ARA SUBMISSION
SECURE JOBS, BETTER PAY AMENDMENT REVIEW

November 2024

INTRODUCTION

The Australian Retailers Association (ARA) welcomes the opportunity to inform the Review of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (*Cth*) ('Secure Jobs') and amendments made by Part 16A of Schedule 1 of the Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (*Cth)* ('Closing Loopholes').

The ARA is the oldest, largest and most diverse national retail body, representing a $430 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate in all states and across all categories - from food to fashion, hairdressing to hardware, and everything in between.

On 2 October 2024, the Minister for Employment and Workplace Relations, Senator the Hon Murray Watt, announced the appointment of Emeritus Professor Mark Bray and Professor Alison Preston to conduct the Secure Jobs, Better Pay (including Part 16A of Closing Loopholes) Review, a requirement introduced by the Secure Jobs and Closing Loopholes legislative amendments.

The review serves as an opportunity for the Australian Government to evaluate the impact of these reforms, assessing their appropriateness and effectiveness, identifying any unintended consequences, and determining the need for further reforms.

The ARA has engaged with a diverse range of retailers—spanning large, medium, and small businesses—to gather insights on the impact of these amendments and to shape the findings and recommendations presented herein.

SUMMARY OF FINDINGS

The feedback we obtained from retailers is broad, far-reaching, and in many instances, varied, given the wide myriad of amendments, however three key themes have emerged through our consultation with businesses.

The first, relates to the acknowledgement that the timing of the review, considered in the context of when the legislative amendments took place (in some instances are less than a year), has left insufficient time for stakeholders to fully understand and assess the comprehensive impact of these amendments, especially within workforces that are complex and low literacy.

The second considers the greater context of these legislative amendments, as at a time of significant transformation in Australian Industrial Relations, coinciding with multiple reforms at both the federal and state levels. This overlap has added complexity to their implementation and has made a thorough evaluation more challenging.

The third, and no less important, is the recognition that in the absence of test cases, which establish precedent and the application of legislative amendments within real-world scenarios, businesses, cannot anticipate the complete impact of these changes and correspondingly, cannot report on them.

These perspectives reflect a consensus among industry that the review is premature.

GREATER CONTEXT

A time of significant industrial relations reform

The Secure Jobs amendments took effect over a period of extensive legislative reform with the Australian Industrial Relations system. When considering the impact of these amendments, they must be considered in the greater context of other extensive employment law changes, including those by way of the Fair Work Legislation Amendment (Closing Loopholes) Act 2023, Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024, the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022, and award modernisation, as well as numerous other reforms at state-level.

Understanding the broad context of these amendments is imperative to cohesively consider that businesses in recent years, especially small and medium-sized, have been focused on day-to-day compliance with, and education of, workplace laws, rather than a capacity to otherwise consider, review or assess the impact of the changes.

The material impact of which is that some of these businesses lack the bandwidth to acknowledge the broader implications or unintended consequences of these reforms, as their attention is diverted to simply meeting immediate legal obligations and avoiding penalties.

For this reason, the feedback available is still evolving, and a more comprehensive understanding of the full impact of these reforms can only be reached once these complexities are fully navigated and more time is given for businesses to acclimate to the changed landscape.

Retail workforce composition

The retail industry plays a vital role in the economy as the second-largest employing sector, accounting for 9.3% of the broader labour market.[1] Its size and significance make it a cornerstone of employment and economic activity, affecting more than a million workers and businesses nationwide.

Given this substantial contribution, recent industrial relations changes have had a disproportionately significant impact on the retail sector compared to other industries. These changes underscore the need to carefully consider how policy decisions influence this critical industry, which serves as a backbone for both employment and consumer activity.

Registered organisations

The ARA's central role, as a registered organisation, is to represent member interests and views, and comply with the requirements set out in the Fair Work (Registered Organisations) Act 2009 (*Cth*) and Fair Work (Registered Organisations) Regulations 2009 (*Cth*).

The ARA notes that the reviewers are seeking evidence and submission from all interested stakeholders relative to the terms of the review, which can be collected by way of case studies.

Having engaged with businesses for the purpose of this review, it is important for the reviewers to consider, businesses are not always comfortable being identified due to concerns of confidentiality, how that information may be otherwise used if publicly available and potential undue reputational repercussions.

[1] Jobs and Skills Australia, Retail Trade I https://www.jobsandskills.gov.au/data/occupation-and-industry-profiles/industries/retail-trade

Relative to the above considerations, all business data contained within this submission has been deidentified, in lieu of such identification, the ARA urges the reviewers to reflect on the legislated role of registered organisations as representative of members and industry.

OVERVIEW OF BARGAINING

The recent legislative changes to bargaining have been extensive and wide-reaching, altering parties processes and avenues for bargaining and amending the commission's considerations of whether an enterprise agreement should be passed. In assessing the impact of the changes, it is important for the reviewers to consider that in some cases, retailers have not yet had the opportunity to engage with these changes.

From 16 December 2022 to date, 8360 Applications to approve an enterprise agreement were lodged with the Fair Work Commission across all industries.[2] Of that wholesale figure, in the same time period, 7,072 Private Sector Agreements were approved.[3] Relative to Retail (ANZSIC Division) , this figure was further broken down to 87 agreements that were approved by the FWC in the same period.[4]

Given the extensive influence of the retail sector across the broader labour market, 87 agreements including varying types of both multi-enterprise bargaining agreements and single-enterprise bargaining agreements, is not, sufficiently representative to assess the wide range of changes to bargaining by way of the Secure Jobs legislative amendments.

Intractable Bargaining

The changes to Part 18 of Schedule 1 of the Fair Work Act 2009 (*Cth*) ('the Act'), by way of Secure Jobs legislative amendments, introduced intractable bargaining declarations and intractable bargaining workplace determinations, replacing the previous serious breach declarations and bargaining related workplace determinations.

The material effect of this change is a bargaining representative can apply to the Commission for an intractable bargaining declaration (orders) where negotiations are intractable,[5] and the Commission will make the declaration if it is satisfied of certain conditions, including that the application is made after the end of the minimum bargaining period (9 months).[6]

Following the declaration, the Commission must make an intractable bargaining workplace determination as quickly as possible.[7] This determination establishes the terms and conditions (including mandatory and agreed terms) of employment in place of an enterprise agreement.[8]

By way of the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (*Cth*) ('Closing Loopholes No. 2') amendments, the intractable bargaining provision were further altered to require that upon making an intractable bargaining workplace determination, the Commission must be

[2] FWC Statistical Reports on Enterprise Agreements data I https://www.fwc.gov.au/work-conditions/enterprise-agreements/about-enterprise-agreements/statistical-reports-enterprise
[3] DEWR Trends Federal Enterprise Agreement Bargaining I https://www.dewr.gov.au/download/16480/trends-federal-enterprise-bargaining-june-quarter-2024/38128/trends-federal-enterprise-bargaining-june-quarter-2024/pdf
[4] DEWR Trends Federal Enterprise Agreement Bargaining I https://www.dewr.gov.au/download/16480/trends-federal-enterprise-bargaining-june-quarter-2024/38128/trends-federal-enterprise-bargaining-june-quarter-2024/pdf [at 22].
[5] The Fair Work Act 2009 (Cth) s234.
[6] The Fair Work Act 2009 (Cth) s235 (1) (c).
[7] The Fair Work Act 2009 (Cth) s 269.
[8] Fair Work Commission I https://www.fwc.gov.au/about-us/new-laws/secure-jobs-better-pay-act-whats-changing/bargaining-support-6-june-2023/changes

satisfied that any term dealing with a particular matter must be 'not less favourable' [9] to the employee or employee organisation than the existing terms and conditions in their current enterprise agreement.

Within the Revised Explanatory Memoranda to the Bill, the amendments were explained as being able to [at 107-108]:

> *…. support the right to just and favourable conditions of work by providing an effective means to resolve otherwise intractable disputes about terms and conditions of employment to be established by enterprise agreement. Without such a provision, the dispute may be irresolvable and there would be no change to the conditions of work.*
>
> *While the primary focus of the FW Act would remain on supporting parties to reach their own agreements through collective bargaining in good faith, the FWC would, following the proposed amendments, have the ability to determine any outstanding matters by arbitration where there is otherwise no reasonable prospect of the parties reaching agreement..*[10]

The retailers we represent showed great concern over the operation of Intractable Bargaining declarations and determinations, with many reporting the recent amendments undermine the reality of the bargaining process, and significantly disincentivise businesses from engaging in bargaining.

The process of enterprise bargaining requires business-union collaboration to negotiate, vary or settle on proposed terms. Businesses report that, when in disagreement with bargaining representatives, it is common for a concession to be made in one area as part of broader negotiations, in order to secure a more favourable outcome in another area.[11] This approach, reportingly utilised by both employer and employee reps, allows both sides to bargain, and negotiate workplace terms and conditions holistically rather than item by item.

As an intractable bargaining workplace determination recognises and determines agreed and mandatory terms, there is concern that recognising agreed terms in an isolated way, separate from the broader context of negotiation and the reason a term was settled, will lead to a series of inequitable and unfavourable workplace terms for businesses. This concern is further compounded by the requirement that the Commission must now be satisfied that any term dealing with a particular matter must be 'not less favourable' to the employee or employee organisation than existing terms and conditions. The practical effect is that employees retain all their existing terms and conditions, with the Commission limited to making determinations that enhance or improve upon those conditions.

The minimum period of bargaining being only 9 months was also found pressuring and burdensome for some retailers. One retailer remarked that with one proposed bargaining agreement meant to cover 54 franchises and 800 stores, of all different sizes and complexity, 9 months was too short a time frame to bargain meaningfully.[12] While the Commission can only make an intractable bargaining declaration if it is satisfied of certain conditions,[13] there is apprehension among businesses the minimum bargaining period is too short a time frame and does not reflect the willingness of employers to resolve instances of non-agreement.

Another significant concern among retailers is that the Commissions' intractable bargaining workplace determination, which establishes the terms and conditions of employment, will be misaligned with workplace realities. A prime example of this, as emphasised by another retailer, is that where a business has multiple enterprise agreements in place, and an established uniform process for dispute

[9] Fair Work Act 2009 (Cth) s 270A.
[10] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) I https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6941_ems_465eaf38-214a-4ca7-8bca-40e697e10cad%22
[11] Major Fast Food Employer I Other business details retracted.
[12] Major Fast Food Employer I Other business details retracted.
[13] Fair Work Act 2009 (Cth) s235.

resolution across the broader business, if the commission was to settle on a term that varies from the current processes recognised and practiced by the business or contained within other enterprise agreements that covers employees within the business, this would be extremely costly and burdensome for the retailer.[14]

While the Commission must consider the views of the bargaining representative,[15] the reality is that no one is eager to serve as a test case. The prospect of being one of the first to face the legal uncertainties of new amendments or interpretations is not only risky but also burdensome for businesses, who fear the unpredictable consequences and corresponding, impact on business operations.

With the cases that already exist, the terms set by the Commission have departed from the views of the employer. A prime example is the Commission's decision in Transport Workers Union of Australia (179V) v Cleanaway Operations T/A Cleanaway Operations Pty Ltd[16] where the Commission awarded a 23% increase in wages to employees incrementally to September 2026. The determination was much higher than the pay increase pursued by the employer of 11%.

While the complete extent and scope of the impact of these amendments are still unfolding, as more test cases have yet to emerge, the uncertainty and extent, coupled with ambiguity of these changes, has as an unintended consequence, deterred businesses willingness to bargain.

RECOMMENDATION 1: Replace arbitration with compulsory mediation between representatives.

This change ensures that bargaining negotiations that reach an impasse can still be effectively resolved, while simultaneously upholding the principles of good faith bargaining between representatives.

The involvement of the Commission in a facilitative role, would support constructive dialogue and mutual respect between employers and employees, fostering solutions that are fair, collaborative, and fit-for-purpose, with material regard to the unique circumstances of each business and broader context of negotiations.

RECOMMENDATION 2: Amend the "no worse off" requirement within the Act.

Amend s270A (2) of the Act to require:

A term that is included in the determination to comply with subsection 270(3), and that deals with a particular matter, must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter or a term within a comparable modern award.

This change would better encourage negotiations between parties, especially where, current terms of an enterprise agreement are more favourable than that of a comparable modern award as parties would be incentivised to negotiate meaningfully in good faith, rather than just opt to seek the Commissions intervention.

[14] Major Fashion Retailer I Other Business Details Retracted.
[15] Fair Work Act 2009 (Cth) S235 (2) (c)
[16] [2024] FWCFB 287.

RECOMMENDATION 3: Extend the end of the minimum bargaining period

Amend s235 (5) of the Act to define the End of the Minimum bargaining period to refer to a '12 month period' rather than '9 month period'.

This amendment would allow bargaining representatives negotiating agreements covering many stores and employees more time to reassess their positions and reach mutually agreed terms without looming Commission intervention.

Better Off Overall Test (BOOT)

The amendments to the Act were intended to move the FWC away from a line-by-line assessment and foster a simpler, flexible and fairer BOOT Test.[17]

Notably, industry partisans can only comment on the impact of this global assessment if they have bargained in the year and half period since the legislative amendment took effect.

Some early feedback from retailers suggests that the changes are beneficial and take into consideration the value of the proposed workplace terms and conditions holistically.[18] However, as many retail businesses have not yet had the opportunity to digest these changes, with only 87 retail enterprise agreements passed in the same period,[19] it is unknown as of yet, whether there are any further praises or concerns relative to this particular legislative amendment.

Cooperative Workplace Bargaining Stream

From 6 June 2023, the cooperative workplace bargaining stream per s216 C-CE of the Act, by way of the Secure Jobs amendment, was introduced. The change replaced the former multi-enterprise bargaining stream, permitting 2 or more employers who have voluntarily agreed, to bargain together for a 'cooperative workplace agreement' in circumstances where there is no supported bargaining authorisation or single interest employer authorisation in operation.[20]

The Revised Explanatory Memorandum to the Bill explains this change as implementing 'one of the outcomes of the Jobs and Skills Summit in relation to boosting job security and wages, and creating safe, fair and productive workplaces by improving the enterprise bargaining process'[21]

The retailers we engaged for the purposes of feedback have not had direct experience with this stream of bargaining as of yet, reaffirmed by the fact that the only agreement to have been approved by the Commission relates to the banking sector,[22] and instead remark indifference to engage in this process, viewing this amendment as unnecessary and an attempt at a more balanced bargaining framework that falls short.[23]

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[17] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 101 I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_465eaf38-214a-4ca7-8bca-40e697e10cad/upload_pdf/Revised%20EM_22120.pdf;fileType=application%2Fpdf
[18] Major Fast Food Employer I Other business details retracted.
[19] DEWR Trends Federal Enterprise Agreement Bargaining I https://www.dewr.gov.au/download/16480/trends-federal-enterprise-bargaining-june-quarter-2024/38128/trends-federal-enterprise-bargaining-june-quarter-2024/pdf [at 22].
[20] Fair Work Act 2009 (Cth) s 12.
[21] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 1114I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_465eaf38-214a-4ca7-8bca-40e697e10cad/upload_pdf/Revised%20EM_22120.pdf;fileType=application%2Fpdf
[22] Application by Bendigo and Adelaide Bank Limited [2024] FWCA 1016.
[23] Major Fast Food Employer I Other business details retracted

This lack of engagement is fundamentally evidenced by no direct record of cooperative workplace agreement being approved or sought by Retailers as of yet.[24] This importantly shows the demand does not exist for Cooperative Workplace Bargaining Stream, at least not as of yet, within the retail sector.

Initiating bargaining-Single Enterprise agreements for franchisees

Per 216DC of the Act, by way of the Secure Jobs Amendments, franchises of a common franchisor can now voluntarily bargain together for a single-enterprise agreement. These changes recognise that employee of the franchises, when voting to approve the agreement, will vote together as a single group rather than by workplace.

Previously this way of bargaining was enabled by way of legal precedent, however, the changes, as remarked by one retailer,[25] bring about greater clarity and remove ambiguity for franchisees.

This change has been fundamentally viewed as beneficial by employers with no such unintended consequences reported as of yet.

Enterprise agreement approval requirements

The Act s188 (1) was amended to require that the FWC must be satisfied that an enterprise agreement has been genuinely agreed to by employees. In assessing whether an agreement has had genuine agreement, the commission must consider the (newly introduced) Statement of Principles.[26]

This Statement sets out matters that the Fair Work Commission (FWC) must take into account in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

The Explanatory memorandum details the intended impacts of the amendment would [at 29] 'simplify the pre-approval requirements, while retaining sufficient safeguards for employees'.[27]

The Explanatory Memorandum also outlines the purpose of the Statement of Principles as a 'guide parties as to how the FWC will consider particular issues when determining whether the proposed enterprise agreement has been 'genuinely agreed'.[28]

Initial feedback from one of the 87 retail organisations that have had enterprise agreements approved in the relevant period suggest that the changes have not resulted in further complexity or red tape, instead fostering a more positive experience.[29]

As a result, although feedback will still evolve over the next few years as more businesses seek approval from the Commission, initial feedback suggests no unintended consequences have arisen.

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[24] Current applications include Application by Inner West Community Enterprises Limited T/A Seddon Community Bank [2024] FWCA 2835; Application by Break O'Day Community Financial Services Ltd & Cardwell & District Community Enterprises Limited and Others [2024] FWCA 3687.
Application by Our Lady Of Sion College Ltd T/A Our Lady Of Sion College [2024] FWCA 1690.
[25] Major Fast Food Employer I Other business details retracted.
[26] Fair Work Act 2009 (Cth) 188 (1) (B).
[27] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 29 I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_465eaf38-214a-4ca7-8bca-40e697e10cad/upload_pdf/Revised%20EM_22120.pdf;fileType=application%2Fpdf
[28] Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 716 I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_d310a6ae-0ff2-4129-bc25-
[29] To be inserted.

Supported Bargaining Stream

The supported bargaining stream, introduced by the Secure Jobs, Better pay legislative Amendments, replaced the low paid bargaining stream, enabling employees to more easily apply to the FWC to have themselves and their employer added to a supported bargaining authorisation, notably, without the employer's consent.[30]

The revised explanatory memorandum to the legislative amendment explains [at 921] 'the proposed supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level.'[31]

The memorandum further goes onto further explore the intended impact [at 927]:

> these amendments would deliver on the Jobs and Skills Summit outcome of ensuring workers and businesses have flexible options for reaching agreements, including removing unnecessary limitations on access to single and multi-employer agreement.[32]

In terms of the operation of these amendments assessed against their intention, there is a clear disconnect. This is evidenced in the absence of employer consent required to engage in this bargaining stream. This lack of consent undermines the rationale of the required changes being to also assist employers who may have difficulty bargaining at the single-enterprise level as noted above.[33]

In terms of the impact of these changes, retailers have not directly engaged within this process as of yet,[34] however, a real concern is businesses being pulled into bargaining where they are not ready, equipped or financially capable.

The timing of this review remains premature for the retail sector, and likely other industries, to fully assess the impact of these changes. The effects on businesses are still unfolding, and there has not been enough time to identify or communicate any unintended consequences in detail. This early stage of implementation limits the ability to provide a comprehensive evaluation of the reforms' true implications.

However, a clear discernible risk for businesses is the potential to be drawn into bargaining processes without adequate preparation.

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[30] Fair Work Act 2009 (Cth) s 216.
[31] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 921 I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_d310a6ae-0ff2-4129-bc25-
[32] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 927 I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_d310a6ae-0ff2-4129-bc25-
[33] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 921 I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_d310a6ae-0ff2-4129-bc25-
[34] Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia [2023] FWCFB 176 ('Long Daycare Case'); The Health Services Union & The Australian Education Union v Alkira Disability Services Ltd T/A Alkira Centre and Others [2024] FWC 2713; Application by Independent Education Union of Australia (130N) & United Workers' Union (108V) [2024] FWC 2583; Application by Australian Municipal, Administrative, Clerical and Services Union (052V) [2024] FWC 2491. Application by Australian Municipal, Administrative, Clerical and Services Union (052V) [2024] FWC 2036. Application by Health Services Union, Australian Education Union (B2023/1235); Application by Shop, Distributive and Allied Employees Association (B2024/992).

Termination of Enterprise Agreements after nominal expiry date

The amending Act introduced new sections, S225-226, into the Act. The key change resulting from these amendments is the variation in the factors the Fair Work Commission (FWC) must consider when deciding to terminate an enterprise agreement that has passed its nominal expiry date. If the revised criteria are satisfied, the Commission is now required to terminate the agreement.[35]

The intended impact of the changes was outlined to be to [as noted at 87]:

> …stop the practice of employers applying unilaterally to the FWC for termination of a nominally expired enterprise agreement, where termination would result in reducing employees' entitlements other than in prescribed circumstances. That includes situations where the threat of termination may disrupt bargaining for a new enterprise agreement.[36]

Retailers we engaged have shared extensive reservations over these changes, observing these changes make for a 'gridlock'[37] during negotiations in that once a retailer begins the bargaining cycle, they cannot exit. We note the intended impact, as noted above, was to ensure that employee entitlements were not reduced, and/or threatened by termination or an enterprise agreement.

However, the material impact is two-fold; employers cannot readily exit the bargaining cycle and the changes disincentivise employers from initiating a bargaining cycle for fear of being locked into negotiations that then lead to the possibility of an intractable bargaining determination if negotiations are not as productive as the Commission deems they need be with regard to certain considerations.[38]

Materially this change, when considered in the broad context of the existence of a supported bargaining stream which employees can readily access,[39] is not essential and instead is burdensome and overly prescriptive.

JOB SECURITY & GENDER EQUALITY

Fixed Term Contracts

The Act S333E-s333L, by way of the Secure Jobs amendments, introduced a limitation on the use of fixed term contracts, unless a specified exception exists per s333F of the Act, providing fixed term contract can't be for longer than 2 years including extensions or renewals. These changes also impart a requirement for employers to provide employees with a Fixed Term Contract Information Statement (FTCIS).[40]

The intention, as noted by the Revised Explanatory Memorandum, was for these changes would limit the misuse of fixed term contract arrangements [noted at 568]:

> …fixed term contracts exacerbate job insecurity for employees when they are used for the same role over an extended period, or where employees are subject to rolling contract renewals for jobs that would otherwise be ongoing. The amendments would limit fixed term contracts for the same role to two consecutive contracts or a maximum duration of two years, while preserving the legitimate use of fixed term contracts in certain circumstances.[41]

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[35] Fair Work Act 2009 (Cth) s225.
[36] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 87 I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_d310a6ae-0ff2-4129-bc25-
[37] Major Fast Food Employer I Other business details retracted.
[38] The Fair Work Act 2009 (Cth) s 269.
[39] Fair Work Act 2009 (Cth) s 216.
[40] Fair Work Act 2009 (Cth) s333J.
[41] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 568 I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_465eaf38-214a-4ca7-8bca-40e697e10cad/upload_pdf/Revised%20EM_22120.pdf;fileType=application%2Fpdf

Retailers we engaged have remarked the exceptions are difficult to apply in practice and challenging for managers, trying to do the right thing, to understand.[42] A prime example being when an employee transfers from one project to another similar, an assessment is required as to whether the work is substantively the same or similar work and whether the fixed term rules apply, especially where there is a small break between projects and an employee being reengaged.[43] Another raised area of ambiguity is the relationship of these provisions with secondments, given the employee's main substantive role is the one they have to return to. [44]

In practice, businesses remark that more understanding and assessment is needed of one's workforce demographic, comparative to before, to attend to the newly introduced legislative requirements and often, requires ongoing revision of role duration and employee responsibilities to maintain compliance.[45]

Another ambiguity that has arisen is the relationship between fixed term contracts and parental leave covers, notably as employees that are eligible for unpaid parental leave under the Act can now extend their leave beyond one year[46].

The fixed term contract provisions fails to adequately address circumstances where a business hires a temporary work cover to ensure continuity of services during an employee's parental leave.[47] This lack of recognition creates challenges for businesses attempting to support employees in utilising their entitlements, leading to operational difficulties that are not sufficiently addressed within the current framework.

Prohibiting Pay Secrecy Clauses

The Act s333 B-s333D, by way of the Secure Jobs amendments, deals with pay secrecy and provides an employee with a right to disclose or not disclose their pay. The changes also enabled employees to ask any other employee (whether employed by the same employer or a different employer) about their pay.[48]

These amendments took effect from 7 December 2022, however, some businesses have yet to experience their direct impact until a workplace contract made before the effective legislative date is replaced or varied.[49]

The Revised Explanatory Memorandum for the bill explains the reasons for these amendments as [at 68]:

> …establishing a right to disclose remuneration, invalidating contract terms which are inconsistent with such rights, and expressly prohibiting pay secrecy clauses would also positively engage this right by supporting all employees to confirm whether they are being remunerated fairly and comparably.[50]

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[42] Major Fashion Retail Employer I Other business details Retracted.
[43] Major Fashion Retail Employer I Other business details Retracted.
[44] Major Fashion Retail Employer I Other business details Retracted.
[45] Major Retailer I other Business details Retratced.
[46] Fair Work Act 2009 (cth) s76.
[47] Major Fashion Retail Employer I Other business details Retracted.
[48] Fair Work Act 2009 (Cth) S333B (2).
[49] Fair Work Ombudsman I https://www.fairwork.gov.au/pay-and-wages/pay-secrecy#:~:text=From%207%20June%202023%2C%20pay,in%20them%20could%20face%20penalties.
[50] Revised Explanatory Memorandum to secure Jobs, Better Pay Bill (2023) I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_465eaf38-214a-4ca7-8bca-40e697e10cad/upload_pdf/Revised%20EM_22120.pdf;fileType=application%2Fpdf

Businesses have noted that an unintended consequence of these amendments is a rise in union activity. Union delegates, aiming to understand pay equity at the workplace level, are increasingly engaging with employees and encouraging them to disclose their salaries. [51]

This has generally led to a noticeable increase in union involvement, imposing additional impediments for employers trying to navigate setting fair, equitable, above award, pay, based upon an employee's individual skill, experience and workplace instrument, rather than ensuring consistent standardised wages which undermine individual recognition of employee performance.

While some businesses have yet to experience and report on the impact of these changes, initial feedback suggests increased difficulty for businesses to administer and settle employee salaries (including bonuses) based on the individual recognition of an employees' skills, and experience.

Reforming Equal Renumeration Provisions

As of yet, the Commission has made no equal renumeration orders, relative to the amendments, pursuant to s302 of the Act. For this reason, the ARA and retailers cannot yet comment upon the impact of these amendments including their operation and any unintended consequences.

Right to Request Flexible Work Arrangements

The Secure Jobs amendments expand the definition of eligible employees that can access flexible work arrangements, as contained within s65 of the Act. Now employees that are pregnant, experiencing family or domestic violence or a member of their family or household is experiencing family or domestic violence can request flexible work arrangements.[52] The changes also empower the FWC to now deal with a dispute about the flexible work arrangement.[53]

The Revised Explanatory Memorandum to the Bill, depicts the changes as [at 84]:

> … support[ing] employees experiencing family and domestic violence to access flexible work arrangements. In doing so, it would promote Articles 6 and 7 of the ICESCR by supporting employees who experience family and domestic violence to engage in work on terms and conditions that justly recognise their circumstances.[54]

When engaging with retailers to better understand the impact of these changes, the feedback shared contingences upon the acknowledgement that the volume of change, including this amendment and others explored herein, has significantly created complexity, ambiguity and educational burdens for employers.[55]

An example of this ambiguity is that the legislation does not specify acceptable forms of evidence for vulnerable cohorts seeking to access flexible work arrangements to provide to employers, fostering challenges for employers to navigate their obligations, coupled with the sensitivity of the situation, competently.

This feedback highlights the challenges employers face due to the increasing complexity and ambiguity introduced by legislative changes.

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[51] Major Retailer I Other business details retracted.
[52] Fair Work Act 2009 (Cth) s 65.
[53] Fair Work Act 2009 (Cth) s65B.
[54] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 84 I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_d310a6ae-0ff2-4129-bc25-
[55] Major Fashion Retail Employer I Other business details Retracted.

Small Claims Process

As of yet, the amendments, pursuant to s548 of the Act, have not been utilised. For this reason, the ARA and retailers cannot yet comment upon the impact of these amendments including their operation and any unintended consequences.

Widening the list of protected attributes

As of yet, the amendments, pursuant to s351 of the Act, have not been utilised. For this reason, the ARA and retailers cannot yet comment upon the impact of these amendments including their operation and any unintended consequences.

Prohibiting Sexual Harassment

The Act s527D, introduced by way of the Secure Jobs amendments, deals with the prohibition of sexual harassment in connection with work, which applies to all workers, prospective workers and people conducting business.[56]

The Revised Explanatory Memorandum to the Bill defined the purpose of the Bill was to implement recommendation 28 of the Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces (Respect@Work Report).[57]

This introduction of legislation provides another avenue for sexual harassment matters to be dealt with when considering the positive duty of the Sex Discrimination Act 1984 (*Cth*), and state-based law requirements for businesses to manage Psychosocial Hazards at Work, which can arise as an ancillary consequence of sexual harassment.[58]

This amendment has seen limited use since its inception, resulting in many retailers lacking a clear understanding of how this pathway will function in practice and what to expect from it.[59] Notably, it also remains unclear as to the necessity of these amendments, when considered in the context of the positive duty requirements imparted by way of s47C of the Sex Discrimination Act 1984 (*Cth*).

Feedback from retailers, given the underutilisation of these amendments remains minimal, however, it is clear that businesses now face the challenge of navigating a broader and more diverse range of workplace laws and employer obligations than before.

Job Advertisements

The Act s536AA, by way of the SJBP amendments, now impose obligations on employers relative to job advertisements. Employers are prohibited from advertising employment at pay rates that would breach the Fair Work Act or any applicable fair work instrument.[60]

The ARA has engaged with retailers to assess the impact of these changes and identify any unintended consequences. However, as of yet, no feedback has been received regarding unintended outcomes. The ARA contends that this reflects the insufficient time between the amendments taking effect and the review process, leaving businesses unable to fully digest the changes, collate concerns and correspondingly, report on the changes.

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[56] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 419 I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_d310a6ae-0ff2-4129-bc25-
[57] Revised Explanatory Memorandum to Secure Jobs, Better Pay Bill (2023) at 419 I https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6941_ems_465eaf38-214a-4ca7-8bca-40e697e10cad/upload_pdf/Revised%20EM_22120.pdf;fileType=application%2Fpdf
[58] Safework I https://www.safework.nsw.gov.au/hazards-a-z/sexual-harassment
[59] Major Fashion Retailer I Other business details retracted
[60] Fair Work Act 2009 (Cth) s536AA.

Part 16A of Closing Loopholes

Right of Entry-—assisting health and safety representatives

The Act s306A, by way of Closing Loopholes Amendments, removed the requirement for an official of an organisation to require a right of entry permit where they are assisting a health and safety representative (HSR) on request under a provision of a State or Territory OHS law.

The amendments did not alter the obligations contained with s499-504 of the Act which continue to apply to the official whether or not they are a permit holder, and apply to the official as if they were a permit holder.

The Replacement Supplementary Explanatory Memorandum to the amendments identified the intended impact of the changes as being able to:

> empower officials of registered organisations without a Fair Work entry permit to enter workplaces, on request from an HSR (under a 'State or Territory OHS law'), to provide assistance. Improving HSRs' access to appropriate assistance will help them better discharge their statutory functions, leading to better health and safety outcomes at their workplaces. [61]

Contrary to the intention, an unintended impact of these amendments is that if a union official enters the workplace without an entry permit, it can complicate safety procedures and investigations. For example, in a recent safety incident at a retail business, it is suspected that the union official entered without the permit as permitted by the amendments and advised the injured employee in a way that obstructed safety protocols, such as insisting they move and see a doctor immediately. The material impact, being that without the necessary permit, the official's role within the safety investigation becomes unclear, making the situation more challenging for all parties involved.[62]

If an official is not required to obtain a permit, the Commission is also not obligated to verify whether they have completed the necessary training on the rights and responsibilities of a permit holder,[63] increasing the likelihood of a breach of duty.

For this reason, the requirement of a right of entry permits remain critical to ensure that union officials are aware of their rights and responsibilities. As without this formal process, as noted above, there is a risk of role confusion, and corresponding, adverse impacts for businesses including impediments to an employer's ability to reconcile safety risks effectively.

This amendment has only been in effect since December 15, 2023, and as such, while feedback is still evolving, an initial assessment of the operation of the amendments suggests the impact on businesses is harmful.

RECOMMENDATION 1: Repeal the Amendments to the Act

To mitigate the risks identified above, and uphold workplace safety and procedural clarity, it is crucial to reinstate the mandatory right of entry permit requirement. This formal process ensures that union officials are properly trained, reducing the potential for adverse impacts on safety protocols and employer operations.

[61] Replacement Supplementary Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) accessed at Replacement SEM_Fair Work Amendment (Closing Loopholes).pdf;fileType=application/pdf.
[62] Major Fashion Retail Employer I Other business details Retracted.
[63] See Fair Work Act 2009 (Cth) s 513(1)(a).