining disputes framework amendments in full and others accepted the Secure Jobs, Better Pay amendments but sought the repeal of the Closing Loopholes No. 2 amendments.

Union stakeholders were almost uniformly supportive of amendments to deal with bargaining disputes. They largely expressed the view that amendments to IBDs motivated parties to reach a resolution quicker.

The ACTU asserted that this view is shared among unions and that 'even where a declaration has not been sought, the intractable bargaining laws have, more often than not, encouraged

[525] Application by Virgin Australia Regional Airlines Pty Ltd t/as Virgin Australia Regional Airlines (VARA). VARA Outline of Submissions, [4], [14].
[526] Virgin Australia Regional Airlines – application for an intractable bargaining declaration (B2023/543). ALAEA Outline of Submissions, [8].
[527] Virgin Australia Regional Airlines – application for an intractable bargaining declaration (B2023/543), Correspondence – discontinuance and Commission's reply 20 July 2023.
[528] Virgin Australia Regional Airlines – application for an intractable bargaining declaration (B2023/543), Notice of listing – hearing cancelled 20 July 2023.
[529] *Virgin Australia Regional Airlines Aircraft Engineers (Western Australia) Enterprise Agreement 2023*, [2023] FWCA 2946.

parties to try to reach terms upon which all parties can agree'.[530] Further, the ACTU submitted:[531]

> [The] amendments … made by the Closing Loopholes No. 2 Act to preserve existing conditions are viewed as being critically important by affiliates. The effect of these amendments has been not only to protect employees' terms and conditions (save for the issues identified in relation to the consultation and disputes terms) but to ensure that for most parties, the new intractable bargaining mechanism remains – appropriately - a mechanism of last resort.

The Independent Education Union of Australia (IEU) submitted that, before the Secure Jobs, Better Pay Act, '[t]he lack of access to arbitration of intractable disputes arising from bargaining meant that employers were advantaged by being able to indefinitely prolong negotiations'.[532] The Community and Public Sector Union (CPSU) expressed a similar sentiment, asserting that 'the introduction of intractable bargaining provisions … has the potential to create discipline in the bargaining process and drive resolution'.[533] The Australian Nursing and Midwifery Federation has observed a 'shift in bargaining behaviour [to] the threat of an intractable bargaining declaration (IBD) being made … both employers and unions are more motivated to come to an agreement and engage more efficiently on contested points due to the inherent risk and uncertainty involved in an IBD'.[534] The United Workers Union (UWU) provided similar sentiments, arguing that 'intractable bargaining is a course of action that remains, in UWU's view, an option of last resort' and that the not less favourable amendment 'has been a positive amendment which provides some level of safeguard to employees'.[535]

The Electrical Trades Union expressed concerns about good faith bargaining, noting that the 9-month minimum bargaining period 'allow[s] employers to treat … [the minimum bargaining period] as a mere formality, rather than requiring genuine and meaningful negotiations.'[536] The Australian Retailers Association expressed that the 9-month period was too short and should be extended to 12 months.

Employer groups were divided about the impact of the Secure Jobs, Better Pay amendments but were largely unified in their opposition on the not less favourable amendment. The prevailing view was that the system (as further amended) discourages good faith bargaining.

The Chamber of Minerals & Energy of Western Australia, Master Builders Australia and Whitehaven Coal called for the repeal of the intractable bargaining amendments in the Secure Jobs, Better Pay Act and Closing Loopholes No. 2 Act.[537]

Other employer associations, such as ACCI,[538] Ai Group,[539] Australian Resources & Energy Employer Association (AREEA), Business Council of Australia (BCA) and Chamber of

[530] ACTU submission, 86.
[531] ACTU submission, 86.
[532] IEU submission, 5.
[533] CPSU submission, 8.
[534] ANMF submission, 9.
[535] UWU submission, 33.
[536] ETU submission, [7].
[537] Chamber of Minerals & Energy of Western Australia submission, 4; MBA submission, 19–20; Whitehaven Coal submission, 7.
[538] ACCI submission, 34.
[539] AI Group submission, 31.

Commerce and Industry of Western Australia, submit they are generally less concerned about the Secure Jobs, Better Pay Act amendments but sought repeal of the Closing Loopholes No. 2 Act amendments.

BCA argued that to 'ensure that the IBD framework is operating effectively and appropriately having regard to its stated objectives, and to mitigate unintended consequences, [the not less favourable amendment] should be repealed'.[540] The supported this recommendation, asserting the further amendment 'creates a substantial incentive for arbitrated outcomes'.[541]

AREEA also supported repealing the not less favourable amendment, being concerned that the further amendment 'mean[s] unions/employees have "nothing to lose" … [the potential] benefits and risk burden from intractable bargaining provisions must be apportioned equally between employers and employees/unions.'[542]

The Australian Higher Education Industrial Association recommended adjusting the not less favourable test 'such that employees and employee organisations are not worse off, but that the test of whether they would be worse off be directed to the agreement as a whole, rather than being focused on a single term'.[543]

The Australian Retailers Association took a slightly different approach and recommended the test allow terms of the agreement to be no worse off than either 'a term of the enterprise agreement that deals with the matter *or a term within a comparable modern award*'.[544]

Clubs Australia 'recommends an amendment to the Act to ensure that agreements can incorporate flexibility and above-award trade-offs that support productivity improvements.'[545]

14.3 Findings and recommendations

The Review Panel finds that the development of practice in this area is in its early stages. Not only have there been relatively few instances where applications have been made, but also there have been relatively few decisions made by the FWC so far in interpreting the amendments. There remain many elements of the process leading up to intractable bargaining applications and the finalising of IBWDs to be resolved.

To the extent that stakeholders view the use of intractable bargaining as a bargaining tactic, the Review Panel does not accept this premise. The reality is that both sides use bargaining tactics and there is nothing inherently wrong in doing so. The purpose of the intractable bargaining framework is to introduce a level of risk (through the uncertainty of the FWC's decisions) to continuing disagreement and to balance the positions and power of the bargaining participants. It is only in these circumstances that bargaining will efficiently and effectively produce agreements, which is part of the intent of the amendments.

The Review Panel remains unconvinced about whether the 'not less favourable' amendments have the intended effect of focusing the minds of parties on reaching a mutually acceptable compromise. However, these amendments only came into operation on 27 February 2024. The

[540] BCA submission, 13.
[541] CCIWA submission, 10.
[542] AREEA submission, 11.
[543] AHEIA submission, 13.
[544] ARA submission, 6.
[545] Clubs Australia submission, 2.

amendments require further consideration in tribunal decisions and application in practice before the law will be fully tested. The Panel considers that close attention to forthcoming events will be required to be able to reach a conclusion on whether further amendments are required.

As a result, the Review Panel will not make specific recommendations at this time.

Chapter 15. Industrial action

Part 19 of the Secure Jobs, Better Pay Act amended some of the provisions of the Fair Work Act relevant to industrial action. In particular, the main topic of attention in this chapter is the new requirements for bargaining representatives to attend mandatory conciliation during the protected action ballot (PAB) period (i.e. before protected industrial action can be taken).

15.1 Amendments and intent

The amendments themselves will first be introduced, followed by a brief exploration of the intentions behind them.

15.1.1 Secure Jobs, Better Pay amendments

The newly amended Part 3-3 of the Fair Work Act includes 2 substantial changes: the Protected Action Ballot Agent Scheme and the introduction of a new mandatory step before protected industrial action may be taken. A third amendment to change notice periods before industrial action can be taken was also made, but this was largely technical.

First, the amendments provide for a process whereby the Fair Work Commission (FWC) may approve a person as an eligible PAB agent, authorised to conduct PABs.[546] The FWC may approve a person as a PAB agent if they are satisfied the person is a fit and proper person and meets any other prescribed requirements under regulations.[547]

Second, a new mandatory step requires that, where the FWC orders a PAB in relation to a proposed enterprise agreement, the FWC must also make an order directing the bargaining representatives for the agreement to attend a conference for the purpose of mediation or conciliation in relation to the agreement.[548] This conference must occur before the close of the PAB.[549]

If a bargaining representative (employee or employer) fails to participate the mandatory conference, they will be in breach of an order of the FWC. Consequently, they will not be able to satisfy the common requirements that apply for industrial action to be protected.[550]

Further amendments to the mandatory conference process were made by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (Closing Loopholes Act), providing non-attendance at a compulsory conference by a bargaining representative who *did not* apply for the PAB order would no longer result in any subsequent industrial action being unprotected.[551]

Third, the notice requirements for protected industrial action for multi-employer agreements was amended to require at least 120 hours' notice before commencing the industrial action.[552]

---

[546] *Fair Work Act 2009* (Cth) s 468A.
[547] *Fair Work Act 2009* (Cth) s 468A(2).
[548] *Fair Work Act 2009* (Cth) s 448A(1).
[549] *Fair Work Act 2009* (Cth) s 448A(2).
[550] *Fair Work Act 2009* (Cth) ss 408(a), 408(c).
[551] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2022 1069–1070.
[552] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2023 (Cth)* Div 4, Pt 19 to Sch 1.

15.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of the amendments to the industrial relations framework was to promote efficiency in dealing with applications for PAB orders and 'de-escalate' disputes prior to industrial action being taken.[553] The result, in a broader context, would lead to an increase in collective bargaining and wages.

15.2 Impact and issues

The impact of the amendments in the Secure Jobs, Better Pay Act and Closing Loopholes Act are yet to play out, with data suggesting the levels of industrial action have remained largely unchanged. While the introduction of the mandatory conference has caused some unease, the other changes have been largely uncontroversial.

15.2.1 Quantitative evidence

The main sources of quantitative data concerning industrial disputes are the Australian Bureau of Statistics (ABS) Industrial Disputes data and Fair Work Commission reports.

The statistical data reveals 2 matters. First, there are differences in the number of disputes each year. This may relate to the cycle of enterprise bargaining across the economy, although other factors are potential influences. Second, these differences are within a very narrow and very low band. The evidence does not establish that there has been any increase or difference in the level and variance of industrial disputation since the commencement of the amendments overall.

15.2.2 Qualitative evidence

Early in the operation of these amendments, an unintended consequence arose.

In a decision of 4 August 2024, the FWC considered the new mandatory conference provisions.[554] In reaching its decision, the Full Bench of the FWC noted that industrial action 'will only be protected industrial action if *each* bargaining representative of an employee who will be covered by the agreement' had not contravened a mandatory conference order issued by the FWC.[555] The Full Bench pointed out that noncompliance, even by a bargaining representative 'who may not have been the applicant for the PABO, could result in any subsequent employee claim action being unprotected' for all parties.

The Closing Loopholes Act made further amendments to these provisions to rectify the practical implications highlighted by the Full Bench (as noted above).[556]

15.2.3 Stakeholder views

Stakeholder views on the amendments were mixed, but they largely focused on the new mandatory conference requirement.

Ai Group supported amendments to require mandatory conferences as 'worthwhile'[557] and noted that in some cases they have led to agreement being reached, resulting in less industrial

---

[553] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 xi.
[554] *CEPU v Nilsen (NSW) Pty Ltd* [2023] FWCFB 134 [30].
[555] *CEPU v Nilsen (NSW) Pty Ltd* [2023] FWCFB 134 [68].
[556] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes No.1) Bill 2022 1069–1070.
[557] Ai Group submission, 148.

action.[558] The Australian Chamber of Commerce and Industry (ACCI) shared similar views that mandatory conferences are a 'further opportunity for parties to participate in a process that may bring it closer to a resolution, and may in fact avoid [protected industrial action] altogether'.[559] However, both Ai Group and ACCI reported issues with the process, citing frustration over the obligation when consent not to participate was reached between parties; and calling for the FWC to have further discretion to convene conferences in a way that minimises any administrative burden.[560]

The Australian Resources & Energy Employer Association wholly criticised these changes on behalf of their members, stating the conferences were a 'waste of time for all parties',[561] and the FWC was not making any 'real efforts to avert industrial action or help parties resolve the dispute'.[562]

Union stakeholders shared a similar view. The Australian Nursing and Midwifery Federation (ANMF) and United Workers Union (UWU) both reported negative experiences of mandatory conferences and that conferences had not achieved their intended aim.[563] The ANMF argued that the mandatory conferences 'undermine the significant bargaining tool of protected action',[564] while the UWU similarly stated that any 'movement' between parties is due to threat of industrial action rather than the conference itself.[565] The UWU called for the removal of this provision.[566] AWU stated it is not supportive of any additional requirements 'to withdraw … labour in pursuit of better employment outcomes' and noted mixed feelings about mandatory conferences and inconsistency of approach between members.[567] Forsyth and McCrystal expressed a similar sentiment about the compulsory conciliation conference, stating this amendment imposed 'another hurdle on bargaining representatives seeking to take protected industrial action during bargaining for a new agreement'.[568]

Of the few stakeholders that did comment on the PAB agent process, such as the Community and Public Sector Union (CPSU) (PSU Group), UWU, Australian Chamber of Commerce and Industry and Ai Group, there was substantial agreement that the amendments are beneficial. Some stakeholders, while generally supportive of the efficiency reform, have suggested that close monitoring of performance of protected action ballot agents should continue to ensure the robustness and transparency of the ballot process.[569]

From a more general perspective, Forsyth and McCrystal critiqued the entire approach to industrial action under the Fair Work Act, saying 'the legislative regime is highly complex and

[558] Ai Group submission, 148.
[559] ACCI submission, 88.
[560] Ai Group submission, 149; ACCI submission, 88.
[561] AREEA submission, [98].
[562] AREEA submission, [98].
[563] ANMF submission, [24]; UWU submission, 33.
[564] ANMF submission, [24].
[565] UWU submission, 33.
[566] UWU submission, 34.
[567] AWU submission, 5
[568] A Forsyth and S McCrystal, 'Reforming Australian Bargaining and Strike Laws to Maximise Worker Power', page 1125.
[569] ACCI submission, 37 – recommendation 1.

challenging to navigate'.[570] They draw on a previous article by Professor McCrystal which outlines:[571]

> the range of circumstances under which they [employees] can take lawful strike action are very narrow: when those circumstances arise it is technically difficult to engage in lawful strike action and easy to get it wrong, and when lawful strike action does occur the action may be stopped.

Forsyth and McCrystal also criticised Secure Jobs, Better Pay amendments to industrial action as continuing the 'trend of legal change effectively weakening worker access to the right to strike'.[572] However, the authors supported the availability of protected industrial action for certain multi-employer agreements[573] – in particular, single-interest employer agreements and supported bargaining agreements.

Ai Group called for the ability to take protected industrial action at the multi-employer level to be taken away, calling this 'not appropriate'.[574] Instead, protected industrial action should only be permitted in bargaining for a single-enterprise agreement.[575]

The Australian Council of Trade Unions (ACTU) recommended that s 413(5) of the Fair Work Act, which takes away the protected nature of industrial action if the party fails to comply with an order, should be repealed (with UWU and Construction and General Division of the CFMEU agreeing).[576] ACTU argued this provision 'adds nothing legitimate' to the merit requirement under s 413(5) and instead can result in unintended consequences.[577]

15.3 Findings and recommendations

The Review Panel finds that the provisions relating to the mandatory conference requirements have been somewhat effective. The Review Panel notes some stakeholder views suggest in practice these amendments have led to inefficiency and frustration with the process and that there has been no difference in the level of disputation.

However, the Review Panel notes that there is merit in the mandatory conciliation conferences during the PAB period. Stakeholder feedback indicates that the conferences can lead to either the narrowing of issues or agreement being reached between the parties, therefore avoiding industrial action. The Review Panel also notes stakeholder feedback that consideration should be given in relation to the conduct of the mandatory conferences where there is agreement between the parties that there is little to no utility in the FWC convening a conference. The

[570] A Forsyth and S McCrystal, 'Reforming Australian Bargaining and Strike Laws to Maximise Worker Power' (2023) 46(4) *UNSW Law Journal* 1125.
[571] S McCrystal, 'Why Is It So Hard to Take Lawful Strike Action in Australia?' (2019) 61(1) *Journal of Industrial Relations* 129, 130.
[572] A Forsyth and S McCrystal, 'Reforming Australian Bargaining and Strike Laws to Maximise Worker Power' (2023) 46(4) *UNSW Law Journal* 1129.
[573] A Forsyth and S McCrystal, 'Reforming Australian Bargaining and Strike Laws to Maximise Worker Power' (2023) 46(4) *UNSW Law Journal* 1129.
[574] Ai Group submission,157.
[575] Ai Group submission,157.
[576] ACTU Ai Group submission, recommendation 25; UWU submission, recommendation 23; CFMEU submission, recommendation 3.
[577] ACTU submission, 90.

Review Panel makes a recommendation in relation to providing the FWC with discretion not to conduct a conference in these circumstances.

Draft Recommendation 6: The mandatory conciliation conference in s 448A of the Fair Work Act should be amended to provide the FWC with the discretion not to conduct a conference if there is agreement of relevant bargaining representatives.

Chapter 16. Enterprise agreement approval

Various legislative amendments in Part 14 of the Secure Jobs, Better Pay Act were designed to facilitate the creation of enterprise agreements and ensure that enterprise agreements are genuinely agreed to by employees.

16.1 Amendments and intent

The Secure Jobs, Better Pay Act amended the genuine agreement requirements to remove or alter some of the more prescriptive pre-approval requirements for agreements. These amendments relate to enterprise agreements with a notification time on or after 6 June 2023.

16.1.1 Secure Jobs, Better Pay amendments

Part 2-4 of the Fair Work Act deals with enterprise agreements and includes rules for making and approving agreements. Section 188(1) of the Fair Work Act was amended to require the Fair Work Commission (FWC) to take into account the 'statement of principles' made under s 188B in determining whether it is satisfied that an agreement has been genuinely agreed to by the employees covered by the agreement.

The Secure Jobs, Better Pay Act also amended s 188 of the Fair Work Act to require the FWC to create the statement of principles and publish the statement on the FWC's website and by any other means that the FWC considered appropriate.[578]

Section 188B(3) sets out the matters that the statement of principles must deal with:

> (a) informing employees of bargaining for a proposed enterprise agreement;
>
> (b) informing employees of their right to be represented by a bargaining representative;
>
> (c) providing employees with a reasonable opportunity to consider a proposed enterprise agreement;
>
> (d) explaining to employees the terms of a proposed enterprise agreement and their effect;
>
> (e) providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote;
>
> (f) any matter prescribed by the regulations for the purposes of this paragraph;
>
> (g) any other matters the FWC considers relevant.

In determining whether the FWC is satisfied an agreement has been genuinely agreed, the Secure Jobs, Better Pay Act also introduced provisions under s 188(2), which require the FWC to be satisfied that employees requested to approve the agreement by voting for it:[579]

---

[578] *Fair Work Act 2009* (Cth) s 188(1)–(2); s 188B(1)–(2).
[579] *Fair Work Act 2009* (Cth) s188(2).

> (a) have a sufficient interest in the terms of the agreement, and
>
> (b) are sufficiently representative, having regard to the employees the agreement is expressed to cover.

Part 14 of the Secure Jobs, Better Pay Act made a number of consequential amendments to the pre-approval requirements, as those matters were required to be dealt with in the statement of principles, including the removal of:

- the requirement to provide a notice of employee representational rights (NERR) for multi-employer agreements
- the definition of 'access period'
- the requirement that the employer take all reasonable steps to give employees a copy of the agreement and any incorporated materials during the access period
- the requirement that the employer take all reasonable steps to notify employees of the time, place and method of voting by the start of the access period.

A requirement that employers must take all reasonable steps to ensure that the terms of a proposed enterprise agreement, and their effect, are explained to employees in an appropriate manner, was retained in the Fair Work Act, rather than dealt with in the statement of principles.[580] The FWC cannot be satisfied that an enterprise agreement has been genuinely agreed unless it is satisfied that this requirement has been complied with.[581]

The Secure Jobs, Better Pay Act retained the FWC's ability to disregard minor procedural or technical errors made in relation to certain requirements if it is satisfied that the employees were not likely to have been disadvantaged by the errors.[582]

16.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of the Secure Jobs, Better Pay amendments was to simplify the bargaining process and make the enterprise agreement approval requirements easier to comply with, with the expectation that collective bargaining would increase. The problem that these amendments were designed to address was summarised by the Department of Employment and Workplace Relations (DEWR) in its submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022:[583]

> There is consensus amongst workplace relations stakeholders that the pre-approval processes and approval requirements for enterprise agreements are onerous, complex, and easy to misinterpret. This means that there are circumstances where bargaining parties reach an agreement, but the agreement cannot be approved by the Fair Work Commission because of procedural error. Complexity in the bargaining framework discourages parties from bargaining. The Bill makes

[580] *Fair Work Act 2009,* s.180(5).
[581] *Fair Work Act 2009*, s.188(4A).
[582] *Fair Work Act 2009* (Cth) s188(5).
[583] Senate Education and Employment Committee, Parliament of Australia, Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, Submission of the Department of Employment and Workplace Relations, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions] Submission 49, November 2022, 20.

> changes to reduce the complexity associated with bargaining and make approval requirements easier to comply with.

Additionally, DEWR submitted that procedural complexity, the multiple steps for approval and the strict timeframes was also deterring bargaining:[584]

> Employers must currently take multiple steps within strict timeframes in order for an agreement to be approved under the Fair Work Act bargaining framework. These processes are difficult to follow and can discourage employers from engaging with the bargaining system. For example, an employer must take all reasonable steps to provide employees with access to the prospective agreement during a seven-day period immediately before the employer conducts a vote on the agreement.

The requirement that the FWC be satisfied that the agreement has been 'genuinely agreed to' is also intended to 'safeguard against agreements which are not the result of good faith bargaining but, instead, are agreements made with 'unrepresentative' and 'low voter' (small) cohorts.[585]

16.2 Impact and issues

Consistent with its obligations under the new s.188B of the Fair Work Act, and after extensive consultation, FWC published the 'Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023' on 12 May 2023. This 13-page document came into operation on 6 June 2023. The impact of the amendments and the issues they raise can be assessed through: firstly, quantitative data from both the FWC and the DEWR; secondly, qualitative data, mostly from decisions of the FWC; and thirdly, the views of the stakeholders.

16.2.1 Quantitative evidence

As noted, a key start date for changes to enterprise agreement approvals was 6 June 2023. The window for assessing the impact of the amendments and issues is, therefore, relatively short. As the intent of the amendments is to facilitate more collective bargaining, one set of appropriate indicators with which to assess the amendments is the number of new collective agreements made and the number of employees covered by those agreements. The latter is particularly important, as it may be that an increase in multi-employer agreements reduces the number of enterprise agreements in operation but increases the number of employees who are covered by an enterprise agreement.

Long-term trends in the incidence and coverage of collective agreements – based on data from DEWR – were reviewed in Chapter 8. Specifically, Figure 3 shows trends on new approved agreements. The analysis there shows that the number of agreements has increased only moderately, if at all, but the coverage of those agreements has expended considerably in recent quarters.

---

[584] Senate Education and Employment Committee, Parliament of Australia, Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, Submission of the Department of Employment and Workplace Relations, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions] Submission 49, November 2022, 20–21.

[585] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, 129 [705].

Also important are data from the FWC, which traces the time taken to approve agreements as well as the number of undertakings being required by the FWC when approving agreements. These data are examined in detail in Chapter 17. Suffice it to say here that the speed with which the FWC approved collective agreements was not greatly improved by the publication of the statement of principles. At the same time, the performance of the FWC on this measure was already strong.

16.2.2 Qualitative evidence

The Secure Jobs, Better Pay amendments are designed to ensure that, amongst other things, the FWC is satisfied that the agreement has been 'genuinely agreed to'. In particular, the amendments are intended to 'safeguard against agreements which are not the result of collective bargaining in good faith, including "unrepresentative" and "low voter cohort" agreements'.[586]

At least four decisions by the FWC help to assess the effectiveness of the Secure Jobs, Better Pay amendments.

First, the Full Bench of the FWC on 6 September 2023 concluded in *The Australian Workers' Union v Altrad APTS Pty Ltd t/as Altrad*[587] that the provisions are operating as intended, as the Full Bench noted that 'in some circumstances a small voter cohort should trigger greater scrutiny'.[588]

Second, the Full Bench had reason to consider how to apply the principles in *Shop, Distributive and Allied Employees Association v Allen Family Pty Ltd* (*Allen)* (6 February 2024).[589] The Full Bench held:[590]

> The important point to be made is that while the Commission is required to take into account the Statement of Principles in determining whether an agreement has been genuinely agreed, it does not operate as a set of mandatory rules that must be complied with by an employer absent which the Commission cannot be satisfied that an agreement has been genuinely agreed. Where an employer follows pre-approval steps that are consistent with the Statement of Principles, that would weigh more favourably towards a conclusion that an agreement has been genuinely agreed. The converse is equally true of course. The requirement to take into account the Statement of Principles does not displace the requirement to consider each of the other matters set out in s 188 in determining whether an agreement has been genuinely agreed …

Third, in *Application by Geocon Constructors (ACT) Pty Ltd T/A Geocon* (13 October 2023)[591] the FWC found that a single enterprise agreement proposed to cover Geocon and its employees had not been genuinely agreed to because Geocon did not provide a full copy of the final

[586] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, 129 [705].
[587] *The Australian Workers' Union v Altrad APTS Pty Ltd t/as Altrad* [2024] FWCFB 21.
[588] *The Australian Workers' Union v Altrad APTS Pty Ltd t/as Altrad* [2024] FWCFB 21 [77].
[589] *Shop, Distributive and Allied Employees Association v Allen Family Pty Ltd* [2024] FWCFB 48.
[590] *Shop, Distributive and Allied Employees Association v Allen Family Pty Ltd* [2024] FWCFB 48 [76].
[591] *Application by Geocon Constructors (ACT) Pty Ltd t/as Geocon* [2023] FWC 2676.

agreement after changes had been made following negotiations and did not take reasonable steps to explain it to the employees before the voting date.[592]

Fourth, in *AMWU v Sublime Infrastructure Pty Ltd and CEPU* (14 November 2024)[593] a Full Bench of the FWC issued a decision allowing AMWU's appeal against an FWC single-member decision made on 18 June 2024 to approve an enterprise agreement covering a single employer, Sublime Infrastructure. In that decision, the Full Bench found that the agreement was not genuinely agreed to because bargaining was conducted so that voting was deliberately confined to 2 employees despite the agreement applying to a wider group of employees.[594] The 2 employees did not have sufficient interest in the terms of the proposed agreement[595] and were not 'sufficiently representative of the employees to be covered by the [a]greement'.[596] Further, the Full Bench was not satisfied Sublime Infrastructure had taken all reasonable steps to explain the agreement to the 2 employees.[597]

16.2.3 Stakeholder views

A range of views were raised in submissions and during roundtables concerning the impact of the amendments. The majority of submissions centred on 'small cohort' enterprise agreements. Whether the impacts on these agreements were perceived as positive depended on whether the stakeholder was a union or an employer group. Stakeholders also noted concerns about the Statement of Principles and the removal of the access period.

The Australian Resources & Energy Employer Association (AREEA) raised concerns about how the FWC must consider whether the employees who voted on the agreement have a sufficient interest and are sufficiently representative of who the agreement intends to cover.[598] They noted that, while an enterprise agreement may only cover a small cohort, this may be because 'businesses are growing and need in-term EAs voted up in order to tender for future work'.[599] Ai Group raised similar concerns, stating that these kinds of agreements 'are common in the construction industry because work on a project typically ramps-up over time. Also, the employees who are employed at the early stages of a construction project (e.g. employees engaged in earthworks) are not representative of all the types of employees who would be employed at later stages (e.g. employees involved in the fit-out)'.[600]

However, AREEA acknowledged that some sectors may have taken advantage of small cohort agreements[601] and that they had not noticed any of these matters 'surface before the FWC in any substantial way'.[602]

The Mining and Energy Union (MEU) submitted that, prior to the Secure Jobs, Better Pay Act, common practice of 'employers in the coal mining industry was to seek approval of an enterprise agreement made with a small number of carefully selected employees without any real bargaining … [who] typically had "no stake" in the enterprise agreement – they were

[592] *Application by Geocon Constructors (ACT) Pty Ltd t/as Geocon* [2023] FWC 2676 [31]–[33].
[593] *AMWU v Sublime Infrastructure Pty Ltd and CEPU* [2024] FWCFB 432.
[594] *AMWU v Sublime Infrastructure Pty Ltd and CEPU* [2024] FWCFB 432 [30].
[595] *AMWU v Sublime Infrastructure Pty Ltd and CEPU* [2024] FWCFB 432 [33].
[596] *AMWU v Sublime Infrastructure Pty Ltd and CEPU* [2024] FWCFB 432 [32].
[597] *AMWU v Sublime Infrastructure Pty Ltd and CEPU* [2024] FWCFB 432 [34].
[598] AREEA submission, [124].
[599] AREEA submission, [125].
[600] Ai Group submission, [56].
[601] AREEA submission, [125].
[602] AREEA submission, [127].

provided with guaranteed wages and conditions in excess of the wages and conditions in the enterprise agreement that they had purportedly bargained'.[603] The MEU stated that, following the Secure Jobs, Better Pay amendments that require the employees voting on an agreement to be sufficiently representative, 'there has been very few, if any, inauthentic small cohort agreements made'.[604]

Similarly, the Australian Workers' Union (AWU) noted that, in the past, they have had to challenge small cohort agreements based on pre-approval steps not being met but now they are hopeful that 'the Statement of Principles can prevent what was possible under the previous scheme'.[605]

Several stakeholders (e.g. Australian Retailers Association, the Community and Public Sector Union and the United Workers Union (UWU)) submitted that the Statement of Principles has led to 'a more positive experience'[606] and success in 'streamlining of approval processes'.[607] The UWU submitted there has been 'a significant fall in work and hearings on technical non-compliance of pre-approval steps and [it] is a change that UWU believes has been favourable'.[608]

The Australian Chamber of Commerce and Industry submitted that 'in addition to having to understand the complexities of the entire bargaining process, employers must now familiarise themselves and comply with this document' and 'this has resulted in additional effort and complexity for employers, without actual simplification of the process'.[609] A similar view was expressed by Master Electricians Australia, which submitted that '[b]argaining under single interest has become more administrative and less streamlined since the enactment of the Statements of Principle (SOPs) when determining "genuine agreement"'.[610]

Master Builders Australia asserted that the Statement of Principles has resulted in 'non-union agreements [being] automatically scrutinised far more stringently when compared to agreements to which unions are a party'.[611]

The Australian Council of Trade Unions (ACTU) expressed concern that at paragraph 6 in the FWC 'Statement of Principles on Genuine Agreement' Instrument, the 'reasonable time period' (i.e. the access period) is set at 'at least 7 full calendar days', and it has requested that this be increased to at least 14 full calendar days. It argued that the 7 full calendar day access period 'may not be long enough, especially in workplaces with multiple shift patterns or workers from culturally and linguistically diverse backgrounds where more steps may be required to speak to their union and consider a proposed agreement'.[612]

16.3 Findings and recommendations

The prime intent of the 'enterprise agreement approval' reforms is to simplify the process for agreement making and ensure that there is genuine agreement. The Review Panel is satisfied

[603] MEU submission, [10].
[604] MEU submission, [16].
[605] AWU submission, 4.
[606] ARA submission.
[607] CPSU submission, 9.
[608] UWU submission, 23.
[609] ACCI submission, [29] 13.
[610] MEA submission, 2.
[611] MBA submission, 18.
[612] ACTU submission, 77.

that the reforms are having their intended effect. Although evidence would appear to suggest little growth in the number of agreements approved since June 2023, data does show that there has been a significant growth in the number of employees covered.

Some stakeholders did submit that the Statement of Principles is a source of some confusion, has not simplified the process and in some cases has increased scrutiny. The Review Panel notes that other stakeholders have welcomed the Statement of Principles. The Review Panel understands that the FWC has established an 'Enterprise Agreements and Bargaining Advisory Group', whose purpose is to provide ongoing feedback to the FWC about the operation of the amendments. The Review Panel recommends the FWC engage further with this group to investigate and advise on the issues (e.g. confusion) associated with the Statement of Principles.

The Review Panel acknowledges there remains some complexity with the interaction between the genuine agreement provisions in the Fair Work Act and the application of the Statement of Principles and consider that this complexity should be addressed. A contributor to the difficulties in this interaction is the retention in the Fair Work Act of the requirements to take all reasonable steps to explain agreement terms and effects rather than deal with this matter in the statement of principles along with other genuine agreement matters. The Panel makes a recommendation in relation to this.

Draft Recommendation 7: The Australian Government amend the Fair Work Act to ensure the statement of principles on genuine agreement is a complete statement of the matters FWC must consider in relation to whether a proposed enterprise agreement has been genuinely agreed. This should include, at least, removing duplication of requirements in s 180(5) and s 188(4A) of the Fair Work Act and the Statement of Principles on Genuine Agreement.

Draft Recommendation 8: The FWC regularly engage with its Enterprise Agreements and Bargaining Advisory Group to review and advise on the operation of the Statement of Principles of Genuine Agreement to ensure it is operating appropriately and effectively.

Chapter 17. Better Off Overall Test

As part of the outcomes from the Jobs and Skills Summit, the Australian Government committed to removing 'unnecessary complexity for workers and employers, including making the Better Off Overall Test (BOOT) simple, flexible and fair'.[613] This chapter therefore focusses on enterprise agreement approval and considers the changes as a result of the commitment to simplify the BOOT.

17.1 Amendments and intent

This section first provides an overview of the amendments made to the application of the BOOT and then the intention of the amendments.

17.1.1 Secure Jobs, Better Pay amendments

Part 16 of Schedule 1 of the Secure Jobs, Better Pay Act made 5 substantive changes to the BOOT.

First, the changes to s 193A of the Fair Work Act confirm that the BOOT is a global assessment. Prior to the Secure Jobs, Better Pay amendments, the BOOT was prescribed in the Fair Work Act as:[614]

> each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee ...

Early on, then Fair Work Australia described the application of the BOOT as follows:[615]

> The BOOT, as the name implies, requires an overall assessment to be made. This requires the identification of terms which are more beneficial for an employee, terms which are less beneficial and an overall assessment of whether an employee would be better off under the agreement.

The new s 193A applies to 'avoid doubt' that in applying the BOOT 'the FWC must undertake *a global assessment* of whether each employee concerned would be better off'.[616] In doing so, the FWC must have regard to the terms that are more and less beneficial to employees than the relevant modern award.[617]

Second, in undertaking the BOOT, the Secure Jobs, Better Pay amendments require that the Fair Work Commission (FWC) must give consideration to any views expressed by the employer, employees and bargaining representatives for the agreement about whether the agreement passes the BOOT.[618] The amendments provide that the FWC must 'give primary consideration to

[613] Jobs and Skills Summit September 2022 – Outcomes, 7.
[614] *Fair Work Act 2009* (Cth) s 193(1) (as at 11 September 2021 – 06 December 2022).
[615] *Re Armacell Australia Pty Ltd* [2010] FWAFB 9985 [41].
[616] *Fair Work Act 2009* (Cth) s 193A(2) (emphasis added).
[617] *Fair Work Act 2009* (Cth) s 193A(2)(a).
[618] *Fair Work Act 2009* (Cth) s 193A(3).

a common view (if any)' of the employer, employer bargaining representatives, or union bargaining representatives of employees about whether the agreement passes the BOOT.[619]

Third, prior to the Secure Jobs, Better Pay amendments, the BOOT required that FWC be satisfied that '*each* prospective award covered' employee is better off overall. As the application of the test developed by the FWC and its predecessor, views emerged that the test was being applied strictly and inflexibly.[620]

The FWC must now be satisfied that each award covered employee, and each 'reasonably foreseeable employee', are better off overall under the proposed agreement rather than the award.[621] In undertaking this assessment, the FWC may only have regard to 'patterns or kinds of work, or types of employment, if they are reasonably foreseeable' at the test time.[622]

Fourth, the Secure Jobs, Better Pay Act also inserted a new provision (s 191A of the Fair Work Act) which enables the FWC to address concerns that the agreement does not pass the BOOT by amending the agreement. If the FWC seeks to amend an agreement, it 'must seek the views of the … employer or employers that are covered by the agreement; award covered employees covered by the agreement; [as well as] a bargaining representative for the agreement'.[623]

These provisions therefore allow the FWC to amend an agreement to address BOOT concerns as opposed to seeking undertakings. The Explanatory Memorandum explains these provisions:[624]

> The FWC would have discretion to work with the parties during the approval process in a constructive manner, to consider specific objections and to amend or excise terms that do not otherwise meet the BOOT. This would limit the use of undertakings which can make it harder for workers and managers to interpret an agreement, lead to future legal disputes if poorly drafted, and cause delays in agreements commencing.

Fifth, in order to ensure the changes to the BOOT do not leave workers worse off, the Secure Jobs, Better Pay Act also introduced provisions to enable an employee, employer or union covered by an agreement to 'apply to the FWC for a reconsideration of whether an enterprise agreement passes the [BOOT]'.[625]

To apply for a reconsideration, certain preconditions must be met (s 227A(2)):[626]

> (a) before approving the agreement the FWC had regard, under subsection 193A(6), to patterns or kinds of work, or types of employment engaged in, or to be engaged in, by:
>
> (i) the award covered employees for the agreement; and

[619] *Fair Work Act 2009* (Cth) s 193A(4).
[620] See e.g. E Hannan, 'Wage Growth Won't Happen without Meaningful Change', *The Australian,* 23 April 2022.
[621] *Fair Work Act 2009* (Cth) s 193(1).
[622] *Fair Work Act 2009* (Cth) s193A(6).
[623] *Fair Work Act 2009* (Cth) s 191A(3).
[624] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, 136–137 [736].
[625] *Fair Work Act 2009* (Cth) s 227A.
[626] *Fair Work Act 2009* (Cth) s 227A(2).

(ii) if the agreement is a single-enterprise agreement that covers one or more employees to whom a supported bargaining agreement or a single interest employer agreement applies – those employees; and

(b) at the test time or a later time, one or more employees covered by subsection (4) or (5) engaged in other patterns or kinds of work, or other types of employment, to which the FWC did not have regard under subsection 193A(6).

If, after having reconsidered the BOOT, the FWC has a concern that the agreement does not pass the BOOT, the FWC may either accept an undertaking or amend the agreement to address its concerns.[627]

These amendments came into effect on 6 June 2023 and apply to agreements made on or after this date.

17.1.2 Intent of Secure Jobs, Better Pay amendments

The Secure Jobs, Better Pay Act changes to the BOOT have arisen out of 'concerns about the complexity of the current process for approving enterprise agreements'.[628] The Australian Government intended to respond to issues with 'the workability of the current framework, and include appropriate safeguards to protect employees'.[629] The Australian Government intended for these amendments to 'limit the use of undertakings which can make it harder for workers and managers to interpret an agreement, lead to future legal disputes if poorly drafted, and cause delays in agreements commencing'.[630]

17.2 Impact and issues

The data used below to assess the effectiveness of the amendments relating to the BOOT fall into three categories: quantitative evidence, mostly provided by the FWC; qualitative evidence based on decisions by the FWC; and stakeholder feedback.

17.2.1 Quantitative evidence

The BOOT amendments have been in effect for approximately 18 months and therefore there is limited available data. The quantitative data from the FWC below relates to three aspects of its application of the BOOT: the timeliness of FWC approvals; the number of approval decisions requiring undertakings; and the number of applications requesting that the FWC reconsider the application of the BOOT.

First, the FWC timeliness data shows that the median time to approve enterprise agreements has remained stable since the commencement of the amended BOOT provisions and has remained consistent since 2021–22.

---

[627] Fair Work Act 2009 (Cth) s 227B(3).
[628] Senate Education and Employment Committee, Parliament of Australia, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions]* (Report, 2022) [1.48] <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/025002/toc_pdf/FairWorkLegislationAmendment(SecureJobs,BetterPay)Bill2022%5bProvisions%5d.pdf;fileType=application%2Fpdf>.
[629] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, 137 [734].
[630] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, 137 [736].

In 2023–24 the FWC continued to approve agreements more efficiently compared to previous years, despites an overall increase in workload to the FWC which is evident from the increase in all application types.[631]

Additionally, applications to the FWC are at a 7-year high and agreement approval applications appear to be returning to close to almost 5,000 a year. This suggests that amendments to the assessment of the BOOT may have had a positive impact on ensuring the FWC maintain low approval timeframes. However, this may be attributed to other factors – for example, the actions taken by FWC in 2018–19 to improve timeliness, such as:

- publishing a guide to assist parties to make compliant agreement applications
- increasing resources allocated to assessing agreement applications
- establishing a user group comprising of the employers and organisations that lodged, or were associated with lodging, a substantial number of agreement applications in 2018.[632]

Another factor to consider is that the data provided by FWC to the Review Panel (28 November 2024) and data from FWC annual reports does not separate 'Agreements approved with undertakings' by the content of the undertakings. Therefore, the Review Panel is unable to differentiate between agreements where undertakings are provided in response to BOOT concerns and those provided to address another concern (e.g. inconsistency with the National Employment Standards (NES)).

However, the Review Panel has been provided data by the FWC which identifies its use of s 191A to make amendments to an agreement where it holds concerns that the agreement does not pass the BOOT. Table 12 shows that agreements requiring undertakings for any reason or s 191A amendments to address BOOT concerns tend to take longer to be approved. The Panel acknowledges that the additional time to approve agreements with undertakings and/or amendments likely reflects the time taken by the FWC to consider views of the parties before accepting undertakings and using its power under s 191A to make amendments.

[631] In 2017–18 the FWC received a total of 31,554 applications and in 2023–24 the FWC received a total of 40,190 applications (FWC annual reports).
[632] Fair Work Commission, *Annual Report 2018–19* (Report, 2019) 70.

Table 12: Agreement approval applications and approval timeliness

		2017–18[633]	2018–19[634]	2019–20[635]	2020–21[636]	2021–22[637]	2022–23[638]	2023–24[639]
Agreement approval applications lodged		5,287	4,932	3,795	3,753	4,516	4,173	4,790
Median days to approval decision	Agreements approved without undertakings	32	30	17	14	12	12	12
	Agreements approved with undertakings	^	^	^	^	22*	22*	23*
	Agreements approved with s 191A amendments	N/A	N/A	N/A	N/A	N/A	N/A	32*
	Agreements approved with s 191A amendments and undertakings	N/A	N/A	N/A	N/A	N/A	31*	20*
	All agreements approved	76	79	33	20	15	17*	16*

* Calculated from data provided by FWC

^ Data not available at the time of publication of the report.

Source: Data provided to the Review by the FWC.

Second, in relation to agreements approved with undertaking and/or amendments, the available data does not show any significant trends. Table 13 shows that the proportion of agreements approved with undertakings has remained stable and there has been limited use of the new provisions under s 191A of the Fair Work Act.

[633] Fair Work Commission, *Annual Report 2017–18* (Report, 2018).
[634] Fair Work Commission, *Annual Report 2018–19* (Report, 2019).
[635] Fair Work Commission, *Annual Report 2019–20* (Report, 2020) 'Access to justice'.
[636] Fair Work Commission, *Annual Report 2020–21* (Report, 2021) 'Access to justice'.
[637] Fair Work Commission, *Annual Report 2021–22* (Report, 2022).
[638] Fair Work Commission, *Annual Report 2022–23* (Report, 2023).
[639] Fair Work Commission, *Annual Report 2023–24* (Report, 2024).

Table 13: Outcomes of enterprise agreement applications, by financial year

Result	2021–22		2022–23		2023–24	
	Count	%	Count	%	Count	%
Approved without undertakings or amendments	2,253	49.9%	1,885	45.2%	2,503	52.3%
Approved with amendments	0	0.0%	0	0.0%	20	0.4%
Approved with undertakings	2,108	46.7%	2,133	51.1%	2,038	42.5%
Approved with undertakings and amendments	0	0.0%	1	0.0%	18	0.4%
Not approved	24	0.5%	13	0.3%	34	0.7%
Other (includes dismissed and withdrawn)	131	2.9%	140	3.4%	177	3.7%
Total	4,516	100.0%	4,172	100.0%	4,790	100.0%

Source: Data provided to the Review by the FWC.

Third, in relation to reconsideration applications, in 2022–23[640] and 2023–24[641] the FWC received 3 applications under s 227A of the Fair Work Act.

Two of the applications were in relation to the same agreement and were dismissed as not meeting the conditions necessary for reconsideration.[642] The other application for reconsideration of the BOOT was withdrawn. The limited use of the reconsideration applications may indicate that the Secure Jobs, Better Pay Act BOOT amendments have not led to any significant reduction in entitlements for workers.

17.2.2 Qualitative evidence

The following decisions outline some examples where the FWC has considered the amended BOOT provisions.

1. On 26 November 2024, in *Qantas Airways Limited T/A Qantas Airways Ltd*,[643] the FWC dealt with the issue of the BOOT in an enterprise agreement variation matter. Deputy President Saunders interpreted the BOOT in the following way:
    a. 'the BOOT is not applied as a line-by-line analysis. It is a global test requiring consideration of advantages and disadvantages to relevant employees. An enterprise agreement may pass the test even if some award benefits have been reduced, as long as overall, those reductions are more than offset by the benefits of the enterprise agreement'[644]
    b. 'It is clear from the references to 'each … employee' in section 193(1) of the Act that *every employee* to whom the enterprise agreement will apply, if approved, must be

[640] Fair Work Commission, *Annual Report 2022–23* (Report, 2023) 64.
[641] Fair Work Commission, *Annual Report 2023–24* (Report, 2024) 63.
[642] *Application by Kinetic (Melbourne) Pty Ltd T/A Kinetic* [2023] FWCA 3966 [2].
[643] *Qantas Airways Limited T/A Qantas Airways Ltd* [2024] FWCA 4143.
[644] *Qantas Airways Limited T/A Qantas Airways Ltd* [2024] FWCA 4143 [19].

better off overall than if the relevant modern award applied to the employee. It is not enough that a majority or most of the employees to whom the enterprise agreement will apply, if approved, will be better off overall than if the relevant modern award applied'[645]

The FWC was satisfied at the 'test time', having regard to 'all the benefits and detriments in the Agreement compared to the relevant awards', that each award covered employee and 'reasonably foreseeable employee' would be better off overall if the varied agreement applied.[646]

2. Examples of what the FWC considers in the BOOT was outlined on 15 March 2024, in *McMahon Services Australia Pty Ltd*,[647] including 'higher wage rates, the increased daily fares, the more generous disability allowance, the redundancy scheme payments, and the provision of some maintenance insurance'.[648]
3. An instance of where the FWC found the BOOT was not met was in *Skilled Workforce Solutions (NSW) Pty Ltd*.[649] The employee's bargaining representative, the Mining and Energy Union (MEU), submitted that the application for approval of a single-enterprise agreement should not be approved because casual employees are not better off overall under the proposed agreement compared against the casual provisions of the Black Coal Mining Industry Award (BCMIA).[650]
   The FWC agreed with the MEU, holding the casual employees would be better off under the BCMIA than the proposed agreement when a 25% causal loading was applied to casual production and engineering employees. Deputy President Slevin held 'an assessment of the benefits that a 25% loading on ordinary rates of pay are inadequate to compensate' the employees in question.[651] As a result, the BOOT was not met and the application was dismissed.

No FWC decisions have considered or applied the substantive BOOT reconsideration provisions.

17.2.3 Stakeholder views

Overall, employers expressed a range of views in relation to the impact of the BOOT amendments. A few employer associations agreed that some amendments have addressed existing issues with the operation of the BOOT, whereas other attempts to address issues have not resulted in a noticeable change.

Some employer groups, such as Australian Retailers Association (ARA) and the Australian Chamber of Commerce and Industry (ACCI), provided positive feedback about some of the BOOT amendments.

ARA submitted that 'early feedback from retailers suggests that the changes are beneficial and take into consideration the value of the proposed workplace terms and conditions holistically'.[652]

---

[645] *Qantas Airways Limited T/A Qantas Airways Ltd* [2024] FWCA 4143 [21].
[646] *Qantas Airways Limited T/A Qantas Airways Ltd* [2024] FWCA 4143 [33].
[647] *McMahon Services Australia Pty Ltd* [2024] FWCA 934.
[648] *McMahon Services Australia Pty Ltd* [2024] FWCA 934 [120].
[649] *Skilled Workforce Solutions (NSW) Pty Ltd* [2024] FWC 2625.
[650] *Skilled Workforce Solutions (NSW) Pty Ltd* [2024] FWC 2625 [15].
[651] *Skilled Workforce Solutions (NSW) Pty Ltd* [2024] FWC 2625 [72].
[652] ARA submission, 7.

ACCI submitted that the change in focus to reasonably foreseeable patterns of work or types of employment had 'been immensely helpful in progressing the approval of enterprise agreements.'[653]

In contrast, the predominant employer view (including from ACCI, Ai Group,[654] the Council of Small Business Organisations Australia (COSBOA),[655] Clubs Australia[656] and the Chamber of Commerce and Industry of Western Australia (CCIWA)[657]) was that the BOOT is not being assessed globally and instead continues to be assessed line by line.

Ai Group, for example, submitted that the:[658]

> BOOT is still too often being applied by the FWC in a largely mathematical or with far too narrow a focus on a particular clause, rather than the relevant FWC Member reaching a more practical view on whether or not the proposed enterprise agreement results in the employees being better off overall in a genuinely holistic sense.

The CCIWA raised a concern about consistency in the approach taken by different members of the FWC, arguing the approach varies 'even when the agreements may be similar'.[659]

While the ARA and ACCI have expressed positive sentiments for some of the BOOT changes, they are cautious, with ARA noting 'it is unknown as of yet, whether there are any further praises or concerns relative to this particular legislative amendment'.[660]

Employer groups also submitted that there appeared to be no change to how often employers were requested to provide undertakings.

Ai Group, for example, submitted that employers often have to provide undertakings related to BOOT issues even in relation to agreements that are very similar to previous agreements for the same group of employees.[661] The Australian Resources & Energy Employer Association (AREEA) expressed similar views and, while they hoped for 'agreements approved without undertakings and faster approvals overall', their 'members are reporting little practical change as a result of these amendments'.[662] Clubs Australia expressed similar views.[663]

Similarly, ACCI expected 'that the FWC would require fewer undertakings from employers, however, feedback from members indicates that undertakings are still being sought by the FWC as frequently as they were being sought prior to the amendments.'[664]

The Pharmacy Guild's submission expressed concerns about the power for the FWC to amend the agreement to allow it to pass the BOOT. They stated that 'any alteration power beyond [the

[653] ACCI submission, 23 [56].
[654] Ai Group submission, 17 [77].
[655] COSBOA submission, 6.
[656] Clubs Australia submission, 2.
[657] CCIWA submission, 10.
[658] Ai Group submission, 17 [77].
[659] CCIWA submission, 11.
[660] ARA submission, 7.
[661] Ai Group submission, 18 [78].
[662] AREEA submission, 17 [118].
[663] Clubs Australia submission, 2
[664] ACCI submission, 23 [55].

power to correct errors] is of serious concern. The open nature of this portion of the Act affords the Commission unnecessary power to rewrite sections of an agreement'.[665]

Employer groups also expressed negative views around the amendments that provide for reconsideration of the BOOT. Ai Group,[666] CCIWA[667] and COSBOA[668] all expressed that this amendment creates uncertainty for businesses.

While expressing overall positive views about the BOOT changes, the submissions from unions focused mostly on the reconsideration provisions.

The United Workers Union (UWU) and the Australian Council of Trade Unions (ACTU) both expressed that the inclusion of the ability to reconsider agreements was positive. However, both organisations called for further amendments.

UWU noted that the reconsideration power had not yet been used and submitted that the power 'should be broadened to allow for an agreement to be reassessed where a variation to the award (whether to wages or to other provisions) has resulted in employees now likely being worse off overall when compared to the award'.[669]

ACTU submitted that the reconsideration amendments are constructed in a way that creates a 'limitation in who may apply for reconsideration of whether an agreement continues to pass the BOOT brought about by use of the phrase "an employee organisation covered by the agreement"'.[670] ACTU seek to have this amended so that it is clear that, where an employee is covered by an agreement, their union can make a reconsideration application regardless of whether the agreement explicitly covers them.

17.3 Findings and recommendations

There is little evidence before the Review Panel to indicate that the amendments in relation to the BOOT have significantly reduced complexity or substantially changed the way the FWC assesses the BOOT. However, it is clear that the FWC has significantly improved agreement approval timeliness since 2017–18 and have maintained consistent timeliness performance since 2021–22. The delays in approving agreements seem to have been somewhat overstated.

There do not appear to have been any negative impacts as a result of the BOOT amendments, as enterprise agreements approval timeliness has remained consistent over the 3 years, despite an overall increase in the FWC's workload in 2023–24.

Additionally, there was a notable decrease in the use of undertakings between the 2022–23 financial year and the 2023–24 financial year. However, as Ai Group noted in their submission, many agreements require undertakings for reasons other than not passing the BOOT (such as inconsistencies with the NES).[671] It is difficult, therefore, to draw a causal link between the BOOT amendments and the reduction in the use of undertakings. However, it is reasonable to conclude that at least some of the reduction is a result of the amendments.

[665] Pharmacy Guild submission, 4.
[666] Ai Group submission, 23 [105].
[667] CCIWA submission, 11.
[668] COSBOA submission, 6.
[669] UWU submission, 29.
[670] ACTU submission, 82.
[671] Ai Group submission, 18 [80].

The data further shows limited use by the FWC of its power to amend an agreement to address BOOT concerns under s 191A of the Fair Work Act, representing just 0.8% of agreement approval applications in the 2023–24 financial year.

The Review Panel acknowledges that employers are likely to continue to see variation in the approaches taken by FWC members in assessing the BOOT and requesting undertakings. While sympathetic to the need to adjust to different approaches, the Review Panel acknowledges that FWC members are independent statutory office holders and make decisions and exercise discretion within the parameters of the Fair Work Act. Based on the examples available, FWC decision-making appears to align with the Australian Government's broader intent, noting that employer representatives have expressed concerns that agreements are not being 'globally assessed'.

In relation to the reconsideration of the BOOT provisions, early signs indicate that these provisions are difficult to use, as the lack of success in making these applications may suggest there may be a lack of understanding about their application. However, the Review Panel acknowledges that the FWC has not considered these provisions in detail and therefore it is too early to conclude whether these amendments are operating appropriately and effectively. A similar conclusion can be made about the Pharmacy Guild's concerns about amending agreements, as so far only a small number of agreements have been approved with amendments.

The Review Panel finds that based on the evidence available, the amendments relating to the BOOT have been neither effective nor ineffective at improving simplicity of the BOOT assessment.

The Review Panel finds that the BOOT amendments have not led to any unintended consequences. There is no evidence before the Review Panel of any delays in the approval of agreements and the data shows the FWC remained consistent in its timeliness performance.

The Review Panel makes no recommendations at this time.

Chapter 18. Dealing with errors in enterprise agreements

Part 17 of Schedule 1 of the Secure Jobs, Better Pay Act established a new power for the Fair Work Commission (FWC) to vary enterprise agreement to correct or amend errors, defects or irregularities and other administrative errors with draft agreements during the approval process. These expanded powers address a regulatory gap arising from the FWC's previously limited ability to correct errors and mistakes in enterprise agreements. These new powers have been received positively by stakeholders and do not appear to have created any issues.

18.1 Amendments and intent

These amendments were intended to simplify the process for correcting errors in enterprise agreements. Prior to the commencement of the Secure Jobs, Better Pay Act there was a regulatory gap to address obvious errors, defects and irregularities in enterprise agreements and to efficiently deal with the situation where the incorrect version of an agreement or variation was submitted and subsequently approved by the FWC.[672]

18.1.1 Secure Jobs, Better Pay amendments

Prior to the Secure Jobs, Better Pay Act, a practical issue had arisen in circumstances where proposed enterprise agreements, voted on and approved by employees, contained typographical or other errors (like missing paragraph numbers) or where incorrect versions of proposed enterprise agreements were submitted, and subsequently approved by, the FWC. Following a number of decisions by the FWC,[673] a gap in the FWC's powers to assist in either of these scenarios emerged. While there were solutions available, they were limited and often onerous on participants (and the FWC).

The amendments introduced s 218A of the Fair Work Act, which empowers the FWC to 'vary an enterprise agreement to correct or amend an obvious error, defect or irregularity (whether in substance or form)'.[674] Under s 218A(2), the FWC can use this power on its own initiative or on application by a party covered by the agreement.[675]

In addition, where an incorrect draft agreement or draft variation was provided to the FWC, and subsequently approved, under ss 602A and 602B, the FWC now has the power to validate the approval or variation and publish the correct version of the agreement, as if the error had not occurred.[676]

These amendments came into effect on 7 December 2022.[677]

18.1.2 Intent of Secure Jobs, Better Pay amendments

The Australian Government's intention was to address a regulatory gap and provide a practical and efficient process for remedying obvious errors in agreements. In the Explanatory Memorandum to the Secure Jobs, Better Pay Bill, the Australian Government asserted that this amendment 'implements one of the outcomes of the Jobs and Skills Summit in relation to

---

[672] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [776]. See also e.g. *Advantage Care Pty Ltd v Health Services Union* [2021] FWCFB 453.
[673] See e.g. *Yarra Valley Water Corporation v Australian Municipal, Administrative, Clerical and Services Union (052V) & Moon, Jacquie and Others* [2021] FWCFB 6006.
[674] *Fair Work Act 2009* (Cth) s 218A(1).
[675] *Fair Work Act 2009* (Cth) s 218A(2).
[676] *Fair Work Act 2009* (Cth) ss 602A, 602B.
[677] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) s 2.

boosting job security and wages, and creating safe, fair and productive workplaces (i.e. removing unnecessary complexity for workers and employers)'.[678]

18.2 Impact and issues

The data on the impact of the amendments comes in three forms: numbers from the FWC of applications for varied agreements; qualitative data from decisions of the FWC; and stakeholder feedback. All suggest that since the commencement of the reforms there have been less applications to vary enterprise agreements.

18.2.1 Quantitative evidence

Data from the FWC (presented in Table 14) shows that there has been a decline in agreement variation applications under ss 210 and 217 of the Fair Work Act for the past 2 years, being the years since commencement of the reforms. At the same time, the data demonstrates that since the Secure Jobs, Better Pay Act provisions commenced there has been a large number of applications made under s 218A to correct or amend obvious errors, defects or irregularities.

While it is likely that there are numerous factors impacting on the use of applications to vary agreements under s 210 or s 217 of the Fair Work Act, the decline may be attributed to the FWC's ability to now correct errors on its own initiative (under new s 218A) without parties needing to apply to the FWC.

Table 14: Agreement variation applications 2019–20 to 2023–24

Type of application	2019–20 [679]	2020–21 [680]	2021–22 [681]	2022–23 [682]	2023–24 [683]	5-year average
s 210 – Application for approval of a variation of an enterprise agreement	201	364	149	81	61	171.2
s 217 – Application to vary an agreement to remove an ambiguity or uncertainty	24	32	33	22	18	25.8
s 218A – Application to vary an agreement to correct or amend errors, defects or irregularities	N/A	N/A	N/A	29	83	N/A
Total variation applications	225	396	182	132	162	219.4

Note: The data in Table 14 does not capture all instances of FWC's use of s 218A, as some applications arise in the course of agreement approval applications.

Source: FWC annual reports, various.

[678] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, 141 [773].
[679] Fair Work Commission, *Annual Report 2019–20* (Report, 2020) 'Access to justice' 62.
[680] Fair Work Commission, *Annual Report 2020–21* (Report, 2021) 'Access to justice' 58.
[681] Fair Work Commission, *Annual Report 2021–22* (Report, 2022) 57.
[682] Fair Work Commission, *Annual Report 2022–23* (Report, 2023) 64.
[683] Fair Work Commission, *Annual Report 2023–24* (Report, 2024) 63.

In the 2022–23 financial year, the FWC recorded no applications to validate an agreement approval or agreement variation.[684] In the following 2023–24 financial year, the FWC reported only 4 applications to validate the approval of an enterprise agreement,[685] while no applications to validate the variation of an agreement have been made.

18.2.2 Qualitative evidence

FWC decisions following the commencement of s 218A of the Fair Work Act demonstrate that this power has been used to address a range of errors. The following decisions, which are examples only, demonstrate that the power to correct obvious errors appears to be making it simpler to fix minor errors in agreements.

Doctors in Training (Victorian Public Health Sector) (AMA Victoria/ASMOF (Single Interest Employers) Enterprise Agreement 2022–2026 (13 December 2022)

The Victorian Hospitals' Industrial Association applied to correct an error where a clause setting out how annual leave entitlements are to be calculated was inadvertently left out.[686] The FWC was satisfied that this was an error of substance and varied the agreement.[687] Whilst not a prerequisite for the FWC to exercise its discretion, the FWC noted that the error significantly disadvantaged employees.[688]

Queensland Police-Citizens Youth Welfare Association T/A PCYC Queensland – Re QPCYWA Enterprise Agreement 2024 (2 September 2024)

The employer applied to vary the agreement to correct an error relating to the number of hours for minimum engagement of part-time employees specified in the undertaking. The agreement accidentally referred to 3 hours instead of 2 hours.[689] The FWC corrected the error.[690]

Olex Australia Pty Ltd T/A Nexans Australia – Re Nexans Australia – Geebung Warehouse Employees Enterprise Agreement 2024 (22 August 2024)

The FWC initiated a matter to vary the agreement and correct an error relating to the identification of the wage schedule which erroneously failed to indicate pay frequency.[691]

Commonwealth of Australia as represented by the Department of Parliamentary Services (6 May 2024)

The employer initiated an application to rectify an administrative error on the part of the employer. When filing the application for approval of the agreement, the employer lodged a draft agreement instead of the final version that the employees voted on. The FWC corrected this error by approving the final version of the agreement, taken to be 'valid and effective' as if it

[684] Fair Work Commission, *Annual Report 2022–23* (Report, 2023) 66.
[685] Fair Work Commission, *Annual Report 2023–24* (Report, 2024) 65.
[686] [2022] FWCA 4390 [7] [11].
[687] [2022] FWCA 4390 [13].
[688] [2022] FWCA 4390 [13].
[689] [2024] FWCA 3149 [12]–[13].
[690] [2024] FWCA 3149 [20].
[691] [2024] FWCA 3069 [12].

had been lodged at first instance.[692] The operation of s 602A meant that the employer was not required to file another application for the approval of the correct agreement.[693]

18.2.3 Stakeholder views

Submissions from stakeholders were broadly very positive about these amendments, with almost all comments, from both unions and employer groups, welcoming the changes.

The Australian Council of Trade Unions submitted that the previous gap in FWC's powers has been 'remedied, via the insertion of the clear power for the FWC to correct mistakes in an enterprise agreement after it has been approved, or to substitute the correct version of an agreement where application to approve an agreement (or variation) is made using an incorrect draft of the agreement'.[694]

Similarly, the Community and Public Sector Union (noted that the provisions were relied on by a number of Australian Public Service (APS) agencies, resulting in the correction of significant typographical errors in the recent APS bargaining round.[695]

The Australian Resources & Energy Employer Association welcomed the continuation of providing greater discretion to the FWC to correct procedural errors in agreement making where the errors are deemed to have no material impact on the bargained outcomes.[696]

The Australian Chamber of Commerce and Industry submitted that the amendments have been effective in 'enhancing the flexibility and simplicity of the framework around enterprise agreements, while still balancing fairness by giving effect to the intent of the negotiating parties'.[697] It also made a recommendation that the FWC 'seek to monitor the use of these provisions and provide educational materials on common errors that may reduce the frequency these provisions are utilised'.[698]

Ai Group submitted that s 218A is operating effectively and no amendments are required.[699]

18.3 Findings and recommendations

Based on the evidence and stakeholder feedback, the Review Panel is satisfied the amendments relating to dealing with errors in enterprise agreements have provided a simple way for the FWC to correct obvious errors in enterprise agreements. The Review Panel finds that the amendments are operating appropriately and effectively.

While there is limited data available to assess their impacts, there is no evidence before the Review Panel which suggests there are any unintended consequences so far.

The Review Panel considers that no further amendments are required to these provisions and makes no recommendations at this time.

---

[692] [2024] FWCA 1616 [12]–[15].
[693] [2024] FWCA 1616 [15].
[694] ACTU submission, 83.
[695] CPSU submission, [49], 9.
[696] AREEA submission, [112], 16.
[697] ACCI submission, [61], 25.
[698] ACCI submission, 26.
[699] Ai Group submission, [110] 24.

Chapter 19. Varying enterprise agreements to remove employers and their employees

Part 22 of Schedule 1 to the Secure Jobs, Better Pay Act enables the FWC vary multi-employer agreements to remove employers and their employees with effect from 6 June 2023.[700] These provisions received little attention from stakeholders during consultations, with little evidence available as to their current operation.

19.1 Amendments and intent

These amendments were intended to assist in the functioning of the new multi-employer bargaining streams by providing a process for some parties to leave agreements established under these streams.

Before the Secure Jobs, Better Pay Act came into operation, there were limited pathways for an employer and a group of employees to vary a multi-employer agreement so it no longer covered them. Generally, these processes required the approval of all employers and a majority of employees covered by the multi-employer agreement, not just those that are seeking to no longer be covered by it.[701]

19.1.1 Secure Jobs, Better Pay amendments

These amendments only apply to multi-employer agreements made after commencement of the provisions (i.e. after 6 June 2023).

Employers may request employees approve a proposed variation by vote.[702] A variation to an enterprise agreement 'is made when a majority of the affected employees who cast a valid vote approve the variation'.[703]

Employers and employees may 'jointly make [an application for] variation of a multi-enterprise agreement' to remove them from the agreement's coverage.[704] The FWC must approve the variation if it is satisfied that the employer took 'all reasonable steps to notify the employees of … the time and place at which the vote will occur; the voting method that will be used; and [gave] the employees a reasonable opportunity to decide whether they want to approve the proposed variation'.[705]

When approving a variation to remove an employer and employees, the FWC must also be satisfied that:[706]

> (a) the employer mentioned in paragraph 216E(1)(a) complied with subsection 216E(5) (which deals with giving employees a reasonable opportunity to decide etc.) in relation to the variation; and

[700] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), Outline, ii.
[701] *Fair Work Act 2009* (Cth) ss 207–209 (as at 11 September 2021 – 06 December 2022).
[702] *Fair Work Act 2009* (Cth) s 216E(4).
[703] *Fair Work Act 2009* (Cth) s 216E(7).
[704] *Fair Work Act 2009* (Cth) s 216E(1).
[705] *Fair Work Act 2009* (Cth) ss 216E(5), 216EB(a).
[706] *Fair Work Act 2009* (Cth) s 216EB.

(b) the affected employees have voted, by ballot or by an electronic method, on whether to approve the variation and, of those who cast a valid vote, a majority approved the variation; and

(c) there are no other reasonable grounds for believing that a majority of the affected employees who cast a valid vote did not approve the variation; and

(d) each employee organisation covered by the agreement, that is entitled to represent the industrial interests of one or more affected employees, agrees to the variation.

19.1.2 Intent of Secure Jobs, Better Pay amendments

The Australian Government states that it intends for these amendments to empower the FWC 'to vary multi-enterprise agreements to remove an employer and affected employees from coverage'[707] with voting requirement and employee organisation agreement requirements to act as safeguards 'to ensure affected employees are sufficiently protected'.[708]

19.2 Impact and issues

The FWC is yet to deal with any applications to remove employers and their employees from a multi-employer agreement. Therefore, it is too early to assess the operation of the amendments.

19.2.1 Quantitative evidence

The Review Panel is not aware of any significant quantitative evidence in relation to these amendments.

19.2.2 Qualitative evidence

The Review Panel is not aware of any significant qualitative evidence in relation to these amendments.

19.2.3 Stakeholder views

Ai Group submitted that the requirement that any union covered by the agreement to approve the variation is 'highly inappropriate and should be removed'.[709] Ai Group proposed that this requirement be replaced with an alternative safeguard that would require the FWC to consider whether there are 'serious public interest grounds for not approving the variation'.[710]

In contrast, the Australian Council of Trade Unions (ACTU) stated that the 'provisions provide for a consensual and democratic pathway for an employer (and its employees who are covered by a multi enterprise agreement) to exit a multi-employer agreement'.[711] It argued that union approval ensures that employers properly inform employees and that 'the unions that are

[707] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [113] xxiii (update to revised Explanatory Memorandum).
[708] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [114] xxiii. (update to revised Explanatory Memorandum).
[709] Ai Group submission, 71 [287].
[710] Ai Group submission, 72 [288].
[711] ACTU submission, 99.

covered by the agreement would not provide the necessary consent if the employees were misled in this regard'.[712]

Master Builders Australia did not provide any commentary on Part 22 of Schedule 1 to the Secure Jobs, Better Pay Act but, as noted in previous chapters, recommended 'that the amendments at Parts 12-23A [of the Secure Jobs, Better Pay Act] … [s]hould be repealed in their entirety'.[713]

19.3 Findings and recommendations

As these provisions are yet to be used, the Review Panel cannot make any conclusions as to the use or effectiveness of these amendments.

The Review Panel acknowledges the concern about the requirement for unions covered by an agreement to support the variation and notes the ACTU's view that this provides a safeguard against employees being misled. However, there is no evidence to indicate whether the concern has impacted on the ability to vary coverage of a multi-employer agreement under these provisions, as they have not yet been tested.

The Review Panel makes no recommendations at this time.

[712] ACTU submission, 99.
[713] MBA submission, [98].

Chapter 20. Termination of agreements

Part 12 of Schedule 1 to the Secure Jobs, Better Pay Act amended the Fair Work Act to alter the circumstances in which an enterprise agreement may be terminated. In the past, during the bargaining process, employers have sometimes threatened to unilaterally apply to terminate existing enterprise agreements. This tactic would return wages and conditions to those contained in awards. It therefore threatened to force workers to accept less favourable conditions in a new agreement rather than risk having no enterprise agreement in place.

To address this, the Secure Jobs, Better Pay Act amended the process for terminating an enterprise agreement after its nominal expiry date.

20.1 Amendments and intent

Prior to the Secure Jobs, Better Pay Act, if an enterprise agreement had passed its nominal expiry date, any party to an enterprise agreement could apply to the Fair Work Commission (FWC) to have it terminated.[714] Under the former s 226 of the Fair Work Act, the FWC was required to consider:

- whether terminating the agreement would be 'contrary to the public interest'[715]
- 'the views of the employees, each employer, and each employee organisation (if any) covered by the agreement'
- 'the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them'.[716]

Upon these conditions being met, the FWC was required to terminate the agreement.

The Full Bench of the FWC in *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd t/a AGL Loy Yang* (2 March 2017)[717] (Appeal Decision) considered an appeal against an earlier decision of the FWC in *AGL Loy Yang Pty Ltd T/A AGL Loy Yang* (12 January 2017)[718] (Originating Decision) to terminate the relevant enterprise agreement.

Deputy President Clancy, in the Originating Decision, interpreted the requirements under the previous iteration of s 226 of the Fair Work Act in the following way:[719]

> the Act does not contemplate agreements operating in perpetuity … having regard to s.226 of the Act, I must terminate the Agreement if I am satisfied that it is not contrary to the public interest to do so and consider it appropriate to do taking into account all the circumstances, including the views of the employees, AGL Loy Yang, the CFMEU and the other Unions and their circumstances, including the likely effect the termination will have on each of them.

[714] *Fair Work Act 2009* (Cth) s 225 (as at 11 September 2021 – 06 December 2022).
[715] *Fair Work Act 2009* (Cth) s 226(a) (as at 11 September 2021 – 06 December 2022).
[716] *Fair Work Act 2009* (Cth) s 226(b)(ii) (as at 11 September 2021 – 06 December 2022).
[717] *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd t/a AGL Loy Yang* [2017] FWCFB 1019.
[718] *AGL Loy Yang Pty Ltd T/A AGL Loy Yang* [2017] FWCA 226.
[719] *AGL Loy Yang Pty Ltd T/A AGL Loy Yang* [2017] FWCA 226 [74]–[75].

The FWC, in the Originating Decision, found it was not against the public interest to terminate the enterprise agreement for the following reasons:[720]

1. While acknowledging that bargaining positions would be altered by the termination of the agreement, bargaining would still be available to the parties and the ability to take protected industrial action.
2. The termination would not negatively affect the location.
3. The loss of various industrial standards in the location did not 'make termination contrary to the public interest'.
4. There was not enough evidence that safety standards would be reduced by the termination.

The Full Bench of the FWC, in the Appeal Decision, rejected 7 of the 9 grounds of appeal by the CFMEU, ultimately holding that, while the appeal was upheld on 2 grounds, the termination of the agreement by AGL Loy Yang was valid.[721]

20.1.1 Secure Jobs, Better Pay amendments

The Secure Jobs, Better Pay Act amended s 226 of the Fair Work Act to change the circumstances in which a single party could seek to terminate an agreement after it has passed its nominal expiry date and provided safeguards to preserve employee conditions.

The amendments changed the test from a focus on consideration of the 'public interest' to consideration of 'fairness' towards the employees covered by the agreement.
Section 226(1)–(1A) of the Fair Work Act provides:

> (1) If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:
>
> (a) the FWC is satisfied that the continued operation of the agreement would be unfair for the employees covered by the agreement; or
>
> (b) the FWC is satisfied that the agreement does not, and is not likely to, cover any employees; or
>
> (c) all of the following apply:
>
> (i) the FWC is satisfied that the continued operation of the enterprise agreement would pose a significant threat to the viability of a business carried on by the employer, or employers, covered by the agreement;
>
> (ii) the FWC is satisfied that the termination of the enterprise agreement would be likely to reduce the potential of terminations of employment covered by subsection (2) for the employees covered by the agreement;

[720] *AGL Loy Yang Pty Ltd T/A AGL Loy Yang* [2017] FWCA 226 [103]–[114].
[721] *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd t/a AGL Loy Yang* [2017] FWCFB 1019 [43].

> (iii) if the agreement contains terms providing entitlements relating to the termination of employees' employment—each employer covered by the agreement has given the FWC a guarantee of termination entitlements in relation to the termination of the agreement.
>
> (1A) However, the FWC must terminate the enterprise agreement under subsection (1) only if the FWC is satisfied that it is appropriate in all the circumstances to do so.

Section 226 of the Fair Work Act retains the requirement for FWC to consider the views of all parties to the agreement.[722] However, the Secure Jobs, Better Pay Act added a requirement in s 226(4) of the Fair Work Act for the FWC to consider the impact that terminating an agreement would have on bargaining as follows:[723]

> (4) In deciding whether to terminate the agreement (the existing agreement), the FWC must have regard to:
>
> (a) whether the application was made at or after the notification time for a proposed enterprise agreement that will cover the same, or substantially the same, group of employees as the existing agreement; and
>
> (b) whether bargaining for the proposed enterprise agreement is occurring; and
>
> (c) whether the termination of the existing agreement would adversely affect the bargaining position of the employees that will be covered by the proposed enterprise agreement.

Additionally, the Secure Jobs, Better Pay Act inserted provisions that provide that, where one party opposes the application, the decision must be allocated to the Full Bench of the FWC to determine whether to terminate the agreement.[724]

These amendments came into effect on 7 December 2022.

20.1.2 Intent of Secure Jobs, Better Pay amendments

In the Explanatory Memorandum to the Secure Jobs, Better Pay Bill, the Australian Government asserted that amendments to the process to terminate enterprise agreements were intended to 'stop the practice of employers applying unilaterally to the FWC for termination of a nominally expired enterprise agreement, where termination would result in reducing employees' entitlements other than in prescribed circumstances. That includes situations where the threat of termination may disrupt bargaining for a new enterprise agreement'.[725]

---

[722] *Fair Work Act 2009* (Cth) s 226(3).
[723] *Fair Work Act 2009* (Cth) s 226(4).
[724] *Fair Work Act 2009* (Cth) s 615A(3).
[725] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [634].

20.2 Impact and issues

The data relevant to the impact of the amendments comes in three forms: quantitative data from the FWC, qualitative evidence based on decisions by the FWC; and stakeholder feedback.

20.2.1 Quantitative evidence

Two types of quantitative data were provided by the FWC to the Review (28 November 2024).

The first (summarised in Table 15) indicates that there has been a decline in applications to terminate agreements after their nominal expiry dates. However, this appears to be part of a consistent decline in these applications over the past 5 years.

The data does not differentiate between applications to terminate that relate to bargaining and those that are more straightforward (e.g. to terminate an agreement that no longer covers any employees).

Therefore, it is not clear that the decline in the number of termination applications can be attributed to the Secure Jobs, Better Pay amendments.

Table 15: Number of applications to terminate an agreement after nominal expiry date

Type of application	2019–20[726]	2020–21[727]	2021–22[728]	2022–23[729]	2023–24[730]
s 225 – Application for termination of an enterprise agreement after its nominal expiry date	323	270	236	195	136

Source: Data provided to the Review by the FWC.

Second, the FWC has considered a number of applications to terminate an enterprise agreement after their nominal expiry date under the new provisions.

Since 7 December 2022, the FWC has issued 7 Full Bench decisions relating to contested applications to terminate an enterprise agreement after its nominal expiry date (as at 17 January 2025). Of these 7 decisions, 2 related to applications made by an employer.

[726] Fair Work Commission, *Annual Report 2019–20* (Report, 2020) 62.
[727] Fair Work Commission, *Annual Report 2020–21* (Report, 2021) 'Access to justice' 58.
[728] Fair Work Commission, *Annual Report 2021–22* (Report, 2022) p.57.
[729] Fair Work Commission, *Annual Report 2022–23* (Report, 2023) 64.
[730] Fair Work Commission, *Annual Report 2023–24* (Report, 2024) 63.

Table 16: Contested applications to terminate an enterprise agreement after its nominal expiry date (from commencement of Secure Jobs, Better Pay Act changes on 7 December 2022)

Matter title	Decision issued	Outcome
Application by Employee X [2023] FWCFB 155	6 September 2023	Agreement terminated
Application by Patrick Flynn [2023] FWCFB 178	11 October 2023	Agreement terminated
Application by Milla Olivia Banks [2023] FWCA 4141	7 December 2023	Agreement terminated
Application by Forest Coach Lines Pty Ltd [2023] FWCA 4472	22 December 2023	Agreement terminated
Application by Mr Paul Hensman [2024] FWCFB 32	1 February 2024	Agreement terminated
Application by Laria Barnett [2024] FWCFB 132	13 March 2024	Agreement terminated
Application by BDS Support Services t/as Broadmeadows Disability Services [2024] FWCFB 404	22 October 2024	Agreement not terminated, application dismissed

Source: Table prepared using data from FWC website.

20.2.2 Qualitative evidence

As indicated above, there have been two contested applications to terminate an agreement after its nominal expiry date made by an employer since the commencement of the Secure Jobs, Better Pay Act changes on 7 December 2022. The FWC's decisions in these decisions provide useful data.

First, in *Forest Coach Lines Pty Ltd*[731] (22 December 2023), the employer sought to terminate the agreement on grounds that it does not cover any employees.[732] The Transport Workers' Union (TWU) initially opposed the termination of the agreement. However, on further consideration, it 'formed the view that the Agreement does not cover any employees' and withdrew its opposition.[733]

Second, in *BDS Support Services T/A Broadmeadows Disability* Services[734] (22 October 2024), the employer sought to terminate the enterprise agreement on the basis that its continued operation posed a significant threat to the viability of their business.[735] The Full Bench of the FWC examined the evidence adduced in support of the application and considered that the Australian Government's intention to prevent agreements being terminated as a 'bargaining tactic' as relevant in the matter. Ultimately, the Full Bench was not satisfied the agreement

[731] *Application by Forest Coach Lines Pty Ltd* [2023] FWCA 4472.
[732] *Application by Forest Coach Lines Pty Ltd* [2023] FWCA 4472 [31].
[733] *Application by Forest Coach Lines Pty Ltd* [2023] FWCA 4472 [8].
[734] *BDS Support Services T/A Broadmeadows Disability* Services [2024] FWCFB 404.
[735] *BDS Support Services T/A Broadmeadows Disability* Services [2024] FWCFB 404 [7].

posed a threat to the viability of the business and that termination would be likely to reduce the potential of terminations of employment and dismissed the application to terminate.[736]

The above decisions demonstrate that, under the new termination provisions, employers have not successfully utilised the provisions to negatively impact employees' rates of pay and terms and conditions of employment.

20.2.3 Stakeholder views

Stakeholder views were largely split between unions and employer groups. Employers expressed a desire to make it easier to terminate agreements and raised concerns about the impact the Secure Jobs, Better Pay Act provisions have on their bargaining position. In contrast, unions were supportive of the amendments.

Ai Group and the Business Council of Australia[737] both raised concerns that, combined with the intractable bargaining declarations, employers would be unable to remove 'the generosity and restrictions of any existing enterprise agreement term'.[738] The Australian Retailers Association also raised similar concerns about the interaction with intractable bargaining determinations.[739] A similar sentiment was shared by Maritime Industry Australia and Master Builders Australia,[740] which both raised concerns about exercising caution in what they agree to in an enterprise agreement. Maritime Industry Australia submitted that employers will need 'to consider the likely operating environment over the course of multiple EA terms, as historically once a condition is agreed in any future negotiations are based on a position that a term must be "bought" out, regardless of the operating environment'.[741] Clubs Australia argued that these amendments are making it 'more challenging to negotiate new agreements … resulting in less flexible outcomes for clubs and employees'.[742] The Australian Resources & Energy Employer Association expressed similar sentiments.[743]

The Australian Chamber of Commerce and Industry recommended balancing the current amendment by taking into consideration the bargaining position of employers when considering termination of the agreement.[744] Ai Group made a similar recommendation and submitted that the consideration about unfairness to employees should also be extended to employers.[745]

Unions expressed broadly positive views on the amendments. The Australian Workers' Union, Mining and Energy Union, United Workers Union, Community and Public Sector Union and Australian Council of Trade Unions (ACTU) all noted that the amendments effectively remove opportunities for employers to use termination of an agreement or the threat thereof during bargaining. The ACTU argued the 'amendments were necessary in order to remove incentives and opportunities for employers to walk away from the deals they had made with their workforce and unions'.[746]

---

[736] [2024] FWCFB 404 [40], [41].
[737] BCA submission, p.14.
[738] Ai Group submission, 7 [25].
[739] ARA submission, 10.
[740] MBA submission, 18.
[741] Maritime Industry Australia submission, 11 [6.3].
[742] Clubs Australia submission, 3.
[743] AREEA submission, 15.
[744] ACCI submission, 10.
[745] Ai Group submission, 8 [25].
[746] ACTU submission, 71.

20.3 Findings and recommendations

The Review Panel does not agree that the threat of termination of enterprise agreements is a legitimate bargaining tactic.

The Review Panel finds that early evidence shows that these amendments have effectively discouraged the bargaining tactic of terminating agreements or threatening to do so, as intended by the Australian Government.

Consequently, the Review Panel therefore finds that the provisions relating to the termination of enterprise agreements after their nominal expiry date are operating appropriately and effectively.

While employer groups have expressed concerns about the impact the Secure Jobs, Better Pay amendments have had on their bargaining position, this bargaining tactic is not the appropriate solution. The Review Panel is of the view that the Fair Work Act continues to allow employers to terminate agreements for genuine reasons.

The Review Panel makes no recommendations at this time.

Chapter 21. Sunsetting of 'zombie' agreements

Part 13 of Schedule 1 to the Secure Jobs, Better Pay Act amended the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Fair Work Transitional Act) to sunset (terminate) all remaining transitional instruments preserved by that Act. These instruments were commonly referred to as 'zombie' agreements.

21.1 Amendments and intent

The Secure Jobs, Better Pay Act amended the Fair Work Transitional Act to automatically sunset zombie agreements at the end of 6 December 2023 following a default period of 12 months, unless the Fair Work Commission (FWC) extended the default period for an agreement.

21.1.1 Secure Jobs, Better Pay amendments

Part 13 of Schedule 1 of the Secure Jobs, Better Pay Act amended the Fair Work Transitional Act to automatically sunset all remaining transitional instruments preserved by that Act:

- agreement-based transitional instruments under Schedule 3
- Division 2B state employment agreements under Schedule 3A
- enterprise agreements made during the bridging period (from 1 July 2009 to 31 December 2009) under Schedule 7 to the Fair Work Transitional Act.

The Secure Jobs, Better Pay Act amended Schedules 3, 3A and 7 to the Fair Work Transitional Act to:

- automatically sunset the relevant class of zombie agreement at the end of the grace period for the agreement if it has not already ceased to operate before that time (i.e. a default period of 12 months, which may be extended by the FWC with the period of extension becoming the new grace period)
- require employers to give affected employees notice of automatic sunsetting within 6 months of commencement, including information about the automatic sunsetting, its timing, and the FWC's role in extending the default period
- set out the process for making an application to the FWC to extend the default period, including who may apply and how an application is made
- empower the FWC to extend the default period for a period of no more than 4 years at a time if the FWC is satisfied the applicable criteria have been met
- set out rules for pending applications
- for enterprise agreements made during the bridging period– provide for the effect of sunsetting.[747]

21.1.2 Intent of Secure Jobs, Better Pay amendments

Prior to the Secure Jobs, Better Pay Act, zombie agreements continued to operate unless terminated or replaced. Zombie agreements often contained conditions that were inferior to those provided for by the relevant modern award that would otherwise apply. As the FWC has no discretion to terminate agreements on its own motion, this resulted in employees having to

[747] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [686].

proactively make applications to terminate agreements to remove any inferior conditions – a process many employees were not familiar with.[748]

The nature of the problem was demonstrated in *Empire Holdings (QLD) Pty Ltd T/A Empire Hotel and Cloudland* (11 January 2022),[749] where the FWC noted the deficiencies of zombie agreements, stating that these agreements often deny employees some benefits within modern awards, including penalty rates.[750]

The sunsetting of zombie agreement provisions introduced by the Secure Jobs, Better Pay Act intend to address these deficiencies. In the Explanatory Memorandum the Australian Government stated:[751]

> 87. These remaining transitional instruments set pay and conditions for covered employees, and many provide take-home pay and conditions inferior to those provided by the relevant modern award that would otherwise apply. Sunsetting these transitional instruments (following an extended transitional period provided upon commencement of the Fair Work Act more than a decade ago) is expected to uplift terms and conditions of employment for many employees as they would become covered by the relevant modern award or (if made) enterprise agreement.

In removing inferior conditions, the Australian Government also stated:[752]

> employers will no longer have to compete with businesses operating under terms and conditions of employment that were assessed under an inferior test … [and] [b]usinesses would be bound by the relevant modern award which sets employees' pay and conditions (alone or in combination with contracts of employment), or may opt to bargain for a new agreement better suited to their circumstances. This will level the playing field, reduce complexity and encourage agreement making.

21.2 Impact and issues

The Secure Jobs, Better Pay Act introduced provisions which required employers to give affected employees notice by 6 June 2023 that their agreement would automatically terminate at the end of 6 December 2023. The notice was required to include information about the automatic sunsetting, its timing and the FWC's role in extending the default period.

The FWC published extensive material to support employers with the provisions, including:

- a guide for employers around providing the written notice to employees[753]

[748] Regulation Impact Statement, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, 46.
[749] *Empire Holdings (QLD) Pty Ltd T/A Empire Hotel and Cloudland* [2022] FWCA 62.
[750] *Empire Holdings (QLD) Pty Ltd T/A Empire Hotel and Cloudland* [2022] FWCA 62 [42].
[751] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, xix [87].
[752] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, xix [88]–[89].
[753] Justice Hatcher, Fair Work Commission, *Implementing the Secure Jobs, Better Pay Changes and the Fair Work Commission's Performance in 2022–23* (President's Statement, 2 August 2023) 2 [8] <https://www.fwc.gov.au/documents/resources/president-statement-implementing-sjbp-performance-02-08-2023.pdf>.

- a template written notice[754]
- a dedicated form for extension applications (Form F81)[755]
- information about how to make an application for an extension of the zombie agreement using the approved Form F81[756]
- an interactive checklist and fact sheet to help employees and employers determine if they were affected.[757]

The data relevant to assessing the effectiveness of these amendments comes in three forms: quantitative, qualitative and stakeholder views.

21.2.1 Quantitative evidence

The quantitative data comes in three ways. First, at the end of 6 December 2023, all zombie agreements that were still in operation terminated unless an application to the FWC to extend their operation was successful or pending at that date.[758]

It is unclear how many zombie agreements terminated on this date. This is in large part because the records for the various instruments are not available from one particular agency. For example, in July 2023 the President of the FWC noted that the FWC does 'not have any records of AWAs [Australian Workplace Agreements], since the Commission was not the approving authority for this type of agreement, and for the same reason our records of collective agreements made in the 2006 to 2009 WorkChoices period are incomplete'.[759]

In the Secure Jobs, Better Pay Bill Regulation Impact Statement, the Department of Employment and Workplace Relations estimated that, in September 2019, 300,000 to 450,000 employees were covered by zombie agreements at that time.[760] However, as it is difficult to quantify how many zombie agreements were in operation and therefore the exact number of employees covered by zombie agreements, it is impossible to measure the number of zombie agreements that terminated and resulted in new enterprise agreements or employees reverting back to the relevant modern award.

---

[754] Justice Hatcher, Fair Work Commission, *Implementing the Secure Jobs, Better Pay Changes and the Fair Work Commission's Performance in 2022–23* (President's Statement, 2 August 2023) 2 [8] <https://www.fwc.gov.au/documents/resources/president-statement-implementing-sjbp-performance-02-08-2023.pdf>.

[755] Fair Work Commission, *Application to Extend the Default Period for a Zombie Agreement (Form F81)* (Web Page, n.d.) <https://fwc.gov.au/apply-or-lodge/form/apply-extend-default-period-zombie-agreement-form-f81>.

[756] Justice Hatcher, Fair Work Commission, *Implementing the Secure Jobs, Better Pay Changes and the Fair Work Commission's Performance in 2022–23* (President's Statement, 2 August 2023) 1 [6] <https://www.fwc.gov.au/documents/resources/president-statement-implementing-sjbp-performance-02-08-2023.pdf>.

[757] Justice Hatcher, Fair Work Commission, *Fair Work Commission's 2023 Work and 2023–24 Performance* (President's Statement, 22 December 2023) 4 [24] <https://www.fwc.gov.au/documents/reporting/presidents-statement-work-performance-2023-12-22.pdf>.

[758] Fair Work Commission, 'Zombie Agreements Have Now Sunsetted' (Media Release, 7 December 2023) <https://www.fwc.gov.au/about-us/news-and-media/news/zombie-agreements-have-now-sunsetted>.

[759] Justice A Hatcher, 'Review of the Fair Work Commission's Implementation of the Secure Jobs, Better Pay Legislation' (Speech, Australian Industry Group Conference, 31 July 2023) 4 <https://www.fwc.gov.au/documents/resources/presidents-address-aig-pir-conference-2023-07-31.pdf>.

[760] Regulation Impact Statement, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, 45.

Second, in 2023–24 the FWC received 475 applications to extend the default period for zombie agreements. Table 17 shows that, of those applications, the FWC granted 223 extensions.[761]

Table 17: Applications to extend the default period for a zombie agreement (agreement-based transitional instrument, Division 2B State employment agreements and enterprise agreements made during the bridging period) (6 December 2022 – 30 June 2024)

Outcome	Number of applications
Extension granted	223
Extension not granted	119
Application dismissed	4
Application withdrawn	125
Awaiting outcome	4
Total applications	475

Source: Data provided to the Review by the FWC.

Third, as noted in Table 12 in Chapter 17, agreement approval applications in 2023–24 are at a 5-year high, with almost 1,000 more applications in 2023–24 (4,790)[762] compared to 2019–20 (3,795).[763]

21.2.2 Qualitative evidence

In a statement issued on 2 August 2023, the President of the FWC noted that the FWC had begun receiving applications to extend the default period for zombie agreements. The President referred to the Full Bench decision *Suncoast Scaffold Pty Ltd As Trustee For The Warren Family Trust T/A Suncoast Scaffold Pty Ltd*[764] (*Suncoast Scaffold*), which identified general principles applicable to applications to extend the default period for a zombie agreement.

On 16 June 2023 the Full Bench of FWC in *Suncoast Scaffold* dismissed an application to extend the default period for a transitional agreement, holding that the relevant employees under the *Trustee For The Warren Family Trust t/a Suncoast Scaffold Pty Ltd Employee Collective Agreement 2009* would not be 'better off overall' when compared against the relevant modern award/s as required by Part 13 of Schedule 1, subitem 20A(9), of the Secure Jobs, Better Pay Act.[765]

The Full Bench was not satisfied the award-covered employees would be better off if this agreement continued to apply compared to if the awards applied due to the employees' lack of

[761] Fair Work Commission, *Zombie Agreements Extended Past 7 December 2021* (Web Page, 20 December 2024) <https://fwc.gov.au/work-conditions/enterprise-agreements/sunsetting-pre-2010-agreements/zombie-agreements-extended >.
[762] Fair Work Commission, *Annual Report 2023–24* (Report, 2024) 63.
[763] Fair Work Commission, *Annual Report 2019–20* (Report, 2020) 62.
[764] *Suncoast Scaffold Pty Ltd As Trustee For The Warren Family Trust T/A Suncoast Scaffold Pty Ltd* [2023] FWCFB [105].
[765] *Suncoast Scaffold Pty Ltd As Trustee For The Warren Family Trust T/A Suncoast Scaffold Pty Ltd* [2023] FWCFB 105 [37].

access to award entitlements and being disadvantaged financially.[766] The Full Bench concluded that it was not reasonable to extend the 'default period'.[767]

The main principle outlined was the interpretation of 'better off overall' in subitem 20A(9) in the larger context of deciding whether or not to extend the default period for a zombie agreement. The Full Bench provided 2 main reasons for why this test was different to the Better Off Overall Test (BOOT):

- The test under subitem 20A(9) 'does not require an individualised assessment' but that the award employees be 'viewed as a group' in the comparison between the transitional instrument and relevant award.[768]
- The 'better off overall' requirement under subitem 20A(9) only has to meet the threshold of 'likelihood' of the employee being better off overall, compared to the FWC being satisfied the enterprise agreement passes the BOOT.[769]

The Full Bench mentioned that the 'better off overall criterion is less stringent' than the BOOT that applies to enterprise agreement approval applications.[770]

21.2.3 Stakeholder views

Stakeholders largely expressed that the provisions relating to the sunsetting of zombie agreements were positive and the amendments have operated as intended.

Ai Group, for example, stated that, 'while termination of zombie agreements has created difficulty for some employers, Ai Group nonetheless acknowledge that the Secure Jobs, Better Pay amendments relating to the sunsetting of 'zombie' agreements are operating as envisaged and no further amendments to the relevant legislative provisions are proposed'.[771]

The Shop, Distributive and Allied Employees Association (SDA) strongly supported the measures and stated that they were 'a necessary measure to eradicate outdated agreements that undermine fair work conditions'.[772] The Australian Nursing and Midwifery Federation stated that the expiration of zombie agreements assisted several branches to renegotiate new agreements with employers seeking to maintain certain conditions.[773] Similarly, the Australian Council of Trade Unions submitted that 'in many circumstances the sunsetting of a Zombie Agreement has been responsible for restarting long stalled negotiations for a new agreement'.[774]

Master Grocers Australia, however, submitted that the process happened too quickly, stating that 'in the future, employers [should] be provided with at least 36 months to prepare and

---

[766] *Suncoast Scaffold Pty Ltd As Trustee For The Warren Family Trust T/A Suncoast Scaffold Pty Ltd* [2023] FWCFB 105 [39](1)–(2).
[767] *Suncoast Scaffold Pty Ltd As Trustee For The Warren Family Trust T/A Suncoast Scaffold Pty Ltd* [2023] FWCFB 105 [39].
[768] *Suncoast Scaffold Pty Ltd As Trustee For The Warren Family Trust T/A Suncoast Scaffold Pty Ltd* [2023] FWCFB 105 [13].
[769] *Suncoast Scaffold Pty Ltd As Trustee For The Warren Family Trust T/A Suncoast Scaffold Pty Ltd* [2023] FWCFB 105 [13].
[770] *Suncoast Scaffold Pty Ltd As Trustee For The Warren Family Trust T/A Suncoast Scaffold Pty Ltd* [2023] FWCFB 105 [13].
[771] Ai Group submission, 10 [36].
[772] SDA submission, 6
[773] ANMF submission, 9 [23].
[774] ACTU submission, 76.

implement major operational changes'[775] and 'where an employer is forced to make major operational changes to its business at the initiative of government policy, that funding and resources are made available and offered to all employer associations registered with the FWC to support impacted member businesses'.[776]

The United Workers Union (UWU) and SDA noted that there are a number of agreements made after 2010 that may provide pay and conditions below the award. UWU submitted that 'there remains a further gap in respect to the continued operation of old enterprise agreements', including those that were subject to the 'no disadvantage test', a less rigorous BOOT, agreements that have been replaced but have not been terminated and those agreements that may have passed the BOOT at test time but now contain rates of pay and terms and conditions below the award.[777] The SDA submitted that there remains a cohort of zombie agreements made between 2010 and 2016 that continue to operate and 'may still contain terms less favourable than the relevant modern awards'.[778] The SDA noted they have been actively lodging termination applications for these agreements and proposed allowing '[a] union who has interest in an industry [to] be able to make an application to terminate an agreement where there is no union party to an agreement'.[779]

21.3 Findings and recommendations

At the end of 6 December 2023, all zombie agreements that were still in operation automatically terminated unless their operation was extended by the FWC or an application for an extension was pending at that time. There are a small number of zombie agreements that are still in operation, because the FWC has granted extensions to their default periods.

The data demonstrates that enterprise bargaining has increased and coverage of enterprise agreements is at the highest level since March quarter 2020.[780] This may also suggest that the Secure Jobs, Better Pay amendments (including the sunsetting of zombie agreements) has had a positive effect on enterprise bargaining. However, it is too early to say whether the Secure Jobs, Better Pay amendments more generally will result in a long-term increase in enterprise bargaining.

The evidence before the Review Panel suggests that the provisions relating to the sunsetting of zombie agreements are operating appropriately and as intended.

While agreements made before the Fair Work Act commenced (or fully commenced) have terminated (unless extended on application to the FWC or an application for extension is pending), there remains a number of agreements made after 2010 that have long since passed their nominal expiry date and continue to operate. Some of these agreements were potentially approved at a time when pay and conditions were in a period of transition between pre-Modern Awards and Modern Awards meaning they may not have been assessed against current pay and conditions. UWU and SDA submitted that these agreements may contain rates of pay, terms and conditions that are below the relevant awards. The Review Panel acknowledges this may be

[775] MGA submission, 7 [13].
[776] MGA submission, 7 [16].
[777] UWU submission, 27.
[778] SDA submission, 6.
[779] SDA submission, 6.
[780] Department of Employment and Workplace Relations, *Trends in Federal Enterprise Bargaining: June Quarter, 2024* (Report, 2024) 12 <https://www.dewr.gov.au/download/16480/trends-federal-enterprise-bargaining-june-quarter-2024/38128/trends-federal-enterprise-bargaining-june-quarter-2024/pdf>.

the case and therefore considers that further data is required to identify the incidence of agreements that meet this criterion. The Review Panel recommends that further research to quantify the incidence and coverage of enterprise agreements that have nominally expired more than five years ago and identify the wages and conditions under these instruments as compared to the applicable modern awards should be undertaken.

Part 3. Job security and gender equality

In the following chapters the Review Panel focuses on legislative changes broadly classified as 'job security and gender equality'. It is important to note that changes concerning collective bargaining and agreement making, discussed in Part 2 of this report, will also have a bearing on job security and gender equality. The specific Secure Jobs, Better Pay amendments considered in this part relate to:

- Paid family and domestic violence leave
- The Objects of the Fair Work Act
- Equal remuneration and work value
- Pay secrecy
- Sexual harassment in connection with work
- Anti-discrimination
- Fixed-term contracts
- Flexible work
- Unpaid parental leave.

Chapter 22. Context for the job security and gender equality amendments

This introductory chapter aims to provide some context to the amendments considered in this Part 3 of the report. The chapter has 2 main objectives. First, it examines the evolving nature of the labour market over recent decades, with a particular focus on gender. While it does not attempt to empirically link the aforementioned amendments, its primary goal is to highlight particular trends. These include the increasing workforce participation of women (especially those in their 30s and older), the rise of non-standard employment (such as part-time and casual jobs), and significant shifts in the industrial structure, notably toward service industries like healthcare and education. The analysis underscores the growing presence and importance of women in the labour market and the necessity for industrial relations policies and laws that accommodate their needs. These needs include equal pay, flexible work arrangements, predictable schedules and pay, support for work-life balance, protection from sexual harassment, and provisions for domestic violence leave—elements that collectively define 'decent work' standards.

The second objective is to provide an overview of recent work value cases and related rulings by the Fair Work Commission (FWC)[781]. This discussion is complemented by a descriptive analysis of the gender wage gap (GWG), a key indicator of women's status and progress in the labour market.

The chapter is organised as follows. It begins in section 22.1 with a historical overview of wage setting in Australia, emphasising the gendered nature of the industrial relations system and its role in perpetuating gender inequalities. Section 22.2 describes trends in employment, hours worked and labour force status by gender. Section 22.3 focuses on the GWG. Section 22.4 concludes the chapter.

22.1 Historical context

Historically, the Australian industrial relations system has not been conducive to gender equality.[782] It was built around a male 'breadwinner' model, where the male basic wage was determined based on family needs – being a wage that was sufficient for a husband to support his wife and 3 children. In contrast, a decade after the male basic wage was established, the female basic wage was calculated based on individual needs, at 54% of the male basic wage.[783] Gender wage discrimination was embedded in the industrial relations system from the outset.[784]

By prioritising the needs of men, the system inherently advantaged full-time workers in traditional, standard employment. The manufacturing sector, in particular, was afforded a

[781] See, also, Appendix 9 – The FWC and pay equity - for more detailed discussion.
[782] For further discussion see B Ellem, CF Wright, S Clibborn, R Cooper, F Flanagan and A Veen, Work and Industrial Relations Policy in Australia (forthcoming, Bristol University Press, 2025) Ch 6.
[783] The male basic wage was initially determined in *Ex parte HV McKay* (1907) 2 CAR 1 (*Harvester case*) and was set at 70% of the skilled wage. In 1917 the court heard the case for the female basic wage and set it at 54% of the male basic wage. The rate was subsequently increased to 75% during World War II. For an overview of this early history of wage fixing in Australia, see A Preston, *The Structure and Determinants of Wage Relativities: Evidence from Australia* (Ashgate Publishing, 2001) Ch 3, 36–90.
[784] See also < https://www.fwc.gov.au/documents/resources/history-of-australian-minimum-wage.pdf>.

privileged position within this framework, not only due to its economic significance at the time but also because of its strong union representation.

This historical framework has also played a significant role in entrenching the high levels of occupational and industry segregation that continue to define Australia's labour market today. These persistent patterns reinforce traditional gender roles and limit opportunities for women, perpetuating systemic barriers to achieving gender equality in the workplace.[785]

Although the industrial relations system has undergone gradual reforms over time, the Secure Jobs, Better Pay amendments are intended to take further steps in tackling systemic barriers to gender equality in the workplace. Key measures to implement this intent include, and are not limited to, eliminating gender-based undervaluation of work, prohibiting pay secrecy, promoting flexible work arrangements, and strengthening protections against sexual harassment.

22.2 Gender and employment

As noted, historically the Australian labour market and industrial relation system have been centred on a male full-time workforce. In recent decades, however, the character of the labour market has changed markedly. Aside from a doubling in the size of the labour force, there has been a notable growth in female participation and part-time and casual work. In this section ABS data are used to profile these developments.

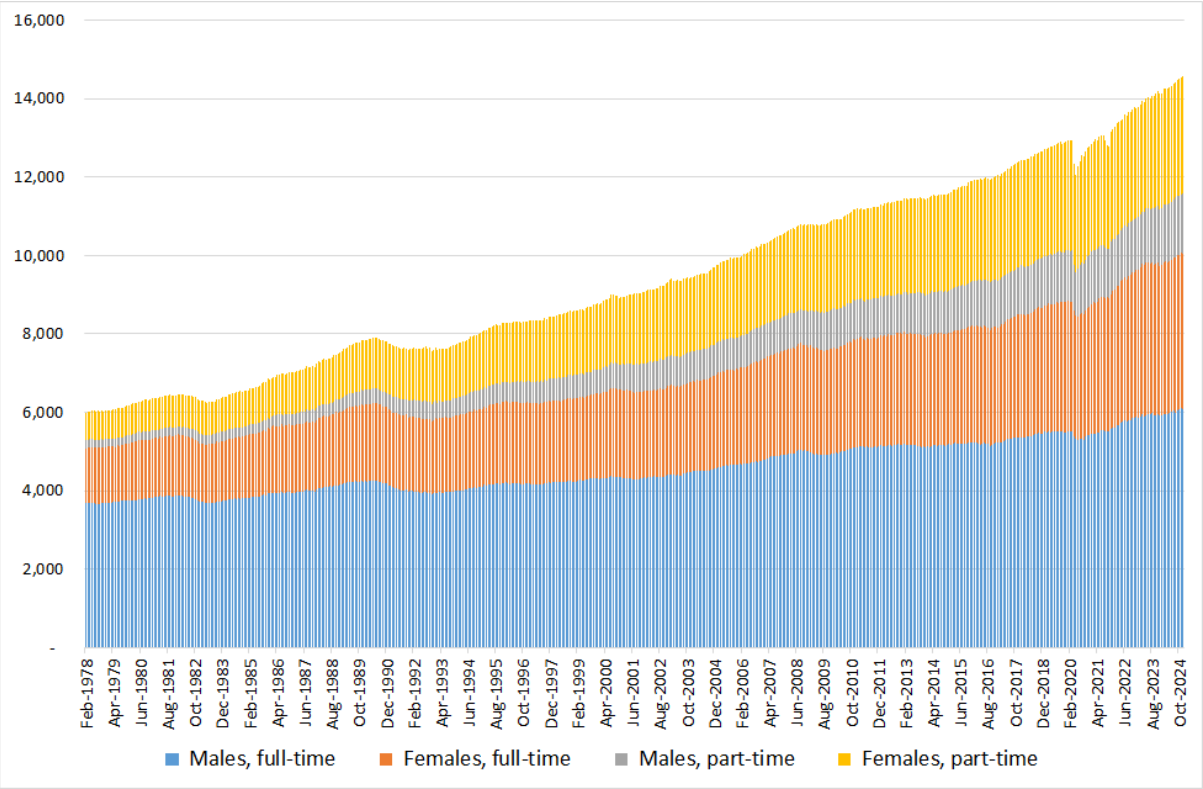
22.2.1 Trends in employment and labour force participation

Figure 11 plots the employment of men and women by year and employment status. The period covered is from February 1978 (the start of the ABS data series) to December 2024 (the most recent available data at the time of writing). In 1978 there were nearly 6 million people in employment. By 2024 there were 14.6 million employed persons in the labour market, meaning it had more than doubled in size since 1978. Growth has been particularly strong in recent years. For example, between December 2012 and December 2024 total employment increased by 28%.

In 1978 men accounted for 65% of the workforce, with 85% working full-time (defined as working 35 or more hours per week in all jobs). By December 2009 the proportion of jobs held by men had declined to 55% and the share of full-time employment had dropped to 70%. As of December 2024 men accounted for 52% of total employment and 69% of those working full-time. These trends highlight a notable rise in female workforce participation and employment and an increase in part-time employment. Women are particularly prevalent in part-time employment, currently accounting for 66% of all part-time work.

[785] See also S Williamson, J Parker, N Donnelly, M Gavin and S Ressia, *Gender, Work and Employment Relations*, (forthcoming, Edward Elgar Publishing, 2025).

Figure 11: Number employed ('000) by gender and employment status, February 1978 to December 2024



Source: ABS 6202.0 Labour Force, Australia, Table 1. Seasonally adjusted.

Figures 12 and 13 illustrate, respectively, the labour force participation (LFP)[786] rates for men and women across 3 time periods: 1979, 2009 and 2024.[787] Figure 12 indicates that, in 1979, 90% of men aged 20–24 were part of the labour force, while the participation rates for men aged 30–34 and 60–64 were 96% and 53%, respectively. By 2024 these rates had shifted to 82% for men aged 20–24, 92% for those aged 30–34, and 68% for the 60–64 age group. These trends reflect a significant decline in LFP among younger men (aged 20–24) and a notable increase among older men (aged 60–64).

Figure 13 presents LFP rates for women across the same 3 age groups – 20–24, 30–34 and 60–64 – over time. In 1979 women's participation rates in these age groups were 69%, 52% and 12%, respectively. By 2024 these figures had risen to 81% for both the 20–24 and the 30–34 age groups and 56% for those aged 60–64. This data highlights a substantial increase in female LFP across all stages of life.

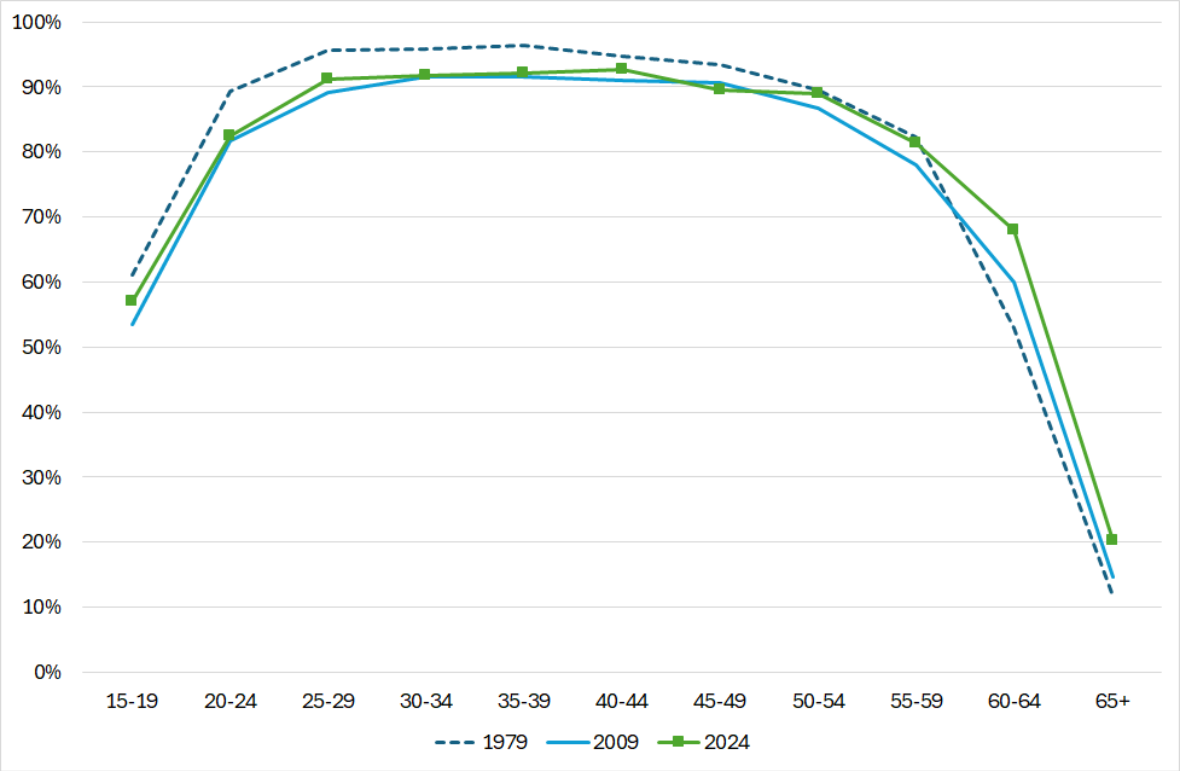
However, 2 notable trends stand out in the female labour force participation chart. First, there is a gradual flattening of the characteristic 'M' curve for women in their 20s and early 30s over time. This trend suggests that more women are either choosing not to have children or are returning to work after childbirth rather than leaving the labour force entirely. Second, there has

[786] The labour force participation (LFP) rate is measured as the number employed and unemployed as a share of the total resident civilian population (i.e. it excludes members of the permanent defence forces) aged 15 and over. For any group the LFP is expressed as a percentage of the civilian population for the same group.
[787] Table 1 in the Statistical Appendix 1 to this report presents key labour market indicators (including full-time and part-time employment as well as LFP) for November 2022 (just before the Secure Jobs, Better Pay Act was passed) and November 2024 (the most recent available data at the time of writing).

been a significant rise in participation among older women, indicating that more women are remaining in the workforce later in life. This increase is partly driven by financial necessity and the gradual rise in the qualifying age for the age pension, which is now set at 67 for both men and women.

Figure 14 shows trends in the share of women employed full-time (with the balance employed part-time). Although there has been a significant increase in the LFP rates over the decades, the data in Figure 14 shows that there has been little change in *the way* women participate in employment, in terms of full-time and part-time status. For example, at age 35–39, 52% of employed women worked full-time in 1979; by 2024 this share was equal to 60%. The exception to this pattern is among females aged 15–24. Here the data show that proportionately fewer are working full-time today than in the past. This likely reflects an increased share of women studying full-time and working part-time. Most older women (60+) are employed part-time.

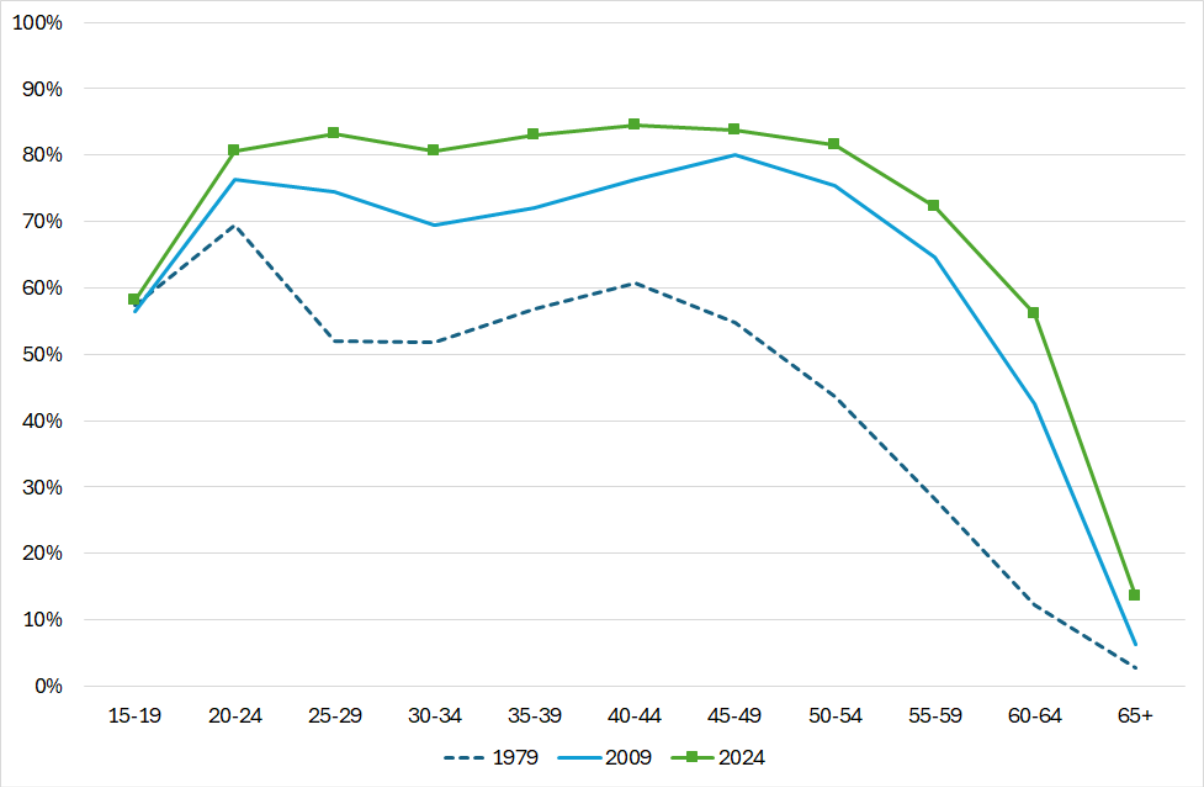
Figure 12: Male labour force participation, by age, 1979-2024



Notes: Data points are for November 1979, November 2009 and November 2024.

Source: ABS 6291.0.55.001 Labour Force, Australia, Detailed.

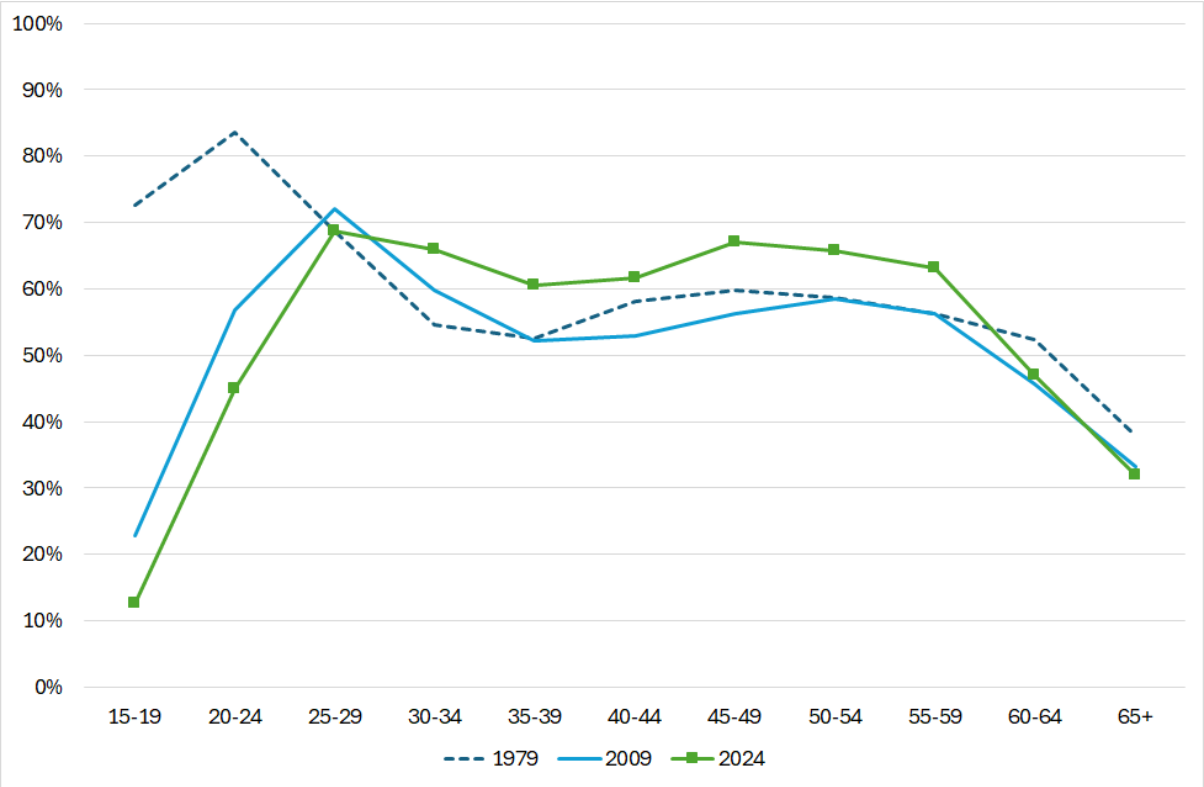
Figure 13: Female labour force participation, by age, 1979–2024



Notes: see notes to Figure 12.

Source: ABS 6291.0.55.001 Labour Force, Australia, Detailed.

Figure 14: Female full-time employment as a share of total employment, by age, 1979-2024



Notes: See notes to Figure 12.

Source: ABS 6291.0.55.001 Labour Force, Australia, Detailed.

In summary, the Australian labour market has undergone a significant transformation over the past few decades, driven by a substantial increase in female workforce participation. In 1978, 65% of all employed persons were men; by 2024, their share had declined to 52%.

A particularly notable trend is the increasing participation of women in their 30s – typically considered prime child-rearing years – and the incidence of full-time work among this group. Presently women account for 48% of total employment. Of those women in paid employment, 56% work full-time (35 or more hours per week across all jobs), while 44% are part-time (fewer than 35 hours per week). Among men, 80% work full-time and 20% part-time.

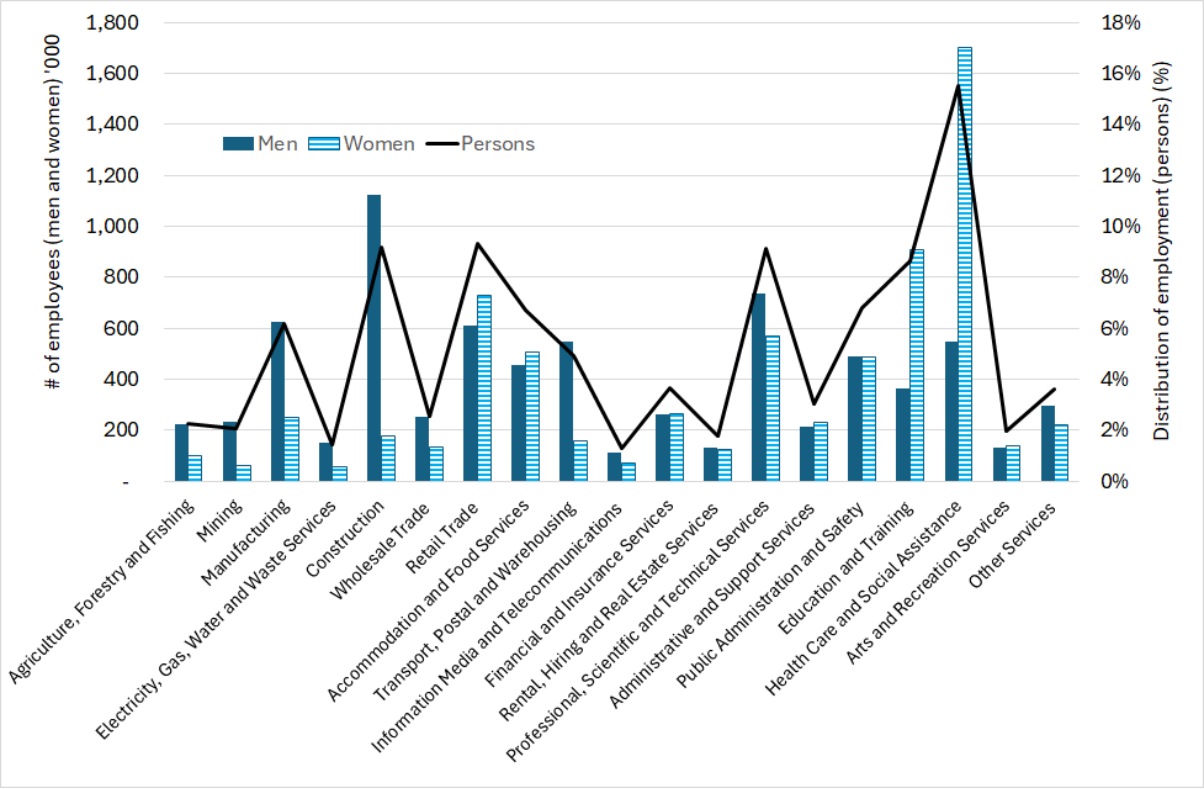
Overall, part-time employment now accounts for 31% of total employment, indicating a broader shift toward more flexible, non-standard working arrangements across the labour market.

22.2.2 Gender differences in employment by industry

Figure 15 shows the distribution of employment by industry in 2024. The bars show the industry distribution by gender. The line shows the industry distribution for all persons in percentage terms. The health care and social assistance sector is by far the largest sector in terms of total employment, accounting for 2.2 million workers, or 16% of total employment.

Among other things, Figure 15 shows that the health care and social assistance sector is a female-dominated sector, with women accounting for 76% of workers in this sector. The second largest sector, in terms of employment size, is retail trade, with approximately 1.34 million workers (9% of all employed). This sector also employs a disproportionate share of women (54% of all workers in this sector are women). Construction is third largest at slightly less than the 1.34 million workers in the retail trade sector. It employs a disproportionate share of men – only 14% of workers in this sector are women. The fourth largest sector, at 1.27 million workers, is the education and training sector. This is another highly feminised sector, with women constituting 71% of its workforce. Mining, in comparison, employs 293,000 workers, or 2% of total employed. It is a male-dominated sector, with women making up only 21% of its workforce.

Figure 15: Gender differences in employment by industry, 2024

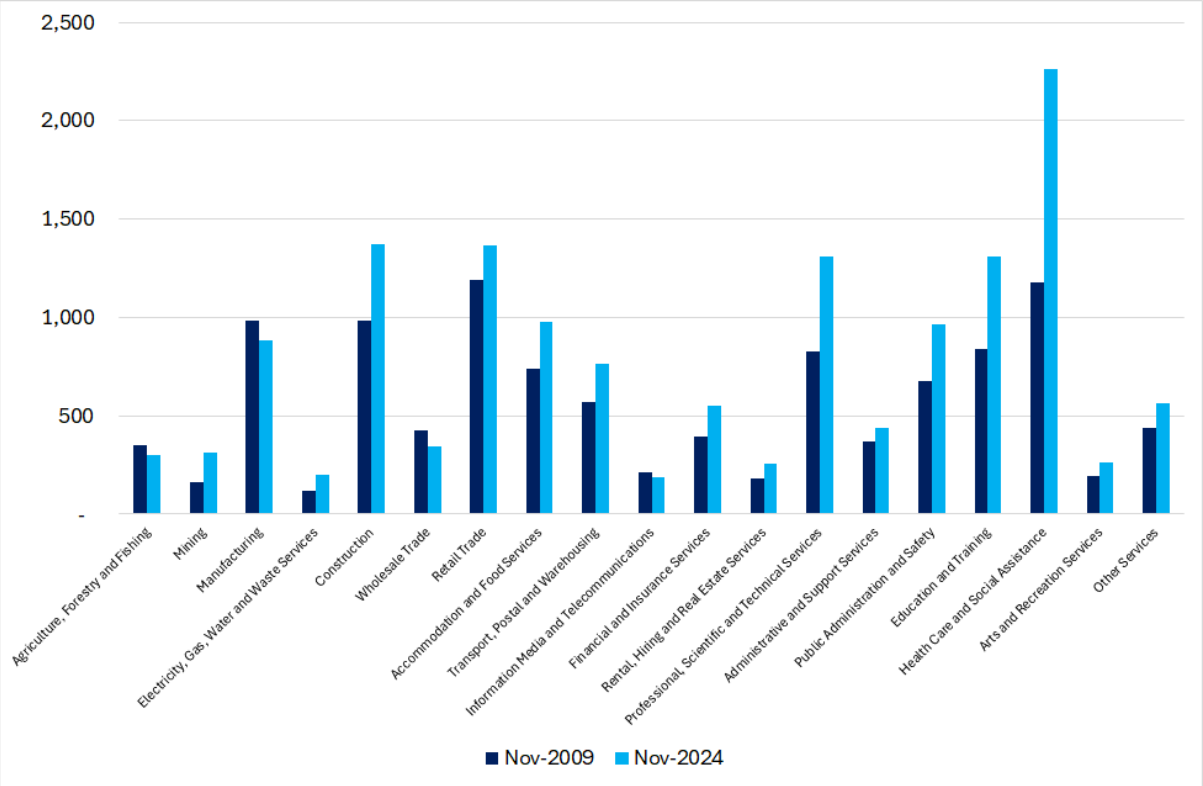


Source: ABS Labour Force, Australia, Detailed. Cat No 6291.0.55.001. Table 4, August 2024, Seasonally adjusted data.

The pattern of employment shown in Figure 15 is significantly different from that of even 10 to 15 years ago. Figure 16 offers a comparison using data from 2009 and 2024. In 2009, retail trade was the largest sector in terms of employment, with 1.19 million workers, closely followed by the health care and social assistance sector, which employed 1.18 million workers.

Although total employment grew by 35% between 2009 and 2024, certain sectors experienced disproportionately higher growth – health care and social assistance increased by 92%, professional, scientific and technical services by 58%, education and training by 56%, and construction by 40%. These trends underscore a profound shift in the composition of the labour market, in terms of both industry structure and the nature of employment. It is important that the industrial relations system evolves in step with these changes if it is to remain relevant and responsive to the needs of a transforming workforce.

Figure 16: Number employed ('000) by industry, 2009 and 2024



Source: ABS 6291.0.55.001 (EQ11), Original series.

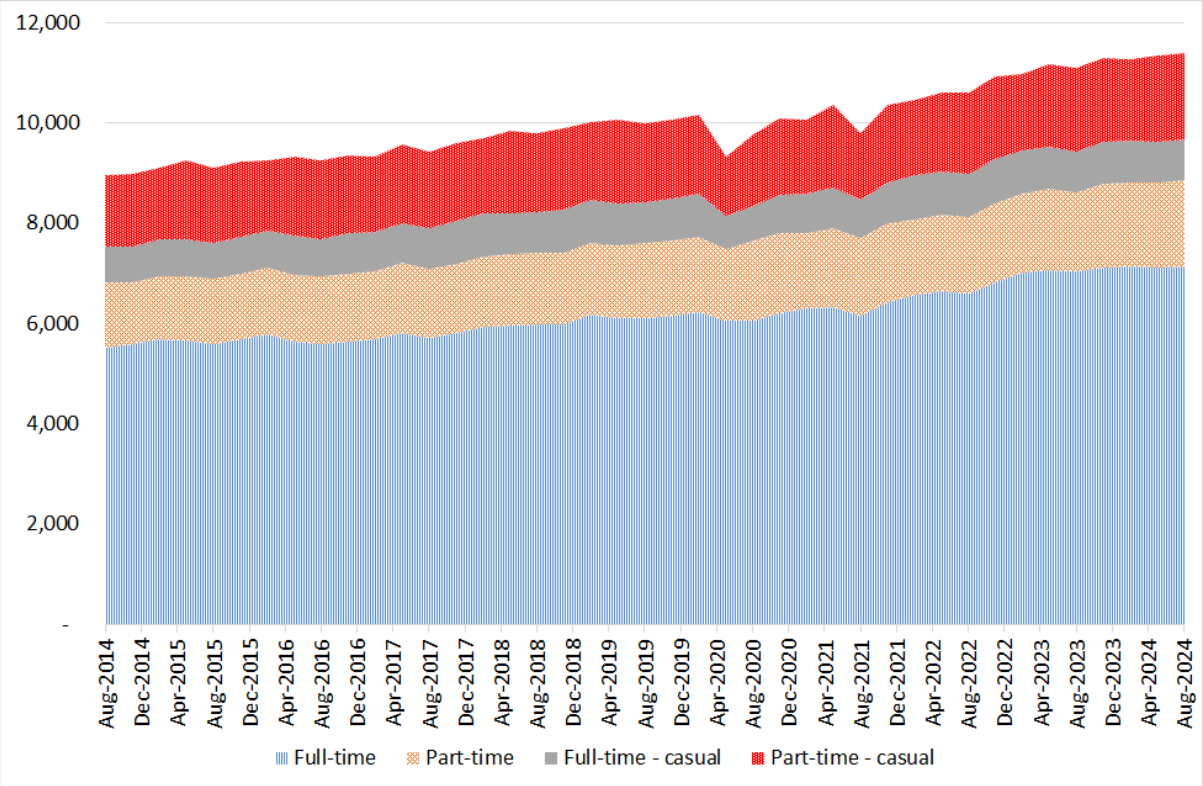
22.2.3 Non-standard employment and job security

The growth in female employment overall and in different sectors has been accompanied by a notable rise in non-standard forms of employment in the form of part-time and casual work. This is illustrated in Figure 17, which shows employment growth over the decade leading to 2024, categorised by employment status in the main job (i.e. casual or not).[788]

Over this period, the number of people employed on a casual basis grew by 368,000, reaching a total of 2.5 million by August 2024. Notably, one-third of casual workers are engaged in full-time employment. While the proportion of the workforce within each employment category has remained relatively stable over the past decade, the key takeaway is the large growth in absolute terms in the number of individuals who are now engaged in non-standard working arrangement. For convenience the employment numbers in Figure 17 for 2014 and 2024 are presented in Table 18.

[788] As previously noted, the definition of 'casual' applied here follows the Australian Bureau of Statistics. A person is defined as casual if they *do not* have paid leave entitlements.

Figure 17: Trends in employment, by status of employment in main job, 2014 to 2024



Source: 6291.0.55.001 – EQ04 – Employed persons by Hours actually worked in all jobs, Sex and Status in employment of main job.

Table 18: Employment, by status of employment in main job, 2014 and 2024

	August 2014	August 2024	Change 2014–2024	
			Number employed	% change
Full-time	5,520	7,142	1,622	29%
Part-time	1,289	1,718	430	33%
Full-time casual	709	814	105	15%
Part-Time casual	1,444	1,707	263	18%
Total	8,962	11,382	2,419	27%

Source: 6291.0.55.001 – EQ04.

Non-standard employment encompasses several forms of insecure work. Casual workers, for example, may not have 'regular and predictable' access to employment.

In the estimates reported here it is not possible to further disaggregate the employment forms by other categories of employment – for example, fixed term. A person working part-time but on a fixed-term contract and in receipt of paid leave entitlements will be classified here as 'part-time' (because they are not part-time, casual). The same applies to persons who may be working full-time on a fixed-term contract.

It is important to recognise that part-time (or even full-time) employment, even if not casual, is not necessarily 'secure'. The Australian Government, in the Secure Jobs, Better Pay Act Revised Explanatory Memorandum, defines job security as 'ongoing, stable, and secure employment that provides regular and predictable access to beneficial wages and conditions of

employment'.[789] Part-time work (casual or ongoing) may not necessarily provide access to predictable wages, particularly where rosters are concerned. This was highlighted in the recent Senate Select Committee on Work and Care. It was also considered by the FWC in the 'Job Security Stream' of the Modern Awards Review 2023–24.[790] In their final report the FWC noted that the parties raised issues about matters such as part-time employment:[791]

> Several parties made extensive submissions concerning part-time employment, focused on the extent of flexibility provided by the part-time provisions in modern awards and the influence such provisions have on job security and access to secure work, both in theory and in practice. Submissions included proposals to change rostering restrictions, notice periods regarding rostering, changes to how regular patterns of hours and guaranteed hours can be established, arranged and varied, as well as proposals for both lesser and greater minimum engagement periods.

In August 2024, following the conclusion of the Modern Awards Review 2023–24, the FWC announced a review of award provisions regulating part-time employment. This review will commence in 2025 and will give further opportunity to examine issues related to part-time employment that 'provides regular and predictable access to beneficial wages and conditions of employment'.

In its recent publication on working arrangements in Australia (for August 2024), the ABS reports several other characteristics associated with job insecurity. For example, 2.8 million employees (23% of all employees) have earnings that vary from one period to the next (excluding overtime payments), and 2.2 million workers (18% of employees) do not have a guaranteed minimum number of hours each week, while 1.2 million workers (10% of employees) do not expect to be working for their current employer in 12 months.[792]

22.2.4 Job security and wage growth

In the Chair's foreword to the fourth interim report of the Senate Select Committee on Job Security, they note that job insecurity is a workplace issue, a public health issue and an economic issue.[793] They also note the effect of insecure work on bargaining power and wages:

> The committee does not believe it is a coincidence that the steep rise in job insecurity has occurred alongside eight years of record low wage growth.
>
> Australians in insecure work often do not have the bargaining power to obtain wage increases. Through the use of labour hire intermediaries,

[789] Cited in the Fair Work Commission, *Modern Awards Review 2023–24* (Report, 2024) [49].
[790] The Fair Work Commission *Discussion Paper: Job Security* was released on 18 December 2023. <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-discussion-paper-job-security-181223.pdf>.
[791] Fair Work Commission, *Modern Awards Review 2023–24* (Report, 2024) [51] <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-review-report-180724.pdf>.
[792] See Australian Bureau of Statistics, *Working Arrangements* (Web Page, August 2024) <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/working-arrangements/aug-2024>.
[793] Senate Select Committee on Job Security, Parliament of Australia, *Final Report: Matter of Possible Privilege* (Report, 2022) Chair's foreword, xiv.

> gig platforms and dependent contracting, many insecure workers do not even have access to bargaining with their true employer.

The connection between job insecurity and sluggish wage growth has also been highlighted by a former Governor of the Reserve Bank of Australia (RBA). In a 2019 speech, he emphasised the need for a 'pick-up in wage growth' to support broader economic growth.[794] In an earlier address, he attributed stagnant wage growth to workers' diminished bargaining power and their concerns over job security, which discouraged them from seeking higher wages or better conditions.[795]

The broader discussion on sluggish wage growth and the declining labour share of gross domestic product (GDP) is covered in Appendix 4 (Productivity) and will not be revisited here.

22.3 The gender wage gap

The previous section highlighted significant shifts in the Australian labour market, including the growing representation of women, older workers, part-time employees and casuals. It also noted that the fastest growing sectors – health care and social assistance; and education and training – are highly feminised industries. Understanding these trends is essential to contextualising the GWG – the focus of this section. The GWG remains a persistent challenge despite legislative and policy efforts to promote equality.

Examining the GWG is an important part of understanding the intent of the recent Secure Jobs, Better Pay amendments aimed at enhancing job security and advancing gender equality. While the gap has its limitations as an indicator, it remains a commonly reported high-level indicator of women's progress in the labour market.[796] For example, in August 2024, when the ABS published its bi-annual *Survey of Average Weekly Earnings*, the Australian Government was quick to distribute its media release heralding the news on the GWG:[797]

> New data released by the [ABS] shows the national gender pay gap is the lowest on record – today falling to 11.5 per cent …We came to Government with a commitment to help close the gender pay gap and that's exactly what we're seeing. That's not a coincidence, it's because the Government has taken action like banning pay secrecy clauses, modernising the bargaining system, enforcing transparent gender pay gap reporting and delivering pay rises for aged care and child-care workers.

In the remainder of this section, the discussion first centres on the measurement of the GWG and a discussion of its limitations as a high level indicator. Thereafter, trends in the gap before 2022 and after 2022 are discussed.

---

[794] M Janda, 'Reserve Bank Says Housing Won't "Derail the Economy" But Tight-fisted Bosses Might', *ABC News* (online, 22 February 2019) <https://www.abc.net.au/news/2019-02-22/reserve-bank-governor-philip-lowe-parliament/10836828>.
[795] S Long, 'Reserve Bank Boss Philip Lowe Urges Workers to Push for Pay Rises', *ABC News* (online, 29 June 2017) <https://www.abc.net.au/news/2017-06-29/rba-governor-philip-lowe-goes-marxist/8662228>.
[796] Workplace Gender Equality Agency, *What Is the Gender Pay Gap?* (Web Page, n.d.) <https://www.wgea.gov.au/the-gender-pay-gap>.
[797] The Hon Anthony Albanese MP, 'Gender Pay Gap Drops to Historic Low' (Media Release, 15 August 2024) <https://www.pm.gov.au/media/gender-pay-gap-drops-historic-low>.

22.3.1 The measurement of the gender wage gap

There are several ways of measuring the GWG. Economists typically distinguish between a 'raw' gap and an 'adjusted' gap. The raw gap is a measure that simply estimates the GWG using mean or median data. The adjusted gap is a measure that is generally derived from a regression analysis and is thus able to control for gender differences in characteristics that may relate to wage differentials – for example, gender differences in experience.

Institutions such as Workplace Gender Equality Agency (WGEA) typically report the raw GWG.[798] At a national level this gap is usually measured using the ABS *Survey of Average Weekly Earnings*. These ABS data are reported biannually in February and August of each year and provide estimates of the average weekly ordinary time earnings (AWOTE) of men and women *employed full-time*. The gap is typically expressed as a share (%) of male earnings (showing how much lower male earnings need to be to equal those of females).[799] While it would be more appropriate to include part-timers in the calculation, given that 31% of employees work part-time, such an approach is not possible with the ABS data given the absence of data on hourly wages.[800]

It is noted that some may hold concerns about a single aggregate indicator being used to capture progress across a range of labour market and industrial relations interventions. However, as noted earlier, it is not an uncommon approach. Assuming there are no stark changes in the composition of the workforce from period to period, it serves as a useful metric simply because it is consistently and reliably measured and reported, publicly accessible and easily understood.

The alternative to reporting a raw GWG is to report an adjusted GWG. The latter is generally derived using regression analysis and a common approach is to employ the 'dummy variable approach'. This involves including a binary variable in a pooled (male + female) wage regression, with the binary variable equal to 1 if the respondent is female and 0 otherwise. The coefficient on this variable shows the extent of the wage gap between men and women, holding all other characteristics constant.

Estimates of the adjusted GWG are presented in Appendix 1 (based on HILDA data and regression analysis) and reported below at section 22.3.3. The characteristics controlled for in the regression include education, experience, marital status, family status, migrant status, sector of employment, part-time status, casual status, fixed-term contract status, union membership status and whether award reliant or paid according to a collective agreement – in other words, a range of factors that correlate with wages and which could account for gender differences in pay. The regression approach effectively nets out any gender differences in wages that derive from these characteristics (e.g. gender differences in coverage of collective agreements).

---

[798] Workplace Gender Equality Agency, 'The Gender Pay Gap Explained', *What Is the Gender Pay Gap?* (Web Page, n.d.) <https://www.wgea.gov.au/the-gender-pay-gap>.
[799] Australian Bureau of Statistics, *Gender Pay Gap Guide* (21 February 2023) <https://www.abs.gov.au/statistics/understanding-statistics/guide-labour-statistics/gender-pay-gap-guide>.
[800] The Australian Bureau of Statistics *Average Weekly Earnings, Australia* series, however, only reports *weekly wages* for full-timers and all employees. It does not report an hourly wage. The gender pay gap weekly wages in the full-time labour market is, therefore, the focus of analysis, as this group is more homogeneous in terms of hours worked.

22.3.2 The gender wage gap before 2022

Figure 18 shows trends in the GWG between 1984 and 2024 based on the ABS AWOTE data. While progress has been made in reducing the gap, it is clear that progress is not linear and that there have been 'advances' and 'retreats.'[801]

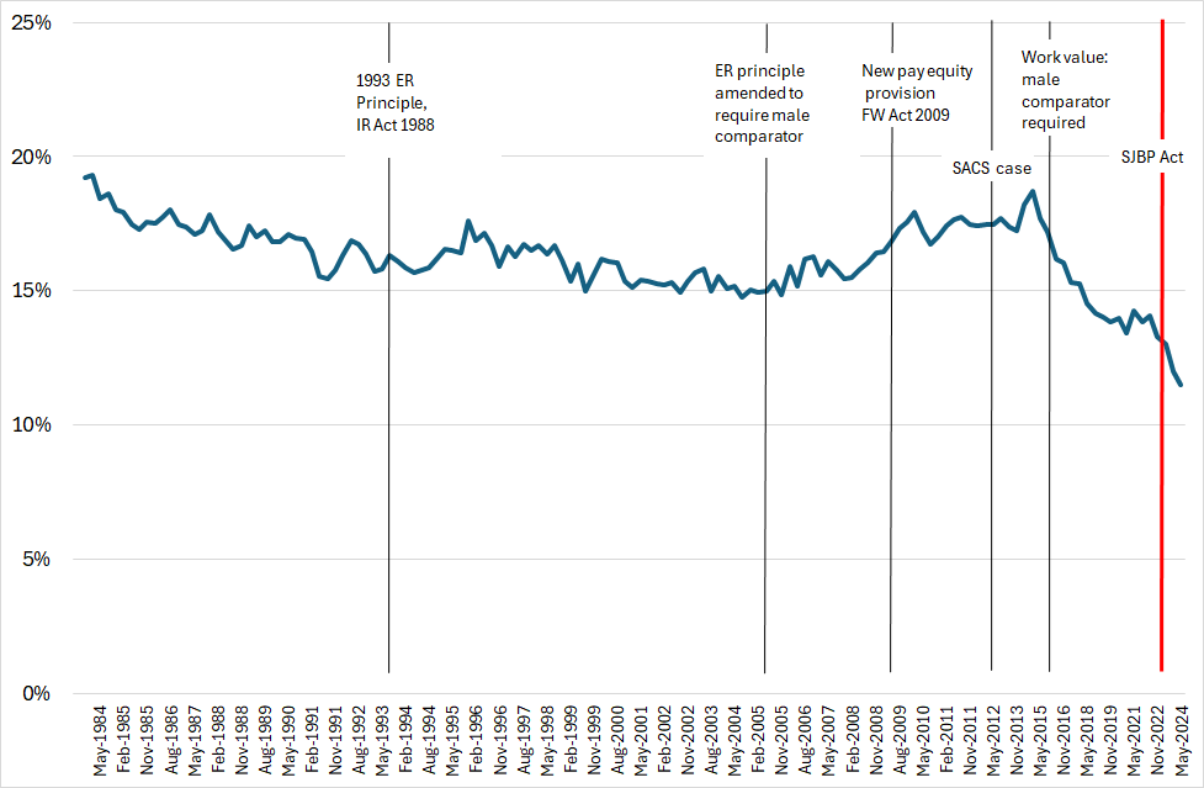
In February 1984, at the start of the series, it was equal to 19%. It dropped to 15% in 1991, during the 'recession we had to have', with the result likely reflecting a greater incidence of job loss among lower paid women vis-à-vis higher paid women. It increased to 18% in 1995, dropping to 15% again 2024. In the period post the 2007–08 Global Financial Crisis, the gap widened, returning to 19% at May 2014. The growth during this period was likely driven by compositional changes in the labour market, such as the growth in lower paid jobs in retail and in the health care and social assistance sector (see the earlier section on employment growth by industry).

The subsequent narrowing of the GWG between 2012 and 2022 could reflect several factors, including the 2012 'Social and Community Services' (SACS) test case where the FWC concluded that the work performed by women in this case had been systematically undervalued due to historical gender-based bias. The FWC ordered a significant pay increase, ranging from 19% to 41% to minimum award rates.[802] The Australian Government of the day committed $3 billion to pay for the increases. The wage adjustments were phased in over a period of time and continued until the full increase was realised in December 2020.

Other potential factors include compositional effects such as increased employment by more educated women (noting that the average woman is now more qualified than the average man), the effects of policies such as parental leave reforms, the work of WGEA, public sector pay policies, changing social norms and slowing remuneration in high-paying male sectors such as mining and manufacturing. It is beyond the scope of this chapter to engage in a detailed analysis of the factors contributing to the reductions observed here.

[801] M Smith and G Whitehouse, 'Wage-setting and Gender Pay Equality in Australia: Advances, Retreats and Future Prospects' (2020) 62(4) *Journal of Industrial Relations* 533.
[802] M Smith and G Whitehouse, 'Wage-setting and Gender Pay Equality in Australia: Advances, Retreats and Future Prospects' (2020) 62(4) *Journal of Industrial Relations* 533.

Figure 18: Trends in the gender wage gap (GWG), 2012 to 2024



Notes:

1. ABS data source: ABS 6302.0 Average Weekly Earnings, Australia, Table 2 (seasonally adjusted). Since May 2012 estimates are reported bi-annually. Prior to this they were reported on a quarterly basis.

2. The solid red line shows outcomes post passage of the Secure jobs, Better Pay Act. The others show select important legislative principles and decisions in relation to equal pay. For further details see M Smith and G Whitehouse.[803]

The vertical lines in Figure 18 show where significant decisions or legislative changes occurred that might be expected to impact on the gender pay gap. The evidence generally suggests a weak relationship between the amendments and the GWG. This is not surprising given that wage adjustments in major decisions are generally phased in, so a sharp break in the series would be unusual. It is also not surprising given that some amendments or decisions are more impactful than others. For example, between the SACS case in 2012 and the 'Early Childhood Education and Care' (ECEC) case in 2015, the FWC shifted its reasoning on the basis upon which equal remuneration could be claimed and ruled that a male comparator was required. The effect was to again limit advances in pay equity in highly feminised sectors remained.[804]

22.3.3 The gender wage gap since 2022

Many of the Secure Jobs, Better Pay amendments that could be expected to affect the GWG came into effect on 7 December 2022.

[803] M Smith and G Whitehouse, 'Wage-setting and Gender Pay Equality in Australia: Advances, Retreats and Future Prospects' (2020) 62(4) *Journal of Industrial Relations* 533.
[804] See also S Williamson, J Parker, N Donnelly, M Gavin and S Ressia, *Gender, Work and Employment Relations*, (forthcoming, Edward Elgar Publishing, 2025), Ch 19 (Anne Junor, Alison Preston and Meg Smith, "Occupational segregation and gender pay equity strategies in Australia: Comparison, revaluation or raising minimum wages?").

A noteworthy change is the amendment at Part 5 of the Secure Jobs, Better Pay Act in relation to equal remuneration. Subsequent to the FWC's position in the 2015 ECEC case and the requirement for a male comparator, the Secure Jobs, Better Pay Act changed the Fair Work Act to require that, when deciding whether there is equal remuneration for work of equal or comparable value, the FWC need not limit the comparison to similar work or require that a comparison be made with an historically male-dominated occupation or industry (s 157(3B)).

The Secure Jobs, Better Pay Act also made important changes to the Objects of the Act. These and other amendments are discussed in detail in subsequent chapters in this part, so they are not detailed here other than to note that the changes concerning the Objects of the Act and the equal remuneration (work value) amendments have, on the balance of probabilities, significantly improved the wages for many award reliant workers. At an aggregate level this would appear to be showing up in the data reported in Figure 18.

The notable reduction in the GWG since 2022 is also observed when an adjusted measure of the GWG is used. The regression results are presented in Appendix 1. The sample consists of employees aged 21–64, with the data covering the period 2008 to 2023. Estimates based on Ordinary Least Squares (OLS) show that the mean 'adjusted' GWG over the period 2008 to 2022 is equal to 10.8%. In 2023 it falls to 6.5%, with the change statistically significant at the 1% level.[805]

There have been several major FWC determinations which have delivered significant wages increases to some award-reliant workers since 2022 – decisions which were underpinned by the Secure Jobs, Better Pay amendments. These wage increases have been in sectors with significant greater female representation. This includes decisions arising from the 'Aged Care Work Value' case as well as wage increases arising from the 2022–23 and 2023–24 Annual Wage Reviews (AWRs). For further details see Appendix 9 (FWC and pay equity).

22.4 Summary and conclusion

This introductory chapter provides context for recent amendments to the Fair Work Act by examining key developments in the labour market. The analysis highlights significant changes in the composition of the labour market, with female labour force participation rising from 43.4% in 1979 to 63.1% in 2024, while male participation has declined. This shift reflects broader societal trends, with more women engaged in the workforce across all life stages, particularly during their 30s (prime child-rearing years) and later in life. Despite these advances, the labour market remains highly gender-segregated, with women predominantly employed in sectors such as health care and education, often in part-time and casual roles. The gendered nature of employment, coupled with the persistent undervaluation of women's work, remains a key factor contributing to the gender pay gap.

The Secure Jobs, Better Pay Act represents a significant legislative development aimed at improving women's position in the labour market. Early trends in the gender pay gap suggest

[805] Statistical significance is a way to determine whether the results in a study are due to chance or if they reflect a real relationship. When it is statistically significant it means it did not occur randomly and that there is strong evidence to show that the outcome variable is determined by (or correlates with) the explanatory variable. In this case the results show that the gender wage gap, measured using the 'dummy variable approach' which was previously explained, is significantly smaller (in a statistical sense) between 2023 and earlier periods.

positive outcomes, although it is recognised that the gap is just one measure of progress, and improvements will result from a combination of factors.

The following chapters analyse the specific Secure Jobs, Better Pay amendments which are broadly categorised as those relating to 'job security and gender equality'. Each chapter outlines the amendment, explains the Australian Government's intent and evaluates its impact using available quantitative and qualitative evidence, as well as stakeholder feedback. The Review Panel concludes that most amendments in this part are achieving their intended objectives. Several recommendations are proposed.

Chapter 23. Paid family and domestic violence leave

In this chapter the focus is on Part 28 (Paid family and domestic violence leave) amendments in the Secure Jobs, Better Pay Act.

By way of background information, family and domestic violence leave (FDV leave) entitlements first became part of the National Employment Standards (NES) on 31 August 2018.[806] Under this new entitlement all employees (full-time, part-time and casual) were eligible for 5 days of unpaid FDV leave in a 12-month period.

Following the passage of *the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) (Paid Family and Domestic Violence Leave Act), the NES entitlement of 5 days of unpaid FDV leave was replaced with a new NES entitlement of 10 days of paid FDV leave per year for all employees. The Paid Family and Domestic Violence Leave Act also extended the entitlement to non-national system employees[807] and amended the Fair Work Act at s 536(2) to require that a pay slip must '(c) not include any information prescribed by the regulations in relation to paid family and domestic violence leave'.[808]

Further amendments (outlined below) were made to s 536 (Employer obligations in relation to pay slips) via the Secure Jobs, Better Pay Act.

23.1 Amendments and intent

This section first outlines the main amendments at Part 28 of the Secure Jobs, Better Pay Act followed by a discussion of their intent.

23.1.1.1 Secure Jobs, Better Pay amendments

The amendment to the Fair Work Act arising from Division 1 of Part 28 of Schedule 1 to the Secure Jobs, Better Pay Act primarily concern Division 3 of Part 3-6 (Employer obligations in relation to employee records and pay slips) of the Fair Work Act. At s 536(2) of the Fair Work Act, a new subsection (d) has been inserted requiring that payslips must 'comply with any requirements prescribed by the regulations in relation to the reporting of paid family and domestic violence leave' (s 536(2)(d)).

At s 536(3) of the Fair Work Act (False or misleading pay slips) a new subsection "3A" (Exception: paid family and domestic violence leave) has also been inserted (s 536(3A)):

> A pay slip is not false or misleading merely because it complies with regulations made for the purposes of paragraph 2(d).

In brief, the above amendments to the Fair Work Act concern the displaying of FDV leave entitlements on pay slips. Any paid FDV leave should be recorded on the pay slip as ordinary

---

[806] It was introduced via the *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* (Cth). A timeline of events leading up to the introduction and adoption of this Act is given at Figure 3 in K Seymour, M Marmo, A Cebulla, N Ibrahim, H Esmaeili, J Richards and E Sinopoli, *Independent Review of the Operation of the Paid Family and Domestic Violence Leave Entitlements in the Fair Work Act 2009* (Report, Flinders University, 2024) 11 <https://www.flinders.edu.au/content/dam/documents/fair-work/FU_Independent_Review_2022_FWA_Final_Report.pdf>.

[807] *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) Sch 2, Item 9, s 757B.

[808] *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) Sch 1, Item 21A. <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6882#:~:text=Amends%20the%20Fair%20Work%20Act,definition%20of%20family%20and%20domestic>.

hours of work or another kind of payment for performing work such as an allowance, bonus or overtime payment or another form of leave (e.g. annual leave) if an employee requests it.[809]

These Secure Jobs, Better Pay amendments came into effect on 1 February 2023 and 9 June 2024, immediately after the commencement of associated schedules in the Paid Family and Domestic Violence Leave Act.[810]

23.1.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of these provisions was to address minor, technical issues related to the Paid Family and Domestic Violence Leave Act. The Secure Jobs, Better Pay amendment arose from stakeholder feedback concerning the operation of this new NES entitlement to 10 days of paid FDV leave. An August 2024 report reviewing the operation of this new entitlement noted that stakeholders were concerned that 'recording the leave as miscellaneous/other leave might make it identifiable to perpetrators as paid FDV leave'.[811]

The second amendment (concerning s 536(3A)) is designed to protect employers from penalties that may arise from issuing what would otherwise be false or misleading pay slips.

The civil remedy provisions were also updated to permit an affected person to apply for a court order for any breach of the additional provision concerning pay slips.

23.2 Impact and issues

This section summarises the key data and information considered by the Review Panel in evaluating the amendments discussed above.

23.2.1 Quantitative evidence

In the report of the Independent Review of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* the review team notes that there are 'limitations on obtaining accurate data on paid FDV leave' and that, because paid FDV leave could not be recorded on pay slips, there was no administrative data to review.[812] The same data limitations face the Review Panel.

23.2.2 Qualitative evidence

The Review Panel is not aware of any significant qualitative evidence in relation to these amendments.

23.2.3 Stakeholder views

The dominant view in consultations and submissions to the Review was that this pay slip amendment is important and welcomed.

---

[809] *Fair Work Regulations 2009* (Cth) reg 3.48.
[810] *Fair Work Legislation Amendment* (*Secure Jobs, Better Pay) Act 2022* (Cth) s 2.
[811] K Seymour, M Marmo, A Cebulla, N Ibrahim, H Esmaeili, J Richards and E Sinopoli, *Independent Review of the Operation of the Paid Family and Domestic Violence Leave Entitlements in the Fair Work Act 2009* (Report, Flinders University, 2024) 18, 29 <https://www.flinders.edu.au/content/dam/documents/fair-work/FU_Independent_Review_2022_FWA_Final_Report.pdf>.
[812] K Seymour, M Marmo, A Cebulla, N Ibrahim, H Esmaeili, J Richards and E Sinopoli, *Independent Review of the Operation of the Paid Family and Domestic Violence Leave Entitlements in the Fair Work Act 2009* (Report, Flinders University, 2024) 8 <https://www.flinders.edu.au/content/dam/documents/fair-work/FU_Independent_Review_2022_FWA_Final_Report.pdf>.

The Review Panel heard that employers play a critical role in creating a safe and supportive environment for employees and that it is important that they understand their legal obligations and that noncompliance could lead to legal repercussions.

The Review Panel also notes that the FWO provides clear guidelines on employers' legal obligations concerning paid FDV leave. This includes information and recommendations concerning the treatment of pay slips.[813]

23.3 Findings and recommendations

Based on stakeholder views, the Review Panel is satisfied that the Secure Jobs, Better Pay amendments concerning pay slips are having their intended effect and there are no unintended effects.

Accordingly, the Panel makes no recommendations in relation to these amendments.

[813] See Fair Work Ombudsman, *Small Business Employer Guide to Family and Domestic Violence* (2023) 8 <https://www.fairwork.gov.au/sites/default/files/migration/1414/employer-guide-to-family-and-domestic-violence.pdf>.

Chapter 24. Objects of the Fair Work Act

In this chapter the focus is on Part 4 (Objects of the Fair Work Act) amendments in the Secure Jobs, Better Pay Act.

24.1 Amendments and intent

An overarching goal of the Secure Jobs, Better Pay Act is to enhance productivity and real wage growth by fostering job security and advancing gender equality. The objects of the Fair Work Act have, therefore, been amended to ensure that the Fair Work Act promotes job security and gender equality and that the Fair Work Commission (FWC) takes account of job security and gender equality in its modern awards and minimum wage determinations.

24.1.1 Secure Jobs, Better Pay amendments

Division 2 of Part 1-1, s 3, of the Fair Work Act concerns the Objects of the Act.

The Fair Work Act Object was amended to include the object of promoting job security and gender equality.[814] Section 3 now reads as follows:

> 3 Object of this Act
>
> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations ...

The modern awards objective was also amended to include 2 new objectives at s 134(1)(aa) and(ab)):

> (aa) the need to improve access to secure work across the economy; and
>
> (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; ...

The minimum wages objective at s 284(1) was amended to include an additional new objective:

> (aa) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable

[814] *Fair Work Act 2009* (Cth) s 3(a).

value, eliminating gender-based undervaluation of work and addressing gender pay gaps.

Amendments to these 3 parts of the Fair Work Act took effect from 7 December 2022.

24.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of these amendments was to place job security and gender equality at the 'heart of the FWC's decision-making, and support the Government's priorities of delivering secure, well-paid jobs and ensuring women have equal opportunities and equal pay'.[815]

Despite various legislative amendments over time (see Chapter 22 for an overview), the gender wage gap (GWG) remains significant in Australia. Much of the GWG is attributed to the historical undervaluation of work traditionally performed by women, particularly in sectors like health care, education and social services. The intent of these amendments was to engender pay equity by strengthening the FWC's capacity to address pay equity.

In terms of job security, the FWC has noted that the intent of these amendments 'recognises the importance of employees and jobseekers "having the choice" to be able to enjoy as much as possible "ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment"'.[816]

24.2 Impact and issues

This section describes relevant quantitative and qualitative data as well as information from roundtables and submissions relied upon to evaluate the amendments described above.

24.2.1 Quantitative evidence

In terms of job security (a new object in the Fair Work Act), the Review Panel notes that the share of employed persons holding a full-time permanent position was equal to 48.3% in 2023 – the highest recorded level in the last decade. It is, however, only marginally higher than the share recorded in 2022 (48.1%).[817] It is too early to statistically quantify the impact of changes to the Objects on job security. That said, there is no statistical evidence of any unintended effects.

Data measuring trends in the GWG shows that, since the passage of the Secure Jobs, Better Pay Act and changes to the Objects coming into effect, there has been a convergence in the gap. This is also confirmed by regression analysis. Estimates generated using the HILDA data show that, for a sample of employees aged 21–64, the GWG was, on average, 10.8% over the period 2008 to 2022. In 2023 it was equal to 6.5% (see Chapter 22 for further discussion).

24.2.2 Qualitative evidence

On the matter of job security, the construction of s 3(a) and s 134(1)(aa) of the Fair Work Act has been the focus of some deliberations by the FWC in the context of the 2022–23 and 2023–24 AWRs and in the Modern Awards Review 2023–24.

---

[815] *Annual Wage Review 2022–23* [2023] FWCFC 3500 (2 June 2023) [24], citing the Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [330].
[816] *Annual Wage Review 2022–23* [2023] FWCFC 3500 (2 June 2023) [30], citing the Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [334].
[817] These estimates are based on data from the HILDA survey, wave 2023. See, also, Chapter 22.

In the 2022–23 AWR, for example, the Expert Panel considered what 'having regard to job security' meant, in terms of its function in determining the national minimum wage and the minimum rates in modern awards. The Expert Panel noted that, in the Secure Jobs, Better Pay Act, Revised Explanatory Memorandum (REM):[818]

> the reference to promoting job security [in s 3(a)] recognises the importance of employees and job seekers 'having the choice' to be able to enjoy as much as possible 'ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment.

The 2022–23 AWR Expert Panel goes on to note:[819]

> We see no reason to consider that the expression 'secure work' in s 134(1)(aa) bears any substantially different connotation to 'job security' in s 3(a). However, we consider that it is significant that s 134(1)(aa) refers to 'the need to improve access' to secure work rather than the general promotion of job security. The language of s 134(1)(aa) suggests that it is more tightly focused on the capacity of employees to enter into work which may be characterised as secure. This appears to reflect the [REM's] reference to the importance of employees being able to have a 'choice' to enter into secure employment. As such, the consideration in s 134(1)(aa) would appear to direct attention primarily to those award terms which affect the capacity of employees to make that choice …

The 2023–24 AWR Expert Panel noted:[820]

> In the context of this Review, the relevance of this consideration concerning the need to improve access to secure work across the economy (s 134(1)(aa)) is primarily whether the review outcome might affect the capacity of employers in the future to continue to offer, or maintain permanent employment.

The Full Bench conducting the Modern Awards Review 2023–24 referred to the commentary of the 2023–24 AWR Expert Panel and saw 'no reason to deviate from these views about the meaning of job security and the need to improve access to secure work in the object of the Fair Work Act in s 3 and in the modern awards objective in s.134(1)(aa) respectively'.[821]

It is clear from these statements by the FWC that the terms 'job security' and 'access to secure work' are open to interpretation. The FWC has set out its interpretation (as noted). It is also clear that the FWC has, and is, taking the revised objects into account in their deliberations.

In considering the effect of amendments to the objects of the Fair Work Act on decisions of the FWC, the Expert Panel began examining decisions in the 2022–23 AWR and 2023–24 AWR, the

---

[818] *Annual Wage Review 2022–23* [2023] FWCFC 3500 (2 June 2023) [30], citing the Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [26].
[819] *Annual Wage Review 2022–23* [2023] FWCFC 3500 (2 June 2023) [30].
[820] *Annual Wage Review 2023–24* [2024] FWCFB 3500 (3 June 2024) [133].
[821] Fair Work Commission, *Modern Awards Review 2023–24* (Report, 2024) [50] <~~h~~https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-review-report-180724.pdf>.

'Aged Care Work Value' case and the Modern Awards Review 2023–24. The Review Panel considers these decisions below (see also Appendix 9 FWC & Pay equity).

24.2.2.1 The 2022–23 Annual Wage Review

The FWC, constituted by an Expert Panel, is required to review and make an order concerning the national minimum wage and modern award minimum wages each year (called the Annual Wage Review (AWR)). In the 2022–23 AWR the Expert Panel noted the Secure Jobs, Better Pay amendments have the effect of giving greater emphasis to the issues of gender equality and job security. They discuss how the amendments were considered at section 2.2 of their decision.[822]

In its decision, the Expert Panel refers to the new requirement in the minimum wage objective to 'achieve gender equality' and 'eliminate gender-based undervaluation of work'.[823] The amendments, they note, mean that AWR decisions must now consider the 'elimination of gender-based undervaluation' and gender wage gaps when determining the annual adjustment to minimum wages – a departure from previous principles guiding AWR decisions.

Following consideration of these new objects, the Expert Panel determined that the historic alignment of the National Minimum Wage with the C14 wage rate in modern awards (the lowest modern award minimum wage) rate should be ended and that there should be a wider review, with supporting research, as to the appropriate level of alignment for the National Minimum Wage.

The Expert Panel also determined that the National Minimum Wage and the minimum rates in modern awards be increased by 5.75%. This was significantly higher than the general rate of wage growth for the workforce at that time. A stated factor weighing in their decision to award this increase was evidence showing that women are disproportionately award-reliant and that the new minimum wage objective requires that the Expert Panel take the gender pay gap into account in determining the minimum rates in modern awards.[824]

24.2.2.2 The 2023–24 Annual Wage Review

In the 2023–24 AWR decision the Expert Panel expressly considered the modern award objective of needing to improve access to secure work across the economy[825] and the potential impacts of their decision on casual employees.[826]

The Expert Panel also 'decided to increase the National Minimum Wage and all modern award minimum wage rates by 3.75 per cent, effective from 1 July 2024',[827] noting that it had considered a number of Fair Work Act requirements, including the need to achieve gender equality,[828] and set out its program for 'the timely resolution of gender undervaluation issues arising in respect of certain modern awards'.[829]

24.2.2.3 Aged Care Work Value case

In the Aged Care Work Value case, the Full Bench of the FWC also took into consideration the revised Objects in its Stage 2 (February 2023) and Stage 3 (March 2024) decisions. For example,

---

[822] *Annual Wage Review 2022–23* [2023] FWCFC 3500 (2 June 2023) 10.
[823] *Annual Wage Review 2022–23* [2023] FWCFC 3500 (2 June 2023) [40].
[824] *Annual Wage Review 2022–23* [2023] FWCFC 3500 (2 June 2023) [174]; *Fair Work Act 2009* (Cth) s 284(1)(aa).
[825] *Annual Wage Review 2023–24* [2024] FWCFB 3500 (3 June 2024) [133].
[826] *Annual Wage Review 2023–24* [2024] FWCFB 3500 (3 June 2024) [134]–[135].
[827] *Annual Wage Review 2023–24* [2024] FWCFB 3500 (3 June 2024) [8].
[828] *Annual Wage Review 2023–24* [2024] FWCFB 3500 (3 June 2024) [5].
[829] *Annual Wage Review 2023–24* [2024] FWCFB 3500 (3 June 2024) [10].

the FWC considered the impacts of pay rises on staff recruitment and retention (in its consideration of the need to improve access to secure work across the economy) and noted that the rate changes do not 'provide either lower or higher levels of secure work or job security from an employee perspective'.[830]

24.2.2.4 Modern Awards Review 2023–24

The FWC is the body responsible for the safety net of modern awards. The FWC must ensure that the safety net remains a fair and relevant minimum safety net taking into account certain social and economic factors.

The FWC announced the commencement of a review of modern awards on 15 September 2023 (the Modern Awards Review 2023–24).[831] Consistent with the revised Objects in the Fair Work Act, job security was identified as a priority topic for this review, with emphasis given to reviewing fixed-term contract provisions in higher education awards (this is currently underway)[832] and part-time provisions in awards (this will commence in 2025).

24.2.3 Stakeholder views

Union parties welcomed the amended Objects and noted that, since coming into effect, the FWC has changed its approach to Modern Awards Reviews. As evidence, they note that issues such as part-time work and quality jobs are now on the agenda. They also welcomed FWC's research, noting the value of the FWC's 'Gender Prism' analysis used to identify key differences in award entitlements in male and female awards.

Employer associations raised concerns about the affordability of higher wages and increased entitlements arising from the FWC application of the new Objects.[833] The Australian Chamber of Commerce and Industry submitted that ongoing business viability and productivity growth should be considered as part of job security (as businesses which cannot absorb the cost increases will collapse or layoff staff, contrary to the goals of secure work).[834]

Some stakeholders suggested further amendments to the Objects, such as a need to consider any government funding commitments (or a lack thereof), an approach to First Nations wage redress, and business viability.[835]

---

[830] *Work Value Case* [2023] FWCFB 93 (18 May 2023) [171].

[831] The first step in the Work and Care priority topic was the release of a discussion paper: Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper 29, January 2024) <https://www.fwc.gov.au/documents/sites/award-review-2023-24/discussion-paper-work-and-care-290123.pdf>. The next step involved the release of a literature review on work and care: M Smith and S Charlesworth, *Literature Review for the Modern Awards Review* (March 2024) <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am2023-21-literature-review-work-care-2024-03-08.pdf>. The FWC also convened a consultation conference and undertook survey of employers aimed at gathering information about the potential to vary modern award provisions to increase flexibility for employees balancing work and care responsibilities. The final report of the Modern Awards Review 2023–24 was released 18 July 2024: Fair Work Commission, *Modern Awards Review 2023–24* (Report, 2024) <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-review-report-180724.pdf>.

[832] Fair Work Commission, *Modern Awards Review 2023–24* (Report, 2024) <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-review-report-180724.pdf>.

[833] Ai Group submission, 80; Australian Chamber of Commerce and Industry submission, 66.

[834] Australian Chamber of Commerce and Industry submission, 66.

[835] Australian Chamber of Commerce and Industry submission, 66; Ai Group submission, 80; Honorary Professor Anne Junor submission.

24.3 Findings and recommendations

The Review Panel is satisfied that the amendments to the Objects of the Fair Work Act are having their intended effect; there is demonstrated evidence that the amended Objects are central to considerations by the FWC in its AWRs and other reviews.

While the terms 'job security' and 'access to secure work' are open to interpretation, the Review Panel is also satisfied with the FWC's careful consideration of these Objects and business viability in its decision making. Therefore, the Panel is of the view that no further legislative amendments are required to define or give clarity to the terms.

The Review Panel similarly sees no value in amending the Objects to include reference to government funding and procurement activities. While acknowledging that express funding commitments have bolstered equal remuneration decisions of the FWC (discussed further in Chapter 25 (Equal remuneration)), the Review Panel's view is that funding commitments and procurement activities may be dealt with elsewhere and not through additional amendments to the Objects of the Fair Work Act.

The Review Panel makes no recommendations in relation to these amendments.

Chapter 25. Equal remuneration

In this chapter the focus is on Part 5 (Equal remuneration) amendments in the Secure Jobs, Better Pay Act.

25.1 Amendments and intent

As noted in Chapter 22, pay equity in Australia has been (and continues to be) fraught with challenges. Moreover, there is, as scholars note, 'no guarantee of a progressive trajectory'.[836] At times a particular constraint has been the requirement that remedying gender-based undervaluations through the workplace relations framework be based on a male comparator.

The Secure Jobs, Better Pay amendments in relation to equal remuneration now make it very clear that the Fair Work Commission (FWC) consideration of work value must be free of assumptions based on gender, must include considerations of historical gender-based undervaluation and need no longer rely on a male comparator.[837]

25.1.1 Secure Jobs, Better Pay amendments

The main amendments in Part 5 of the Secure Jobs, Better Pay Act, in relation to equal remuneration – specifically work value, are as follows.

In s 157(2) of the Fair Work Act, which provides that the FWC may vary modern awards minimum wages if justified and necessary, new s 157(2B) was inserted which provides:

> (2B) The FWC's consideration of work value reasons must:
>
> (a) be free of assumptions based on gender; and
>
> (b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.

Division 2 of Part 2-7 of the Fair Work Act concerns Equal Remuneration Orders (EROs). Via the Secure Jobs, Better Pay amendments, new subsections ((3A), (3B), (3C) and (4A)) have been added to s 302 of the Fair Work Act (FWC may make an order requiring equal remuneration). Sections 302(3A) to 302(5) now read:

> Gender equity considerations
>
> (3A) For the purposes of this Act, in deciding whether there is equal remuneration for work of equal or comparable value, the FWC may take into account:
>
> (a) comparisons within and between occupations or industries to establish whether the work has been undervalued on the basis of gender; or

[836] M Smith and G Whitehouse, 'Wage-setting and Gender Pay Equality in Australia: Advances, Retreats and Future Prospects' (2020) 62(4) *Journal of Industrial Relations* 533–559, 533.

[837] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) Pt 5; Commonwealth, *Parliamentary Debates,* House of Representatives, 27 October 2022 (Tony Burke, Minister for Employment and Workplace Relations).

(b) whether historically the work has been undervalued on the basis of gender; or

(c) any fair work instrument or State industrial instrument.

(3B) [Comparisons within and between occupations and industries]

If the FWC takes into account a comparison for the purposes of paragraph (3A)(a), the comparison:

(a) is not limited to similar work; and

(b) does not need to be a comparison with an historically male-dominated occupation or industry.

(3C) [Findings of discrimination not required]

If the FWC takes into account a matter referred to in paragraph (3A)(a) or (b), the FWC is not required to find discrimination on the basis of gender to establish the work has been undervalued as referred to in that paragraph. ...

FWC must take into account orders and determinations made in annual wage reviews

(4) For the purposes of this Act, in deciding whether there is equal remuneration for work of equal or comparable value, the FWC must take into account:

(a) orders and determinations made by the FWC in annual wage reviews; and

(b) the reasons for those orders and determinations ...

Note: The FWC must be constituted by an Expert Panel in annual wage reviews (see section 617).

(4A) Nothing in this section limits the considerations the FWC may take into account in deciding whether there is equal remuneration for work of equal or comparable value.

Requirement to make an equal remuneration order

(5) ... the FWC must make the equal remuneration order if it is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for work of equal or comparable value.

These various amendments came into effect on 7 December 2022.

25.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of these amendments was to make it more likely that the FWC would order pay rises for low-paid female workers.[838]

For example, prior to the commencement of the Secure Jobs, Better Pay amendments, the Fair Work Act equal remuneration provisions set out that 'Equal remuneration for work of equal or comparable value means equal remuneration for men and women workers for work of equal or comparable value'.[839] The FWC had interpreted these provisions to mean that it had to be satisfied that a group of employees covered by an equal remuneration application (usually women) do not receive equal remuneration for work of equal or comparable value compared to another group of employees of the opposite gender (usually men). A male (or female) comparator was required to make orders requiring equal remuneration.[840]

During the 2022 election campaign, as part of their broader strategy to address gender inequality in the workplace, the Labor government (then opposition) committed to introducing measures aimed at promoting gender pay equity.

25.2 Impact and issues

The following describes the data and information considered by the Review Panel when evaluating the amendments discussed above.

25.2.1 Quantitative evidence

The Review Panel expects increased wages for women (especially in highly feminised and historically undervalued industries) to contribute to a significant convergence in the gender wage gap (GWG). The GWG in the full-time labour market is now at 11.5% – a new low (see Chapter 22). Regression analysis also reported in Chapter 22 shows that, since 2022, when the Secure Jobs, Better Pay amendments commenced, there has been a significant convergence in the GWG net of compositional effects. This suggests that the work value reforms are impacting as intended.

25.2.2 Qualitative evidence

The FWC has varied modern award minimum wages for work value reasons since they came into effect. Notable cases include the Aged Care Work Value case (which was underway when the Secure Jobs, Better Pay amendments commenced). In this case the FWC accepted evidence that the workers in this sector suffered 'historic gender-based undervaluation'.[841] As noted in Chapter 22, in February 2023 the Full Bench of the FWC granted an interim pay increase of 15% for direct care workers and in March 2024 an additional final increase of up to 28.5% depending on job and level.[842]

---

[838] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) Pt 5; Commonwealth, *Parliamentary Debates,* House of Representatives, 27 October 2022 (Tony Burke, Minister for Employment and Workplace Relations).

[839] *Fair Work Act 2009* (Cth) s 302(2).

[840] E*qual Remuneration Decision – Children's services and Early childhood education industry* [2015] FWCFB 8200 [292]–[294].

[841] *Work Value Case* [2022] FWCFB 200 (4 Nov 2022) [1048]. Note: the pay increases apply to workers paid according to the relevant awards.

[842] *Work Value Case* [2023] FWCFB 40, [17]; *Work Value Case* [2024] FWCFB 150, [197].

Building on its gender pay equity research, in the Annual Wage Review 2023–24 the FWC set out its program to remedy gender undervaluation, beginning with the Gender Undervaluation Priority Awards Review, which is currently underway.[843]

The FWC is now also reviewing gender undervaluation in 5 modern awards:[844]

- Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020
- Children's Services Award 2010
- Health Professionals and Support Services Award 2020
- Pharmacy Industry Award 2020
- Social, Community, Home Care and Disability Services Industry Award 2010.

The FWC's intent is to complete the gender undervaluation review prior to the 2024–25 AWR and likely then progress to consider gender undervaluation issues in other awards.

During work value cases and other matters, the FWC has undertaken research and prepared materials to facilitate proceedings. For example, in the Aged Care Work Value case, the FWC prepared documents including a background of award histories and a summary of lay witnesses' evidence.[845] Similarly, to support the ongoing Gender Undervaluation Priority Awards Review, the FWC has published a data profile to provide information on pharmacists and employees whose pay is set by the Pharmacy Award and engaged Jumbunna Institute for Indigenous Education and Research to undertake a literature review about the intersection of cultural and gender-based skills.[846] These sorts of activities facilitate the proceedings and alleviate some of the evidentiary burden on the particular parties involved. Noting the broader public importance of work value proceedings, this is an appropriate and important function of the FWC.

25.2.3 Stakeholder views

In terms of amendments concerning Equal Remuneration Orders (EROs), unions welcomed the provisions requiring that the FWC must make an ERO if it is satisfied that the employees to be covered by the ERO do not have equal remuneration for work of equal or comparable value. Unions also welcomed the change that allows the FWC to make its own ERO without having to wait for an equal remuneration application.

The unions also note that the new equal remuneration provisions provide individual remedies as well as collective ones.[847] In other words, individuals may apply to the FWC for an ERO. At the time of writing there has been only one such application – *Sabbatini v Peter Rowland Group*

---

[843] *Annual Wage Review 2023–24* [2024] FWCFB 3500 (3 June 2024) [10].
[844] Hearings were conducted through December 2024.
[845] Fair Work Commission, *Background Document 2: Award Histories* (2022) <https://www.fwc.gov.au/documents/sites/work-value-aged-care/decisions-statements/am202099-63-65-background-doc-no-2-090622.pdf>; Fair Work Commission, *Report to the Full Bench* (2022) <https://www.fwc.gov.au/documents/sites/work-value-aged-care/decisions-statements/am202099-63-65-lay-witness-evidence-report-200622.pdf>.
[846] Fair Work Commission, *Data Profile – Pharmacists and the Pharmacy Industry Award 2020* (Report, 2024) <https://www.fwc.gov.au/documents/sites/am2024-19/am202419-pharmacists-pharmacy-industry-award-data-profile-300824.pdf>; N Young, J Sherwood, C Anthony, J Gilbert, K Gray and C McEwen, *A Hidden History of Aboriginal Women's Work in the Community Controlled Health Sector* (Jumbunna Institute for Indigenous Education and Research, 2024) < https://www.fwc.gov.au/documents/sites/am2024-19/am202422-lit-review-191124.pdf>.
[847] Australian Council of Trade Unions submission, 41.

Pty Ltd.[848] In this case, Sabbatini applied for an ERO on the grounds that she was paid less than her male counterparts for performing equally valuable work. The FWC acknowledged the pay disparity but could not issue an ERO because she had subsequently resigned and was no longer employed by the company by the time the FWC heard the case.[849]

Several issues concerning the work value amendments were, however, raised during the roundtable consultations and via submissions. These are summarised as follows.

Process and efficiency concerns

Stakeholders in roundtables submitted that the rapid pace of priority award review proceedings was placing significant pressure on parties, making it challenging for them to meaningfully contribute. The Review Panel also heard that the time required to gather evidence and conduct reviews was taxing and with the numerous reviews underway the process was generating participant fatigue.[850]

The Centre for Future Work (CFW) submitted that:[851]

> [g]ender inequality and gender-based undervaluation will not be eradicated by small incremental adjustments. Further amendments to the FWA could include a requirement that the FWC adopt a standard methodology and principles for classifying work and ascribing work value that breaks with the historic reliance on standards in male-dominated industries.

Substantive issues

Concerns were expressed that the FWC may be conflating front-line care work with gender-based undervaluation, potentially overlooking how 'gender impacts on all those involved in highly female-dominated occupations and industries.' The CFW highlighted that, in cases such as the Federal SACs Case and the Aged Care Case non-frontline workers received less attention and smaller wage increases. The CFW urge the FWC to take a broader approach to 'gender-based undervaluation'.[852]

Some stakeholders also noted that a focus solely on gender undervaluation could overlook other contributing factors to gender wage inequality, such as gender differences in working time arrangements and access to overtime payments. (The Review Panel notes that the FWC has committed to reviewing part-time working arrangements in 2025).[853] Concerns were also raised that wage increases achieved may result in unintended consequences in enterprise agreements.

---

[848] [2023] FWCFB 127.
[849] [2023] FWCFB 127 [41].
[850] The Panel heard that some work value cases can take years to finalise. For example, the 2021 decision to adjust the minimum rates in the Teachers Award (operative January 2022) started off with equal remuneration applications in 2013 and, while the Aged Care Work Value case started off in 2020, it was separated in to multiple stages and cases that were finalised in late 2024: Fair Work Commission, *Equal Remuneration and Work Value Case* (Web Page, n.d.) <https://www.fwc.gov.au/hearings-decisions/major-cases/previous-major-cases/equal-remuneration-and-work-value-case>; Fair Work Commission, *Work Value Case – Aged Care Industry* (Web Page, n.d.) <https://www.fwc.gov.au/hearings-decisions/major-cases/work-value-case-aged-care-industry>; Fair Work Commission, Work Value Case – Nurses and Midwives (Web Page, n.d.) <https://www.fwc.gov.au/hearings-decisions/major-cases/work-value-case-nurses-and-midwives>.
[851] Centre for Future Work submission, 11.
[852] Centre for Future Work submission, 11.
[853] Fair Work Commission, *Modern Awards Review 2023–24* (Report, July 2024) [167].

Financial and funding concerns

Some stakeholders raised concerns about the significant cost to run a work value case, noting that these reviews have significant public value and are effectively being funded by union members, many of whom are low paid.[854] Employers also expressed anxiety about costs, notably their ability to absorb wage increases, particularly in situations where there is no corresponding increase in government funding to offset the costs. Several stakeholders urged the Australian Government to review its procurement processes and seek to build greater funding certainty into contracts to ensure that wage increases are sustainable and will not place an undue financial burden on employers.

Relevant to this, the Review Panel notes that the Australian Government made an initial submission to the FWC Gender Undervaluation – Priority Awards Review on 27 September 2024.[855] The submission supported the process and the broader task of identifying and addressing gender undervaluation in the modern awards system, recognising that the FWC's work was informed by the Secure Jobs, Better Pay reforms.[856] It also considered Commonwealth funding (including budget processes and timeframes), affected programs and policies, and the timing of wage increases,[857] submitting that:[858]

> the Commission's decision in the Priority Review should be made on the basis that the Commonwealth is yet to decide whether it will fund (including at all, and if so, to what extent) any wage increases in areas where the Commonwealth has a funding role.

25.3 Findings and recommendations

Overall, the Review Panel finds that the Secure Jobs, Better Pay work value amendments are having their intended effect. They have enabled the FWC to make important work value determinations and quantitative evidence shows that, since 2022, there has been a significant convergence in the GWG. This captures structural inequalities in pay (e.g. issues such as occupational and industry segregation) and, accordingly, is a high-level indicator of women's progress and status in the labour market.

The FWC's ability to make EROs on application has yet to be substantively tested. The Review Panel is only aware of the one case heard under s 302 of the Fair Work Act to date. Given this, it is perhaps too early to tell whether this amendment will have its intended effect or not.

The Review Panel also notes Professor Andrew Stewart's submission to the Secure Jobs, Better Pay Bill inquiry, recommending that the Expert Panel for pay equity 'should be expressly permitted to make a "statement of policy" about the exercise of its power to issue EROs'.[859]

---

[854] This matter was raised in the academic roundtable discussions.
[855] Fair Work Commission, Gender Undervaluation, Priority Awards Review, Commonwealth submission <https://www.fwc.gov.au/documents/sites/am2024-19/am202419-ors-sub-cth-270924.pdf>.
[856] Fair Work Commission, Gender Undervaluation, Priority Awards Review, Commonwealth submission, [3]–[4] <https://www.fwc.gov.au/documents/sites/am2024-19/am202419-ors-sub-cth-270924.pdf>.
[857] Fair Work Commission, Gender Undervaluation, Priority Awards Review, Commonwealth submission, [38]–[52] <https://www.fwc.gov.au/documents/sites/am2024-19/am202419-ors-sub-cth-270924.pdf>.
[858] Fair Work Commission, Gender Undervaluation, Priority Awards Review, Commonwealth submission, [38] <https://www.fwc.gov.au/documents/sites/am2024-19/am202419-ors-sub-cth-270924.pdf>.
[859] Senate Education and Employment Legislation Committee, Parliament of Australia, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, submission 89, [2]. <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/SecureJobsBetterPay/Submissions>.

The Review Panel does not recommend further amendments at this stage, given the limited cases to date and noting that the FWC considers individual cases on their merits.

The Review Panel also acknowledges the Australian Council of Trade Unions suggestion that there should be a statutory requirement for the FWC to consider reports of Expert Panels when making EROs. However, the Review Panel is cautious about adopting this suggestion at this stage, noting that the provisions are still in their early stages, with no reports yet published. There is also no indication that the FWC would not consider any such reports if relevant.

Relevant to a number of Secure Jobs, Better Pay amendments, the Review Panel makes several recommendations about the ongoing work to address gender undervaluation.

Through its commentary in Annual Wage Reviews, the FWC appears to have set out an initial roadmap to identify and address gender undervaluation across all modern awards. While the current priority awards review focuses on the care sector, the FWC's gender pay equity research appears to indicate that its next tranches of work will go beyond care work. It also appears that the outcomes of the priority awards review currently underway will set out principles for future consideration.

Draft Recommendation 9: The Review Panel encourages the FWC to continue its program of work to advance gender equality, particularly by addressing the low pay in other female dominated sectors (beyond care work), and to set out broader principles for identifying and addressing work value and gender undervaluation.

The Review Panel notes that the nature of FWC processes (in which initial cases identify evidence gaps, collect and interrogate relevant information, and set out principles to guide future proceedings) mean that a significant 'burden' falls on the parties which participate in these initial cases. In the context of valuing work appropriately and addressing historical gender undervaluation, these initial cases have important public value which warrants broader support. As noted above, the FWC should continue to undertake the significant volume of research and evidence collection that reduces the burden on parties.

Draft Recommendation 10: The FWC continue to support parties and facilitate proceedings to address gender undervaluation, including through its gender pay equity unit undertaking research and gathering evidence to support future work value proceedings.

The Australian Government's position on funding wage increases is likely to play a part in FWC's consideration of when and how to address gender undervaluation, where found. The Review Panel notes that the early government funding commitments for aged care work supported the FWC decisions to award significant pay increases but that budget processes and uncertainty about potential costs have limited the Australian Government from making such commitments in the priority awards review currently underway.

The Australian Government intended the Secure Jobs, Better Pay amendments to deliver pay rises for low-paid female workers. To support this, and given the broader importance and socioeconomic value of addressing gender undervaluation (see Chapter 22), the Australian Government should also look to prioritise funding commitments now and as the FWC continues its program of work to advance gender equality. Where there are not direct funding impacts, the Australian Government may also consider ways to support employers to understand and implement any increases.

While the specific outcomes of FWC proceedings cannot be predicted, it is clear that there will very likely be further minimum wage increases to address gender undervaluation. While the FWC will likely consider the timing and phasing in of any such increases, employers need to adapt their business plans and processes to account for these.

Draft Recommendation 11: The Australian Government take steps to advise the FWC and stakeholders of its position on funding for the outcomes of FWC reviews to address gender undervaluation at the earliest opportunities.

Noting that initial FWC outcomes appear to indicate a shift towards benchmarking higher pay classifications against training qualifications, the Australian Government should also monitor these outcomes and ensure appropriate support and pathways for people to obtain these higher qualifications.

The Review Panel also notes that the work to address gender undervaluation in modern awards is anticipated to flow through to future rounds of enterprise bargaining. The base rate of pay for an employee under an enterprise agreement must not be less than the base rate of pay under the relevant modern award (s 206(1)). If it is, then the agreement rate, in effect, becomes the same as the modern award rate (s 206(2)). The effect of these provisions is that enterprise agreements in sectors that receive the benefit of significant award increases (to rectify gender undervaluation) may have previously bargained above-award rates which become the same as minimum pay rates. All parties should recognise that these were one-off increases to address historical wrongs. It would be unfortunate if these corrections were to lead to poorer bargaining outcomes in these historically low-paid sectors (compared to other sectors).

Draft Recommendation 12: The Australian Government should actively monitor bargaining outcomes in sectors that receive significant increases to modern award rates of pay due to gender undervaluation. This monitoring is essential to ensure that these increases lead to sustained improvements in pay equity and do not result in unintended changes in wage-setting practices within enterprise agreements.

Chapter 26. Expert panels

In this chapter the focus is on Part 6 (Expert panels) amendments in the Secure Jobs, Better Pay Act.

26.1 Amendments and intent

The Secure Jobs, Better Pay amendments to the Fair Work Act introduced 3 new expert panels to address specific and pressing issues concerning pay equity and the care and community sector.

Alongside these changes the Secure Jobs, Better Pay amendments also extended the knowledge and experience requirements for the appointment of expert panel members (EPMs) to the FWC. EPMs are persons who are appointed by the Governor-General on a part-time basis for a maximum period of 5 years for their specialised knowledge and expertise in a particular area.

It is important not to confuse EPMs with expert panels. Expert panels are required for certain functions of the FWC. For example, an expert panel is required for Annual Wage Reviews (AWRs). An expert panel need not always include EPMs. The composition of particular panels is defined in the Fair Work Act (as will be described below). The key amendments concerning expert panels and EPMs are outlined in the following section.

26.1.1 Secure Jobs, Better Pay amendments

Part 6 of Schedule 1 (Expert panels) to the Secure Jobs, Better Pay Act makes several amendments to the Fair Work Act. The following sets out the main amendments.

Section 627(4) of the Fair Work Act specifies the qualifications for the appointment of EPMs (the part-time members of the FWC). Prior to the Secure Jobs, Better Pay amendments, EPMs must have knowledge or experience in one or more of the following fields: workplace relations; economics; social policy; business, industry or commerce; finance; investment management; superannuation. The Secure Jobs, Better Pay amendments extended this list to include gender pay equity; anti-discrimination; and the care and community sector (s 627(4)(h), (i) and (j)).

Section 620 of the Fair Work Act broadly provides for the 'Constitution and decision-making of an Expert Panel'. Expert panels are required for certain functions of the FWC.

Section 617 of the Fair Work Act sets out the functions that must be performed by an expert panel. These include s 617(1), (2) and (3) – AWRs and the making and varying of national minimum wage orders or a determination; s 617(4) and (5) 4-yearly reviews of default superannuation fund terms of modern awards and for amending the Schedule of Approved Employer MySuper Products. The Secure Jobs, Better Pay amendments to the Fair Work Act added 3 new expert panels to this list:

- *Expert Panel for Pay Equity* (s 617(6): 'If the President considers that substantive gender pay equity matters might require the making of a determination under s.157(2) ... the determination must be made by an Expert Panel constituted for the purpose of deciding whether to make the determination.'
- *Expert Panel for the Care and Community Sector* (s 617(8)): 'A determination or modern award made under s.157(1) that the President considers might relate to the Care and

Community Sector must be made by an Expert Panel constituted for the purpose of deciding whether to make the determination or modern award.'

- *Expert Panel for Pay Equity in the Care and Community Sector* (s 617(9)): 'A determination made under s.57(2) that the President considers might relate to the Care and Community Sector must be made by an Expert Panel constituted for the purpose of deciding whether to make the determination.'

In relation to requirements for the composition of an expert panel for the AWR, the requirements for appointment are set out in the Fair Work Act at s 620(1) and requires the inclusion of 3 EPMs:

> An Expert Panel constituted under this subsection for the purpose of an annual wage review … consists of 7 FWC Members … and must include:
>
> (a) the President; and
>
> (b) 3 Expert Panel Members who have knowledge of, or experience in, one or more of the following fields:
>
> (i) workplace relations;
>
> (ii) economics;
>
> (iii) social policy;
>
> (iv) business, industry or commerce.

While the AWR Expert Panel must include 3 EPMs, EPMs, as noted, need not necessarily be included as members of particular expert panels. For example, where an expert panel is required for substantive gender pay equity matters (other than those that relate to the care and community sector) (s 617 (6), (7) or (11)) the expert panel must include:

> (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
>
> (b) at least 2 Expert Panel Members *or* other FWC Members who have knowledge of, or experience in, one or both of the following fields:
>
> (i) gender pay equity; and
>
> (ii) anti-discrimination … [emphasis added]

If the matter relates to the care and community sector and requires an expert panel (s 617(8) or s 617(11)) the expert panel constituted for this purpose must consist of (s 620(1C)):

> (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
>
> (b) at least 2 Expert Panel Members *or* other FWC Members who have knowledge of, or experience in, the Care and Community Sector … [emphasis added]

An Expert Panel for pay equity in the Care and Community Sector must include at least one EPM or FWC member with relevant knowledge or experience in gender pay equity or anti-discrimination, and one with knowledge or experience in the care and community sector.[860]

In addition to the above, under a new s 617A(1):

> The president may give a direction under section 582 requiring that a matter that is relevant to the function of an Expert Panel ... be investigated and that a report about the matter be prepared.

The Note in s 617A(1) states that '[m]atters that may be relevant include gender pay equity, equal remuneration, and the Care and Community Sector, in Australia'.

Under a new s 617A(2):

> The direction may be given to: (a) an Expert Panel; or (b) an Expert Panel Member; or (c) a Commissioners; or (d) a Full Bench that includes one or more Expert Panel Members.

Section 617B(1) of the Fair Work Act requires that any reports prepared following a presidential direction at s 617A of the Fair Work Act must be published by the FWC: 'the FWC must publish the report so that submissions can be made addressing issues covered by the report'.

The main amendments concerning expert panels came into effect on 6 March 2023.

26.1.2 Intent of Secure Jobs, Better Pay Amendments

The intent of these amendments was to ensure that FWC decisions about pay equity and the care and community sector are guided by specialised knowledge and expertise.[861]

The establishment of these expert panels was a 2022 election commitment of the current government, included in its Fair Pay and Conditions for Working Women policy, which referred to aged care, early childhood education and care, and disability care when describing the care sector.[862]

26.2 Impact and issues

Part 6 of Schedule 1 to the Secure Jobs, Better Pay Act is designed to ensure that, where relevant, expert panels have knowledge or experience of a variety of fields, including pay equity, anti-discrimination and/or the care and community sector.

The following describes the data and information considered by the Review Panel when evaluating the amendments.

26.2.1 Quantitative evidence

EPMs are appointed for a period of up to 5 years. There are 6 EPMs, 3 of whom were appointed following the passage of the Secure Jobs, Better Pay Act. The 3 new members are:

- Professor Marian Baird

[860] *Fair Work Act 2009* (Cth) s 620(1D).
[861] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [364].
[862] Anthony Albanese, Tony Burke and Tanya Plibersek, 'Labour to Deliver Fair Pay & Conditions for Working Women' (Media Release, 1 May 2022).

- Mr Mark Cully
- Dr Leonora Risse.

Professor Baird and Dr Risse 'bring extensive experience in pay equity and will bolster the Commission's capacity to properly consider the gender pay gap when making decisions.' Mr Cully brings 'a wealth of experience in economics and workplace relations.'[863]

Given that the expert panel amendments were intended to ensure FWC decisions on pay equity in the care and community sector are informed by specialised knowledge and expertise, it may be inferred that a reduction in the gender wage gap (GWG) serves as a key indicator of the measure's success. To this end, the Review Panel notes the significant wage increases awarded since the Secure Jobs, Better Pay amendments concerning expert panels and the associated convergence in the GWG (see Chapter 22) intended effect.

26.2.2 Qualitative evidence

In response to the Secure Jobs, Better Pay amendments, the FWC issued statements about how the FWC would implement the expert panel provisions, and the impact and relevance of expert panels to matters before the FWC.[864]

Alongside describing the Secure Jobs, Better Pay amendments and the roles of the new expert panels, the FWC noted that the Revised Explanatory Memorandum included a non-exhaustive list defining the care and community sector to include aged care, early childhood education and care and disability care sectors.[865]

At the time of commencement, the FWC identified 3 ongoing matters to be dealt with by an expert panel for the care and community sector as well as the need for an expert panel for pay equity in the care and community sector to deal with the Aged Care Work Value case.[866] The FWC also noted that an ongoing matter to review superannuation clauses in all modern awards did not need to be made by an expert panel for the care and community sector, as the determinations were more likely to be made under s 160 of the Fair Work Act rather than s 157(1) of the Fair Work Act.[867]

---

[863] The Hon Tony Burke MP, 'Appointments to the Fair Work Commission Expert Panel' (Media Release, 6 March 2023).

[864] Justice Hatcher, Fair Work Commission, *Pay Equity and Care and Community Sector – Expert Panels* (President's Statement, 3 February 2023) <https://www.fwc.gov.au/sites/default/files/2023-02/presidents-statement-expert-panels-2023-01-03.pdf>; Justice Hatcher, Fair Work Commission, *Expert Panels – Provisional Views* (President's Statement, 24 February 2024) <https://www.fwc.gov.au/documents/consultation/presidents-statement-expert-panels-audit-of-current-matters-2023-02-24.pdf>; Fair Work Commission, *Pay Equity and Care and Community Sector – Expert Panels* (President's Statement, 14 March 2023) <https://www.fwc.gov.au/sites/default/files/2023-02/presidents-statement-expert-panels-2023-01-03.pdf>.

[865] Justice Hatcher, Fair Work Commission, *Expert Panels – Provisional Views* (President's Statement, 24 February 2024) [8] citing the Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 at [380] <https://www.fwc.gov.au/documents/consultation/presidents-statement-expert-panels-audit-of-current-matters-2023-02-24.pdf>.

[866] Justice Hatcher, Fair Work Commission, *Expert Panels – Provisional Views* (President's Statement, 24 February 2024) [15]–[16] <https://www.fwc.gov.au/documents/consultation/presidents-statement-expert-panels-audit-of-current-matters-2023-02-24.pdf> affirmed in Justice Hatcher, Fair Work Commission, *Pay Equity and Care and Community Sector – Expert Panels* (President's Statement, 3 February 2023) [6] <https://www.fwc.gov.au/sites/default/files/2023-02/presidents-statement-expert-panels-2023-01-03.pdf>.

[867] Justice Hatcher, Fair Work Commission, *Expert Panels – Provisional Views* (President's Statement, 24 February 2024) [17] <https://www.fwc.gov.au/documents/consultation/presidents-statement-expert-panels-audit-of-current-matters-2023-02-24.pdf> affirmed in Justice Hatcher, Fair Work Commission, *Pay Equity and Care and Community*

26.2.3 Stakeholder views

The Secure Jobs, Better Pay amendments regarding expert panels and EPMs have largely been welcomed by stakeholders. One submission also suggested that expert panels be established to address matters related to First Nations peoples and other equity issues such as race.[868] In roundtable discussions it was also suggested that additional EPMs be appointed to assist with the work of the FWC, noting that only 3 appointments have been made since the Secure Jobs, Better Pay Act came into effect.

Unions have recommended that gender pay equity be added as a specified area of knowledge and experience for expert panels constituted to hear and determine the AWR. While the Fair Work Act does not explicitly require expertise in gender pay equity, unions note that, in recent years, the expert panel's membership has included such expertise and this has been instrumental in shaping its decisions.[869]

The Review Panel was informed that an unintended consequence of the Secure Jobs, Better Pay amendments is the requirement for the President to convene an expert panel for any (major or minor) determination or modern award decision involving the care and community sector (s 617(8) and (9)).

There are 121 modern awards and, periodically, the FWC makes minor variations across all the awards. Under the Secure Jobs, Better Pay amendments, however, a Care and Community Expert Panel must be constituted for any matter concerning this sector. The Review Panel heard that this requirement could limit the panel's capacity to focus on more substantive issues. It was therefore proposed that the involvement of the Care and Community Expert Panel be reserved for cases where its input is essential and that the FWC President be granted greater discretion as to when this particular expert panel would be required.

26.3 Findings and recommendations

Overall, the Review Panel finds that the Secure Jobs, Better Pay 'expert panel' amendments are generally working as intended.

In terms of recommendations, the Review Panel notes the significant value brought by having gender pay equity experts involved in AWR decisions. As above, the Fair Work Act currently requires the 3 EPMs on the AWR panel to have knowledge or experience about workplace relations, economics, social policy and/or business, industry or commerce. Including gender pay equity to this list would be an appropriate step to ensure the reforms continue to advance gender equality and send a strong signal about its ongoing importance.

Draft Recommendation 13: The Australian Government amend the Fair Work Act at s 620(1)(b) to include gender pay equity as an additional area of expertise when appointing Expert Panel Members to the Annual Wage Review Expert Panel.

Sector – Expert Panels (President's Statement, 3 February 2023) [6] <https://www.fwc.gov.au/sites/default/files/2023-02/presidents-statement-expert-panels-2023-01-03.pdf>.

[868] Honorary Professor Anne Junor, Submission 26 to Secure Jobs, Better Pay Review, *Review of the Secure Jobs, Better Pay Act* (29 November 2024), 3.

[869] Australian Council of Trade Unions, Submission 20 to Secure Jobs, Better Pay Review, *Review of the Secure Jobs, Better Pay Act* (29 November 2024) 42; United Workers Union, Submission 35 to Secure Jobs, Better Pay Review, *Review of the Secure Jobs, Better Pay Act* (1 December 2024) 15.

The Review Panel also heard that the administrative burden on the FWC of needing to form a Care and Community Sector Expert Panel for all matters including care sector awards has been an unintended consequence of the Secure Jobs, Better Pay amendments. The new s 617(10A) of the Fair Work Act makes clear that it does not matter if the matter relates to another sector as well. In other words, the FWC President must form a Care and Community Sector Expert Panel for matters that might relate to the care and community sector. While this indicates that this was the intent of the Secure Jobs, Better Pay amendments, the Review Panel agrees that it is unnecessarily burdensome to require an expert panel for all matters just because they involve a care and community sector award (e.g. minor processes to update all awards to reflect legislative amendments).

Draft Recommendation 14: The Fair Work Act should be amended to provide the FWC President with greater discretion in determining when a Care and Community Sector Expert Panel is required.

Chapter 27. Prohibiting pay secrecy

In this chapter the focus is on Part 7 (Prohibiting pay secrecy) of Schedule 1 to the Secure Jobs, Better Pay Act.

27.1 Amendments and intent

The following section describes the main provisions within this new division.

27.1.1 Secure Jobs, Better Pay amendments

The new Division 4 (Prohibiting pay secrecy) of Part 2-9 of the Fair Work Act consists of 3 sections: s 333B (Employees not subject to pay secrecy), s 333C (Pay secrecy terms to have no effect) and s 333D (Prohibition on pay secrecy terms). The main amendments within each of these sections include:

- Section 333B(1): 'An employee may disclose, or not disclose, any of the following information to any other person: (a) The employee's remuneration; (b) any terms and conditions of the employee's employment that are reasonably necessary to determine remuneration outcomes'.
- Section 333B(2): 'An employee may ask any other employee (whether employed by the same employer or a different employer) about any of the following information: (a) the other employee's remuneration; (b) any terms and conditions of the other employee's employment that are reasonably necessary to determine remuneration outcomes' (e.g. hours of work arrangements, incentives and bonus schemes).
- Section 333C: 'A term of a fair work instrument or a contract of employment has no effect to the extent that the term would be inconsistent with s.333B(1) or (2) (about employee rights relating to pay secrecy).'
- Section 333D: 'An employer contravenes this section if: (a) the employer enters into a contract of employment or other written agreement with an employee; and (b) the contract or agreement includes a term that is inconsistent with s.333B(1) or (2)'.

While employers cannot limit employees from sharing information about their pay, and other employees can ask, employees are allowed to choose not to share information about their pay.

If an employer includes a pay secrecy clause in a contract of employment they could be liable for a maximum penalty of $990,000 (if it is a serious contravention). [870] Additionally, the clause will be void.[871]

Amendments made by this part of the Secure Jobs, Better Pay Act took effect from 7 December 2022. Generally, the new workplace rights at s 333B of the Fair Work Act do not apply to employment contracts entered into before 7 December 2022 and employees will not have this right until those contracts are varied.

27.1.2 Intent of Secure Jobs, Better amendments

These Secure Jobs, Better Pay amendments intend to enhance pay transparency in the labour market by empowering individuals and representative organisations (e.g. unions) with better

[870] *Fair Work Act 2009* (Cth) s 333D.
[871] *Fair Work Act 2009* (Cth) s 333C.

information for pay negotiations.[872] Prior to these amendments employers could enforce pay secrecy clauses in employment contracts, preventing employees from comparing their pay and conditions with others and giving employers an upper hand in negotiations.

Any orthodox introductory economics text will explain that, for markets to work effectively, it is important that its participants are well informed. There are many sources of market failure, including market power, information asymmetry, factor immobility and inequity. Each source of market failure disrupts market efficiency and may warrant government interventions to improve outcomes.

Key sources of market failure in labour markets include imbalances in bargaining power between employers and employees, which can suppress wages and working conditions. Pay secrecy policies further exacerbate this by limiting transparency and preventing workers from identifying wage disparities. A lack of information on prevailing wage rates can hinder workers' ability to negotiate fair pay. Additionally, cultural norms and historical undervaluation of wages in certain sectors, particularly those dominated by women or minorities, perpetuate inequities and inefficiencies in labour market outcomes. These factors distort the allocation of labour and contribute to persistent disparities in earnings and opportunities (see also Chapter 22, for a discussion of gender-based undervaluation of work).

In a recent report on pay transparency, the OECD notes that '80% of the gender wage gap … is attributable to pay inequity *within* firms.' It goes on to say, 'It is, however, very difficult … for an *individual* worker to know whether she or he is being underpaid – and with whom their salary should be compared'.[873]

Globally, pay transparency laws are increasingly being adopted as a way of reducing the gender wage gap.[874] In the UK, employers with 250 or more employees have been required to publicly report their gender pay gaps since 2017.[875] In Australia, following changes to the *Workplace Gender Equality Act 2012* (Cth) in March 2023, from February 2024 the Workplace Gender Equality Agency (WGEA) began publishing, on an annual basis, the gender pay gaps for private sector employers and Commonwealth public sector organisations with 100 or more employees.[876]

The European Union (EU) also has a new 'Pay Transparency Directive', with member states expected to translate this into national law by 2026. It includes a new right for employees (irrespective of the size of the company) to request information from their employer on average pay, by sex, for categories of workers doing the same work or work of equal value.[877]

---

[872] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [252], [408].
[873] Organisation for Economic Co-Operation and Development (OECD), *Pay Transparency Tools to Close the Gender Wage Gap* (Final Report, 30 November 2021) 19.
[874] D Avdul, W Martin and Y Lopez, 'Pay Transparency: Why it is Important to be Thoughtful and Strategic' (2023) 56(2) *Compensation & Benefits Review* 103.
[875] Workplace Gender Equality Agency, *Employer Gender Pay Gap Publication in the United Kingdom: A Review of the Literature* (Research Paper, 13 February 2024) 1 <https://www.wgea.gov.au/sites/default/files/documents/UK-Gender-Pay-Gap-Publication-Research-Brief-February-2024.pdf>.
[876] Workplace Gender Equality Agency, *Publishing Employer Gender Pay Gaps in 2025 FAQ* (Web Page, n.d.) <https://www.wgea.gov.au/about/our-legislation/publishing-employer-gender-pay-gaps>.
[877] European Commission, 'Commission Welcomes the Political Agreement on New EU Rules for Pay Transparency' (Media Release, 15 December 2022) <https://ec.europa.eu/commission/presscorner/detail/es/ip_22_7739>.

27.2 Impact and issues

The following describes the data and information considered by the Review Panel when evaluating the amendments discussed above.

27.2.1 Quantitative evidence

At the outset it is important to note that there is a dearth of information on the effects of these new pay secrecy laws on wage relativities in Australia. To the extent that there is relevant data, the Review Panel notes data from the FWO showing that in 2022–23 and 2023–24 their online resources for pay secrecy, job ads and flexible work on the FWO's website had almost 140,000 page views or downloads. This suggests there is a growing awareness on the part of employees of new rights concerning pay secrecy. In the same period, the FWO received 7 requests for assistance and commenced 1 investigation in relation to pay secrecy. As of 31 October 2024, the FWO has not issued any infringement notices, compliance notices or enforceable undertakings or commenced litigation in relation to these provisions.

The Review Panel also notes that the WGEA's latest round of reporting shows more employers are conducting gender pay gap analysis and are reporting the gaps to their employees.[878] For example, in 2023–24, 62% of employers reported pay equity metrics (including gender pay gaps) to the executive, while 31% reported these metrics to all employees.[879] These legislative amendments may engender a cultural change and see these reporting shares increase over time.

In terms of findings from the academic literature on the effects of pay transparency laws, the Review Panel notes that available quantitative evidence points to mixed effects. Several studies point to a positive effect of pay transparency laws on the gender pay gap, although others note that change largely came about through a fall in men's wages rather than an increase in women's wages.[880]

Other scholars find no evidence of an effect of pay transparency provisions on the gender pay gap. The latter could reflect the perceived 'cost' of requesting wage information, such as potential negative career implications.[881] In Germany, for example, a year after pay transparency legislation was implemented, fewer than 5% of employees had requested wage comparison data.[882] As the OECD notes, 'While pay transparency laws may give workers more information, their effectiveness largely relies upon workers having bargaining power to negotiate collectively or individually – and to negotiate without backlash, which is less likely the

[878] Workplace Gender Equality Agency, *Gender Equality Scorecard November 2024* (Report, 2024) 32–35 <https://www.wgea.gov.au/publications/australias-gender-equality-scorecard>.
[879] Workplace Gender Equality Agency, *Gender Equality Scorecard November 2024* (Report, 2024) 35 <https://www.wgea.gov.au/publications/australias-gender-equality-scorecard>.
[880] Organisation for Economic Co-Operation and Development (OECD), *Pay Transparency Tools to Close the Gender Wage Gap* (Final Report, 30 November 2021) 60.
[881] P Werner, 'Wage Negotiations and Strategic Responses to Transparency' (2023) 209 (May) *Journal of Economic Behavior & Organization* 161.
[882] K Brütt and H Yuan, *Pitfalls of Pay Transparency: Evidence From the Lab and the Field* (Discussion Paper No 2022-055/I, Tinbergen Institute, 7 December 2022).

case for female workers'.[883] The absence of an effect might also stem from employees' limited understanding of what pay transparency entails and its implications.[884]

27.2.2 Qualitative evidence

The Review Panel is not aware of any significant qualitative evidence in relation to these amendments.

27.2.3 Stakeholder views

Unions and academic submissions gave broad support for the pay secrecy reforms. The Australian Council of Trade Unions (ACTU) noted that the prohibition on pay secrecy clauses is crucial for addressing gender pay inequality, as it allows employees to share pay details without fear of retaliation. However, the ACTU highlighted concerns that these provisions only apply to contracts made or varied after December 2022, leaving older contracts unaffected. They suggested extending these provisions to cover all workers, including independent contractors, to close potential gaps. They also recommended that research be conducted to assess if these laws have fostered a workplace culture of pay transparency.

The Finance Sector Union (FSU) welcomed the abolition of pay secrecy clauses, particularly given the significant gender pay gap in the finance sector (22%). However, they argued that the laws do not go far enough in ensuring transparency in job advertisements and wage negotiations. Amongst other things, the FSU proposed further legislative amendments to require salary ranges in job ads to enhance transparency.

The Centre for Future Work highlighted that pay secrecy clauses have historically contributed to wage inequity, particularly for women and marginalised workers. The prohibition of these clauses is welcomed as a positive step toward reducing the gender pay gap. It also stressed that transparency in remuneration is essential for identifying and addressing pay disparities. However, it argued that the effectiveness of these provisions will require ongoing assessment and may need further strengthening.

The Review Panel heard mixed views from employer associations about the pay secrecy reforms. Several employers raised concerns about the potential adverse effects the laws may have on organisational culture and workplace harmony, particularly where some employees misunderstand their rights and pressure their colleagues to share information.

The Australian Chamber of Commerce and Industry (ACCI) written submission to the Review reported on the experience of its members in relation to the new pay secrecy provisions. Some members note that the laws have brought bonuses and incentives into question and that a likely outcome will be that payments (particularly to high performers) will suppressed because of the provisions. ACCI also noted a generational divide, with younger employees more likely to discuss remuneration than older counterparts, and that this was a source of workplace tension (e.g. older workers not willing to discuss or share remuneration details).

Finally, ACCI noted that 'remuneration' is not defined by the Fair Work Act and questions whether any payment in a deed of settlement is included or excluded by the new provisions at

---

[883] Organisation for Economic Co-Operation and Development (OECD), *Pay Transparency Tools to Close the Gender Wage Gap* (Final Report, 30 November 2021) 20.
[884] R Stofberg, C Mabaso and M Bussin, 'Employee Response to Pay Transparency' (2022) 48(1) *SA Journal of Industrial Psychology* 1, cited in David Avdul, William Martin and Yvette Lopez, 'Pay Transparency: Why It Is Important to be Thoughtful and Strategic' (2023) 56(2) *Compensation & Benefits Review* 103.

s 333D of the Fair Work Act.[885] In the Review Panel's opinion, remuneration would likely be defined by its ordinary meaning (as pay or recompense for work) so would be unlikely to include amounts paid as part of separate dispute settlements. While this is different to remuneration in the context of pay secrecy, the Review Panel also notes the importance of transparency in all contexts.

The Ai Group's view is that the pay secrecy clauses are not likely narrow the gender pay gap and that they are a blunt instrument for this purpose. They submitted that they are more likely to give rise to privacy concerns and generate conflict in the workplace. They also submitted that the new laws may result in 'unintended privacy concerns' (e.g. an employee's revelation about their pay on social media may not be supported by other co-workers with the same title and who may be paid the same).

Ai Group also raised concerns about the transitional provisions. They suggested the need to further clarify whether all changes to contracts count as variations (such as wage increases) such that pay secrecy clauses no longer have any effect. They also noted that employees need to consent for employers to remove contractual provisions. The Review Panel notes that any clauses remaining would have no effect (even if there had not been consent to remove them).

27.3 Findings and recommendations

The new pay transparency provisions in the Fair Work Act took effect on 7 December 2022. To date there is limited evidence regarding the impacts of this legislation – for example, about whether better informed employees are achieving better pay or conditions or about the impacts of transparency on workplace harmony.

To address this gap, the Review Panel recommends that the Australian Government support comprehensive research to examine how the new laws are affecting employers and employees in advance of a further review (see Draft Recommendation 1). Key areas of investigation could include:

- employees' and employers' understanding of pay transparency
- sources of information on pay transparency for employees and employers
- the frequency and characteristics (e.g. occupations, industries, workplace size) of employees requesting wage information
- employers' responses to the legislation
- whether the legislation is achieving its intended goals and producing additional benefits (e.g. improved employee attraction, trust, workplace harmony, productivity)
- the effect of the legislation on the culture of pay transparency in workplaces – whether a culture of pay secrecy still remains, notwithstanding the legislative reforms
- the identification of any unintended consequences.

As well as supporting a further review of the Secure Jobs, Better Pay amendments, this research should also inform future policy decisions, including whether the laws should be extended beyond employees to other groups of workers such as contractors.

[885] ACCI submission, 71–72.

Chapter 28. Prohibiting sexual harassment in connection with work

In this chapter the focus is on Part 8 (Prohibiting sexual harassment in connection with work) of Schedule 1 to the Secure Jobs, Better Pay Act.

28.1 Amendments and intent

Part 8 of Schedule 1 to the Secure Jobs, Better Pay Act made several changes to the Fair Work Act. The following section provides a summary of the main changes.

28.1.1 Secure Jobs, Better Pay amendments

The main change to the Fair Work Act concerns the insertion of a new Part 3-5A (Prohibiting sexual harassment in connection with work). Division 1 of the new Part 3-5A provides an introductory guide and other technical matters for Part 3-5A. Division 2 prohibits sexual harassment in connection with work and provides matters on vicarious liability. Division 3 broadly deals with sexual harassment disputes.

Focusing on Division 2 (Prohibiting sexual harassment in connection with work), the key amendments are:

- Section 527D(1): 'A person (the first person) must not sexually harass another person (the second person) who is: (a) a worker in a business or undertaking; or (b) seeking to become a worker in a particular business or undertaking; or (c) a person conducting a business or undertaking'.
- Section 527D(2): 'For the purpose of this Part, worker has the same meaning as in the *Work Health and Safety Act 2011*' – in this regard, 'a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer'.
- Section 527E: This is a new section that establishes vicarious liability for employers regarding acts of sexual harassment committed by their employees or agents in connection with work. However, the employer may, potentially, not be found liable if they can show that they took all reasonable steps to prevent sexual harassment from occurring.

Division 3 (dealing with sexual harassment disputes) may be broadly summarised as follows:

- Section 527F: This section sets out what an 'aggrieved person' or their representative may ask the Fair Work Commission (FWC) to do when dealing with the dispute. The FWC may make a stop order or they may try to resolve the dispute (e.g. through conciliation, mediation, making a recommendation or arbitration by consent).
- Section 527G: This section concerns the time for application: '[t]he FWC may dismiss an application that is made under s.527F more than 24 months after the contravention, or the last of the contraventions, of Division 2 is alleged to have occurred.'
- Section 527H: This section states that an application to the FWC to deal with a sexual harassment dispute must be accompanied by a fee. It also states that regulations may

prescribe, relevantly, '(c) the circumstances in which all or part of the fee may be waived or refunded'.

- Section 527J: This section sets out the matters related to 'stop sexual harassment orders' including that the FWC may dismiss an application if the application relates to Australia's defence or national security, amongst other matters.

These amendments commenced in two stages, on 6 March 2023 and 9 June 2024.

28.1.2 Intent of Secure Jobs, Better Pay amendments

These reforms are intended to improve gender equality by 'achieving safe, productive and gender equitable workplaces'.[886]

Prior to the Secure Jobs, Better Pay amendments:[887]

> [The Fair Work Act did] not expressly prohibit sexual harassment. However, it [could] be raised indirectly in matters brought to the Fair Work Commission through a number of provisions: general protections against 'adverse action' on the basis of a workplace right; general protections against 'adverse action' on the basis of sex'; the anti-bullying jurisdiction; unfair dismissal; unlawful termination on the grounds of sex.

These reforms intend to offer workers a simple, efficient, and affordable process for lodging complaints. The changes broaden the range of jurisdictions that can address sexual harassment complaints, with the FWC pathway designed to facilitate prompt resolution and support victim-survivors in maintaining their workplace connections.

The changes were made in response to the Australian Human Rights Commission's (AHRC) *Respect@Work: Sexual Harassment National Inquiry Report 2020*[888] (Respect@Work Report). This inquiry was established in response to evidence that sexual harassment in Australian workplaces was 'widespread and pervasive' and the approach to addressing it was complex, making it hard for aggrieved persons to make a complaint. A key recommendation (recommendation 28) of the Respect@Work Report was that '[t]he Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the Sex Discrimination Act, is expressly prohibited'.

In the federal jurisdiction there are 3 key pieces of legislation concerning sexual harassment:

- Sex Discrimination Act 1984 (Cth)
- Australian Human Rights Commission Act 1986 (Cth)
- Fair Work Act 2009 (Cth)

---

[886] Commonwealth, *Parliamentary Debates,* House of Representatives, 27 October 2022 (Tony Burke, Minister for Employment and Workplace Relations).
[887] Australian Human Rights Commission (AHRC), *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Final Report, 5 March 2020) 30 <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.
[888] Australian Human Rights Commission (AHRC), *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Final Report, 5 March 2020) <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

In addition to the above there are also state anti-discrimination laws and state workplace relation laws and work health and safety laws.[889]

Employees may lodge complaints via multiple avenues, including:

- the FWC – for stop sexual harassment orders or applications to deal with the dispute
- the Australian Human Rights Commission (AHRC) – which deals with complaints under the *Sex Discrimination Act 1984*
- work health and safety regulators – which deal with complaints as a workplace safety issue.

At the same time a new 'positive duty' on employers, businesses and organisations was also included in the *Sex Discrimination Act 1984*.[890]

The Respect@Work Council's 2022 guide to external pathways in Australia to address sexual harassment sets out the eligibility requirements and appropriateness of different pathways, including anti-discrimination and human rights bodies, workplace relations bodies, workers' compensation bodies and work health and safety regulators.[891] The below table provides a high-level overview of the key differences between the FWC's jurisdiction to issue stop sexual harassment orders, AHRC, and work health and safety regulators and is not intended to be a comprehensive comparison of avenues.

[889] Australian Human Rights Commission (AHRC), *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Final Report, 5 March 2020) <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.
[890] Australian Human Rights Commission (AHRC), 'Resource: Workplace Harassment, Discrimination and Victimisation' (Media Release, 10 August 2023) <https://humanrights.gov.au/about/news/media-releases/resource-workplace-harassment-discrimination-and-victimisation>.
[891] Respect@Work, Guide to external pathways in Australia to address workplace sexual harassment (2022), see: < https://humanrights.gov.au/our-work/sex-discrimination/publications/guide-external-pathways-address-workplace-sexual>.

Table 19: High-level overview of the key differences between pathways

	Australian Human Rights Commission[892]	**Fair Work Commission**[893]	**Work health and safety regulators**[894]
Role	Resolves complaints of discrimination, including complaints about workplace sexual harassment	Hears applications relating to an order to stop sexual harassment or an order to stop bullying and sexual harassment	Promote safe and healthy workplaces and reduce risks of health or safety incidents, including by investigating work health and safety issues
Dispute resolution process	Conciliation	Conciliation or mediation Conference Formal hearing	Generally, parties should resolve the dispute at the workplace level before escalating to a regulator who may conduct an investigation of the workplace
Remedies	Compensation Apology Job reinstatement Changes to workplace practices	Conciliation may result in changes in work arrangements, or conducting a safety risk assessment of the workplace If conciliation or mediation is unsuccessful, a stop sexual harassment order	Less focused on individual remedies Investigations can result in things such as improvement notices or prosecution (less common)
Time to resolve complaint	At least 5 months	14 days	Variable
Cost to lodge	Free *If complaint remains unresolved and the matter proceeds to court or tribunal processes, parties are responsible for their own legal costs*	$87.20 (FY 2024–25) for orders to stop sexual harassment that started before 6 March 2023; otherwise free	N/A

[892] Respect@Work, Guide to external pathways in Australia to address workplace sexual harassment (2022), 10, 22. See: < https://humanrights.gov.au/our-work/sex-discrimination/publications/guide-external-pathways-address-workplace-sexual>.
[893] Respect@Work, Guide to external pathways in Australia to address workplace sexual harassment (2022), 10, 47,48. See: < https://humanrights.gov.au/our-work/sex-discrimination/publications/guide-external-pathways-address-workplace-sexual>.
[894] Respect@Work, Guide to external pathways in Australia to address workplace sexual harassment (2022), 99-123. See: < https://humanrights.gov.au/our-work/sex-discrimination/publications/guide-external-pathways-address-workplace-sexual>.

28.2 Impact and issues

The following describes the data and information considered by the Review Panel when evaluating the amendments discussed above.

28.2.1 Quantitative evidence

There is limited quantitative data that the Review Panel may draw on to assess the impact and effects of the amendments. In particular, the Review Panel notes that the legislative changes may be having a 'shadow effect' – that is, a change in workplace behaviour that is not captured in any formal statistical data. The Review Panel nevertheless reports available and relevant data from the FWC, Fair Work Ombudsman (FWO) and Workplace Gender Equality Agency (WGEA).

Table 20 shows that, between 6 March 2023 and 30 June 2023, 11 applications to deal with sexual harassment disputes were lodged under s 527F.[895] In 2023–24, the FWC reported 95 applications under s 527F.[896] For context, prior to the Secure Jobs, Better Pay amendments, Table 20 also notes applications under s 789FC of the Fair Work Act.

Table 20: Applications to the FWC to deal with sexual harassment

	Applications under s 527F			Applications under s 789FC		
	Order to stop and deal with a sexual harassment dispute	Order to stop sexual harassment	Deal with a sexual harassment dispute	Order to stop bullying and sexual harassment	Order to stop sexual harassment	Total
Sep-21	0	0	0	0	0	0
Dec-21	0	0	0	9	1	10
Mar-22	0	0	0	10	2	12
Jun-22	0	0	0	4	2	6
Sep-22	0	0	0	13	1	14
Dec-22	0	0	0	6	2	8
Mar-23	1	0	0	8	5	14
Jun-23	4	0	6	0	3	13
Sep-23	6	0	10	0	3	19
Dec-23	8	4	15	0	4	31
Mar-24	4	4	12	0	1	21
Jun-24	11	0	21	0	1	33

Source: Data provided to the Review by the FWC.

[895] Fair Work Commission, Annual Report 2022-23 (Report, 2023) 'Access to justice', 27.
[896] Fair Work Commission, Annual Report 2023–24 (Report, 2024) 'Access to justice', 64–65.

Since the prohibition commenced on 6 March 2023, the FWO reported receiving 7 requests for assistance and commencing 4 formal investigations regarding workplace sexual harassment (one finalised).[897] The FWO also noted that it has received steady traffic through its Infoline and Anonymous Reporting Tool and that it has taken an educative approach to assist workers and businesses to understand their rights and obligations.[898]

The WGEA's latest round of reporting also revealed a steady increase in the proportion of employers with a policy or strategy in relation to sexual harassment, from 98.2% in 2020–21 to 98.9% in 2023–24.[899]

28.2.2 Qualitative evidence

The FWC and FWO report that they have collaborated with each other, the AHRC, and other regulators to implement these changes.

In its *Annual Report 2022–23*, the FWC noted that to implement the changes to its sexual harassment jurisdiction it had set up a working group of industry and employee representatives and that National Practice Lead, Commissioner McKinnon, and specialist staff were taking a trauma-informed approach to the case management process.[900]

In response to these amendments and other changes from the Respect@Work Report, the FWO published a new '[M]aking a complaint about workplace sexual harassment' guide and updated education tools and resources on its website, including the Fair Work Information Statement.[901] FWO staff also completed additional training and established a specialist team to handle complex and sensitive cases.[902]

Recent media reports also highlight the potential negative impacts of non-disclosure agreements, as they mean employers tend to treat incidents as one-offs rather than addressing issues with their workplace culture.[903] While submissions raised this issue in relation to pay transparency, the Review Panel notes that it is particularly important in the context of effectively preventing workplace sexual harassment.

28.2.3 Stakeholder views

While the Secure Jobs, Better Pay amendments prohibiting sexual harassment in connection with work have been favourably received by stakeholders, several noted the ongoing confusion when it came to navigating various laws and bodies.

---

[897] FWO, information provided to the Review (6 December 2024).
[898] FWO, information provided to the Review (6 December 2024).
[899] Workplace Gender Equality Agency, *Workplace Gender Equality Scorecard* (Final Report, November 2024) 54 <https://www.wgea.gov.au/sites/default/files/documents/Australia%27s%20Gender%20Equality%20Scorecard%202023-24_V10_0.pdf>.
[900] Fair Work Commission, *Annual Report 2022–23* (Report, 2023) 27.
[901] Fair Work Ombudsman, *Annual Report 2022–23* (Report, 2023) 40.
[902] Fair Work Ombudsman, *Annual Report 2022–23* (Report, 2023) 40.
[903] L Heap and D Peetz, 'Should Non-disclosure Agreement Be Restricted in Cases of Workplace Sexual Harassment? Here's What Reforms Need to Get Right', *The Conversation* (online, 17 December 2024) <https://theconversation.com/should-non-disclosure-agreements-be-restricted-in-cases-of-workplace-sexual-harassment-heres-what-reforms-need-to-get-right-245851>.

The Review Panel heard that, from an employee perspective, it is not always clear where to take a complaint.[904] Employers, on the other hand, are not clear how to align their policies with all the laws. They also fear that improper action on their part could expose them to legal action.[905]

The Review Panel also heard that the quality of materials available to employers and employees on workplace sexual harassment could be further simplified.[906]

The Australian Council of Trade Unions (ACTU) submission argued that the Secure Jobs, Better Pay amendments do not go far enough and that further reforms could enable the FWC to consider general risks. It pointed out that the FWC may only make a stop order if they perceive that the second person may continue to be harassed by the first person (or persons) in the complaint. The FWC may not consider a general risk or make broad orders that might require the employer to change how the work is performed.

Section 527J of the Fair Work Act concerns stop sexual harassment orders. Section 527J(1) sets out when the FWC may make an order. The FWC may do so if:

> (a) An application made under section 527F includes an application for a stop sexual harassment order; and
>
> (b) The FWC is satisfied that:
>
> (i) The aggrieved person has been sexually harassed in contravention of Division 2 by one or more persons; and
>
> (ii) There is a risk that the aggrieved person will continue to be sexually harassed in contravention of Division 2 by the person or persons; ...

The ACTU proposes that s 527J(1)(b)(ii) be changed to refer to 'any person' rather than 'the person or persons'. The intent of this change would be to reduce the risk of future harassment. The ACTU also suggests that additional factors that the FWC can take into account when considering the terms of a stop sexual harassment order could be added to s 527J(3) include matters such as workplace culture, workplace profile, work design and systems of work.[907]

28.4.3 Findings and recommendations

The Respect@Work Report[908] identified a clear need for a new division in the Fair Work Act to expressly prohibit sexual harassment in connection with work. The Secure Jobs, Better Pay amendments are in response to this need. In this regard, the Secure Jobs, Better Pay amendments are having their 'intended effect'. The legislative gap in the Fair Work Act has now been addressed.

---

[904] Law Council of Australia submission, 3.
[905] Senate Education and Employment Legislation Committee, Parliament of Australia, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, Ai Group submission (11 November 2022) 24.
[906] Law Council of Australia submission, 3.
[907] ACTU submission, page 49.
[908] Australian Human Rights Commission (AHRC), *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Final Report, 5 March 2020) <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

Consistent with the Respect@Work recommendations, the Secure Jobs, Better Pay amendments have created more pathways to address workplace sexual harassment. The Review Panel notes that ensuring the ongoing effectiveness of these reforms will require continuing support for people to identify and access the most appropriate pathways. In the context of evolving technology, this may require steps to increase public awareness about roles of different bodies and where to go to lodge complaints through various forms of media (including social media). To aid this, aspects of the different pathways (like the costs to access them) should be streamlined and aligned wherever possible.

The Review Panel also notes the ACTU's recommendations about expanding the powers of the FWC to make more general orders about workplaces, arbitrate and issue more remedies (like reinstatement), and to extend vicarious liability for employers. The Review Panel notes that the pathways through the FWC are only part of the broader framework of protections, including workplace health and safety laws which require safe and healthy workplaces. As more evidence becomes available about how the different pathways are being used in practice, any changes to the role and powers of the FWC should be considered in the context of this broader framework (and with consideration to the appropriate role of the FWC).

The Review Panel makes no specific recommendations in relation to these amendments.

Chapter 29. Anti-discrimination and special measures

In this chapter the focus is on Part 9 (Anti-discrimination and special measures) amendments in the Secure Jobs, Better Pay Act.

29.1 Amendments and intent

The Fair Work Act protects employees and prospective employees from discriminatory adverse action, where that action was taken because the employee has a protected attribute.[909] Before the Secure Jobs, Better Pay amendments, these attributes included race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction, and social origin. However, these provisions did not cover discrimination on the grounds of breastfeeding, gender identity or intersex status. To this extent, the Fair Work Act was not aligned with protections extended by the *Sex Discrimination Act 1984* (Cth).[910]

29.1.1 Secure Jobs, Better Pay amendments

The key amendments delivered through the Secure Jobs, Better Pay Act include the following:

- Section 195(1) of the Fair Work Act: Breastfeeding, gender identity, or intersex status have been added as a protected attribute. Section 195(1) now reads:

> A term of an enterprise agreement is a ***discriminatory term*** to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.

- Section 195, about the meaning of discriminatory terms, now also includes 3 new subsections: s 195(4), 195(5) and 195(6). All are concerned with 'special measures' to achieve equality – that is, they are 'not discriminatory terms and therefore not unlawful terms in enterprise agreements'.[911]
- Section 351 (1), that employers must not discriminate, has been amended to include breastfeeding, gender identity or intersex status as protected attributes.

The amendments came into effect from 7 December 2022.

The Review Panel notes that the *Fair Work Amendment (Closing Loopholes) Act 2023* also added 'subjection to family and domestic violence' to the Fair Work Act as a new protected attribute.[912]

---

[909] *Fair Work Act 2009 (Cth)* s 351.
[910] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [544].
[911] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [536].
[912] *Fair Work Amendment (Closing Loopholes) Act 2023* (Cth), Sch 1 Part 8 Item 94.

29.1.2 Intent of Secure Jobs, Better Pay amendments

The changes are intended to align the protected attributes in the Fair Work Act with those in other Commonwealth anti-discrimination legislation. The amendments regarding 'special measures to achieve equality' further harmonised the Fair Work Act with other anti-discrimination laws, clarifying that measures such as gender quotas, designed to promote equality, are not considered unlawful discrimination.[913] Beyond ensuring legislative consistency, these reforms also enable employees and employers to agree on terms that may expedite the achievement of equality.

The Secure Jobs, Better Pay amendments at Part 9 of the Secure Jobs, Better Pay Act have the potential to significantly improve job security and address gender disparities (e.g. pay gaps) in the workplace.

29.2 Impact and issues

The following describes the data and information considered by the Review Panel when evaluating the amendments discussed above.

29.2.1 Quantitative evidence

The Fair Work Ombudsman informed the review that it not yet received any requests for assistance regarding the new protected attributes and had not commenced any investigations or litigation. The Review Panel is therefore not aware of any significant quantitative evidence in relation to these amendments.

29.2.2 Qualitative evidence

The Review is not aware of any cases considering the new protected attributes under s 351 of the Fair Work Act.

The Fair Work Commission (FWC) has applied the principles under s 195 of the Fair Work Act as part of an enterprise agreement approval, where an employee to be covered by a proposed agreement objected to its approval.[914] The objection was made on the basis that the provision of gender affirmation leave and support is an 'unlawful term', as it is a discriminatory term under s 195.

As part of the FWC's dismissal of the objection, the FWC found that the provisions are not discriminatory under s 195(2)(c), with the provision acting to achieve substantive equality under s 195(4)(a) and 195(5) of the Fair Work Act for employees or prospective employees who are transgender or transitioning.[915]

29.2.3 Stakeholder views

Stakeholders provided generally positive feedback on the appropriateness and effectiveness of these amendments, while noting that their impact remains to be seen in cases before the FWC.

[913] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [544]-[548].
[914] Application by Curtin University [2023] FWCA 3356 [6].
[915] Application by Curtin University [2023] FWCA 3356 [7].

While welcoming the amendments, unions argued that the reforms do not go far enough and should also include reproductive health (e.g. menstruation, perimenopause, menopause and IVF) as a protected attribute.[916] (Reproductive health is further discussed below.)

The Australian Council of Trade Unions emphasised that the inclusion of the additional protected attributes means that employees facing discrimination now have a more affordable, faster, and accessible pathway in the form of the FWC compared to pursuing remedies under the Sex Discrimination Act.[917]

The Community and Public Sector Union highlighted that the clarity around special measures had facilitated improvements to support First Nations employees in Australian Public Service (APS) bargaining. Using the new special measures provisions, they were able to negotiate dedicated conditions, including NAIDOC leave, ceremonial leave and the requirement for the employer to consider connection to country when considering requests for flexible work that includes working in a different location.[918]

The Australian Chamber of Commerce and Industry (ACCI) noted that the special measures to achieve equality in an enterprise agreements has not been used and referred the Review Panel to the case considered above.[919] ACCI pointed to the FWC ruling that its inclusion is not a 'discriminatory term' as indicating that the FWC may need to provide educational material on the nature of, and how to make, special measures operational.

Alysia Blackham, from the University of Melbourne, highlights the 'significant limits of individualised enforcement mechanisms for advancing equality' and emphasises the potential of the Secure Jobs, Better Pay reforms to promote gender equality by expanding opportunities for equality bargaining within collective agreements.[920]

The Employment Rights Legal Service submits that the scope of anti-discrimination coverage under the Fair Work Act is limited by the exclusion in s 351(2)(a) that provides action in not unlawful under that provision, where the action is not unlawful on other federal or state and territory anti-discrimination laws. The submission notes that, while gender identity and intersex status is protected under the Fair Work Act, the *Anti-Discrimination Act 1977* (NSW) provides expanded coverage for expanded gender identity if they are non-binary or gender diverse, which is not applicable under the Fair Work Act.[921]

The Review Panel is aware that this exception was considered in a 2023 Federal Court of Australia (FCA) appeal decision (*CFMMEU v Quirk*), where the Full Court of the FCA held that the protection against adverse action does not operate in states or territories that do not prohibit discrimination on the same grounds.[922] The Australian Law Reform Commission has recommended that the Australian Government review the operation and impact of the 'not unlawful' exemption following this decision.[923]

---

[916] ACTU submission, 55; UWU submission, 19.
[917] ACTU submission, 52–53.
[918] ACTU submission, 54.
[919] ACCI submission, 77–78.
[920] A Blackham submission, 1.
[921] Employment Rights Service submission.
[922] *Construction, Forestry, Maritime, Mining and Energy Union v Quirk* [2023] FCAFC 163.
[923] ALRC, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report 142, December 2023) [7.11] and [9.47].

29.3 Findings and recommendations

The anti-discrimination and special measure amendments are directed at ensuring legislative consistency and supporting gender equality. There is no evidence to suggest that they are not operating as intended.

Noting the interactions between Commonwealth, state and territory anti-discrimination laws, all governments should work together to ensure there is alignment and maximum effectiveness of anti-discrimination protections, particularly when considering adding any new protected attributes.

Menopause, Perimenopause and Reproductive Health

Noting the broader goals of promoting job security and advancing gender equality, there is a growing body of evidence about women's negative workplace experiences during perimenopause and menopause, and this should be considered in the context of Fair Work Act protections and entitlements. This is part of a broader discussion about reproductive health impacts on workforce participation.

Two recent parliamentary inquiries have considered the interactions between reproductive health and workplace relations and made recommendations for further consideration and research.[924] There is also a variety of domestic and international examples of additional leave entitlements.[925]

The key suggestions raised by stakeholders through consultations and in the media more broadly focus on including perimenopause and menopause (or reproductive health more broadly) as a protected attribute, to enliven the right to request flexible working arrangements, or as an additional leave entitlement. At this stage, further research and consideration is required before recommending legislative amendments.

Based on the current evidence, the Review Panel sees merit in further exploring whether adverse action because of perimenopause and menopause would already be protected against (e.g. through the protected attributes for sex or gender identity). If not already captured by existing provisions, the Australian Government should undertake further research to consider whether such amendments are appropriate, noting the Australian Government's aims of promoting job security and gender equality.

Draft Recommendation 15: The Australian Government should undertake further research and consider whether it is appropriate to extend the protected attributes in the Fair Work Act to cover perimenopause and menopause, as well as other reproductive health issues.

[924] Senate Community Affairs References Committee 2024 report on *Issues related to menopause and perimenopause*; 2023 Senate Inquiry into Universal Access to Reproductive Healthcare

[925] The Guardian, "Reproductive leave could be a 'gamechanger' for Australian workers – how would it work?" (13 January 2025).

Chapter 30. Fixed-term contracts

In this chapter the focus is on Part 10 (Fixed-term contracts) of Schedule 1 of amendments in the Secure Jobs, Better Pay Act.

30.1 Amendments and intent

These Secure Jobs, Better Pay amendments inserted new Division 5, relating to fixed-term contracts, into Part 2-9 (Other terms and conditions of employment) of the Fair Work Act. The following section summarises the main provisions within this new division.

30.1.1 Secure Jobs, Better Pay amendments

The key provisions in relation to fixed-term contracts include:

- Section 333E – establishing a limitation on the use of fixed-term contracts that are for greater than 2 years (including renewals or extensions) or beyond 2 consecutive contracts relating to the same work.

- Section 333F – the limitation does not apply where the employee is engaged:
  - to perform only a distinct and identifiable task involving specialised skills
  - under a training arrangement
  - to undertake essential work during a peak demand period
  - during emergency circumstances or during a temporary absence of another employee.

- Section 333F – the limitation also does not apply where:
  - the employee's earnings under the contract are above the high income threshold (the threshold changes each year and from 1 July 2024 is equal to $175,000 for a full-time employee in a given year)[926]
  - the contract relates to work that has contingent funding (e.g. wholly or funded in part by government) that is payable for a period of more than 2 years and there is no reasonable prospect that the funding will be renewed
  - the contract relates to a governance position that is time limited under the governing rules of a corporation or association
  - a modern award includes a term permitting the use of fixed-term contracts in the circumstances limited by the Fair Work Act, or
  - the Fair Work Regulations provide an exception.

- Section 333H – prohibits behaviour in order to avoid the limitation like:
  - terminating an employee's employment for a period
  - delaying re-engaging an employee for a period
  - engaging another person to perform the same or substantially similar work
  - changing the nature of work or tasks the employee is required to perform, or
  - otherwise altering an employment relations.

[926] Fair Work Ombudsman, *Fixed Term Contract Employees* (Web Page, n.d.) <https://www.fairwork.gov.au/starting-employment/types-of-employees/fixed-term-contract-employees#fixed-term-contract-information-statement>.

- Section 333J – requiring the Fair Work Ombudsman (FWO) to prepare and publish a Fixed Term Contract Information Statement that includes information about the limitations on fixed term contracts and the process to resolve disputes.

- Section 333K – requiring employees to be given the Fixed Term Contract Information Statement as soon as practicable after the contract is entered into.

- Section 333L – establishing a dispute resolution process allowing the Fair Work Commission (FWC) to deal with disputes after attempts have been made to resolve disputes at the workplace level. Where there is agreement, the FWC may arbitrate the dispute.

If a fixed-term contract includes a term that is covered by the limitation (and no exception applies), the term will be of no effect but otherwise does not affect the validity of any other term of the contract.[927] The effect of this will be the employee will be considered a permanent employee.[928]

These amendments came into effect from 6 December 2023.

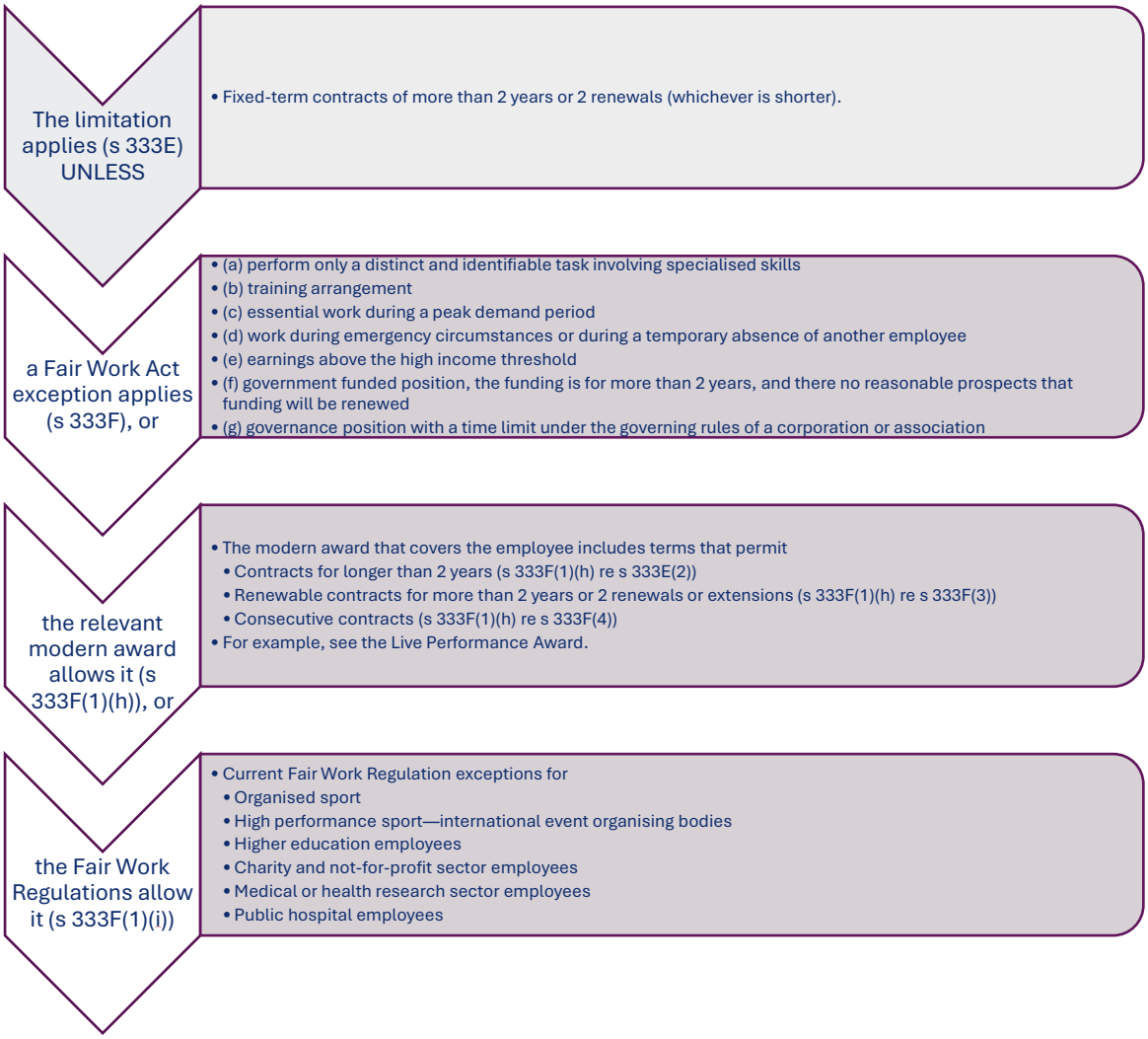
Subsequent to these amendments, additional exceptions to the limitation have been added the Fair Work Regulations relating to organised sport; high-performance sport; higher education employees; charities and not-for-profit, medical or health research; and public hospitals.

The exceptions for organised sport, high-performance sport and higher education apply to contracts entered into on or after 6 December 2023 and before 1 November 2025. The exceptions for charities and not-for-profit, medical or health research, and public hospitals, apply to contracts entered into on or after 1 November 2024 and before 1 November 2025.[929] In other words, certain contracts entered into on or after 6 December 2023 and before 1 November 2025 are exempt from the provisions outlined above.

The live performance industry previously had an exception through the regulations; however, this expired on 1 November 2024 and the rules for fixed-term contracts in the industry are now set out in the Live Performance Award.[930]

[927] *Fair Work Act* (Cth) s 333G.
[928] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, s 333G(1).
[929] Live Performance Award cl 28A; *Fair Work Amendment (Fixed Term Contracts) Regulations 2023,* as enacted 24 November 2023 to 19 March 2024; Fair Work Ombudsman, *Additional Fixed Term Contract Exceptions* (Web Page, n.d.) <https://www.fairwork.gov.au/starting-employment/types-of-employees/fixed-term-contract-employees/additional-fixed-term-contract-exceptions#higher-education>.
[930] Fair Work Ombudsman, *Expired and Replaced Additional Fixed Term Contract Exceptions – Live Performance and Funding Reliant Positions* (Web Page, n.d.) <https://library.fairwork.gov.au/viewer/?krn=K700424>.

Figure 19: How the current limitation on fixed-term contracts works



The Review Panel notes that *Fair Work Amendment (Closing Loopholes No. 2) Act 2024* (Cth) also made amendments to the Fair Work Act provisions regarding the limitation on fixed-term contracts.[931]

30.1.2 Intent of Secure Jobs, Better Pay amendments

The fixed-term contract provisions are intended to limit the misuse of fixed-term contacts and, in so doing, enhance job security, reduce precarious employment and support fair working conditions. The amendments also give effect to Australia's obligations under Article 6 of the UN International Covenant on Economics, Social and Cultural Rights (ICESCR) to promote the right to work by ensuring workers have access to secure and stable employment.[932]

The then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, noted in the second reading speech for the Secure Jobs, Better Pay Bill that 'the number of workers on fixed-term contracts has increased by over 50 per cent since 1998'.[933] The Minister also noted

[931] *Fair Work Amendment (Closing Loopholes No. 2) Act 2024*.
[932] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [83].
[933] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 2179.

that workers on fixed-term contracts are more likely to be women, and 40% of workers on fixed-term contracts have been with their employers for more than 2 years.[934]

The Explanatory Memorandum acknowledged that fixed-term contracts do have a legitimate purpose to 'help businesses to source workers to perform discrete tasks for a fixed period'.[935] However, when used for an extended period for the same role, or as rolling contracts, fixed-term contracts can 'exacerbate job insecurity'.[936]

30.2 Impact and issues

The following describes the data and information considered by the Review Panel when evaluating the amendments discussed above.

30.2.1 Quantitative evidence

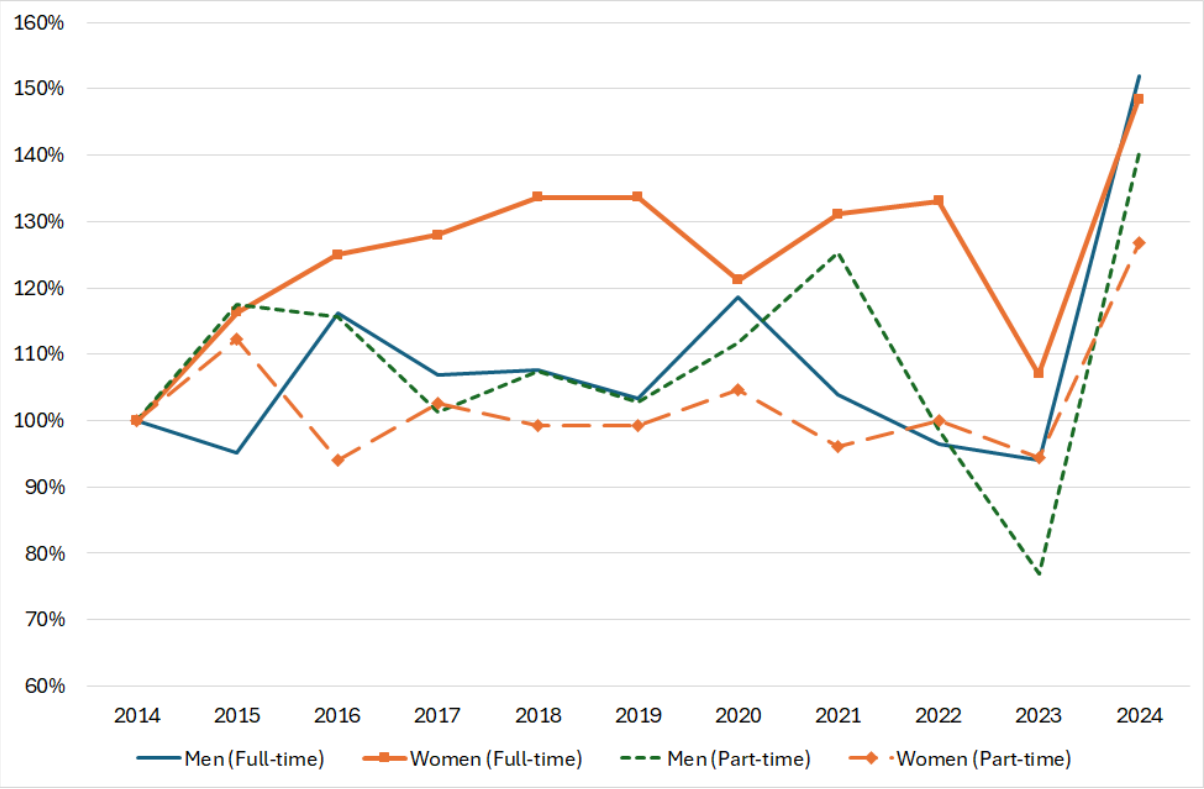
FWC data provided to the Review indicates that 10 applications were received to deal with a dispute about a fixed-term contract in the 2023–24 financial year. Of those applications, 4 were withdrawn, 4 were not resolved and 2 were resolved.

Estimates from the Australian Bureau of Statistics (ABS) indicate that as at August 2024 there were 12.1 million employees in the Australian labour market, with 512,300 (4.2%) employed on a fixed-term contract. Many (40.8%) have been in their current job for less than one year. Although tenure is short, there is a high expectation of ongoing employment (74.8% expect to remain in their job for the next 12 months).[937] Across industries, the education and training sector stands out as the sector most likely to engage employees on fixed-term contracts. In 2024, 11.7% of all employees in this industry were on a fixed-term contract. Between 2002 and 2024 the main growth in fixed-term employment came from the health care and social assistance sector.[938]

In 2023 there was a marked decline in the use of fixed-term employment contracts, particularly among women employed full-time and men employed part-time. In 2024 this rebounded, such that the number of people on fixed-term contracts is now at its highest when viewed over the last decade (see Figure 20 below).

[934] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 2179.
[935] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [568].
[936] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [568].
[937] See Statistical Appendix 1, section 2.4, Tables 28 to 32.
[938] See Statistical Appendix 1, section 2.4, Table 32.

Figure 20: Trends in fixed-term employment, 2014 to 2024



Source: ABS Working Arrangements, August 2024 (Cat No 6336.0, Table 6).

Alt-text: A line chart showing trends in the growth in fixed-term employment between 2014 and 2024 (indexed to 2014). Fixed-term employment grew by nearly 20% by 2020 among men and women employed full-time. There was a marked decline between 2022 and 2023 in the numbers of male part-time employees and female full-time employees engaged on fixed-term contracts. The use of fixed-term employment contracts resumed in 2024. By August 2024 the number of full-timers engaged on a fixed-term contract was nearly 50% higher than levels recorded in 2014.

Analysis of Household, Income and Labour Dynamics in Australia (HILDA) data (with the latest release being for 2023) shows some slightly different trends. Part of the explanation may be that the HILDA analysis is based on outcomes in a person's main job. Estimates based on HILDA suggest that among those aged 21–64 around 10% of employees are engaged on a fixed-term contract.

Fixed-term contracts are more common among professionals than other occupation groups and consistent with this a relatively high share (around 7.5% according to HILDA) are employees whose annual earnings exceed the high income threshold (meaning they are not covered by the Fair Work Act limitation).

Analysis of transition outcomes using HILDA data, done by comparing employment status over 2 consecutive years, shows that around 44% of employees are on fixed-term contracts over 2 consecutive years, around 49% transition from being on a fixed-term contract to being on a permanent contract and the balance (around 7%) transition from being on a fixed-term contract to being on a casual contract.

HILDA data also shows that in 2023 there was a small decline in the share who were on fixed-term contract over 2 consecutive years and a marginal increase in the shares moving from a

fixed-term contract to a permanent contract. These trends are consistent with the intent of the Secure Jobs, Better Pay amendments, although the changes are not statistically significant.

Regression analysis examining the characteristics of those who transition from being on a fixed-term contract to a permanent contract shows that individuals are less likely to transition if they earn above the high income threshold, are more likely to transition if young, and are less likely to transition if older. Occupation analysis shows that the groups having the highest probability of transitioning from fixed to permanent are managers and professionals. Industry analysis shows that, relative to the education and training sector, employees in the mining sector have a greater likelihood of transitioning onto a permanent contract. In most other industries the probability of transitioning from a fixed to a permanent contract is lower. The exception is the health and community sector, where the transition probability is the same as that of the education and training sector.[939]

An examination of the determinants of wages shows that the hourly wages of employees on fixed-term contracts and those on permanent contracts are statistically the same.[940]

To summarise, available quantitative data shows that the proportion of employees on fixed-term contracts declined in 2023 following the passage of the Secure Jobs, Better Pay Act and significantly increased in 2024. There may be many explanations for this increase, including the anticipation of the limited additional exceptions (e.g. higher education, charities, public hospitals) coming to an end.

HILDA analysis shows no difference in transition outcomes from fixed-term contracts after the passage of the Secure Jobs, Better Pay Act. It also shows no difference in the earnings of employees on fixed-term contracts vis-à-vis permanent contracts. However, this analysis *does not* explore the job insecurity effects that come with being on a fixed-term contract and not knowing whether contracts will actually be renewed or not. It similarly does not examine the effect of fixed-term employment on other matters, such as securing a mortgage and individual and household planning (e.g. around finances, children etc.).

30.2.2 Qualitative evidence

There is limited information available regarding qualitative evidence on the operation of fixed-term contracts directly between employers and employees.

The rules for fixed-term contracts in the live performance industry are now set out in the Live Performance Award.[941] The Review Panel notes that, consistent with the intended design of the Secure Jobs, Better Pay amendments, the live performance industry had a time-limited exception in the Fair Work Regulations (which expired on 1 November 2024) while they made updates to the award.[942]

The Higher Education Industry – Academic Staff – Award 2020 and the Higher Education Industry – General Staff – Award 2020 (the HE Awards) permit fixed-term employment in specific circumstances. As an outcome of the Modern Awards Review, on 30 September 2024, the FWC began proceedings to review the fixed-term contract provisions as contained within

[939] See Statistical Appendix 1, section 2.6.3, Table 36.
[940] See Statistical Appendix 1, section 3.5.2, Table 52.
[941] Live Performance Award 2020, cl 28A.
[942] Fair Work Ombudsman, *Expired and Replaced Additional Fixed Term Contract Exceptions – Live Performance and Funding Reliant Positions* (Web Page, n.d.) <https://library.fairwork.gov.au/viewer/?krn=K700424>.

the HE Awards.[943] In doing so, the FWC noted that the provisions 'were developed against the backdrop of a different legislative scheme – one that did not regulate the use, extension and renewal of fixed term contracts'.[944] The FWC has also noted some stakeholder views about the suitability of these provisions in light of the Secure Jobs, Better Pay amendments.[945]

The FWC's review will consider whether any changes are necessary to ensure the HE Awards meet the modern awards objective to improve access to secure work across the economy.[946]

30.2.3 Stakeholder views

The general view among employer associations was that the fixed-term contract amendments were an overly complex solution to the perceived problem.

Employer associations have submitted that the amendments concerning fixed-term contracts have created confusion and anxiety among employers. Employer associations almost unanimously described the processes for determining and applying exceptions as complex and challenging. The Review Panel heard that these amendments represent the most pressing issue on which members are seeking advice from employer associations.

For these stakeholders, this complexity is compounded by the introduction of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*, which establishes a new pathway for casual employees to seek permanent employment after meeting qualifying criteria. The perception of some stakeholders is that these subsequent amendments have meant that moving fixed-term employees onto casual contracts is a limited option given the new casual permanency pathway.

In summary, many employers remain uncertain about their obligations and the applicability of exceptions. For instance, while employees engaged in training arrangements (e.g. apprenticeships) are exempt, there is a perceived ambiguity or gap about whether this exception extends to employees in graduate programs or students on internships. Some industries are struggling to adapt their operations and budgeting practices to accommodate a shift towards employing more staff in ongoing roles. Employers have also reported that, in response to the changes, some employers are employing fewer workers or factoring potential redundancy costs into their financial planning – particularly when applying for government funding.

The Review Panel notes that the Fair Work Act has included indirect limitations on fixed-term contacts since its commencement, and conditions in the National Employment Standards made clear that fixed-term contracts could not be used to avoid redundancy payments well before the Secure Jobs, Better Pay amendments (whether or not this was well understood by employers).[947]

Unions, on the other hand, report a mixed experience. Overall, unions have noted a growing use of fixed-term contracts in several industries, most notably the higher education sector. They

[943] Justice Hatcher, Fair Work Commission, *Modern Awards Review 2023–24* (Report, 2024) [69], [167].
[944] Justice Hatcher, Fair Work Commission, *Modern Awards Review 2023–24* (Report, 2024) [69] <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-review-report-180724.pdf>.
[945] Statement - [2024] FWCFB 389 [7]
[946] Statement - [2024] FWCFB 389 [13]
[947] *Fair Work Act 2009* (Cth) s 123(2).

voiced concerns that some employers are using fixed-term contracts as an alternative to engaging in long-term workforce planning.

However, the Independent Education Union has indicated that the Secure Jobs, Better Pay amendments were having an effect and limiting the use of fixed-term contracts:[948]

> Branches report that a significant number of employees have [have] had their contracts of employment varied from temporary to on-going. We estimate this number to be not less than 5000 nationally. There has been a similarly sharp reduction in the number of new employees commencing on fixed term contracts.

The Australian Services Union has submitted that the exceptions granted to charities and government meant that many of their members were excluded. The ASU regarded this as unnecessary. It was suggested that the root problem lay in the procurement processes of government and associated funding cycles. Concerns were also raised with other exceptions.

The higher education sector, as noted, has the largest share of fixed-term contracts, and debate has ensued in the sector about the proper construction of ss 333E and 333F in the Act.

As part of the job security stream of the Modern Awards Review 2023–24, the National Tertiary Education Union has submitted that the general limitation on fixed-term contracts does not apply to employees working under the HE Awards because of the exception where a modern award applies to an employee and the modern award permits a fixed-term contract greater than 2 years. The Review Panel understands this interpretation of the relevant provisions is in dispute and is yet to be determined by the FWC.

The National Tertiary Education Union has submitted to FWC that 'the higher education sector has moved from having the greatest level of restriction on the use of fixed-term employment to being far more permissive than the rest of the economy which is subject to the restrictions contained in s 333E'.[949] It submitted that the HE Awards do not meet the modern awards objective to improve access to secure work across the economy.[950]

The Australian Higher Education Industrial Association, however, has submitted to FWC that employees on fixed-term contracts have the same pay and entitlements as permanent employees in the higher education sector.[951] They also submitted that the Secure Jobs, Better Pay amendments warranted a review of the arrangements in the HE Awards.[952] Again, the Review Panel understands these matters are in dispute before the FWC and are yet to be determined.

As outlined above, the FWC review is ongoing.

---

[948] IEU submission, 2.

[949] Fair Work Commission, *Modern Awards Review 2023–24* (5 February 2024) National Tertiary Education Industry Union submission, 29.

[950] *Fair Work Act 2009* (Cth) s 134(1)(aa).

[951] Fair Work Commission, *Modern Awards Review 2023–24* (5 February 2024) Australian Higher Education Industrial Association (AHEIA) submission, 16.

[952] Fair Work Commission, *Modern Awards Review 2023–24* (2 October 2024) Australian Higher Education Industrial Association reply submission, 4.

30.3 Findings and recommendations

Section 333F of the Fair Work Act outlines numerous exceptions to the fixed term contract limitations which sit alongside exceptions in the Fair Work Regulations and modern awards. Noting it has been a little over 12 months since the commencement of the provisions and the current multiple sector specific temporary exceptions, there is limited evidence to assess the impacts of the framework.

The FWC, on its own initiative, has commenced a matter to assess the suitability of the fixed-term contract provisions in higher education awards. Outcomes from these proceedings are pending.[953]

ABS data indicates that, contrary to the intentions of the Secure Jobs, Better Pay Act, the number of employees on fixed-term contracts has reached its highest level in a decade. Growth has been particularly strong in the education and training sector and the health care and social assistance sector. These trends may be an unintended consequence, potentially reflecting efforts by employers in exempted sectors to engage employees on fixed-term contracts before the exception period ends. There may be other contributing factors.

Analysis of HILDA data shows that approximately 50% of employees on fixed-term contracts transition to permanent employment, with only a small proportion moving into casual roles. This transition rate to permanent contracts has remained stable over the past 15 years.

Employer associations have called for the repeal of the Fair Work Act amendments concerning fixed-term contracts. Conversely, unions have raised concerns that the extensive exceptions prevent many of their members from benefiting from the legislation.

The Review Panel concludes that the strong stakeholder perceptions about uncertainties and ambiguities created by the exceptions and extensions have potentially undermined the intended effect of the legislation in the short term.

The limitation on fixed-term contracts was intended to achieve the overarching goal of the Secure Jobs, Better Pay amendments to improve job security. The Review Panel agrees that in many cases it is more appropriate and beneficial to employ workers in secure, ongoing roles rather than on rolling contracts. However, it is clear that many fixed term contracts last more than two years or two renewals and that they can be an appropriate form of employment (from stakeholder feedback and the number of exceptions).

There is limited evidence available about the use of fixed-term contracts to assess the extent to which their use is appropriate or contrary to the broader job security goals. General reporting mechanisms (whether through WGEA or others) as well as more detailed reporting of the use of exceptions would better inform future policy in this area and a further review (see Draft Recommendation 1). Such research could also provide more insights into the effects of fixed-term contracts on workplaces and employees.

Alongside the complexity and confusion employers have experienced in implementing these reforms, the Review Panel notes that detailed evidence is not available about the use of fixed-term contracts and the choice to limit them to 2 years and 2 renewals.

---

[953] Fair Work Commission, *Review of Fixed-term Contract Provisions: Higher Education Awards (AM2024/39)* (Web Page, n.d.) <https://www.fwc.gov.au/hearings-decisions/major-cases/higher-education-industry-academic-staff-award-2020-and-higher>.

The Review Panel also accepts that the design of the framework created by the Secure Jobs, Better Pay amendments does provide avenues to set out industry-specific conditions in modern awards as well as the option for additional exceptions through the Fair Work Regulations (the challenges have been with understanding and implementing it in practice).

The Review Panel acknowledges the perception of stakeholders about the current system of exceptions in the Fair Work Act, Fair Work Regulations and modern awards. The Review Panel also notes that, while the Secure Jobs, Better Pay amendments introduced a new framework, the Fair Work Act has included a limit on the use of fixed-term contracts since commencement.[954] While any new rules are challenging to implement with confidence (in the absence of cases and decisions to assure employers that they are interpreting the requirements correctly), the levels of anxiety experienced by some are clearly an unintended consequence of these amendments.

Given the linkages to job security and noting work underway or completed in certain sectors to amend modern awards and implement these amendments in practice, the Review Panel accepts that some form of limitation on or disincentive against the use of fixed-term contracts is appropriate.

To identify potential Final Report recommendations, the Review Panel proposes alternative approaches to limiting the use of fixed term contracts for discussion. The first option is to make targeted improvements to the existing limitations (for example by making the exceptions clearer or increasing the two years and two renewals threshold). The second option is to replace the current Fair Work Act framework with a principles-based approach that gives the FWC more powers and responsibility (e.g. through modern awards).

Draft Recommendation 16: The Australian Government should reconsider the approach to limiting the use of fixed term contracts. The Review Panel is seeking stakeholder views on the following options:

- **amending the existing framework to make the limitation and current exceptions more readily applicable in practice (for example, by increasing the years/renewals threshold or clarifying the Australian Government funding exception), or**
- **introducing a principles-based framework into the Fair Work Act with specific limitations and exemptions primarily determined through the FWC (further consideration would need to be given to technical aspects of implementation including application to award/agreement free employees).**

[954] *Fair Work Act 2009* (Cth) s123(2).

Chapter 31. Flexible work

In this chapter the focus is on Part 11 (Flexible work) amendments in the Secure Jobs, Better Pay Act.

31.1 Amendments and intent

Part 2-2 of the Fair Work Act is concerned with the National Employment Standards (NES). There are 12 NES which apply to all national system employees. The NES cannot be excluded by modern awards or enterprise agreements. Within Part 2-2 of the Fair Work Act Divisions 2–12 describe the provisions in each of the 12 minimum standards. Division 4 is concerned with the right to request flexible working arrangements. It was part of the NES in the original Fair Work Act in 2009.

Section 65 (Requests for flexible working arrangements) of Division 4 outlines the conditions under which an employee may seek changes to their working arrangements (e.g. modifications to working hours, work patterns or work location). Eligible employees must have completed at least 12 months of continuous service with their employer or be long-term casuals (at least 12 months) with a reasonable expectation of ongoing work and have eligible circumstances.[955]

The circumstances – outlined at s 65(1A) – are as follows:[956]

> (aa) the employee is pregnant;
>
> (a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
>
> (b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010);*
>
> (c) the employee has a disability
>
> (d) the employee is 55 or older;
>
> (e) the employee is experiencing family and domestic violence;
>
> (f) the employee 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 family and domestic violence.

The Secure Jobs, Better Pay Act expanded the eligibility circumstances to include pregnancy (s 65(1)(aa)). It also aligned language with the entitlement to family and domestic violence leave (s 65(1A)(e) and (f) describe circumstances where employees, or their immediate family members, experience family or domestic violence).[957]

The main Secure Jobs, Better Pay amendments, however, include the insertion of a new s 65A (concerned with employers responding to requests) and a new s 65B (concerned with the Fair

[955] *Fair Work Act 2009* (Cth) s 65(2), (2A).
[956] *Fair Work Act 2009* (Cth) s 65(1A).
[957] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, [612].

Work Commission (FWC) dealing with disputes). The following sections summarise these main amendments and their intended effect.

31.1.1 Secure Jobs, Better Pay amendments

The Secure Jobs, Better Pay amendments made 2 main changes to Part 2-2, Division 4, on flexible working arrangements:

- It included a new s 65A aimed at enhanced employer obligations concerning requests. Employers are now required to genuinely try to reach an agreement and there is more detail about the explanation they have to give if refusing a request.
  - This did not change the procedural requirements for employees to make requests, for employers to respond within 21 days, and for refusals to be based on reasonable business grounds (which did not substantively change).
- It included a new dispute resolution procedure at s 65B. If the employer refuses the request or does not respond in writing within 21 days, and the parties have attempted to resolve the dispute at the workplace level, the dispute may then be referred to the FWC.
  - The FWC is empowered to deal with the dispute as it considers appropriate, and must first do so by mediation or conciliation.
  - In exceptional circumstances the FWC may deal with the dispute via arbitration without first conducting mediation or conciliation (s 65B(4)).

The Fair Work Act specifies, at s 65A(5), the business grounds upon which an employer may refuse a request for a flexible working arrangement. These include:[958]

> (a) that the new working arrangements requested would be too costly for the employer;
>
> (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;
>
> (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;
>
> (d) that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;
>
> (e) that the new working arrangements requested would be likely to have a significant negative impact on customer service.

A note in the Fair Work Act makes clear that the size, nature and specific circumstances of the employer and their business are relevant when considering the reasonable business grounds for refusing requests.[959]

These amendments came into effect from 6 June 2023.

[958] *Fair Work Act 2009* (Cth) s 65A(5).
[959] *Fair Work Act 2009* (Cth) s 65A(5).

31.1.2 Intent of Secure Jobs, Better Pay amendments

The broad intentions of the Secure Jobs, Better Pay reforms include improving job security and closing the gender pay gap. In the second reading speech accompanying the introduction of the initial Secure Jobs, Better Pay Bill, the then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, noted that:[960]

> Too many Australians are struggling to manage their work and care responsibilities. This is damaging families, communities, and our national economy. Women still carry the main responsibility for caring work; and are more likely to request flexible work arrangements. In order to access the flexibility they need to manage work and care, they are often forced to drop out of the workforce, or to take lower-paid or less secure employment. This plays a major role in widening the gender pay gap. We want families to have better access to flexible work, so they can better share and manage their caring responsibilities. Under our current laws, an employee can ask for flexible work, but if their employer says no, they've got nowhere to go.

The Minister went on to refer to research on the lived experiences of balancing work and care in the retail and fast food sectors[961] and to findings of the Senate Select Committee on Work and Care.[962] The Secure Jobs, Better Pay amendments intend to give effect to the interim recommendations of this committee, including the requirement to consult with workers about flexibility requests and the inclusion of a process of appeal to the FWC where requests are refused.[963] Prior to these amendments, the Fair Work Act did not address employer obligations when responding to flexible work requests and did not provide a mechanism for dispute resolution via the FWC.[964]

31.2 Impact and issues

The following describes the data and information considered by the Review Panel when evaluating the amendments discussed above.

31.2.1 Quantitative evidence

The available quantitative evidence for assessing the reforms is limited. There is no mechanism that monitors the number of new requests under the new pregnancy or new family and domestic violence eligibility circumstances. There is, similarly, a dearth of data that would enable a quantitative analysis of reforms at s 65(A) of the Fair Work Act concerning enhanced

---

[960] Commonwealth, *Parliamentary Debates,* House of Representatives, 27 October 2022 (Tony Burke, Minister for Employment and Workplace Relations).
[961] N Cortis, M Blaxland and S Charlesworth, *Challenges of Work, Family and Care for Australia's Retail, Online Retail, Warehousing and Fast Food Workers* (Report, 12 October 2021) <https://unsworks.unsw.edu.au/entities/publication/05a2026d-f09a-405f-ad66-046cc685cf68/full>.
[962] Senate Select Committee on Work and Care, Parliament of Australia, *Interim Report* (Report, October 2022) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024963/toc_pdf/InterimReport.pdf;fileType=application%2Fpdf>.
[963] Senate Select Committee on Work and Care, Parliament of Australia, *Interim Report* (Report, October 2022), 108 <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024963/toc_pdf/InterimReport.pdf;fileType=application%2Fpdf>.
[964] The exception to this was where a right was provided in a term in a modern award or an enterprise agreement. Employees could then lodge a dispute with the FWC under s 739 of the *Fair Work Act 2009* (Cth).

employer obligations around genuinely trying to reach agreement and providing written responses.

The new dispute arrangements (s 65B of the Fair Work Act) are, however, quantifiable in the sense that the FWC records the number of applications made under this section.

Prior to the amendments the FWC's role in such matters was limited to applications under s 739. Under this provision, the FWC could address disputes only if a modern award or enterprise agreement included a term outlining procedures for resolving disputes on specific issues.

- Between 1 July 2022 and 5 June 2023, the FWC received 34 s 739 applications related to refusals of flexible working arrangement requests.
- Since the implementation of the Secure Jobs, Better Pay Act, the volume of applications has significantly increased. Between 6 June 2023 and 31 March 2024 (a comparable timeframe), the FWC received 150 s 65B applications. The FWC received an additional 63 applications to 30 June 2024.

A limited number of s 65B applications have been resolved through arbitration. Throughout these cases, the FWC found the employers had reasonably accommodated certain circumstances and refused other parts of the requests on reasonable business grounds.[965]

31.2.2 Qualitative evidence

In a recent article published in the *Australian Journal of Labour Law*, Amanda Selvarajah examines how the FWC is exercising its new powers concerning flexible work disputes.[966] Her overall conclusion is that, although the FWC has the powers to assess whether employers are reasonably refusing requests on business grounds, they have, instead, become more focused on verifying eligibility. This, Selvarajah argues, stems from the approach of the Full Bench of the FWC in *Quirke v BSR Australia Ltd*. Quirke had applied to change her roster, as evening shifts were exacerbating her symptoms of anxiety, depression and sleep disturbances. Selvarajah notes that Quirke had not served 12 months and was not eligible, but the significance of the case is that the Full Bench of the FWC found that Quirke had not been able to prove a 'nexus' between the criteria and the request. Citing Selvarajah, 'the Full Bench found that Ms Quirke had not explained "*why* she considers she has a psychosocial disability"'.[967] Selvarajah goes on to argue that the 'stringent scrutiny' applied by the FWC when considering the 'nexus between an employee's relevant circumstance and their flexibility request' has resulted in them applying a 'narrow approach' to establishing eligibility flexible work requests and is, as a result, undermining the intent of the flexible work arrangement provisions. She concludes:[968]

> the FWC is allowing for requests to be deemed ineligible due to a lack of evidence, preventing scrutiny of the reasonableness of employer responses. This approach has worrying implications for Australia's

[965] For examples, see *Charles Gregory Gregory v Maxxia Pty Ltd* [2023] FWC 2768 [46]-[47]; Shane Gration v Bendigo and Adelaide Bank Limited [2024] FWC 717 [51]; Michael Fogo v Boeing Aerostructures Australia Pty Limited [2024] FWC 3037 [129].
[966] AD Selvarajah, 'Proving the Right to Request Flexible Work: The Concerning Consequences of Comments in Quirke v BSR' (2024) 37 *Australian Journal of Labour Law* 3.
[967] AD Selvarajah, 'Proving the Right to Request Flexible Work: The Concerning Consequences of Comments in Quirke v BSR' (2024) 37 *Australian Journal of Labour Law* 4.
[968] AD Selvarajah, 'Proving the Right to Request Flexible Work: The Concerning Consequences of Comments in Quirke v BSR' (2024) 37 *Australian Journal of Labour Law* 11–12.

> flexible work rights. Employers could be emboldened to not seriously consider a flexible work request and reject even the negotiation phase required by the amended s 65 where they believe the employee's eligibility may be easily challenged as such as where the criterion of having a disability or caring for someone with a disability is invoked. It is therefore essential that this approach is revised. The recent amendments have the potential to improve the enforceability of the right to request flexible work by positioning the FWC as a safeguard against the improper handling of requests. This power will remain underutilised, however, if requests are considered ineligible on account of arbitrary evidentiary requirements … Parliament should also consider clarifying and expanding eligibility requirements relating to the right to request flexible work to ensure that its recent amendments serve its intended purpose in strengthening Australia's flexible work rights.

The Review Panel notes that in several cases, while the FWC has found that the eligibility criteria have not been met, it has also noted findings and given reasoning about the reasonableness of employers' grounds for refusal.

31.2.3 Stakeholder views

Stakeholders expressed mixed views about the expanded right to request flexible working arrangements.

Employer associations raised concerns that employees were now of the view that everyone has a right to request flexible work arrangements, irrespective of their role. Concerns were also expressed about the difficulty of managing flexible work in customer-facing roles. Employer associations also anticipate an increase in the number of disputes and legal costs due to the rising number of requests, with worries about some paying 'go-away money' to avoid disputes.

Other matters raised by employer associations included:

- concerns that there may be exceptional circumstances preventing employers from responding to requests within 21 days (Ai Group)
- a requirement that flexible work agreements be time limited (Australian Chamber of Commerce and Industry (ACCI))
- that jurisdictional objects be raised earlier in FWC processes (ACCI).

Unions, on the other hand, welcomed the changes and noted a surge in calls to assist with flexible work requests. They submitted that the FWC powers to arbitrate a dispute had led to a reduction in disputes. The Shop, Distributive and Allied Employees Association explained that in the retail sector requests to change a roster had always been a problem, with many refused. Subsequent to the amendments – and the threat of arbitration - requests for roster changes are being approved.

Unions requested that the right be extend to all workers with caring responsibilities and those requiring flexibility for reproductive health. (Reproductive health is discussed above).

31.3 Findings and recommendations

The Secure Jobs, Better Pay amendments related to the NES right to request flexible work arrangements included new provisions aimed at enhancing employer obligations concerning the requests (e.g. genuinely trying to reach agreement and providing sufficient detail in written responses) and new dispute resolution provisions. These amendments came into effect on 6 June 2023.

Available evidence suggests that the amendments are working as intended. Employees have better access to flexible work arrangements (e.g. rosters) and have an avenue for dispute resolution if their requests are unreasonably refused.

The Review Panel acknowledges Amanda Selvarajah's concerns that the FWC may be taking a narrow approach to determining eligibility, potentially diverging from the legislation's intent. The Review Panel also recognises her recommendation for parliament to clarify and expand eligibility criteria. However, the Review Panel is cautious about adopting this suggestion at this stage, noting that the provisions are still in their early stages, with limited cases to date, and that the FWC, being a tribunal rather than a court, is not strictly bound by precedent.

The Review Panel also acknowledges the Ai Group's concern that some requests may take longer than 21 days to address for understandable reasons. However, the Review Panel believes this issue can be effectively managed through clear and timely communication between the parties and does not warrant a legislative amendment.

The Review Panel makes no recommendations in relation to these amendments.

Chapter 32. Unpaid parental leave

In this chapter the focus is on Part 25B (Unpaid parental leave) amendments in the Secure Jobs, Better Pay Act.

32.1 Amendments and intent

The Part 25B amendments result in changes to Division 5 (Parental leave and related entitlements) in Part 2-2 (The National Employment Standards) of the Fair Work Act.

There are 2 main changes. The first (Division 1) is concerned with employer obligations concerning requests for extensions to unpaid parental leave. The second (Division 2) sets out the dispute resolution process if requests are refused. The amendments are similar to those outlined at Chapter 31 (Flexible work) related to requests to vary working arrangements.

32.1.1 Secure Jobs, Better Pay amendments

Section 70 (Entitlement to unpaid parental leave) of the Fair Work Act specifies that:

> An employee is entitled to 12 months of unpaid parental leave if:
>
> (a) the leave is associated with:
>
> (i) the birth of a child of the employee or the employee's spouse or de facto partner; or
>
> (ii) the placement of a child with the employee for adoption; and
>
> (b) the employee has or will have a responsibility for the care of the child.

Section 71 specifies the period of leave (e.g. single continuous period, when it must start and end). Section 76 enables an employee who takes unpaid parental leave under s 71 to request an extension for up to 12 months.

The Secure Jobs, Better Pay amendments insert a new section (s 76A) concerning employer obligations relating to requests for an extension of unpaid parental leave. Under this section employers are required to:

- provide a written response to the request within 21 days
- set out the agreed extended period (if different to the period sought)
- explain the grounds for refusal (if refused).

Employer associations may refuse on reasonable business grounds.[969] The grounds are similar to those set out in s 65A(5) (the business grounds upon which an employer may refuse a request for flexible working arrangements) (see section 31.1.1 above).

The changes came into effect on 6 June 2023.

[969] *Fair Work Act 2009 (Cth)* s 76A(3)–(5).

The Review Panel notes that *Fair Work Amendment (Protecting Worker Entitlements) Act 2023* (Cth) also made amendments to the Fair Work Act provisions regarding unpaid parental leave.[970]

32.1.2 Intent of Secure Jobs, Better Pay amendments

The Secure Jobs, Better Pay amendments concerning the extension of unpaid parental leave were included in the Secure Jobs, Better Pay Bill because of parliamentary negotiations with the Australian Greens. The amendments were moved by Senator Barbara Pocock and their intent was to provide parents with greater workplace flexibility when it comes to caring for children.[971] Senator Barbara Pocock chaired the Senate Select Committee on Work and Care and, in its final report, the committee commended these amendments to the Fair Work Act.[972]

32.2 Impact and issues

The following describes the data and information considered by the Review Panel when evaluating the amendments to request an extension of unpaid parental leave.

32.2.1 Quantitative evidence

In its *Annual Report 2022–23*, the FWC reported that:[973]

> Between 6 June 2023 when these changes commenced and the end of the reporting period, the Commission received one application for a dispute about extension of unpaid parental leave and 6 applications to deal with a dispute in relation to flexible working arrangements. No decisions were made.

The FWO advised the Review that there have been no requests for assistance or investigations in relation to the unpaid parental leave amendments. However, the FWO noted that there was a sizable increase in web page views on 'unpaid parental leave and other entitlements' – from 151,579 in 2022–23 to 219,619 in 2023–24.

According to 2023–24 Workplace Gender Equality Agency (WGEA) data, 68% of employers offer access to paid parental leave in addition to the Australian Government scheme, 87% of employers offering parental leave pay superannuation for parents while on paid leave, and 17% of primary carer's leave is taken by men.[974]

32.2.2 Qualitative evidence

The Review Panel is not aware of any significant qualitative evidence in relation to these amendments.

---

[970] *Fair Work Amendment (Protecting Worker Entitlements) Act 2023* (Cth), Sch 2.
[971] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.
[972] Senate Select Committee on Work and Care, Parliament of Australia, *Final Report* (Report, 2023) xxviii <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024994/toc_pdf/FinalReport.pdf;fileType=application%2Fpdf>.
[973] Fair Work Commission, Annual Report 2022–23 (Report, 2023) 29.
[974] Workplace Gender Equality Agency, Parental Leave (Web Page, n.d.) <https://www.wgea.gov.au/parental-leave#:~:text=This%20benefit%20can%20take%20the,addition%20to%20the%20government%20scheme>.

32.2.3 Stakeholder views

Stakeholders were generally supportive of the amendments. There were no objections to the reforms in the roundtable meetings with employer associations and unions.

While supporting this amendment, Professor Andrew Stewart's submission on the Secure Jobs, Better Pay Bill had proposed a similar alignment of the right to request flexible working arrangement provisions and the right to request an extension on unpaid parental leave.[975]

The Employment Rights Legal Service also recommended removing the 12-month qualifying period before workers become eligible for the Fair Work Act entitlements.[976]

32.3 Findings and recommendations

As no stakeholders have raised concerns about the operation of the amendments concerning extended unpaid parental leave, the Review Panel concludes that the amendments are operating as intended.

The Review Panel makes no recommendations in relation to these amendments.

[975] Senate Education and Employment Legislation Committee, Parliament of Australia, Fair Work Legislation Amendment (Securer Jobs, Better Pay) Bill 2022, Professor Andrew Stewart, Submission 89, 2 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/SecureJobsBetterPay/Submissions>.
[976] Employment Rights Legal Service submission.

Part 4. Miscellaneous

Chapter 33. Introduction to Part 4

Part 4 of this report addresses various 'miscellaneous' amendments introduced through the Secure Jobs, Better Pay Act and other acts. Specifically, it considers:

- Enhancing small claims process
- Prohibiting employer advertisements with pay rates that would contravene the Act
- Having regard to certain additional matters (the provision of multilingual resources)
- Amendment of the *Safety, Rehabilitation and Compensation Act 1988*
- Closing Loopholes Act – Health and Safety Representative (HSR) assistant right of entry

These amendments intended to improve workplace accessibility and compliance.

Each section dealing with the matters raised above is structured as follows. Each begins by outlining the relevant amendments and their policy intent, followed by an analysis of the impact and issues raised during the review. Each section concludes with findings and recommendations (where applicable).

Chapter 34. Enhancing small claims process

Part 24 of Schedule 1 to the Secure Jobs, Better Pay Act concerns amendments to s 548 of the Fair Work Act on small claims procedures.

The Review Panel notes that the Department of Employment and Workplace Relations released its *Review of the Fair Work Act Small Claims Procedure* in January 2025.[977] This Review considered the effectiveness of the courts' current small claims framework with a view to identifying issues and efficiencies, and exploring more effective avenues for wage redress for workers in Australia (including migrant workers).[978] This chapter considers the Secure Jobs, Better Pay amendments but notes that the department's review has given a detailed consideration to the effectiveness and operation of the small claims framework more broadly.

34.1 Amendments and intent

The small claims procedure allows for a less complicated, informal process for courts to deal with certain applications under the Fair Work Act.[979] Section 548 of the Fair Work Act allows certain proceedings, such as those involving underpayment or non-payment of employee entitlements,[980] fixed-term contracts[981] and casual conversion[982] to be dealt with through the small claims procedure in either the Federal Circuit and Family Court of Australia (FCFCOA) or a magistrates court.[983] Part 24 of the Secure Jobs, Better Pay Act made 3 main amendments to s 548 of the Fair Work Act.

34.1.1 Secure Jobs, Better Pay amendments

The first amendment concerns the limits on the award that a court may make. Prior to the Secure Jobs, Better Pay amendments the maximum monetary cap for recovering unpaid entitlements via the small claims process was $20,000. Through the Secure Jobs, Better Pay Act the limit was increased to a maximum of $100,000 (s 548(2)(a) of the Fair Work Act).

The second amendment concerns interest payable on compensation ordered in small claims proceedings. A new section 548(2A) clarifies that any interest payments awarded under section 547 of the Fair Work Act does not count towards the maximum amount that a court may award.

The third amendment concerns the 'costs for filing fees paid in relation to the proceedings'. Two new subsections were added to section 548 as follows:

> (10) If the court makes an order (the ***small claims order***) mentioned in subsection (1) against a party to small claims

[977] Department of Employment and Workplace Relations, Review of the Fair Work Act Small Claims Procedure.
[978] Department of Employment and Workplace Relations, Review of the Fair Work Act Small Claims Procedure, 5.
[979] *Fair Work Act 2009* (Cth) s 548(3).
[980] According to Tess Hardy the term 'wage theft' is 'commonly used in the media to refer to the underpayment or non-payment of employee related entitlements': Senate Standing Committee on Economics, Parliament of Australia, inquiry into unlawful underpayment of employees' remuneration, Dr Tess Hardy, Submission No 85, [5].
[981] *Fair Work Act 2009* (Cth) s 548(1B).
[982] *Fair Work Act 2009* (Cth) s 548(1C).
[983] For more details, see FWC, *Enforcement of Commission Orders* (Web Page, n.d.) <https://www.fwc.gov.au/enforcement-commission-orders#:~:text=What%20is%20a%20small%20claim%20procedure?&text=A%20small%20claim%20procedure%20in,through%20this%20small%20claim%20procedure>; and FWO, *Legal Action in the Small Claims Court* (Web Page, n.d.) <https://www.fairwork.gov.au/workplace-problems/fixing-a-workplace-problem/resolving-disputes-with-our-help/legal-action-in-the-small-claims-court>.

> proceedings, the court may make an order as to costs against the party for any filing fees paid to the court by the party that applied for the small claims order.
>
> (11) Subsection (10) applies despite section 570.

Section 570 limits the court's power to order costs. Except for section 548(1), generally the court may only award costs where:[984]

> (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
>
> (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
>
> (c) the court is satisfied of both of the following:
>
> (i) the party unreasonably refused to participate in a matter before the FWC;
>
> (ii) the matter arose from the same facts as the proceedings.

These amendments came into effect on 1 July 2023.

34.1.2 Intent of Secure Jobs, Better Pay amendments

The Australian Government's Secure Jobs, Better Pay amendments were informed by reports from the Migrant Workers' Taskforce (MWTF) and the Senate Economics Reference Committee (SERC) inquiry into the unlawful underpayment of employees' remuneration. The MWTF was established in 2016 by the Liberal–National Coalition government to deal with the problem of the underpayment of wages of migrant workers. It was chaired by Professor Allan Fels AO with Mr David Cousins AM as Deputy Chair. The MWTF released its final report to the Australian Government in February 2019,[985] issuing 22 recommendations.[986] The SERC issued their report in March 2022, making 19 recommendations.[987]

In response to the SERC report, the Australian Government asserted that these amendments were intended 'to address issues cited by the committee'.[988] They also note that 'the Government provided funding for a review of the effectiveness of the Fair Work Act small claims process, in line with the recommendations of the 2019 Migrant Workers' Taskforce report'.[989]

---

[984] *Fair Work Act 2009* (Cth) s 570(2).
[985] Australian Government, *Australian Government Response: Report of the Migrant Workers' Taskforce* (Report, March 2019) 2.
[986] For a summary overview see A Fels and D Cousins, 'The Migrant Workers' Taskforce and the Australian Government's Response to Migrant Worker Wage Exploitation' (2019) 84 *Journal of Australian Political Economy* 13.
[987] Senate Economics References Committee, Parliament of Australia, *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees' Remuneration* (Report, March 2022).
[988] Australian Government, *Australian Government Response to the Senate Economics References Committee Report: Systemic, Sustained and Shameful: Unlawful Underpayment of Employees' Remuneration* (6 April 2023) 6.
[989] Australian Government *Australian Government Response to the Senate Economics References Committee Report: Systemic, Sustained and Shameful: Unlawful Underpayment of Employees' Remuneration* (6 April 2023) 6.

The Australian Government's intent when amending the threshold amounts in the Fair Work Act was to update the monetary amount in real terms (noting that the amount had not been changed since initially set at $20,000 in 2009) and allow workers to pursue claims exceeding $20,000. Their concern was that $20,000 was now a low threshold and could cause 'prospective claimants with modest claims that exceed $20,000 to abandon part of their claim to bring it within the monetary cap or not use the small claims procedure at all (instead using a full court process which is expensive, time-consuming and complex)'.[990]

The amendment concerning the recovery of filing fees was to ensure that compensation awarded on successful claims was not reduced by filing costs. It was also aimed at minimising disincentives for lodging a claim.[991]

34.2 Impact and issues

The following describes the data and information considered by the Review Panel when evaluating the amendments discussed above.

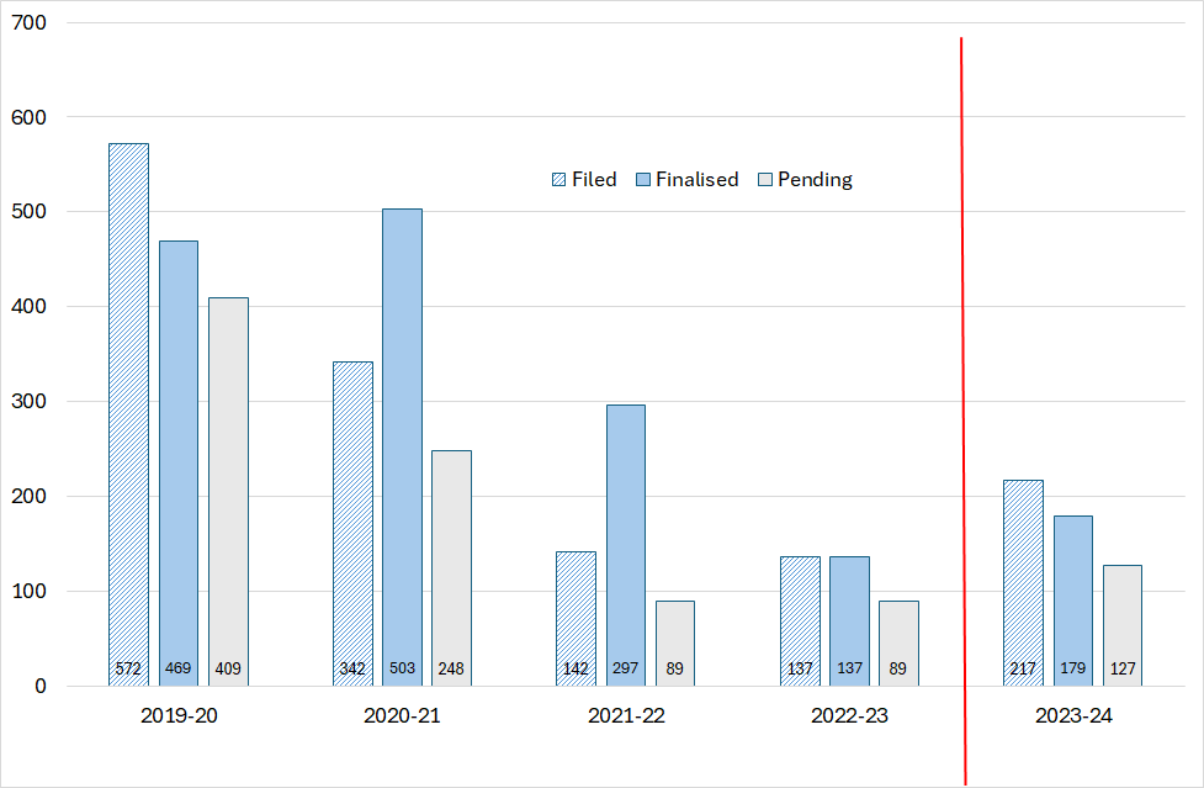
34.2.1 Quantitative evidence

Small claims proceedings are made through Division 2 of the FCFCOA. The following figure shows trends in the number of small claim applications over the last 5 financial years. The data is from the FCFCOA annual reports. Prior to 2019–20 the small claims data is not disaggregated to the number of applications filed, finalised and pending and therefore has not been included.

Figure 21 shows that, over the 5-year period examined, the number of small claims applications filed was at its highest in 2019–20. This may relate to the fact that the report from the MWTF was released by the National–Liberal Coalition government in March 2019 and there was likely heightened attention concerning underpayments.[992] Between 2019–20 and 2022–23 there was a decline in the number of applications filed. This trend reversed in 2023–24 with the number of new cases filed increasing by 80 (or 58%) to 217 between 2022–23 and 2023–24 financial years.

[990] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth), 204.
[991] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth), 205.
[992] The Migrant Workers' Taskforce (MWTF) was established in 2016 to deal with the problem of the underpayment of wages of migrant workers. It was chaired by Professor Allan Fels AO with Mr David Cousins AM as Deputy Chair. In an article published in 2019 Fels and Cousins note that, in 2017–18, migrant workers comprised 6% of the Australian workforce but accounted for 20% of formal disputes at the FWO. Their paper summarises various recommendations of the MWTF, including increasing penalties in the Fair Work Act to help deter noncompliance: A Fels and D Cousins, 'The Migrant Workers' Taskforce and the Australian Government's Response to Migrant Worker Wage Exploitation' (2019) 84 *Journal of Australian Political Economy* 13.

Figure 21: The number of small claims applications filed, finalised and pending, 2019–20 to 2023–24



Note:

1. The small claims division of the FCFCOA deals with request under subsection 548(1A) of the Fair Work Act (concerning compensation for an entitlement such as underpayment) and subsections 548(1B) and (1C) of the Fair Work Act in relation to fixed-term and casual contracts .

2. The data for Figure 21 are from the FCFCOA Annual Reports 2023-24, Figure 4.5.6(c). The information is not disaggregated by the section of the Fair Work Act under which applications are filed etc. Accordingly, it is not possible to say, with certainty, whether the increased number of applications filed are arising under s.548(1A) in relation to unpaid entitlements.

3. The Secure Jobs, Better Pay amendments concerning small claims came into effect from 1 July 2023. This is shown in the above chart via the horizontal red line (2023-24 is the only year which includes fixed-term contract disputes).

Source: Federal Circuit and Family Court of Australia, *Annual Report 2023–24*, Figure 4.5.6(c).

Alt-text: A bar chart showing the number of small claims filed, finalised and pending. In 2023–24 financial year the number of small claims filed was equal to 217, up by 80 (or 58%) on the numbers filed in 2022–23.

The rise in small claims in 2023–24 aligns with the Australian Government's intent and the changes to the Act to encourage workers to pursue their entitlements through a more accessible claims process. However, other factors may also explain the observed increase. For example, there has been extensive media coverage of underpayment following Australian

Government inquiries[993] [994] [995]and changes to the Act. This could have had an educative function and generated more claims. Claims may also be up on account of union campaigns and cost-of-living pressures.[996]

It is important to note that the data in Figure 21 provides only partial insight into the extent of worker underpayment / non-payment. For example, it only reports on small claims taken through the FCFCOA. From the limited data available it appears that some claims have pursued through state courts. However, state court data not been captured in this data due to a lack of disaggregated data on small claims in most states. Better data from state courts may help better understand how many small claims applications have been made across the country. The enforcement activities of the FWO may have also affected the number of small claims filed.

Table 21 outlines trends in enforcement outcomes by the Fair Work Ombudsman (FWO) from data provided to the Review. Compliance notices, a key tool for rectifying worker underpayments, increased by 6% in 2023–24, with 2,574 notices issued. Beyond highlighting the prevalence of underpayments and the amounts recovered, Table 21 illustrates how the FWO's enforcement activities likely mitigate the volume of small claims reflected in Figure 21.

[993] J Hare, 'Wage Theft Shameful and Systemic, Says Senate Report', *Australian Financial Review* (online, 31 March 2022) <https://www.afr.com/work-and-careers/education/wage-theft-shameful-and-systemic-says-senate-report-20220331-p5a9rn>.
[994] S Marsh, 'Sydney's Five-star Shangri-La Hotel Underpaid Employees more Than $3 million', *9news* (online, 1 April 2022) <https://www.9news.com.au/national/shangrila-sydney-five-star-hotel-found-to-have-underpaid-workers-3-million/16feb7b5-1a40-4dc9-9168-e8e2a4c1fd71>.
[995] C Conor Duffy, 'Union Calls for Backpay and Apology after University of Melbourne Faculties Cut PhD Rates for Casuals', *ABC News* (online, 21 March 2022) <https://www.abc.net.au/news/2022-03-21/union-calls-for-action-on-university-of-melbourne-phd-pay/100921064>.
[996] See e.g. UWU, *2022–2024: Taking Down Wage Thieves Across Australia* (Web Page, n.d.) <https://unitedworkers.org.au/history/taking-down-wage-thieves-across-australia/#:~:text=Between%202022%2D2024%2C%20United%20Workers,practices%20and%20building%20union%20power> and Unions NSW, *Wage Theft – The Shadow Market Empowering Migrant Workers to Enforce Their Rights* (Web Page, n.d.) <https://www.unionsnsw.org.au/publication/wage-theft-the-shadow-market-empowering-migrant-workers-to-enforce-their-rights/>.

Table 21: Office of the Fair Work Ombudsman, Enforcement Outcomes 2019–20 to 2023–24

	2019–20	2020–21	2021–22	2022–23	2023–24
Infringement notices ('on-the-spot fines' to employers breaching record-keeping and pay slip requirements)					
Notices	603	513	492	626	760
Penalties paid	$891,173	$518,396	$446,037	$739,966	$986,616
Compliance notices (rectifying suspected underpayment of workers)					
Notices	952	2,025	2,345	2,424	2,574
Penalties paid	$7.8m	$16.5m	$20.2m	$14.8m	$16.9m
Enforceable undertakings (includes recovering unpaid wages outside 6-year statutory limit)					
Notices	12	19	9	15	15
Penalties paid	$56.8m	$81.7m	$56.4m	$40.3m	$30.2m
Litigation (more serious or systemic cases of noncompliance)					
Proceedings commenced	54	76	137	81	64
Court orders	4.4m	$2.9m	$2.7m	$3.7m	$21.2m

Note: Every year the FWO also reports serious contraventions of the FWO. The serious contraventions are not included in this table.

Source: FWO annual reports 2019–20 to 2023–24, various.

34.2.2 Qualitative evidence

As previously noted, there have been several reports and inquiries into the matter of wage theft in Australia.

In the March 2022 report by the SERC, the majority view of the committee was that wage theft was systemic and 'often a deliberate decision of businesses that participate in a race to the bottom'.[997] Among other things the committee recommended that:[998]

> the Australian Government establish a small claims tribunal, ideally co-located with the Fair Work Commission, to create a simple, affordable, accessible, and efficient process for employees to pursue wage theft, including Superannuation Guarantee non-compliance.

[997] Senate Economics References Committee, Parliament of Australia, *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees' Remuneration* (Report, March 2022) 137 [6.3].
[998] Senate Economics References Committee, Parliament of Australia, *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees' Remuneration* (Report, March 2022) 139 [6.17].

Since the amendment of the Act, the Grattan Institute (May 2023)[999] and the Migrant Justice Institute (June 2024)[1000] have also released reports on exploitation of migrant workers.[1001] The latter examines the effectiveness of the small claims process within the FCFCOA for migrant workers seeking to recover unpaid entitlements. They note that 137 small claim applications were filed in 2022–23 but argue that '[t]his number should be seen against the Grattan Institute's estimate that between 490,000 and 1.26 million workers are paid below the national minimum wage in a year'. They also note that 'it is not clear that wage claims are being systematically resolved via other legal forums or by the Fair Work Ombudsman'.[1002]

Their report identifies significant barriers that prevent workers from utilising the small claims process. Among other things they recommend increased funding for community legal centres, a duty lawyer scheme to support workers in court, a new dispute resolution process in the Fair Work Commission (FWC) for wages and entitlements and a new Fair Work Court to streamline claims. Their recommendations echo the recommendations of the SERC, with both calling for a simpler, more informal body to deal with underpayments that utilises a lot of the FWC's simpler, more affordable and more efficient processes.

The concern about cost may be due in part to the filing fees being lower in the FWC. If an employee is represented, the cost of representation will likely be a substantial cost; however, for self-represented employees the filing fees represent an initial cost barrier and disincentive to using the process. In the FWC it currently costs $87.20 to file an unfair dismissal application.[1003] This is less than half of the $295 it currently costs to file a small claims application in the FCFCOA, which increases to $470 for claims between $10,000 and $50,000 or to $545 for claims between $50,000 and $100,000.[1004] However, both jurisdictions do allow for parties to apply to have their filing fees waived.[1005]

As noted, the Department of Employment and Workplace Relations has recently released its *Review of the Fair Work Act Small Claims Procedure*.[1006] If any issues are identified during further consultation, the Review Panel may further consider its findings and recommendations in the Final Report.

34.2.3 Stakeholder views

In submissions to the review, many stakeholders (the Australian Council of Trade Unions (ACTU), United Workers Union (UWU), the Council of Small Business Organisations Australia (COSBOA), Employment Rights Legal Service, Master Electricians Australia) gave positive feedback about the increased accessibility to small claims procedures for workers and many

---

[999] B Coates, T Wiltshire and T Reysenbach, *Short-changed: How to Stop the Exploitation of Migrant Workers in Australia* (Report No. 2023-07, Grattan Institute, May 2023).
[1000] C Hemingway, F Yeh, L Berg and B Farbenblum, *All Work, No Pay: Improving the Legal System So Migrants Can Get the Wages They Are Owed* (Migrant Justice Institute, 2024).
[1001] For further discussion of the history and an overview of the literature on underpayment and insecure work in Australia see B Ellem, CF Wright, S Clibborn, R Cooper, F Flanagan and A Veen, *Work and Industrial Relations Policy in Australia* (forthcoming, Bristol University Press) Ch 9 (Policy failure: underpayment and insecure work).
[1002] C Hemingway, F Yeh, L Berg and B Farbenblum, *All Work, No Pay: Improving the Legal System So Migrants Can Get the Wages They Are Owed* (Migrant Justice Institute, 2024) 7.
[1003] FWC, *Apply for Unfair Dismissal (Form F2)* (Web Page, n.d.) <https://fwc.gov.au/form/apply-unfair-dismissal-form-f2>.
[1004] FCFCOA, *Fees* (Web Page, n.d.) <https://www.fcfcoa.gov.au/resources/fees>.
[1005] FCFCOA, *Application for Exemption from Paying Court Fees – General (General Federal Law)* (Web Page, n.d.) <https://www.fcfcoa.gov.au/gfl/forms/app-exemption-fees-general>; FWC, *Ask to Waive an Application Fee (Form F80)* (Web Page, n.d.) <https://fwc.gov.au/apply-or-lodge/form/ask-waive-application-fee-form-f80>.
[1006] Department of Employment and Workplace Relations, Review of the Fair Work Act Small Claims Procedure.

noted that the changes have not yet been used enough to definitively evaluate whether the amendments are working as intended or not. The ACTU submitted that:[1007]

> Giving those workers access to the cheaper and less formal avenue of small claims processes makes justice more accessible for them and reduces the burden on the courts. Indeed, the changes are already having this effect.

The ACTU also noted that, because of changes to the monetary caps, unions are now able to take cases for larger amounts.[1008]

Some employer groups (e.g. Ai Group) questioned the appropriateness of the Secure Jobs, Better Pay amendments and raised concerns that employers may be pulled into disputes for 'substantial sums' ($100,000) without rules of evidence and procedure. Both the Ai Group, Australian Chamber of Commerce and Industry (ACCI) and COSBOA submitted that $100,000 was not a small claim and the amount should be lowered. The Ai Group suggested an amount between $40,000 and around $60,000[1009] and ACCI suggested $50,000 with annual indexing,[1010] while COSBOA recommended lowering it to $30,000 and indexing it annually.[1011]

Other employer groups (e.g. Master Electricians Australia) welcomed the changes 'recognising its potential to provide greater assistance with judicial matters'.[1012]

Unions welcomed the amendments. The UWU submitted that the increased threshold would enable more workers to access the small claims jurisdiction.[1013] Both the UWU and ACTU called for an amendment to the Act to clarify that parties may make claims on enterprise agreements that have since been replaced by a new enterprise agreement.

The Employment Rights Legal Service welcomed the amendments to the Act but submitted that the reforms do not go far enough:[1014]

> we do not believe the reforms go far enough to address the problems facing workers experiencing disadvantage who need to access the court process to recover unpaid wages and entitlements. Even with these changes, the small claims process is too complicated for the majority of the workforce to navigate without assistance, especially for migrant workers who have English as a second language and workers on temporary visas.

It recommended, among other things, that 'The FWC's jurisdiction should be expanded in order to handle underpayment and wage theft matters.'[1015]

[1007] ACTU submission, 101.
[1008] According to the ACTU, the HSU has multiple small claims underway, one for over $40,000 and another for around $80,000 (ACTU submission, 101).
[1009] Ai Group submission, 113–114 [476]–[478].
[1010] ACCI submission, 93.
[1011] COSBOA submission, 8.
[1012] MEA submission, 1.
[1013] UWU submission, 46.
[1014] Employment Rights Legal Service submission, 6.
[1015] Employment Rights Legal Service submission, 7.

The Law Council of Australia also welcomed the amendments, particularly as 'it introduced for the first time a right to costs, albeit very limited'.[1016] However, it asserted that the small claims procedure remains underutilised and they recommend reforms that would result in 'penalties issued against an employer, with the ability to seek to have those amounts paid to themselves'.[1017]

34.3 Findings and recommendations

The amendments concerning small claims took effect on 1 July 2023. While the short timeframe since their implementation limits comprehensive evaluation, data limitations are also a problem. Despite this, several stakeholders have expressed their satisfaction with the amendments and view that the amendments are working as intended. The Panel is inclined to agree.

Consistent with the findings of the Department of Employment and Workplace Relations' *Review of the Fair Work Act Small Claims Procedure*, the Review Panel acknowledges the need for more data about the impacts of the small claims framework in proceedings and on employer behaviour, as well as the need to support employees to access legal assistance in small claims matters.

In particular, the Review Panel notes the lack of clear data around the use of small claims procedures, particularly in state and territory courts. Collecting and monitoring more data about their use is important to understand the impacts of these amendments and the potential benefits of further reform. This data should also be considered as part of broader evidence about workplace entitlements not being met (e.g. the proportion and characteristics of workers who continue to be underpaid) and the extent to which different mechanisms for redress are being used (including small claims procedures).

The Review Panel also notes reports (SERC and MWTF) before the amendments, more recent research (e.g. by the Migrant Justice Institute and the Grattan Institute)[1018] and stakeholder submissions (e.g. Employment Rights Legal Service) highlighting the complexity of the small claims process. Given this, individuals continue to need support to access the process (such as through community legal education or duty lawyer services). While some of the financial barriers and disincentives have been removed, broader procedural and institutional reform may still be required. While the small claims process is simpler than other legal processes, it is also more formal than mediation and conciliation procedures such as those used by the FWC.

Given its recent release, the Review Panel reiterates the Review of the Fair Work Act Small Claims Procedure's recommendations, particularly in relation to the need for further data, support for employees to access legal assistance and potential institutional reform.

Draft Recommendation 17: Consistent with recommendations 9, 10 and 11 of the Department of Employment and Workplace Relations' Review of the Fair Work Act Small Claims Procedure:

[1016] Law Council submission, 5.
[1017] Law Council submission, 6.
[1018] C Hemingway, F Yeh, L Berg and B Farbenblum, *All Work, No Pay: Improving the Legal System So Migrants Can Get the Wages They Are Owed* (Migrant Justice Institute, 2024) 7.

- **9. The Government should undertake further work to consider whether additional funding is required for legal assistance in small claims matters, to enable:**
    - **a. the establishment of duty lawyer services**
    - **b. the provision of targeted community legal education initiatives, and**
    - **c. legal assistance providers to assist and represent more workers.**
- **10. Once data on the effects of the increased monetary cap becomes available, the Department of Employment and Workplace Relations should consider whether any additional changes to the small claims procedure under the *Fair Work Act 2009* are necessary.**
- **11. Noting differing views about the potentially complementary nature of extending small claims jurisdiction to a tribunal and establishing an industrial court, it is recommended that Government consider these options further and determine which option, if any, to pursue. In progressing the selected policy, stakeholder feedback, including that received as part of the Small Claims Review, should be considered.**

Chapter 35. Prohibiting employer advertisements with pay rates that would contravene the Act

Part 25 of the Secure Jobs, Better Pay Act concerns amendments at Part 3-6 (Other rights and responsibilities) of the Fair Work Act on employer obligations in relation to advertising rates of pay.

35.1 Amendments and intent

The main amendments to the Fair Work Act made by Part 25 of the Secure Jobs, Better Pay Act is the insertion of a new provision 'about the obligations of national system employers in relation to advertising rates of pay'.[1019]

35.1.1 Secure Jobs, Better Pay amendments

The Secure Jobs, Better Pay Act adds Division 4 (Employer obligations in relation to advertising rates of pay) to Part 3-6 of the Fair Work Act. There are 2 key parts to this new division:

- Section 536AA(1) broadly provides that employers must not advertise employment with a rate of pay that contravenes the Fair Work Act or a fair work instrument.
- Section 536AA(2) broadly provides that advertisement of piecework must include any periodic rate of pay to which pieceworker is entitled.
- Sections 536AA(1) and (2) are civil remedy provisions. The Fair Work Ombudsman (FWO) can issue compliance notices requiring an employer to take specific action in relation to noncompliant advertisements, amongst other things.[1020]

Section 536AA(3) includes reasonable excuse provisions. Section 536AA(1) and (2) do not apply if the employer has a reasonable excuse.

It is important to note that prohibitions only apply to employers that opt to specify a rate of pay in their advertising.[1021] It does not apply to publishers of employment advertisements (such as websites that host employment advertisements).[1022]

These amendments came into effect on 7 December 2022 and apply to jobs being advertised on or after 7 January 2023, regardless of when the advertisement was originally posted.[1023]

35.1.2 Intent of Secure Jobs, Better Pay amendments

In the Revised Explanatory Memorandum, then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, explained that the prohibitions on offering employment with

[1019] *Fair Work Act 2009* (Cth) s 528.
[1020] *Fair Work Act 2009* (Cth) s 716(1)(fa).
[1021] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth), 207.
[1022] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth), 207.
[1023] FWO, *Pay Secrecy, Job Ads and Flexible Work* (Web Page, n.d.) <https://www.fairwork.gov.au/about-us/workplace-laws/legislation-changes/secure-jobs-better-pay/pay-secrecy-job-ads-and-flexible-work#job-ads>.

rates of pay that are below the Fair Work Act or a fair work instrument are intended to reduce worker exploitation and reduce unintentional underpayments:[1024]

> The proposed prohibition on advertising employment opportunities at below minimum wages is also aimed at reducing worker exploitation. It would send a clear message to employers that they must verify the correct entitlements prior to advertising. It would help promote a culture of compliance with industrial relations laws by encouraging employers to consider their workplace obligations before hiring employees, which should help to reduce unintentional underpayments of employees.

The amendments implement a previous recommendation from the 2018 report of the Migrant Workers' Taskforce (MWTF). At recommendation 4 the MWTF recommended that 'legislation be amended to prohibit persons from advertising jobs with pay rates that would breach the Fair Work Act 2009'.[1025] Professor Fels and Mr Cousins (Chair and Deputy Chair, respectively, of the MWTF) noted that:[1026]

> Whilst it is a breach of the law to under-pay, it is not necessarily a breach of the law to advertise a job at a pay rate which is below award conditions. The Taskforce considered this should be readily fixed by legislative change.

The amendments also address recommendation 2 of the Senate Economics References Committee inquiry into unlawful underpayments of employees' remuneration.[1027] Among other things, recommendation 2 provided that the Australian Government amend the *Fair Work Act 2009* to 'make it an offence for employers to advertise employment with a rate of pay less than the national minimum wage'.[1028]

The amendments were also made in the context of a Unions NSW 2020 report (*Wage Theft: The Shadow Market*) highlighting the pervasive exploitation of migrant workers and revealing that a significant number of job advertisements in foreign languages offered wages which were below the legal minimum.[1029]

35.2 Impact and issues

The following summarises the data and information considered by the Review Panel when evaluating the amendments discussed above.

[1024] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth), xxxi [156].

[1025] This recommendation was accepted by the National–Liberal Coalition government but not legislated.

[1026] A Fels and D Cousins, 'The Migrant Workers' Taskforce and the Australian Government's Response to Migrant Worker Wage Exploitation' (2019) 84 *Journal of Australian Political Economy* 31.

[1027] Senate Economics References Committee, Parliament of Australia, *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees' Remuneration* (Report, March 2022) 138.

[1028] Senate Economics References Committee, Parliament of Australia, *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees' Remuneration* (Report, March 2022) 138.

[1029] Over 7,000 job advertisements were reviewed across more than 10 industries in 5 main languages (Chinese, Japanese, Vietnamese, Spanish and Portuguese). (Unions NSW, *Wage Theft: The Shadow Market – Empowering Migrant Workers to Enforce Their Rights* (Web Page, n.d.) <https://www.unionsnsw.org.au/publication/wage-theft-the-shadow-market-empowering-migrant-workers-to-enforce-their-rights/>).

35.2.1 Quantitative evidence

The data reported in this section is in relation to the activities of the FWO. The FWO is responsible for compliance and enforcement of the prohibition of employment advertisements with illegal rates of pay. If the FWO found an employer advertising a job with pay below the minimum it could, for instance:

- issue a compliance notice
- impose an infringement notice
- seek court penalties
- educate the employer about the prohibition.[1030]

The amendments, as noted, came into effect on 7 December 2022 and apply to jobs being advertised on or after 7 January 2023.

Data provided from the FWO to the Review indicates that, from 7 January 2023 to 31 October 2024, the FWO issued 243 infringement notices to employers contravening the Act provisions on job advertisements.

Part of the role of the FWO is to provide education around workplace entitlements and employer obligations and its web page on 'Job ads'[1031] includes an example of a job advertisement template for employers. This includes specific information on rules about what cannot be included in job ads, including ensuring pay rates do not breach the Act or a fair work instrument. The template also includes a link to the FWO 'Pay and Conditions Tool'.[1032]

The data provided from the FWO to the Review indicates their job ads web page was viewed over 20,000 times between 2022–23 and 31 October 2024.

Members of the public, including employees, may report breaches of the Fair Work Act to the FWO. The FWO website sets out the information required when reporting an incident and explains that reporting may be done anonymously.[1033] Workers may also contact the FWO for direct help or questions on their workplace entitlements.

The FWO data also indicates that they provided assistance in response to 2 requests regarding these provisions. However, they did not provide details of how many anonymous reports were received which may be substantially higher.

35.2.2 Qualitative evidence

The Review Panel is not aware of any other significant qualitative evidence in relation to these amendments.

35.2.3 Stakeholder views

The Australian Chamber of Commerce and Industry (ACCI) raised concerns in their submissions about job advertising platforms. ACCI noted that some pay discrepancies in job

[1030] FWO, *Job ads – Fair Work Ombudsman* (Web Page, n.d.) <https://www.fairwork.gov.au/starting-employment/job-ads>.
[1031] FWO, *Job ads – Fair Work Ombudsman* (Web Page, n.d.) <https://www.fairwork.gov.au/starting-employment/job-ads>.
[1032] FWO, *The Pay and Conditions Tool* (Web Page, n.d.) <https://calculate.fairwork.gov.au/FindYourAward>.
[1033] FWO, *Send Us an Anonymous Tip-off* (Web Page, n.d.) <https://www.fairwork.gov.au/workplace-problems/send-us-an-anonymous-tip-off>.

advertisements occur because platforms pre-fill pay ranges. Their suggestion is that platforms such as SEEK could improve their interfaces to allow manual input of pay rates and reduce the risk of errors.[1034]

Ai Group raised no issues with these amendments but asserted that 'the Government should devote resources to ensuring that there are appropriate public education initiatives implemented to ensure that the new obligations widely known, including initiatives that are communicated in a variety of different community languages'.[1035]

Clubs Australia[1036] expressed concerns about the amendments. They highlighted the risk that clubs might unintentionally breach the law when advertising roles. For example, a club might advertise a part-time position with a legally compliant wage rate but later decide to hire a casual employee instead. If a casual loading had not been included in the original advertisement, this could potentially be a breach of the Act.

Clubs Australia and the Australian Retailers Association[1037] noted that they had not experienced any issues yet but indicated some concerns about the potential liability of employers.[1038]

The Australian Council of Trade Unions (ACTU)[1039] and the Employment Rights Legal Service (ERLS)[1040] strongly support the amendments, although the ERLS contends that the reforms do not go far enough. Their particular concern relates to 'closed' environments (e.g. WhatsApp) which are used by many young people, migrant workers and vulnerable workers when searching for work. They note that s 536AA may 'inadvertently encourage employers to advertise employment in "closed" environments (for example, private social media groups and message boards, e.g., WhatsApp) in order to evade detection, or to decline to advertise any specific rate of pay'.

The Finance Sector Union also asserted that there 'has been an increasing trend in the advertising of job vacancies to advertise roles without pay rates attached.'[1041] It recommended the 'government introduce salary range transparency legislation and/or regulations to require employers to disclose salary ranges in every job advertised'.[1042]

35.3 Findings and recommendations

The amendments came into effect on 7 December 2022 and apply to jobs being advertised on or after 7 January 2023. Evidence provided by the FWO and stakeholders suggests that the changes are having their intended effect. The Panel concurs.

Notwithstanding this conclusion the Panel notes the concerns and issues raised by stakeholders and, accordingly, makes a recommendation.

The ongoing effectiveness of these reforms, intended to make sure prospective employees receive correct and lawful information about potential employment opportunities, will depend

[1034] ACCI submission, 95.
[1035] Ai Group submission, 81.
[1036] Clubs Australia submission, 5.
[1037] Australian Retailers Association submission, 13.
[1038] Clubs Australia submission, 5.
[1039] ACTU submission, 102.
[1040] Employment Rights Legal Service submission.
[1041] FSU submission, 5.
[1042] FSU submission, 5.

on applying them in the context of evolving technology and methods of communication. For example, job advertising platforms should be set up to support compliance by making sure that pay ranges do not display rates below the legal minimums. Similarly, amendments may be required if the provisions do not effectively cover new channels being used to advertise jobs, such as WhatsApp groups, private social media pages or closed job boards.

Draft Recommendation 18: The Fair Work Ombudsman (FWO) should engage with job advertising platforms and other technology stakeholders to ensure that all job advertisements include accurate and lawful information, supported by the FWO's public education initiatives and materials.

Several stakeholders also raised concerns about what constitutes a 'reasonable excuse' in the context of job advertisements. For example, the Panel understands that this was intended to protect employers from penalties where pay rates change while a job is being advertised. The Review Panel anticipates that as the provisions are implemented in practice, more examples will become available to support consistent application and enforcement of the amendments.

The Review Panel notes that there is no Australian law requirement for job advertisements to include rates of pay. More evidence is required about the impacts of job advertisement information on employment and workplace behaviour, the effectiveness of regulation and whether there are other similarly important issues (e.g. expected hours of work and rosters). Ideally, longer datasets which can identify trends alongside FWO engagement and enforcement data would support such considerations in future. Pending further evidence about issues in Australia and international best practice, it may be appropriate to consider future reforms to require pay and other information in job advertisements.

If available in time, such evidence would also inform the consideration of these amendments in a further review of the Secure Jobs, Better Pay Act (see Draft Recommendation 1).

Chapter 36. Having regard to certain additional matters

Part 25AA of the Secure Jobs, Better Pay Act concerns the requirement that the Fair Work Commission (FWC) and the Fair Work Ombudsman (FWO) make educational materials and resources available in multiple languages.

The FWC deals with workplace disputes[1043] and makes orders. It assists people with limited English proficiency to access these services through the Translation and Interpreting Service (TIS National) with nationally accredited interpreters as well as information on the role of the FWC in 28 languages other than English.[1044]

The FWO provides general information and guidance to both employers and employees, serving a diverse audience. Its website features an automatic translation tool (Microsoft Translator) that converts content into over 30 languages.[1045] The tool enables quick access for individuals with limited English proficiency by making information instantly available in their preferred language.

36.1 Amendments and intent

Part 5-1, Division 2, of the Fair Work Act describes the functions of the FWC. Part 5-2 (Division 2) describes the functions of the FWO.

36.1.1 Secure Jobs, Better Pay amendments

The amendments to the Fair Work Act concerning providing services in multiple languages were as follows:

- Under a new s 577(2) the FWC must now have regard to '(a) the need for guidelines and other materials to be available in multiple languages; and (b) the need for community outreach in multiple languages'.
- Under a new s 682(1A) the FWO must have regard to '(a) the need for guidelines and other materials to be available in multiple languages; and (b) the need for community outreach in multiple languages'.

These new provisions came into effect on 7 December 2022.

36.1.2 Intent of Secure Jobs, Better Pay amendments

The intent of these amendments is to ensure that employees and employers in culturally and linguistically diverse (CALD) communities have access to important workplace information, regardless of their English language proficiency, creating greater awareness of workplace rights and employer obligations.

To quote the Australian Government, 'Making resources, information and services available in multiple languages helps more workers from linguistically diverse backgrounds understand their workplace rights and obligations in Australia, so reducing the risk of misinformation and exploitation'.[1046]

[1043] *Fair Work Act 2009* (Cth) s 595.
[1044] FWC, *Information in Your language* (Web Page, n.d.) <https://www.fwc.gov.au/about-us/information-your-language>.
[1045] FWO, *Language Help* (Web Page, n.d.) <https://www.fairwork.gov.au/tools-and-resources/language-help>.
[1046] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth), xxiv [119].

The Australian Government also noted that, although the FWC and FWO provide translation services/tools, there has never been a statutory requirement for them to do so.

36.2 Impact and issues

The following summarises the data and information considered by the Review Panel when evaluating the amendments discussed above.

36.2.1 Quantitative evidence

The FWO provided data to the Review indicating that they provided an auto-translation tool on their website allowing the website to be translated into 36 languages other than English.

The FWO data also shows that, in 2023–24, pages on their website were translated 126,843 times using the automatic translation tool. The most common languages were Simplified Chinese, Spanish, Korean, Japanese and French, and most of the translated pages concerned pay and minimum wages.

The FWO data also provided information about the page views/downloads for their pages that link to their language tools and translated materials. The data provided is from 1 July 2020 to 31 October 2024. On average 14,779 people a year viewed or downloaded the 'Language help' web page and 1,865 viewed or downloaded the 'Workplace help in other languages' web page between 2020–21 and 2023–24, with the latter web page seeing an increase in views/downloads each year.

Table 22: Data views/downloads of translated resources

Webpage / online resource	Page views / downloads				
	2020–21	2021–22	2022–23	2023–24	2024 – 31 Oct 2024
Language help – Fair Work Ombudsman	18,418	13,498	12,459	14,742	7,298
Workplace help in other languages – Fair Work Ombudsman	533	1,830	2,414	2,686	971

Source: Data provided to the Review by the FWO.

36.2.2 Qualitative evidence

Both the FWC and FWO provided information and support in multiple languages prior to the Secure Jobs, Better Pay amendments and have undertaken further work since.

In December 2024 the FWC released its 'Community and Engagement Strategy 2025–27' focused on ways to support CALD communities.[1047] In the strategy document the FWC notes that some CALD users are hesitant to use TIS National and that the FWC intends to do further research with the CALD community to better understand what refinements and enhancements are required regarding the use of interpreters. The strategy document also indicates that the

[1047] FWC, *Community Engagement Strategy 2025–27: Supporting Access to Justice for Culturally and Linguistically Diverse (CALD) Communities* (Web Page, n.d.).

FWC will explore the use of an automatic translator tool/service similar to the one the FWO uses.

This follows the release of resources for people from CALD communities in October 2023. The President of the FWC reports that the 'resources [were] translated by NAATI-accredited translators into 28 community languages to help those from CALD backgrounds better understand the role of the Commission. The languages were chosen based on 2021 Census data and our own internal data regarding interpreter requests'.[1048]

The FWO's ongoing commitment to the maintenance and revision (and expansion where necessary) of web content for CALD workplace participants is a component of its publicly available Multicultural Access and Equity Action Plan 2023–2025. This plan sets out how the FWO meets its responsibilities under the Australian Government's Multicultural Access and Equity Policy, including to ensure that CALD workplace participants are educated about their workplace rights, entitlements and responsibilities and that the FWO addresses any barriers that exist for members of CALD communities in accessing its services and assistance.

The Multicultural Access and Equity Action Plan follows considerable work to make the FWO more accessible for CALD communities, such as the 'in-language Anonymous Report tool' released in July 2017 and the automatic translation tool launched in February 2018.[1049]

Additionally, the FWO has taken targeted measures to support First Nations people as part of their Reconciliation Action Plan. The FWO notes that, along with other materials targeted at supporting First Nations people, such as webinars and face to face information session in English, they have worked with the 'Aboriginal Resource and Development Services (ARDS Aboriginal Corporation) in the production of the Yolnu Matha in-language workplace materials for First Nations people'.[1050]

36.2.3 Stakeholder views

No submissions to the review raised concerns or provided specific feedback about these amendments.

36.3 Findings and recommendations

The Review Panel is satisfied that the new statutory requirement for the FWC and FWO to have regard to guidelines and materials being available in multiple languages is having its intended effect and that there are no unintended effects.

The Review Panel supports the current actions being taken by the FWO and the FWC to support CALD communities, particularly the FWO's use of Microsoft Translator. However, more can be done to provide targeted materials to First Nations peoples. The Review Panel is interested in the materials prepared in Yolnu Matha by FWO with ARDS and notes that similar materials could be prepared to support other First Nations peoples.

[1048] Justice Hatcher, Fair Work Commission, *Fair Work Commission's 2023 Work and 2023–24 Performance* (President's Statement, 22 December 2023) [45].
[1049] FWO, *The Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2017–18* (Report, 2018) 13.
[1050] FWO, *Fair Work Ombudsman Innovate Reconciliation Action Plan September 2024 – September 2026*, 11 (Web Page, n.d.).

Draft Recommendation 19: The FWC should implement an automatic language translation tool on its website (as used by the FWO) and the Australian Government should investigate whether such tools could be used to translate materials into First Nations languages.

Chapter 37. Amendment of the Safety, Rehabilitation and Compensation Act 1988

The Secure Jobs, Better Pay Act, at Part 27, made amendments to the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act). The SRC Act is the legislative framework that underpins the Comcare workers' compensation scheme.

37.1 Amendments and intent

The following summarises the main amendments and the intent of the amendments.

37.1.1 Secure Jobs, Better Pay amendments

The Secure Jobs, Better Pay Act amended the SRC Act to streamline access to workers' compensation for firefighters, including reducing the qualifying period for oesophageal cancer from 25 years to 15 years, extending coverage of presumptive workers' compensation to volunteer firefighters in the Australian Capital Territory (ACT) and clarifying how volunteer firefighters access the presumptive provisions under the SRC Act.[1051]

These amendments came into effect on 7 December 2022.

37.1.2 Intent of Secure Jobs, Better Pay amendments

The amendments are designed to make it easier for employed and volunteer firefighters who contract certain illnesses to access the Comcare workers' compensation scheme.[1052]

37.2 Impact and issues

The following summarises the data and information considered by the Review Panel when evaluating the amendments discussed above.

37.2.1 Quantitative evidence

The Review Panel understands that no workers' compensation claims have been made by volunteer firefighters in the ACT since the Secure Jobs, Better Pay amendments came into effect. The Review Panel is therefore not aware of any significant quantitative evidence in relation to these amendments.

37.2.2 Qualitative evidence

The Review Panel has not identified any other qualitative evidence to consider outside of the views shared by stakeholders. The Review Panel is therefore not aware of any significant qualitative evidence in relation to these amendments.

37.2.3 Stakeholder views

The only submission that mentioned Part 27 of the Secure Jobs, Better Pay Act was from the Australian Council of Trade Unions (ACTU). The ACTU provided no criticism or recommendations, stating that they 'welcomed the recent commitment of the Minister for Employment and Workplace Relations to continue working with the relevant parties, including the union, to ensure that the intent of these changes are fairly and effectively met'.[1053]

[1051] Revised Explanatory Memorandum, Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022, [123].
[1052] Revised Explanatory Memorandum, Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022, [123].
[1053] ACTU submission, 104.

Other feedback provided to the review indicates that amendments to the firefighter provisions of the SRC Act are functioning as intended and without unintended consequences.

37.3 Findings and recommendations

A comprehensive review of the SRC Act commenced in June 2024 and its recommendations are expected within 12 months (June 2025), with terms of reference addressing all aspects of the Comcare workers' compensation scheme, including governance, usability and entitlements.[1054]

Noting that the SRC Act is subject to a broader ongoing review, the Review Panel concludes that these amendments are having their intended effects and makes no recommendations at this time.

[1054] Department of Employment and Workplace Relations, *An Independent Review of the Safety, Rehabilitation and Compensation Act 1988* (Web Page, n.d.).

Chapter 38. Closing Loopholes Act: Right of entry – assisting health and safety representatives

Under the Terms of Reference, the Review Panel was also asked to review the right of entry amendments made to Part 3-4 of the Fair Work Act by Part 16A of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (Closing Loopholes Act).

38.1 Amendments and intent

The Closing Loopholes Act amended the requirement for officials of registered organisations (e.g. union officials) to hold a right of entry permit when assisting Health and Safety Representatives (HSRs). While these changes impact on union officials, they relate to a right exercised by HSRs.

HSRs are employees who are elected by their colleagues to deal with work health and safety issues in the workplace. While HSRs may request a union official to come to the workplace to assist them, there are also other reasons union officials may enter workplaces (i.e. to hold discussions with members) that are governed by Fair Work right of entry permits.

38.1.1 Closing Loopholes amendments

Under the Fair Work Act (at s 494) officials must hold a right of entry permit to exercise a state or territory occupational health and safety (OHS) right to enter a worksite. Prior to the Closing Loopholes Act, this was required even where the official (or anyone else) was assisting the HSR.

The Closing Loopholes Act at Part 16A added a new s 494(4) in the Fair Work Act that confirms that the requirement to hold a right of entry permit does 'not apply to an official of an organisation assisting a health and safety representative on request under a provision of a State or Territory OHS law'. This means officials are subject to the same entry requirements as any other people assisting HSRs.

Further, ss 495 to 498 of the Fair Work Act no longer apply where a union official is assisting a HSR.[1055] This means that union officials acting as HSR assistants are, among other things, not required to give at least 24 hours' notice before exercising their right to enter a worksite[1056] and are not restricted to exercising a right of entry during working hours.[1057]

Sections 499 to 504 of the Fair Work Act continue to apply in relation to union officials. For example, while the permit requirement has been removed, officials of organisations assisting HSRs must 'not intentionally hinder or obstruct any person, or otherwise act in an improper manner'.[1058]

These amendments came into effect on 15 December 2023.

[1055] *Fair Work Act 2009* (Cth) s 494(4).
[1056] *Fair Work Act 2009* (Cth) s 495.
[1057] *Fair Work Act 2009* (Cth) s 498.
[1058] *Fair Work Act 2009* (Cth) s 500.

38.1.2 Intent of Closing Loopholes amendments

The Explanatory Memorandum indicated that Part 16A of the Closing Loopholes Act was intended to 'implement Recommendation 8 of the Boland Review (and reverse the effect of Powell), subject to appropriate safeguards imposed by the FW Act'.[1059]

This legislative amendment arose from the Federal Court of Australia (FCA) appeal decision, *Australian Building and Construction Commissioner (ABCC) v Powell*.[1060] In this case Mr Powell, a union official from the Construction, Forestry and Maritime Employees Union (CFMEU), stated that he had been invited to enter a worksite (in Victoria) by a HSR to provide them with assistance. He argued that under s 58(1)(f) of the *Occupational Health and Safety Act 2004* (Vic) (Vic OHS law) he did not need a permit for this purpose, as it was the HSR exercising the OHS right, not him, so s 494 of the Fair Work Act did not apply.[1061]

In the original decision, the FCA ruled in favour of Mr Powell, determining that he did not enter in his representative capacity as a union official.[1062] The ABCC appealed to the Full Court of the FCA.

In a unanimous ruling the Full Court of the FCA allowed the appeal, setting aside the orders of the previous judge and remitted the matter for further hearing. The Full Court found 'that Mr Powell as an official of an organisation required a permit under the *FW Act* to enter the premises because he was exercising his right to enter the premises or the HS representative's right to have him enter the premises to assist the HS representative in his task'.[1063]

In 2018 Marie Boland was appointed to conduct the Review of the model WHS laws (Boland Review). WHS law is legislated and regulated separately by each of Australia's state, territory and Commonwealth jurisdictions. They are effectively harmonised across the jurisdictions through a set of uniform laws known as the 'Model WHS laws'.[1064] In assessing the powers and functions of HSRs, the Boland Review considered the capacity for a HSR to 'request the assistance of any person in the performance of' their role.[1065] Having considered submissions, the Boland Review concluded 'the right of an HSR to bring in a person with appropriate experience and knowledge to assist them should not be restricted if that person is also a union official. In practice, persons assisting an HSR will not necessarily be union officials.' The Boland Review recommended (recommendation 8):[1066]

> Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit

[1059] Fair Work Legislation Amendment (Closing Loopholes) Act 2023 Replacement supplementary explanatory memorandum relating to sheets PU108, ZB276, ZC255 and ZE249, para.32.
[1060] [2017] FCAFC 89.
[1061] *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89, [7].
[1062] *Director of the Fair Work Building Industry Inspectorate v Powell* [2016] FCA 1287, [105].
[1063] *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89, [59].
[1064] For a fuller explanation see Department of Employment and Workplace Relations, *Work Health and Safety* (Web Page, n.d.) <https://www.dewr.gov.au/work-health-and-safety>.
[1065] M Boland, *Review of the Model Work Health and Safety Laws: Final Report* (Report, 2018) 65.
[1066] M Boland, *Review of the Model Work Health and Safety Laws: Final Report* (Report, 2018) 68 <https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf>.

under the Fair Work Act or another industrial law, taking into account the interaction between Commonwealth, state and territory laws.

38.2 Impact and issues

The following describes the data and information considered by the Review Panel when evaluating the amendments discussed above.

38.2.1 Quantitative evidence

Data provided by the FWO to the Review covering 1 July 2023 – 31 October 2024 indicates that they received no requests for assistance or complaints related to union officials entering the worksite (to assist HSRs) without a permit. The Review Panel is therefore not aware of any significant quantitative evidence in relation to these amendments.

38.2.2 Qualitative evidence

In submissions to the 2018 Boland Review, the Ai Group argued that the provisions could be used by union officials to circumvent the usual right of entry provisions and could result in HSRs being pressured by union organisers to arrange for their right of entry. The Minerals Council of Australia (MCA) argued that only those with a valid entry permit under WHS and workplace relation laws should be allowed entry to assist. The CME argued that the person must have relevant knowledge.[1067]

In response to concerns raised, the Boland Review noted that the Model WHS Act 'includes provisions to ensure that the right to request assistance is used appropriately'. This includes disqualifying a HSR if 'they exercise their powers for an improper purpose (and this would include their powers related to requesting assistance from any person)'. The Boland Review also noted that the employer may (at s 71(5) of the model WHS Act) refuse access to the workplace on 'reasonable grounds.'[1068]

38.2.3 Stakeholder views

Several employer associations, including the Australian Chamber of Commerce and Industry (ACCI), Master Builders Australia (MBA),[1069] MCA, the Ai Group,[1070] the Chamber of Minerals & Energy of Western Australia,[1071] the Australian Retailers Association,[1072] the Business Council of Australia,[1073] the Housing Industry Association[1074] and the Chamber of Commerce and Industry of WA[1075] submitted that the amendments are misguided and inappropriate, with the potential to undermine workplace safety.

ACCI, for example, noted that persons granted a right of entry permit by the FWC are required to satisfy certain requirements (e.g. they are a 'fit and proper' person and have completed right of

[1067] M Boland, *Review of the Model Work Health and Safety Laws: Final Report* (Report, 2018) 66 <https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf>.
[1068] M Boland, *Review of the Model Work Health and Safety Laws: Final Report* (Report, 2018) 68 <https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf>.
[1069] MBA submission, 12.
[1070] Ai Group submission, 116.
[1071] CMEWA submission, 3.
[1072] ARA submission, 14.
[1073] BCA submission, 17.
[1074] HIA submission, 4.
[1075] CCIWA submission, 14.

entry training).[1076] If officials assisting HSRs are not required to hold a right of entry permit, they also bypass the criteria needed to obtain one. This, in turn, may pose 'a significant risk to both the occupier of the premises and the official during their attendance, as well as causing unnecessary tension between parties'. They cited an example from Australian Resources & Energy Employer Association of officials assisting a HSR identifying themselves as an onsite visitor to avoid compliance with safety procedures.[1077] ACCI also submitted that, although civil penalties apply where an official contravenes their obligations at ss 499 to 504 of the Fair Work Act, 'civil penalties do not necessarily act as a deterrent for organisations'.

Employer associations expressed concern that the new provisions could be open to abuse by union officials and that the FWC is powerless to deal with the abuse. According to ACCI:

> there is no mechanism in place that enables the FWC to refuse access to an official who is assisting an HSR. If an occupier seeks to prevent the access of an official assisting an HSR, their only option is to make an application to the Federal Court for injunctive relief, or, after a contravention has occurred, alert the FWO to the contravention and/or file the matter before the Federal Court or the Federal Circuit Court to seek a pecuniary penalty. A decision for the occupier to take the matter to the Federal Court or Federal Circuit Court will be costly and is an unjust imposition upon that occupier to address the conduct of an official assisting an HSR acting inconsistently with their obligations.[1078]

The MCA submitted that the amendments go 'significantly further than the Boland Review recommendation. The recommendation assumed that union officials who do not hold an entry permit under an industrial law will nonetheless have some qualifications to enter a site for safety purpose'.[1079]

Most employer association submissions recommended that the amendments be repealed and that officials assisting HSRs be required to hold a federal right of entry permit. Among other things this would enable the FWC to ensure that permits were only issued to 'fit and proper persons'. In a similar vein the Maritime Industry Australia Ltd submitted that, as a minimum, 'officials who have had their permits cancelled, revoked, or have made applications that have not been granted should be ineligible to assist HSRs in the performance of their duties'.[1080]

ACCI also recommended that 'the training required by officials seeking to obtain a right of entry permit is expanded to contain information relating to the statutory functions of an HSR'.[1081]

Unions, including the United Workers Union (UWU)[1082] and the Construction, Forestry, Maritime, Employees Union (CFMEU), supported the amendments, arguing that it assists the safety and wellbeing of workers, particularly in high-risk industries such as mining and construction.

[1076] Right of entry training programs are designed to ensure parties understand right of entry provisions under the Fair Work Act and ensure persons who enter workplaces understand their rights and responsibilities: ACTU, *Federal Right of Entry* (Web Page, n.d.) <https://atui.org.au/course/federal-right-of-entry/>.
[1077] ACCI submission, [277]–[278].
[1078] ACCI submission, [281] –[282].
[1079] MCA submission, 28.
[1080] Maritime Industry Australia Ltd submission, 16.
[1081] ACCI submission, 106.
[1082] AWU submission, 43.

The CFMEU submitted that employer concerns about the amendments undermining safety or increasing the power of unions are unfounded and were also raised in the Boland Review and dismissed; 'WHS law already contains provisions which ensure the right to request assistance is used appropriately'.[1083] Further, it argued that the amendments at s 494(4) do not go far enough and 'are limited to circumstances where a properly elected HSR requests the assistance of a person'. It noted that the process for electing HSRs under the WHS Act is not suitable for industries such as construction where much of the work is performed by contractors or subcontractors with frequent turnover.[1084]

The Electrical Trades Union of Australia (ETU) also seeks further amendments to Part 3-4 of the Fair Work Act on right of entry, noting that they are routinely denied right of entry to registered training organisations (e.g. to engage with apprentices) and to camps where fly-in-fly-out workers sleep, as the camps are often owned and operated by a party other than the employer.

38.3 Findings and recommendations

The Review Panel notes that the amendment was designed to address a specific issue raised by the Boland Review. Specifically, the intent of the amendment is to ensure that HSRs may access timely assistance from union officials to address WHS concerns without having to obtain a permit.

Employers argue that the amendment undermines rather than enhances workplace safety. They believe the removal of the permit requirement bypasses essential safeguards, such as training and the 'fit and proper person' test, which is required for right of entry permits.

The amendment has been positively received by unions. They argue that it facilitates timely assistance for HSRs, particularly in high-risk industries such as construction and mining, where safety concerns can be urgent. The CFMEU and other unions see the amendment as essential to improving workplace safety outcomes. Unions also argue that the amendments do not go far enough and should be expanded to allow union officials to assist workers even in the absence of a formally elected HSR.

The Review Panel notes employer associations' concern that the amendment could be exploited by union officials to gain access to workplaces under the guise of assisting HSRs. There is also concern that officials assisting HSRs are no longer subject to the oversight of the FWC, not required to meet fit and proper persons requirements, and not required to undertake basic training before entering workplaces.

In relation to the particular issues and allegations relating to the CFMEU, the Review Panel notes that significant steps have been taken to address these, including placing the Construction and General Division of the CFMEU and all of its branches into administration (see Chapter 4).

The Review Panel considers that more actual evidence of misuse is required before attempting to re-impose requirements or establish an alternative oversight mechanism, including in relation to unions that have been placed in administration.

[1083] CFMEU submission, 7.
[1084] CFMEU submission, 8.

There has been a limited amount of time since this amendment took effect. There is no appropriate evidence available to make findings and recommendation about this recent amendment. If Parliament has genuine concerns about the immediate operation of amendments in the future, the Review Panel suggests that significantly more work should be undertaken to collect empirical data and evidence before commencing a statutory review.

Such evidence would also inform consideration of the amendment in future reviews (see Draft Recommendation 1, noting that these amendments were made through the Closing Loopholes Act).

Part 5. Next steps

The Review Panel invites additional submissions in response to this draft report and its draft recommendations. Written submissions should be provided as soon as possible and no later than 16 February 2025.

The Panel requests that stakeholders provide appropriate data or other evidence when making a submission in response to this draft report and its draft recommendations.

Following consideration of additional submissions received, the Review Panel will deliver its final report to the Minister by 31 March 2025.

Bibliography

Andersen, S. (2024) 'Multi-employer bargaining in Denmark: Interwoven processes of coordination', International labour Review, 163(4): 693-710.

Ayres, I. & Braithwaite, J. (1992) responsive Regulation: Transcending the Deregulation Debate, Oxford University Press, Oxford.

Australian Government (2025) 'Work Choices: Employee collective agreements': https://www.aph.gov.au/~/media/Estimates/Live/eet_ctte/estimates/bud_0607/dewr/w098-07att8.ashx

BCA (2019) The state of enterprise bargaining in Australia, Business Council of Australia: https://www.bca.com.au/the_state_of_enterprise_bargaining_in_australia

Bray M., Waring, R. Cooper & J. Macneil (2018) Employment Relations: Theory and Practice, McGraw-Hill, Sydney, 4th Edition.

Bray, M, McCrystal, S & Spiess, L (2020) 'Why doesn't anyone talk about non-union collective agreements?' Journal of Industrial Relations, 62(5) pp. 784-807

Bray, M. & Macneil, J. (2016) 'Reforming Collective Bargaining' in K. Hancock & R. Lansbury (eds), Industrial Relations Reform: Looking to the Future, Federation Press, Sydney: 105-131.

Bray, M. & Macneil, J. (2023) 'Still Central: Change and continuity in Australia's major industrial tribunal', Industrial Relations Journal, 54 (4-5): 359-376.

Bray, M. & Stewart, A. (2013) 'What is Distinctive About the Fair Work Regime?', Australian Journal of Labour Law, 26 (1), pp. 20-49.

Chaudhuri, U & Sarina T (2018) 'Employer Controlled Agreement-Making: Thwarting Collective Bargaining Under the Fair Work Act' in S McCrystal, B Creighton & A Forsyth (eds.) Collective Bargaining Under the Fair Work Act, Federation Press, Sydney, pp. 138-161

Cooper, R. & Ellem, B. (2008) 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia', British Journal of Industrial Relations, 46 (?): 284-

Cooper, R. & Ellem, B. (2011) ''Less than zero': union recognition and bargaining rights in Australia 1996–2007', Labour History, 52 (1): 49-69.

Creighton, B., Denvir, C., Johnstone, R., McCrystal, S. & Orchiston, A. (2020) Strike Ballots, Democracy, and the Law, Oxford University Press, Oxford.

Flanders, A. (1974) 'The Tradition of Voluntarism', British Journal of Industrial Relations, 12 (3): 352-370.

Forsyth, A & McCrystal, S (2023a) 'The potential impact of the Fair Work Amendment (Secure Jobs, Better Pay) Act 2022 on collective bargaining in Australia: Reviewing the new multiemployer bargaining provisions and other measures to promote bargaining' Journal of Industrial Relations, 65(4) pp. 386-402.

Forsyth, A & McCrystal, S (2023b) 'Reforming Australian Bargaining and Strike Laws to Maximise Worker Power', UNSW Law Journal, 46(4) pp. 1105-1133.

Forsyth, A. (2020) 'Ten Years of the Fair Work Act: (More) Testing Times for Australia's Unions', Australian Journal of Labour Law, 33(1): 122-138.

Forsyth, A., Gostencnik, V., Ross, I. & Sharard, T. (2007) Workplace relations in the building and construction industry, LexisNexis Butterworths, Chatswood, N.S.W.

Forsyth, A., Howe, J., Gahan, P. & Landau, I. (2017) 'Establishing the Right to Bargain Collectively in Australia and the UK: Are Majority Support Determinations under Australia's Fair Work Act a More Effective Form of Union Recognition?', Industrial Law Journal, 46 (3): 335-365.

FWC (2014) Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level, Fair Work Commission, Melbourne: https://www.fwc.gov.au/documents/resources/pieac-report-23-dec-2014.pdf

Grace Kelly, K. (2019) 'The IR system isn't broken, so it doesn't need to be "fixed"', The Australian, 13-14 July: 22.

Gunningham, N. (2011) 'Enforcement and Compliance Strategies' in R. Baldwin, M. Cave & M. Lodge (eds), The Oxford Handbook of Regulation, Oxford University Press, Oxford): 120-145. Hancock et al. (1985)

Hancock, K. (2016) 'Reforming Industrial Relations: Revisiting the 1980s and 1990s' in K. Hancock & R. Lansbury (eds), Industrial Relations Reform: Looking to the Future, Federation Press, Sydney: 16-39.

Hancock, K. (2016) 'Reforming Industrial Relations: Revisiting the 1980s and 1990s' in K. Hancock & R. Lansbury (eds), Industrial Relations Reform: Looking to the Future, Federation Press, Sydney: 16-39.

Hancock, K. (chair) (1985), Committee of Review into Australian Industrial Relations Law and Systems, Report, AGPS, Canberra

Isaac, J, (2018) 'Why are Australian Wages Lagging and What Can Be done About It?', Australian Economic Review, 51 (2): 175-90.

Isaac, J. (1989) 'The Arbitration Commission: Prime Mover or Facilitator', Journal of Industrial Relations 31 (3): pages?

Kent, A. (2021) 'New Zealand's fair pay agreements: a new direction in sectoral and occupational bargaining', Labour & Industry, 31 (3): p235-254.

Macdonald, F., Charlesworth, S. & Brigden, C. (2018) 'Access to Collective Bargaining for Low-Paid Workers' in McCrystal et al. (eds), Collective Bargaining under the Fair Work Act, Federation Press, Sydney: 206-227.

McCrystal, S & Bray, M (2021) 'Non-Union Agreement-Making in Australia in Comparative and Historical Context' Comparative Labor Law and Policy Journal, 41(3) pp. 753-788.

McCrystal, S. (2019) 'Why is it so hard to take lawful strike action in Australia?', Journal of Industrial Relations, 61 (1): 129-144.

Naughton, R. (1995) 'Bargaining in Good Faith' in P Ronfeldt and R McCallum (eds) Enterprise Bargaining, Trade Unions and the Law, The Federation Press, Sydney: .

Pekarek, A., Landau, I., Gahan, P., Forsyth, A., & Howe, J. (2017). Old game, new rules? The dynamics of enterprise bargaining under the Fair Work Act. Journal of Industrial Relations, 59(1), 44-64.

Pennington, A. (2018) 'On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector', Centre for Future Work at the Australia Institute, December: https://australiainstitute.org.au/wp-content/uploads/2020/12/Collective-Bargaining-On-the-Brink-WEB.pdf

Pohler, D. (2018) 'Collective Bargaining' in A. Wilkinson et al. (eds), The Routledge Companion to Employment Relations, Routledge, Oxford: 235-250.

Rasmussen, E., Bray, M. & Stewart, A. (2019) 'What is distinctive about New Zealand's Employment Relations Act 2000?', Labour & Industry, 29 (1): 52–73.

Read, R. (2018) 'The Role of Trade Unions and Individual Bargaining Representatives: Who Pays for the Work of Bargaining?' in S. McCrystal et al. (eds), Collective Bargaining under the Fair Work Act, Federation Press, Sydney: 69-92.

Roche, W. & Gormley, T. (2020) 'The durability of coordinated bargaining: Crisis, recovery and pay fixing in Ireland', Economic and Industrial Democracy, 41 (2): 481-505.

Romeyn, J. (1986). The Role of Specialist Tribunals. Journal of Industrial Relations, *28*(1), 3-23

Sheldon, P. & Thornthwaite, L. (2022) 'Employers' Associations in Australia' in L. Gooberman & M. Hauptmeier (eds), Contemporary Employer' Organisations: Adaptation and Resilience, Routledge, London, 139-158.

Stanford, J. (2018) 'The Declining Labour Share in Australia: Definition, Measurement, and International Comparisons', Journal of Australian Political Economy, No. 81, pp. 11-32.

Stanford, J., McDonald, F. & Raynes, (2022) 'Collective Bargaining and Wage Growth in Australia', Centre for Future Work: https://futurework.org.au/wp-content/uploads/sites/2/2022/11/Collective_Bargaining_and_Wage_Growth_in_Australia_FINAL.pdf

Stewart, A, McCrystal, S & Forsyth, A (2023) 'Will Pay Be Better and Jobs More Secure? Analysing the Albanese Government's First Round of Fair Work Reforms' Australian Journal of Labour Law, 36(2) pp. 104-144.

Stewart, A. & Forsyth, A. (eds) (2009) Fair Work: The new workplace laws and the Work Choices legacy, Federation Press, Sydney.

Stewart, A., Forsyth, A., Irving, M., Johnstone, R., & McCrystal, S. (2016) Creighton & Stewart's Labour Law, Federation Press, Sydney.

Stewart, A., Stanford, J. & Harding, T. (eds) (2018) The Wages Crisis in Australia, University of Adelaide Press, Adelaide: https://www.adelaide.edu.au/press/ua/media/621/uap-wages-crisis-ebook.pdf

Sutherland, C. (2009) ‘Making the “BOOT” Fit: Reforms to Agreement-Making from Work Choices to Fair Work’ in A. Forsyth & A. Stewart (eds), Fair Work: the New Workplace Laws and the Work Choices Legacy, Federation Press, Sydney: 99-119.

Walker, K. (1970) Australian Industrial Relations Systems, Oxford University Press, Melbourne.

Walpole, K (2015) ‘The Fair Work Act: Encouraging collective agreement-making but leaving collective bargaining to choice’ Labour and Industry, 25(3) pp. 205-218

Waring, P., de Ruyter, A., & Burgess, J. (2006) ‘The Australian Fair Pay Commission: Rationale, Operation, Antecedents and Implications’, The Economic and Labour Relations Review, 16(2), 127-146.

Wright, C. F., & McLaughlin, C. (2021) ‘Trade union legitimacy and legitimation politics in Australia and New Zealand’, Industrial Relations, 60(3), 338–369.

Yerbury, D. & Isaac, J. (1971) ‘Recent Trends in Collective Bargaining in Australia’, International Labour Review, 103 (?): 431-452.

Appendix 1 – Labour market and wages

1. Introduction

This statistical appendix draws on data from numerous sources, including the Australian Bureau of Statistics (ABS) and the Household, Income and Labour Dynamics in Australia (HILDA) survey,[1085] to describe recent labour market developments and trends in wages in Australia. It presents information that the Review Panel has drawn on when evaluating the impact and effects of the Secure Jobs, Better Pay Act. Information drawn from the Department of Employment and Workplace Relations (DEWR) Workplace Agreements Database is contained in Appendix 2.

The charts and tables in this appendix are organised across 2 sections. The first concerns developments in the labour market. It presents information on employment growth and the characteristics of employment. The second section focuses on wages growth.

2. Developments in the labour market

This section presents information on patterns and characteristics of employment. There are 6 subsections in total, covering employment growth, casual employment, flexible working arrangements, fixed-term contract arrangements, trade union membership and an analysis of employment characteristics based on HILDA.

2.1 Employment growth, by industry and occupation

This section reviews trends in employment, including trends at the 1-digit industry and occupation levels. Consideration is given to longer-term changes (e.g. those spanning 2012 to 2022) and changes since 2022 (i.e. since the passage of the Secure Jobs, Better Pay Act in December 2022).

Table 23 draws on data from the ABS monthly Labour Force Survey.[1086] At the time of writing, the reference period (most recently available data) was November 2024. To facilitate comparisons the selected timeframe for analysis of these data are the 10 years to November 2022 and the 2 years from November 2022 (just before the SJBP reforms) to November 2024.

This analysis illustrates a significant increase in employment since 2012. By November 2024 there were 14.5 million people employed in the Australian labour market. Employment growth increased by 24.3% in the 10 years to November 2022 and by a further 6.6% between November 2022 and November 2024.

Male employment growth was particularly strong in the part-time labour market (fewer than 35 hours per week), increasing by 35.9% in the 10 years to 2022 and by a further 10.4% in the 2

[1085] Disclaimer: The unit record data from the HILDA Survey was obtained from the Australian Data Archive, which is hosted by The Australian National University. The HILDA Survey was initiated and is funded by the Australian Government Department of Social Services (DSS) and is managed by the Melbourne Institute of Applied Economic and Social Research (Melbourne Institute). The findings and views based on the data, however, are those of the authors and should not be attributed to the Australian Government, DSS, the Melbourne Institute, the Australian Data Archive or The Australian National University and none of those entities bear any responsibility for the analysis or interpretation of the unit record data from the HILDA Survey provided by the authors

[1086] ABS Labour Force, Australia (Cat No 6202.0).

years to November 2024. There has been an increase in the unemployment rate – from 3.5% in November 2022 to 4.1% in November 2024. The male underemployment rate (as a share of total employed) has increased between 2022 and 2024. At November 2024 it was equal to 5.2%.

Among women, employment growth was more marked in the full-time labour market, rising by 32% in the 10 years to November 2022 and by a further 6.1% in the 2 years to November 2024. By November 2024, 48% of all employed persons were women. As a share of full-time employment, women accounted for 39% (up from 35% at November 2012). The share of women participating in the labour market has also increased markedly in recent years, up from 58.6% at November 2012 to 62.9% at November 2024. In line with this, the gender gap in labour force participation continues to fall, declining from 13 percentage points in November 2012 to 8.4 percentage points at November 2024. The underemployment rate (as a % of total employed) among women was stable between 2022 and 2024 at 7.6%.

Table 23: Selected indicators of labour force status: November 2012 – November 2022; November 2022 – November 2024, Australia

	Employed full-time '000	Employed part-time '000	Employed total '000	E/P ratio (%)	Labour force '000	Partici-pation rate (%)	Unemployment rate (%)	Underemployment ratio (% of employed)
Men								
Nov-12	5,182.3	990.8	6,173.1	67.7	6,517.4	71.6	5.3	5.6
Nov-22	5,850.4	1,346.1	7,196.5	68.3	7,457.2	70.7	3.5	4.8
Nov-24	6,101.2	1,486.6	7,587.8	68.3	7,909.4	71.3	4.1	5.2
Change Nov 2012 – Nov 2022	12.9%	35.9%	16.6%	0.62	14.4%	-0.92	-1.71	-0.80
Change Nov 2022 – Nov 2024	4.3%	10.4%	5.4%	0.0	6.1%	0.62	0.55	0.40
Women								
Nov-12	2,833.3	2,378.5	5,211.8	55.5	5,499.2	58.6	5.2	9.6
Nov-22	3,740.5	2,843.0	6,583.5	60.4	6,824.3	62.6	3.5	7.6
Nov-24	3,966.9	2,980.8	6,947.7	60.6	7,221.4	62.9	3.8	7.6
Change Nov 2012 – Nov 2022	32.0%	19.5%	26.3%	4.87	24.1%	3.98	-1.70	-2.00
Change Nov 2022 – Nov 2024	6.1%	4.8%	5.5%	0.15	5.8%	0.30	0.30	0.00
Persons								
Nov-12	8,015.6	3,369.3	11,384.9	61.5	12,016.5	64.9	5.3	7.4
Nov-22	9,590.9	4,189.1	13,780.0	64.3	14,281.5	66.6	3.5	6.1
Nov-24	10,068.1	4,467.4	14,535.5	64.4	15,130.8	67.0	3.9	6.3
Change Nov 2012-Nov 2022	19.7%	24.3%	21.0%	2.77	18.8%	1.69	-1.71	-1.30
Change Nov 2022-Nov 2024	5.0%	6.6%	5.5%	0.06	5.9%	0.36	0.35	0.20

Notes:

1. E/P: employment to population ratio.
2. Where the initial data is a % (e.g. E/P ratio), the change calculation shows the percentage point change.

Source: ABS Labour Force, Australia (Cat No 6202.0), Table 1 and Table 22 (Underutilised persons by age and sex). Seasonally adjusted data.

Table 24 shows the distribution of men and women across major industry divisions and, in so doing, highlights the sex-segregated nature of the Australian labour market. These data are from the ABS detailed Labour Force Survey.[1087]

In the 10 years to 2022 the top 5 growth industries (in descending order of growth) were health care and social assistance; professional, scientific and technical services; education and training; financial and insurance; and public administration and safety.

Employment fell in manufacturing; wholesale trade and agriculture; and forestry and fishing. Since August 2022 2 industries – health care and social assistance; and education and training – have continued to exhibit strong employment growth.

By August 2024 nearly a quarter (24.7%) of all employed women were employed in the health care and social assistance sector. A further 13.1% were employed in education and training and 10.6% in retail trade. The distribution of men across the industry divisions was quite different. The largest share, at 15%, was in construction, followed by 9.8% in professional, scientific and technical services and then 8.3% in manufacturing. Only 3.7% of employed women were in manufacturing. These patterns of labour market segmentation have implications for the gender wage gap (as will be explained below).

In terms of total employment, Table 24 shows that the largest is health care and social assistance. At August 2024 this industry division accounted for 15.5% of all employed people in Australia. The second largest industry division was retail trade (at 9.3%), followed by construction (9.2%), professional, scientific and technical services (9.1%) and education and training (8.6%).

Table 25 shows employment growth – and distribution – by occupation of employment. Between August 2012 and August 2024 total employment increased by 28%. Above average growth, however, occurred among community and personal service workers (56% growth rate between 2012 and 2024) and professionals (52% increase in employment over the same period). In the 2 years to August 2022 employment growth among men was strongest amongst clerical and administrative workers, whereas among women it was strongest amongst community and personal service workers.

[1087] ABS Labour Force, Australia, Detailed. Cat No 6291.0.55.001.

Table 24: Employment growth and distribution by industry division, Australia

	Aug 2012–2022			Aug 2022–2024			Aug-2012		Aug-2024	
	Total	Men	Women	Total	Men	Women	Men	Women	Men	Women
Agriculture, forestry and fishing	-6%	-3%	-8%	10%	6%	18%	3.5%	1.8%	3.0%	1.5%
Mining	9%	0%	49%	1%	-1%	6%	3.8%	0.7%	3.1%	0.9%
Manufacturing	-10%	-15%	0%	5%	6%	2%	11.4%	4.8%	8.3%	3.7%
Electricity, gas, water and waste services	8%	12%	-4%	31%	21%	69%	1.8%	0.7%	2.0%	0.8%
Construction	33%	29%	55%	4%	4%	5%	13.7%	2.1%	15.0%	2.6%
Wholesale trade	-13%	-4%	-17%	1%	-3%	11%	4.4%	2.8%	3.3%	1.9%
Retail trade	12%	21%	4%	1%	0%	2%	8.2%	13.2%	8.1%	10.6%
Accommodation and food services	20%	16%	22%	5%	13%	-1%	5.7%	8.1%	6.1%	7.4%
Transport, postal and warehousing	26%	22%	42%	2%	3%	-2%	7.1%	2.2%	7.3%	2.3%
Information, media and telecommunications	-15%	-14%	-20%	-6%	-4%	-9%	2.2%	1.9%	1.5%	1.0%
Financial and insurance services	27%	27%	26%	0%	2%	-2%	3.3%	4.2%	3.5%	3.9%
Rental, hiring and real estate services	14%	4%	27%	11%	21%	3%	1.7%	1.8%	1.8%	1.8%
Professional, scientific and technical services	42%	41%	37%	3%	2%	4%	8.4%	7.7%	9.8%	8.3%
Administrative and support services	11%	8%	18%	0%	1%	-2%	3.2%	3.9%	2.8%	3.3%
Public administration and safety	25%	14%	37%	14%	14%	16%	6.2%	6.0%	6.5%	7.1%
Education and training	28%	9%	37%	11%	18%	8%	4.6%	11.9%	4.8%	13.1%
Health care and social assistance	51%	73%	46%	10%	10%	10%	4.7%	20.6%	7.3%	24.7%
Arts and recreation services	9%	4%	11%	19%	10%	28%	1.9%	1.9%	1.8%	2.0%
Other services	19%	16%	22%	1%	3%	-3%	4.1%	3.6%	3.9%	3.2%
Total (All industries)	16%	16%	26%	3%	6%	6%	100.0%	100.0%	100.0%	100.0%

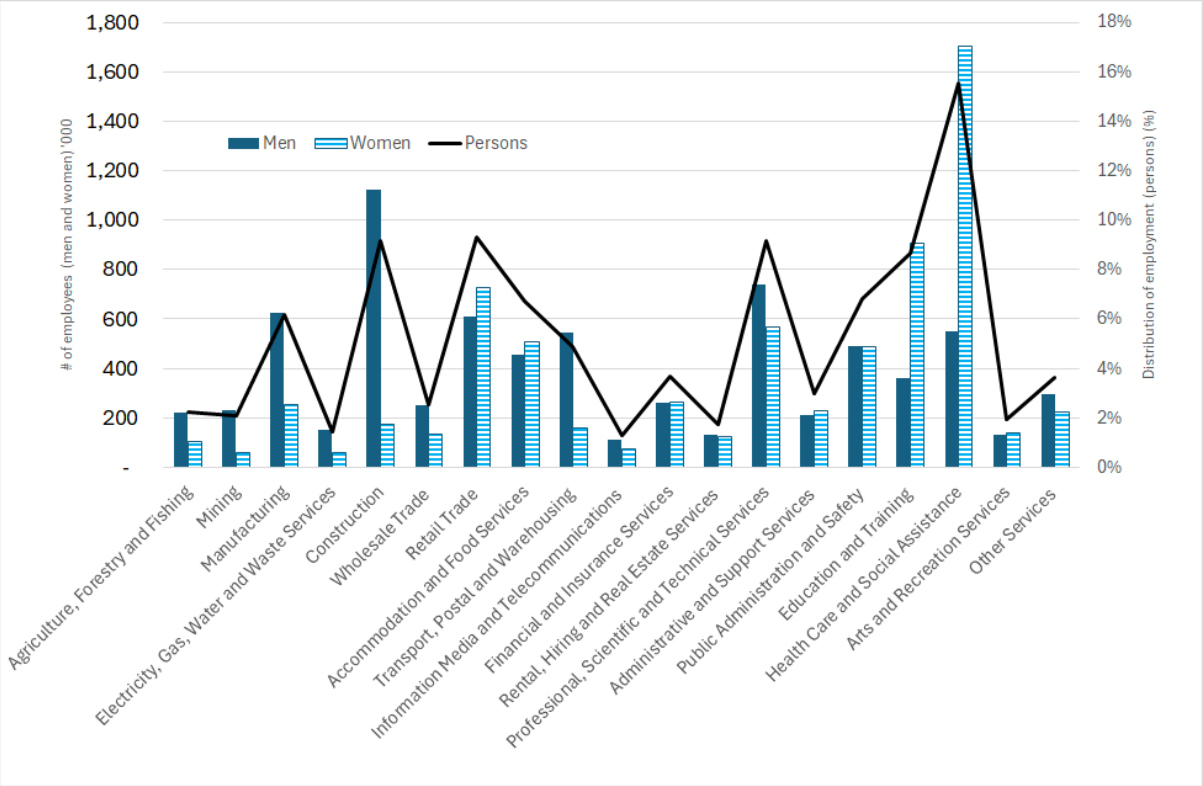
Source: ABS Labour Force, Australia, Detailed (Cat No 6291.0.55.001), Table 4. Seasonally adjusted data.

Table 25: Employment growth by 1-digit occupation division and distribution of employment by occupation, Australia

	Managers	Professionals	Technicians and trades workers	Community and personal service workers	Clerical and administrative workers	Sales workers	Machinery operators and drivers	Labourers	Total
Men									
Aug-2012	939.8	1,204.8	1,419.0	337.1	397.2	405.1	669.1	736.1	6,108.2
Aug-2022	1,132.6	1,539.7	1,538.4	460.3	451.9	441.4	770.7	763.6	7,098.6
Aug-2024	1,116.8	1,723.0	1,620.2	514.8	505.9	465.4	772.8	786.3	7,505.1
Change Aug 2012 – Aug 2022	20.5%	27.8%	8.4%	36.6%	13.8%	9.0%	15.2%	3.7%	16.2%
Change Aug 2022 – Aug 2024	-1.4%	11.9%	5.3%	11.8%	11.9%	5.4%	0.3%	3.0%	5.7%
Women									
Aug-2012	489.4	1,310.9	235.4	727.4	1,267.0	653.9	57.3	414.7	5,155.9
Aug-2022	735.2	1,935.0	311.9	1,037.1	1,281.2	659.0	124.0	412.7	6,496.2
Aug-2024	760.6	2,097.4	333.8	1,143.5	1,346.2	650.7	113.4	446.1	6,891.7
Change Aug 2012 – Aug 2022	50.2%	47.6%	32.5%	42.6%	1.1%	0.8%	116.5%	-0.5%	26.0%
Change Aug 2022 – Aug 2024	3.5%	8.4%	7.0%	10.3%	5.1%	-1.3%	-8.5%	8.1%	6.1%
Persons									
Aug-2012	1,429.1	2,515.7	1,654.4	1,064.5	1,664.2	1,059.0	726.4	1,150.8	11,264.1
Aug-2022	1,867.8	3,474.7	1,850.3	1,497.5	1,733.1	1,100.4	894.7	1,176.3	13,594.7
Aug-2024	1,877.4	3,820.5	1,953.9	1,658.3	1,852.1	1,116.1	886.2	1,232.4	14,396.8
Change Aug 2012-Aug 2022	30.7%	38.1%	11.8%	40.7%	4.1%	3.9%	23.2%	2.2%	20.7%
Change Aug 2022-Aug 2024	0.5%	10.0%	5.6%	10.7%	6.9%	1.4%	-0.9%	4.8%	5.9%
Distribution at August 2024									
Men	14.9%	23.0%	21.6%	6.9%	6.7%	6.2%	10.3%	10.5%	100.0%
Women	11.0%	30.4%	4.8%	16.6%	19.5%	9.4%	1.6%	6.5%	100.0%
Persons	13.0%	26.5%	13.6%	11.5%	12.9%	7.8%	6.2%	8.6%	100.0%
Share of new jobs created between August 2012 and August 2024, by occupation (persons)	14.3%	41.6%	9.6%	19.0%	6.0%	1.8%	5.1%	2.6%	100.0%

Source: ABS Labour Force, Australia, Detailed (Cat No 6291.0.55.001), Table 7, original series.

Figure 22: Industry size (employment) and distribution of employment



Source: ABS Labour Force, Australia, Detailed (Cat No 6291.0.55.001), Table 4, August 2024. Seasonally adjusted data.

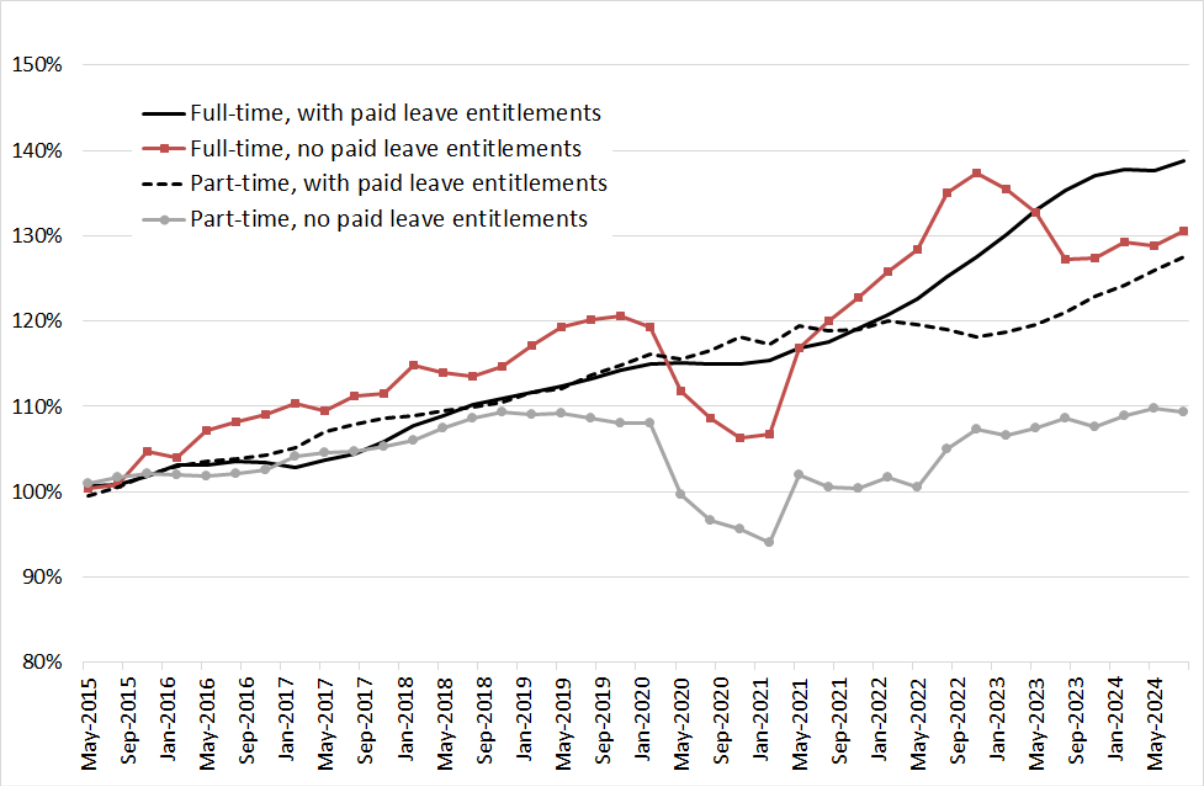
Alt-text: A combination chart showing the distribution of employees by industry. At August 2024, 15.5% of all employees (persons) (black line) were employed in the health care and social assistance sector (making this the largest industry sector (by employee size). The bars show the distribution of men and women across industries. In 2024, around 17% of all women employees were in the health care and social assistance sector, followed by around 9% of women in the education and training sector. Among men the largest share (around 11%) were in construction.

2.2 Casual employment

There are various ways of defining casual employment. A common approach used in Australia is to classify someone as casual if they have no paid leave entitlements. Adopting this approach Figure 23 shows that, among women, much of the full-time employment growth among women is casual in nature.

Figure 24 for men, it shows that over the last decade part-time employment (with and without paid leave entitlements) has grown faster than full-time employment.

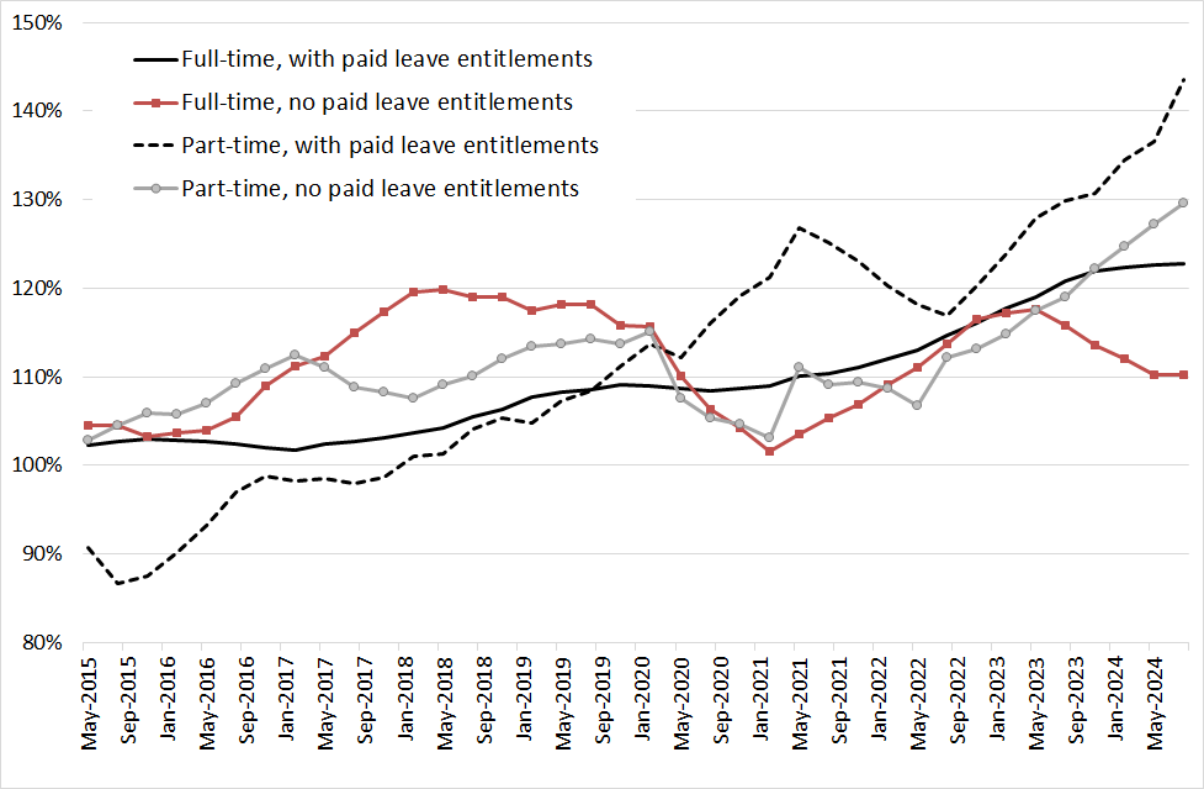
Figure 23: Trends in casual employment, women



Source: ABS Labour Force, Australia, Detailed (Cat No 6291.0.55.001), EQ04. Original series. Indexed to August 2014 and then smoothed using a four-quarter moving average to August 2024.

Alt-text: A line chart showing trends in female employment disaggregated by hours (full-time, part-time) and paid leave entitlements. Between 2015 and 2024, in the female labour market, full-time employment (with paid leave) has grown by nearly 140%. The next strongest growth has been among full-timers without paid leave entitlements (i.e. casuals), increasing by just over 130% between 2015 and 2024.

Figure 24: Trends in casual employment, men



Source: ABS Labour Force, Australia, Detailed (Cat No 6291.0.55.001), EQ04. Original series. Indexed to August 2014 and then smoothed using a 4-quarter moving average to August 2024.

Alt-text: A line chart showing trends in male employment disaggregated by hours (full-time, part-time) and paid leave entitlements. Between 2015 and 2024, in the male labour market, part-time employment (with paid leave) has grown by around 145%. The next strongest growth has been among part-timers without paid leave entitlements (i.e., casuals), increasing by around 130% between 2015 and 2024.

Table 26 summarise changes in employment by hours (full-time, part-time) and status of employment in the main job between November 2022 (before the Secure Jobs, Better Pay Act) and August 2024 (at time of writing, the most recent available data). Among women there has been a decline in the incidence of casual employment in the full-time and part-time labour markets. Among men, the number and share employed as casuals has decline in the full-time labour market but increased in the part-time labour market.

Table 26: Employed persons by sex and status in employment of main job

	Women					Men				
	Full-time, with paid leave entitlements	**Full-time, no paid leave entitlements**	**Part-time, with paid leave entitlements**	**Part-time, no paid leave entitlements**	**Total**	**Full-time, with paid leave entitlements**	**Full-time, no paid leave entitlements**	**Part-time, with paid leave entitlements**	**Part-time, no paid leave entitlements**	**Total**
Nov-2022 (employed '000)	2,826	325	1,212	1,038	5,401	3,982	569	362	601	5,513
Aug-2024 (employed '000)	3,022	305	1,306	1,018	5,652	4,120	508	412	689	5,729
% change	7.0%	-6.1%	7.7%	-1.9%	4.6%	3.5%	-10.6%	13.8%	14.7%	3.9%
Row % share of each employment group										
Nov-2022	52.3%	6.0%	22.4%	19.2%	100.0%	72.2%	10.3%	6.6%	10.9%	100.0%
Aug-2024	53.5%	5.4%	23.1%	18.0%	100.0%	71.9%	8.9%	7.2%	12.0%	100.0%

Source: ABS Labour Force, Australia, Detailed (Cat No 6291.0.55.001), EQ04. Original series.

Alt-text: A table showing the number of men and women employed, by employment status in main job. Between November 2022 and August 2024 there was a decline in casual employment among women. Among men, over the same period, there was an overall growth in employment among those with no paid leave entitlements, driven by a growth in men employed on a part-time casual basis.

2.3 Flexible working arrangements

Table 27 summarises changes in working arrangements since 2015.[1088] As shown, in 2024, 30.3% of employees had an agreement with their employer to work flexible hours, down from 33.4% in August 2023.

Table 27: Working arrangements, Australia

	Aug-15 (%)	Aug-17 (%)	Aug-19 (%)	Aug-21 (%)	Aug-23 (%)	Aug-24 (%)
Had an agreement to work flexible hours	31.9	32.7	34.1	35.6	33.4	30.3
Regularly worked from home in job or business	29.9	30.9	32.1	40.3	36.9	31.5

Source: ABS Working Arrangements, August (Cat No 5336.0 and Cat No. 6336.0).

Alt-text: A table showing the shares of employees who have an agreement to work flexible hours. At August 2024 30.3% of employees had an agreement to work flexible hours, down from 35.6% in August 2021.

2.4 Fixed-term arrangements

Tables 28 to 32 and Figure 25 are based on ABS data for August 2024 and describe the employment characteristics of employees on fixed-term contracts or arrangements. In total there were 512,000 employees (4.2% of all employees) on fixed-term contracts at this time. The majority of employees on fixed-term contracts are full-time employees (72.4%) (see Table 28) and professionals (48.4%) (see Table 31). Many (40.8%) have been in their current job for less than one year (see Table 29). Although tenure is short, there is a high expectation of ongoing employment; 74.8% expect to remain in their job for the next 12 months (see Table 30).

At August 2024, 3 industries stood out for their use of fixed-term contracts (see Table 32): the share was highest in:

- education and training (11.7% of all employees)
- public administration and safety (8.1%) of all employees)
- arts and recreational services (7.9%) of all employees.

Since August 2022 fixed-term employment among employees has increased by 122,600 – an increase of 31% from the 389,700 fixed-term employees at August 2022. Of all new fixed-term employment contracts, 21.7% were in health care and social assistance, 18.7% in public administration and safety and 14.1% in education and training.

[1088] Data in the ABS Working Arrangements series start at 2015. Unless otherwise stated, all data from the ABS Working Arrangements series are original series.

Table 28: Fixed-term employment, by status in main job

Full-time or part-time status in main job	Number fixed-term at August 2024	% (distribution)
Full-time	371.1	72.4%
Part-time	141.2	27.6%
Total	512.3	100.0%

Source: ABS Working Arrangements, August 2024 (Cat No 6336.0, Table 6).

Alt-text: A table showing the number of employees by full-time or part-time status in their main job who were employed under a fixed-term contract at August 2024. Of all those engaged under a fixed-term contract 72.4% were full-time employees.

Table 29: Fixed-term employment, by duration of employment in main job

Duration of employment in main job	Number fixed-term at August 2024	% (distribution)
Less than 1 year	209.2	40.8%
1 year and over	303.1	59.2%
1–2 years	141.5	27.6%
3–4 years	62.2	12.1%
5–9 years	52.6	10.3%
10 years and over	46.8	9.1%
	512.3	100.0%

Source: ABS Working Arrangements, August 2024 (Cat No 6336.0, Table 6).

Alt-text: A table showing the number of employees by who were employed under a fixed-term contract at August 2024 by duration of employment in main job. Nearly 60% of employees on a fixed-term contract had been employed for 1 year or more.

Table 30: Fixed-term employment, by expectation of future employment in main job

Expectation of future employment in main job	Number fixed-term at August 2024	% (distribution)
Expects to remain in main job for next 12 months	383.2	74.8%
Does not expect to remain in main job for next 12 months	129.1	25.2%
Total	512.3	100.0%

Source: ABS Working Arrangements, August 2024 (Cat No 6336.0, Table 6).

Alt-text: A table showing the number of employees who were employed under a fixed-term contract at August 2024 by expectations of future employment. The majority (74.8%) expect to remain in their job for the next 12 months.

Table 31: Fixed-term employment, by occupation of main job

Occupation of main job	Number fixed-term at August 2024	% distribution
Managers	49.8	9.7%
Professionals	248.1	48.4%
Technicians and trade workers	45.9	9.0%
Community and personal service workers	49.9	9.7%
Clerical and administrative workers	79.0	15.4%
Sales workers	10.5	2.1%
Machinery operators and drivers	12.5	2.4%
Labourers	16.6	3.2%
Total	512.3	100%

Source: ABS Working Arrangements, August 2024 (Cat No 6336.0, Table 6).

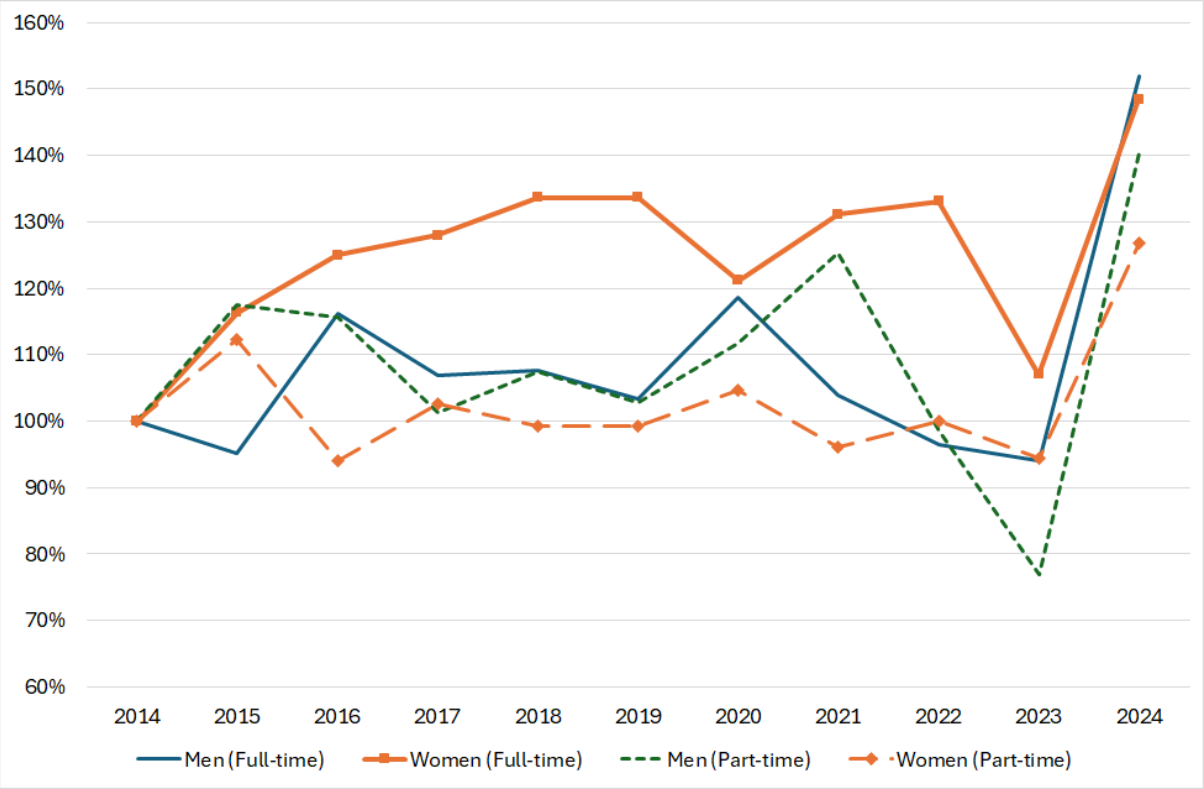
Alt-text: A table showing the number of employees by who were employed under a fixed-term contract at August 2024 by occupation of main job. The majority (48.4%) are professionals.

Table 32: Fixed-term employment, by industry of main job

Industry of main job	Number fixed-term at August 2022 ('000)	Number fixed-term at August 2024 ('000)	Within industry share of employees on fixed-term contracts (2024) (%)	Distribution of fixed-term employment at 2024 (%)	% share of growth in fixed-term employment 2022–2024
	(1)	(2)	(3)	(4)	(5)
Agriculture, forestry and fishing	0.7	2.8	2.2%	0.6%	1.7%
Mining	4.4	11.2	4.3%	2.2%	5.6%
Manufacturing	9.8	10.2	1.3%	2.0%	0.3%
Electricity, gas, water and waste services	5.8	7.7	3.7%	1.5%	1.5%
Construction	9.2	16.4	1.9%	3.2%	5.8%
Wholesale trade	2.2	2.6	0.8%	0.5%	0.3%
Retail trade	7.7	15.5	1.3%	3.0%	6.3%
Accommodation and food services	3.1	9.8	1.1%	1.9%	5.5%
Transport, postal and warehousing	4.5	8.6	1.5%	1.7%	3.4%
Information, media and telecommunications	12.7	9.5	6.0%	1.8%	-2.6%
Financial and insurance services	10.6	17.1	3.4%	3.3%	5.3%
Rental, hiring and real estate services	2.8	5.0	2.7%	1.0%	1.8%
Professional, scientific and technical services	31.8	34.2	3.4%	6.7%	2.0%
Administrative and support services	15.9	13.8	4.5%	2.7%	-1.7%
Public administration and safety	55.4	78.3	8.1%	15.3%	18.7%
Education and training	120.3	137.6	11.7%	26.9%	14.1%
Health care and social assistance	78.7	105.3	5.3%	20.5%	21.7%
Arts and recreation services	5.3	16.3	7.9%	3.2%	9.0%
Other services	8.8	10.5	3.0%	2.1%	1.4%
	389.7	512.3	4.2%	100%	100.0%

Source: ABS Working Arrangements, August 2024 (Cat No 6336.0, Table 6). **Alt-text:** A table showing the number of employees who were employed under a fixed-term-contract at August 2022 and August 2024 by industry of main job. Column 3 shows that in 2024, 11.7% of all employees in education and training were on fixed-term contracts. The next industry to have the highest 'within' industry share was public administration and safety at 8.1%. Column 4 shows the distribution of 2024 fixed-term employment. Just over a quarter (26.9%) of all fixed-term employees are in the education and training sector, while 20.5% are employed in the health care and social assistance sector. Column 5 shows that, of the 122,600 increase in the total number of employees on fixed-term contracts between 2022 and 2024, 21% of the growth was in the health care and social assistance sector.

Figure 25: Trends in fixed-term employment, 2014 to 2024



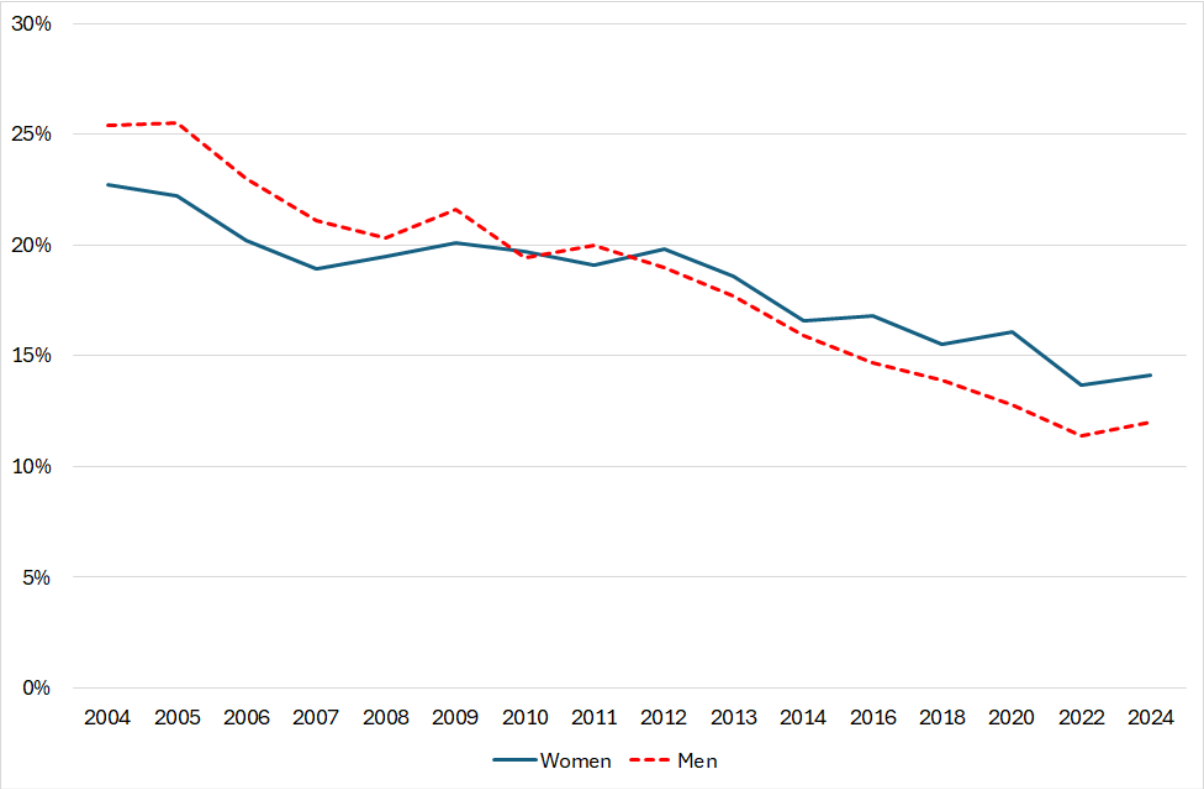
Source: ABS Working Arrangements, August 2024 (Cat No 6336.0, Table 6).

Alt-text: A line chart showing trends in the growth in fixed-term employment between 2014 and 2024 (indexed to 2014). Fixed-term employment grew by nearly 20% by 2020 among men and women employed full-time. There was a marked decline between 2022 and 2023 in the numbers of male part-time employees and female full-time employees engaged on fixed-term contracts. The use of fixed-term employment contracts resumed in 2024. By August 2024 the number of full-timers engaged on a fixed-term contract was nearly 50% higher than levels recorded in 2014.

2.5 Trade union membership

Figure 26 shows trends in trade union membership in Australia. The data are from the ABS Characteristics of Employment Survey. As of August 2024, 1.6 million employees (or 13.1%) were trade union members. The incidence of union membership was higher among women (14.1%) than men (12.0%).

Figure 26: Trade union membership (%), Australia, 2004 to 2024

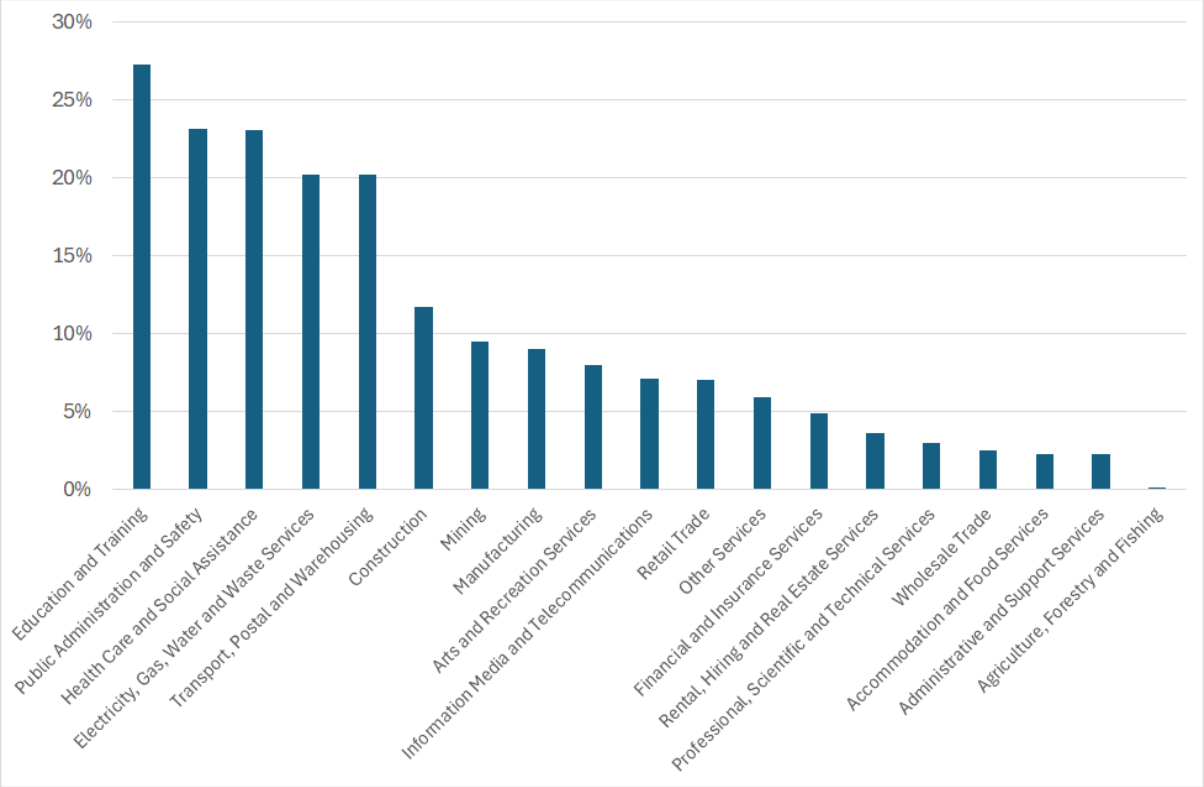


Source: Australian Bureau of Statistics, Trade union membership August 2024.

Alt-text: A line chart showing trends in the trade union membership in Australia. Although the share of union membership has declined significantly over recent decades, there was a slight increase in the incidence of membership between 2022 and 2024.

Figure 27 presents information on union density (the share of employees who are union members) by industry. At August 2024, 27% of employees in the education and training industry division were union members. In health care and social assistance (the largest sector in terms of employment size), 23% of employees were union members. In construction (the second largest industry in terms of employment size) union density was equal to 11.7%.

Figure 27: Trade union membership by industry, Australia, August 2024



Source: Australian Bureau of Statistics, Trade union membership August 2024.

Alt-text: A bar chart showing union membership by industry. In 2024 union membership was highest in the education and training sector.

Union density is highest among professionals (see Table 33). This likely reflects the large incidence of union membership in the education and training industry and the health care and social assistance industry.

Table 33: Trade union membership by occupation, August 2024

1-Digit occupation division	Trade union membership (%)
Professionals	19.8%
Community and Personal Service Workers	16.4%
Machinery Operators and Drivers	15.9%
Technicians and Trades Workers	13.0%
Labourers	9.8%
Clerical and Administrative Workers	7.9%
Managers	6.3%
Sales Workers	5.9%

Source: Australian Bureau of Statistics, Trade union membership August 2024.

Alt-text: A table showing union membership rates by occupation. In 2024 union membership was highest among professionals at 19.8%, followed by community and personal service workers (16.4%). Fewer than 6% of sales workers were union members.

2.6 Select employment characteristics based on data from the HILDA Survey

Additional insight into various labour market characteristics may be obtained from the Household, Income and Labour Dynamics in Australia (HILDA) survey. HILDA is a longitudinal household survey. After weighting using the population weights the HILDA data are nationally representative.

2.6.1 Union membership

Table 34 reports trends in trade union membership by employment status and method of pay setting. In 2012, 10.8% of all casual employees were union members. By 2023 this had declined to 6.9%. Similarly, in 2012, 30.2% of all employees on a permanent contract were union members. By 2023 this had fallen to 24.5%. Among all those whose pay is determined by a collective agreement, 40.8% are union members.

Table 34: Union membership (%) by employment status and method of pay setting status in main job, 2012 to 2023

	Casual	Permanent	Fixed-term contract	Part-time	Full-time	Award	Collective agreement	Individual agreement
2012	10.8%	30.2%	24.8%	20.8%	27.8%	25.2%	47.3%	8.1%
2013	9.0%	30.8%	29.8%	21.4%	28.4%	24.8%	48.2%	8.9%
2014	10.1%	29.4%	26.9%	21.3%	26.6%	24.3%	46.7%	8.0%
2015	9.0%	29.3%	23.4%	20.7%	25.9%	22.2%	45.3%	7.9%
2016	7.6%	27.6%	23.1%	18.5%	24.8%	19.1%	44.4%	9.1%
2017	8.6%	27.6%	22.9%	17.9%	25.2%	18.3%	44.2%	9.8%
2018	7.4%	26.6%	20.7%	18.3%	23.5%	17.8%	42.0%	8.8%
2019	8.5%	25.7%	20.3%	18.4%	22.9%	18.1%	40.6%	7.7%
2020	9.1%	25.6%	23.5%	20.2%	23.2%	17.4%	44.1%	8.6%
2021	7.3%	25.0%	22.7%	18.8%	22.4%	16.5%	41.5%	7.7%
2022	6.8%	24.1%	22.2%	18.0%	21.3%	16.1%	41.5%	6.4%
2023	6.9%	24.5%	19.8%	17.8%	22.1%	16.0%	40.8%	7.9%

Source: HILDA, waves 12 to 23. Sample: employees. Estimates weighted to reflect population totals.

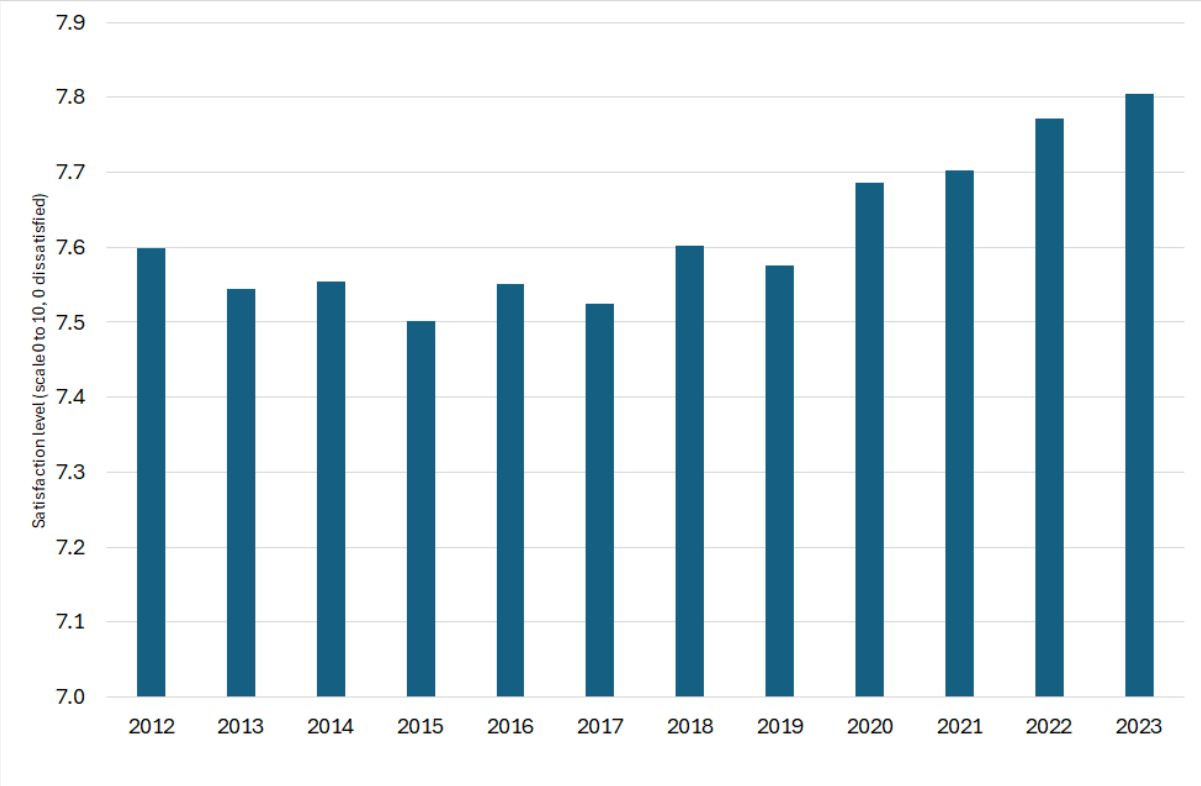
Alt-text: A table showing union density across various characteristics of employment. In 2023, 6.9% of casual employees were trade union members. Among those who were on permanent contracts the membership share was equal to 24.5%. Union membership is higher among full-timers (22.1%) than part-timers (17.8%). It also varies by method of pay setting. Among those covered by a collective agreement, the union membership share is equal to 40.8%. Among those who are award reliant, the union membership share is equal to 16.0%.

2.6.2 Flexibility to balance work and non-work commitments

Figure 28 reports the extent to which employees are satisfied with their ability to balance work and non-work commitments. The scale ranges from 0 (totally dissatisfied) to 10 (totally satisfied). As shown, since COVID-19 there has been a marked increase in the share reporting that they are satisfied. This may relate to the increased ability among some employees to work at home.

Figure 29 shows that in 2012 around 15% of employees worked some or all their usual hours in their main job at home. By 2023 this had increased to around 31%.

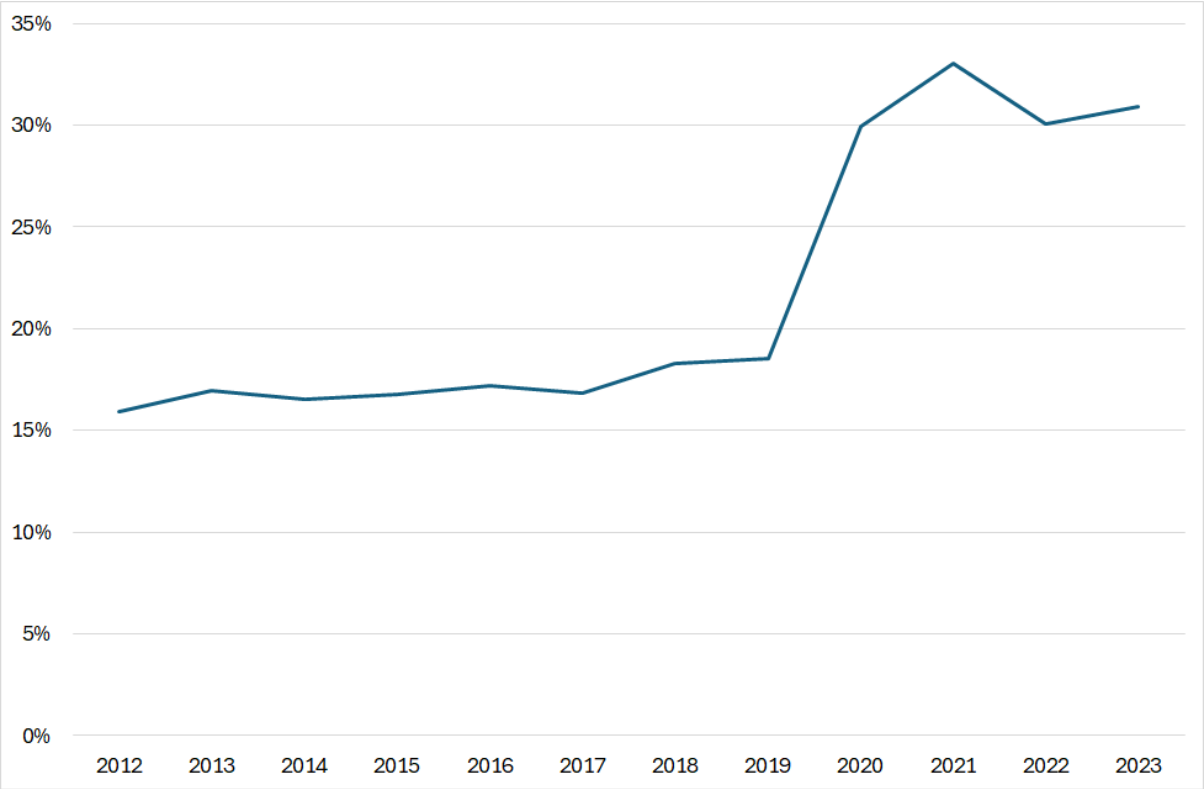
Figure 28: Perceived satisfaction with ability to balance work and non-work commitments, employees, Australia



Source: HILDA, waves 12 to 23. Estimates weighted to reflect population totals.

Alt-text: A bar chart showing employee perceived satisfaction levels with ability to balance work and non-work commitments. In 2015 the mean response among employees, on a scale of 0 (low) to 10 (high), was 7.5. By 2023 this equivalent mean response had increased to just over 7.8, suggesting satisfaction levels are increasing.

Figure 29: Share of employees who report being able to work some or all of their usual hours in their main job at home



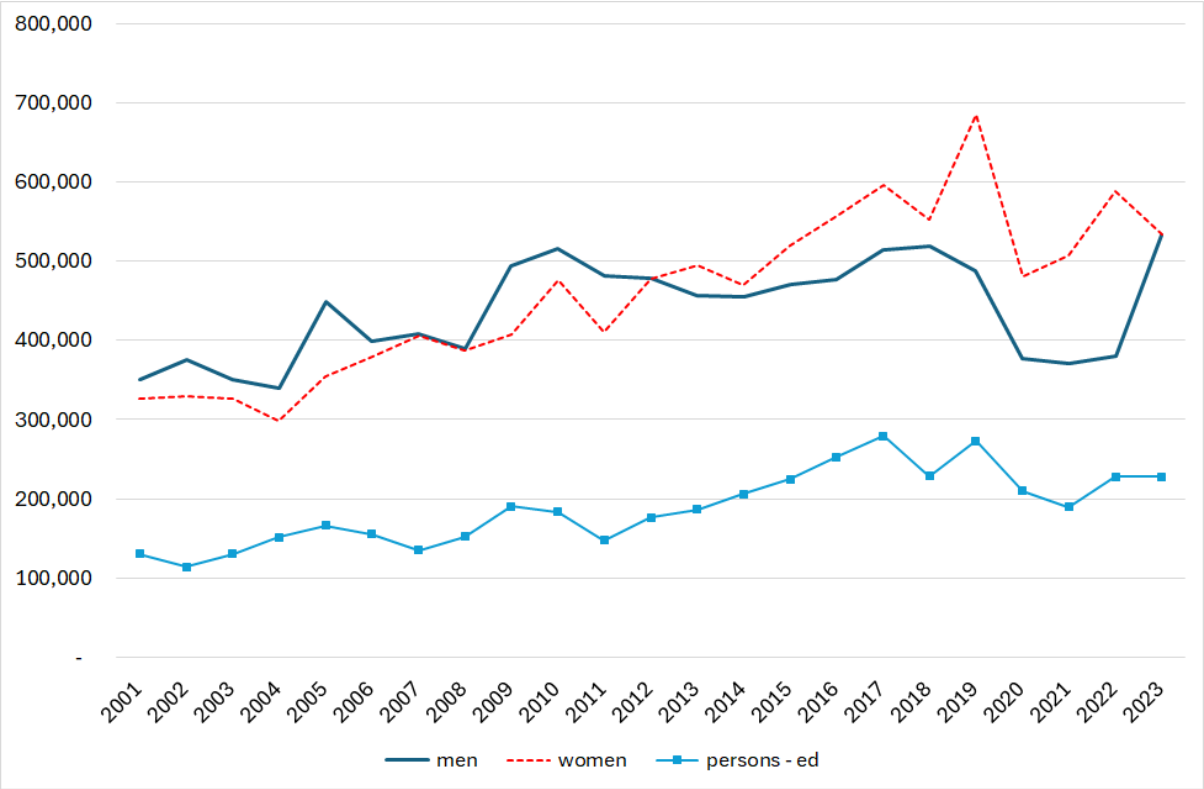
Source: HILDA, waves 12 to 23. Estimates weighted to reflect population totals.

Alt-text: A line chart showing the share of employees able to work some or all of their usual hours of work per week (main job) at home. Since 2019 and the effects of COVID-19 there has been a significant jump in the share of workers who may work at home. In 2023 around 30% of all employees could work some or all hours at home.

2.6.3 Fixed-term contracts

Figures 30 and 31 show trends in fixed-term employment. Between 2001 and 2023 there has been a 58% growth in the total number of employees on fixed-term contracts. The growth has been faster among women (64% growth) compared to men (52% growth) and parallels growth in the education and training sector. Between 2022 and 2023 there was a sharp growth in the number of men employed under a fixed-term contract. As a share of all employees, male fixed-term contracts increased from 7% in 2022 to 9% in 2023.

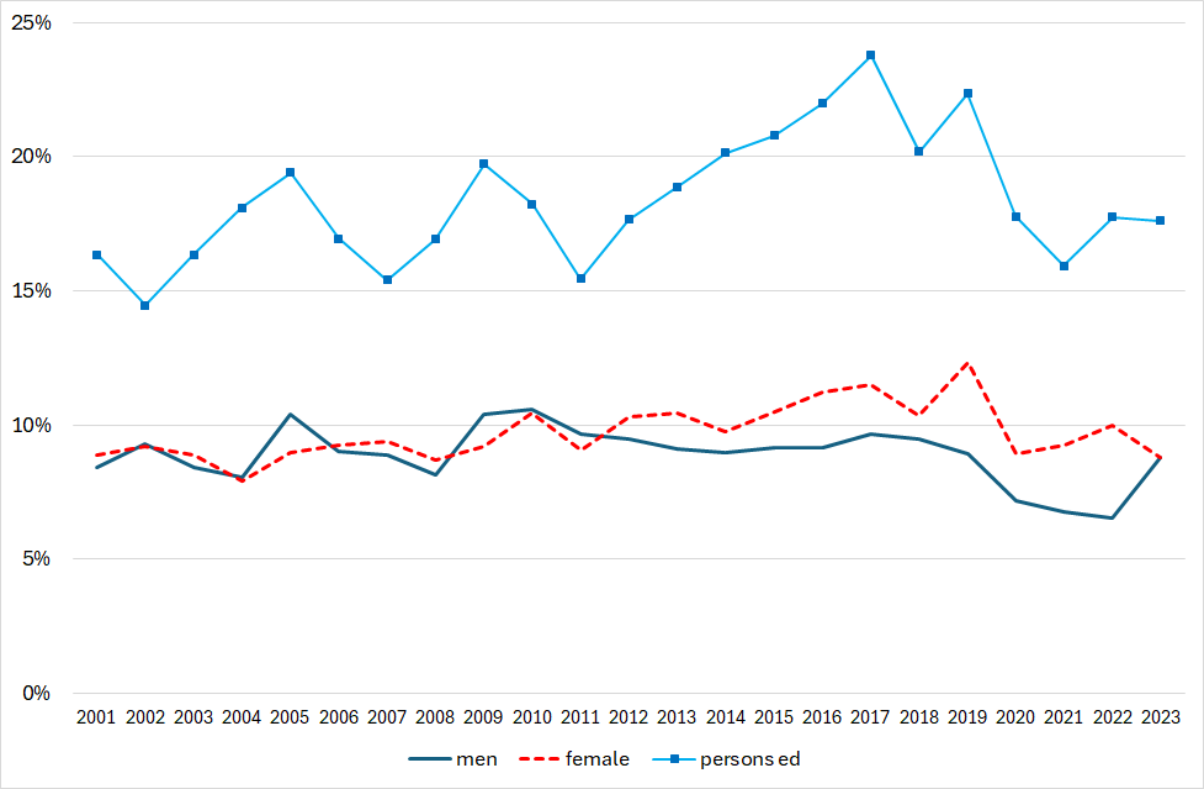
Figure 30: Trends in the number of employees who are employed via a fixed-term contract, by gender



Source: HILDA, waves 1–23.

Alt-text: A line chart showing the number of men and women who are employees and engaged using a fixed-term contract. In 2001 there were 326,148 female employees on fixed-term contracts. By 2023 this number stood at 533,875 (a 64% increase). The number of employees on fixed-term contracts who work in the education and training sector peaked in 2017 at 278,950.

Figure 31: Trends in the share of employees who are on fixed-term contracts, by gender



Source: HILDA, waves 1–23.

Alt-text: A line chart showing the share of employees, by gender, who are on fixed-term contracts. The share averaged 9% for men and 10% for women between 2001 and 2018. It peaked in 2019 among women at 12%. Since 2022 it has decline for women and increased, sharply, among men. In the education and training sector the share peaked at 24% in 2017.

In Table 35 the analysis focuses on understanding what share of fixed-term contract holders earn above the high income threshold. In 2023–24 financial year, persons earning more than $167,500 on an annual basis were exempt from the new provisions in the Secure Jobs, Better Pay Act concerning limits on fixed-term contracts. To estimate the share, hourly earnings in HILDA were computed as usual weekly earnings divided by usual hours worked. These were deflated into 2023 prices and then multiplied by 38 (for 38 hours) and 52 (for 52 weeks). A dummy variable was then created and set equal to 1 if a persons usual hourly earnings, on a full-time equivalent basis, exceeded the $167,500 threshold.

The descriptive data in Table 35 show that, over the 23 years of HILDA data (2001 to 2023), 10% of all employees were on a fixed-term contract. This falls to 9% among a sample where hourly earnings are below the threshold and rises to 14% for a sample where hourly earnings are above the threshold. The results are consistent with earlier findings showing that professionals have the greatest likelihood of being on a fixed-term contract.

Table 35: Share of fixed-term contract holders who earn over the high income threshold?

		Earns over $167,500 on an annual equivalent basis (in 2023 prices)		
		no	**yes**	**Total employees**
Fixed-term contract?	**no**	152,184	7,472	159,656
		91%	86%	90%
	yes	15,704	1,261	16,964
		9%	14%	10%
	Total employees	167,888	8,733	176,620

Note:

1. Sample: employees aged 18–64 employed on either a permanent, fixed or casual contract.

2. Period covered: 2001 to 2023.

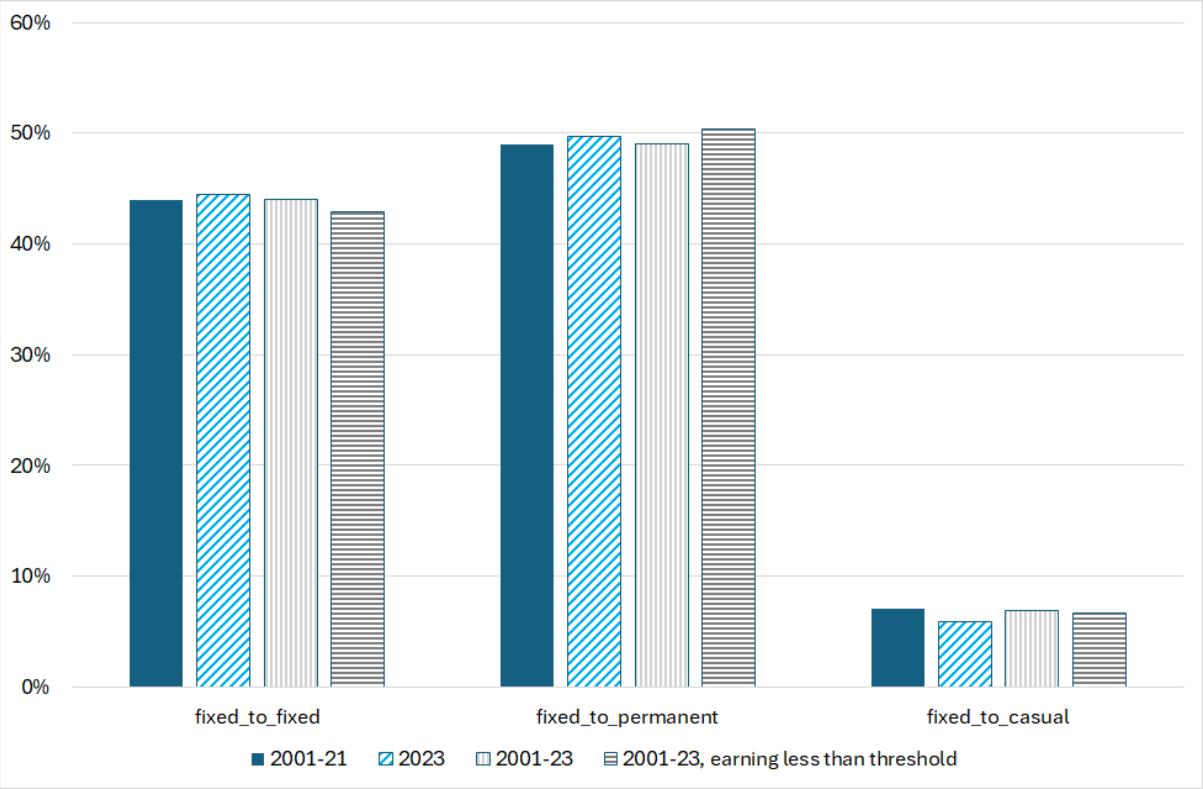
3. Estimates weighted to reflect population totals.

Source: HILDA, waves 1–23.

Alt-text: A table showing the share of high income earners (those earning above $167,500 in 2023 prices) who are on a fixed-term contract. Estimates show that 14% of employees who are high income earners were on a fixed-term contract.

In Figure 32, descriptive analysis is used to examine the transition outcomes of employees who are on fixed-term contracts. The analysis is based on a sample of HILDA employees who are observed over at least 2 consecutive waves. The results for 2001 to 2021 (first dark blue bar) show that, over this period, 44% of those who were on a fixed-term contract in period 1 were on a fixed-term contract in period 2, and 49% of those on a fixed-term contract in period 1 were on a permanent contract in period 2. The '2023' results show outcomes among those on a fixed-term contract in 2022 and their status in 2023. The results are qualitatively the same as those for the 2001–2021 period. A marginally higher share (50%) transition to a permanent contract and a smaller (6%) transition to a casual contract. The bars labelled '2001–23 earning less than the threshold' show the outcomes for those earning less than the high income threshold (on a full-time, annual, equivalent basis). A slightly higher share transition to having a permanent contract in year 2.

Figure 32: Fixed-term contract transition analysis



Notes:

1. Employees aged 18–64, excludes employees in agriculture and restricts the sample to those observed in at least 2 consecutive waves of data.

2. Estimates weighted to reflect population totals.

Source: HILDA, waves 1–23.

Alt-text: A bar chart showing the employment status in year 2 of employees who were on fixed-term contracts in year 1. The '2023' bars show that, of those who were fixed term in 2022, 44% where fixed term in 2023, 50% were permanent in 2023 and 6% were casual. The '2001–23, earning less than threshold' bars show that those learning less than the threshold who were fixed-term contract holders in year 1 had a 50% probability of being permanent in year 2.

Table 36 uses regression analysis to explore the characteristics of employees who are on fixed-term contracts over 2 consecutive years and those who transition from a fixed-term contract to a permanent position. A dummy variable 'Post22' is used to see if there is any difference post the Secure Jobs, Better Pay Act coming into effect. The coefficient on this variable is not significant. The variable 'Thresh' is highly significant and shows that high income earners are much more likely than other employees to have consecutive fixed-term contracts (column 1). Column 2 shows high income earners are less likely than other employees to transition to a permanent job.

Remaining with column 2, the analysis shows there is no difference in the outcome by gender. In terms of age, the reference group is aged 18–24. When compared to this group, persons aged 25–34 are more likely to transition from a fixed to permanent, whereas older aged workers are less likely to transition from fixed to permanent. When compared to labourers and related

workers, transitioning probabilities (transitioning to a permanent contract) are also significantly higher for all occupation groups.

The industry analysis shows the results benchmarked to education and training. When compared to this sector, the only sector where there is a significantly higher likelihood of transitioning from fixed to permanent is mining. In the health care and social assistance sector the probability of transitioning to permanent is the same as in the education training sector. The negative and statistically significant sign on many of the other industry coefficients shows that in these sectors, when compared to education and training, the probability of transitioning from fixed to permanent is significantly lower.

Transitioning is lower in urban areas. When compared to New South Wales, the likelihood of moving from fixed to permanent is higher in Victoria, Queensland, South Australia and Western Australia.

Table 36: Logit regressions – what are the characteristics of employees who transition from fixed-to-fixed and from fixed-to-permanent contracts?

	Fixed to fixed (1)	Fixed to permanent (2)
Post22 (=1 if 2023 and 0 otherwise)	-0.002	-0.001
	(0.002)	(0.002)
Thresh (=1 if hourly wage * 38 * 52 > $167,500) (in 2023 prices).	0.018***	-0.010***
	(0.002)	(0.002)
thresh22 (=1 if thresh=1 & post22=1)	0.000	0.004
	(0.007)	(0.010)
Female (=1 if female)	-0.002	-0.001
	(0.001)	(0.001)
age2534 (=1 if aged 25-34)	0.005***	0.005***
	(0.002)	(0.002)
age3554 (=1 if aged 35-54)	-0.002	-0.004**
	(0.002)	(0.002)
age5564 (=1 if aged 55-64)	-0.003*	-0.010***
	(0.002)	(0.002)
Manager	0.048***	0.032***
	(0.003)	(0.003)
Professional	0.044***	0.029***
	(0.003)	(0.003)
Trades person	0.035***	0.027***
	(0.003)	(0.003)
Service worker	0.026***	0.015***
	(0.003)	(0.003)
Clerical worker	0.026***	0.022***
	(0.003)	(0.003)
Sales worker	0.021***	0.012***
	(0.004)	(0.003)
Operator	0.008*	0.011***
	(0.005)	(0.003)
Public sector	0.020***	0.003**
	(0.001)	(0.001)
Mining	-0.019***	0.010***
	(0.004)	(0.003)
Manufacturing	-0.043***	-0.008***
	(0.003)	(0.003)

Electricity, gas and water	-0.019***	-0.008*
	(0.004)	(0.005)
Construction	-0.030***	-0.005*
	(0.003)	(0.003)
Wholesale trade	-0.035***	-0.007**
	(0.004)	(0.003)
Retail trade	-0.029***	-0.003
	(0.003)	(0.003)
Accommodation and food services	-0.060***	-0.034***
	(0.004)	(0.004)
Transport, postal and warehousing	-0.035***	-0.010***
	(0.004)	(0.003)
Information media and telecommunications	-0.019***	-0.007*
	(0.003)	(0.004)
Financial and insurance services	-0.037***	-0.004
	(0.003)	(0.003)
Rental, hiring and real estate services	-0.029***	0.006
	(0.005)	(0.004)
Professional, scientific and technical	-0.026***	-0.010***
	(0.002)	(0.002)
Administrative and support service	-0.021***	-0.010***
	(0.003)	(0.004)
Public, administration and safety	-0.019***	-0.004**
	(0.002)	(0.002)
Health care and social assistance	-0.016***	-0.000
	(0.001)	(0.002)
Arts and recreation services	-0.012***	-0.011***
	(0.003)	(0.004)
Other services	-0.016***	-0.003
	(0.003)	(0.003)
Migrant, born main English-speaking country	0.002	0.002
	(0.002)	(0.002)
Migrant, born non-English-speaking country	0.002	0.001
	(0.001)	(0.002)
Resides in a main urban area	-0.002**	-0.002**
	(0.001)	(0.001)
Victoria	0.006***	0.009***
	(0.001)	(0.001)
Queensland	-0.001	0.004**
	(0.001)	(0.001)
South Australia	0.017***	0.006***
	(0.002)	(0.002)
Western Australia	0.005***	0.010***
	(0.002)	(0.002)
Tasmania	0.002	0.002
	(0.003)	(0.003)
NT and ACT	0.012***	0.003
	(0.002)	(0.003)
Observations	168,701	168,701

Note:

1. Dependent variable in column 1 is equal to 1 if transition is from fixed-to-fixed (from year 1 to year 2). Dependent variable in column 2 is equal to 1 if transition is from fixed-to-permanent (from year 1 to year 2).

2. Sample: aged 18–64, excludes agriculture and persons not observed in employment over at least 2 consecutive waves. Time period covered 2001 to 2023.

3. Estimator: logit. Marginal effects reported.

4. Significance given by: *** p<0.01, ** p<0.05, * p<0.1; 5. Robust standard errors in parentheses.

6. Reference groups are: aged 18–24, labourers, education and training, Australian born, New South Wales.

7. Source: HILDA, waves 1–23.

3. Wage relativities and growth

Within Australia wage data are collected via a range of different surveys and methods. Some of it is collected from employer records and employer surveys; other data is collected from surveys of individuals Table 37. Aside from challenges monitoring wages using different sources, there is no common agreement on how to best measure or define wages. For example, should the measure focus on hourly, weekly or annual labour earnings? Should it be by gender? Should it measure hours paid for or be a measure based on hours worked (e.g. usual weekly wage divided by usual weekly hours worked)? Should it only measure the wages of employees or should it include all workers (including the self-employed)? Should the focus be the ordinary time earnings or total earnings (including irregular payments such as bonuses)? Should it be labour earnings form all jobs or just the main job? Should the focus be on gross or net labour earnings? Should it include superannuation? Should the sample be restricted to persons employed full-time or should part-timers also be included?

In addition to the above, there is also a lack of agreement as to what the denominator might be for certain high level indicators such as the gender wage gap (GWG). The GWG is commonly measured as: $(Wages_{Men} - Wages_{Women})/Wages_{Men} * 100$. This shows how much lower the wages of men need to be for the gap to equal zero. An alternative approach is to measure the GWG as: $(Wages_{Men} - Wages_{Women})/Wages_{Women} * 100$. This shows how much higher the wages of women need to be to equal those of men.

There is also the question of nominal wages (wages at current prices) and real wages (wages after adjusting for inflation). Additionally, a distinction is sometimes made between the real *consumer* wage and the real *producer* wage. The real consumer wage adjusts the nominal wage for changes in the prices of goods and services that consumers purchase; that is, it deflates the nominal wage uses the consumer price index (CPI). The real producer wage deflates the nominal wage using the producer price index (PPI). The PPI captures changes in the prices producers receive for goods and services, including prices producers pay for inputs. Real producer wages therefore show wages in relation to the price of outputs and inputs.

Table 37: Source of wage data in Australia[1089]

Series	Source	Availability	Description
Wage price index (WPI)	ABS Cat No 6345.0	Available quarterly covering March, June, September and December. (December 2024 WPI to be released on 19 February 2025.)	The wages for a basket of jobs are collected from a sample of public and private sector employers. The index is not affected by compositional changes in the labour market or hours worked. Information available by sector and industry but not gender. Most published series do not include bonuses. Superannuation is not included in the index. Index numbers are available on a quarterly basis. Information on the 'contribution to wage growth by method of setting pay' (enterprise agreement, individual arrangement or award) is also available.
Average weekly earnings (AWE), Australia	ABS Cat No 6302.0	Estimates are available on a bi-annual basis (May and November). November 2024 data will be released in February 2025.	Survey of business units. Information stratified by gender, sector, industry and state/territory as well as by full-time (35 or more hours per week) employment. AWE excludes irregular and infrequent payments such as annual bonuses and leave loading. AWE data is collected for a typical week.
Employee earnings and hours (EEH), Australia	ABS Cat No 6306.0.	Available every 2 years. Most recent reference period is May 2023 (released in January 2024); next release will pertain to May 2025.	The EEH is conducted every 2 years. It was last conducted in May 2023. It contains information on methods of setting pay with current categories being award only, collective agreement (enterprise agreement), individual arrangement or owner manager of incorporated enterprise. Employees who receive pay above the award rate are classified as being paid by either a collective agreement or an individual arrangement. Wage data is collected from employers and pertains to hours paid for. It includes all cash earnings, including regular bonuses.

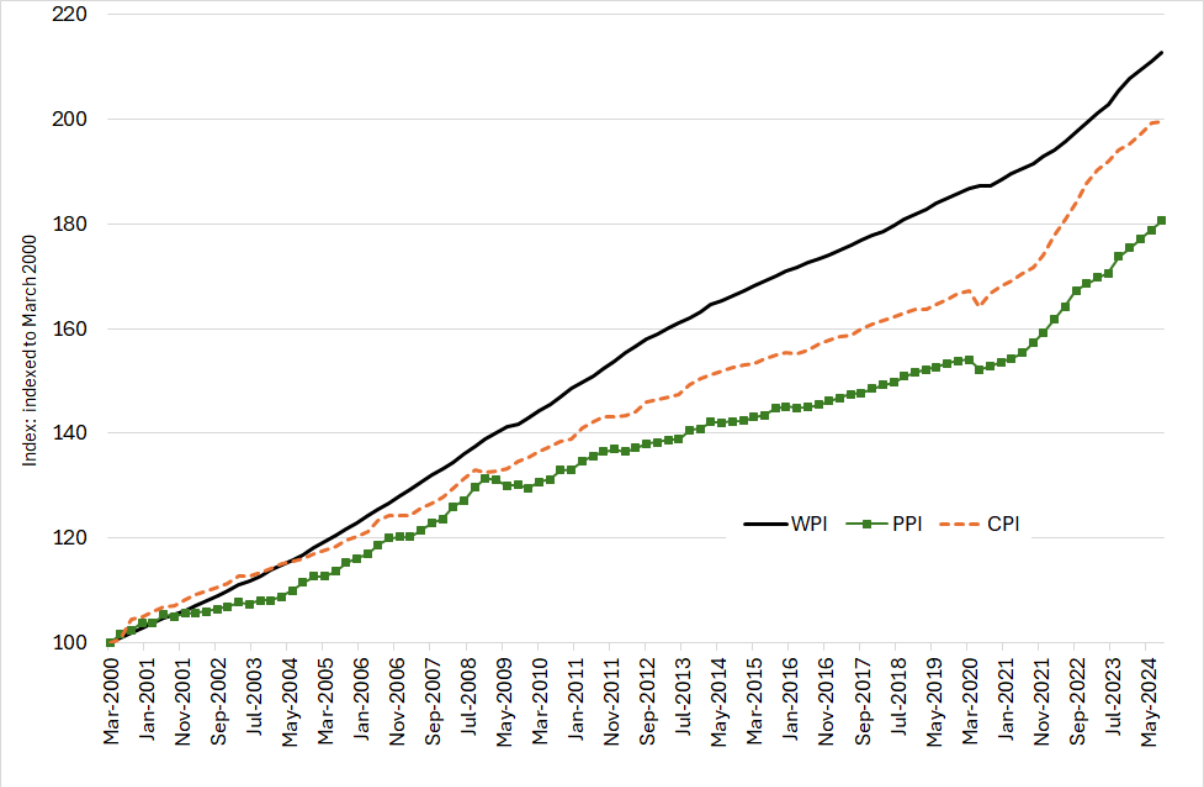
[1089] The Productivity Commission, as part of its 'PC productivity insights' series, also discusses wage measurement issues and available data sources. See Productivity Commission, *Productivity Growth and Wages – A Forensic Look* (September 2023) Appendices <https://www.pc.gov.au/ongoing/productivity-insights/productivity-growth-wages>.

Employee earnings	ABS Cat No 6337.0	Reference period August 2024 (released December 2024).	Released on an annual basis. Wage information pertains to hours actually worked. (The employee earnings information is part of the Characteristics of Employment (COE) survey (ABS 6333.0)).
Labour Account Australia	ABS Cat No 6150.0.55.003	Monthly.	Includes information on average hourly income per Labour Account employed person and total compensation of employees. It includes employees and owner managers. As with the WPI, these data cannot be disaggregated by gender.
Workplace Agreement Database (WAD)	Department of Employment and Workplace Relations (DEWR)	All federal enterprise agreements certified or approved since 1 January 1997.	Contains information on the coverage of federal enterprise agreements and wage increase. DEWR publishes a quarterly bulletin on trends in federal enterprise bargaining. The most recent bulletin (released September 2024) is for the June 2024 quarter.
Household, Income and Labour Dynamics in Australia (HILDA) survey	Melbourne Institute	Available annually since 2000.	Unit record data, with the survey collecting information from responding individuals on their usual weekly labour earnings in their main job and all jobs and total hours usually worked each week in main job and all jobs. HILDA data can be used to compute estimates of hourly wage and disaggregated trends by sector and gender.

3.1 WPI data

Figure 33, based on the WPI, shows trends in total hourly rates of pay excluding bonuses since 2000. That is, it shows trends in ordinary time earnings (the base rate of pay for standard hours worked) plus allowances and penalty payments. Information on the CPI and the PPI is also included for comparison purposes. Between 2000 and 2020 the WPI grew at a faster rate than the CPI and PPI. This was reversed after COVID-19 owing to inflationary pressures. Between September 2023 and September 2024, however, the WPI grew faster than the CPI. The real consumer wage (measured as the percentage change in the WPI minus the percentage change in the CPI) is, as a result, now positive again.

Figure 33: Trends in total hourly rates of pay excluding bonuses (WPI), the CPI and the PPI



Note: Calculations based on ABS Cat No 6345.0 (WPI), ABS Cat No 6401.0 (CPI) and ABS Cat No 6427.0 (PPI).

Alt-text: A line chart showing the trend in the WPI, CPI and PPI between March 2000 and September 2024. The increase was greatest among the WPI, followed by the CPI.

Table 38 shows the percentage change in the WPI, CPI and real consumer wage from March 2010 to September 2024. Estimates elsewhere point to a slowdown in Australian wage growth from around 2012.[1090] This is also reflected in Figure 34, with real wage growth stalling (becoming negative) in 2014 and again in 2021. Most recently available data points to a slower growth in the WPI and faster growth in real consumer wages, with the latter underpinned by a slowdown in inflation (slower growth in the CPI).[1091]

Table 38: Real wage growth, nationally, since December 2022

			% change from corresponding quarter of previous year	
	% change Dec 22 to Sept 24	Quarterly average % change Dec 22 to Sept 24	Sept 22 to Sept 23	Sept 23 to Sept 24
WPI	6.8	3.8	4.1	3.5
CPI	6.3	5.1	5.4	2.8
PPI	7.1	4.4	3.8	3.9
Real consumer wage (WPI-CPI)	0.5	-1.3	-1.3	0.7

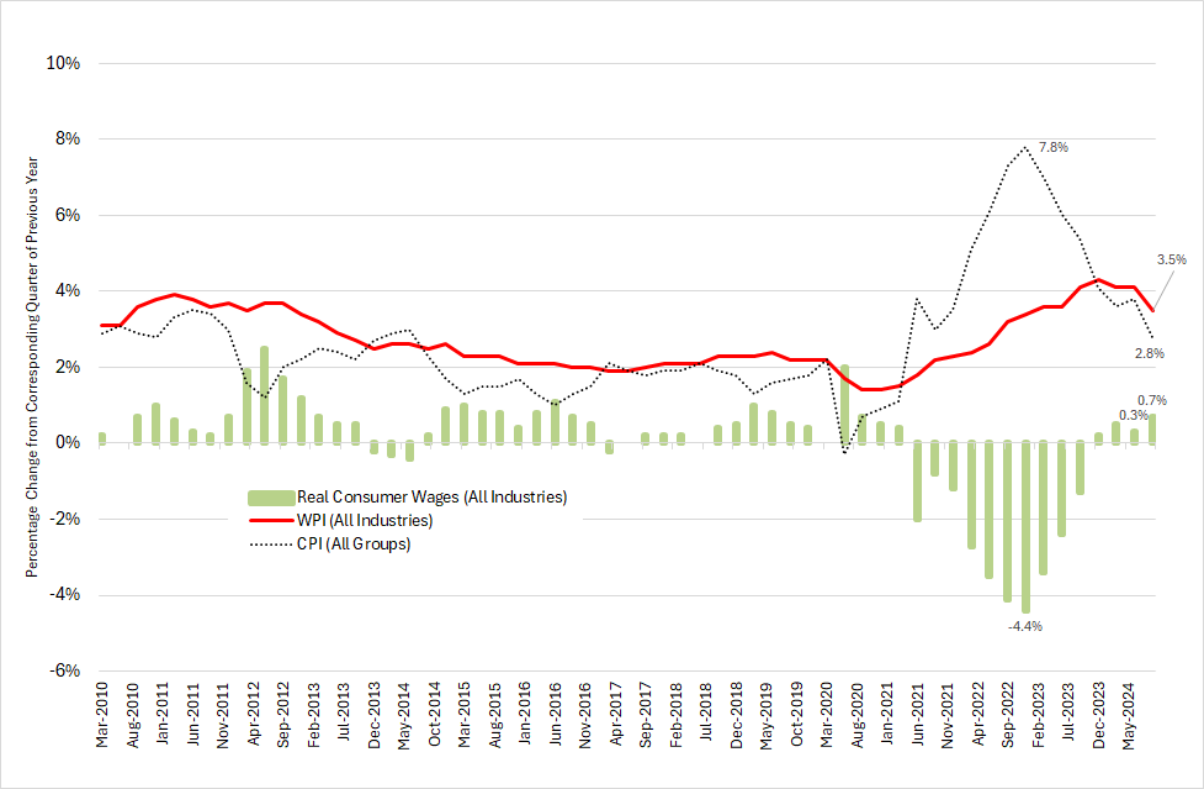
Source: ABS Cat No 6345.0 (WPI), ABS Cat No 6401.0 (CPI) and ABS Cat No 6427.0 (PPI).

Alt-text: A table showing changes in the WPI and real consumer wage since December 2022. Over the period December 2022 to September 2024 the real wage has increased by 0.5%.

[1090] The Treasury, *Analysis of Wage Growth* (November 2017), 4 <https://treasury.gov.au/sites/default/files/2019-03/p2017-t237966.pdf>.

[1091] Using the WPI, the real consumer wage may be calculated as the WPI ÷ CPI. The real producer wage is calculated as the WPI ÷ PPI. If the focus is on quarterly percentage change in the WPI (as in Figure 34) then the real consumer wage is the % change in the WPI minus the % change in the CPI for the same period. The real producer wage is the % change in the WPI minus the % change in the PPI for the same period. CPI data may be sourced from ABS 6401.0 Consumer Price Index, Australia. PPI data are available from ABS 6427.0 Producer Price Indexes, Australia.

Figure 34: Nominal and real wage growth in Australia, March 2010 to September 2024



Note:

1. ABS 6345.0 Wage Price Index, Australia. Table 1, Total hourly rates of pay excluding bonuses, original.

2. ABS 6401.0 Consumer Price Index, Australia. Tables 1 and 2, All groups CPI Australia, original.

3. Real wages derived by subtracting the CPI from the WPI.

Alt-text: A combination line and bar chart showing trends in the percentage change in nominal and real wages from the corresponding quarter of the previous year. Growth in real wages was negative between December 2013 and June 2014 and became negative again in June 2021. With growth in the CPI easing, real wage growth turned positive in December 2023.

Table 39 shows nominal wage growth by sector. Estimates in column 2 show that certain industries such as manufacturing, construction, education and training, and health care and social assistance (private sector) have experienced above average wage growth since December 2022. Sectors with below average wage growth include health care and social assistance workers (public sector), arts and recreational services, and rental, hiring and real estate services.

Table 39: Nominal wage growth by industry and select sectors since December 2022

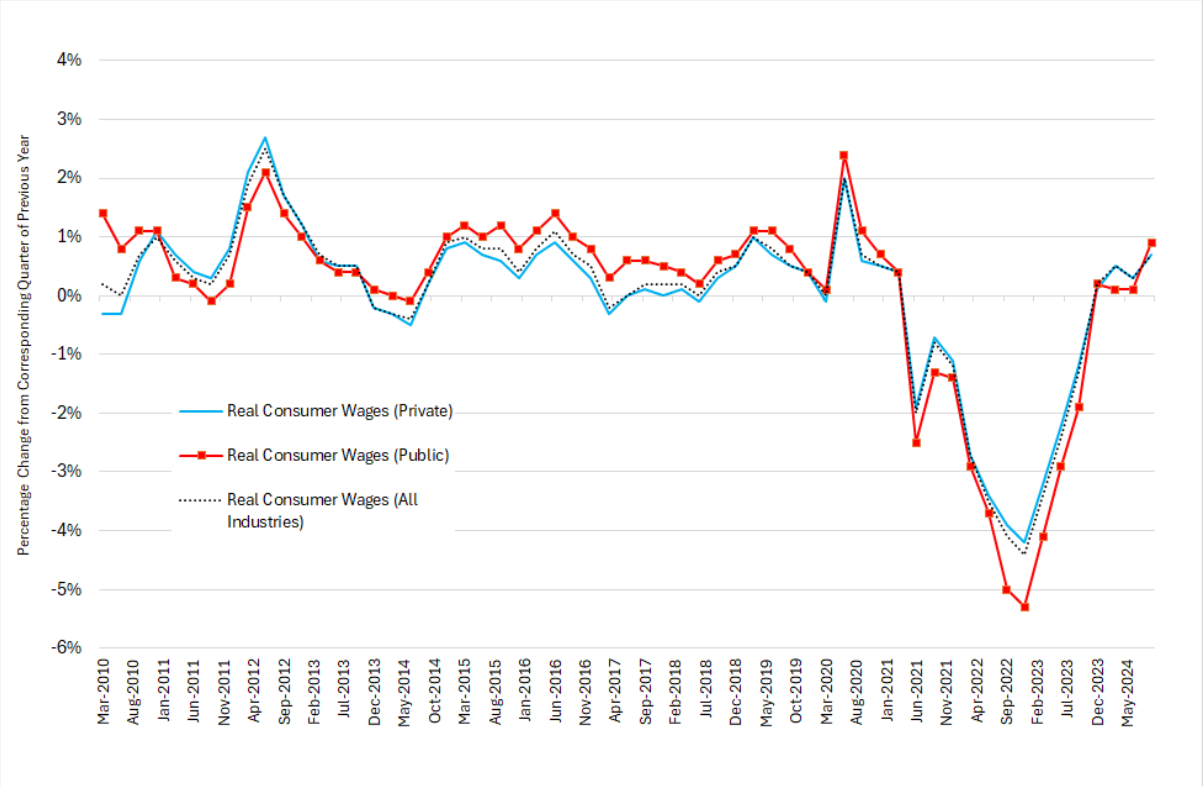
	March 2010 to September 2024	December 2022 to September 2024	Quarterly average % change Dec 22 to Sept 24	% change from corresponding quarter of previous year	
				Sept 22 to Sept 23	Sept 23 to Sept 24
	(i)	(ii)	(iii)	(iv)	(v)
Mining	46.3%	6.7%	3.9	4.0	3.8
Manufacturing	50.6%	7.0%	4.1	4.4	3.8
Electricity, gas, water and waste services	53.1%	7.8%	4.1	3.9	5.0
Construction	47.2%	7.0%	3.9	4.3	3.5
Wholesale trade	47.6%	5.9%	3.8	3.7	3.2
Retail trade	44.3%	7.0%	4.0	4.4	3.4
Accommodation and food services	47.3%	7.3%	4.0	5.5	3.5
Transport, postal and warehousing	46.5%	7.0%	3.8	4.4	3.7
Information media and telecommunications	43.5%	6.0%	3.5	3.6	3.3
Financial and insurance services	48.8%	5.2%	3.5	3.1	3.0
Rental, hiring and real estate services	43.0%	6.5%	3.6	3.7	3.2
Professional, scientific and technical services	46.0%	6.3%	3.7	3.8	3.0
Administrative and support services	44.1%	8.0%	4.1	4.3	3.9
Public administration and safety	45.5%	6.1%	3.2	3.4	3.3
Education and training	50.3%	7.6%	3.7	3.6	4.4
Private	*50.4%*	*7.3%*	*3.7*	*3.4*	*4.3*
Public	*50.5%*	*7.8%*	*3.8*	*3.7*	*4.4*
Health care and social assistance	52.6%	7.9%	4.2	4.9	3.6
Private	*57.9%*	*9.6%*	*5.0*	*6.0*	*4.0*
Public	*46.0%*	*5.6%*	*3.2*	*3.3*	*3.1*
Arts and recreational services	48.9%	6.3%	3.8	4.6	2.9
Other services	46.6%	6.3%	3.7	3.8	3.2
All Industries	**47.8%**	**6.9%**	**3.8**	**4.1**	**3.5**
Private	*48.0%*	*7.0%*	*3.9*	*4.2*	*3.5*
Public	*47.2%*	*6.5%*	*3.5*	*3.5*	*3.7*

Source: ABS Cat No 6345.0, Wage Price Index, Australia, Tables 1, 4b and 5b.

Alt-text: A table showing nominal wage growth by industry and select sectors. In the year to September 2024 nominal wage growth was stronger in the public sector than it was in the private sector, reversing a pattern shown in the year to September 2023.

Figure 35 shows trends in the growth in wages (from the corresponding quarter of the previous year) disaggregated by sector. Wage growth was slower in the public sector than in the private sector over the period 2011 and 2012 and again in the period June 2021 to June 2024. In the September 2024 quarter the trend was reversed, with nominal wages in the public sector growing at 3.7% when benchmarked to September 2023. The corresponding change in the private sector was 3.5%.

Figure 35: Trends in annual growth in real wages by sector, March 2010 to September 2024



Notes:

1. ABS 6345.0 Wage Price Index, Australia. Table 1, Total hourly rates of pay excluding bonuses, original.

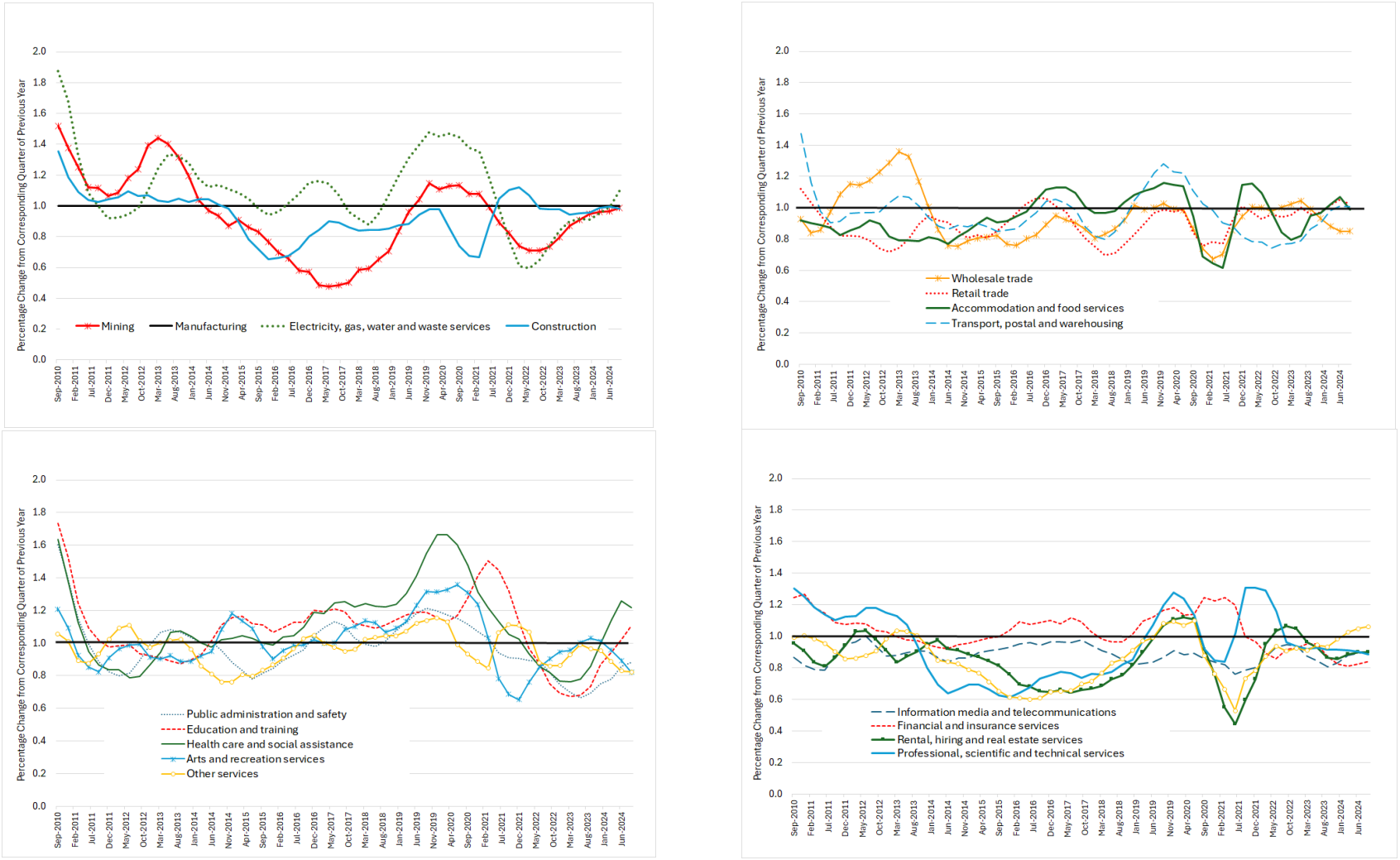
2. ABS 6401.0 Consumer Price Index, Australia. Tables 1 and 2, All groups CPI Australia, original.

3. Real wages derived by subtracting the CPI from the WPI.

Alt-text: A line chart showing the percentage change in real consumer wages relative to the corresponding quarter of the previous. The data are disaggregated by sector. In the period June 2021 to June 2024 real wage growth was slower in the public sector.

Figure 36 shows considerable variability in patterns of wage growth by industry of employment. For comparative purposes all industry estimates are benchmarked to the manufacturing sector. For much of the past 10 years wage growth in mining and construction has been below that of manufacturing. The opposite holds for wage growth in education and training and in health care and social assistance.

Figure 36: Trends in wage growth over the year benchmarked to manufacturing and smoothed using a 4-quarter moving average



Notes: 1. ABS 6345.0 Wage Price Index, Australia. Table 5b, Total hourly rates of pay excluding bonuses by sector and industry, original; 2. ABS 6401.0 Consumer Price Index, Australia. Tables 1 and 2, All groups CPI Australia, original; 3. Wage growth is relative to wage growth in the manufacturing standard. Below 1.0 means growth was weaker; above 1.0 means growth was stronger.

3.1.1 Contributions of methods of pay setting to wage growth

Table 40 shows growth in wages by method of pay setting since December 2022. As shown, wage growth has been strongest in the award stream, reflecting, in part, that growth is coming off a lower base.

Table 40: Wage growth by method of pay setting, December 2022 to September 2024

	Enterprise agreement	Individual arrangement	Award
Dec-22	100.0%	100.0%	100.0%
Mar-23	100.9%	100.7%	100.1%
Jun-23	101.5%	101.4%	100.1%
Sep-23	103.4%	102.9%	104.7%
Dec-23	104.7%	103.7%	105.6%
Mar-24	105.3%	104.4%	105.7%
Jun-24	105.9%	105.1%	105.8%
Sep-24	107.2%	106.4%	108.6%

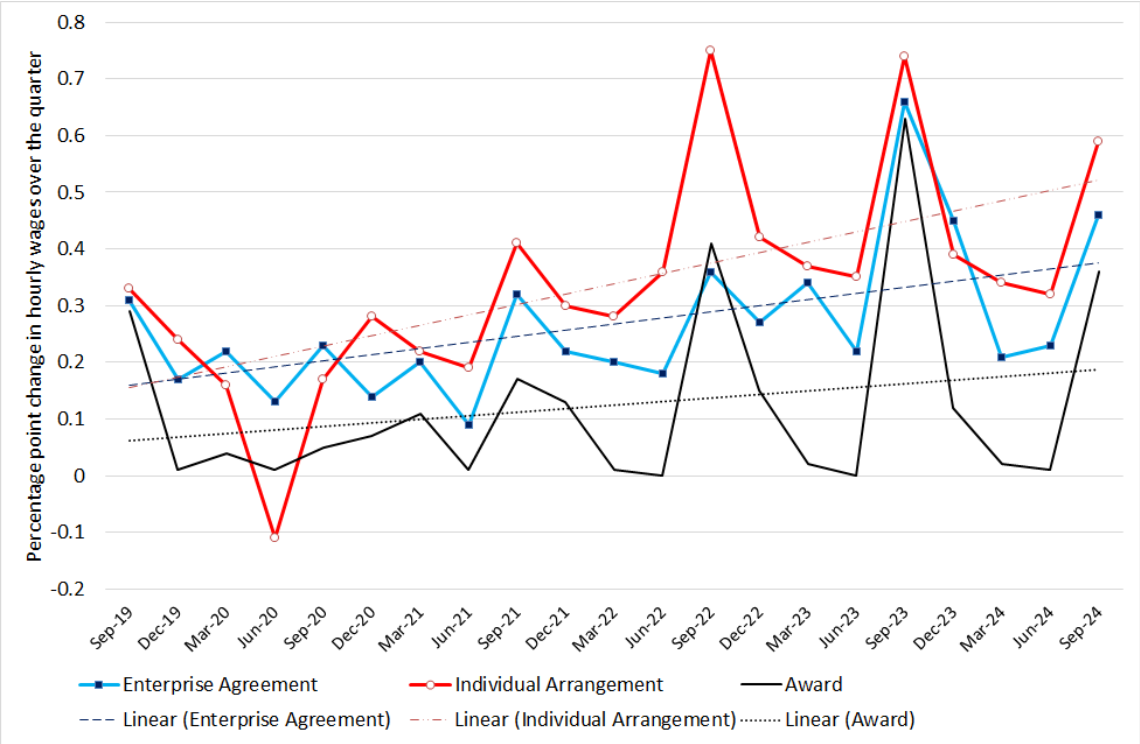
Source: ABS Wage Price Index, Appendix B.

Alt-text: A table showing growth in wages by method of pay setting. Between December 2022 and September 2022 award wages increased by 8.6%, wages in individual agreements increased by 6.4% and wages in enterprise agreements increased by 7.2%.

Figure 37 focuses on the contribution the various methods of pay setting have made to the observed quarterly growth in total hourly rates of pay (excluding bonuses). In the September 2024 quarter wages grew by 1.41 percentage points; one-third (33%) of this growth came from wage increases in enterprise agreements, 42% from wage increases in individual arrangements and 26% from wage increases to award-reliant workers. In the September 2023 quarter wages increased by 2.03 percentage points. The contribution of the 3 components previously listed were, respectively, 33%, 36% and 31% (see Table 41).

Since June 2020 the main contribution to wage growth has been individual arrangements, followed by wage increases contained in enterprise agreements and then the award.

Figure 37: Contributions to quarterly growth in total hourly rates of pay (excluding bonuses) by method of pay setting



Source: ABS 6345.0 Wage Price Index, Australia.

Alt-text: A line chart showing contributions to hourly wage growth by quarter. In the September 2024 quarter hourly wages grew by 1.41 percentage points. The components of this 1.41 percentage point growth were enterprise agreements, 0.46; individual arrangements, 0.59; and awards, 0.36. The linear trend lines show that individual arrangements have contributed a rising share of wage growth since 2019.

Each year, under s 285 of the *Fair Work Act 2009* (Cth) the Fair Work Commission (FWC) is required to conduct an annual wage review (AWR). Following the review the FWC then makes decisions on annual adjustments to the National Minimum Wage (NMW) and, separately, minimum wages in modern awards.

The NMW applies to persons in the national industrial relations system who are not covered by a modern award or an enterprise agreement. Estimates suggest that the NMW applies to only a small fraction (around 0.25%) of the employee workforce.[1092]

Decisions concerning adjustments to the minimum wages in modern awards are more significant. There are 121 modern awards. Estimates by the FWC suggest that around 20.7% of employees are paid exactly the award minimum – that is, they are dependent on the annual decisions of the FWC for adjustments in wages.[1093]

AWR decisions are typically made in June and come into effect in July of the same year. They, therefore, show up in the September quarterly WPI numbers – hence the spike in wage growth observed in each September quarter in Figure 37. (Note that the award contribution captured in

[1092] *Annual Wage Review 2023–24 Decision* (2024) FWCFB 3500 [27].
[1093] These estimated coverage rates are FWC estimates. See *Annual Wage Review 2023–24 Decision* (2024) FWCFB 3500 (June 2024), [29].

the WPI will predominantly reflect decisions of the FWC but will also reflect contribution from wage increases in state awards).

Although only 20.7% of employees are directly affected by FWC concerning wage adjustments in modern awards, the decisions can flow through to wages in enterprise agreements and individual agreements. For many the award serves as a floor upon which over-award or individual wage arrangements are based. There is, as a result, a high degree of correlation in the movement of award wages and movements in wage increases contained in enterprise agreements and individual arrangements. For example, the correlation coefficient associated with award wage changes and wage changes from individual agreements observed in Figure 37 is equal to 0.78 (a score of 1 means it is perfectly correlated). The correlation coefficient between wage increases under enterprise agreements and the award for the same period is 0.83.

Table 41 shows that between June 2023 and September 2023 total hourly wages increased, on average, by 2.03 percentage points. Of this increase, 33% (0.66 percentage points) came from increases covered by enterprise agreements, 36% (0.74 percentage points) came from increases agreed to under individual arrangements and a further 31% (0.63 percentage points) was from changes in awards.

In the AWR 2022–23 decision (handed down in June 2023) the FWC awarded an increase of 5.75% to modern award minimum wages. In the September quarter of 2023 the WPI increased by 2.03 percentage points. The fact that the overall growth in hourly wages was lower than the amount awarded to minimum wage workers relates, in part, to the fact that many award-reliant employees are low paid.[1094] [1095]

Between June 2024 and September 2024 total hourly wage growth was equal to 1.41 percentage points – 33% (0.46 percentage points) of the change was driven by changes enterprise agreements, 42% (0.59 percentage points) of the change was driven by individual agreements and only 26% (0.36 percentage points) of the change was from awards.[1096]

Table 41 also shows the contribution to growth in total hourly wages over the year. In the year to September 2024 total hourly wages increased by 3.5%, with the contribution from awards equal to 14.6%. The biggest contribution to wage growth is individual arrangements.

[1094] In the *Annual Wage Review 2022–23 Decision* (2023) FWCFB 3500.
[1095] The September 2023 award contribution would also have included a 15% interim pay increase awarded to staff in the aged care sector (*Annual Wage Review 2023–24 Decision* (2024) FWCFB 3500 [39]).
[1096] In the *Annual Wage Review 2023–24 Decision* (2024) FWCFB 3500 the FWC awarded an increase of 3.75% to all modern award minimum wages, effective from 1 July 2024.

Table 41: Contribution of method of pay setting to growth in total hourly wages, September 2022 to September 2024

	Enterprise agreement	Individual arrangement	Award	Total
	Percentage point change			
Sep-22	0.36	0.75	0.41	1.52
Dec-22	0.27	0.42	0.15	0.84
Mar-23	0.34	0.37	0.02	0.73
Jun-23	0.22	0.35	0.00	0.57
Sep-23	0.66	0.74	0.63	2.03
Dec-23	0.45	0.39	0.12	0.96
Mar-24	0.21	0.34	0.02	0.57
Jun-24	0.23	0.32	0.01	0.56
Sep-24	0.46	0.59	0.36	1.41
Total over the year				
Dec-22 to Sep-23	1.49	1.88	0.80	4.17
Dec-23 to Sep-24	1.35	1.64	0.51	3.50
% contribution over the year				
Dec-22 to Sep-23	35.7%	45.1%	19.2%	100%
Dec-23 to Sep-24	38.6%	46.9%	14.6%	100%

Source: ABS 6345.0 Wage Price Index, Australia, original.

Alt-text: A table showing the contributions of method of pay setting to total growth in hourly wages. In the year to September 2024 wages grew by 3.5%. The final row in the table shows that 38.6% of this 3.5% growth came from wage increases in enterprise agreements, 46.9% from wage increases in individual arrangements and 14.6% from wage increases in awards.

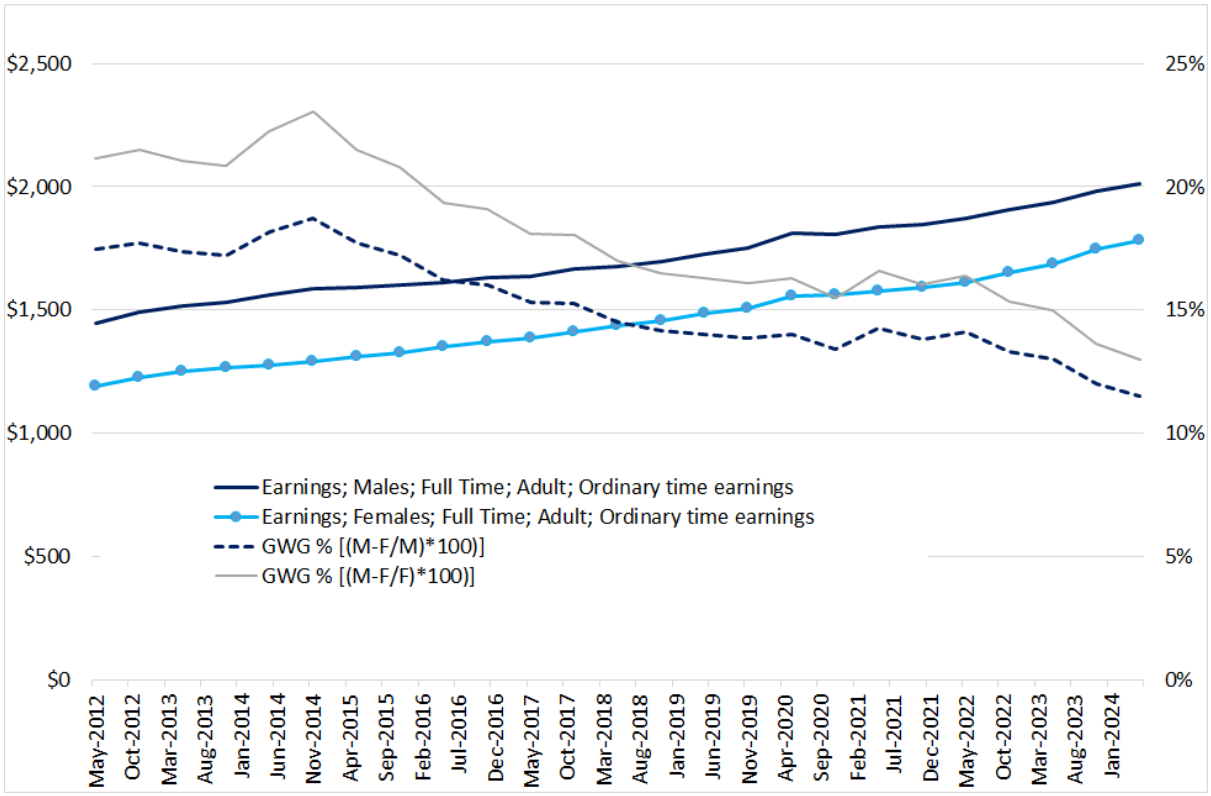
3.2 Average weekly ordinary time earnings (AWOTE) data

This section describes wage trends and outcomes using data from the Average Weekly Earnings (AWE) bi-annual survey of business units (ABS Cat No 6302.0). The latest release (at the time of writing) is for May 2024. November 2024 estimates will be released on 20 February 2025.

Figure 38 focuses on trends in the average weekly ordinary time earnings (AWOTE) of adult men and women employed full-time. Two versions of the gender wage gap (GWG) are provided for comparison purposes. The conventional measure (using male wages as the denominator) shows how much male earnings need to fall for gender equality to be achieved. The gap using female wages as the denominator (showing how much female wages need to increase for equality to be achieved) is also reported but not the focus of discussion.

The estimates in Figure 38 show that since November 2022 AWOTE of adults employed full-time has grown faster among women than men.

Figure 38: Trends in AWOTE of men and women and in the GWG



Source: ABS 6302.0 Average Weekly Earnings, Australia, Table 2 (seasonally adjusted).

Alt-text: A combination graph showing trends in average weekly ordinary time earnings of adults employed full-time and trends in the gender wage gap (GWG). The dashed GWG line shows gender differences in wages expressed as a share of male earnings. At May 2024 the GWG was equal to 11%, down from the peak of 19% in November 2014.

Table 42 summarises the changes in Figure 38. The net effect (in terms of raw wages) is that the GWG has narrowed (both measures). At May 2024 the raw GWG based on AWOTE was 11%, significantly lower than the 19% observed in November 2014.

Table 42: Changes in AWOTE and GWG since 2022

	Earnings; males; full-time; adult; ordinary time earnings	**Earnings; females; full-time; adult; ordinary time earnings**	**GWG %** **[(M-F/M)*100)]**
Nov 22 to May 2024	5.6%	7.8%	-2%
Year to May 2023	3.5%	4.8%	-1%
Year to May 2024	3.9%	5.7%	-2%

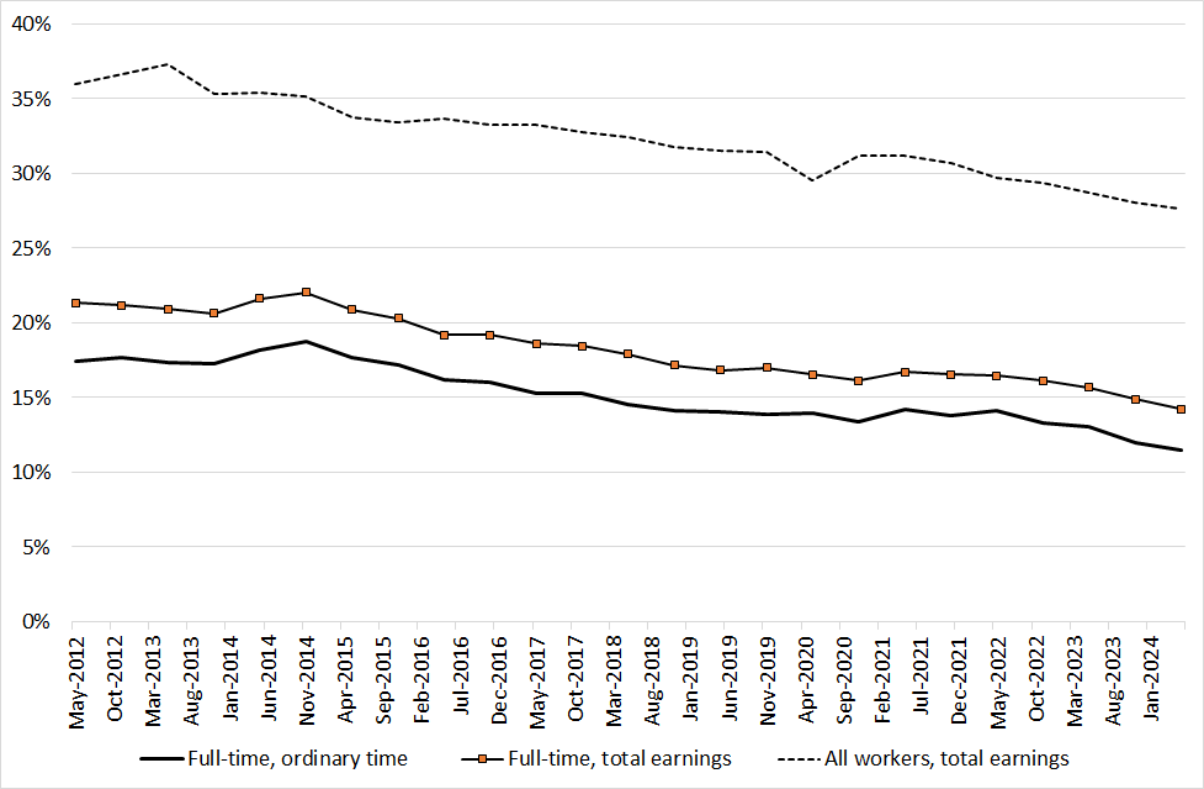
Source: ABS 6302.0 Average Weekly Earnings, Australia, Table 2 (seasonally adjusted).

Alt-text: A table showing changes in AWOTE and the GWG since late (November) 2022. AWOTE of women has increased at a faster rate than male AWOTE.

It is important to note that the AWOTE measure (and associated GWG) may be affected by compositional shifts in the labour market. For example, if tertiary educated women were to join the labour market at a faster rate than similarly educated men and if qualifications correlated with wages then the 'raw' (or unadjusted) wages of women could be expected to grow faster than the corresponding growth in male wages. For this reason, economists often talk about the 'raw' gender wage gap and the 'adjusted' gender wage gap. The adjusted gender wage gap accounts for compositional shifts in the workforce. The estimates based on ABS *Average Weekly Earnings* data show raw measures.

Ideally the wage measure would be the AWOTE of all employees and not just full-timers, particularly given the large share of women who work part-time. The ABS *Average Weekly Earnings* series does not publish an hourly wage. The GWG in the full-time labour market is, therefore, monitored as this group is more homogeneous in terms of hours worked. Figure 39 shows trends in the gap in the full-time labour market using total earnings (which includes overtime payments) and trends in the gap among all persons. At May 2024 the gender pay gap was 11.5% when measures using AWOTE; 14.2% when measuring differences in the average total weekly earnings of men and women employed full-time; and 27.7% when measuring gender differences in total earnings of employed men and women (i.e. not accounting for differences in characteristics such as hours worked).

Figure 39: Trends in the GWG based on total earnings

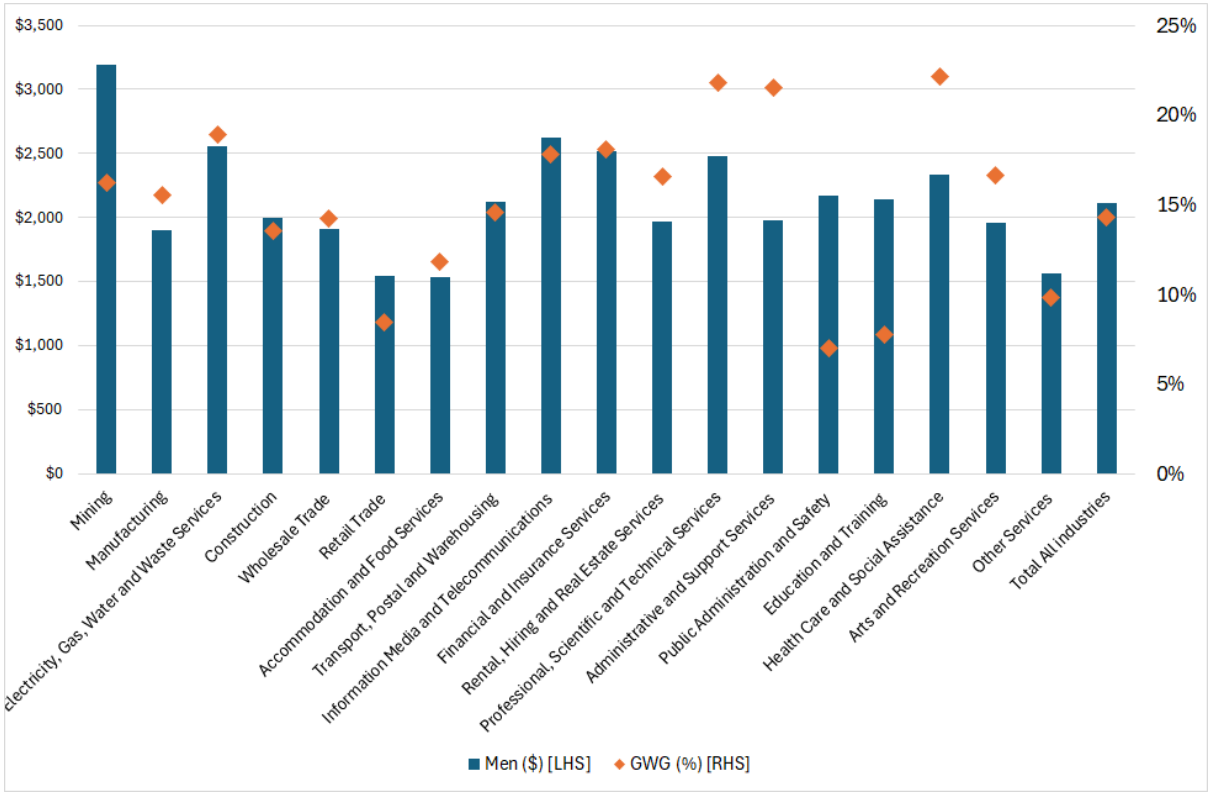


Source: ABS 6302.0 Average Weekly Earnings, Australia, Table 2 (seasonally adjusted).

Alt-text: A line graph showing trends in the gender wage gap based on full-time average ordinary weekly earnings, total earnings of full-time workers and total earnings of all workers (which includes part-timers).

In Figure 40 the focus is on average weekly total (rather than ordinary) earnings of adult men and women, disaggregated by industry. Actual earnings at May 2024 are reported for men, with the markers showing the GWG (conventional measure) within each sector. At May 2024 the overall GWG (all industries) measured using average weekly total earnings was 14.3%. The GWG was highest within the professional, scientific and technical services industry division (22.8%), followed by the administrative and support services industry (22.5%) and then the health care and social assistance sector (22.1%). It was lowest in retail trade (8.5%).

Figure 40: Average weekly total earnings of adult men employed full-time industry and the associated GWG, May 2024



Source: ABS 6302.0 Average Weekly Earnings, Australia, Tables 10B and 10E 2 (original series).

Alt-text: A combination graph showing, by industry, the average weekly total earnings of adult men employed full-time at May 2024. The markers show the GWG within each industry. Nationally, across all industries, at May 2024 the average male employed full-time earned $2,113 per week. The average women employed full-time earned $1,811 per week. The GWG was, as a result, equal to 14.3%.

3.3 Employee earnings and hours (EEH)

The ABS EEH series permits an analysis of average weekly and hourly wages by method of pay setting. At the time of writing the most recent available data are for May 2023. Table 43 shows the number of employees by pay setting method.

Table 43: Number of employees by employment status and method of pay setting, May 2023

	Award	Collective agreement	Individual arrangement	Total
NUMBER OF EMPLOYEES ('000)				
Males				
Full-time employees	537.3	1,314.5	2,365.5	4,217.3
Part-time employees	638.3	521.9	372.7	1,532.9
All employees	**1,175.6**	**1,836.4**	**2,738.2**	5,750.2
Females				
Full-time employees	434.4	1,068.3	1,296.8	2,799.5
Part-time employees	1,309.7	1,381.2	836.1	3,527.0
All employees	**1,744.2**	**2,449.5**	**2,132.9**	6,326.6
Persons				
Full-time employees	971.7	2,382.8	3,662.3	7,016.8
Part-time employees	1,948.0	1,903.1	1,208.8	5,059.9
All employees	**2,919.8**	**4,285.9**	**4,871.2**	12,076.9

Source: ABS 6306.0 Employee Earnings and Hours, May 2023. Table 1.

Alt-text: A table showing the number of employees by method of pay setting. At May 2023 there were 2.9 million workers who were paid according to the award (only) in their main job. The majority of employees are paid by an individual arrangement.

The above information is re-presented in Table 44 in percentages. It shows the size of each group as a share of total employees. For example, of all employees at May 2023, 24.2% were award-dependent workers. The majority of these award-dependent workers are part-time. Women are over-represented in the award stream while men are more likely to have their pay set via an individual arrangement.

Table 44: Distribution of employees over different methods of pay setting

	Award	Collective agreement	Individual arrangement	Total
NUMBER OF EMPLOYEES ('000)				
Males				
Full-time employees	4.4%	10.9%	19.6%	34.9%
Part-time employees	5.3%	4.3%	3.1%	12.7%
All employees	9.7%	15.2%	22.7%	47.6%
Females				
Full-time employees	3.6%	8.8%	10.7%	23.2%
Part-time employees	10.8%	11.4%	6.9%	29.2%
All employees	14.4%	20.3%	17.7%	52.4%
Persons				
Full-time employees	8.0%	19.7%	30.3%	58.1%
Part-time employees	16.1%	15.8%	10.0%	41.9%
All employees	24.2%	35.5%	40.3%	100.0%

Source: ABS 6306.0 Employee Earnings and Hours, May 2023. Table 1.

Alt-text: A table showing the distribution of employees by employment status and method of pay setting. At May 2023 58.1% of employees were full-time and 41.9% worked part-time in their main job. Of all employees, 24.2% were award-dependent workers. The majority of them were part-time employees (16.1% of all employees are part-time award-dependent workers). Women are over-represented in the award stream (14.4% of total employees are women who are award-dependent workers). Men are more likely than women to have an individual arrangement; 22.7% of all employees are men on an individual arrangement.

Table 45 shows the average hourly (total cash) earnings of men and women by method of pay setting. The final row shows the gender pay gap (expressed as a share of male earnings). Among award-dependent employees women, on average, are paid more than men. The gender pay gap among award workers shows that, at the mean, the average hourly earnings of award-dependent men would need to increase by 3.8% to equal the earnings of award-dependent women.

Women, however, are paid less than men among those covered by a collective agreement and those covered by an individual agreement. Collective agreements, on average, have a higher hourly wage than individual agreements (see Table 45)

Table 45: Average hourly total cash earnings of non-managerial employees employed full-time and paid at the adult rate, by method of pay setting, May 2023

	Award only	Collective agreement	Individual arrangement
Males	$37.00	$53.50	$51.40
Females	$38.40	$49.90	$45.80
Persons	$37.70	$51.90	$49.40
Gender pay gap (%)	-3.8%	6.7%	10.9%

Source: ABS 6306.0 Employee Earnings and Hours, May 2023. Table 7. Sample: non-managerial employees employed full-time and paid at the adult rate.

Alt-text: A table showing that at May 2023 women who were employed full-time in non-managerial roles and paid at the adult rate had an hourly wage (total cash earnings) of $49.90 if covered by a collective agreement. The corresponding hourly rate for men was $53.50. This equates to a gender pay gap of 6.7% (meaning male wages need to fall by 6.7% to equal those of women). The gender pay gap favoured women in the award stream.

Table 46 shows the average hourly (total cash) earnings of non-managerial employees employed full-time and paid the adult rate, disaggregated by sector and by employer size. In the public sector the average hourly rate for award only workers is $54.3; in the private sector it is $33.4. These differences do not account for compositional factors – for example, many professional workers are award-covered workers in the public sector. The table also shows the hourly rate by employer size. Large employers, on average, have higher hourly wages.

Table 46: Average hourly (total cash) earnings by sector, employer size and method of pay setting, May 2023

	Award only	Collective agreement	Individual arrangement
Sector			
Private sector	$33.4	$49.1	$49.1
Public sector	$54.3	$55.0	$68.6
All sectors	$37.7	$51.9	$49.4
Employer size			
Under 20 employees	$31.4	$54.0	$41.2
20–49 employees	$33.5	$47.9	$44.1
50–99 employees	$33.1	$43.3	$49.0
100–999 employees	$36.7	$49.7	$55.2
1,000 and over employees	$48.8	$54.0	$62.6
Total	$37.7	$51.9	$49.4

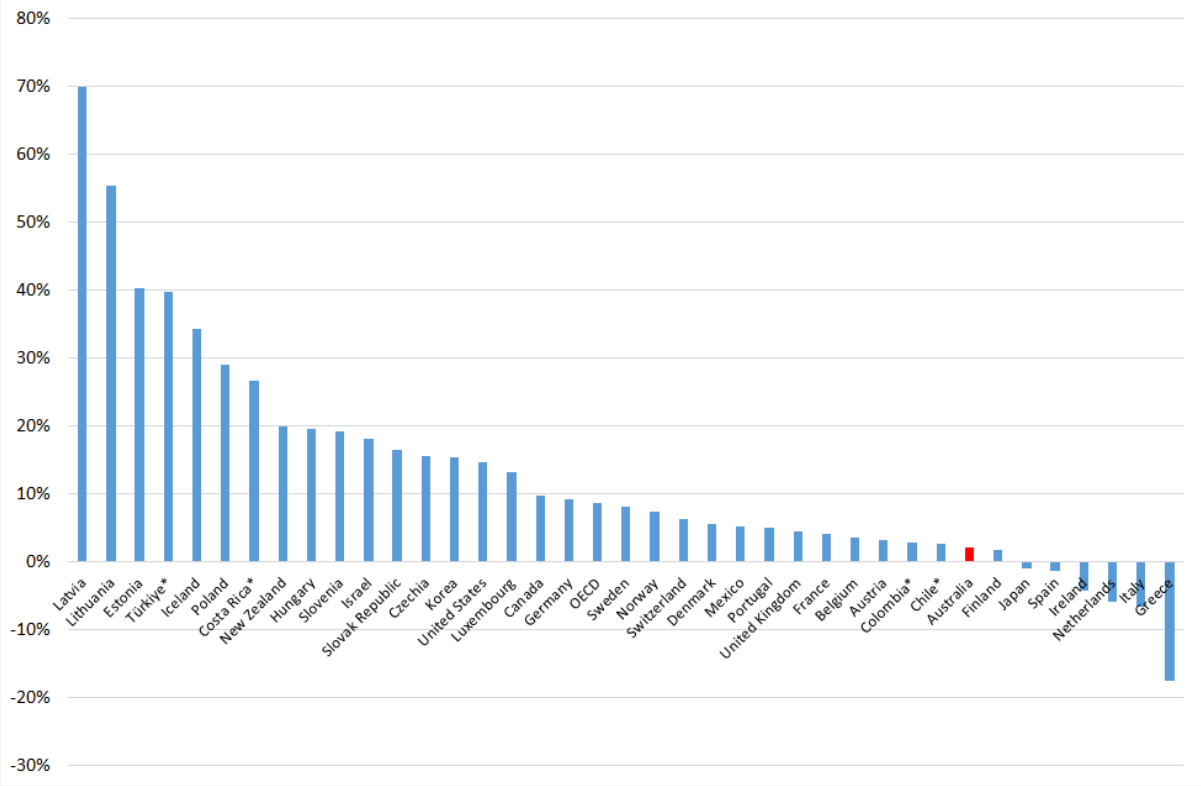
Source: ABS 6306 Employee Earnings and Hours, May 2023. Data cube No. 7 (6306ODO007). Sample: non-managerial employees employed full-time and paid at the adult rate.

Alt-text: A table showing the average hourly earnings of non-managerial employees by method of pay setting. In the private sector the average cash earnings of award reliant workers in 2023 was $33.4 per hour. In the public sector it was equal to $54.3 per hour.

3.4 OECD data

In this section OECD data are used to examine and compare annual wage growth in Australia with growth in other OECD countries. Comparisons are made over the period 2011 to 2023. Over this period the average growth in annual wages of OECD member countries was 8%. In Australia it was markedly lower at 2%.

Figure 41: Growth in average annual wages of member OECD countries, 2011 to 2023



Notes:

1. Average annual wages per full-time equivalent employee.

2. Wage growth comparisons made using estimates which are adjusted for inflation and purchasing power parity.

3. The OECD derives average annual wages by dividing the national accounts based total wage bill by the number of employees in the total economy and then weights by the ratio of average usual weekly hours per full-time employee to that of all employees to obtain the full-time equivalent measure.

Source: OECD Data Explorer, Average Annual Wages.

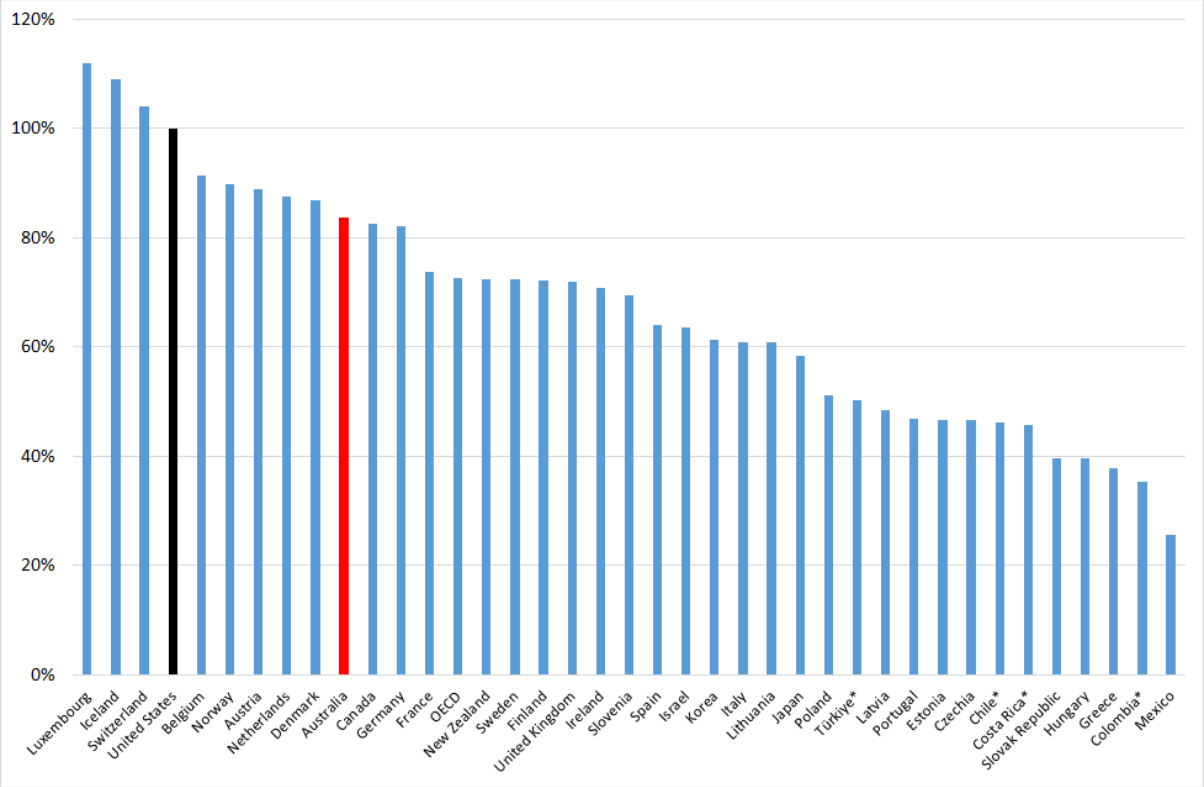
Alt text: A bar chart showing growth in average annual wages of OECD countries between 2011 and 2023 (indexed to 2011). The average OECD growth rate was 8%. Annual average wage growth in Australia over this period was below the OECD average at 2%.

Australia's relatively slower wage growth may relate, in part, to the fact that wages in Australia are higher than average – which means growth is coming off a higher base.

In Figure 42 wage data for 2023 from OECD member countries are used to rank the average annual wages of member countries. Comparisons are made using estimates which are adjusted for inflation and purchasing power. Estimates are benchmarked to the United States. The comparison shows that average annual wages in Australia are above the OECD average but

below several countries which had higher wage growth (at Figure 41) – for example, Belgium, Norway and Austria.

Figure 42: Average annual wage by OECD member country, benchmarked to average annual wages in the United States, 2023



Notes:

1. Average annual wages per full-time equivalent employee

2. Wage comparisons made using estimates which are adjusted for inflation and purchasing power parity.

3. The OECD derives average annual wages by dividing the national accounts based total wage bill by the number of employees in the total economy and then weights by the ratio of average usual weekly hours per full-time employee to that of all employees to obtain the full-time equivalent measure.

Source: OECD Data Explorer, Average Annual Wages, 2023.

Alt text: A bar chart showing the relative average annual wages of OECD member countries. Wages are benchmarked to the United States (US). In 2023 average annual wages were above those of the US in Luxembourg, Iceland and Switzerland and below in countries such as Norway, Denmark, Australia and Canada. In Australia the average annual wage in 2023 was 84% of that in the US. The OECD average was 73% that of the US. Average annual wages in Australia are high relative to the OECD average.

3.5 HILDA data

In this section the descriptive analysis draws on the Household, Income and Labour Dynamics in Australia (HILDA) survey. Unless otherwise stated the analysis in this section is restricted to employees aged 21 to 64.

HILDA, as previously noted, is a longitudinal survey of household members aged 15 and over and is, after weighting, nationally representative of individuals. It contains rich information on individual characteristics, including their qualifications, their work history, their wages and their

socioeconomic characteristics. The HILDA survey commenced in 2001 and at the time of writing there are 23 waves of data (covering the period 2001 to 2023). A particular advantage of HILDA is that, since wave 8 (2008), the survey has collected information on method of pay setting.

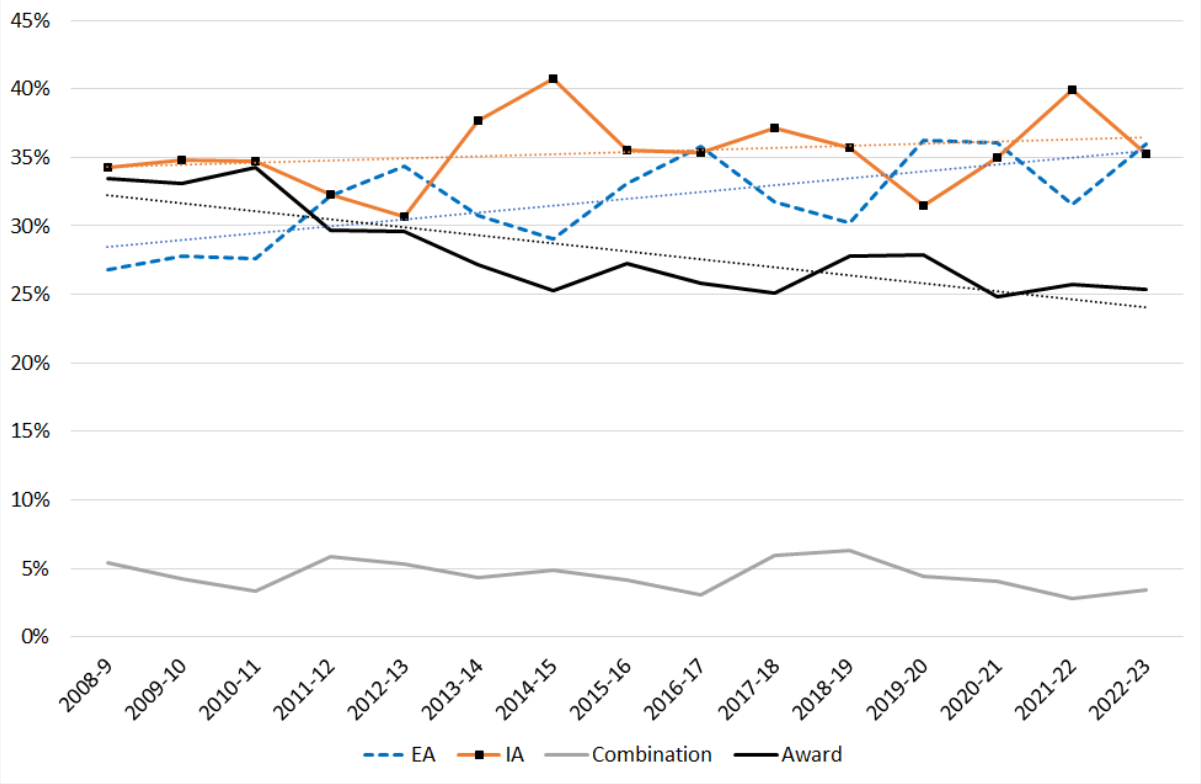
3.5.1 Method of pay setting

Figure 48 shows trends in the various pay setting methods between 2008 and 2023. The data, disaggregated by gender, is presented in Table 47.

As shown, the share of employees paid by the award (only) has been steadily declining, while the share of employees covered by a collective agreement has been steadily increasing. The majority of male employees are paid according to an individual arrangement (39% in 2022–23), with only 25% paid by the award. In comparison, among women, around one-third are paid by a collective agreement, one-third by an individual arrangement, and one-third by the award (Table 47).

Table 48 describes trends in methods of pay setting disaggregated by employment status (full-time and part-time). Part-timers, as shown, are much more likely to be award reliant.

Figure 43: Trends in method of pay setting, 2008–09 to 2022–23



Source: Table 28.

Alt-text: A line graph showing trends in the share of employees paid according to a particular method of payment. The share who are award reliant has been trending down. In the 2022–23 period 25% of employees were award reliant. The share paid according to an enterprise agreement has been trending up, while the share paid according to an individual arrangement has been fairly steady.

Table 47: Trends in methods of pay setting of employees, disaggregate by gender, 2008-9 to 2022-23

	Persons				Men				Women			
	CA	IA	Combination	Award	EA	IA	Combination	Award	EA	IA	Combination	Award
	%				%				%			
2008–9	26.8	34.3	5.4	33.5	27.9	39.7	6.1	26.2	26.0	30.2	4.9	39.0
2009–10	27.8	34.8	4.3	33.1	30.0	38.7	5.0	26.3	26.2	32.0	3.7	38.2
2010–11	27.6	34.8	3.4	34.3	30.4	40.5	3.7	25.4	25.5	30.3	3.1	41.2
2011–12	32.2	32.3	5.9	29.7	34.6	39.4	4.9	21.1	30.1	26.1	6.7	37.1
2012–13	34.4	30.7	5.4	29.6	35.9	40.0	4.3	19.8	33.1	23.2	6.2	37.5
2013–14	30.8	37.7	4.4	27.2	30.5	46.3	4.6	18.6	31.0	31.5	4.2	33.4
2014–15	29.1	40.8	4.9	25.3	28.0	44.7	4.4	23.0	29.9	37.9	5.3	27.0
2015–16	33.1	35.5	4.2	27.2	34.8	37.2	2.4	25.7	31.8	34.3	5.6	28.4
2016–17	35.8	35.3	3.1	25.8	40.4	35.7	2.2	21.7	32.4	35.0	3.7	28.9
2017–18	31.7	37.2	6.0	25.1	33.0	38.9	8.4	20.6	30.6	36.5	4.0	29.0
2018–19	30.3	35.7	6.3	27.8	30.0	37.1	8.7	24.2	30.4	34.5	4.2	30.9
2019–20	36.2	31.5	4.4	27.9	38.2	33.2	4.6	24.1	34.7	30.1	4.3	30.9
2020–21	36.1	34.9	4.1	24.9	39.5	37.3	4.2	19.0	33.3	33.0	4.0	29.7
2021–22	31.5	40.0	2.8	25.7	34.2	42.2	3.5	20.1	29.4	38.2	2.2	30.3
2022–23	36.0	35.2	3.4	25.3	36.8	38.8	4.9	19.5	35.4	32.6	2.4	29.6

Notes: 1. Sample consists of respondents aged 21 to 64 who are employees, have an observable wage and work more than 5 hours per week in their main job and fewer than 60 hours per week in their main job. It excludes those who do not know how their pay is set or who refused to answer. It also excludes a small share of respondents whose pay is set by some other means; 2. Data are pooled for each of 2 waves to increase the sample size; 3. CA = collective (enterprise) agreement; IA = individual arrangement; Combination = combination of CA and IA; Award = award only; 4. Estimates weighted to reflect population totals.

Source: Household, Income and Labour Dynamics in Australia (HILDA) Survey, waves 8 to 23.

Table 48: Trends in methods of pay setting of employees, disaggregate by hours employed in main job, 2008–09 to 2022–23

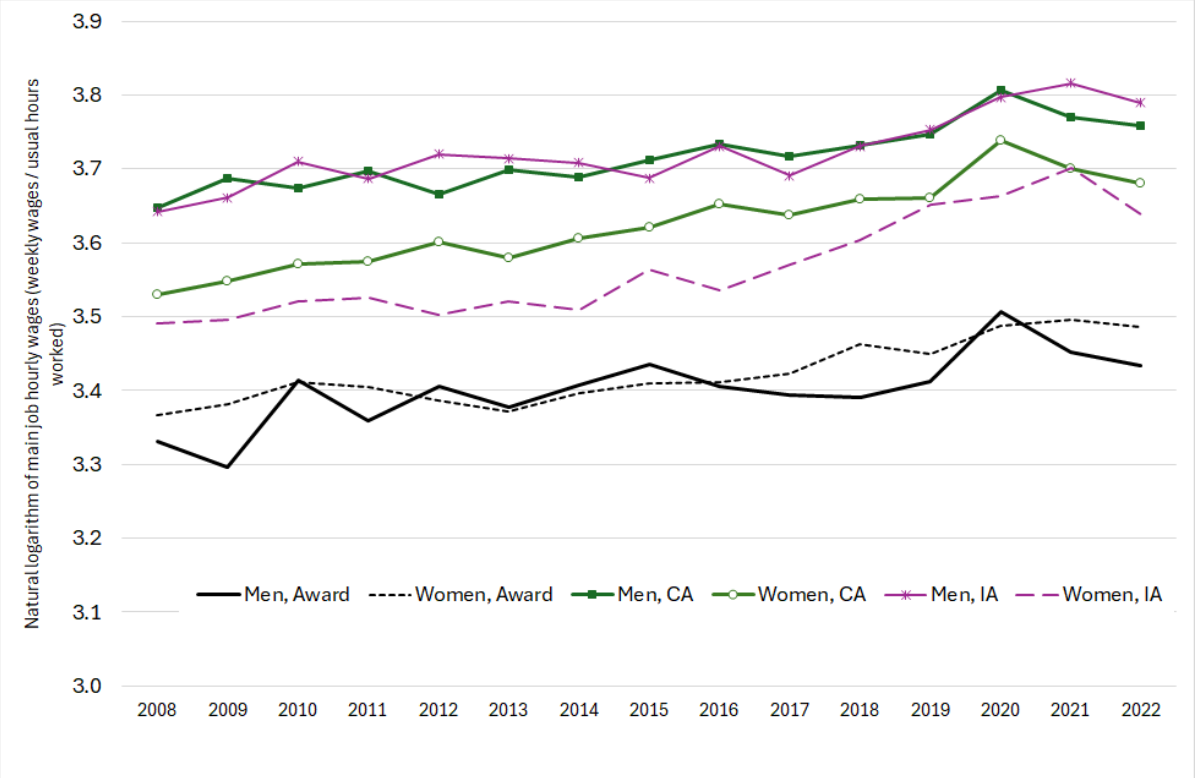
	Employed full-time				Employed part-time			
	CA	IA	Combination	Award	EA	IA	Combination	Award
	%				%			
2008–09	32.1	39.2	5.1	23.6	21.7	29.4	5.7	43.2
2009–10	34.9	36.7	5.1	23.4	21.5	33.2	3.5	41.8
2010–11	33.1	36.4	4.5	26.0	23.1	33.4	2.4	41.1
2011–12	32.3	38.7	6.0	23.1	32.2	27.1	5.8	34.9
2012–13	33.8	35.8	5.3	25.1	34.8	26.8	5.4	33.0
2013–14	31.5	40.9	4.5	23.2	30.2	35.3	4.3	30.2
2014–15	30.9	45.8	4.8	18.4	27.7	37.0	4.9	30.3
2015–16	35.8	40.1	5.4	18.7	31.2	32.3	3.4	33.1
2016–17	36.8	39.2	4.9	19.1	35.1	32.8	1.9	30.2
2017–18	33.8	40.0	5.5	20.8	30.4	35.4	6.3	27.8
2018–19	33.2	37.4	5.6	23.8	28.4	34.6	6.7	30.3
2019–20	40.8	34.0	4.3	20.9	33.2	29.8	4.5	32.5
2020–21	40.7	40.8	2.1	16.3	32.5	30.5	5.6	31.4
2021–22	36.2	47.1	1.8	14.9	28.0	34.4	3.5	34.1
2022–23	40.1	40.6	4.3	15.0	32.8	31.1	2.8	33.3

Notes: 1. Sample consists of respondents aged 21 to 64 who are employees, have an observable wage and work more than 5 hours per week in their main job and fewer than 60 hours per week in their main job. It excludes those who do not know how their pay is set or who refused to answer. It also excludes a small share of respondents whose pay is set by some other means; 2. Data are pooled for each of 2 waves to increase the sample size; 3. CA = collective (enterprise) agreement; IA = individual arrangement; Combination = combination of CA and IA; Award = award only; 4. Estimates weighted to reflect population totals; **Source:** Household, Income and Labour Dynamics in Australia (HILDA) survey, waves 8–23.

Alt-text: A table showing how pay was set for full-timers and part-timers between 2008 and 2023. In 2023, 15% of full-timers had their pay set by the award only. This compares to 33% among part-timers.

Figure 44 shows trends in the hourly wages by gender and method of pay setting. Those paid exactly the award rate, on average, receive lower hourly earnings than those on a collective or individual agreement.

Figure 44: Trends in the natural logarithm of hourly wages by method of pay setting, Australia, 2008 to 2022



Notes:

1. Sample consists of respondents aged 21 to 64 who are employees, have an observable wage and work between 5 and 60 hours per week in their main job and have observable data on method of pay setting.

2. Estimates are weighted to reflect population totals.

3. The outcome variable is the natural logarithm of hourly earnings in the main job in 2022 prices.

Source: HILDA, waves 8–22.

Alt-text: A line chart showing trends in the natural logarithm of hourly wages (in 2022 prices). Wage growth between 2008 and 2022 is slowest among men who are paid exactly according to the award and highest among women who are paid according to a collective agreement.

Table 49 provides further insight into the nature of pay setting in Australia. In columns 1 and 2 the sample is constrained to employees who work full-time in their main job. Columns 3 and 4 present summary statistics for those employed part-time. The sample excludes full-time students.

Estimates in column 1 show that, in the period 2012–22, 37.7% of male employees working full-time had their pay set by a collective agreement. The corresponding share among women was lower at 32.7%.

Columns 3 and 4 show that persons working part-time are more likely than those working full-time to be paid according to the award. Part-timers are also more likely to be casual (38.5% of men and 36.1% of women).[1097]

[1097] In the *Annual Wage Review 2023–24 Decision* (2024) FWCFB 3500, the FWC refers to an analysis of the composition and characteristics of the modern award reliant workforce based on EEH data. In their summary at [30] they note that modern award reliant employees are predominantly female, predominantly work part-time hours, are disproportionately casual, are younger, are more likely to be employed by a small business and are more likely to be low paid.

Table 49: Descriptive statistics concerning employees in Australia, 2012–2022 (pooled)

	Employed full-time main job (>=35 hours per week)		Employed part-time main job (fewer than 35 hours per week)	
	Men	**Women**	**Men**	**Women**
	(1)	(2)	(3)	(4)
Weekly wage main job (in 2022 prices)	$1,766.7	$1,476.6	$977.6	$844.1
	($1,091.8)	($750.7)	($805.9)	($589.7)
Natural logarithm of weekly wage in main job (in 2022 prices)	7.4	7.2	6.7	6.6
	(0.4)	(0.5)	(0.6)	(0.6)
Paid by an award	16.0%	22.5%	25.4%	33.5%
Covered by a collective agreement	37.7%	32.7%	31.0%	32.0%
Covered by an individual agreement	42.1%	39.8%	36.9%	30.1%
Paid by some other arrangement	4.2%	5.0%	6.8%	4.5%
Permanent employee	79.1%	77.5%	50.4%	52.9%
Fixed-term employee	9.5%	14.8%	11.1%	11.1%
Casual employee	11.4%	7.7%	38.5%	36.1%
Highest qualification a diploma/certificate	35.7%	28.9%	22.6%	30.6%
Highest qualification an undergraduate degree	20.1%	22.9%	25.6%	27.2%
Highest qualification a postgraduate degree	21.3%	25.4%	29.8%	21.8%
Age	39.9	37.5	38.4	40.8
	(11.7)	(11.8)	(12.2)	(12.1)
Married or living in a de facto relationship	67.3%	59.0%	65.3%	67.1%
Has a dependent child	35.0%	22.3%	33.9%	36.0%
Born in a main English-speaking country	8.5%	16.1%	5.6%	8.5%
Born in a non-English-speaking country	20.5%	20.7%	33.2%	18.3%
Employed in the private sector	71.8%	67.9%	76.6%	69.5%
Member of a trade union or employee association	28.2%	31.2%	30.5%	27.5%
Observations	1,566	980	833	2,372

Notes:

1. Sample consists of respondents aged 21 to 64 who are employees, have an observable wage, work between 5 and 60 hours per week in their main job, and have observable data on method of pay setting.

2. Estimates are weighted to reflect population totals.

3. Standard deviation in parentheses for continuous variables only.

Source: HILDA, waves 12–22.

Alt-text: A table describing the characteristics of persons employed full-time and those employed part-time, disaggregated by gender. Column 2 shows that in 2012–22 around 22.5% of women who were full-time were paid by the award. This compares to 16% among male full-time employees. Among part-time workers, around 33.5% of women were paid by the award. The share of award-reliant workers among men employed part-time was 25%.

Table 50 shows the industry coverage or usage of the various methods of pay setting. Columns 1 and 2 for collective agreements (CAs) show that in both periods studied (2012 and 2022), of those covered by a CA, the largest group was health care and social assistance employees. The second largest group in both periods was in the education and training industry. Individual arrangements featured strongly among professional, scientific and technical service workers.

Table 50: Distribution of pay setting methods across industries, 2012 and 2022

	CA		IA		Award	
Industry of main job	**2012**	**2022**	**2012**	**2022**	**2012**	**2022**
Agriculture, forestry and fishing	0.2%	0.3%	1.3%	1.6%	2.2%	1.7%
Mining	3.3%	1.7%	3.1%	4.5%	0.4%	0.4%
Manufacturing	6.7%	4.3%	10.8%	11.9%	6.4%	6.7%
Electricity, gas, water and waste services	1.6%	1.7%	1.1%	0.9%	0.4%	0.4%
Construction	4.8%	3.7%	8.6%	11.0%	4.5%	5.6%
Wholesale trade	1.7%	1.1%	5.9%	4.2%	2.3%	1.5%
Retail trade	7.7%	7.5%	8.9%	6.6%	16.3%	15.8%
Accommodation and food services	3.7%	3.0%	5.6%	4.7%	12.0%	15.6%
Transport, postal and warehousing	6.3%	5.8%	3.9%	3.4%	4.6%	4.4%
Information media and telecommunications	1.8%	1.7%	3.4%	1.3%	0.7%	0.4%
Financial and insurance services	3.8%	5.4%	6.5%	5.9%	0.8%	0.8%
Rental, hiring and real estate services	0.4%	0.3%	1.5%	1.8%	1.0%	0.5%
Professional, scientific and technical services	3.4%	2.9%	15.6%	14.9%	2.5%	2.4%
Administrative and support services	2.5%	1.2%	3.2%	2.1%	2.9%	2.1%
Public administration and safety	14.0%	14.3%	2.0%	1.9%	5.9%	4.5%
Education and training	16.2%	19.6%	4.8%	5.1%	11.6%	9.8%
Health care and social assistance	18.5%	22.0%	8.1%	12.1%	20.4%	22.7%
Arts and recreation services	1.6%	1.6%	1.6%	2.1%	1.4%	1.8%
Other services	2.0%	2.0%	4.1%	4.0%	3.7%	3.0%
Column total	100.0%	100.0%	100.0 %	100.0 %	100.0%	100.0%
Share of total employees covered by method of pay setting, by year	32.0%	31.6%	37.2%	38.7%	26.2%	24.8%

Notes:

1. Sample consists of all employees.

2. Information concerning those paid by a combination of pay methods is not included. In 2012 and 2022 the shares of employees in the combined group were, respectively, 4.6% and 5.0%.

Source: HILDA waves 12 and 22.

Alt-text: A table showing the industry distribution of employees by method of pay setting. Comparisons are made between 2012 and 2022. Focusing on award reliant workers. In 2012, 20.4% of award-reliant workers were in the health care and social assistance sector. By 2022 this share had increased to 22.7%.

Employees paid exactly by the award are typically found in the health care and social assistance sector, retail trade sector and accommodation and food services sector. Indeed, estimates by the FWC suggest that award-reliant employees are found in 4 main sectors: accommodation and food services, health care and social assistance, retail trade, and administrative and support services. The 4 sectors are said to account for over 65% of all modern award-reliant employees. The FWC also notes that over 63% of all modern award-reliant employees are covered by just 10 of the 121 modern awards that are currently in operation. In other words, award-reliant employees are typically concentrated in just a few sectors and typically covered by just a few set of awards.[1098]

Table 51 draws on HILDA data from waves 12 to 22 and regression analysis to examine the association between method of pay setting and wages while controlling for a range of other factors known to affect wages. The sample is restricted to persons employed full-time in their main job and the dependent variable is the natural logarithm of weekly wages in the main job in 2022 prices. A prime reason for focusing only on employees working full-time in their main job is that it helps minimise some of the confounding effects that may be associated with underemployment.[1099]

In addition to controlling for method of pay setting, the wage regression controls for other characteristics known to affect wages (e.g. qualifications, trade union membership, geographic location, migrant status). The reference group consists of employees who hold a permanent appointment and who are paid exactly by the award. The coefficients on the 'collective agreement' variable in columns 1 and 2 show that, relative to those paid exactly according to the award, those covered by a collective agreement earn 13.9% more. The wage premium (or penalty) is given by a transformation of the coefficient as follows: [exp(coef)-1]*100. Those covered by an individual agreement or arrangement earn around 15% more than those paid exactly according to the award.

The estimates in column 1 also show that men on a fixed-term contract earn around 14% more per week than their permanent contracts and there is no significant difference in the earnings of men engaged on a permanent contract and those working on a casual arrangement.[1100] Column 2 estimates for women employed full-time shows that those on a casual contract earn around 21% less (exp[-0.24)-1*100) than their counterparts on a permanent contract.

Columns 3 and 4 of Table 51 present the results using a panel estimator (fixed effects estimator). The advantage of this approach is that it controls for time invariant unobservable characteristics that may correlate with wages (e.g. ability and preferences regarding full-time work). The downside of this approach is that identification of the wage effect follows a transition from one characteristic to another. The lack of any statistical relationship between contract type and wages in columns 3 and 4 may reflect the fact that, within the sample of full-timers, those covered by a collective agreement tend to remain covered by a collective agreement from one year to the next (around 82% of men and 74% of women have no change in collective agreement status from one year to the next).

[1098] Annual Wage Review 2023-24 Decision [2024] FWCFB 3500, [6].
[1099] A similar approach is adopted in G. Kalb and J. Meekes, 'Wage growth distribution and decline among individuals', *Reserve Bank of Australia Conference on Low Wage Growth,* 2019, 6. Available from: <www.rba.gov.au/publications/confs/2019/pdf/rba-conference-2019-kalb-meekes.pdf>. Last accessed 26 November 2024.
[1100] The definition of 'casual' applied here follows the Australian Bureau of Statistics. A person is defined as casual if they *do not* have paid leave entitlements.

Table 51: Correlates of real weekly wages, estimates from OLS and Fixed Effects regression

	OLS Men	OLS Women	FE Men	FE Women
	(1)	(2)	(3)	(4)
Collective agreement	0.132***	0.133***	0.042	0.010
	(0.042)	(0.048)	(0.032)	(0.038)
Individual agreement	0.146***	0.149***	0.051	0.017
	(0.042)	(0.048)	(0.037)	(0.036)
Other pay-setting arrangement	0.054	0.066	0.075	0.075
	(0.065)	(0.079)	(0.046)	(0.065)
Fixed-term contract	0.132**	0.054	-0.013	-0.048
	(0.054)	(0.046)	(0.034)	(0.037)
Casual contract	-0.064	-0.240*	0.099*	-0.178***
	(0.050)	(0.124)	(0.060)	(0.067)
Observations	1,566	980	1,566	980
Unique individuals			769	589

Notes:

1. Sample consists of respondents aged 21 to 64 who are employees, have an observable wage and work more than 5 hours per week in their main job and fewer than 60 hours per week in their main job, and have observable data on method of pay setting.

2. Dependent variable is the natural logarithm of main job weekly wages in 2022 prices.

3. Columns 1 and 2 are based on ordinary least squares (OLS) while columns 3 and 4 present estimates using a fixed effects panel estimator.

4. OLS estimates weighted to reflect population values.

5. Other controls in the regression include 2 dummies for type of employment (fixed term or casual; the reference group is permanent), 3 dummies for highest education attained (the reference group is those with no post-school qualifications), age and its square, marital status, dependent children, country of birth (2 dummies), sector of employment, trade union membership, controls for geographic area of residence (urban, other urban and state fixed effects), the unemployment rate and year fixed effects.

6. Robust standard errors in parentheses, significance given by: *** p<0.01, ** p<0.05, * p<0.1.

Source: HILDA, waves 12–22.

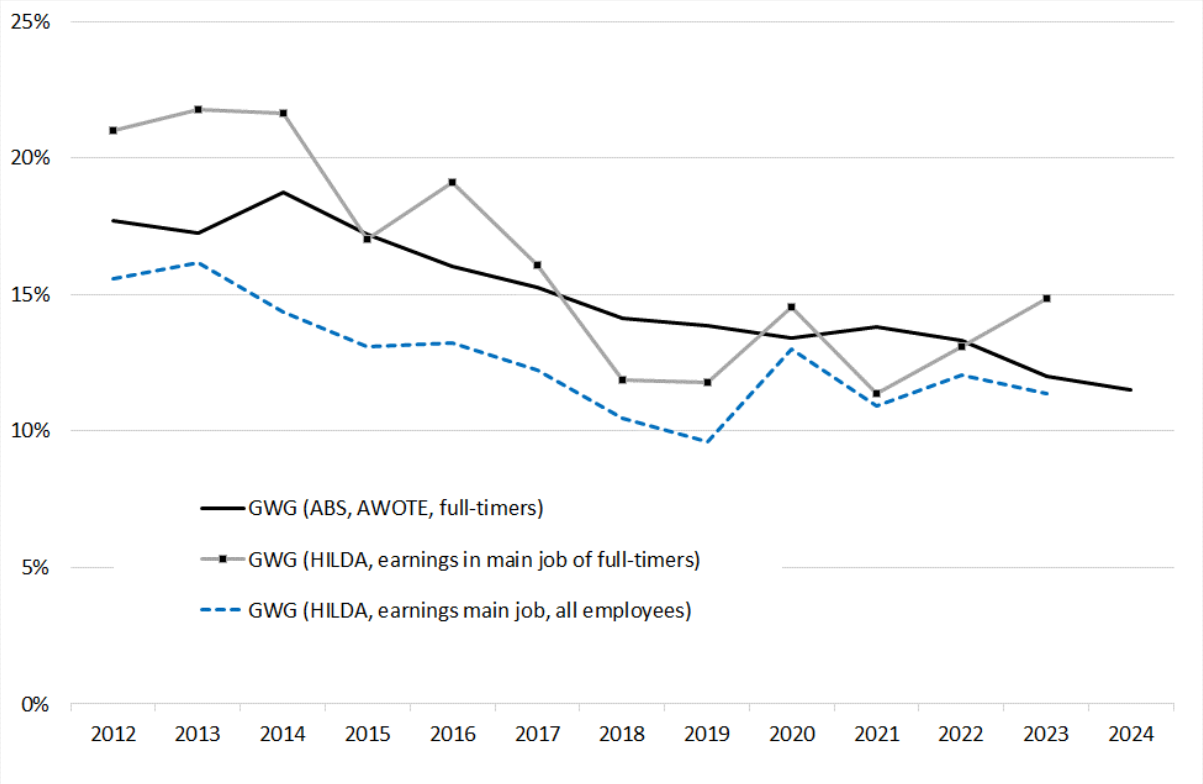
Alt-text: A table of results from a multiple regression showing the effect or association of method of pay setting with the weekly wages of full-time employees in Australia. Columns 1 and 2 based on ordinary least squares shows that persons covered by a collective agreement earn significantly more than their counterpart paid exactly by the award.

3.5.2 Gender wage gap

Earlier it was noted that a large share of employed women (43%) work part-time. The raw GWG, however, is typically measured using AWOTE and because the ABS series used to generate this gap does not publish hourly data the focus is restricted to outcomes in the full-time labour market.

To extend this analysis, Figure 45 compares the GWG using AWOTE (full-timers) with measures of the GWG using HILDA data. The GWG generated using the HILDA data is based on hourly earnings and a sample that includes part-timers as well as full-timers.

Figure 45: Trends in the gender wage gap among full-timers and all employees



Notes:

1. Sample consists of employees aged 21 to 64

2. Estimates from the Household, Income and Labour Dynamics in Australia (HILDA) survey (for waves 8–23) are weighted to reflect population totals and are based, separately, on hourly earnings (main job) among full-timers (persons who work 35 or more hours per week) and all employees.

3. The gender wage gap (GWG) using data from the Australian Bureau of Statistics average weekly ordinary time earnings (AWOTE) series for full-timers (only) is shown for comparison. This series is based on the November estimates of each year (the exception is 2024, which uses the May estimates).

Alt-text: A line chart comparing the gender wage gap (GWG) measured using ABS data and HILDA data. When part-timers are included the overall GWG is lower.

The HILDA estimates reported in Figure 45 are more volatile than the AWOTE estimates, reflecting the smaller sample size. However, as shown, the trend across both series is similar. When part-timers are included the GWG tends to be less, consistent with a lower overall GWG in the part-time labour market.

The GWG measured by comparing the average hourly wage of men and women is commonly also referred to as the 'raw' GWG. It is 'raw' in the sense that it does not control for compositional effects.

Table 52 reports the results following the estimation of a wage equation. The dependent variable is the natural logarithm of hourly earnings in the main job. The GWG is given by the coefficient on a female dummy variable. In the OLS estimates the coefficient is equal to negative 0.114. This translates to a GWG of 10.8% (computed as: [exp(coef)-1]*100). The highly statistically significant positive coefficient on the variable 'female*2023' (which is the female dummy interacted with a dummy for 2023) shows that in 2023 the GWG converged. The resultant 2023 GWG is the sum of the first 2 coefficients (i.e. -0.114 + 0.047 = -0.067). After exponentiating (exp) this coefficient the resultant gender wage gap in 2023 is equal to -6.5%. In other words, OLS estimates show that, after controlling for factors known to correlate with wages such as education, experience, birthplace, marital status, children, part-time and casual status, union membership and method of pay setting, women, on average, earn 6.5% less than men.

The column 3 results are estimated using a fixed effects regressor. The advantage of this approach is that it controls for time-invariant characteristics. If factors such as personality, ability and characteristics that correlate with preferences to be in the labour market or not are assumed to be time-invariant then the fixed effects estimates have the advantage of also controlling for selection effects. The coefficient estimates differ from OLS, as they are identified by changes in the observed characteristics. For example, the 0.025 coefficient on the union membership variable shows that becoming a union member is associated with a 2.5% increase in hourly wages. Similarly, the negative coefficient on award shows that employees who become award reliant receive hourly wages which are, on average, 3.5% lower than counterparts who are paid according to an individual agreement. The coefficient on 'female' is not estimated, as this is a stable characteristic, as is birthplace. The 'Female*2023' coefficient shows that in 2023 there was a GWG and based on the fixed effects estimates it was equal to 2.4%.

Table 52: The gender wage gap using regression analysis

	(1) **OLS**	(2) **Random Effects**	(3) **Fixed Effects**
Female (GWG)	-0.114***	-0.136***	--
	(0.008)	(0.006)	
Female*2023	0.047***	0.018***	-0.024***
	(0.009)	(0.005)	(0.006)
Highest qualification – diploma or certificate	0.067***	0.057***	0.037***
	(0.009)	(0.006)	(0.009)
Highest qualification – bachelor degree or higher	0.318***	0.278***	0.130***
	(0.010)	(0.007)	(0.012)
Actual experience	0.020***	0.029***	0.041***
	(0.001)	(0.001)	(0.001)
Actual experience squared	-0.0003***	-0.0004***	-0.001***
	(0.000)	(0.000)	(0.000)
Migrant, born in a main English-speaking country	0.052***	0.026**	--
	(0.013)	(0.010)	
Migrant, born in a non-English-speaking country	-0.044***	-0.050***	--
	(0.012)	(0.009)	
Married or living as de facto	0.058***	0.043***	0.036***
	(0.008)	(0.004)	(0.005)
Has dependent child	0.061***	0.020***	0.004
	(0.007)	(0.004)	(0.004)
Employed in the public sector (main job)	0.105***	0.068***	0.052***
	(0.009)	(0.005)	(0.006)
Works part-time in main job	-0.033***	0.087***	0.108***
	(0.010)	(0.004)	(0.005)
Employed under a casual contract, main job	-0.101***	-0.021***	-0.000
	(0.012)	(0.006)	(0.007)
Part-time* casual interaction	0.075***	0.018**	0.010
	(0.015)	(0.008)	(0.009)
Employed under a fixed-term contract	0.019**	0.001	0.004
	(0.009)	(0.004)	(0.004)
Union member	0.053***	0.031***	0.025***
	(0.008)	(0.004)	(0.005)
Award reliant	-0.175***	-0.061***	-0.035***
	(0.008)	(0.004)	(0.004)
Paid according to a collective agreement	-0.061***	-0.012***	-0.006*
	(0.007)	(0.004)	(0.004)
Constant	3.328***	3.188***	3.008***
	(0.012)	(0.008)	(0.011)
Observations	113,199	113,199	113,199
R-squared (%)	25.0%	21.2%	10.5%
Number of unique individuals		17,494	17,494

Notes:

1. Dependent variable is the natural logarithm of hourly earnings in main job in 2023 prices.

2. Sample: employees aged 21 to 64.

3. Time period covered: 2008 to 2023.

4. Column 1 shows OLS estimates for pooled sample. Column 2 shows panel estimates using a random effects regressor. Column 3 shows estimates generated using a fixed effects estimator.

5. The reference group is men who completed no post-school qualifications, are not partnered, have no dependent children, are Australian born, work in the private sector, are employed full-time, hold a permanent position, are not union members and are paid according to an individual agreement.

Appendix 2 – Federal Workplace Agreements Database

The federal Workplace Agreements Database (WAD) tracks information on enterprise agreements made under the *Fair Work Act 2009* (Cth). The WAD contains detailed information on average annualised wage increases (AAWI) in enterprise agreements, agreement duration and how wage increases are distributed over the term of the agreement. Information may be disaggregated by industry, sector and agreement type (e.g. single enterprise agreement, multi-employer agreement). At the time of writing the most recent period covered was the September quarter of 2024 (released 12 December 2024).

Table 53 shows trends in number of new approved agreements (column 2) and new approved non-union agreements (column 1). The difference between the columns is the number of new approved union agreements. As a proportion of all agreements, the share of non-union agreements being approved is around one-quarter. Non-union new approved agreements cover around 6% of employees, although the share varies across the years. In 2022 the share was 3.7%.

Table 53: Number and coverage of new non-union agreements, 2012 to 2024

	No of approved non-union agreements (annual)	No of all approved agreements (annual)	% of non-union vs all approved agreements	No of employees covered by approved non-union agreements	No of employees covered by all approved agreements	% of employees covered by approved non-union agreements
	(1)	(2)	(3)	(4)	(5)	(6)
2012	1,854	8,229	22.5%	57,858	1,026,007	5.6%
2013	1,874	6,697	28.0%	61,819	914,029	6.8%
2014	1,763	5,671	31.1%	69,356	803,224	8.6%
2015	1,622	4,998	32.5%	64,671	643,785	10.0%
2016	1,389	5,196	26.7%	43,658	663,126	6.6%
2017	975	3,542	27.5%	32,413	652,206	5.0%
2018	865	3,864	22.4%	25,547	669,010	3.8%
2019	1,439	5,283	27.2%	48,641	933,338	5.2%
2020	734	3,281	22.4%	23,159	521,559	4.4%
2021	793	4,363	18.2%	29,944	546,472	5.5%
2022	797	4,166	19.1%	30,913	837,696	3.7%
2023	919	4,111	22.4%	50,629	843,182	6.0%
2024 (to Q3)	610	3,158	19.3%	25,701	981,437	2.6%
Total 2012–2023	15,450	61,626	25.1%	555,763	9,694,035	5.7%
Average 2012–2023	1,252	4,950	25.3%	44,884	754,470	5.9%

Note: Only three-quarters of data are available for 2024.

Source: DEWR Workplace Agreements Database.

Table 54 shows the coverage of 'current' (includes non-expired agreements). Around one-third of all current agreements are non-union. The latter cover around 7% of employees currently covered by a collective agreement.

Table 54: Number and coverage of current non-union collective agreements, December of each year

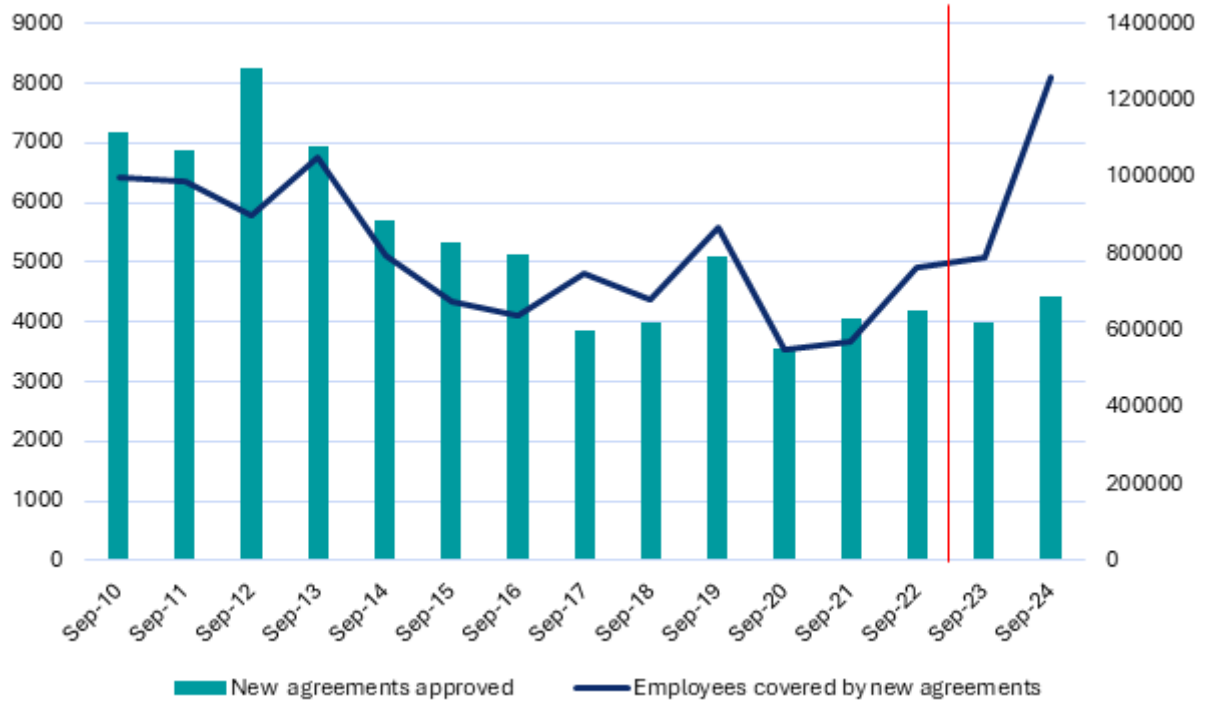
	No of current non-union agreements	No of all current agreements	% of non-union vs all current agreements	No of employees covered by non-union agreements ('000)	No of all employees covered by current agreements ('000)	% of employees covered by non-union agreements
2012	6,126	23,605	26.0%	181	2,532	7.2%
2013	6,594	23,292	28.3%	201	2,620	7.7%
2014	5,705	19,031	30.0%	197	2,411	8.2%
2015	5,554	14,666	37.9%	206	2,244	9.2%
2016	5,272	14,752	37.9%	194	2,070	9.4%
2017	4,637	13,072	35.5%	169	1,822	9.3%
2018	3,824	10,994	34.8%	121	1,893	6.4%
2019	3,795	10,831	35.0%	120	2,255	5.3%
2020	3,335	10,084	33.1%	110	1,910	5.8%
2021	3,091	10,741	28.8%	107	1,662	6.4%
2022	2,953	11,318	26.1%	105	1,800	5.8%
2023	2,775	10,266	27.0%	105	2,034	5.9%
2024(to Q3)	2,813	10,113	27.8%	124	2,206	5.6%
Total 2012–2023	53,661	172,652	31.0%	1,830	25,255	7.2%
Average 2012–2023	4,472	14,388	31.1%	153	2,105	7.2%

Note: Only 3 quarters of data have are available for 2024.

Source: DEWR Workplace Agreements Database.

Figure 46 shows that, although the number of enterprise agreements being approved has declined since 2010, the number of workers covered by new enterprise agreements has not fallen at the same rate. Indeed, while the number of enterprise agreements approved in the years to September 2023 and 2024 appears relatively static, the number of employees covered by those enterprise agreements has increased. In the year to September 2024 the total number of employees covered by new agreements was equal to over 1.25 million. This pattern (of rising employee coverage notwithstanding slow growth in agreement coverage) stems from a growth in new union agreements and the fact that they cover a greater proportion of employees.

Figure 46: Number of new agreements approved and employees covered, year to September quarter



Source: DEWR Workplace Agreements Database.

Alt-text: A combination chart. The bars show the number of new approved agreements between 2009 and September quarter (Q3) of 2024 and the line shows number of employees covered by these new agreements. For calendar year 2023 a total of 4,111 new agreements were approved across all sectors (LHS axis) covering 843,182 employees. In the year to September 2024 a total of 3,158 new agreements had been approved covering 981,000 employees.

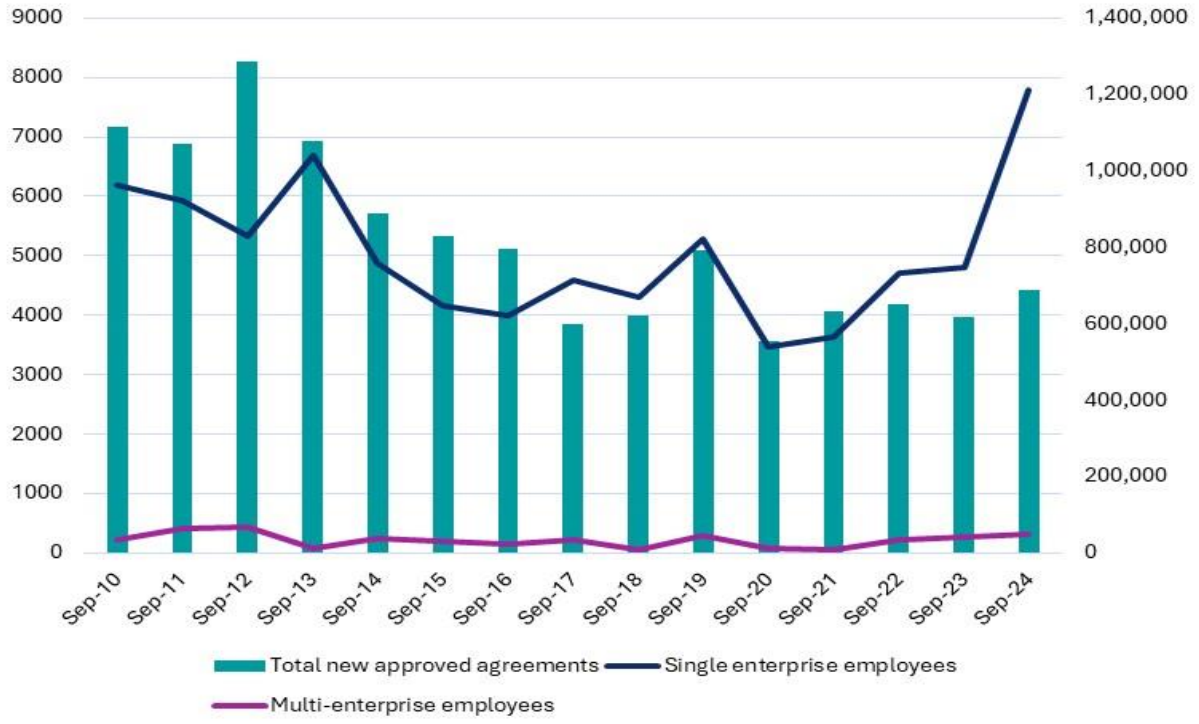
Figure 47 shows the number of new agreements approved in the quarter and number of employees covered.

Figure 47: Number of new agreements approved by the quarter and number of employees, June 2021 to September 2024

Source: DEWR Workplace Agreements Database.

Alt-text: A combination chart. The bars show the number of new approved agreements approved in each quarter (covering the period June quarter (Q2) 2021 to September quarter (Q3) of 2024 (LHS)). The line shows the number of employees covered by these new approved agreements in each quarter (RHS). A total of 341,00 employees were covered by agreements approved in the September 2024 quarter.

Figure 48: Trends in approval of new agreements and their coverage (by single and multi-employer), year to September quarter



Source: DEWR Workplace Agreement Database.

Alt text: A combination chart showing the number of new agreements approved in the year to the September quarters from 2010 to 2024, and the coverage of those agreements by whether they were single or multi-employer agreements. The left hand side axis (columns) shows the number of new agreements approved. The right hand side axis (lines) shows the number of employees covered by the single and multi-employer agreements approved. In the year to the September 2024 quarter 4,417 agreements were approved, with 1,210,202 employees covered by single enterprise agreements and 48,120 covered by multi-employer agreements.

Table 55: New approved agreements by calendar year, September 2009 to September 2024

	New approved single enterprise agreements		New approved multi-employer agreements			
	No of agreements	Employees covered	No of agreements	% of agreements	Employees covered	% of employees
2009 (Q3–Q4)	1,343	211,728	3	0.2%	6,810	3.1%
2010	7,946	1,106,781	53	0.7%	49,561	4.3%
2011	6,839	845,004	26	0.4%	57,663	6.4%
2012	8,193	957,955	36	0.4%	68,052	6.6%
2013	6,673	879,288	24	0.4%	34,741	3.8%
2014	5,656	792,606	15	0.3%	10,618	1.3%
2015	4,967	601,742	31	0.6%	42,043	6.5%
2016	5,174	649,591	22	0.4%	13,535	2.0%
2017	3,522	622,032	20	0.6%	29,904	4.6%
2018	3,843	645,899	21	0.5%	23,111	3.5%
2019	5,259	897,784	24	0.5%	35,554	3.8%
2020	3,267	508,209	14	0.4%	13,350	2.6%
2021	4,351	542,113	12	0.3%	4,360	0.8%
2022	4,136	803,998	30	0.7%	33,649	4.0%
2023	4,101	805,607	10	0.2%	37,575	4.5%
2024 (to Q3)	3,138	933,363	20	0.6%	48,074	4.9%
Total 2013–2022	46,848	6,943,262	213	0.5%	240,865	3.4%

Source: DEWR Workplace Agreements Database.

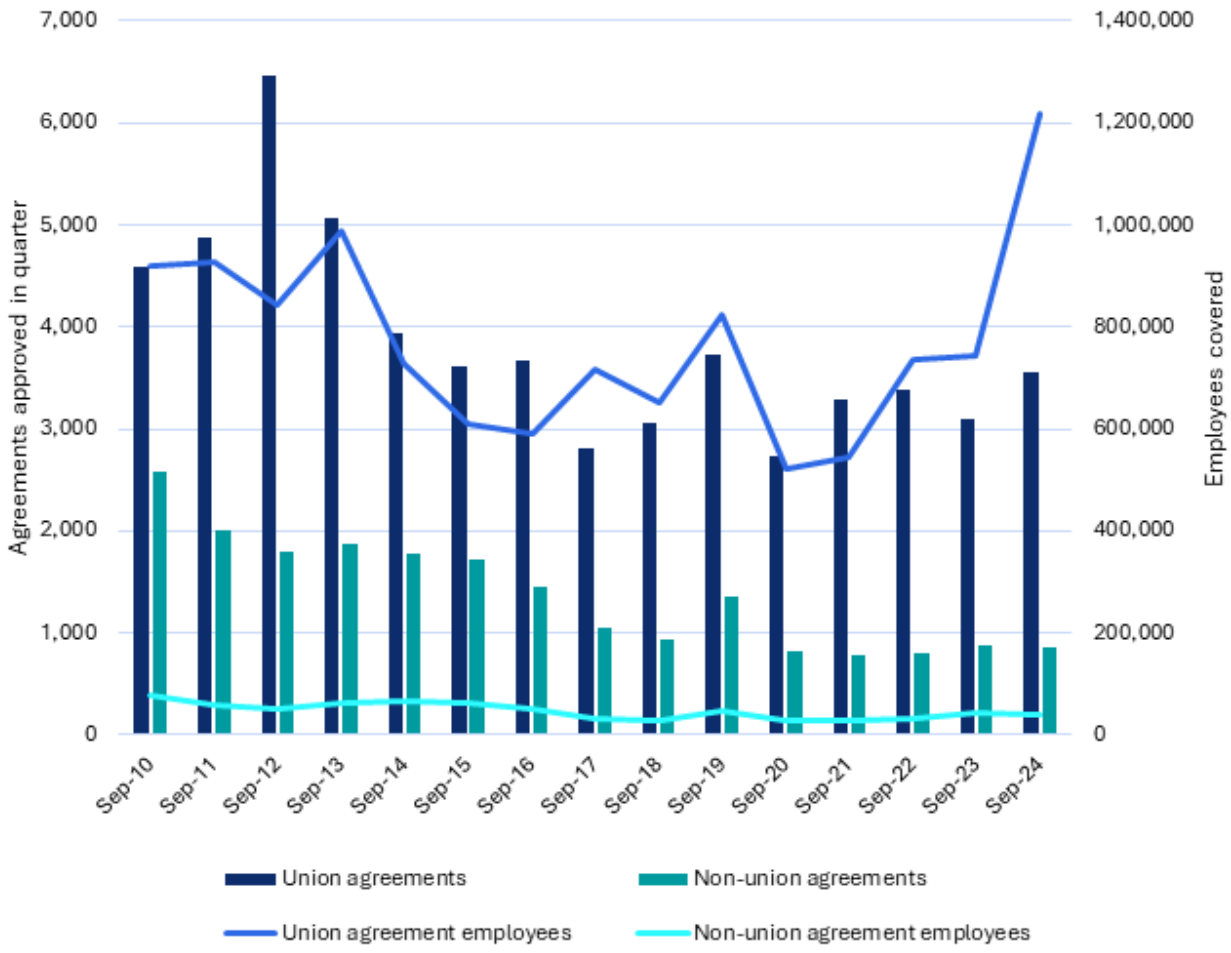
Alt text: A table showing the number of approved single and multi-employer agreements in a calendar year, except for 2009, which shows data for only the third and fourth quarters; and 2024, which excludes the fourth quarter. The table also shows the proportion of multi-employer agreements by number and coverage.

Table 56: Current single and multi-employer agreements as at September, 2009–2024

	Current single enterprise agreements		Current multi-employer agreements	
	Number of agreements	Employees covered	Number of agreements	Employees covered
Sep-09	165	16,755	1	5,836
Sep-10	7,118	969,002	40	35,818
Sep-11	11,755	1,689,953	58	49,713
Sep-12	17,338	1,976,718	82	107,282
Sep-13	19,704	2,269,648	79	100,825
Sep-14	18,884	2,197,104	61	112,274
Sep-15	15,075	2,064,481	65	108,174
Sep-16	14,162	1,913,136	65	76,316
Sep-17	12,855	1,710,392	57	50,442
Sep-18	10,944	1,849,443	57	49,248
Sep-19	10,815	2,082,241	69	89,639
Sep-20	9,771	1,811,580	56	83,524
Sep-21	10,080	1,620,224	41	27,696
Sep-22	10,919	1,673,274	50	50,780
Sep-23	9,758	1,729,536	46	76,005
Sep-24	10,023	2,087,896	56	114,725

Source: DEWR Workplace Agreements Database.

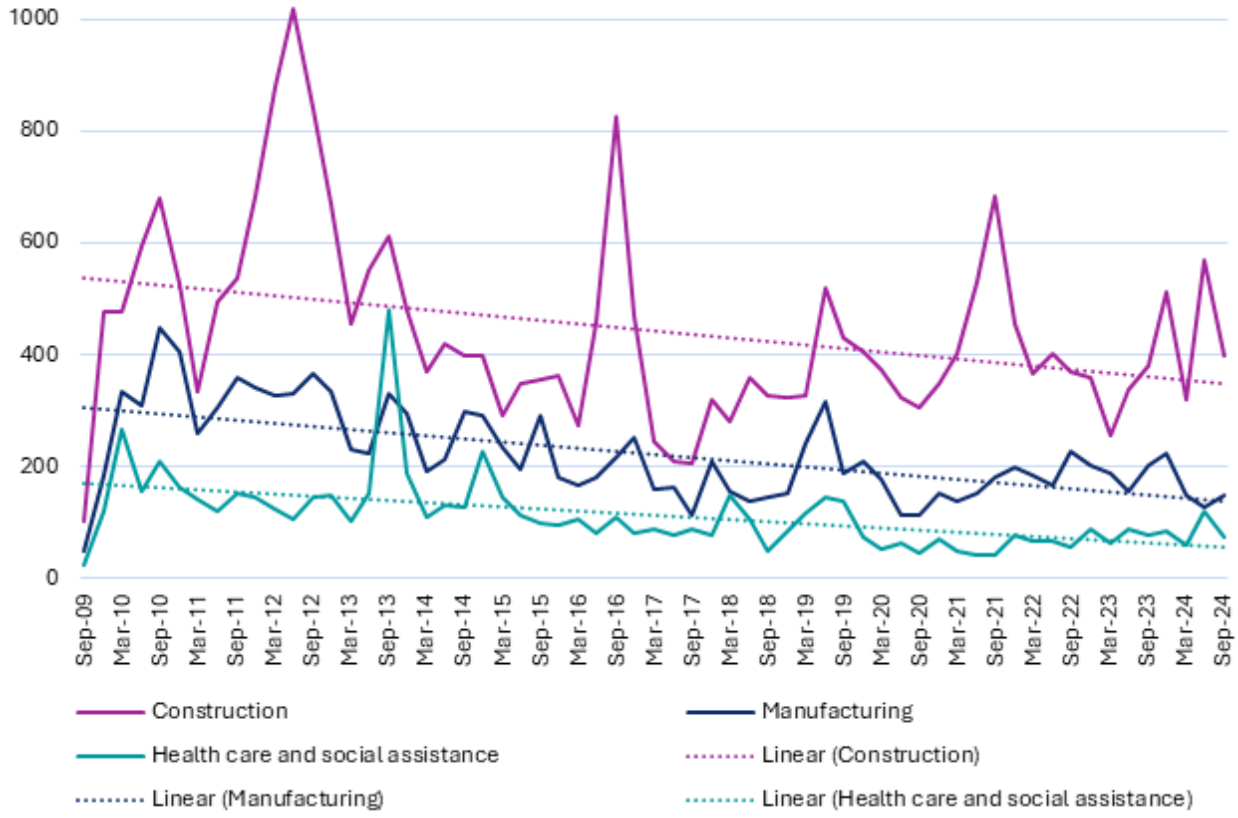
Figure 49: Trends in approval of union and non-union agreements, year to September quarter



Source: DEWR Workplace Agreement Database.

Alt text: A combination chart showing the number and coverage of new agreements approved in the year to the September quarters from 2010 to 2024, by union status. The left hand side axis (columns) shows the number of union and non-union agreements approved. The right hand side axis (lines) shows the number of employees covered by the union and non-union agreements approved. In the year to the September 2024 quarter 3,549 union agreements were approved, covering 1,218,842 employees. In that same period 868 non-union agreements were approved, covering 39,480 employees.

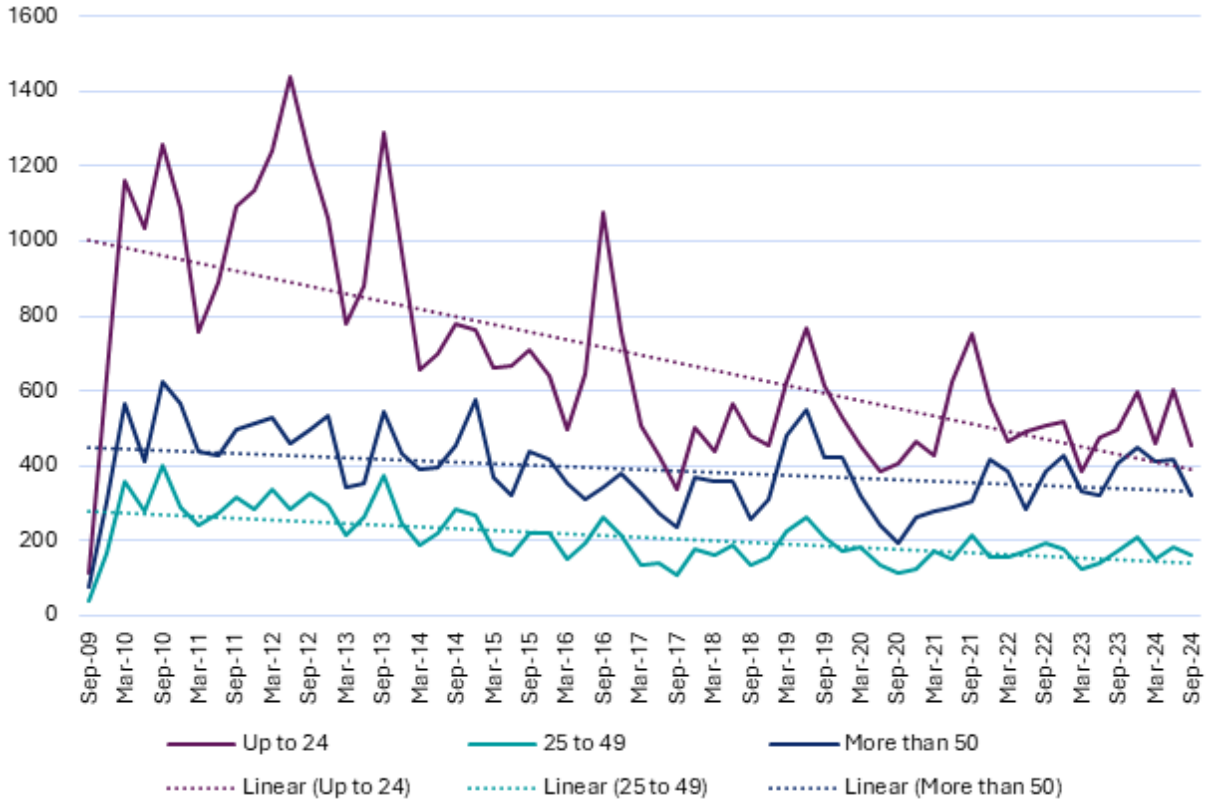
Figure 50: Trends in enterprise agreement approvals by industry, September 2009 to September 2024



Source: DEWR Workplace Agreement Database.

Alt text: A line graph showing the number of new agreements approved in each quarter from the September 2009 quarter to the September 2024 quarter. The solid lines represent the number of new agreements approved in each quarter in the construction, manufacturing, and health care and social assistance industries, while the dotted lines reflect the respective linear trends for each industry. In the September 2024 quarter a total of 937 enterprise agreements were approved, of which 397 were in the construction sector, 159 were in the manufacturing sector and 76 were in the health care and social assistance sector.

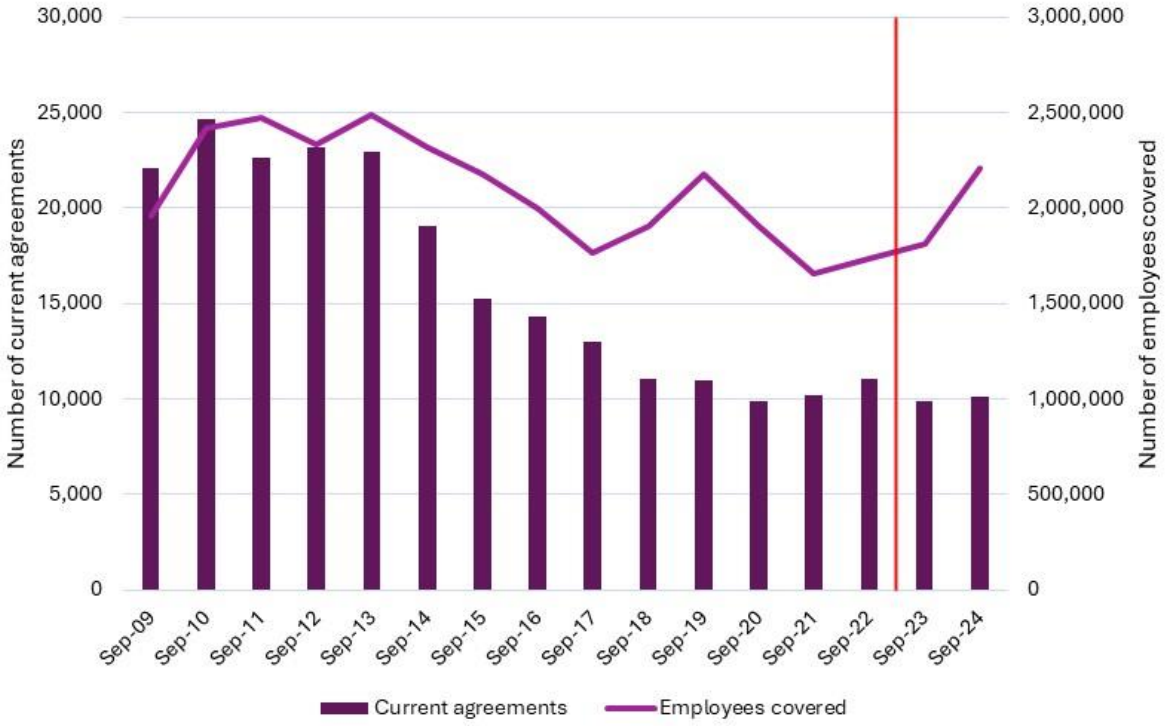
Figure 51: Trends in enterprise agreement approvals by cohort size, September 2009 to September 2024



Source: DEWR Workplace Agreements Database.

Alt text: A line chart showing the number of enterprise agreements approved in each quarter from September 2009 to September 2024, by the size of the employee cohort covered by the agreement. In the September quarter 2024 there were 456 enterprise agreements approved that covered 24 or fewer employees, 161 that covered 25 to 49 employees and 320 that covered more than 50 employees.

Figure 52: Number of current enterprise agreements and employees covered, September quarters 2009 to 2024

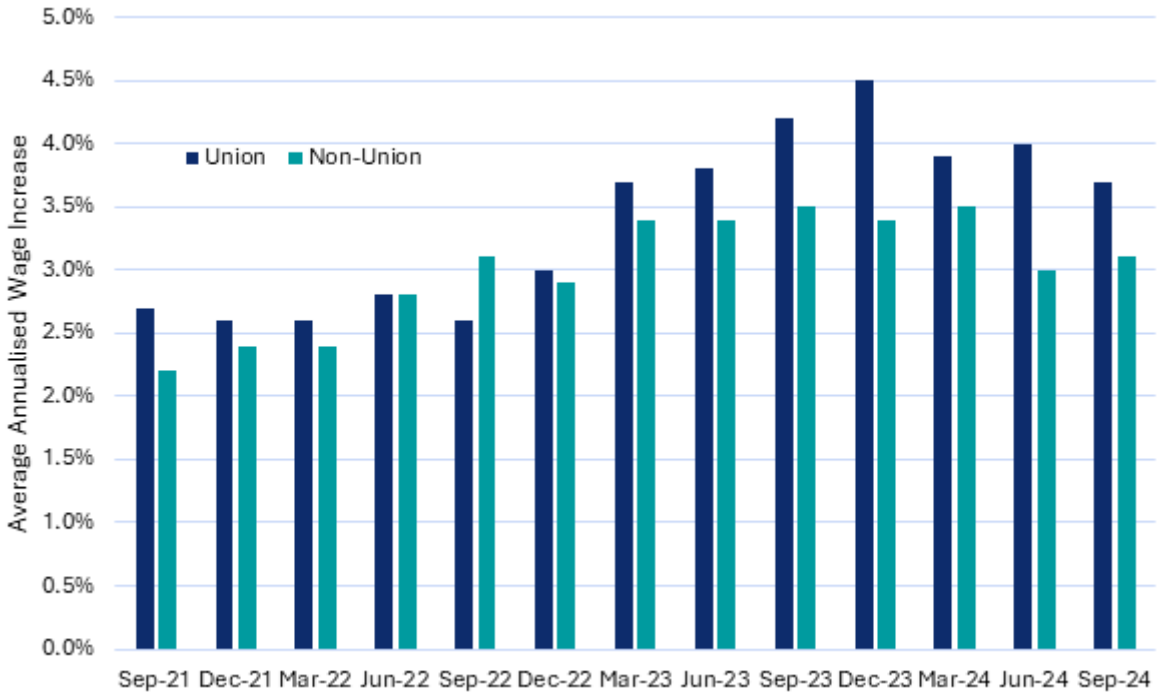


Source: DEWR Workplace Agreements Database.

Alt-text: A combination chart. The bars shows the number of current agreements in the September quarters between 2009 and 2024 and the line shows number of employees covered by these agreements. Although the number of current agreements was lower in 2023 than in 2022 the number of employees covered by the agreements had increased. The data show that in the 2024 September quarter there are just over 10,000 agreements covering 2,206,000 workers.

Figure 53 trends in the AAWI of union and non-union approved enterprise agreements. Since December 2022 the AAWI in union agreements has exceeded the AAWI in non-union agreements. The differences may reflect, in part, differences between the 2 groups in the timing and approval of new agreements.

Figure 53: Average annualised wage growth (AAWI) in union and non-union agreements, September 2021 to September 2024



Source: Trends in Federal Enterprise Bargaining, September quarter 2024, Chart 6.

Alt-text: A bar chart showing the average annualised wage increases (AAWI) in union and non-union agreements at various quarters since September 2021. In the September 2024 quarter the AAWI in agreements that cover union(s) was 3.7% and, in the same quarter, the AAWI in agreements with no union(s) covered was 3.1%.

Table 57 reports the number of employees in each quarter covered by a new approved agreement and a current agreement, with the information disaggregated by sector. In the September 2024 quarter, 21.1% of all public sector employees were covered by a federal (current) enterprise agreement. The corresponding share of private sector employees covered by a current federal enterprise agreement was 11.9%.

Table 57: New approved and current federal agreements by sector and number of employees

	New approved agreements		Current agreements		Total employees (labour force)		% of total employees on current federal enterprise agreements	
	Public sector employees ('000)	Private sector employees ('000)	Public sector employees ('000)	Private sector employees ('000)	Public sector ('000)	Private sector ('000)	Public sector	Private sector
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Jun-21	27.7	72.4	544	1,246	1846.5	11277.2	29.5%	11.0%
Sep-21	47.5	133	426	1,229	1888.1	11007.1	22.6%	11.2%
Dec-21	44.7	105.4	411	1,249	1951.9	11252.3	21.1%	11.1%
Mar-22	120.3	126.7	438	1,227	1985.1	11453.3	22.1%	10.7%
Jun-22	21.7	133.1	466	1,286	1967.0	11602.0	23.7%	11.1%
Sep-22	103.2	110.5	481	1,251	1918.3	11676.4	25.1%	10.7%
Dec-22	70	152.1	507	1,292	1975.6	11862.9	25.7%	10.9%
Mar-23	33.4	101	522	1,215	1883.0	12032.8	27.7%	10.1%
Jun-23	33.5	102.7	547	1,242	1969.8	12126.1	27.8%	10.2%
Sep-23	83.8	211.9	598	1,215	1937.6	12081.9	30.9%	10.1%
Dec-23	65.6	211.3	635	1,398	1980.2	12283.6	32.1%	11.4%
Mar-24	201.9	163.1	692	1,445	1994.0	12339.9	34.7%	11.7%
Jun-24	61.8	213.6	730	1,480	2074.9	12313.8	35.1%	12.0%
Sep-24	112.8	228.3	801	1405	2572.0	11791.1	21.1%	11.9%

Note: The quarterly labour force data are for May, August, November and February. The WAD data are for the quarters reported in the table.

Source: Federal, Workplace Agreements Database and ABS Labour Force Survey, Detailed, Table 26a.

Table 58 shows that agreements approved in periods since December 2022 contain larger AAWIs than agreements that were current (not expired or terminated). In the September quarter 2024 the AAWI for agreements approved was 3.6% compared to 3.5% for current agreements. Public sector agreements approved in the September quarter were the exception to the trend.

Table 58: Average annualised wage increases by sector

	All sectors		Public sector		Private sector	
	Approved agreements	Current agreements	Approved agreements	Current agreements	Approved agreements	Current agreements
	%	%	%	%	%	%
Dec-22	3.0	2.6	2.3	2.3	3.5	2.8
Mar-23	3.7	2.7	3.2	2.4	3.9	2.9
Jun-23	3.8	2.8	3.6	2.5	3.9	3.0
Sep-23	4.1	2.9	4.4	2.8	3.9	3.1
Dec-23	4.4	3.1	5.2	3.0	3.9	3.2
Mar-24	3.9	3.3	4.0	3.4	3.6	3.2
Jun-24	4.0	3.4	3.9	3.6	4.0	3.3
Sep-24	3.6	3.5	3.5	3.6	3.9	3.4

Source: Trends in Federal Enterprise Bargaining, September quarter 2024, Tables 3 and 4.

Alt-text: A table showing average annualised wage increases (AAWI) by sector disaggregated by agreements approved in the quarter and current agreements. Across all sectors, in the September 2024 quarter, the AAWI was equal to 3.6% in agreements approved in that quarter and 3.5% in current agreements (agreements that had not expired or had not been terminated).

Table 59 documents trends in the approval of single and multi-employer agreements (excluding greenfields agreements) by quarter (since September 2021). Information on the AAWI (%), the duration of the agreement and the number of employees covered is also provided. In the September 2024 quarter a total of 862 single enterprise agreements were approved with an AAWI of 3.6%. The number of employees covered was the largest recorded since December 2022, when the Secure Jobs, Better Pay reforms came into effect.

In the March 2024 quarter the FWC approved 16 multi-employer agreements. The AAWI was equal to 2.5% and the number of employees covered equal to 44,300.

Table 59: Agreements approved in the quarter by agreement type (non-greenfields agreements)

	Single enterprise agreements				Multi-employer agreements			
	No of agreements	AAWI (%)	Duration (yrs)	Employees ('000)	No of agreements	AAWI (%)	Duration (yrs)	Employees ('000)
Sep-21	1,174	2.6	2.3	178.4	1	*	4	0
Dec-21	1,050	2.5	2.3	144.1	7	3.7	2.5	2
Mar-22	908	2.6	2.4	217.3	12	2.7	2.9	26.4
Jun-22	832	2.8	2.7	150.6	7	2.5	2.7	0.9
Sep-22	1,016	2.6	3	208.5	7	3.4	1.5	3.7
Dec-22	1,061	3	2.5	216.5	3	3.4	2.5	2.6
Mar-23	781	3.7	2.3	131.4	1	*	4	0.7
Jun-23	868	3.8	2.4	133.3	3	2	2.9	0.4
Sep-23	1,003	4.3	2.7	257	5	3.4	2.3	36.5
Dec-23	1,194	4.4	2.5	275.1	1	3.8	3	0
Mar-24	955	3.9	2.7	319	16	2.5	2.6	44.3
Jun-24	1,092	4	3	269.3	4	6.6	2.2	3.7
Sep-24	862	3.6	3.1	338.6	0	*	0	0

Note: *indicates not available.

Source: Trends in Federal Enterprise Bargaining, September quarter 2024, Table 5.

Appendix 3 – Fair Work Commission data

1. Enterprise agreement applications

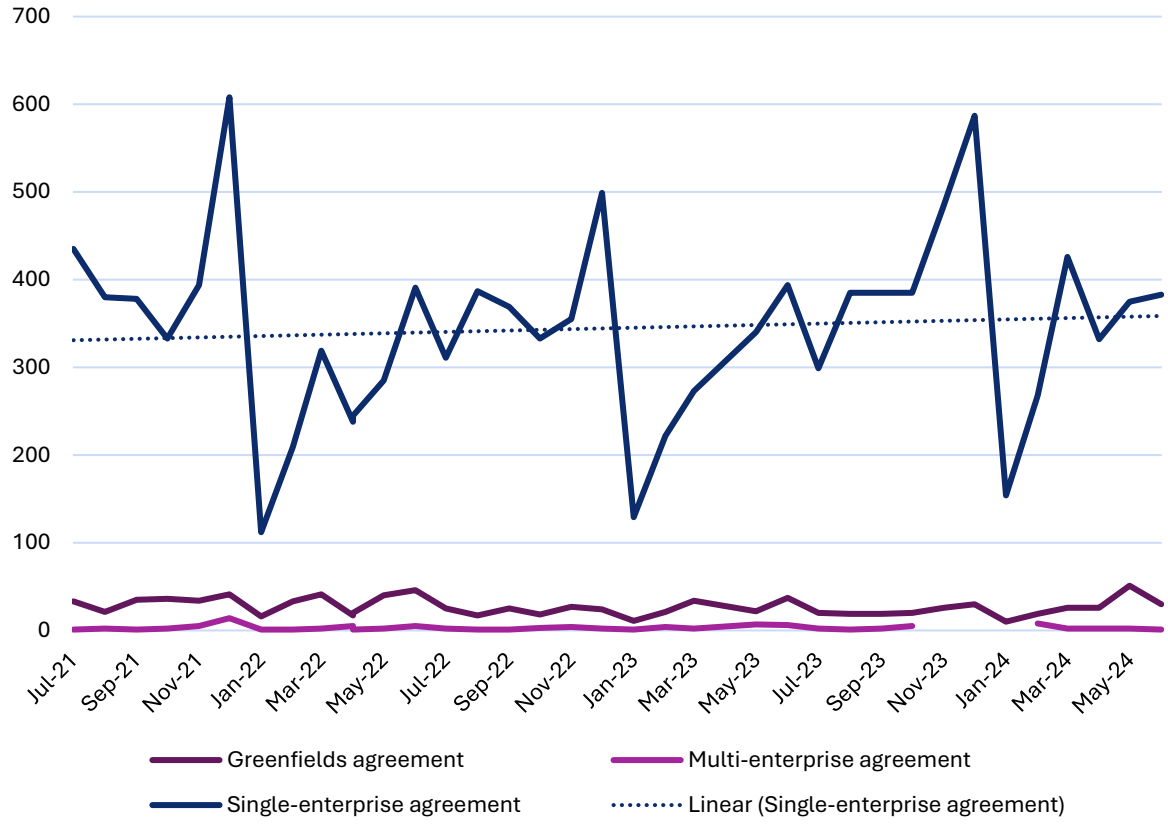
Between July 2021 and June 2024, the Fair Work Commission (FWC) received 13,478 applications for approval of an enterprise agreement. Table 60 demonstrates that, despite monthly variations, the overall trend of applications for this period remains stable.

Table 60: Monthly enterprise agreement applications

	Greenfields agreement	Multi-employer agreement	Single-enterprise agreement	Total
Jul-21	33	1	435	469
Aug-21	21	2	380	403
Sep-21	35	1	378	414
Oct-21	36	2	333	371
Nov-21	34	5	394	433
Dec-21	41	14	608	663
Jan-22	16	1	112	129
Feb-22	33	1	209	243
Mar-22	41	2	319	362
Apr-22	17	5	238	260
May-22	40	2	285	327
Jun-22	46	5	391	442
Jul-22	25	2	311	338
Aug-22	17	1	387	405
Sep-22	25	1	369	395
Oct-22	18	3	333	354
Nov-22	27	4	355	386
Dec-22	24	2	499	525
Jan-23	11	1	129	141
Feb-23	21	4	222	247
Mar-23	34	2	273	309
Apr-22	20	1	245	266
May-23	22	7	340	369
Jun-23	37	6	394	437
Jul-23	20	2	299	321
Aug-23	19	1	385	405
Sep-23	19	2	385	406
Oct-23	20	5	385	410
Nov-23	26	0	485	511
Dec-23	30	5	587	622
Jan-24	10	0	154	164
Feb-24	19	8	268	295
Mar-24	26	2	426	454
Apr-24	26	2	332	360
May-24	51	2	375	428
Jun-24	30	1	383	414
Total	970	105	12403	13478

Source: Review analysis of data provided by the FWC, July 2021 – June 2024.

Figure 54: Monthly enterprise agreement approval applications, July 2021 to May 2024



Source: Review analysis of data provided by the FWC, July 2021 – June 2024.

Alt text: A line graph showing the number of enterprise agreement approval applications, by agreement, on a monthly basis, July 2021 to May 2024.

2. Outcomes of enterprise agreement applications

Applications for agreement approval are largely successful, either as they are drafted or as the result of FWC amendments or employer undertakings. Table 61 outlines the outcomes of applications for approval.

Table 61: Outcomes of enterprise agreement approval applications, by type of agreement

	Greenfields agreement		Multi-employer agreement		Single enterprise agreement		Total	
Result	**Count**	**%**	**Count**	**%**	**Count**	**%**	**Count**	**%**
Approved	743	76.6%	32	30.5%	5861	47.3%	6636	49.2%
Approved with amendments	1	0.1%	0	0.0%	19	0.2%	20	0.1%
Approved with undertakings	178	18.4%	60	57.1%	6034	48.6%	6272	46.5%
Approved with undertakings and amendments	1	0.1%	0	0.0%	19	0.2%	20	0.1%
Not approved	4	0.4%	1	1.0%	63	0.5%	68	0.5%
Other (includes dismissed and withdrawn)	43	4.4%	12	11.4%	407	3.3%	462	3.4%
Total	970	100%	105	100%	12403	100%	13478	100%

Source: Review analysis of data provided by the FWC, July 2021 – June 2024.

Alt-text: A table showing the outcomes of applications for approval of enterprise agreements in total, and by whether they were greenfields, single-enterprise and multi-employer agreements. The table shows that 49.2% of agreements were approved without undertakings or amendments, while 46.5% were approved with undertakings. Multi-employer agreements had the higher rate of undertakings, with 57.1% of agreements requiring undertakings.

Table 62: Outcomes of enterprise agreement approval application, by financial year, 2021 to 2024

Result	2021–22		2022–23		2023–24	
	Count	%	Count	%	Count	%
Approved without undertakings or amendments	2,253	49.9%	1,885	45.2%	2,503	52.3%
Approved with amendments	0	0.0%	0	0.0%	20	0.4%
Approved with undertakings	2,108	46.7%	2,133	51.1%	2,038	42.5%
Approved with undertakings and amendments	0	0.0%	1	0.0%	18	0.4%
Not approved	24	0.5%	13	0.3%	34	0.7%
Other (includes dismissed and withdrawn)	131	2.9%	140	3.4%	177	3.7%
Total	4,516	100.0%	4,172	100.0%	4,790	100.0%

Source: Review analysis of data provided by the FWC, July 2021 – June 2024.

Alt text: A table showing the outcomes of applications for approval of enterprise agreements by the financial year in which the application was lodged. The table shows that in the 2023–34 financial year 2,503 (52.3%) applications were approved without variation, 20 (0.4%) were approved with amendments, 2,038 (42.5%) were approved with undertakings and 18 (0.4%) were approved with both undertakings and amendments.

3. Timeliness of enterprise agreement approvals

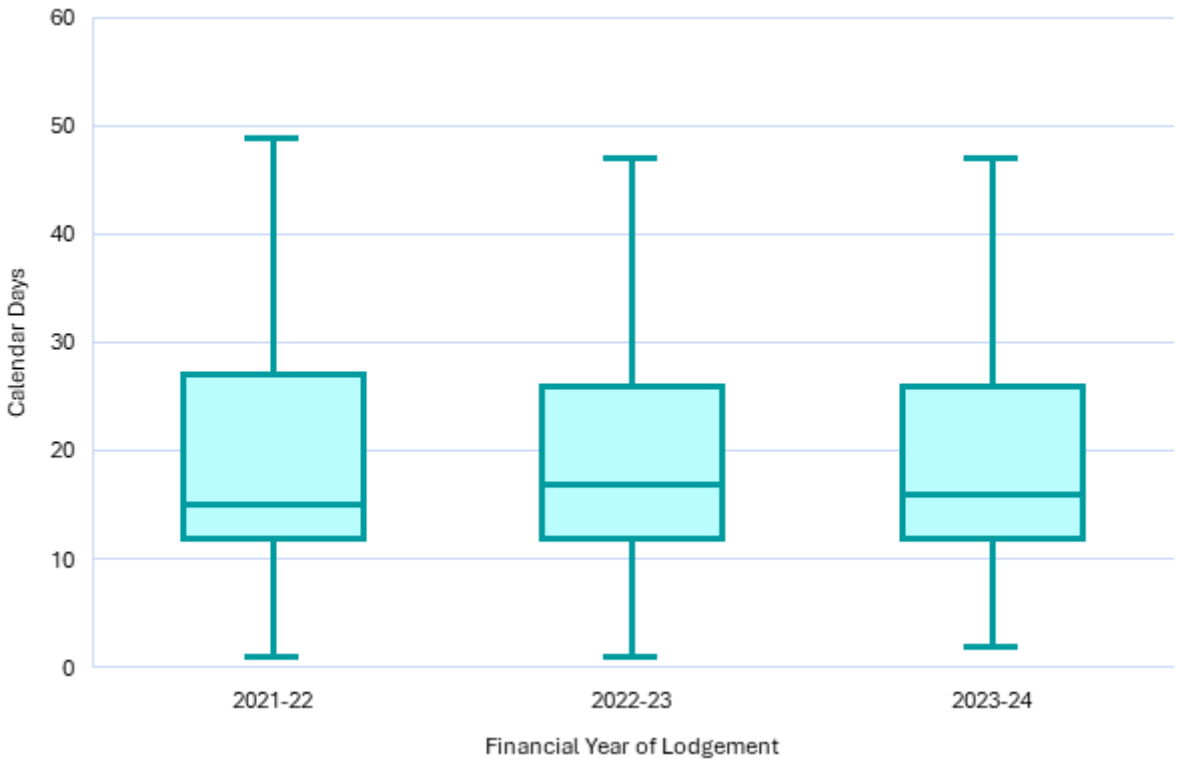
The time taken by the FWC to approve agreements has remained stable over the last 3 financial years. As shown in Table 63, the median time taken to approve an enterprise agreement is largely dependent on whether undertakings from the employer or amendments by the FWC itself are required. Figure 55 shows the spread of all approval decisions in each financial year.

Table 63: Median calendar days to approval decision, 2021–22 to 2023–24

	2021–22	2022–23	2023–24
All agreement approvals	15	17	16
Approved with undertakings and/or amendments	22	22	23
Approved without undertakings or amendments	12	12	12

Source: Review analysis of data provided by the FWC, July 2021 – June 2024.

Figure 55: Approval decisions plot by financial year, 2021 to 2024



Source: Review analysis of data provided by the FWC, July 2021 – June 2024.

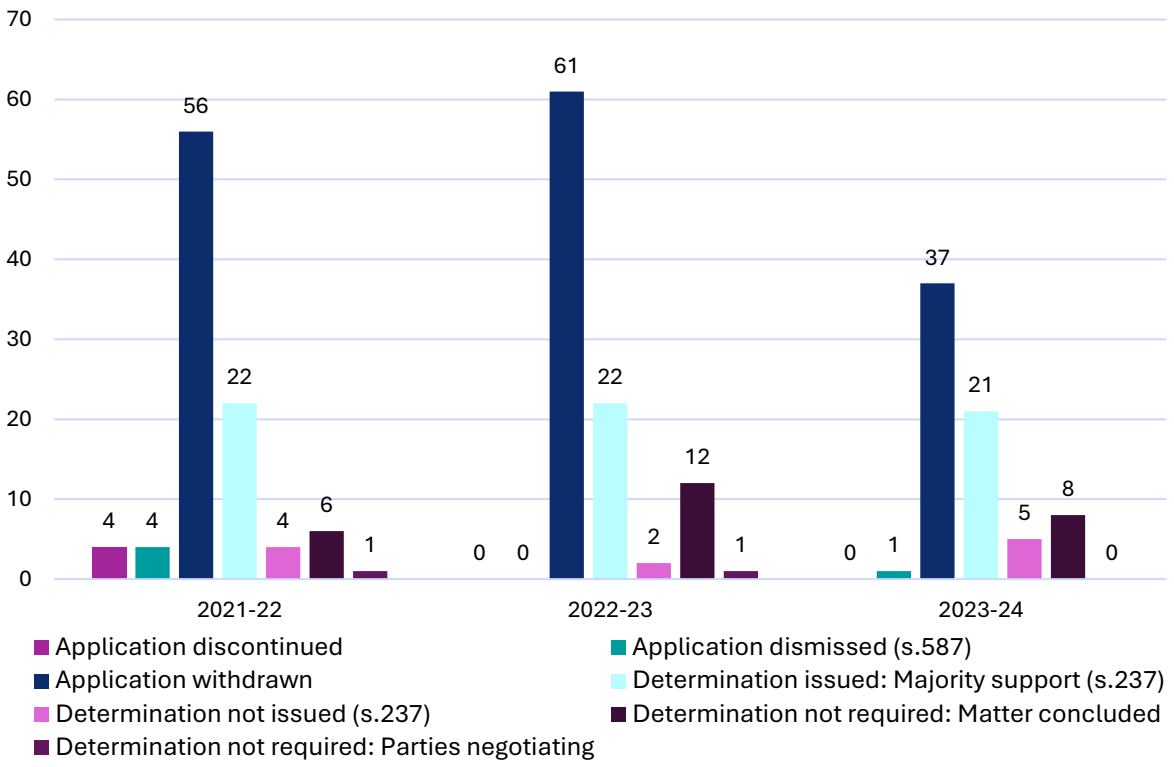
Alt text: A box and whisker plot showing the distribution of calendar days taken for the FWC to approve an enterprise agreement once an application for approval is lodged. It shows a relatively consistent spread over the financial years compared, with the median days for all approvals being 15 in 2021–22, 17 in 2022–23, and 16 in 2023–24.

4. Majority support determination applications

The Secure Jobs, Better Pay amendments provided an additional avenue for employees to commence bargaining to replace a nominally expired agreement, enabling a bargaining representative to commence bargaining without the need for a majority support determination.

The removal of the requirement for a majority support determination to commence bargaining in these circumstances has not resulted in a notable decrease in their use. As Figure 56 shows, while applications in total have decreased, so has the rate of withdrawal and dismissal.

Figure 56: Outcomes of majority support determination (s 236) applications, 2021–22 to 2023–24



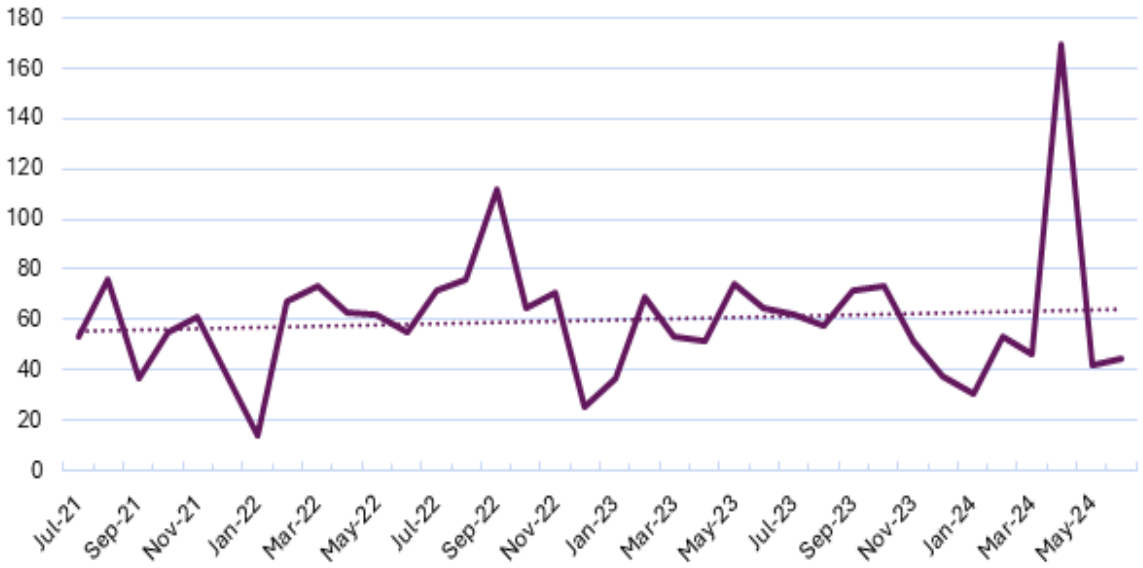
Source: Review analysis of data provided by the FWC, July 2021 – June 2024.

Alt text: A clustered column chart showing the outcomes from majority support determination (MSD) applications for the 2021–22, 2022–23 and 2203–34 financial years. In 2023–24 total MSD applications received was equal to 72. This compares with 98 in 2022–23 and 97 in 2021–22. The number of MSDs issued is constant across the financial years.

5. Industrial action

The incidence of applications for protected action ballot orders, and thus protected industrial action, has not significantly increased since the commencement of the provisions as shown in Figure 57.

Figure 57: Monthly applications for a protected action ballot order (s 437), 2021 to 2024

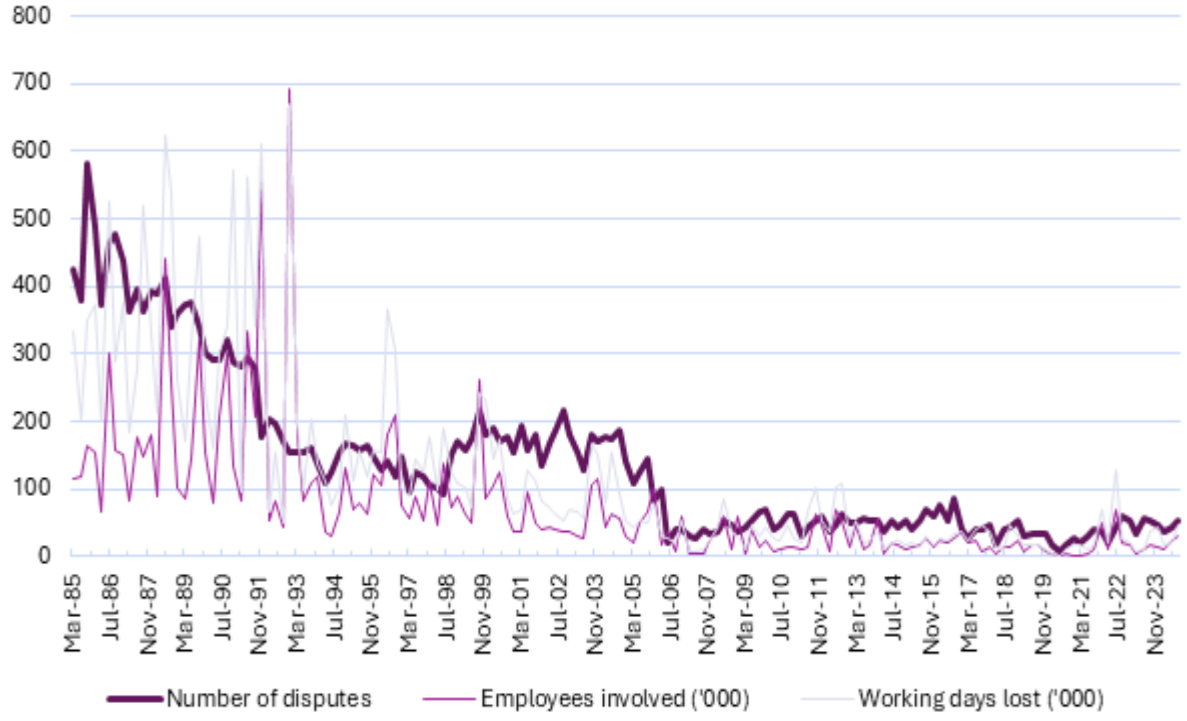


Source: Review analysis of data provided by the FWC, July 2021 – June 2024.

Alt text: A line graph of the monthly applications for a protected action ballot order from July 2021 to June 2024, plus a trend line. The graph shows the number of applications has varied significantly by month in the reference period. The trend line slopes slightly upwards.

Figure 58 provides greater historical context to Figure 57, demonstrating the relatively low incidence of industrial disputes and impact on the workforce in the last decade.

Figure 58: Historical industrial disputes, quarterly, 1985 to 2023



Source: ABS Industrial Disputes, Table 1: Industrial Disputes which occurred during the period, 2024.

Alt text: A line graph showing the number of new disputes, the employees involved in those disputes and the working days lost to those disputes on a monthly basis from the March quarter 1985 to the September quarter 2024. The number of new disputes peaked at 581 in the September quarter 1985, compared to 54 in the September quarter 2024. The number of employees involved and working days lost peaked in the December quarter 1992 with 694,300 employees and 669,200 working days, compared to 30,900 employees and 46,600 working days in the September quarter 2024.

6. Sexual harassment

Data from the FWC indicates that, while there has been use of the sexual harassment provisions, its uptake has been limited as shown in Table 64 shows that between 6 March 2023 and 30 June 2023, 11 applications to deal with sexual harassment disputes had been lodged under s 527F.[1101] In 2023–24, the FWC reported 95 applications under s 527F.[1102] For context, prior to the Secure Jobs, Better Pay amendments, Table 64 also notes applications under s 789FC.

Table 64: Applications to the FWC in relation to sexual harassment, 2021 to 2024

	Applications under s 527F			Applications under s 789FC		
	Order to stop and deal with a sexual harassment dispute	Order to stop sexual harassment	Deal with a sexual harassment dispute	Order to stop bullying and sexual harassment	Order to stop sexual harassment	Total
Sep-21	0	0	0	0	0	0
Dec-21	0	0	0	9	1	10
Mar-22	0	0	0	10	2	12
Jun-22	0	0	0	4	2	6
Sep-22	0	0	0	13	1	14
Dec-22	0	0	0	6	2	8
Mar-23	1	0	0	8	5	14
Jun-23	4	0	6	0	3	13
Sep-23	6	0	10	0	3	19
Dec-23	8	4	15	0	4	31
Mar-24	4	4	12	0	1	21
Jun-24	11	0	21	0	1	33

Source: Review analysis of data provided by the FWC, July 2021 – June 2024.

[1101] Fair Work Commission, *Access to Justice* (Annual Report 2022-23, 28 September 2023) 27.

[1102] Fair Work Commission, *Access to Justice* (Annual Report 2023-24, 30 September 2024) 64-65.

Appendix 4 – Productivity and industrial relations: competing perspectives, trends and evolving challenges

1. Introduction

Productivity is a very important topic, especially as Australia, like most developed countries, has seen low productivity growth over recent years. The Australian debate over productivity and its links to industrial relations, however, has mostly been unsophisticated and too often self-interested. This appendix aims to provoke further discussion of productivity, in the hope that a more sophisticated conversation emerges. It focuses on a limited number of issues, including the definition of productivity and its measurement, the causes of productivity growth and the most appropriate methods to create and distribute productivity growth. It also considers the relevance of productivity to issues highlighted in the Review, such as gender equality and collective bargaining. This appendix does not examine the relationship between job security and productivity, nor does it directly address the impact of changes in institutional arrangements on productivity. Likewise, it does not explore in detail the potential interactions between various factors such as gender equality, collective bargaining, and productivity. The omission of these topics is not due to their lack of importance but, rather, to time constraints.

2. Different (and often competing) perspectives on productivity

There is common agreement that 'a well-functioning labour market is a key condition for achieving inclusive growth'.[1103] There is, however, less agreement about what a well-functioning labour market means in practice. Likewise, there is a divergence of views about how the industrial relations system – and, more specifically, the Secure Jobs, Better Pay amendments – can contribute to productivity outcomes.[1104]

In submissions to this Review, the divergence of views about the industrial relations system and its relationship with productivity was particularly stark. Employers generally viewed productivity through the lens of flexibility, competition and cost-efficiency (similar to the Productivity Commission in its recent reports).[1105] They (employers) emphasised the importance of enterprise-specific solutions that are designed by managers (unilaterally or through consultation with employees but not unions). More specifically, they argued that the Secure Jobs, Better Pay amendments, such as multi-employer bargaining, would introduce rigidities, increase costs and stifle innovation. For them, productivity is tightly linked to reducing regulatory burdens and fostering an environment that encourages tailored workplace agreements and business-specific strategies. Rarely did they address the productivity consequences of the amendments focused on reducing job insecurity or gender inequality. To the extent that they did comment on these issues,

[1103] OECD, *Good Jobs for All in a Changing World of Work: The OECD Jobs Strategy* (Report, 2018) 46.
[1104] Productivity Commission, *5-year Productivity Inquiry: A more productive labour market*, (Interim report, October 2022) iv.
[1105] Productivity Commission, *5-year Productivity Inquiry: A more productive labour market*, (Interim report, October 2022); Productivity Commission, *5-year Productivity Inquiry: A more productive labour market*, (Inquiry Report – volume 7, February 2023).

it was to assert that measures such as flexible working arrangements would 'likely result in a significant loss in efficiency or productivity'.[1106]

Unions, on the other hand, focused on systemic issues such as wage stagnation, insecure work and inequality, arguing that these are the primary barriers to productivity growth (similar to the OECD in its latest jobs strategy report).[1107] They (unions) see serious social and economic consequences arising from these issues, including reduced wellbeing, restricted opportunities for skill development and weakened social cohesion. Accordingly, they welcome the recent legislative amendments and focus on facilitating multi-employer bargaining as well as other changes, such as the strengthening of the right to request flexible work and changes to the way the Fair Work Commission (FWC) is required to consider equal remuneration and work value cases. Unions focused mostly on the distribution of productivity gains and rarely explored their own attitudes and behaviours towards the creation of productivity improvement.

These divergent views reflect deeper philosophical differences – a point previously noted by the Productivity Commission.[1108] Indeed, these differences are typical of the adversarialism of Australian industrial relations and politics. One way of identifying more clearly the philosophical differences between the parties is to focus on their respective 'frames of reference'.[1109] Australian employers demonstrate a preoccupation with 'unitarist' frames, which emphasise causes of weak productivity growth in external factors, like the legislative framework or the unhelpful contributions of unions. At the same time, they emphasise solutions to the 'productivity problem' in the unilateral actions of managers (i.e. 'autocratic unitarism') or actions resulting from managers working with their employees but never with unions (i.e. 'consultative unitarism').

Unions, on the other hand, display attitudes towards productivity more consistent with 'radical' or 'adversarial pluralist' frames. They see the causes of 'the problem' in the actions of managers and they focus mostly on the distribution of productivity gains while effectively ignoring the generation of productivity growth. It is rare to see Australian unions adopt more 'collaborative pluralist' frames, which accept some responsibility for the creation of productivity improvement.

Consistent with these divergent philosophical positions, there was little on either side in the way of evidence in support of much of the productivity assertions.

3. The definition and measurement of productivity

There is general agreement – particularly among economists – that productivity growth is important for improved living standards. There is, however, little agreement on what productivity actually is.[1110] It has been suggested that 'To some people productivity growth comes from working harder and longer (unpaid) hours, to others it is the return from investing more in capital (such as

[1106] See, for example, Australian Chamber of Commerce and Industry (ACCI), Secure Jobs, Better Pay Review Submission and Annexure (Submission Number 39, 2 December 2024) 88.
[1107] OECD, *Good Jobs for All in a Changing World of Work: The OECD Jobs Strategy* (Report, 2018).
[1108] See: Productivity Commission, *5-year Productivity Inquiry: A more productive labour market*, (Interim report, October 2022).
[1109] M. Bray, J.W. Budd, J. Macneil, The many meanings of co-operation in the employment relationship and their implications', (2020) 58 *British Journal of Industrial Relations*, 114.
[1110] J. Gordon, S. Zhao, P. Gretton, 'On productivity: concepts and measurement', Productivity Commission Staff Research Note, 2015), 1.

infrastructure and education investment). Productivity has also been equated to "working smarter", but exactly what this implies is rarely defined'.[1111]

At a basic level 'productivity is a measure of the rate at which output of goods and services are produced per unit of input (labour, capital, raw materials, etc.)'.[1112] Put differently, improving productivity is 'the process by which people get more from less: more and better products to meet human needs produced with fewer hours of work and fewer resources.'[1113]

That aside, it is important to distinguish between the definition and measurement of productivity at 3 levels: national, industry/sectoral and enterprise/organisational. Most contributions to this Review, and to the debate over productivity and industrial relations more generally (in Australia and elsewhere), either conflate these levels or fail to even acknowledge them and the different analyses they require.

3.1 Productivity at the national level

Measuring productivity at the national level is not a straightforward activity. For example, one measure of labour productivity is to divide output (gross domestic product (GDP)) by the number of hours worked. Another approach is to adjust for changes in the composition of the workforce (e.g. more skilled and experienced workers) in recognition that not all hours contribute equally to output. The denominator then becomes 'quality adjusted hours worked'. When dividing through by hours that are adjusted for quality, this effectively increases the total measured hours (the denominator). The more the denominator is adjusted for quality, the greater the divergence between a non-adjusted productivity measure and the adjusted measure.[1114]

Another challenge when measuring national productivity is that it is difficult to measure in the service sector (e.g. aged care, child care, education, health, public administration) where the 'output' is not easily quantified. These sectors typically produce intangible benefits (e.g. improved wellbeing). Many service providers are in the 'non-market sector', meaning their services are subsidised or produced by governments and their 'value' is, therefore, not necessarily reflected in market prices.[1115]

One way around the challenge of measuring productivity in the service sector is to simply focus on the market sector. The limitation of this approach, however, is that it overlooks developments in the non-market sector – a sector which has seen significant employment growth in recent

[1111] J. Gordon, S. Zhao, P. Gretton, 'On productivity: concepts and measurement', Productivity Commission Staff Research Note, 2015) 1.
[1112] Productivity Commission, 'Productivity Primer' (no date), <www.pc.gov.au/ongoing/productivity-performance/productivity-primer.pdf>.
[1113] Productivity Commission, 'An agenda to lift Australia's productivity' (5-year Productivity Inquiry Report – volume 1, February 2023) 1.
[1114] Australian Bureau of Statistics (ABS), 'Understanding labour quality and its contribution to productivity measurement' (2022).
[1115] For further discussion on measuring productivity see ABS 'Interpreting ABS productivity statistics' (2023). This note explains that industries that considered to be predominantly non-market in nature (Public administration and safety, Education and training, and Health care and social assistance) are not included in the published MFP estimates. This is because it is difficult to measure their capital productivity or MFP.

years,[1116] particularly among women. Indeed, it is worth emphasising that women dominate employment in the non-market sector.

In the market sector, national productivity may be measured through 3 main indexes: labour productivity, capital productivity and multifactor productivity (MFP). Each is defined and measured as follows:

$$Labour\ productivity\ = \frac{\text{Output (GDP)}}{\text{Labour input (hours worked or total employment)}}$$

$$Capital\ productivity = \frac{\text{Output (GDP)}}{\text{Capital input (capital services or stock)}}$$

$$Multifactor\ productivity\ (MFP) = \frac{\text{Output (GDP)}}{\text{Combined input (weighted labour and capital inputs)}}$$

The MFP indicator provides a broader measure of productivity, incorporating the interplay between labour and capital. At an industry level the numerator becomes gross value added (GVA).

Figure 59 shows productivity in the market sector between 1995 and 2024. As shown, *capital productivity* has been declining steadily since 2004, with this becoming more pronounced after the 2007/8 Global Financial Crisis (GFC). When compared to June 2009, capital productivity is down by 5.7%. One significant contributor to the observed decline in capital productivity is the substantial increase in capital investment in sectors such as mining, where the returns are slower to materialise.

Two measures of *labour productivity* in Australia are shown in Figure 59 – one that simply divides by the hours worked and another that uses the quality adjusted measure of hours. The quality adjusted measure lies below the non-adjusted measure. This indicates that the shift in hours worked has been towards higher quality hours (more skilled labour).[1117] The estimates show a steady increase in labour productivity in the market sector up until 2022. Between 2022 and 2024 labour productivity in the market sector fell by 3.4%.

There are several possible reasons for the recent fall in labour productivity in the market sector. First, it could be the result of labour shortages (and low unemployment) and businesses having to hire less experienced or otherwise less productive workers. It is also consistent with a greater share of recent migrants entering the workforce and perhaps needing time to integrate and upskill, moving into low paid jobs in the meantime.[1118] It could be that, after COVID-19, businesses are meeting the demand for output by hiring more workers instead of investing in productivity-

[1116] For example, at August 2024 the Health care and social assistance sector accounted for 15.5% of total employment (the highest share across all industries). Of all new jobs created in the 12 years to 2024, 28% were in the Health care and social assistance sector followed by 12% in education and training and 9.4% in Public administration and safety. Taken together these 3 sectors – which are generally classified as non-market sectors – accounted for 49% of new jobs growth between 2012 and 2024.

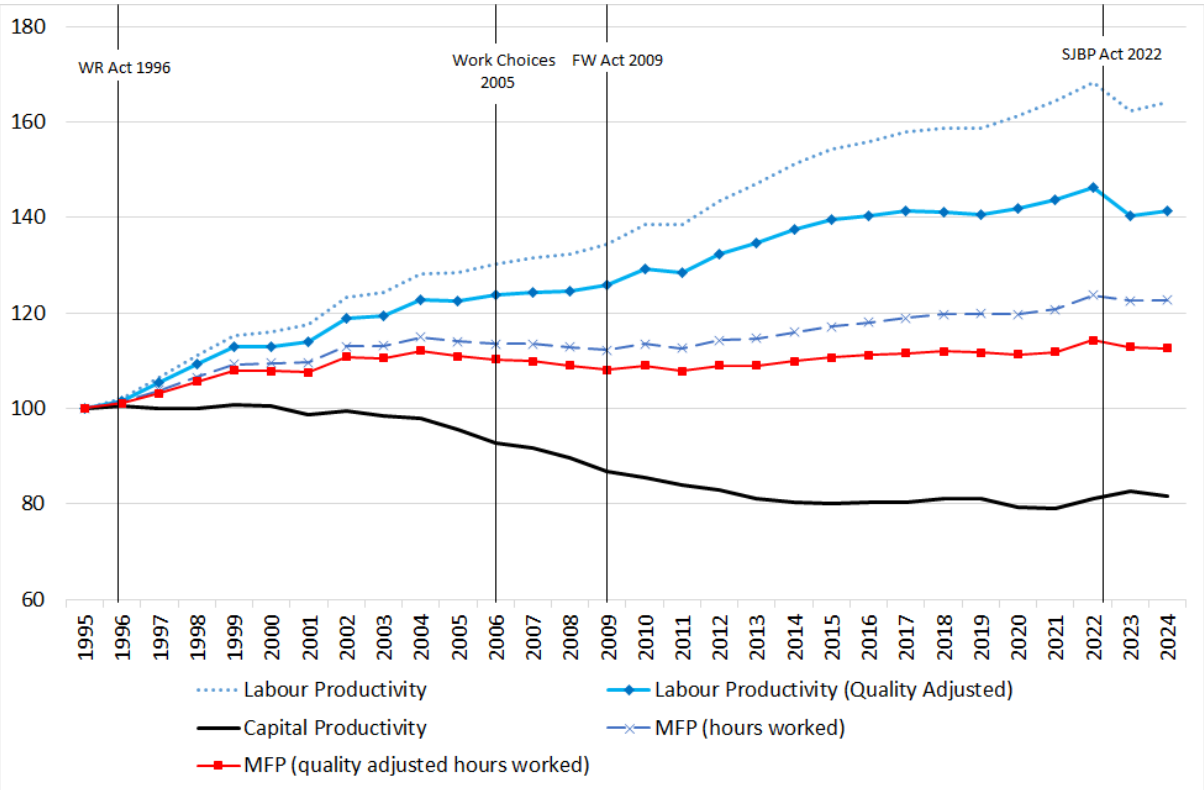
[1117] For further discussion of these 2 measures of labour productivity and interpretation see: K. Hancock, 'Enterprise bargaining and productivity', (2012) 22(3) *Labour and Industry*, 289.

[1118] In a recent report on immigration and productivity by the e61 Institute the authors show that migrant workers are more likely to be employed in lower productivity industries and firms compared to non-migrants and that this trend has intensified in recent years. In other words, the allocation of migrant workers has become less efficient, contributing to Australia's productivity slowdown. The authors suggest that the work restrictions that the Australian Government places on particular migrant groups (e.g., students) may have unintended negative economic consequences. For more see: D. Andrews, E. Clarke, L. Vass and Aaron Wong, 'Misallocated migrants: immigration and firm productivity in Australia' (2023) e61 Research Note No. 5.

enhancing capital (e.g. technology or automatic), which means the productivity per worker will decline. A related explanation is that firms may be hoarding labour, given the difficulties and cost of recruiting skilled workers in a tight labour market. Non-compete agreements, designed to prevent turnover, could be contributing to this labour hoarding.[1119] Another potential explanation is that workers are burning out (tiring) and/or perhaps becoming less efficient if facing financial stress because their wages are not keeping up with inflation.

The third measure of national productivity presented in Figure 59 is MFP. Between 2009 and 2024 MFP increased by 8.5%, while quality-adjusted MFP increased by 4.1%. Overall, however, both these measures show that there have been long-term improvements in the interaction between capital and labour. The dip after 2022 could be the product of a labour-intensive recovery. Other potential contributory factors might include economic pressures such as inflation, rising input costs and increased uncertainty, making it hard for businesses to plan investments.

Figure 59: Productivity in the market sector, 1995 to 2024



Notes:

1. Annual estimates of productivity at June of each year.

2. Data indexed to 1995.

Source: ABS 5204.0 Australian System of National Accounts, Table 13.

Series IDs used: A2421358T, A2421359V, A2421360C, A2421361F, A2421362J.

[1119] The Business Council of Australia (BCA) suggests that labour hoarding may, in part, have dragged down labour productivity – see: BCA, 'Australia's flagging competitiveness and productivity', (November 2024). Research from e-61 suggests that 1-5 Australian workers are subject to a non-compete clause. See: D. Andrews and B. Jarvis, 'The ghosts of employers' past: how prevalent are non-compete clauses in Australia?' (2023), e61 Micronote.

Figure 59 also shows where there were significant changes to the industrial relations system. Four points are highlighted, via the vertical lines in Figure 1: (a) Workplace Relations Act, first passed in 1996; (b) the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), which came into effect in 2006; (c) the adoption of the Fair Work Act in 2009; and (d) the Secure Jobs, Better Pay amendments. Echoing Hancock, the aggregate productivity data does not indicate any significant break in any of the series following the introduction of any of these legislative changes.[1120] It is, therefore, difficult to argue that industrial relations systems have a significant, dominant effect on national productivity outcomes or, at the very least, it requires a more nuanced analysis; this theme will be explored below.

3.2 Productivity at the industry level

Figure 60 shows trends in labour productivity at the industry level. For each industry the numerator is gross value added (GVA) and the denominator hours worked. No adjustment is made for quality hours worked. For convenience, only a select set of industries are shown (as space precludes showing trends for all industries). The set includes industries from the market as well as the non-market sector. Selection of industry is based primarily on size (in terms of employment at August 2024). The sectors profiled include health care and social assistance; retail trade; construction; professional, scientific and technical services; education and training; mining; and manufacturing. Mining has been included because it has a disproportionate effect on measures of Australia's national productivity; and manufacturing has been included because of its historical importance in the Australian economy.

An initial observation is that trends in labour productivity growth varies enormously by industry, suggesting that national productivity debates need to be more nuanced and sensitive to industry differences.

Vertical lines have been introduced into Figure 60 to recognise 5 'productivity growth cycles' between 1998–99 and 2021–22. These productivity growth cycles, identified by the Australian Bureau of Statistics (ABS), provide a long-term perspective on productivity trends, recognising that annual or short-term fluctuations in MFP may not accurately reflect underlying changes in the economy's productivity. Growth cycles vary in length, with each cycle endeavouring to capture peaks in productivity. As David Peetz notes, the trouble with growth cycles is that 'the end point is not easy to pick'.[1121] ABS estimates for the latest growth cycle (2017–18 to 2021–22) show that GVA growth (i.e. output) in the market sector was relatively subdued, averaging 1.6% per year. This compares to 2.8% in the 2009–10 to 2017–18 growth cycle.[1122] [1123] Low/slowing productivity is not unique to Australia. KPMG reports that Australia, Canada and the United States exhibit similar patterns in terms of high and low growth periods.[1124]

[1120] K. Hancock, 'Enterprise bargaining and productivity', (2012) 22(3) *Labour and Industry*, 289.

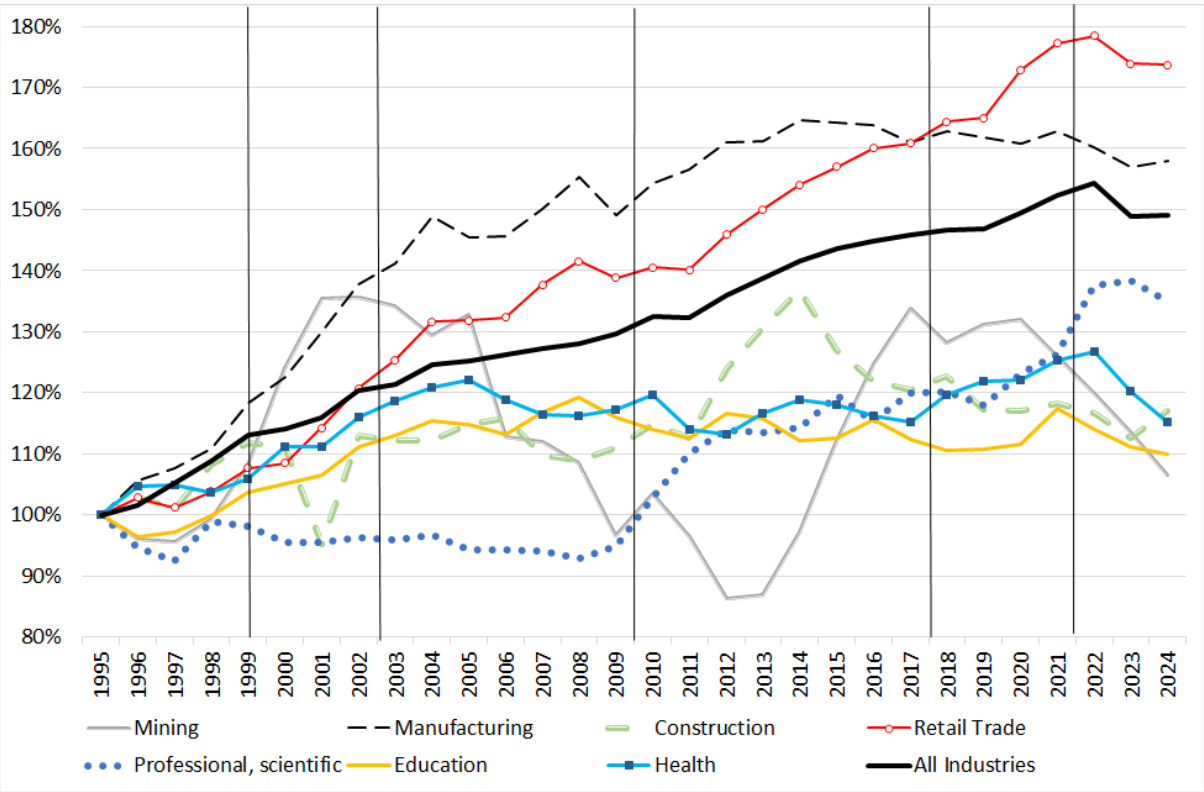
[1121] D. Peetz, 'Productivity is often mistaken for wages. What does it really mean? How does it work? (October, 2024), The Conversation.

[1122] For a discussion of the methodology used to identify industry growth cycles in Australia see: <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/5260.0.55.002Feature%20Article12015-16?opendocument&tabname=Summary&prodno=5260.0.55.002&issue=2015-16&num=&view=#analysis-of-results>.

[1123] ABS, 'Estimates of industry multifactor productivity', (January 2025): https://www.abs.gov.au/statistics/industry/industry-overview/estimates-industry-multifactor-productivity/latest-release

[1124] KPMG, 'Australia's productivity growth: further research and findings' (KPMG Research Paper, June 2024), 3.

Figure 60: Estimates of labour productivity growth for select industries, Australia, 1995 to 2024



Notes:

1. Data indexed to 1995/96.

2. The vertical lines show the productivity growth cycles as identified by the ABS. These are: 2003–04 to 2009–10, 2009–10 to 2017–18, 2017–18 to 2021–22.

Source: ABS 5204.0, Australian system of National Accounts, Table 15.

The growth cycle 2002–03 to 2009–10 in Figure 60 shows a sharp fall in labour productivity in mining. This was during the mining boom and a period of significant investment in new infrastructure (capital) during the construction phase (also known as 'capital deepening'). Further declines at the peak of the mining boom (around 2012) are consistent with incentives to mine lower quality resources at that time.[1125]

In the 2009–10 to 2017–18 growth cycle, labour productivity in mining grew (on the back of the investments in the previous growth cycle). It has been declining since 2020. This reflects a combination of factors, including weaker iron ore prices and increases in hours worked. The ABS notes that mining recorded its fourth consecutive annual decline in MFP in 2023–24. It attributes

[1125] The KPMG report notes that 'measured productivity within the mining industry was negative "because of the massive capital spending by mining companies during that time in response to the huge upswing in Australia's terms of trade (resulting in more mining projects becoming economically viable due to higher world minerals' prices).'. KPMG, 'Australia's productivity growth: further research and findings' (KPMG Research Paper, June 2024) 14.

the latest decline, in part, to a growth in hours worked on account of weather disruptions and unplanned maintenance.[1126]

Retail trade has shown strong growth in labour productivity, peaking in 2022. Growth in this sector likely reflects technological advancements (e.g. e-commerce, self-service checkouts, online shopping etc.).

Labour productivity in manufacturing was also strong over most of the period shown, although there was some stalling after around 2016. Australian manufacturers have faced substantially increased competition since the Button Plans of the late 1980s, which progressively reduced tariffs on significant industries. But resultant increases in efficiency had their limits, with the dramatic reductions in, or total disappearance of, some industry sectors.[1127] Ford, for example, stopped manufacturing in Australia in 2016. Rising energy costs would also affect production costs, and therefore productivity, in this sector.

In the professional, scientific and technical services sector labour productivity was weak (negative) until around 2009. Between 2009 and 2023 it exhibited strong growth, on the back of technological advancements such as cloud computing, data analytics etc.). Between 2022–23 and 2023–24 labour productivity growth slowed. The cause would appear to be a fall in the GVA in relative to the growth in hours 'as demand for business services softened' alongside a growth in hours worked.[1128]

Included in Figure 60 are estimates for the education and training sector and the health and social assistance sector. Much of the activity in these sectors is in the non-market sector, which means measuring the GVA is challenging (see earlier discussion). The ABS, nevertheless, produces estimates of GVA per hour worked for these 2 industries and given their importance in the economy they are included here.

In education and training there is evidence of a growth in labour productivity up until the GFC. This would be consistent, for example, with increased class sizes. There was little in the way of productivity growth between 2010 and 2022, other than a surge in 2021. This may have been on the back of COVID-19 and large investments in technology. In 2021, the ABS published new experimental MFP estimates for education and health, in recognition of the importance of non-market sector industries to the Australian economy.[1129] In describing the higher education trends, the ABS notes that between 2008–09 and 2018–19 labour productivity in this sector grew by an average of 1.2% per annum, similar to the average for the market sector industries.

The labour productivity estimates for the health care and social assistance sector show that over the period 2010 to 2022 labour productivity increased by 6% but has been declining since. ABS commentary concerning hospitals notes that, between 2008–09 and 2018–19, labour input was the main driver of output growth, consistent with the labour-intensive nature of hospitals. Labour productivity increased by 5% over this period. In a recent (2024) report on productivity in the care

[1126] https://www.abs.gov.au/statistics/industry/industry-overview/estimates-industry-multifactor-productivity/latest-release

[1127] Productivity Commission (2003) From Industry Assistance to Productivity: 30 years of 'the Commission', Productivity Commission, Canberra, pp.185.

[1128] See: <https://www.abs.gov.au/statistics/industry/industry-overview/estimates-industry-multifactor-productivity/latest-release>.

[1129] For further discussion see: <https://www.abs.gov.au/statistics/research/experimental-hospital-multifactor-productivity-estimates> and <https://www.abs.gov.au/statistics/research/experimental-higher-education-multifactor-productivity-estimates>.

sector, the e61 Institute notes that, over the decade to 2022, 20% of new care workers were migrants and around 20% came from outside the labour force.[1130]

The main conclusions here are that industries vary significantly according to measures of productivity growth. Further analysis of these different trends is necessary and evidence-based industry variations should be part of future industrial relations debates. Indeed, the causes of productivity trends at the industry level and the most appropriate ways to generate and distribute growth would be logical and desirable topics on the agenda of industry councils, whose establishment is recommended in Chapter 5.

3.3 Enterprise productivity

The definition and measurement of productivity at enterprise level is rarely discussed or systematically analysed in the Australian debate, particularly when compared to national or sectoral productivity analysis. This neglect, which unfortunately must be continued here, is the result of various factors. For example, it is partly because data for monitoring at the industry and national level are systematically collected and reported by institutions such as the ABS and the Productivity Commission. Their focus is on industry-level trends, regulatory settings, labour market conditions, competition and technology rather than on enterprise-specific productivity measures.

At the enterprise level measuring productivity can be complex and resource intensive. It is unclear how many enterprises develop a systematic approach to the definition and measurement of productivity. The neglect at the enterprise level may also arise from so much variety in how it is measured from enterprise to enterprise. Businesses are also often reluctant to disclose or share detailed performance metrics because managers fear that information will be used to their disadvantage by either competitor enterprises or unions. As a result, there is limited public data available to support enterprise-level productivity analysis.

That said, there has been growing interest in enterprise-level productivity in recent years. Recent examples include Deloitte's 2024 report on generative AI,[1131] Consult Australia's 2020[1132] report on procurement and productivity, e61 Institute's 2023[1133] report on job switching (noting that non-compete clauses are a barrier to job mobility and are hampering productivity), a Treasury report on productivity performance and business dynamism[1134] and the Productivity Commission's 2023

[1130] In the e61 study the authors suggest there has been 'virtually no measured labour productivity growth in the care economy for 20 years'. In their study the care economy consists of 4 2-digit groups from the Health care and social assistance sector (1. hospitals, 2. medical and other health care services, 3. residential care services, and 4. social assistance services). They use the same definition of labour productivity as used here (GVA per hour worked). It is hard to reconcile the finding of zero labour productivity growth with the estimates presented here and the findings from the ABS in their experimental MFP series. What the report does note is that there are 'substantial impediments to productivity growth in the care economy' including little competition' and limits to incentives to innovate or contain costs. They also note a recent Grattan report that argues that meeting the labour demand in this sector is better met by wage adjustments than by expansion of less-skilled migration. For further details see: M. Maltman and E. Ranking, 'What if we didn't care? Implications for growth in the care economy for the broader macroeconomy', (October 2024), e61 Research Note.

[1131] Deloitte, 'Moving from potential to performance', Deloitte's State of Generative AI in the Enterprise Quarter 3 report, (August 2024).

[1132] Consult Australia, 'Uplifting productivity: delivering economic growth through best practice procurement', (2020).

[1133] J. Buckley, 'Productivity in motion: the role of job switching', (November 2023), e61 Institute Micro Note 14.

[1134] D.Andrews, J.Hambur, D.Hansell and A.Wheeler, 'Reaching for the stars: Australian firms and the global productivity frontier', (January 2022), Treasury Working Paper.

inquiry report on productivity and the labour market.[1135] With the exception of the Productivity Commission report, none of the other reports mentioned here would appear to have an explicit focus on industrial relations.

4. The causes of productivity growth

Apart from explanations of the causes of productivity trends derived from different philosophical positions (discussed above), different parties have also emphasised different factors as causes of productivity growth. Consistent with the argument above that levels are important in productivity debates, the discussion here focuses on the causes of productivity growth at 2 levels: first, the national level, where most attention has so far been focused; and second, the enterprise level, which is less well and less systematically discussed.

The separation of these 2 levels has recently been a central theme of research about multi-employer bargaining. One recent international paper on this topic, for example, concluded that there are very different causes of productivity growth at the 'macro' and 'micro' levels:[1136]

> Today, there is near consensus that bargaining systems have limited influence on macroeconomic performance (compared to capital investment and systems for innovation and skill development, say), but positive effects on firm and sectoral performance, including productivity and innovation ...

These conclusions justify a similarly bifurcated discussion beyond bargaining systems.

4.1 The factors influencing national productivity growth

Most studies of national productivity growth conclude that it is caused by several factors, none of which is the national system of industrial relations. Primary drivers of national productivity include advancements in technology, improvements in workforce skills, and investment in infrastructure and innovation.[1137]

In this section consideration is given to less commonly discussed factors, which are central to this review – namely, gender equality, collective bargaining and wages.

4.1.1 Gender equality

Gender equality is both a fundamental human right and a critical national productivity issue. Despite numerous reports from organisations such as the World Economic Forum (WEF),[1138] the Workplace Gender Equality Agency (WGEA)[1139] and the Women's Economic Equality Taskforce[1140]

[1135] Productivity Commission, '5-year Productivity Inquiry: A more productive labour market' (Report, Productivity Commission, February 2023), Volume 7.
[1136] D.Grimshaw, B.Brandl, F.Bertranou and S.Gontero, 'Trading the potential benefits and complex contingencies of multilevel collective bargaining', (2024) 153(4) *International Labour Review*, 660-661.
[1137] D.Andrews, J.Hambur, D.Hansell and A.Wheeler, 'Reaching for the stars: Australian firms and the global productivity frontier', (January 2022), Treasury Working Paper.
[1138] See World Economic Forum (WEF) Global Gender Gap Reports. The 2024 report was released June 2024.
[1139] For example: WGEA, 'Workplace gender equality: the business case', (November, 2018) <https://www.wgea.gov.au/publications/gender-equality-business-case#economic-growth>.
[1140] Women's Economic Equality Taskforce, 'A 10-year Plan to unleash the full capacity and contribution of women to the Australian economy', (Report, Department of the Prime Minister and Cabinet, 2023).

emphasising the 'business case' for gender equality, it remains largely absent from national productivity analyses.

For example, the Productivity Commission's 2023 report *A More Productive Labour Market* makes only 4 references to gender and 2 to women. This is despite the fact that women, on average, are now more highly educated than men and a critical source of skilled labour;[1141] and account for 48% of total employment. Of the 3.2 million new jobs created since 2012, 55% of have gone to women.

Indeed, not only does the Productivity Commission report largely overlook gender equality but also, where it does address the issue, it reflects a limited understanding of the relationship between gender equality and productivity. A particularly concerning example is the commission's assertion that 'work value is largely a social goal and does not necessarily relate to the desirable outcomes of efficient labour markets'.[1142] This perspective fails to acknowledge that appropriately valuing work can significantly drive productivity by enhancing employee effort, motivation and job satisfaction while reducing turnover. Recognising work value is also essential for addressing labour shortages and mitigating the adverse effects of wage stagnation and inequality on national economic performance.

There are, of course, multiple perspectives on the gender equality debate. Advocates focusing on labour market participation and productivity highlight factors such as increased labour supply, human capital utilisation and the fiscal benefits of higher female workforce participation, including greater tax contributions (e.g. WEF, OECD and the Women's Economic Equality Taskforce). According to a recent Deloitte Access Economics report, the opportunity cost of barriers preventing women from achieving full and equal participation in economic activity is estimated at $128 billion annually.[1143]

On the other hand, some argue that framing gender equality solely as an economic issue can be detrimental, as it risks overlooking fundamental aspects of decent work conditions, such as job security, work–life balance and remuneration (pay equity). This broader perspective underscores the crucial role of industrial relations in driving both gender equality and productivity. In this context, legislative reforms such as the Secure Jobs, Better Pay amendments are directly aimed at addressing gender-based disparities in the workplace. These amendments seek to improve flexibility and wage equality and create a more inclusive labour market where workers – regardless of gender – can balance work and care responsibilities without penalty, discrimination and harassment.[1144]

[1141] As of May 2024, 36.9% of Australian females aged 15-74 held a bachelor's degree or higher, compared to 29.8% of males in the same age group. See: Australian Bureau of Statistics (ABS), 'Education and Work, May 2024', Table 11: Highest education attainment.

[1142] Productivity Commission, '5-year Productivity Inquiry: A more productive labour market' (Report, Productivity Commission, February 2023), Volume 7, 101.

[1143] Deloitte Access Economics, 'Breaking the norm: unleashing Australia's economic potential', (Report, November 2022) cited in: Women's Economic Equality Taskforce, 'A 10-year Plan to unleash the full capacity and contribution of women to the Australian economy', (Report, Department of the Prime Minister and Cabinet, 2023), 9.

[1144] The Senate Select Committee on Work and Care report underscores the challenges individuals face in balancing paid employment with unpaid caregiving responsibilities. It emphasises the need to create conditions that enable both men and women to share caregiving duties more equitably, which is essential for achieving gender equality, improving workforce participation, and ensuring economic security for all. Equitable sharing of care responsibilities can also help break down traditional gender roles, reduce the gender pay gap, and promote better work-life balance for families. The Senate, 'Senate Select Committee on Work and Care', (Final Report, 2023), Commonwealth of Australia. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Work_and_Care/workandcare/Report

4.1.2 Collective bargaining

Australian studies of the link between bargaining systems and national productivity have largely confirmed the conclusion reached by international studies that this relationship is weak. Jeff Borland, for example, shows that the Howard government's 2005 Work Choices framework, which privileged employers, had minimal effects on productivity. Similarly, he also shows that the Rudd government's 2009 reforms, which aimed to restore some bargaining power to workers and strengthen minimum wages and conditions, also had no significant overall impact on productivity.[1145] Research by Keith Hancock similarly observed no obvious effect of particular bargaining arrangements on productivity: 'There can be no certainty about the productivity effects of enterprise bargaining, because the counterfactual situation is and will remain unknown'.[1146] His particular point was that the industrial relations system is just one of a range of factors that are important for productivity. Others include technology and innovation, health, education, industry concentration, economic shocks (e.g. COVID-19), capital markets, monetary and fiscal policies, trade and globalisation (and the list goes on).[1147]

The importance of these non-industrial relations factors must be acknowledged, but so too must the potential impact of collective bargaining at the national level. In particular, the emerging (or ongoing) debate raised by this Review must consider how national collective bargaining systems and the laws regulating them can contribute to both the generation of productivity growth and the distribution of productivity gains.

4.1.3 Wages

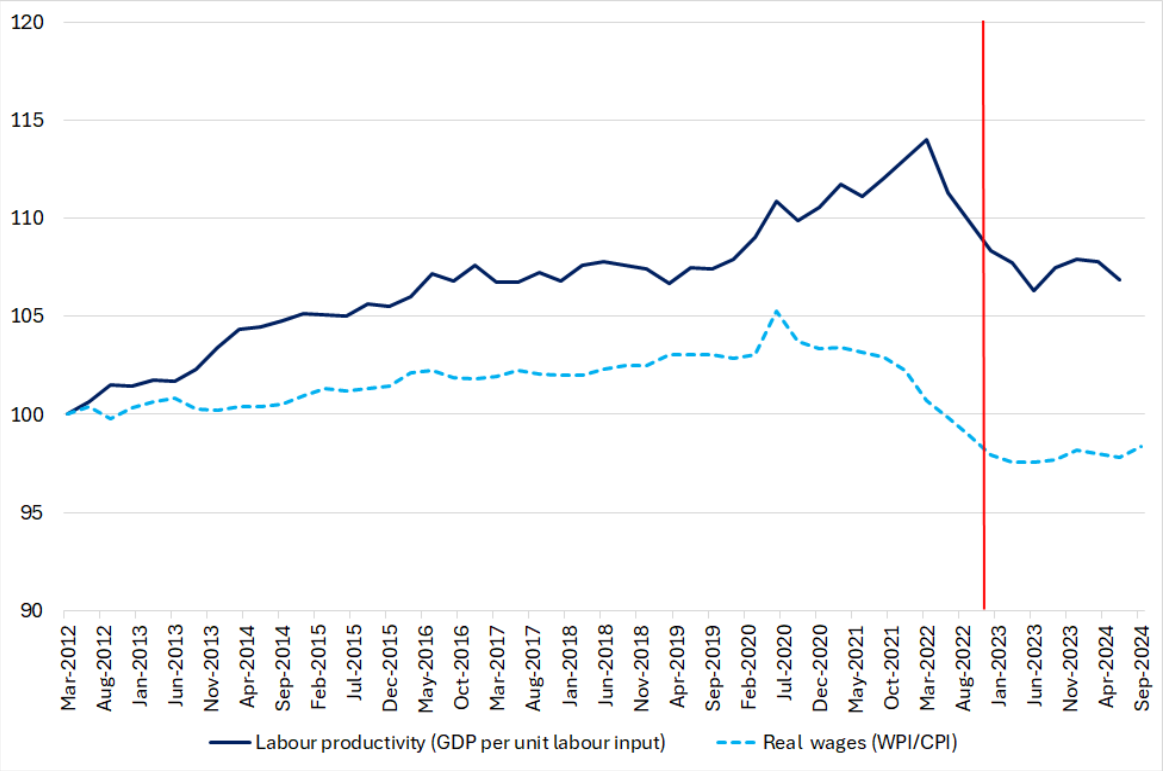
One aspect of industrial relations that has received some attention in debates is the relationship between productivity and wages, although it is often unclear whether this considers the generation of productivity growth or the distribution of gains through productivity growth. With respect to the former (i.e. whether wages are important in explaining the generation of productivity growth), David Peetz notes that 'Productivity measures the rate at which output of goods and services are produced per unit of input … if someone says "higher wages means lower productivity" they don't know what they are talking about'.[1148]

With respect to the latter (i.e. whether productivity is important is determining wages), there was (historically) a strong relationship between productivity growth and real wage growth. As productivity grew, Australian firms shared the benefits via higher wages. In recent years (since around 2012), however, this relationship has changed. In technical terms, there has been a 'decoupling' in the relationship (see Figure 61). Real wages are now growing at a slower pace than labour productivity. The ABS refers to the gap (i.e. the difference between labour productivity

[1145] J. Borland, 'Industrial relations reform: chasing a pot of gold at the end of the rainbow?', (2012), 45(3), *The Australian Economic Review,* 269-289.
[1146] K. Hancock, 'Enterprise bargaining and productivity', (2012), 22(3), *Labour and Industry*, 289-302, p.301.
[1147] Recent work by the OECD (2019), however, does suggest that coordinated (e.g., centralised) collective bargaining systems do matter for employment, job quality and labour market inclusiveness. They analysed the labour market outcomes across 35 OECD countries using data from 1980 to 2015 and, among other things, concluded that "…co-ordinated systems are shown to be associated with higher employment, lower unemployment, a better integration of vulnerable groups and less wage inequality than fully decentralised systems". See, also submission #41 by Professor Chris Wright.
[1148] D. Peetz, 'Does industrial relations policy affect productivity?', (2012), 38(4) *Australian Bulletin of Labour*: 268-292.

growth and real compensation) as 'net decoupling'.[1149] Real wage decoupling is not unique to Australia. It has occurred in most OECD countries over recent years.[1150]

Figure 61: Labour productivity and real wages (composition adjusted), 2012 to 2024



Notes:

Notes:

1. Indexed to March 2012.

2. Labour productivity measures GDP per unit labour input. It is derived by dividing seasonally adjusted GDP chain volume measures (National Accounts, ABS Cat No 5206.0, Table 1, series A2304402X) with information on seasonally adjusted total hours actually worked in all jobs from the Labour Account (ABS 6150.0.55.003, Table 1, series A85389483J).

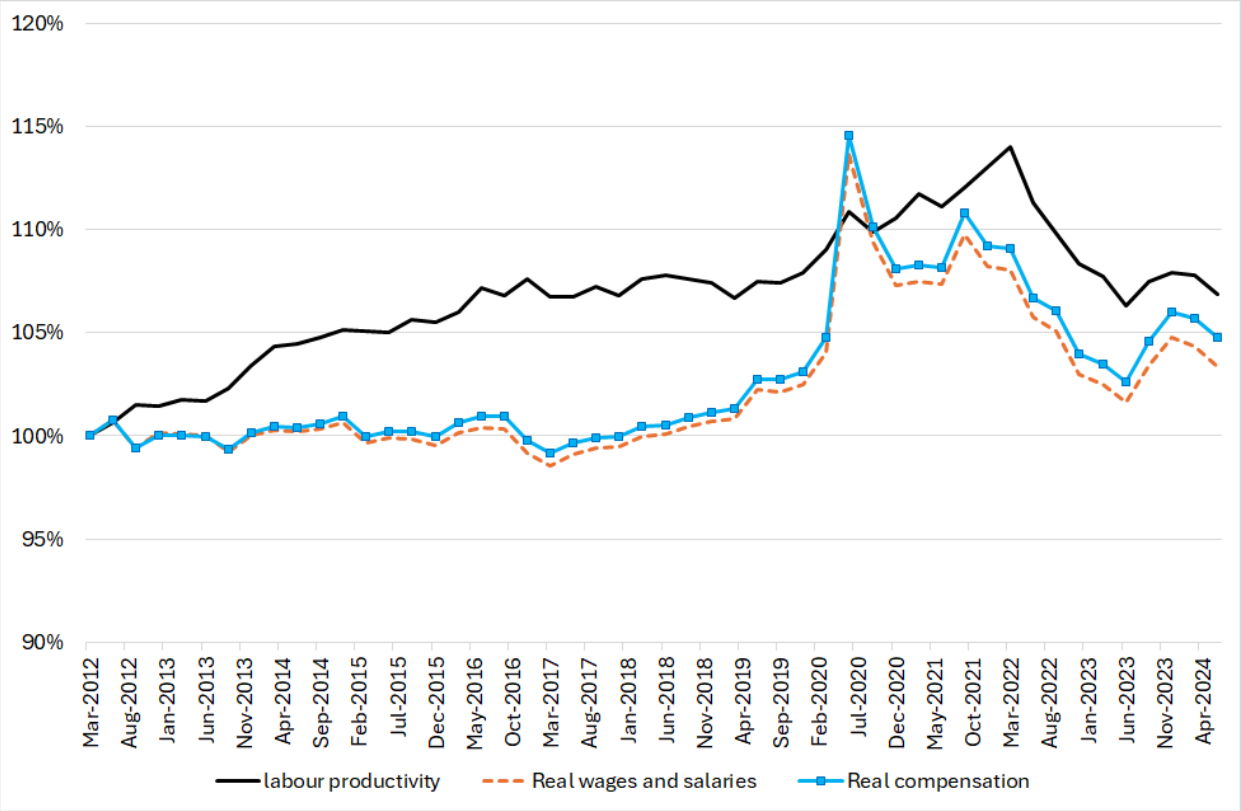
3. Real wages are derived by dividing the wage price index (WPI) by the consumer price index (CPI). The source of the WPI and CPI are given below.

Source: WPI data: ABS 6345.0 Wage Price Index, Australia. Table 1, Total hourly rates of pay excluding bonuses, original. CPI data: ABS 6401.0 Consumer Price Index, Australia. Tables 1 and 2, All groups CPI Australia, original.

[1149] Australian Bureau of Statistics, Has worker compensation reflected labour productivity growth?, (13 December 2022).
[1150] C.Schwellnus, A.Kappeler, and P. Pionnier, 'Decoupling of wages from productivity: Micro-level facts. (2017), OECD Economics Department Working Papers, No. 1373, 3.

Some commentators prefer to make comparisons using productivity and wage data from the National Accounts, i.e, the same series. For comparative purposes data from the national accounts are used to replicate Figure 61 – the result is given in Figure 62. In Figure 62 the wage estimates are not adjusted for compositional effects. Two wage indictors are used, one that measures total wages and salaries paid, and the other that includes social contributions (e.g., superannuation). The surge in employee compensation during COVID-19 (supported by government subsidies) is reflected in the 2020 peak. The main take-away from both figures is that pattern of wage-productivity decoupling is similar.

Figure 62: Labour productivity and wages (not adjusted for compositional effects)



Notes:

1. Indexed to March 2012.

2. See notes to Figure 61 for calculation of labour productivity.

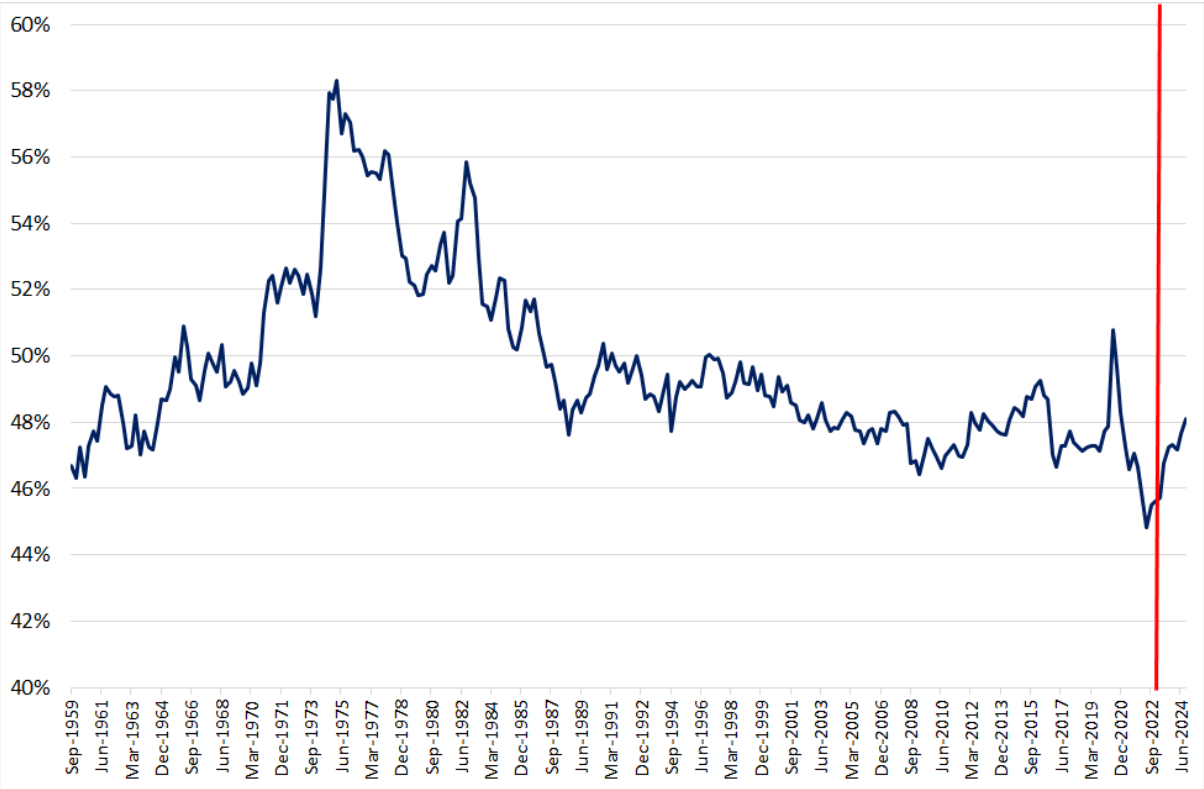
3. Real wages and salaries are estimated by dividing seasonally adjusted compensation of employees (wages and salaries) from Table 7 of ABS 5206.0 National accounts (series A2303355A) with information on seasonally adjusted total hours actually worked from Table 1 of the ABS Labour Account (series A85389483J). As this information is in current prices it is deflated using the CPI (all groups).

4. Real compensation measures wage and salaries plus employer's social contributions. As with the above it is then divided by total hours actually worked and deflated using the CPI.

This divergence between productivity and wages has sparked extensive debate among economists, policymakers and industrial relations experts. Several factors have been proposed to explain this decoupling. One key consideration is the declining bargaining power of workers, influenced by changes such as declining union membership, the rise of precarious and gig work

and the fall in collective bargaining. These changes have weakened workers' ability to negotiate wages that keep pace with productivity gains. Another explanation points to technological advancements and capital deepening, where firms invest more in capital which enhances productivity and profits but does not necessarily translate into wage increases for employees. Instead, a larger share of productivity gains is captured by capital owners and shareholders, contributing to growing income inequality. Related issues include the rising power and concentration of firms and the retention of productivity gains as profits rather than passing on gains as higher wages.[1151] This is reflected in the declining share of GDP going to labour – see Figure 62.

Figure 62: Labour share of GDP, 1959 to 2024



Source: ABS 6206.0, Table 7. Compensation of employees and GDP.

The decoupling of productivity growth and real wages has significant implications for the issues examined in this Review, particularly in relation to gender equality and collective bargaining. The stagnation of real wages, despite productivity gains, raises concerns about the equitable distribution of economic growth, which disproportionately affects women and other vulnerable groups in the workforce. The stagnation and decoupling also underscore the need for interventions that strengthen workers' bargaining power and distribution of productivity gains through collective bargaining.

4.2 The causes of enterprise-level productivity growth

Industrial relations are more important in explaining productivity growth at this level. This is not to say that other factors are unimportant. Certainly, the impact of factors like technology, skills

[1151] See: D.Shubhdeep, J.Eeckhout, A.Patel and L.Warren, 'What drives wage stagnation: monopsony or monopoly? ((2022) 20(6) *Journal of the European Economic Association*, 2181-2225.

formation and utilisation and especially management competencies on productivity enhancement is widely confirmed. Rather, there is greater potential than at national or macro level for industrial relations arrangements to impact productivity – and productivity to impact industrial relations – at the 'micro' or organisational level. The key question is how? In other words, what are the key mechanisms that promote organisational productivity growth?

4.2.1 Gender equality

Many of the gender equality factors discussed above (see section 4.1.1) can be translated (again, in principle) to the enterprise/organisational level. This translation comes through mechanisms that make better use of and advance women's skills and experience; that reduce inflexibilities affecting women's full participation at work; that reduce discrimination or harm in the workplace; that improve women's share of benefits of increased productivity; and, overall, that improve the recruitment, experience and retention of women within the organisation. The importance of these mechanisms for enterprise productivity is well established.

One issue with a profound effect on organisational or enterprise productivity is workplace sexual harassment. It is easy to see how sexual harassment at work could adversely affect productivity through proxy measures such as:

- working in less productive ways as a direct or indirect result of harassment (i.e. avoidance of certain tasks, people, places, circumstances; increased conflict)
- increased absences from work and higher staff turnover
- time taken in related processes, such as complaints, adjustments, investigations and hearings
- additional time spent in remedial (as opposed to preventative) training, policy communication, 'culture change' programs.[1152]

Moreover, experiences of workplace sexual harassment are higher for some workers, some types of work and in some industries. Insecure work can have a compounding effect. Women, including young women and migrant women, are disproportionately represented in insecure work and in incidents of sexual harassment.[1153]

Another gender equality issue with an important effect on organisational or enterprise productivity is parental leave.[1154] This is an area in which the economic, or 'business case' arguments, are well established. The disagreement seems to be about where and by whom costs and benefits are accrued. At the level of organisations, the productivity benefits of increased uptake of parental leave would be captured in measures such as the number of, and speed at which, workers return to work and all of the associated benefits of skilled worker retention (e.g. reduced recruitment, training cost, retained knowledge).[1155]

The key to understanding the potential productivity benefits of many of the Secure Jobs, Better Pay amendments lies in the way they use national laws to change harmful gendered attitudes,

---

[1152] AHRC 2020 Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces: 208-09; 302; 316-320.

[1153] Women's Economic Equality Taskforce (2023) *Women's Economic Equality: A 10-year plan to unleash the full capacity and contribution of women to the Australian economy 23-33*, Department of Prime Minister and Cabinet, Commonwealth of Australia, Canberra: 32.

[1154] Baird, M., Hamilton, M., & Constantin, A. (2021). Gender equality and paid parental leave in Australia: A decade of giant leaps or baby steps? Journal of Industrial Relations, 63(4), 546-567.

[1155] Women's Economic Equality Taskforce 2023:29.

motivations and behaviours.[1156] These can be seen in the chapters of the report on paid family and domestic violence leave (Chapter 23), equal remuneration (Chapter 25), prohibiting pay secrecy (Chapter 27), prohibiting sexual harassment in connection with work (Chapter 28), anti-discrimination and special measures (Chapter 29), flexible work (Chapter 31) and unpaid parental leave (Chapter 32).

4.2.2 Collective bargaining

Much research attention has focused on the effects of the presence of unions and/or collective bargaining within the organisation on productivity. The conclusions vary, but the first lesson is that neither unions nor collective bargaining are antithetical to good productivity outcomes. Not all unions or all instances of collective bargaining lead to good or bad productivity performance. As a classic source said, 'unionism per se is neither a plus nor a minus to productivity'.[1157] Unions and collective bargaining are frequently found to be correlated with good productivity, but there are no guarantees.

Instead of universal definitive prescriptions for productivity growth, this kind of research focuses attention on the specific aspects of unions and/or collective bargaining that contribute to good productivity growth within organisations.

Some of the answers may lie with collective bargaining itself, although it begs the question of what aspects of bargaining lead to productivity growth within the enterprise. Is it, for example, the negotiated provisions within the final agreement that are most important for productivity? Is it the provisions about wages or working hours or shift arrangements or flexibility or disputes procedures? The FWC explored this question in a valuable (and much neglected) research paper which argued, first, that there are limited quantitative data on the relationship between enterprise bargaining and productivity:[1158]

> At the time of publication, there were limited Australian data on businesses available that could be used to shed detailed light on the link between enterprise agreements that contain clauses or measures to improve productivity and the effect of such clauses or measures (if any) on firms' productivity levels.

The research paper's summation of the research literature was ambiguous, reporting that there was 'a variety of findings in regards to the relationship between productivity and enterprise bargaining, with some studies suggesting some form of positive association may exist and others concluding that there is little or no connection between them'.[1159]

The research paper went on to examine, by way of case studies, the effectiveness of 26 different clauses of enterprise agreements that were nominated by the parties to those agreements as promoting productivity growth within the enterprise. These clauses fell into three broad categories: flexibility and leave; skills; and incentives and engagement. As the researchers observed, many of these enterprise agreement clauses corresponded with major causes or

---

[1156] Women's Economic Equality Taskforce, 2023:47.
[1157] R. Freeman and D. Medoff, *What do unions do?* (1984) Basic books, New York, p. 179.
[1158] FWC, 'Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level', (December 2014), Future Directions 2014–15: Initiative 29, p.18.
[1159] FWC, 'Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level', (December 2014), Future Directions 2014–15: Initiative 29, p. 19.

determinants of productivity growth mentioned above: 'productivity or innovation, including: change in work arrangements, competitiveness, changes in organisational or managerial processes, engagement, targets and incentives for employees, training and human resource planning'.[1160]

Moreover, the success of these clauses was found to be closely affected by the organisational context:[1161]

> The case studies also highlight the complex issues associated with any exploration of enterprise agreements and productivity. In particular, in each case the operation and effect of the clauses discussed was highly dependent on organisational context and shaped by the policies or practices and particular work or operations to which they relate.

Alternatively, the promotion of productivity growth may not lie in collective bargaining itself, whether that bargaining by single-enterprise or multi-employer. Research amongst employer associations, for example, found that the more profound workplace changes emanated from outside the bargaining framework:[1162]

> according to leading employer association officials we interviewed, many of the employers who 'lived the enterprise bargaining dream' of improvements to productivity and organisational culture, now consider the role of enterprise agreements and the bargaining processes that generate them to be of fairly minor significance. Having greatly reduced their expectations of what enterprise bargaining can deliver, they no longer see enterprise bargaining as 'the be all and end all' for gaining improvements in workplace relationships, flexibility or productivity. Rather, of those still interested in those goals, most tend now to pursue them outside formal enterprise bargaining processes through such avenues as employee engagement programs.

Consistent with this notion of productivity growth being effectively advanced outside enterprise bargaining were 5 extended Australian case studies of cooperation between managers and union representatives, facilitated by tribunal members.[1163] In all 5 cases, greater cooperation in the workplace led to enhanced productivity growth, even though it was not necessarily the main motivation for change and it came in very different ways. Just as relevantly, in 2 of the 5 cases, enterprise bargaining was largely irrelevant to the successful cooperative relationships. In the other 3 cases, cooperation involved the bargaining rounds, but they were never the 'main game'.

Finally, an important point in most instances of successful productivity growth at organisational level is that the bargaining process itself. In other words, bargaining at least forces the parties

---

[1160] FWC, 'Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level', (December 2014), Future Directions 2014–15: Initiative 29, p. 28.
[1161] FWC, 'Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level', (December 2014), Future Directions 2014–15: Initiative 29, p. 28.
[1162] L. Thornthwaite and P. Sheldon, 'Employer and employer association experiences of enterprise bargaining: being careful what you wish for?', (2012) 22(3) *Labour & Industry: a journal of the social and economic relations of work* 255.
[1163] M. Bray, J. Macneil and A. Stewart, *Cooperation at work: How Tribunals Can Help Transform Workplaces*, (2017) Federation press, Sydney.

(usually managers and union representatives) to talk to each other. Only by initiating conversations and compromises, motivated by the desire to 'do things differently' can cooperative relationships be developed. Then the parties can cooperatively address productivity issues.

So, research both overseas and in Australia, suggests that the industrial relations mechanism by which greater productivity growth is achieved is not necessarily the collective agreement itself but, rather, the relationships within the enterprise between managers, workers and unions. Certainly, collective bargaining can be used to achieve productivity growth – sometimes this is single-enterprise bargaining, but increasingly it is argued that multi-employer bargaining can also promote productivity growth.[1164] But this goal can often be achieved outside the formal collective bargaining rounds.

Discussions about the potential contributions of unions and collective bargaining to productivity growth at an enterprise level are directly relevant to the intentions – if not the effectiveness – of the Secure Jobs, Better Pay amendments and this Review. In particular, they were raised by stakeholders in feedback about the amendments concerning the integration of institutions (Part 1 of the Draft Report) and those concerning bargaining and agreement making (Part 2 of the Draft Report).

5. Summary and conclusion

This appendix is not designed as a comprehensive account of productivity and its relationships with industrial relations. Rather, it aims to identify some key aspects of the debate and provoke discussion of them. The key points are:

- It must not be assumed that productivity is a universal concept: in particular, interpretations of its causes and solutions are deeply affected by the *values/frames of reference* of the parties.
- Productivity is *defined* and *measured* differently according to the 'level' in question. In particular, 3 levels are important and should be considered separately: the nation, the industry and the enterprise.
- Productivity growth is *generated* by many factors, only one of which is industrial relations:
  - at national level, industrial relations are widely accepted as less important than other factors, like technological innovation and skills;
  - at enterprise level, industrial relations are more important, especially where the presence of unions or collective bargaining are found to be less important than the nature of the relationships between the parties.
- The *distribution* of gains generated by productivity growth – especially through wages and gender equality – is vital and it is not just determined by market forces; rather, the balance of power between the parties and the impact of institutional arrangements (like collective bargaining) are important.
- The key message is that collective bargaining should focus on both the generation of productivity growth and the distribution of productivity growth, in combination. One without the other will not be effective.

[1164] D.Grimshaw, B.Brandl, F.Bertranou and S.Gontero, 'Tracing the potential benefits and complex contingencies of multilevel collective bargaining', (2024) 163(4) International Labour Review, 660-663.

Appendix 5 – Additional tables

Table 65: Federal Court proceedings commenced by the regulator

Completed/current		Initiated by FWC (and FWA) / ROC
Current	*General Manager of the Fair Work Commission v Diana Asmar and Others*	FWC
Completed	*General Manager of the Fair Work Commission v Construction Forestry and Maritime Employees Union & Ors* – commenced 2 August 2024, concluded 4 September 2024	FWC
Completed	*General Manager of the Fair Work Commission v Stephen Smyth [QUD411/2021]* – commenced 30 November 2021; judgment delivered 28 March 2024	ROC (commenced between 1 May 2017 & 6 March 2023)
Completed	*General Manager of the Fair Work Commission v The Australian Workers' Union* [NSD992/2022] – commenced 17 November 2022; judgment delivered 21 December 2023	ROC (commenced between 1 May 2017 & 6 March 2023)
Completed	*Registered Organisations Commissioner v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [NSD802/2018] – commenced 10 May 2018; judgment delivered 11 February 2020. Appeal: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Registered Organisations Commissioner* [NSD338/2020] – commenced 23 March 2020; judgment delivered 22 December 2020	ROC (commenced between 1 May 2017 & 6 March 2023)
Completed	*Registered Organisations Commissioner v The Australian Workers' Union & Anor* [VID583/2018] – commenced 16 May 2018; judgment delivered against first respondent on 12 August 2020 and second respondent 12 November 2019	ROC (commenced between 1 May 2017 & 6 March 2023)
Completed	*Registered Organisations Commissioner v Australian Hotels Association* [VIC1442/2018] – commenced 13 November 2018; judgment delivered 17 September 2019	ROC (commenced between 1 May 2017 & 6 March 2023)
Completed	*Registered Organisations Commissioner v Australian Nursing and Midwifery Federation & Anor* [WAD470/2015] – commenced 21 August 2015; judgment delivered on liability on 13 November 2018 and penalty on 14 December 2018	FWC
Completed	*Registered Organisations Commissioner v Transport Workers Union* [NSD2041/2016] – commenced 25 November 2016; judgment delivered 2 February 2018. Appeal: *Transport Workers Union of Australia v Registered Organisations Commissioner* [NSD232/2018] – judgment delivered 21 November 2018	FWC
Completed	*Registered Organisations Commissioner v Michael Mijatov* [NSD2181/2016] – commenced 19 December 2016 and concluded on 22 June 2018	FWC
Completed	*General Manager of the Fair Work Commission v James McGiveron and Richard Burton* [WAD 363 of 2016] – commenced on 8 August 2016 and concluded on 21 April 2017	FWC
Completed	*General Manager of Fair Work Australia v Musicians' Union of Australia &*	FWC

	Anor [VID620/2014] – commenced 21 October 2014 and concluded on 30 March 2016	
Completed	*General Manager of Fair Work Australia v Craig Thomson External* [VID 798/2012] – commenced 15 October 2012 and concluded on 15 December 2015	FWC
Completed	G*eneral Manager of Fair Work Australia v Health Services Union & Ors* [VID 380/2012] – commenced 23 May 2012 and concluded on 10 September 2014	FWC
Completed	*General Manager of Fair Work Australia v Health Services Union* [VID1128/2012] – commenced 21 December 2012 and concluded 4 December 2013	FWC

Note: FWC: Fair Work Commission; ROC: Registered Organisations Commission.

Source: Table prepared using data from FWC website.

Appendix 6 – Acronyms and abbreviations

Term	Definition
Fair Work Act	*Fair Work Act 2009* (Cth)
Secure Jobs, Better Pay amendments	*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)
Secure Jobs, Better Pay Act	*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)
Secure Jobs, Better Pay Bill	*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth)
Closing Loopholes Act	*Fair Work Legislation Amendment (Closing Loopholes) Act 2023*
Closing Loopholes No. 2 Act	*Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2023*
BCIIP Act	*Building and Construction Industry (Improving Productivity) Act 2016* (Cth)
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
ABCC	Australian Building and Construction Commission
ROC	Registered Organisations Commission
ACTU	Australian Council of Trade Unions
MCA	Minerals Council of Australia
CCIWA	Chamber of Commerce and Industry of Western Australia
COSBOA	Council of Small Business Organisations Australia
CME WA	Chamber of Minerals and Energy of Western Australia
MIA ltd.	Maritime Industry Australia Ltd
ARA	Australian Retailers Association

AREEA	Australian Resources & Energy Employer Association
ANMF	Australian Nursing and Midwifery Federation
UWU	United Workers Union
ERO	Equal Remuneration Order
AEC	Australian Electoral Commission

Appendix 7 – Terms of Reference

As issued by Minister Watt on 1 November 2024.

Terms of Reference

The Review Panel are conducting a joint review of the operation of *the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Secure Jobs, Better Pay Act) and of the amendments made by Part 16A of Schedule 1 of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Closing Loopholes Act) (the Secure Jobs, Better Pay Review).

Scope of the Review

The requirement for the Secure Jobs, Better Pay Review is outlined in the respective Acts:

- Secure Jobs, Better Pay Act: Section 4 of the Secure Jobs, Better Pay Act requires the Minister for Employment and Workplace Relations (the Minister) to cause a review of the amendments made by the Act to be conducted.
- Closing Loopholes Act: Section 4A of the Act requires the Minister to cause a review of the operation of the amendments made by Part 16A of Schedule 1 of the Closing Loopholes Act to be conducted.

Both Acts require that the:

- persons who conduct the review must give the Minister a written report of the review within 6 months of the commencement of the review
- Minister must cause a copy of the report or the review to be tabled in each House of the Parliament within 15 sitting days after the Minister receives it.

The Secure Jobs, Better Pay Review commenced on 2 October 2024. A draft Report must be provided to the department on or before Friday, 31 January 2025. The draft Report is to include preliminary findings and draft recommendations and is to be published for stakeholder comment.

A final Report is to be delivered to the Minister on or before 31 March 2025.

Without limiting the matters that may be considered when conducting the review of the Secure Jobs, Better Pay Act and Part 16A of the Closing Loopholes Act, the review must:

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

Secure Jobs, Better Pay Act

The Act is the first of a series of workplace relations reforms introduced by the Australian Government and includes reforms in the following areas:

- Enterprise bargaining
- Job security and gender equality
- Compliance and enforcement
- Workplace conditions and protections
- Workplace relations institutions
- Workers' compensation.

Further information is available at https://www.dewr.gov.au/secure-jobs-better-pay.

Part 16A of the Closing Loopholes Act

Part 16A of the Closing Loopholes Act amends section 494 of the *Fair Work Act 2009* (Fair Work Act) to give effect to 'Recommendation 8: Workplace entry of union officials when providing assistance to an HSR' of the '2018 Review of the model WHS laws' conducted by Marie Boland and published on 20 March 2020. Recommendation 8 provided that Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to a health and safety representative is not required to hold an entry permit under the Fair Work Act or another industrial law, taking into account the interaction between Commonwealth, state and territory laws.

For further information about the Closing Loopholes Act is available at https://www.dewr.gov.au/closing-loopholes.

Further information about the Review of the model WHS laws is available at https://www.safeworkaustralia.gov.au/doc/review-model-whs-laws-final-report.

Conduct of the review

In conducting the Secure Jobs, Better Pay Review, the Review Panel will consider available qualitative and quantitative research.

The review must be informed by stakeholder perspectives and stakeholders must be given an opportunity to provide submissions and evidence on the matters to be considered by the review.

Stakeholders must be given an opportunity to provide submissions in response to the draft Report.

All submissions and evidence received must be published and be publicly accessible, where appropriate.

The final Report must detail the Review Panel's findings and recommendations about each of the matters to be considered by the review.

Publication

The final Report must be presented to the Minister in a high-quality standard. This includes ensuring that the final Report is cohesive and written in plain English. After provision to the Minister the Report must be professionally copy edited and proof-read to support publication and tabling in Parliament.

The final Report and any website or associated material must comply with Web Content Accessibility Guidelines. For more information please visit: https://www.stylemanual.gov.au/accessible-and-inclusive-content/make-content-accessible.

Appendix 8 – Stakeholder input

Written submissions received

1. Dr Amanda Selvarajah – Monash University
2. Associate Professor Alysia Blackham – University of Melbourne
3. Association of Australian Medical Research Institutes
4. Housing Industry Association
5. Community Public Sector Union (PSU Group)
6. Master Electricians Australia
7. Shop, Distributive and Allied Employees' Association
8. Whitehaven Coal
9. Finance Sector Union
10. Mining and Energy Union
11. Maritime Industry Australia Ltd
12. Recruitment, Consulting & Staffing Association
13. Council of Small Business Organisations of Australia
14. Clubs Australia
15. Employment Rights Legal Service (Inner City Legal Centre, Redfern Legal Centre and Kingsford Legal Centre)
16. Master Grocers Australia
17. Construction Forestry and Maritime Employees Union (Construction and General Division)
18. Business Council of Australia
19. Australian Retailers Association
20. Australian Council of Trade Unions
21. Community Council for Australia
22. Australian Higher Education Industrial Association
23. Chamber of Commerce and Industry WA
24. Australian Nursing and Midwifery Federation
25. Office of the Commissioner for Public Employment (NT)
26. Honorary Associate Professor Anne Junor
27. Australian Resources and Energy Employer Association
28. National Tertiary Education Union
29. Electrical Trades Union of Australia
30. Chamber of Minerals & Energy of Western Australia

31. Circle Green Community Legal
32. Minerals Council of Australia
33. Pharmacy Guild of Australia
34. Master Builders Australia
35. United Workers Union
36. Professor Rae Cooper AO, FASSA
37. Centre for Future Work
38. Australian Services Union
39. Australian Chamber of Commerce and Industry
40. Ai Group
41. Associate Professor Chris F Wright
42. Independent Education Union
43. Live Performance Australia
44. Australian Workers' Union
45. Professor Emeritus David Peetz
46. Private submission
47. Law Council of Australia

Roundtables

The lists below show the stakeholders that were invited to each roundtable. The underlining shows the stakeholders that attended that roundtable.

Employer groups (30 October)

Housing Industry Association

Australian Resources and Energy Employer Association (formerly AMMA)

Australian Chamber of Commerce and Industry

Business Council of Australia

National Farmers' Federation

Master Builders Australia

Australian Industry Group

Council of Small Business Organisations of Australia

Minerals Council of Australia

Employee representatives (31 October)

Australian Council of Trade Unions

Australian Institute of Marine and Power Engineers

Australasian Meat Industry Employees Union

Australian Education Union

Australian Manufacturing Workers' Union

Australian Maritime Officers Union

Australian Nursing and Midwifery Federation

Australian Services Union

Australian Workers Union

CFMEU (Manufacturing Division)

Community and Public Sector Union (Public Sector Union Group)

Community and Public Sector Union (SPSF Group)

Financial Services Union

Flight Attendants' Association of Australia

Health Services Union

Independent Education Union

Maritime Union of Australia

Media, Entertainment and Arts Alliance

Mining and Energy Union

National Tertiary Education Union

Professionals Australia

Rail, Tram and Bus Union

Shop, Distributive and Allied Employees Association

Transport Workers Union

United Firefighters Union Victoria

United Workers Union

Academics (1 November)

Associate Professor Chris F Wright

Professor Rae Cooper AO

Professor Graeme Orr

Professor Marilyn Pittard

Professor Andrew Stewart

Distinguished Professor Anthony Forsyth

Professor Shae McCrystal

Dr Alex Veen

Associate Professor Stephen Clibborn

Professor Meg Smith

Dr Michael Lyons

Dr Adriana Orifici

Dr Fiona McDonald

Dr Jim Stanford

Adjunct Associate Professor Anne Junor

Professor David Peetz

Emeritus Professor Sara Charlesworth

Associate Professor Tess Hardy

Dr Iain Campbell

Dr Phillip Toner

Emeritus Professor Glenda Strachan

Professor Gabrielle Meagher

Professor Paula McDonald

Appendix 9 – The FWC and pay equity

This appendix provides an introduction and summary to the significant and impactful work that the Fair Work Commission (FWC) has and is doing in to address gender equality. The first section summarises the Aged Care Work Value case (2020) explaining outcomes across various staged decisions. The second section summarises the work being undertaken as part of the FWC Gender Pay Equity Research Project. The third section summarises the 2023–24 Modern Awards Review. The final section summarises recent annual wage review decisions.

1. The Aged Care Work Value case

In November 2020 the Health Services Union lodged an Aged Care Work Value case with the FWC. The union was seeking a 25% wage increase for all workers due to the work being historically undervalued.

In the 2022 federal election campaign, the Hon Anthony Albanese pledged to increase funding for aged care and improve the pay and conditions for aged care workers if elected.[1165]

Decisions on Aged Care Work Value case were handed down in 3 stages. In Stage 1 (4 November 2022) the Full Bench of the FWC accepted expert evidence – particularly that provided by Associate Professor Anne Junor – that, as a general proposition, work in feminised industries (including care work) suffered from historical gender-based undervaluation.[1166]

The then FWC President (Justice Ross) also issued a statement on 'Occupational Segregation and Gender Undervaluation', and referred to the Aged Care Work Value Case in which His Honour noted the causes of gender-based undervaluation and the barriers to properly assessing work value in female-dominated occupations and industries.[1167] In the statement His Honour noted that 'Although the Commission can vary a modern award on its own motion pursuant to s.157, it is apparent from the Aged Care case that cases of this type require significant evidence from those with experience in relevant industries, supported by appropriate experts'. [1168]

In Stage 2 (21 February 2023), a differently constituted Full Bench of the FWC awarded a 15% interim pay increase for direct care workers, effective from 30 June 2023.[1169] The 15% pay increase was also extended to certain other groups (e.g. cooks, head chefs and recreational activities officers).

In Stage 3 (15 March 2024), the FWC introduced new classification definitions and structures into the Aged Care Award and new benchmark wage rates for direct care workers. Final wage increases

[1165] Rob Harris, 'Albanese promises to increase aged care funding, lift sector wages', The Sydney Morning Herald, (online, 30 January 2022), <https://www.smh.com.au/politics/federal/albanese-promises-to-increase-aged-care-funding-lift-sector-wages-20220130-p59sbm.html>.
[1166] [2022] FWCFB 200 (4 Nov 2022) [42].
[1167] See: <https://www.fwc.gov.au/documents/consultation/presidents-statement-segregation-gender-2022-11-04.pdf> [6].
[1168] See: <https://www.fwc.gov.au/documents/consultation/presidents-statement-segregation-gender-2022-11-04.pdf> [16]
[1169] The Albanese Government committed around $8bn over 4 years to fund the 15% interim wage increase (ACTU submission, 22).

of up to 28.5% (depending on job and level), inclusive of the initial 15%, were also awarded in the Stage 3 decision.[1170]

In September 2024 the FWC issued its determinations varying the relevant modern awards (Aged Care Award 2010, Nurses Award 2020, Social, Community, Home Care and Disability Services (SCHADS) Industry Award 2010) from 1 January 2025 and noted that this 'generally concluded the aged care work value proceedings'.[1171] Some outstanding aspects relating to nurses in the aged care sector are being considered as part of the Nurses and Midwives Work Value case.[1172]

These key decisions have clearly played an important role in narrowing the gender wage gap (GWG) since 2022. As noted, this arises, in part, because the awards in question cover a significant portion of the award-reliant workforce. For example, the SCHADS Industry Award covers 10.5% of award-reliant workers, and two-thirds of all award-reliant workers are covered by just 10 modern awards.[1173]

2. FWC gender pay equity research project

Following the passage of the Secure Jobs, Better Pay Bill in 2022, on 3 February 2023 the new FWC President (Justice Hatcher) announced a 2-stage gender pay equity research project.[1174] The aim of the Stage 1 report from this project was to identify sectors where gender-based occupational segregation was prevalent and whether there were any common characteristics in the relevant occupations and industries (including prevalence of casual and non-ongoing employment).[1175]

The Stage 2 report was prepared by staff in the FWC and involved an examination of the history of wage fixing and work value assessments in 12 awards.[1176]

On 7 June 2024 the FWC announced that an expert panel would be established to review gender undervaluation in 5 priority modern awards in the care and community sector. At the time of writing the review is ongoing. The 5 awards being considered are:

- Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020
- Children's Services Award 2010
- Health Professionals and Support Services Award 2020
- Pharmacy Industry Award 2020
- Social, Community, Home Care and Disability Services Industry Award 2010.

[1170] [2024] FWCFB 150, [197], [198], [200], [277].
[1171] *Work value case – Aged care industry* [2024] FWCFB 367 [4].
[1172] *Work value case – Aged care industry* [2024] FWCFB 367 [4]; *Work value case – Nurses and midwives* [2024] FWCFB 405 [1].
[1173] Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No. 1/2023, March, 2023). Chart 3.3.
[1174] FWC, Stage 2 report Gender pay equity research Annual Wage Review 2023–24 (4 April 2024), [6].
[1175] Natasha Cortis, Yuvisthi Naidoo, Melissa Wong and Bruce Bradbury, 'Gender-based occupational segregation: a national data profile' (Final report, UNSW Social Policy Research Centre, 6 November 2023) 6.
[1176] The Stage 2 report includes a very useful timeline of key wage fixation decisions (in relation to pay equity) and work value decisions and inquiries in the federal industrial relations system.

3. FWC 2023–24 Modern Awards Review

On 15 September 2023 the FWC also announced the commencement of the Modern Awards Review 2023–24 looking at 4 priority topics:

- Arts and culture sector (to consider minimum standards and awards coverage in the arts and culture sector)
- Job security (to consider how provisions in modern awards support the objectives of job security and secure work)
- Work and care (to consider the impacts of award terms on workers with caring responsibilities)[1177]
- Making awards easier to use (to consider options without reducing workers' entitlements).

The FWC commenced this Modern Awards Review in response to a request from the then Minister for Employment and Workplace Relations, the Hon Tony Burke MP.[1178]

The Modern Awards Review 2023–24 report by the FWC was released on 18 July 2024.[1179] Among other things, the FWC found that there were gender differences in entitlements in modern awards, particularly regards those relevant to balancing work and care responsibilities. In the report the FWC noted that 'some conditions that are more generous to employees are more likely found in male-dominated awards than in female dominated awards, and vice versa'.[1180] From a gender equality perspective, this was yet another highly important review and report. Going forward there is potential to further advance gender equality by addressing disparities in award entitlements and working conditions across male and female dominated industries.

4. Annual wage reviews

Alongside its other work, the FWC has also taken steps to address gender equality and provided commentary about its approach through its annual wage review decisions.

In the Annual Wage Review 2022–23, the FWC:

- decided 'All modern award minimum wage rates will be increased by 5.75 per cent effective from 1 July 2023'
- made clear that the addition of gender equality to the Fair Work Act minimum wages and modern awards objectives weighed significantly in favour of the wage rise
- noted that significant issues concerning the potential gender undervaluation of work and qualifications in the modern award minimum wage rates applying to female-dominated

[1177] The first step in the Work and Care priority topic was the release of a discussion paper: Fair Work Commission, *Discussion Paper: Work and Care* (Discussion Paper 29, January 2024) <https://www.fwc.gov.au/documents/sites/award-review-2023-24/discussion-paper-work-and-care-290123.pdf>. The next step involved the release of a literature review on work and care: M Smith and S Charlesworth, *Literature Review for the Modern Awards Review* (March 2024) <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am2023-21-literature-review-work-care-2024-03-08.pdf>. The FWC also convened a consultation conference and undertook survey of employers aimed at gathering information about the potential to vary modern award provisions to increase flexibility for employees balancing work and care responsibilities. The final report of the Modern Awards Review 2023–24 was released 18 July 2024: Fair Work Commission, *Modern Awards Review 2023–24* (Report, 2024) <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-review-report-180724.pdf>.

[1178] Letter from Anthony Burke to Justice Adam Hatcher, 12 September 2023 <https://www.fwc.gov.au/documents/consultation/letter-from-minister-2023-09-12.pdf>.

[1179] Fair Work Commission, *Modern Awards Review 2023–24* (Report, 2024).

[1180] Fair Work Commission, *Modern Awards Review 2023–24* (Report, 2024), [123].

industries and occupations would need to be resolved in future annual wage reviews and proceedings.

In the Annual Wage Review 2023–24, the FWC 'decided to increase the National Minimum Wage and all modern award minimum wage rates by 3.75 per cent, effective from 1 July 2024, noting that it had considered a number of Fair Work Act requirements, including the need to achieve gender equality, and set out its program for 'the timely resolution of gender undervaluation issues arising in respect of certain modern awards'.

In addition to this determination of priority areas for consideration, the FWC's Annual Wage Review 2023–24 decision included a section entitled '8.4 The gender equality agenda' considering the next steps from its gender pay equity research. Here, the FWC:

- did not award interim wage increases to address gender undervaluation (at that time)
- noted comments from employer associations about the need for separate proceedings to consider the issues relevant to each modern award
- indicated its intent to complete the gender undervaluation priority awards review before the Annual Wage Review 2024–25.

The FWC did not award interim wage increases to address gender undervaluation in the Annual Wage Review 2023–24, noting that there had not been sufficient time to 'afford procedural fairness and to proceed on a sound evidentiary foundation' since publication of its Stage 2 Gender Pay Equity Research. It also noted that the FWC could not commit to phased wage increases over future annual wage reviews (but can in proceedings to vary modern awards), as the Fair Work Act requires consideration of the modern awards and the minimum wages objectives in the context of the circumstances applying at the time.

Appendix 10 – The Fair Work framework

The Fair Work Act establishes a safety net of statutory minimum entitlements through the National Employment Standards (NES), national minimum wage and modern awards. It also establishes and sets out the functions of Australia's workplace relations tribunal, the Fair Work Commission (FWC), and Australia's workplace relations regulator, the Fair Work Ombudsman (FWO).

The NES are the minimum terms and conditions of employment that have to be provided to all national system employees.[1181] These minimum standards relate to maximum weekly hours, requests for flexible working arrangements, casual employment, parental leave and related entitlements, annual leave, personal/carer's leave, compassionate leave and paid family and domestic violence leave, community service leave, long service leave, public holidays, superannuation contributions, notice of termination and redundancy pay, the Fair Work Information Statement, and the Casual Employment Information Statement.[1182]

Modern awards apply at the industry or occupation level and set out minimum wages and terms and conditions of employment, on top of the NES. Modern awards set out conditions such as arrangements for when work is performed, overtime and penalty rates, leave arrangements, allowances, and industry-specific redundancy schemes.

Employees and employers can also agree to tailored terms and conditions of employment for their enterprise through other workplace instruments, such as enterprise agreements and individual arrangements.

Modern awards, enterprise agreements, and employment contracts cannot exclude or provide less beneficial conditions than the NES.[1183]

The FWC has a role in promoting cooperative and productive workplace relations and preventing disputes.[1184] The FWC, amongst other things, sets and maintains the terms and conditions in modern awards, including hearing applications to vary modern awards; deals with workplace disputes; approves, varies and terminates enterprise agreements; and issues entry permits and regulates registered organisations. The FWC can also undertake or commission research to inform itself in relation to a matter before it.

The FWO promotes harmonious, productive, cooperative and compliant workplace relations, as well as monitoring, inquiring into, investigating and enforcing compliance with Australia's workplace laws.[1185] The FWO provides information and advice to employees and employers about workplace rights and entitlements. The FWO also enforces workplace laws (through the courts or the FWC) and seeks penalties for breaches of workplace laws.

[1181] *Fair Work Act 2009 (Cth)* s 61.
[1182] *Fair Work Act 2009 (Cth)* s 61(2).
[1183] *Fair Work Act 2009 (Cth)* s 61(1).
[1184] *Fair Work Act 2009 (Cth)* s 576(2)(aa).
[1185] *Fair Work Act 2009 (Cth)* s 682; see also <https://www.fairwork.gov.au/sites/default/files/migration/723/About-the-fair-work-ombudsman.pdf>.