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RESEARCH CENTRE

The Great Regression:
How unions and the Government have changed the rules from accord to central control

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The Great Regression: How unions and the Government have changed the rules from accord to central control

A report of the Menzies Research Centre. We acknowledge the Menzies Research Centre staff who contributed to this report and the many specialist economists and lawyers who provided assistance.

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EXECUTIVE SUMMARY

Australia's industrial relations system has undergone a historic reversal.

The workplace reforms of the Hawke and Keating era modernised Australia's economy and shifted the focus of industrial relations from centralised wage fixing to enterprise-level bargaining. Unions were encouraged to negotiate directly with employers, with workplace improvements tied to productivity and collaboration – not industry-wide arbitration or imposed national standards.

These reforms brought higher wages, productivity, and growth. They reflected a Labor leadership prepared to challenge entrenched interests in pursuit of broader national goals.

That consensus no longer holds. The Albanese Government has introduced a series of sweeping industrial relations (IR) laws that in large part mark a deliberate and systematic shift away from the enterprise model. Many of these changes prioritise centralised control, increase union intervention, and reduce productivity for businesses and workers alike.

Since 2022, the Government has enacted the most significant changes to Australia's IR framework in decades, including:

- Reinstating industry-wide 'bargaining' across large sectors of the economy;
- Abolishing the construction watchdog (ABCC) and the Registered Organisations Commission (ROC);
- Tightening regulations around casual employment and labour hire;
- Expanding union right of entry powers and regulatory burdens on employers;
- Expansive union control over the transport and gig economy sectors.

These reforms are not grounded in productivity or growth objectives. In fact, their objective is the exact opposite. As Minister for Employment and Workplace Relations Murray Watt acknowledged when questioned on the link between these laws and economic outcomes:

> *"I don't think it's correct to say you can't have real wage growth without stronger productivity growth."*

The evidence tells a different story. Long-run real wage growth is ultimately impossible without stronger productivity. As this report demonstrates, the Government's approach seeks nothing more than greater union powers at an industry level and greater union control at a workplace level.

Union membership has continued to decline, down to 12.5% of the workforce (and less than 8% in the private sector), and yet, union influence has grown. The first round of priority invitations to the Albanese Government's August 2025 Economic Reform Roundtable gave unions approximately 30% of seats at the table, far out of proportion to their current workplace representation.

At the same time, union revenue is climbing to record highs, driven by billion dollar union controlled funds and government pork barrelling rather than through membership.[1] A modern union movement that struggles to attract members is now seeking influence through legislation – bypassing entirely the need to have legitimate majority support from workers in the actual workplace.

This report details how the Albanese Government's IR laws are reshaping Australia's industrial landscape and radically regressing from the Hawke-Keating model.

The report also outlines what's likely to come next. Among the most significant proposals is the national expansion of union-run portable leave schemes. These would transfer vast sums in worker entitlements into funds controlled by unions, creating new income streams with limited transparency and minimal direct benefit to workers. Rather than empowering employees, such funds risk embedding unions as permanent monopoly capitalists with guaranteed revenue and little accountability.

The reform process that began in the 1980s and once led towards decentralisation and productivity has been reversed back towards regulation and control. What began as a cooperative agreement between the government, unions, and businesses has shifted into a two-way political compact between Labor and the unions. This new accord is mutually beneficial: the unions provide financial support, in exchange, the Labor Party delivers the union's legislative agenda.

The scale of the changes already made, and the ambitions yet to be revealed, deserve close and urgent scrutiny. What is at stake is not just the structure of workplace law, but the foundational principles that underpin our economy: reward for effort, accountability, and productivity. The policy changes documented in this report extend beyond isolated amendments and represent a turning point in Australian industrial relations. The result is a power shift away from enterprises and workers and back towards centralised control. This report is intended to clarify that shift, document its consequences, and help ensure that Australians understand what is being changed before it becomes irreversible.

David Hughes
Executive Director

1 Menzies Research Centre, *Unions Inc: The corporatisation of the Australian union movement*. Available at: https://www.menziesrc.org/latest-reports-and-submissions/unions-inc

INTRODUCTION - PRODUCTIVITY AND INDUSTRIAL RELATIONS

> *"The Keating government made the historic 100-year shift away from centralised wage fixing. The objective was to lift enterprise productivity and share it by agreement between employers (profits) and employees (wages)."*
>
> Paul Keating, 'The Labor Government 1983-96'
> (Speech, University of New South Wales, 19 March 1999 [2]

Australia is a prosperous country, but we are at a crossroads. The rags-to-riches story of an arid and undeveloped continent which became one of the wealthiest countries in the world by federation, and maintained its extraordinary living standards well into the 20th century, is under threat. As of late Australia's prosperity has stagnated. The 'Lucky Country' has been in a per capita recession since 2022, and if governments fail to confront our mounting structural challenges, the nation's future prosperity is at risk.

Although Australia has experienced headline economic growth since the Covid pandemic, much of it can be attributed to rapid population increases driven by record migration, rather than genuine improvements in per capita output. In fact, economic growth per capita has gone backwards or stagnated in 10 of the last 11 quarters. This is evidence of structural stagnation that threatens the expectations Australians hold for higher wages, better services, and improved living standards.

Other indicators tell a similar story. Business confidence, as measured by the National Australia Bank's Quarterly Business Survey, has remained consistently negative since late 2022. If this persists, businesses will hold back the investment needed to grow the economy and create jobs. The impacts are clear as Australia's recent performance does not stack up well internationally. Australia has fallen in the World Competitiveness Ranking slipping from 13th in 2020 to 18th in 2025, with only five countries performing worse globally.[3] Our rankings for other key indicators, 43rd on labour regulations and 60th on both GDP per capita growth and workforce productivity, underscore the scale of the problem.

Perhaps the most worrying trend of all is our productivity growth. Australia's labour productivity growth is at a standstill with an IMD report citing the need to "return productivity growth to long-term averages" as a key national challenge.[4] The most recent ABS data shows that labour productivity fell by 1% in the year to March 2025, returning us to around 2019 levels. This stagnation has serious implications. Over time, productivity is the primary driver of real wage growth and improved living standards.

Recent research by the Productivity Commission has demonstrated the enormous benefits that Australians have reaped from productivity gains since 1980 – working 23% fewer hours on average while enjoying

2 Keating P. 19 March 1999. *The Labor Government 1983 to 1996*. Available at: https://www.paulkeating.net.au/shop/item/the-australian-government-1983-to-1996---19-march-1999
3 International Institute for Management Development, *World Competitiveness Rankings*. Available at: https://www.imd.org/centers/wcc/world-competitiveness-center/rankings/world-competitiveness-ranking/
4 International Institute for Management Development, *World Competitiveness Rankings*. Available at: https://www.imd.org/centers/wcc/world-competitiveness-center/rankings/world-competitiveness-ranking/

significantly higher incomes. If productivity continues to flatline, so too does the capacity for the economy to deliver these kinds of improvements in living standards.

Improving productivity must be at the heart of any credible economic reform agenda. Unfortunately, the structural economic reform needed to address productivity growth has effectively ceased since the Hawke-Keating-Howard era. The last significant national reform was the introduction of the GST in 2000 – a quarter century ago.

A modern, well-functioning IR system is essential to reversing this trend and ensuring that productivity gains translate into higher wages, aligning the interests of workers and employers. The decentralised enterprise bargaining system, introduced during the Hawke-Keating era, was built on a clear principle: linking wage increases to firm-level productivity.

This link is now under threat from the Albanese Government. In April 2025, the Minister for Employment and Workplace Relations, Senator Murray Watt, told an *Australian Financial Review* forum:

> *"I don't think it's correct to say you can't have real wage growth without stronger productivity growth."*

This is not only economically incorrect – it is a dangerous falsehood. When wages increase faster than productivity, the result is inflation and reduced competitiveness, culminating in job losses and decreased investment. The RBA has warned repeatedly that real wage growth disconnected from productivity – whether because wages grow too fast, productivity is too slow, or both – poses a threat to inflation and interest rates.

Yet the Albanese Government has overseen a sweeping overhaul of IR laws that are designed solely to deliver long-standing union ambitions rather than improving productivity. These include the introduction of multi-employer bargaining, expanded union right of entry, the abolition of the Australian Building and Construction Commission (ABCC) and Registered Organisations Commission (ROC) and compulsory union delegates powers in every workplace. The cumulative effect of these reforms is to entrench union power, increase compliance burdens for employers, and weaken the productivity-enhancing function of enterprise-level wage negotiations. They make Australia's already uniquely complex IR laws even messier.

The process followed to enact these changes stands in stark contrast to the Government's consideration of reforms to lower compliance burdens on business. When pressured to alter the Fair Work Act's definition of a small business from fewer than 15 employees, the Government passed the buck to a review by the Fair Work Ombudsman (FWO). The FWO took a staggering 12 months to find that it was not able to make any recommendations because there were divergent views – a fact which was clear from the outset. By comparison, the changes examined in this report were largely announced without consultation and legislated at breakneck speed despite strongly divergent views and opposition from business and industry groups. Many of the changes did not even carry an electoral mandate.

It is worth noting that the Albanese Government's first term IR overhaul implemented the vast majority – almost 80 per cent – of the Australian Council of Trade Union's (ACTU) policy wish list developed in the 24 months ahead of the 2022 Federal Election. In March 2020, the ACTU called for less restrictive union right of entry notice requirements, provisions to hand unions the right to inspect records, and a new exemption to right of entry rules for 'wage theft' allegations.[5] In February 2020, the ACTU called for 'industry level bargaining', code for multi-employer enterprise agreements, to displace the current enterprise bargaining system.[6] In April 2021, the ACTU called for the redefinition of 'employee', tighter restrictions on independent contractors, and overturning the labour hire system,[7] and in December 2022, it called for multi-employer and sector bargaining.[8] Throughout 2023, the ACTU renewed calls for the redefinition of the employment relationship, when the Fair Work Commission can arbitrate disagreements, new rights for union delegates, and new parental leave entitlements.[9] All of these, and many others not covered here, were implemented.

As the former NSW secretary of the CFMEU (since convicted of criminal corruption and bribery charges) Darren Greenfield boasted to a union rally in 2023:

> *"We all delivered to them to get them into government, so they need to deliver for us."*[10]

We should expect the balance of the union movement's demands, and no doubt new ones, to feature in this second term of the Albanese Government. The ACTU will continue pushing for previous demands such as a 'windfall profits tax', 52 weeks of "grandparental leave", mandatory union pre-departure and arrival briefings for temporary migrants, radical transparency and reporting of employee compensation, and day one access to 52 weeks' paid parental leave.

This report provides a detailed analysis of the IR changes implemented during the Albanese Government's first term.

Most worrying of all is the shift to multi-employer 'bargaining'. By allowing unions to unilaterally force employers into sector-wide 'agreements', without any requirement for an employer to actually ***agree***, the Government has effectively (and very intentionally) undermined the logic of Enterprise Bargaining Agreements (EBAs).

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5 ACTU. 6 March 2020. *Wage Theft: the exploitation of workers has become a business model.* Submission to the Senate Economics Committee of the Australian Parliament Inqury into the Unlawful Underpayment of Employees' Remuneration. Available at: *https://www.actu.org.au/wp-content/uploads/2023/06/media1449199d11-actu-submission-to-senate-economics-committee-inquiry-into-the-unlawful-underpayment-of-employee-remuneration-20200306-1.pdf*

6 ACTU. 28 February 2020. *Creating opportunities for Cooperation.* Response to the Cooperative Workplaces Discussion Paper. Available at: *https://www.actu.org.au/wp-content/uploads/2023/06/media1385924d10-actu-submission-regarding-cooperative-workplaces.pdf*

7 ACTU. 30 April 2021. *Insecure Work in Australia.* Submission to the Senate Select Committee on Job Security: Inquiry into the impact of insecure or precarious employment. Available at: *https://www.actu.org.au/wp-content/uploads/2023/06/media1449507d20-actu-submission-senate-inquiry-into-insecure-work.pdf*

8 ACTU. 12 December 2022. *Restoring Real Wages and Full Employment.* Submission on the Employment White Paper. Available at: *https://www.actu.org.au/wp-content/uploads/2023/06/media1450231d50-actu-full-employment-white-paper-submission.pdf*

9 ACTU. 31 January 2023. *Paid Parental Leave Amendment Bill.* Submission to the Senate Community Affairs Legislation Committee. Available at: https://www.actu.org.au/wp-content/uploads/2023/06/media1450247d01-actu-submission-on-the-paid-parent-leave-amendment-improvements-for-families-and-gender-equality-bill-2022.pdf, ACTU. May 2023. *Closing the Loopholes: Casual Work.* Available at: https://www.actu.org.au/wp-content/uploads/2023/07/media1450338actu-research-note-casual-work-loopholes-may-23.pdf, ACTU. 3 March 2023. *Closing the Gender Pay Gap Bill 2023.* Submission to the Senate Finance and Public Administration Committee. Available at: https://www.actu.org.au/wp-content/uploads/2023/07/D06-ACTU-submission-on-Closing-the-Gender-Pay-Gap-Bill-2023-final.pdf

10 Patrick, A. 1 May 2025. *Guilt, corruption and cleaning up the CFMEU.* Available at: https://thenightly.com.au/opinion/aaron-patrick-guilt-corruption-and-cleaning-up-the-cfmeu--c-18546901

Different businesses face different conditions, use different technologies, operate under different cost structures, and compete in different markets. The wage-setting framework should reflect that diversity, not override it with union-imposed arrangements that constrain businesses and their employees. The effect of the government's legislation will be to remove the concepts of 'Enterprise', 'Bargaining' and 'Agreement' from EBAs.

Other measures, such as the removal of the ABCC, expanded union right of entry provisions, and restrictions on the use of labour hire, further increase union power and reduce productivity.

The overwhelming majority of employers and employees want a constructive relationship. The cumulative effect of the Government's changes is instead to revive the confrontational and highly litigious model of industrial relations that Australia had largely moved beyond. They bring hostility back to the workplace and further complicate and regulate the system. It is in such conditions that modern unions tend to thrive.

Australia cannot afford to take our prosperity for granted and recent changes risk locking in structural stagnation. With fiscal pressures growing, energy costs rising, an ageing population, and rising global uncertainty, the policy focus must be on making the economy more innovative, and productive. Instead, the Government has chosen a path that prioritises union power at the expense of long-term growth.

Understanding the impact of these changes is critical, particularly given the so-far un-announced IR agenda of a second term Albanese Government. The major legislative changes implemented during the Albanese Government's first term were not detailed before the 2022 election. The majority of changes were sprung on employers following the 2022 'Jobs and Skills Summit' held barely four months after Labor was first elected.

Businesses, economists and industry groups will need to do better this time around. That means making the case not only for reforms that support productivity and growth, but also against further changes that would deepen Australia's productivity crisis and weaken our economy. This report aims to contribute to that effort.

LABOR'S FIRST TERM INDUSTRIAL RELATIONS AMENDMENTS

"The mighty trade union movement has given us strength and inspiration."

Prime Minister Anthony Albanese, speech to the 2024 ACTU Congress

Overview: Labor's *Closing Loopholes* and *Secure Jobs, Better Pay* legislation

The changes to Australia's industrial relations landscape between 2022 and late 2024 are best described as a series of deliberately designed measures which significantly changed Australia's industrial relations system. This is likely to lead to real consequences for economic growth, productivity and employment. Of particular concern are changes that undermine enterprise bargaining and shift industrial relations back towards a more centralised bargaining framework. Centralised wage fixing is heavily associated with high levels of disputation, as anyone who lived through the 1960s and 1970s in Australia can attest. Enterprise bargaining, by contrast, produces better outcomes for employers and workers – with far less disputation.

There is yet to be a substantive scholarly analysis of the first term Albanese Government changes to industrial relations law in Australia, given the short period since these changes were implemented. What is clear however, is that the combined effect of these substantive legislative changes represent a marked shift from the era of enterprise bargaining and the prosperity it enabled. A new era of industrial relations looms, one that is adversarial and holds significant risk for Australia's future growth prospects.

The purpose of this section is to set out each of the changes, in broad terms, to the industrial relations framework and likely consequences. Though modest in isolation, in combination these amendments have led to a decisive, and in some cases destructive, rebalancing of industrial relations policy.

Three legislative tranches: Secure Jobs, Better Pay, Loopholes I, and Loopholes II

The first tranche of legislation (the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)) introduced forced multi-employer bargaining, abolished the Australian Building and Construction Commission (ABCC) and the Fair and Lawful Building Code that protected workers and subcontractors from union bullying, and curtailed freedom of association in Australian workplaces. New draconian provisions designed to empower unions to initiate negotiations without the majority support of workers are completely at odds with the right to freedom of association principle enumerated in section 336 of the *Fair Work Act*.[11]

New sections of the *Fair Work Act* require employers to adhere to industrial agreements they had no or negligible involvement with creating. These multi-enterprise agreements will force businesses who had no

11 *Fair Work Act 2009* (Cth).

say in negotiating the terms of the agreement to be bound by their provisions without regard to the unique circumstances that they – and conceivably, their employees – deem necessary to ensure the viability of their organisation.

The first tranche also abolished the Australian Building and Construction Commission (ABCC), having already stripped the commission of its powers "to the bare legal minimum"[12]. The ABCC's enforcement powers were shifted to the already under-resourced Fair Work Ombudsman. This resulted in the Ombudsman immediately dropping many of the former ABCC's ongoing investigations.

The balance of the first term Albanese Government's industrial relations changes were delivered in two tranches – the *Fair Work Legislation (Closing Loopholes) Act 2023,* and the *Fair Work Legislation (Closing Loopholes No.2) Act 2024*. The first of these tranches, introduced under the slogan "Same Job Same Pay" (not to be confused with the *Secure Jobs, Better Pay* amendments of 2022), empowered the Fair Work Commission to make a Regulated Labour Hire Arrangement Order on application by an employee or union. The orders, if granted, require third party employees to be paid no less than the rates of pay under an enterprise agreement that would apply to workers employed directly by the host organisation.

The second tranche contained the bulk of consequential changes to Australia's IR landscape, with wide-reaching impacts for businesses large and small. The legislation redefined the meaning of "employee" to include certain independent contractors, and introduced new intractable bargaining provisions that subject every single clause of new enterprise agreements to a "better-off" test. In addition, it fundamentally recharacterised casual employee relationships, and ratcheted up union delegate rights in the workplace, among other measures.

Taken as individual measures, some aspects of Labor's IR agenda initially appear as a reasonable response to the changing character of work. The introduction of a new jurisdiction within the Fair Work Commission (FWC) to address the particular challenges of the "gig economy", for instance, seems reasonable as people seek greater flexibility in how and when they work.

But even the most sensible changes to Australia's industrial relations policy settings are only as useful as the body that is empowered to interpret and enforce the rules. Without the ABCC, the Building Code, or the Registered Organisations Commission, the only mechanisms left are a toothless Fair Work Ombudsman, a FWC stacked with union-aligned members, or the Federal Court.

It's become clear that under the Albanese Government, the FWC has become an arm of the union movement. Of the 25 appointments made by the first-term Albanese Government, 21 have a background as either a union official or a union lawyer from a union law firm. Only one appointee has exclusively worked with employer groups, and that was a promotion within the FWC.

The cumulative effect of the changes will lower productivity and reduce international competitiveness.

12 Burke MP, The Hon T. 2022. 'Restoring equal rights for construction workers'. Press release available at https://ministers.dewr.gov.au/burke/restoring-equal-rights-construction-workers

Legislative amendments

Industrial relations amendments under Albanese Government I

Legislative instrument	Amended legislation (main section(s))	Amendment
Secure Jobs, Better Pay	FWA* s 317, FW(RO)A	Abolition of the Registered Organisations Commission
Secure Jobs, Better Pay	FWA ss 171-3	RO enforcement
Secure Jobs, Better Pay	Various	Abolition of the Australian Building and Construction Commission
Secure Jobs, Better Pay	FWA ss 157(2A), 302, Sch 1 Part 5	Equal remuneration ("same job same pay")
Secure Jobs, Better Pay	FWA ss 616-81	Expert panels
Secure Jobs, Better Pay	FWA ss 321, 333B-D, 539(2)	Prohibiting pay secrecy
Secure Jobs, Better Pay	FWA Pt 3-5A	Prohibiting sexual harassment in connection with work
Secure Jobs, Better Pay	FWA ss 12, 153(1), 172A, Pt 6-4E	Anti-discrimination, special measures, breastfeeding
Secure Jobs, Better Pay	FWA ss 141A, Div 5	Fixed term contracts
Secure Jobs, Better Pay	FWA s 65A	Flexible work incl. family and domestic violence, pregnancy
Secure Jobs, Better Pay	FWA ss226-A	Termination of enterprise agreements after nominal expiry date
Secure Jobs, Better Pay	FW(TPCA)A* Sch 3 Item 20, Sch 7 Pt 8, Sch 16 Item 4B	Sunsetting of "zombie" agreements
Secure Jobs, Better Pay	FWA ss 12, 173, 124, 179-88A, 207, Div 7 Pt 2-4	Enterprise agreement approval
Secure Jobs, Better Pay	FWA ss 173, 230	Initiating bargaining
Secure Jobs, Better Pay	FWA ss 191A-3A, 201, 211, 231A, 213B, 215A, Div 7A	Better off overall test amendments
Secure Jobs, Better Pay	FWA Pt 204, Div 7, s 602A-B	Errors in enterprise agreements
Secure Jobs, Better Pay	FWA ss12, 169, Pt 2-4 Div 8, Sub B ss 234-5A, Div 4 s 269,	Bargaining disputes including intractable bargaining
Secure Jobs, Better Pay	FWA s 440-4, 468A 437A, 172(3)	Industrial action (protected ballots, multi-enterprise agreement ballots, notice for industrial action, mediation requirements)
Secure Jobs, Better Pay	FWA ss 172, 176, 211, Pt 2-4 Div 7 Sub AA-AB, s 243, 243A, 245	Supported bargaining (low paid employees and multi-enterprise bargaining)
Secure Jobs, Better Pay	FWA Part 2-4 Div 7 Sub AD	Single interest employer authorisations
Secure Jobs, Better Pay	FWA Pt 2-4 Sub AE	Varying enterprise agreements, varying multi-employer agreements
Secure Jobs, Better Pay	FWA Pt 2-4 Div 7 Sub AC	Cooperative workplaces
Secure Jobs, Better Pay	FWA Part 1-2 Div 4 s 23B	Excluded work (building and construction)
Secure Jobs, Better Pay	FWA s 548	Small claims processes
Secure Jobs, Better Pay	FWA Div 4 s 536AA	Employment advertisements
Secure Jobs, Better Pay	FWA ss 577, 682	Additional matters
Secure Jobs, Better Pay	FWA Part 6-4D	Establishment of the National Construction Industry Forum
Secure Jobs, Better Pay	FWA ss 76A, 76B	Unpaid parental leave amendments
Secure Jobs, Better Pay	FWA s 536(2)(c)	Paid family and domestic violence leave
Loopholes I	FWA s 121	Small business redundancy exemption
Loopholes I	FWA s 201, Part 2-7A	Labour hire prohibitions
Loopholes I	FWA ss 149E, 201(1A), 205A, 273, 350A, 350C	Workplace delegates' rights (including access, training, and facilities)
Loopholes I	FWA s 789HA, 789HD	Discrimination protections

Legislative instrument	Amended legislation (main section(s))	Amendment
Loopholes I	FWA s 321, 327A	Wage theft offence
Loopholes I	FWA s 494	Right of entry (assisting Health and Safety Representatives)
Loopholes I	ASEAA† ss 2A, 5A, 5B	Asbestos (addressing silica)
Loopholes I	SRCA‡ ss 7(11), (13), (13A), (14)	Post-traumatic stress disorder
Loopholes I	SRCA s 57A	Rehabilitation assessments
Loopholes I	WHSA# s 30A	Industrial manslaughter offence
Loopholes I	WHSA 31(1)(b)	Category 1 offences
Loopholes I	WHSA ss 244A, 244B, 244BA, 244C, 244D, 244E	Corporate criminal liability
Loopholes I	WHSA ss 245A, 245B, 245BA, 245C, 245D, 245E	Commonwealth criminal liability
Loopholes I	WHSA s 251	Criminal liability of public authorities
Loopholes I	WHSA ss 4, 31-3, Division 3-10, Schedule 4	Penalties
Loopholes I	WHSA Part 3A	Family and Injured Workers Advisory Committee
Loopholes II	FWA ss 15A, 66AAA, 66AAB, 66AAC,66 AAD,	Casual employment
Loopholes II	FWA ss 172(5A)	Multiple franchisees, access single-enterprise stream
Loopholes II	FWA ss 58(2)(c), 180B	Transitioning from multi-enterprise agreements
Loopholes II	FWA ss 202(), 205(3), 616(4), 737, 768BK	New model terms
Loopholes II	FWA ss 270A, 274(3)	Intractable bargaining workplace determinations
Loopholes II	FWA ss 350B, 350C(3)(b)(i), (ii)	Workplace delegates' rights
Loopholes II	FWA ss 12, 149F, 333M, 333N, 333P	Right to disconnect
Loopholes II	FWA s 357(2)	Sham arrangements (contracting)
Loopholes II	FWA s 519(1)(b)	Exemption certificates for suspected underpayment
Loopholes II	FWA s546(2AA), 557A, 546(2A), 546A	Penalties, civil remedies, underpayments
Loopholes II	FWA s 545(2)	Compliance notices
Loopholes II	FW(RO)A^ ss 111(3)(b), 111(4), 123(2)	Withdrawal from [union] amalgamation
Loopholes II	FWA ss 15AA, 15AB, 15AC, 15AD	New definition of employee and employer
Loopholes II	FWA ss 40D, E, F, G, 582(4A), 617(10B), (10C), (10D), 617AA(4), 620(1E), (1F), (1G), Division 3A,	Road transport (expert panel, transport matters)
Loopholes II	FWA Chapter 3A	Minimum standards
Loopholes II	ICA** s 12(2A)	Independent Contractors Act amendments

**Fair Work Act 2009*

†Asbestos Safety and Eradication Agency Act 2013

‡Safety, Rehabilitation and Compensation Act 1988

#Workplace Health and Safety Act 2011

^Fair Work (Registered Organisations) Act 2009

***Independent Contractors Act 2006*

Abolition of the Registered Organisations Commission: *Secure Jobs, Better Pay*

Fair Work Act s 317

The Registered Organisations Commission (ROC) was established in 2017 as an independent regulator for unions and employer associations. Its creation followed recommendations from the 2015 Royal Commission into Trade Union Governance and Corruption, which identified systemic issues of financial mismanagement, lack of transparency, and weak enforcement under existing regulatory arrangements.[13] The ROC was introduced by the former Coalition Government with the aim of improving accountability and governance in registered organisations. It was tasked with overseeing financial reporting, disclosure obligations, and the conduct of elections within these bodies. Unlike its predecessor, the Fair Work Commission (FWC), the ROC was given enhanced investigatory powers, including the ability to initiate own-motion inquiries and audits, compel testimony, and seek civil penalties. The establishment of the ROC marked a significant shift towards a more proactive compliance regime for industrial organisations in Australia.

The ROC was abolished as part of the *Secure Jobs, Better Pay* amendments in 2022, in a move welcomed by the union movement. Its functions were transferred to the General Manager of the FWC in March 2023. The Commission had conducted enquiries into several unions and employer organisations, but none were deregistered or found to be in breach of the Act's requirements. In 2023, the Community and Public Sector Union, SPSF Group Western Australian Prison Officers Union Branch had an inquiry closed after the CPSU entered into an enforceable undertaking.

Responsibility for monitoring fraud and mismanagement by unions now rests once more with the Fair Work Commission. Before the establishment of the ROC, the FWC was responsible for investigations and prosecutions, but was hamstrung by limited resources and a lack of transparency of regulated organisations. The ROC had the ability to initiate and conduct random or targeted audits of financial reports and disclosure statements, as well as compulsory powers to conduct own-initiative investigations of potential breaches of the *Registered Organisations Act*. Some of the ROC's functions were abolished rather than transferred to the FWC, including certain own-initiative investigations, civil penalties, and powers to compel testimony and conduct searches.

13 *Royal Commission into Trade Union Governance and Corruption Final Report*. Volume 5, [28], Recommendation 3.

Abolition of the Australian Building and Construction Commission: *Secure Jobs, Better Pay*

> *"They have to understand–where did the money come from to get them elected? Where did the people on the … polling booths, on the phones [come from]?"*
>
> *"And this time they better understand that, if they're not going to deliver for us, [then] we're coming for them."*
>
> CFMEU National Secretary Christy Cain, June 2022

Union militancy in the Australian construction industry is systemic and well documented. The Australian Building and Construction Commission (ABCC) existed as an effective and dedicated regulator to police the industry. It was the last line of defence between rampant lawlessness, criminal activities and higher costs across the board.

The abolition of the ABCC occurred as part of the *Secure Jobs, Better Pay* amendments of 2023. At the time, the Government claimed the ABCC had been ineffectual in investigating corrupt behaviour in building and construction and preferred:

> *"chasing down unionists who put stickers on their helmets and displaying different flags rather than actually dealing with the real issues."*[14]

This was always a deliberately and demonstrably false assertion. In response, the ABCC publicly denied prosecuting unions over union stickers, telling the ABC in 2022:

> *"We have not had one investigation or prosecution dealing with [the code's union insignia provision] 13 (2)(j)."*[15]

Despite the ABCC's broad regulatory powers in the building and construction sector, it did not have a role in investigating criminal breaches (such as physical violence, threats of intimidation and theft) and therefore limited capacity to investigate corrupt behaviour in the industry.

An external review of the legislation that was commissioned by the Government following the abolition of the ABCC conceded that a narrower range of notices are available to the Fair Work Ombudsman (FWO) than the ABCC.[16] Effectively, these now relate only to contraventions of the *Fair Work Act*, mostly with respect to employee entitlements, whereas the ABCC could issue an examination notice into a "suspected contravention by a building industry participant or a designated building law". Effectively, scrutiny of building and construction industry union behaviour has been removed from the FWO's remit, along with criminal penalties for the failure of any party to comply with examination notices.

The Review also noted:

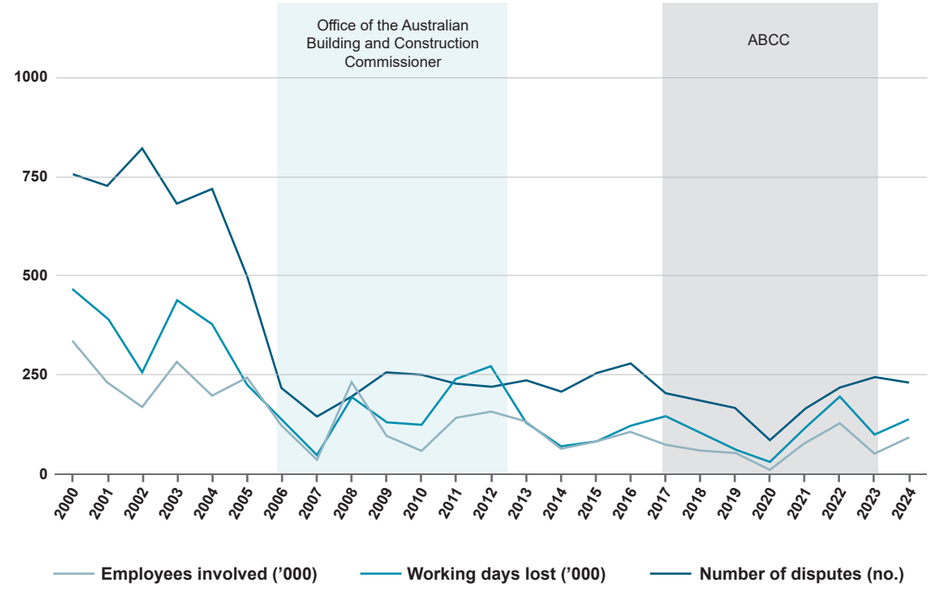
> *"The Fair Work Act also does not include a civil penalty [for] organising unlawful industrial action and engaging in unlawful picketing."*[17]

14 Minister Murray Watt interview. 11 August 2024. Sky News.
15 ABCC Commissioner Stephen McBurney interview. 27 July 2022. ABC Radio National.
16 Bray, M., Preston, A., 31 January 2025. *Secure Jobs, Better Pay Review: Draft Report.*
17 Ibid. p 27

These offences attracted civil penalties under previous rules, attracting 60 penalty units for individuals ($18,700) or up to 600 penalty units for individuals for serious breaches ($187,800), and attracting up to 1,000 penalty units for corporate bodies ($330,000). Both the impact the removal of civil penalties for unlawful industrial action may have had on the level of disputation, and time lost to disputes was not considered in the Review. However, the Australian Bureau of Statistics reported in March 2025 that 65,100 of 415,500 working days lost to industrial action since the change of government in April 2022 had directly affected the construction industry, with most industrial action occurring in 2024.[18] Concurrently, 7661 firms in the construction industry became insolvent, representing 26.5% of total insolvencies in the same period.

The Opposition claimed the ABCC had achieved a significant reduction in days lost to disputes during its six years of operation. The graph below shows this to be true – during the six years and two months the ABCC operated, Australia lost a cumulative of 710,000 days to industrial action compared with approximately 986,000 over the previous period. And that, of course, is nothing compared to the number of days lost in the 1980s and 1990s, where days lost often exceeded 4 million annually, peaking at over 6 million in 1974. It's worth noting that the ABCC's predecessor organisation, the Office of the Australian Building and Construction Commissioner which operated from October 2005 to May 2012, placed significant downward pressure on the number of days lost to industrial action over that period.

ANNUAL INDUSTRIAL DISPUTES: 2000 TO 2024



Source: ABS Industrial Disputes, March 2025 release, annualised.

18 *ABS Industrial Disputes,* March 2025 release

Gender equality: *Secure Jobs, Better Pay*

Fair Work Act ss 616-81, 65A, 76A, 76B, 106

Unlike the bulk of recent IR reforms initiated by the current Government, these changes are largely progressive rather than regressive. They are, however, documented below for completeness.

As part of the Government's IR reforms, 'social inclusion' has been added as an object of the Act, along with the promotion of national economic prosperity.[19] While social inclusion is not defined in industrial terms, the Act identifies the need to promote job security and gender equality, to assist employees with balancing their work and life responsibilities and to protect against discrimination and unfair treatment as measures to fulfill its objectives.[20]

Although equal pay for women was first adopted by the Industrial Relations Commission in 1969, gender equality had not previously been identified as an object of industrial legislation. Industrially, gender inequality is best described by the gender wage gap. This gap reflects not only less pay for the same work but also differences in the attributed value of work between men and women. The Fair Work Commission now requires the determination of the size and extent of that work value gap when deciding award wages and conditions. This will involve more complicated analysis than required by the equal pay provisions, given there is no agreed methodology for determining work value.

To assist the FWC determine the extent to which certain work has been undervalued because it has been traditionally or mostly done by women, the Act has been significantly amended. New additions include Expert Panels, including a panel for pay equity.[21] Undervaluation is not defined in the *Fair Work Act*. Rather, the Act outlines that the President of the FWC determines whether a substantive gender pay equity matter might require the making of a determination relating to minimum wages, which must then be referred for assessment to the relevant Panel.[22] Consequently, the Expert Panels, to consist of gender and industry specialists, will make those assessments. The Fair Work Commission gives the following advice:

> *FWA ss 616-81. The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 amends the Fair Work Act 2009 (the Act) to establish two new Expert Panels in the Fair Work Commission (the Commission) – one for Pay Equity and one for the Care and Community Sector – to hear wage-related matters and help address low wages and challenging workplace conditions faced in the care and community sector.*

To support the panels:

- *four new Commission members with expertise in gender pay equity, anti-discrimination, and the care and community sector will be appointed, and*
- *a dedicated research unit will be established to ensure Commission members have the resources and evidence they need to effectively hear complex and technical wage related matters.*

Following an expert panel investigation by the FWC, from 1 January 2025, direct care workers in the care and community sector as well as nursing assistants in that sector are now part of a 6-level classification structure.

19 *Fair Work Act 2009* (Cth) s 3.
20 Ibid.
21 *Fair Work Act 2009* (Cth) s 617 (6).
22 Ibid. ss 617, 157(2).

Phased wage increases estimated to be over 20% for some workers and a 15% minimum wage increase for aged care employees as well as a range of health service workers were also recommended. In May 2025, the FWC also found that five industrial awards covering female dominated industries do not provide equal pay for work of equal value. These awards apply to the health and community sectors and have also resulted in significant wage rises for employees in these sectors.

The flow-on effects of these changes, if any, for employment and inflation will take time to understand.

The industrial object of gender equity in the *Fair Work Act* is further underpinned by a new section 65A, which allows carers, pregnant women, those returning to work after parental leave, workers with disability or aged more than 55, to request flexible working arrangements.[23] While the Act has allowed for those requests since its inception in 2009, the FWC's power to conciliate and arbitrate disputes about flexible work requests only commenced in 2023. These arrangements do not explicitly include working from home.

Similarly, although sexual harassment at work has been unlawful since the passage of the *Sex Discrimination Act* of 1984, the *Secure Jobs, Better Pay* amendments now extends the jurisdiction of the FWC to include sexual harassment disputes under Part 3-5A of the Act. The Act now empowers the FWC, under section 527, to make appropriate orders to stop sexual harassment and deal with sexual harassment disputes. However, these are discretionary and several limitations apply. Furthermore, the provisions stipulate certain allegations of sexual harassment can only be arbitrated by the FWC with the consent of the respondent, or alleged sexual harasser.[24] Despite the advantages of having sexual harassment claims heard by the FWC, the consent requirement will limit the use of these additional responsibilities by complainants and unions and it will be some time before the effect of these amendments will be known.

Unpaid parental leave is another aspect of gender equality addressed in the *Secure Jobs, Better Pay* amendment bill. While unpaid parental leave has been available under the *Fair Work Act* since 2009, requests for extensions to unpaid leave were subject to various requirements, including the employer's business circumstances. Section 76B of the *Fair Work Act* now allows the FWC to resolve disputes related to those requests and provide additional flexibility for staff, who may now take up to 100 days of their 12 month unpaid leave entitlement flexibly during the first two years of the child's life or placement. To date, there has been little reporting of the impact of these changes on employment, productivity and output.

Finally, the object of gender equity is also reflected in family and domestic violence (FDV) leave arrangements. *The Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* amended section 106 of the *Fair Work Act* to provide paid domestic violence leave for up to 10 days annually.[25] A review was required as soon as practicable 12 months after commencement of the paid entitlement and undertaken by the Australian Industrial Transformation Institute at Flinders University.[26] Their report, which was completed in August 2024, found the entitlement is functioning as intended and the vast majority of the surveyed workforce, including employers, saw it "as a positive step for Australia". The Review also noted that "while the financial and other costs of implementing and administering paid FDV leave, and managing compliance in particular, remain a concern for small business, the extent of these costs are not yet clear … the low utilisation of paid FDV also

23 *Fair Work Act 2009* (Cth) s 65(1).
24 *Fair Work Act 2009* (Cth) s 527S (1)
25 Formerly, the National Employment Standards had required the provision of five days unpaid leave annually.
26 Seymour, K., Marmo, M., Cebulla, A., Ibrahim, N., Esmaeili, H., Richards, J., & Sinopoli, E. 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.

contributes to uncertainty". The Review considered the entitlement met its policy objectives in a range of ways and recommended ongoing evaluation among other changes to the implementation of paid FDV leave.

As of June 2025, there are also amendments before the Parliament to provide for up to 12 days annually of paid reproductive health leave.[27] This includes menopause, perimenopause and other reproductive health issues which might require an employee to take leave.

Regulated Labour Hire Arrangement Orders and Alternative Pay Rate Orders

Labour hire is a flexible employment model that allows businesses to scale their workforce efficiently, respond to changes in demand, access specialised skills, and reduce the administrative burden of direct employment. It plays a crucial role in sectors with seasonal, project-based, or highly variable workloads, such as construction, agriculture, logistics, and mining. For workers, labour hire can provide access to diverse job opportunities and pathways into industries that may otherwise be difficult to enter.

The *2023* amendments to the *Fair Work Act* inserted a new Part 2-7A giving the Fair Work Commission jurisdiction in the wages and conditions of those employed by labour hire employers. The Commission's authority to issue Regulated Labour Hire Arrangements Orders (RLHAOs) came into force on 1 November 2024, and it now requires labour hire companies to pay their staff no less than they would have received had they been directly employed by a business, regardless of differences in job security, benefits, or continuity of employment. The Commission cannot make an order if this is not "fair and reasonable", the labour hire company is providing a service or the employer is a small business.

Deloitte Access Economics' 2019 report, *Economic effects of changes to labour hire laws*, examined the use of labour hire in the minerals industry. Deloitte identified operational flexibility, the securing of specialist skills and the industry's need to respond rapidly to upswings in commodity prices as important reasons for using labour hire workers.[28] The report estimated that labour hire workers accounted for 11% of the total minerals industry workforce, living mostly in rural, regional and remote areas. The report argues a rapid response to changing demand is crucial in a price-taking industry operating in global markets. This is not possible under standard enterprise agreements. Deloitte estimated that the granting of the same pay and conditions as direct employees would reduce full-time employment by 6,400 equivalent jobs from 2019-2031. The decline in GDP over that period is estimated to be $15.3 billion (net present value), peaking at $2.8 billion in 2031.

Major resources companies warned that the Government's introduction of RLHAOs would have a substantial impact and increase costs. In submissions to the Government's consultation paper released ahead of the introduction of the legislation, BHP warned of an annual $1.3 billion labour hire cost impact, equivalent to approximately 5,000 full-time operational employees, which would "create unsustainable cost pressures that will further erode Australia's competitiveness as an investment destination."[29] Similarly, Rio Tinto warned that "it is through productivity improvement that the most favourable environment is created for jobs and sustainable wage increases" rather than greater regulatory burden.[30]

27 *Fair Work Amendment (Paid Reproductive Health Leave and Flexible Work Arrangements) Bill 2025*
28 Deloitte Access Economics. 2019. *Economic effects of changes to labour hire laws.*
29 BHP. Submission to Senate Education and Employment Legislation Committee inquiry: *Fair Work Legislation (Closing Loopholes) Bill 2023.*
30 Rio Tinto. Submission to Senate Education and Employment Legislation Committee inquiry: *Fair Work Legislation (Closing Loopholes) Bill 2023.*

It should be noted that labour hire arrangements remain a legal mechanism available to companies to increase workforce flexibility, allowing them to manage fluctuations in operational demand without the constraints of enterprise agreements. In the mining sector, operational flexibility is critical as it is a price-taker on global markets. Deloitte Access Economics' modelling suggests that the increased costs associated with labour hire arrangement orders would lead to a decline in aggregate employment, as firms seek to reduce risk and control other costs and investment.

Re-defining the legal definition of an 'employee'

There are numerous reasons why somebody might choose to work as an independent contractor. These include favourable rates, flexibility in how and when work is delivered, tax advantages, the ability to work for multiple clients, or to build a small business. In general, legitimate contractors are making a business decision to forgo the entitlements and job security of employment in favour of these opportunities.

Inherently, unions prefer fewer contractors and more ongoing employees because this increases the potential pool of union members.

The new definition of *employee and employment* effectively overturns the High Court's decisions in *CFMMEU v Personnel Contracting Pty Ltd and ZG Operations Australia Pty Ltd v Jamsek* of 2022.[31] In those decisions, the Court decided that its role in determining the relationship between parties is limited to examining the rights and obligations found within the contract. In *Personnel Contracting,* the employee concerned was found to be an employee of a labour hire company due to the substance of his contract, whereas in *Jamek* the opposite was held. In both cases, the High Court confirmed the right of the individual to enter into independent contracting arrangements insofar as contracting arrangements were clear.

However, following *Closing Loopholes No. 2*, even the clearest independent contracts may be overridden by the new section 15AA of the *Fair Work Act*.

New subsections 357(2) and (3) of the *Fair Work Act* bring many clear, existing relationships between contractors and employers into the definition of sham contracting. Sham contracting is defined under the Act as where workers are engaged as independent contractors effectively operating as employees. The amendment alters the conditions which must be satisfied for an employer to employ independent contractors and significantly narrows them. Employers must now be able to demonstrate that they reasonably believed the contract was a contract for services, whereas previously employers merely needed to show they did not know and were not reckless as to whether the contract was one of employment rather than services.

Employers found to have engaged in the new, broadened definition of sham contracting face substantial financial penalties, potentially reaching up to 1,500 penalty units ($495,000) for businesses with more than 15 employees.[32] There may also be tax fraud implications if contractors did not receive superannuation contributions and insufficient provision for personal income tax.

31 [2022] HCA 1; [2022] HCA 2.
32 *Fair Work Act (Cth)* ss 539, 546(2)(b), 546(2AA). The Fair Work Commission may apply two 5-times multipliers on the base rate of 60 penalty units for a large business.

With greater regulation of contractors comes less choice for how and when people work. Understandably, businesses eager to avoid litigation will be more risk-averse when considering engaging contractors unless there is clear evidence of independence, and 'contractor-by-choice' workers will inevitably lose opportunities.

For completeness, it's worth noting that *Closing Loopholes No. 2* also made subsequent amendments to the *Independent Contractors Act 2006*. The new subsection 12(2) removes the pathway for a contractor earning more than the contractor high income threshold (currently $175,000) to have the Federal Court review a contract for unfair or harsh terms. The jurisdiction for scrutinising potentially unfair high income services contracts has been effectively transferred to the Fair Work Commission (FWC), which maintains the ability to consider these applications under Part 3A-5 of the *Fair Work Act*. Applications under the *Independent Contractors Act* require the Federal Court to only consider the terms of the contract and a limited number of matters that existed at the time the contract was made. Conversely, the FWC may take a variety of factors into consideration – relative bargaining power, imbalances in the rights and obligations of parties, unreasonable requirements, and whether a services contract provides less remuneration than employees.

The Federal Government's close attention to removing flexibility for high income contractors appears inconsistent with the position of then-Minister for Industrial Relations Tony Burke who framed the changes as protecting the interests of low-income employees in highly casualised industries.[33] Prior to the changes to the *Independent Contractors Act,* the law reflected the position in *Personnel Contracting and Jamsek:* the statutory regime limited contractual disputes between business and high earning contractors to the terms of the contract. It could be assumed high earning contractors have enough skill and experience to manage the terms of their engagement without the FWC's consideration of 'power imbalances'.

The right to disconnect

The *Fair Work Act* now includes a new section 333M, which allows an employee to refuse *"to monitor, read or respond to contact, or attempted contact, from an employer [or] ... a third party outside of the employee's working hours unless the refusal is unreasonable".*

The right to disconnect has applied to non-small business employers since 26 August, 2024 and will come into effect for small businesses on 26 August, 2025.

If employers and employees are unable to resolve an employee's refusal to respond to workplace communications out of hours, the parties may now seek an order from the Fair Work Commission or a decision that the refusal was unreasonable.

The Fair Work Commission has advised the Commonwealth Senate that of the seven cases which came before the Commission since the right came into effect to March 2025, four related to disciplinary or dismissal provisions and three involved a dispute over the right to disconnect.[34] The new right had also generated 225 inquiries to the Fair Work Ombudsman. Employment law partner with Baker and McKenzie, Michael Michalandos, is reported as observing that this right was being used as part of compensation claims for dismissal or disciplinary action, since the law requires the employer to demonstrate that the refusal was unreasonable, thus reversing the usual onus of proof for claimants.

33 Bourke, T. *Speech, Address to the Australian Labour Law Association*. 15 November 2021. https://www.tonyburke.com.au/speechestranscripts/2021/11/15/speech-address-to-the-australian-labour-law-association
34 Marin-Guzman, D. 2 March, 2025. 'The right to disconnect is becoming the right to sue'. *Australian Financial Review.*

Union right of entry

For most of Australia's history, union right of entry to Australian workplaces was negotiated as part of the federal award system overseen by the Commonwealth Court of Conciliation and Arbitration and a series of appointed registrars. Typically, union right of entry was negotiated as part of the grant of an industrial award approved by the Court.[35] Successor bodies largely retained this process of negotiating right of entry practices, after the Court of Conciliation and Arbitration was ruled unconstitutional in the ***Boilermaker's Case*** in 1956.[36]

A consistent requirement throughout Australia's federal history is that unions and trade associations be accredited.[37] In 1973, the Whitlam Government handed unions the first statutory power to enter workplaces, albeit for relatively narrow purposes. The Hawke Government codified right of entry provisions, formally introducing federal entry permits issued to individual union officials accredited to exercise entry in accordance with the relevant federal award.[38]

In 2004, the Howard Government introduced a 'fit and proper person' test in recognition of the significant powers conferred on a right of entry permit holder.[39] The test survived both the Howard Government's later WorkChoices reforms of 2005 and the Rudd Government's *Fair Work Act* reforms of 2009.

The grant of a right of entry permit by the Fair Work Commission (FWC) is contingent on meeting the fit and proper person test assessed by a qualification criteria outlined by section 513 of the Act. In summary, the FWC is required to take into account whether a person has received appropriate training; whether the person has ever been convicted of an industrial law offence, trespass, fraud or dishonesty, violence against a person, or destruction of property; penalties levied under industrial law; and any other relevant matter.

The Commission is required to give each factor "proper, genuine and realistic consideration and appropriate weight" in considering the above factors.[40]

Previous misconduct or offences under the *Fair Work Act* are no bar to the grant of a permit under the fit and proper person test. The FWC is often willing to overlook previous breaches of the *Fair Work Act* given the passage of time, apparent remorse, and other matters it sees fit.

35 *Commonwealth Conciliation and Arbitration Act 1904* (Cth), ss 39-40
36 *R v Kirby and Ors; ex parte Boilermakers' Society of Australia* [1956] HCA 10
37 Cf. s 55, *Commonwealth Conciliation and Arbitration Act 1904*
38 Cf. s285C *Industrial Relations Act 1988* (Cth)
39 *Workplace Relations Amendment (Right of Entry) Bill 2004* (Cth)
40 *Application by Construction, Forestry and Maritime Employees Union - The Maritime Union of Australia Division for an entry permit for Shane Reside* [2024] FWC 3409

Mr Bradley Upton: CFMEU right of entry permit holder

Mr Bradley Upton presently holds a right of entry permit sponsored by the CFMEU.[41] In determining whether he ought to be granted the permit, the Commission noted Mr Upton had previously been fined $15,600 for three separate contraventions of the *Fair Work Act*.[42]

In the first of those offences, Mr Upton visited the Wheatstone LNG plant outside Onslow. There, Mr Upton used "racially tainted obscene and offensive" language described as "deplorable" by the Fair Work Commission. In another contravention, Mr Upton gave a ten minute "rant" where he threatened non-union members at the worksite.[43]

The Commission also considered that Mr Upton twice before had conditions imposed on right of entry permits.

Nevertheless, Mr Upton was granted a permit. The Commission accepted that Mr Upton's current fitness and propriety to hold an entry permit was supported by his "regret" for historical contraventions, among other factors.

The Commission also noted that the Australian Building and Construction Commission had commenced proceedings against Mr Upton and others relating to an unlawful picket. The proceedings were later dropped by the Fair Work Ombudsman when the Albanese Government transferred responsibility for such matters to the body.[44]

Mr Upton's case, in the worked example above illustrates the comparatively low bar for the fit and proper person test under the *Fair Work Act*. There are innumerable instances of previous offending being overlooked by the Commission on account of the passage of time or supposed 'statements of regret'.[45]

Far from a meaningful safeguard, the fit and proper person test offers a soft landing for repeat offenders able to express the right tone of contrition.

Certainly, the plain meaning of the test, as applied in an industrial relations context, is completely out of step with other fit and proper person tests used in other industries.

In the health profession, for example, it has been suggested that "fit and proper" in the context of registration of a health professional is most generally expressed as whether the person has the:

> *...necessary honesty, knowledge and ability and also whether the person is possessed of sufficient moral integrity and rectitude of character to permit them to be accredited to the public as a person to be entrusted with the sort of work the relevant registration or licence entails.*[46]

41 Fair Work Commission. *Find an entry permit*. Accessed 5 May 2025: https://www.fwc.gov.au/registered-organisations/entry-permits/check-entry-permit
42 *Application by Construction, Forestry, Maritime, Mining and Energy Union - Construction and General Division, WA Divisional Branch* [2023] FWC 728
43 Ibid.
44 Ibid.
45 For example, *RE The Australian Workers' Union* [2022] FWC 3145
46 'When is a Health Practitioner Not a Fit and Proper Person to Practise Their Health Profession in Australia?', (2024) 31 *Journal of Law and Medicine* 88 p 96

As in the case of the medical and legal professions, a 'fit and proper person' test should actually have some meaning. Such tests are intended to protect the public against the abuse of power by those who are given special powers that enable them to perform acts that would otherwise be unlawful (i.e. trespassing on someone else's premises).

The Albanese Government has significantly expanded the power of a right of entry permit under the guise of health and safety and stopping underpayment of wages, while keeping the barriers to obtain this right unchanged.

Notice of exercise of right of entry permits

Prior to the 2023 legislation, right of entry permit holders were generally required to give 24 hours' written notice of entry. Notice could only be waived on application by the Fair Work Commission if the Commission reasonably believed advance notice might result in the destruction, concealment or alteration of evidence.[47]

Under the new rules, the FWC must agree to waive the notice period if there is a mere suspected contravention of underpayment of wages or "monetary entitlements" of a union member working on the premises in question. All that is required is for a union to make an allegation - the FWC has no power to test the credibility of the allegation.

It is unclear why the underpayment of wages merits a specific carve-out to empower unions to enter workplaces without notice when the original intent of the Part was specifically to protect workers from the destruction of evidence relating to a breach of the *Fair Work Act* as a whole. It does not follow that a general provision, designed to prevent the destruction of evidence relating to suspected contraventions of the *Fair Work Act*, ought to be modified so as to lower the bar in such specific circumstances.

The provision is clearly intentionally designed as a tool for unions to enter workplaces with no notice. A suspected contravention involving the underpayment of wages or "monetary entitlements" could amount to as little as a rejected expenses claim, precipitating a disruptive and out-sized response in the form of an unannounced visit from a union official.

Resources sector right of entry increases

In recent media reporting, one BHP executive remarked that right of entry across the Pilbara operations increased 400% over the 12 months to April 2025.[48]

Meanwhile, *The West Australian* reported in March that the number of right of entry visits to a West Australian mine site increased 381 per cent to November 2024 under the Albanese Government.[49]

47 *Fair Work Act 2009* (Cth) s 519
48 Thompson, B. 21 May 2025. 'Mining giants BHP, Rio Tinto revisit their industrial relations warnings as IR tensions simmer in the Pilbara'. *The Australian*. Available at: https://www.theaustralian.com.au/business/mining-giants-bhp-rio-tin-to-revisit-their-industrial-relations-warnings-as-ir-tensions-simmer-in-the-pilbara/news-story/c4011897792f514f-7fa6cddbbab0154d#:~:text=Mining%20giants%20BHP%2C%20Rio%20Tinto,'right%20of%20entry'%20requests.
49 *The West Australian*. 14 March 2025. 'Anthony Albanese backs workers' right to fight major mining companies'. Available at: https://thewest.com.au/politics/anthony-albanese/anthony-albanese-warns-unions-to-be-civil-as-as-figures-reveal-scale-of-mine-site-infiltration-c-18035471

Union right of entry to 'assist' Health and Safety Representatives

Perhaps the most concerning change to industrial relations enacted by the Albanese Government is the ability for a union official to enter worksites even without a right of entry permit.

The new provisions added to section 494 of the *Fair Work Act* in ***Closing Loopholes***, a right of entry permit holder assisting a Health and Safety Representative (HSR) no longer needs to provide any notice.[50] The new amendments allow "any person" to assist a HSR. Far from closing loopholes, the Government's legislation deliberately introduces a loophole that allows union officials to enter premises without notice.

In practice, changes to section 494 of the *Fair Work Act* have created a de-facto bypass of the right of entry permit system, enabling union officials to enter the workplace under the guise of Workplace Health and Safety (WHS) assistance even when they were not authorised - or even banned - from entering under the previous system.

As a result, businesses should expect a significant rise in the number of unannounced visits from union permit holders to exercise right of entry privileges under the guise of assisting HSRs. And the powers handed to the visiting union officials are vast. They may essentially take over an organising role in establishing worker 'health and safety' committees which become a de facto vehicle to control a workplace - just as the CFMEU has done in the construction industry through its 'safety representatives'. They may also receive information concerning the work health and safety of workers.[51]

According to the explanatory memorandum of the first *Closing Loopholes* amendments, handing these powers to a union official without a right of entry permit was to "improve HSRs' access to appropriate assistance [to] help them discharge their statutory functions, leading to better health and safety outcome at their workplace."[52] But the scope of the power is far from this stated intention and creates considerable scope for union officials to abuse their power.

The legislation creates a very deliberate loophole that destroys the safeguards that previously existed to prevent abuse of union entry powers. On one hand, one of the requirements for the Fair Work Commission in granting a right of entry permit is to consider whether an official had received appropriate training.[53] However, the Government's changes now allow for anyone - including people with no prior training or relevant experience - to enter workplaces for industrial purposes.

Only a union official who has had a WHS entry permit revoked, suspended, or disqualified may be refused entry to the workplace to assist a health and safety representative under section 71(4) of the *Work Health and Safety Act 2011*. Critically, a WHS permit is different to a right of entry permit - a union official who has had a right of entry permit governed by the *Fair Work Act 2009* revoked may still enter the workplace to assist a health and safety representative.

50 s 404 (4) *Fair Work Act 2009* (Cth)
51 *Work Health and Safety Act 2011* (Cth) s 68
52 Replacement Supplementary Explanatory Memorandum, *Fair Work Legislation Amendment (Closing Loopholes Bill 2023* (Cth)
53 *Fair Work Act 2009* (Cth) s 512

Health and Safety at a Victorian Government Construction Site

An exchange between 60 Minutes reporter Nick McKenzie and the CFMEU's Jonny 'Two Guns' Walker demonstrates the point:

> McKENZIE: "Just sitting here you're a scary bloke ... are you the right sort of bloke to be a union health and safety rep on a government job?"
>
> WALKER: "Well if you were a boss would you do things unsafe if I come told you not to?"
>
> McKENZIE: "Well that answer says it all doesn't it?"
>
> WALKER: "Well not really, did I threaten you in saying that?"[54]

The CFMEU's health and safety representative, Jonny 'Two Guns' Walker, appears on 60 minutes.

The 60 Minutes investigation revealed the CFMEU appointed several people with serious criminal histories, including those convicted of violent offences and manslaughter, into official roles within the union's structure including in health and safety roles on major construction sites.

54 McKenzie, N. 1 June 2025. "Got to stand your ground": Ex-bikie blasts former CFMEU bosses'. *Sydney Morning Herald.*

Compulsory union delegates' powers

The 2023 legislation included 'last minute' government amendments that now require businesses to pay for union delegates in every workplace – even non-union workplaces. They give new powers to anyone who a union deems to be a delegate – including the right to two weeks' extra leave per year – paid for not by the union but by the employer.

These powers include expansive new 'rights' to communicate with members, be handed office space to undertake recruitment and training activities, and attend paid union training.

Under the new section 149E of the *Fair Work Act*, introduced under *Closing Loopholes,* all modern awards must now include a 'delegates' rights term'. Similarly, all enterprise agreements must now include a delegates' rights term under a new section 205A of the Act.

Under section 350C of the Act, workplace delegates are entitled to 'represent the industrial interests' of both union members and those eligible to be members in disputes with an employer. Businesses must facilitate 'reasonable communication' with both union members and those eligible to be members by organising reasonable access to the workplace and 'reasonable access to paid time during normal working hours' for training (unless the business is a small business).

The legislation requires the FWC to vary every modern award to include such powers and will also require every enterprise agreement to include such powers – even in workplaces without a single union member.

The new award terms include a provision that the employer must provide a workplace delegate to the access of or use of a private room or area to hold discussions with employees, a noticeboard, electronic means of communications, a lockable filing cabinet or similar, and office facilities and equipment including printers, scanners and photocopiers.

Workplace delegates in businesses other than small businesses are, under the new award term, also now entitled to up to 5 days of paid time during normal working hours for initial training and a further day in subsequent years to attend more training. Training attendees do need to provide evidence of attendance within 7 days, and the employer is not required to provide access to training for more than one person per 50 employees.

Prior to the passage of *Loopholes 1* there was no substantive statutory protection for workplace delegates in the *Fair Work Act*. Generally, only authorised union officials were subject to the Act, and regulated under Part 3-4 through right of entry provisions. Workplace delegates who are employees appointed or elected under union rules were previously generally only granted these rights under enterprise agreements.

The Albanese Government has significantly altered these arrangements and with them the balance of power between unions and employers, despite not including these changes in their election policies. The changes are designed to expand union influence over every workplace, seemingly inspired by the coercive tactics of the CFMEU that have made construction one of our least productive industries. However, where the CFMEU required coercion to achieve its objectives, unions in other industries will now be able to use the same tactics legally thanks to the Albanese Government's legislative changes.

Protection provisions carry significant consequences for employers, particularly for those unfamiliar with union activity. Even employers with cordial relationships with workplace union representatives have to be careful to comply with the new statutory requirements, lest they be exposed to new legal risk. Additional compliance overheads should be expected, as unions seek to take advantage of the new rules. In short, the changes are a further erosion of the norm of collaboration between employees and employers in favour of an outdated adversarial position favoured by unions - dragging down trust and productivity in Australian workplaces.

Forced bargaining without employee support – destroying workplace democracy

The *2022* amendments introduced a raft of specific measures that operate together to damage the relationship between employers and unions at the outset of the bargaining process.

The key new trigger for bargaining introduced by the amendments is a request to bargain from a "bargaining representative" in relation to a new agreement (following the expiry of an existing agreement), which includes a person, who could be a union representative, appointed by an employee.[55] Previously, bargaining could only commence following a majority support declaration that demonstrates 50%+1 of employees seek to commence bargaining. The requirement of a majority support declaration no longer applies when 1) the proposed agreement will replace an earlier single-enterprise agreement that has passed its nominal expiry date, 2) a single interest employer authorisation did not cease to be in operation because of the making of the earlier agreement, 3) no more than five years have passed since the nominal expiry date, and 4) the proposed agreement will cover the same or substantially the same group of employees.[56]

The consequence of the new trigger point is that unions can effectively unilaterally commence bargaining by side-stepping the majority determination process. It is worth noting that the *Fair Work Act* explicitly outlines that among its purposes is to "protect freedom of association" by ensuring workers are free to become, or not become, members of industrial associations – as well as that they are "free to be represented, or not represented by industrial associations" and "free to participate, or not participate, in lawful industrial activities."[57]

'Intractable bargaining' and forced arbitration

As part of the *Secure Jobs, Better Pay* reforms, new sections 234 and 269 of the *Fair Work Act* enable the Fair Work Commission (FWC) to grant an intractable bargaining declaration or workplace determination. A declaration can be sought after a new 'minimum bargaining period', which is the later of nine months after the nominal expiry for an existing agreement or nine months after the day bargaining starts. Once a declaration is made, a *determination* must be made under a new section 269 of the *Fair Work Act.*

An intractable bargaining declaration is the new trigger whereby negotiations move from voluntary negotiation to a compulsory process, after which the FWC can step in and eventually impose binding terms of an enterprise agreement.

Previously, parties could ask the FWC to act as mediator where parties could not reach agreement under

55 Ibid. s 173(2)
56 Ibid. s 173(2A)
57 *Fair Work Act 2009* (Cth) s 336

section 240 of the Act. The FWC could not impose binding terms under this section.

In practice, the new rules operate as a '10-month' rule as parties are required to negotiate for at least nine months, before heading to dispute resolution under section 240 of the Act, and then apply for an intractable bargaining declaration under section 234. After this process, there is often a post-declaration negotiating period of several weeks before arbitration can proceed.

Genuine agreement

Under the new section 188B of the *Fair Work Act,* the Fair Work Commission must make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement, and the Commission must use this statement to test whether an enterprise agreement has been genuinely agreed. Employers now need to ensure the agreement was "the product of an authentic exercise in agreement-making", and consider whether employees who voted for the agreement "had an informed and genuine understanding" of what was being approved.

Critically, under the new principles employee organisations, that is unions, are handed "significant weight" by the Commission in determining whether genuine agreement was reached under these subjective tests.[58] While yet untested, as drafted the current principles could enable a union to argue that genuine agreement could not have been reached if an employee were in favour of an agreement where the union was not. The Commission would be required to give "significant weight" to the union's position, however spurious its grounds.

The consequence of this change is that the FWC has imported a series of subjective tests into the process of approving an enterprise agreement by issuing a statement of principles. Previously, employers were required to meet a series of clear procedural requirements under sections 180 to 182 of the Act in determining whether an agreement was genuinely agreed. Form and procedure were significant. Now, employers are expected to apply a contextual, principle-based approach to determining genuine agreement, with a potentially de-facto union veto.

Multi-employer 'bargaining'

Among the most worrying of the Albanese Government's amendments is the shift to multi-employer 'bargaining'. These changes enable unions to initiate sector-wide negotiations and, in many cases, compel employers into agreements, a contradiction in terms given the employer need not have supported nor participated in the bargaining process. This marks a significant shift from Australia's traditional enterprise-level bargaining system.

Historically, multi-employer agreements were voluntary and rarely used, largely confined to low-paid and highly fragmented sectors where bargaining was difficult. That limited use reflected the reality that different businesses face different conditions, operate in different markets, and need tailored industrial arrangements to remain viable and competitive.

58 Fair Work Commission. *Statement of Principles on Genuine Agreement*. Accessed 17 June 2025. https://www.fwc.gov.au/work-conditions/enterprise-agreements/make-enterprise-agreement/you-start-bargaining/statement

The amendments under *Secure Jobs, Better Pay* will force multi-enterprise agreements on businesses who did not participate in negotiating the agreements. Many of these businesses, and their employees, will face unique circumstances that differ substantially from those of other enterprises covered by the agreement. Different businesses face different conditions and compete in different markets, and Australia's IR laws should reflect this diversity.

> Unions are already anticipating using multi-employer enterprise agreements to bring parts of Australian industry to a standstill. In May, Transport Workers' Union leader Michael Kaine warned his members are prepared to "shut down Australian transport", including airline flights, according to reporting in *The Australian*.[59] In that report, the Australian Services Union's Emeline Gaske cited multi-employer bargaining as a tool the ASU hoped to employ across the sector.

The new framework introduces three expanded streams of multi-employer bargaining. Supported bargaining, single interest employer bargaining (SIEB), and cooperative bargaining.

While cooperative multi-employer bargaining remains voluntary, both supported and SIEB streams allow unions to initiate applications without employer agreement. If approved by the Fair Work Commission (FWC), employers can be required to bargain.

Supported bargaining is aimed at industries where employees typically work at or near award rates such as aged care, childcare, and disability services. These sectors often consist of small operators who may lack the resources to negotiate individual enterprise agreements. Importantly, the FWC does not require a majority of employees to support inclusion of their employer; it need only consider whether inclusion is "appropriate."

SIEB, by contrast, targets larger businesses with "common interests", such as those in franchise networks or shared industry settings. Here, a union may succeed in adding an employer if:

1. The business has more than 20 employees,
2. The FWC is satisfied a majority of employees want to be covered, and
3. The employer is not already covered by an enterprise agreement or is in the process of bargaining.

In both cases, the new amendments allow unions to pursue compulsory bargaining across multiple workplaces based on loosely defined criteria of holding a "common interest". This undermines the core logic of enterprise bargaining, namely that industrial agreements should reflect the unique circumstances of individual businesses and their workforces.

Australia's industrial relations framework should respect this diversity, and yet multi-employer bargaining amendments will impose uniformity. Ultimately this will cost jobs, introduce sector-wide industrial campaigns, and damage Australia's global competitiveness.

59 Hannan, E. 16 May 2025. 'Transport Workers Union threat to "shut down Australian transport"'. *The Australian*.

APESMA NSW Coal Mines Case

The first contested multi-enterprise case under the new regime was launched in December 2023 in the wake of the new legislation between the Association of Professional Engineers, Scientists and Managers Australia and mining companies Peabody, Ulan Coal, Whitehaven, and Delta Coal.[60] The dispute considered whether there was a majority of staff in favour of bargaining for the agreement, whether there was a clearly identifiable common interest, and whether the operations and business activities of the mines were reasonably comparable. Delta Coal was excluded because they demonstrated that they use different methods, machinery, and business functions to those of the other respondents.

The Fair Work Commission did not dismiss the application, allowing the agreement to proceed to bargaining. In its ruling, the Commission acknowledged that employers in the same industry and covered by the same award could be, in itself, enough to constitute a common interest.

Following the decision, the three remaining mining companies were required to engage in multi-employer bargaining with APESMA. If, following negotiations, an agreement cannot be met after 12 months, the dispute could be subject to an arbitrated "workplace determination" that would replace existing enterprise agreements.

60 Fair Work Commission. *The Association of Professional Engineers, Scientists and Managers, Australia - application for single interest employer authorisation.* https://www.fwc.gov.au/hearings-decisions/major-cases/association-professional-engineers-scientists-and-managers-australia

CONCLUSION: THE FUTURE OF IR UNDER LABOR

The first term IR agenda of the Albanese Government represents the most significant shift in Australia's workplace relations landscape in decades. As this report has detailed, these changes were not only sweeping in scope, but marked a deliberate and systematic departure from the enterprise bargaining model that has underpinned national productivity and growth since the Hawke-Keating era.

Rather than reinforcing the link between productivity and wage growth, a principle that has historically supported both workers' living standards and broader economic growth, these reforms prioritise union influence and centralised control. This reversal has weakened workplace flexibility, increased regulatory burdens, and introduced adversarial dynamics that undermine cooperation between employers and employees and risk leading to increased industrial disruption. The cumulative impact on business, productivity, and our international competitiveness, is substantial and ongoing.

The scale and speed of these reforms, many implemented without a clear electoral mandate, demand close scrutiny. The Government's approach reflects a political compact with the union movement, not the economic realities faced by the vast majority of Australian enterprises.

There is no doubt that the ACTU's reform wishlist ahead of the 2022 election became the template for the Albanese Government's first term legislative agenda. The union movement is now gearing up to drive a new wave of legislative change, including pushing for heavy regulation of how businesses use AI.[61] The potential consequences of regulation of AI, like the impacts of AI itself, are immense.

As Australia confronts mounting fiscal pressures, an ageing population, and a sustained productivity decline, the need for reform that enhances flexibility, investment, and innovation has never been greater. By presenting the full scope of IR changes implemented by the Albanese Government, this report underscores the urgency of resisting further moves that entrench union power at the expense of national prosperity. To counter this trend, business and civil society must begin to make the case for reforms that genuinely rewards effort, supports enterprise-level agreement-making, and sustains Australia's economic future.

61 ACTU. December 2023. *Artificial Intelligence*. Available at: https://www.actu.org.au/wp-content/uploads/2023/12/Congress24_Artificial-Intelligence.pdf

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