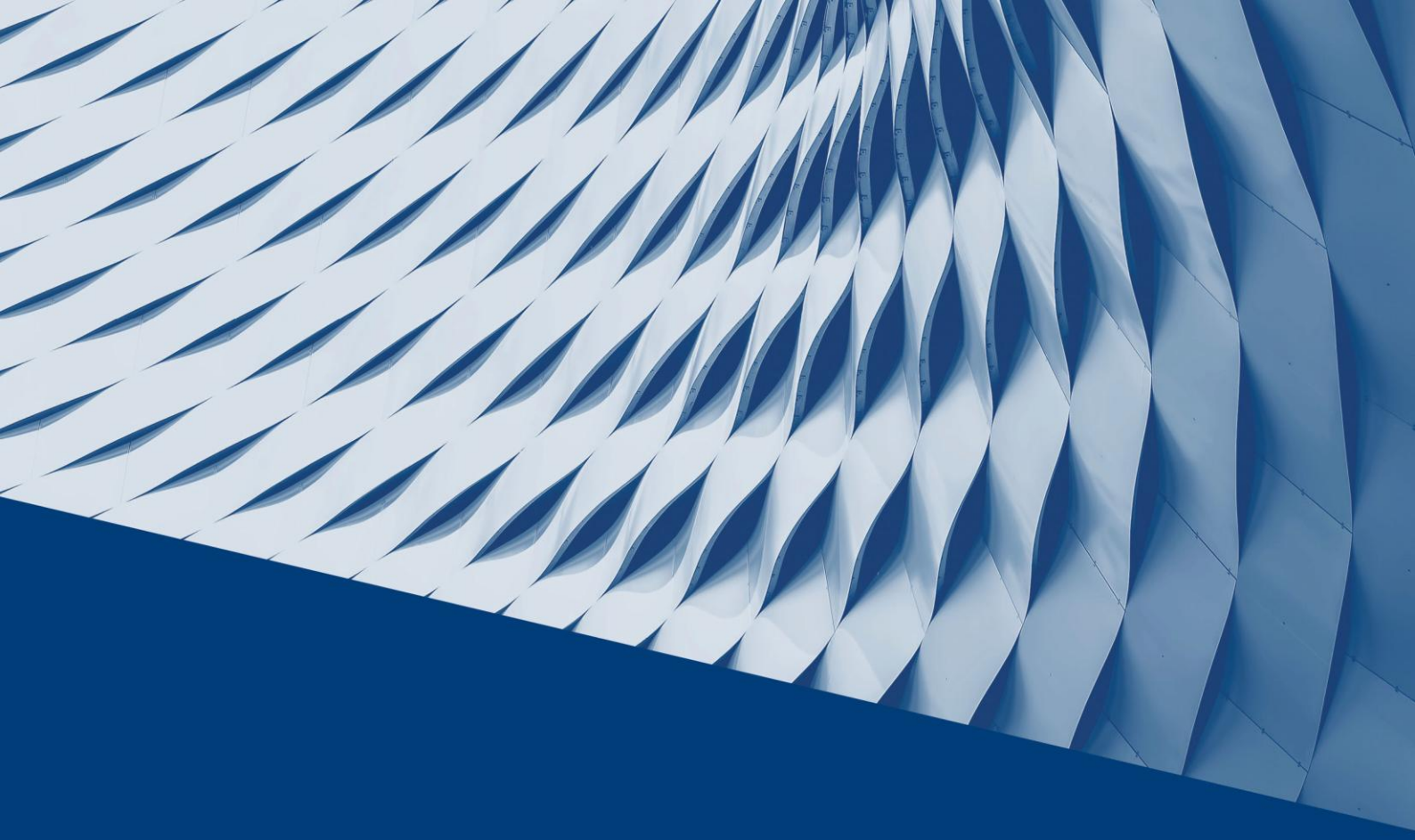


Submission to Review of the Closing Loopholes Acts

Submission by the Australian Council of Trade Unions to the Independent Statutory Review into the operation of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*

ACTU Submission, 06 March 2026
ACTU D. No 17/2026

ACTU
australian council of trade unions

Contents

About the ACTU

The Australian Council of Trade Unions (ACTU) is Australia's peak national body of unions, founded in 1927. Our 37 affiliated unions and trades and labour councils represent nearly 2 million members across all industries and occupations. With this movement, the ACTU has a long and proud history of winning for working people, which it continues to build upon.

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 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.

Part 1: Overview & Summary

The ACTU welcomes this independent statutory review into the operation of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (**Closing Loopholes Act**) and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (**Closing Loopholes No. 2 Act**). Both of these laws made extensive amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) along with several federal safety statutes. The review will:

- consider whether the operation of the amendments is appropriate and effective;
- consider whether the operation of the amendments is appropriate and effective;
- consider whether further amendments to the FW Act, or any other legislation, are necessary to improve the operation of the amendments or rectify any unintended consequences that are identified.[1]

The Terms of Reference also state that:

> The review must also further consider the effectiveness of the amendments made by the Family and Domestic Violence Leave Act, taking into account the 2024 independent statutory review of this Act which found that while the entitlement is operating as intended, more time was needed for employers and employees to experience the existing entitlement before further calls for reform were progressed.[2]

The Closing Loopholes Act and Closing Loopholes No. 2 Act originated in the form of one bill introduced into Parliament on 4 September 2023. The Government's intention in introducing the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**Closing Loopholes Bill**) was to complement the reforms introduced through the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (Cth), which were primarily aimed at improving job security, getting real wage increases moving and closing the gender pay gap. While these changes were already showing signs of success, as the then Minister explained:

> … many Australians are not receiving the full benefit of these changes, because of loopholes that allow pay and conditions to be undercut. For these workers the minimum standards in awards and enterprise agreements are words on a page, with little relevance to their daily lives. The businesses which use these loopholes are able to

[1] Review of the Closing Loopholes Acts, Terms of Reference, 5 December 2025.
[2] Ibid.

> undercut Australia's best employers in a race to the bottom. If we want workers to be paid properly we need to close the loopholes.[3]

Among the loopholes identified by the Minister as requiring attention in the Closing Loopholes Bill were:

- the ability of employers to treat someone as a casual against their wishes, even if they are working like a permanent worker;
- the labour hire loophole through which a business, having agreed on rates of pay in an enterprise agreement, then asks labour hire workers to work for less;
- the loophole through which workers who do not meet the common law definition of "employee" miss out on employment rights and entitlements, especially those engaged by platforms in the gig economy and in the road transport sector;
- the ability of employers to escape criminal liability for wage theft.[4]

In addition to the provisions addressing these matters, other provisions in the original Bill included new protections and rights for workplace delegates; a new jurisdiction in the Fair Work Commission (**FWC**) to resolve unfair contract terms in services contracts; and a new offence of industrial manslaughter at the federal level.[5]

The Senate resolved in December 2023 to split the Closing Loopholes Bill into two separate bills, ultimately passed by Parliament as the Closing Loopholes Act and Closing Loopholes No. 2 Act on 7 December 2023 and 12 February 2024 respectively.

The ACTU welcomed the measures proposed in the Closing Loopholes Bill and strongly supported its passage through Parliament (subject to a series of proposed technical amendments detailed in our submission on the Bill).[6] As we stated at the time:

> Our laws have not kept pace with the changing nature of work or the ways some employers have restructured, reorganised or use technicalities to avoid laws that are designed to protect working people.
>
> The existence of myriad loopholes means that even where industrial legislation is designed to protect working people's interests, it is not operating as designed. Balance

---

[3] Hon Tony Burke MP, Employment and Workplace Relations Minister, *Second Reading Speech - Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*, 4 September 2023.
[4] Ibid.
[5] Ibid.
[6] ACTU, *Submission on the Closing Loopholes Bill 2023*, pages 6-8.

and fairness must be restored to a system that for too long had the scales tipped towards the interests of large corporate interests over every day working Australians.[7]

In the view of the ACTU and our affiliated unions, the reforms introduced through the Closing Loopholes Act and Closing Loopholes No. 2 Act have begun to deliver on their objectives. Some aspects of the new laws have only been in operation for just over two years, while others have been in effect for a considerably shorter period.[8] Even so, significant progress has been made in a number of key areas as detailed in our submission, for example:

- A McKell Institute Report found that, as at April 2025, the changes enabling the FWC to make (in effect) "same job, same pay" orders for labour hire workers were: "already delivering significant wage increases for workers. In the mining industry alone, approximately 1,500 workers have seen average pay rises of around $33,500 each, with some receiving up to $60,000. Meat workers and retail distribution labour hire workers are also seeing strong wage gains."[9]
- The McKell Report projected that: "Another 4,300 mining workers stand to gain from orders pending or under consideration. If successful, the aggregate annual wage uplift across the industry would be approximately $200 million."[10]
- Gig workers engaged by digital labour platforms have enjoyed legal rights for the first time under Australian law, bringing cases in their hundreds to challenge unfair deactivation or suspension from platforms. These workers are also on the way to having legally enforceable pay rates and other minimum conditions, in cases currently being pursued by the Transport Workers Union (**TWU**).
- A new commonsense definition of casual employment has contributed to reducing Australia's record levels of casual employment from 23.3% of the labour force in 2016 down to 19.5% today.[11]
- These outcomes build on the successes of the earlier reforms introduced by the Secure Jobs Better Pay Act: in the 2 and a half years to June 2025, over 1 million workers were added to collective agreements, a 55.6% increase in collective agreement coverage;[12]

[7] Ibid, pages 4-5.
[8] See Fair Work Ombudsman: Closing Loopholes - Timeline of changes
[9] E Cavanough and M Douglass, *Closing Loopholes, Opening Opportunities: How Same Job, Same Pay is Delivering for Workers & Communities,* Report, McKell Institute, April 2025, page 5.
[10] Ibid.
[11] ABS, Working Arrangements, August 2025.
[12] ACTU, *Economic briefing – Trends in Federal Enterprise Bargaining*, June 2025.

and greater access to multi-employer bargaining, in sectors like early childhood education and care, has contributed to a narrowing of the gender pay gap.[13]

Part 2 of this submission lists our Recommendations for further improvements to the amendments introduced by the Closing Loopholes laws.

In Parts 3 and 4, the submission reviews all parts of the Closing Loopholes Act and Closing Loopholes No. 2 Act, showing that they have either been a success, or acknowledging in some cases that it is still too early to tell. This provides the context for our Recommendations, which are mostly 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 would encourage employer organisations to consider supporting them.

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 on the operation of the new provisions (where decisions have emerged), as well as emerging trends in ABS and other data.

Part 2: Recommendations

Regulated labour hire arrangement orders Service provider exemption cast too broadly	***Recommendation 1:*** Narrow the service provider exemption by providing that an employer is only an exempt 'service provider' if: • The tasks performed by the regulated employees are of a specialised nature when compared to the tasks performed by the host employees, and • Tasks of that kind are not, have not been, or could not be performed by employees of the regulated host, or by employees of a person engaged in a joint venture or common enterprise with the regulated host. In addition, amend the provisions to provide that the evidentiary onus is on the employer (rather than the applicant for a RLHAO) to demonstrate the service provider exemption is made out.
Definition of "protected rate of pay" may not require workers of comparable	***Recommendation 2:*** Ensure s.306F(4) of the FW Act requires that the applicable rate of pay is determined by reference to an employee of the host

[13] ACTU, Union wins help narrow the gender pay gap, Media Release, 28 November 2025.

service, experience, skills and competencies to be paid the same	employer with equivalent length of service, experience, skills and competencies, or who performs the same work, tasks or duties as the regulated employee.
Trainees and apprentices are not entitled to the protections of RLHAOs	***Recommendation 3:*** Remove the s.306G(1) exception.
Delays in RLHAOs being issued	***Recommendation 4:*** Amend the FW Act to provide for back-dating of orders to the date on which the application is made (where this is sought by the applicant for the order).
Limitation of orders to "same pay" not "same conditions"	***Recommendation 5:*** Amend the FW Act to provide that: • while an RLHAO is in effect, the employer and the regulated host must afford the regulated employees equal access to training, amenities, rostering rights and host employer vacancies; and • any other conditions in the host enterprise agreement that are more favourable, where practicable.
Complexity and unintended consequences in how the FWC must specify the scope of an order	***Recommendation 6:*** Amend s 306E such that the default scope of the order issued is identical to scope of the covered employment instrument. The scope would only be limited if the contractor employer has made out a positive case that parts of its workforce perform genuine service provision (i.e. it is specialised labour not performed by host employees), and the exclusion should be limited to that group of workers engaged by that employer.
Extending RLHAOs to non-national system employers	***Recommendation 7:*** Commonwealth and relevant State Governments should work to ensure that the principle of "Same Job Same Pay" for labour hire workers applies across all jurisdictions. As a next step, this should be placed on the agenda of the next Workplace Relations Ministers meeting to discuss and agree on a plan on how to achieve this.
Enhancing delegates' rights "Reasonable communication"	***Recommendation 8:*** Insert after s.350C(3)(a) a new sub-paragraph: "(aa) reasonable communication must include the ability for a workplace delegate to be able to communicate directly with members and any other persons eligible to be such members".
Further issue to be addressed arising from the Fair Work Commission Full Bench decision on delegates' rights	***Recommendation 9:*** Insert a new subsection after s 350A(1): (1A) Where a workplace delegate is entitled under section 350C(2) or (3) to represent or communicate with an employee who is employed by a different employer, that other employer must not engage in conduct that would, if engaged in by the employer of the workplace delegate, contravene subsection (1).
Section 205A and delegates' rights terms in enterprise agreements	***Recommendation 10:*** Delete the existing s.205A(2) and insert: (2) However, if, when the agreement is approved: (a) the enterprise agreement does not include a delegates' rights term (within the meaning of section 12); or

	(b) the enterprise agreement includes a delegates' rights term that is less favourable than the delegates' rights term in one or more modern awards that cover the workplace delegates; then: (c) the most favourable delegates' rights term of those in the modern awards, as determined by the FWC, is taken to be a term of the enterprise agreement; and (d) to avoid doubt, if the enterprise agreement includes a term that gives a workplace delegate an entitlement that is more favourable for the workplace delegate than an entitlement conferred by the delegates' right term taken to be included under paragraph (c), the enterprise agreement term continues to apply.
Provide stronger protections against discrimination, adverse action, discrimination and harassment "Not unlawful" exception	***Recommendation 11:*** • 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). • 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.
Streamlining PTSD workers' compensation claims for first responders	***Recommendation 12:*** Remove the requirement for an injured worker to have suffered PTSD as a result of providing an emergency response. Instead, the provisions ought to allow presumptive liability to be accepted for those workers who are exposed to a stressor/s that would satisfy criterion A of the PTSD DSM-V diagnostic criteria.
Extend the powers of the FWC to set minimum standards for "employee-like workers" Lost pay orders for unfair deactivation	***Recommendation 15:*** Amend ss.536LP and 536LQ to clarify that reactivation prior to hearing does not impact a driver's ability to access a lost pay order, despite no order for compensation being available under s.536LP(3).
Availability of lost pay orders following suspension	***Recommendation 16:*** Section 536LW(b) - add "at the time of application" before the comma. This cements the findings in *Hotak v Rasier Pacific* which effectively determined that s.536LW(b) was a point in time assessment at the time of application.
Content of MSOs for employee-like digital platform workers	***Recommendation 17:*** Add terms enabling workers to access their rights to join a union/freedom of association to terms that may be included in s.536KL.

Interaction between MSOs/CCOs and state-based instruments	***Recommendation 18:*** In determining the scope and coverage of an MSO or CCO, the FWC should be required to either: • excise from coverage regulated workers who are covered by existing State based instruments that provide terms and conditions of engagement to regulated workers that are more beneficial; or • take into account existing State based instruments that provide terms and conditions of engagement to regulated workers where those terms and conditions are more beneficial than those provided for in the proposed MSO or CCO.
Interim MSO/CCO orders	***Recommendation 19:*** The FWC should be conferred with power to make a MSO or CCO to deal with an urgent dispute. Such an order could be temporally limited (e.g. for 60 days) with the capacity to extend the operation of the order.
Minimum Standards Guidelines	***Recommendation 20:*** Limit guidelines to supplementation or interpretation of MSO or CCO as they operate.
Extension of the regulated workers MSO framework to other contractors/ freelancers	***Recommendation 21:*** Amend Chapter 3A of the FW Act to extend the MSO framework to independent contractors/freelancers in certain named occupations that have "employee-like" characteristics, based on the model proposed by the ACTU in this submission.
Give workers the right to challenge unfair contractual terms	***Recommendation 22:*** Amend s.536ND to allow for applications to be made by a registered organisation in respect of a class of services contracts that are alleged to contain an unfair term(s). Amend s.536NA to clarify that such applications can apply to a single services contract or multiple services contracts where they are the same or substantially the same. ***Recommendation 23:*** Amend s.536NC to allow for orders to be made for the payment of money in connection with any unfair contract that is set aside in full or part or amended or varied.
Amending the definition of casual employee and providing the employee choice pathway	***Recommendation 24:*** Repeal s.66AAC(4)(b) and s.66AAC(5) ("fair and reasonable operational grounds" for refusing an employee's notification that they believe that their employment is no longer casual). ***Recommendation 25:*** Insert a new provision in the FW Act in similar terms to proposed s.359A in the original Closing Loopholes Bill that would prohibit employers deliberately representing an employment relationship as casual if, in fact, the true nature of the relationship is other than casual.

	Recommendation 26: Insert a new subsection in s.67 to clarify that all service other than service as a casual employee as defined by s.15A is counted as continuous service for the purposes of the NES entitlement to unpaid parental leave in s.67(1).
Meaning of "employee" and "employer" in the FW Act	***Recommendation 27:*** Provide the FWC with power to arbitrate on the question of whether a worker is an employee under s.15AA directly, rather than as an artefact of another proceeding such as eligibility to bring an unfair dismissal claim.
Enabling multiple franchisees to access the single enterprise agreement stream	***Recommendation 28:*** That consideration be given to extending the regime of employee organisation consent (s. 180A) and voting request orders (240A-240B) to single enterprise agreements proposed in franchise settings under the amended s.172.
Transitioning from multi-enterprise agreements	***Recommendation 29:*** That s.193(1)(b)) be amended to ensure that both current employees and employees foreseeably within the scope of a replacement single enterprise agreement are assessed against the conditions in the extant multi enterprise agreement.
Strengthening right of entry to investigate underpayments	***Recommendation 30:*** Remove from subsection 519(1)(b)(ii) the words '*and the FWC reasonably believes that advance notice of the entry given by an entry notice would hinder an effective investigation into the suspected contravention or contraventions.'*
Workplace determinations	***Recommendation 31:*** Insert new subsection (2A) following subjection 270A(2) in the following, or similar, terms: (2A) A mandatory term that is included in the determination to comply with subsection 270(1)(c) and section 273, and that deals with a particular matter, must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter. Subsection 273(4): After "must include the model flexibility term", insert ", or, if section 270A applies, a term that complies with section 270A,". Subsection 273(5): After "must include the model consultation term", insert ", or, if section 270A applies, a term that complies with section 270A,".
Right to disconnect	***Recommendation 32:*** Amend s.333M(3) by adding the following to the factors that may be considered in determining whether an employee's refusal under s.333M(1)-(2) is unreasonable: (f) Whether the employee is on approved leave or another authorised absence. (g) The extent to which the employer has made adequate staffing arrangements and planned for workplace fluctuations to minimise the need for out-of-hours contact.

Family and Domestic Violence Leave Act Evidence	***Recommendation 33:*** • There is a need for further education and training for employers and better guidance on the type and scope of evidence that can reasonably be required, and the difficulties that providing evidence can present for victim-survivors. • To remove a significant barrier to workers applying for paid FDV leave, the Australian Government should develop guidance on forms of evidence that are not unreasonable, onerous, intrusive, or difficult for a worker to access.
Confidentiality	***Recommendation 34:*** There is a need for employers, small businesses and workers to be educated about the confidentiality requirements to ensure that all employers are aware of their obligations, and that workers have confidence that those obligations will be met.
Lack of support, awareness and knowledge	***Recommendation 35:*** More education and training is required to ensure employers are fully aware of the new entitlement and their obligations, as well as how to respond and handle requests in appropriate, sensitive and supportive ways. In particular, there is a need for education around evidence and confidentiality requirements. 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.
Promoting strong bargained outcomes	***Recommendation 36:*** The Australian Government should consider ways of promoting the success of employers, employees and their unions in bargaining for greater entitlements to paid FDV leave.
Extension of entitlement to all employees and employee-like workers	***Recommendation 37:*** Access to paid FDV leave should be expanded to include all workers where there is an employment, or employee-like relationship. As a first step this could be done by including it in the matters that a Minimum Standards Order can cover.
Strengthen ability of casual employees to access FDV leave	***Recommendation 38:*** Amend s.106BA(1) through an additional provision to cover situations where casual employees are not rostered into the future due to their FDV-related circumstances. Under this additional provision, leave would be available based on the average number of hours the casual employee worked in the three months preceding the need to take FDV leave. For example, if the average hours of a casual employee requesting FDV leave

	were two days a week over the past three months, they would be paid two days of paid FDV leave per week.
Make entitlement accessible to immediate family of people experiencing FDV	***Recommendation 39:*** Amend the NES entitlement so that paid FDV leave can also be accessible to immediate family of people experiencing FDV, to allow people to take leave to support victim-survivors.
Fixing issues with the legislative drafting	***Recommendation 40:*** Include further examples in s.106B of actions that might be taken to deal with impacts of FDV that are broader than the current examples, such as "accessing culturally appropriate supports" and "time taken to recover." ***Recommendation 41:*** Amend the current definition of FDV in s.106B(2)(a)-(b) by replacing the word 'and' with 'or', to align with the definition in the *Family Law Act 1975* (Cth). ***Recommendation 42:*** Expand the definition of 'close relative' in s.106B(3) to include a person's aunt or uncle, a person's former intimate partner's immediate family, and someone related to the person according to ethnic, religious or cultural kinship rules.

Part 3: Closing Loopholes Act

Compliance and enforcement: Criminalising wage theft

Part 14 of Schedule 1 of the Closing Loopholes Act introduced new provisions criminalising wage theft. As we stated in our submission on the Closing Loopholes Bill, this was a necessary reform to tackle a systemic problem:

> Wage theft robs working people of money they are rightfully owed for their work. Super theft compounds this, taking money from workers that would be built on due to interest over decades to provide for them in their retirement. Stolen wages trap workers in poverty and deny them the ability to buy the basic necessities they need to live. While other forms of theft are treated as crimes, in many parts of Australia wage theft is not.[14]

Under new s.327A(1) and (3) an employer commits an offence if they are required to pay an amount to an employee under the FW Act or an award or enterprise agreement, and intentionally engages in conduct resulting in a failure to pay the required amount in full on or before the day

[14] ACTU, *Submission on the Closing Loopholes Bill 2023*, page 44.

that payment is due. The "amount" can include not only wages but also superannuation contributions due to an employee.

However under s.327A(2), the offence does not apply to certain payments owing to an employee who is a "national system employee" only because of a state referral of power, i.e. non-payment of superannuation, long service leave or payments related to the taking of leave for jury service, emergency services duties or by reason of being a victim of a crime.

Prosecutions for the wage theft offence can be brought by the Commonwealth Director of Public Prosecutions or the Australian Federal Police, within 6 years of the commission of the offence (s.327C). The penalties include up to 10 years' imprisonment and/or fines of up to $1.65 million for individuals and fines of up to $8.25 million for corporations (or 3 times the underpayment amount if that would be greater) (s.327A(5)-(7)).

Operation Appropriate and Effective?

Evidence continues to emerge of the incidence of wage theft in Australian workplaces. A Melbourne Law School study released in mid-2025, based on a survey of 2,814 workers, found that wage exploitation was rife among young workers, of whom:

- 33% had been paid $15.00 per hour or less (when the federal minimum wage was $24.95 per hour);
- 17.9% had not been paid for all work completed;
- 9.5% had been given food or products instead of being paid money;
- 8% had been forced to return some or all of their pay to the employer.[15]

The ACTU is not aware of any prosecutions that have either been commenced or concluded pursuant to s.327A.

In our view the new criminal offence is an appropriate measure to combat wage theft, but given that it has only been in effect since 1 January 2025, it is too early to assess its effectiveness in deterring employers from engaging in wage theft.

Further Reform to Improve the Operation or Rectify Unintended Consequences

The ACTU does not see the need for any further reforms at this stage.

---

[15] See: A third of young people ripped off by employers, study shows. The full study is: J Howe and T Dillon, *Underpaid and Overlooked: The Wage Crisis Facing Young Workers in Australia*, Final Report of the Fair Day's Work Project, Centre for Employment and Labour Relations Law, Melbourne Law School, July 2025.

Regulated labour hire arrangement orders (Closing the labour hire loophole)

Part 6 of Schedule 1 of the Closing Loopholes Act implemented provisions intended to address a major loophole in the previous legislative framework: the ability of employers to undercut agreed wage rates in enterprise agreements, by engaging external labour hire providers, moving employees to a new or different company or threatening the outsourcing of work to suppress wages.[16] Legislative intervention to enshrine the principle of "same job, same pay" for labour hire workers was therefore necessary.

The provisions in new Part 2-7A of the FW Act[17] have addressed this problem by enabling applications to be made to the FWC for a "regulated labour hire arrangement order" (**RLHAO**). Under s.306E(1) the FWC must make a RLHAO if satisfied that: (a) an employer supplies or will supply, directly or indirectly, one or more of its employees to perform work for a regulated host; (b) a "covered employment instrument" (e.g. an enterprise agreement) applying to the regulated host would apply to the employees if that host were to employ them to perform work of that kind; and (c) the regulated host is not a small business employer. However, under s.306E(2), a RLHAO must not be made if "it is not fair and reasonable in all the circumstances to do so", having regard to the matters in s.306E(8) (e.g. the pay arrangements applying to employees of the regulated host and the labour hire employees, the history of industrial arrangements applying to the regulated host and the employer and the relationship between them, etc). Further, s.306E(1A) provides that the FWC must not make an order unless satisfied that the performance of the work is not for the "provision of a service" rather than the supply of labour to a regulated host, having regard to the matters in s.306E(7A). Several other exceptions to RLHAOs apply, e.g. employees performing work for a host under a training arrangement (s.306G(1)), or during a "short-term arrangement" (s.306G(2)) i.e. a period of up to three months or such longer or shorter period as is determined by the FWC under s.306J.

Section 306F provides that where a RLHAO is in force and covers a regulated host, employer and labour hire employees, the employer must pay the employees no less than the "protected rate of pay" in connection with the work performed by the employees for the host; i.e. the full rate of pay that would be payable to the employees if the host's enterprise agreement (or other instrument) applied to those employees. This is supported by the obligation of a host user of labour hire

---

[16] See e.g. ACTU, *Qantas is One Big Loophole: How Qantas Has Gamed the System*, Report, 2023; ACTU, *Same Job, Less Pay: The Exploitation of Outsourcing Loopholes*, Research Note, 2023.

[17] This summary of the provisions is based on A Forsyth, "Closing the Labour Hire Loophole: Legislative Enshrinement of the 'Same Job, Same Pay' Principle for Australian Labour Hire Workers" (2024) 37 *Australian Journal of Labour Law* 135, 141-151.

services, under s.306H, to provide necessary information about the protected rate of pay of the labour hire employees, where requested by the labour hire employer. The FWC has dispute resolution powers in relation to the operation of Part 2-7A (ss.306P-306Q), including disputes about the protected rate of pay for an employee covered by a RLHAO or whether the employee is being paid less than that rate of pay. Anti-avoidance provisions are set out in ss.306S-306V, e.g. prohibiting an employer or a regulated host entering into a scheme for the sole or dominant purpose of preventing the FWC making a RLHAO, as a result of which the tribunal is prevented from making the order.

Operation Appropriate and Effective?

This has generally been a highly successful reform, with many examples of workers gaining large pay increases through RLHAOs, especially in the mining, meat processing and aviation sectors. Examples include:

- Mining and Energy Union (**MEU**): 20% increase for 105 on-hire workers at Glencore's Wambo open cut mine.[18]
- Australasian Meat Industry Employees Union (**AMIEU**): 20% increase for over 1000 on-hire meatworkers engaged by three host businesses.[19]
- Flight Attendants' Association of Australia (**FAAA**): increase of up to $20,000 per year for Qantas Domestic workers supplied to Qantas Airways Limited, and a rise of up to 43% for those supplied by Maurice Alexander Management and Altara.[20]
- Rail Tram and Bus Union (**RTBU**): more than $49,000 per year plus higher penalty payments for employees engaged at Pacific National.[21]
- United Workers Union (**UWU**): around 40% pay rise for hosted packing and distribution workers at manufacturer/ service provider Ecolab;[22] and "average pay rises of $17,720 and a total increase of about $12 million annually for 677 labour hire workers in

[18] "Rises of up to 40% under new SJSP orders", *Workplace Express*, 28 July 2025; *Application by MEU re United Wambo Open Cut Mine* [2025] FWC 1932.
[19] "Rises of up to 40% under new SJSP orders", *Workplace Express*, 28 July 2025; *AMIEU applications re Bindaree Beef* [2025] FWC 2063, *Beenleigh Pty Ltd* [2025] FWC 2087, *Fletcher International Exports* [2025] FWC 2081.
[20] "Playing field levelled further at Qantas", *Workplace Express*, 24 April 2025.
[21] "SJSP a platform for big rises: RTBU", *Workplace Express*, 11 September 2025; *Application by ARTBIU re Pacific National Bulk Rail NSW* [2025] FWC 2553.
[22] "Rises of up to 40% under new SJSP orders", *Workplace Express*, 28 July 2025; *Application by UWU re Ecolab* [2025] FWC 2022.

warehousing, logistics, production and distribution, deployed to host employers in NSW, Victoria and Queensland".[23]

Another significant effect of the new provisions has been the increase in direct employment of employees by businesses which had previously utilised labour hire providers. For example in the mining industry, both before and after Part 2-7A came into effect, the reform has driven "a change of behaviour by mine operators who are insourcing jobs as a response to the closure of the labour hire loophole".[24]

132 applications for RLHAOs under s.306E were lodged with the FWC in 2024-25.[25] As at 30 June 2025, the FWC had made 82 RLHAOs, and by mid-October had issued around 50 decisions (over 70% of which related to decisions on applications brought by the MEU, AMIEU, UWU and the Shop, Distributive and Allied Employees Association (**SDA**)).[26]

SDA Case Study

Spotlight Distribution Centre (Vic)[27]

After a protracted process, the Victorian Branch of the SDA secured a RLHAO covering labour hire staff at Spotlight's DC in Laverton.

Initially the host employer objected to the application but subsequently withdrew its opposition.

Directly employed staff are covered by the SDA-negotiated Spotlight Distribution Centre Enterprise Agreement 2024.

Pay Gap (at time of order):

Classification	Employment	Rate of Pay
SSWA Store worker Grade 1 – after 12 months	Labour Hire	$33.09/hour
Operational Team Member (after 12 months)	Direct Employee	$42.23/hour

[23] "SJSP puts rocket under warehouse workers pay: Union", *Workplace Express*, 19 November 2025.
[24] E Cavanough and M Douglass, *Closing Loopholes, Opening Opportunities: How Same Job, Same Pay is Delivering for Workers & Communities,* Report, McKell Institute, April 2025, pages 17-18.
[25] FWC, *Annual Report 2024-25*, page 7.
[26] "MEU the big mover on same-job, same-pay", *Workplace Express*, 17 October 2025.
[27] Application by Shop, Distributive and Allied Employees' Association re Spotlight Distribution Centre [2025] PR796312 LH200098.

Difference: $9.14/hour (27.63%). This equates to an additional $18,062.64 per year for a Fulltime Equivalent Employee.

Significant decisions

The first RLHAO application, brought by the MEU,[28] further illustrates the capacity of the new provisions to realise wage gains for workers. It sought to cover employees of Workpac Pty Ltd and Workpac Mining Pty Ltd performing production work for Batchfire Callide Management Pty Ltd at its mine in central Queensland. The application sought to address a pay differential of $10,000–$20,000 per year between Workpac employees and direct employees of Batchfire. FWC made a RLHAO based on the consent of the host (Batchfire) and Workpac. In its decision, *Re Application by the Mining and Energy Union*,[29] the FWC identified many similarities between the Batchfire and Workpac production employees, e.g. they all operated under Batchfire's instructions, policies and procedures, wore its uniforms, performed the same work using Batchfire's machinery and equipment, and were subject to its rostering and annual leave arrangements. The FWC found that the statutory requirements for making a RLHAO were met, including that: the Batchfire Callide enterprise agreement would apply to the Workpac employees if they were employed directly to perform production work at the mine; the performance of that work was not for the provision of a service, having regard to factors including the non-involvement of Workpac in supervising or controlling the work; and it would be fair and reasonable to make the order in the absence of any evidence to the contrary.

A Full Bench of the FWC made a key decision on the service provision exclusion from the making of a RLHAO (s.306E(1A)) in *Applications by the MEU and AMWU re Goonyella Riverside Mine, Peak Downs Mine and Saraji Mine.*[30] The Commission made RLHAOs covering employees of two BHP Operations Services entities (**OS entities**) and external labour hire companies Workpac and Chandler MacLeod, to apply at three BHP coal mines in the Bowen Basin. Rejecting the arguments of BHP Coal and the OS entities that the work performed by employees of those entities is for the provision of a service rather than the supply of labour, the FWC considered the matters required by s.306E(7A) and highlighted features of the relevant arrangements including: the fact that mine and maintenance plans are determined by BHP including the timing, priority and nature of the work performed by employees; OS employees are required to adhere to highly

[28] Forsyth (2024) 152-153, again informing the summary here.
[29] [2024] FWCFB 299.
[30] [2025] FWCFB 134.

prescriptive requirements imposed by BHP; the employees use the same plant, equipment and systems as those used by BHP production and maintenance employees; the work performed by OS employees involves the same specialised and expert skills as are exercised by BHP employees, so that in substance what is being provided by the OS entities is labour.[31] The Full Bench also rejected the arguments of Workpac and Chandler MacLeod who argued that it would not be fair and reasonable for the FWC to make RLHAOs (s.306E(2)), including an argument that making the orders would undermine the object is s.3(f) of the FW Act to promote enterprise-level collective bargaining. The Commission adopted the reasoning of another Full Bench that the opposite is the case: in preventing workers performing the same kind of work at lower pay rates through a labour hire employer, a RLHAO has the effect of protecting rather than undermining enterprise-level collective bargaining.[32] The Full Court of the Federal Court upheld the FWC Full Bench's decision in an application for judicial review brought by BHP Coal and the OS entities,[33] who have applied for special leave to appeal that outcome in the High Court of Australia. According to the MEU the orders made in this case resulted in around 2,200 workers receiving annual pay rises of approximately $30,000. The case also achieved a key goal of this reform: shutting down the in-house labour hire model which had seen "large corporations running multiple, tiered labour-hire entities [and] employers creating contracting entities to outsource then 'resource" their own labour".[34]

In another significant decision the Full Federal Court quashed RLHAOs made by the FWC covering employees of Skilled Workforce supplied to the Bengalla and BHP Mt Arthur coal mines.[35] The FWC had rejected the employers' contention that the orders should be restricted in their application to the specific group of "regulated employees" (i.e. haul truck operators and production employees) presently being supplied to the mines. Rather the orders were expressed to cover any employees of Skilled who perform work at the mines and would, if they were employees, be covered by the applicable host employment instruments (i.e. a wider group including any employees that Skilled *could* provide to the host businesses). In the judicial review case, the MEU contended that the pay rates in host enterprise agreements would be undermined if a RLHAO focuses too narrowly on the specific class of employees presently being supplied to the host or employees in contemplation; and the union would have to make further applications

[31] Ibid, [267].
[32] Ibid, [282]-[284], referring to *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53 at [92]..
[33] *BHP Coal Pty Ltd, OS MCAP Pty Ltd and OS ACPM Pty Ltd v MEU and AMWU* [2025] FCAFC 194.
[34] ACTU, *Same Job, Less Pay: The Exploitation of Outsourcing Loopholes*, Research Note, 2023, page 2.
[35] *Skilled Workforce Solutions (NSW) Pty Ltd v MEU* [2025] FCAFC 195.

every time a new employee is supplied. However, the Full Court held that a RLHAO does not have to be made in the form sought by the applicant; [36] and that the FWC did not confine the operation of the orders here to the "regulated employees" as defined in s.306E(1) and (5), i.e. those employees who the evidence established were being supplied or would be supplied by Skilled to perform work at the mines.[37] The FWC subsequently issued a narrower RLHAO in accordance with the Full Court's decision.[38]

Further Reform to Improve the Operation or Rectify Unintended Consequences

The MEU, which has initiated the majority of applications for RLHAOs, has identified several problems with the application of the new provisions in Part 2-7A. These are outlined in the two tables below, alongside a number of recommendations which are supported by the ACTU and other affiliates including the AMIEU, SDA, UWU and Australian Workers Union (**AWU**).

Issues that need to be addressed to maintain the integrity of Part 2-7A

Service provider exemption cast too broadly Presently, the service contractor exemption in s.306E(1A) and (7A) provides that the FWC must not make the order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour. In *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194 at [48], the Full Federal Court clarified that when conducting this assessment the Commission needs to determine whether the service(s) provided by the employees were identifiable and involved something different from or in addition to the mere supply of labour. This leaves significant scope for the Commission to find that the supply of labour is a service in future cases.	*Recommendation 1:* Narrow the service provider exemption by providing that an employer is only an exempt 'service provider' if: • The tasks performed by the regulated employees are of a specialised nature when compared to the tasks performed by the host employees, and • Tasks of that kind are not, have not been, or could not be performed by employees of the regulated host, or by employees of a person engaged in a joint venture or common enterprise with the regulated host. In addition, amend the provisions to provide that the evidentiary onus is on

[36] Ibid, [79]-[80].
[37] Ibid, [101], [113] and [132].
[38] *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 295.

	the employer (rather than the applicant for a RLHAO) to demonstrate the service provider exemption is made out.
<u>Definition of "protected rate of pay" may not require workers of comparable service, experience, skills and competencies to be paid the same</u> Section 306F(4) of the FW Act defines the *protected rate of pay for the regulated employee* as *the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee.* Depending on how the host enterprise agreement is drafted, the above may not mandate that regulated employees who have comparable service, experience, skills, competencies and/or who are undertaking the same work, tasks or duties as a host employer are paid the same. For example, if an enterprise agreement includes a classification structure which requires a year's service at each level before an employee advances, it is arguable that a regulated employee's experience before an order comes into effect would not be considered when determining their classification.	*<u>Recommendation 2:</u>* Ensure s.306F(4) of the FW Act requires that the applicable rate of pay is determined by reference to an employee of the host employer with equivalent length of service, experience, skills and competencies, or who performs the same work, tasks or duties as the regulated employee.
<u>Trainees and apprentices are not entitled to the protections of RLHAOs</u> Presently, the requirement in s.306F to pay the protected rate of pay under a RLHAO does not apply to a regulated employee if a training arrangement applies to the employee in respect of the work performed for the regulated host, due to the exception in s.306G(1). MEU has seen some businesses withdrawing their use of labour hire and only engaging trainees, removing the basis for a "protected rate of pay" for purposes of a RLHAO.	*<u>Recommendation 3:</u>* Remove the s.306G(1) exception.

Service provider exemption: AWU case study

The service provider exemption from RLHAOs has significantly hampered the ability to use this new framework to assist employees in offshore hydrocarbons.

In the offshore hydrocarbons sector, there are circumstances where contractors are used as 'labour hire', but more commonly the operator will seek tenders for an entire scope of work - for example catering, maintenance, laboratory, logistics. The reason that operators carve up their operations into these scopes of work and put them out to tender is the exact same reason that traditional labour hire is used: to save money.

An illustrative example is the storepersons and material controllers on the Shell Prelude. Once directly-hired, these roles were made redundant in late 2021 and then went out to tender. Qube Offshore was successful in the tender and offered wages 40% less than those of the direct hires previously in the roles. The job stayed the same, it just switched employers.

The offshore hydrocarbons sector is completely rife with contractors taking up most of the work being performed, and they are very rarely specialist workers and almost always paid far less.

It is for this reason that Recommendation 1 above includes the underlined words below, as part of the new factors the FWC must consider when determining whether the service provider exemption applies:

> *Tasks of that kind are not, have not been, or could not be performed by employees of the regulated host, or by employees of a person engaged in a joint venture or common enterprise with the regulated host.*

Issues that need to be addressed to maximise the benefit of Part 2-7A

Delay in RLHAOs being issued On average, across approximately 50 RLHAOs the MEU has obtained, it has taken 236 days for the Commission to issue an order after an application has been made.	*Recommendation 4:* Amend the FW Act to provide for back-dating of orders to the date on which the application is made (where this is sought by the applicant for the order).
Limitation of orders to 'same pay' not 'same conditions' Presently, if an order is made, the employer must ensure that the relevant employees are paid at least the full rate of pay under the host agreement. There is no requirement to afford the employee the other conditions provided under the host agreement (e.g. leave, rostering, redundancy). The Prime Minister's original Bill in opposition (the *Fair Work Amendment (Same Job, Same Pay)* Bill 2021 included several provisions to ensure labour-hire workers received equal rights to: • training • amenities and collective facilities • rostering rights and consultation • apply for vacancies with the host employer. It also provided that labour-hire workers would generally be entitled to the conditions of the host enterprise agreement wherever they were more favourable.	*Recommendation 5:* Amend the FW Act to provide that: • while an RLHAO is in effect, the employer and the regulated host must afford the regulated employees equal access to training, amenities, rostering rights and host employer vacancies; and • any other conditions in the host enterprise agreement that are more favourable, where practicable.
Complexity and unintended consequences in how the FWC must specify the scope of an order	*Recommendation 6:* Amend s 306E such that the default scope of the order issued is identical to

Presently, the Commission is only able to issue an order that covers employees who perform the work performed or which will be performed by the regulated employees at a given site. The Full Federal Court in *Skilled Workforce Solutions (NSW) Pty Ltd v MEU* [2025] FCAFC 195 found that an order cannot extend to the whole of a host enterprise agreement if labour-hire workers are not engaged in all kinds of work within its scope.	scope of the covered employment instrument. The scope would only be limited if the contractor employer has made out a positive case that parts of its workforce perform genuine service provision (i.e. it is specialised labour not performed by host employees), and the exclusion should be limited to that group of workers engaged by that employer.

Extending "same job, same pay" to other conditions – Rostering: AWU case study

The protected rate of pay is defined in s.306F(4) as the 'full rate of pay' that would be payable to the employee if the host instrument applied to them. The 'full rate of pay' is defined at s.18(1) as all monetary amounts, including allowances, bonuses, loadings, etc.

In the offshore hydrocarbons sector especially, it is common for workers of contractors or labour hire providers to work different rosters to workers engaged by the operator of a vessel or facility.

Generally, direct employees of operators work a 40% (or Norwegian) roster, which involves a shift roster where the worker works on 40% of the days of a full roster cycle. The most common examples are a 3/3/3/6 roster (3 weeks on duty, 3 weeks off duty, 3 weeks on duty, 6 weeks off duty) and a 3/4/3/5 roster (3 weeks on duty, 4 weeks off duty, 3 weeks on duty, 5 weeks off duty).

Commonly, employees of labour hire or contractors work even-time rosters, which include both the 4/4 roster (4 weeks on duty, 4 weeks off duty) and the 3/3 roster (3 weeks on duty, 3 weeks off duty).

The rosters worked lead to a difference in the number of working days for the direct employees and labour hire employees - direct employees work 146 shifts a year and the contractors work 182.5 shifts per year.

We recently filed an application for a RLHAO on behalf of our members engaged by a contractor for a tier one operator. These members were engaged on an even-time roster and the direct employees on a 40% roster.

Due to the operation of both s.306F(4) and s.18(1), our concern in having the matter arbitrated was that even if we succeeded in having our members receive the higher earnings of the direct employees, there was no guarantee that the FWC would (or could) also order that our members

were to work the more beneficial roster. If we got one but not the other, the result would be that our members would still be cheaper to engage to perform the work because of the additional 36.5 days they would work for the same remuneration as the direct hires.

Ultimately, in consideration of the above, we chose to settle the matter and not proceed to arbitration. The net result of that is whilst we achieved an excellent outcome for our members, there is no RLHAO and therefore no broader obligation on the contractor to remunerate future employees in this way.

For this reason the AWU supports Recommendation 5 above, which would entitle labour hire workers in the above scenario (under the terms of a RLHAO) to the same rostering rights vis-a-vis the regulated host as direct employees; and the same rostering provisions of the host enterprise agreement wherever these are more favourable. An even more beneficial approach, where there may be a variety of rosters in the host's enterprise agreement, would be to anchor the RLHAO to the roster in the agreement which is *ordinarily worked* by the host employer's employees.

Extending RLHAOs to non-national system employers

Finally, there is the additional issue of extending the availability of RLHAOs to hosts that are not covered by the national workplace relations system. At present the FWC can make a RLHAO in respect of the supply of employees by an employer to a "regulated host" (s.306E(1)). Regulated host is defined in s.306C to include essentially the same types of employers that are "national system employers" under s.14, e.g. constitutional corporations, the Commonwealth and Commonwealth authorities, employers in the territories and Victoria, etc. This leaves out state and local government entities (outside Victoria) who are hosts of employees supplied by a labour hire employer.

Recommendation 7:

Commonwealth and relevant State Governments should work to ensure that the principle of "Same Job Same Pay" for labour hire workers applies across all jurisdictions. As a next step, this should be placed on the agenda of the next Workplace Relations Ministers meeting to discuss and agree on a plan on how to achieve this.

Enhancing delegates' rights

Workplace delegates are a critical mechanism for ensuring that workers are able to exercise their lawful right to collective representation. Workplace delegates serve as a structured and accountable means through which workers can raise concerns about their employment and participate in collective bargaining and workplace consultation.

Prior to the Howard Government's *Workplace Relations and Other Legislation Amendment Act 1996* (**WROLA**), Australia's industrial relations system had, for many years, afforded workplace delegates rights through the award system including in relation to recognition, consultation, roles in grievance and disputes procedures, rights to interview members during paid working hours, holding on-site meetings of members, access to facilities, paid union training leave and access to union officials.[39]

The WROLA confined federal awards to 20 "allowable matters".[40] Importantly, those matters did not include delegates' rights, nor, amongst other things, union picnic day holidays, consultation provisions concerning workplace change, unfair dismissal, or occupational health and safety.[41] Any award terms dealing with non-allowable matters that could not be characterised as incidental to one of the 20 allowable matters were rendered ineffective from the commencement of the legislation. Over time, such provisions were progressively excised from existing awards through the Australian Industrial Relations Commission's "Award Simplification Process".

The removal of delegates' rights from awards therefore did not result from any assessment of their industrial merit. Rather, it was the consequence of a policy decision by the then Government to exclude such matters from the previously arbitrated settlement of industrial disputes embodied in existing awards, and to withdraw the Commission's power to include delegates' rights in future awards.[42]

Whilst terms such as consultation for major workplace change were reintroduced into awards in the *Fair Work Act 2009*, the Albanese Government, through the Closing Loopholes legislation, has been the first government since the WROLA legislation to re-introduce workplace delegates rights terms as a feature of the award/statutory safety net. In so doing it has sought to "positively engage" with Australia's obligations in the *Workers' Representative Convention, 1971* (No. 135) of the ILO (ILO Convention 135),[43] in the context of the High Court's significant reading down of the general protections available to delegates in cases such as *Board of Bendigo*

---

[39] A range of clauses containing such rights for delegates and shop stewards were found to be non-allowable matters in *Minister for Workplace Relations and Small Business*, Re - 218/99 V Print R2700 [1999] AIRC 1549; (12 March 1999) at paragraph [153] to [201].

[40] Then contained in s.89A(2) of the *Workplace Relations Act 1996*.

[41] B Creighton and A Stewart, *Labour law: An Introduction*, 3rd edition, 2000, Federation Press at [6.34] to [6.41].

[42] See for example *Minister for Workplace Relations and Small Business*, Re - 218/99 V Print R2700 [1999] AIRC 1549; (12 March 1999).

[43] *Explanatory Memorandum to the Closing Loopholes Bill 2023* at paragraphs [83] to [86].

Regional Institute of Technical and Further Education v Barclay[44] and *CFMEU v BHP Coal Pty Ltd*.[45]

The statutory workplace delegates rights are now found in s.350A-350C of the FW Act, with the new s.149E and s.205A, in effect, requiring the exercise of those rights, with respect to those delegates who are employees, to be made available in awards and enterprise agreements. The legislative approach to the introduction of workplace delegates rights was staged, with the framework of statutory rights commencing in December 2023, and those rights (and any additional rights) to be subsequently included as terms of awards and agreements from 1 July 2024.

Operation Appropriate and Effective?

Practically speaking, the introduction of workplace delegates' rights into the FW Act has been appropriate and effective. The ACTU, through its Australian Trade Union Institute, has recorded a significant increase in participation in delegates' training since the commencement of the legislation.

Legal Issues

However, a number of legal issues have arisen in the operation of the new legislative provisions. The most prominent substantive issue accompanied the introduction of workplace delegates' rights into the award system. In particular, the FWC's initial determinations to vary modern awards to insert a standard delegates' right term from 1 July 2024 were found by the Full Federal Court to be affected by error in C*onstruction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187 (17 December 2025) (***Delegates Rights Decision***), Specifically, the FWC erred by impermissibly narrowing the rights available to delegates in three ways.

First, the standard award term confined delegates' representational rights to employees of the delegate's employer, rather than extending to members and eligible members who work in the relevant enterprise or regulated business, including in circumstances where multiple employers operate at the same workplace (such as labour hire or project-based arrangements).

[44] [2012] HCA 32.
[45] (2014) 253 CLR 243.

Secondly, the term narrowed the statutory communication entitlement by limiting communications to those undertaken "for the purpose of" representation, rather than communications "in relation to" the industrial interests of members and eligible members, thereby materially restricting the scope of the right conferred by the FW Act.

Thirdly, the term imposed additional constraints on the exercise of delegates' rights that were not authorised by the FW Act, including constraints capable of operating even where a delegate was otherwise reasonably exercising statutory rights, and which were therefore apt to unreasonably restrict the exercise of those rights. In particular, the standard award clause appeared to give absolute primacy to the employee's obligations as an employee to their employer and to not prevent the normal performance of work.[46]

As a result, the Court quashed the determinations varying the 9 modern awards before it and uncertainty was cast over the terms in all other modern awards. The lacuna in modern awards immediately caused technical issues in the operation of s.205A of the FW Act and the approval of enterprise agreements.[47] In January 2026, the FWC acted promptly to address the resultant uncertainty, varying all modern awards retrospectively to expand the entitlements of the standard award clause in accordance with the decision of the Court.[48]

Further Reform to Improve the Operation or Rectify Unintended Consequences

To date, there have been few decisions clarifying the scope of the new entitlements relating to workplace delegates' rights. A period of operation and interpretation may therefore be necessary before a full assessment can be made as to whether the statutory rights require adjustment or refinement. However, the ACTU has already identified the following 3 areas in which reforms would be helpful.

<u>"Reasonable communication"</u>

The ACTU is aware of a matter brought by one of our affiliates before the Federal Court involving an application relevant to the scope of applied rights falling from s.350C, including whether a delegate's right of "reasonable communication" with employees includes the right to speak to

---

[46] The errors are concisely summarised from paragraph [108] to [113] of the decision, ibid.
[47] *Application by John Holland Pty Ltd t/a T2D CJV & Bouygues Construction Australia Pty Ltd t/a T2D CJV* [2025] FWCFB 294.
[48] *Variation of modern awards to include a delegates' rights term* [2026] FWCFB 5.

employees at inductions (*Australasian Meat Industry Employee' Union v. Teys Australia Beenleigh Pty Ltd* QUD411/2025; the matter is yet to be listed for hearing of the substantive issues). Several other ACTU affiliates have encountered difficulties with employers, and ended up in disputes, relating to delegates seeking to exercise their right to communicate with employees under s.350C. A common concern is that employers seek to control the delegate's access to employees or prevent it from happening at all.

On this basis we propose an amendment to clarify this issue, ensuring that reasonable communication includes the ability to communicate directly with members and other eligible persons. The proposed provision would then need to be reflected in the delegates' rights terms in modern awards.

Recommendation 8:

Insert after s.350C(3)(a) a new sub-paragraph:

> "(aa) reasonable communication must include the ability for a workplace delegate to be able to communicate directly with members and any other persons eligible to be such members".

Further issue to be addressed arising from the Fair Work Commission Full Bench decision on delegates' rights

The ACTU identifies a significant gap in the practical operation of workplace delegates rights under s.350C, and a potential impediment to those rights being effectively reflected in modern awards. This concern arises in relation to the exercise of those rights with respect to employees at a workplace who are not employed by the workplace delegate's own employer.

The question of whom a workplace delegate is authorised by s 350C to communicate with and represent was directly considered by the Full Federal Court in the *Delegates' Rights Decision*. In that decision (as noted above), the Court held that the FWC had erred in making a term that confined a workplace delegate's representational role to employees of the delegate's employer, rather than extending to all employees working in the enterprise.[49]

The right recognised by the Court is a substantial one. It enables a properly elected or appointed workplace delegate to communicate with and represent, for example, members of the delegate's

[49] *Construction, Forestry and Maritime Employees Union & Ors v Australian Industry Group* [2025] FCAFC 187 at paragraphs [22] to [72].

union who are labour hire employees working on the same industrial site, mine, or aircraft as employees of the delegate's employer.

However, following the *Delegates' Rights Decision*, a Full Bench of the Commission has identified a potential technical impediment to the effective exercise of that right. In particular, the Full Bench has suggested that the statutory rights conferred on workplace delegates operate only as against the employer of the delegate, and not as against the employer of the employees whom the delegate seeks to communicate with or represent.[50]

This raises the prospect of an anomalous outcome. While a workplace delegate's own employer may be prohibited from preventing the delegate from engaging in reasonable communication with other employees, the employers of those other employees may nevertheless be able to restrict or prevent that communication. If correct, this would substantially undermine the practical effect of the Full Federal Court's decision and the policy intent of the Closing Loopholes Act reforms.

The ACTU submits that this issue should not be left for resolution in future litigation or further proceedings before the FWC. It took approximately 18 months, and costly judicial review proceedings, before unions secured a Federal Court declaration confirming that the Closing Loopholes Act was intended to confer award-based rights on workplace delegates to represent employees employed by other employers. Having overcome that obstacle, workplace delegates now appear to face a further barrier to the exercise of those rights.

The ACTU therefore strongly recommends that this apparent incongruity be addressed through further legislative reform, to ensure that workplace delegate rights are fully effective in multi-employer and labour hire settings and are not frustrated by technical limitations on their enforceability.

Recommendation 9:

Insert a new subsection after s 350A(1):

> (1A) Where a workplace delegate is entitled under section 350C(2) or (3) to represent or communicate with an employee who is employed by a different employer, that other employer must not engage in conduct that would, if engaged in by the employer of the workplace delegate, contravene subsection (1).

[50] [2026] FWCFB 5 at [33].

Section 205A and delegates' rights terms in enterprise agreements

There is a strong case for greater clarity in the operation of s.205A. Following the *Delegates' Rights Decision*, the definition of a "delegates' rights term" in s.12 of the FW Act is properly understood as requiring a substantive and enforceable provision that furnishes, supplies and makes available the full suite of rights conferred by s.350C.

This gives rise to a potential difficulty in the operation of s.205A(2), particularly where an enterprise agreement before the FWC for approval contains one or more provisions that overlap with the rights conferred by s.350C, but does not provide for all of those rights. Where the statutory comparison process results in the deemed inclusion of a relevant award term, it may be unclear the extent to which any overlapping agreement terms are intended to be rendered ineffective by the operation of s.205A(2)(a).

Although this issue has not yet been the subject of judicial consideration, the ACTU submits that a proactive legislative response to the clarification provided by the Federal Court would be to adopt an alternative mechanism for protecting the delegates' rights safety net. One option would be to provide that, where an enterprise agreement does not contain a delegates' rights term, or does not contain terms that are more favourable than the delegates' rights term in the relevant modern award, the award term is taken to be a term of the enterprise agreement **in addition to**, and not in substitution for, any entitlements otherwise conferred by the agreement.

Recommendation 10:

Delete the existing s.205A(2) and insert:

(2) However, if, when the agreement is approved:

(a) the enterprise agreement does not include a delegates' rights term (within the meaning of section 12); or

(b) the enterprise agreement includes a delegates' rights term that is less favourable than the delegates' rights term in one or more modern awards that cover the workplace delegates;

then:

(c) the most favourable delegates' rights term of those in the modern awards, as determined by the FWC, is taken to be a term of the enterprise agreement; and

(d) to avoid doubt, if the enterprise agreement includes a term that gives a workplace delegate an entitlement that is more favourable for the workplace delegate than an entitlement conferred by the delegates' right term taken to be included under paragraph (c), the enterprise agreement term continues to apply.

More generally, the ACTU and affiliates are still considering other implications of the FWC Delegates' Rights Decision, including the status of delegates' rights terms in certain agreements approved under the defective award terms, and may wish to raise further issues as the Closing Loopholes Review progresses.

See also the section of this submission dealing with "Delegates' rights, extension to regulated workers".

Provide stronger protections against discrimination, adverse action and harassment

Family and domestic violence (**FDV**) can impact many aspects of a person's life, including their wellbeing, performance and productivity at work, and can be a significant impediment to workforce participation. This can result in adverse action being taken against a person because they have been subjected to FDV (for example, through reduced hours of work, demotion or dismissal). Workers subjected to FDV may experience decreased performance and productivity, change their job more often, miss out on promotions, are more likely to resign or be terminated and more likely to be bullied at work.[51]

Before the Closing Loopholes reforms, subjection to FDV was not a protected attribute in the FW Act or in other Commonwealth anti-discrimination laws. This reform included a new protection for employees and prospective employees by recognising subjection to FDV as a protected attribute within the FW Act's anti-discrimination provisions, meaning workers cannot be discriminated against on that basis, and can challenge such discrimination in the FWC. The changes flow through to several parts of the FW Act, give effect to Australia's obligations under ILO Convention 190 and complement recent reforms by strengthening workplace protections for employees subjected to FDV.

The reform means that:

- Workers can now bring general protections and unlawful termination complaints in the FWC if adverse action is taken against them or their employment is terminated because they have been subjected to FDV;

[51] ASU (2018) A Workplace Guide to Preventing & Responding to Domestic Violence, pages 5-6.

- Modern awards and enterprise agreements are not able to discriminate against workers on this basis; and
- The FWC needs to take into account the need to prevent and eliminate discrimination on this ground while performing its functions and exercising its powers.

These changes recognise the impacts of FDV and are important protections to ensure that workers who are subjected to FDV are not discriminated against at work, are protected from reprisals for exercising their workplace rights, and have better options for recourse if such discrimination and reprisals do occur. They increase protection for victim-survivors who are often the target of discrimination, and complement the entitlement to paid FDV leave by strengthening workplace protections for employees subjected to FDV and maintaining their economic security.

Operation Appropriate and Effective?

This reform was very much needed. The Independent Review of the operation of the paid family and domestic violence leave entitlement in the FW Act conducted in 2024 (**Independent Review**) heard about the risk of FDV disclosure leading to termination of employment, with employees who disclosed FDV risking being seen as a liability in the workplace.[52] Our affiliates also report that it is an issue, with members being seeing as unreliable and experiencing retribution or discrimination, such as having their responsibilities changed, hours reduced, or being performance managed. In one case study we are aware of, an assistant store manager and SDA member who experienced significant FDV which her employer knew about. When her KPIs were not met (despite there being valid reasons for this including resourcing issues within her team), she was told she could go to a lower level role in another store or go onto a performance improvement plan. The member initially accepted the role and a pay cut, however after she was further marginalised she took all of her leave and resigned.[53]

Our affiliates are hopeful that the new protections will have a deterrent effect on this kind of discrimination, and that it will help victim-survivors to feel more comfortable accessing paid FDV leave and flexible work, without the fear of losing income or their job, or being penalised in any way. Our affiliates also see this reform as an important part of providing holistic support to victim-survivors of FDV. Given that our affiliates are still reporting these issues, however, there is clearly more to be done, through education of employers and further workplace action.

---

[52] Seymour, K., Marmo, M., Cebulla, A., Ibrahim, N., Esmaeili, H., Richards, J., & Sinopoli, E. (August 2024) *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009*. Adelaide: Australian Industrial Transformation Institute, Flinders University of South Australia, pages 58, 84.
[53] See ACTU submission to the Independent Review, page 21 Sub17_ACTU_24 Jun 24.pdf.

Unions are very active on these issues, for example:

- Through providing education and guidance to employers, union representatives such as delegates, and workers. For example, an ASU guide describes a change in work performance as a possible warning sign that a worker is being subjected to FDV.[54]
- Unions regularly bargain and campaign for stronger entitlements relating to FDV than the minimum entitlement in the NES. This includes guarantees that no adverse action will be taken against an employee if their attendance or performance at work suffers as a result of FDV. For example, the ACTU model clause on family and domestic violence leave includes an acknowledgement by the employer that FDV has both immediate and ongoing impacts on the person experiencing it, that recovery may take time, and that the employer will support the employee if they have difficulties with performance. This includes a commitment that no adverse action will be taken against an employee if their attendance or performance at work suffers as a result of experiencing FDV. Another example is the clause the CPSU won for APS employees as part of service wide bargaining in 2023, which includes a commitment that the employer will acknowledge and take into account an employee's experience of family and domestic violence if an employee's attendance or performance at work is affected.[55]

Further Reform to Improve the Operation or Rectify Unintended Consequences

"Not unlawful" exception

Section 351(2)(a) of the FW Act provides that the protections contained in s351(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' exception has been interpreted by the FWC and the courts as meaning that only conduct which is specifically prohibited by discrimination legislation in force in the place where the discriminatory action occurred, is actionable pursuant to FW Act s 351.[56] This has prevented workers from being able to bring adverse action claims on the basis of political opinion in NSW.[57]

This interpretation means that if relevant state/territory anti-discrimination legislation does not include 'subjection to FDV' as a protected attribute, workers will not get the benefits of the

[54] ASU (2018) A Workplace Guide to Preventing & Responding to Domestic Violence, page 6.
[55] APS Bargaining Statement of Common Conditions - 5 February 2024.pdf, Family and Domestic Violence Support, pages 134-136.
[56] *Scott McIntyre v SBS* [2015] FWC 6768; *Construction, Forestry, Maritime, Mining and Energy Union v Quirk* [2023] FCAFC 163.
[57] For example see *Scott McIntyre v SBS* [2015] FWC 6768.

protection in s.351. Multiple states and territories do not include it as a protected attribute in their anti-discrimination legislation, and it is not a protected attribute in Commonwealth anti-discrimination legislation. The ACTU has previously raised concerns about the operation of this exemption, including in our submission on the *Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023*. 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.

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.

Recommendation 11:

- 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).
- 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.

See also the section of this submission dealing with the "Family and Domestic Violence Leave Act 2024".

Addressing anomalous consequences of the small business redundancy exemption in insolvency contexts

This reform addressed "an anomaly arising under paragraph 121(1)(b), commonly referred to as the 'small business redundancy exemption'".[58]

Subsections 119(1) and (2) of the FW Act entitle employees to redundancy pay where their employment is terminated because their job is no longer required or because of the insolvency of their employer. Section 121(1)(b) operates to exclude employees of small businesses from receiving redundancy payments they would otherwise be entitled to in accordance with s.119(1)-(2). Section 23 provides that an employer is a "small business employer" at a particular time if they employ fewer than 15 employees at that time.

The exemption of employers from redundancy liabilities based on the number of employees employed at any given time created the following loophole: an employer that would not usually be a small business employer for the purposes of s.23 could downsize its business prior to insolvency (as often happens, for example if the business is seeking to trade its way out of difficulties) and then become a small business within the meaning of s.23, with any further terminations for redundancy not attracting redundancy pay.

Part 2 of Schedule 1 to the Closing Loopholes Act addressed this problem by introducing a new subsection 121(4).[59] This provision ensures that employees that would otherwise be entitled to redundancy pay in accordance with s.119 are not excluded from that entitlement only because their employer became a small business employer due to the termination of one or more employees, where those terminations occurred: due to the employer's insolvency; or in the 6 months preceding the insolvency or the appointment of an insolvency practitioner.

Operation Appropriate and Effective; Further Reform to Improve the Operation or Rectify Unintended Consequences

The ACTU supported and continues to support this important amendment to s.121. We have not identified any issues with the operation of s.121(4) and at this time we have no recommendations as to further amendments to address this issue.

---

[58] *Explanatory Memorandum to the Closing Loopholes Bill 2023*, at [409].
[59] And related provisions: subsections 121(5)-(7).

Conciliation conference orders

Schedule 1, Division 5 of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**Secure Jobs Better Pay Act**) imposed a new obligation on the FWC to make orders directing bargaining representatives to attend a conciliation conference after making a protected action ballot order.

This requirement of the FWC to direct parties to attend conferences is found in s.448A, which is complemented by new ss.409(6A) and 411(3). These subsections require that for industrial action to be protected, bargaining representatives must not have contravened an order by the FWC directing them to attend a conciliation conference pursuant to s.448A.

Originally, the requirement in s.409(6A) to not have contravened a s.448A order applied to all employee bargaining representatives. Schedule 1, Part 14A of the Closing Loopholes Act amended s.409(6A) so that the requirement to not have contravened a s.448A order instead attaches to "each bargaining representative that applied for the protected action ballot order".

This amendment was introduced in response to the decision of the Fair Work Commission in *CEPU v Nilsen (NSW) Pty Ltd*[60] **(CEPU v Nilsen)**.[61] In that case, the Full Bench observed at [69] that the effect of s.409(6A) was that non-compliance with a direction to attend a s.448A conference by one or more employee bargaining representatives could mean any subsequent industrial action would be unprotected for all participants, even in circumstances where the non-attendance was by a bargaining representative (or representatives) that had not applied for the protected action ballot order.[62]

The amendment to s.409(6A) ensures that the requirement to not have contravened a s.448A order only applies to the bargaining representative(s) that applied for the protected action ballot order authorising the proposed industrial action.

Operation Appropriate and Effective

The amendment to s.409(6A) is welcome. If industrial action could be prevented or rendered unprotected because of non-attendance at a conference by a bargaining representative not involved in the industrial action (as contemplated by CEPU v Nilsen), the ability of employees to progress their claims would be unreasonably curtailed. The amendment to s.409(6A) prevents this outcome.

---

[60] [2023] FWCFB 134.
[61] *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 Supplementary Explanatory Memorandum* [181]-[182].
[62] *CEPU v Nilsen (NSW) Pty Ltd* [2023] FWCFB 134 [69].

Further Reform to Improve the Operation or Rectify Unintended Consequences

The ACTU submits that the amendment to s.409(6A), while welcome, papers over the more substantial issue, which is the requirement of bargaining representatives to attend mandatory s.448A conferences at all.

This issue was considered during the Review into the Secure Jobs Better Pay Act conducted by Emeritus Professor Mark Bray and Professor Alison Preston **(Secure Jobs Better Pay Review Panel).**

During that review, the ACTU submitted that it was the experience of our affiliates that the mandatory conference requirement in s.448A is intensive for all parties, and for the FWC, with little corresponding benefit. Submissions made on behalf of employer associations raised similar issues.[63]

In its Draft Report, the Secure Jobs Better Pay Review Panel recommended that:

> *The mandatory conciliation conference in s 448A of the Fair Work Act should be amended to provide the FWC with the discretion not to conduct a conference if there is agreement of relevant bargaining representatives.*[64]

In its submission to the Draft Report, the ACTU welcomed this recommendation whilst further submitting that any amendment to s.448A also needed to address what should occur in the circumstance where there are numerous bargaining representatives; and where agreement as to participation in a conference cannot be reached amongst all of those representatives. The ACTU proposed that in such an instance:

> *… the FWC [should] 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."*[65]

This submission was not adopted by the Secure Jobs Better Pay Review Panel, who in their Final Report recommended as follows:

---

[63] See for example, the submission of the Australian Resources and Energy Employer Association to the Review Panel at [98]; the submissions of Ai Group (at [148]-[149]) and Australian Chamber of Commerce and Industry (at [88]) claimed the conferences were of some benefit but also raised issues with the burden of resourcing them.

[64] Emeritus Professor Mark Bray and Professor Alison Preston, *Secure Jobs, Better Pay Review: Draft Report*, 31 January 2025 (**Draft Report**) draft recommendation 6, see pages 17, 140.

[65] ACTU, *Submission in Response to Draft Report of the Secure Jobs, Better Pay Review Panel*, D No. 06/2025, 14 February 2025, page 16.

The mandatory conference in s 448A of the Fair Work Act should be amended to provide the Fair Work Commission with the discretion not to conduct a conference if there is agreement of relevant bargaining representatives.[66]

The ACTU acknowledges the CPSU (PSU Group) submission on the work health and safety (**WHS**) amendments implemented by the Closing Loopholes Act and supports the positions outlined therein for the following related sections of this submission.

Entry to assist Health and Safety Representatives

Part 16A of the Closing Loopholes Act amended s.494 of the FW Act dealing with right of entry of a union official in the exercise of state or territory OHS rights. Under new s.494(4), the requirements for entry onto premises in ss.494(1) and 495-498 "do not apply to an official of an organisation assisting a health and safety representative [HSR] on 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 provision allows a HSR in exercising their powers or functions to "whenever necessary, request the assistance of any person".

This reform reverses the effect of the Full Federal Court decision in *Australian Building and Construction Commissioner v Powell*.[67] While an official entering premises to assist a HSR does not need a federal right of entry permit nor have to provide 24 hours' notice of entry, new s.494(5) still provides that the official must comply with certain other FW Act requirements (e.g. to comply with site OHS requirements, to not improperly hinder or obstruct any person on site, etc).

The ACTU strongly supports the removal of barriers preventing HSRs from accessing support and assistance in the workplace. The ability of a HSR to obtain timely assistance from a union official is vital to ensure safety issues are addressed urgently, especially in high-risk sectors.

This reform was very recently considered by the Secure Jobs Better Pay Review Panel, who recommended that:

---

[66] Emeritus Professor Mark Bray and Professor Alison Preston, *Secure Jobs, Better Pay Review: Final Report*, 31 March 2025,recommendation 7, see pages 18, 155.
[67] [2017] FCAFC 89. The reform also implemented Recommendation 8 in M Boland, *Review of the Model Health and Safety Laws: Final Report*, 2018.

> The Australian Government should monitor Health and Safety Representative assistants accessing workplaces without right of entry permits and take immediate action to address any indications of misuse, particularly in the building and construction industry.[68]

However, we reiterate the points made in our submission to that Review, responding to 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: "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 … . 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".[69]

ACTU affiliates report no issues or adverse consequences arising from these amendments. We therefore support the changes, and have no recommendations for further reform in this area at this stage.

Streamlining PTSD workers' compensation claims for first responders

On 27 March 2018, the Senate referred '[t]he role of Commonwealth, State and Territory governments in addressing the high rates of mental health conditions experienced by first responders, emergency service workers and volunteers' (herein collectively referred to as 'first responders') to the Senate Education and Employment References Committee (the Committee) for inquiry. During that inquiry, some stakeholders raised concerns about workers' compensation claims processes, including that they may discourage some first responders from seeking timely assistance. In 2020, the Commonwealth Government released its response to the recommendations of the Senate Education and Employment References Committee Report 'The People Behind 000: Mental Health of Our First Responders', which included support for a nationally consistent approach to workers' compensation arrangements; and the convening of a working group to consider the benefits of a coordinated national approach to presumptive legislation covering post-traumatic stress disorder (**PTSD**) and other psychological injuries in first responder and emergency service agencies.

---

[68]Emeritus Professor Mark Bray and Professor Alison Preston, *Secure Jobs, Better Pay Review: Final Report*, 31 March 2025, Recommendation 21; see pages 306-311.
[69] ACTU, *Submission in Response to Draft Report of the Secure Jobs, Better Pay Review Panel*, D No. 06/2025, 14 February 2025, page 38.

The final report on recommendations for amendments to the 2015 Safe Work Australia (**SWA**) Deemed Diseases List found that consistent evidence is available to demonstrate that emergency response workers – in particular, ambulance officers including paramedics, police officers and fire fighters – appear to be at higher risk of developing PTSD resulting from their work compared to members of the general public. That evidence on prevalence relative to the general public was strong enough that ultimately it was concluded that PTSD ought to be included in emergency responders on the Revised Deemed Diseases List.[70]

In 2022, the ACTU made a submission to the Department of Employment and Workplace Relations Stakeholder Consultation Issues Paper, indicating a high level of support for measures that remove barriers for workers who have been injured or made ill through the course of their employment to access benefits and payments which acknowledge that their employment has been detrimental to their health and safety.[71] A paramount consideration is that any administrative processes must not exacerbate the severity of their injury/illness or impede their recovery.

PTSD is a psychiatric disorder that occurs in people that have experienced or witnessed a traumatic event such as serious injury, death, threat of violence, sexual violence, rape or natural disaster. Exposure to these events may be first-hand or indirect (vicarious) and may occur after listening to recounts of trauma, looking at material (videos, case files) or responding to traumatic events. PTSD diagnosis is distinguishable from many other presumptive occupational diseases as it can only be diagnosed following a traumatic event. This contrasts with other diseases where the clinical diagnosis is clear, but the exposure is presumed to be work-related. The SWA Deemed Diseases in Australia Report refers to the DSM-5 which requires specific linkage to the traumatic or stressful event as a diagnostic criterion when diagnosing PTSD. As the worker will need to detail the exposure it will be clear to the medical practitioner that the PTSD is work-related.

All workers who sustain a physical or psychological work-related injury must be entitled to comprehensive and quality rehabilitation services and to return to suitable and decent

[70] T Driscoll, *SWA Deemed Diseases List. Recommendations for Amendments to 2015 List*, Final Report, 2021.
[71] ACTU, *SRC Act – Presumptive workers' compensation provisions for first responders*, 2022, accessible at: media1450210d42-presumptive-wc-for-first-responders.pdf

employment. Further, injured workers must be entitled to compensation that restores their health and employment as closely as possible to that enjoyed prior to their injury, including full access to superannuation and leave entitlements. Furthermore, the ACTU is of the view that workers' compensation should be available on a no-fault basis where an injury 'arises out of or in the course of employment', even where it is the aggravation of an existing injury or disease.

The new laws introduced by the Closing Loopholes Act provide a presumption that where a (specified) "first responder", who is covered by Commonwealth accident compensation legislation (*Safety Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**)), suffers from (or has suffered) a post-traumatic stress disorder, it will be presumed that the person's prior employment as a first responder was the cause of their post-traumatic stress (unless the contrary is proven). The changes apply to claims made for PTSD with a date of injury on or after 15 December 2023.

While complex in nature, the ACTU maintains that seeing duty holders fulfil their obligations under WHS laws to eliminate or minimise risks to psychological health in the workplace so far as is reasonably practicable must be the priority for legislators and regulators.

However, acknowledging that exposure to such environments inevitably results in deleterious effects, the ACTU strongly supported the introduction of the presumptive legislation covering PTSD. This would not only encourage more first responders to seek timely assistance, but also ensure that claims are dealt with efficiently and do not contribute to workers having to relive these experiences as part of a claims process, which, by its very nature, may itself result in further trauma and in exacerbation of disease.

Operation Appropriate and Effective? Further Reform to Improve the Operation or Rectify Unintended Consequences

The ACTU views the changes to the SRC Act, amending s.7 to provide presumptive workers' compensation coverage for first responders, to be an important step in improving the claims process for first responders, including the expansion to incorporate workers from the ACT Emergency Services, Australian Federal Police and Australian Border Force Officers. It should be noted that since this provision has been implemented, Comcare claims data does not show a large influx of claims for PTSD.

There is a range of work roles both within licensees and premium payers with potential exposure to trauma and vicarious trauma – these include, but are not limited to, emergency service workers, investigators, triple zero workers, Services Australia staff and nurses.

The ACTU supports a broad scope that recognises that many workers covered by the SRC Act may be exposed to trauma and vicarious trauma during the course of their employment. We believe that any worker covered by the SRC Act who makes a claim for PTSD should be afforded presumptive rights.

We note that the CPSU's submission to the Closing Loopholes Review highlights a study on the prevalence or likelihood of PTSD among workers in the Australian Public Service (**APS**). We support the evidence-based recommendations in the report regarding the expansion of presumptive provisions, which would enable a faster, less adversarial claim process for injured workers. The ACTU therefore makes the following recommendation.

Recommendation 14:

Remove the requirement for an injured worker to have suffered PTSD as a result of providing an emergency response. Instead, the provisions ought to allow presumptive liability to be accepted for those workers who are exposed to a stressor/s that would satisfy criterion A of the PTSD DSM-V diagnostic criteria.

Comcare Guide for rehabilitation assessments and independent medical examiners

The improved Comcare *Guidance for Rehabilitation Assessments and Independent Medical Examiners* has provided clarity for employers and, importantly, provides injured workers with the opportunity to have their views sought and considered.

Since the introduction of this guide, we have observed a substantial decline in the number of medical examinations and rehabilitation assessments requested for both licensees and premium payers. Requiring injured workers to undergo regular and repeated medical examinations and assessments, without a clinical need, puts workers under unnecessary stress, and recounting events surrounding illness or injury to medical practitioners can retraumatise workers. We believe this guide is contributing to better decisions about when it is appropriate for a worker to undergo an examination or assessment.

Anecdotal evidence collected by unions suggests there have been positive impacts from this guide, although some ongoing issues with the interpretation of stop-clock provisions remain.

Introduction of industrial manslaughter in the Commonwealth jurisdiction

In 2019, the Boland review of model WHS legislation recommended that the model WHS Act be amended to introduce industrial manslaughter as an offence. The case for national, uniform industrial manslaughter laws enshrined in WHS legislation was clear. Every worker in Australia

should have the right to a safe and healthy working environment. The amendments introduced by the Closing Loopholes Act marked a systemic shift in how this country views the responsibility of employers for the safety of workers, and how our courts could address the tragic loss of life that has become an unacceptable feature of Australian workplaces.

Prior to these amendments, there was no provision for industrial manslaughter in Commonwealth WHS laws. This is despite every state and territory, except for Tasmania, introducing or committing to introduce an industrial manslaughter offence. The ACTU strongly supported the inclusion of a strong 'outcome-based' offence to sit alongside, and complement, the existing 'risk-based' offences in the WHS Act, with this reform being long overdue.

The amendments inserted an offence of industrial manslaughter into Commonwealth WHS legislation, based on conduct which breaches the WHS duties of a Person Conducting a Business or Undertaking (**PCBU**) or officer and which causes the death of a worker, and is reckless or negligent about causing that death. A court may also find a person who is charged with industrial manslaughter guilty of a category 1 or category 2 offence in the alternative, if they are acquitted of the original charge of industrial manslaughter.

The pre-existing category 1 offence (recklessness or negligence that exposes a person to a risk of death or serious illness or injury) was modified to ensure that it is available where an officer breaches their own (due diligence) duties, as well as if they engage in conduct which falls short of the PCBU's overarching health and safety duty.

The inclusion of an industrial manslaughter offence was critical to not only ensuring that a strong effective deterrent exists within the WHS framework for employers who might otherwise cut corners on work health and safety; but also that justice is afforded to families where a worker is killed at work, with thorough investigation processes and employers held to account through appropriate penalties, including incarceration.

As at early 2026, there have been no convictions for industrial manslaughter under the Commonwealth WHS Act.

Clarification on who may commit a Category 1 offence

The ACTU and its affiliates support the amendments which clarified who may commit a Category 1 offence, thereby providing greater certainty regarding liability for the most serious breaches of WHS duties.

Adjustments to criminal responsibility provisions

The ACTU supports the adjustments to criminal responsibility provisions, which provide greater clarity and certainty regarding liability for serious WHS breaches. Clear criminal responsibility is critical to effective enforcement and accountability and ensures that those with genuine control over workplace safety cannot avoid responsibility through legal or corporate technicalities.

Increases to criminal penalties and the introduction of indexation

The ACTU supports the substantial increases to criminal penalties under the Commonwealth WHS Act, which are now the second-highest of the harmonised jurisdictions, as well as the introduction of indexation to ensure those penalties retain their real value over time. Meaningful penalties are essential to ensuring that breaches of work health and safety laws are treated with the seriousness they warrant, particularly where conduct exposes workers to the risk of death or serious injury.

Strong criminal penalties play a critical role in deterrence by making clear to duty holders that non-compliance with WHS obligations will incur consequences that outweigh any perceived cost savings from cutting corners. Indexation is equally important, as penalties that are not adjusted over time risk being eroded by inflation and becoming an ineffective regulatory tool.

Together, increased and indexed penalties reinforce the primacy of worker health and safety, promote compliance, and support a culture in which preventing harm is a core legal and moral obligation of employers.

Establishment of the Family and Injured Workers Advisory Committee

The Family and Injured Workers Advisory Committee provides advice to the Minister for Employment and Workplace Relations and Commonwealth WHS regulators on the support needs of those affected by a serious workplace incident and informs the development of relevant policies and strategies. The Committee meets regularly.

The ACTU and affiliates support the establishment of the Family and Injured Workers Advisory Committee as an important mechanism to ensure that workers and families with direct or

indirect lived experience of serious workplace injury, illness or fatality are able to provide advice to the Minister for Employment and Workplace Relations and Commonwealth WHS regulators.

We consider meaningful engagement with injured workers and bereaved families to be essential to an effective WHS framework. Embedding lived experience in policy development and regulatory decision-making strengthens prevention, enforcement and support systems, and improves outcomes for workers and those affected by workplace incidents involving death, serious injury or illness.

The ACTU views the Advisory Committee as a positive and necessary step toward improving workplace safety systems, strengthening accountability, and ensuring that the needs and experiences of injured workers and families are reflected in Commonwealth WHS policy and practice.

Amendment of the Asbestos Safety and Eradication Agency Act 2013 to incorporate silica-related functions

On 7 December 2023, the Asbestos Safety and Eradication Agency's establishing legislation, the *Asbestos Safety and Eradication Agency Act 2013* (Cth), was amended to provide the Agency with additional functions relating to silica. These include the development and administration of a Silica National Strategic Plan. The Agency's name was changed to the Asbestos and Silica Safety and Eradication Agency to reflect these new functions.

The ACTU supported these amendments made by the Closing Loopholes Act. Expanding the Agency's remit to include silica exposure and silica-related diseases is a necessary and timely response to the significant and ongoing risks posed to workers' health and safety.

Part 4: Closing Loopholes No. 2 Act

Schedule 1, Part 16 of the Closing Loopholes No. 2 Act introduced new Chapter 3A in the FW Act: Minimum Standards for Regulated Workers. These provisions include a range of workplace protections for two types of regulated workers: employee-like workers performing digital platform work; and independent contractors engaged in the road transport industry. As Associate Professor Michael Rawling explains, these provisions (which commenced operation on 26 August 2024) were introduced with the intent of closing a key loophole in pre-existing laws:

> the hiring of vulnerable and other low-skilled workers as independent contractors (on rates that are frequently at or below the pay rates for comparable employees). If employers successfully used this loophole, they could avoid minimum pay and conditions standards under the FW Act and modern award system. Since 2012, this loophole was blatantly exploited in Australia by large, multinational digital labour platform operators. … [T]his — in combination with commercial pressures in supply chains — has contributed to deaths, extensive injuries, low pay, poor working conditions and the threat of capricious dismissal for gig workers and road transport … contractors.[72]

The operation of the provisions in Chapter 3A is considered in the next two sections of this submission, followed by the other aspects of the Closing Loopholes No. 2 Act.

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

Operation Appropriate and Effective?

Chapter 3A provides employee-like workers engaged by digital labour platforms with three avenues of legal protection:

- Empowering the FWC to make a "minimum standards order" (**MSO**) or non-binding guidelines to regulate the work performed by employee-like workers for a digital labour platform.
- Enabling collective agreements to be made between a digital platform operator and a registered union, and approved by the FWC, setting the terms and conditions of work performed by employee-like workers.

[72] Michael Rawling, "Regulating beyond the Employment Relationship to Protect Road Transport and 'Gig' Workers: The Regulated Worker Provisions" (2024) 37 *Australian Journal of Labour Law* 178.

- Allowing employee-like workers to seek remedies from the FWC for "unfair deactivation" by a digital labour platform.

For these purposes, an "employee-like worker" is defined in s.15P as an individual who is a party to a services contract under which they perform work for a digital labour platform, and at least *two* of the following conditions apply: the worker has low bargaining power; the worker receives less pay than an employee doing similar work; the worker has minimal authority over work performance; the worker has other characteristics specified in regulations. A "digital labour platform" is (s.15L): an online enabled application, website or system; operated to allocate, arrange or facilitate the provision of labour services; where the operator engages independent contractors directly or indirectly, or acts as an intermediary on behalf of others who interact with those contractors; and the operator processes aggregated payments referable to the work performed by the contractors (or contracts another entity to process such payments).

The provisions in Chapter 3A have been described as "world-leading" and have certainly offered Australian platform workers access to a floor of legal standards for the first time.[73]

MSOs

The FWC can make an MSO on its own initiative, or on application by employee-like workers engaged by digital labour platforms or their union (ss.536JY-536JZ). Before making an MSO, the FWC must be ensure genuine engagement with the parties to be covered by the order through a prescribed consultation process (ss.536K(4), 536KAA-536KAE). This process requires the FWC to publish a draft of any proposed MSO, allow any "affected entity" to make written submissions in response to the draft order, and make any changes to the draft order it considers appropriate. The FWC may but is not required to hold a hearing as part of the process. Ultimately, the FWC must decide to make or not make an MSO, or may instead make minimum standards guidelines (s.536KG).

The outcomes that can be obtained through the MSO framework for employee-like workers on digital labour platforms are still being explored. The TWU currently has 3 applications for MSOs before the FWC, seeking to establish minimum pay rates and other conditions for workers performing food and beverage delivery via platforms (FWC MS2024/3); platform-based workers engaged in "last mile" delivery of goods (FWC MS2024/1); and rideshare drivers (FWC MS2025/3). These applications have been, at the direction of the FWC President, the subject of

[73] Ibid, 179.

consideration by the Road Transport Advisory Group (**RTAG**) and have been programmed for hearing later this year.[74] However, in the first matter relating to food and beverage delivery, the TWU has reached a consent position with two major platforms - DoorDash and Uber Eats - on the basis of which it would like the FWC to make an MSO sooner. As an indication of what can be achieved for workers through this process, the agreed draft MSO includes provisions for:[75]

- Payment of $31.30 an hour, or $32.00 per hour if the driver is using a motor vehicle (according to the TWU this is 25% above the minimum wage).
- Payment of a baseline amount for a worker's engaged hours over up to a 3-week period, with a top-up amount to be paid if the delivery rates do not meet the earnings floor.
- A dispute resolution process.
- Engagement and feedback prior to major change (e.g. when a platform is exiting a market).
- Rights to union representation and workplace delegates' rights.
- Personal accident insurance coverage.

Unfair Deactivation

These new provisions essentially mirror the FW Act's unfair dismissal provisions, providing employee-like workers a pathway to challenge unfair deactivation (including suspension or termination of access to a platform) so that the worker is unable to perform work under a services contract with the platform (s.536LG). A deactivation will be unfair if it was not consistent with the *Digital Labour Platform Deactivation Code* (**Code**), including whether there was a valid reason for deactivation related to the worker's capacity or conduct and whether any relevant processes in the Code were followed (ss. 536LF, 536LH). Applications can only be made by platform workers who have performed work through a platform on a regular basis for at least 6 months (s.536LD); and earn less than the "contractor high income threshold" (s.536LU), currently $183,100. The remedies that can be obtained by a successful applicant are an order for their "reactivation" (i.e. removal of the suspension or termination of their access to the platform); and, if the FWC considers it appropriate, compensation for any lost pay arising from the deactivation, taking into account any remuneration the worker has earned in the interim (ss.536LP-536LQ).

[74] *Applications by the TWU* [2025] FWC 3300 (3 November 2025).
[75] "Pay guarantee on menu for food delivery gigs", *Workplace Express*, 25 November 2025. The permitted content of employee-like worker MSOs is set down in s.536KL; and in ss.536KM-536KMA, terms that must not be included in an MSO are specified.

Applications to the FWC by employee-like workers seeking remedies for unfair deactivation by platforms, which could be made from 26 February 2025, have quickly become a fast-growing area of the Commission's jurisdiction. The TWU estimates that 345 claims had been lodged by the end of 2025, of which 70 were filed by the union, suggesting a large number of unrepresented applicants.

Platform workers have obtained very good outcomes in a number of these cases. In *Hotak v Rasier Pacific Pty Ltd*,[76] it was found that an Uber driver's deactivation following a dispute with passengers was conducted in breach of the Code, because the evidence did not support the serious allegations against him and Uber failed to make a representative available for a discussion with him within a reasonable time. The Full Bench also rejected Uber's contention that its voluntary reactivation of the driver 6 weeks after it deactivated him meant the Commission had no jurisdiction to deal with his claim.[77] In addition to an order confirming the driver's reactivation,[78] the Full Bench determined that he was entitled to an order for payment of lost earnings (with the parties directed to confer on the appropriate amount).

In *Warraich v Rasier Pacific Pty Ltd*,[79] the FWC determined it was "plainly ludicrous" that Uber's message deactivating a driver alleged to have failed to pick up a rider because of their ethnicity, complied with the Code. In particular Uber had breached the Code s.8(2) requirements to warn the driver he risked deactivation due to conduct or capacity (simply informing him his access had been suspended and investigation of a complaint had commenced), state that he could seek assistance or support, and provide sufficient information enabling a reasonable person to understand the reason for the warning and how to remedy it. The driver's evidence denying any wrongdoing was accepted, and the FWC ordered his reactivation and compensation of an amount to be determined.

---

[76] [2025] FWCFB 214.
[77] The Full Bench found at [86] that Uber's "interpretation would lead to the conclusion that a person whose access to a digital labour platform was suspended for a short period—such as five business days—and later reinstated, was no longer "deactivated" for the purposes of the Act. The consequence of this would be that the Commission lacks jurisdiction to determine an unfair deactivation application in such cases. … [However] the concept of "deactivation" must be assessed by reference to a past event, rather than an ongoing state of affairs." Further (at [87]-[88]), Uber's approach would enable it to avoid the remedy of compensation available to a driver in these circumstances, frustrating the statutory purpose and denying meaningful redress for unfair deactivation.
[78] The Full Bench also confirmed (at [112]) that a broad approach should be taken to the Commission's powers under s.536LQ(1), "enabling it to craft orders that go beyond mere reinstatement and encompass a wider range of remedial measures necessary to fully restore the worker's position". However this did not extend to an order that Uber remove the negative customer reviews that formed the basis for the misconduct allegations against him: "s 536LQ(1) does not extend to reversing the consequences of events that occurred prior to the deactivation, even if those events informed Uber's decision to deactivate Mr Hotak" (at [129]).
[79] [2025] FWC 3338.

In *Bandameeda v Amazon Commercial Services Pty Ltd,*[80] the FWC allowed an Amazon Flex driver to pursue an unfair deactivation claim lodged outside the 21-day time limit. The tribunal found Amazon's communications with the driver, pausing then terminating his access to the app (and therefore ability to perform work) had been "confusing and ambiguous".[81] In the substantive proceeding determining his claim, the FWC ruled that the driver had been unfairly deactivated for entering a home to make a delivery because Amazon's policy and instructions on entering private premises were unclear. Further, Amazon failed to fully investigate the complaint against the driver, ignored his very high performance rating, and maintained a "disingenuous" position that the driver did not request a discussion about the incident (because he had not used those specific words). The FWC ordered his reactivation with repayment of lost pay.[82]

However other cases have been decided against platform workers on both procedural and substantive grounds. For example in the first application made under the new provisions, the FWC decided that a deactivated driver had not worked for Uber for the minimum 6-month period, as he had instead worked via the platform for only 3 and a half months prior to deactivation plus two earlier periods in 2017 and 2019. While this amounted to a cumulative period of more than 6 months, it was determined that s.536LD(c) "is concerned with the person's most recent period of work, which ended with deactivation".[83] The driver's claim therefore could not be considered by the FWC.[84]

This approach was also applied by the FWC in precluding an Uber Eats driver from bringing an unfair deactivation claim, due to a 9-week break he had from work in the relevant 6-month period. In that decision the FWC also considered section 18 of the Code which deals with the circumstances in which work is performed on a regular basis: e.g. if an employee-like worker completes, on average, 60 hours of paid work each month, or paid work on 3 days of each week, for the platform (even if the worker elects not to work in some weeks). Despite this, the FWC found that the driver's break here represented more than a third of the 26-week period

[80] [2025] FWCFB 182.
[81] See also *Derow v Rasier Pacific Pty Ltd* [2025] FWC 2062 where the FWC rejected a driver's 12 days out of time application despite making findings about Uber's farcical, inane and mind-numbing communications with the driver during the period when he sought to challenge his deactivation: "An individual trying to communicate with [Uber] is forced to do so using a system that seems to spit out a series of automated replies until such time as something in particular finally triggers human interaction."
[82] *Bandameeda v Amazon Flex trading as Amazon* [2025] FWC 3842.
[83] *Ibrahim Jibril* [2025] FWC 1289 at [5].
[84] In contrast, a driver who performed work for Uber and Uber Eats was found eligible to bring an unfair deactivation claim, the FWC finding that his periods of work for each entity were performed through the same digital labour platform and both could be counted towards the minimum 6-month period: *Bakar v Rasier Pacific Pty Ltd* [2025] FWC 1874. However the FWC later revoked this decision (see [2025] FWC 2278), leaving the question whether work for multiple Uber entities can be combined for these purposes, open.

s.536LD(c) required, and the driver's estimate of having worked an average of 80.3 hours per month was inflated by the inclusion of time spent online rather than making deliveries.[85]

The deactivations of drivers have been upheld by the FWC, for example where an Uber food and grocery delivery driver's customer satisfaction rating fell to 73% (below the required minimum of 85%);[86] and where an Uber rideshare driver had sought to have customers cancel their trip requests in the app and engage with/pay him directly.[87]

Further Reform to Improve the Operation or Rectify Unintended Consequences

Amendments to address unintended consequences raised by the TWU

As the most active union involved in applications for MSOs and unfair deactivation remedies, the TWU has identified a number of problems in the practical operation of relevant provisions in Chapter 3A of the FW Act, and areas in which the provisions could be improved. These are set out in the table below along with proposed solutions/recommendations which are supported by the ACTU (note that the table also refers to contractual chain orders or CCOs; these are discussed in the section of this submission "Allow the Fair Work Commission to set minimum standards to ensure the road transport industry is safe, sustainable and viable").

Lost pay orders for unfair deactivation In *Hotak v Rasier Pacific Pty Ltd* [2025] FWCFB 214, the FWC ordered payment of lost earnings under s.536LQ(3) and reactivation. The Commission rejected the employer's argument that voluntary reactivation of the driver 6 weeks after it deactivated him meant the Commission had no jurisdiction to deal with his claim. However compensation is not otherwise available (s.536LP(3)) so if no reactivation order is made, there is no scope to order payment of lost earnings.	*Recommendation 15:* Amend ss.536LP and 536LQ to clarify that reactivation prior to hearing does not impact a driver's ability to access a lost pay order, despite no order for compensation being available under s.536LP(3).
Availability of lost pay orders following suspension Concern that if a worker is suspended under s.536LH(3), then reactivated prior to hearing, they cannot get a lost pay order for the period of that suspension (although only meant to be for up to 7 days, platforms often suspend for longer e.g. 14-21 days). One problem with this is that the union has to make applications for lost pay while the individual is deactivated and/or suspended to ensure access.	*Recommendation 16:* Section 536LW(b) - add "at the time of application" before the comma. This cements the findings in *Hotak v Rasier Pacific* which effectively determined that s.536LW(b) was a point in time assessment at the time of application.

[85] *Panwar v Portier Pacific Pty Ltd* [2025] FWC 1578 [21], [31]. See also *Application by Umair Azwar* [2025] FWC 2370.
[86] *Application by Hasnain Ali* [2025] FWC 3243.
[87] *Khan v Rasier Pacific Pty Ltd* [2025] FWC 3347.

Content of MSOs for employee-like digital platform workers Include terms enabling workers to access their rights to join a union/freedom of association.	*Recommendation 17:* Add terms enabling workers to access their rights to join a union/freedom of association to terms that may be included in s.536KL.
Interaction between MSOs/CCOs and state-based instruments Under ss.536JS & 536NW, an MSO or CCO prevails over conflicting state-based instruments. However, the TWU has obtained more favourable provisions (e.g. redundancy, rostering, overtime) in contract determinations under NSW & QLD laws).	*Recommendation 18:* In determining the scope and coverage of an MSO or CCO, the FWC should be required to either: • excise from coverage regulated workers who are covered by existing State based instruments that provide terms and conditions of engagement to regulated workers that are more beneficial; or • take into account existing State based instruments that provide terms and conditions of engagement to regulated workers where those terms and conditions are more beneficial than those provided for in the proposed MSO or CCO.
Interim MSO/CCO orders There is presently no scope for FWC to make MSOs or CCOs to deal with urgent disputes in the road transport industry, e.g. the cash-in-transit sector coming under threat following Armaguard's near-collapse last year. The FWC does not, like the NSWIRC, have the power to make determinations that deal with single disputes or issues which have significant urgency.	*Recommendation 19:* The FWC should be conferred with power to make a MSO or CCO to deal with an urgent dispute. Such an order could be temporally limited (e.g. for 60 days) with the capacity to extend the operation of the order.
Minimum Standards Guidelines See ss.536KR-536L and cognate provisions (e.g. s.536KG(1)(d)). As these Guidelines are not enforceable (cf. MSOs under s.536JB), they are of minimal practical utility to unions.	*Recommendation 20:* Limit guidelines to supplementation or interpretation of MSO or CCO as they operate.

Extension of the regulated workers MSO framework to other contractors/freelancers

The ACTU and three of our affiliates – the Media Entertainment and Arts Alliance (**MEAA**), Professionals Australia (**PA**) and the Australian Writers Guild (**AWG**) – seek the extension of the FW Act framework for making MSOs to groups of independent contractors/freelancers covered by each of those unions, who require an avenue to be covered by legally enforceable minimum pay rates and conditions.

MEAA currently has several informal arrangements in place which attempt to provide a baseline of pay rates and/or conditions for some sectors of its membership, for example:

- The Freelance Charter of Rights for freelance journalists, photographers, writers, editors, producers, cartoonists and illustrators.[88] The Charter specifies minimum pay rates along with other provisions including superannuation, timely payment, ownership of copyright and dispute resolution.
- A minimum $250 per gig for musicians performing at government-subsidised gigs in several Australian states, reflecting rates for employees in the *Live Performance Award*.[89]
- A minimum fee and set of basic conditions for dancers, including provisions relating to social media, negotiated with Ausdance.

However where these arrangements take the form of unregistered agreements, they are not legally enforceable; there are significant gaps in their coverage; and MEAA potentially faces competition law restrictions in negotiating uniform pay rates for workers categorised as independent contractors. The same limitations apply to informal agreements which AWG has negotiated over the years with industry bodies for its writer members. PA has not yet negotiated agreements for the interpreters and translators it represents, many of whom are low-paid women from migrant backgrounds, in a sector that was largely outsourced from government to private providers from the 1980s.

Reform is needed to address the low pay and insufficient minimum standards for these groups of contractors and freelancers. For example, MEAA membership surveys have shown that nearly half of Australian musicians earn less than $15,000 annually from music, and 31% earn under $6,900; while 64% of freelance journalists earn less than $60,000 annually, and 30% earn under $10,000.[90] For artists including writers, actors, directors, dancers, musicians and singers, three quarters of whom work on a self-employed or freelance basis, average total income in 2021-22 was $54,500, 26% below the workforce average.[91]

Under the model we propose: the provisions in FW Act, Chapter 3A for the FWC to make MSOs for employee-like workers on digital labour platforms would remain unchanged – but their

[88] See: Freelance Journalists' Charter of Rights – MEAA Freelancers
[89] See: Musicians' union welcomes $250 minimum fee for gigs - MEAA
[90] See MEAA, *Submission to the Closing Loopholes Review*, March 2026.
[91] David Throsby and Katya Petetskaya, *Artists as Workers: An Economic Study of Professional Artists in Australia*, Creative Australia, 2024.

application would be extended in a modified form to workers in certain named occupations (with a power for the Minister to list further occupations by regulation). Those named occupations would be as follows:

- Journalists and media workers (including writers, editors, cartoonists, photographers, podcasters and producers), Musicians (including music educators), Performers (including voice actors and dancers) and Screen and live performance crew (including designers, creatives and artists).
- Translators and Interpreters.
- Writers.

Access to the MSO framework for these workers would be dependent on their meeting an equivalent of the definition of "employee-like worker" in s.15P (without the requirement of performing work for a digital labour platform). Other features of the current MSO framework could apply without significant change including the minimum standards objective (s.536JX), the parties who may apply for an MSO (s.536JZ) and the process the FWC must follow for making an MSO including consultation with relevant stakeholders (ss.536K-536KAE).

The content of MSOs for workers in the named occupations would essentially be the same, with some modifications to reflect the specific issues which arise for workers in these sectors. While the terms that *must* be included in MSOs under ss.536KH and 536KK need not change, some additions may be needed to:

- Terms that *may* be included in MSOs (s.536KL): for example, add "superannuation"; and "cancellation fees". This would cover what are known as "kill fees" which apply to some MEAA members, where the contributor of the commissioned work will be paid a fee if the commission is terminated by the publisher prior to the date of submission. PA's interpreter members also face lost income from cancellations, e.g. when a court hearing is cancelled due to the parties reaching a late settlement.
- Terms that *must not* be included in MSOs (ss.536KM-536KMA): for example, add "morality or conduct clauses". AWG members face the imposition of these clauses in their current contracts, purporting to prohibit writers from engaging in a wide range of acts in their private lives that would "cause scandal" or "invite ridicule". Writers have had contracts terminated unilaterally without payment and been prevented from obtaining future work in reliance on these clauses, which go way beyond the norms of regulating misconduct by an employee under an employment contract.

Recommendation 21:

Amend Chapter 3A of the FW Act to extend the MSO framework to independent contractors/ freelancers in certain named occupations that have "employee-like" characteristics, based on the model proposed by the ACTU in this submission.

Allow the Fair Work Commission to set minimum standards to ensure the road transport industry is safe, sustainable and viable

Operation Appropriate and Effective?

Chapter 3A of the FW Act includes provisions enabling road transport contractors to challenge the unfair termination of their services contracts, the making of MSOs for road transport contractors, and a scheme of collective bargaining between unions representing these contractors and road transport businesses. In addition, Chapter 3B gives the FWC powers to impose responsibilities on persons in a road transport contractual chain.

MSOs and Road Transport Contractual Chain Orders

The road transport contractor MSO provisions are similar to those for employee-like workers on digital labour platforms, with some important differences. These provisions apply to "regulated road transport contractors", defined in s.15Q(1) to include a person who: is party to a services contract in their capacity as an individual; performs all or a significant majority of the work under the contract; does not perform any of the work as an employee; performs the work in the road transport industry; and is not an employee-like worker. The "road transport industry" includes (s.15S(1)) the road transport and distribution industry, long distance operations in the private road transport industry, the waste management industry, the cash in transit industry and the passenger vehicle transportation industry (e.g. bus transport). A "road transport business" includes a person which receives services under a services contract for the performance of work in the road transport industry (s.15R(1)(a)).

The process for the FWC to make an MSO setting minimum standards for road transport contractors is more elaborate than that for employee-like platform workers. Section 536KA(2) requires a road transport industry Expert Panel of the FWC to: ensure there has been genuine engagement with the parties to be covered; consult with the RTAG; have regard to the commercial realities of the road transport industry; and be satisfied that the MSO will not unduly affect the viability and competitiveness of road transport contractors. The permitted and non-permitted content of road transport MSOs is very similar to that for employee-like platform workers, with the addition that matters dealt with by the *Heavy Vehicle National Law* and other

federal, state or territory laws regulating road transport cannot be included in MSOs (s.536KN(1)).

The FWC has also been given powers to regulate a road transport contractual chain (defined in s.15RA(1)) through the making of a contractual chain order (CCO) under s.536PD. These instruments, and the process for making them, have some similarities with MSOs. CCOs can set standards for road transport contractors, employee-like platform workers and other parties in the wider contractual chain.

The TWU has 1 application before the FWC for a road transport contractor MSO, covering the last mile parcel and goods delivery sector (FWC MS2024/2 complementing the MSO application for employee-like workers in this sector, see above). The union has also made 3 applications for road transport CCOs: one covering operators at all levels of the contractual chain, beginning with clients such as retailers, manufacturers and oil companies at the apex (FWC MS2024/4); one covering the cash in transit sector including cash in transit operators and their customers, e.g. banks and retailers (FWC MS2025/1); and another covering drivers transporting concrete (FWC MS2025/4).

Unfair Termination

As with employee-like platform workers, regulated road transport contractors can bring claims seeking remedies for unfair termination of a services contract, where they have performed work for a road transport business for at least 6 months (s.536LE). In considering unfairness, a valid reason related to capacity or conduct will be relevant along with the business's compliance or otherwise with the *Road Transport Industry Termination Code* (ss,536LK, 536LM). Compared with the provisions for employee-like platform workers:

> For a road transport contractor, the remedies are potentially broader. Here, the FWC may order the contractor's reinstatement, through the creation of a new services contract. Alternatively, it can require the payment of compensation, though only if reinstatement would be inappropriate (s 536LR).426 If a new contract is to be created, it may be on the same terms as the previous one, or with whatever variations the tribunal thinks fit (s 536LS(1)).[92]

In its first decision dealing with an unfair termination application under the new provisions, *Wong v Sal National Pty Ltd*,[93] the FWC determined that the director of a delivery company did not meet the requirements of s.536LE and was therefore ineligible to pursue his claim. Section 536LE

[92] A Stewart et al, *Creighton and Stewart's Labour Law*, Federation Press, 7th edition, 2025, [23.93].
[93] [2025] FWC 1701.

requires that the applicant is a regulated road transport contractor as defined in s.15Q(1) (see above), but the director here did not perform all or a significant majority of the work under the contract as required by that definition. He managed the contract for provision of the service and filled in to make deliveries about 2.5-3.75 hours per week (compared with employees doing deliveries 30-32.5 hours per week). The FWC further found that the contract that was terminated was between two business entities, and the unfair termination provisions: "are not intended to provide protection against the unfair termination of commercial contracts between businesses where the business which has been engaged to perform the work employs multiple employees to do the work."[94]

Further Reform to Improve the Operation or Rectify Unintended Consequences

Some aspects of the framework for making CCOs which the TWU and ACTU have identified as requiring improvement were covered in the table of issues and reform proposals at Recommendations 18-20 above. No further reforms of the unfair termination provisions are considered necessary at this time.

Give workers the right to challenge unfair contractual terms

Part 3A-5 in Chapter 3A of the FW Act was inserted by Schedule 1, Part 16 of the Closing Loopholes No. 2 Act and establishes a new framework and jurisdiction for independent contractors to seek a remedy from the FWC in relation to terms of services contracts that are unfair.

New ss.536NA and 536NC allow the FWC, on application, to make orders setting aside or amending all or part of a services contract if the contract contains an unfair term or terms that would, in an employment relationship, relate to "workplace relations matters". This term is defined exhaustively at s.536JQ(1), with subsection (2) excluding certain matters from being considered workplace relations matters.

Section 536NB(1) sets out the matters the FWC may take into consideration when determining whether a term of a services contract is unfair:

- the relative bargaining power of the parties to the services contract;

[94] Ibid, [22].

- whether the services contract as a whole displays a significant imbalance between the rights and obligations of the parties;
- whether the contract term under consideration is reasonably necessary to protect the legitimate interests of a party to the contract;
- whether the contract term under consideration imposes a harsh, unjust or unreasonable requirement on a party to the contract;
- whether the services contract as a whole provides for total remuneration for performing work that is: less than regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines; or less than employees performing the same or similar work would receive;
- any other matter the FWC considers relevant.

As noted by the ACTU in our submission to the Senate Inquiry on the *Closing Loopholes Bill,* provision for court/tribunal review of a services contract is not new.[95] Amendments made to the *Industrial Relations Act 1988* in 1992 allowed the Australian Industrial Relations Commission to review contracts on general fairness grounds and to set aside or vary contracts to remedy any unfairness.[96] This jurisdiction was later conferred on the Industrial Relations Court of Australia,[97] before later being invested in the Federal Court of Australia by the *Workplace Relations Act 1996*.

The relevant provisions of the *Workplace Relations Act* were then replaced with a new jurisdiction within the *Independent Contractors Act 2006* (Cth) **(Independent Contractors Act)** effective from March 2007, which continues to operate today (in conjunction with the new FW Act provisions).[98]

The Independent Contractors Act allows for an application to be made to the Federal Court of Australia or the Federal Circuit and Family Court of Australia on the grounds that the contract is unfair and/or harsh.[99] However, as we observed in our earlier submission: "Unsurprisingly, given the high cost and time associated with court proceedings, this mechanism is rarely used and is

[95] ACTU, Submission No.110 to Senate Standing Committee on Education and Employment, *Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023 [Provisions] Inquiry* (23 September 2023) page 30.

[96] *Industrial Relations Amendment Act 1992* (Cth) s.8.
[97] See *Industrial Relations Reform Act 1993* (Cth) s.71.
[98] See Part 3, Independent Contractors Act 2006.
[99] Independent Contractors Act s12.

largely ineffectual."[100]

Operation Appropriate and Effective?

The new unfair contracts jurisdiction was considered for the first time in *Somphong (Em) Thongkhamchanh v Raiser Pacific Pty Ltd.*[101] The applicant Mr Thongkhamchanh alleged that his services contract was unfair because:

- it failed to hold Uber accountable for ensuring that its platform functions properly;
- clauses 5.4 and 7.4 of the services contract allowed contractors to be penalised for issues such as cancellations, even if the cancellation was due to malfunctions in the platform (as opposed to having been caused by any act or omission by a contractor); and
- under clauses 15.2 and 15.3 access to the platform could be restricted based on untested user complaints.

Uber sought to have the application dismissed on the basis that, inter alia, the FWC lacked jurisdiction because no term which the application claimed to be unfair would, in an employment relationship, relate to workplace relations matters.

In dealing with Uber's jurisdictional objection, the Full Bench made several observations about the jurisdiction as follows:

- An order made by the Commission pursuant to s,536NC must relate to a services contract as defined at s.15H of the FW Act.
- To make an order pursuant to s.536NC, the Commission must first be satisfied that the services contract contains one or more unfair contract terms.
- The unfair contract term or terms must be terms that would relate to workplace relations matters in an employment relationship.
- Section 536NB sets out the matters that the Commission may take into account when considering whether a term is unfair. This assessment may include matters beyond the specific terms of the contract itself.
- The orders that the FWC is able to make are as set out in s.536NC.

[100] ACTU, Submission No.110 to Senate Standing Committee on Education and Employment, *Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023 [Provisions] Inquiry* (23 September 2023) page 30.
[101] [2025] FWCFB 247.

- The FWC may only make an order if a person has made an application under s.536ND, which requires the person seeking the order to be a person whose annual earnings are less than the contractor high income threshold (presently $183,100).[102]

The FWC went on to observe that unlike the situation under the Independent Contractors Act which allows for a general review of an alleged unfair contract, the jurisdiction in Part 3A-5 requires identification of whether a specific term or terms of a services contract are unfair; and this must be assessed having regard to the terms of the contract as a whole.[103]

The Full Bench also said that although it remains necessary to identify a specific term or terms to enliven jurisdiction, this does not preclude a complaint that a contract is unfair because of the absence of a particular term, if the absence of such a term makes another term or terms unfair. Having made the above observations, the Full Bench determined that Mr Thongkhamchanh had made a competent application and dismissed Uber's jurisdictional objections.[104] However, the applicant discontinued these proceedings in November 2025.[105]

Further Reform to Improve the Operation or Rectify Unintended Consequences

The decision of the Full Bench in *Thongkhamchanh v Raiser Pacific* signifies to independent contractors and principals that the new unfair contracts jurisdiction will be interpreted broadly. The ACTU endorses this approach. We have not identified any unintended consequences arising from the new provisions, although we note that there have not been any other decisions that have considered the new Part 3A-5. Therefore, more time may be required to fully assess the operation of the new provisions.

Section 536N(2) confirms that it is an object of new Part 3A-5 that there be established procedures for dealing with unfair contract terms that are quick, flexible and informal.

Presently, applications for remedies can only be made by a person who is a party to a services contract, or by an industrial organisation on their behalf.[106] The problem with this is that it requires applications to be made and dealt with, on an individual basis. The ACTU submits that it would be more appropriate for applications to also be able to be made by industrial organisations

---

[102] *Somphong (Em) Thongkhamchanh v Raiser Pacific Pty Ltd* [2025] FWCFB 247 [11]-[22].
[103] Ibid [43].
[104] Ibid [63].
[105] "Platform removed for Uber contract test case", *Workplace Express,* 25 November 2025.
[106] Section 536ND(1).

for remedies in relation to a class of service contracts that are alleged to be unfair. For instance, in a situation where there are hundreds or thousands of individuals that are subject to the same pro forma service contract, as is common on platforms like Uber and in the road transport sector, it would be more efficient for all parties and for the FWC if a remedy could be provided that declared a particular term or terms of a contract unfair. This would save the FWC, principals and contractors from needing to determine hundreds or thousands of applications dealing with the same term and would be consistent with the stated objects of Part 3A-5.

Recommendation 22:

Amend s.536ND to allow for applications to be made by a registered organisation in respect of a class of services contracts that are alleged to contain an unfair term(s). Amend s.536NA to clarify that such applications can apply to a single services contract or multiple services contracts where they are the same or substantially the same.

In addition, in our submission on the Closing Loopholes Bill, the ACTU recommended that, in addition to the orders available under s536NC (setting aside all or part of a contract or amending/varying it), the framework should allow for the payment of money in connection with any contract set aside, declared void or amended or varied.[107] The ACTU repeats this submission.

Recommendation 23:

Amend s536NC to allow for orders to be made for the payment of money in connection with any unfair contract that is set aside in full or part or amended or varied.

Amending the definition of casual employee and providing the employee choice pathway

The Government's intention in introducing the amendments made by Schedule 1, Part 1 of the Closing Loopholes No. 2 Act was stated to be: "Improving job security by replacing the existing definition of 'casual employee' with a fair and objective definition and by introducing a new employee choice pathway for eligible employees to change to permanent employment if they wish to do so."[108]

[107] ACTU, Submission No.110 to Senate Standing Committee on Education and Employment, *Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023 [Provisions] Inquiry* (23 September 2023) page 31.
[108] *Explanatory Memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*, page 1.

Casual definition

The new definition in s.15A(1) provides that an employee is a "casual employee" only if their "employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work" and the employee would be entitled to a casual loading or specific casual rate under a fair work instrument if they were a casual, or under a contract. Whether there is a firm advance commitment to continuing and indefinite work is to be assessed by the factors set out in s.15A(2) including: the real substance, practical reality and true nature of the employment relationship; that a firm advance commitment could be in the contract or in the form of a mutual understanding or expectation between the parties (not rising to the level of a contract term); and whether there is a regular pattern of work or a reasonable likelihood of a future availability of continuing work.

Section 15A replaced a provision introduced by the former Coalition Government which aligned with the approach later taken by the High Court in *WorkPac Pty Ltd v Rossato,*[109] defining an employee as a casual if they accepted an offer of employment without a firm advance commitment to continuing and indefinite work. Whether that commitment existed was determined only by reference to the original offer and acceptance, not the parties' subsequent conduct. The ACTU argued in our submission on the original Closing Loopholes Bill that this approach had "effectively [made] it legal to employ anyone as a 'permanent casual'",[110] and further:

> There's a big difference between casual work that's genuine, mutual, agreed and understood versus a situation where a worker is told they're "casual" but expected to be available and work as if they are permanent. This problem needs to be addressed, in the interests of fairness, so that workers don't miss out on leave, job security and other rights and entitlements just because they're incorrectly labelled.[111]

New employee choice pathway

Schedule 1 Part 1 of the Closing Loopholes Act also inserted new s.66AAB. This section enables casual employees to notify their employer that they believe that their employment no longer meets the requirements of casual employment as set out in subsections 15A(1)-(4) **(s.66AAB Notification).**

[109] [2021] HCA 23.
[110] ACTU, *Submission: Fair Work Legislation Amendment (Closing the Loopholes) Bill 2023*, Submission D No. 42/2023, 29 September 2023, page 11.
[111] Ibid, page 9.

To be eligible to make a s.66AAB notification, the casual employee must have been employed by the employer for at least 6 months (or 12 months in the case of a small business); and must have neither received a response from an employer in relation to a previous request within the previous six months, nor had a dispute with their employer about their casual employment resolved in the previous six months. Casual employees seeking to make a s.66AAB Notification must also not already have a dispute with their employer on foot about their casual employment.

Operation Appropriate and Effective?

The casual share of employment rose marginally in November 2025, increasing to 21.7 per cent, up from 21.0 per cent in August 2025. Nevertheless, the casual share of employment has been trending down since the economy reopened and the last of the pandemic-related movement restrictions were lifted in mid-2022 (see Chart 1). While the share of casuals picked up slightly in November 2025, there were around 18,800 fewer casual employees over the year to November 2025, the fourth consecutive quarter of annual declines in the level of casual employment (see Chart 2).[112]

Chart 1: Casual share of total employment

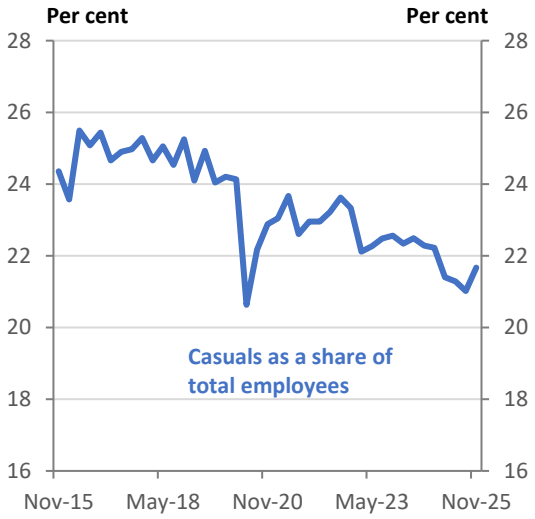
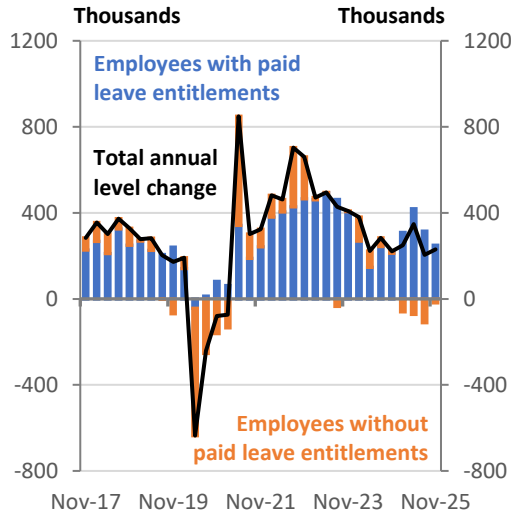


Chart 2: Annual level change in employment



Source: Australian Bureau of Statistics, Labour Force Detailed, Australia, November 2025 & ACTU calculations

In the period before the pandemic, there was widespread use of non-standard forms of employment, including casual, involuntary part-time and 'gig' work employment.[113] This was

[112] Australian Bureau of Statistics, Labour Force Detailed, Australia, November 2025.
[113] J Stanford, A Stewart and T Hardy, *The Wages Crisis Revisited*, Centre for Future Work, Canberra, 2022.

captured in the relative stability of the casual share of employment, which hovered around 25 per cent between May 2016 and May 2019. These non-standard forms of employment raised the underemployment rate and weighed on wage growth. Widespread underutilisation, including entrenched casual employment, led to adverse outcomes in the macroeconomy, including a prolonged period of slow wage growth and below target inflation.[114] Among the more egregious examples are what Stanford et. al. call 'permanent casuals', employees who experience little variation in their working hours and often remain in these positions for years at a time. This often ran against the preference of the workers and did not always come with the loading that was meant to compensate them for their lack of job security.[115] The Closing Loopholes Act No. 2 amendments sought to correct for this deficiency in the law and mitigate the negative macroeconomic outcomes arising.

Since the economy reopened post-pandemic, there has been a marked step-change in employment outcomes. The majority of the growth in employment since then has been full-time, secure work. As noted earlier, the casual share of employment has been trending down over the same period. A key factor behind these outcomes has been a tight labour market, with the unemployment and underemployment rates both sustained below pre-pandemic averages.[116] Further contributions have been made by a shift in the attitude of State Governments, where large numbers of employees have been converted to permanent positions.[117] The changes to casual regulation introduced in the Closing Loopholes No. 2 Act are also likely to have had an impact, although the limited data available and difficulties in isolating legislative impacts from macroeconomic impacts make the extent of this contribution uncertain.

There is some evidence of positive responses from employers and employees to the changes to regulation of casual work. A recent Australian Human Resources Institute (AHRI) research report found that:

> The survey data suggests that both employee engagement and productivity levels have received a boost since the new rules were implemented … . Almost two thirds (64 per cent) of employers attribute the new rules to higher levels of employee engagement in their organisation, and a similar proportion (62 per cent) say the same of productivity growth in their organisation.

[114] Ibid.
[115] Ibid.
[116] Australian Bureau of Statistics, Labour Force, Australia, January 2026.
[117] Government of New South Wales, '16,700 NSW teachers and school-based staff given permanent roles under Minns Labor Government', 17 October 2023, available: 16,700 NSW teachers and school-based staff given permanent roles under Minns Labor Government | NSW Government

> The data also suggests that the legislative changes have been well-received by casual employees. More than two thirds (69 per cent) of employers say the rules have been viewed positively by casual employees, compared with just over a fifth (21 per cent) who say it has had a neutral impact.[118]

However, the AHRI report also indicated that:

> More than two thirds (68 per cent) of employers report that they are more likely to employ casual employees following the implementation of the new legislation. By comparison, a third (32 per cent) of employers say that they are either 'somewhat less likely' or 'much less likely' to employ casuals.[119]

Further Reform to Improve the Operation or Rectify Unintended Consequences

The ACTU welcomes the changes to the FW Act which have strengthened regulation of casual employment. Overall, more time is needed to properly assess their operation. We are not aware of any decisions of the FWC or relevant courts that have considered the new s.15A definition of casual or that have dealt with disputes about the new employee choice pathway.

While we have not identified any unintended consequences associated with these new provisions, the ACTU contends that further changes are required to close two further loopholes and to ensure harmonisation with other provisions in the FW Act.

Interaction between Casual Choice Pathway and s.15A

As outlined above, under the new s.15A, a person is only a casual employee of an employer if the employment is characterised by an absence of a firm advance commitment to continuing and indefinite work; and the employee would be entitled to a specific loading or rate of pay under an award, agreement or contract.

However, subsection 15A(5) provides that a person that commences employment as a casual as defined in s.15A, remains a casual employee until their status is changed to full or part time employment by means of one of the pathways specified in subsections (a)-(d).

On its face, it is anomalous that a person that would otherwise not be considered a casual pursuant to s.15A, can nonetheless remain employed as a casual because of the operation of s.15A. This would not necessarily be problematic if, for example, there was a clear and

---

[118] AHRI, *Recent Employment Legislation: What Do Employers Think?*, October 2025, pages 21-22.
[119] Ibid, page 19.

unassailable pathway for such employees to become permanent full or part time employees in a timely way. However, this is not the case under the current Casual Choice Pathway.

This is because s.66AAC(4)(b) allows an employer of a casual employee to deny a s.66AAB notification if there are "fair and reasonable operational grounds" for not accepting the notification. The relevant factors to make this assessment are set out in s.66AAC(5) and include:

- if accepting the notification would require substantial changes in the way work in the employer's enterprise is organised (s.66AAC(5)(a));
- if accepting the notification would cause significant impacts on the operation of the employer's enterprise (s.66AAC(5)(b));
- if accepting the notification would mean substantial changes to the employee's terms and conditions that are reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full time/part time employee.

Although any fair and reasonable operational grounds (including purported grounds under s.66AAC(5)(c)) claimed by an employer can be tested (for example in arbitration under s.66MA), it is conceivable that an employee who, but for s.15A(5) would not be considered casual, can nonetheless continue to be engaged on a casual basis, potentially indefinitely.[120] This loophole should be closed.

Recommendation 24:

Repeal s.66AAC(4)(b) and s.66AAC(5) ("fair and reasonable operational grounds" for refusing an employee's notification that they believe that their employment is no longer casual).

Misrepresentations

The loophole outlined above is compounded by the fact that there is no prohibition against misrepresenting an employment relationship as casual, in circumstances where the employment relationship in fact does not meet the definition of casual as set out in s.15A.

[120] See e.g. *Priest v Flinders University of South Australia* [2022] FWC 478, decided under the casual conversion provisions in place prior to the Closing Loopholes No.2 Act amendments but with similar wording to current s.66AAC(5); FWC found the employer was not required to offer a casual employee permanent part time employment on a 0.4 FTE basis, because his wage would increase by $7,860.35 per annum and there would be marked differences in the employee's responsibilities and the university's obligations amounting to a 'significant adjustment'.

The absence of such a prohibition, in combination with s.15A(5), establishes a potential motivation to misrepresent an employment relationship as casual – with a view to denying any future s.66AAB notifications on alleged fair and reasonable business grounds to enable a permanent casual arrangement.

The ACTU does not concede that such an approach would be lawful; it is clear that s.15A applies an objective test. Nonetheless, there is a risk that employers may seek to exploit the absence of a general prohibition on misrepresentation.

The original *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* included (at Schedule 1 Part 1 item 21) a new provision (proposed s.359A) that would prohibit deliberately representing an employment relationship as casual if, in fact, the true nature of the relationship is other than casual.

This new provision was to sit alongside ss.359B and 359C which prohibit employers from dismissing an employee or employees to later engage the same employee(s) as a casual; and from making misrepresentations in an effort to persuade an employee or employees to change their employment relationship to a casual relationship (respectively).

The ACTU previously submitted (in relation to the Bill) that an additional subsection (s.359A(4)) should be added to s.359A to clarify that a 'casual' for the purposes of that section is intended to be as defined at new s.15A.[121] This recommendation was not adopted, and instead the proposed s.359A was removed entirely from the Bill via a suite of government amendments.[122]

It is disappointing that this provision was removed from the final Bill. The ACTU contends that a general civil penalty provision prohibiting misrepresentations is necessary for inclusion as part of the overall legislative framework aimed at disincentivising the permanent engagement of casuals, for the reasons outlined above.

The ACTU submits that the proposed s.359A was appropriately directed to this purpose, and that the FW Act should be amended to introduce a provision in the same form as that provision, with an additional subsection (4) clarifying the meaning of "casual" for purposes of the prohibition.

---

[121] ACTU, Submission No.110 to Senate Standing Committee on Education and Employment, *Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023 [Provisions] Inquiry* (23 September 2023) page 12.
[122] *Supplementary Explanatory Memorandum to the Closing Loopholes Bill 2023*, [52].

Recommendation 25:

Insert a new provision in the FW Act in similar terms to proposed s.359A in the original Closing Loopholes Bill that would prohibit employers deliberately representing an employment relationship as casual if, in fact, the true nature of the relationship is other than casual.

Service other than as a casual for parental leave

Section 67(1A) provides that for employees whose employment is changed from casual employment to permanent employment pursuant to Division 4A of Part 2-2 (new casual choice pathway), service as a "regular casual employee" counts towards eligibility for the NES unpaid parental leave entitlement.

The ACTU submits that, to ensure harmony with the FW Act as amended by the Closing Loopholes No.2 Act, an additional subsection should be added to clarify that all service other than service as a casual employee as defined by s.15A is counted as continuous service for the purposes of s67(1). This would clarify that any period which does not qualify as casual service pursuant to the definition should count towards eligibility for parental leave. A similar recommendation was made in our original submission to the Closing Loopholes Bill[123] but was not adopted.

Recommendation 26:

Insert a new subsection in s.67 to clarify that all service other than service as a casual employee as defined by s.15A is counted as continuous service for the purposes of the NES entitlement to unpaid parental leave in s.67(1).

Compliance and enforcement: Civil penalties and sham contracting

Civil penalties

As discussed earlier in this submission, the Closing Loopholes Act has greatly strengthened the regulatory environment as it relates to underpayments by the creation of a new wage theft criminal offence (s.327A, FW Act). This new offence is supplemented by increases to civil penalties and a change to the definition of "serious contravention" introduced by the Closing Loopholes No. 2 Act.

The ACTU submits that this hybrid approach of criminal and civil penalties is appropriate. Civil and criminal penalties are directed at achieving different but complementary purposes. This was

[123] ACTU, Submission No.110 to Senate Standing Committee on Education and Employment, *Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023 [Provisions] Inquiry* (23 September 2023), recommendation 3, page 13.

acknowledged by the High Court of Australia in C*ommonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate*,[124] in which the Court said at [55]:

> *whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in Trade Practices Commission v CSR Ltd, is primarily if not wholly protective in promoting the public interest in compliance.*

For a civil penalty to achieve this goal, it must be set at a rate that is sufficiently high to establish a disincentive against contravening behaviour.

This was not previously the case, with high profile examples demonstrating that many employers simply considered wage theft to be part of the cost of doing business.[125]

The changes to the civil penalty regime brought about by the Closing Loopholes No. 2 Act seek to prevent this situation from occurring, by significantly increasing the maximum penalties available for contraventions that relate to underpayments of wages and entitlements.

The general regime for enforcement of civil penalty provisions is set out in FW Act Part 4-1. The sections of the Act that are civil penalty provisions are collated in the table at s.539(2), with the maximum penalty for each provision being stated at column 4 of the table, and different maximum penalties applying for a "serious contravention" or "otherwise".[126]

Subsections 546(1) and (2) in combination provide that certain courts can, on application, order a person to pay a pecuniary penalty that is appropriate, with the maximum penalty for individuals being that outlined in column 4 of the table at s.539(2), and for corporations, up to five times that penalty.

Part 11 of Schedule 1 to the Closing Loopholes No.2 Act introduced a new s.546(2AA), which allows the relevant penalty amount determined in accordance with s.546(2) to be increased by a further multiple of 5 in circumstances where:

- the civil remedy provision is a selected civil remedy provision (see below); and
- the person is a body corporate; and

---

[124] [2015] HCA 46.
[125] For example, the hospitality group of George Calombaris, MAdE Establishment, underpaid workers $7.8 million in wages but was only required to make a contrition payment of $200,000 under an enforceable undertaking entered into with the Fair Work Ombudsman, see: George Calombaris' fine for multi-million-dollar wages scandal too low, Attorney-General says - ABC News. See other examples cited in ACTU, *Submission on the Closing Loopholes Bill 2023*, page 42.
[126] Section 539(2).

- when the application for the order was made the person was not a small business employer.

New s.546(2A) was also introduced, which applies to contraventions relating to underpayments if:

- the alleged contravention is of a selected civil remedy provision; and
- the person is a body corporate, and
- the person is not a small business employer at the time of the application; and
- the contravention is associated with an underpayment amount (see below); and
- the application for the order specifies that the applicant wants the maximum penalty to be calculated based on a multiple of the underpayment amount; and
- the person is not taken to have contravened the civil remedy provision because of s.550 (dealing with accessorial liability).

In such cases, the maximum penalty is the greater of the amount worked out in accordance with s.546(2AA) (see above) or three times the underpayment amount.

The phrase "associated with an underpayment amount" is defined at s.546A in a way that captures a circumstance where an employer is required to pay an amount under the FW Act, or an instrument or a transitional instrument, and they engage in conduct that results in a failure to pay the required amount to the worker in full on or before it falls due, where the failure is related to the contravention.

The phrase "selected civil remedy provision" is defined in s.12 as meaning:

> *a provision referred to in column 1 of item 1, 2, 3, 4, 5, 7, 8, 9, 10, 10A, 10F, 11A, 29, 29AA, 29A, 32, 33, 33A, 34 or 34AAA in the table in subsection 539(2).*

Relevantly, this means the "selected civil remedy provisions" are as follows:

- s.44 (contraventions of national employment standards);
- s.45 (contraventions of modern awards);
- s.50 (contraventions of enterprise agreements);
- s.280 (contraventions of workplace determinations);
- s.294 (contraventions of minimum wage orders);
- s.305 (contraventions of equal remuneration orders);
- s.323(1) and s.323(2) (which prescribe method and frequency of payments);
- s.325(1) and s.325(1A) (which prohibit employers or prospective employers from requiring an employee to unreasonably spend or pay an amount);
- s.328(1)-(3) (requiring employers to comply with obligations in relation to guarantees of annual earnings);
- s.333X (which preserves employer funded paid parental leave entitlements if a child is stillborn or dies);

- s.357(1) (which prohibits misrepresenting employment as a contract for services);
- s.358 (which prohibits dismissing an employee to engage as an independent contractor);
- s.359 (which prohibits misrepresentations inducing employees to be instead engaged as an independent contractor performing the same work);
- s.535(1), (2)-(4) (dealing with employer obligations in relation to employee records);
- s.536(1)-(3) (dealing with employer obligations in relation to employee pay slips);
- s.536AA(1)-(2) (dealing with employer obligations in relation to advertising rates of pay);
- s.558B(1)-(2) (which make franchisor entities and holding companies responsible for particular contraventions in certain circumstances);
- s.712(3) (dealing with FWO inspectors issuing notices to produce records or documents);
- s.716(5) (requiring persons to comply with compliance notices issued by a FWO inspector);
- s.718A (prohibiting giving false or misleading information to the FWO or an inspector);
- s.745 (which extends the entitlement to paid parental leave to non-national system employees);
- s.760 (which extends the entitlement to notice of termination to non-national system employees);
- s.757BA (which extends employer pay slip obligations relating to family and domestic violence leave for non-national system employees).

The definition of "serious contravention" has been changed from a two--limbed test requiring the contravener to have knowingly contravened and to have done so as part of a systematic pattern of conduct relating to one or more other persons, to a test which simply requires the contravener to have done so either knowingly or recklessly.

The effect of subsections 546(2AA) and (2A) and s.546A is that for all selected civil remedy provisions (outlined above), the maximum penalty is increased to 1500 civil penalty units (currently $495,000) for non-serious contraventions; and 15,000 civil penalty units (currently $4.95 million) for serious contraventions for corporations that are not small businesses.

In addition, s.546(2A) means that, if the alleged contravention relates to an underpayment, a court can order the maximum penalty as outlined above – or three times the underpayment amount if that is greater.

Sham contracting

Schedule 1, Part 9 of the Closing Loopholes No.2 Act amended s.357 of the FW Act, which prohibits persons representing to individuals that an employment contract is a contract for services.

The amendment changed the defence in s.357(2) from being a two-limbed test requiring the employer to not know and not be reckless as to whether the contract was an employment

contract rather than a contract for services; to a test based on an employer's reasonable belief that the contract was a contract for services, with reasonableness assessed with regard to the size and nature of the business and any other relevant factors.

Compliance notices

Division 3, Subdivision DD of Part 5-2 of the FW Act confers powers on FWO Inspectors to, inter alia, issue a "compliance notice" pursuant to s.716, where the inspector reasonably believes the person to whom the notice has been issued has contravened one or more provisions specified in s.716(1).

Under s.716(2) the compliance notice can require a person to take specified action to remedy the contravention and to produce evidence of their compliance with the notice. A failure to comply with a compliance notice without reasonable excuse is itself a contravention attracting a civil remedy (subsections 716(5) and (6)), although a person that has been issued with a notice is able to seek to have it reviewed by a court (see s.717).

Part 12 of Schedule 1 to the Closing Loopholes No.2 Act amended s.716(2)(a) to expand the type of compliance notices that can be issued, with the new subsection 2(a) providing that a compliance notice can require a person to calculate the amount owing to a person.

Operation Appropriate and Effective? Further Reform to Improve the Operation or Rectify Unintended Consequences

The ACTU is not aware of any judicial decisions where increased penalties have been imposed pursuant to s.546(2AA) or s.546(2A), or decisions relating to the amended sham contracting or compliance notice provisions. Therefore we are not able to identify any unintended consequences arising from the new provisions, and do not propose any further reforms at this stage.

Meaning of 'employee' and 'employer' in the *Fair Work Act 2009*

Schedule 1, Part 15 of the Closing Loopholes No. 2 Act inserted new s.15AA to provide statutory guidance on the interpretation of the terms "employee" and "employer" under the FW Act. Under s.15AA(1), whether an individual is an employee or whether a person is an employer "is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person". For those purposes, "the totality of the relationship between the individual and the person must be considered"; and "regard must be had not only to the terms of the contract governing the relationship, but also to other factors

relating to the totality of the relationship including, but not limited to, how the contract is performed in practice" (s.15AA(2)).

According to Professor Joellen Riley Munton, the FW Act and previous federal industrial legislation's reliance on the common law to determine whether a worker was an employee (warranting statutory protections) pointed to a "gaping hole in Australian law's provision of minimum labour standards for ordinary workers … [i.e.] the lack of a satisfactory coverage provision".[127] The evolving common law approach had shifted from the application of a multiple indicia or multi-factor test involving consideration of the overall nature of the parties' relationship,[128] to an overriding concentration in two High Court decisions in 2022 on the rights and duties set out in any written agreement comprehensively regulating that relationship (*Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[129] (**Personnel Contracting**) and *ZG Operations Australia Pty Ltd v Jamsek*[130] (**Jamsek**)). This approach provided employers with much latitude to avoid employment responsibilities to workers through calculated drafting of so-called commercial contracts.

The Note to s.15AA(2) indicates that s.15AA is a direct response to those two decisions. It requires "an inquiry that extends beyond the contractual rights and obligations of the parties" to thereby "overcome the contract-centric approach established by the High Court's decisions".[131] Further, s.15AA is intended: "to require a 'multi-factorial' assessment, as was previously understood to be the correct approach in characterising a relationship as one of employment, or of principal and contractor, for the purposes of the FW Act."[132]

Operation Appropriate and Effective?

The new s.15AA commenced on 26 August 2024.[133] Under the transitional arrangements, s.15AA applies even if the relationship between the parties commenced before 26 August 2024, but does not apply to any applications/cases already on foot as at that date.[134] In determining length of service as an employee, whether a period of service prior to 26 August 2024 is to be

---

[127] Joellen Riley Munton, "Defining Employment" (2024) 37 *Australian Journal of Labour Law* 99.
[128] *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82; *Ace Insurance Limited v Trifunovski* (2013) 209 FCR 146.
[129] [2022] HCA 1.
[130] [2022] HCA 2.
[131] *Explanatory Memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*, [973].
[132] Ibid, [974].
[133] Closing Loopholes No.2 Act s.2.
[134] Closing Loopholes No.2 Act Part 11 clauses 116 and 119.

considered a period of service as an employee is to be determined with reference to the High Court of Australia decisions in Personnel Contracting and Jamsek.[135]

Because the new s.15AA applies to engagements that commenced before commencement, there have already been a number of FWC decisions applying the provision, The ACTU's research indicates that there have been approximately 34 decisions of the FWC that have directly applied the new s.15AA in approaching the question as to whether an individual is an employee. Of these, 6 related to unfair dismissal applications made pursuant to s.394 of the FW Act, with the remaining 28 being applications for the FWC to deal with a General Protections dispute involving dismissal pursuant to s.365.

In *Murray v 239 Brunswick Pty Ltd and Raffoul*[136] **(Murray)**, Deputy President Roberts acknowledged that s.15AA(2) requires a consideration of the totality of the relationship which involves in turn a consideration of, amongst other things, the terms of the contract between the parties and an assessment as to how the contract is performed in practice. Further, the Deputy President said:

> The approach to a consideration of the totality of the relationship under s.15AA is guided by the common law principles established by cases such as Stevens v. Brodribb Sawmilling Co. Pty Ltd and Hollis v Vabu Pty Ltd and involves a reversion to the multifactorial test that was well known and widely applied prior to the High Court decisions in CFMMEU v. Personnel Contracting and ZG Operations v. Jamsek.

The Deputy President also referred to the Fair Work Australia Full Bench decision in *Jiang Shen Cai t/as French Accent v Do Rozario*[137] (**French Accent**) where, at [30], the Full Bench summarised the relevant indicia arising from Stevens v Brodbribb and Hollis v Vabu and other decisions as follows:

- The degree of control over the work of the putative employee.
- Whether the worker performs work for other businesses.
- Whether the worker has a separate place of work and advertises their services to the world at large.

---

[135] Closing Loopholes No. 2 Act Part 18, clause 118 provides that for individuals that were not an employee within the ordinary meaning of that expression immediately prior to the commencement (of s.15AA) but become an employee because of s.15AA on commencement, reference to length of service or minimum period of employment is to be ascertained in accordance with the former statutory provisions, which means the Jamsek and Personnel Contracting decisions apply having been decided under those provisions.
[136] [2025] FWC 978.
[137] [2011] FWAFB 8307.

- Whether the worker provides their own tools and equipment.
- Whether the worker can delegate or subcontract the relevant work.
- How the worker is compensated.
- Whether the putative employer has the right to suspend or dismiss the person engaged.
- Whether the worker is presented to the world as emanation of the putative employer's business.
- Whether income tax is deducted from remuneration paid to the worker.
- Whether the worker is provided with paid holidays or sick leave.
- Whether the work involves a profession, trade or distinct calling on the part of the person engaged.
- Whether the worker creates goodwill or saleable assets in the course of their work.
- Whether the worker spends a significant portion of their remuneration on business expenses.

The approach by DP Roberts in Murray has been followed in subsequent FWC decisions considering s.15AA.[138] Other decisions of the FWC that have not referred to *Murray* have nonetheless summarised the approach in a similar way and many have also referred to *French Accent.*[139] *I*n *Hu v Optima Rea Pty Ltd,*[140] Commissioner Tran adopted a slightly different view (at [10]) although without materially affecting the overall approach of having regard to the totality of the parties' relationship (including the multi-factor test).

Further Reform to Improve the Operation or Rectify Unintended Consequences

The ACTU contends that it would be beneficial for the FWC to be given powers to arbitrate disputes as to whether individuals are employees in accordance with s15AA. This would enable individuals and employers to obtain clarity on the true nature of a particular engagement, for example prior to the relationship breaking down to the point that there is an allegation of dismissal/termination. We proposed the same recommendation in our submission on the Closing Loopholes Bill.

---

[138] See, for example, *Daniloni v Majosalu Pty Ltd* [2025] FWC 2674 at [20]; *Dickson v Kovacs and Cespedes* [2025] FWC 1218 at [21]; *Milne v Festoon Lighting Australia Pty Ltd* [2025] FWC 3373 [29]; *Adrian Smith v Amart Furniture* [2025] FWC 3006 at [14].
[139] See for example, *Bull v Rmbl Bxng Bondi Pty Ltd* [2025] FWC 3069 at [44]; *Challis v Meta Healthcare Pty Ltd* [2025] FWC 3502 at [8]; *Donnelly v KWB Group Pty Ltd* [2025] FWC 2321 [52]; *Meyer v Te Paa* [2025] FWC 672 [22]; *Roberts v Level 9 Fitness Pty Ltd* [2025] FWC 3267 [18];
[140] [2025] FWC 2296.

Recommendation 27:

Provide the FWC with power to arbitrate on the question of whether a worker is an employee under s.15AA directly, rather than as an artefact of another proceeding such as eligibility to bring an unfair dismissal claim.

Enabling multiple franchisees to access the single enterprise agreement stream

Schedule 1, Part 3 of the Closing Loopholes No. 2 Act amended s.172 of the FW Act to allow multiple franchisees to access the single-enterprise agreement stream, without removing the ability to bargain for a multi-enterprise agreement if the parties wish to do so. Previously, franchisees did not come within the definition of "related employers" who could make a single-enterprise agreement. New s.172(5A)(c) expanded the definition of related employers to include employers that carry on similar business activities under the same franchise and are:

- franchisees of the same franchisor; or
- related bodies corporate of the same franchisor; or
- any combination of the above.

In our submission on the Closing Loopholes Bill, the ACTU noted the "numerous examples of compliance concerns in franchise networks including United Petroleum, Pizza Hut, Caltex and 7-11" and the potential benefits of "allowing franchisee operators and franchisor "own store" operations to bargain together on a level playing field".[141] However we also argued that:

> Franchise operations are prevalent in the retail, fast food and restaurant/hospitality sector and tend to employ a high proportion of vulnerable workers, many of whom are engaged on a casual basis and for a mere fraction of the maximum nominal term of enterprise agreement. There is a high risk that poorly represented workers will have insufficient information to bargain effectively for terms and conditions that sufficiently protect and advance both their own interests and the interests of those who will perform their roles over the term of the agreement. There is a strong case for introducing a requirement for the consent of employee organisation bargaining representatives to be sought before submitting such agreements for an employee vote.[142]

On this basis the ACTU made the following recommendation, which we repeat in this submission.[143]

---

[141] ACTU, *Submission on the Closing Loopholes Bill 2023*, pages 78-89.
[142] Ibid, page 79.
[143] Ibid.

Recommendation 28:

That consideration be given to extending the regime of employee organisation consent (s. 180A) and voting request orders (240A-240B) to single enterprise agreements proposed in franchise settings under the amended s.172.

Transitioning from multi-enterprise agreements

Part 4 of Schedule 1 to the Closing Loopholes No. 2 Act made a series of amendments to relevant provisions in Part 2-4 of the FW Act, to enable a single-enterprise agreement to replace either a single interest employer agreement or a supported bargaining agreement, *before* the nominal expiry date of the agreement being replaced. Previously this option was only available after the nominal expiry date of the multi-employer agreement.

These amendments provided for employers and their employees to consensually exit from a multi-enterprise agreement in the supported bargaining or single interest employer bargaining stream. The relevant multi-enterprise agreement would continue to apply to all other employers and employees within its scope/coverage.

In allowing employers and employees to agree instead to be covered by a single enterprise agreement, the amendments provided for a number of safeguards to ensure that this new mechanism would operate for the benefit of workers (as explained in our submission on the Closing Loopholes Bill):

> Firstly, moving from an unexpired multi-enterprise agreement to the single enterprise agreement must be voluntary and consensual, in the sense that majority support determinations, bargaining orders or scope orders are not available to progress bargaining.
>
> Secondly, before submitting a proposed single enterprise agreement to a vote, the employer must seek the written consent of each employee organisation covered by the existing unexpired multi enterprise agreement and either obtain that consent or obtain an order to permit the vote (which cannot be granted unless the FWC forms the view that the failure to give consent was unreasonable).
>
> Thirdly, the relevant employees must be assessed as being better off overall under the terms of the new single enterprise agreement than under the existing multi enterprise agreement (whether expired or not) - or an acceptable undertaking given or permissible amendment made to the agreement to ensure this is the case. Consequential amendments ... ensure that the new agreement can be reconsidered against this

> modified test in the event that the patterns or kinds of work or types of employment engaged in change after the agreement has been approved.[144]

However, the ACTU also highlighted a gap in the provisions aimed at implementing a higher standard against which the BOOT is applied to single enterprise agreements which replace multi enterprise agreements. That is, what is now s.193(1)(b): "provides no equivalent to the concept of 'reasonably foreseeable employee' which exists in respect of award covered employees. The result is that an existing employee covered by an extant multi-employer agreement is assessed against that agreement, but an employee not currently employed but within the scope of the agreement is assessed only against the award."[145]

We therefore made the following recommendation,[146] which we repeat in this submission.

Recommendation 29:

That s.193(1)(b)) be amended to ensure that both current employees and employees foreseeably within the scope of a replacement single enterprise agreement are assessed against the conditions in the extant multi enterprise agreement.

Strengthening right of entry to investigate underpayments

Part 3-4 of the FW Act establishes a framework that allows union officials that hold entry permits to enter premises to, inter alia, investigate potential contraventions of the FW Act and fair work instruments such as awards and enterprise agreements.

Section 512 allows the FWC to issue an entry permit to a union official on application if satisfied the official is a fit and proper person.

Section 481 allows permit holders to enter premises to investigate a suspected contravention of the FW Act or a fair work instrument. Sections 482 and 483 allow the official exercising the entry right to inspect work processes, interview persons and allow for the inspection and copying of documents that are directly relevant to the contravention.

---

[144] Ibid, page 83.
[145] Ibid, page 84.
[146] Ibid, page 84.

Subsection 518(1) sets out the general notice requirements that apply when a permit holder is seeking to exercise an entry right. These requirements include the premises, the day of entry and the permit holder's union.

Subsection 518(2) sets out additional requirements that apply when the purpose of the entry is to investigate a suspected contravention pursuant to s.481. These include requirements to:

- specify the section of the FW Act authorising the entry;
- specify the particulars of the suspected contravention(s);
- include a declaration by the permit holder that their union is entitled to represent the industrial interests of the member to whom the suspected contravention relates;
- specify the provision of the rules of the organisation entitling the official to represent the member to whom the suspected contravention relates.

However, s.519 allows for unions to apply to the FWC for an exemption certificate, which exempts the permit holder from the notice requirements in subsections 518(1) and (2).[147]

The Closing Loopholes No. 2 Act amended s.519, making it easier for unions to obtain exemption certificates if the alleged contravention relates to an underpayment.

Whereas previously the FWC could only issue an exemption certificate if it "reasonably believed that the advance notice of the entry might result in the destruction, concealment or alteration of relevant evidence", the Closing Loopholes No.2 Act amendment requires the FWC to issue an exemption certificate if satisfied that the suspected contravention(s) involves the underpayment of wages or entitlements and it reasonably believes that advance notice would hinder an effective investigation.

This amendment (appropriately) makes it easier for exemption certificates to be obtained, complementing other amendments made via the Closing Loopholes laws directed at compliance and enforcement including the new criminal wage theft offence, and increased penalties for underpayment contraventions.

[147] Under s.487 an entry notice must be provided by an official seeking entry to premises, unless an exemption certificate has been issued.

Operation Appropriate and Effective? Further Reform to Improve the Operation or Rectify Unintended Consequences

The ACTU has not identified any unintended consequences arising from the operation of the amendment to s.519.

The history of the FWC's jurisdiction to issue exemption certificates on ex parte application by a union is characterised by a lack of uptake.

The ACTU submits that this can be attributed to the previous requirement that an applicant be able to establish there was a risk of evidence being destroyed concealed or altered. This is a very high bar, as it requires evidence of potential suspected future conduct.

The Closing Loopholes Act No. 2 amendment appropriately lowered this threshold for underpayment contraventions. However, subsection 519(1)(b) still requires some consideration of whether advance notice of entry under an entry notice to investigate an underpayment contravention would hinder an effective investigation, and, uptake has seemingly not improved; the FWC quarterly reports indicate that there have not been any applications for exemption certificates since the commencement of the s519 amendments.

The ACTU submits that as a matter of principle, permit holders should be able to enter premises to investigate alleged underpayment contraventions without notice, and therefore advocates for the removal of the requirement to establish that there is a risk of such an investigation being "hindered". The requirement to consider the hindering of an effective investigation was not a feature of the original Closing Loopholes Bill and was introduced via amendments in the Senate.[148]

The ACTU recommends reversion to the original wording of the *Closing Loopholes Bill* to allow wage theft inspections to be undertaken without notice.

Recommendation 30:

Remove from subsection 519(1)(b)(ii) the words '*and the FWC reasonably believes that advance notice of the entry given by an entry notice would hinder an effective investigation into the suspected contravention or contraventions.'*

[148] Schedule of amendments made by the Senate to the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* at item (52) (JLN/Ind (Pocock) (1) [sheet 2368]).

Fair Work Commission preparing enterprise agreement model terms

Part 5 of Schedule 1 to the Closing Loopholes No. 2 Act amended the FW Act in several ways that affected the enterprise agreement model terms that had previously been contained in the *Fair Work Regulations 2009* (Cth) **(FW Regulations).** The model terms include a flexibility term, a consultation term and a dispute settlement term.[149]

By way of background, the statutory context and function of the model terms are as follows:

- During the approval proceedings for enterprise agreements, if the FWC is not satisfied that the agreement contains a flexibility term, the model flexibility term is taken to be a term of the agreement.[150]
- Similarly, during the approval proceedings, if the Commission is not satisfied that an enterprise agreement contains a consultation term, the model consultation term is taken to apply[151] and any non-compliant consultation term is rendered of no effect.[152]
- While the FW Act also requires enterprise agreements to have a dispute resolution term,[153] no deeming mechanism applies to the model disputes term. The model disputes term is, however, provided by the FWC as an example of a compliant term[154] and is, from time to time, adopted by the mechanism of undertakings in agreement approval proceedings.155

The key changes made by the amending legislation affecting enterprise agreements were twofold. Firstly, to move the responsibility for the making of the model terms from being a matter prescribed in the FW Regulations by the Minister, to terms determined by the FWC. Secondly, for the first time, to provide a number of mandatory matters to be taken into account in determining the content of the model terms including:

---

[149] The Closing Loopholes Act No. 2 also provided for a similar change in the dispute settlement model term for copied State Instruments.
[150] Subsection 202(4) of the FW Act.
[151] Subsection 205(2) of the FW Act.
[152] *Maritime Union of Australia v Fair Work Commission; Teekay Shipping (Australia) Pty Ltd (Intervening)* [2017] FCAFC 154.

[153] Subsection 186(6) of the FW Act.
[154] See for example: Fair Work Commission. (n.d.). *Terms and dates for developing an enterprise agreement*. https://www.fwc.gov.au/work-conditions/enterprise-agreements/make-enterprise-agreement/develop-agreement/terms-and-dates

[155] See for example *Application by G.James Glass & Aluminium Pty Ltd & G.James Glass and Aluminium (Qld) Pty Ltd and Another* [2019] FWCA 2933.

- ensuring that the model terms are consistent with the minimum requirements for flexibility, consultation and dispute settlement terms for enterprise agreements in the FW Act;

- whether the model term is broadly consistent with comparable terms in modern awards, and best practice workplace relations as determined by the FWC;

- whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term; and

- the objects of the FW Act.[156]

Operation Appropriate and Effective?

In accordance with the new requirements, the FWC conducted a consultation process between September 2024 and February 2025. The consultation was assisted by the publication of a Commission "Staff Background Paper" and included private joint consultations with peak bodies, and multiple rounds of written and/or oral submissions from interested stakeholders. This culminated in a determination of a Full Bench of the Commission on 20 February 2025: *Re Model Terms for Enterprise Agreements.*[157] The new model terms commenced on 26 February 2025. The changes to the model terms updated the terms in a number of relatively minor but important ways, bringing them more into line with contemporary industrial standards and expectations. Those changes included:

The model flexibility term being amended:

- To only allow individual flexibility arrangements (**IFAs**) to be made after commencement of employment and without coercion or duress.[158]
- To require that a written proposal for an IFA is provided prior to the actual IFA, and an obligation that reasonable steps be taken to ensure the employee understands the IFA.[159]
- To require that an employer meet an employee to discuss a proposed IFA if requested by the employee.[160]

---

[156] Section 768BK of the FW Act.
[157] [2025] FWCFB 39.
[158] [2025] FWCFB 39 at [70] and [74].
[159] Ibid at [78] and [79].
[160] Ibid at [82] and [83].

- To require IFAs to meet the genuine needs of employees in all respects, rather than in only one respect.[161]
- The inclusion of a note advising an employee that they may also seek to make a flexible work request under the FW Act.[162]

The model dispute settlement term being amended:

- To clarify that a union can be a party to a dispute (consistent with Federal Court authority).[163]
- To provide the FWC a capacity to waive otherwise mandatory steps of a disputes procedure (where appropriate).[164]

The model consultation term being amended:

- To use the word "consult" in the consultation term in place of "discuss".[165]
- To include "job security" being included in the definition of matters that constitute a "significant effect" in relation to consultation required for major changes.[166]
- To include the duration and likely financial impact of a change to rosters or hours being one of the prescribed matters over which consultation must occur.[167]
- An obligation to communicate the outcome of the consultation.[168]

In addition, the Full Bench foreshadowed later returning (on its own motion or on application) to the question of at what stage an obligation to consult should be triggered under the model them; and whether "major change" should continue to be limited to the historically derived changes in "production, program, organisation, structure or technology".[169]

Further Reform to Improve the Operation or Rectify Unintended Consequences

The ACTU has not identified any unintended consequences of this aspect of the reforms. We submit that having an open, consultative process aligned to the objects of the FW Act, which seeks to ensure model terms better reflect contemporary standards and evolving legal authority, is clearly an improvement on the previous legislative approach.

---

[161] Ibid at [69].
[162] Ibid at [91].
[163] Ibid at [136].
[164] Ibid at [138] - [140].
[165] Ibid at [109].
[166] Ibid at [123].
[167] Ibid at [125].
[168] Ibid at [115].
[169] Ibid at [18], [103] and [104].

Repeal de-merger from registered organisations amalgamation provisions

Part 13 of Schedule 1 to the Closing Loopholes No. 2 Act amended the *Fair Work (Registered Organisations) Act 2009* (**FW(RO) Act**) to restore the provisions as they were before amendments made by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020* (**2020 Withdrawal from Amalgamation Act**).

By way of background, the 2020 Withdrawal from Amalgamation Act had introduced a process where the time limitation in the FW(RO) Act enabling constituent parts of an amalgamated organisation to withdraw from that organisation could be extended beyond the 5 year time limit in s.94A of the FW(RO) Act. That process involved various matters including, as a threshold issue, the Commission being satisfied that the amalgamated organisation had a record of not complying with workplace or safety laws (as defined in the amendments). Applications were made by the Mining and Energy Division and the Manufacturing Division of the then CFMMEU to withdraw from that amalgamated organisation.

Operation Appropriate and Effective? Further Reform to Improve the Operation or Rectify Unintended Consequences

Subject to the transitional laws contained in the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamation) Act 2024* (Cth), which specifically apply to the Manufacturing Division of the CFMEU, the Closing Loopholes No. 2 Act amendments have been substantially effective in returning the law to its former position with respect to the time limit on the withdrawal of constituent parts of amalgamated organisations.

No further applications have been made for withdrawal from an amalgamation beyond the 5-year time limit, or at all, since the Closing Loopholes No. 2 Act amendments.

The ACTU does not consider there is any need for further reform.

Workplace determinations

The Secure Jobs, Better Pay Act introduced a new form of workplace determination in circumstances where the Commission was satisfied that bargaining had become intractable (forming the basis for the FWC to make an intractable bargaining declaration). Schedule 1, Part 5A of the Closing Loopholes No. 2 Act amended the intractable bargaining disputes framework created by the Secure Jobs, Better Pay Act by providing in a new s.270A that where the Commission made a workplace determination, certain of its terms "must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative

of any of those employees, than a term of the enterprise agreement that deals with the matter". The intractable bargaining dispute framework, including s.270A, were considered by Emeritus Professor Mark Bray and Professor Alison Preston in Chapter 14 of the Final Report of the Secure Jobs, Better Pay Review.[170] At that time, the authors concluded in relation to s.270A:

> In the draft report, the Review Panel stated that it remains unconvinced about whether the 'not less favourable' (s 270A) amendments have the intended effect of focusing the minds of all the parties on reaching a mutually acceptable compromise. In response to the draft report, employer representatives were consistently opposed to s 270A, while the ACTU drew the Review Panel's attention to several perceived risks to a union bargaining representative in gaming the intractable bargaining framework. It was suggested that there remain significant disincentives to proceed to arbitration, including the delay in achieving wage increases while arbitration occurs; the resource costs of arbitration; and the legal issue identified in Unanderra preventing the FWC from arbitrating dispute resolution clauses with mandatory arbitration.
>
> Whether these matters provide sufficient risk to focus the minds of all bargaining parties on reaching mutually acceptable outcomes remains to be seen. The amendments require further consideration in tribunal decisions and application in practice before the law will be fully tested. The Panel considers that close attention to forthcoming events will be required to be able to reach a conclusion on whether further amendments are required. As a result, the Review Panel declines to make any specific recommendations at this time.[171]

Operation Appropriate and Effective?

The ACTU position remains that s.270A is an important part of the intractable bargaining framework and a necessary protection for employees for the reasons it was introduced.

The intractable bargaining framework commenced on 6 June 2023, with the s.270A amendment effective from 27 February 2024. The Review of the Secure Jobs, Better Pay Act, found that, as at 21 February 2025, there had been 9 intractable bargaining declarations made and 2 intractable bargaining workplace determinations.[172] In relation to the declarations, 4 applications were made by employers, and 5 by unions.[173]

---

[170] Bray, M., & Preston, A. (2025). *Final report of the Secure Jobs, Better Pay Review*. Department of Employment and Workplace Relations. https://www.dewr.gov.au/download/17101/final-report-secure-jobs-better-pay-review/40698/final-report-secure-jobs-better-pay-review/pdf.

[171] Ibid, page 150.
[172] Ibid, pages 141-143.
[173] Ibid, Table 13.at pages 142-143.

The Commission's 2024-2025 Annual Report records that in the 2024-2025 financial year, 12 applications were made for an intractable bargaining declaration, with one reported bargaining workplace determination.[174]

No published data is currently available on applications for the financial year 2025-2026.[175] Our search of Commission decisions made under s.234 in the 13 months since the date of the last recorded decision in the Report of the Review of the Secure Jobs, Better Pay Act (*Transdev Sydney Pty Ltd & Great River City Light Rail Pty Ltd v Australian Rail, Tram and Bus Industry Union*[176]) has identified 6 matters in which the Commission has made an intractable bargaining declaration[177] and 7 intractable bargaining workplace determinations.[178]

The above data suggests that the intractable bargaining framework continues to play a structurally important role, albeit its practical use is confined to a relatively small set of cases. For context, the relatively small number of intractable bargaining workplace determinations can be compared with 4,024 applications for approval of single-enterprise agreements lodged in 2024-25.[179]

Since the Secure Jobs Better Pay Review, our affiliates report that the intractable bargaining provisions have generally been positive in focussing the minds of the parties in bargaining. This is because of the significant disincentives for both unions and employers to enter into intractable bargaining, and the converse incentives to resolve matters through bargaining, as evidenced by

---

[174] FWC, *Annual Report 2024-25;* see reference data in Appendix C to the Report.
[175] As of 1 March 2026, the Quarterly Reports containing such data usually reported on the Commission's website are unavailable: Quarterly reports | Fair Work Commission.
[176] [2024] FWC 3594.
[177] *Mining and Energy Union v Ulan Coal Mines Pty Ltd* [2025] FWC 3726 (5 December 2025); *Transport Workers' Union of Australia-Western Australian Branch v. Ventia (Australia) Pty Ltd* [2025] FWC 3049 (10 October 2025); *Qube Offshore Services Pty Ltd v The Australian Workers' Union* [2025] FWC 977 (8 April 2025); *Australian Rail, Tram and Bus Industry Union v Qube Logistics (Rail) Pty Ltd Trading as Qube Logistics* [2025] FWC 1283 (8 May 2025); *Australian Nursing and Midwifery Federation v. Healthscope Operations Pty Ltd* [2025] FWC 2507 (28 August 2025); *Association of Professional Engineers, Scientists and Managers, Australia v Concentrix Pty Ltd* [2025] FWC 1088 (16 April 2025).

[178] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v. Endeavour Energy Network Management Pty Ltd Trading as Endeavour Energy* [2025] FWCFB 285 (11 December 2025); *Australian Salaried Medical Officers Federation* [2025] FWCFB 261 (12 November 2025) (ACT Public Sector Medical Practitioners Workplace Determination 2025); *Application by Terminals Pty Ltd Trading AS Quantem Bulk Liquid Storage & Handling* - [2025] FWCFB 260 (11 November 2025); *Qube Offshore Services Pty Ltd v Australian Workers' Union* [2025] FWCFB 139 (7 August 2025); *Network Aviation Pty Ltd as Trustee for The Network Trust Trading AS Network Aviation Australia v Australian Federation of Air Pilots, Australian and International Pilots Association, Transport Workers' Union of Australia* [2025] FWCFB 176 (12 August 2025); *Australian Rail, Tram and Bus Industry Union v. Qube Logistics* [2025] FWCFB 129 (10 July 2025); *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* [2025] FWCFB 109 (27 May 2025).
[179] FWC, *Annual Report 2024-25;* see reference data in Appendix C to the Report.

the very low usage of this avenue. These factors were detailed in the ACTU reply submission to that review, and remain relevant today.[180]

Further Reform to Improve the Operation or Rectify Unintended Consequences

In terms of the technical application of s.270A, the ACTU raises one important matter for reform: that s.270A be amended to apply to mandatory terms in workplace determinations where those matters remain at issue. The proposal arises following the FWC's approach to intractable workplace determinations to the effect that where matters concerning dispute resolution, consultation, flexibility or delegates' rights terms are not "agreed matters", s.270A has no application: see *Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v. Endeavour Energy* [2025] FWCFB 285 (11 December 2025) from paragraph [226] to [238].

Several ACTU affiliates, including the AEU, NTEU and the UFU, have raised concerns about this anomaly which allows employers to pursue an arbitrated outcome (following the making of an intractable bargaining declaration) in which the more favourable terms in the enterprise agreement being replaced are automatically stripped back – to the level of the model dispute resolution, consultation, flexibility and delegates' rights terms – without any regard to the circumstances of the parties, or the merits of the pre-existing clauses. In the experience of our affiliates this loophole, applying as it does to key matters in an agreement, risks significantly compromising the objective of the "no less favourable" amendment.

Subject to the current term in an agreement being compliant with the relevant mandatory terms in s.273 of the FW Act, there is no sound policy basis to treat the mandatory terms differently to other terms in the agreement when applying the "no less favourable" rule in s.270A.

Recommendation 31:

Section 270A

Insert new subsection (2A) following subjection 270A(2) in the following, or similar, terms:

> (2A) A mandatory term that is included in the determination to comply with subsection 270(1)(c) and section 273, and that deals with a particular matter, must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter.

[180] ACTU (2025), *Secure Jobs Better Pay Review - Reply Submission*, 14 February 2025, see pages 11 to 16.

Subsection 273(4)

After “must include the model flexibility term”, insert “, or, if section 270A applies, a term that complies with section 270A,”.

Subsection 273(5)

After “must include the model consultation term”, insert “, or, if section 270A applies, a term that complies with section 270A,”.

Right to disconnect

The ‘Right to Disconnect’, as set out in s.333M of the FW Act (introduced by the Closing Loopholes No.2 Act), granted employees the right to ‘refuse to monitor, read or respond to contact or attempted contact from an employer outside of the employee’s working hours, unless the refusal is unreasonable’. This same right extends to contact from third parties where the ‘contact relates to their work’. Clause 111C(2) of Schedule 1 to the FW Act required the Fair Work Commission to vary all modern awards to include a right to disconnect term, which was achieved via the decision issued on 23 August 2024. The modern award terms took effect for all national system employers, apart from small business employers, and their employees on 26 August 2024, and for small business employers and their employees on 26 August 2025. The FWC committed to review the operation of the right to disconnect terms in modern awards approximately 12 months after the terms first took effect, giving the parties the opportunity to raise any practical difficulties which they perceive have arisen in the operation of the terms, either generally or in particular industries or occupations.

Operation Appropriate and Effective?

The FWC’s Review process was initiated on 21 August 2025. In the statement issued by the FWC on that day, the Bench noted that, despite the modern award terms having been in operation for 12 months, the Commission had not yet been asked to consider any test cases or resolved any significant disputes in accordance with the right to disconnect terms. Nor had it been asked to deal with any test cases regarding the substantive right to disconnect provisions in the FW Act., although it is understood that there is a case currently before the Commission to be heard in the coming months. Decided cases referring to the right to disconnect have arisen indirectly only, for instance in unfair dismissal proceedings.

The ACTU further notes that there would appear to be no published academic research on the right to disconnect clause in modern awards and that the operation of the term with respect to small business is only very recent, having taken effect on 26 August 2025. The limited information in the public domain about the broader effect of the laws appears positive. For

example, while the methodological approach that has produced the reported results is not sufficiently detailed to make an assessment of the reliability of the outcomes, the Australian HR Institute **(AHRI)**'s Quarterly Australian Work Outlook (June Quarter 2025) reported that there have been reports of significant improvements in productivity, employee engagement, work-life balance and employee stress levels associated with the new rights contained in the legislation.[181] A more recent AHRI research report based on a survey of over 600 employers, and focus groups, found that:

> 58 per cent reported that the [right to disconnect] legislation had either 'significantly increased' or 'somewhat increased' employee engagement and productivity levels at their organisation. This was particularly apparent among public-sector employers, 75 per cent of whom reported seeing benefits to employee engagement. In addition, a higher share (77 per cent) of public-sector employers said that the new right to disconnect legislation had either 'significantly increased' or 'somewhat increased' productivity at their organisation. …
>
> Overall, almost four in 10 (39 per cent) employers reported benefits to work-life balance among employees at their organisation … as a direct result of the right to disconnect legislation. …
>
> Thirty-seven per cent of employers reported that they had seen 'mostly positive changes' in stress levels among employees of their organisation after implementing the right to disconnect legislation.[182]

Speaking about the report's findings, AHRI Chief Executive Sarah McCann-Bartlett said: "what this has really done is it's provided awareness, consistency and clarity among employers and managers around how we [contact employees] in our organisation, created that common respect for boundaries outside standard working hours and driven better understanding between managers and employees around that are the expectations."[183]

On the other hand, practical access to the laws may be an issue; a survey of more than 2000 workers commissioned by HR Platform HiBob indicated that around one-third of workers not feeling confident to actually use their new disconnection rights.[184]

---

[181] Australian HR Institute. (2025). Quarterly Australian Work Outlook: June quarter 2025 (p. 23-29). https://www.ahri.com.au/wp-content/uploads/AHRI-WorkOutlook-Report-2025-Q2.pdf

[182] AHRI, *Recent Employment Legislation: What Do Employers Think?*, October 2025, pages 10-13.

[183] Ewin Hannan, "How Australia's right to disconnect laws improved work-life balance and engagement", *The Australian*, 1 February 2026.

[184] Quinn, K. (2025, September 4). One year on — is our "right to disconnect" law actually working? The Sydney Morning Herald. https://www.smh.com.au/business/workplace/one-year-on-is-our-right-to-disconnect-law-actually-working 20250904-p5msfi.html. Again, however, the methodological rigour of the survey cannot be assessed on the published results.

Further Reform to Improve the Operation or Rectify Unintended Consequences

During the process conducted by the FWC to consider the nature of the setting of the modern award term to enshrine a right to disconnect, the Australian Nurses and Midwifery Federation (**ANMF**) described its concerns that clause 19.7 of the *Nurses Award 2020* facilitates employers to direct employees to recommence work outside of a rostered start time even when that employee is not on call. The ANMF submitted that clause 19.7 is fundamentally at odds with the concept and operation of a right to disconnect and arises solely in the Nurses Award. The ANMF confirmed during the FWC call for submissions on the question of whether a Review was required into the operation of the Modern Award term, that it remains concerned about the interaction of the model award term with clause 19.7 of the Nurses Award.

The ACTU supports the ANMF's concerns being dealt with in a targeted review of that issue in the Nurses Award. The ANMF submitted to the FWC in October 2025 that changes are required to ensure the recall to work provisions in clause 19.7 do not nullify the model term. In response to this, the FWC did not accept that it should, on the Commission's own initiative, undertake a targeted review of the Nurses Award as proposed by the ANMF. The FWC, instead, invited the ANMF to apply to vary the award pursuant to s.158 of the FW Act 2009. The issue, therefore, remains unresolved. However, no change to the legislation is required.

During the FWC process to determine the nature of the modern award term, the ACTU submitted that the term adopted should provide practical guidance to both employers and employees on how the clause will be exercised in workplaces. In particular, the clause proposed by the ACTU added two criteria to the reasonableness test. The ACTU clause proposed the following addition to subsection (3) of s.333M:

> (f) Whether the employee is on approved leave or another authorised absence.
> (g) The extent to which the employer has made adequate staffing arrangements and planned for workplace fluctuations to minimise the need for out-of-hours contact.

These additions were not adopted by the FWC but are considered necessary by the ACTU. Proposed s.333M(3)(f) does not prevent an employer from attempting to contact an employee while they are on leave or another authorised absence, it merely enables the fact of the employee being on that leave or authorised absence to explicitly be a relevant factor in the determination of whether their election to refuse such contact was reasonable.

In relation to proposed s333M(3)(g), the existence of a right to disconnect is of little or no utility if the workplace is organised in such a way as to be reliant on contacting employees when they are not working in order to function. For this reason, the ACTU included - as a factor of

reasonableness in exercising the rights to disconnect – a consideration of whether the employer has taken reasonable steps to eliminate or minimise the need to contact the worker when they are not working. In essence, that consideration sought to identify whether the employer has recognised the need not to intrude into their employees' personal time or has instead made contacting employees when they are not working part of the ordinary course of conducting its business.

Again, this addition would not prevent employers from making contact with employees when they are not working, or seek to enforce specific staffing arrangements on employers. It would simply recognise that the party with the ability to control the work environment, and accordingly whether the new right would be able to be practically implemented, is the employer – and responsibilities rest with employers as a result of this reality.

The ACTU submits that the addition of these 2 elements to the factors relevant to determining whether a worker's refusal to respond to work contact is unreasonable would enhance the effectiveness of the new right to disconnect.

Recommendation 32:

Amend s.333M(3) by adding the following to the factors that may be considered in determining whether an employee's refusal under s.333M(1)-(2) is unreasonable:

> (f) Whether the employee is on approved leave or another authorised absence.
> (g) The extent to which the employer has made adequate staffing arrangements and planned for workplace fluctuations to minimise the need for out-of-hours contact.

Workplace delegates' rights, extension to regulated workers

In introducing statutory workplace delegates' rights into the FW Act as discussed earlier in this submission, the *Closing Loopholes No. 2 Act* did not confine those rights to workers engaged as employees. New s.350B of the FW Act extended workplace delegates' rights to regulated workers covered by Chapter 3A, essentially reflecting those in s.350A. This marks a significant advance for a particularly vulnerable cohort within the labour market.

Operation Appropriate and Effective? Further Reform to Improve the Operation or Rectify Unintended Consequences

Unfortunately, the one judicial consideration of s.350B and cognate general protections provisions reveals an important and unintended practical limitation in the operation of the

provision. The decision in *BUWA Transport Pty Ltd v Cleanaway Waste Management Ltd (No 2)*[185] (**BUWA v Cleanaway**) demonstrates that, notwithstanding Parliament's intention to extend protections beyond traditional employment relationships, principals in commercial contracting arrangements may avoid liability by directing retaliatory conduct at a delegate's corporate contracting vehicle, rather than at the delegate personally.

BUWA v Cleanaway involved a truck driver, Daniel Walsh, and two small trucking companies, BUWA Transport Pty Ltd and D&T Transport Pty Ltd. The companies, controlled by Mr Walsh, contracted with Cleanaway in its waste management operations. Mr Walsh personally performed the driving work and was active in workplace affairs, including as a TWU delegate. The applicants (Mr Walsh and his two companies) alleged that Cleanaway terminated, or declined to renew, the service arrangements with the trucking companies in retaliation for Mr Walsh's workplace and union delegate activities, pleading contraventions of ss.340(1), 346 and 350B(1) of the FW Act.

Cleanaway succeeded in having these claims summarily dismissed. The Court accepted that Mr Walsh, as a natural person and workplace delegate, was a separate legal entity from the companies he controlled, which were the entities in a direct commercial relationship with Cleanaway. The consequences of that separation were dispositive of each pleaded cause of action for the following reasons.

First, in relation to s.340, the Federal Circuit and Family Court held that no relevant "workplace right" was established insofar as the claim depended upon rights said to arise from Mr Walsh's companies' service contracts. Those contracts were not "workplace instruments" within the meaning of s.12, and therefore were incapable of generating "workplace rights" for the purposes of s.341.

Secondly, in relation to s.346, the Court held that the pleaded adverse action (which was denied by Cleanaway) was not alleged to have been taken against Mr Walsh because of his industrial activity as a workplace delegate, but rather against the corporate entities through which he contracted. As a result, the statutory protection was not engaged.

Thirdly, in relation to s.350B, the Court held that the pleaded case did not allege an unreasonable failure or refusal to deal with Mr Walsh himself. Instead, it alleged a refusal to deal with BUWA Transport Pty Ltd. The Court reasoned that s.350B does not extend protection to the corporate vehicles through which a workplace delegate performs work.

---

[185] [2025] FedCFamC2G 846.

In effect, the current legislative framework was found to provide protection and entitlements for Mr Walsh vis-à-vis the corporate entities he controlled, and through which he performed work, but afforded no corresponding protection or entitlement for Mr Walsh (or those entities) as against Cleanaway.

Despite this outcome, in our view it is premature to suggest any further reforms in this area at this point.

Family and Domestic Violence Leave Act

Background

The *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) and the entitlement to 10 days paid FDV leave were reviewed independently in 2024.[186] The Independent Review found that while the entitlement is operating as intended, more time was needed for employers and employees to experience the existing entitlement before further calls for reform were progressed.[187] In its response to the Review, the Government committed to reviewing the entitlement again.[188]

The ACTU and many of its affiliates made detailed submissions to the Independent Review in 2024. The ACTU's submission and other union submissions can be found here, and the ACTU submission is also provided as an attachment to this submission. These contained detailed submissions on the operation and implementation of the entitlement, and further areas for improvement and reform. All of these submissions and the issues raised in them remain relevant for this review. In the sections below we have sought to summarise the major themes and issues our affiliates raised in the Independent Review in 2024, and to include updated information.

[186] Seymour, K., Marmo, M., Cebulla, A., Ibrahim, N., Esmaeili, H., Richards, J., & Sinopoli, E. (August 2024) *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009*. Adelaide: Australian Industrial Transformation Institute, Flinders University of South Australia.
[187] Ibid, viii-ix.
[188] Australian Government Response to the Independent Review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009 (Cth).

Major themes from the 2024 Independent Review which remain relevant (including reform proposals)

The profoundly positive impact of the entitlement

The first major theme highlighted by unions in the 2024 Independent Review was the incredibly positive impact the new NES entitlement to 10 days' paid family and domestic violence leave (**FDV leave**) has made to workers in three key ways.

Firstly, it has allowed countless workers to take the time they need off work to deal with family and domestic violence. The Independent Review found that paid FDV leave was succeeding in supporting the financial security of those escaping or experiencing violence. Nearly all surveyed users of paid FDV leave reported that it helped them to maintain their income (91%) or their employment (89%).[189] Victim-survivors also reported that accessing the leave enabled them to 'do tasks associated with escape or safety during work hours without the perpetrator knowing'.[190]

The experience of unions with the entitlement has been that it has kept people in work and ensured they don't lose their job and don't need to choose between their safety and their livelihood. It has also allowed workers to 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. We included many case studies and examples in the ACTU's submission to the Independent Review. We include just a few of those here:

- An HSU member and mental health nurse working at a hospital accessed the full 10 days' FDV leave, which enabled her to leave an abusive relationship. The member picked up an overtime shift at the hospital, made a call on her break to organise crisis accommodation, where she went after her shift finished. The member was able to talk with her associate nurse unit manager about it and that she would be taking 10 days' paid FDV leave starting the next day. The paid leave enabled her to access a $5000 leaving violence grant and get set up in a new home.
- A frontline worker and ASU member assisted a client experiencing family and domestic violence working as a factory hand and who was not an Australian citizen. Prior to the NES entitlement, the client would have had no support to get out, as she was not eligible for Centrelink entitlements and had limited access to temporary accommodation or

[189] Seymour, K., Marmo, M., Cebulla, A., Ibrahim, N., Esmaeili, H., Richards, J., & Sinopoli, E. (August 2024) *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009*. Adelaide: Australian Industrial Transformation Institute, Flinders University of South Australia, pages 42, 77.
[190] Ibid, page 77.

government support. The client was afraid she would lose her job, but spoke to her direct manager, who was very supportive and assisted the worker to access paid FDV leave, commencing the following day. The manager had previously had several requests and so was familiar with the process. The client took 10 days' paid leave, and because she did not have to worry about any interruptions to her income, was able to move house, leave the violent situation and re-establish herself.

- An SDA member working as a casual at a discount department store accessed FDV leave to leave a relationship, and again when her ex-partner tried to re-enter her life. She was able to use the leave to organise temporary accommodation, find care for her children and pay her bills.
- A CPSU member accessed FDV leave. Their partner was psychologically and economically abusive and had stated an intention to take the children overseas without the member's consent. The member was able to use the leave to attend legal appointments and prepare for legal proceedings.

Affiliates with members who are front line workers have also reported the following:

- A greater uptake of women utilising this leave compared to the previous NES entitlement of unpaid leave or when workers had to utilise other forms of leave such as annual or sick leave.
- Since the legislation was passed, they have witnessed more women attending court and being able to navigate and seek protection through the court system.
- Many women workers have commented on how difficult it would have been for them to leave a violent relationship if they if they had not been able to access paid leave and remain in paid employment, and that it is a huge relief to know they can engage in the legal process without putting their employment in jeopardy.
- A wide variety of workers are accessing the leave – including vulnerable cohorts of workers such as culturally and linguistically diverse workers, workers in regional and remote areas, and people employed in casual and part time work.

Secondly, the inclusion of this entitlement in the NES has brought much needed awareness and conversation to workplaces and employers that had not previously provided such support. Paid FDV leave focuses attention on the problem of FDV and the actions women must take to survive abusive and violent relationships. It brings the issue further out of the shadows and challenges the silence and stigma experienced by victim-survivors. Our affiliates report that paid FDV leave entitlements they have previously won through bargaining have led to improved workplace attitudes towards FDV. The discussion of paid FDV leave means that FDV is demystified,

destigmatised, and prioritised amongst workers. The implementation of FDV leave entitlements and advocacy by unions for proper processes and training has had positive impacts on employers' approaches to FDV and paid FDV leave. Anecdotal reports from frontline workers support this, with those workers reporting to their unions that paid FDV leave sends a powerful message that society and workplaces stand with victim-survivors, and that the entitlement is changing workplace culture as workers and employers start to have conversations about the entitlement, about policy and procedure, and about how to support workers who are in abusive relationships and make the workplace safe.

However, the stigma still very much exists, with some affiliates reporting that it is difficult to get case studies as workers do not wish to talk about it.

Thirdly, the entitlement has allowed unions to more easily negotiate and secure additional entitlements, protections and supportive arrangements through collective bargaining to support employees experiencing FDV and other forms of gender-based violence, which improve on the baseline entitlement in the NES. Many unions bargain for 20 days' paid FDV leave or more, with some unions also securing access to uncapped leave in agreements. For example:

- The CPSU won uncapped paid leave for all APS employees in APS service-wide bargaining in 2023, as well as less onerous evidentiary provisions (discussed further below).
- In 2024-2025, the FSU negotiated 32 enterprise agreements. Of those 32 agreements, 26 included paid FDV leave that is *more generous* than the NES, covering 73,000 workers in total. 12 of those agreements include unlimited paid leave (with 2 agreements providing 15 days, 9 agreements providing 20 days, and 3 agreements providing 30 days).

Varied experiences with implementation of the reform and the key role of unions

The second major theme highlighted by unions in the 2024 Independent Review was that there are quite different experiences with implementation, depending on the employer, and that unions play a key role in implementation. Our affiliates report that implementation of the new NES entitlement has been relatively straightforward for employers who previously provided an entitlement to paid FDV leave. There are more likely to be implementation issues for employers who have never provided the leave before. Common implementation issues raised by our affiliates are in relation to confidentiality; evidence; lack of support, knowledge and awareness; rostering issues for casual and part time workers; and the need for further education about the entitlement for employers, managers and workers.

Some affiliates report that take-up of the leave is limited and could be stronger, due to a lack of awareness and education about the entitlement amongst employers, managers and workers, and also due to stigma, which still prevents many employees from disclosing FDV and means they use up other entitlements first such as paid personal leave. Some workers are only accessing FDV leave when they are at a crisis point or they have run out of other paid entitlements. On the other hand, some affiliates report a huge increase in members raising FDV matters since the new entitlement was legislated.

Unions play a key role in understanding and implementing paid FDV leave, including raising awareness in workplaces and addressing gaps in both employer and employee understanding. As well as providing direct information and support to members, unions often play a significant role as a bridge between the employer and worker. This role often includes education of employers as to their obligations and how to respond in sensitive and compassionate ways. Unions are also an important source of information for workers more broadly, with many affiliates providing information to workers about paid FDV leave in various forms. There are many examples of this included in the ACTU submission to the Independent Review. One example provided to us post the 2024 Independent Review is:

- An FSU member separated from a violent partner after experiencing FDV and is going through court proceedings. Her manager was unaware of the entitlement and was unwilling to allow her flexibility to attend appointments associated with the FDV. The manager offered her either a secondment to a lower paid job or threatened that the member would be put on an "informal performance plan" and might lose her job. The FSU became involved and the member was able to access paid FDV leave to attend appointments.

Key implementation challenges – evidence, confidentiality, and lack of knowledge

The third major theme highlighted by unions in the 2024 Independent Review was that there are some common implementation challenges centring around evidentiary requirements, confidentiality and a lack of knowledge, support and awareness.

Evidence

Our affiliates report that the evidence required by employers to support the taking of FDV leave can be unreasonable, onerous, intrusive, or difficult for a worker to access. For example, some employers insist on seeing police reports, or refuse to accept letters from FDV services. Some managers ask for too much information from victim-survivors. Often the kind of evidence requested by employers contains deeply personal and distressing information which workers will not want to share with their employers. Research has shown that evidentiary requirements have

deterred some victim-survivors from using leave entitlements due to the shame of providing sensitive information, difficulties in getting access to documents, and concerns about how the information would be recorded.[191]

Requirements for evidence can therefore be a barrier that makes accessing the leave more difficult, and which may reduce safety for people experiencing FDV. Many of our affiliates work with employers on improving their approach to evidence requirements. For example, this can include measures such as not requiring evidence at all, only requiring a statutory declaration, only requiring evidence once (rather than on every occasion leave is requested), or the employer sighting the evidence but not retaining a copy.

For example, the CPSU secured less onerous evidentiary requirements for an employee to access paid FDV leave than under the NES in APS bargaining in 2023. In most cases, evidence is not required for a manager to approve paid leave for FDV. Where evidence is requested, a manager is required to have a discussion with the affected employee and is only able to request evidence in the form of a statutory declaration unless the employee chooses to provide another form of evidence.

Recommendation 33:

- There is a need for further education and training for employers and better guidance on the type and scope of evidence that can reasonably be required, and the difficulties that providing evidence can present for victim-survivors.
- To remove a significant barrier to workers applying for paid FDV leave, the Australian Government should develop guidance on forms of evidence that are not unreasonable, onerous, intrusive, or difficult for a worker to access.

Confidentiality

Some affiliates have reported difficulties with employers not maintaining confidentiality. They have also reported that many workers are fearful to access the entitlement, or choose not to, because of confidentiality and privacy concerns. For some, there is a fear that the perpetrator may become aware of their plans, especially where they work for the same employer or there are workplace friendships that extend beyond the workplace. Others are concerned that their personal life and circumstances may become common knowledge in the workplace, and that

[191] Fitz-Gibbon, K, Pfitzner, N. MicNicol, E & Rupanagudi, H. (2021), *Safe, thriving and secure: Family violence leave and workplace supports in Australia,* Monash University.

they may face judgement, victim blaming or stigma as a result. This can be particularly problematic in small businesses, where workers fear that if they tell one person, the whole organisation will know.

Other affiliates have reported that they had broadly positive experiences with management of confidentiality issues, and that managers have tended to be supportive and empathetic, HR and payroll practices have been discreet, and they have been able to achieve minimal handling and retention of sensitive employee evidence which demonstrates the need to take FDV leave.

Again, some unions have addressed these issues in bargaining. The clause negotiated by the CPSU in APS bargaining in 2023 requires employers to take all reasonable measures to treat information relating to family and domestic violence confidentially, with any information only disclosed on a need to know basis, subject to steps they may need to take to ensure safety or mandatory reporting requirements. Where confidential information does need to be disclosed, the consent of the worker will be sought and practical steps will be taken to minimise any associated safety risks and privacy breaches.[192]

Recommendation 34:

There is a need for employers, small businesses and workers to be educated about the confidentiality requirements to ensure that all employers are aware of their obligations, and that workers have confidence that those obligations will be met.

Lack of support, awareness and knowledge

Take up of paid FDV leave is still low. Stakeholder accounts of low utilisation in the 2024 review were supported by survey findings that, of over 1,400 employers surveyed, only 12% reported any instance of staff using the paid FDV leave entitlement.[193]

Some of the issues our affiliates have reported are:

- Workers are not adequately informed by their employers about their entitlements or how to access the leave;
- Some employers have problematic attitudes towards the leave – for example, they do not see the entitlement as necessary, or view it as an indulgence;

[192] See APS Bargaining Statement of Common Conditions - 5 February 2024.pdf Family and Domestic Violence Support, pages 135-136.
[193] Seymour, K., Marmo, M., Cebulla, A., Ibrahim, N., Esmaeili, H., Richards, J., & Sinopoli, E. (August 2024) *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009*. Adelaide: Australian Industrial Transformation Institute, Flinders University of South Australia, page 83.

- Workers can face unreasonable and intrusive questions from some managers about the reasons for taking the leave, including the expectation for them to share unnecessary detailed personal information about their circumstances;
- Managers may also question the need to take a whole day of leave and may seek to limit approval to 1-2 hours where the person is attending a specific appointment, which fails to take into account the toll taken on a person's capacity to work by the stress of their experience;
- Some workers have also experienced some initial pushback from their manager where seeking to access paid leave to deal with violence not relating to an intimate partner (this underscores a lack of awareness of other forms of family violence and that the NES entitlement covers violence from family other than from an intimate partner); and
- Some managers lack an understanding of the time required for a victim-survivor to deal with violence, including the time it takes to do safety planning, deal with risks, leave a relationship, and remain safe after leaving. Victim-survivors may avoid asking for more leave for fear of frustrating their managers.

There are multiple examples included in the ACTU's submission to the Independent Review that demonstrate the need for education regarding the entitlement and how to support employees experiencing FDV. We have included just two of these examples here:

- An SDA member who needed to go into protective custody with her daughter and requested FDV leave was told by her manager that she could not access it as she did not have any sick leave, and FDV leave is just "a fancy way to use sick leave without a certificate".
- A UWU member who worked for a state public sector employer left a violent relationship in 2023, and was homeless for 6 months (having to couch surf/stay with friends). As a result, she had to cancel some work shifts or was unable to accept them when offered. She let three separate managers know that she was not able to work due to experiencing FDV. No one provided her any information about the FDV policy or her entitlement to paid FDV leave. She only found out about the entitlement later, by which time she was told her employment ID number had been terminated as she had not been able to work a shift for 6 months and had not provided a reason for her unavailability (despite having advised 3 managers of the situation).

A recent example (post the 2024 Independent review) that has been provided to us is:

- An FSU member was experiencing FDV and got in touch with a victim support organisation. The victim support organisation provided her with a letter to send to her

employer referencing the NES leave entitlement. This member works for an employer that has unlimited paid FDV leave. The member was unaware of either entitlement. Despite being entitled to access unlimited paid FDV leave, the employer contacted the member to ask when she was going to be back at work, instead of just putting the leave into their system and taking the necessary steps. This was unsettling for the member as it was the day following the incident, and was ultimately unnecessary given she was entitled to unlimited paid FDV leave.

Recommendation 35:

More education and training is required to ensure employers are fully aware of the new entitlement and their obligations, as well as how to respond and handle requests in appropriate, sensitive and supportive ways. In particular, there is a need for education around evidence and confidentiality requirements. 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.

Further reform to improve the operation or rectify unintended consequences

There are several other reforms that unions called for in the 2024 Independent Review which would improve the operation of the entitlement and/or rectify unintended consequences. The ACTU and its affiliates continue to support these reforms.

Promoting strong bargained outcomes

Our affiliates report that 10 days' leave is often insufficient for victim-survivors to address the multifaceted challenges they face. Escaping an abusive relationship requires significant time to secure safe housing, legal protection, and emotional support. Victim-survivors often need to attend court hearings (which on average takes 5 days), as well as relocate, look for rentals, look for new schools, and seek counselling and support, all of which are time-intensive processes that cannot be adequately managed within ten days. Increasing the duration of paid leave ensures victim-survivors have the necessary time to make informed decisions and to stabilise their lives

without worrying about taking off unpaid leave and financial insecurity. On average, it takes 141 hours to leave a violent relationship[194] – which equates to 17.6 eight hour days.

Since unions started bargaining for paid FDV leave, 20 days was recognised as necessary. The original model clause developed by unions in 2009 was for 20 days' paid leave. The first clause that was won in an enterprise agreement in 2010 was for 20 days' paid leave.[195] Unions continue to bargain for more than 10 days in agreement, with 20 days and uncapped leave both being common outcomes of bargaining negotiations. Both the NSW and Victorian governments provide 20 days' paid FDV leave for all public sector workers.

Recommendation 36:

The Australian Government should consider ways of promoting the success of employers, employees and their unions in bargaining for greater entitlements to paid FDV leave.

Extension of entitlement to employee-like workers

Access to paid FDV leave should be expanded to include all workers where there is an employment, or "employee-like" relationship. This would capture gig workers and those on insecure contracting arrangements (including those discussed in the section of this submission: "Extend the powers of the FWC to set minimum standards for 'employee-like' workers). These insecure forms of employment are becoming increasingly common in feminised and low paid work, particularly in the health and care sectors. For example, in disability support and home and community aged care, there are an increasing number of sole traders, sub-contractors and independent contractors (gig workers). This leaves some of the most vulnerable workers who are more likely to experience FDV without access to this lifesaving entitlement. The 2022 Paid FDV Leave Bill Senate Committee Report noted the government's commitment to regulating 'employee-like' forms of work such as in the gig economy and said there was merit in examining how the entitlement could be extended to those groups of workers in the near future.[196] Given the Closing Loopholes reforms in relation to these workers (discussed earlier), it is timely that such an extension is considered as part of this review.

---

[194] 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 Committee Report at [2.16].

[195] In 2010, the Australian Services Union Victoria and Tasmania Branch, supported by VTHC, negotiated the world's first paid FDV leave clause in an enterprise agreement covering workers at the Surf Coast Shire council - ASU-Victorian Authorities & Services Branch, 15 October 2010, ASU to launch and celebrate Australian-first Family Violence clause at Surf Coast Shire, http://www.asu.asn.au/documents/doc_download/389-asunews-archive-asutolaunch-and-celebrate-australian-first-family-violence-clause-at-surf-coast-shire-15-october-2010.

[196] Paid FDV Leave Bill Senate Committee Report at [2.89].

Recommendation 37:

Access to paid FDV leave should be expanded to include all workers where there is an employment, or employee-like relationship. As a first step this could be done by including it in the matters that a Minimum Standards Order can cover.

Strengthen ability of casual employees to access FDV leave

The Independent Review found that it is harder for casual employees to access the paid FDV leave entitlement – because they are less aware of it, less likely to access it, and employers are less likely to grant paid FDV leave to them.[197] The Independent Review found that low awareness of the entitlement is particularly pronounced among casual employees, and that providing the entitlement to casuals has been one of the most challenging aspects of implementation for employers. Only 22% of employers had granted the leave to casuals, compared with 75% of employers who had granted it to full-time employees and 34% to part-time employees.[198] Casual employees are also one of the most vulnerable cohorts due to the precarious nature of their employment and inability to access other entitlements.[199]

The Independent Review also found that there were significant challenges in providing the entitlement to casuals, associated with applying the leave to casual employees given that employees must both be rostered and have accepted the rostered shift before they can request paid FDV leave.[200] This limits the utility of the leave for casuals, for several reasons, including:

- Casuals are more likely to decline or not accept shifts than access paid FDV leave.
- Casuals are often taken off the roster when they disclose FDV, and not put back on until the issue is 'resolved' (this can also be a problem for some part time employees).
- Casuals who work irregular and unpredictable hours effectively lose their entitlement due to their hours constantly changing (this is also a problem for some part time employees who work irregular and unpredictable hours and have frequently changing rosters).

The provisions need to be amended to accommodate this reality and ensure that casual employees can access the entitlement.

---

[197] Seymour, K., Marmo, M., Cebulla, A., Ibrahim, N., Esmaeili, H., Richards, J., & Sinopoli, E. (August 2024) *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009*. Adelaide: Australian Industrial Transformation Institute, Flinders University of South Australia, Finding 9, pages 90-91.
[198] Ibid.
[199] Ibid.
[200] Ibid.

Recommendation 38:

Amend s.106BA(1) through an additional provision to cover situations where casual employees are not rostered into the future due to their FDV-related circumstances. Under this additional provision, leave would be available based on the average number of hours the casual employee worked in the three months preceding the need to take FDV leave. For example, if the average hours of a casual employee requesting FDV leave were two days a week over the past three months, they would be paid two days of paid FDV leave per week.

Make entitlement accessible to immediate family of people experiencing FDV

Victim-survivors are often isolated with few supports, and when trying to leave or address violence they are at their most vulnerable and their safety is most at threat. Making the paid FDV leave entitlement accessible to the immediate family of people experiencing FDV for the purpose of supporting them would deepen its broad social efficacy, dramatically increase the quality of support available to victim survivors, broaden the support network available, and acknowledge the psychological impact family violence has in the workplace, including to those adjacent to the direct harm. Many unions bargain for this kind of leave in enterprise agreements. Our affiliates report that they have had multiple members that have requested to be able to use the leave to support a family member (most commonly a female member seeking access to the leave to support their daughter) and have not been able to do so, and have either been denied leave entirely or have had to take unpaid leave instead.

Recommendation 39:

Amend the NES entitlement so that paid FDV leave can also be accessible to immediate family of people experiencing FDV, to allow people to take leave to support victim-survivors.

Fixing issues with the legislative drafting

There are three elements of the current legislative drafting that could be amended to improve the operation of the entitlement.

Firstly, Note 1 to s.106B of the FW Act contains non-exhaustive examples of actions that might be taken to deal with the impact of FDV. These examples are all of active participation in quite formal and legal processes, which might not be applicable to people who are less likely to engage with institutions but who might rely on culturally appropriate and informal supports. They also do not specifically contemplate that the leave can include time for general recovery, or to manage an injury. The examples therefore do not reflect the breadth of the legislative entitlement that allows people to access leave to "do something to deal with the impact of family and domestic violence." Adding one or two further examples to illustrate the breadth of the entitlement, without

making the list exhaustive, could assist. These could include "accessing culturally appropriate supports" and "time taken to recover."

An example illustrating this problem is of an FSU member who was injured as a result of FDV from a family member, and became unfit for work due to the injury. Because the examples provided in the FW Act include attending appointments with medical professionals but do not specifically include paid time off to manage the injury itself, the employer argued that the member was not entitled to FDV leave on this basis, and that they should be taking personal leave instead. The FSU became involved and advocated on the behalf of the member, resulting in the employer allowing the worker to take FDV leave instead of personal leave.

Recommendation 40:

Include further examples in s.106B of actions that might be taken to deal with impacts of FDV that are broader than the current examples, such as "accessing culturally appropriate supports" and "time taken to recover."

Secondly, the definition of FDV in s.106B(2)(a)-(b) of the FW Act uses an unreasonably burdensome double threshold in the use of the term "and". FDV is defined as being behaviour that 'seeks to coerce or control the person' and 'causes the person harm or to be fearful'. The word 'and' could be replaced with 'or.' This would broadly align the definition of FDV in the FW Act with the definition of FDV in s.4AB in the *Family Law Act 1975* (Cth), which uses 'or' rather than 'and.'

Recommendation 41:

Amend the current definition of FDV in s.106B(2)(a)-(b) by replacing the word 'and' with 'or', to align with the definition in the *Family Law Act 1975* (Cth).

Thirdly, s106B(3) defines 'close relative' as a member of a person's immediate family (defined in s.12), or who is related to the person according to Aboriginal and Torres Strait Islander kinship rules. 'Immediate family' does not contemplate the diversity of non-Aboriginal and Torres Strait Islander family and domestic relationships, including relationships based on non-Indigenous ethnic, religious or cultural kinship rules. In many cultures, kinship extends beyond the nuclear family model and includes aunts, uncles, cousins and community elders. FDV is also often perpetrated by a former intimate partner's immediate family. This leaves some workers experiencing FDV without protection, including workers from diverse cultural backgrounds who are already marginalised. One of our affiliates reports that a member was refused access to paid FDV leave by the employer on the basis that it was a non-Aboriginal and Torres Strait Islander cultural kinship relationship. The definition of close relative should be expanded to include a

person’s aunt or uncle, a person’s former intimate partner’s immediate family, and someone related to the person according to ethnic, religious or cultural kinship rules.

Recommendation 42:

Expand the definition of 'close relative' in s.106B(3) to include a person’s aunt or uncle, a person’s former intimate partner’s immediate family, and someone related to the person according to ethnic, religious or cultural kinship rules.

address

ACTU

Level 4 / 365 Queen Street

Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au

australianunions.org.au

ACTU Australian Unions