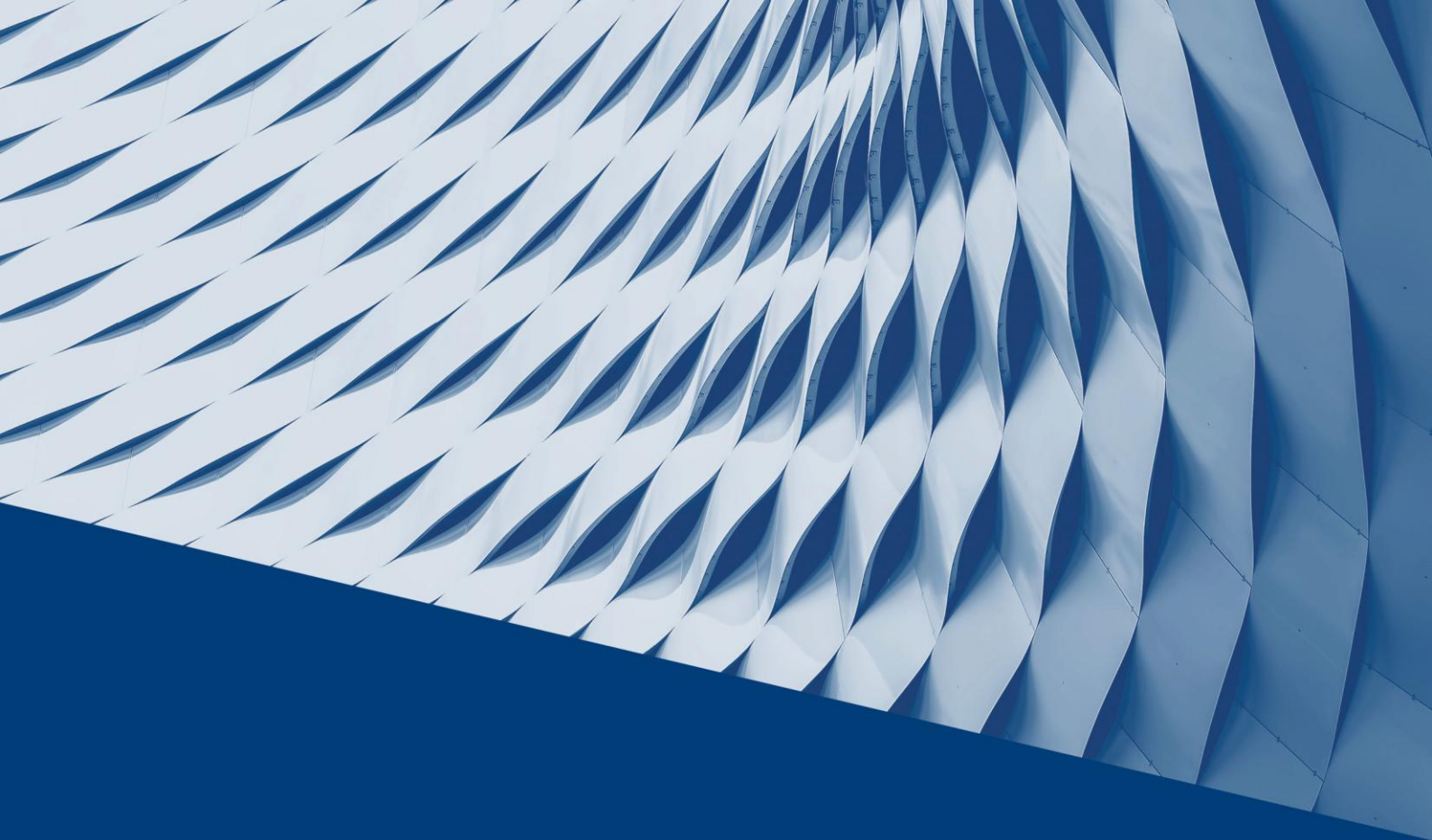




Draft Report of the Review of the Closing Loopholes Acts

Submission by Australian Council of Trade Unions on the Draft
Report of 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, 29 May 2026
ACTU D. No 40/2026

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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.

Overview & Chapter 1 The Closing Loopholes Reforms

The ACTU welcomes the opportunity to respond to the Draft Report¹ of the 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**).

We also welcome and support the Review's overall view in the Draft Report that the Closing Loopholes laws and the paid family and domestic violence amendments (which were also the subject of review) "have enhanced the workplace relations framework" – with key examples including the new rights for employee-like workers engaged by digital platforms and the provisions relating to "same job, same pay" for labour hire workers.² The reforms in those two areas arose from long-standing union campaigns to enhance rights for gig and labour hire workers. Therefore we are pleased with the Review's observations in the Draft Report that:

- The framework of Minimum Standards Orders for employee-like workers "is functioning largely as intended" at this early stage and "the unfair deactivation jurisdiction is being utilised and is capable of delivering effective remedies in appropriate cases".³
- The same job same pay provisions have delivered wage increases for workers across a wide range of industries, demonstrating "the strong uptake and material impact of the measure" along with a wider "shadow effect" whereby some businesses have moved to direct employment instead of resorting to labour hire.⁴

The Draft Report notes the concerns of some employer groups that the Closing Loopholes reforms could have negative economic effects including on productivity growth. However the ACTU supports the Review's position that such claims be approached "with caution", noting that: "The Review has not received clear evidence of a causal link between the amendments ... and any negative macroeconomic outcomes."⁵

In relation to several overarching matters raised for consideration and feedback in the Draft Report, the ACTU responds as follows:

¹ Susan Booth, *Closing Loopholes: An Independent Statutory Review, Draft Report – 15 May 2026 (Draft Report)*.

² Draft Report, page 11.

³ Draft Report, pages 97, 101.

⁴ Draft Report, pages 167, 180-181.

⁵ Draft Report, page 43.

- The request for further information on page 29: we have included additional data, decisions and updated information on the operation of the reforms in this submission, where relevant.
- We generally support the proposal on page 29 (reflected in several proposed Recommendations) to provide customised guidance and support to meet the needs of different cohorts in the workplace relations system, including efforts to ensure the full benefits of the reforms can be accessed by vulnerable and hard to reach workers. In this regard we also propose a further idea to reach employee-like workers in the care sector in Further Recommendation 8.
- We support proposed Recommendation 1 regarding greater flexibility in the timeframes for future legislative reviews. The experience with the Closing Loopholes Review, and the earlier Secure Jobs Better Pay Act Review,⁶ demonstrates that reviews conducted within 2 years of amendments coming into effect may be too early to assess their effectiveness.
- We generally support proposed Recommendation 2 for further reviews of various aspects of the Closing Loopholes reforms. These reviews (apart from the criminal wage theft offence and civil penalties) should be conducted together and no earlier than 2-3 years from the end of the present Review.

The ACTU reiterates the positions and 42 recommendations put forward in our original submission to the Closing Loopholes Review.⁷ In the remainder of this submission, we outline our responses to the Review's proposed findings and recommendations in the Draft Report which are of particular relevance to the ACTU and our affiliates.

We also make the following 26 further recommendations for the Review's consideration:

ACTU further recommendation 1: That the FWC be given the 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.

ACTU Further Recommendation 2: Replace subsection 66AAC(5)(c) of the Act with a new s.66AAC(5A) that states that: "(5A) Substantial changes or significant impacts in subsections 66AAC(5)(a) and (b) are not fair and reasonable operational grounds if the change or impact

⁶ Emeritus Professor Mark Bray and Professor Alison Preston, *Secure Jobs, Better Pay Review: Final Report*, 31 March 2025.

⁷ ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026.

arises from an increase or improvement in the employee's entitlements, or a substantial change to duties, as a result of conversion to permanent employment."

ACTU Further Recommendation 3: That the Australian Public Service Commission should consult with the CPSU regarding any assessment of the employee choice pathway and any data collected to conduct this assessment.

ACTU Further Recommendation 4: Amend the Fair Work Act to properly address the exclusion of APS staff from the employee choice pathway.

ACTU Further Recommendation 5: Any reviews of Minimum Standards Orders should take place 2 to 3 years after the first order comes into operation and in conjunction with the other reviews proposed in the Draft Report.

ACTU Further Recommendation 6: Replace draft recommendation 10 with a recommendation to encourage the Government to work with Platforms to improve their handling of complaints and adherence to the unfair deactivation code

ACTU Further Recommendation 7: The Fair Work Act should be amended to clarify that Guidelines operate only to provide further information that supplements any Minimum Standards Orders.

ACTU Further Recommendation 8: Pilot information sessions for employee-like workers on Minimum Standards Orders (MSOs) on the basis of digital labour platform operator or sector, facilitated by the FWO and run by the relevant registered employee organisation or organisations.

ACTU Further Recommendation 9: Amend proposed Recommendation 13 by replacing the concluding words "the creative sector" with "journalists and media workers, musicians, performers, screen and live performance crew, writers, translators and interpreters".

ACTU Further Recommendation 10: 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, including a power for the relevant Minister to be able to include additional occupations on this list by regulation.

ACTU Further Recommendation 11: That the Review does not proceed with proposed Recommendation 16 relating to the development of FWO guidance on assessment of an

employment or contracting relationship in the engagement of workers; or that if such guidance is developed, it does not play a role in assisting those engaging a worker to satisfy the "reasonable belief" defence to sham contracting in s.357 of the FW Act.

ACTU Further Recommendation 12: Remove the s.306G(1) exception which deprives employees engaged under a training arrangement to perform work for the host of the benefit of the requirement in s.306F to pay a labour hire employee the protected rate of pay under a Regulated Labour Hire Arrangement Order.

ACTU Further Recommendation 13: That the FWC be subject to statutory timeframes within which it must deal with an application for a Regulated Labour Hire Arrangement Order, for example uncontested applications within 1 month and 2-3 months for contested applications.

ACTU Further Recommendation 14: That the Review does not proceed with proposed Recommendation 22 to amend section 235 of the FW Act.

ACTU Further Recommendation 15: Insert after s.350C(3) in the Fair Work Act a new subsection: "(aa) reasonable communication must include the ability for a workplace delegate to be able to communicate directly and confidentially with members and any other persons eligible to be such members".

ACTU Further Recommendation 16: Amend proposed Recommendation 34 to apply to all protected attributes under anti-discrimination law.

ACTU Further Recommendation 17: Remove the requirement for an injured worker to have suffered PTSD as a result of providing an emergency response. Instead, the SRC Act 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.

ACTU Further Recommendation 18: The review of the reforms of entry to assist HSRs should occur in 2 to 3 years and as part of the general review proposed.

ACTU Further Recommendation 19: The government should also work with trade union organisations to provide education and training to HSRs and those assisting them to better understand their roles and responsibilities.

ACTU Further Recommendation 20: To enhance proposed Recommendation 45, the ACTU considers that it would be helpful to include additional data points in the collection of data on FDV leave in the abovementioned surveys that capture things like:

- Average number of days/hours taken
- Whether the employee required more leave than what they took or what was available to them
- Any other forms of leave (annual, personal, unpaid etc) taken by an employee due to FDV
- Where an employee who is entitled to access FDV leave did not do so, the reasons for not utilising it
- Any barriers employees experienced in accessing the leave that either prevented them from utilising it at all or made it difficult
- Any information gaps, confusion or uncertainty experienced by employers when employees are wanting to access the leave.

ACTU Further Recommendation 21: Given that proposed Recommendation 46 relating to the entitlement to take FDV leave in s.106B of the FW Act would be a substantial change to the legislation, it may be useful for the Review to express a clear policy intent about what the proposed change is trying to achieve, rather than propose a specific test or drafting. The specific test, wording or drafting to be used could be subject to further and detailed consultation with relevant stakeholders.

ACTU Further Recommendation 22: That proposed Recommendation 47 clarifying the types of evidence that might be appropriate to request from an employee taking FDV leave be enhanced in three ways:

- Medical certificates should also be specifically mentioned as a type of evidence that may be appropriate to request, if necessary.
- Only one type of evidence is required, and that any of the types mentioned are sufficient to satisfy a reasonable person.
- If required by an employer to provide evidence, an employee is able to provide evidence once, and then is not required to provide it again on each occasion they need to access FDV leave subsequently. This kind of ‘enduring’ evidence could last for a set period of time (for example, 12 months).

ACTU Further Recommendation 23: That proposed Recommendation 48, under which the FWO would reissue guidance that supports employers in relation various aspects of requesting evidence from employees about taking FDV leave, also cover the implications of requesting

evidence and the various difficulties that providing evidence may present for victim survivors, and how evidence can be a barrier to accessing leave and reduce safety for people experiencing FDV.

ACTU Further Recommendation 24: That proposed Recommendation 49 relating to improved awareness raising efforts and additional educational materials be expanded to include young people, employees with a disability and LGBTIQ+ employees; and that resources be made available in different languages and in a range of formats to support accessibility.

ACTU Further Recommendation 25: That proposed Recommendation 50 include a specific solution to address the problem of low take-up of FDV leave by casual employee, i.e. 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.

ACTU Further Recommendation 26: that the FW Act be amended to make it clear that provision of paid FDV leave is not a prohibited term in a Minimum Standards Order for employee-like workers, and does not change the form of engagement or status of the worker for the purpose of s.536KM.

Chapter 2 Employment Relationships & Standards

Meaning of ‘employee’ and ‘employer’

The Closing Loopholes No. 2 Act inserted new s.15AA in the *Fair Work Act 2009* (Cth) (**FW Act**) 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” (see also s.15AA(2)), reviving the multi-factor test which applied prior to two 2022 High Court decisions.⁸

⁸ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (**Personnel Contracting**) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (**Jamsek**).

The Review found that the s.15AA test has been applied in many Fair Work Commission (FWC) decisions including unfair dismissal and general protections cases.⁹ We support the analysis in the Draft Report indicating that:

The amendments support fairer and more accurate characterisation of the employment relationship, by limiting reliance on contractual drafting where it does not reflect the real relationship.

The Review ... agrees that a totality-based assessment is necessary to restore fairness and accuracy to employment classification. This approach better reflects contemporary work arrangements and more effectively addresses misclassification by preventing contractual form from obscuring the relationship's true nature.¹⁰

The Review found that this “measure is currently operating appropriately and effectively”, supporting correct classification by focusing on practical reality – and while not agreeing with employer concerns as to increased complexity and uncertainty, acknowledged some issues for businesses in day-to-day application.¹¹

The Draft Report proposes in Recommendation 4 that:

The government should consider the definition of ‘employee’ and ‘employer’ across relevant Commonwealth laws, including tax law, to ensure consistency with the *Fair Work Act 2009*.

This is intended to provide certainty and reduce the risk of inadvertent non-compliance through misclassification of workers.¹² It would address the problem that while the s.15AA definition applies to the determination of employment status under the FW Act, the contract-centric approach from the *Personnel Contracting* and *Jamsek* decisions still applies for purposes of other federal statutes including taxation and superannuation.¹³ Having the s.15AA test apply for these other purposes would bring welcome consistency and has the potential to produce more favourable outcomes for workers. For example, the *Superannuation Guarantee (Administration) Act 1992* (Cth) applies to employees and to any person working under a contract that is wholly or principally for their labour (s.12(1), (3)). However the courts have given s.12(3) a very narrow interpretation.¹⁴ The application of an equivalent to s.15AA (as proposed in Recommendation 4) could therefore bring more workers within the obligation upon employers to make contributions to a superannuation fund on their behalf.

⁹ Draft Report, page 57.

¹⁰ Draft Report, page 61.

¹¹ Draft Report, page 64.

¹² Draft Report, page 64.

¹³ Draft Report, page 63.

¹⁴ A Stewart et al, *Creighton and Stewart's Labour Law*, Federation Press, 7th edition, 2025, [15.100].

The Review also responded to the ACTU's proposal in Recommendation 27 of our initial submission, that the FWC be given: "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."¹⁵ The Draft Report rejected this proposal, stating that: "employment status determinations under section 15AA are inherently fact-specific and turn on the totality of the individual circumstances. Conferring an arbitral role on the FWC would be unlikely to provide clarity beyond the particular case."¹⁶ We request that the Review reconsider this issue, as we have considered the following additional ways in which an arbitral power for the FWC under s.15AA could be useful:

- The FWC could determine employment status on application by either party to the work relationship – in advance of any claim being made – if that would assist them in ascertaining their rights and responsibilities (e.g. for purposes of award coverage, eligibility to bring an unfair dismissal claim, underpayment of wages).
- Alternatively or in addition, the FWC could – in the course of determining a particular claim, such as unfair dismissal – make a finding that a worker is an employee, which would also be determinative of employment status for purposes of another FW Act claim the worker might later bring, e.g. underpayment. This would mean the worker does not have to prove employment status in each separate proceeding.

ACTU further recommendation 1: That the FWC be given the 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.

Casual employment

The Draft Report finds that the new definition of casual employment and the employee choice pathway "have been operating appropriately and effectively to date, and no unintended consequences have been identified."¹⁷ While the ACTU broadly agrees with this finding, we do note that the number of matters that have progressed to the FWC since the operation of these amendments is still limited.¹⁸

¹⁵ ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 74-75.

¹⁶ Draft Report, page 62.

¹⁷ Draft Report, page 79.

¹⁸ Only 23 matters have been filed with the FWC under the new employee choice pathway to date. See Draft Report, Table 1 page 70.

Further, the key exception to this overall finding is in higher education where the Draft Report concludes that the casual conversion pathway “is mostly not available to casual academic employees”.¹⁹ This is because universities engage staff casually for teaching-only work, whereas permanent roles have research and administrative duties as well. This has enabled employers in the sector to refuse conversion on “fair and reasonable operational grounds” (s.66AAC(4)(b)), arguing that transitioning an employee from casual to permanent would require “substantial changes to the employee’s terms and conditions” that “would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument...” (s.66AAC(5)(c)).

The Draft Report cites the current enterprise agreement workload structures as barriers to conversion and recommends (at proposed Recommendation 7): “universities should review and modernise enterprise agreement provisions including teaching-only roles and fixed term engagement rules.”

There are two challenges with this Recommendation being effective. Firstly it appears that employers in higher education have no interest in making such changes. The peak employer body for the sector, AHEIA considers the existing framework “appropriate given the distinct nature of academic work”.²⁰ Secondly, there is a long history of industrial solutions seeking to improve job security in the sector which have had mixed success.

The ACTU and the National Tertiary Education Union (NTEU) therefore suggest an alternative approach of deleting current s.66AAC(5)(c) and replacing it with a new s.66AAC(5A) that excludes any substantial changes or impacts from the meaning of s.66AAC(5)(a) if they arise from an improvement in conditions for an employee, or a change or increase in duties. This change could apply more generally, given that the challenges the NTEU identifies are likely to apply beyond higher education.

ACTU Further Recommendation 2: Replace subsection 66AAC(5)(c) of the Act with a new s.66AAC(5A) that states that: “(5A) Substantial changes or significant impacts in subsections 66AAC(5)(a) and (b) are not fair and reasonable operational grounds if the change or impact arises from an increase or improvement in the employee’s entitlements, or a substantial change to duties, as a result of conversion to permanent employment.”

¹⁹ Draft Report, page 79.

²⁰ Draft Report, page 78.

Further, the Draft Report also cites a lack of data on conversion within the Australian Public Service²¹, but does note a significant decline in the number of casual employees there.²² It recommends that the Australia Public Service Commission review the operation of the new employee choice pathway, including collecting data as a first step. The ACTU and the CPSU (PSU Group) support this recommendation. We also note that the CPSU recommends that data collected from Commonwealth agencies be published and any assessment conducted by the APSC of the operation of the employee choice pathway in the APS should occur in consultation with the CPSU.

The ACTU also shares the CPSU's broader concerns that the Draft Report did not adopt its submission that s.66AAC(1) and (4)(c) of the Fair Work Act be amended to properly address the exclusion itself - rather than having to rely on separate APS Commissioner Directions. The ACTU supports the CPSU's more detailed submissions on this point.

ACTU Further Recommendation 3: That the Australian Public Service Commission should consult with the CPSU regarding any assessment of the employee choice pathway and any data collected to conduct this assessment.

ACTU Further Recommendation 4: Amend the Fair Work Act to properly address the exclusion of APS staff from the employee choice pathway.

Minimum standards for 'employee-like' workers

Operation of the employee-like provisions

The Closing Loopholes No.2 Act introduced Chapter 3A into the FW Act: Minimum Standards for Regulated Workers, including new workplace protections for employee-like workers performing digital platform work and independent contractors engaged in the road transport industry. The provisions include powers for the FWC to make a "minimum standards order" (**MSO**) to regulate the work performed by employee-like workers for a digital labour platform; and the ability of employee-like workers to seek remedies from the FWC for "unfair deactivation" by a digital labour platform.

²¹ Draft Report, page 78.

²² Draft Report, page 72.

As noted earlier in this submission, we are pleased that the Review overall considers these new provisions to be operating as intended, as indicated in the Draft Report as follows:

The employee-like minimum standards framework is in its infancy, and based on available evidence, including the current MSO applications before the FWC, is functioning largely as intended. It is clear that the process for MSOs is complex and has been the subject of stakeholder scrutiny, including those covered by the new employee-like framework. However, this reflects both the novelty of the framework and legislative design that prioritises consultation, tailored minimum standards and procedural fairness to the parties involved. These characteristics reflect an ambitious, world-first reform that will require time to mature within the broader workplace relations system. ...

The unfair deactivation jurisdiction has experienced high utilisation, with a growing caseload and early decisions indicating the jurisdiction is functioning reasonably well with some exceptions Applications are being progressed and the FWC has granted effective remedies (including reactivation and, in some cases, lost pay orders). Stakeholder feedback indicates that the framework is providing meaningful protections for employee-like workers, particularly by creating avenues for early resolution and increased dialogue between platforms and unions to resolve disputes around deactivation prior to an application to the FWC.²³

The Draft Report provides five recommendations for this new jurisdiction which the ACTU responds to as follows:

Draft Recommendation 9 – further review

The Draft Report recommends a further review of the new jurisdiction to take place within 12 months of the first minimum standards orders being made. The ACTU submits that this is far too soon for yet another review. The orders would still be in their infancy, and only representative of one sector or platform provider. Instead any review should take place within 2 to 3 years of such orders coming into operation, and ideally on the same timeframes as the other reviews referred to in Recommendation 2.

ACTU Further Recommendation 5: Any reviews of Minimum Standards Orders should take place 2 to 3 years after the first order comes into operation and in conjunction with the other reviews proposed in the Draft Report.

Draft Recommendation 10 – evidentiary threshold on unfair deactivation matters

The Draft Report further recommends that the Government should urgently address the management of unfair deactivation matters involving serious misconduct allegations, including legislative clarifications on the evidentiary threshold.

²³ Draft Report, pages 97, 99.

The ACTU does not support this recommendation. Lowering the evidentiary threshold a Platform needs to satisfy before deactivating a worker on the grounds of serious misconduct significantly risks workers losing work on the basis allegations that could be without foundation. The ACTU is also not persuaded that platform workers deserve lesser protections than employees enjoy with unfair dismissal protections because of the different nature of their work. The work being performed by platform workers and employees is often identical, including, for example, delivery work, or home care support. The ACTU also does not accept the view that platform users should not have to substantiate feedback or participate in legal processes. This just opens up the possibility that platform users can make claims without foundation that ultimately harm workers, knowing they will not be held to account. The ACTU instead encourages the Government to work with Platforms to improve their handling of complaints and adherence to the unfair deactivation code.

ACTU Further Recommendation 6: Replace draft recommendation 10 with a recommendation to encourage the Government to work with Platforms to improve their handling of complaints and adherence to the unfair deactivation code.

Draft Recommendation 11 – The role of minimum standards guidelines.

The Draft Report finds that Minimum Standards guidelines have not been utilised in practice with limited stakeholder interest in their use.²⁴ The Report concludes that the interaction between MSOs and the Guidelines should be examined by the Government to see whether they are functioning as intended or require refinement. The ACTU believes that this recommendation should go further and clarify that the role of any guidelines is to provide supplementary information that can assist parties with understanding MSOs. This would resolve any potential ambiguity between the two instruments and likely see guidelines developed after MSOs are in place.

ACTU Further Recommendation 7: The Fair Work Act should be amended to clarify that Guidelines operate only to provide further information that supplements any Minimum Standards Orders.

²⁴ Draft Report, page 98.

Draft Recommendation 12 - Overcoming low uptake in the care and disability sectors

Recommendation 12 in the Draft Report recommends that the Government review the operation of the employee-like framework in the care and disability sectors to better understand what is inhibiting uptake. In consultation with our unions in the care sector, there are several major barriers here.

Firstly making an application for a Minimum Standards Order is a serious undertaking. It requires significant resources and a long-term commitment to building standards in a particular sector or digital labour platform. This requires the resources and collective advocacy of a trade union organisation. Some unions have reported that their current priority is the ongoing and extensive FWC gender undervaluation review of the Social Community, Home Care and Disability Services (SCHADs) Award, which would set a de facto point of comparison for any MSO in this sector.

Secondly, it also requires organising and representing those workers whom the standards seek to benefit – a significant challenge where it is often impossible for a union to access these workers. They do not have a common workplace and usually work in residential homes. Unions also report that many of these workers also do not identify as platform workers, because they are typically engaged by platforms to do hours in addition to their primary work. Further, there is no accepted definition of employee-like work in this sector because it has never been tested by the FWC.

One idea to overcome this second set of barriers would be for those workers to be periodically invited to information sessions run by the relevant trade unions that explain the new jurisdiction and the steps it would take to get an MSO in place, as well as provide information on how workers could get involved. Digital labour platforms are likely to have little interest in supporting such a process and may even oppose it. In anticipation of that, the Fair Work Ombudsman could be tasked with inviting workers to the information session, including handling any work-related contact details. But trade unions would be responsible for the content of the sessions and the follow-up coming out of them. As MSOs come into place, the information session could then become training sessions on the standards themselves.

ACTU Further Recommendation 8: Pilot information sessions for employee-like workers on Minimum Standards Orders (MSOs) on the basis of digital labour platform operator or sector, facilitated by the FWO and run by the relevant registered employee organisation or organisations.

Draft Recommendation 13: Extending the employee-like minimum standards framework to other contractors/freelancers

The ACTU welcomes proposed Recommendation 13:

The government should consider whether the employee-like framework should be expanded to other cohorts of independent contractors experiencing similar conditions of low pay and low bargaining power, including the creative sector.

This responds to the submission of the ACTU, Media Entertainment and Arts Alliance (MEAA), Australian Writers Guild and Professionals Australia, seeking 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.²⁵ The Draft Report recognises the vulnerability of these groups of workers and the need for greater workplace protections as follows:

The employee-like jurisdiction was deliberately confined to digital platform work to address the growing vulnerability of these workers. However, there is merit in the recommendations put forward by the ACTU, and MEAA to extend the framework to other cohorts of independent contractors who are experiencing similar conditions of low pay and low bargaining power, in particular workers in the arts sector, translators and interpreters, and writers. Early indications are that MSOs will provide a meaningful safety net of protections for digital platform workers that may suit other cohorts of similarly vulnerable independent contractors.²⁶

To ensure that all relevant workers are encompassed within Recommendation 13, we request that the concluding words “the creative sector” be replaced with “journalists and media workers, musicians, performers, screen and live performance crew, writers, translators and interpreters”. The complete list of occupations intended to be covered by the ACTU’s proposal to extend the MSO framework in Chapter 3A, where workers in these named occupations meet the definition of “employee-like” but without having to be engaged by a digital labour platform, is as follows:²⁷

- 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.

²⁵ ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 51-54 (including Recommendation 21).

²⁶ Draft Report, page 99.

²⁷ For details of the ACTU’s proposed model, see again ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 51-54.

We also recommend creating a power for the relevant Minister to be able to include additional occupations on this list by regulation.

ACTU Further Recommendation 9: Amend proposed Recommendation 13 by replacing the concluding words “the creative sector” with “journalists and media workers, musicians, performers, screen and live performance crew, writers, translators and interpreters”.

ACTU Further Recommendation 10: 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, including a power for the relevant Minister to be able to include additional occupations on this list by regulation.

Allow the FWC to set minimum standards for the road transport industry

The Draft Report provides the same recommendations for minimum standards orders for the road transport industry, as for employee-like minimum standards orders on the issues of further reviews and guidelines.²⁸ The ACTU holds the same views with these recommendations, as the earlier ones: that any review should occur later and in concert with other reviews called for, and that it should be clarified that guidelines play a supplementary role to MSOs.

Change the defence to sham contracting

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 (also known as “sham contracting”). The amendment changed the defence in s.357(2) from 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.

The Review found that there have not yet been any decisions applying the amended defence to sham contracting since it took effect on 27 February 2024, nor “other evidence indicating that there should be changes to the measure, including returning to the previous ‘recklessness’ defence or abolishing the defence altogether”.²⁹ Yet seemingly on the basis that “there is a clear

²⁸ Draft Report, page 123.

²⁹ Draft Report, pages 126, 129.

problem with sham contracting in the road transport industry”, the Draft Report proposes in Recommendation 16 that:³⁰

The Fair Work Ombudsman should develop clear guidance, in the form of a checklist, to assist persons engaging workers to assess the nature of the employment or contracting relationship by applying the multifactor test.

- The checklist should be developed to assist workplace participants in correctly assessing the relationship, and with a view to satisfying the ‘reasonable belief’ defence if applied in good faith.
- Industry-specific checklists (including for the road transport industry) should be developed to complement industry guidance developed in response to Recommendation 5. The Fair Work Ombudsman should work with relevant employer groups and unions to develop the checklists.

The ACTU is concerned that Recommendation 16, if implemented, could undermine the effect of the amendment only recently made to strengthen s.357, but which is as yet untested. That is, a person alleged to have engaged in sham contracting in breach of s.357 now has to demonstrate they had a reasonable belief that the contract was a contract for services. Allowing that person to satisfy the defence by simply consulting a checklist as to the true nature of the relationship may serve to “lower the bar” for relying upon the defence, when it has just been raised.

ACTU Further Recommendation 11: That the Review does not proceed with proposed Recommendation 16 relating to the development of FWO guidance on assessment of an employment or contracting relationship in the engagement of workers; or that if such guidance is developed, it does not play a role in assisting those engaging a worker to satisfy the “reasonable belief” defence to sham contracting in s.357 of the FW Act.

Give workers the right to challenge unfair contractual terms

The ACTU welcomes proposed Recommendation 17 in the Draft Report for a further review in 2-3 years of the FWC’s new jurisdiction to resolve disputes about unfair contract terms in services contracts, including whether this measure should apply to classes of services contracts. This recognises the concerns we raised about the ineffectiveness of the requirement for applications to be made on an individual basis, “where there are a large number of individuals that are subject to the same services contract, as is common on digital platforms such as Uber and in the road transport sector”.³¹

³⁰ Draft Report, pages 130-131, indicating that the proposed checklist “might also be helpful in other industries with a high risk or incidence of sham contracting”.

³¹ Draft Report, page 135. See also ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 59-60 (including Recommendation 22).

Chapter 3 “Same Job, Same Pay” & the Bargaining Framework

Regulated labour hire arrangement orders

The Closing Loopholes Act introduced Part 2-7A into the FW Act, giving the FWC powers to deal with applications for a “regulated labour hire arrangement order” (**RLHAO**) which has the effect that labour hire employees placed with a host business are entitled to the same pay as if they were performing work under the host’s enterprise agreement (or other employment instrument).

As noted earlier in this submission, we are pleased that the Review has recognised the positive impact of Part 2-7A’s operation in delivering wage increases for many workers, details of which we provided in our initial submission.³² As the Draft Report notes, the new provisions are being actively utilised with 182 applications for RLHAOs to 31 December 2025 and 104 orders made.³³ The Review found that:

The core purpose of the measure is to prevent labour hire arrangements that undercut bargained rates in enterprise agreements, such that workers are not receiving the same pay for the same job. The volume of applications and orders made, and the scale of wage increases ... , demonstrates the strong uptake and material impact of the measure. ...

The increase in wages paid to labour hire employees ... supports the conclusion that the measure is operating as intended. ...

No systemic failure has been demonstrated. There is no compelling evidence that the legislation is malfunctioning or incapable of being interpreted coherently. At this stage the system is functioning, albeit with predictable early friction around the boundaries of the scheme.³⁴

In our original submission to the Review, the ACTU put forward seven recommendations aimed at maintaining the integrity of Part 2-7A and maximising its benefits.³⁵ While maintaining the need for all of those proposals, we focus here on the consideration of two of them in the Draft Report.

Removing the training arrangements exception

Under s.306G(1), the requirement in s.306F to pay a labour hire employee the protected rate of pay (**PROP**) under a RLHAO does not apply to employees engaged under a training arrangement to perform work for the host. We proposed that this exception should be removed as it has led to some employers (e.g. in the mining industry) withdrawing their use of labour hire and only engaging trainees.³⁶ On this issue, the Draft Report states as follows:

³² ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 15-17.

³³ Draft Report, page 167.

³⁴ Draft Report, pages 180, 182-183; see also page 189.

³⁵ ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 19-23 (including Recommendations 1-7).

³⁶ Ibid, page 20 (including Recommendation 3).

Several unions called for the repeal of the training exemption, arguing that some employers are structuring work as traineeships to avoid engaging the provisions. Allegations that employers may be using training arrangements to avoid paying the PROP are concerning, particularly given that workers in these arrangements, such as apprentices, are often young and new to the workforce.

The purpose of the exemption is to avoid impacting upon training arrangements regulated by state and territory laws, and to reduce the barriers to employers providing training pathways to meet future skills demands.

Apprenticeships are a key mechanism for skill development for many occupations and are crucial to supporting the future workforce. ... However, apprenticeship completion rates have been in steady decline over several years. Accordingly, no recommendation is made to amend the training exemption from the requirement to pay the PROP, as such a change may have implications for participation in training pathways that contribute to Australia's future skills needs.³⁷

Noting the Draft Report's description of the alleged misuse of training arrangements as "concerning", we urge the Review to reconsider the need to remove this. The Mining and Energy Union (MEU) has seen mine sites increasingly advertising for trainees on lower pay rates,³⁸ rather than using trained operators through labour hire or direct employment. The MEU is also aware of employers extending 12-month training arrangements to 2 years "because of same job same pay", as indicated in the union's survey and case analysis of mining traineeships submitted to a NSW Government consultation process:

Several survey respondents directly referenced that "*we were told the traineeship would now be two years because of same job, same pay*" – a change which extended employment duration without any additional training content or competency acquisition.³⁹

The ACTU also supports the submission of the Australian Manufacturing Workers' Union (AMWU) in response to the Draft Report, providing detailed evidence of the misuse of the training arrangements exception in the context of Group Training Organisations, and the need to remove the exception to ensure that apprentices and trainees have the benefit of the same job same pay principle.

ACTU Further Recommendation 12: Remove the s.306G(1) exception which deprives employees engaged under a training arrangement to perform work for the host of the benefit of the requirement in s.306F to pay a labour hire employee the protected rate of pay under a Regulated Labour Hire Arrangement Order.

³⁷ Draft Report, page 184 (emphasis added).

³⁸ For further details see the MEU's submission in response to the Draft Report.

³⁹ MEU, *Submission to the NSW Department of Education Consultation: Modernising the Apprenticeship and Traineeship Act 2021*, page 11.

Delays in the making of RLHAOs

Under s.306E(9)(e) a RLHAO can only come into force on the day it is made or a later day specified in the order. The Draft Report noted the submissions of some unions that contested applications for RLHAOs can be delayed for up to 8 months, and that unions therefore recommended giving the FWC the ability to backdate orders to the date of the application.⁴⁰ The Review found as follows:

Union submissions highlighted the practical disadvantage arising from delays between the lodgement of an application and the making of an order, regardless of whether those delays are attributable to FWC processes or the contested nature of the application. The MEU submitted that orders were taking an average of around 8 months to be made, while DEWR's internal analysis indicates an average timeframe of approximately 7 months from application to order. In cases involving significant wage increases, this delay can result in workers foregoing substantial earnings, potentially amounting to tens of thousands of dollars.

These concerns relate to operational and resourcing issues, rather than deficiencies in the legislative framework. It is appropriate that the FWC's resourcing and processes be reviewed rather than pursuing legislative amendment.⁴¹

This provided the basis for proposed Recommendation 21:

The government should monitor the Fair Work Commission's resourcing as the regulated labour hire arrangement orders framework is embedded, to ensure it is able to consider applications in a timely manner.

The ACTU submits that this is not a problem that can solely be addressed by monitoring the FWC's resources. Our affiliates continue to report significant delays in obtaining RLHAOs, including as a result of deliberate delay tactics by employers. For example the Shop, Distributive and Allied Employees Association (**SDA**) has encountered delays of 4-5 months in cases where employers have raised objections to the making of a RLHAO for some time after the application has been lodged, only to ultimately agree to the order just prior to the FWC hearing.

In addition to our original proposal for backdating of the RLHAO to the date of the application, we request that the Review consider another option for addressing the issue of delays: that the FWC be subject to statutory timeframes within which it must deal with an application for a RLHAO, for example uncontested applications within 1 month and 2-3 months for contested applications. This is an approach already found in other provisions of the FW Act, for example:

- Applications for orders to stop industrial action under ss.418-419 must be determined within 2 days, or the FWC must make an interim order: s.420.

⁴⁰ Draft Report, page 179. See also ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, page 21 (including Recommendation 4).

⁴¹ Draft Report, page 187 (emphasis added).

- Applications for orders suspending or terminating protected industrial action under s.424 must be determined within 5 days, or the FWC must make an interim order.
- Applications for protected action ballot orders must be determined within 2 working days: s.441(2).
- The FWC must begin to deal with applications for stop sexual harassment and stop workplace bullying orders within 14 days of an application being made: ss.527J(2), 789FE(1).

Improving the speed with which the FWC deals with RLHAO applications would also help address the Review's proposed Recommendation 20, that the government should improve access to these orders for certain groups of labour hire workers (e.g. those in regional areas, women, First Nations people, people with disability, young and migrant workers). Unions including the SDA, United Workers Union (UWU) and Australasian Meat Industry Employees Union (AMIEU) have already been active in bringing RLHAO applications on behalf of many of the vulnerable workers mentioned in proposed Recommendation 20, including in high-risk sectors. Quicker FWC resolution of these applications would open the same job same pay system up to more labour hire workers.

ACTU Further Recommendation 13: That the FWC be subject to statutory timeframes within which it must deal with an application for a Regulated Labour Hire Arrangement Order, for example uncontested applications within 1 month and 2-3 months for contested applications.

Workplace determinations

The Closing Loopholes No.2 Act introduced s.270A into the FW Act, requiring that terms of an intractable bargaining workplace determination (other than those relating to wage increases) must be no less favourable for employees and their bargaining representatives than the relevant terms of an enterprise agreement that the determination will replace.

We note and wish to emphasise the following comments in the Draft Report, which contest the concerns raised by employer groups about s.270A:

... the purpose of the amendments was to ensure that, unless otherwise agreed, terms for employees and employee organisations cannot go backwards under an IBWD. Section 270A was intended as a protective mechanism, to ensure involuntary arbitration did not undermine employees' baseline bargaining position. The 'no less favourable' test in section 270A constrains the FWC's capacity to reduce existing conditions and strengthens employee protections in the context of intractable bargaining.

The concerns of employer groups about the reforms having set a 'floor' through the 'no less favourable' test, applied in limited circumstances, is an intended feature of the reforms. Parliament's intention for the measure was to ensure employees do not end up in a worse position

compared to the existing enterprise agreement. Section 270A is operating to give effect to the intention.⁴²

The ACTU supports proposed Recommendation 23:

The *Fair Work Act 2009* should be amended to ensure that mandatory terms to be included in an intractable bargaining workplace determination must be no less favourable to each employee and their representatives, than a term of the enterprise agreement that deals with the matter.

This would address the exclusion of mandatory terms under s.273 (dispute resolution, consultation, flexibility and delegates' rights terms) from the operation of the no less favourable provision in s.270A, as a result of the decision in *Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Endeavour Energy* [2025] FWC 285 (11 December 2025).⁴³ The ACTU proposed amendments to the FW Act in our original submission to the Review which would implement proposed Recommendation 23, as follows:⁴⁴

Insert new subsection (2A) following subsection 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, ".

However, the ACTU has concerns about the Review's observations as to the context of the intractable bargaining framework in which s.270 operates, on the basis of which it has proposed Recommendation 22:

Section 235 of the *Fair Work Act 2009* should be amended to provide a legislated set of guardrails that must be considered by the Fair Work Commission before an intractable bargaining declaration can be made.

The justification for this proposal is said to be as follows:

Section 235 sets out the matters which the FWC must be satisfied before issuing an IBD, however, these requirements do not currently adequately incentivise genuine bargaining nor address

⁴² Draft Report, page 208.

⁴³ Draft Report, page 210.

⁴⁴ ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 86-87 (including Recommendation 31).

incentives to hold out for the status quo. The Review recommends the introduction of a legislated list of factors that the FWC must consider before making an IBD to address these risks. The factors should ensure that a balance is struck to discourage strategic delay and preserve genuine bargaining. Such an amendment would better give effect to parliament's intention in introducing section 270A. ...

The proposed amendment would provide a counterbalance to the risk the 'no less favourable' test incentivise IBD and IBWD processes, while maintaining the intention of the Closing Loopholes amendments on the intractable bargaining framework. It would drive appropriate behaviour during bargaining, with parties knowing these matters will be considered by the FWC. ...

More can be done to the bargaining framework to emphasise enterprise-level agreement making and reduce any incentive to utilise intractable bargaining processes.⁴⁵

We question the necessity of proposed Recommendation 22 when (as noted on page 197 of the draft Report) there have been only 29 applications for intractable bargaining declarations out of 14,693 applications for approval of agreements over the last 4 years. In other words, intractable bargaining declarations have been sought in less than 0.2% of agreement negotiations that have occurred in that period.

Some ACTU affiliates have raised concerns that the proposed codification in s.235 of additional factors the FWC should consider in deciding whether to make an intractable bargaining declarations⁴⁶ will simply give employers more grounds on which to oppose a declaration. We encourage the Review to consider that the intractable bargaining framework addressed the long-standing gap in the legislation which enabled employers to avoid concluding an agreement,⁴⁷ bolstered by other mechanisms they had available to enhance their negotiating position (such as applying to the FWC for termination of an agreement after its nominal expiry date). The availability of intractable bargaining has readjusted the scales in favour of employees, and in our submission there is no substantive case to support interfering with that rebalancing.

ACTU Further Recommendation 14: That the Review does not proceed with proposed Recommendation 22 to amend section 235 of the FW Act.

⁴⁵ Draft Report, pages 209-211.

⁴⁶ For example, whether parties have engaged in genuine/constructive bargaining, whether they have held out for intractable bargaining to obtain a more favourable arbitrated outcome, whether their conduct was consistent with the objects of the FW Act including achieving productivity and fairness through enterprise-level good faith bargaining: Draft Report, pages 209-210.

⁴⁷ See Andrew Stewart, Shae McCrystal and Anthony Forsyth, 'Will Pay be Better and Jobs More Secure? Analysing the Albanese Government's First Round of Fair Work Reforms' (2023) 36:2 *Australian Journal of Labour Law* 104, page 138.

Chapter 4 Protecting Workers & Strengthening Enforcement

Enhancing delegates' rights

The Closing Loopholes reforms introduced delegates' rights into the FW Act, as well as requiring the FWC to develop and include delegates' rights terms in modern awards.

In reviewing these new rights the Draft Report concludes that "it is too soon to assess the full impacts of this measure on workplaces, and these impacts should continue to be monitored over time".⁴⁸ While unions and employers raised a range of issues with regard to the new rights, the Draft Report concludes that the case for any further change has not been made out because of "the absence of evidence to suggest the measure is not operating as intended".⁴⁹

The one exception the Draft Report makes to this finding is the operation of s.205A. This section requires the FWC to replace an agreement term on delegates' rights with the relevant modern award term during the approval process if "the delegates' rights term is less favourable than the delegate's rights term in one or more modern awards that cover the workplace delegates". In practice however, this has led the FWC to replace terms simply because an otherwise superior agreement term lacked all of the elements of an award term. The Draft Report concludes:

Overriding enterprise agreement terms that are more favourable in most respects, simply because one element is less favourable than the award, undermines the role and incentives of enterprise bargaining.⁵⁰

The ACTU agrees, and supports the proposed solution at Recommendation 36 which states that the award term would only replace the agreement term to the extent of any deficiency in such circumstances. The ACTU also supports the proposed change to workplace determinations at Recommendation 36(b).

The ACTU made other suggestions for reforming the delegates' rights provisions in our initial submission,⁵¹ and notes that the Draft Report stated generally that there was an absence of evidence to support further reforms. The ACTU accepts that reasoning and provides further evidence for the Review's consideration on the following issue.

Resolving the contested meaning of "reasonable communication".

⁴⁸ Draft Report, page 295.

⁴⁹ Draft Report, page 296.

⁵⁰ Draft Report, page 301.

⁵¹ ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 26-29.

In our initial submission to this review the ACTU highlighted the problem of whether or not a delegate's right to "reasonable communication" with a member or potential member (s.350C(3)(a)) includes the ability to directly communicate with them, given early anecdotal evidence from our affiliated unions that this was becoming a significant source of conflict in the workplace.⁵² Since the Draft Report was released, the Finance Sector Union (**FSU**) and the Australian Nursing and Midwifery Federation (**ANMF**) have provided the following examples:

FSU example 1 – access to staff email

During negotiations for a new enterprise agreement, a delegate wrote to the employer representative to ask for the required IT permissions to be able to email employees about the bargaining process and to provide union updates.

Management responded stating that his right to communicate with his colleagues under the Fair Work Act was only to the extent his actions complied with his employer's Code of Conduct and IT Acceptable Use Standard. The delegate was concerned that these policies did not allow broadcast emails to be sent and he would face disciplinary action if he were to do so.

Management then proposed sending an email to all employees covered by the Enterprise Agreement to ask if they wanted to expressly consent to receiving emails from the delegate. Ultimately, the delegate was not able to email their colleagues.

FSU example 2 – access to staff email

During enterprise agreement negotiations, a delegate had been emailing employees with union updates. After the union secured a "no" vote when the employer put the agreement to ballot, the delegate had their permissions to email groups of employees removed. When this was questioned, the employer either denied it had happened, or said that it was required for consistency with their IT policies.

⁵² Ibid, pages 26-27.

FSU example 3 – access to Microsoft Teams chats

When a delegate put messages about Union meetings and communication in Teams chats, they received replies stating that chats were for “operational messages” and that the delegates’ messages would be removed. When the delegate queried this decision and asserted their rights to communicate with colleagues, they were told that Teams chats were not a channel they had access to.

FSU example 4 – physical access

Union materials that delegates have put on noticeboards and in other areas of workplaces are routinely removed. Employers have given reasons for this including that the cleaners removed the posters without instruction to do so, and that they could be confused with safety-related posters.

FSU example 5 - Induction access

Many large companies have refused to allow delegates access to new starter inductions to discuss the union. The union negotiates collective agreements with induction access rights but where these do not exist or employers refuse, the union has generally been unable to gain access for delegates to new starter inductions.

The employer rationale for this is generally that there is no explicit right for delegates to address new starters in an induction format, that they can speak to them via other channels in the workplace.

FSU example 6 – Enterprise Agreement clauses

Employers are now trying to put clauses into EAs to limit or give shape to the delegates’ rights clause.

One example is: “[the delegates’ right to communication clause] does not require the employer to provide a workplace delegate with access to electronic means of communication in a way that provides individual contact details for eligible workers.”

Any access to any form of communication would necessarily involve the provision of some contact details, given that workers’ email addresses are generally in the format of their first and

last name. These types of clauses effectively remove the right of a delegate to reasonable communication.

ANMF example

A large national employer the ANMF is currently bargaining with has offices nationwide and many employees work from home. The employer has repeatedly obstructed the union's requests for delegates to be provided with work email addresses to communicate with potential members. Only after extensive requests and argument was the union provided with deidentified group email addresses. While this has been an improvement, the union has no visibility over who is receiving emails from the lists and delegates have received automatic replies from the CEO and members of the executive team, thus identifying themselves as being on the list and monitoring union communications.

The above examples show that employers are aggressively seeking to restrict the meaning of "reasonable communication" for workplace delegates and their members and potential members. Many of these instances are arguably breaches of the FW Act or the relevant agreement or award term, but it is very difficult for a delegate and their union to pursue these cases, especially given the significant disciplinary action they are usually threatened with.

Amending the FW Act to provide that the right to reasonable communication includes the right to communicate directly, and without being monitored by the employer would greatly reduce the early workplace conflict which the ambiguity of this right is causing.

Finally, the Draft Report also noted that a test case is underway on whether or not this right includes a workplace delegate being able to address induction meetings of new staff, among other grounds.⁵³

While this test case will provide helpful guidance for the parties on the meaning of "reasonable communication", it will most likely be highly context or fact specific given that any test of "reasonableness" involves an evaluative judgement based on the facts of the case, and therefore of potentially narrow application elsewhere.⁵⁴ Statutory clarity on this issue would significantly reduce the disputation that is already emerging.

⁵³ *Australasian Meat Industry Employee's Union v Teys Australia Beenleigh Pty Ltd* QUD411/2025.

⁵⁴ *Minister for Immigration and Citizenship v Li* [2013] HCA 18, French J at [26].

ACTU Further Recommendation 15: Insert after s.350C(3) in the Fair Work Act a new subsection: “(aa) reasonable communication must include the ability for a workplace delegate to be able to communicate directly and confidentially with members and any other persons eligible to be such members”.

Criminalising wage theft and changes to Fair Work Act civil penalties framework

The changes introduced by the Closing Loopholes laws included the new criminal offence of intentional underpayment, changes to some of the functions and powers of the FWO, abrogating the privilege against self-incrimination in relation to employee records and pay slips, and increasing the maximum civil penalties for underpayments and other forms of non-compliance by employers with their workplace obligations.

The ACTU welcomes the Draft Report’s general rejection of employer claims about the complexity of the workplace relations system as a barrier to compliance and, for example, that the new wage theft offence “criminalises ‘complexity errors’”.⁵⁵ Overall it states that: “The Review does not see complexity as inherently problematic. In some cases, complexity reflects the nuanced realities of modern work arrangements and the degree of legal specification required to fairly recognise and regulate those arrangements.”⁵⁶ However it proposes that these issues could be managed by providing practical guidance and tools (including for particular sectors)⁵⁷ as reflected in proposed Recommendations 28-31.

We repeat the points made in our initial submission to the Review,⁵⁸ and since made in our submission to the Senate Wage Theft Inquiry,⁵⁹ about the continuing necessity of strong civil and criminal consequences for underpayment and other forms of wage theft.⁶⁰ As the Draft Report observes:

... there are recent examples of employer non-compliance that courts in civil matters have described as deliberate, or intentional. It should also be noted that recent significant underpayment cases have involved payments below the national minimum wage. These underpayments cannot easily be attributed to complexity within the system, noting the minimum wage figure can easily be found through various plain-English resources. This suggests there is a role for deterrence in preventing underpayment of entitlements.⁶¹

⁵⁵ Draft Report, pages 250-251.

⁵⁶ Draft Report, page 45.

⁵⁷ Draft Report, pages 45-46, 251.

⁵⁸ ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 12-13, 67-68.

⁵⁹ ACTU, *Submission to the Wage Theft Inquiry*, ACTU D. No 32/2026, 1 May 2026.

⁶⁰ See also the more recent evidence presented in Laurie Berg and Bassina Farbenblum, *Off the Books: Inside Australia’s Hidden System of Migrant Worker Exploitation*, Migrant Justice Institute, Feature Report, May 2026.

⁶¹ Draft Report, pages 264-265; see also page 249.

The ACTU agrees with the Draft Report's view that the absence of FWO referrals to prosecuting authorities of alleged criminal wage theft breaches is not (only 16 months after the offence commenced operating) evidence that the measure is ineffective.⁶² We also agree with proposed Recommendation 25 that a further review of the wage theft offence and changes to the civil penalties framework take place within 1 year of the Review's final report being published, including the appropriateness of the FWO's powers. This essentially reflects the proposal in our Senate Wage Theft Inquiry submission for an independent review of the FWO including its efforts to combat wage theft.⁶³

The ACTU supports proposed Recommendation 26:

The Minister for Employment and Workplace Relations should require the Fair Work Ombudsman to report annually on its activities relating to wage theft and civil remedies for underpayment. The report should be published to enhance transparency.

The Fair Work Ombudsman's report should be required to include:

- any investigations and enforcement work about criminal wage theft (see sections 327A-327D)
- referrals made for prosecution
- civil proceedings for underpayments, and
- systemic underpayment and wage theft compliance issues identified through its functions in Part 4-1 and Part 5-2.

The ACTU also supports proposed Recommendation 27:

The government should consider options to allow employees to recover unpaid entitlements despite any criminal investigation or prosecution that may be underway. This should include consideration of a mechanism to allow civil recovery proceedings without prejudicing any criminal prosecution.

The ACTU does not oppose proposed Recommendation 32:

The *Fair Work Act 2009* should be amended to reduce the penalties for contraventions of subsection 66MA(8) and sections 359B and 359C in line with other equivalent civil remedy provisions, and these 3 provisions should be added to the definition of 'selected civil remedy provision'.

Providing Stronger Protections against discrimination, adverse action and harassment

The ACTU welcomes the finding that the inclusion of 'subjection to FDV' as a protected attribute recognises the effects of FDV on victim-survivors and its impact in the workplace and strengthened the general protections framework. We equally welcome the finding that an unintended consequence has been identified in relation to the operation of the 'not unlawful'

⁶² Draft Report, page 248.

⁶³ ACTU, *Submission to the Wage Theft Inquiry*, ACTU D. No 32/2026, 1 May 2026 (Recommendation 1).

exception in section 351(2)(a) of the Act, and that amendments should be made to ensure a nationally consistent approach and ensure the measure is achieving its stated intent. As noted in the Draft Report, the interpretation of that provision by the courts means the prohibition against adverse action because of an employee or prospective employee's subjection to FDV does not apply to employers and employees in New South Wales, Victoria, Western Australia or Tasmania, as their anti-discrimination laws do not prohibit discrimination on the ground of 'subjection to FDV'.⁶⁴ The ACTU has raised these concerns on multiple occasions, including in our submission on the *Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023*.

We therefore support Recommendation 34 to address this issue by amending s351(2)(a) to make it clear that paragraph 351(2)(a) applies only to conduct that is expressly authorised or exempted by applicable state or territory anti-discrimination law that relates to 'subjection to family and domestic violence', rather than being enlivened merely because a jurisdiction's anti-discrimination statute does not prohibit discrimination on that ground.

However, this is a problem that affects other protected attributes, such as political opinion and religion, which are not included in some state/territory anti-discrimination laws, or in any Commonwealth anti-discrimination law. We therefore recommend that the proposed solution be broadened out to include all protected attributes, and not be confined to 'subjection to family and domestic violence.' There should not be inconsistency between protected attributes. If the Review considers this is outside of its scope, we suggest a recommendation be made that the Government review and consider the same proposal in relation to other protected attributes to ensure there is consistency.

ACTU Further Recommendation 16: Amend proposed Recommendation 34 to apply to all protected attributes under anti-discrimination law.

Chapter 5 Safe Workplaces

Work Health and Safety Act 2011 Amendments

The ACTU notes and supports the following draft recommendations:

- Recommendation 37: The Commonwealth should establish an evaluative framework to better determine the impact of the industrial manslaughter offence on deterrence, workplace safety culture and the prevention of workplace fatalities.

⁶⁴ Draft Report, page 284.

- Recommendation 38: The *Work Health and Safety Act 2011* should be amended to:
 - a. extend the penalty indexation mechanism introduced by the Closing Loopholes No. 1 Act to include the financial penalty for the industrial manslaughter offence, and
 - b. increase the financial penalty for industrial manslaughter to ensure it is set at the rate it would have been, had indexation applied from commencement.
- Recommendations 39-41 relating to the Family and Injured Workers Advisory Committee.

Safety, Rehabilitation and Compensation Act 1988 Amendments

The Closing Loopholes Act introduced 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 (**PTSD**), 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.

The Draft Report found that: “The amendments have been operating appropriately and effectively to date, and no unintended consequences have been identified.”⁶⁵

The ACTU and the Community and Public Sector Union (PSU Group) advocated for extending presumptive liability for PTSD to all workers covered by the SRC Act.⁶⁶ We acknowledge evidence provided in the draft report that the current provisions for first responders are operating effectively, including reduced claim lodgement timeframes and a less adversarial claims process reported by Comcare. It is well substantiated that earlier engagement with injured workers is generally associated with better outcomes in workers’ compensation matters, which aligns with the policy intent of the amendments. Therefore, we are disappointed that the Draft Report does not recommend a broader application of these provisions.⁶⁷

These positive outcomes demonstrate that presumptive liability can simplify access to compensation and support earlier intervention. While we note concerns regarding potential resourcing and premium impacts, these considerations should be addressed alongside, rather than in place of, policy reform aimed at improving equitable access to compensation.

⁶⁵ Draft Report, page 349.

⁶⁶ See ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 40-41 (Recommendation 14).

⁶⁷ See Draft Report, page 348.

ACTU Further Recommendation 17: Remove the requirement for an injured worker to have suffered PTSD as a result of providing an emergency response. Instead, the SRC Act 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.

Entry to assist Health and Safety Representatives

The Closing Loopholes reforms amended the FW Act to remove an inconsistency in the law: requiring a union official to hold a FW Act entry permit when they were entering a workplace to assist a Health and Safety Representative (HSR) on request under a provision of a State or Territory WHS law. The reform removed this requirement, making the official subject to the same entry requirements as any other person who is requested to assist an HSR. As we said in our initial submission, 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.⁶⁸

This reform has been in place since 15 December 2023. Since then - nearly two and a half years later - the ACTU is not aware of any evidence of misuse, nor have the Draft Report or employer organisations identified any. Even if there was an example of misuse, safeguards exist to prohibit such conduct.⁶⁹ The ACTU therefore submits this reform should only be subject to further review on the same terms as any other part of the Closing Loopholes Reforms.

ACTU Further Recommendation 18: The review of the reforms of entry to assist HSRs should occur in 2 to 3 years and as part of the general review proposed.

Finally, the draft report recommends that the government should work with work health and safety regulators to provide further training for both HSRs and those assisting them to understand their roles and responsibilities (Recommendation 44). Given that the trade union movement provides extensive training to HSRs we recommend that this recommendation be extended to include them also.

⁶⁸ ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 37-38.

⁶⁹ For example, a person conducting a business or undertaking may refuse access to an assistant on reasonable grounds, including where the assistant has previously intentionally or unreasonably delayed, hindered or obstructed any person, among other reasons. Model Work Health and Safety Bill 2025 (Cth) s.71(5).

ACTU Further Recommendation 19: The government should also work with trade union organisations to provide education and training to HSRs and those assisting them to better understand their roles and responsibilities.

Chapter 6 Paid Family & Domestic Violence Leave

Overview

The ACTU welcomes the findings of the Review, including that paid FDV leave is critical to supporting victim-survivors of FDV; that when utilised, it is effective in supporting victim-survivors to address the impacts of FDV without having to make a choice between their safety and their job; and that a range of barriers to strong utilisation of the entitlement remain, with additional work needed to increase awareness and address implementation challenges, including improvements being made to the entitlement.⁷⁰ The ACTU is pleased that the Review has made a number of recommendations to improve the operation of the entitlement, and we respond to these below.

Monitoring and reporting

Proposed Recommendation 45 calls for the government to regularise the collection of evaluative data about paid FDV leave, including usage and sentiments about the leave type, to ensure it can best identify whether the measure is operating effectively. The ACTU agrees that ongoing monitoring would be very helpful to track the usage and efficacy of the entitlement, and that the limited quantitative data currently available has been a significant limitation for both reviews that have been conducted. In particular, such data would be helpful to further understand barriers to accessing the leave, and whether the entitlement is of a sufficient quantum. As long as the data can be collected in ways which do not interfere with an employer's obligations in relation to privacy and confidentiality, the ACTU is supportive of this recommendation. We concur with the Review that replicating the BETA surveys and interviews and utilising existing surveys (with the addition of data points) such as the ABS personal safety survey and the WGEA survey is likely to ensure that the privacy, confidentiality and safety of victim survivors is maintained.

⁷⁰ Draft Report, pages 419-420.

ACTU Further Recommendation 20: To enhance proposed Recommendation 45, the ACTU considers that it would be helpful to include additional data points in the collection of data on FDV leave in the abovementioned surveys that capture things like:

- Average number of days/hours taken
- Whether the employee required more leave than what they took or what was available to them
- Any other forms of leave (annual, personal, unpaid etc) taken by an employee due to FDV
- Where an employee who is entitled to access FDV leave did not do so, the reasons for not utilising it
- Any barriers employees experienced in accessing the leave that either prevented them from utilising it at all or made it difficult
- Any information gaps, confusion or uncertainty experienced by employers when employees are wanting to access the leave.

Amending the entitlement – s.106B

Proposed Recommendation 46 calls for the FDV leave entitlement to be amended and simplified to ensure that it applies in all circumstances where an employee is unable to work or is unavailable for work due to being affected by FDV. This should include, but not be limited to, circumstances where the employee needs to take steps to manage, respond to, or recover from the impacts of the family and domestic violence. This would include repealing the current requirements for taking paid family and domestic violence leave contained in paragraphs 106B(1)(b) and (c), and would align evidentiary requirements with this simplified approach. We note the Draft Report states that simplifying the entitlement in this manner, together with other changes to reduce the evidentiary burden on victim survivors, may meaningfully reduce the actual and perceived barriers currently faced by victim-survivors such as the prohibitive effect of stigma and disclosure, address privacy risks, improve understanding of the entitlement, and minimise evidentiary challenges. Under the proposed change, it is intended that access to paid FDV leave would depend on the inability to work due to FDV, rather than an employee needing to demonstrate specific activities or timing constraints.⁷¹

The ACTU strongly supports the policy intent behind this recommendation of simplifying the entitlement, removing limitations and barriers to accessing the leave that currently exist, and

⁷¹ Draft Report, at p 427.

ensuring it is accessible in the breadth of circumstances that was intended by the legislation. We concur with the findings of the Review that there is low uptake of the entitlement and that the test in s.106B could be contributing to this as well as to onerous and intrusive requests for evidence (because of the need to demonstrate specific activities or timing constraints, and a lack of employer understanding of the breadth of reasons for which leave can be accessed).⁷²

We note that our recommendation to deal with these issues had been to include more examples in the guidance note at s.106B of actions that might be taken to deal with impacts of FDV.⁷³ However we note the Review's concern that the list is not focused on 'impacts' and could be reinforcing a narrow view of the 'impacts' that are contemplated, and that addition of further examples may not solve the problem. We agree that there is significant merit in simplifying the requirements for taking the leave, and that this may overcome some of the barriers that victim survivors face – particularly if these changes were made together with changes to evidentiary requirements.

However, we have some concerns that the Review's proposed amendment may inadvertently make the test more stringent, and that employers may not consider that an employee meets the test of 'unable or unavailable to work' in all of the circumstances that an employee may need to use the entitlement (such as to attend appointments related to FDV and take time to recover afterwards, for general recovery purposes, to manage an injury, or to access culturally appropriate supports). Further, we consider that there could be a risk that changing the test in this way could result in employers interpreting the test as requiring that an employee be experiencing violence currently and not granting the leave to employees dealing with the impacts of violence that predate the request for leave. An amended test may therefore have unintended consequences and result in additional disputation.

One possible way to address this and avoid unnecessary disputation could be to amend the test to the 'employee is unable or unavailable to work or it is impractical for the employee to work.' This test of 'unable, unavailable or impractical to work' could further be defined to mean where an employee needs to deal with the impact of FDV, including but not limited to where an employee needs to manage, respond to, or recover from the impacts of the family and domestic violence. If the test was to be amended, it is crucial that it includes reference to (but is not

⁷² Draft Report, pages 426-428.

⁷³ ACTU, *Submission to Review of the Closing Loopholes Acts*, ACTU D. No 17/2026, 6 March 2026, pages 103-104 (Recommendation 40).

limited to) circumstances where the employee needs to take steps to manage, respond to, or recover from the impacts of the family and domestic violence.

The policy intent of the change should also be made very clear in accompanying material (such as an Explanatory Memorandum) - that is, that the change is designed to capture the breadth of situations in which employees may need to take the leave, and to reduce the barriers to access and address low uptake and onerous evidentiary requirements. We also consider that there would still be utility in providing some indicative and non-exhaustive examples to illustrate the breadth of the entitlement in a guidance note in s.106B, as well as providing further guidance elsewhere – for example in the Explanatory Memorandum, and in publicly available guidance for employers and employees, that emphasises the breadth of situations the entitlement is designed to capture.

Given this would be a substantial change to the legislation, and there has not been adequate time to fully consider it and consult with our affiliates, we consider that it may be useful for the Review to express a clear policy intent about what the proposed change is trying to achieve, rather than propose a specific test or drafting. The specific test, wording or drafting to be used could be subject to further and detailed consultation with relevant stakeholders.

ACTU Further Recommendation 21: Given that proposed Recommendation 46 relating to the entitlement to take FDV leave in s.106B of the FW Act would be a substantial change to the legislation, it may be useful for the Review to express a clear policy intent about what the proposed change is trying to achieve, rather than propose a specific test or drafting. The specific test, wording or drafting to be used could be subject to further and detailed consultation with relevant stakeholders.

Evidentiary requirements

We welcome and concur with the Review's findings that clarifying evidentiary obligations through guidance has not sufficiently addressed stakeholder concerns, and that the current guidance provided by the FWO in relation to evidence is inadequate in some respects.⁷⁴ We welcome the two proposed recommendations made in relation to evidence, which are consistent with Recommendation 33 of the ACTU's submission to the Review.

⁷⁴ Draft Report, pages 428-429.

Proposed Recommendation 47 calls for the FW Act to be amended to clarify the types of evidence, such as statutory declarations or letters from support services, that might be appropriate to request, if necessary. The ACTU is very supportive of this recommendation, as it would help to address some of the issues we highlighted in our submission to the Review regarding evidence, including 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. Some employers insist on seeing particular kinds of evidence, refuse other kinds of evidence, or ask for too much information or for evidence which contains deeply personal and distressing information which workers do not want to share with their employers. The reference to letters from support services could be broadened out to include referral notes from support/community services, which may be easier to obtain than a letter.

We would recommend three additions to Recommendation 47. Firstly, medical certificates should also be specifically mentioned as a type of evidence that may be appropriate to request, if necessary. This is in acknowledgement of the fact that for many workers, this is the form of evidence they are most used to accessing and providing, and therefore may be the most familiar and present less of a barrier. However we acknowledge that there is often a cost involved in seeing a GP to obtain a medical certificate which could also operate as a barrier, so it is crucial that other forms of evidence that do not involve a cost are also specifically mentioned as recommended in the Draft Report (such as a statutory declaration or letter from a support service).

Secondly, it should be made clear in the amendment to the FW Act that only one type of evidence is required, and that any of the types mentioned are sufficient to satisfy a reasonable person. This would ensure that an employee has some level of choice about the most appropriate form of evidence for them to provide with regard to their circumstances, and prevent employers from requesting specific forms of evidence which may not be appropriate in the circumstances if it reveals sensitive information, is difficult to obtain or otherwise presents a barrier to the employee accessing the leave.

Thirdly, the amendment should provide that if required by an employer to provide evidence, an employee is able to provide evidence once, and then is not required to provide it again on each occasion they need to access FDV leave subsequently. This kind of ‘enduring’ evidence could last for a set period of time (for example, 12 months), before the employee could be requested to again provide evidence should they need to access the leave. This would recognise that FDV and managing its impacts often takes place over long periods of time, and that requiring employees

to provide evidence every time they need to access the leave is highly burdensome and is a barrier to accessing the leave.

ACTU Further Recommendation 22: That proposed Recommendation 47 clarifying the types of evidence that might be appropriate to request from an employee taking FDV leave be enhanced in three ways:

- Medical certificates should also be specifically mentioned as a type of evidence that may be appropriate to request, if necessary.
- Only one type of evidence is required, and that any of the types mentioned are sufficient to satisfy a reasonable person.
- If required by an employer to provide evidence, an employee is able to provide evidence once, and then is not required to provide it again on each occasion they need to access FDV leave subsequently. This kind of ‘enduring’ evidence could last for a set period of time (for example, 12 months).

Proposed Recommendation 48 calls for the FWO to reissue guidance that supports employers to understand their discretion in requesting evidence; the challenges victim survivors may have obtaining evidence, and how to approach assessing whether it is reasonable to request evidence, what evidence is reasonable to request, and how to engage with employees when requesting evidence, in a trauma-informed and practical manner.

We strongly support this recommendation – in addition to the amendments to the FW Act contemplated above, further education and guidance is critical to ensuring evidentiary requirements are not a barrier to workers who need to access the leave. In addition to the topics already identified, we recommend that the guidance also cover the implications of requesting evidence, the various difficulties that providing evidence may present for victim survivors, and how evidence can be a barrier to accessing leave and reduce safety for people experiencing FDV. This should include reference to findings from the two reviews of paid FDV leave and research that has shown that evidentiary requirements have deterred some victim-survivors from using leave entitlements for reasons including the shame of providing sensitive information, difficulties in getting access to documents, and concerns about how the information would be recorded.⁷⁵

⁷⁵ Fitz-Gibbon, K, Pfitzner, N, McNicol, E & Rupanagudi, H. (2021), *Safe, thriving and secure: Family violence leave and workplace supports in Australia*, Monash University.

ACTU Further Recommendation 23: That proposed Recommendation 48, under which the FWO would reissue guidance that supports employers in relation various aspects of requesting evidence from employees about taking FDV leave, also cover the implications of requesting evidence and the various difficulties that providing evidence may present for victim survivors, and how evidence can be a barrier to accessing leave and reduce safety for people experiencing FDV.

Addressing awareness and understanding issues

Proposed Recommendation 49 calls for government, employer, employee and community organisations to partner together to improve awareness raising efforts and develop and deliver additional materials seeking to educate employees and employers about family and domestic violence and paid family and domestic violence leave.

We strongly support all aspects of this recommendation, which is consistent with Recommendations 34 and 35 of the ACTU submission to the Review, including the need for these initiatives to be funded by government and include dedicated resources, materials and training for assisting diverse employees. We recommend that the vulnerable cohorts specifically identified in the Recommendation be expanded to include young people, employees with a disability and LGBTIQ+ employees, consistent with the Draft Report identifying how these cohorts are disproportionately affected by FDV. We also reiterate our recommendation that resources be made available in different languages and in a range of formats to support accessibility.

ACTU Further Recommendation 24: That proposed Recommendation 49 relating to improved awareness raising efforts and additional educational materials be expanded to include young people, employees with a disability and LGBTIQ+ employees; and that resources be made available in different languages and in a range of formats to support accessibility.

Casual employment

Proposed Recommendation 50 calls for the government to further consider how to address the uptake of paid FDV leave for casual employees, by considering what barriers are inhibiting uptake. It also calls for specific consideration to be given to rostering practices and whether the means of calculating the entitlement for casual employees requires further change.

We welcome this recommendation, which responds to concerning findings in the Independent Review⁷⁶ and the Draft Report, including the very low rates of awareness and utilisation amongst casuals (only 20% of casually employed victim-survivors surveyed by BETA were aware of the entitlement⁷⁷); the repercussions casual employees may face when accessing leave; and the unique barriers to casual employees accessing the entitlement – including that where a victim-survivor has declined an offer to work a rostered shift, or has not been rostered because they are generally unavailable or the employer does not want to provide paid FDV leave, the worker will be left without access to the entitlement, compromising their income and their safety, and defeating the purpose of the entitlement. Given casual employees are disproportionately women and are one of the most vulnerable cohorts due to the precarious nature of their employment and inability to access other entitlements, these issues urgently need to be addressed.

We urge the Review to go further and recommend a specific solution to address this problem, as put forward by unions in their submissions to the Review – that is, to 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.

As noted in the Draft Report and in the SDA's submissions to the Review, these kinds of arrangements have been negotiated in multiple enterprise agreements and are working well to address the issues identified in the Draft Report. Such arrangements support victim survivors and maintain their financial security, whilst also giving employers certainty about how to address the issue.

ACTU Further Recommendation 25: That proposed Recommendation 50 include a specific solution to address the problem of low take-up of FDV leave by casual employee, i.e. 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,

⁷⁶ 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 (**Independent Review**).

⁷⁷ Draft Report, page 434.

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.

Definitions

Proposed Recommendation 51 calls for a broadening of the definition of who can be considered a perpetrator for the purpose of accessing FDV leave, in response to concerns raised by stakeholders regarding the current limited list of perpetrators which does not encompass the full range of family and domestic relationships in a modern context, and fails to capture key categories of people who commonly perpetrate violence, such as extended family members, former immediate family members, former household members, and family members according to ethnic, cultural or religious kinship rules. Expanding the scope of who can be considered a perpetrator for the purposes of paid FDV leave is crucial to ensuring the entitlement is operating as intended, and we strongly support this recommendation, which is consistent with recommendation 42 of the ACTU's initial submission.

Proposed Recommendation 52 calls for the definition of 'family and domestic violence' in the FW Act 2009 to be amended to align it with the *Family Law Act 1975* (Cth) by removing the double threshold. We support this recommendation, noting that it would provide a more accessible entitlement, reduce barriers to access and contribute to consistency of legislative definitions (something the Independent Review recommended⁷⁸). It is also consistent with Recommendation 41 of the ACTU Submission to the Review.

Employee like workers

The ACTU recommended in its submission to the Review that access to paid FDV leave should be expanded to include all workers where there is an employment, or employee-like, relationship including as a first step by including it in the matters that a Minimum Standards Order can cover (Recommendation 37).

We note the concern identified in the Draft Report that pursuant to s.536KM(1)(d) of the FW Act, MSOs cannot include terms that would change the form of the engagement or the status of the

⁷⁸ Draft Report at page 441; Independent Review at pages 93-95.

worker covered by the MSO, including terms that deem the worker to be an employee, and that it is unclear whether a requirement to pay FDV leave would be one of these prohibited terms.⁷⁹

This concern could be addressed through a recommendation that the FW Act be amended to make it clear that provision of paid FDV leave is not a prohibited term in an MSO, and does not change the form of engagement or status of the worker for the purpose of s.536KM. Given that these insecure forms of employment are becoming increasingly common in feminised and low paid work, for example in disability support and home and community aged care, this is becoming an increasingly urgent question to address, as some of the most vulnerable workers who are likely to experience FDV are left without access to this lifesaving entitlement.

Further, we do not agree with the Draft Report that such a change is outside the scope of the Review. The 2022 Paid FDV Leave Bill Senate 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.⁸⁰ Given the subsequent passage of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth), and this Review of that legislation, we respectfully submit that it is both appropriate and timely that such an extension is considered as part of this Review.

ACTU Further Recommendation 26: that the FW Act be amended to make it clear that provision of paid FDV leave is not a prohibited term in a Minimum Standards Order for employee-like workers, and does not change the form of engagement or status of the worker for the purpose of s.536KM.

⁷⁹ Draft Report, page 437.

⁸⁰ Paid FDV Leave Bill Senate Report at [2.89].

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