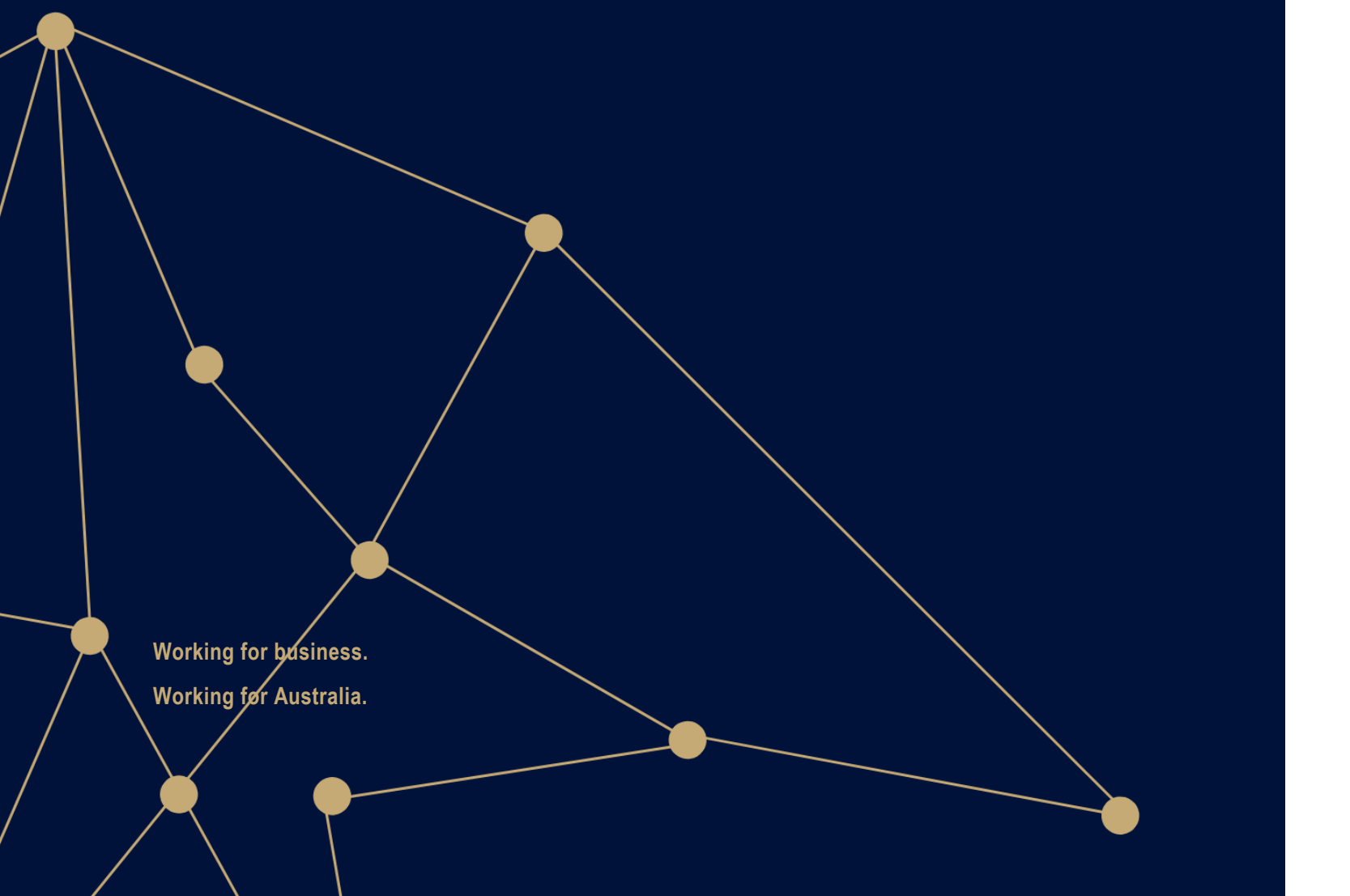


# ACCI Submission

## Modern Awards Review 2023-24: Job Security

5 February 2024



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## Introduction

1. ACCI welcomes the opportunity to make submissions in relation to the job security stream of the Modern Awards Review 2023-24 (**Review**) conducted by the Fair Work Commission (**Commission**).
2. This submission includes two parts. First, the submission will address the key issues that are relevant to the stream and outline the matters which should be prioritised. Second, the submission will respond to the questions contained in the Discussion Paper.
3. As a peak employer body with national coverage, ACCI intends to engage more closely with specific proposals to resolve any issues that emerge from submissions of other parties through the consultation process and, if necessary, a submission in reply.

## Issues

4. The objective of this stream of the Review is to consider “whether the terms of modern awards appropriately reflect the new object of the FW Act and modern awards objective regarding job security and the need to improve access to secure work across the economy, including by: (a) considering award provisions concerned with rostering, guaranteed shifts, and the interaction of permanent, part-time, and casual classifications; and (b) reviewing standard award clauses with general application across the award safety net, to assess their continuing suitability in light of the updated modern awards objects.”<sup>1</sup>
5. In response to this objective, ACCI submits that the Commission should be guided by the following principles while conducting this stream of the Review:
  - (1) In considering whether award terms of modern awards appropriately reflect the updated objectives, the Commission should consider whether they improve access to secure work, taking into account:
    - a. whether the employee has a choice to enter into work which promotes regularity and predictability; and
    - b. the effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, especially on a permanent rather than casual basis.
  - (2) Improving access to ‘secure work’ does include an assessment of wage rates or modern award terms which do not go directly to regularity or predictability.
6. The basis for these principles and their implications for the conduct of the Review are as follows.

### **Scope of the Review**

#### Updated objects of the FW Act

7. As noted in the Discussion Paper<sup>2</sup> the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (SJBPA Act)*, inserted the following amendments to the Fair Work Act 2009 (Cth) (**FW Act**):
  - (1) “3 Object of this Act:

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

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<sup>1</sup> Justice Hatcher, Fair Work Commission, President’s Statement on Modern Awards Review 2023-24 (15 September 2023) [3(4)] (emphasis added).

<sup>2</sup> Discussion Paper: Job Security, Modern Awards Review 2023-24 – Fair Work Commission (18 December 2023) (**Discussion Paper**) [9]–[12].

- (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

...

(emphasis added)

- (2) "134 The modern awards objective

What is the modern awards objective?

- (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

...

(aa) the need to improve access to secure work across the economy; and

(emphasis added)

8. As a result, the Commission is required to take into account the need to improve access to secure work and the goal of promoting job security (the updated objectives) when exercising its modern awards powers.<sup>3</sup>
9. "Secure work" and "job security" are contentious terms, which are not defined in the FW Act.
10. The position preferred by employers, is set out in ACCI's initial submission to the Annual Wage Review 2022-2023 (**AWR Submission**) at [111] to [117]. For completeness this submission can be summarised as follows:
- (1) The starting point for the ascertainment of the meaning of s 134(1)(aa) is the text of the FW Act whilst, at the same time, regard is to be had to its context and purpose.<sup>4</sup> The natural and ordinary meaning of its words, namely, how they are ordinarily understood in discourse, must be considered.<sup>5</sup>
- (2) The meaning of "work" is unambiguous. The adjective "secure" in the relevant sense ordinarily means "free from fear of or about something".<sup>6</sup> In the context of work, that "something" would naturally be understood to primarily refer to joblessness. In other words, in the composite expression "secure work", the modifier "secure" denotes a lack of risk or anxiety about the availability of or entitlement to the work not persisting into the future. Accordingly, improving access to secure work means reducing the risk of joblessness.

<sup>3</sup> Discussion Paper at [13].

<sup>4</sup> *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Oxford English Dictionary* (online, 2023) 'secure, adj., adv., and n.1' (def 1b).

- (3) The meaning of the term “secure work”, its antithesis, “insecure work”, and the broader concept of “job security”, is contested, and to some degree, controversial. It has been the subject of extensive public debate among peak councils and industry bodies since the launch of the ACTU’s national campaign in 2011.<sup>7</sup>
  - (4) The trade union movement contends that the only work that is “secure work” is permanent full-time employment, while casual employment, fixed term work, seasonal work, independent contracting, labour hire and part-time employment are all characterised as “insecure work”.<sup>8</sup>
  - (5) This definition does not accord with the natural and ordinary meaning of the words constitutive of the term. There is nothing indicative of a legislative intention for a construction of the term that would mean that the Commission should aim to “improve access” to permanent full-time employment “across the economy” by disfavouring, disincentivising or disturbing the usage of alternative forms of work.
  - (6) While ACCI will refer to full time and part time employment in this submission as ‘permanent work’ it should be noted that the Full Bench in the *4 yearly review of modern awards – Casual employment and Part-time employment*<sup>9</sup> stated that this description is a misnomer.
11. Since ACCI put forward this position, the concept of job security and the updated objects were discussed by the Expert Panel in the AWR 2022-23 as follows<sup>10</sup>:

“[28] .. In the award context, job security is a concept which is usually regarded as relevant to award terms which promote regularity and predictability in hours of work and income and restrict the capacity of employers to terminate employment at will. The award provisions which are likely to be most pertinent in this respect are those which concern the type of employment (full-time, part-time, casual or other), rostering arrangements, minimum hours of work per day and per week, the payment of weekly or monthly rather than hourly wages, notice of termination of employment and redundancy pay (noting that a number of these matters are dealt with in the NES).

[29] Beyond the immediate award context, job security has a broader dimension and may be understood as referable to the effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, especially on a permanent rather than casual basis ...”

12. The Expert Panel also observed:

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<sup>7</sup> Australian Council of Trade Unions, ‘Unions launch new campaign for secure jobs and a better future for Australian workers’ (Media Release, 28 September 2011).

<sup>8</sup> See Australian Council of Trade Unions, Submission No 98 to Select Committee on Job Security, *Inquiry into the impact of insecure or precarious employment* (30 April 2021) [3].

<sup>9</sup> [2017] FWCFB 3541.

<sup>10</sup> Annual Wage Review Decision 2022-23 [2023] FWCFB 3500.

“[30] ... paragraph 334 of the REM explains that the reference to promoting job security in s 3(a) recognises the importance of employees and job seekers ‘having the choice’ to be able to enjoy as much as possible ‘ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment’. We see no reason to consider that the expression ‘secure work’ in s 134(1) (aa) bears any substantially different connotation to ‘job security’ in s 3(a). However, we consider that it is significant that s 134(1)(aa) refers to ‘the need to improve access’ to secure work rather than the general promotion of job security. The language of s 134(1)(aa) suggests that it is more tightly focused on the capacity of employees to enter into work which may be characterised as secure. This appears to reflect the REM’s reference to the importance of employees being able to have a ‘choice’ to enter into secure employment. As such, the consideration in s 134(1)(aa) would appear to direct attention primarily to those award terms which affect the capacity of employees to make a choice...”

13. Relevant to this Review, the Expert Panel’s view may be summarised as follows:

- (1) The term “secure work” in s 134(1)(aa) does not bear any substantially different connotation to ‘job security’ in s 3(a), but “job security” has a broader dimension which may be understood as referable to the “effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, especially on a permanent rather than casual basis”.<sup>11</sup>
- (2) The terms “job security” and “secure work” are concepts which are usually regarded as relevant to award terms which promote regularity and predictability.<sup>12</sup>
- (3) It is significant that s 134(1)(aa) refers to the “need to improve access” to secure work. The Expert Panel suggests that this means that the modern awards objective is more tightly focused on the capacity of employees to enter into work which may be characterised as secure, especially the capacity of employees to have a “choice” to enter into secure work.<sup>13</sup>

14. Consistent with the view of the Expert Panel, ACCI submits that when considering whether the terms of modern awards appropriately reflect the updated objectives, the Commission should consider whether they improve access to secure work, taking into account:

- (1) whether the employee has a choice to enter into work which promotes regularity and predictability; and
- (2) the effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, especially on a permanent rather than casual basis.

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<sup>11</sup> Annual Wage Review Decision 2022-23 [2023] FWCFB 3500 at [29].

<sup>12</sup> Annual Wage Review Decision 2022-23 [2023] FWCFB 3500 at [28].

<sup>13</sup> Annual Wage Review Decision 2022-23 [2023] FWCFB 3500 at [30].



15. The effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, is clearly relevant to whether an employee has a choice to enter into secure work. If economic circumstances are such that the employer cannot offer employees work, then the employee will be deprived of this choice.
16. It is through this lens that the Commission should consider whether a modern award term is consistent with the updated objectives. It should avoid any interpretation of the updated objectives which, for example, may deprive employees of a choice to enter into non-permanent forms of work (casual, fixed term etc employment) and must take into account the economic impact on the employer, and relatedly, the capacity for that employer to offer work.
17. At [334] of the Revised Explanatory Memorandum (**REM**) to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, it says “the reference to promoting job security recognises the importance of employees and job seekers having the choice to be able to enjoy, to the fullest extent possible, ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment” (emphasis added). To the extent that the concept of “beneficial wages and conditions” is relevant to the present matter, we submit that it only seeks to highlight the Parliament’s view that regular and predictable forms of work (i.e., permanent forms of work) provide more beneficial wages and conditions of employment.
18. While ACCI does not support this view, noting that non-permanent forms of work provide many advantages to those employees seeking flexibility in work, with appropriate financial compensation (casual loadings) for an absence of leave entitlements, these words should not be read to support the proposition that ‘secure work’ supports a review of wages and of conditions of employment unrelated to modern award terms which promote regularity and predictability. Improving access to ‘secure work’ does not include an assessment of wage rates or modern award terms which do not go to regularity or predictability.
19. For completeness, we note that before the Commission can consider any specific proposals for variations to modern award terms it must have regard to all other section 134 matters, not just s 134(1) (aa), which is the subject of this Review.<sup>14</sup> No particular primacy is attached to any individual s 134 consideration.<sup>15</sup>

#### Relevant modern award terms

20. ACCI will advance submissions regarding which modern award terms are relevant to the concept of “job security” and “secure work” in the second part of this submission, which responds directly to the questions set out in the Discussion Paper.

#### Proposed Closing Loopholes legislation

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<sup>14</sup> *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retailers Association v Fair Work Commission* (2024) 225 154 at [56]

<sup>15</sup> *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC at [48]

21. At [2.2.5] of the Discussion Paper, the impacts of the *Fair Work Legislation Amendment (Closing Loopholes No 2) Bill 2023 (Cth)* (**Closing Loopholes Bill**) is discussed. While ACCI agrees that the proposed legislation, especially those provisions dealing with casual employment, may have relevance to the Review, it is highly contentious and remains before the Federal Parliament. There is no certainty as to whether the proposed laws will pass the Federal Parliament, nor whether it will remain in its current form unamended.
22. Accordingly, it would be inappropriate for the Review to involve consideration of proposed laws until such time as they pass both Houses of Parliament. If this should happen during the course of the Review, ACCI will provide additional submissions on their impact.

*Independent contracting/ digital platform work*

23. The Discussion Paper, including at [3.4.5] states the view, advanced by the union movement, that the recent advent of independent contracting in the on-demand platform or ‘gig’ economy has been identified as a form of insecure work.
24. While ACCI rejects the characterisation of platform work as negative, noting the advantages such work can provide for those looking for supplementary income and for those who may be in-between substantive jobs, it submits that these considerations have no bearing on this Review.
25. Independent contractors are excluded from the coverage of modern awards, which are the instruments under review.

**“The issue of job security?”**

26. Chapter 3 of the Discussion Paper provides an overview of the so-called issue of job security, and prevalence of ‘insecure work’ in Australia. It seeks to summarise competing concepts of job security and analyses data when considering whether job security is growing.
27. As the competing definitions of “job security” set out in Chapter 3 of the Discussion Paper are general concepts only, and do not seek to define either “job security” or “secure work” for the purposes of this Review, or otherwise specific to the modern award context, ACCI does not propose to respond to those arguments in this submission. Instead, ACCI will respond to more targeted submissions put forward by other parties as part of this Review process.
28. Similarly, data looking at whether non-permanent forms of work are rising or not, while relevant to the policy behind introducing the updated objectives, is not directly relevant to the Review, namely, to ensure that modern award terms reflect the updated objectives.
29. In response to arguments put forward in the Discussion Paper about the so-called consequences of job insecurity and its growth in Australia, ACCI wishes to highlight the following:
  - (1) ACCI continues to support submissions it put forward during the Senate Select Committee on Job

Security, and summarised in the Discussion Paper<sup>16</sup>, including that workers are increasingly interested in alternative forms of employment and that non-standard arrangements ‘have an increasingly important role to play in ensuring an agile and productive workplace as the needs of the modern economy cannot and will not be met by employing only permanent employees’.<sup>17</sup>

(2) ACCI is pleased to see that the Discussion Paper confirms that data “supports some of these claims”.<sup>18</sup> This includes research published by the University of Melbourne, which found that a range of labour force statistics show no rising trend in job insecurity over time.<sup>19</sup>

(3) Updated data from the Australian Bureau of Statistics (**ABS**), confirms that this research is still relevant. This includes that:

a. The incidence of casual employment as a percentage of persons employed has reduced since 2014. In 2014, 24.1% of employed persons were casual. Over the decade, that figure has declined to 22%.<sup>20</sup>

b. The number of fixed term contracts, cited by the union movement as a form of ‘insecure work’, has reduced both as a percentage of the employed population and the total number of employees over the decade. In 2014 3.7% of the workforce or 355,600 employees were on a fixed term contract. In 2023, 3% of the workforce or 345,000 employees were on a fixed term contract.<sup>21</sup>

c. Similarly, and again, nominated by the union movement as a form of ‘insecure job’, labour hire workers (as a main job) has slightly risen since 2014 from 217,200 people to 270,500 in 2023. However, that figure has decreased from a peak of 309,300 people in 2019.<sup>22</sup> As a proportion of all employed people, however, labour hire workers (as a main job) make up 1.9% of the working population. That is an uptick of merely 0.1% since 2014 when the rate was 1.8%.<sup>23</sup>

(4) While perceptions of job security has risen, especially following labour market disruptions during the COVID-19 pandemic,<sup>24</sup> RBA research published in late 2021, established that workers consistently overestimate their risk of job loss.<sup>25</sup> The actual job loss rate was lower than the self-estimated probability of job loss. In this sense employees tend to feel more insecure in their employment than

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<sup>16</sup> Discussion Paper at [61].

<sup>17</sup> Australian Chamber of Commerce and Industry, Submission 71 to Senate Select Committee, *Inquiry on Job Security*, March 2021, p.18.

<sup>18</sup> Discussion Paper at [62].

<sup>19</sup> Mark Wooden, ‘Insecure employment: Do we really have a crisis?’ In P Dawkins and A Payne eds., *Melbourne Institute Compendium 2022: Economic and Social Policy. Towards Evidence-Based Policy Solutions*, University of Melbourne, pp.46-59, 49.

<sup>20</sup> Australian Bureau of Statistics, [Working Arrangements](#), Release: December 2023.

<sup>21</sup> Australian Bureau of Statistics, [Working Arrangements](#), Release: December 2023.

<sup>22</sup> Australian Bureau of Statistics, [Labour Hire Workers](#), Release: September 2023.

<sup>23</sup> Australian Bureau of Statistics, [Labour Hire Workers](#), Release: September 2023.

<sup>24</sup> Roger Wilkins et al, the Household, Income and Labour Dynamics in Australia Survey: Selected findings from Waves 1 to 20 – *The 17<sup>th</sup> Annual Statistical Report of the HILDA Survey* (Melbourne Institute, University of Melbourne, 2022), p 86.

<sup>25</sup> ‘Job Loss, Subjective Expectations and Household Spending’, Gabrielle Penrose, Gianni La Cava, Reserve Bank of Australia, August 2021.

they actually are. These findings are particularly relevant in the face of the latest ABS data available which indicates that the annual retrenchment rate in Australia is the lowest it has ever been on record, sitting at 1.4%.<sup>26</sup>

- (5) If retrenchment rates are taken to be actual job insecurity, on the latest measurement job insecurity is at its lowest rate since such data was recorded. This must play a strong role in any consideration over the perception of employees of job insecurity, which, again, research from the RBA indicates is consistently overestimated.
  - (6) As noted in the Discussion Paper at [64], the Expert Panel observed, in the AWR 2022-23 decision, that the capacity of persons to obtain employment over the previous 12 months has been at its highest point since the 1970s and that most of the job growth in the past 12 months has been in full-time employment.<sup>27</sup> The Expert Panel observed that, excluding the COVID-19 lockdown-affected period in mid-2020, the proportion of casual employees, based on quarterly data, was at its lowest since August 2014. The Expert Panel also observed that data suggests the capacity of persons to access secure employment across the economy is currently at its highest for the last decade.<sup>28</sup>
30. In summary, data clearly establishes that the rate of non-permanent work has remained steady for two decades. It also demonstrates that access to secure employment across the economy is currently at its highest for the last decade and the rate of labour underutilisation is about as low as it has been in three decades.<sup>29</sup> The only statistic pointing in favour of rising 'insecure work' is workers own perception of insecurity, which RBA research demonstrates is not matched by reality.
31. To the extent that this data is relevant to the Review, it demonstrates that our modern award settings, taken as a whole, cannot be contributing to rising 'job insecurity', as that concept is generally understood by the union movement, as there is no evidence to support any growth in this area at all.

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<sup>26</sup> Job mobility survey, ABS, Released 30 June 2023.

<sup>27</sup> Annual Wage Review 2022-23 [2023] FWCFB 3500 at [143].

<sup>28</sup> *Ibid* at [144].

<sup>29</sup> Mark Wooden, 'Insecure employment: Do we really have a crisis?' In P Dawkins and A Payne eds., *Melbourne Institute Compendium 2022: Economic and Social Policy. Towards Evidence-Based Policy Solutions*, University of Melbourne, p. 49.

## Discussion Paper Questions

(1) **Are there specific provisions in the seven modern awards the subject of this review that parties consider are necessary to improve access to secure work across the economy? Parties are asked to specifically consider provisions dealing with:**

**a. Types or modes of employment:**

32. All seven most commonly used modern awards provide that employees are to be employed in one of the three main types of employment<sup>30</sup>, being full time, part time or casual employment.
33. As is clear from the Discussion Paper, at [132]-[133], full time work is defined consistently across all awards, noting exceptions for sectors with variable hours or to account for rostering arrangements. While there is some limited variations for part-time work, in all cases it must provide 'reasonably predictable hours' as agreed between employers and employees. It is clear that part-time employment is a form of secure work, as that concept is understood for the purposes of this Review, because of the predictability of hours. Any attempt by union parties to categorise part-time employment as 'insecure work', which many have done publicly, should be rejected by the Commission.
34. It is clear that both full time and part time employment is consistent with the objective of improving access to secure work across the economy.
35. While casual employment, by its very nature, does not guarantee predictability or regularity of work, it is nonetheless an important third category of employment, which provides necessary flexibility for the employer, who will not otherwise be able to provide a more permanent role, because of the unpredictable or irregular nature of the work needed. Casual employees who chose to enter into these arrangements also find this flexibility beneficial, especially for those just starting out in the workforce and those with caring responsibilities.
36. A casual loading of 25% is generally paid to casuals in lieu of a range of entitlements owed to permanent employees, including annual leave, personal/carer's leave, compassionate leave, payment for absence on a public holiday, payment in lieu of notice of termination; and redundancy pay. It is therefore, not correct, to say that casual employees are not entitled to many of the entitlements in the National Employment Standards (**NES**). Different types of employment receive different entitlements by their nature.

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<sup>30</sup> Discussion Paper at [131].

37. Additionally, the default approach of the Commission regarding the interaction between the casual loading and penalty rates for weekend and public holidays is for the casual loading to be added to the penalty rate of a permanent employee.<sup>31</sup> The Productivity Commission had recommended this default position, adopted by the Full Bench, on the basis that “it would make an employer indifferent, at the margin, between hiring a permanent employee over a casual employee. It would also be consistent with the desirability of ‘equal pay for equal work’”.<sup>32</sup>
38. ACCI submits that this is sufficient to offset all appropriate entitlements provided to permanent employees, meaning that employees who choose to be casuals for the flexibility it provides them are not disadvantaged in their employment when compared to permanent employees.
39. For those employees who do not wish to stay as casuals, they have a right to convert to permanency. Currently, under the NES, a casual employee within the meaning of s 15A of the FW Act is eligible to request a casual conversion if they have worked for their employer for 12 months or longer and, in the 6-month period ending on the day the request is given, with a ‘regular pattern of hours ... without significant adjustment’.<sup>33</sup> The Full Bench has also decided that the inclusion of a casual conversion clause was necessary in all modern awards.<sup>34</sup>
40. The casual conversion element ensures that casuals who remain casuals do so largely out of choice.
41. ACCI would reject any submissions put forward by other parties in this Review, which would have the effect of reducing the availability of casual employment on the basis that it would be inconsistent with the updated objective to improve access to secure work, namely because it would negate the choice of employees to enter into more flexible forms of work.

**b. Rostering arrangements, including rostering restrictions:**

42. As discussed in the Discussion Paper at [4.1.3], modern awards have a wide range of provisions concerning rostering arrangements. While it’s clear that rostering arrangement terms are terms which go to regularity and predictability, ACCI would reject any submissions put forward by other parties which would seek to wind back an employer’s right to vary rostering arrangements, when necessary, after providing notice and/or consulting about such a change. Disputes around rostering of hours are subject to dispute resolution processes specified elsewhere in the award, and covered at [4.2] of the Discussion Paper.

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<sup>31</sup> 4 yearly review of modern award – *Overtime for casuals* [2019] FWCFB 6953, [2020] FWCFB 4350 and [2020] FWCFB 5636.

<sup>32</sup> Productivity Commission, Inquiry report – *Workplace Relations Framework*, Volume 1, 30 November 2015, p.496.

<sup>33</sup> Fair Work Act 2009, section 66F(1).

<sup>34</sup> 4 yearly review of modern awards – *Casual employment and Part-time employment* [2017] FWCFB 351.

43. While notice, and, where necessary, consultation requirements assist in improving employees' access to secure work, ACCI submits that rostering arrangements often go to the heart of business operations and any submissions seeking to curtail employers' ability to manage its workforce by removing reasonable unilateral variations to rostering will likely have significant consequences upon the capacity of employers to employ, or continue to employ, workers, especially on a permanent rather than casual basis.

44. ACCI will respond more fully to any proposed variations to rostering terms as the Review progresses.

**c. Payment of wages, in particular pay cycles:**

45. ACCI submits that payment of wages in particular pay cycles, whether that be weekly, fortnightly or monthly<sup>35</sup>, is not a term which deals substantially with regularity or predictability of work. Employees, regardless of employment type, receive pay in a regular cycle and can plan accordingly.

46. ACCI will respond to any submissions seeking to propose a variation to such terms as the Review progresses.

**d. Agreed regular patterns of work or guaranteed hours for part time employees:**

47. The Discussion Paper summarises the various provisions in the specific modern award terms at [4.1.5].

48. ACCI will respond to any specific submissions put forward by other parties regarding any proposed variations to these terms as the Review progresses.

**e. Minimum engagement/ payment periods**

49. ACCI will respond to any specific submissions put forward by other parties regarding any proposed variations to these terms as the Review progresses.

**(2) Are there any additional specific award provisions that are consistent with the new modern awards objective? If so, parties are asked to consider and address whether it is relevant and necessary to vary any awards to include that or those specific award provision(s).**

50. ACCI does not propose to put forward submissions on any additional specific award provisions but will respond to any other party's submission to this effect as the Review progresses.

**(3) Are there specific award provisions that are not consistent with the new modern awards objective? If so, parties are asked to address whether it is relevant and necessary to vary any awards to amend or remove that specific award provision.**

51. ACCI does not propose to put forward submissions to vary any awards, to amend or remove specific award provisions, but will respond to any such proposals from other parties as the Review progresses.

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<sup>35</sup> Fair Work Act 2009, section 323.



**(4) Having regard to the new modern awards objective, should the exclusion of casual employees from accessing certain NES entitlements (such as paid personal leave) continue?**

52. The exclusion of casual employees from accessing those certain NES requirements should continue, having regard to a survey undertaken of employers by ACCI (see annexures A and B) and noting that by nature of the form of engagement certain NES entitlements only apply to certain categories of employee.
53. The vast majority of employers expressed serious concerns about their ability to continue to engage casuals at existing levels if they were required to pay casuals NES entitlements generally reserved for permanent employees in addition to casual loading.
54. 88.16% of casual-employing respondents said it would negatively impact their business if they were required to pay casual employees entitlements afforded to permanent employees in addition to their casual loading.
55. 81.58% of casual-employing respondents said they would not continue to engage casuals at existing levels if they were required to pay casual employees entitlements afforded to permanent employees in addition to their casual loading.
56. This is particularly salient when looking to responses to questions about employers' ability to convert casual employees to full time or part time. 39.47% of casual-employing respondents said they would reduce staffing levels if they were required to convert all casuals to full time or part time. 10.53% of casual-employing respondents said they would scale down their businesses if they were required to convert all casuals to full time or part time. 13.16% of casual-employing respondents said they would adjust their business model (including increasing fees to customers) if they were required to convert all casuals to full time or part time.
57. In this respect, not only would many employees lose the opportunity to choose casual work, as per paragraph [55], but those same workers may lose their employment all together due to the negative operative impact of converting casual employees.
58. In this sense, if casuals were to be afforded access to the NES entitlements generally reserved for permanent employees in addition to the casual loading, it would lead to higher job insecurity as many employers would not retain the ability to engage those casuals at existing levels.
59. This would therefore inhibit the ability of employers to continue to offer work to employees in the form which they may prefer.
60. Furthermore, casual employees would be less likely to receive hours and work under a model that requires access to certain NES entitlements in addition to the casual loading.



61. Requiring the provision of such entitlements in addition to the casual loading could be considered to have the effect of reducing the availability of casual employment on the basis that it would be inconsistent with the updated objective to improve access to secure work, namely because it would negate the choice of employees to enter into more flexible forms of work.
62. The exclusion should continue.
- (5) Should any of the awards be varied to supplement these NES entitlement gaps for casual employees?**
63. Awards should not be varied to allow casual employees to access additional NES entitlements, noting that they already receive a casual loading.
64. As stated above, doing so could result in many employers ceasing to engage casual employees at existing levels due to the negative operative impacts that such a change would incur. Casuals would lose hours and/or the availability of such work would reduce, and not only would those employees lose access to that flexibility, but they could lose their employment altogether due to the negative operative impact conversion could incur as mentioned at paragraphs [55] through to [57].
65. In this sense, if modern awards were varied to provide those NES entitlements to casual employees in addition to the casual loading, the result would be a negation of choice of employees to enter into more flexible forms of work, which they may genuinely prefer, and the potential for existing casual employees to lose their employment altogether.
- (6) Is there evidence that use of individual flexibility arrangements (IFAs) undermine job security?**
66. ACCI refers to its submission to the Making Awards Easier to Use stream of the Modern Award Review.<sup>36</sup>
67. IFA clauses serve a critical purpose. Given the diversity of workplaces, the terms of modern awards are not always suitable for every working arrangement. IFA's provide a mechanism for allowing employers and employees to agree to arrangements that differ from the terms of an award, without leaving a worker worse off. IFAs are designed to provide such a mechanism. They benefit employers and employees who choose to enter into them.
68. It would incorrect to assert such agreements undermine job security. The legislation clearly outlines that agreements are only implemented via consent of the employee.<sup>37</sup> Furthermore, an employee must be better off overall than they would have been if no individual flexibility arrangement were agreed to.<sup>38</sup>
69. Unfortunately, however, IFAs are rarely used. In the General Manager of the FWC's most recent report into the use of IFAs pursuant to section 653, of all respondents (comprising employers, unions, employer

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<sup>36</sup> ACCI Submission to the Making Awards Easier to Use stream of the Modern Award Review, 22 December 2023.

<sup>37</sup> Fair Work Act 2009, section 144.

<sup>38</sup> Ibid.

associations and legal practitioners) 64.9% had been involved in the making of or responding to 10 or fewer IFAs between 2018 and 2021.<sup>39</sup>

70. The feedback that ACCI persistently receives from employers and their representatives is that the low utilisation of IFAs is largely attributable to the administrative complexity and burden required by IFA clauses.

71. ACCI has submitted a proposal in the Award Simplification stream of the Modern Awards Review 2023-24 in its submission to that stream at paragraph [7.1.] to vary IFA terms to make them more workable.<sup>40</sup>

**(7) Having regard to the following modern award standard clauses:**

- (2) **Individual flexibility arrangements;**
- (3) **Consultation about major workplace change;**
- (4) **Consultation about changes to rosters or hours of work;**
- (5) **Dispute resolution;**
- (6) **Termination of employment; and**
- (7) **Redundancy.**

**a. Are provisions of the standard clauses consistent with the new modern awards objective?**

72. ACCI submits that standard clauses referenced in the above question are not inconsistent with the new modern awards objective.

**b. Do any of the standard clauses negatively impact job security? If so, how?**

73. ACCI does not submit that the standard clauses referenced above negatively impact job security.

**c. Do any or any part of the standard clauses:**

- i. Prevent or limit access to secure work?**
- ii. Enhance access to secure work?**

74. ACCI does not submit that the standard clauses referenced above prevent or limit access to secure work.

75. ACCI does not submit that any part of the standard clauses necessarily enhance access to secure work.

**(8) Are there variations to the standard clauses that could improve access to, or remove barriers to accessing, the standard clauses by employees who are vulnerable to job insecurity?:**

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<sup>39</sup> 'General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009', Fair Work Commission, November 2021.

<sup>40</sup> ACCI Submission to the Making Awards Easier to Use stream of the Modern Award Review, 22 December 2023.

76. ACCI does not submit here to propose any variations to the standard clauses but will respond to other parties seeking variations.

## ANNEXURE A: Survey Questions

### Survey questions:

1. Do you employ casual employees?

Yes/No

(if no please proceed to question 10)

2. Do you use casuals only to meet surge demand?

Yes/No

3. Would you be able to convert all casuals to full time or part time employment without impacting your operations negatively?

Yes/No

4. Have any casuals you employed ever made a formal request to convert to full-time or part-time employment?

Yes/No

5. What would be your response if you were required to convert all casual employees to full-time or part-time employment?

Reduce staffing levels

Scale down the business

Adjust business model

Increase automation

Invest or shift resources overseas

Close the business

Nothing (I would be in a position to convert all casuals to permanent)

Other (please list)

6. Would it negatively impact your business if you were required to pay casual employees entitlements afforded to full-time and part-time employees (annual leave, personal leave, redundancy pay, etc) in addition to their casual loading?

Yes/No

7. Would you continue to engage casual employees at existing levels if you were required to pay them such entitlements in addition to their casual loading?

Yes/No

8. Would you continue to engage casual employees at existing levels if you were required to provide them with a set minimum number of hours per week, rather than for a minimum number of hours per occasion they attend work?

Yes/No

9. Would you continue to engage casuals at existing levels if you were forced to provide them with a regular roster and to pay overtime for each hour worked outside their regular roster?

Yes/No

10. Do you engage part time employees?

Yes/No (if no please proceed to 14)

11. Would it negatively impact your business if you were required pay part-time employees overtime for each additional hour outside their regular roster or guaranteed hours??

Yes/No

12. Would you offer additional work to part-time employees for if you were required to pay overtime for each hour outside their regular roster or guaranteed hours?

Yes/No

13. Would you continue to engage part-time workers at existing levels if you were required to convert them to full-time if they had regularly worked over 35 hours in a week for 12 months?

Yes/No

14. Have you ever had an employee request an individual flexibility arrangement?

Yes/No

15. Do you or have you had an individual flexibility arrangement with an employee?

Yes/No (if No please proceed to 18)

16. Have these arrangements been with male or female employees?

Male

Female

Both

**17.** Who initiated these arrangements?

The employee

The business

Both

**18.** Do you employ any employees on a fixed term contract?

Yes/No (if no proceed to 21)

**19.** Would you be able to convert all fixed term employees to full-time or part-time ongoing employment without impacting your operations negatively?

Yes/No

**20.** What would be your response if you were required to convert all fixed term employees to full-time or part-time ongoing employment?

Reduce staffing levels

Scale down the business

Adjust business model

Increase automation

Invest or shift resources overseas

Close the business

Nothing (I would be in a position to convert all casuals to permanent)

Other (please list)

**21.** Would you like to provide any additional information or commentary on the above questions and their content, or how the impact of any of the above policies affect or may affect your business?

[Text box]

**22.** How many people do you employ?

0-14

15-19

20-199

200+

**23.** Which State or Territory is your business in?

ACT

NSW

NT

QLD

SA

TAS

VIC

WA

**24.** Is your business in a regional or metropolitan area?

Regional

Metropolitan

Other

**25.** Would you be willing to be contacted about your answers?

Yes/no (if no finish survey)

**26.** Please provide your details.

Business Name, Phone Number, Email

## ANNEXURE B: Survey Results

There were 119 respondent businesses.

### **Casual Employment Arrangements**

62.18% of businesses employ casual employees.

61.84% of casual-employing respondents only use casuals to meet surge demand.

68.42% of casual-employing respondents said that it would impact their operations negatively if they were required to convert all casuals to full time or part time.

77.63% of casual-employing respondents said they had ever had a casual make a formal conversion request.

39.47% of casual-employing respondents said they would reduce staffing levels if they were required to convert all casuals to full time or part time.

10.53% of casual-employing respondents said they would scale down their businesses if they were required to convert all casuals to full time or part time.

13.16% of casual-employing respondents said they would adjust their business model (including increasing fees to customers) if they were required to convert all casuals to full time or part time.

88.16% of casual-employing respondents said it would negatively impact their business if they were required to pay casual employees entitlements afforded to full time or part time employees in addition to their casual loading.

81.58% of casual-employing respondents said they would not continue to engage casuals at existing levels if they were required to pay casual employees entitlements afforded to full time or part time employees in addition to their casual loading.

57.89% of casual-employing respondents said they would not continue to engage casual employees at existing levels if they were required to provide them with a set minimum number of hours per week, rather than for a minimum number of hours per occasion they attend work.

77.92% of casual-employing respondents said they would not continue to engage casual employees at existing levels if they were required to provide them with a regular roster and to pay overtime for each hour worker outside their regular roster.

### **Part Time Employment Arrangements**

56.25% of respondent businesses employ part time employees.

70.15% of part time-employing respondents said it would negatively impact their business if they were required to pay part time employees overtime for each additional hour outside their regular roster or guaranteed hours.



76.12% of part time-employing respondents said they would not offer additional work to part time employees if they required to pay overtime for each hour outside their regular roster or guaranteed hours.

48.53% of part time-employing respondents said they would not continue to engage part time workers at existing levels if they were required to convert them to full time if they had regularly worked over 35 hours in a week for 12 months.

### **Individual Flexibility Arrangements**

51.82% of respondent businesses had never had an employee request an individual flexibility arrangement.

52.73% of respondent businesses had never had an individual flexibility arrangement with an employee.

25.00% of respondents, which had had an individual flexibility arrangement with an employee, had only had such an arrangement with a male employee.

21.15% of respondents, which had had an individual flexibility arrangement with an employee, had only had such an arrangement with a female employee.

53.85% of respondents, which had had an individual flexibility arrangement with an employee, had had such an arrangement with both female and male employees.

59.62% of respondents, which had had an individual flexibility arrangement with an employee, had the employee initiate the arrangement.

5.77% of respondents, which had had an individual flexibility arrangement with an employee, had initiated the arrangement.

34.62% of respondents, which had had an individual flexibility arrangement with an employee, had had an arrangement initiated by both the employee and the business.

### **Fixed Term Contract Employment Arrangements**

8.62% of respondents employ an employee on a fixed term contract.

84.62% of fixed term contractor-employing respondents said they would not be able to convert all fixed term contractors to full time or part time ongoing without it impacting their operations negatively.

73.33% of fixed term contractor-employing respondents said they would reduce staffing levels if they were required to convert all fixed term contractors to full time or part time ongoing employment.

### **General Information About Respondents**

74.48% were a small business (62.24% had 0-14 employees, 12.24% had 15-19 employees)

22.45% were a medium sized business (20-199 employees)

3.06% were a large business (200+ employees)

49.98% of respondents were from a regional area

46.94% of respondents were from a metropolitan area

4.08% said they were from other (generally indicating business represented in both metropolitan and regional areas)

26.53% of respondents were from Western Australia

22.45% of respondents were from South Australia

18.37% of respondents were from New South Wales

18.37% of respondents were from Victoria

7.14% of respondents were from Queensland

4.08% of respondents were from the Northern Territory

3.06% of respondents were from Tasmania

No responses from the Australian Capital Territory



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