



Secure Jobs Better Pay Independent Review

ACTU submission in response to Draft Report

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ACTU
australian council of trade unions

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Part 1: Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions 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.

The ACTU is 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 1.6 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

Summary

The ACTU welcomes and supports the Review Panel's overall conclusions that, despite the limited time available for the review and certain data limitations, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (SJBPA Act)* is achieving its intended purposes. The reforms are "operating appropriately and effectively and with minimal unintended consequences".¹ We particularly welcome the Panel's findings in the Draft Report in respect of the early success of the reforms in achieving the Government's goals of getting wages moving and tackling gender inequality.

On lifting wages, the Panel concluded that: "the early signs are positive: collective bargaining is increasing, especially the coverage of collective agreements, and wages (and other indicators [of] workers' economic circumstances) have started to improve."² These outcomes were achieved through a 27% increase in the number of employees covered by a collective agreement between September 2022 and September 2024, consistent with the intention of the amendments.³ The

¹ Emeritus Professor Mark Bray and Professor Alison Preston, *Secure Jobs, Better Pay Review*, Draft Report, 31 January 2025 (**Draft Report**), page 13.

² Draft Report, page 84.

³ Draft Report, page 82.

Panel found that: “real wages gradually increased each quarter after the amendments from an annual low of –4.4% in the December quarter of 2022 until they exceeded price rises at the end of 2023. According to the latest data, real wages increased by 0.7% through the year to the September quarter 2024.”⁴

On tackling gender inequality, the Panel concluded that: “The Secure Jobs, Better Pay Act represents a significant legislative development aimed at improving women’s position in the labour market. Early trends in the gender pay gap suggest positive outcomes, although it is recognised that the gap is just one measure of progress”.⁵ In particular, the amendments inserting gender equality as an object of the *Fair Work Act 2009 (FW Act)* “and the equal remuneration (work value) amendments have, on the balance of probabilities, significantly improved the wages for many award reliant workers.”⁶ A notable achievement which the ACTU has long campaigned for is the reduction in the Gender Wage Gap (**GWG**) since 2022, the Panel finding that: “the mean ‘adjusted’ GWG over the period 2008 to 2022 is equal to 10.8%. In 2023 it falls to 6.5%, with the change statistically significant at the 1% level.”⁷

The ACTU also notes the problems raised by the Panel concerning the inadequacy and limitations of various forms of data – including that available from independent agencies – and the impacts of these data gaps on the Panel’s ability to conduct the review.⁸ Accordingly, we support Draft Recommendation 1, that the Australian Government should conduct a further review of the SJPB Act in 2-3 years, “once gaps in the data have been addressed and additional evidence is available”.⁹ We propose that the Panel should make a further recommendation to form an inter-agency (DEWR, ABS, FWC, FWO) working group with stakeholder and academic members, to develop and implement the tools required to collect and publish the necessary data.

Part 2 of this submission contains the ACTU’s specific responses to the Panel’s proposed findings and recommendations in relevant chapters of the Draft Report.

⁴ Draft Report, page 83.

⁵ Draft Report, pages 194-195.

⁶ Draft Report, page 194.

⁷ Draft Report, page 194.

⁸ Draft Report, pages 11-13.

⁹ Draft Report, page 14.

Part 2: ACTU responses to proposed findings and recommendations in the Draft Report

Chapter 5. Establishment of the National Construction Industry Forum

The ACTU notes the Panel’s finding that the National Construction Industry Forum (NCIF) established by the SJPB Act amendments is working as intended, and Draft Recommendation 3 that the federal Government consider using the NCIF as a model tripartite forum in other industries.¹⁰ We suggest that this type of tripartite forum could also have useful application in industries where worker exploitation is prevalent (e.g. hospitality, horticulture, agriculture, meat processing, security). The ACTU would welcome the opportunity to work with the federal Government on developing suitable tripartite consultative arrangements in relevant sectors.

Chapter 7. Additional Registered Organisations Enforcement Options

The ACTU notes the Panel’s findings that the FWC General Manager’s power to issue Enforceable Undertakings is operating as intended, but “an impediment to wider use of [the new Infringement Notices power] appears to be the scale of penalties, which is beyond the discretion of the General Manager”.¹¹

We are unaware of circumstances that have led to the General Manager issuing no Infringement Notices between 6 March 2023 and 17 January 2025. However, the ACTU agrees with the Panel that an Infringement Notice penalty of \$19,800 is likely to be excessive for many of the potential contraventions to which it applies under s.316A of the *Fair Work (Registered Organisations) Act 2009 (FWRO Act)*. At the same time, we note that under s.104(2) of the *Regulatory Powers (Standard Provisions) Act 2014*, the amount to be stated in an Infringement Notice for a single alleged contravention is the lesser of one-fifth of the maximum penalty that could be imposed or 60 penalty units (for a body corporate). In the example provided in the draft report, this would appear to mean that the quantum for an Infringement Notice for missing a timeframe to lodge prescribed information in relation to an election to be conducted by the AEC as required by s.189

¹⁰ Draft Report, pages 45-46.

¹¹ Draft Report, page 62.

of the FWRO Act would be \$3,960 (a fifth of 60 maximum penalty units), rather than the \$19,800 referred to in the draft report.

In the context of the Panel's observation that no Infringement Notices have yet been issued, the ACTU does not oppose Draft Recommendation 4 that the Australian Government consult in relation to whether penalty amounts payable under Infringement Notices are proportionate to the contraventions that are subject to an Infringement Notice.

Chapter 9. Initiating Bargaining

The ACTU welcomes the Panel's finding that the new provisions enabling employee bargaining representatives to initiate bargaining for a replacement enterprise agreement by issuing a notice to the employer under s. 173(2A), have been effective in reducing barriers to collective bargaining.¹² We are especially pleased to see the Panel's rejection of employer calls to revive the former requirement that unions obtain a majority support determination (**MSD**) in order to begin replacement agreement negotiations. As the Panel notes, and contrary to employer claims, obtaining an MSD is not straightforward and the process has provided employers many opportunities to avoid the commencement of bargaining.¹³

However, we are concerned that the Panel rejected our proposal to amend s.173(2A)(d), to make it clear that bargaining can be initiated by issuing the notice to the employer, not only where the proposed agreement would cover the same (or substantially the same) employees as the earlier agreement – but also where the new agreement would cover additional employees.¹⁴ The Panel stated that this would: “[broaden] the scope of the legislation and potentially opens up disputes about whether the agreement was a true replacement agreement or a new agreement.”¹⁵ However, as it is accepted that a union's proposed coverage (or scope) of an agreement can change during the course of bargaining,¹⁶ we do not accept that the addition of employees (for

¹² Draft Report, pages 91-92.

¹³ Draft Report, page 92. See also A Forsyth, J, Howe, P, Gahan & I Landau, “Establishing the Right to Bargain Collectively in Australia and the UK: Are Majority Support Determinations under Australia's Fair Work Act a More Effective Form of Union Recognition?” (2017) 46 *Industrial Law Journal* 335.

¹⁴ ACTU, *Submission to the Secure Jobs Better Pay Independent Review*, ACTU D. No 79/2024, 29 November 2024 (**ACTU Submission**), recommendation 21.

¹⁵ Draft Report, page 92.

¹⁶ See for example, in the context of protected industrial action, [Royal Melbourne Institute Of Technology T/A Rmit University v National Tertiary Education Industry Union, Ms Patricia McLaughlin \[2023\] FWC 3406](#) and more generally in [Stuartholme School & Ors v. IEU \[2010\] FWAFB 1714](#).

purposes of the s.173(2A) notice) would mean that a new agreement altogether was being proposed – rather than a replacement agreement. Our proposal merely improves understanding in a context where a union can already validly embark upon a re-initiation of bargaining under s. 173(2A) and thereafter modify its proposal as to scope.

The ACTU is also concerned about Draft Recommendation 5, that the FWC should publish guidance to assist employers to understand their obligations after receiving a written request to bargain under s.173(2A), including a template written request for bargaining representatives to use. This recommendation is based on a decision in a case involving Sephora Australia Pty Ltd and the Shop, Distributive and Allied Employees Association (**SDA**),¹⁷ which the Panel states “highlights a potential lack of knowledge about the significance of the written request to bargain”.¹⁸ However, in our view, this conclusion is based on a misreading of the Sephora decision. In that case, the SDA applied for bargaining orders, the FWC finding that Sephora had breached its good faith bargaining obligations by not including the union in bargaining meetings, despite its awareness of the union’s interest in representing employees (including through its issuing of the s.173(2A) notice to Sephora).¹⁹ The case illustrates not so much the employer’s lack of knowledge of the import of a s.173(2A) notice, as the actions taken by a large, sophisticated employer (presumably with access to legal advice) to avoid bargaining with a union.

ACTU affiliates have raised concerns that if unions were required to use a template notice, this would provide employers with an opportunity to dispute whether the template had been correctly followed – and therefore enable employers to frustrate union efforts to commence bargaining and add unnecessary complexity.

For all of the above reasons we consider that Draft Recommendation 5 is unnecessary, and will only add complexity to the simplified process that now applies for initiating bargaining renewals. If there are genuine reasons that some employers (e.g. small-medium enterprises) have difficulty understanding the meaning of a s.173(2A) notice and what actions it requires them to take, this

¹⁷ [Shop, Distributive and Allied Employees Association \[2024\] FWC 1225](#).

¹⁸ Draft Report, page 89.

¹⁹ [2024] FWC 1225 at paras [44]-[51].

could be addressed through information or guidance developed and provided by the FWC or FWO.²⁰

Chapter 10. Cooperative Workplaces

The ACTU notes the Panel's finding that the cooperative workplace bargaining stream is operating effectively, without unintended consequences.²¹ The Panel rejected our proposal to enable s.240 dispute resolution by the FWC to be activated in cooperative bargaining without the agreement of other bargaining representatives,²² on the basis that this would be inconsistent with the voluntary nature of the stream.²³ However, the ACTU remains of the view that this mechanism is necessary to deal with a situation where an employer (although having entered bargaining consensually) disengages from the negotiations. Further, we do not consider that the availability of unilateral access to the FWC necessarily detracts from the voluntary nature of cooperative bargaining – given that under s.240, the FWC would engage in consensus-oriented conciliation or mediation (with arbitration only available where all parties agree) in any event.²⁴

Chapter 11. Supported Bargaining

The ACTU welcomes the Panel's observations as to the early signs that the supported bargaining stream is having some success in overcoming the limitations of the former low-paid bargaining stream, as evidenced by the achievement of the first supported bargaining agreement in the early childhood education and care (ECEC) sector.²⁵ More recently, the gains for ECEC workers have been extended by the addition of 33 employers and approximately 20,000 employees to coverage of the Early Childhood Education and Care Multi-Employer Agreement 2024-2026.²⁶ However, the Panel also noted that:

The progress of this form of multi-employer bargaining has clearly been slow. There have been only a small number of applications for supported bargaining authorisations and

²⁰ Noting that clear information is already provided on the FWC's website: [Request to bargain for a replacement agreement | Fair Work Commission](#).

²¹ Draft Report, page 96.

²² ACTU Submission, recommendation 36.

²³ Draft Report, page 96.

²⁴ FW Act, ss. 240(1) & (4), 595(1)-(3).

²⁵ Draft Report, pages 104-106.

²⁶ Nest Employee Services Pty Ltd T/A Nido Early School & Others [2025fwca282.pdf](#).

*only one agreement finalised and approved. It is also questionable whether large numbers of applications and/or approvals will be forthcoming given the significant conditions that must be met if authorisations are to succeed, bargaining is to produce agreements and agreements are to be approved.*²⁷

The slow uptake of supported bargaining needs to be placed in some perspective. It may be slow in comparison to single interest bargaining, but supported bargaining has already yielded greater gains for many workers than were achieved in the 13 years in which the prior low-paid bargaining stream was in operation. The ACTU agrees, though, with the Panel's concern that further applications to utilise supported bargaining may be inhibited by the current architecture of the scheme. On that basis, we reiterate the recommendations in our original submission to improve and open up access to the supported bargaining stream.²⁸

We wish to address two further observations in the Draft Report:

- At page 105, the Panel states that: "The ACTU raised the potential for a procedural or logistical difficulty with putting multi-employer agreements to a vote where one (or more) employers do not agree. The ACTU submitted that this has been demonstrated in one matter already and was 'highly disruptive to the efficiency of the bargaining process'. The Review Panel has not been provided the details of this case." We can clarify that this issue was raised by the United Workers Union (UWU).²⁹
- At page 107, the Panel states that: "The Review Panel acknowledges that the ongoing matter in relation to McDonald's franchises in South Australia may, in future, require further consideration about the intended scope of the supported bargaining stream. However, until such time as the FWC has considered the evidence in that matter, it is premature to consider further changes." These comments relate to the application by the SDA for an authorisation to instigate negotiations for a supported bargaining agreement with McDonald's franchisees in South Australia. The ACTU is an intervenor in that matter, which is presently before the FWC. In those circumstances, we consider the Panel's comment to be highly inappropriate as it tends to imply that the union's application

²⁷ Draft Report, page 106.

²⁸ ACTU Submission, recommendations 26-28.

²⁹ UWU, *Secure Jobs, Better Pay Review: Submission of the United Workers Union*, 1 December 2024, pages 38-39.

involves an attempt to go beyond the intended scope of supported bargaining. That may well be among the issues to be addressed in the proceedings, but it is not a matter upon which the Panel should have commented, pending the outcome of the case. In any event, the ACTU's position is that there is nothing in the relevant statutory provisions,³⁰ nor in the explanatory material for the SJBPA Act amendments,³¹ to indicate that the supported bargaining stream was intended to be limited in its scope in the manner suggested by the Panel.

Chapter 12. Single-Interest Employer Authorisations

The ACTU welcomes the Panel's general observations about the operation of the single interest employer bargaining stream, which refute many of the negative claims made by employer groups about the likely impact of this form of multi-employer bargaining:

The Review Panel notes that there remain extensive requirements that need to be met in order to successfully obtain a single-interest employer authorisation or vary a single-interest employer agreement to add an employer and employees. The Review Panel also notes that, while the broader amendments to the stream are intended to enhance its use, these requirements are intended to ensure that the stream is restricted to appropriate employers. The Review Panel does not share the concern of some stakeholders that further amendments are needed to stem the scope of the stream. The Review Panel acknowledges the limited evidence in relation to these amendments but considers many of the submissions to be 'highly hypothetical' in nature. At this time, the Review Panel does not have any evidence before it that indicates the changes to the single-interest employer bargaining stream are or will negatively impact productivity, the labour market, or employers. The Review Panel also notes that the international experience points to potential economic benefits.³²

We note the Panel's views that there is insufficient data to definitively assess whether the single interest stream is operating as intended, it is therefore too early to draw any significant

³⁰ FW Act, ss. 241-243A.

³¹ Commonwealth of Australia, *Revised Explanatory Memorandum to the Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022*, pages 160-161, 168-172.

³² Draft Report, page 118.

conclusions, and the stream should be allowed to further develop before amendments are considered.³³ The ACTU is willing to work with the Government to address the resolution of the concerns we identified about the operation of the single interest stream, and proposed amendments to improve the operation of this scheme for workers and unions, in our original submission.³⁴

Chapter 14. Bargaining Disputes

The ACTU notes the Panel's view that the development in practice of the new provisions to resolve bargaining disputes through intractable bargaining declarations and intractable bargaining workplace determinations is at an early stage, with relatively few applications and decisions made.³⁵ We welcome the Panel's rejection of the premise put forward by some stakeholders that the intractable bargaining mechanism is used as a "bargaining tactic", with the implication that this is somehow illegitimate. Rather, as the Panel states:

*The reality is that both sides use bargaining tactics and there is nothing inherently wrong in doing so. The purpose of the intractable bargaining framework is to introduce a level of risk (through the uncertainty of the FWC's decisions) to continuing disagreement and to balance the positions and power of the bargaining participants. It is only in these circumstances that bargaining will efficiently and effectively produce agreements, which is part of the intent of the amendments.*³⁶

The "No Less Favourable" Amendment

The ACTU is concerned that the Panel appears to flag the "no less favourable" component of intractable bargaining,³⁷ for further review. In particular, the ACTU is concerned that the Panel proposes to make the observation that it "remains unconvinced about whether the 'not less

³³ Draft Report, page 118.

³⁴ ACTU Submission, recommendations 29-35.

³⁵ Draft Report, page 134.

³⁶ Draft Report, page 134.

³⁷ Introduced by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*, s.270A of the FW Act provides that when the FWC is making an intractable bargaining workplace determination, a term dealing with a matter at issue between the parties must be no less favourable to employees and unions than that in the enterprise agreement being replaced by the determination. The definition of "agreed terms" in s.274(3) was also amended to ensure that any agreed terms at the time an application for an intractable bargaining declaration is made cannot subsequently be "unagreed".

favourable' amendments have the intended effect of focusing the minds of parties on reaching a mutually acceptable compromise".³⁸

The ACTU accepts that the jurisdiction remains a relatively new one. The ACTU also accepts that in terms of where the parties' minds are focused, a matter of "qualitative evidence", the Panel, by its nature, is limited in how it can come to an independent view of what is in the minds of parties in bargaining. The submissions of unions have supported the "no less favourable" component of the new intractable bargaining framework.³⁹ On the other hand, the Panel in its draft report notes that the "prevailing view" of the employer groups is that the jurisdiction "(as further amended) discourages good faith bargaining".⁴⁰

The Draft Report refers, in particular, to the Business Council of Australia's submission that the no less favourable amendment "creates a substantial incentive for arbitrated outcomes" and the Australian Resources and Energy Employer Association's submission that the amendment "mean[s] unions/employees have "nothing to lose" ... [the potential] benefits and risk burden from intractable bargaining provisions must be apportioned equally between employers and employees/unions."⁴¹

The quantitative evidence however is wholly inconsistent with the submissions of the employer groups. Only 9 intractable bargaining declarations have been made and 2 intractable bargaining workplace determinations. Further, 4 of the 9 declarations listed on pages 128-129 of the Draft Report were made following an application by the *employer* in the dispute. The ACTU is only aware of one declaration being refused. The application was made by an *employer* in *Ventia Australia Pty Ltd v United Firefighters' Union of Australia* [2023] FWC 3041.

Not only is there no support in the quantitative evidence, but the notion posited by employer groups that employees and unions have "nothing to lose" and are disincentivised from bargaining in good faith, in the context of the no less favourable requirement, is a complete misrepresentation of bargaining under the FW Act for reasons including the following.

³⁸ Draft Report, page 134.

³⁹

⁴⁰ Draft Report, page 133.

⁴¹ Draft Report, page 134.

Wage Freezes Generally Assist Employers Not Employees

First, a delay in bargaining freezes only the income of employees. Most employees covered by enterprise agreements rely on the enterprise agreement for wage rises. Further, it is very rare for enterprise agreements to provide for wage rises beyond their nominal expiry date and typically agreements provide for the final wage rise 12 months before the end of the nominal expiry date.

As a broad proposition, this will mean that employees are likely to be, and indeed are, significantly more disadvantaged by delays in bargaining. There is – very practically speaking - a substantial and rising risk for employees to wait for an intractable bargaining determination while their real income is dropping as each week and month passes. The extent and effect of the delay can be observed in the 2 determinations made by the Fair Work Commission in this jurisdiction:

- In *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd (Unanderra)* [2024] FWCFB 305, the Commission made a determination on 10 July 2024. The workers' last pay rise was on 1 July 2021. The TWU estimated that over that period of wage freeze, inflation had increased by 13.7%.⁴²
- In *Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd (Erskine Park)* [2024] FWCFB 287, the Commission made a determination on 26 June 2024. The workers' last pay rise was on 23 September 2021.⁴³

In this context, the “no less favourable” requirement should not be treated as a discrete part of the intractable bargaining framework. Rather, it is a key aspect of the effectiveness of the entire scheme in that it lessens the incentive for employers to delay bargaining, while effectively implementing a wage freeze with a hope to achieve some further reduction in employee conditions in an arbitration.

Uncertainty of Outcome of Arbitration Remains

⁴² See paragraph [180] of the decision.

⁴³ See paragraph [18] of the decision.

Secondly, notwithstanding the “no less favourable” requirement, there still remains very significant uncertainty for employees and unions in the benefits of utilising the intractable bargaining jurisdiction including that:

- The “no less favourable” requirement does not require the Commission to award any wage increase at all, let alone one to cover likely rises in inflation nor the real wage losses that employees have already incurred.⁴⁴
- The “no less favourable” requirement will not prevent employees losing the right to have a dispute resolution with binding arbitration.⁴⁵
- The “no less favourable” requirement may not prevent employees losing potentially more favourable consultation terms in existing agreements.⁴⁶
- There remain few decisions applying the requirement and the outcome of each determination will be highly dependent on the factual matrix before the Commission.

BCA’s Example

Third, the *single* actual example put forward by employer groups concerning the supposed problems raised by the no less favourable requirement appears to relate to an Electrical Trades Union dispute with Endeavour Energy.⁴⁷ While it would appear on the information provided by the BCA that the union referred to an intractable bargaining application in a communication to its members in suggesting a “no vote”, there is no information provided at all to suggest this was a long term strategy of the union to take advantage of the “no less favourable” requirement, indeed the requirement is not referred to at all. Notably, the union's application for an intractable bargaining declaration referred to by the BCA appears to have come in the context of:

- The parties beginning bargaining in September 2023, three months before the nominal expiry date of the current agreement on 31 December 2023.⁴⁸
- Forty bargaining meetings and 27 subgroup meetings occurring.⁴⁹

⁴⁴ FW Act, s.270A(4).

⁴⁵ [Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd \[2024\] FWCFB 305 \(10 July 2024\)](#) especially at [175].

⁴⁶ FW Act, s.273.

⁴⁷ See the BCA Submission to the Review Panel, pages 11-13.

⁴⁸ [Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Others \[2024\] FWC 3063 \(6 November 2024\)](#) at paragraph 4.

⁴⁹ *Ibid.*

- A very substantial campaign of industrial action which involved “almost daily” industrial action.⁵⁰
- The employer formerly refusing an offer to enter a period of “intensive bargaining” while industrial action was happening.⁵¹
- A s.240 application made by the *employer*.⁵²
- Industrial action being temporarily suspended on the basis of third party harm.⁵³
- An unsuccessful application by the employer under s.424 to terminate the industrial action.⁵⁴
- An unsuccessful attempt at resolving the dispute with a private mediation provider.⁵⁵

Whatever the merits of the industrial dispute, what the example most definitely does *not* suggest is a union simply "surface bargaining" to access the intractable bargaining jurisdiction and gain the benefit of the no less favourable requirement. While no determination has yet been made, the example, if anything, would appear to show the intractable bargaining system working effectively.

Costs of Arbitration

Fourth, to run an arbitration of an enterprise agreement is far from a low-cost exercise in terms of time or resources. That cost to parties, including obviously, unions and employees, exists regardless of the “no less favourable” requirement.

The Risk of Agreement Termination

Fifth, the risk of an employee’s enterprise agreement being terminated on application by the employer as a bargaining tactic has been substantially reduced by the SJBPA amendments, if an employer’s business is genuinely at significant risk or termination avenues remain under s.226 of the FW Act for the agreement to be terminated.

⁵⁰ Ibid.

⁵¹ [Shoalhaven Starches Pty Ltd T/A Manildra Group v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia](#) [2024] FWC 1282 (16 May 2024) at paragraph 24.

⁵² [Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Others](#) [2024] FWC 3063 (6 November 2024) at paragraph 4.

⁵³ [Shoalhaven Starches Pty Ltd T/A Manildra Group v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia](#) [2024] FWC 1282 (16 May 2024).

⁵⁴ [Endeavour Energy Network Management v. CEPU](#) [2024] FWC 2285.

⁵⁵ [Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Others](#) [2024] FWC 3063 (6 November 2024) at paragraph 4.

Matters Beyond the Enterprise Agreement

Sixth, while the “no less favourable” requirement is intended to assist employees in bargaining, it would be fanciful to view employees as uninterested in the economic health of their employer, not least because it affects their job prospects and those terms and conditions of employment that are not protected in binding agreements.

Inconsistency with Matters to Date

Finally, the notion that unions will have “nothing to lose” and lack any incentive to negotiate is inconsistent with the proceedings that have already reached resolution where the Transport Workers’ Union (**TWU**) demonstrated itself willing to agree to matters where possible.

In *Transport Workers’ Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd (Erskine Park)* [2024] FWCFB 287, the TWU and the employer had agreement on all but the following: ordinary hours of work; weekend penalty rates; wage increases; consultation; and nominal expiry date. While the Full Bench noted 3 times in its decision that various clauses were consistent with s.270A⁵⁶, nowhere in the decision did the Full Bench refuse to make a determination sought by the employer on the basis of s.270A of the FW Act.

In *Transport Workers’ Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd (Unanderra)* [2024] FWCFB 305, the TWU submitted that matters were agreed at the time of the application for a declaration and later to agreement on a significant number of matters with the employer during the post-declaration period. Because of the inactivity of two individual bargaining representatives, the Commission was unwilling to find that there were any “agreed matters”. However, the arbitration proceeded on the basis that the TWU (and the employer) nevertheless agreed that all terms were not in dispute and should be included in the workplace determination other than: ordinary hours of work; the dispute resolution procedure; wage increases; redundancy; classifications; and the nominal expiry date. Of those outstanding items, s.270A was determinative only with respect to the ordinary hours of work.

Conclusion

⁵⁶ See paragraphs [205], [212] and [215] of the decision.

For all of the above reasons, the ACTU submits that if the Panel concludes that it does not consider it has enough information to make a finding with respect to intractable bargaining, including the no less favourable requirement, such a conclusion should be worded more neutrally. There would appear to be simply no evidence of any substance before the Panel to justify an observation that appears to cast doubt on the effectiveness of the “no less favourable” amendment.

Chapter 15. Industrial Action

The ACTU welcomes Draft Recommendation 6,⁵⁷ that s.448A of the FW Act be amended to provide the FWC with discretion not to hold a mandatory conciliation conference during the protected action ballot process, where relevant bargaining representatives agree. This should streamline the process for accessing protected industrial action and avoid fruitless discussions. A similar amendment was proposed by the ACTU in our original submission to the Review.⁵⁸ However, we now consider that the Panel needs to address what should occur where there are numerous employee bargaining representatives (e.g. multiple union and/or individual representatives) and agreement cannot be reached between all of them and the employer bargaining representative(s) about the need for a conciliation conference. We propose that in that instance, the FWC be given discretion to determine whether to order a conference and who must attend any conference, based on its assessment of the views of all bargaining representatives involved in the negotiations.

We are disappointed that the Panel noted⁵⁹ – but did not meaningfully engage with – another of our proposals, to repeal s.413(5) of the FW Act.⁶⁰ We reiterate our view that this provision deprives industrial action of protected status where there is non-compliance with any order related to bargaining for the proposed agreement, in a disproportionate and unwarranted manner.

Chapter 16. Enterprise Agreement Approval

⁵⁷ Draft Report, pages 139-140.

⁵⁸ ACTU Submission, recommendation 24.

⁵⁹ Draft Report, page 139.

⁶⁰ ACTU Submission, recommendation 25.

The ACTU welcomes the Panel's finding that the amendments to the pre-approval requirements in the FW Act are having their intended effect, although with some confusion among employers around the interaction between the FWC Statement of Principles on Genuine Agreement and relevant statutory provisions.⁶¹ We support Draft Recommendation 8, that the FWC regularly engage with its Enterprise Agreements and Bargaining Advisory Group to ensure the Statement of Principles is operating appropriately and effectively.

However, the ACTU and our affiliates hold significant concerns about Draft Recommendation 7, in which the Panel proposes that the FW Act be amended to ensure the Statement of Principles is a complete statement of the matters which the FWC must consider in determining whether a proposed enterprise agreement has been genuinely agreed to by employees; and at least, duplication of requirements in the Statement and in ss.180(5) & 188(4A) should be removed. In our view, this proposal could lead to the dilution of protections for employees in the process of making enterprise agreements.

In respect of ss. 180(5) & 188(4A) relating to the requirements upon employers to explain the terms of a proposed enterprise agreement to employees, we do not agree there is any "duplication" of requirements. The statutory provisions set down the basic obligation, while Principles 8-14 in the Statement provide details as to how employers should meet the obligation.

We would be concerned if the proposal in Draft Recommendation 7 were to extend to the transfer of other protections for employees from the FW Act to the Statement of Principles:

- The employer's obligation in ss.173-174 to issue the Notice of Employee Representational Rights (**NERR**) at the commencement of bargaining is reflected in Principles 1-3 of the Statement. However, the requirement to issue the NERR must remain in the statute, for example because it forms part of the requirements of which the FWC must be satisfied to approve an agreement.⁶²
- The same applies to s.181, under which an employer may request employees to vote on a proposed agreement, reflected in Principles 15-16 of the Statement. This provision is linked to the NERR requirement, in that a request to vote must not be made until at least

⁶¹ Draft Report, pages 146-147.

⁶² FW Act, ss. 186(2)(a), 188(4)(a) dealing with genuine agreement by employees.

21 days after the employer issued the NERR to employees (s. 181(2)), which in turn is a requirement of which the FWC must be satisfied to approve the agreement (s.188(4)(b)).

In any case, employers retain the fallback provided in s.188(5), under which minor procedural or technical errors in meeting the pre-approval requirements may be disregarded by the FWC (as long as employees are not likely to have been disadvantaged by the errors).

The Panel has not identified any *inconsistency* between the obligations imposed upon employers by the relevant FW Act provisions and the guidance set out in the Statement of Principles. Rather, the Panel highlights areas of perceived *duplication* in the statutory provisions and the Statement. Instead of making the Statement of Principles the complete statement of the “genuine agreement” requirements as proposed in Draft Recommendation 7, the ACTU would prefer to see a tripartite process whereby the areas of duplication and their implications for stakeholders can be clearly identified, and potential solutions discussed. This process could begin through the FWC’s Enterprise Agreements and Bargaining Advisory Group (see above). In summary, we suggest that the Panel should not include Draft Recommendation 7 in its Final Report, but should include issues of duplication between the FW Act and the Statement of Principles as a matter to be addressed by the FWC Advisory Group as part of Draft Recommendation 8 (based on the premise that important employee safeguards in agreement-making should not be removed from the FW Act pre-approval requirements).

Chapter 17. Better Off Overall Test

The ACTU notes that the Panel found little evidence that the amendments to the FW Act provisions relating to the better off overall test (**BOOT**) have significantly reduced complexity or changed how the FWC assesses the BOOT when deciding whether to approve enterprise agreements. On this basis the Panel concludes that “the amendments relating to the BOOT have been neither effective nor ineffective at improving the simplicity of the BOOT assessment”.⁶³ While the Panel proposed no draft recommendations, the ACTU reiterates our view of the need to amend the new provision allowing for FWC reconsideration of whether an approved agreement continues to pass the BOOT post-approval under s.227A - by allowing an employee organisation

⁶³ Draft Report, pages 156-157.

entitled to represent the industrial interests of a worker covered by the agreement to make an application for reconsideration (rather than, as at present, only an employee organisation covered by the agreement).⁶⁴

Chapter 20. Termination of Agreements

The ACTU welcomes the Panel's findings that the threat of terminating an enterprise agreement is not a legitimate bargaining tactic, that the early evidence indicates the amendments to s.226 of the FW Act have effectively discouraged this tactic, and that the legislation allows employers to seek termination of agreements for genuine reasons.⁶⁵

Chapter 21. Sunsetting of "Zombie" Agreements

The ACTU welcomes the Panel's finding that, generally, the provisions dealing with sunsetting of pre-FW Act Zombie agreements are operating appropriately and as intended. However, the Draft Report notes that "there remains a number of agreements made after 2010 that have long since passed their nominal expiry date and continue to operate. Some of these agreements were potentially approved at a time when pay and conditions were in a period of transition between pre-Modern Awards and Modern Awards meaning they may not have been assessed against current pay and conditions."⁶⁶

The ACTU agrees that there will still be operative enterprise agreements approved during the transitional period from 1 January 2010 to 31 December 2014. During that period, modern awards generally had provisions applying to employees transitioning off certain other industrial instruments onto the new modern awards. The FWC at that time was required to apply a better off overall test which took into account those transitional arrangements.⁶⁷

The ACTU also agrees with the Panel's observation that there will likely be a significant number of other enterprise agreements still in operation that, if assessed against the better off overall test

⁶⁴ ACTU Submission, recommendation 23.

⁶⁵ Draft Report, page 171.

⁶⁶ Draft Report, page 177.

⁶⁷ The transitional better off overall test, whilst no longer operational, can still be found in the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*, Schedule 2.1.

relative to the current relevant modern award, would not pass that test.⁶⁸ Such outcomes appear inevitable in the current scheme of the FW Act, given the indefinite operation of enterprise agreements and the requirement in ss.193(1) & (6) that the better off overall test is to be conducted using the terms of the modern award as they stood at the time of the application for approval of the agreement.

To address these issues, the Panel “recommends that further research to quantify the incidence and coverage of enterprise agreements that have nominally expired more than five years ago and identify the wages and conditions under these instruments as compared to the applicable modern awards should be undertaken”.⁶⁹ The ACTU strongly supports the recommendation and requests that it be made a formal (numbered) recommendation in the Panel’s Final Report.

In addition, for the reasons identified in the SDA’s submission to the Review,⁷⁰ the ACTU supports an amendment being made to the FW Act to broaden the category of persons with standing to apply for the termination of an agreement made in the transitional period from 1 January 2010 to 31 December 2014, to include registered organisations entitled to represent the industrial interests of employees covered by the agreement. At the least, any further research to understand the scale and nature of this issue could also provide recommendations on possible further legislative fixes.

Chapter 25. Equal Remuneration

The ACTU welcomes the Panel’s observations that the activities undertaken by the FWC in the Gender Undervaluation Priority Awards Review to support and facilitate the proceedings alleviate some of the evidentiary burden on the parties involved, and that this is an appropriate and important function of the FWC.⁷¹ The ACTU strongly agrees, and submits that it would be appropriate in future for the FWC to take on more of this role in these kinds of proceedings to alleviate the burden.

Unlike the Aged Care Work Value Case, which was initiated by union parties and ran for several years considering that industry alone, the Gender Undervaluation Priority Awards Review was

⁶⁸ Draft Report, page 177.

⁶⁹ Draft Report, page 178.

⁷⁰ See SDAEA, Submission to the Secure Jobs, Better Pay Act Review, page 6.

⁷¹ Draft report, page 208.

initiated by the FWC and involved multiple occupations and industries under 5 awards, with a huge diversity in the work performed. The Review ran for just over 6 months. The nature of the proceedings placed a substantial evidentiary burden on the parties, with union parties having only a few months to develop proposals and responses to the FWC's issues for consideration, and to prepare lay and expert evidence, and then only a month to prepare reply evidence responding to the significant volume of evidence filed by other parties.

In submissions filed on 18 June 2024, the ACTU put forward a proposal that there be an agreed methodology of assessment of work value of the occupations the subject of the Review, which would avoid the time and cost associated with the parties obtaining competing expert evidence, as well as producing an assessment method which could be deployed in subsequent proceedings.⁷² This occurred against a backdrop of the Aged Care decisions leveling criticism toward the failings of work value assessment and wage adjustment methodologies by the FWC's predecessors while offering no clear single alternative.

In a Statement published on 24 June 2024, the Expert Panel indicated it was prepared to accommodate the course proposed by the ACTU, including by way of the FWC engaging an independent expert if necessary, if a consensus about this course amongst the parties intending to participate in the proceedings could be achieved.⁷³

In submissions filed on 18 July 2024, the ACTU put forward several specific proposals on the development and use of an agreed methodology for the assessment of gender-based undervaluation that could be replicable for use in subsequent related proceedings, including that an expert be engaged by the FWC. The ACTU also made clear that while its first preference was that the methodology be developed by agreement between the parties, if that was not possible then the FWC should proceed to develop a methodology on its own initiative, and give the parties a reasonable opportunity to be consulted about and provide input on the proposed methodology.⁷⁴

A conference of the parties was held on 19 July 2024 to ascertain whether a measure of consensus as to the ACTU's proposal could be reached. In a Statement published on 12 August 2024, the FWC stated that there had been no consensus on the ACTU's proposal from the other

⁷² [Outline of Submissions](#) of the ACTU, 18 June 2024.

⁷³ [Statement and Directions](#) [2024] FWCFB 291 at [7].

⁷⁴ [Outline of Submissions](#) of the ACTU on the use of an agreed methodology for the identification of invisible skills, 18 July 2024.

parties, and accordingly it would not adopt the ACTU's proposal, and did not consider it appropriate to develop a methodology on its own initiative.⁷⁵ Unfortunately, this placed a significant burden on the parties to prepare both lay and expert evidence in a short timeframe, and for some awards, there was not enough time to engage an expert to do a full Spotlight analysis. In addition, because the occupations to be reviewed were chosen by the FWC rather than by the parties, it was in some cases difficult for unions to gather evidence in relation to those occupations (especially in the available time).

There was also some uncertainty, in respect of two of the awards, about which particular occupations were within the scope of the proceedings until fairly late in the Review. Union parties attempted unsuccessfully to resolve this through the conferences the FWC had programmed in August 2024, but ended up filing submissions with the FWC on 11 September 2024 to request clarity on this issue.⁷⁶ The FWC published a Statement on 20 September 2024 clarifying the list of occupations in scope.⁷⁷

One of the issues for determination in the Review was whether any changes to the classification structure were required.⁷⁸ It was not clear to union parties what the FWC's intentions were regarding changes to the classification structures until the hearing. The views of many union parties in relation to their awards were that changes to the classification structure were not required, and if changes were to be considered, that should occur after the rates of pay had been determined, so that evidence specific to that question could be prepared. The FWC put a proposed revised classification structure to some of the parties during the course of the hearing, giving unions very little time to respond. The reality of these proceedings was that six months was simply not enough time to do initial scoping, and to then address both rates of pay and any required changes to classification structures.

If the FWC continues to initiate these kinds of proceedings in future, then it would be helpful to address these issues. We strongly recommend that Draft Recommendations 9 and 10 be strengthened to include the following:

⁷⁵ [Statement](#) [2024] FWCFB 334 at [4]-[5].

⁷⁶ [Outline of Submissions](#) of the ACTU, at [21]-[32].

⁷⁷ [Statement](#) [2024] FWCFB 382, 20 September 2024.

⁷⁸ Issue 6 in the list of issues to be considered was: "To the extent that any adjustment to the existing classification structure in any of the awards is required, what are appropriate terms (including classification descriptors and minimum wage rates) for a new or modified classification structure?" - [Statement and Directions](#) [2024] FWCFB 291, 24 June 2024.

- That the FWC utilise its functions to commission research and undertake inquiries as essential supports to making progress on eliminating gender-based undervaluation. This should include consideration of broad principles and a methodology for the assessment of gender-based undervaluation (including commissioning expert evidence), that is replicable for future cases.
- That the Commonwealth Government resource the FWC to do this work through providing funding for expert evidence, research and other materials.
- That future proceedings be divided into multiple phases, including an initial inquiry phase which determines the scope of the proceedings and where parties have input into the issues to be determined and which awards and occupations are the subject of review; before moving into determinative phases to determine rates of pay and classification structures.
- That the FWC set a realistic timetable for the programming of FWC-initiated (and party initiated) proceedings, having regard to the time needed for the initial scoping phase, and the outcomes of that scoping (e.g. number of awards, the number of occupations, the diversity of the work performed and any challenges faced in obtaining evidence from those particular occupations). The timetable should also allow enough time for parties to bring evidence both about rates of pay and classification structures, in that order.
- That once the decision in the Gender Undervaluation Review is handed down, the FWC consult with stakeholders on how these kinds of proceedings should be conducted in future.

Chapter 26. Expert Panels

The ACTU welcomes Draft Recommendation 13, that s.620(1)(b) of the FW Act be amended to include gender pay equity as an additional area of expertise when appointing Expert Panel Members to the Annual Wage Review Expert Panel.⁷⁹ This recommendation was made by the ACTU and its affiliates because of the central importance of gender equality considerations in Annual Wage Reviews, and the need to ensure the Expert Panel has members with relevant expertise in its decision making.

⁷⁹ Draft Report, p217.

The ACTU notes the Review Panel's observation that an unintended consequence of the amendments is the requirement for the President to convene an expert panel for any (major or minor) determination or modern award decision involving the care and community sector, including minor variations across all awards, and that this could limit the Expert Panel's capacity to focus on more substantive issues. The Review Panel expresses the view that it is unnecessarily burdensome to require an Expert Panel for all matters, for example minor processes to update all awards to reflect legislative amendments. Accordingly, Draft Recommendation 14 is that the FW Act be amended to provide the FWC President with greater discretion in determining when a Care and Community Sector Expert Panel is required.⁸⁰

The ACTU is not privy to any information about whether the current provisions are presenting a capacity issue for the Expert Panel. Our affiliates report that having the Expert Panel has been very beneficial, and that there is a much greater understanding of the issues in care and community sector matters, including the nature of the sector, its workforce and funding arrangements. Unions would not want to see the role of the Expert Panel diminished. Whilst there may be an argument that the Expert Panel does not need to be formed for minor matters in which awards are updated to reflect legislative amendments, some sector specific knowledge may still be beneficial, given the unique nature of the sector. The FWC President should only have discretion in minor matters involving legislative updates to all awards that do not require consideration of care and community sector specific issues, and this discretion should be subject to seeking the views of the parties.

Chapter 27. Prohibiting Pay Secrecy

The ACTU notes the Panel's observation that there is limited evidence as to the impacts of the new FW Act provisions relating to pay transparency, including whether better informed employees are obtaining improved pay and conditions or the effects on workplace harmony.⁸¹ The ACTU agrees with the Panel's recommendation that the Australian Government should support comprehensive research to examine how the pay secrecy provisions are affecting employers and employees in advance of the further review of the SJPB Act proposed in Draft Recommendation 1. As well as making the proposal for further research a formal (numbered) recommendation of

⁸⁰ Draft Report, pages 217-218.

⁸¹ Draft Report, page 223.

the review, we reiterate the position in our original submission that such research should examine the drivers of workplace cultures and practices of pay secrecy and transparency (as well as sexual harassment and flexible work) including the role of unions and workplace delegates.⁸² The proposed research should also consider the need for further reforms, including requiring all job advertisements to include a pay rate that cannot be a range of more than 10% of the total remuneration (including incentives and bonuses);⁸³ and extending the pay secrecy provisions so they apply to all workers (not just employees).⁸⁴

Chapter 28. Prohibiting Sexual Harassment in Connection with Work

The ACTU welcomes the Panel's observations on the potential negative impacts of non-disclosure agreements (NDAs), including on the effective prevention of workplace sexual harassment.⁸⁵

The misuse of NDAs/confidentiality clauses (including as a tool to conceal sexual harassment, silence victims, protect perpetrators and organisations and avoid liability) is internationally recognised as a problem.⁸⁶ The #MeToo movement put this issue into the spotlight in 2017, and since then a significant shift in the understanding and regulation of NDAs has been taking place in many parts of the world. This has included legislative and other regulatory reform in multiple jurisdictions, informed by recent research and data about the harmful impacts of NDAs on victim-survivors, workplace cultures, and the ability of employers and institutions to prevent and respond to sexual harassment and discrimination.

There is a growing body of evidence about the acute harm caused by NDAs. International and Australian research demonstrates that NDAs cause serious harm and further isolate victim-survivors, many of whom are forced out of the workforce.⁸⁷ These agreements not only put other workers at risk, but also shield perpetrators from consequences. They exist primarily to protect

⁸² ACTU Submission, recommendation 3.

⁸³ ACTU Submission, recommendation 4.

⁸⁴ ACTU Submission, recommendation 5.

⁸⁵ Draft Report, page 229.

⁸⁶ R Featherstone and S Bargon, "Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work report", University of Sydney, Law School, 6 March 2024, at page 2.

⁸⁷ For example, see: House of Commons Women and Equalities Committee, The Use of Non-Disclosure Agreements in Discrimination Cases: Ninth Report of Session 2017-19, 5 June 2019, at page 9; Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces, ('Respect@Work Report'), at pages 558, 564; Olivia Leahy, 'The Channel 4 News Women are just the Tip of the Iceberg - Have Women of Colour been Disproportionately Silenced via NDAs for Years?' Speak Out Revolution (Web Article); Can't Buy My Silence Factsheet, accessed 11 September 2024 at NDA Fact Sheet May 2024.docx (squarespace.com); Submission of Victoria Trades Hall Council to the Consultation into Restricting the Use of Non-Disclosure Agreements in Workplace Sexual Harassment Cases, 6 September 2024, at pages 1, 5.

the reputations of employers, allowing them to evade responsibility for failing in their duty to provide a safe workplace. The availability of NDAs also discourages employers from addressing the systemic cultural issues that led to the harassment, despite positive duties to prevent sexual harassment being legislated.

The Victorian Government recently undertook consultation about restricting the use of NDAs in sexual harassment matters.⁸⁸ The ACTU's submission⁸⁹ made 11 recommendations, including that:

- the Victorian government legislate to restrict and reduce the use of NDAs in sexual harassment and discrimination matters;
- the Victorian government adopt the legislative model put forward by Victorian Trades Hall Council (**VTHC**), which prohibits the use of NDAs unless initiated by and the expressed wish and preference of the victim survivor; and allows them to waive their own confidentiality in the future by giving 7 days' notice, while the employer's confidentiality obligations remain intact.

Research into the use of NDAs in Australia found that broad and exhaustive NDAs remain the default confidentiality term used by lawyers in workplace sexual harassment settlements in Australia.⁹⁰ This practice persists despite a suite of reforms to Australia's sexual harassment landscape since the global #MeToo movement.⁹¹ Following the #MeToo movement, the AHRC has also confirmed that in Australia sexual harassment matters are routinely settled with NDAs.⁹²

The ACTU and its affiliates call for an end to the misuse of NDAs in workplace sexual harassment and discrimination cases. The ACTU strongly supports the campaign 'End the Silence' run by our affiliate, VTHC, to end the misuse of NDAs. Reform to restrict the use of NDAs/confidentiality clauses should be considered, along with the rest of the reforms recommended in the ACTU's original submission.⁹³

⁸⁸ Victorian Government, Consultation into Restricting the Use of Non-Disclosure Agreements in Workplace Sexual Harassment Cases - [Restricting NDAs in workplace sexual harassment cases | Engage Victoria](#)

⁸⁹ Submission of the ACTU to the Consultation into Restricting the Use of Non-Disclosure Agreements in Workplace Sexual Harassment Cases, 13 September 2024 - [Consultation into Restricting NDAs in Sexual Harassment Cases - Australian Council of Trade Unions](#)

⁹⁰ Featherstone and Bargon report, above n 85, at pages 1, 30.

⁹¹ Ibid.

⁹² Ibid, at page 15.

⁹³ ACTU Submission, recommendations 6-11, page 52.

The ACTU notes the Panel’s observation that as more evidence becomes available about how the different pathways to address sexual harassment are being used in practice, any changes to the role and powers of the FWC should be considered in the context of this broader framework (and with consideration to the appropriate role of the FWC).

With respect to the Panel, it is already readily apparent that there is a low take up of the FWC sexual harassment jurisdiction (for example when compared to the anti-bullying jurisdiction - the FWC received 1550 applications compared to just 180 for sexual harassment), and this low take up can be directly linked to the limitations of the jurisdiction identified in the ACTU’s original submission.⁹⁴ We strongly encourage the Panel to make recommendations in their final report to address these limitations.

We note also the Panel’s observation that aspects of the different pathways should be streamlined and aligned wherever possible, such as the costs to access them. In this context, we particularly emphasise the recommendation made in the ACTU’s original submission that the FW Act costs provisions be amended so that the equal access costs model applies to discrimination and sexual harassment matters brought under the FW Act, making it consistent with recent reform to federal anti-discrimination laws.⁹⁵ Without such reform, the FW Act pathway will continue to be utilised far less than the federal anti-discrimination framework.

Chapter 29. Anti-Discrimination and Special Measures

Not unlawful exemption

The ACTU welcomes the Panel’s observations regarding the ‘not unlawful’ exemption in s.351(2)(a).⁹⁶ The ACTU has raised concerns about the operation of this exemption, including in our submission on the *Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023*.⁹⁷

Section 351(2)(a) of the FW Act provides that the protections contained in s.351(1) do not apply to action that “is not unlawful under any anti-discrimination law in force in the place where the action was taken.” This ‘not unlawful’ exemption has been interpreted as meaning that only

⁹⁴ ACTU submission to the Secure Jobs Better Pay Independent Review, 29 November 2024, pages 47-52.

⁹⁵ Australian Human Rights Commission Amendment (Costs Protection) Act 2024 (Cth)

⁹⁶ Draft Report, page 234.

⁹⁷ ACTU Submission on the Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023, 29 September 2023 [D42-Closing-the-Loopholes-Bill-ACTU-Submission.pdf](#).

conduct which is specifically prohibited by discrimination legislation is actionable pursuant to FW Act s.351.⁹⁸ This has prevented workers from being able to bring adverse action claims on the basis of political opinion in NSW.⁹⁹

This is a complete inversion of the ideal policy position, which would be to ensure that the highest levels of protection from discrimination are afforded to workers. The FW Act should make clear that only conduct which is specifically sanctioned by anti-discrimination legislation is 'not unlawful' for the purposes of the FW Act. Moreover, where conduct might be considered discriminatory in one jurisdiction, but not discriminatory in another jurisdiction which the worker can access, that conduct should be considered discriminatory for the purposes of the FW Act – on the basis that if proceeding under anti-discrimination law the worker would have choice of jurisdiction and an available course of action. For example, many workers are covered by anti-discrimination legislation at a Commonwealth and at a state/territory level, which often have different provisions.

If one piece of legislation makes certain conduct unlawful and the other does not, the worker should be entitled to pursue a claim under the FW Act on the basis that the conduct is unlawful in a jurisdiction that covers them.

The operation of the not unlawful exemption is particularly concerning in light of the addition of 'subjection to family and domestic violence' as a protected attribute in the FW Act but not in a range of other state and territory jurisdictions. Without reform, there is a real risk that the new FW Act protections legislated in Closing Loopholes will be rendered useless for workers in the majority of Australian states and territories. This is therefore a matter which requires urgent clarification.

The ACTU calls for the following reforms:

- Amend the FW Act to clarify that only conduct which is specifically sanctioned by anti-discrimination legislation is 'not unlawful' for the purposes of s.351(2) of the FW Act; and
- Amend the FW Act to clarify that where conduct might be considered discriminatory in one jurisdiction but not in another jurisdiction that the worker has access to, the conduct should be considered discriminatory for the purposes of s.351(2) of the FW Act.

⁹⁸ *Scott McIntyre v SBS* [2015] FWC 6768; *Construction, Forestry, Maritime, Mining and Energy Union v Quirk* [2023] FCAFC 163.

⁹⁹ For example see *Scott McIntyre v SBS* [2015] FWC 6768.

Reproductive Health

The ACTU welcomes Draft Recommendation 15, that the government undertake further research on the need to extend protected attributes in the FW Act to perimenopause, menopause and other reproductive health issues.¹⁰⁰

Reproductive health and its impact on gender equality has been the subject of increasing discussion over the last few years, although there is still a concerning lack of research and data in the Australian context.

Despite the lack of research, there is a growing body of research evidence on poor workplace supports for reproductive health (including menstruation, fertility treatment, pregnancy loss and menopause), showing that inadequate support for these reproductive concerns contributes to inequality and gendered disadvantage at work, with some women reporting reduced wellbeing and economic participation, discrimination and withdrawal from the labour market, with significant impacts for gender equality and women's economic security.¹⁰¹

Unions have been actively engaging on these issues and the work they have undertaken has highlighted themes that are consistent with the broader research – including the impact on women's workforce participation and resulting economic consequences, the lack of understanding and awareness in workplaces, the difficulties workers experience in disclosing these issues and seeking appropriate workplace adjustments and support, and the need for a holistic and active approach to reproductive health to ensure all workers are safe and healthy at work, and can continue to work and progress in their jobs and careers.

To address these issues, the ACTU has made the following recommendations¹⁰²:

- That the government invest in research to better understand the impact of reproductive health on women's participation in the workforce, the effectiveness of workplace supports, the extent to which women reduce or end their workforce participation due to menopause, and the economic impact of that to them and the economy.

¹⁰⁰ Draft Report, page 235.

¹⁰¹ S Colussi, E Hill and M Baird, (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) page 20.

¹⁰² See [Submission](#) by the ACTU to the Senate Community Affairs References Committee on issues related to menopause and perimenopause, 10 May 2024.

- That the government consider funding a public education campaign to increase the understanding of the range of symptoms of menopause and the impact they have on those who experience them, including through unions and employer organisations.
- That reproductive health be included as a reason that workers can request flexible work arrangements under s.65 of the Fair Work Act.
- That reproductive health be included as a protected attribute in anti-discrimination law, including in the Fair Work Act provisions.
- That 10 days paid reproductive leave be included in the NES.
- That a Regulation and Code of Practice regarding reproductive health be developed under model WHS laws.

Chapter 30. Fixed-Term Contracts

The ACTU notes the Panel’s findings regarding the limitations on fixed-term contracts introduced by the amendments (now found in Part 2-9 of the FW Act), including that:¹⁰³

- uncertainties and ambiguities created by the many exceptions to these new limitations, and available extensions to fixed-term contracts, have potentially undermined the effectiveness of the reforms;
- the reforms were intended to improve job security, and while in many cases it is more beneficial to employ workers in ongoing roles, it is clear that many fixed-term contracts last more than the new limits of 2 years or 2 renewals and “that they can be an appropriate form of employment” in limited circumstances;
- there have been challenges for stakeholders in understanding and implementing the changes, given that the design framework of the amendments enables industry-specific conditions in modern awards and additional exceptions in the *Fair Work Regulations 2009*;
- the levels of anxiety experienced by some stakeholders in interpreting the new requirements correctly “are clearly an unintended consequence of these amendments”;
- “some form of limitation on or disincentive against the use of fixed-term contracts is appropriate”.

¹⁰³ Draft Report, pages 244-245.

The ACTU agrees strongly with this last observation, particularly given the Panel’s reference to the latest ABS data showing - after a decline in the use of fixed-term contracts in 2023 - an increase in their use in 2024 from 2.9% to 4.2% of the labour force (512,000 employees).¹⁰⁴ The Panel notes that “contrary to the intentions of [the reforms], the number of employees on fixed-term contracts has reached its highest level in a decade”, with growth especially strong in the education and training and healthcare/social assistance sectors. The Panel considers that: “These trends may be an unintended consequence, potentially reflecting efforts by employers in exempted sectors to engage employees on fixed-term contracts before the exception period ends. There may be other contributing factors.”¹⁰⁵ The Panel’s explanation for the increase partially holds true, when the industries with exceptions coming to an end are compared with those which saw growth in fixed-term contract use in 2024. For example, organised sport and high performance sport (international event organising bodies) have exemptions under the regulations until 1 November 2025, while live performance had an exemption until 1 November 2024. These all fall within the arts and recreation services sector, which had the equal second-highest use of fixed-term contracts in 2024 at 8% of its labour force.¹⁰⁶ Higher education also has an exemption, recently extended to 1 November 2025; the education and training sector saw an increase in fixed-term contracts from 8% in 2023 to 11% in 2024.¹⁰⁷ The extension of exemptions to charities, the not-for-profit sector, medical/health research and public hospitals - for 12 months from 1 November 2024 - will also likely lead to further employer resort to fixed-term contracts. Other factors may be behind the significant recent increase in the use of fixed-term contracts, including the possibility that some employers may be avoiding engaging casual workers due to the new casuals definition in the FW Act and the casual conversion pathway. However, that the increase is occurring reinforces the necessity of improving regulatory controls in some form.

In Draft Recommendation 16, the Panel outlines two alternative approaches to limit the use of fixed-term contracts, for discussion and stakeholder input:

¹⁰⁴ Draft Report, pages 239-242; ABS, *Characteristics of Employment, Australia* (Working Arrangements), August 2024, at: [Working arrangements, August 2024 | Australian Bureau of Statistics](#).

¹⁰⁵ Draft Report, page 244.

¹⁰⁶ ABS, *Characteristics of Employment, Australia* (Working Arrangements), August 2024.

¹⁰⁷ *Ibid.*

- Amending the existing framework to make the limitation and current exceptions more readily applicable in practice (for example, by increasing the years/renewals threshold or clarifying the Australian Government funding exception);
- Introducing a principles-based framework into the Fair Work Act with specific limitations and exemptions primarily determined through the FWC (further consideration would need to be given to technical aspects of implementation including application to award/agreement free employees). [This would replace the FW Act, Part 2-9, Division 5 framework].

The ACTU, along with affiliates with higher levels of members engaged on fixed-term contracts, favours the first option proposed by the Panel – with the major qualification that we would not entertain any increase in the thresholds that trigger the limitations on use of fixed-term contracts under s.333E of the FW Act. The inclusion of those limitations formed part of a key policy intent of the SJPB Act reforms, to enhance job security and reduce the use of fixed-term contracts.¹⁰⁸ The new limitations were also a significant advance in protections for workers against employer abuse of fixed-term contracts, through practices such as placing workers on rolling contracts where they were frequently uncertain as to whether their employment would be renewed.¹⁰⁹ These newly-won protections for workers must be preserved in the legislation, rather than being removed as proposed in the Panel’s second option. The adoption of a principles-based framework overseen by the FWC would enable the unique circumstances of certain sectors to be addressed through changes to relevant modern award provisions. However, it would also create considerable uncertainty (while FWC cases were being worked through) and see the loss of statutory protections for many workers in sectors where some of the current legislation/award interaction problems do not arise. In any event, the FWC already has at least some capacity to address industry-specific issues relating to the interaction between FW Act provisions and modern award terms (for example, through the current higher education awards case).

We support a variation to the Panel’s first option which would see the current s.333E limitations on fixed-term contracts retained in their current form, with the exceptions set out in s.333F

¹⁰⁸ See e.g. Parliament of the Commonwealth of Australia, *Revised Explanatory Memorandum to the Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022*, pages iii, xix, 99.

¹⁰⁹ See e.g. Industrial Relations Victoria, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report*, 31 August 2016, pages 286-289; Parliament of the Commonwealth of Australia, *Revised Explanatory Memorandum to the Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022*, page 99.

amended to provide both clarity and a narrowing of key exceptions to better meet the policy intent of the reforms to reduce the use of fixed term contracts and work insecurity. We reiterate the view expressed in our original submission to the review, that: “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.”¹¹⁰ We also repeat and urge the Panel to consider recommendations 13-15 in our original submission:

13. Reduce the extensive list of exemptions in the Act, by either amending or deleting key exemptions in s.333F, as detailed on pages 60 to 61 of this submission.

[In summary, these were as follows:

(1) The s.333F(1)(a) specialised skills exemption is too broad. It needs to be time-limited and only apply if the employer does not already engage staff with the same skills.¹¹¹

(2) In s.333F(1)(b), confine the training arrangement exemption to an apprentice/trainee under a recognised formal training scheme/arrangement.

(3) The s.333F(1)(c) essential work in peak period exemption is unnecessary because such a period would not reasonably last beyond 2 years.

(4) The same applies to the emergency circumstances exemption (s.333F(1)(d)), along with the need to clarify the meaning of ‘temporary absence’ of another employee.

(5) In s.333F(1)(f), there is a need to tighten two identified problems with the government funding exception (‘funded in whole or part’ could be abused by unscrupulous employers, change this to ‘funded in whole or mostly’; and in relation to ‘no reasonable prospect of funding being renewed’, an amendment is required to address a situation where funding is not technically renewed but a new funding stream emerges to support the same or similar work.]

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 s.333E(1) does not

¹¹⁰ ACTU Submission, page 59.

¹¹¹ This is the stated intent of the exception (although is not reflected in the wording of the provision): see *Revised Explanatory Memorandum to the Secure Jobs, Better Pay Bill*, page 101.

apply only to the extent that any of those circumstances is expressly permitted by the terms of a clause in that award.

Finally, a significant driver behind employer concerns about the imposition of restrictions on fixed-term contracts appears to be a financial one: these limits mean some employees may have to be engaged on a permanent basis (whether full-time or part-time), with the consequential risk that they will have to be provided with notice (or payment in lieu) and redundancy payments upon termination of employment. To the extent that this risk is present in government-funded sectors, it could be addressed by appropriate federal government funding arrangements. The ACTU is willing to participate in a tripartite process to work through these issues with all levels of government and employer representatives.

Chapter 31. Flexible Work

The ACTU notes the Panel’s findings that the amendments to the right to request flexible work are working as intended. The Draft Report acknowledges the improved experience of the SDA and its members with such requests in this regard.¹¹² We also draw the Panel’s attention to the positive experiences of the IEU, CPSU and ASU in our original submission and in their own submissions.¹¹³

The ACTU notes the article by Amanda Selvarajah published in the Australian Journal of Labour Law¹¹⁴, the findings of which are discussed by the Panel in the Draft Report.¹¹⁵ The ACTU concurs with the findings of the article as quoted by the Panel that “the ‘stringent scrutiny’ applied by the FWC when considering the ‘nexus between an employee’s relevant circumstance and their flexibility request’ has resulted in them applying a ‘narrow approach’ to establishing eligibility for flexible work requests and is, as a result, undermining the intent of the flexible work arrangement provisions.”¹¹⁶ In multiple flexible work decisions, the FWC has found that the medical or other evidence required to establish a disability or status as a carer was unsatisfactory.¹¹⁷ Selvarajah

¹¹² Draft Report page 250.

¹¹³ ACTU Submission, at page 65

¹¹⁴ AD Selvarajah, ‘Proving the Right to Request Flexible Work: The Concerning Consequences of Comments in *Quirke v BSR*’ (2024) 37 *Australian Journal of Labour Law*.

¹¹⁵ Draft Report, pages 249-251.

¹¹⁶ Draft Report, page 249.

¹¹⁷ For example, see *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).

argues that deeming requests ineligible due to a lack of evidence prevents scrutiny of the reasonableness of employer responses, which may embolden employers to reject requests, and concludes that “it is therefore essential that this approach is revised.”¹¹⁸ Selvarajah argues that Parliament should consider clarifying and expanding eligibility requirements relating to the right to request flexible work to ensure that its recent amendments serve its intended purpose.¹¹⁹

The ACTU raised these concerns in our initial submission¹²⁰ and agrees with the concerns and findings articulated in the Selvarajah article. We note however the caution of the Review Panel in recommending further change given that the provisions are still in their early stages.

Further, we note the recent FWC decision in *Naden v Catholic Schools Broken Bay Limited as Trustee for the Catholic Schools Broken Bay Trust* [2025] FWC 317, in which the FWC found that the school had reasonable business grounds to reject the flexible work request of a teacher and coordinator seeking to return part time to her leadership role after a period of parental leave. The FWC supported the school’s offer of a lower paying teacher position. The outcome of the matter is that a woman in an executive role was unable to return to it after parental leave because she needed to work part time due to her caring responsibilities. The impact of this decision on the member will be a 15% pay cut and disruption to her career development and progression. The use of reasonable business grounds to deny the request has clear gender equality implications which undermine the intent of the amendments. This decision demonstrates a potential problem with the breadth of reasonable business grounds defence in s.65A(5), although is a single member decision.

The ACTU calls for the Panel to have an explicit recommendation that the Government commission research to examine how the flexible work provisions are working in practice, in advance of the further review of the SJBPA Act proposed in Draft Recommendation 1. Such research should further examine the issues identified in the Draft Report, this submission and the original ACTU one, workplace cultures around flexibility and how requests are being responded to in workplaces, including the role of unions and workplace delegates. It could also examine the experience of other jurisdictions with systems to negotiate and secure flexible working arrangements, especially in the

¹¹⁸ AD Selvarajah, ‘Proving the Right to Request Flexible Work: The Concerning Consequences of Comments in *Quirke v BSR*’ (2024) 37 *Australian Journal of Labour Law* 11–12.

¹¹⁹ *Ibid.*

¹²⁰ ACTU Submission, page 66.

UK. This research could be conducted in conjunction with the proposed research on pay secrecy the Panel has also recommended and that the ACTU also put forward.¹²¹

Chapter 34. Enhancing Small Claims Processes

The ACTU welcomes the Panel’s findings that the SJBPA Act amendments intended to provide a more effective and accessible small claims procedure under the FW Act are working as intended. However, the Panel also identified continuing complexity in the small claims process, highlighting the need for support services to enable individuals to bring small claims as part of “broader procedural and institutional reform”.¹²² Framing its Draft Recommendations 9-11 as consistent with those in the Department of Workplace Relations Review of the Fair Work Act Small Claims Procedure,¹²³ the Panel made several proposals including that:

- the Government consider additional funding for legal assistance in small claims matters (e.g. duty lawyer services, provision of targeted community legal education initiatives, law firms assisting more workers) - the ACTU recommends that this should also include additional funding for community legal centres such as the Young Workers Centre in Victoria and trade unions to assist workers in small claims matters;
- assessing data on the increased small claims cap from \$20,000 to \$100,000 to consider whether further changes are necessary; and
- evaluating other options including extending the small claims jurisdiction to a tribunal or establishing an industrial court.

The ACTU welcomes these draft recommendations and we look forward to engaging with the Government on them, including as part of the ongoing consultation process arising from the Department of Workplace Relations Review.

Chapter 35. Prohibiting Employer Advertisements with Pay Rates that Would Contravene the Act

The ACTU notes the Panel’s observations that the amendments to the FW Act prohibiting employers from placing advertisements with pay rates below applicable legal minima are having their intended effect, although with the limitation that the prohibitions do not apply to pay rates posted

¹²¹ Draft Report, page 223. ACTU submission page 45.

¹²² Draft Report, page 265.

¹²³ See: [Review of the Fair Work Act Small Claims Procedure – Report – February 2024](#)

in closed communications environments.¹²⁴ We support Draft Recommendation 18, that the FWO should engage with job advertising platforms and other technology stakeholders to ensure all job advertisements include accurate and lawful information. The issue could also be addressed by expanding the obligation to advertise correct pay rates beyond “employers” in s.536AA of the FW Act, to include job platforms and other providers of such information.¹²⁵

The ACTU also notes the Panel’s observation that there is no current legal requirement that job advertisements include pay rates, and therefore (after considering further Australian evidence and international approaches) “it may be appropriate to consider further reforms to require pay and other information in job advertisements”.¹²⁶ We consider that requiring pay rates to be included in job advertisements is a necessary further measure to combat wage theft.¹²⁷

Chapter 38. Closing Loopholes Act: Right of Entry – Assisting Health and Safety Representatives

The ACTU notes, regarding the amendments to Part 3-4 of the FW Act allowing health and safety representatives (HSRs) to request the assistance of union officials without those officials having to meet certain federal right of entry requirements, the Panel’s view that it has no appropriate evidence on which to make any findings or recommendations.¹²⁸ The ACTU strongly supported this reform, introduced by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, to reverse the effect of the Full Federal Court decision in *Australian Building and Construction Commissioner v Powell*.¹²⁹ The reform also implements a recommendation of the 2018 Boland Review into Model Work Health and Safety Laws, that Safe Work Australia and relevant agencies consider how to achieve the policy intention that a union official accessing a workplace to assist an HSR not be required to hold a right of entry permit under the FW Act or other industrial law.¹³⁰

Under the relevant provision as amended,¹³¹ the requirements for entry onto premises in ss.494(1) and 495-498 “do not apply to an official of an organisation assisting a [HSR] on

¹²⁴ Draft Report, pages 270-271.

¹²⁵ Such an extension would need to be sensitive to constitutional limits, but these still permit a breadth of regulation, see for example s. 338.

¹²⁶ Draft Report, page 271.

¹²⁷ See also recommendation 4 of the ACTU’s original submission to the review, discussed under 27. Prohibiting Pay Secrecy, above.

¹²⁸ Draft Report, page 283.

¹²⁹ [2017] FCAFC 89.

¹³⁰ M Boland, *Review of the Model Health and Safety Laws: Final Report*, 2018, recommendation 8.

¹³¹ FW Act, s 494(4).

request under a provision of a State or Territory OHS law equivalent to paragraph 68(2)(g) of the *Work Health and Safety Act 2011*". That latter provision allows an HSR in exercising their powers or functions to "whenever necessary, request the assistance of any person". As a result, a union official can enter premises to assist an HSR without holding a federal right of entry permit, without providing 24 hours' notice of entry, and may access the premises during or outside working hours. However, some requirements continue to be imposed under the relevant state legislation, for example in Western Australia the HSR must give at least 24 hours' notice of required access by a person they invite into the workplace to assist them.¹³²

We note the Panel's observations about employer concerns that the new provisions could be exploited by union officials to gain access to workplaces under the guise of providing assistance to HSRs, and that FWC oversight of officials' entry onto sites (e.g. through the permit system and fit and proper person assessments) has been lost. However, the ACTU welcomes the Panel's assessment "that more actual evidence of misuse is required before attempting to re-impose requirements or establishing an oversight mechanism".¹³³ Indeed in our view, this change in the law needs to be given more opportunity in practice at the workplace level, to assess its full implications (including whether amendments are needed to address union concerns about its limitations).¹³⁴ In any case, employers retain the protections against hindering or obstructive behaviour (and other forms of misconduct) by union officials entering worksites to assist HSRs, under s. 494(5) which modifies the application of ss. 499-504 for this purpose.

¹³² *Work Health and Safety Act 2020* (WA), ss. 68(2)(g), (3A)-(3B).

¹³³ Draft Report, page 282.

¹³⁴ See Draft Report, pages 281-282.

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