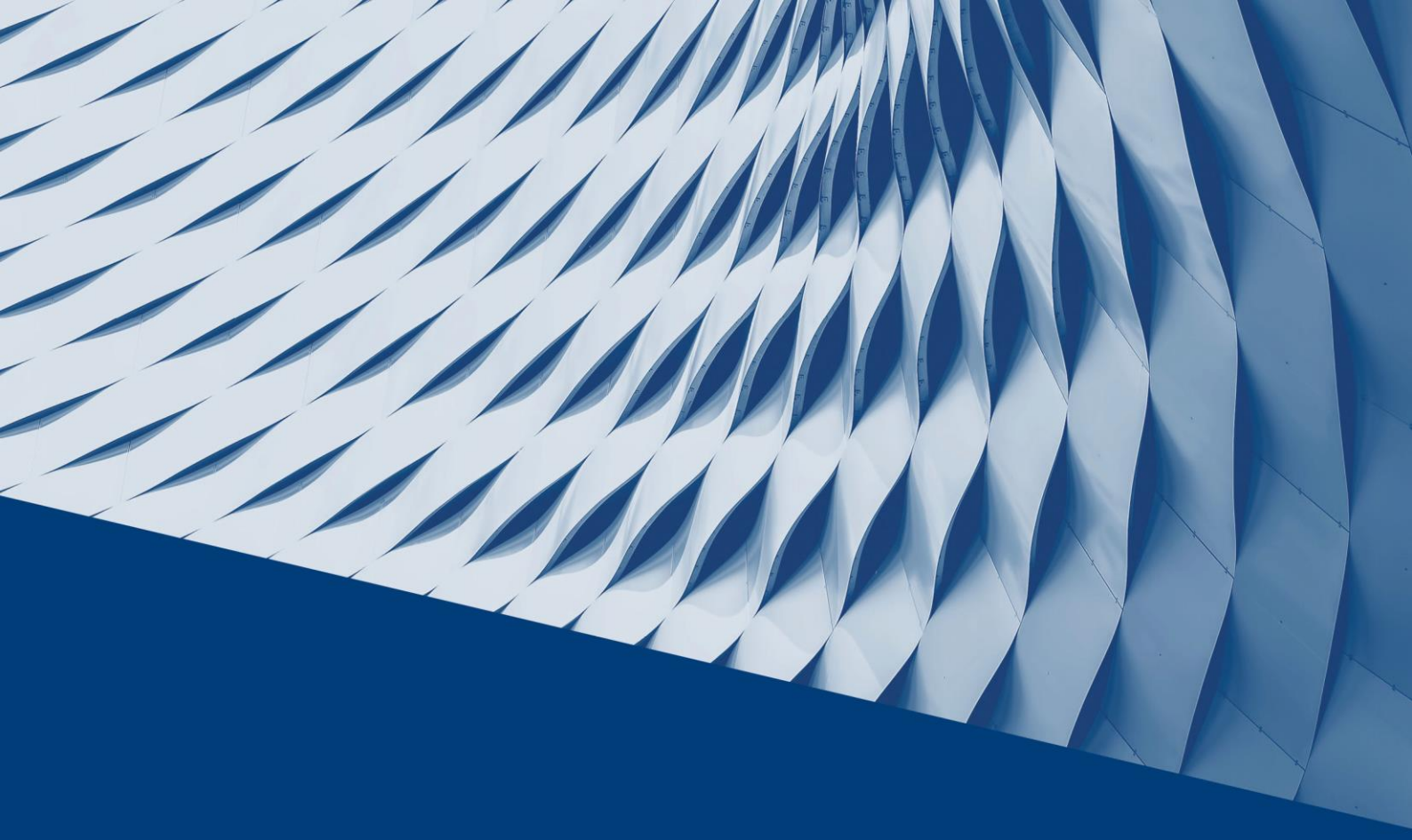

Secure Jobs Better Pay Independent Review

ACTU submission

ACTU Submission, 29 November 2024
ACTU D. No 79/2024

ACTU
australian council of trade unions

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Part 1: Introduction

About the ACTU

Formed in 1927, the ACTU Australia's sole peak body of trade unions, consisting of affiliated unions and State and regional trades and labour councils. There are currently 35 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

The ACTU has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning the world of work and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

I. Summary

The ACTU welcomes the review into the Secure Jobs Better Pay amendments to the Fair Work Act (**FW Act**), which will:

(i) Consider whether the operation of the amendments are appropriate and effective,

(ii) identify any unintended consequences of the amendments, and

(iii) Consider whether further amendments to the Fair Work Act 2009 are necessary: to improve the operation of the amendments or rectify any unintended consequences that are identified.[1]

[1] Review of the Secure Jobs Better Pay Act, Terms of Reference, 4 November 2024

The *Fair Work Legislation Amendment (Secure Jobs Better Pay) Bill 2022* (the **Reforms**) was introduced and passed by the Parliament with the goals to, "get wages moving, boost job security, tackle gender inequality and restore fairness and integrity to Fair Work institutions".[2] While the Reforms have been in operation for less than two years, significant progress has been achieved under all four major goals, in stark contrast to the legacy of nearly a decade of Coalition governments.

On wage growth, wages only grew on average by 2.1 percent per year in nominal terms under the Coalition. In real terms, they only grew by 0.5 percent during their entire time in office. In contrast, the Reforms have contributed to more real wage growth (0.7 percent) in the last twelve months alone, than the entire period the Coalition was in office. In nominal terms it has lifted annual average wage growth up to 3.7 per cent, almost double the Coalition's record.

How have the reforms helped? They have clearly turned around the long run decline in collective bargaining coverage, lifting it from 1.8 million employees covered just prior to the Reforms, up to 2.2 million on the latest figures. As this submission shows, a range of reforms have delivered this, especially the ability to reinitiate bargaining within five years of the nominal expiry date of an agreement. Unions have also detected a willingness from employers to bargain, due perhaps to both a genuine shift in attitude, and as an alternative to multi-employer bargaining.

There is a very strong correlation between collective bargaining coverage and wage outcomes. As this submission shows, every percentage point increase in the share of total employees on collective agreements is strongly associated with annual wage growth being 0.15 percentage points higher. That means that the addition of just over 400,000 workers since the legislation passed, which increased the share of employees on collective agreements by 3.4 percentage points, is estimated to have increased wage growth by 0.5 percentage points more than it would have otherwise have been had those agreements not been made.

[2] Revised Explanatory Memorandum, Fair Work Legislation Amendment, (Secure Jobs, Better Pay) Bill 2022, page vi

Economy-wide, this would have contributed to an extra $6.3 billion overall in wages for workers in the last year. But this is only about 31% of the estimate boost in wages that workers will have received this year, as wage growth on average is now 1.6 percentage points higher under this Government than the previous Coalition governments. In dollar terms, a worker starting out on $77,000 is now $1,232 better off, of which $385 has come from the improvements in bargaining driven by the Reforms alone.

For some workers the boost will be much more. Afterall, workers on collective agreements earn just over $100 a week more than the average pay of all employees.[3] Critics of these sensible reforms to bargaining are effectively opposing fair and reasonable wage increases during a cost of living crisis.

On boosting job security, 31 per cent of the Australian labour force were in insecure work arrangements based on an ACTU estimate from May 2022 - an alarmingly high level.[4] While this Bill only dealt explicitly with limiting the use of fixed term contracts[5], early indications are that it has been a success, with a sharp 14.7 per cent drop in their usage occurring just prior to those limits coming into operation, presumably as employers changed practices in anticipation.

On tackling gender equality, the Reforms have led to substantial progress in correcting the historic undervaluation of work on the basis of gender, particularly in aged care, and with cases under away also for early childhood education and care, nursing, key health professionals and pharmacy among others. The Reforms are helping all workers stay connected to work through significant improvements to accessing flexible work, and seeking to stamp out sexual harassment at work. Today the Gender Pay Gap is closing at more than three times the rate achieved under the previous Coalition Governments, in large part due to the Reforms.[6]

[3] Based on the most recent data from ABS EEH May 2023, which is close to 18 months old now.
[4] ACTU (May 2022), Morrison's record of failure on secure jobs
[5] It also introduced "Job Security" as a new Object of the Act. Subsequent legislation under the *Closing Loopholes* reforms have addressed casual work and labour hire, the major types of insecure work.
[6] ACTU (November 2024), Minding the Gap: the 20 reforms that are closing the gender pay gap faster

On restoring fairness and integrity to Fair Work institutions, this has also been a success. The abolition of the Registered Organisations Commission and return of this role to the General Manager of the FWC has led to marked improvements in accessibility, advice and assistance provided by the regulator, better enabling all registered organisations to strive towards good governance.

As a highly politicised organisation, the abolition of the Australian Building and Construction Commission (ABCC) is welcome. It also did nothing to uncover or investigate the recent issues identified in the Construction and General (C&G) Division of the CFMEU, now being handled by an Administrator.

In Part 2 of this submission, we provide a detailed overview of the bigger macro-economic and bargaining context that reforms were enacted in. We review their positive impact at that level, in particular on wage growth, bargaining and the gender pay gap. This part concludes with a consideration of the main and common criticisms employer groups made during the debate around the passage of the Reforms. Those criticisms were extensive– with many bordering on hysterical - about the negative impact these reforms would have, from job destruction to lowering wages. This submission shows those claims to be completely baseless. This is in contrast to the positive attitude many employers have taken to the new laws, from discussing and agreeing to more flexible working requests, agreeing to bargaining with multiple employers, and through to offering staff permanent roles after being on rolling fixed term contract arrangements, as reported by our affiliated unions.

In Part 3, this submission reviews all parts of the Reforms, showing that they have either been a success, or acknowledging in some cases that it is still too early to tell. We have also identified a handful of unintended consequences that can be easily addressed through amendment or changes to policy or practice.

For this submission the ACTU has closely consulted its affiliated unions on the impact of each part of the Reforms. It has also carefully reviewed FWC and judicial decisions under the Reforms, as well as emerging trends in ABS data and data collected by the Fair Work Commission (FWC) and Government.

In some cases the data is clear. For example, there has been a welcome drop in the number of applications by employers to unilaterally terminate enterprise agreements, a standard employer

tactic to undermine the bargaining efforts of their employees and unions. In other cases, available data only tell part of the story. For example, unions report a sea change in employer attitudes to considering and approving flexible work requests that in the past they would have quickly rejected. The introduction of the possibility of arbitration has clearly focussed employer minds. But this is not easily detected in currently available data. In other cases it is too early to understand the full impact of the reforms.

The recommendations the ACTU provides are of a technical nature, directed at improving the effective operation of the laws or bringing them closer to their original policy intent. Many of these recommendations would clearly benefit all industrial parties and we'd encourage employer organisations to consider supporting them.

In summary, the ACTU welcomes the Reforms and the compelling progress towards improving wages, job security, gender equality and good governance they have already achieved. We would be pleased to provide more information on this submission should the reviewers require.

II. Recommendations

1. S302(4) should be amended to provide that reports of the new Expert Panels must be taken into account when making an equal remuneration order.
2. Gender pay equity should be added to the areas of knowledge and experience an expert panel should have when constituted for the Annual Wage Review.
3. Consider commissioning research into the drivers of workplace cultures and practice of pay secrecy and transparency (as well as sexual harassment and flexible work), including a focus on the role of unions and workplace delegates especially.
4. Consider requiring all job advertisements to include a pay rate that cannot be a range of more than 10 per cent of the total remuneration, including incentives and bonuses.
5. Extend the pay secrecy provisions so that they apply to all workers, and not just employees.
6. Amend sexual harassment provisions so the FWC can have regard to the general risk that a person will continue to be sexually harassed by others in a workplace and make orders that will reduce the risk of future harassment occurring.
7. Give the FWC stronger powers with regard to sexual harassment applications not solely seeking stop orders, allowing it to arbitrate where the worker or their union requests this.

8. Give the FWC the ability when dealing with applications to stop sexual harassment to make orders designed to put the worker back into the financial position they were in prior to the commencement of the harassment.
9. Include reinstatement as a remedy for former workers.
10. Extend vicarious liability for employers in S527E to include sexual harassment perpetrated by third parties.
11. Amend the FW Act costs provisions so that the equal access costs model recently enacted for federal anti-discrimination law applies to discrimination and sexual harassment matters brought under the FW Act.
12. Include reproductive health as a protected attribute under the FW Act in all relevant sections.
13. Reduce the extensive list of exemptions in the Act, by either amending or deleting key exemption in s.333F, as detailed on page 60 to 61 of this submission.
14. End the use of exempting sectors from the new Act requirements via regulation.
15. Replace the exemption in s.333F(1)(h) with:

    … (h) a modern award that covers the employee includes a clause which by its express terms permits any of the circumstances mentioned in subsections 333E(2) to (4) to occur, and in such a case subsection 333E(1) does not apply only to the extent that any of those circumstances is expressly permitted by the terms of a clause in that award.
16. Flexible work arrangements should be made available to more employees, including all employees with caring responsibilities, not just those within the meaning of the Carer Recognition Act; and for employees for reasons relating to their reproductive health.
17. Employers should be required to consult collectively about flexible work processes, and workers should have the right to bring collective flexible work requests and disputes.
18. The flexible work provisions should be amended so that FWC orders do not need to be consistent with the terms of an industrial instrument that indirectly discriminate against workers.
19. Require employers to reasonably accommodate flexible working arrangements unless it causes them unjustifiable hardship.
20. To promote “ease of use” the FWC should produce a “consolidated” version of an enterprise agreement alongside the formally approved enterprise agreement with undertakings.
21. Provide clarity that bargaining can be initiated in the manner provided where parties seek a new agreement that covers the same, or substantially similar workers as a previous agreement, even if the new agreement would also cover additional workers.
22. Expand the new provisions that allow for the re-initiation of bargaining within five years of the nominal expiry date to multi-employer agreements.

23. Allow an employee organisation that is entitled to represent the industrial interests of a worker covered by the agreement to make an application for reconsideration of whether an agreement passes the BOOT.
24. Conciliation conferences held in connection with applications for protected action ballots should only take place where the parties agree.
25. Subsection 413(5) of the FW Act should be repealed.
26. The objects of the Act should be amended to no longer preference single enterprise level bargaining, but to promote all levels or forms of bargaining.
27. Section 244(2) should be amended to provide registered unions the ability to remove an employer from a supported bargaining authorisation.
28. Section 244(4A) should be amended to permit employers covered by a current enterprise agreement to be added to a bargaining authorisation if they wish to do so.
29. Permit single interest employer authorisations in franchise operations (s. 249(2)) to also cover brand outlets where the operator and employer is the franchisor.
30. Employers and employees should be permitted to obtain an authorisation irrespective of business size, common interest or similarity in business or operations if they genuinely consent to an authorisation being granted.
31. Consider should be given to narrowing the exclusions to the issuing of or inclusion in an authorisation premised on bargaining at the single enterprise level.
32. The requirement to demonstrate majority support in contested applications be removed.
33. A mechanism be provided to resolve deadlocks wherein an employer within a bargaining cohort covered by a single interest authorisation breaks with the majority and refuses to submit the agreement to a vote. This could involve a power for the FWC to resolve the matter by either directing the objecting employer to submit the proposed agreement to ballot or instead removing the employer from the authorisation, subject to a merit test which takes into account the views of the affected parties and the prospects of reaching agreement.
34. Relatedly, some thought should be given to whether section 249(4) is an effective means of bringing an authorisation to an end in circumstances where the multi enterprise agreement that is ultimately approved does not cover all of the employers named in the authorisation.
35. Provisions dealing with the variation of agreements should be amended to state the relevant requirements in full, rather than requiring the application of other provisions with modifications.
36. Consideration should be given to permitting some level of FWC support to continuing cooperative bargaining processes, including through amendments to section 240 to support unilateral referral to the FWC for assistance and making bargaining orders available.

37. Provisions dealing with the variation of agreements should be amended to state the relevant requirements in full, rather than requiring the application of other provisions with modifications.
38. Items 4 and 7 in column 2 of the table at section 539(2) be amended to place it beyond doubt that all interested parties can enforce historical contraventions of replaced enterprise agreements and workplace determinations an equal footing.
39. Subsection 536AA(3), which allows employers to escape scrutiny if they have a 'reasonable excuse' should be removed.
40. Subsection 536AA(2) should be amended to refer to outworker entities, as well as employers, to ensure that responsibility is conferred to the correct hiring entity.
41. The Government should fund further education, training and awareness building activities that are developed and rolled out by both unions and employer organisations, to ensure effective implementation of the FDV leave entitlement. This should include dedicated resources, materials and training for assisting diverse employees experiencing FDV, including resources in different language and in a range of formats.

Part 2: The context and goals of the *Secure Jobs Better Pay* Reforms

Low wage growth

Prior to the pandemic, Australia experienced a sharp slowdown in wages growth. Annual wage growth began to slow from late 2012, dropping steadily from 3.8 per cent over the year in the June and September quarters and bottoming out at 1.9 per cent year on year from September 2016, continuing at this level through to June 2017. Thereafter, wage growth remained in the low twos until March 2022, when the economy began to reopen after nation-wide lockdowns to contain the spread of COVID-19 (see Chart 1).

Between September 2013 to March 2022, annual wage growth averaged 2.1 per cent. This average was a marked slowdown from the 3.6 per cent average of annual wage growth between December 1998 and June 2013. This was no accident. Former Finance Minister Matthias Cormann famously said that downward wage flexibility was a 'deliberate design feature of [the Coalition's] economic architecture.'[7] The Coalition set out to keep the wages of Australia's workers low, which in turn worsened cost of living pressures when inflation set in after the pandemic, making workers worse off than they would have been had the Coalition not taken office.

The near decade of mediocre wage growth also meant cost of living pressures were mounting before the pandemic, but the onset of inflation drove a precipitous decline in workers' living standards. Between March 2021, just prior to the onset of above-target inflation growth and December 2022, around the time the *Secure Jobs, Better Pay* legislation received royal assent, the real wages of workers declined by 5.3 per cent, dragging the level of real wages down to where it was in September 2010 – representing over a decade of lost real wage gains and living standards (see Chart 2). While annual real wage growth returned from December 2023, the task of catching up to previous levels remains a significant one.

[7] Morrison-Missing-in-Action-on-Wages.pdf

Chart 1: Annual growth in wages

Source: ABS Wage Price Index & ACTU calculations

Chart 2: Real wage level

Source: ABS Wage Price Index, ABS Consumer Price Index & ACTU calculations

Declining collective bargaining coverage & insecure work

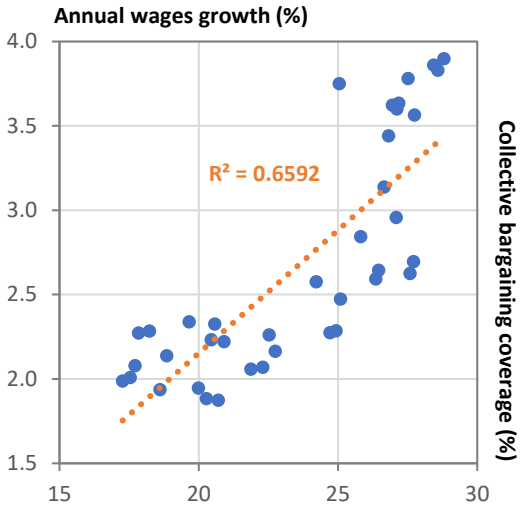
Related to the slowdown in wage growth has been the collapse in collective agreement coverage. As noted by Stanford *et. al.*, there has been a strong correlation between the rapid erosion of collective bargaining coverage and aggregate wages growth (see Chart 3).[8] After some up-and-down volatility in late 2012 through 2013, thereafter collective bargaining coverage began to slide, declining from 27.7 per cent in the first quarter of 2014 to reach a low of 17.3 per cent in the first quarter of 2018.[9] After a slight recovery into 2020, collective bargaining coverage fell again to a renewed low of 14.8 per cent in the first quarter of 2022, sinking back to that same level after a brief pick-up by the first quarter of 2023, shortly after the passage of the *Secure*

[8] Collective Bargaining and Wage Growth in Australia | The Australia Institute's Centre for Future Work, p. 4

[9] Collective bargaining coverage is defined as the percentage of employees in the labour force covered by a current federally registered collective agreement.

Jobs, Better Pay legislation, which would reverse the fortunes of collective bargaining in short order (see Chart 8 below).

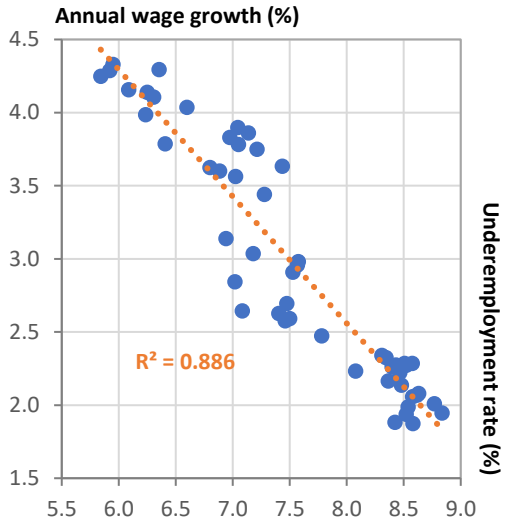
Chart 3: Correlation between annual wage growth and collective agreement coverage, Mar-10 to Dec-19



Source: ABS Wage Price Index, ABS Labour force, detailed, DEWR Trends in Federal Enterprise Bargaining database & ACTU calculations

Note: Employees on federally registered enterprise agreements as a share of total employees

Chart 4: Correlation between annual wage growth and the underemployment rate, Mar-07 to Dec-19



Source: ABS Wage Price Index, ABS Labour force & ACTU calculations

Note: Underemployment rate lagged by six months

Another feature of the labour market during the 2010s that the *Secure Jobs, Better Pay* legislation sought to address that also contributed to the slowdown in wage growth was widespread insecure work and non-standard employment. As noted by Stanford *et. al.,* while there is no single statistical measure that captures the proliferation of insecure work[10], the underemployment rate is indicative. Most workers reporting underemployment are in part-time, casual, or insecure self-employment positions, which covers the range of non-standard employment relationships acting as drag on wages documented in Stanford *et. al.*.[11] The underemployment rate rose from around 6.3 per cent in November 2008, around where it had been bouncing for the best part of two years,

[10] The ACTU estimated in May 2022 that 31 per cent of employees in Australia were in a form of insecure work. See ACTU, *Morrison's record of failure on secure jobs*, May 2022, page 5

[11] The Wages Crisis Revisited | The Australia Institute's Centre for Future Work, p. 60.

up to 7.3 per cent in February 2009, around where it would remain for a few years before climbing again from May 2013 to remain in the range of 8½ per cent until the eve of the pandemic. It was during this period that wage growth would begin to slow dramatically and settle at lower annual growth rates than prevailed when the underemployment rate was at a lower level.

While the underemployment rate was shifting upwards, there was a strong, negative correlation between the underemployment rate and annual wage growth six months hence (see Chart 4). The association implied that the higher the rate of underemployment, the lower would be annual wage growth half a year later. The strength of the correlation is consistent with the view taken by Stanford *et. al.* that 'workers in [non-standard and precarious work] are relatively powerless in pushing for high incomes, even as the unemployment rate declines', given the coincidence of the elevated underemployment rate and sluggish annual wage growth pre-pandemic.[12] As with the decline in collective bargaining pre-pandemic, widespread insecure and precarious work weakened the bargaining position of workers and contributed to the slowdown in wages, giving rise to the preconditions for the severe collapse in living standards that followed. The underemployment issue was in turn exacerbated by sluggish wage growth, which weakened demand generation that could otherwise have helped strengthen the labour market, which itself worsened the prospects and outcomes for wages growth during those years.

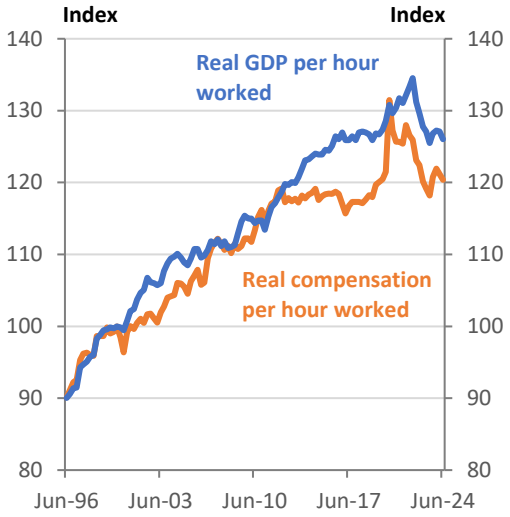
Weakening link between productivity and real wages

Amidst the stagnation of wages growth, the decline in collective bargaining coverage and the rise in insecure work, there was a weakening in the relationship between labour productivity growth and the real wages of workers. The former Governor of the Reserve Bank, Philip Lowe, highlighted the issue in a 2017 speech to the Anika Foundation, where he noted that in Australia, 'productivity growth has slowed somewhat…however, the slowing in earnings growth has been more pronounced than that in productivity. The result has been a decline in labour's share of national income.'[13] From September 2012 – the last reading of 3.8 per cent annual growth in the wage price index – through to 2019, real compensation of employees per hour worked stagnated, increasing only 2.7 per cent by December 2019. In contrast, real GDP per hour

[12] Wages Crisis Revisited, p. 60
[13] The Labour Market and Monetary Policy | Speeches | RBA

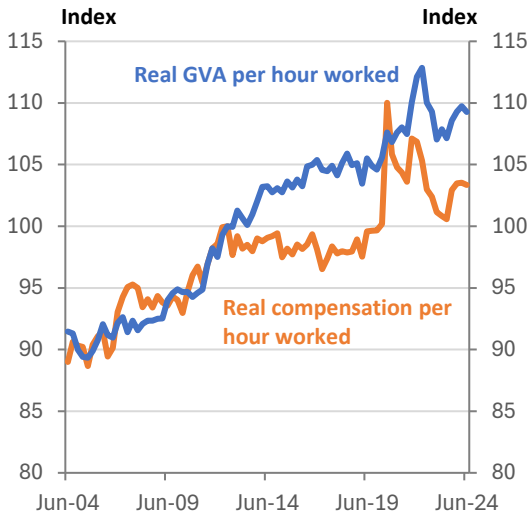
worked increased a much more substantial 9.2 per cent over the same period, indicating the size of the gap that at the time troubled the RBA Governor (see Chart 5). The problem was not just a phenomenon tied to commodity exporters, either. Between September 2012 and December 2019, output per hour worked in the market sector excluding commodities increased 4.7 per cent, while real compensation per hour in that segment of the economy increased only 2.1 per cent (see Chart 6). The weakening in the relationship was widespread, not simply a phenomenon of volatility in the price of key commodity exports.

Chart 5: Productivity and real wages



Source: ABS National Accounts: Income, Expenditure and Product, ABS Consumer Price Index & ACTU calculations

Chart 6: Productivity and real wages in the market sector excluding commodities



Source: ABS National Accounts: Income, Expenditure and Product, ABS Labour Account, ABS Labour Force, Australia, Detailed, ABS Consumer Price Index, Productivity Commission & ACTU calculations

Stalling in the gender pay gap

Another part of the Coalition's custodianship of the economy, quite apart from the slowdown in wages growth, was the mishandling of the gender pay gap. While the gender pay gap declined between 2013 and 2022, the period was marked by stop-start progress and long stretches of stagnation. On a full-time basis, the gender pay gap increased from 17.2 per cent in November 2013 to 18.7 per cent a year later in November 2014, returning to where it had started two years later in November 2015, where it was unchanged at 17.2 per cent. Progress resumed thereafter until November 2018, where the full-time gender pay gap stalled again, moving no more than 0.3 percentage points over the four years until May 2022, when it resumed its previous place at

14.1 per cent (see Chart 14 below).[14] The nine years of Coalition rule saw progress in the gender pay gap slow down and stagnate, a marker of the LNP's approach to wages and its disregard for gender equality.

A landmark study in 2018 found that one in three people experienced sexual harassment at work in the past five years. The study and inquiry by the Sex Discrimination Commissioner produced the final Respect@Work Report which included 55 recommendations to turn around this crisis.[15] Coalition governments let them gather dust, until the national outcry in the wake of Brittany Higgins' treatment and the #MeToo movement forced their hand. Even then, most recommendations that required real legislative action were ignored. Many of those recommendations were finally implemented in these Reforms, and other accompanying legislation.

The now Opposition's economic mismanagement in government can be summarised as a litany of bad outcomes: slow wage growth, rising insecure work and underemployment, a weakening of the relationship between real wages and productivity growth, and a stalling in the gender pay gap. The *Secure Jobs, Better Pay* legislation was the antidote to nearly a decade of economic vandalism; its successes steps on the path back to setting the economy on the right track again.

III. Impact of the reforms

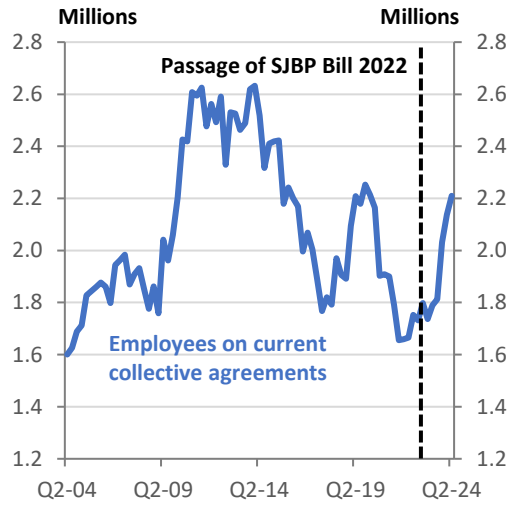
Collective bargaining

A key part of the *Secure Jobs, Better Pay* legislation was addressing the fact that 'Australia's bargaining system is not working effectively and hasn't worked effectively for a long time.'[16] Reinvigorating collective bargaining and expanding collective bargaining coverage is an important step to making the bargaining system work again.

[14] The large decline in November 2020 to 13.4 per cent reflected the COVID-19 lockdowns and the distribution of jobs and pay-rates arising from changes in the composition of the workforce.
[15] Respect@Work: Sexual Harassment National Inquiry Report (2020)
[16] Tony Burke, 'Second Reading Speech: Secure Jobs, Better Pay Bill 2022', Parliament House, Canberra, 27 October 2022 – available here.

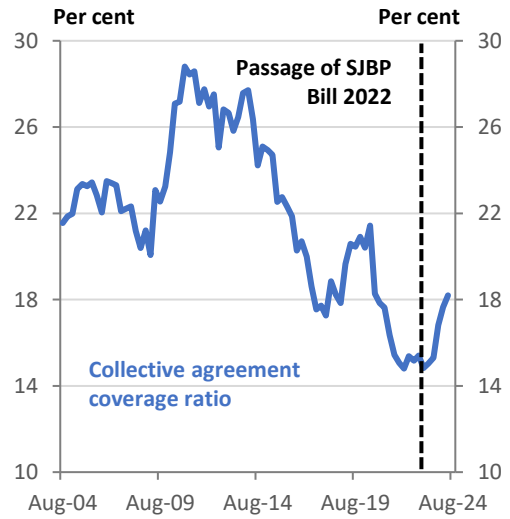
Since the legislation passed the Senate in December 2022, there has been a notable pick-up in the number of workers covered by collective agreements. Between the fourth quarter of 2022 and the second quarter of 2024, there has been an increase of 411,700 employees covered by current collective agreements. The total number of workers covered by collective agreements has risen from 1.8 million in December 2022 to 2.2 million as of June 2024 (see Chart 7). The sharp up-turn in workers covered occurred two quarters after the passage of *Secure Jobs, Better Pay*, with a decline of 87,700 workers covered in the quarter immediately after the legislation passed followed up a sharp increase of 159,500 workers covered in the third quarter of 2023. This suggests that the uptick was not already in motion and can be tied to an adjustment in the behaviour of unions and employers following the passage of the legislation and a gradual flow through the system.

Chart 7: Total employees covered by current collective agreements



Source: DEWR Trends in Federal Enterprise Bargaining database & ACTU calculations

Chart 8: Employees on collective agreements as a share of total employees



Source: ABS Labour force, detailed, DEWR Trends in Federal Enterprise Bargaining database & ACTU calculations

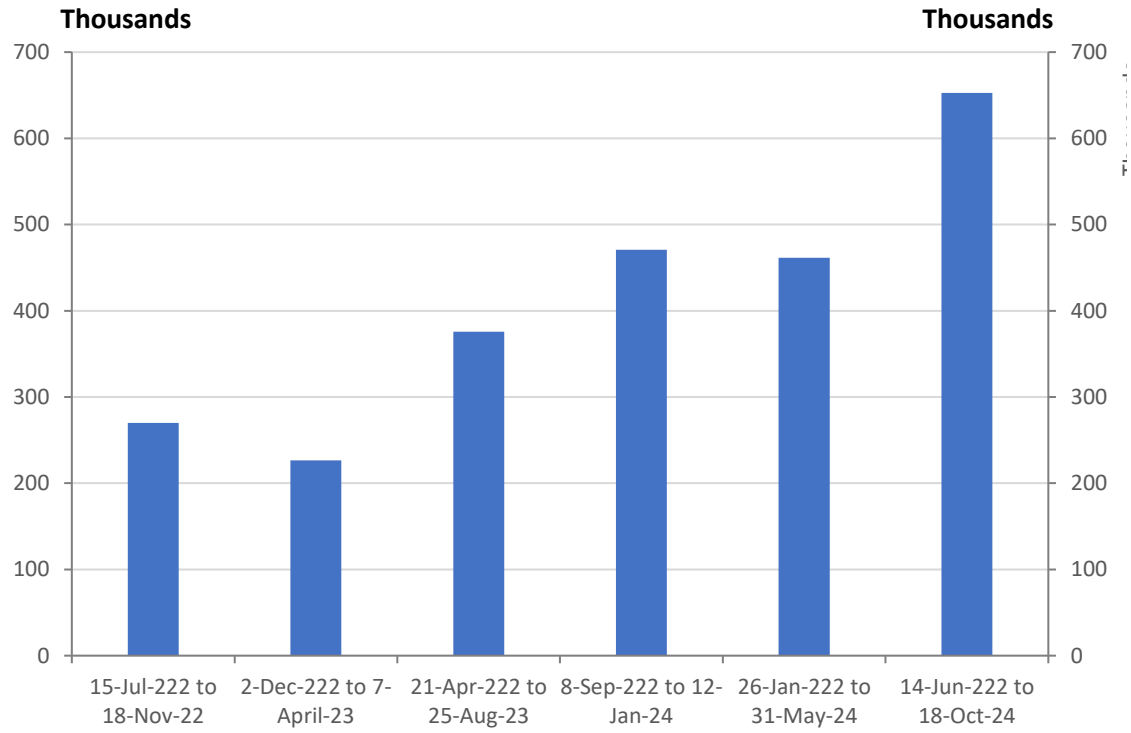
Note: Federally registered enterprise agreements only

The pick-up has been broad based across the public and private sector. In the private sector, between the fourth quarter of 2022 and the second quarter of 2024, there has been an increase of around 188,300 employees covered by current collective agreements. The total number of workers covered in the private sector has risen from 1.3 million in December 2022 to 1.5 million as of June 2024. In the public sector the number of employees covered increased by around 233,300 between the passage of the legislation and June 2024. The total number of workers

covered in the public sector has increased from 507,000 to 730,000 between the fourth quarter of 2022 and the second quarter of 2024.

The shift in collective agreement coverage since *Secure Jobs, Better Pay* passed the Parliament has seen the share of total employees covered by an agreement increase from 15.4 per cent in the fourth quarter of 2022 to 18.2 per cent as of the second quarter of 2024 (see Chart 8), showing that it is on the road to working effectively once again. The steady growth in the number of employees covered by applications to approve agreements since the Reforms came into operation is further evidence of success. Just prior to the reforms, about 27,000 employees a fortnight were covered by agreements filed for approval (See Chart 9). At the time of writing this number has more than doubled to 65,000.

Chart 9: Lodged applications for agreement approvals



Source: Fair Work Commission & ACTU calculations

Further, our affiliated unions report that an important component of the increase in collective bargaining has been that it is now easier for unions to initiate bargaining when employers would otherwise be recalcitrant. Another dimension to the improvement in collective bargaining coverage has been the willingness of employers to return to the bargaining table, perhaps due to a genuine change in attitude, and also to avoid being captured under a multi-employer agreement, indicating a positive indirect effect of multi-employer bargaining. Other changes

assisting will have been reduction in employer tactics to seek to terminate agreement unilaterally and employers seeking to bargain to replace expired zombie agreements.

Getting wages moving

Another of the objectives of the legislation was to 'get wages moving and end the era of deliberate wage stagnation.'[17] Getting wages moving again was all the more urgent because of the precipitous collapse in workers' living standards driven by high and persistent inflation from June 2021 onwards, exacerbating the drag on living standards overseen by the Coalition. The legislation has seen some success in restoring wages growth, with positive recent decisions in Annual Wage Reviews of the FWC and a tight labour market also contributing to an increased pace of wage growth.

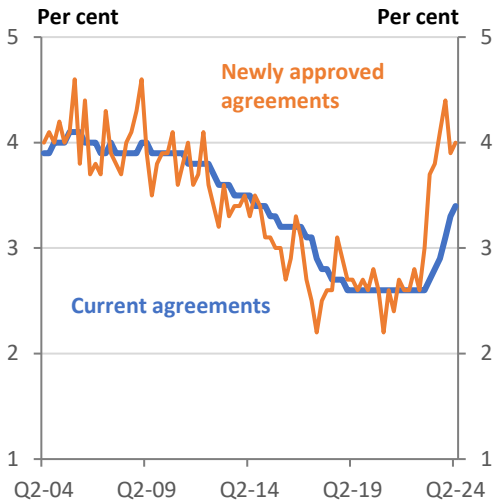
In September 2022, the Average Annual Wage Increase in a newly approved federal enterprise agreement was 2.6 per cent. In December 2022, the AAWI increased to 3.0 per cent. But from March 2023, the Average Annual Wage Increase shot up to 3.7 per cent, peaking at 4.4 per cent in December 2023, fully one year after the legislation was passed by Parliament (see Chart 10). While wage growth has come off the peak in December 2023, the Average Annual Wage Increase on a newly approved agreement was still 4.0 per cent as of the June quarter 2024, well above rates prevailing during the decade of Coalition rule and the highest since early 2012.

The pick-up in Average Annual Wage Increases alongside the increase in the number of collective bargaining coverage is consistent with the relationship prevailing before the pandemic. Between September 2011 and December 2019 – just prior to the onset of the COVID-19 pandemic – there was a strong and positive association between the share of total employees covered by collective agreements and annual wage growth for workers on enterprise agreements (see Chart 11). The association implied that a higher share of total employees on collective agreements would mean higher annual wage growth for workers on enterprise agreements. It is worth recalling that this positive association was coincident with the period in Australia where wages growth had slowed considerably and inflation was persistently below target, a period explored earlier in this submission. This suggests that the collapse in collective bargaining

[17] Tony Burke, 'Second Reading Speech: Secure Jobs, Better Pay Bill 2022', Parliament House, Canberra, 27 October 2022 – available here.

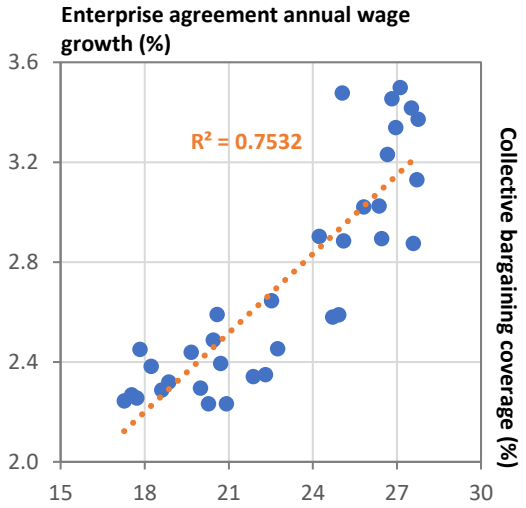
occurred at a macroeconomically inconvenient time and contributed to below target inflation, acting as a drag on wages and unsettling macroeconomic balance.

Chart 10: Average Annual Wage Increase



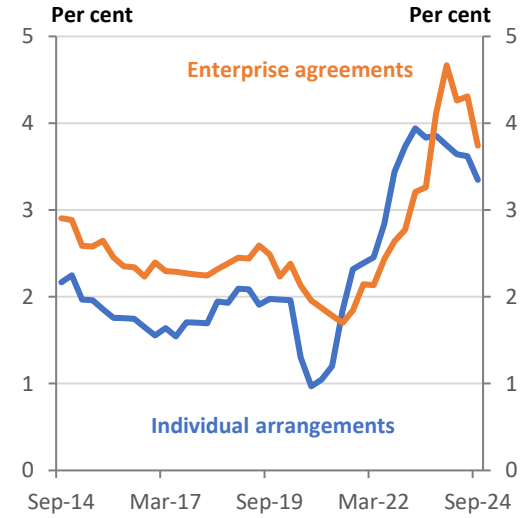
Source: DEWR Trends in Federal Enterprise Bargaining database & ACTU calculations

Chart 11: Correlation between annual wage growth and collective bargaining coverage, Sep-11 to Dec-19



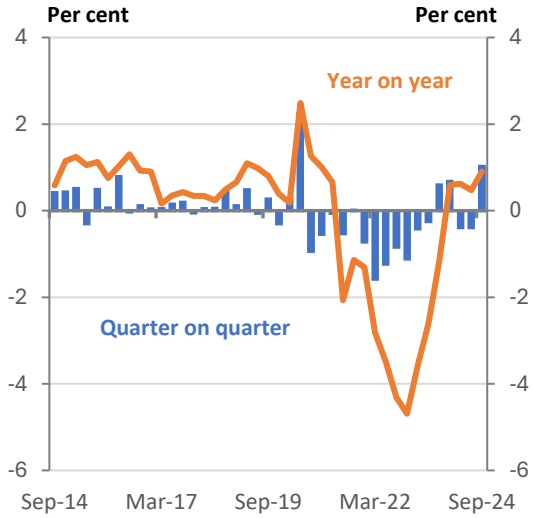
Source: ABS Wage Price Index, ABS Labour force, detailed, DEWR Trends in Federal Enterprise Bargaining database & ACTU calculations

Chart 12: Annual wage growth by pay-setting method



Source: ABS Wage Price Index & ACTU calculations

Chart 13: Real wage growth for workers on enterprise agreements



Source: ABS Wage Price Index, ABS Consumer Price Index & ACTU calculations

While there are not enough data points available since the enactment of the legislation to arrive at solid conclusions, overall annual wage growth has been solid in the quarters since the royal assent of *Secure Jobs, Better Pay*. According to data from the ABS' Wage Price Index, annual

wage growth for workers on enterprise agreements peaked at 4.7 per cent in December 2023, having increased from 3.3 per cent in June 2023 and 4.1 per cent in September 2023. While wage growth for workers on enterprise agreements has eased off, consistent with the economy-wide slowing in wage growth, it was still solid at 4.3 per cent in both March and June 2024 and 3.7 per cent in September 2024. This is notably above wage growth for workers on individual arrangements, which peaked at the lower level of 3.9 per cent in March 2023, then eased off to 3.6 per cent in both March and June 2024 and fell further to 3.3 per cent in September 2024 (see Chart 12). While there was a period of around a year – from June 2022 to June 2023 – where individual arrangements were more responsive to the tightening labour market, this situation was short-lived and quickly shifted. Even as wages growth eased off, as expected, workers on enterprise agreements were still securing higher pay increases than workers on individual arrangements. The data on wage growth suggest that the combination of higher collective agreement coverage and solid wages growth spell an end to the decade of wage stagnation due to the reckless macroeconomic management of the Coalition Government and that the legislation has laid the groundwork for a sustained recovery in wages growth after the current inflation crisis has passed. The strong correlation between collective bargaining coverage and economy-wide annual wage growth suggests that for every 1 percentage point increase in the share of total employees on collective agreements, annual wage growth would be 0.15 percentage points higher. That means that the addition of just over 400,000 workers since the legislation passed, which increased the share of employees on collective agreements by 3.4 percentage points, is estimated to have increased wage growth by 0.5 percentage points more than it would have otherwise have been had those agreements not been made - not counting the contribution of the other workers already on collective agreements made to strong annual wage growth.

The recent strength in wages growth for workers on enterprise agreements has also contributed to a budding recovery in real wage growth for those workers. Real wages increased 0.6 per cent over the year to December 2023, 0.6 per cent over the year to March 2024, 0.5 per cent over the year to June 2024 and 0.9 per cent over the year to September 2024. Over the same period, real wages for workers on individual arrangements declined 0.3 per cent over the year to December 2023, were flat at 0.0 per cent over the year to March 2024, declined 0.2 per cent over the year to June 2024 and have only just returned to positive territory in September 2024, rising 0.5 per cent over the year – still below real wage growth for workers on enterprise agreements. Annual real wage growth for workers on enterprise agreements has also been higher than the economy-wide average, which rose 0.1 per cent over the year to December 2023, 0.4 per cent over the year to March 2024, 0.2 per cent over the year to June 2024 and

0.7 per cent over the year to September 2024 (see Chart 13). This would suggest that the *Secure Jobs, Better Pay* legislation has been successful in getting wages moving and that the strength of wage growth arising from a restoration of a functioning bargaining system has seen the first steps on the road to the recovery in workers living standards. Taken together with solid nominal wage growth, it also suggests that the workers are better off being on an enterprise agreement compared to an individual arrangements if they wish to see solid wage growth and some recovery in real wages.

Narrowing the gender pay gap

Another of the objectives of the *Secure Jobs, Better Pay* legislation was to close the gender pay gap. Progress on closing the gender pay gap stalled just after the Liberal Prime Ministership changed from Turnbull to Morrison. This meant that on the eve of the 2022 Federal Election, the gender pay gap was 14.1 per cent of male full-time earnings, which is exactly where it was four years prior in November 2018.

The change in government in May 2022 marked a turning point and progress in closing the gender pay gap resumed at pace once Australia had done away with the Liberal-National Government. The first important step to restoring progress in closing the gender pay gap was foreshadowed during the election campaign, when Anthony Albanese stated that the minimum wage should at least keep up with the cost of living and that a Labor Government would make a submission to the Annual Wage Review to that effect.[18]

The *Secure Jobs, Better Pay Act* consolidated this drive, with amendments to the *Fair Work Act 2009* made to include the promotion of gender equality. Further, gender equality considerations were also included in the Modern Awards Objective and the Minimum Wages Objective. Alongside a more expansive policy programme to promote equality, including the Government committing around $8 billion over four years to fund the interim 15 per cent wage increases for direct care workers after the Fair Work Commission handed down its Aged Care Work Value case determinations, the *Secure Jobs, Better Pay* legislation has helped drive down the gender pay gap.

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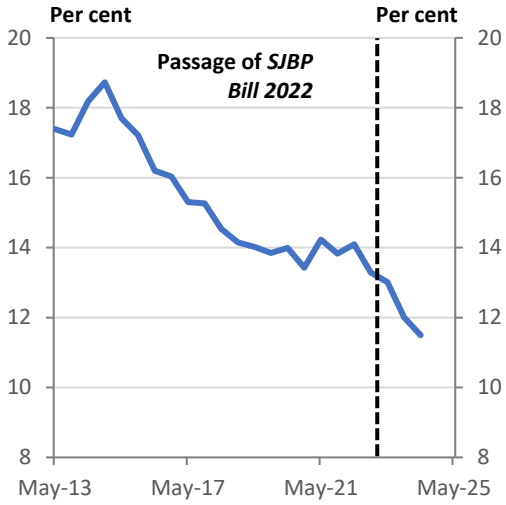
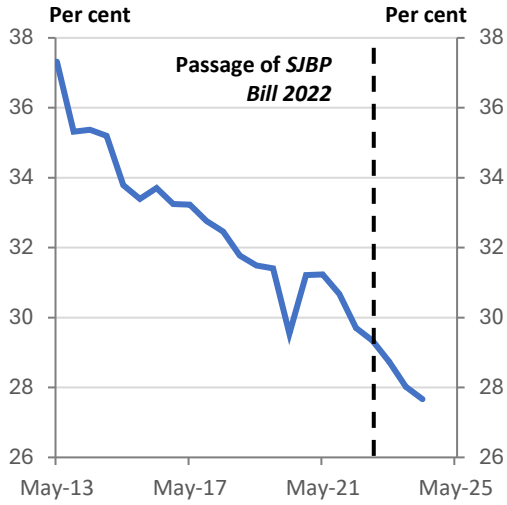
[18] Election 2022: Anthony Albanese backs 5.1 per cent minimum wage rise to keep pace with inflation | Australian politics | The Guardian

Chart 14: Full-time gender pay gap



Source: ABS Average Weekly Earnings & ACTU calculations

Chart 15: Total earnings gender pay gap



Source: ABS Average Weekly Earnings & ACTU calculations

Since May 2022, the full-time gender pay gap has fallen 2.6 percentage points, declining to 11.5 per cent as of May 2024 (see Chart 14) and seeing an average annual fall of 1.3 percentage points across that time. Since the passage of *Secure Jobs, Better Pay* in December 2022, the annual decline in the full-time pay gap has accelerated. The full-time gender pay gap fell 0.5 percentage points over the year to November 2022, with the pace increasing to a 1.1 percentage point decline over the year to May 2023, 1.3 percentage point decline over the year to November 2023 and a 1.5 percentage point decline over the year to May 2024.

A similarly strong decline in the total earnings gap has been observed over the last two years. The total average earnings pay gap declined 2.0 percentage points between May 2022 and May 2024, a decline only slightly less than the fall of 2.1 percentage points seen between November 2018 and May 2022. The pace of decline has been steady across the last two years, with an average annual decline of 1.2 per cent, with the smallest decline of 1.0 percentage points in May 2023 and large declines of 1.3 percentage points in November 2022 and November 2023, slightly outpacing the 1.1 percentage point decline over the year to May 2024 (see Chart 15).

IV. Employer claims

Employer groups made a range of claims about the likely outcomes arising from the passage of the *Secure Jobs, Better Pay* legislation. Many were alarmist, bordering on hysterical, and all of them have proven to be without foundation. This section evaluates the common claims of key employer groups after nearly two years of the Reforms being in operation.

Claims regarding multi-employer bargaining

In a show of multi-employer collective agreement, business lobby groups asserted that multi-employer bargaining would undermine the system of enterprise bargaining.[19]

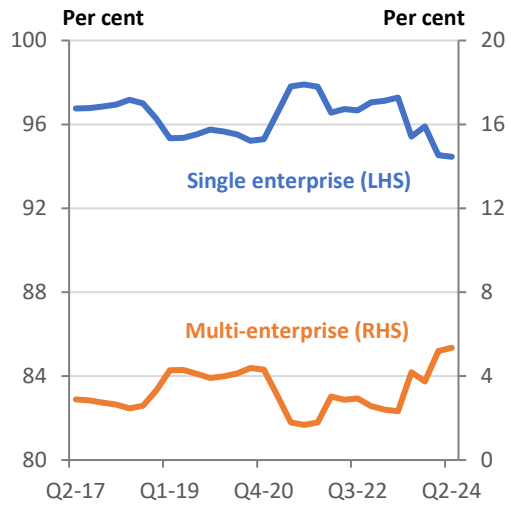
No such thing has happened. As demonstrated earlier (see Chart 7 and Chart 8 above), the *Secure Jobs, Better Pay* legislation has increased collective bargaining coverage, with 2.2 million workers on collective agreements as of June 2024. According to the most recent Trends in Federal Enterprise Bargaining report, of those 2.2 million workers, 2.1 million are on single enterprise agreements.[20] There were around 118,300 workers on multi-enterprise agreements in June 2024, a modest increased from the 46,200 workers on multi-enterprise agreements in December 2022, around when the legislation passed. Around 5.4 per cent of employees on collective agreements were on multi-employer agreements in June 2024, up from 2.6 per cent in December 2022 (see Chart 16). Instead early evidence under the Reforms suggests the improvements to multi-employer bargaining may have incentivised some employers to instead seek single enterprise bargaining.

Employer groups also raised concerns that "potentially thousands of private sector firms and hundreds of thousands of employees" would be covered by multi-employer bargaining, as if this were a bad thing.[21] Nevertheless, evidence of the early use of these new laws suggests otherwise. Prior to the reforms only 72,100 employees were covered by multi-employer agreements.

Since the reforms, use of the multi-employer bargaining stream by unions has been cautious and targeted. Employees covered by current multi-employer agreements only make up 1.0 per cent of total employees, and as of June 2024, there were 62 multi-employer agreements, up from 52 in December 2022, with more being bargained for as discussed on page 92.

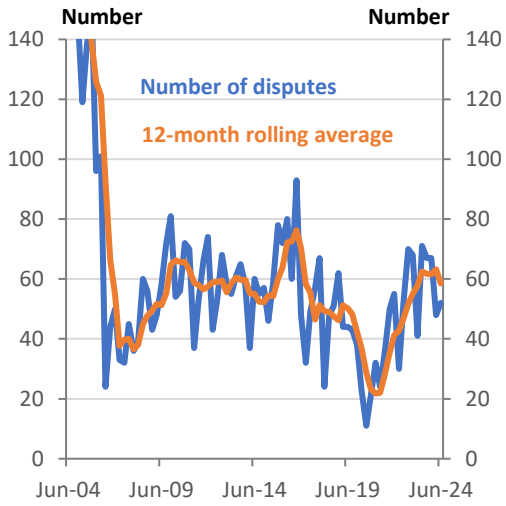
[19] Leading employer organisations join in call for major rethink of Federal Government's IR Bill | Ai Group
[20] Department of Employment and Workplace Relations, 'Table 6', *Trends in Federal Enterprise Bargaining*, p. 19
[21] Australian Industry Group, submission to *Secure Jobs, Better Pay* Inquiry, p. 60 and p. 68

Chart 16: Single enterprise and multi-enterprise agreement employees as a share of employees on collective agreements



Source: Department of Employment and Workplace Relations, Trends in Federal Enterprise Bargaining & ACTU calculations

Chart 17: Number of industrial disputes



Source: ABS Industrial disputes, Australia & ACTU calculations

Many employer groups appear to hate the idea of bargaining with a union, full stop. When the FWC approved an authorisation to commence bargaining with three NSW coal mining companies back in August – the first ever approval for a contested application – the Minerals Council of Australia (MCA) went apoplectic. It described the decision as "an alarming shift", and "a dangerous precedent", based on "reckless changes to workplace law".[22] The MCA were particularly disgusted that a small handful of employers were forced into bargaining with their own collieries staff and their union, Professionals Australia. These are incredibly well-resourced employers who have a long history of bargaining throughout other parts of their operation with a range of other enterprise agreements already in place.

Both the Business Council of Australia[23] and the Australian Industry Group[24] made assertions that the legislation would open the door to more strikes and strikes across whole sections of the

[22] Minerals Council of Australia, Statement on the Fair Work Commission decision regarding multi-employer bargaining, 23 August 2024
[23] Workplace changes a disappointment for business and workers - Business Council of Australia
[24] IR Bill deal fails to address industry concerns | Ai Group

economy. Since the passage of the legislation in December 2022, the number of active disputes has fallen from 68 to 52. As this series is volatile, a twelve-month rolling average assists in looking through any noise. On this basis, the number of disputes has risen slightly relative to December 2022, up by 3 as of June 2024, though the number of disputes has been falling consistently since June 2023 (see Chart 17). Further, the number working days lost in the quarter has been broadly steady since the passage of the legislation, with 21,000 days lost in December 2022 compared to 21,900 days lost in June 2024. The rolling average of this measure has picked up slightly to 30,000 days lost in June 2024, but this is well down on the average prevailing in December 2022 of 49,200 days lost. Neither indicator is suggestive of a pick-up in strike activity, and asserting that the legislation would result in such a pick-up is wilfully obtuse given the restrictiveness of industrial action laws in Australia, which have been in place for a number of decades. Further, the rate of applications for Protected Action Ballots – a fair proxy for upcoming industrial action - has potentially declined since the Reforms came into operation (See page 89).

The Australian Chamber of Commerce and Industry (ACCI) made a related claim, suggesting that wages would go backwards and there would be increased disputation and the laws.[25] Alongside the data on industrial disputes just highlighted, it is worth recalling from earlier (see Chart 1 and Chart 12) that wages have increased since the passage of the laws, and in large part because of them.

ACCI also suggested the laws would result in higher unemployment, while the Australian Industry Group (AiG) made a broader assertion that multi-employer bargaining would reduce productivity, investment and jobs, with little argument or evidence to back it up..[26] While the unemployment rate has increased to 4.1 per cent as of September 2024, up from the 3.5 per cent prevailing in December 2022, this in no way indicates what ACCI were suggesting. Instead, according to the Reserve Bank of Australia, the updrift in the unemployment rate 'reflects increasing labour supply outpacing still-solid growth in labour demand', arising from the slowdown in the economy as interest rates weigh on activity and bring mismatches in supply and demand closer to

[25] Australian Chamber of Commerce, submission to *Secure Jobs, Better Pay* Inquiry, p. 6
[26] Australian Industry Group, submission to *Secure Jobs, Better Pay* Inquiry, p. 2

balance.[27] Given the wider macroeconomic context and the quite sharp monetary policy tightening that has occurred since 2022, it is not credible to attribute an increase in the unemployment rate to changes in the industrial relations system. Further, since December 2022, the number of employed has increased by around 751,600 people, of which just over half (around 395,500) have been full-time positions, with solid outcomes for employment not indicating any adverse impact on employment opportunities from the new laws.

As to claims with respect to productivity, following the bursting of the productivity bubble that arose because of the re-composition of output and employment in response to lockdowns, the level of GDP per hour worked has settled around levels prevailing in mid-to-late 2016.[28] Our productivity challenges emerged well before the legislation passed in 2022, and rather points to deeper issues and a failure to undertake meaningful structural reform by the Federal Government in the decade prior to the pandemic. That notwithstanding, productivity in the market sector excluding commodities, which broadly represents the domestic private sector, is up 2.1 per cent relative to December 2022 and as of June 2024 is 4.2 per cent higher than the average level prevailing between September 2016 and December 2019 (see Chart 6 earlier). These outcomes are not suggestive of issues in productivity tied to the recent passage of industrial relations reform and frantic claims like this are better side-lined in the economic policy debate.

At the micro-level, one argument advanced by critics of the Reforms is that an employer roped into a multi-employer agreement would be preventing from paying higher wages to attract better and more productive staff, thereby inhibiting firm dynamism.[29] This argument misunderstands labour law: there are no restrictions in enterprise agreements preventing an employer from paying staff above the agreement rates.

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[27] Economic Conditions | Statement on Monetary Policy – November 2024 | RBA
[28] Quarterly productivity bulletin – September 2024
[29] Dan Andrews and Jack Buckley, "Multi-employer bargaining: a barrier to firm growth?", E61 Institute, 10 March 2023

Delinking of wages from productivity

ACCI asserted that the *Secure Jobs, Better Pay* legislation represented a delinking of wages from productivity as the laws aimed at lifting wages but wouldn't improve productivity at the same rate.[30] As noted earlier, this claim does not stand up to scrutiny, and the inverse has been happening for more than a decade: productivity growth moved ahead of anaemic wages growth between 2012 and 2019 in both the aggregate economy and the domestic private sector, represented by the market sector excluding commodities. Further, the weakening of the link was noted with concern by then-Governor of the Reserve Bank Philip Lowe. Instead, it would be more intelligent to view the *Secure Jobs, Better Pay* legislation as an attempt to strengthen the link between productivity growth and real wage growth.

The Business Council of Australia indicated that the Bill would not lead to higher wages or higher productivity.[31] As canvassed already (see Chart 9 and Chart 11 above), wage growth did pick up in the period immediately following the passage of the *Secure Jobs, Better Pay* legislation, with both the new laws themselves and the strength of the labour market contributing. As to the claim regarding the effect the laws would have on productivity, the best available research suggests that the assumption that employment laws, and the regulation of bargaining specifically, is a key driver of productivity is not supported by the evidence. Associate Professor Chris Wright summarised the main contours of the literature in a submission to the Senate Inquiry examining the *Closing Loopholes Bill 2023*:

> As various studies have highlighted, productivity is driven to a greater extent by other factors, including capital investment, investment in and utilisation of new technology, research and development, employees' education and skills, management capability, and the efficient organisation of work and production systems.[32]

Attempting to pin poor productivity performance to the *Secure Jobs, Better Pay* legislation lacks credibility. That notwithstanding, as of June 2024, the level of productivity is currently sitting around where it was between June 2016 and September 2019. With the pandemic productivity

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[30] Industrial relations bill still puts jobs and business at risk - Australian Chamber of Commerce and Industry
[31] Business Council of Australia submission to *Secure Jobs, Better Pay* Inquiry, p. 5
[32] Professor Chris Wright, 'Submission to the Senate Education and Employment Legislation Committee Inquiry Fair Work Legislation Amendment (Closing Loopholes) Bill 2023', Parliament of Australia, Canberra – link

bubble over, the reversion back to levels seen in the years before the pandemic suggest – consistent with the literature – very little impact of the *Secure Jobs, Better Pay* legislation. Instead, current productivity issues point to problems with non-mining investment, which was stagnant as a share of GDP well before the 2016 to 2019 period, as well as other deeper issues around the uptake of technology, management capability and other problems unrelated to industrial relations laws. If the Business Council of Australia wish to see higher productivity, the organisation may be better served telling its members to get their collective act together to turn around record low productivity-sapping levels of business investment, rather than shrilly blaming industrial relations reform designed to help Australia's workers get a decent pay rise for the first time over ten years.

Claims related to labour market outcomes arising from the passage of the legislation

The AiG claimed[33] that the reforms would put at risk the strong gains in employment and the inroads that have been made into underemployment and unemployment. Between the passage of the legislation in December 2022 and October 2024, around 767,000 jobs have been added, with a notable 405,000 (or 52.8 per cent) of those jobs being full-time positions. Further, the underemployment rate sat at 6.2 per cent in December, where it remains as of October 2024. While unemployment has increased from 3.5 per cent in December 2022 to 4.1 per cent as of October 2024, that increase has not come at cost of large job losses. Instead, the increase in the unemployment rate has coincided with elevated inflation and the tighter monetary policy (December 2022 being partway through the RBA's tightening cycle) that have weighed on economic activity. Notwithstanding a slight pick-up, the unemployment rate is still below the 10-year pre-pandemic average of 5.5 per cent. At present, the main risks to the employment gains made since the economy reopened are the Reserve Bank of Australia holding interest rates too high and risking a recession or a renewed bout of global inflation from an unnecessary trade war triggered by tariffs.

[33] Passage of disappointing IR Bill delivers nothing for the economy, productivity or employment growth | Ai Group

Part 3: Reviewing the Secure Jobs Better Pay Reforms

I. Governance Reforms

1. Abolition of the ROC

The SJBP Act amended the FW(RO) Act to abolish the Registered Organisations Commission ("**the ROC**") and return the role of registered organisation regulator to the General Manager of the Fair Work Commission. That transfer occurred on 6 March 2023. As part of that process all ROC staff were transferred to form the new Registered Organisations Governance and Advice Branch of the Fair Work Commission.

The SJBP Act also sought to amend the approach of the regulator by introducing as new s.329A(2) of the FW(RO) Act:

> *(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.*

In March 2023 General Manager commissioned an independent review of its functions by former Fair Work Commission Members Jonathan Hamberger and Anna Booth. That review made a significant number of recommendations to improve service delivery, a number of which the General Manager has either implemented or begun implementing.[34]

The reforms implemented by the General Manager have included the establishment of the Registered Organisations Advisory Committee ("the ROAC") and the Compliance Practitioners Reference Group ("the CPRG"). The ROAC consists of representatives from the ACTU, AiG and ACCI. The CPRG consists of members of the Commission's Registered Organisations Services Branch and registered organisations nominated by the ROAC. The CPRG's purpose is to gather

[34] The Final Report of the Review and the General Managers Response can be downloaded at Registered Organisations Governance & Compliance External Review: Final report and General Manager's response | Fair Work Commission.

feedback on compliance-related issues affecting registered organisations. Both groups 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.
- 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.

Finally, we note that the independent review commissioned by the General Manger made several recommendations that would require legislative change. Those recommendations are matters beyond the scope of a review of the SJBP Act however, remain items for possible further reform of the FW(RO) Act, subject to appropriate consultation with those affected. The recommendations included but are not limited to

(a) A review of penalties, financial reporting and auditing requirements under the FW(RO) Act taking into account comparable institutions in the not-for-profit sector.
(b) A review of the requirements with respect to notification of changes in office holders.

The ACTU submits that the abolition of the ROC has been an unequivocally positive reform.

2. Additional RO enforcement options

The SJBP Act amended the FW(RO) Act to include enforceable undertakings as part of the regulatory framework applying to registered organisations. The amendments sought to provide the FWC with additional enforcement tools to enhance the regulator's ability to ensure compliance and accountability, while providing a more targeted and proportionate approach to enforcement. The context of the changes are well described in the Explanatory Memorandum to the SJBP Bill:

> *88. The RO Act pre-dates the Regulatory Powers Act and has not been amended to trigger any of its standard suite of powers. While the current regulator of the RO Act has 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. The current regulator has few options to address suspected instances of non-compliance under the RO Act, between seeking voluntary compliance and litigation. The proposed measures in this Part would trigger the infringement notice and enforceable undertaking schemes under the Regulatory Powers Act, to provide the new regulator with two additional enforcement tools.*
>
> *89. This measure would expand the agency's powers and bring them closer into line with that of other comparable Commonwealth regulators. 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. This would enable them to take a measured and proportionate approach to address suspected non-compliance under the RO Act, depending on the circumstances of each case.*

Since the amendments, the General Manager has received two enforceable undertakings; one from the Community and Public Sector Union – State Public Sector Federation ("the CPSU-SPSF") and another from the Transport Workers Union of Australia ("the TWU"). For convenience, the undertakings can be downloaded here (CPSU Undertaking) and here (TWU Undertaking).

In broad terms, it is the ACTU's understanding that both affiliates viewed the experience overall as an improvement on the adversarial approach of the former Registered Organisation Commission. For example, the CPSU SPSF recognised (and accepted) that a significant error had occurred in one of its smaller branches and also that it benefited from the opportunity to work constructively with the General Manager to take action to remedy the problems and improve the union's systems. This can be contrasted with the experience of the ACTU's other affiliates with the ROC which were characterised by a series of hostile interactions with the regulator, too often culminating in lengthy and expensive litigation. In those circumstances, the work of rectifying the underlying issues became almost entirely framed by – and subsidiary too - the adversarial context in which the issue was being dealt with. In contrast, it appears that the undertaking process in this instance has allowed the CPSU SPSF, acting in good faith, to better – and more quickly - meet the requirements of the FW(RO) Act as well as the expectations of the regulator. Critically, it also meant the union could focus on how best to regularise and improve its structures to better serve and represent its members in as shorter time as possible.

In that context, the ACTU views the introduction of enforceable undertakings as a positive change to the regulation of registered organisations.

3. Abolition of the ABCC

The ACTU submission to the Senate Inquiry into the Secure Jobs Better Pay Reforms documented in detail the highly politicised and ultimately ineffective Australian Building and Construction Commission (ABCC).[35] Its abolition under those Reforms is welcome. We also note that the ABCC did nothing to uncover or investigate the recent issues identified in the Construction and General (C&G) Division of the CFMEU, now being handled by an Administrator.

[35] ACTU Submission, Senate Inquiry into the Secure Jobs Better Pay Bill 2022, pages 101 to 103.

II. Gender Equality and Job Security

4. Objects and objectives

Job security and gender equity are trade union values which we and our affiliates promote and prosecute vigorously. We welcomed amendments to the objects set out in s. 3 of the FW Act and to the modern awards and minimum wages objectives in s.134 and 284 to enshrine these principles.

The impact of those amendments has been pronounced insofar as they deal with gender equity, at least with respect to proceedings in the FWC. Despite some early positive indications, it does not appear that the same can be said of job security.

The primary relevance of amendments to the stated objects of legislation is in influencing how courts and tribunals interpret operative provisions, particularly in the case of legal argument as to the proper construction of those provisions or in cases where such provisions involve the application of a public interest test. The modern award objective and the minimum wages objective have a more direct effect, in that the matters enumerated therein are mandatory considerations for the FWC in deciding whether to vary the safety net as set out in modern awards and by what amount. It is in that later setting that the gender equity principles have driven positive outcomes.

Firstly, the amendments to these objectives were treated as a matter of significance in the 2022/23 Annual Wage Review, wherein the FWC departed from its longstanding view that the Annual Wage Reviews mandated by the FW Act were of limited utility in addressing gender-based undervaluation of work.[36] Specifically, the FWC determined that:

> *"... a result of the amendments to ss134(1) and 284(1) made by the Amending Act, any issues of unequal remuneration for work of equal or comparable value or gender undervaluation relating to modern award minimum wage rates can no longer be left to be dealt with on an application-by-*

[36] See [2017] FWCFB 3500 at [639]- [678], [2018] FWCFB 3500 at [35]

application basis outside the framework of the Review process. Such issues, insofar as they may be identified, should now be dealt with in the Review process or in other Commission-initiated proceedings between Reviews."[37]

To assist in progressing these issues, the FWC commissioned research to assist in identifying sectors and occupations which were highly feminised, and thereafter further examining the historical safety net wage setting practices which had applied to that work.

Secondly, although the amendments came into effect whilst the landmark proceedings concerning the aged care industry were part heard, they were applied in determining the final relief in that matter. Relevantly, the amendments to the objects and objectives, in conjunction with the new section 157(2B) of the FW Act, provided a gateway to determine that the work of aged care sector employees had been historically undervalued because of gender and to address that undervaluation.[38]

Thirdly, in its 2023-2024 Annual Wage Review, the FWC advanced on its previously announced intention to "deal with" gender undervaluation by scheduling proceedings to assess and address gender undervaluation in "priority" occupations.[39] Those proceedings are currently underway, with hearings occurring through December.[40]

As noted above, the amendments concerning Job Security have been far less impactful to date, with the FWC taking the view in the most recent annual wage review that, in that context at least, the requirement to consider the need to improve access to secure work across the economy was primarily concerned with whether the annual wage review outcome might affect the capacity of employers in future to continue to offer or maintain permanent employment.[41] That is, the requirement to consider the need to improve access to secure work acts as a wage restraint, in the same manner as the pre-existing requirements to consider employment costs and the need

[37] [2023] FWCFB 3500 at [120]
[38] [2024] FWCFB 150
[39] [2024] FWCFB 3500 at [111]-[129]
[40] See Fair Work Commission – Gender Undervaluation – priority awards review
[41] [2024] FWCFB 3500 at [133].

to promote social inclusion through increased workforce participation[42] have placed capacity to pay at the forefront of contemporary Australian minimum wage fixation, in stark contrast to the origin of our minimum wage as a cost of doing business that is not made to depend on the profits of the employer.[43]

A somewhat more expansive view was taken of the amendments concerning job security in the 2022-23 Annual Wage Review and then in the *Aged Care* proceedings, wherein the requirement was accepted to involve consideration of employees' interests to choose to engage in work that was regular and predictable.[44]

The FWC will have soon have further opportunities to consider and apply the objects and objectives concerning job security in proceedings it has initiated arising from the 2023-24 Review of Modern Awards. Specifically:

- the FWC has decided to conduct a "fundamental review of award provisions regulating part time employment"[45] next year, noting that it is a matter of significance for employee's job security and focussed on the seven most utilised modern awards.[46] The decision to embark upon this program of work was driven by a lack of consensus among employer and employee representatives concerning the improvements required to part time provisions (with employers wanting greater flexibility to unilaterally alter working arrangements and employees seeking greater predictability and control over hours of work), as well as the FWC's observation that there was a lack of uniformity in part time provisions across awards, in particular noting awards covering female dominated work generally offered lesser protections and entitlements concerning changes to hours of work, minimum engagement and overtime.

[42] See FW Act at s. 134(1)(c), 134(1)(f), 284(1)(b).
[43] *Ex Parte H.V. McKay* (1907) CAR 1 at 5-8.
[44] [2023] FWCFB 3500 at [28]-[30], [2023] FWCFB 93 at [171].
[45] President' Statement concerning Modern Awards Review 2023-24, 18/7/2024
[46] General Retail Industry Award; Social, Community, Home Care and Disability Services Industry Award; Hospitality Industry (General) Award; Fast Food Industry Award; Restaurant Industry Award; Children's Services Award; Clerks-Private Sector Award.

- The FWC has recently commenced proceedings to review the provisions of the Higher Education Industry Academic Staff Award and the Higher Education Industry General Staff Award regulating fixed term contracts, in light of the commencement of Division 5 of Part 2-9 the FW Act (which introduced legislative restrictions on the entering into of such contracts). These proceedings will examine, among other things, whether variations to the relevant terms in the awards are necessary to ensure the awards improve access to secure work.[47]

5. Equal Remuneration

Prior to the Reforms, equal pay laws had largely failed to address the historic undervaluation of work in female dominated sectors - in the 30 years since equal remuneration provisions were introduced in 1993, there had only been one successful case. This was because the requirements were too strict and technical, making the pursuit of Equal Remuneration Orders an extremely costly, time consuming, adversarial, and ultimately fruitless exercise.

The Reforms significantly strengthened the equal pay and work value provisions of the FW Act to make it easier for workers in female dominated industries to address gender-based undervaluation and win substantial pay increases. The FW Act was amended to provide new guidance for both equal remuneration and work value cases that no longer require strict and technical tests to be met (such as the need for a 'male comparator'), and which instead focus on whether the work has been undervalued based on gender. These changes aligned the federal workplace relations framework with best practice Australian jurisdictions, with the aim of addressing the barriers preventing the FWC from effectively tackling gender-based undervaluation of work. Amendments to both equal remuneration and work value provisions ensure women have multiple avenues to pursue equal pay claims.

Work value

[47] [2024] FWCFB 389

The Reforms incorporated new gender equity considerations into work value cases that did not previously exist. When considering whether amending an award is justified for work value reasons, the FWC's consideration of work value reasons must, pursuant to new s.157 (2B): a) be free of assumptions based on gender, and b) include consideration of whether the work has been historically undervalued because of assumptions based on gender.

The Reforms had their first test in the Aged Care Work Value case led by unions. This case was lodged in November 2020, seeking to increase the minimum wages of aged care workers covered by three awards[48] by 25 per cent. That case was decided in three stages, with the reforms coming into effect before the second stage decision. Along with the new objectives of the Act, new section 157 (2B) of the FW Act provided a gateway to determine that the work of aged care sector employees had been historically undervalued because of gender and to address that undervaluation.[49]

In Stages 1 and 2 (handed down on 4 November 2022 and 21 February 2023 respectively), the FWC decided to provide a 15 per cent interim increase to the minimum award wages for 'direct care' workers (being registered nurses, nurse practitioners, enrolled nurses, assistants in nursing, personal care workers, recreational/lifestyle activities officers, and home care workers.) The 15 per cent increase was also given to the most senior food services employees (head chefs/head cooks). These increases came into effect from 30 June 2023, with the Albanese Government committing around $8 billion over four years to fund these increases for workers across the sector.

Stage 3 of the Aged Care case considered whether work value reasons justified a further pay rise for 'direct care' workers, and whether other aged care workers ('indirect care' workers in support and administration) should also get an increase. On 15 March 2024, the Expert Panel handed down its Stage 3 decision. The Expert Panel found that the work of aged care sector employees had been historically undervalued because of assumptions based on gender and determined

[48] The Aged Care Award 2010 (Aged Care Award), Nurses Award 2020 (Nurses Award) and the Social, Community, Home Care and Disability Services Industry Award 2010 (SCHADS Award).
[49] [2024] FWCFB 150

that there were work value reasons for the minimum award rates of pay for direct care workers to be increased substantially beyond the 15 per cent interim increase determined in Stage 1 of the proceedings, with some direct care workers receiving a 28.5 per cent increase in total. They also found that the rates of pay for 'indirect care' workers should be increased.

The result of the Aged Care Work Value case will be pay increases across the sector for both indirect and direct care workers ranging from 3 to 28.5 per cent, with the Albanese Government committing to fully fund those increases. This has meant that the health and broader care economy has had the fastest wages growth of any sector, with the final Stage 3 pay increases still to come into effect in 2025.

The Stage 3 decision means the following further pay increases for aged care workers[50]:

- Significant additional increases for direct care workers under the Aged Care Award on top of the 15 per cent awarded in 2023, with total wage increases for direct care workers ranging from 20.9 per cent to 28.5 per cent
- Significant additional increases for assistants in Nursing under the Nurses Award on top of the 15 per cent awarded in 2023, with total wage increases of between 17.9 per cent to 23 per cent
- An increase of 7 per cent for support workers in catering, cleaning and laundry
- A 3 per cent increase for other 'indirect care' workers, including administration, maintenance and gardening workers.

Further pay increases for registered nurses and enrolled nurses covered by the Nurses Award will be determined in separate work value proceedings brought by the Australian Nursing and Midwifery Federation (ANMF) which are currently before the FWC. That application seeks to increase award wages for frontline nurses, midwives, and assistants in nursing (AIN) by up to 35 per cent on the basis that the work of nurses and midwives has never been properly valued.

[50] Indirect care workers will receive their full wage increase in one go from 1 January 2025. 'Direct care' workers will receive half of the increase from 1 January 2025, and the second half from 1 October 2025.

The ANMF is arguing that the modern award rates are set too low, stemming from the historic, gender-based undervaluation of nursing and midwifery care work. Nurses and midwives make up over 50 per cent of Australia's registered health professionals and are predominantly women, with approximately 89 per cent of nurses being female, and nearly 100 per cent of midwives. If successful, the application will ensure that the recognition of work value given to nurses and AINs in the Aged Care Work value case, will be extended to all modern award covered nurses, midwives and AINs, regardless of the healthcare setting, and will contribute to the further narrowing of the gender pay gap.

Equal Remuneration

The equal remuneration provisions were strengthened in several ways by the Reforms:

- The inclusion of revised principles and guidance means that these cases no longer require comparison with 'similar work' or a 'male comparator', instead focusing on whether the work has been undervalued. The FWC can make comparisons within and between occupations and industries to establish whether the work has been undervalued on the basis of gender, but such comparisons are not limited to similar work, or to historically male dominated occupations or industries.[51]
- The FWC is no longer required to find that there has been discrimination on the basis of gender to establish that the work has been undervalued or to grant an equal remuneration order (**ERO**).[52]
- The discretion the FWC previously had about whether to make an ERO has been removed. This means that the FWC must make the ERO if it is satisfied that there is not equal remuneration for work of equal or comparable value for the affected employees.[53]
- EROs may now be made on the initiative of the FWC and it does not have to wait for an application to act on equal remuneration.[54]

[51] FW Act s 302 (3B)
[52] FW Act s 302 (3C)
[53] FW Act s302 (5)
[54] FW Act s 302(3)

As yet there has not been a collective test of the new equal remuneration provisions, with unions so far opting to use the work value and supported bargaining pathways to raise wages in female dominated industries. However an early case brought by an individual worker demonstrates the potential of these provisions to also provide individual remedies as well as collective ones. In *Sabbatini v Peter Rowland Group Pty Ltd* [2023] FWCFB 127, a female chef discovered three male chefs working alongside her were paid $15,000 more than her for the same work. She quit her job and sought compensation in the FWC. Unfortunately, despite her colleagues providing evidence that she was a better performer than her male colleagues, which was undisputed, and the Expert Panel finding that clear gender inequality in remuneration existed, it dismissed the application as she was no longer an employee. It found the law only applies to current employees and an ERO can only lift wages prospectively, not remedy past instances. Whilst the worker in that case was unsuccessful, the case highlights the potential of these provisions to provide a mechanism for individual workers to address gender pay inequity.

Gaps in the law

If the making of equal remuneration orders is to be informed by investigations or inquiries of the new expert panels, the reports of the expert panels should be referred to in s.302(4) of the FW Act as a matter that the FWC must take into account when making an equal remuneration order. S302(4) currently requires the FWC to take into account orders and determinations made in annual wage reviews, and the reasons for those orders and determinations. The inclusion of reports of the new expert panels in s302(4) is important to ensure that reports of the expert panels serve a purpose and are taken into account in decisions the FWC makes.

Recommendations

1. S302(4) should be amended to provide that reports of the new Expert Panels must be taken into account when making an equal remuneration order.

6. Expert Panels

The Reforms established new expert panels - a Pay Equity Panel and Care and Community Sector Panels. The Pay Equity Panel considers any applications for equal remuneration orders, and any matters related to determinations to vary modern award minimum wages for work value reasons under s157(2) if there are substantive gender pay equity matters justifying the determination.

The Panel has at least two experts with knowledge or experience relating to gender pay equity and/or anti-discrimination.

The Care and Community Sector Panels deal with any matters that arise in the care and community sector and which would otherwise have been considered by the Pay Equity Panel, as well as any decisions regarding determinations or modern awards under s157(1) that relate to the care and community sector, in order to address low wages and challenging workplace conditions faced in that sector. The Panel has at least two experts with knowledge of or experience in the care and community sector, and when dealing with pay equity in the care and community sector, will have one expert in the sector and one expert in gender pay equity/anti-discrimination.

This has meant that matters in the care economy and matters relating to pay equity have been dealt with and decided by Expert Panels with the expertise and specialist knowledge needed to assess pay and conditions for women and for workers in feminised industries. This has led to better and fairer outcomes for women in achieving pay equity.

Our affiliates have so far had positive experiences of the expert panels, including in work value cases and in a number of care and community sector matters. Our affiliates have reported that there is a much greater understanding of the issues, especially for matters in the care and community sector which is unique in many ways. Having people who understand the nature of the sector, its workforce and its funding arrangements has been very beneficial to resolving issues and getting good outcomes. The affiliates involved in the Aged Care Work Value case report that the Stage 3 Decision, decided by an Expert Panel, recognised the previous failures of the FWC and its predecessors to address gender-based undervaluation, and sought to rectify this through its decision.

Gaps in the law

Consistent with the Minimum Wage objective being amended to include the need to consider gender equality, the expert panel that is constituted for the Annual Wage Review should also include panel members with expertise relating to gender pay equity. This could be done by amending s620(1)(b) to include gender pay equity as an area of knowledge and experience. We note that in the last two Annual Wage Reviews, this has been happening in practice, and has had a beneficial impact on the outcomes of the Annual Wage Review (which have focused for the first

time on gender based undervaluation of work, as discussed above). This practice should be formalised by making it a requirement in the legislation.

Recommendations

2. Gender pay equity should be added to the areas of knowledge and experience an expert panel should have when constituted for the Annual Wage Review.

7. Prohibiting pay secrecy

Pay secrecy clauses were commonly inserted into employment contracts by employers to prohibit workers from disclosing what they get paid and taking action about wage inequity. This lack of transparency means that women have no way of knowing whether they are being paid equally to men, whether their pay is keeping up with market rates, and whether there is a gender pay gap in their workplace. Pay secrecy clauses can significantly contribute to the gender pay gap and suppressing wages more generally.

The Reforms provide that an employee has a right to disclose pay information which is a workplace right within the general protections provisions of the FW Act (s.333B). They prohibit the use of such clauses in contracts (s.333D) and provide that they have no effect (s.333C). These provisions only apply to contracts entered into or varied on or after the operative date of 7 December 2022, or that did not contain a prohibited term prior to that date.
Anecdotally, unions report that the new provisions are having some effect. Professionals Australia routinely review new employment contracts for its members, and report that pay secrecy clauses have largely disappeared from them when they were common prior to the reforms coming into effect. The ASU have found that the new provisions have made it much easier for them to talk to their members about their pay and related issues, especially in the private sector. Similarly, the AMOU have been able to use the provisions to encourage their members to talk about their pay and organise for equal pay in the workplace.

The ACTU is unaware of any judicial decisions under the new provisions. One matter was filed but resolved.[55]

One area that needs further consideration is whether or not such transparency has ended workplace practices and cultures of pay secrecy, beyond just the terms of an employment contract, or has improved the negotiating power or employees, particularly women, to enable them to seek and win fair pay rises. A recent study in the United States, where many jurisdictions have had law prohibiting pay secrecy for some time, found that half of all workers in states that have prohibited pay secrecy rules still confront barriers at work, and that this was only a slightly better rate than states that had not outlawed pay secrecy. This was thought to be because employers reacted to such reforms by making their pay secrecy rules more informal.[56] The power of the employer in the workplace continued to have a chilling effect on discussions and actions around pay transparency despite a ban on pay secrecy clauses.

Further research would be helpful to better understand this dynamic in Australian workforces. For example, have the reforms promoted a culture of pay transparency in workplaces or does one of pay secrecy remain? And what are the workplace characteristics that underpin such cultures? One hypothesis to test is that a workplace where workers are more likely to feel empowered, particularly through an active union presence and workplace delegates, will have a better culture of pay transparency.

Further proactive measures supporting pay transparency could also be considered including requiring employers to take further proactive steps to promote pay transparency, for example, by requiring pay rates be included in all job advertisements.

The provisions regarding pay secrecy only apply to employees, and do not apply to other types of workers such as independent contractors. This means that other kinds of workers don't have the same workplace rights to ask others about their remuneration, and to disclose their

[55] Guardian, "Melbourne bookstore accuses employee of breaking 'confidentiality' by discussing pay rise", 13 June 2023.
[56] Oswalt M, Rosenfeld J and Denic P, "Power and Pay Secrecy", 99 *Indiana Law Journal* 43 (2024),

remuneration, and employees who ask non–employees about remuneration will not be protected. For example, an employee who asks about the remuneration of another person in the workplace, not realising that they are not an employee, would not have any protection from adverse action including termination of their employment. It also means that the prohibition on pay secrecy terms in contracts and written agreements only apply to employees, and pay secrecy terms in agreements with other kinds of workers will still be allowed. These are significant gaps which will hamper the ability of these provisions to achieve their aim. The provisions should be extended to apply to all workers, including independent contractors, which would also provide consistency with s.342 of the FW Act.

Recommendations

3. Consider commissioning research into the drivers of workplace cultures and practice of pay secrecy and transparency (as well as sexual harassment and flexible work), including a focus on the role of unions and workplace delegates especially.
4. Consider requiring all job advertisements to include a pay rate that cannot be a range of more than 10 per cent of the total remuneration, including incentives and bonuses.
5. Extend the pay secrecy provisions so that they apply to all workers, and not just employees.

8. Prohibiting sexual harassment in connection with work

The Reforms delivered on the Albanese government's election commitment to fully implement the recommendations of the landmark Respect@Work Report, published in 2020 and allowed to gather dust under the Morrison government. The Government has now implemented all legislative recommendations of the Respect@Work Report, including changes to industrial, anti-discrimination and work health and safety laws, giving workers far greater protection from sexual harassment and sex discrimination at work.[57]

[57] These changes include: prohibiting workplace environments that are hostile on the grounds of sex; introducing a positive duty for employers under the SD Act to prevent sexual harassment sex-based harassment, sex discrimination, hostile workplace environments and victimisation in workplaces; new enforcement powers for the Australian Human Rights Commission to monitor and assess compliance with

Prior to the Reforms, the FW Act did not prohibit sexual harassment in the workplace and workers were not properly protected from sexual harassment under our industrial relations laws. The FWC had very limited powers to deal with sexual harassment matters (under the same flawed provisions that apply to bullying at work), as it could only issue 'stop sexual harassment orders' to prevent future harassment occurring for certain types of employees, and had no ability to remedy the harm caused by sexual harassment. These limited powers were only introduced by the former Coalition government in 2021, in partial implementation of the Respect@Work recommendations (pursuant to the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) (Respect@Work Act 2021). Those provisions were hardly used and ineffective. Prior to that legislation, the FW Act had no specific sexual harassment provisions at all.

The Reforms addressed these issues by prohibiting sexual harassment in the FW Act (with a breach of these provisions attracting a civil penalty) and enabling the FWC to deal with sexual harassment disputes. This new jurisdiction for the FWC gives workers access to a simple, quick, and affordable complaints mechanism, with the ability to seek both 'stop orders' and compensation and other remedies for harm caused. This new jurisdiction assists workers to seek assistance early on and makes it more likely that issues are resolved early on that victim-survivors can stay connected to their workplace rather than being forced out of their job. This is a vast improvement on the previous situation, where workers' only option for redress was to pursue a lengthy and costly claim in the courts, often after the employment relationship had ended.

Case study

In 2024, the Young Workers Centre represented a young hospitality worker in a sexual harassment application. The young worker had been sexually harassed at work and was seeking

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the positive duty, and inquire into systemic or suspected systemic unlawful discrimination; dedicated codes of practice and guidance for employers about how to prevent sexual harassment under work health and safety laws; and new costs protection provisions for anti-discrimination and sexual harassment complaints brought under federal anti-discrimination laws.

both a stop order and compensation. The FWC promptly responded to the application, listing the matter for a conference. In direct response to the application, the employer transferred the perpetrator to minimise the risk of further sexual harassment. Despite this, the conference went ahead and the worker was also able to obtain undertakings from the company to undertake face to face training on sexual harassment throughout the country, and for human resource staff conducting investigations to undergo training on dealing with complaints in a trauma-informed way. This case study shows the power of such provisions to operate quickly and minimise harm to complainants.

Gaps in the law

Statistics from the FWC that have been provided to the ACTU identify that from the commencement of the sexual harassment jurisdiction in the FWC (6 March 2023) up to 30 September 2024:

- 160 applications were received, 143 of which were made under the new provisions (17 were made under the old provisions subject to transitional arrangements, where the only remedy was seeking a stop order).
- Of the 143 applications made under the new provisions, 11 sought stop orders only. 82 sought the FWC to otherwise deal with the dispute (i.e. they sought compensation and other remedies), and 50 sought both stop orders and other remedies.
- 138 applications have been finalised. 62 were withdrawn, 32 were resolved by agreement, 10 were dismissed for jurisdictional or administrative reasons, 34 could not be resolved and a certificate was issued. There are 22 matters pending.
- There have been no applications granted or orders made since the new provisions came in – largely because matters have been resolved between parties, or there was no future risk of harassment.
- The FWC has not received any applications for consent arbitration (which is required where an applicant wants remedies other than stop orders. If the parties do not consent to arbitration in the FWC, the matter can be taken to the Federal Court). The FWC does not have data on how many matters have proceeded to the Federal Court.

There have only been a few decisions made by the FWC since the Reforms were implemented.

In one case[58], the FWC declined to order a worker (the respondent) to stop sexually harassing a colleague (the applicant) after accepting he regretted his "inappropriate" sexist remark and regretted making the applicant uncomfortable, and that the employer would reduce future interaction between the two employees as much as possible. DP Colman noted that the employer had directed the respondent to stay away from the applicant and that he had complied with the direction, and the employer made assurances that when the applicant returned to work it would minimise their contact as much as possible. The FWC found there was no future risk of harassment, and therefore an order could not be made.

In another case[59], the FWC found that a male employee (the respondent) sent numerous 'vile and sexually inappropriate' texts to a junior male employee (the applicant). However, no orders were made because the respondent resigned, and therefore there was no future risk of the applicant being sexually harassed by the respondent.

These decisions, in combination with the FWC statistics which demonstrate that as yet there have been no applications granted or order made, highlight several key limitations of the FWC jurisdiction that the Review should consider.

Future risk of harassment

The narrow framing of the future risk of harassment and the inability for the FWC to consider general risks as well as specific risks limits the ability of the FWC to address the risk of sexual harassment. In order to make a stop sexual harassment order, the FWC has to be satisfied that a person has been sexually harassed by one or more persons, and that there is a risk that they will continue to be harassed by that person or persons. This means that the FWC can't consider a general risk that the person will continue to be sexually harassed by others (eg by other

[58] S. T. [2024] FWC 2099 (7 August 2024)
[59] Application by AB [2024] FWC 967 (15 April 2024)

employees or other third parties) and can't make orders dealing with that. This unnecessarily limits the FWC's ability to make broadly applicable orders that could significantly reduce the risk of future harassment – for example, orders that require the employer to take certain steps, or make changes to how work is performed. The FWC should be able to consider workplace culture and the nature of the workplace (including specific risks present in that workplace) as relevant factors when considering future risk.

For example, if young female staff at a hospital kept getting harassed by male patients with dementia, the FWC could consider orders that would reduce that risk, such as an order that young female staff are not to be rostered on in that ward on their own or unsupervised. Another example may be an employee who is harassed in a male dominated workplace where sexual harassment is rife (such as the constant presence of sexualised jokes, comments and material in the workplace). Simply making a stop order against one individual will not reduce the risk that the employee may be harassed by others due to the workplace culture. The FWC could consider orders that required the employer to take steps to address the workplace culture, such as education and training, or having designated contact officers in the workplace.

The provisions could be amended so that the FWC can have regard to the general risk that a person will continue to be sexually harassed by others in a workplace and make orders that will reduce the risk of future harassment occurring. This could be achieved by amending s527J(1)(b)(ii) to refer to "any person" (rather that "the person or persons"). Additional factors that the FWC is to take into account when considering the terms of an order could also be added to s527J(3) – such as workplace culture, workforce profile, specific risks and drivers of sexual harassment in the workplace, work design and systems of work.

Access to arbitration

Secondly, access to arbitration for applications that are not solely about stop orders (i.e where applicants are seeking other remedies such as compensation) is only available by consent. The FWC statistics demonstrate (unsurprisingly) that the number of applicants who only want stop orders is very small. The lack of access to consent arbitration for all sexual harassment applications limits the utility of these provisions and the ability of workers to seek remedies through the FWC, as in practice employers and respondents do not consent to arbitration by the

FWC, in the hope that the applicant will give up rather than proceed to a Federal Court. This is a common occurrence in general protections claims, where consent arbitrations are exceedingly rare, and the FWC statistics provided shows that this is also occurring in the new sexual harassment jurisdiction. The number of claims made will be very limited due to the time, cost and resources involved in bringing Federal Court claims. The result will be less decisions made and a lack of jurisprudence in this area. In order to give full effect to the intent of these provisions to offer workers a low cost, quick and efficient complaints mechanism, arbitration should be available for sexual harassment applications not solely seeking stop orders at the request of the worker or their union on their behalf where conciliation has not resolved the dispute.

Limited powers

The provisions do not allow the FWC to make orders for compensation when dealing with applications for stop sexual harassment orders. The FWC should be able to make orders which effectively put the worker back into the financial position they were in prior to the commencement of the harassment – such as allowing for the recrediting of leave a worker may have been forced to take as a result of the harassment.

When dealing with former workers seeking remedies other than stop orders, reinstatement is not included as a remedy that the FWC can order. Given how common it is for people who have experienced workplace sexual harassment to be forced out of their employment, it is important that they are given access to reinstatement under our industrial laws. This can be rectified by including reinstatement as an order that can be made in s527S(3)(a).

Vicarious liability

Employers are vicariously liable pursuant to s.527E for conduct done by an employee or agent in connection with their employment or duties as an agent, but are not liable for the conduct of third parties and other workplace participants (such as independent contractors, apprentices, trainees, students and volunteers), meaning that any remedy involving compensation for third party sexual harassment would be very difficult to obtain, as the third party would need to be individually pursued. S527E could be amended so that employers are liable for third party

conduct, for example by inserting the following words: "'If a third party does, in connection with the employment of an employee or agent of an employer, an act that contravenes subsection 527D(1), this Act applies in relation to the principal as if the principal had also done the act."

Costs Protection

Legislation was recently passed that will make it much easier for a victim of discrimination or sexual harassment to bring a matter under the appropriate federal anti-discrimination laws. It does this by removing one of the main deterrent's victim-survivors face – the huge legal costs involved in bringing legal action. Prior to this reform, if victim-survivors were unsuccessful, they would have to bear their own legal costs as well as paying the respondent's legal costs, creating a significant barrier to justice. Costs are often hundreds of thousands of dollars and can easily bankrupt workers. Only 1 in 230,000 of workers end up bringing proceedings in an Australian court, according to an analysis by the ACTU.[60]

The Australian Human Rights Commission estimates that nearly 1 in 5 workers are sexually harassed at work each year, yet only 444 cases have ever been brought to court since 1984 according to research by the ANU.[61] This means that perpetrators are often never held to account, and dangerous workplaces continue to expose workers to dangerous behaviour.
The new laws mean victim-survivors of workplace discrimination & sexual harassment can recoup their legal costs if successful, whilst being protected from having to pay a respondent's legal costs if unsuccessful (provided they have not acted vexatiously or unreasonably or in other limited circumstances).

The costs provisions that now apply to cases brought under federal anti-discrimination law are now far better than those that apply in the FW Act. In order to align these laws and ensure the FW jurisdiction remains a good option for applicants and continues to be used, the costs provisions

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[60] ACTU, "Only 1 in 230,000 sexual harassment victims get to court", Media Release, 20 August 2024
[61] Margaret Thornton, Kieran Pender and Madeleine Castles (25 March 2022) Damages and Costs in Sexual Harassment Litigation.

in the FW Act should be amended so that the equal access costs model applies to sexual harassment and discrimination matters.

Recommendations

6. Amend sexual harassment provisions so the FWC can have regard to the general risk that a person will continue to be sexually harassed by others in a workplace and make orders that will reduce the risk of future harassment occurring.
7. Give the FWC stronger powers with regard to sexual harassment applications not solely seeking stop orders, allowing it to arbitrate where the worker or their union requests this.
8. Give the FWC the ability when dealing with applications to stop sexual harassment to make orders designed to put the worker back into the financial position they were in prior to the commencement of the harassment.
9. Include reinstatement as a remedy for former workers.
10. Extend vicarious liability for employers in s.527E to include sexual harassment perpetrated by third parties.
11. Amend the FW Act costs provisions so that the equal access costs model recently enacted for federal anti-discrimination law applies to discrimination and sexual harassment matters brought under the FW Act.

9. Anti-discrimination and special measures

Anti-Discrimination

Prior to the Reforms, the anti-discrimination provisions in the FW Act provided protection against discrimination on the basis of a number of protected attributes (race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin) but it did not protect workers against discrimination on the basis of breastfeeding, gender identity or intersex status. This meant that the FW Act was inconsistent with the *Sex Discrimination Act 1984* (Cth) (SD Act) and that workers were unable to challenge such discrimination in the FWC.

The Reforms amended the FW Act to include breastfeeding, gender identity and intersex status as protected attributes, protecting workers from discrimination on these grounds, and bringing the FW Act into alignment with the SD Act. Workers are now able to bring general protections and unlawful termination complaints in the FWC on these grounds, which may be cheaper, quicker

and more accessible than seeking remedies under the SD Act. Modern awards and enterprise agreements are also not able to discriminate against workers with those protected attributes, and the FWC needs to take into account the need to prevent and eliminate discrimination on these three grounds while performing its functions and exercising its powers. Inclusion of these protected attributes in the FW Act increases protection for groups that are often the target of discrimination by enabling the FWC to protect workers from discrimination on these grounds at work.

Special Measures

Prior to the Reforms, the FW Act limited the ability of workers and unions to achieve substantive equality in the workplace through bargaining due to the definitions of 'matters pertaining to the employment relationship' and 'discriminatory terms.' The Reforms addressed these issues by confirming that 'special measures to achieve equality' are matters pertaining to the employment relationship and are therefore matters about which an enterprise agreement may be made. It also clarified that 'special measures to achieve equality' are not discriminatory terms and therefore are not unlawful terms in an enterprise agreement. These changes aligned the FW Act with other anti-discrimination laws, which expressly exclude positive discrimination measures from the concept of unlawful discrimination.[62] The Reforms removed uncertainties and doubt in the law and provided confirmation that parties can bargain for measures to achieve substantive equality. This has enabled workers and employers to collectively negotiate and bargain for terms in enterprise agreements which will accelerate progress towards achieving substantive equality, which should accelerate equal treatment, representation and participation across workforces of employees with particular protected attributes or a combination of attributes.

Case studies

[62] There are special measures provisions in the Racial Discrimination Act 1975 (Cth) (RD Act), Sex Discrimination Act 1984 (Cth), Disability Discrimination Act 1992 (Cth) and the Age Discrimination Act 2004 (Cth).

In 2023, the CPSU-PSU settled the first round of service wide bargaining in 20 years, resulting in common conditions across the Australian Public Service (APS) covering over 185,000 employees. The CPSU relied on the new special measures provisions to negotiate dedicated conditions to support First Nations employees, including NAIDOC leave, ceremonial leave, and the requirement for the employer to consider connection to country when considering requests for flexible work that include working in a different location.

The AMOU also negotiated a gender diversity clause in one of its agreements[63] that provides that where there are two candidates of equal skills and qualification, the woman or gender diverse person will be given preference over the cis-male until equality is reached in that classification. The AMOU now includes this clause in the log of claims for every enterprise agreement it negotiates.

Gaps in the law

Reproductive health as a protected attribute

Many workers are discriminated against in the course of their employment for reasons related to their reproductive health – for example menstruation, perimenopause, menopause and IVF. This contributes to inequality and gendered disadvantage at work, reduced wellbeing and economic participation, and withdrawal from the labour market, with significant impacts for gender equality and women's economic security.[64]

Multiple affiliates of the ACTU have conducted surveys of their members in relation to reproductive health in the workplace.[65] A common theme arising from the survey results is that many workers are reluctant to speak about their experience of menstruation, menopause and

[63] Engage Marine Pty Ltd Abbot Point Towage Services Union Collective Agreement 2021.
[64] Colussi, S., Hill, E. and Baird, M. (2024) 'Reproductive policies: An expanding approach to work and care' in M. Baird, E. Hill, and S. Colussi (eds) *At a Turning Point: Work, Care and Family Policies in Australia* (Sydney University Press, 2024) p 20
[65] For more information about these surveys, see the ACTU submission to the Senate Community Affairs References Committee on issues related to menopause and perimenopause (10 May 2024) D36-ACTU-submission-to-Senate-Inquiry-re-issues-related-to-menopause-and-perimenopause.pdf

perimenopause in the workplace, due to stigma, embarrassment, the taboo nature of these issues, the lack of support, understanding and respect from employers, and fear of the consequences of doing so (for example being perceived negatively, having their abilities or commitment to work questioned, fear of encouraging further sexism or ageism in the workplace, or being otherwise discriminated against). Another common theme from the survey results is the difficulties workers face in accessing reasonable adjustments at work. Some workers described workplace practices which could constitute indirect discrimination against menopausal workers, such as unsuitable uniforms which do not provide thermal comfort, and strict rostering that does not allow for toilet breaks to manage heavy bleeding or hot flushes.

Given how these issues disproportionately affect women and their participation in work, and the ongoing stigma and lack of understanding associated with them, inclusion of reproductive health as a standalone protected attribute in the FW Act is justified and has the potential to significantly improve women's workforce participation. The addition of reproductive health as a standalone protected attribute would also assist in bringing about the cultural shift required in many workplaces to ensure workers receive the support and workplace accommodations that they require.

Costs Protection

As outlined in the section above, recent legislative reform means that the costs provisions applying to cases brought under federal anti-discrimination law are now far better than those that apply in the FW Act. In order to align these laws, and ensure the FW jurisdiction remains a good option for applicants and continues to be used, the costs provisions in the FW Act should be amended so that the equal access costs model applies to discrimination and sexual harassment matters.

Recommendations

12. Include reproductive health as a protected attribute under the FW Act in all relevant sections.

10. Fixed Term Contracts

Prior to the introduction of the Reforms, Australia was one of a minority of countries that did not restrict the use of fixed term contracts in employment.[66] An employer could place an employee on a series of fixed term contracts and simply not renew them if the employer no longer needed the work to be performed. While a worker with permanent employment would be entitled to redundancy pay in such a situation, a worker on a rolling fixed term arrangement would not.[67] Further, the arrangements could also be used to deny an employee in the education sector employment over a semester or summer break where contracts finish at the conclusion of one semester and commence at the beginning of the next.

The new reforms have the stated goal of "limiting the use of fixed term contracts".[68] Such contracts, or series of such contracts, can run for no longer than two years, although a series of exemptions apply.[69] The changes became operative less than a year ago on 6 December 2023, to give parties 12 months to prepare for their introduction.

Impact of the reform

While data on the impact of this reform since it came into operation is not yet available, there appears to have been an effect just prior to its introduction as employers presumably prepared for the change. The August 2023 release of the ABS Characteristics of Employment survey shows a sharp drop in the use of fixed term contracts from 389,000 in August 2022, down to 343,800 in August 2023 (see Chart 18). As a percentage of the labour force, that is a drop from 3.4 per cent down to 2.9 per cent.[70] Given strong net gains in employment over this period, these jobs are more likely to have been converted to permanent ones rather than lost altogether.

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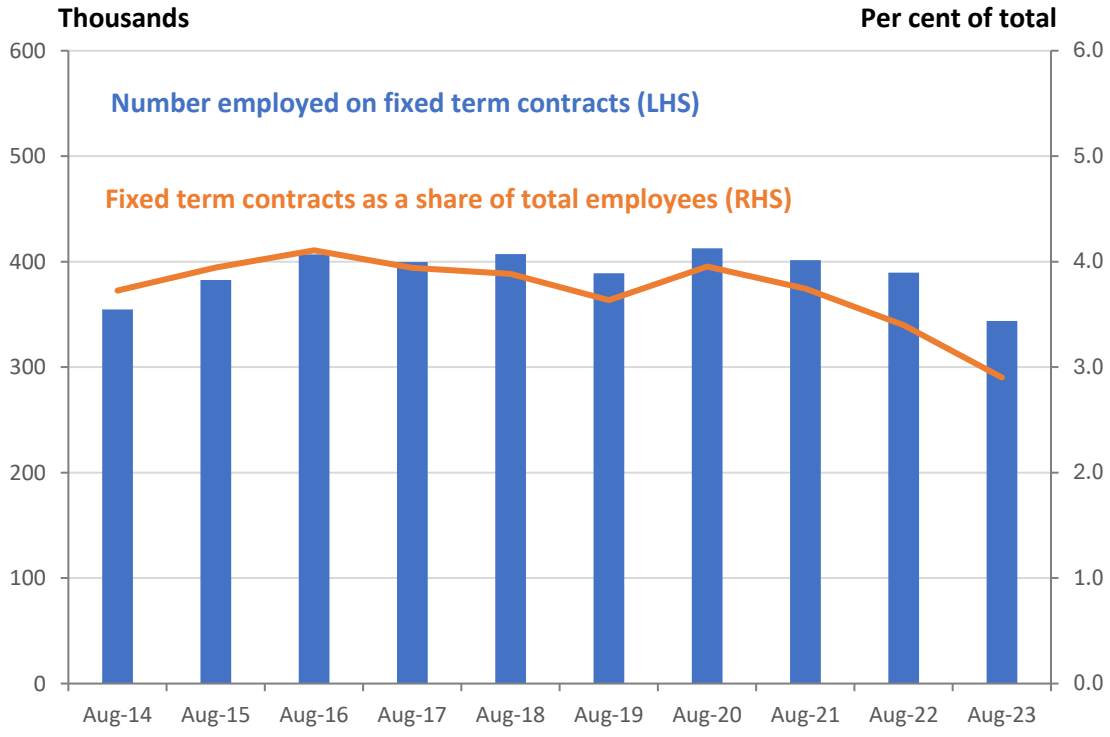
[66] International Labour Organisation, 2016, *Non-standard Employment Around the World: Understanding challenges, shaping prospects*, International Labour Office (Geneva), 22, 187
[67] Despite the *Fair Work Act* prohibiting the use of Fixed Term Contracts to avoid paying redundancy pay, it is a widespread practice.
[68] Revised Ex Mem, page iv
[69] See s 333E of the FW Act.
[70] The next release of the ABS Characteristics of Employment Survey is due on 9 December 2024 for the August 2024 survey period.

This accords with feedback from the ACTU's affiliated unions. In the independent schools sector in NSW, for example, an estimated 2,000 teachers on fixed term contracts had their employment converted into permanent ones according to the IEU.

The number of women working on fixed term arrangements has dropped by 37,000 from August 2022 to August 2023, while the number of men has only dropped by 9,800 over the same period. This has seen women as a percentage of employees on fixed term arrangements drop from 61 per cent down to 59 per cent.

Chart 18: Employees on fixed term contract in main job



Source: ABS Characteristics of Employment, August 2023 & ACTU calculations

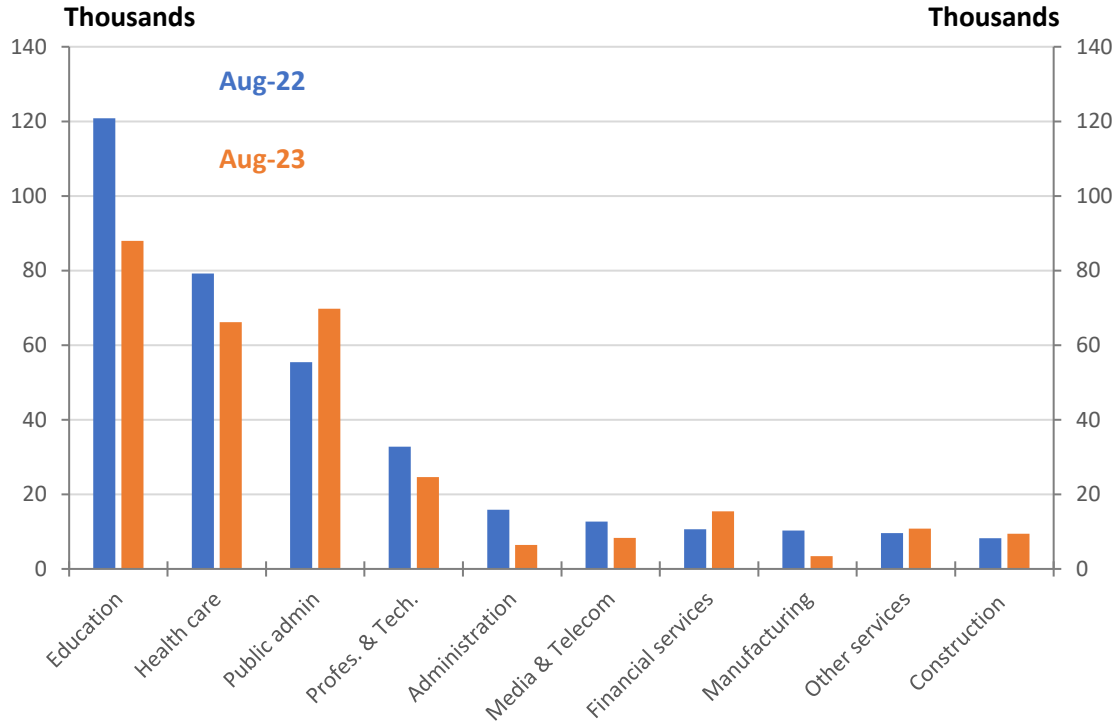
This accords with feedback from the ACTU's affiliated unions who report that:

a. In the independent schools sector in NSW, an estimate 2,000 teachers on fixed term contracts had their employment converted into permanent.

The number of women working on fixed term arrangements has dropped by 37,000 from August 2022 to August 2023, while the number of men has only dropped by 9,800 over the same period. This has seen women as a percentage of employees on fixed term arrangements drop from 61 per cent down to 59 per cent.

The largest drop in the usage of fixed term contracts comes in Education and training, Health care and social assistance, Profession, scientific and technical Services, and Administrative and support services. Somewhat surprisingly, public administration and Safety has recorded a rise in usage, which could be attributable to the reforms in the FW Act not covering significant parts of state public services.

Chart 19: Change in fixed term contract use by industry



Source: ABS Characteristics of Employment, August 2023 & ACTU calculations

While the early signs are that the overall changes have been positive and are supporting the stated objective, they have only been in operation for less than twelve months. Many of the key tests within the new provisions have yet to be tested by the FWC or the Courts. To date, only 10 applications have been made to date to deal with a dispute about a fixed term contract and none of them have proceeded to decision.[71]

Unions remain concerned that the full benefits of these reforms may not flow through to many employees, given the extensive range of exemptions to the new limitations under the Act and made via regulation. In summary, s.333F of the FW Act exempts a contract of employment from the new limitations if it is for:

- A distinct and identifiable task involving specialised skills (s.333F(1)(a));
- A training arrangement (s.333F(1)(b));
- Essential work during a peak demand period (s.333F(1)(c));
- Work during emergency circumstances or during a temporary absence of another employee (s.333F(1)(d));
- Earnings above the high-income threshold (s.333F(1)(e));
- Work that is funded in whole or in part by government funding with no reasonable prospects of renewal (s.333F(1)(f);
- A governance position (s.333F(1)(g);
- Work covered by a modern award that includes terms that permit any of the new limitations (s.333F(1)(h); or
- Work of a kind prescribed by regulation (s.333F(1)(i)).

Many of these exemptions are either unnecessary, cut against the policy intent of the changes, or could be more clearly worded. The ACTU raises the following five issues and recommendations:

Firstly, the exemption in s 333F(1)(a) is potentially very broad given the breadth of the concept of "specialised skills" and that an employer's need for such skills is not time bound. For example, a

[71] FWC Annual Report 2023-2024, page 67.

contract could be to "teach Spanish" on an ongoing basis via a series of rolling fixed term contracts and still satisfy this exemption. Instead the task in question should be time limited, and the exemption should only come into play if an employer does not already engage staff with the same skills. This could be achieved by amending s 333F(1)(a) as follows:

> *"the employee is engaged under the contract to perform only a distinct, identifiable and specialised task, and the need for the performance of that task will not be required by the employer beyond the period of the contract"*

Secondly, the exemption in s 333F(1)(b) contains substantial ambiguities through use of the phrase "in relation to" and "training arrangement". It could arguably cover the teacher of such a training arrangement rather than the recipient, as is clearly intended. This could be addressed by replacing s 333F(1)(b) with:

> *"the employee is employed as an apprentice or trainee under a recognised formal training scheme or arrangement".*

Thirdly, the exemption in s 333F(1)(c) for essential work undertaken during a peak demand period is unnecessary because such a period would not reasonably last beyond the two year limit of the new provisions. Given the likelihood that this exemption could be used as a broader loophole, it would be far better to delete it than retain it.

Fourthly, the exemption in s 333F(1)(d) suffers from a similar issue by applying to "emergency circumstances", which again, should not reasonably last beyond two years. It also uses the phrase "temporary absence" which affiliated unions report has been abused in other contexts and could be better defined to clearly capture the policy intent of the exemption. Accordingly, the ACTU recommends replacing current s 333F91)(d) with:

> *"the employee is engaged under contract to undertake work replacing a full time or part time employee for a definable period for which the replaced employee is either on an authorised leave of absence or is temporarily seconded away from their usual work area."*

Fifthly and finally, the exemption in s.333F(1)(e) contains two problematic aspects that make it easy for an employer to abuse. Firstly, it applies to contracts that are "funded in whole or in part" by government funding, or funding prescribed by regulation. An unscrupulous employer could easily allocate a nominal amount of government funding to fund "in part" any work arrangement it wanted exempt from the new rules. Secondly, while the exemption only applies where there

"are no reasonable prospects that the funding will be renewed…" often a new funding stream or program emerges that supports similar or same work. The funding is not technically renewed, but the work arrangements could be effectively rolled over. To overcome these two weaknesses in the exemption, the ACTU recommends that:

i. The phrase *"funded in whole or in part"* at s 333F(1)(f)(i) be replaced with *"funded in whole or mostly"*
ii. A new s 333F(1)(f)(iv) be added that states: *"and (iv) the funding will not be replaced by funding for similar or like work".*

Temporary exemption via regulation

The Government has also exempted a number of sectors from the new limitations on fixed term contracts on a temporary basis via regulation, including in medical research, not for profits, live performance, higher education and sport.[72] The ACTU understands that such regulations were made on the understanding that employers had flagged up concerns with the new changes and that they needed time to work with relevant unions and other parties to attempt to reach compromise arrangements. In some cases this has been successful, for example, in live performance.

The ACTU and our affiliated unions generally do not support these temporary exemptions via regulation. The key argument put forward for them by employers is that the new restrictions place additional financial burdens on employers. This would mainly be the case where an employer had been using fixed term arrangements to avoid the obligation to pay redundancy (or e.g. deny a worker employment between semesters) and would now need to budget for this.

The ACTU does not find this argument persuasive on the following grounds: Firstly, this reason is an invalid one under the FW Act at s 123(2). Secondly, it would only arise where an employer could not offer the employee ongoing work. No evidence has been presented to show that this is a significant issue. Thirdly, many employers have successfully moved staff engaged on fixed term contracts onto permanent arrangements showing that the barrier is often one of perception

[72] See 2.15 of FW Regulations.

rather than a real one. Fourthly, employers have had extensive time to prepare for the introduction of these changes. Providing them further extensions has in some cases, simply delayed or ended positive changes some employers were prepared to make.

The ACTU does however accept that Government funding, both the quantum and length of funding cycles, can have a bearing on security of employment, particularly for smaller community sector organisations, and encourages the Federal Government to work with unions and employers in Government funded services to improve funding arrangements.

Fixed term contract limitations and modern awards

The exemption in s.333F(1)(h) has been particularly problematic. It provides that a contract of employment will be exempt from the new limitations if "a modern award that covers the employee includes terms that permit any of the circumstances mentioned in subsections 333E(2) to (4)." Those subsections put in place limitations on contracts with an identifiable period greater than 2 years (s 333E(2)), or where renewable or consecutive contracts exceed such a period in total (s 333E(3) to (4)). A significant problem arises where a modern award expressly permits at least one of those circumstances, thereby arguably denying the employee any of the new protections.

This issue arises in the *Higher Education Academic Staff* and *General Staff Awards 2010* which both expressly permit fixed term contracts of greater than two years duration, restricted to two fixed term employment categories (pre-retirement contracts or if engaged on research only functions). These industry specific award terms, beneficial to Higher Education employees should be retained and Higher Education employees provided with certainty and immediate access to the new provisions.

In the Higher Education sector, fixed-term employment stands at around 30 per cent of FTE employment and 37 per cent of non-casual employment compared to the economy-wide figure of

just 2.9 per cent.[73] This is despite the restrictions on the use of fixed-term employment in the HE Awards. It is clear that while these award restrictions remain critical, immediate and certain application of the new legislative provisions is vital to improve access to secure employment to fixed term employees.

The Fair Work Commission has been persuaded to commence a review of these Awards[74], however the outcome of this process is uncertain at the time of writing. The situation is also not resolved for other Awards that may fall into this category, or where a future variation of an Award brings it within the scope of this exemption.

To achieve clarity, certainty and protection for all employees, the ACTU is recommending an amendment to s.333H(1)(h) to overcome this unintended consequence of the drafting, as described in recommendation 15 below.

Recommendations

13. Reduce the extensive list of exemptions in the Act, by either amending or deleting key exemption in s.333F, as detailed on pages 60 to 61 of this submission.
14. End the use of exempting sectors from the new Act requirements via regulation.
15. Replace the exemption in s.333F(1)(h) with:

    … (h) a modern award that covers the employee includes a clause which by its express terms permits any of the circumstances mentioned in subsections 333E(2) to (4) to occur, and in such a case subsection 333E(1) does not apply only to the extent that any of those circumstances is expressly permitted by the terms of a clause in that award.

11. Flexible Work

[73] ABS, December 2023, Working Arrangements
[74] See FWC, Modern Awards Review 2023-24 (AM2023/21) Report, 18 July 2024, pages 16 to 17

The Reforms significantly strengthened the rights of workers to flexible working arrangements, transforming it from a mere 'right to request' to a substantive right to a change in working arrangements. Previously, the right to request flexible work was not enforceable under s.65 of the FW Act (it was only enforceable pursuant to s. 739 where an enterprise agreement gave the right for parties to take the dispute to the FWC – a reasonably rare occurrence. Further, there was barely any guidance on how employers should respond to requests. This was a gap in the safety net that discriminated against workers with family responsibilities and disproportionately impacted women who still shoulder the lion's share of caring responsibilities and take the majority of parental leave. The result was that a significant proportion of requests for flexible work were refused, either in whole or part, and a significant proportion of employees who needed flexibility did not ask at all (including many men).[75]

The Reforms placed new requirements on employers responding to requests, gave employees a right of review in the FWC with access to arbitration, and introduced civil penalties for a contravention of FWC orders. Employers now have to genuinely try to reach agreement at the workplace level with employees who request flexible working arrangements, including by having discussions with them, and making efforts to identify alternative arrangements when an employee's request cannot be accommodated. Further, if they refuse a request, employers must provide details of the reasons for the refusal, the particular business grounds for refusing the request, and explain how those grounds apply to the request. Workers have access to the FWC where workplace discussions do not resolve the dispute, and the FWC can deal with the dispute as it considers appropriate, including by way of conciliation and arbitration.

The ACTU's affiliated trade unions report that these changes have resulted in many more flexible work requests being approved by employers, decreased disputation and many more workers having access to flexible work who previously did not. This helps to achieve gender equality and reduce the gender pay gap by:

[75] Professor Jill Murray, Family Friendly Provisions: Report to the Fair Work Commission, 4 May 2017.

- Ensuring women have access to quality flexible work, rather than being forced into insecure and low paid work at the crucial moment when they take on caring responsibilities;
- Normalising flexible work so that discrimination against those accessing it will be reduced;
- Providing the conditions for unpaid work to be shared more equally between men and women; and
- Increasing female workforce participation by enabling women to stay in work that meets their needs.

The IEU reports that prior to the Reforms, they had a high number of refused requests, especially in particular parts of their sector. The refused requests were often in relation to women seeking to return to work part time after a period of parental leave, with employers refusing to negotiate or agree whilst there was no ability to take the dispute to the FWC. Post Reforms, the IEU has seen about a 90 per cent reduction in the number of disputes referred to it by members, and reports that the Reforms have been very beneficial for its members, many of whom have access to flexible work for the first time. UWU has seen similar benefits for its members, with many more requests being approved, including many of which are accepted in FWC Conciliation.

The SDA reports that the practices in retail have significantly changed. Prior to the Reforms, they had a lot of disputation about requests for flexible work including for changes to rosters, part time work, changed arrangements for women returning from parental leave, and for workers with disabilities. The attitude from employers was that all employees had to share the load of working unsociable hours and share the same roster. Since the Reforms, the SDA has found that managers are far more likely to agree to requests and there is much less disputation. This is particularly significant in retail as there are high levels of automatic rostering and there is often strong resistance from employers to changing rosters.

In the service wide APS bargaining concluded last year, the CPSU negotiated a new flexible work clause that extends the right to request flexible work to all APS employees, with no need to have the circumstances referred to in s.65. The process is the same as in the FW Act. The employer must consider the request with a bias towards approving. This clause applies to over 185,000 workers, and the CPSU reports that it is working very well. The CPSU and APS agencies have worked through the implementation, with minimal need for recourse to dispute settlement procedures. Since the clause came in, there have been about 900 calls made to the CPSU

regarding flexible work requests, and 5 disputes, of which all have settled. None have proceeded to the FWC, because the new requirements in the NES are highly effective in reducing disputation – there is an emphasis on discussion and genuinely trying to reach agreement, there is new accountability for employers (they need to consider the impact of refusal, outline why they are refusing the request, and any changes they are willing to consider), and the ability to have the matter dealt with by the FWC if agreement cannot be reached.

Gaps in the law

Whilst the Reforms have significantly strengthened flexible working arrangement provisions, they still have several limitations which act as significant barriers for employees who need access to flexible work. There have been about six flexible work decisions since the Reforms, and none of them have resulted in a positive outcome for the worker. These decisions have highlighted several limitations of the current regime:

- The requirement for there to be a nexus between the 'circumstance' of the worker and the change being sought;[76]
- The reasonable business grounds defence makes it too easy for requests to be rejected[77];
- The medical or other evidence required to establish a disability or status as a carer, which the FWC has found to be unsatisfactory in multiple cases.[78]

Expand access to flexible work to more workers

Flexible working arrangements are only available to certain cohorts of workers, and only after 12 months of employment. Further, the definition of 'carer' in s65 of the FW Act is limited to carers

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[76] Deborah Lloyd v Australia And New Zealand Banking Group Limited [2024] FWC 2231 (22 August 2024)
[77] The Police Federation of Australia v Victoria Police/Chief Commissioner of Police [2024] FWC 1631 (21 June 2024)
[78] Charles Gregory Gregory v Maxxia Pty Ltd [2023] FWC 2768 (16 November 2023); Jordan Quirke v BSR Australia Ltd [2023] FWCFB 209 (10 November 2023); Shane Gration v Bendigo Bank [2024] FWC 717 (15 April 2024)

recognised as such under the Carers Recognition Act – an unduly narrow definition which excludes many workers with caring responsibilities.S.5 of the Carers Recognition Act defines 'carer' as an individual who provides personal care, support and assistance to another person who needs it because they: have a disability; or a medical condition; or a mental illness; or are frail and aged. An individual is not a carer merely due to their relationship to someone or because they live with a person who requires care. This definition is overly formal and is limited by identifying specific categories of people who require care. There are workers who have caring responsibilities who are not captured by this definition, whether because the support they provide is more informal, or because the person they are providing care to does not fit within the identified categories.

Flexible working arrangements should be available to more workers. It should be available to all workers with caring responsibilities, not just those within the meaning of the Carer Recognition Act. It should also be available to workers for reasons relating to their reproductive health. Many workers, disproportionately women, require changes to working arrangements for reasons related to their reproductive health. For example, 20 per cent of women experiencing menopause have severe symptoms that can range from extreme fatigue, recurrent migraines, anxiety, and other physical and mental health concerns which significantly affect them at work. Menopausal workers are generally highly skilled and experienced, but many feel forced to leave work because of menopausal symptoms despite the fact many symptoms can be managed effectively through the making of reasonable adjustments and access to flexible working arrangements. This contributes to lower rates of workforce participation for women.

It is arbitrary and unfair for an employee to have to wait 12 months before being able to request flexible working arrangements, and acts as a disincentive for workers to change jobs (and thereby have access to pay increases and promotions). It is also a disincentive for women returning to the workforce (but not to the same job they had prior to parental leave) – the inability to request flexible work for 12 months may mean they are not able to return to the workforce at all. Given research demonstrating how prevalent discrimination against pregnant women and women returning to

work after parental leave is[79], removing eligibility based on length of service would help women to return to the workforce where they have been discriminated against and would increase female workforce participation.

Our affiliates report that medical evidence for workers with a disability is a problem, and that employers often insist on workers producing expensive specialist reports, especially when matters are filed in the FWC. It is often beyond the resources of an individual member to obtain such evidence, as they are both expensive and take significant time to obtain. This is even the case for members who have jobs that can easily be done at home, where the employer has tracking software, and where members would greatly benefit from working in a quiet area without distractions at home due to neurodivergence.

The review could also reflect on the experiences of other countries that have different approaches to flexibility and positive rates of labour participation as a result. The UK for example has made the right to request flexibility available to all employees, without any waiting period. It aims to maximise workforce participation and de-stigmatise the utilisation of flexible arrangements, especially for men and fathers.[80] This is similar to the rights won in collective agreements by the CPSU as described above which have worked well in practice.

Reasonable business grounds

The reasonable business grounds contained in s.65A(5) on which employers can refuse requests for flexible working arrangements are much too broad, give employers far too many opportunities to refuse requests, and place a number of obstacles in the way of workers who need flexibility.

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[79] AHRC research found that one in five mothers indicated that they were made redundant, restructured or dismissed, or that their contract was not renewed because of their pregnancy, their request for or taking of parental leave or because of their family responsibilities, breastfeeding or expressing on return to work: Australian Human Rights Commission (2014) Supporting Working Parents: Pregnancy and Return to Work National Review. A national study currently being undertaken by Dr Rachael Potter and colleagues at the University of South Australia found in its interim results that 18 per cent of survey respondents on parental leave had their role permanently replaced: Potter et al. (2023). National Study on Parent's Work Conditions: Pregnancy, Leave and Return to Work Preliminary Results.

[80] Senate Select Committee on Work and Care, Interim Report (October 2022) at pxxi

The continued availability of these grounds to refuse requests undermines the intent and impact of the Reforms. In some industries such as healthcare, it can be almost impossible for workers to get flexible working arrangements due to the employer's claims regarding the impact on service delivery.

The focus should be on whether the request can be accommodated. The FWC should apply an objective and narrower test. Employers should be required to reasonably accommodate flexible working arrangements unless it causes them unjustifiable hardship. This would mean employers could only refuse flexible working requests on the basis of 'unjustifiable hardship' rather than on 'reasonable business grounds.' This is an objective and more rigorous test which is well understood, and will not allow employers to dress up inconvenience as a reasonable business ground and hence a reason to reject requests for flexible working arrangements. This variation would bring the provision in line with concepts under anti-discrimination law and enable many more workers to access flexible work. We note this was recommended by the Senate Select Committee on Work and Care.[81]

Collective disputes

There are inherent limitations in individual rights mechanisms. Our affiliates report that an individual disputes term does not work as effectively in workplaces where there are high levels of need for flexible work and complex rostering arrangements (for example in disability services, health services and aviation). There is often a lack of collective consultation by employers about flexible work processes, which leads to inconsistent approaches to flexible work and blanket refusals to accommodate requests. Employers should be required to consult collectively about flexible work processes, and workers should have the right to bring collective flexible work requests and disputes.

[81] Senate Select Committee on Work and Care, Interim Report (October 2022), Recommendation 3

No jurisdiction for FWC to make orders inconsistent with industrial instruments

The FWC must not make orders that would be inconsistent with a provision of the FW Act or a term of a fair work instrument such as an award or enterprise agreement that applies to the parties.[82]

Terms in enterprise agreements and awards that indirectly discriminate against certain groups of employees are not considered to be discriminatory terms (and therefore unlawful). In order to be a discriminatory term, it is not enough that the term is capable of indirectly discriminating, a term must actually do so.[83] Therefore, terms in industrial instruments that indirectly discriminate against a group of employees (for example, employees with caring responsibilities) will override the ability of the FWC to make orders under s.65C (1) (e) and (f), and will mean the FWC has no effective jurisdiction in these matters. For example, if an enterprise agreement contains terms providing for how work is to be organised and performed (such as clauses dealing with rostering, span of hours, breaks etc) that indirectly discriminates against workers with caring responsibilities, employees adversely affected by that term will have no effective recourse. The FWC will not be able to make any orders it considers appropriate to ensure compliance by the employer with s.65A, and will not be able to make orders that the employer grants the request or makes specified changes to accommodate the employee's circumstances. This leaves employees in this situation with effectively no ability to access flexible working arrangements. The provisions should be amended so that FWC orders do not need to be consistent with the terms of an industrial instrument that indirectly discriminate against workers.

Recommendations

16. Flexible work arrangements should be made available to more employees, including all employees with caring responsibilities, not just those within the meaning of the Carer Recognition Act; and for employees for reasons relating to their reproductive health.

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[82] s76C(1) (3) (b)
[83] Application by Metropolitan Fire and Emergency Services Board [2019] FWC 106 (Gostencnik DP, 15 January 2019) at [176]; Shop, Distributive and Allied Employees' Association v National Retail Association (No 2) [2012] FCA 480

17. Employers should be required to consult collectively about flexible work processes, and workers should have the right to bring collective flexible work requests and disputes.
18. The flexible work provisions should be amended so that FWC orders do not need to be consistent with the terms of an industrial instrument that indirectly discriminate against workers.
19. Require employers to reasonably accommodate flexible working arrangements unless it causes them unjustifiable hardship.

III. Bargaining

12. Termination of enterprise agreements after their nominal expiry date

The amendments to Subdivision D of Division 7 of Part 2-4 introduced additional threshold tests in situations where a party to whom an enterprise agreement applies seeks to have that agreement terminated after its expiry date without obtaining a vote of employees in support of doing so. These 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.

The predecessor provisions of the FW Act required an application for termination to be granted where it was not contrary to the public interest and appropriate in all the circumstances. Despite the seemingly anodyne language of those provisions, the application and interpretation of them through contested FWC and Court proceedings ultimately led to a situation whereby threatening to terminate an extant agreement during negotiating for a replacement agreement (in order to reduce pay and conditions to award minimums) was seen as a legitimate negotiating tactic and strategic tool intentionally gifted to employers through the design of the bargaining framework. That is, flipping the bargaining dynamic to force workers to negotiate from a position of weakness was not a bug, but a feature of the FW Act.[84]

The provisions as amended provide more limited and sensible gateways to termination of an agreement after its nominal expiry date, being where it no longer covers (and is unlikely in future

[84] [2015] FWCFB 540 at [173]-[181]; [2017] FWCA 226 at [73]-[74], [103]-[107],[154]-157]; [2015] FCAFC 126 at [23]-[25].

to cover) any employees, or where its continued operation would be unfair to employees, or where the agreement poses a significant threat to the viability of the employer and its termination is likely to reduce the potential for redundancies (subject to employees' redundancy entitlements being guaranteed). Since the amended provisions took effect in December of 2022 (and through to the end of October 2024), there have been:

- 52 applications in which termination was sought on the basis (or on grounds including) that the continued operation of the agreement would be unfair to employees, and 51 of those applications were successful on that ground;
- 100 applications in which termination was sought on the basis (or on grounds including) that the agreement did not, and was unlikely to, cover any employees, and 99 of those were successful on that ground;
- 3 applications in which termination was sought on the basis (or on grounds including) business viability, and 1 of those was successful on that ground.

Data from the FWC annual reports indicates that the overall volume of applications to terminate enterprise agreements has decreased over the last 5 years.

Table 1: Applications to terminate an enterprise agreement.

	FY 2019/20	FY 2020/21	FY 2021/22	FY 2022/23	FY 2023/24
Number of applications	323	267	236	195	136

Source: Fair Work Commission annual reports

Those numbers also confirm the reports of ACTU affiliates that the employer bargaining tactic of seeking or threatening to terminate an agreement has all but disappeared after the Reforms.

13. Sun-setting of Zombie Agreements, etc.

The SJBP Act amended the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* to provide for the sunsetting of various pre-2010 preserved agreements. The agreements, many of which were decades old, had come to be known in industrial parlance as "Legacy Agreements" or "Zombie Agreements". The affected instruments were compromised of the following:

Agreement-based Transitional Instruments

- Collective agreements, workplace determinations, preserved collective State agreements, pre-reform certified agreements, old IR agreements, and section 170MX awards.

- Individual agreements such as individual transitional employment agreements (ITEAs), preserved individual State agreements, Australian Workplace Agreements (AWAs), and pre-reform AWAs.

Division 2B State Employment Agreements

- Agreements registered under State industrial laws in NSW, Queensland, South Australia, and Tasmania before January 1, 2010, covering referred employers. These could be collective or individual agreements.

Enterprise Agreements Made During the Bridging Period

- Agreements made under the FW Act between July 1, 2009, and December 31, 2009, which had to pass the 'no disadvantage test' instead of the 'better off overall test'

Notably, a cessation of the operation of these types of preserved instruments had been proposed by the former Coalition government in Part 13 of Schedule 3 to the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021* when it was first introduced.[85] At that time, the proposed mechanism included a cessation date of 1 July 2022, with no ability for parties to apply to the Fair Work Commission to extend the operation of the instruments. Those provisions were however omitted, along with the remainder Schedule 3, in the version of the Bill that eventually passed the Parliament.

The SJBP Bill revisited the issue of the operation of Zombie Agreements. The approach adopted in the SJBP Act has been that the instruments would cease to apply from 12 months after the commencement of the SJBP Act (7 December 2022) subject to an application being made to the Fair Work Commission to extend the term of the Zombie Agreement.

The primary policy reason for the sunsetting of Zombie Agreements was to address the disparity between the content of those preserved instruments and the contemporary legislative safety net

[85] See the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, as read a first time.

provided by the FW Act. In particular, Zombie Agreements, despite their ongoing indefinite operation as industrial instruments, were not required to be compared against current industrial standards. This aspect of preservation meant that employees on Zombie Agreements could, and often did, receive less beneficial terms and conditions in their employment as compared to what they would receive on a Modern Award. The continued preservation of Zombie Agreements therefore risked perpetuating inferior employment conditions for employees and providing for what, by 2022, if not well before, was an unfair competitive advantage for those businesses not subject to contemporary industrial standards.

However, unlike the amendments initially proposed in the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021,* the amendments made by the SJBP Act, recognised that there were limited instances where workers are better off under the terms of a Zombie Agreement. The amendments also therefore introduced a process where Zombie Agreements could be extended beyond the sunsetting date. This process required an application to be made to the Fair Work Commission by 7 December 2023 to extend the operation of their Zombie Agreement.

The SJBP Act provided that the Zombie Agreements would generally be extended if the Commission was satisfied that:

- it was reasonable in the circumstances to do so, or
- it was otherwise appropriate in the circumstances and one of the following applied:
    (i) bargaining is occurring for a new enterprise agreement; or
    (ii) it is likely that the employee or employees would be better off overall if the 'zombie agreement' continued to apply to them than if the relevant modern award applied.[86]

In order to facilitate the parties actively assessing their circumstance, the amendments also required that employers notify the employees covered by a Zombie Agreement that unless an application was made to the Fair Work Commission that the Zombie Agreement would expire

[86] Fair Work (Transitional Provisions And Consequential Amendments) Act 2009 - Schedule 3.

within 12 months of the coming into effect of the new laws (effectively, by 7 December 2023). That notification was required to be given in writing by 6 June 2023.

In terms of the number of instruments affected by the sunsetting mechanism, the Explanatory Memorandum to the SJBP Bill acknowledged that it was difficult to assess the precise number of Zombie Agreements however, observed that "[i]n September 2019, the Department estimated that 300,000 to 450,000 employees could still be covered by 'zombie' agreements, 95 per cent of which were in the private sector."[87]

The Fair Work Commission reported in its 2022-2023 Annual Report that 93 applications to extend the operation of a Zombie Agreement were made during the reporting year ending 30 June 2023, while the 2023-2024 Annual Report advised that a further 382 applications were made in the reporting year ending 30 June 2024.[88]

In accordance with the SJBP Act, all Zombie Agreements expired on 7 December 2023, except those who were subject to a successful or pending application to extend their operation. The Fair Work Commission has collated the Zombie Agreements still currently in operation: Zombie agreements extended past 7 December 2023 | Fair Work Commission. The Commission's data (accessed on 6 November 2024) provided that 64 Zombie Instruments continued to operate (44 extended and 20 ***pending*** a determination by the Fair Work Commission).

In the context of the criteria necessary for a successful application to be made, the comparatively small number of Zombie Agreements still in operation, in large part, speaks for itself. That is, the legislation has been largely successful in bringing employers and employees on historical transitional arrangements into the contemporary arrangements and protections of the FW Act. While the precise effects of each sunsetting instruments is specific to the employees and workplace affected, ACTU affiliates report that in their experience the vast majority of members

[87] Explanatory Memorandum, Fair Work Amendment (Secure Jobs Better Pay) Bill 2022.
[88] See FWC Annual Report 2022-2023 pg. 29 and FWC Annual Report 2023-2024 pg.67.

affected have not been disadvantaged by the sunsetting of the instrument and in many cases enjoyed its benefits. The SDA has advised the ACTU that the new laws have been particularly effective at removing disadvantage in the fast food industry, with many sub-award instruments now removed (including but not limited to at many Subway Franchisees) and the application of the Modern Award becoming substantially more widespread.

Further, in many circumstances the sunsetting of a Zombie Agreement has been responsible for restarting long stalled negotiations for a new enterprise agreement, according to the Australian Nurses and Midwifery Federation, the United Workers' Union and the Australian Manufacturing Workers' Union.

The ACTU recommends no further change to the amendments providing for the sunsetting of Zombie Agreements.

14. Enterprise agreement approval and small cohort agreements

The Reforms dispensed with or modified many of the agreement approval requirements that were previously criticised by employers. The changes included:

- That the FWC was required to develop and publish a "Statement of Principles" relating to when an enterprise agreement has been 'genuinely agreed' to by employees. This Statement of Principles must now be taken into account during the approval process, and replaces the previous requirements relating to genuine agreement, such as the requirement to observe a 7 day 'access period' prior to a proposed enterprise agreement being voted on.
- The tightening of a loophole exploited by employers, involving the practice of making agreements with a small group of workers and then subsequently applying that agreement to a much greater number of workers. Following the amendments, the FWC can only be satisfied of genuine agreement if the employees who voted for the agreement are sufficiently represented and have a sufficient interest in its terms.

Statement of Principles and removal of 7-day "access period"'

The ACTU did not support the removal of the requirement for a 7-day 'access period' from the FW Act and had instead argued for it to be increased to 14 days. The Statement of Principles does

provide at paragraph 6 that the access period should be "at least 7 full calendar days", and "such other reasonable time period as is agreed with one or more employee organisation(s) acting as a bargaining representative for a significant proportion of the employees to be covered by the agreement".

The ACTU remains concerned the 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.

A recent decision applying the principles in paragraphs 4 and 5 of the Statement found that, against union opposition, a clear 10 days of access to the agreement was sufficient to satisfy the test in the circumstances.[89] The ACTU believes that additional time is needed to evaluate the effectiveness of the new principles in practice and to determine if employees need the increased protection provided by a 14-day requirement.

Use of undertakings

Undertakings are an issue for the comprehensibility of enterprise agreements. As the use of undertakings in the agreement approval process increases, there can be significant complexity introduced in interpreting agreements alongside their undertakings, as well as ambiguity about the undertakings actually made, particularly for employees attempting to ascertain their rights and responsibilities under the agreement. The SDA reports that there are often 3-4 pages of undertakings in agreements, which are extremely difficult for employees to understand, and require extensive cross-referencing when interpreting rights and responsibilities under the agreement. The issue of a "consolidated" version of an enterprise agreement alongside the formally approved enterprise agreement with undertakings would greatly assist employees, employers and practitioners to use these documents more effectively.

Small cohort agreements

[89] Application by Osmose Australia Pty Ltd [2024] FWCA 3373

Prior to these amendments, there was a lack of clarity as to the availability and breadth of this loophole. A 2015 Full Federal Court overturned a FWC Full Bench decision which had found that: in circumstances where an agreement contained 10 classification bands applying potentially to "a number of different occupations" across an entire state but was approved by and made with just 3 employees engaged at a single site; the FWC could not be satisfied that the group of employees covered by the agreement was "fairly chosen".[90] In overturning the FWC Full Bench's decision, the Full Court also found that it had misdirected itself to the question of whether making an agreement in these circumstances would undermine collective bargaining when it lacked the statutory authority to consider this question.[91]

A more recent (2018) decision of the Full Federal Court considered similar circumstances, in which once again 3 employees were asked to approve an agreement covering a multitude of classifications and occupations beyond those they were engaged in (and covered by about 11 different modern awards).[92] In that case, however, the Full Court held that the FWC had failed to properly consider whether such an agreement could possibly be "genuinely agreed" in the circumstances.[93]

The change in relation to small cohort agreements is sensible and removes uncertainty and doubt. The practical effect of this change will be that large businesses cannot conclude agreements with small cohorts of employees before then locking in potentially thousands of workers who didn't have a say about those agreements, thereby avoiding negotiations with the wider group and potentially imposing pay and conditions worse than what would have been achieved through genuine bargaining between the parties. Such a cynical practice should have no place in industrial relations. The recent Full Bench decision of *Australian Workers' Union v Altrad APTS Pty Ltd T/A Altrad* [2024] FWCFB 21 demonstrates that the laws are working as intended. The FB determined that the presence of a small voter cohort warranted greater

[90] Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd [2015] FCAFC 16 at [8], [10], [32]-[33], [57]
[91] Ibid at [84].
[92] One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU) (2018) 262 FCR 527
[93] Ibid at [168].

scrutiny. When that greater scrutiny was applied, the agreement was found to be lacking in authenticity and moral authority and was not genuinely agreed.

Recommendations

20. To promote "ease of use" the FWC should produce a "consolidated" version of an enterprise agreement alongside the formally approved enterprise agreement with undertakings.

15. Initiating bargaining

The FW Act was amended to allow for bargaining for a replacement single-enterprise agreement where no more than five years has passed since the nominal expiry date, to commence upon a written request being made by a bargaining representative to start negotiations. This addressed one of the significant impediments to collective bargaining under the FW Act, which was that even if there had been a history of collective bargaining in a workplace, an employer had a lot of power to freeze wages and conditions simply by refusing to bargain.

The Department of Employment and Workplace Relations calculated in 2022 that there was a remarkably high number – some 56 per cent of total enterprise agreements in Australia covering 16 per cent of all employees – which remain in force but have passed their nominal expiry dates.[94] This entire group of expired but still applicable agreements had not been re-negotiated despite the potential to do so. This demonstrated the failure of the system to facilitate subsequent rounds of bargaining in workplaces that clearly had an initial capacity and willingness to engage in enterprise bargaining. This is attributable to the significant control that employers have under the current framework in relation to whether and how they will enter into negotiations for a replacement agreement. This problem, to which majority support determinations were an incomplete solution at best, was compounded by changes to the FW Act

[94] Department of Employment and Workplace Relations, Trends in Enterprise Bargaining, March 2022.

made by the then Coalition Government which prohibited the taking of protected industrial action as a means of securing agreement to bargain.[95]

To address this problem, the FW Act definition of the "notification time" (or the time when bargaining is taken to have commenced) was amended. The amendment means that a notification time for a proposed single-enterprise agreement will occur if all of the following conditions are met:

- The employer has received a written request to bargain from a bargaining representative of an employee who would be covered by a single-enterprise agreement that is not a greenfields agreement;[96]
- The proposed agreement will replace an earlier single-enterprise agreement;[97]
- The earlier single enterprise agreement did not follow from a single-interest employer authorisation;[98]

The earlier agreement has passed its nominal expiry date, but this occurred less than

- 5 years prior to the request to bargain being given;[99] and
- The proposed agreement will cover the same, or substantially the same group of employees as the earlier agreement.[100]

The reforms are achieving their purpose, by simplifying and streamlining the approach to bargaining. For example, in February 2023, the CPSU utilised the new provisions to initiate bargaining with major APS agencies (Services Australia, Department of Home Affairs, Department of Defence, and Department of Agriculture, Fisheries, and Forestry) which resulted in NERRs being issued for all APS agencies shortly thereafter. Having agreed to conduct service-wide bargaining, the Commonwealth then commenced the process, and the first service-wide bargaining meeting was scheduled for 30 March 2023. This prompt commencement of agency-level bargaining and service-wide bargaining facilitated a significant reform process and the most

[95] See FW Act 437(2A), enacted in response to TWU v JJ Richards & Sons Pty Limited [2012] FWA 5609
[96] FW Act s 173(2)(aa)
[97] FW Act s 173(2)(aa)
[98] FW Act s 173(2A)(b)
[99] FW Act ss 173(2A)(a), 173(2A)(c)
[100] FW Act s 173(2A)(d)

productive bargaining round in the APS for some time. A range of other affiliates report positive experiences in reinitiating bargaining under these changes, including the AWU and SDA.

We note that the amendments are confined to scenarios where 'the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement'. We remain concerned that this limitation could have the unintended effect of limiting the availability of access to bargaining for a new agreement in some circumstances where a different scope is sought for a new agreement. For example, where a replacement agreement is sought in relation to the same employees as well as other employees that were not previously covered by the agreement (this might arise where two agreements are being combined). We are also concerned that the potential applicability and ongoing viability of the multi-enterprise streams will be curtailed if the provisions are not extended to include the ability to initiate bargaining for multi enterprise agreements in the same manner.

Recommendations

21. Provide clarity that bargaining can be initiated in the manner provided where parties seek a new agreement that covers the same, or substantially similar workers as a previous agreement, even if the new agreement would also cover additional workers.
22. Expand the new provisions that allow for the re-initiation of bargaining within five years of the nominal expiry date to multi-employer agreements.

16. Better off overall test

The Better Off Overall Test (BOOT) is a safeguard to ensure that terms and conditions set by enterprise agreements do not leave workers worse off than the minimum modern award safety net that applies to them. The amendments to the test brought about by the Reforms were prompted by criticisms by employers and their representatives, particularly surrounding the

FWC's consideration of how the agreement might affect workers in the future.[101] Whilst we did not share the employers' concerns, it is the ACTU's assessment that these changes have entirely addressed employer concerns, by streamlining the agreement approval processes, while providing safeguards to ensure that workers are not left worse off.

The amendments provide that in applying the BOOT, the FWC will only have regard to patterns of work (i.e. rosters etc.), kinds of work, or types of employment that are "reasonably foreseeable" at the test time. A built-in safeguard also ensures that the system cannot be "gamed" by locking in conditions based on a current scenario then proceeding to make changes which leave workers worse off. The provisions allow for the FWC, on application, to reconsider whether the agreement continues to pass the BOOT in light of subsequent patterns or kinds of work, or types of employment which have emerged post-approval (for example, a change of roster). The Bill also modifies the FW Act to specify that the BOOT requires a "global assessment" and sets up a rebuttable presumption that an employee belonging to a class of employees who are better off, will also be better off. The FWC must also give primary consideration to any views held in common by the bargaining representatives. This simplifies the approval process to assist the FWC in examining agreements more efficiently where parties to the agreement fully concur as to its effect.

We remain concerned by 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". Whilst this appears intended to permit trade unions to make such an application, in circumstances where a trade union was not a party to the original negotiations despite having coverage of workers, it may be barred from making an application

[101] See The Australian Industry Group, Submission No 70 to the Education and Employment Legislation Committee, Inquiry the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery Bill 2020 [Provisions], February 2021, 41 <https://www.aph.gov.au/DocumentStore.ashx?id=578665f5-eeeb-483b-a9bf-9c9934c9203c&subId=701309f>; See also Australian Chamber of Industry and Commerce, 'Outline of Submissions', Submission in Aldi Prestons Agreement (AG2017/1925), Aldi Stapylton Agreement (AG2017/1943), Workpac Pty Ltd Manufacturing Agreement 2017 (AG2017/3027), 1 <https://www.australianchamber.com.au/wp-content/uploads/2018/01/acci_submission_-_01112017.pdf>; See also Productivity Commission, October 2022, Interim Report No. 6, 5-year Productivity Inquiry: A more productive labour market, 58 <https://www.pc.gov.au/inquiries/current/productivity/interim6-labour/productivity-interim6-labour.pdf>

under the proposed section as it would not have participated in the agreement's approval process and therefore would not be covered by the agreement. This should be amended to allow applications to be made by any employee organisation which is entitled to represent the industrial interests of workers covered by the agreement.

Recommendations

23. Allow an employee organisation that is entitled to represent the industrial interests of a worker covered by the agreement to make an application for reconsideration of whether an agreement passes the BOOT.

17. Dealing with errors in enterprise agreements

Prior to these amendments, enterprise agreements could be varied by agreement, but there was no specific power for the FWC to correct errors. This led to the scenario that arose in *Cragcorp Pty Ltd T/A Queensland Bridge and Civil*, where an employer had wrongly sought and obtained the FWC's approval of an earlier draft enterprise agreement that differed from the later version approved by employees.[102] In that case, the employer applied to alter the approval decision to substitute the correct version of the enterprise agreement. Despite acknowledging that the incorrect version of the agreement had been submitted and approved, and agreeing that that version should not continue to have effect, a single member of the FWC held that it lacked the statutory authority to remedy the situation and that the appropriate course was to appeal the matter to a Full Bench of the FWC.

This problematic state of affairs has now 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.[103] Recent experiences of the Health Services Union demonstrate that these amendments are working as intended. The HSU recently

[102] [2020] FWC 2830.
[103] FW Act ss 218A, 602A and 602B.

successfully sought an amendment to two obvious errors in an enterprise agreement. One correction was to an error that would have resulted in overpayments to workers; the other error, if applied strictly, would have removed an evening penalty rate. The amendment therefore averted harm being occasioned to both employers and employees, and considerable time and resources on behalf of the FWC.

18. Bargaining disputes – Intractable Bargaining

The SJBP Act amended the FW Act to introduce a new mechanism to resolve long running, intractable, bargaining disputes. The new provisions came into effect on 6 June 2023 and are found in Subdivision B of Division 8 of Part 2-4 of the FW Act (intractable bargaining declarations) and Division 4 of Part 2-5 of the FW Act (intractable bargaining workplace determinations).

Very broadly, under the new provisions where bargaining has been occurring for at least 9 months (or 9 months has passed since the NED has passed, whichever is later) and the parties are at an impasse, the FWC can, on application by one of the parties, make an intractable bargaining declaration. For a declaration to be made, the dispute must have already been dealt with in a s.240 bargaining dispute application. Should the Commission make an intractable bargaining declaration, and bargaining representatives are still unable to resolve the dispute during any post-declaration bargaining period, the Commission is able to exercise powers of arbitration in relation to non-agreed matters by the making an intractable bargaining workplace determination.

The intractable bargaining mechanism introduced by the SJBP Act was subsequently amended by the *Fair Work Amendment (Closing Loopholes No. 2) Act 2024* (the "Closing Loopholes No. 2 Act"). The Closing Loopholes No. 2 Act amended the circumstances where matters might be considered "agreed" between the parties and provided that, unless otherwise agreed, an intractable bargaining workplace determination is not to reduce terms and conditions for employees. The Closing Loopholes No. 2 Act changes came into effect on 27 February 2024. The FWC's data shows a relatively small number of applications have been made under the new provisions. The FWC's Annual Report for 2022-2023, which covered the 12 months to 30 June 2023, reported 1 application being made for that reporting year. The FWC's Annual Report for 2023-2024, covering the reporting year to 30 June 2024 reported an increase to 11 applications.

An analysis of the published decisions regarding intractable bargaining (as at early November 2024) demonstrates the following:[104]

- Applications have been brought by both unions and employers.
- With 1 exception, the making of a declaration has not been opposed.
- In all but 1 of the matters where a declaration has been made, the bargaining process had included protected industrial action.
- Seven declarations have been made.
- One application for an intractable bargaining declaration has been refused.[105]
- The time period ordered for the post-declaration bargaining period has varied from around 1 week to 4 weeks.
- In the almost 18 months since the new laws came into operation, 2 intractable bargaining determinations have been made.[106]

The relatively low number of applications is consistent with the nature of the industrial issue that the amendments sought to address, that is, to provide a fair and orderly resolution to long running and entrench bargaining disputes which parties have been otherwise unable to resolve.

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[104] *TWU v Cleanaway Operations Pty Ltd* [2024] FWC 91; *Terminals Pty Ltd T/A Quantem Bulk Liquid Storage & Handling v United Workers' Union* [2024] FWC 2707; *NSW Electricity Networks Operations Pty Limited as Trustee for NSW Electricity Networks Operations Trust T/A Transgrid v. Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Mining and Energy Union, Australian Municipal, Administrative, Clerical and Services Union, the Community and Public Sector Union, and Professionals Australia* [2024] FWC 2841; *Transport Workers' Union of Australia v. Cleanaway Operations Pty* [2024] FWCFB 127; *United Firefighters' Union of Australia v. Fire Rescue Victoria* [2023] FWCFB 180; *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; *Ventia Australia Pty Ltd v. United Firefighters' Union of Australia* [2023] FWC 304; *Transdev Sydney Pty Ltd, Great River City Light Rail Pty Ltd v. Australian Rail, Tram and Bus Industry Union* (B2024/983). Note that other matters are currently before the Commission that are not captured by reviewing the above matters.

[105] *Ventia Australia Pty Ltd v United Firefighters' Union of Australia* [2023] FWC 3041

[106] TWU v. Cleanaway Operations Pty Limited [2024] FWCFB 362; and see TWU v. Cleanaway Operations Pty Limited [2024] FWCFB 287. The determination in the latter proceeding can be found in Cleanaway Erskine Park Drivers Workplace Determination 2024 AG525208 PR776447.

The low number of applications also demonstrates that the concerns Coalition Senators expressed in the Senate Education and Employment Committee Dissenting Report into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions], extracted below, have proven to be unfounded:

> *Intractable Bargaining Declaration*
>
> *1.84 Coalition Senators note part of this bill will energise the arbitration process at the expense of the conciliation process. The BCA highlighted this during its testimony, where it expressed concern the threshold to trigger the arbitration process was low and the definition of 'intractable' not precise. There is a risk that such a low threshold will dramatically increase the volume of cases received by the FWC—as it will have to arbitrate a bargaining outcome—and it will be too readily used as an instrument when two disputing parties should first 'have genuinely tried to reach agreement'.*

The qualitative feedback from ACTU affiliates is that even where a declaration has not been sought, the intractable bargaining laws have, more often than not, *encouraged* parties to try to reach terms upon which all parties can agree. The encouragement to reach agreement appears to stem from parties preferring to keep the settlement of the dispute at least partly within their control, with arbitration after 9 months being viewed by the majority of industrial participants only as a last resort.

That experience however, has not been uniform. Some unions report that some employers appeared to adopt a slower approach to bargaining during the 9-month period, apparently content to delay any increase in wages or meet any claims for improved conditions while threatening to use the intractable bargaining provisions. Affiliates also report an increase in the number of employers bargaining on a “nothing is agreed until everything is agreed”.

ACTU affiliates have also raised significant concerns that under the current legislation employees potentially lose long standing rights to arbitration of disputes and consultation if the matters

remain an unagreed matter.[107] The potential loss of consultation rights arise by the operation of s.273 to effectively mandate the model consultation term in a workplace determination. The potential loss of arbitration rights however is not immediately evident on the face of the legislation but has arisen from the Commission's concern that it lacks power, in effect to arbitrate an arbitration power because of Chapter III of the Constitution.[108]

In that context, the ACTU wishes to emphasise that the further amendments to the FW Act 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 ACTU submits that while, on balance, the amendments appear to have played a largely positive role in encouraging agreement making, the limited number of applications made to date means that a comprehensive assessment impact of the legislation may be premature.

19. Industrial Action

The Reforms dealing with access to protected industrial action were both procedural and substantive. Procedurally, the amendments provided greater effective choice in terms of who could conduct protected action ballots (and, as a result, improved access to electronic balloting) and imposed an additional requirement that bargaining representatives participate in a conciliation conference prior to a protection action ballot voting period closing. Substantively, the amendments permitted a protected action ballot to be sought in respect of proposed multi-enterprise agreements, where a single interest employer authorisation or supported bargaining authorisation had been issued by the FWC in respect of that proposed agreement.

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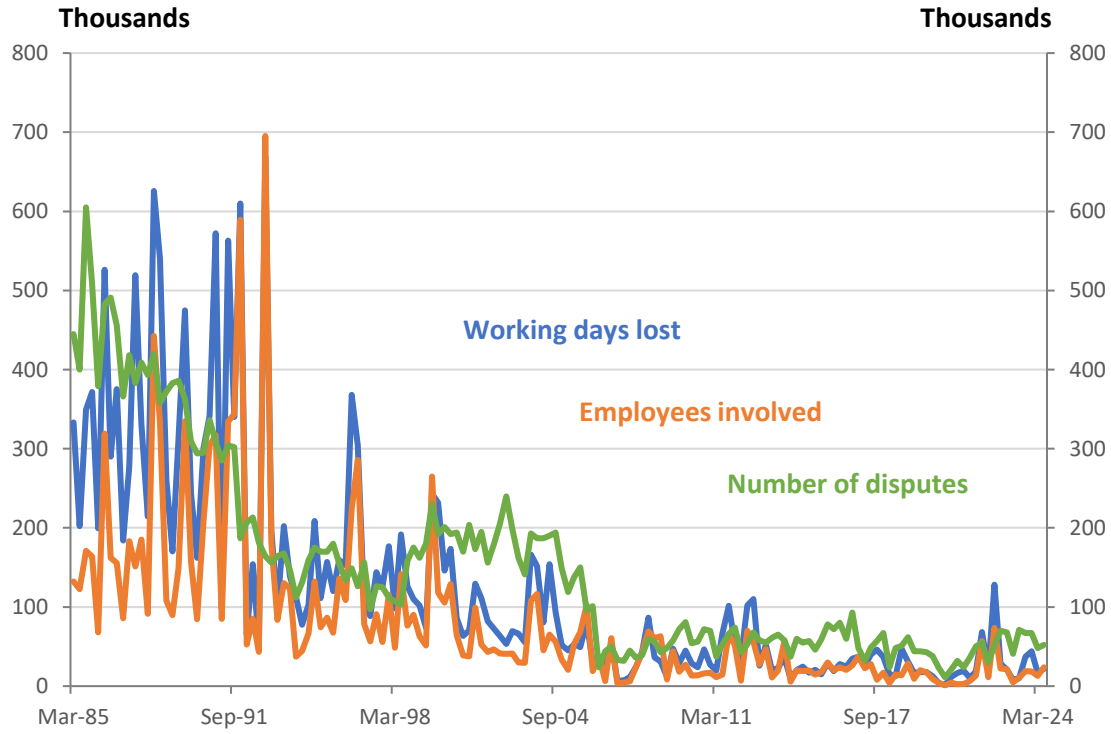
[107] See s.273 of the FW Act. See also Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd [2024] FWCFB 305 (10 July 2024) at paragraphs [169] to [172].
[108] Ibid.

Prior to the amendments taking effect, it was permissible for the Fair Work Commission to order that a ballot be conducted by a person other than the Australian Electoral Commission. However, in order to do so, it needed to satisfy itself – on every occasion – that the alternative provider was a fit and proper person to perform that role (even if it had, just yesterday, conducted the same inquiry in respect of that same provider in another ballot application). This imposed an administrative burden on the making and processing of applications for ballots to be conducted. The amended provisions allow the Commission to credential providers as "eligible protected action ballot agents" on an ongoing basis for a period of up to three years, subject to the fit and proper person assessment.

There has not been any discernible shift in the frequency or extent of industrial action since the amendments took effect. A long-term view continues to show that in the last two decades there have relatively fewer disputes, involving fewer employees and less working days lost than was typical of the 1980's or 1990s. The small peaks observable tend to be associated with bargaining cycles in particular industries, rather than any systemic or sustained shift toward more strike action.

Chart 20: Industrial Disputes, Quarterly, March 1985 to June 2024.



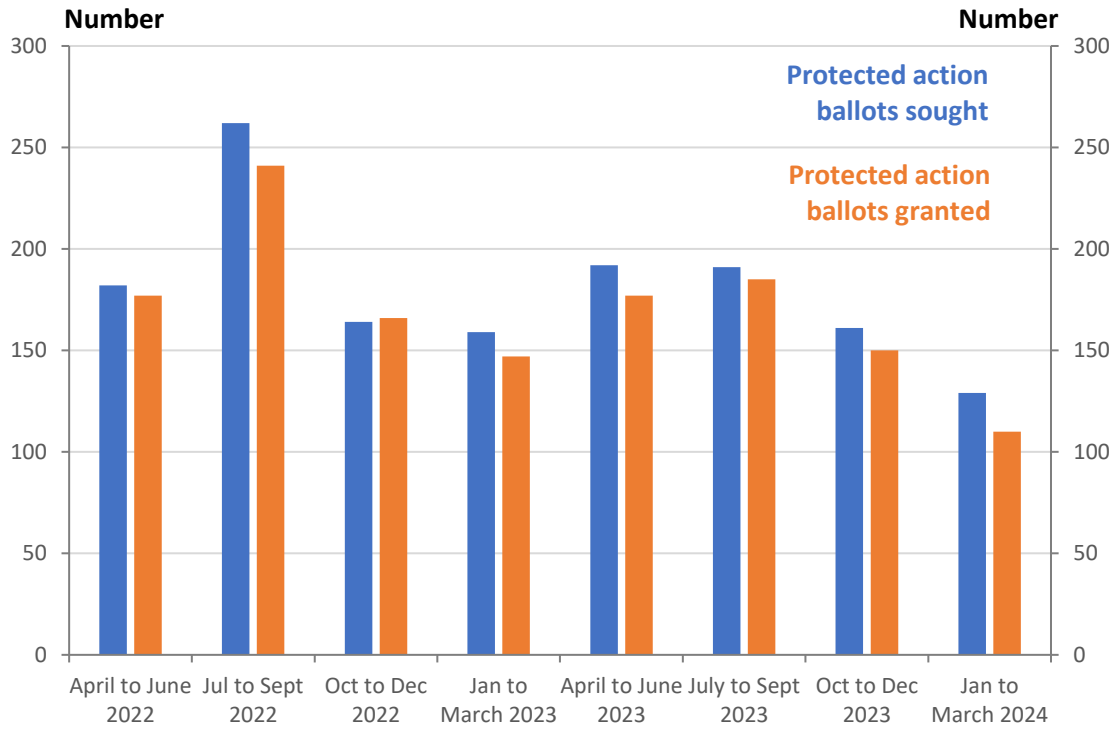
Source: ABS Industrial Disputes, historical time series.

In terms of the utilisation of the provisions, quarterly reports from the Fair Work Commission do not indicate any clear spike in the seeking or issuing of Protected Action Ballot Orders since June 2023 when the provisions took effect, compared to activity in the 12 months previous.

The FWC has utilised its powers to approve eight voting services operators as eligible protected action ballot agents pursuant to the amended provisions, which facilitates the more timely conduct of protected action ballots than the standard 30 days associated with postal ballots that were the default method conducted by the Australian Electoral Commission.

The requirement for bargaining representatives to participate in a conference "for mediation or conciliation in relation to the agreement" makes mandatory what is otherwise optional for bargaining representatives who have been unable to agree on the terms of their proposed enterprise agreement. The conferences are, appropriately, not directed by terms of the statute to dissuade a bargaining representative from organising protected industrial action which a ballot order and subsequent ballot might authorise, however this could conceivably be the outcome in the event that the conference resulted in the resolution of all outstanding issues in bargaining.

Chart 21: Protected Action Ballots, sought vs obtained, April 2022 to March 2024.



Source: Fair Work Commission, Annual Report 2023-2024

The experience of our affiliates is that the mandatory conference requirement is resource intensive for all parties and the FWC with little corresponding benefit. Whilst there are some reports of issues in bargaining being narrowed through the conference process, it would be erroneous to attribute these effects purely to the mandatory conferencing requirement – it has generally been the case the threat of protected industrial action itself focuses the minds of the bargaining parties.

Whilst the amended provisions are permissive of protected action ballots being sought, and protected industrial action being taken, in support of multi-enterprise bargaining that is covered by a supported bargaining authorisation or single interest employer authorisation, it is our understanding that neither has occurred to date.

Disappointingly, the amendments did not address a longstanding risk to the availability of protected industrial action which arises from s.413(5) of the FW Act. This provision deprives industrial action of its protected character based on *any* failure to comply with, *inter alia*, any order that related to a matter arising during bargaining for the agreement. There is no proportionality test involved, meaning that filing a document in the FWC 10 minutes late (such as a response to a claim from another in bargaining which the FWC has ordered be provided in the context of a conciliation under s. 240) has the result that no protected industrial action can ever be taken by the defaulting party in respect of bargaining for that agreement. This technical requirement adds nothing legitimate to the merit requirement that a party seeking to take protected industrial action be "genuinely trying to reach agreement" and should be repealed.

Recommendations

24. Conciliation conferences held in connection with applications for protected action ballots should only take place where the parties agree.
25. Subsection 413(5) of the FW Act should be repealed.

20. Supported Bargaining

Supported bargaining replaced the former low paid bargaining stream. It is intended to operate as a gateway or pathway to greater rights and obligations and a greater role for the FWC than would otherwise be this case in bargaining for multi enterprise agreements. The significance of

the low paid bargaining stream, and of the new supported bargaining stream, is that entry into it facilities assistance from the FWC in bargaining and resolving disputes during bargaining (even without all parties consenting), enlivens the good faith requirements (and the capacity to enforce them through bargaining orders), allows FWC to direct a third party to participate in bargaining by attending FWC conferences and opens up the prospect of arbitration of the contents of an agreement through the making of a workplace determination if bargaining proves to be intractable.

The most significant change between the old low-paid bargaining stream and the new supported bargaining stream is the process and criteria for granting a low paid authorisation. These amendments are intended to address the major issue with the former scheme – it simply was unusable. The low paid bargaining pathway was intended to be a "framework to facilitate bargaining for multi-enterprise agreements for certain types of employees, being low-paid employees who either have not historically had access to collective bargaining or who face substantial difficulties in bargaining at the enterprise level".[109] Despite the low paid bargaining pathway having been in place since the inception of the FW Act, few applications for low paid authorisations were ever made and only one succeeded. In the one case where an authorisation *was* made, no multi-enterprise agreement was successfully agreed upon. By any measure, these statistics represented a total failure of the laws.

The previous scheme included a "public interest" test, which had in practice directed attention to the objects of the Act, inclusive of the preference there expressed for "enterprise -level collective bargaining" and proved to be an obstacle to the making low-paid authorisations.[110] The removal of the public interest test, as well as references to the employees being low-paid, past bargaining practices and the *"degree of commonality"* in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises represent the intention of Parliament to liberalise access to the new scheme.[111]

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109 Explanatory memorandum to the *Fair Work Bill* 2009.
110 s 3.(f), [2013] FWC 511 at [152].
111 Revised Explanatory Memorandum at [38], at [922].

Early indications are that the new scheme is working as intended and has already surpassed the results of the prior scheme. There have already been several authorisation applications made, and 4 authorisation applications granted. These authorisations were made in the early childhood education and care sector,[112] the social and community services sector,[113] and in the disability sector,[114] and were all made by consent, with the first few opposed applications currently before the FWC. One multi-enterprise agreement arising from these applications has just been successfully made and is in the process of being finalised. Emerging precedent indicates that the stated principal intention of the amendments; namely, the modification of the previous low-paid bargaining scheme, with the objective of rendering the scheme more accessible and therefore more widely-used, is being realised. The continuing development of principles around the construction of the common interest test, and the "appropriateness" standard will be more fully understood when decisions in relation to opposed applications are published.

We remain concerned that the objects of the Act still include a stated preference for "enterprise-level collective bargaining", a factor which proved to be an obstacle to the making of the former low-paid authorisations.[115] We are yet to see whether it will continue to serve as a barrier to entry into the scheme, but as a matter of principle the objects of the Act should be amended to no longer preference single enterprise level bargaining but to promote all levels or forms of bargaining.

Early indications are that there may be some logistical issues with the operation of the new scheme, which are emerging now that it is genuinely being accessed and utilised. In relation to the issue of authorisation variations, there are questions around how issues may be resolved when there is one employer amongst a much larger group named on an authorisation that is unable to agree on a point of contention, or for some other reason is unable to reach agreement

112 Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia [2023] FWCFB 176.
113 Australian Municipal, Administrative, Clerical and Services Union v Australian Capital Territory Council of Social Service Inc T/A ACTOSS and Others [2024] FWC 2036
114 The Health Services Union & The Australian Education Union v Alkira Disability Services Ltd T/A Alkira Centre and Others [2024] FWC 2713.
115 s 3.(f), [2013] FWC 511 at [152].

with the other bargaining representatives and accordingly holds the agreement up unduly. Currently, applications to remove employers from an authorisation may only be made by the employer seeking to be removed and must be granted "…if the FWC is satisfied that, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation".[116] The inability of the union to be able to apply to remove an employer who was unable or unwilling to proceed to agreement has already been demonstrated in one instance to be highly disruptive to the efficiency of the bargaining process and should be addressed.

Relatedly, there seems to be no reason as a matter of principle why employers who apply to be added to an authorisation may not do so, even in circumstances where that employer is already covered by an unexpired single enterprise agreement. It is also becoming clear that there will be practical and resourcing issues with the reinitiation of supporting bargaining authorisations, which can be avoided if a streamlined process for parties who have previously been engaged in a multi-enterprise agreement under this scheme was to be developed, as highlighted earlier.

Recommendations

26. The objects of the Act should be amended to no longer preference single enterprise level bargaining, but to promote all levels or forms of bargaining.
27. Section 244(2) should be amended to provide registered unions the ability to remove an employer from a supported bargaining authorisation.
28. Section 244(4A) should be amended to permit employers covered by a current enterprise agreement to be added to a bargaining authorisation if they wish to do so.

21. Single Interest Employer Authorisations

Single interest employer authorisations are instruments issued by the FWC which authorise employers to bargain together with their employees and unions for a multi enterprise agreement. Their function within the bargaining framework is to make rights and obligations normally associated with single enterprise bargaining available in a multi enterprise bargaining context.

116 S. 244(2)

As with all bargaining processes, there is no guarantee that they will result in an agreement. Single interest employer authorisations have been a pathway to making multi enterprise agreements since the inception of the FW Act. However, they were only previously available in the context of franchise businesses, or enterprises where the Minister had declared the enterprises could bargain together. Moreover, authorisations could only be granted where the relevant employers had agreed to bargain with one another.

The relevant policy shift brought about by the amendments contained in Part 21 of Schedule 1 to SJSP Act was to remove the role of the Minister in determining which employers could bargain together and to expand the classes of eligible employers beyond franchise arrangements to employers who shared "clearly identifiable common interests" and have "reasonably comparable operations and business activities", subject to a public interest test. Whilst it is now possible for the FWC to make an authorisation even where the employers proposed to be subject to it do not want to bargain together, these gateways place limits on the circumstances in which this may occur. In any case, neither a small business of less than 20 employees or an employer covered by an unexpired agreement can be subject to an authorisation without their consent. Moreover, there are exclusionary provisions which ensure that an employer that has agreed in writing with a union to bargain for a single enterprise agreement for the relevant employees will not be covered by an authorisation, as well as a discretionary provisions which permit the FWC to exempt an employer for an authorisation if it is bargaining in good faith for a single enterprise agreement for the relevant employees and has history of doing so. Rather than "jeopardising the important focus on encouraging employers and employees to reach agreements at the enterprise level"[117], the provisions squarely frame bargaining at the enterprise level as an effective option for employers wishing to avoid being covered by a single interest employer authorisation (even if they do so only after proceedings seeking a single interest employer authorisation have commenced).

It would be wrong to claim that the changes have resulted in an explosion in multi-employer bargaining in the short period they have been available (since June 2023). In 20203/24, there

[117] Joint Statement from Business Council of Australia, Australian Chamber of Commerce and Industry and Ai Group, 21 October 2022

were 13 applications for single interest employer authorisations, largely in relation to cohorts of employers who had bargained together under predecessor provisions. In 2024/25, there have been 5 applications. Many of the applications have occurred in contexts where an authorisation had also been granted under the former laws, such as the Victorian Public Hospital system[118], independent schools[119] and franchise operations.[120] Most applications were made with the consent of all parties, in sectors including Early Childhood Education and Care[121], Technical and Further Education[122], heating, ventilation and air conditioning[123], and government arts agencies[124]. The only decided matter in which a single interest employer authorisation was opposed related to senior employees in the coal mining industry. Whilst the authorisation in that matter was granted[125], employers have sought a judicial review of the decision. One of the issues engaged in those judicial review proceedings (and in other proceedings currently before the FWC) is how the FW Act's continued expression of an "emphasis on enterprise level collective bargaining" in its objects ought to be applied in applications for single interest employer authorisations – a risk we warned of in our submission to the Senate inquiry into the provisions of the Bill (as it then was).

Whilst we infer that at least some of the renewed interest in firm level bargaining our affiliates have experienced is attributable to employers seeking to insulate themselves from the exaggerated spectre of being dragged into a bargaining process with other employers, this is a mixed blessing. Certainly, it has assisted to "get wages moving again", a stated aim of the reforms. However, we continue to hold concerns that the single enterprise bargaining "escape ramp" is too generous to employers who wish to frustrate the collective wishes of a legitimate bargaining cohort. Furthermore, the small business exemption for employers of less than 20 employers lacks justification in circumstances where employees in smaller business have traditionally faced barriers in successfully engaging their employers in any form of bargaining,

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[118] [2024] FWC 776
[119] [2023] FWC 2720; [2024] FWC 1993; [2024] FWC 1405; [2023] FWCFB 177
[120] [2024] FWC 2275
[121] [2024] FWC 1447
[122] [2023] FWC 3034
[123] [2024] FWC 395
[124] [2024] FWC 1402
[125] [2024] FWCFB 253

and where multi-employer bargaining could be a far more efficient process for them. Additionally, whilst we accept that the FW Act has always placed limits on who may bargain together under a single interest authorisation, we query whether the merit tests concerning franchise operations, common interest, business activities/operations and public interest need to be applied (even presumptively) in cases where employer freely consent to making of an authorisation and the "switching on" of other rights and obligations that come with it.

There are also some technical and practical issues that appear not to have been given sufficient attention in the drafting of the provisions, as follows:

- Insofar as the single interest authorisation process captures franchise business models (without the separate necessity to satisfy the FWC of common interest, business activity/operation and public interest tests) there is an omission in its failure to capture franchisor-owned outlets. It is common, for example, for fast food brands to have a market presence constituted by both franchisee operated stores and stores operated by the franchisor directly. The current formulation of s. 249(2) does not permit franchisor operated stores to be included in the bargaining cohort.
- The requirement to demonstrate majority support as a condition for gaining an authorisation that is opposed places a considerable administrative burden on unions and employees, for little benefit given that any resultant agreement will also need to be voted on. In the one decided case where an authorisation was opposed by employers, the majority support test proved fertile ground for interlocutory orders and technical arguments that ultimately amounted to nothing more than the occupation of the union's limited resources.
- There is some uncertainty as to how to proceed in a circumstance where one or more employers covered by an authorisation do not agree to the terms of an agreement accepted by the majority of all other employers. Whilst it is clear that a multi-enterprise agreement will not cover the employer (and relevant employees thereof) in circumstances where the ballot for approval was not successful[126], there is a difficulty getting to that point – namely how to resolve the deadlock of the objecting employer refusing to submit

[126] See s. 184

the agreement to a vote. The current mechanisms for releasing an employer from an authorisation do not appear to contemplate this circumstance.[127] A potential solution may be a provision which empowers the FWC to resolve the matter by either directing the objecting employer to submit the proposed agreement to ballot or instead removing the employer from the authorisation, subject to a merit test which takes into account the views of the affected parties and the prospects of reaching agreement. Relatedly, some thought should be given to whether section 249(4) is an effective means of bringing an authorisation to an end in circumstances where the multi enterprise agreement that is ultimately approved does not cover all of the employers named in the authorisation.

- More thought should also be given to the desirability of a "fast track" to re-initiating bargaining after a single interest employer agreement has passed its nominal expiry date. Such a fast track has been made available for single enterprise agreements (s. 173(2A)), and, given its success there in streamlining bargaining, should be made available for single interest employer agreements – at least presumptively subject to a "change in circumstances" test as utilised in s. 251(2A) in connection with the narrowing of an authorisation.

These issues should be carefully considered and rectified.

Part 21 of Schedule 1 to the SJSP Act also dealt with how a multi enterprise agreement made following the issuing of single interest employer authorisation may be varied. Given the short period of operation of the provisions, it is unsurprising that they have not been called upon to date. The provisions provide for extensions of coverage of single interest employer agreements to new employers and employees by application of analogous tests to those that apply for the making of authorisations, with a distinction preserved between applications made by employers and those made by employee organisations on behalf of members employed by the putative new employer. Whilst there is a clear logic to this, the provisions become somewhat convoluted in the manner in which they uplift and modify the "genuine agreement" test.[128] These provisions continue the drafting technique used elsewhere in the FW Act to deal with variations of

[127] See section 251
[128] See section 216DD

enterprise agreements in other contexts by inviting the reader to refer back to other provisions and either apply them incompletely or with modifications either specified in the FW Act itself or elsewhere.[129] It would be far clearer for users of the legislation for the requirements that apply to a variation to be stated in full in the provisions dealing with the variation power.

Recommendations

29. Permit single interest employer authorisations in franchise operations (s. 249(2)) to also cover brand outlets where the operator and employer is the franchisor.
30. Employers and employees should be permitted to obtain an authorisation irrespective of business size, common interest or similarity in business or operations if they genuinely consent to an authorisation being granted.
31. Consider should be given to narrowing the exclusions to the issuing of or inclusion in an authorisation premised on bargaining at the single enterprise level.
32. The requirement to demonstrate majority support in contested applications be removed.
33. A mechanism be provided to resolve deadlocks wherein an employer within a bargaining cohort covered by a single interest authorisation breaks with the majority and refuses to submit the agreement to a vote. This could involve a power for the FWC to resolve the matter by either directing the objecting employer to submit the proposed agreement to ballot or instead removing the employer from the authorisation, subject to a merit test which takes into account the views of the affected parties and the prospects of reaching agreement.
34. Relatedly, some thought should be given to whether section 249(4) is an effective means of bringing an authorisation to an end in circumstances where the multi enterprise agreement that is ultimately approved does not cover all of the employers named in the authorisation.
35. Provisions dealing with the variation of agreements should be amended to state the relevant requirements in full, rather than requiring the application of other provisions with modifications.

22. Varying enterprise agreements to remove employers and employees

[129] See section 211

The amendments made by Part 22 of the amending Act are directed toward narrowing the coverage of multi-employer non-greenfields agreements that were made after the provisions took effect on 6 June 2023. It is unsurprising in this context that we have found no examples of the provisions being utilised to date.

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, irrespective of whether the agreement was one bargained for under the auspices of single interest authorisation or supported bargaining authorisation. These requirements ought to function as a shadow guarantee that employees who are asked to vote on the withdrawal from the agreement are properly informed as to the effects on them of ceasing to be covered by the agreement: the unions that are covered by the agreement would not provide the necessary consent if the employees were misled in this regard.

23. Cooperative workplaces

The provisions of Part 23 of Schedule 1 of the SJSP Act essentially provide for the continuance of the existing standard (and rarely utilised) pathway for multi-enterprise agreements. This is a pathway that is maintained based on the consent of all parties to commence or continue bargaining. No authorisation from the FWC is required to commence bargaining in this way, and bargaining proceeds without mandatory good faith bargaining requirements, rights to take protected industrial action or the possibility of arbitration through an intractable bargaining declaration and authorisation. The FWC can be called upon to assist to resolve disputes in bargaining, but only if all bargaining representatives consent. Since the SJSP Act, this stream of bargaining is the only form of bargaining which can cover building and construction work (and then only if the agreement is a greenfields agreement).

As noted above, consensual multi enterprise bargaining has historically been very small feature of the bargaining system, hence the major reforms to single interest bargaining and the introduction of the supported bargaining stream. Consensual bargaining has however been a valuable option in some sectors, particularly education.

The difficulty with the cooperative stream is essentially the absence of support to conclude an agreement. This leaves workers and their representatives with few options if an employer disengages from the process – even where that occurs at an advanced stage of negotiations. In our view, consideration should be given to permitting some level of FWC support to continuing

cooperative bargaining processes, including through amendments to section 240 to support unilateral referral to the FWC for assistance and making bargaining orders available.

Part 23 of Schedule 1 of the SJSP Act also provides for the variation of cooperative bargaining agreements to add employers and their employees. These provisions are unremarkable, but as with other variation provisions they are expressed in a complex manner that invites the application of other statutory provisions with modifications[130] rather that stating clearly what requirements actually need to be met. This should be rectified.

Recommendation

36. Consideration should be given to permitting some level of FWC support to continuing cooperative bargaining processes, including through amendments to section 240 to support unilateral referral to the FWC for assistance and making bargaining orders available.

37. Provisions dealing with the variation of agreements should be amended to state the relevant requirements in full, rather than requiring the application of other provisions with modifications.

III. Combatting wage theft

24. Enhancing small claims processes

Prior to these amendments, the Federal Circuit Court's "Small Claims" jurisdiction for wage theft was limited to claims of less than $20,000. This was identified as one of the barriers to addressing wage theft by the 2019 report 'Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration' the Senate Economic References Committee, as well

[130] See section 216CC

as the costs associated with bringing such a claim, including small claims fees, court filing fees, and the cost of hiring a lawyer.

Both of these barriers have been addressed by the amendments, which increase the small claims threshold from $20,000 to $100,000; and allowing the court, in a small claims proceeding, to make orders that allow workers to recoup any court filing fees as well as the wages that they are owed.

These changes mean that more workers can access the streamlined and less formal small claims process. This is important because currently many workers who have been underpaid for extended periods of time may have claims that are above the current threshold. 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 Health Services Union reports that they are making use of the small claims jurisdiction for underpayments that exceed $20,000, but for one reason or another are not well-suited to a non-small-claim civil penalties case. The HSU reports that they have multiple small claims in the works presently; one for over $40,000 and one for around $80,000, that they would not have had the resources to run internally as full-scale litigation. The legislation is operating as intended.

One potential barrier to the efficient recovery of underpayments (whether through the small claims process or otherwise) and other remedies relates to the manner in which the rules of standing are expressed in column 2 of the table at section 539(2), particularly in respect of item 4 (concerning enterprise agreements) and item 7 (concerning workplace determinations). These on one view place employee organisations at a disadvantage compared to FWO inspectors and individuals brining proceedings in their own name, in that once an enterprise agreement or workplace agreement is replaced, the employee organisation could lose its right to bring proceedings on one construction of the provisions. Whilst a compelling contrary view is available as to the proper construction of the provision, the matter ought to be placed beyond the doubt

that has caused it to become a live issue in current proceedings[131] by amendments which ensure that all interested parties can enforce historical contraventions on an equal footing.

Recommendation

38. Items 4 and 7 in column 2 of the table at section 539(2) be amended to place it beyond doubt that all interested parties can enforce historical contraventions of replaced enterprise agreements and workplace determinations an equal footing.

25. Prohibiting employment advertisements with pay rate that would contravene the Act.

Wage theft hurts both employers and employees. For workers, it means being unable to pay the bills despite having a job. For good employers, it means being forced out of business by those that don't play by the rules.

Waiting until an employee has accepted an offer of employment, started work, performed their duties for a period of time and been paid before something can be done about this issue is clearly not the most efficient way to solve the problem. It also means that workers have to be underpaid, struggle to pay their bills and spend their own time and money just to get what should have been given to them in the first place.

Under the new provisions, an employer who advertises employment at a rate of pay that contravenes the Fair Work Act 2009 (Cth) or a fair work instrument (e.g. modern award, enterprise agreement) is liable for a civil penalty, unless they have a reasonable excuse for doing so.[132] The amendments allow unions and the Fair Work Ombudsman to address wage theft before it occurs. They also provide some employers who aren't already doing the right thing a solid incentive to make sure they're paying correct wages and advertising accordingly.

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131 VID534/2022 (*NTEU v. Monash University),* in which the Respondent is defending underpayment and associated claims on the basis that the union is not entitled to bring proceedings to enforce an enterprise agreement that has been replaced.
132 FW Act s 536AA(1)

However, the positive effect that the provisions could have as part of addressing wage theft could be reduced if the provisions themselves aren't meaningful and can be escaped too easily. The provisions currently permit employers who advertise jobs at less than the legal minimum rate to escape scrutiny entirely if they have a "reasonable excuse". This exception is far too wide and should be removed.

Recommendations

39. Subsection 536AA(3), which allows employers to escape scrutiny if they have a 'reasonable excuse' should be removed.
40. Subsection 536AA(2) should be amended to refer to outworker entities, as well as employers, to ensure that responsibility is conferred to the correct hiring entity.

IV. PPL, WHS and Paid FDV Leave

25B Unpaid parental leave

Prior to the Reforms, there were only two National Employment Standards (NES) entitlements that were not enforceable – and they both disproportionately affected women: the right to request flexible work and the right to request an extension of unpaid parental leave for a further period of up to 12 months. This was a gap in the safety net that discriminated against (predominantly female) workers with family responsibilities and undermined the development of family friendly work practices in Australian workplaces, which are proven to benefit employers as well as employees, and the national economy as a whole. The Reforms ensured that both of these important entitlements are enforceable.

Prior to the reforms, if an employer refused (or didn't respond to) an employee's request for extended unpaid parental leave, there was nothing more the worker could do. Discrimination against women in relation to pregnancy, parental and caring responsibilities is pervasive and widespread and despite decades of legislation making it illegal, the level of discrimination remains relatively unchanged. It is common for women to suffer adverse action on the basis of taking parental leave or making requests to extend parental leave.

The Reforms did three key things: they gave employees a substantive right to extended unpaid parental leave (subject to the reasonable business grounds 'defence'); they gave employees a right to a process with the employer; and they gave employees a right of review (both of the substantive and process rights) through the FWC, or for contravention of either right in the courts.

It is reasonable to assume that, consistent with the flexible work reforms, these significant improvements are resulting in more workers having access to extended unpaid parental leave, decreased disputation, and a positive impact on female workforce participation by allowing women to return to their previous job when they are able to (whereas previously if their request hadn't been granted, a likely outcome, and one our affiliates often saw, would be the termination of the employment relationship).

27. Amendment of the Safety, Rehabilitation and Compensation Act 1988

The Bill amended the *Safety, Rehabilitation and Compensation Act 1988* to:

- Reduce the prescribed qualifying period for oesophageal cancer from 25 years to 15 years,
- amend subparagraph 7(9)(a) of the SRC Act to specify that an employee is taken to have been employed as a firefighter if firefighting duties made up a not insubstantial portion of their duties.

The ACTU supported the passage of these changes and 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.

28. Paid family and domestic violence leave.

Entitlement to 10 days paid family and domestic violence leave

A staggering 3.8 million Australians aged 18 years and over have experienced violence from an intimate partner or family member since the age of 15.[133] This includes 27 per cent of women

[133] Personal Safety, Australia, 2021-22 financial year | Australian Bureau of Statistics (abs.gov.au), Table 1.1

(2.7 million) and 12 per cent of men (1.1 million).[134] The overwhelming majority of these victim-survivors– 71 per cent - are women, and on average one woman a week is killed by a current or former partner.[135] There has been a sharp rise in deaths in 2024 compared to previous years.[136] In comparison to women with no experience of family and domestic violence, women experiencing or who have experienced family and domestic violence have a more disrupted work history; are on lower personal incomes; have had to change jobs frequently; and are more likely to be employed on a casual and part-time basis.[137]

The Government implemented its election commitment to include ten days paid family and domestic violence leave in the National Employment Standards of the Fair Work Act. This leave supports victim-survivors of family and domestic violence to deal with the impacts of that violence. It means that workers impacted by family and domestic violence, including those escaping a violent relationship – nearly always women - don't have to choose between their safety and their livelihood.

The evidence shows that workers (and particularly women) are more likely to survive, leave and be able to stay away from violent relationships if they have a secure job and secure income. Prior to this reform, women without access to paid family and domestic violence leave were at significant risk of losing employment and homelessness, key drivers for women returning to violence. On average it takes $18,000 and 141 hours to leave a violent relationship[138] and economic security is a key factor determining whether a person is able to do so.

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[134] Ibid. These figures are further broken down by the ABS. Of women aged 18 years and over, 2.3 million (23 per cent) experienced violence by an intimate partner, 1.7 million (17 per cent) experienced violence by a cohabiting partner, 920,300 (9.3 per cent) experienced violence by a boyfriend/girlfriend/date, and 806,000 (8.1 per cent) experienced violence by a family member.
[135] Fair Work Commission, 5 April 2022, Information note - Initiatives to reduce family and domestic violence in Budget 2022–23.
[136] Davey, Melissa (4 May 2024) *Eight years ago Australia had a wake-up call on family violence. So how did we end up here again?* https://www.theguardian.com/australia-news/article/2024/may/04/australia-family-violence-against-women-law-changes-reforms.
[137] [2022] FWCFB 2001 at [75], [436], [749] and [927].
[138] Seymour et al, Family and Domestic Violence Leave Entitlement in Australia: A Systemic Review (3 November 2021) (**SWIRLS Report**) at p 5; Paid FDV Leave Bill Senate Report at [2.16].

Impact of entitlement and Review of paid FDV leave

Our affiliates report that the new NES entitlement has allowed many workers to take the time they need off work to deal with family and domestic violence. The experience of unions has been that the entitlement has:

- kept people in work, ensuring they remain connected to their employment and they don't lose their job, and do not have to choose between attending work or taking safety and other actions in relation to FDV;
- ensured they can access support and services from a safe place (including the workplace where needed); and
- meant they can maintain financial independence and security, making it more likely they can leave and remain away from violence.

The ACTU submission to the recent independent review of the FDV Leave Entitlement (**FDV Leave Review**) contains many example and case studies.[139] Another positive impact of the legislation is that it has allowed unions to more easily negotiate and secure additional entitlements and supportive arrangements through collective bargaining to support employees experiencing FDV and other forms of gender-based violence which improve on the baseline entitlement in the NES.

The FDV Leave Review found that the new entitlement had lifted the percentage of employers who report issuing the leave from 6 percent to 13 percent.[140] The FDV Leave Review found that victim-survivors who have used the entitlement largely find it effective in enabling them to take steps to ensure their safety without jeopardising their income or employment. The leave is making a profound difference to workers, assisting them to stay connected with their work and seek safety. Overall, it found that the entitlement is working as intended and having very positive impact for workers, but that a lot more education is required for both workers and employers about their rights and obligations in relation to FDV leave.

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[139] ACTU Submission, Paid Family and Domestic Violence Leave Review, 24 June 2024
[140] Flinders University (2024) Independent Review of Paid Family and Domestic Violence Leave.

The FDV Leave Review also found that:

- There is majority support for the entitlement amongst employers, with over three-quarters (77 per cent) of surveyed employers supportive of the reforms.[141]
- Many employers provide support above and beyond the entitlement - 75 per cent of large businesses, 65 per cent of small businesses and 53 per cent of micro businesses 'offered additional supports for staff experiencing FDV leave'.[142]
- Employers who have provided the entitlement to workers are more likely to say it is not a burden, compared to those who haven't yet provided it. That is, practical experience with rolling out the entitlement shifts views. Survey results found that financial costs and staffing implications were a concern for some employers but were seen as more significant by employers who had not yet provided FDV leave. For example, 30 per cent of employers who had not provided leave identified financial costs as a barrier, compared to 18 per cent of those who had. This suggests that "financial costs and staffing shortages may be more significant in anticipation than in reality".[143]

This is strong evidence that provides a significant counterpoint to the opposition of many employers and small business to the paid FDV leave entitlement, and the usual employer and small business opposition to IR reforms more generally. That opposition should be considered in light of these findings of the FDV Leave Review. The experience of the ACTU and its affiliates is that the imagined or anticipated impact of IR reforms by employers is usually far worse than the reality once those reforms are in place.

Secure Jobs Better Pay Reforms – payslip requirements

Part 28 of the SJBP Act provided for the Fair Work Regulations (FW Regulations) to prescribe what information can be included on payslips regarding paid family and domestic violence leave.

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[141] Ibid p76.
[142] Ibid.
[143] Ibid, p 44 and 82.

Part 28 also provided that an employer must not include any information prescribed by the Regulations on payslips and must comply with the requirements of the Regulations.

Amendments to the FW Regulations to deal with this matter were made and were effective from 4 February 2023.[144] The changes mean that employers are prohibited from including information on pay slips that shows:

- that an amount paid to an employee is a payment for paid family and domestic violence leave
- a period of leave taken by an employee has been taken as paid family and domestic violence leave
- an employee's paid family and domestic violence leave balance

When an employee takes paid family and domestic violence leave, employers must report it on the pay slip as the performance of ordinary hours of work, or as another kind of payment made in relation to the performance of work, such as overtime, allowances or a bonus. Employers are not able to report paid FDV leave as another type of leave such as 'miscellaneous leave' or 'other leave', unless an employee has requested that it be recorded as a period of leave. Employers may be liable to pay a civil penalty if they don't comply.

These new requirements about what information can be included on payslips are essential to worker safety and privacy. They reduce the risk to an employee's safety when accessing paid family and domestic violence leave by not alerting perpetrators to the fact that the victim-survivor may be taking paid FDV leave, as perpetrators often monitor payslips and income.

[144] See Schedule 1 of the Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023, made on 3 February 2023, and which commence on 4 February 2023 (accessible at Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023 (legislation.gov.au). See also Explanatory Statement (accessible at 034A1900.PDF).

The Regulations that were made are strong, and the FDV Leave Review observed the importance of the new payslip requirements to worker safety, that they were welcomed by stakeholders and described as 'excellent' and a 'game changer.'[145]

The FDV Leave Review also highlighted the challenges of managing and maintaining confidentiality, especially in relation to record-keeping, pay slips and storage of evidence. The experience of our affiliates is that some employers are not complying with those obligations. The FDV Leave review found that a lot more education is needed for both workers and employers about their rights and obligations in relation to FDV leave.

Recommendations

41. The Government should fund further education, training and awareness building activities that are developed and rolled out by both unions and employer organisations, to ensure effective implementation of the entitlement. This should include dedicated resources, materials and training for assisting diverse employees experiencing FDV, including resources in different language and in a range of formats.

[145] Ibid.

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