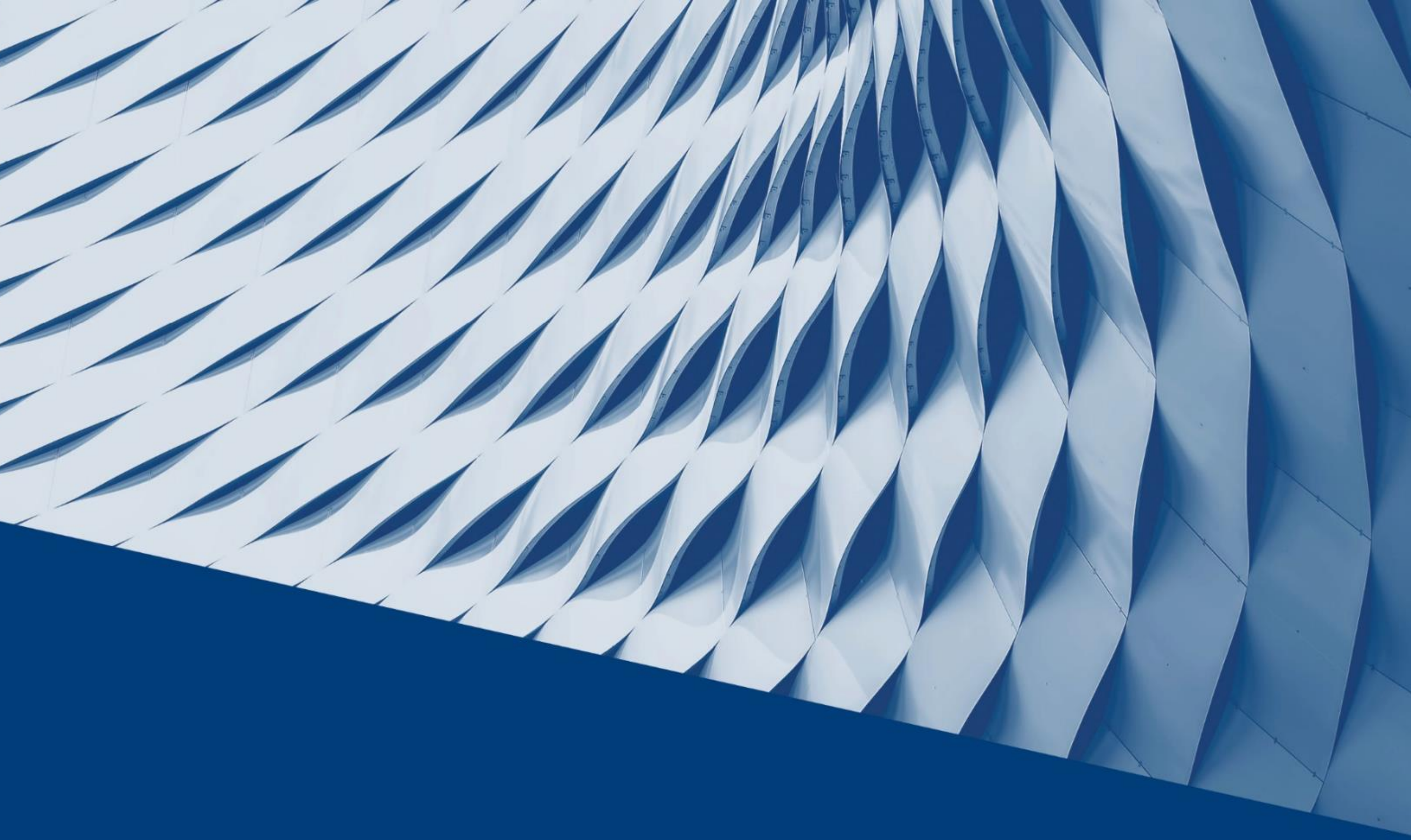

Supplementary Submission to the Annual Wage Review 2023-24

ACTU Submission, 17 May, 2024
ACTU D. 39 /2024

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1. INTRODUCTION AND OVERVIEW

1. This supplementary submission seeks to assist the Panel in the following ways:
    a. By proving commentary and analysis on data and research that has come to hand since the filing of reply submission on 29 April (Chapter 2);
    b. By responding to Questions on Notice that the Panel circulated on 6 May 2024 (Chapter 3);
    c. By discussing the significance and relevance of initiatives announced in the 2024-25 Budget (Chapter 4);
    d. By responding to submissions that engaged with the proposals we advanced in our initial submission concerning addressing gender equality considerations in this Review (Chapter 5); and
    e. By responding more generally to propositions advanced in the reply submissions of other parties (Chapter 6).

   We have endeavoured to address the above matters as succinctly as possible, however the proper interrogation of matters raised has at times required detailed analysis and discussion.

2. None of the matters raised by opposing parties, or the developing social and economic context, demand a reconsideration of the outcomes we seek in this review. In particular:
    a. The cost of living crisis has continued to measurably effect households, including with respect to essential items such as housing;
    b. Real wages are growing, albeit slightly slower than forecast, continuing pressure on households but consistent with input cost pressures abating and inflation returning to target in a reasonable timeframe;
    c. Inflation has moderated more quickly than earlier forecasts had predicted;
    d. Despite an uptick, unemployment and underemployment rates remain low relative to their pre-pandemic averages. Continued employment growth is expected, notwithstanding some rise in the unemployment rate;
    e. Net business entry is increasingly positive and in line with our previous analysis, and strong business investment as recently observed is expected to continue.

3. The criticisms and assertions advanced in reply submissions by particular employer groups are shown not to withstand careful analysis and we urge the Panel to reject them.

4. We look forward to participating in the consultations on 22 May 2024.

2. RECENT DEVELOPMENTS

5. In this section, we briefly discuss new economic commentary and forecasts from the Treasury as well as recent releases of data and research which are relevant to the Panel's deliberations.

2.1 Selected Living Cost Indexes

6. The employee households cost of living index rose 1.7 per cent in the March quarter, up from 1.1 per cent in December, and increased 6.5 per cent over the year, down from 6.9 per cent annual growth in December (see Figure 1).

7. The increase in the cost of living index for employee households was three percentage points higher than growth in the CPI, reflecting increases in interest rates, higher insurance premiums and higher food prices (see Figure 2).

Figure 1: Growth in employee household cost of living index

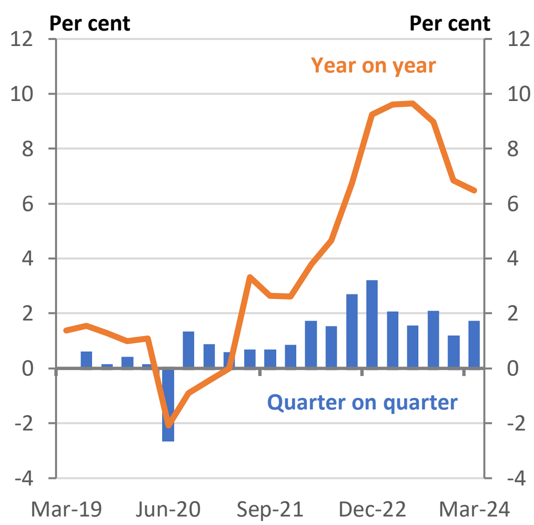
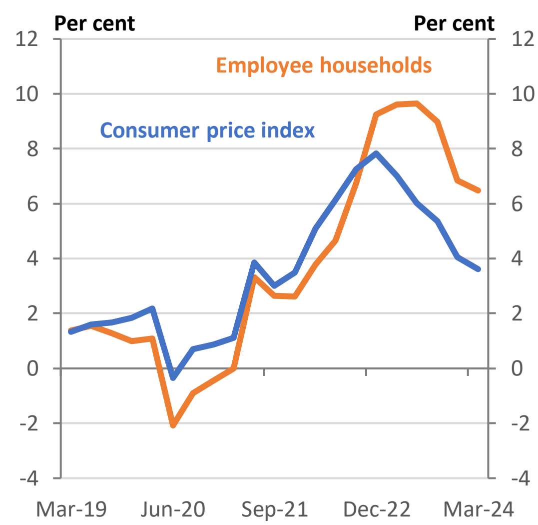


Figure 2: Annual growth in employee household cost of living index and CPI



Source: ABS Consumer Price Index, Australia, ABS Selected Living Cost Indexes, Australia & ACTU calculations

8. The employee household cost of living index illustrates that cost of living pressures remain acute and economic conditions are particularly challenging for employees as high prices for essentials drag on real incomes. These pressures will be especially sharp for lower income workers despite the welcome progress on returning inflation closer to target.

2.2 Retail trade

9. Retail trade volumes fell 1.3 per cent over the year to March 2024, the fourth consecutive quarter of annual declines in retail trade (see Figure 3).

10. According to the ABS, declines reflect a scaling back by consumers of the purchase of large household items like furniture and electronic goods and a generalised reversal of spending in response to cost of living pressures over the past two years.[1]

Figure 3: Growth in retail turnover volumes

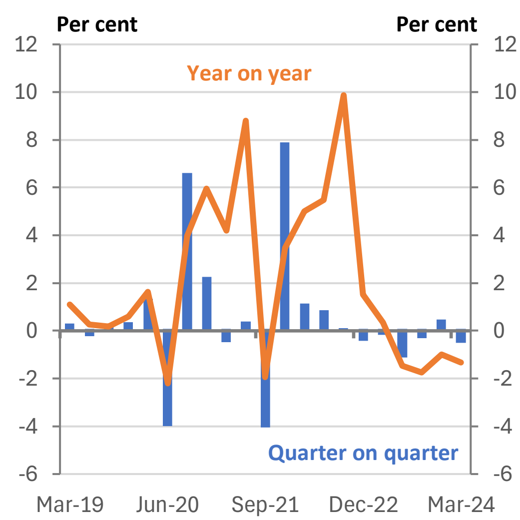
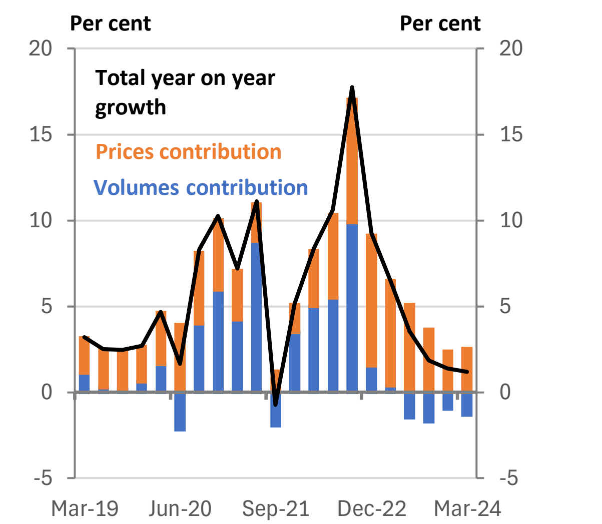


Figure X: Growth in nominal retail turnover by component



Source: ABS Retail Trade, Australia & ACTU calculations

11. The March quarter was also the fourth in a row where annual growth in nominal retail turnover was driven exclusively by prices as businesses pass on costs so that workers take the hit to real incomes while profit to income ratios remain stable or otherwise increase (see Figure 21 and Figure 45 to 47 of the ACTU's initial submission).

12. This suggests that it is workers bearing the brunt of the loss of real income as firms exercise market power to hold onto their share of national income.

[1] Retail volumes fall for the fifth time in six quarters | Australian Bureau of Statistics (abs.gov.au)

2.3 Wage Price Index

13. Wages rose 0.8 per cent in the March quarter 2024, up 4.1 per cent over the year to March (see Figure 4). The result was below market expectations of 0.9 per cent quarterly growth and 4.2 per cent annual growth. The result was also reportedly weaker than the Reserve Bank of Australia's forecasts.[2]

14. The result is suggestive of three key things:
    a. First, while still growing at a welcome rate, wage growth is easing in line with labour market conditions, consistent with expectations that the economy will slow gradually over the next year.
    b. Second, lower than forecast wages alongside the easing in inflation growth does not suggest the looming prospect of a failure of inflation to return to the Reserve Bank of Australia's target band in a reasonable timeframe, consistent with the RBA Board's strategy and stated goals.
    c. Third, while real wages are growing again, the level of real wages remains 5.3 per cent below where it was in March 2021, just prior to inflation leaving the RBA's target band (see Figure 5). This suggests that the cost of living crisis that Australia's workers are enduring is far from over and the run-up in the cost of essentials is still affecting workers acutely.

[2] Wages growth slows, lowering the chances the RBA will raise interest rates soon (afr.com)

Figure 4: Nominal wage growth

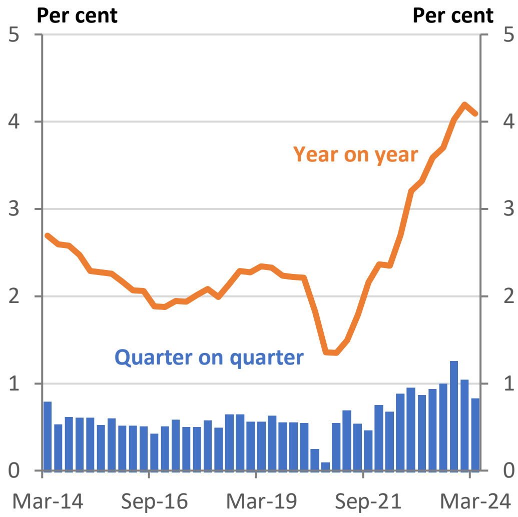


Figure 5: Real wage level

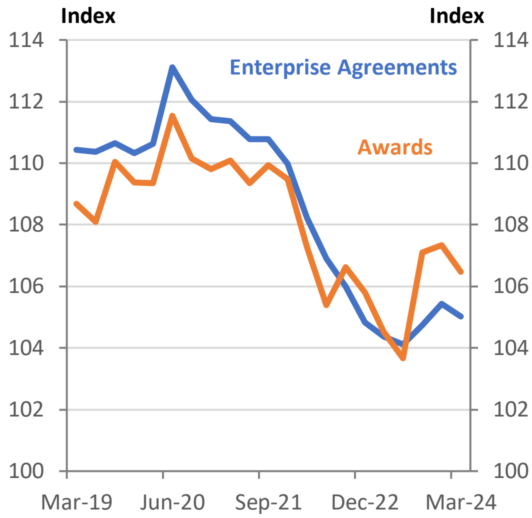
Source: ABS Wage Price Index, Australia, ABS Consumer Price Index, Australia & ACTU calculations

15. For the Panel's purposes, it is worth noting that for workers on awards, the cost of living crisis will be biting harder given the larger share of essentials that make up lower income households' consumption baskets. The cost of living challenge for award workers will be exacerbated by the institutional arrangements that see wages increase once per year only for subsequent price rises to eat away at the real value of earnings.

16. This can be seen by the decline in the level of the real wages of workers on awards (see Figure X), which fell by 0.8 per cent in the most recent quarter as a result of this mismatch between increases in award wages and increases in consumer prices. The result is that the level of real wages for workers on awards is 3.3 per cent lower than March 2021 as of March 2024.

17. This will be compounded by the fact that the Panel has in the previous three Review decisions increased award wages by less than the rate of inflation at the time the decision took effect, a further erosion of the real incomes of workers on awards and an issue that needs urgent redress (see Figure 48 of the ACTU initial submission).

Figure 6: Real wage level by pay-setting method



Source: ABS Wage Price Index, Australia, ABS Consumer Price Index, Australia & ACTU calculations

18. As indicated in the analysis of the Selected Cost of Living Indexes and Retail trade data, cost of living pressures are still acute and workers are bearing the brunt of the loss in real income during this inflationary episode.

2.4 Labour force

19. The April 2024 Labour Force release indicated that the unemployment rate increased to 4.1 per cent in April, up from 3.9 per cent in March, while the underemployment rate ticked up to 6.6 per cent, an increase on the 6.5 per cent underemployment rate in March.

20. The uptick in the unemployment rate reflects both more people without jobs and looking for work and also more people than usual indicating that they had a job that they were waiting to start.[3] A situation of a greater than normal share of people with a job that they were waiting to start occurred most recently in January 2024, resulting in an increase in the unemployment rate to 4.1 per cent before a subsequent decline to 3.7 per cent in February.

[3] Unemployment rate rises to 4.1% in April, along with higher participation | Australian Bureau of Statistics (abs.gov.au)

21. While a later decline in the unemployment rate cannot be ruled out, the slower growth in employment relative to the labour force giving rise to an increase in the unemployment rate has been expected to occur by the RBA for some time and should be understood in that context. Reserve Bank Governor Bullock told reporters following the March 2024 monetary policy decision that:

> "So, if you'll also see our forecasts, you will see employment continues to grow but it just doesn't grow quite as fast as the supply of labour. So that's mechanically why the unemployment rate rises. I think that we're focusing on that and if we can achieve that, with a slight rise in the unemployment rate while continuing to keep employment growing, I think we will have achieved our goals."[4]

22. It is also worth the Panel recalling that the unemployment rate, even at 4.1 per cent, is still well below the 5.5 per cent unemployment rate that prevailed on average in the 10 years prior to the pandemic and the underemployment rate of 6.6 per cent is below the 7.9 per cent underemployment rate that prevailed on average in the 10 years prior to COVID-19.

23. Lower unemployment and underemployment rates relative to the pre-pandemic era suggest that while the labour market may be weakening, it remains resilient. Further, said weakening can be explained by the macroeconomic factors of high inflation and the attendant cost of living crisis weighing on households, as well as the tighter monetary policy settings aimed at addressing inflation growth.

24. No candid analysis would diminish the role these accepted factors have played in easing labour market conditions in favour of a self-serving argument that wage costs have been the main, or even an important, culprit behind an easing off in employment growth. Such an effort to misdirect would surely fail if profits were currently elevated and able to shift downwards slightly to accommodate a recovery in workers' real incomes, as appears to be the case (see **Business Performance** section of this submission).

[4] Monetary Policy Decision | Speeches | RBA

2.5 Budget forecasts

25. The Budget outlook for the economy is broadly unchanged from MYEFO 2023-24, with the economy still expected to slow through 2024 before picking up again in 2025 and 2026.

26. As noted by the Treasury, inflation remains elevated but has moderated substantially, a moderation that has occurred more quickly than previously forecast. Cost of living measures by the Government are expected to help reduce inflation and not add to broader inflationary pressures. Treasury forecasts that inflation will return to the target band by June 2025 – and has suggested that the Government's cost of living measures could see inflation back in the target band by the end of 2024 (see Figure 7).[5]

Figure 7: Forecasts for headline inflation growth

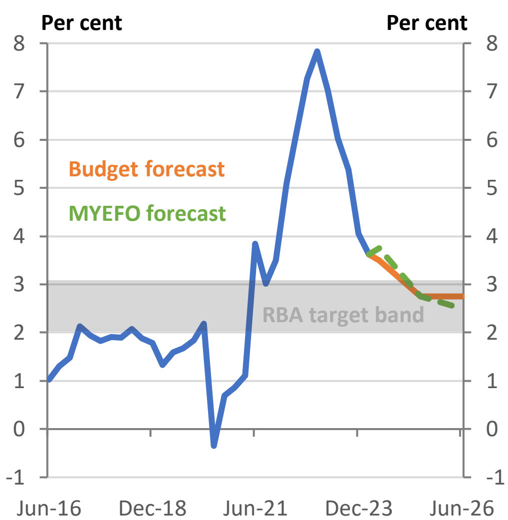
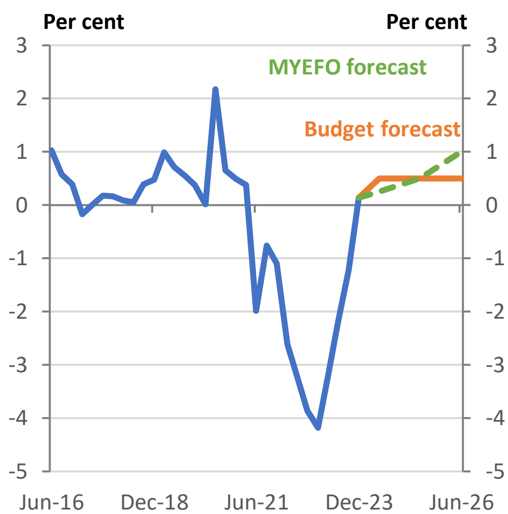


Figure 8: Forecasts for real wage growth



Source: ABS Wage Price Index, Australia, ABS Consumer Price Index, Australia, MYEFO 2023-24, Budget 2024-25 & ACTU calculations

27. Wages growth is expected to ease in line with the up-tick in the unemployment rate, consistent with MYEFO and with the most recent Wage Price Index release (see above). Real wages are expected to grow by 0.5 per cent in each of the forecast years (see Figure 8), a gradual but slow recovery from the cost of living crisis that workers have endured since June 2021.

[5] Budget Paper No. 1

28. It is worth noting in passing that the forecast rise in unemployment rate is not due to job shedding but instead employment will continue to grow but not as far as the increase in the labour force. It is also worth recalling that the unemployment rate is forecast to settle at a lower level than prevailed prior to the pandemic, namely 4.5 per cent in the detailed forecast years as opposed to the 5.5 per cent pre-pandemic average cited by the Treasury, consistent with the RBA's strategy of returning inflation to target while holding on to as many employment gains as possible.

29. Treasury notes that there is a positive outlook for business investment, reflected in both the strength of recent outcomes and forward-looking capex intentions, with business investment expected to remain at high levels (see Figure 15 in section 6.1.2 of Chapter 6). Treasury forecasts the upswing in business investment to continue through to 2025-26, which would be the longest sustained increase in business investment since the mining boom.

30. Treasury continues to expect non-mining investment to be the main driver of business investment growth over the coming years (see Figure 13 in section 6.1.2 of Chapter 6), with investments focussed on renewable energy infrastructure, data centres and warehouses.

31. Treasury's forecasts are consistent with the ACTU's view that the business sector is in good health and that the Panel is justified in having a positive outlook for productivity, given the expectations that private non-mining business investment will settle at a high level in the coming years.

2.6 Business Entries and Exits

32. On 7 May 2024, the ABS released updated information in its Counts of Australian Businesses survey which showed growth in the total count of business of 3.3 per cent in the year to the March 2024 in seasonally adjusted terms. This comes after slower growth of 2.2 per cent earlier in the year to March 2023. This improvement further supports the ACTU hypothesis, put in our initial submission at paragraphs 504 and 505 that the application and end of Covid-era supports for businesses was a significant factor in the spike and then dip in the growth rate of businesses that has now unwound.

2.7 Gender pay gap

33. Since the date of the ACTU's April submission, a report by the e61 Institute, 'Beyond Skills and Occupations: Unpacking Australia's Gender Wage Gap'[6], has been published (May 2024) which provides useful insights into drivers of the gender pay gap, using population-wide taxation data covering the Australian workforce. The findings of the report and how they relate to this Review and particular submissions made by employer associations is discussed in section 5.4 of Chapter 5 of this submission.

6 Elsye Dwyer and Silvia Griselda "Beyond Skills and Occupations: Unpacking Australia's Gender Wage Gap" e61 Institute, 3 May 2024, available at Beyond Skills and Occupations: Unpacking Australia's Gender Wage Gap – e61 INSTITUTE.

3. RESPONSE TO QUESTIONS ON NOTICE

34. In this section, we respond to the Questions directed to all parties.

3.1 Business performance

35. The Panel has asked parties what should be concluded as to the performance of the business sector given divergent conditions experienced and the recent improvements in business investment.

36. On the question of business investment, as canvassed in section 6.1.2 of Chapter 6 of this supplementary submission, notwithstanding a slowdown in the growth of investment, the level of investment expenditure is expected to settle at a higher level and support expansion of the capital stock (see Figure 15). As investment is usually undertaken because it is viewed as profitable to do so, investment expenditure settling at a higher level suggests a business sector in a solid position and with prospects enough for solid profit gains over the life of those investment projects.

37. The ACTU's view remains that the Panel has a credible foundation upon which to conclude that the business sector is in a solid position to support a wage rise of the magnitude put forward in the ACTU's initial submission. The reasons are outlined below:
    a. Capacity utilisation rates are high and above pre-pandemic averages (see Figure 5 of the ACTU reply submission).
    b. Business investment expenditure has picked up and is expected to settle at a higher level, notwithstanding an expected slowdown in growth (see Figure 14 of the initial submission and Figure 15 of this submission).
    c. Year on year non-mining profit growth remains solid and at a high level even as the economy slows (see Figure 16 of the initial submission).
    d. The non-mining profit to income ratio remains above the pre-pandemic average, despite a very slight easing as the economy slows (see Figure 21 of the initial submission).

e. In Award reliant industries, output and employment have been solid in general; vacancies remain elevated; and profit to income ratios have stabilised or otherwise risen (see **Performance of Award reliant industries** section of the initial submission).

f. Growth is expected to pick up from late 2024, driven by a pick-up in household consumption, which should flow through to increased business sales and income.[7]

3.1.1 Assertions made by Ai Group and ACCI

38. Ai Group asserted in its reply submission that capacity to pay would be better measured in real terms and that comparing the current high inflation period to the pre-COVID low inflation period is inappropriate.[8]

39. Figure 9 and Figure 10 show the level of real company profits and profits of unincorporated enterprises for the non-mining sector. Profit levels have been deflated by the price deflator for income from sales of goods and services in business indicators, which reflects the price businesses can charge for output, and the producer price index, a deflator raised by AiG in the context of its assertion.

Figure 9: Real non-mining company profit level

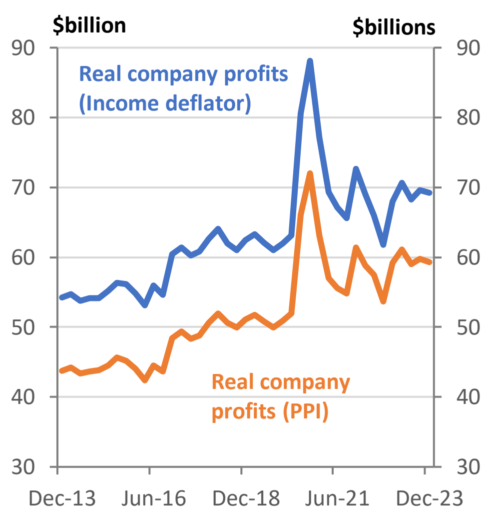
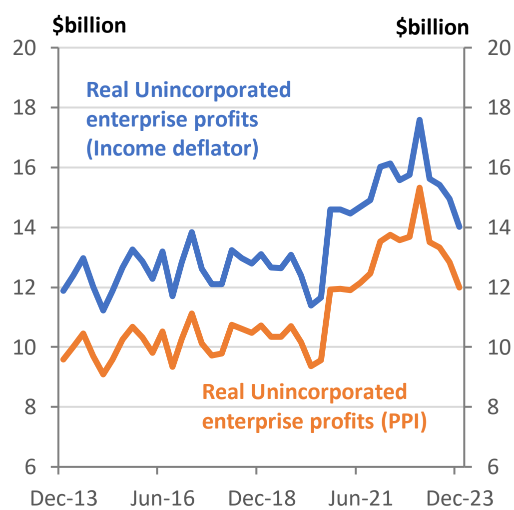


Figure 10: Real non-mining unincorporated profit level



Source: ABS Business Indicators, Australia, ABS Producer Price Indexes, Australia & ACTU calculations

[7] Outlook | Statement on Monetary Policy – May 2024 | RBA
[8] AiG reply submission, p. 16

40. In real terms, the level of both company profits and unincorporated enterprises has been higher in the inflationary period than in the low-inflation, pre-pandemic period, suggesting real profits have improved somewhat during this inflationary episode. While it is noteworthy that the level of unincorporated enterprise profits has come off, it remains above levels prevailing before this inflationary episode. An easing in profits should be expected given the discretionary nature of the sales of such enterprises as the cost of living crisis bites. This may shift as economic growth picks up after the end of 2024 and real disposable incomes rises. In the case of companies, real profits appear to have stabilised at a higher level.

41. Relatedly, the *growth rate* of real profits for unincorporated enterprises may be falling, but a decline from one very high level to another still high level that is in excess of a previous period does not necessarily suggest a reduced capacity to pay. There are adjustment processes going on in the economy, notably the shift from the sudden release of demand in March and June 2022 following the easing in movement restrictions through to a severe cost of living crisis. Profits holding at a higher level despite this economic volatility shows a great deal of resilience from unincorporated businesses.

42. Ai Group makes some assertions about relative profit margins required under different operating conditions, and seems to imply that a higher margin would be required in more challenging circumstances.

43. A short note by NAB on productivity and the RBA's inflation target noted in passing that 'the evolution of profit margins can play a role cyclically' in inflation and that in 'the short-term though, the profit share does not need to move much to have meaningful implications for the consistency of near-term productivity, wage, and inflation outcomes and means wages growth somewhat hotter…for a period of time needn't derail the inflation outlook.'[9] The ACTU raises this to suggest that running a higher than average profit to income ratio may not be especially helpful in bringing about less challenging economic circumstances and that AiG's implication that

[9] NAB Markets Research, 'The RBA's productivity red herring', 16 April 2024

it is necessary to do so because of challenging economic circumstances may be putting the cart before the horse.

44. NAB's comments about the profit share shifting only slightly to reconcile wages, productivity and inflation outcomes is for the aggregate non-mining sector as a whole. It is worth recalling the Commission's information note that found the wage bill for Awards is a very small share of GDP, suggesting an even smaller magnitude of adjustment to align inflation and productivity with the nominal and real wage outcomes under consideration in this Review.[10]

45. The comments made in NAB's note go to the issue raised by ACCI in its reply submission around high wages growth and the return of inflation to target, suggesting that ACCI's claim is more smoke than fire and therefore should not influence the Panel in its deliberations. Further, it addresses the issue raised by ACCI around the imperative that wages growth is closely linked to productivity growth to avoid inflationary pressures.[11] While this is a useful guide to a long-run relationship, it need not be the case at all points in time and in all circumstances, not least of all when there is sufficient room to scale back profit margins to accommodate a recovery in real incomes for workers, and when wages growth has lagged productivity growth over the present cycle.

46. Figure 11 and Figure 12 show the level of real business profits for the award-reliant market industries (i.e., excluding Health care and social assistance) and the profit to income for the same grouping. As with most of the economy, the level of real profits has been higher during the inflationary period than during the low inflation period, as is the profit to income ratio. Both measures suggest some room for adjustment to accommodate an increase in wages with inflation continuing to ease back to the RBA's target band.

[10] Information note—Award dependent wages in the economy (fwc.gov.au)
[11] ACCI reply submission, para. 18, p. 3 & para. 52, p. 11

Figure 11: Award reliant business profit level

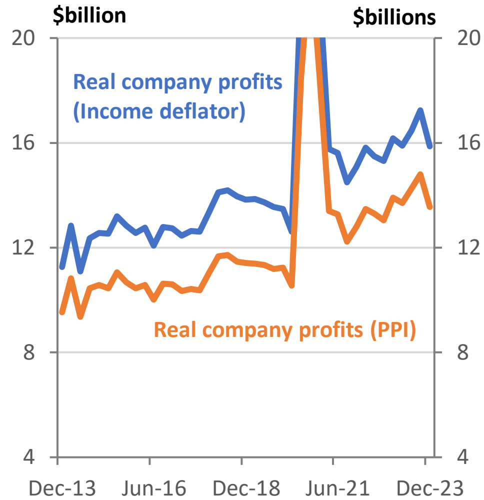
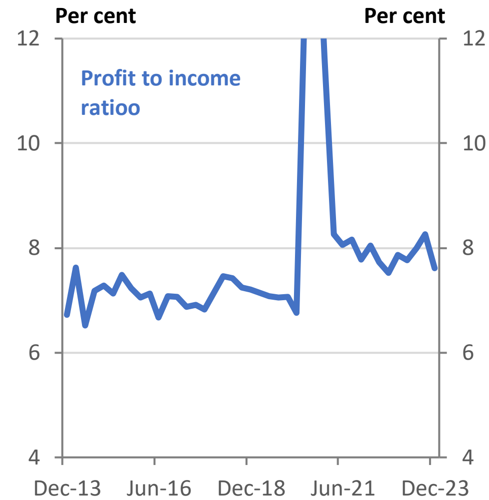


Figure 12: Award reliant business profit to income ratio



Source: ABS Business Indicators, Australia, ABS Producer Price Indexes, Australia & ACTU calculations
Note: upper level of the axis scale has been truncated because of the distortionary impacts of COVID-19 related subsidies on profits

47. The Panel should, in the ACTU's estimation, not be troubled by any of the assertions made by Ai Group or ACCI that they have failed to verify. Instead, as already suggested, the Panel should conclude that the business sector is in a solid position to support a wage rise of the magnitude argued for in the ACTU's original submission.

3.2 Productivity performance

48. The Panel has asked that parties provide their position on Australia's productivity performance by reference to **Section 2: Productivity** of the statistical report and the Commission's information note on labour productivity.

49. The analysis of short-term productivity found in the ACTU's initial submission was made with reference to the same series presented in Chart 2.1, Table 2.1 and Chart 2.3 of the statistical report and as such the conclusion still holds.

50. A brief summary of the main points is below:

a. The increased supply of capital goods is facilitating capital deepening and investment is expected to remain at a high level, lending credence to a positive outlook for productivity.

b. The volume of hours worked has begun to normalise now that the disruptions of the pandemic, or what the Productivity Commission calls the 'productivity bubble', has worked its way out of the system.[12]

c. Productivity growth as measured by real GDP per hour worked has turned positive on a quarterly basis in the second half of 2023 and the market sector has seen both quarterly and annual growth as of December 2023.

d. While nominal unit labour costs are high, so too are unit profit costs and the direction of travel of both measures is towards a growth rate consistent with the inflation target, given the RBA's forecast is for productivity to increase and wages to ease.

e. The Albanese Government has committed to building a more dynamic economy and adaptable workforce in service of reigniting productivity growth.

51. The ACTU's view remains that the Panel should have an optimistic view of the outlook for productivity growth over the coming years.

52. This conclusion is also supported by the RBA's forecast for annual growth in labour productivity in its May 2024 Statement on Monetary Policy. It forecasts that real average earnings per hour (non-farm) will lift to 3.1 percent by the year to June 2024, before easing back to 1.1 per cent by June 2025, while acknowledging uncertainty. Similarly, on the measure of GDP per hour worked, labour productivity will lift further to 1.8 per cent in the year to June 2024 before easing back to 1.3 per cent by June 2025, and closer to Australia's long run average of 1.1 per cent growth since 2009, the second best performance among comparable countries as highlighted in the Commission's information note on labour productivity.[13] These forecasts should give the Panel further confidence that Australia is returning to the longer-run average of productivity growth of 1.2 percent across the two cycles just prior to the pandemic, which the Panel has previously stated is its preferred measure.

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[12] Information note—Labour productivity (fwc.gov.au) &
December 2023 - Quarterly Bulletin - PC Productivity Insights

[13] Information note—Labour productivity (fwc.gov.au)

3.2.1 Assertions made by Ai Group

53. AiG in both its initial and reply submission leans heavily on an analysis of productivity performance by industry for the financial year 2022-23. Using this data source is not a reliable guide as to the state of productivity performance in the Australian economy, or as a guide to the outlook for productivity. Financial year 2022-23 covers the period of the come down in the 'productivity bubble' and significantly reflects the distortions of the pandemic.

54. Instead, it is more informative to keep in mind the outlook for productivity, which as the ACTU has argued there are good grounds to be optimistic about once the process of normalisation in productivity outcomes has run its course.

3.3 Estimates of the NMW reliant workforce

55. The Panel has sought views about the likelihood that estimates provided to it of the number of persons covered by the National Minimum Wage are inaccurate. References are made in the Question on Notice to the estimate of 0.7% of employees found to be National Minimum Wage Order reliant (NMWO reliant) based on 2021 data (by both Tomlinson in 2024 and the Australian Government in 2023) and the estimate in 2024 by the Australian Government of 0.3% employees being NMWO reliant (32,100 out of 12,593,100), based on 2023 data.

56. There are methodological challenges in identifying the number of employees who are reliant on the National Minimum Wage Order. The only available dataset for estimating this figure is the ABS *Survey of Employee Earnings and Hours,* used both by the Australian Government in successive submissions to the Panel and by Tomlinson in the *Characteristics* study referred to in the Question on Notice. The survey is completed by employers in respect of their employees, rather than the employees directly. The process of estimation of NMWO reliant employees from this data set (as adopted by both the Australian Government and Tomlinson) involves two key steps: firstly finding the number of adult employees who are paid an hourly rate akin to that set by the NMW order (rounded to the nearest 50 cents), then secondly attempting to identify which of these employees receive that rate *because* they are reliant on the NMW order.

57. The first step may lead to inaccuracies due to the ordinary hours earnings as measured by the EEH including all purpose allowances or penalty rates – meaning the true base rate of pay is (possibly unlawfully) less than the NMW. In addition, the hourly rate paid to employees is derived by dividing variables for "ordinary time cash earnings" (reported as rounded to the nearest dollar) by variable for "ordinary hours paid for", which may lead to further inaccuracies.

58. The second step involves filtering out employees who are identified by their employer as being paid pursuant to an award or collective agreement, and selecting only employees who are classified in the data as being paid according to an "individual arrangement". The descriptions of both "award" and "individual arrangement" contained within the publicly published EEH methodology suggest the possibility for some confusion as to how an NMWO reliant employee might be classified. Further, the published definitions are not consistent as between the 2021 edition and the 2023 edition. We are unaware of any guidance provided to employers who complete the survey, or the form of the actual questions, in either year.

Table 1: Key definitions in the Employee Earnings and Hours Survey

Employee earnings and hours definitions 2023[14]	
"Award only"	"Individual arrangement (also known as an individual agreement)"
Awards are legally enforceable determinations which set out minimum terms and conditions of employment, in addition to any legislated minimum terms. Decisions relating to awards and associated rates of pay are determined by a Federal or State industrial tribunal or authority. Awards may be applied for discrete industries or occupations and include a minimum rate of pay. Awards are periodically reviewed by the relevant governing body, where consultation and submissions from interested parties may be heard. Employees that negotiate rates of pay in excess of the award rate are classified as paid by Collective agreement or Individual arrangement for EEH purposes. Key requirements in determining an Award: • Terms and conditions, including wage rises, decided independently from interested parties by a State or Federal industrial tribunal or authority. • Employees are not classified to Award if they are paid more than the rate of pay specified in the award.	Employees covered by an Individual arrangement will have their wages and conditions set on an individual basis. This can include informal arrangements, such as handshake or ad hoc arrangements, and also written contracts or arrangements that have not been lodged with an authority. An Individual arrangement can also be referred to as a common law contract. Key requirements in determining an Individual arrangement: • One-on-one arrangement between employer and employee setting the wage rates and conditions of employment on an individual basis. • Individual arrangements generally offer a set of terms and conditions above relevant state or national awards. Arrangements set to the National Minimum Wage in conjunction with the national legislated minimum conditions (National Employment Standards) are recorded as Individual arrangements.

[14] ABS, Employer Earnings and Hours 2023 methodology

Employee earnings and hours definitions 2021[15]	
"Award only"	"Individual arrangement"
Awards are legally enforceable determinations made by federal or state industrial tribunals that set the terms of employment (pay and/or conditions), usually in a particular industry or occupation. An award may be the sole mechanism used to set the pay and/or conditions for an employee or group of employees, or may be used in conjunction with an individual or collective agreement. Employees are classified to the Award only category if they are paid at the rate of pay specified in the award, and are not paid more than that rate of pay.	An arrangement between an employer and an individual employee on the terms of employment (pay and/or conditions) for the employee. Common types of individual arrangements are individual contracts, letters of offer and common law contracts. Employees are classified to the Individual arrangement category if they have their pay set by an individual contract, individual agreement registered with a Federal or State industrial tribunal or authority (e.g. Australian Workplace Agreement), common law contract (including for award or agreement free employees), or if they receive over-award payments by individual agreement. However, the Fair Work Act 2009 does not allow the making of new individual employee agreements. Collective enterprise agreements contain a provision which allows flexibility in the workplace to be achieved by agreement between an employer and individual employee. Agreements which existed under the Workplace Relations Act will continue in existence under the Fair Work Act 2009 as 'agreement-based transitional instruments'. These are defined by the Fair Work (Transitional and Consequential Amendments) Act 2009 (TA Act).

59. If it was the case that the information provided to employer participants in the 2021 survey matched that above, there would be a greater likelihood that NMWO reliant employees would be allocated by them to the Award Only group rather than the Individual Arrangement group. This is because the National Minimum Wage Order falls into the definition of "award" provided for that year and because there is no clear contradiction of that allocation in the definition of "Individual Arrangement". In the 2023 definitions, the final element of the description of an "Individual arrangement" does indicate that NMWO Reliant employees should be allocated to that group (although the matter is not beyond all doubt). All other things being equal, the expected observation would be an increased share of NMWO reliant employees when applying the data filtering described above in 2023 compared to 2021 - but this is the opposite to what has been estimated by the Australian Government in its successive submissions using the technique described. A potential change in conditions between the two surveys may at least partially explain the shift in the direction observed, being some tighter labour market conditions

[15] ABS, Employee Earnings and Hours 2021 methodology

in May 2023 compared to May 2021 leading to higher rates being paid to persons who might otherwise be paid exactly at the rate set out in in the NMWO.

Table 2: Labour market indicators, May 2021 and May 2023

	May 2021	**May 2023**
Unemployment rate	5.1%	3.6%
Underemployment rate	7.4%	6.4%
Annual employment growth	8.1%	3.4%
Job vacancies	362,500	431,600

Source: ABS Labour force, ABS Job vacancies

60. The *Characteristics* study, at Table 4 and Appendix C, identifies industry and occupational characteristics of employees estimated to be NMWO reliant employees based on the usual approach discussed above. The Panel questions whether, based on these characteristics, a large proportion of these employees are in fact covered by modern awards, and if so whether the estimates of the number of employees said to be NMWO reliant are significant overestimates.

61. Table C1 in Appendix C of the *Characteristics* study sets out industry and occupational characteristics of employees paid at the NMW rate who are on an individual arrangement, which as above is the selection criteria for NMWO reliance. Each estimate relating to an industry subdivision is marked with a relative standard error warning in the 25%-50% range. Only one estimate for occupation groups lacks a relative standard error warning, of those remaining 5 have a relative standard error warning in the 25%-50% range has one has one in the 50%+ range. Of the 7 occupation types listed in Table 4 of the *Characteristics* study, five have a relative standard error warning in the 25%-50% range. The standard error warnings indicate that the estimates are unreliable for quantitively describing the distribution of occupations and industries in which NMWO reliant workers actually work in the general population.

62. However, it is surprising to us that, at the individual record level, there would be a large share of NMWO reliant workers working in the food and beverage services industry, or as general clerical workers, which seem to have been the most common observations. With the expanded coverage of the Miscellaneous Award since 2020, it is difficult to fathom how significant numbers of employees in non-managerial or non-professional roles (who one would expect to be paid much higher than the NMW in any event) would not be covered by an award. The only

explanation we can offer, other than misallocation in the survey process of type detailed at paragraphs 58-59 above, is State minimum wage coverage (for State and local government employees in most jurisdictions and some private sector employees in Western Australia).

63. In summary, whilst the industry and occupational data provided suggests that many of the employees identified as NMWO reliant *should* be covered by an award (thus suggesting an overestimate), the possibility and extent to which some NMWO reliant employees are misclassified as award reliant cannot be understood without reference to the survey instrument actually used by employers. In the event it does not already do so, the survey instrument would benefit from directly asking employers if an employee's pay is set by the National Minimum Wage Order, with this variable being available for use in future releases of the data.

4. INITIATIVES ANNOUNCED IN THE BUDGET

64. In this section, we outline the initiatives contained in the 2024-25 Budget which we consider relevant to the Panel's deliberations in this Review. Our commentary is based on the content of Budget Paper No. 2, save where otherwise noted.

65. The Panel has an established practice of taking budget measures into account which does not apply a formulaic or mechanistic approach and is based on the state of the law as of the date of its decision. We encourage the Panel to continue to apply that approach.

66. The Budget announced that business will, subject to the passage of legislation, benefit from a one year extension of the $20,000 instant asset write off program, first announced for the 2023-24 year. The extension of the program into the 2024-25 year will permit deduction by businesses with less than $10 million in turnover of the full cost of eligible assets costing less than $20,000 each that are first installed or ready for use by 30 June 2025. If implemented, the policy may support business investment in productivity improvements. It should be noted that the government is yet to secure passage of the amendments[16] necessary to give effect to the scheme for the 2023-24 year.

67. Households and some small businesses will benefit from an extension to the Energy Bill Relief Fund. Unlike the current arrangements that had complex household eligibility requirements and involved a mix of State and Federal funding, it is intended that all households will receive the Federally funded $300 rebate in 2024-25. The rebate for eligible small business, at least in part defined by usage thresholds which vary in each State and Territory, will be $325.[17] The ABS has estimated that between July 2023 and March 2024, energy bill rebates reduced electricity price inflation from a likely 17% to 3.9%.

68. Beyond knowing the cash value of the rebate, it is difficult to predict what the ultimate effect of these rebates will be on households, due to default offer prices not yet being finalised and varying

[16] *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023.*
[17] Budget paper 2 at page 179, Department of Climate Change, Energy, Environment and Water, [Energy Bill Relief Fund Extension]

household circumstances. The Australian Energy Regulators Draft Default Market Offer Determination (which regulates default offers in Queensland, South Australia and New South Wales) proposed changes that would result in typical annual bill price shifts of between -3% to +2.5% depending on location.[18] Many households may receive the rebate for the first time in 2024-25, whereas as some on partial income support (such as those in South Australia, the Northern Territory, Queensland and Western Australia) will receive a lesser rebate than they did this year.[19]

69. Apprentices and their employers will be assisted by some revisions to incentive payments pending the finalisation of a more comprehensive review. The changes announced relate only to occupations on the priority list and consist of an increase of the $3,000 direct payment to apprentices over 2 years to $5,000 (presumably still to be paid in 6 monthly instalments) and an increase of the $4,000 hiring incentive to employers to $5,000 (presumably still to be paid in instalments over 12 months).[20]

70. A further increase to Commonwealth Rent Assistance has been announced, intended to take effect from 20 September 2024. Giving effect to this change would require amendments to Part 3.7 of the *Social Security Act 1991*, and would raise the maximum fortnightly payment for a single person by $18.82 per fortnight. This is a 10% increase, compared to the 15% increase that took effect in September of last year. As noted in paragraph 116(a) of our reply submission, not all award reliant workers receive rent assistance. The ABS estimated that the 15% increase of rent assistance moderated rent CPI in the year to March from 9.5% to 7.8%, which remained the strongest rise for 15 years.[21]

71. Persons with a capacity to work up to 14 hours a week and in receipt of the JobSeeker payment may from September of 2024 be entitled to access JobSeeker at the existing higher rate of $816.90 per fortnight, a rate currently reserved for single principal carers and persons over 55 who have been in receipt of the payment for 9 months or more. At the time of writing, we have been unable to establish whether it is intended that the higher payment rate will apply to those who are in

[18] Australian Energy Regulator, Default market offer prices 2024-25; Draft Determination, March 2024, at Table 2.1
[19] Department of Climate Change, Energy, Environment and Water, Energy Bill Relief Fund Extension
[20] Budget paper 2, at Page 90
[21] See ABS CPI March Quarter 2024, 'Strongest annual rise in rental price growth since 2009'.

receipt of a partial payment to supplement employment income and if so what income test and tapering arrangements will apply. In any event, this reform will require legislation.[22]

72. More minor reforms that may have impacts which are difficult to quantify at this stage include:
    a. The removal of tariffs on "on a wide range of imported goods including toothbrushes, hand tools, fridges, dishwashers, clothing, and menstrual and sanitary products"[23]. If the necessary amendments to the *Customs Tariff Act* 1995 pass through the Parliament, these will result in a small decline in input costs for some wholesalers and importers servicing retail, which if passed through will reduce the cost of these items to households. The aggregate loss of revenue through 2024/2025 is estimated at $10 million.
    b. Whilst the budget refers[24] to increases to the Medicare levy low income threshold, the legislative change required to give effect to this passed the Parliament in February 2024.[25] The Medicare levy is 2% of taxable income and the function of the low-income threshold is to set the income level at which no levy is paid and at which tapering begins. As a result of the amendments made, the threshold rose by $1724 to $26,000 for singles. It is of negligible benefit and bears little consideration in the current review.
    c. The budget may also help to address skills shortages in the medium term. This could be assisted through the $88.8 million allocated from 2024-25 to fund 20,000 new free training courses at TAFE and RTOs that are relevant to the construction industry and the additional $1.8 million in funding to DEWR to streamline skills assessments for migrants who wish to work in Australia's housing construction industry.[26]
    d. Whilst business will not pay for the government's decision to pay the superannuation guarantee on paid parental leave, small business employers will benefit from $10 million in handouts over 2 years commencing in 2024-25 to support administration of the scheme.[27]
    e. Small business may also benefit from additional funding ($20.5 million over four years from 2024-25) to support them with compliance.[28]

[22] See Services Australia, [Budget 2024-25 information]
[23] Budget paper 2, at Page 7
[24] Budget Paper 2, at Page 12
[25] *Treasury Laws Amendment (Cost of Living – Medicare Leve) Bill 2024.*
[26] Budget Paper 2 at Page 74-75.
[27] Budget Paper 2 at Page 166-167
[28] Budget Paper 2 ant Page 96.

5. GENDER EQUALITY

73. In their submissions dated 29 April 2024, Australian Business Industrial/Business NSW (**ABI/BNSW**) raise a number of matters regarding the ACTU's proposal for addressing gender-based undervaluation of work in modern awards,[29] which are addressed in these brief reply submissions.[30] These matters are:

(1) Whether the Commission is required to find 'exceptional circumstances' in order to award interim increases in some awards but not all.[31] The answer is no: the exceptional circumstances test in s 286 of the FW Act is not relevant to the exercise of the discretion in s 285 to determine variations on an award-by-award basis.

(2) Whether findings in the Aged Care decisions are too fact-specific and otherwise limited to provide a sufficient basis for the Expert Panel to award interim increases to minimum wages in modern awards as a step towards addressing gender-based undervaluation of work.[32] The answer is no. Findings in the Aged Care decisions, as well as the Stage 1 and 2 Gender Research, provide a sufficient basis on which to determine that certain interim increases[33] should be made. Further, the ACTU's proposal is an appropriate application of the finding in the Aged Care Stage 3 decision as to the utility of the SCHADS ERO benchmark to other proceedings.

(3) Whether the ACTU's proposal is likely to lead the Panel into error, taking into account ss 134, 138 and 284.[34] For the reasons set out in paragraph 93 below, the answer is no.

Additionally, these submissions also briefly address:

(4) Matters raised by other parties regarding the gender pay gap.

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29 The ABI/BNSW submission dated 29 April 2024 responds to the ACTU's 28 March 2024 submission.

30 Several of these issues were also raised by some of the other employer submissions. We have identified those submissions, and responded to them, where necessary, in the paragraphs which follow.

31 ABI/BNSW submission, [2.2(a)] and [2.8]–[2.15].

32 ABI/BNSW submission, [2.16]–[2.18]; and [2.2(b)] and [2.23]–[2.46] and [2.2(c)] and [2.47]–[2.55]. Although these paragraphs are identified under separate headings in the ABI/BNSW submissions, we have addressed them together in these submissions as they all concern the Aged Care decisions.

33 Described as Group 1 Adjustments in the ACTU's submission dated 29 April 2024.

34 ABI/BNSW submission, [2.2(d)].

(5) Other matters raised in the employer submissions.

74. It is necessary, at the outset of these reply submissions, to make an overarching observation.

75. The ACTU's proposal contained in Chapter 5 of the 28 March 2024 submissions and 29 April 2024 submissions is made in response to the Expert Panel's statutory mandate contained in s 284(1)(aa) and s 134(1)(aa) of the FW Act to address gender-based undervaluation of work in the AWR, and the clear and unequivocal statements by the Expert Panel in June 2023,[35] and the President in February 2024,[36] that the Expert Panel in the 2023–24 AWR would address gender equity issues.[37]

76. On 21 December 2023, the ACTU wrote to the President and stated, among other matters, that the view of the ACTU and affiliates was that no *final* findings or *final* variations to modern awards dealing with gender-based undervaluation of work should be made in the 2023–24 AWR, and that it was appropriate to undertake a comprehensive assessment of work value issues on a classification (or industry, or award) basis.

77. On 2 February 2024, the President issued a statement in which his Honour stated that the extent to which gender equity issues were addressed in the AWR would be a matter for the Expert Panel constituted for the Review, but that at least the issues identified by the Panel in the 2022–23 AWR would receive attention.[38] His Honour did not anticipate that all issues of gender-based undervaluation of work would be addressed comprehensively to finality in the review,[39] and confirmed that nothing in the proposed approach to the AWR constrained interested parties from making any application to vary modern awards.[40]

78. Relevantly, in the 2022–23 AWR, the Expert Panel considered, and expressly departed from, previous statements in Review proceedings that the AWR was not the appropriate forum for addressing gender-based undervaluation of work. The Panel observed that s 284(1)(aa) "adds an important new dimension to the Review… the requirement to now take into account the elimination

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35 *Annual Wage Review 2022–23* [2023] FWCFB 3500, [133], [137]–[139].

36 Annual Wage Review 2023–24 Statement [2024] FWC 278.

37 These principles are summarised in the ACTU's March submissions at [367]–[372].

38 Being: (1) that the way in which modern award minimum wages in female-dominated industries may have, historically, been set in a way which involves gender undervaluation and unequal remuneration for work of equal or comparable value; and (2) the failure to ensure that degree-qualified rates are aligned with a theoretical C1 classification: see *Annual Wage Review 2022–23* [2023] FWCFB 3500, [133]–[134].

39 Annual Wage Review 2023–24 Statement [2024] FWC 278, [3].

40 Annual Wage Review 2023–24 Statement [2024] FWC 278, [6]–[7].

of gender-based undervaluation of work in the conduct of the Review itself necessarily requires us to consider whether the existing NMW and modern award minimum wage rates constitute a properly valued and non-gender biased foundation upon which to make any wages adjustment".[41]

79. The ACTU, the UWU and the FAAA are the only parties to offer substantive proposals for consideration by the Panel. It is no answer, as some of the employer submissions suggest, that the Panel simply avoid the statutory imperative in s 284(1)(aa) and encourage the parties to undertake work value proceedings instead;[42] that course would be contrary to the terms of the legislation. The criticisms of the ACTU's proposal should be viewed in this statutory context.

5.1. The exceptional circumstances test is not relevant to the exercise of discretion to vary one or more modern awards

80. Contrary to the ABI/BNSW submissions, the ACTU does not contend that s 286 provides a basis for the Panel to make disparate variation determinations in the AWR.[43] The Panel is expressly empowered by s 285(2)(b) to make one or more determinations varying modern award minimum wages.[44] There is no question of power; the only question is of the appropriate exercise of the discretion.[45] The exceptional circumstances test is not a relevant consideration in the exercise of the discretion in s 285(2)(b); to contend otherwise is an impermissible fetter on the discretion, contrary to the plain words of the provision.

81. Section 286 concerns the date on which a determination varying modern award minimum wages comes into effect. The starting point is that determinations come into effect on 1 July of the new financial year: s 286(1). A determination may come into operation on a later date if justified by exceptional circumstances: s 286(2). But nowhere in its submissions does the ACTU contend that the operation of any determination varying modern award minimum wages, including a Group 1 interim increase, *should* come into effect other than on 1 July. Rather, at [399] of the March submissions, the ACTU observes that the Panel may determine, subject to the exceptional

41 *Annual Wage Review 2022–23* [2023] FWCFB 3500, [39]–[40].

42 See ACCI submission, [121]–[130], AI Group submissions, pp 21–22; ABI/BNSW submissions, [2.16]–[2.22].

43 ABI/BNSW submission, [2.8], referring to ACTU March submission, [399].

44 The reference in the ACTU's March submission, [399] to s 2**0**5(2)(b) is a typographical error and should be to s 285(2)(b).

45 As to this, see the ACTU March submission, [376].

circumstances test, to stage any interim increases ('Group 1 Adjustments', using the language in the April submissions) throughout the 2024/2025 financial year.[46]

5.2 There is a sufficient basis to make Group 1 Adjustments

82. ABI/BNSW criticise the ACTU's proposal on the basis that there is not a sufficient basis to justify an interim increase to the classifications in awards, now identified as the Group 1 Adjustments in the ACTU's April submissions.[47]

83. These submissions proceed from a misapprehension of the Panel's stated aim in this AWR, and of the scope of the ACTU's proposal. The ACTU is not proposing (and does not understand the Commission to be suggesting) that the Panel can address to finality in the AWR the pervasive issue of gender-based undervaluation of work. Further, the ACTU accepts and agrees that where necessary parties and/or the Commission of its own motion should conduct award-specific work value cases in order to comprehensively address gender-based undervaluation of work in a particular industry. But the availability of the work value process is not mutually exclusive with the Panel's statutory mandate to take into account in the conduct of the AWR the need to eliminate gender-based undervaluation of work. The ACTU's proposal involves taking appropriately scaled and targeted interim steps to achieving that measure.

84. There is a sufficient basis to enable the Panel to determine that the Group 1 Adjustments should be made, as follows:

    (1) the identification in the Stage 1 Gender Research Report of 13 awards which contain very high levels of gender-based occupational segregation;

    (2) the identification that nine awards (seven excluding the *Aged Care Award* and the *Teachers Award*)[48] out of the 13 awards identified above cover female-dominated 'caring' work;[49]

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46 The principles applicable to the exceptional circumstances test were set out in Appendix B to the ACTU's submission to the 2022-2023 Annual Wage Review, a link to which is at footnote 188 of the March submission.

47 See, eg, ABI/BNSW submission, [2.16]–[2.18].

48 These awards are presently the subject of work value proceedings. See ACTU April submission, [176].

49 The *Animal Care and Veterinary Services Award*, the *Children's Services Award*, the *Educational Services (Schools) General Staff Award*, the *Health Professionals and Support Services Award*, the *Nurses Award*, the *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award*, and the SCHADS Award.

(3) the acknowledgment by the Full Bench in the Aged Care Stage 1 and Stage 3 decisions and of the Expert Panel in the 2023 *Annual Wage Review* that the alignment of pay and classifications against masculinised benchmarks in the *Manufacturing Award* either undervalued or failed to recognise skills practiced in feminised work;[50]

(4) the identification in the Stage 2 Report of indicia of gender-based undervaluation of work in modern award minimum wages, being a lack of work value exercise undertaken by the Commission, inadequate application of equal pay principles, and the making of consent awards and agreements, and the endorsement of that by the President;[51]

(5) the identification in the Stage 2 Report that of the six awards referred to in point (2) above, the relevant history of each of them[52] revealed each of the indicia of gender-based undervaluation of work;[53]

(6) the identification by the ACTU in the April submissions that award rates in each of the Group 1 Adjustments cohort are low (in that wages for the relevant occupations are well below the SCHADS ERO benchmark);

(7) the identification by the Full Bench in the Aged Care Stage 3 decision of the SCHADS ERO benchmark as an appropriate benchmark rate for Certificate III-qualified PCWs, AINs and HCWs,[54] and the acknowledgement in that decision that the application of the SCHADS ERO benchmark:

> "provides appropriate guidance as to the rectification of historic gender undervaluation in respect of female-dominated 'caring' work. The adoption of such a benchmark rate for work of this nature, in replacement of the C10 rate, would provide a stable anchor point for a modern award system which ensures gender equality in the valuation of work".[55]

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50 See Aged Care Stage 1 decision [2022] FWCFB 200, [758(6)(iii)]; Aged Care Stage 3 decision [2024] FWCFB 150, [19], [84]; *Annual Wage Review 2022–2023* [2023] FWCFB 3500, [124].

51 See President's Statement, 4 April 2024, Gender Pay Equity Research – Stage 2 Report published, [8].

52 As well as, relevantly for the ACTU's Group 1 Adjustments proposal, the *Hair and Beauty Award*. See ACTU April submission, part 5.5.6.

53 See ACTU April submission, part 5.51–5.5.4, 5.5.7 and 5.5.11.

54 Aged Care Stage 3 decision [2024] FWCFB 150, [170].

55 Aged Care Stage 3 decision [2024] FWCFB 150, [173].

85. It follows from the above that the Panel can be satisfied that there *is* gender-based undervaluation of work in the subject occupations in the Group 1 Adjustment awards.

86. An interim increase of 4 per cent serves a dual purpose: it recognises and seeks to correct gender-based undervaluation of work, and it does so at a level that is sufficiently conservative so as to be 'comfortably below' the total increase in modern award minimum wages following the conclusion of award-by-award work value assessments which, it appears, all parties agree should occur.

5.2.1 Specific findings in the Aged Care decisions

87. At [2.23]–[2.27] of its submission, ABI/BNSW suggests that the ACTU's proposal involves the application of the SCHADS ERO benchmark as a form of 'automatic comparative wage justice'.[56] This submission significantly misunderstands the ACTU's use of the SCHADS ERO benchmark.

88. First, the application of the SCHADS ERO benchmark is consistent with the express statement of the Full Bench in the Aged Care Stage 3 decision as to the broader utility of that aspect of the decision.[57] The ACTU's Group 1 Adjustments proposal is a limited, targeted, and appropriate application of the benchmark.

89. Second, the ABI/BNSW submission emphasises particular factual findings in the Aged Care Stage 1 and Stage 3 decisions which underpinned the ultimate conclusion that an increase in minimum wages for work value reasons was warranted, but lightly skates over the (significant) relevance of 'invisible skills' to that conclusion.[58] The recitation of these matters is deployed in support of the proposition that the Full Bench in the Aged Care decisions did not attribute a particular percentage of the work value increase to the correction of gender-based undervaluation of work, or 'specific gender assumptions'.[59] That proposition is self-evident, but irrelevant. It is no part of the function of the Commission in awarding an increase to minimum wages for work value reasons, to attribute portions of the total increase to specific factual findings underpinning the ultimate determination – such an exercise would be highly artificial. The fact that the Full Bench did not undertake this

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56 Although this part of ABI/BNSW's submissions fall under the 'Issue 2' heading, as it deals with the Aged Care decisions, we have addressed it under this topic which considers the matters raised in the ABI/BNSW Aged Care decisions together.

57 See paragraph 84(7) above.

58 See [2.31], cf. [2.29]; although see [2.34(b)] and [(c)].

59 ABI/BNSW submission, [2.27].

exercise in the Aged Care decisions is not evidence of any deficiency in the process, nor does that absence nullify the utility of the Aged Care decisions the present purposes.

90. Further, nowhere does ACTU submit that specific factual findings as to, for example, the increase in responsibility and regulation of direct care workers in the residential aged care sector warrants the application of an increase in modern award minimum wages to all female employees engaged in 'care' work. Rather, the ACTU's Group 1 Adjustments proposal is designed to correct existing undervaluation of work, the existence of which is at least partly attributable to the failure by the Commission *and* parties to recognise and value skills otherwise seen as 'invisible'.[60] The interim increases are not designed to fully compensate for changes in work value; that is a task for such other processes which the Commission considers to be appropriate, or separate hearings initiated by interested parties.

5.2.2 Asserted limitations of the Stage 3 decision

91. For the reasons set out above, 'Limitation 1' in the ABI/BNSW submission wrongly characterises the approach taken by the ACTU with regard to the utility of the findings in the Aged Care Stage 3 decision. The ACTU does not suggest that the fact-specific findings in the Aged Care cases are transferable to, e.g., education aides. The material point is that the approach taken to identifying and rectifying gender-based undervaluation of work in the Aged Care decision provides broader guidance which is applicable in the AWR, taking into account the statutory mandate to address such issues.

92. 'Limitation 2' is obscure. If all that is intended by this submission is that funding considerations are relevant, the ACTU suggests that more is required to erect this a barrier than a mere assertion that capacity to pay is relevant. We explore this issue further in paragraphs 94-95 below.

5.3 The factors in ss 134 and 284

93. There is no dispute that the Expert Panel is required to take into account all of the factors in s 134(1) and s 284(1) of the FW Act. However, as the Panel has observed, the fact that "no consideration is assigned any particular primacy" does not mean that certain considerations may not have greater

[60] See Aged Care Stage 1 decision [2022] FWCFB 200 at [42(2)], [42(3)]; and see Aged Care Stage 3 decision [2024] FWCFB 150 at [13], [156(1)] ("This mischaracterisation and disregard of 'invisible' skills lies… at the heart of gendered undervaluation of work").

relevance and weight, depending on the social and economic context at the time.[61] The social and economic context of this Review includes the recently stated aims of the Commission in its various guises as to the importance of taking steps to rectify gender-based undervaluation of work in modern awards, and the steps it has already taken to do so including undertaking the Gender Pay Equity Research. Seen in this light, the ACTU's focus on the relatively new provisions in s 134(1)(aa) and s 284(1)(aa) is not disproportionate.[62] Rather, our approach is a genuine effort to assist the adaptation of the modern award system to standards and legislative requirements that neither modern awards nor their underpinning instruments have previously been required to satisfy.

94. As noted in paragraph 92, the employers' submissions raise the issue of the impost of the interim increases we seek. However, this does not rise far above the mere raising of the issue. Section 5.1 in Chapter 5 of our initial submission squarely raised that we were seeking interim increases in this Review to address gender equality considerations. Our initial submission additionally identified particular awards in respect of which interim increases were sought and foreshadowed a process for identifying further awards. Further, it was clearly evident from that submission that the approach we were recommending concerning female dominated care work was informed by the observations in the Aged Care Stage 3 decision concerning the utilisation of the ERO rates as a "stable anchor point" for the rectification of the problem of gender based undervaluation in the modern award system. It was equally evident that our position on the issue of pay rates for degree qualified work was informed by a desire to bridge the gap between the current rates for "degree qualified professionals who are fully qualified and capable of exercising the skills and discharging the profession in an entirely unsupervised and autonomous way" and the C1(a) rate, and also bridging the gap between graduate entry rates for degree qualified employees requiring supervision or some further accreditation and the C2(b) rate. Employers have had a month to respond to that submission in the replies and on any reasonable view have been on notice about these matters since the events referred to in paragraph 77-78 above. However, the reply submissions merely:

a. Assert that *any* increase in wages in the early childhood education and care sector "will have a direct and material increase impact upon families that engage and rely upon

61 *Annual Wage Review 2022-23* [2023] FWCFB 3500, [22].

62 Cf. ABI/BNSW submission, [2.56]–2.59].

childcare services" and "impact performance within in the industry and the national economy"[63];

b. Pose the question "Will the government cover the cost of the increase for all female-dominated sectors?"[64]; and

c. Suggest that it is important to "consider that it may be necessary to implement appropriate transitional arrangements" and give "careful and detailed consideration" to the "potential effect on employers"[65].

95. These minimal efforts to engage with our position ought not be rewarded. They can be dealt with in turn briefly:

a. Quite evidently, the extent to which an increase in the wage cost base for childcare services is reflected in costs to childcare users is in part determined by government funding. The available evidence on this point, including the recent announcement in the Budget concerning government funding "..to deliver on its commitment to provide funding towards a wage increase for the Early Childhood Education and Care sector" and to "support a response to Fair Work Commission processes as they relate to this sector", points to this funding being made available.[66]

b. As to whether the government will cover the cost of the increase for *all* female dominated sectors, there is self evidently no basis to presume that the government would fund increases for services that are not funded services. Funded services however have a reasonably good history of being funded to address gender equality related concerns, including in the Aged Care matter and indeed in the proceedings that led to the making of the ERO.

c. As to transitional arrangements, our initial submission anticipated and was sensitive to those concerns and indeed the proposals we have advanced are in any event interim steps to *begin* making progress toward satisfaction of the relevant gender equality

63 ABI reply submission at [2.61]
64 ACCI reply submission at [131]
65 Ai Group reply submission at page 22.
66 Budget Paper No 2, at page 86.

considerations. The AI Group and others have had ample opportunity to put forward information that they wish the Panel to give "careful and detailed" consideration to concerning effects on employers.

96. Insofar as it is suggested that the interim increases we are seeking to a small group of awards to progress gender equality concerns might be inflationary[67], it bears repeating that Jericho and Stanford estimated in March 2024 that even a 10% increase *across the entirety* of modern award wages would be "easily accommodated within the RBA's target range for inflation".[68] Moreover, Jericho and Stanford's analysis likely overestimates any inflationary effect given that it calculated that 13.5 per cent of the national wage will was referable to wages paid to employees reliant on modern awards, using publicly released ABS data. The information note released in April by the FWC relies on ABS' non-public microdata, and indicates that only 10.6 per cent of the total national wage bill is referable to wages paid to employees reliant on modern awards.

5.4 The Gender Pay Gap

97. Since the date of the ACTU's April submission, a report by the e61 Institute, 'Beyond Skills and Occupations: Unpacking Australia's Gender Wage Gap'[69] (**e61 Report**), has been published (May 2024) which provides useful insights into drivers of the gender pay gap, using population-wide taxation data covering the Australian workforce.

98. The e61 report findings include the following:

    a. Approximately one-fifth of the estimated overall hourly gender wage gap is driven by men and women working in occupations with different pay rates for people aged 25-65. It accounts for one-third of the gap for people who went to university after 2004. Among university-educated individuals, women are much less likely to enter STEM high-paying professions, even among women with a similar Australian Tertiary Admissions Rank (**ATAR**) to men.[70]

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67 Abi reply submission at [2.63], ACCI at [132].

68 Jericho,G., and Stanford, J., "The irrelevance of Minimum Wages to Future Inflation", Centre for Future Work, March 2024.

69 Elsye Dwyer and Silvia Griselda "Beyond Skills and Occupations: Unpacking Australia's Gender Wage Gap" e61 Institute, 3 May 2024, available at Beyond Skills and Occupations: Unpacking Australia's Gender Wage Gap – e61 INSTITUTE.

70 Ibid page 8.

b. The bulk of the disparity, about 80%, is driven by men and women being paid differently while employed in the same occupation.[71]

c. Differences between genders in personal characteristics such as full-time status, educational attainment, number of dependents, and ATAR scores do not account for the gender pay gap within occupations nor do they explain why women sort into lower-paying occupations.[72]

d. The majority of the wage gap within the same occupation is largely due to how marriage and parenthood negatively affects women's hourly earnings compared to men's.[73]

e. Data from the entire Australian workforce aged 25-60 shows that women are over-represented in roles such as carers, nurses, teachers, and clerical positions.[74]

f. By contrast, men are disproportionately represented in trade professions, machinery operators, and STEM professions.[75]

g. The average female finance professional (financial brokers, dealers, and investment managers) earns a similar hourly amount to the average male nurse, despite male finance professionals being the second-most well-paid profession.[76]

h. While 25% of men are concentrated in lower-paying professions such as Trades and Machinery Operators, the average pay of men in these occupations is still $5 per hour more than the average pay rate of women who work in Clerical occupations (24% of the female workforce).[77]

99. The finding that 80% of the gender pay gap can be attributed to women being paid less than men in the same occupations is consistent with the fact that women are more award-reliant than men. Women are significantly more likely to be paid at the award rate than men are at all levels of education and experience (except in their first year of work) and are dispersed within award

[71] Ibid, page 1-2.
[72] Ibid page 2.
[73] Ibid, page 1-2
[74] Ibid, page 2.
[75] Ibid.
[76] Ibid, page 3.
[77] Ibid.

classification structures.[78] Therefore a meaningful increase to award rates will contribute to addressing the gender pay gap, especially if the increase is above overall market wages.

100. The finding that between one fifth and one third of the gender pay gap can be attributed to men and women working in different occupations lends weight to the ACTU's proposal to take interim steps to address gender-based undervaluation in certain awards.

101. AI Group argue that the impact of increases to minimum and award wages on the gender pay gap are likely to be small, because the gender pay gap is mostly driven by factors associated with other more highly-paid employee categories.[79] The e61 report casts serious doubts over that assertion, demonstrating that there are gender pay gaps within both low paid and high paid occupations, and making clear that differences between genders in personal characteristics do not account for the gender pay gap within occupations, or explain why women sort into lower-paying occupations, finding instead that the majority of the wage gap within the same occupation is due to the impact of being married and having dependent children on women's earnings.[80] This is a factor that affects all occupations, not just higher paid ones. For example, Figure 7(B) demonstrates a gender pay gap in the following lower paid occupations: personal services, labourer, customer service, technician, sales, machinery operators, and clerical.[81] Many of these occupational categories have a relatively high degree of award reliance, as shown in Table 3 of the ACTU's March submission.

102. Further, AI Group's submission ignores the impact on the overall gender pay gap of increases in the NMW and modern award wages, and is directly contrary to what the Panel has itself previously found. As has long been recognised by the Panel, because women are disproportionately award reliant, "any increase to modern award minimum wage rates will provide a disproportionate benefit to female workers, and may contribute to narrowing the aggregate gender pay gap across the entire employee workforce."[82]

103. Previous Panels have found that increases in the NMW and modern award wages can address the gender pay gap in two key ways – firstly, because it raises the level of low pay rates relative to median

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78 *Annual Wage Review 2018–19* [2019] FWCFB 3500 at [397], [399].

79 AI Group Submission, page 19.

80 Elsye Dwyer and Silvia Griselda "Beyond Skills and Occupations: Unpacking Australia's Gender Wage Gap" e61 Institute, 3 May 2024, pages 1-2, 10.

81 Ibid, Figure 7(B): Average Hourly Wages, page 10.

82 *Annual Wage Review 2022–23* [2023] FWCFB 3500 at [9], [114]–[115], [117].

pay rates and hence particularly benefits women who disproportionately receive low pay rates; and secondly, an increase in the higher levels of award rates will particularly benefit women because, at the higher award classifications, women are more likely to be paid the award rather than the bargained rate than are men.[83]

104. ARA argue that the AWR is not gender specific, and that any increase applies to all employees on the minimum wage and awards linked to the AWR, irrespective of their gender. They also argue that the gender pay gap in retail is largely the result of hours worked and therefore an increase of up to 9% for certain occupations in certain awards would only serve to grow the gender pay gap (based on total remuneration) between men and women rather than close it.[84]

105. In response, firstly, the ACTU does not propose that the rates in the GRIA Award receive a 9% increase. In our April submission we noted the presence of indicia of gender-based undervaluation of work in the history of the GRIA, as well as the existence of research about working conditions and invisible skills exercised by retail workers. Taking these matters into account, we submitted that an interim adjustment may be appropriate following consultations as part of the Group 3 Measures.[85] Further, an additional increase of this kind would not grow the gender pay gap. It would reduce the gap between workers paid at the award rate (predominately women) and workers paid above the award rate (who are more likely to be men). For men and women workers paid at award rates, the existing gap due to different hours of work would be maintained by any increase (but would not grow). Such an increase would also help to close the gender pay gap at an overall level (given that increases to NMW and award wages disproportionately benefit women).

106. Secondly, ARA's submission focuses entirely on the gender pay gap and ignores the issue of gender-based undervaluation of work, which is what the ACTU's proposal for Group 1 Adjustment interim increases is aimed at addressing. Occupational segregation and gender-based undervaluation of work are key causes of the gender pay gap. Increasing wages in female dominated industries that have been subject to gender-based undervaluation helps to close the gender pay gap, and increases wages for large numbers of female employees. It is irrelevant that there are some male employees in these industries, and indeed lifting wages in these industries is an important measure to reduce

83 *Annual Wage Review 2015–16* [2016] FWCFB 3500 at [75].

84 ARA submission, page 3.

85 ACTU April submission at [234].

occupational segregation by attracting more male employees into these sectors, which in turn has the potential to address workforce shortages.

107. ACCI argue that because the gender pay gap has been in steady decline since May 2014 (with only one rise between May 2020-November 2020), the recent decline in the gender pay gap is more likely to be a result of the "significant policy levers which Federal, State and Territory governments have pulled to reduce the gender pay gap over many years."[86] ACCI do not identify these 'significant policy levers'. Their argument to support this claim is that uniform increases to minimum and award wages cannot narrow the gender pay gap, but rather maintain any existing gap across awards, a point which the ACTU addressed in our April submissions.[87]

108. Further, ACCI's statement about the decline of the gender pay gap is incorrect. There have been multiple rises in the gender pay gap since May 2014. There have been rises from May-November 2014, November 2019-May 2020, November 2020-May 2021, and November 2021-May 2022. Indeed, the gender pay gap was stuck in the 13th percentile from November 2019 until May 2023 (including three slight rises to the 14th percentile in May 2020, May 2021 and May 2022), finally dropping to 12% in November 2023.[88]

109. Further, the 1% drop in the gender pay gap in the six months from May to November 2023 is one of the biggest on record. This suggests that the substantial increases awarded in last year's Review, combined with the 15% increase from July 2023 to aged care workers engaged in direct care, were influential in reducing the gender pay gap. A similar inference was drawn by the Panel in the *2018-19 Annual Wage Review* where the gender pay gap had dropped by 1.9% from November 2016 to November 2018. The Panel attributed this in part to the fact that increases in modern award minimum wages had exceeded the increase in the AWOTE in the preceding years.[89]

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86 ACCI submission at [108]-[109].

87 See eg Figure 34 and surrounding text.

88 ABS, Gender Indicators [Gender indicators | Australian Bureau of Statistics (abs.gov.au)] and ABS, Average Weekly Earnings, November 2023.

89 *Annual Wage Review 2018-19* [2019] FWCFB 3500 at [390].

5.6 Other Matters

5.6.1 Insecure work and caring responsibilities.

110. ACCI argue that women are more likely to be in casual employment because more women “choose to take on” caring responsibilities, and because according to ACCI casual employment provides “significant flexibility” by allowing people to turn down shifts at little notice. ACCI argue that increasing minimum wages may mean women are unable to take up “flexible forms of work they desire” due to disemployment outcomes, and this may inhibit women’s ability to undertake caring responsibilities if they cannot access work that suits their needs.[90]

111. The disemployment argument has been addressed at paragraphs 279–285 of the ACTU’s April submissions. Leaving aside the obvious point that taking on caring responsibilities is not simply a matter of free ‘choice’ in a world where all else is equal, the notion that casual employment allows women to undertake caring responsibilities because of its flexibility completely ignores the impact of insecure work on workers. Insecure work is often characterised by uncertain and unpredictable hours, which has significant negative impacts on the ability of workers to plan for and manage their caring responsibilities outside work; and their economic security, including their ability to budget for essentials, or secure a mortgage or rental property. These issues were the subject of extended discussion in the Work and Care Stream of the Modern Award Review. We note the distinction made in the academic literature between ‘good flex’ and ‘bad flex’, with the latter (characterised as precarious and poorly rewarded work where workers have low levels of control) coming at the expense of job security and gender equality over the life course. [91]

5.6.2 Employer proposals.

112. ABI/BNSW proposes that the Commission undertake an inquiry, including consultation, into whether minimum rates in certain modern awards (separately or in tranches) have been properly set.[92] ACCI proposes that the Commission conduct a review, separate to the AWR, to reconsider the general application of the C10 *Manufacturing Award* framework to wage-setting in modern awards,

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90 ACCI submission, at [98]-[99].

91 Rae Cooper, Frances Flanagan and Meraiah Foley, ‘Flexible Work Policy: Building “Good Flex” across the Life Course’ in Marian Baird, Elizabeth Hill and Sydney Colussi (eds), At a Turning Point: Work, Care and Family Policies in Australia (Sydney University Press, 2024) 103–124.

92 ABI/BNSW submission, [2.65]–[2.67].

acknowledging the observations of the FWC that the C10 alignment approach may have reinforced gender-based undervaluation of work.[93] The substance of these suggestions are captured by the ACTU's proposal with respect to Group 3 Measures.

5.6.3 Nurses Award.

113. Since the date of the ACTU's April submissions, the ANMF has confirmed that, due to the anticipated timing of the conduct of the work value application by the ANMF concerning the Nurses Award (AM2024/11), it is appropriate that the Nurses Award be included in the awards appropriate for a Group 1 Adjustment.

93 ACCI submission, [120].

6. RESPONSE TO REPLY SUBMISISONS

114. In this section, we deal briefly with specific matters raised in the reply submissions of other parties which we consider important to correct or properly contextualise.

6.1 Common issues

6.1.1 Wages and inflation

115. Ai Group raises with alarm that the March quarter inflation data showed that inflationary pressures are far from over and that inflation was principally driven by services and non-tradables, which are categories that are most exposed to wage pressures.[94] Similar concerns about the impacts of wages on inflation are raised in ACCI's discussion of inflation, which commences on page 3 of their reply submission.

116. Analysis by the Australia Institute's Chief Economist Greg Jericho suggests that the services driving inflation in the March quarter were things like rents, education, hospital services and insurance.[95] Further, the ABS noted that education fees, from pre-school through to tertiary education, increase with the start of the calendar year and prices for medical and hospital services typically rise in the March quarter as GPs and health service providers review consultation fees.[96]

117. Once a year price rises aside, rents are not typically associated with wage pressure, and so claims about services inflation should be examined closely to determine the extent to which wage pressures are driving price increase. On this question, it is worth recalling that Governor Bullock has described a range of factors contributing to services price inflation beyond labour costs, including insurance, electricity, rents, and other administrative costs.[97] Further, Governor Bullock also noted that historically, services inflation typically runs above goods inflation, so caution

[94] AiG reply submission, p. 7
[95] The government shouldn't boast about Australia's latest CPI figures, but it shouldn't panic either - The Australia Institute
[96] CPI rose 1.0% in the March 2024 quarter | Australian Bureau of Statistics (abs.gov.au)
[97] See para. 72 of the ACTU initial submission

needs to be taken in reading the results of the March quarter CPI without putting them in context.[98]

118. It is also worth noting that the RBA's most recent *Statement on Monetary Policy* suggests wages growth has peaked for workers on individual arrangements, which should indicate the beginning of easing in wages growth as these wages are most responsive to market conditions. The RBA's May SMP also indicates that unit labour cost growth has peaked, another indication that the cycle has broadly turned as expected.[99] The RBA forecasts wages growth to ease from June 2024, with growth declining gradually to 3.3 per cent by June 2026.[100]

119. It is also important to recall that the Centre for Future Work (Stanford and Jericho 2024) argued that the 'impact of economy-wide prices of even a large increase in minimum and Award wages is negligible, due both to the limited coverage of Awards, and the relatively low starting level of Award wages.'[101]

120. The Panel should bear all of this in mind when contemplating general claims about services inflation made by the social partners to the Review so as to not draw overstated conclusions from the most recent data available, not least of all for similar reasons to those noted by Westpac's Chief Economist Luci Ellis, referenced in paragraph 149 below.

6.1.2 Interpreting investment

121. ACCI charges that the ACTU has been selective in analysing investment by using an expansive measure of Gross Fixed Capital Formation, suggesting that private sector capital assets would be a more appropriate measure to gauge investment.[102] It appears to have escaped ACCI's notice that the ACTU focused on private business investment, in a section titled "Business investment".

122. ACCI also charges that this measure is inappropriate because it includes net purchase of second hand assets and that this should in some way challenge the position we take on the issue. This

[98] See para. 73 of the ACTU initial submission
[99] Economic Conditions | Statement on Monetary Policy – May 2024 | RBA
[100] Outlook | Statement on Monetary Policy – May 2024 | RBA
[101] The Irrelevance of Minimum Wages to Future Inflation | The Australia Institute's Centre for Future Work
[102] ACCI reply submission, para. 32, p. 6

criticism is somewhat undermined by the net purchase of second hand assets making up 4.3 per cent of total private business investment on average since December 2018 and only 3.4 per cent of total private business investment in the December 2023.

123. Conveniently, Figure 13 and Figure 14 of the ACTU initial submission refer to series derived from the new private business investment analytical series published in the ABS National Accounts, so can be taken as in line with ACCI's suggestion of being as precise as possible by focusing on new private business investment as a driver of productivity. It is also noteworthy that real new machinery and equipment investment by private businesses from the National Accounts publication rose 7.6 per cent over the year to December 2023, having averaged 7.3 per cent in the last twelve months.

124. ACCI also quote with concern RBA Governor Michele Bullock's appearance before the House of Representative's Economics Committee to suggest weak business investment is noted during this exchange. Unhelpfully for ACCI, and something that can be easily checked, Dr Kohler mentions immediately afterwards that:

> "During the last two quarters we've seen **quite strong growth on the investment side**, both in the private and public sectors. Some of that is machinery equipment coming in after the pandemic disruptions. We think it's going to be holding at that level—not the growth rates but at least holding at that level—and that will be adding to the capital stock and, hopefully, at least making up a bit of it."[103]

125. Ai Group also raise an interpretation of investment, presenting the suggestion that growth in investment is forecast by both Treasury and the RBA to ease in coming financial years.[104] The forecast growth rates are incorrectly presented in Chart 5 of Ai Group's reply submission. Treasury forecasts year average growth for financial year, that being growth of one financial year on another, while the RBA forecasts annual growth rates for quarterly data, that being the change between a quarter and its equivalent twelve months earlier. Whilst these are not strictly speaking comparable growth rates, presenting them on the same chart as Ai Group have done suggests that they are, giving a misleading picture of investment growth.

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103 [ParlInfo - Standing Committee on Economics : 09/02/2024 : Review of the Reserve Bank of Australia Annual Report 2023 (aph.gov.au)]

104 AiG reply submission, p. 11

126. Further, Chart 5 by Ai Group presents total growth in business investment, rather than disaggregating by sector. Fortunately, Treasury presents sectoral growth rates for private business investment. It is strictly speaking true that investment is forecast to ease from the pandemic related rebound. However, non-mining investment is forecast to be stronger than is mining investment (see Figure 13 and Figure 14), given mining investment mainly reflects expenditure to maintain existing resource production capacity, along with a modest number of new LNG and metal ore projects, according to Treasury.[105] For the Panel's purposes, non-mining investment is the more relevant metric for both the health of the economy and for the outlook for productivity.

Figure 13: Non-mining investment growth

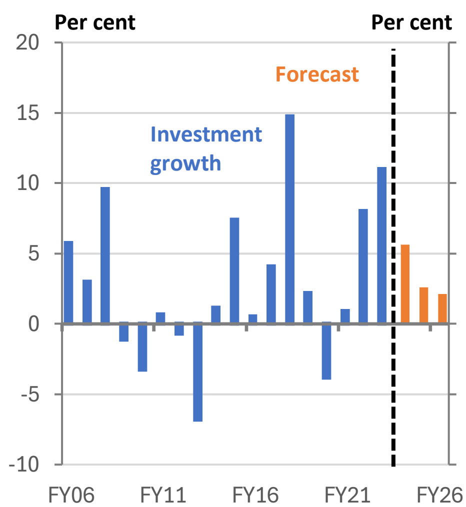
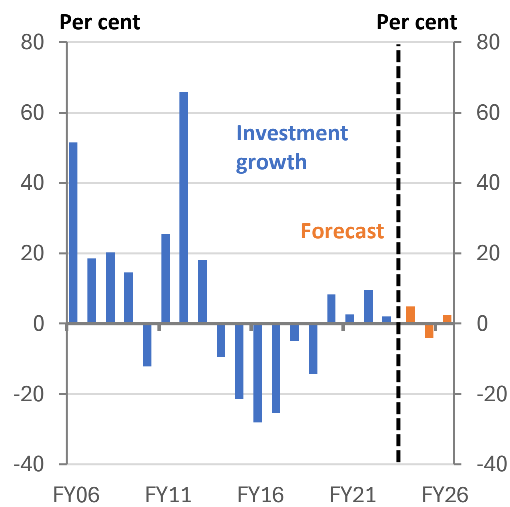


Figure 14: Mining investment growth

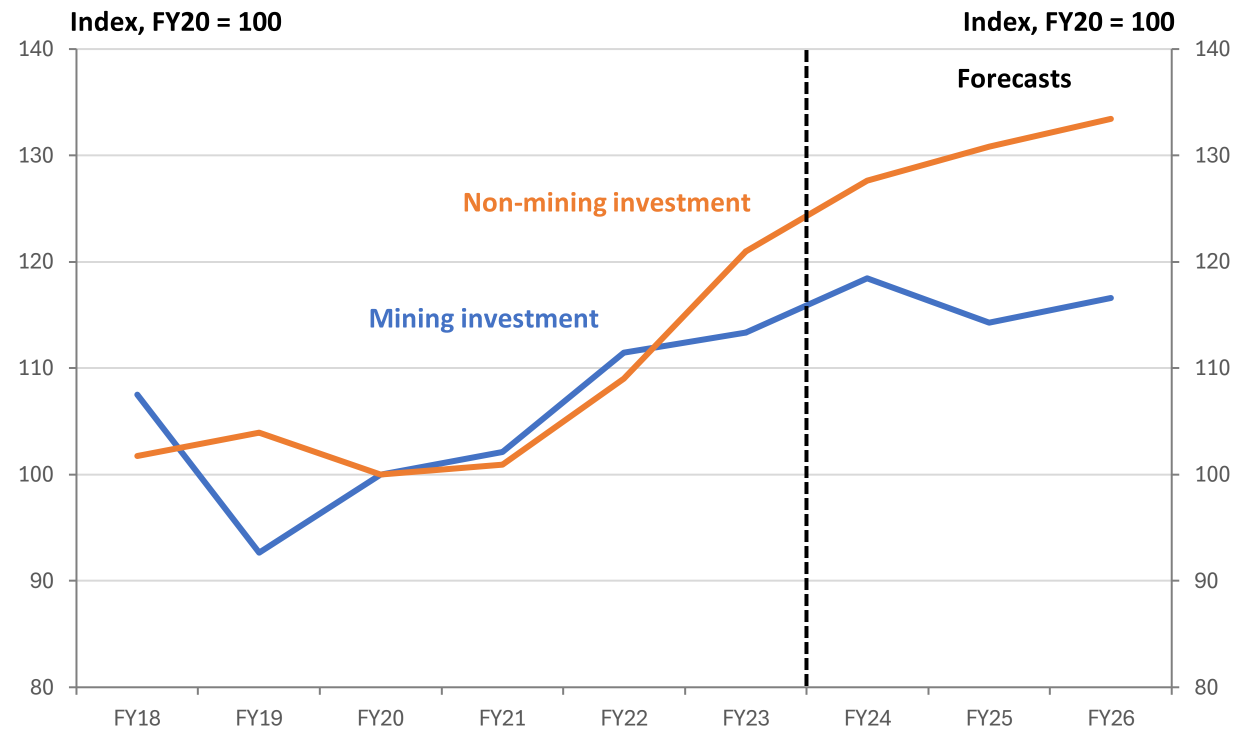


Source: ABS National Accounts: Income, Expenditure and Product, Budget 2024-25 & ACTU calculations

127. AiG also suggests that high business investment growth rates are not indicative of expected performance in the coming years. This is in the strictest sense true, but it is potentially misleading. As noted already, non-mining investment is forecast to continue to grow and will do so from a high level. Figure 15 indicates that while investment *growth* may ease, the *level* of investment will continue to increase from an already high base, laying the foundations for future productivity growth and expansion of the capital stock.

[105] Budget Paper No. 1

Figure 15: Indexes of investment and forecasts



Source: ABS National Accounts: Income, Expenditure and Product, MYEFO 2023-24 & ACTU calculations

128. It should not be controversial for the Panel to take the view that investment is expected to remain robust in the coming year. The Panel should also be mindful of the comparability of growth rates presented by the social partners to the Review and keep in mind that both growth rates and levels are important considerations when assessing the performance and outlook of the economy.

6.2 Response to individual submissions

6.2.1 Ai Group

129. At page 7 of their reply submission, Ai Group claim that there is a disparity between different sectors of the economy and that hours worked are falling in the market sector.[106] It would be very easy to draw overstated conclusions from this outcome, so it would be worth recalling that the uptick in hours worked after the economy re-opened post-COVID is a well-known phenomenon related to firms increasing the hours of existing staff in response to the sudden release of consumer demand as movement restrictions were removed and services consumption rebounded.[107] This high level of hours has been expected to unwind for some time as the economy slows and consumption patterns readjust to something resembling normality.

130. We suggest that it might be of greater interest to the Panel to note that hours worked in award reliant industries have increased slightly in March 2024, rising around 0.5 per cent from December 2023 and up 8.7 per cent since March 2022, compared to an increase of 8.4 per cent in the market sector and 9.3 per cent in the non-market sector (see Figure 16).

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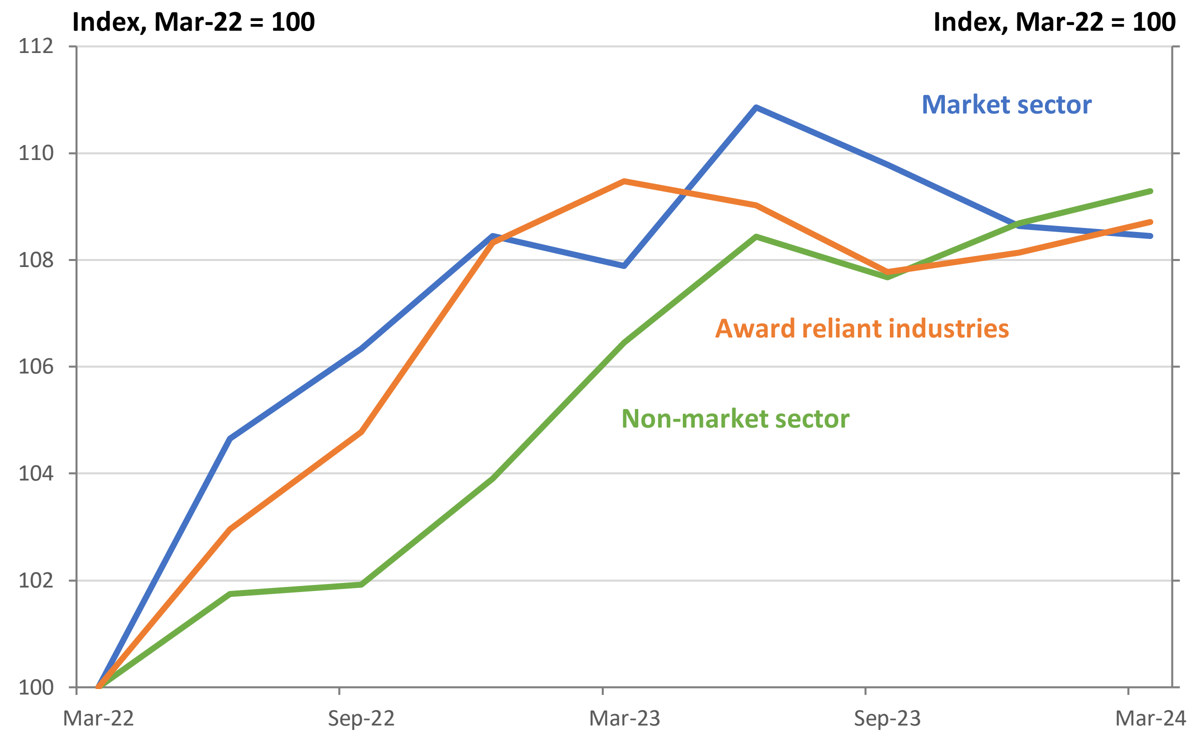
106 AiG reply submission, p. 7

107 Domestic Economic Conditions | Statement on Monetary Policy – February 2023 | RBA

Figure 16: Index of hours worked by institutional sector



Source: ABS Labour Force, Australia, ABS Labour Force Detailed, Australia & ACTU calculations

131. The Panel should treat AiG's claim with some caution and ensure that it is placed in the context of the rebound in economic activity following movement restrictions and that the direction of travel by institutional sector is understood.

132. On page 14-15 of their Reply submission, Ai Group indicate that the labour market is weakening and that Retail trade and Accommodation & food services are especially vulnerable to the easing in labour market conditions.

133. While it is broadly true that the labour market is weakening, and is expected to continue to weaken, this does not preclude the labour market's resilience being remarkable, not least of all because employment growth and the participation rate had both been stronger than expected relative to the forecasts published prior to the last Review decision.

134. The award reliant sectors identified by Ai Group, namely Retail trade and Accommodation & food services are currently in transition because they have been most affected by COVID-19 related disruptions.

135. Accommodation & food services saw a very strong rebound in output from June 2022, a reflection of the easing of movement restrictions and the sudden release of pent-up demand for discretionary services that had been unavailable for the best part of two years. The sector was then adversely affected as households had to scale back on discretionary spending as inflation dragged on real income and prices for essentials accelerated. The easing in employment in this industry can be explained by the unique combination of a solid COVID rebound and then the drag of a cost of living crisis, and as such reflects an industry going through an adjustment with strange macroeconomic circumstances the main culprit for employment coming off. That said, the vacancy rate is above the pre-pandemic average and the underemployment rate, while increasing, is below pre-pandemic averages. Given these unique circumstances, the Panel should interpret the easing employment figures cautiously.

136. Retail trade has also been affected by similar COVID-related disruptions. During the pandemic, Retail trade saw less of a decline in output and employment than other sectors due to workers switching consumption from services to goods and because a number of sub-sectors in the retail industry were classified as essential. From late 2022, after movement restrictions had eased and the rebound in discretionary services had begun in earnest, real GVA in Retail began to ease, with employment following soon thereafter as workers shifted from discretionary goods and towards discretionary services – and as the cost of living crisis began to act as a drag on workers' consumption. However, the vacancy rate is above the pre-pandemic average and the underemployment rate, while increasing slowly, is well below pre-pandemic averages. As with Accommodation & food services, the decline in employment in Retail trade should read in the context of significant COVID disruptions as the industry normalises after the pandemic.

137. It is worth noting in passing that the ACTU's claim that there is no evidence of dis-employment effects *from increases in minimum and award wages* should not be confused with an easing in the labour market attributable to macroeconomic factors, as AiG appears to do in at pages 14-15 of their reply submission. Factors such as the cost of living crisis, inflationary pressures and

high interest rates have been expected and known to have been leading to an easing in labour market conditions.

138. Ai Group's discussion of income support measures at pages 26-27 of its submission fails to appreciate that the "break with well-established practice" concerning how tax and transfer changes are taken into account by the Panel occurred in last year's decision. As the discussion of the issue in section 3.4 of our initial submission makes clear, we are not suggesting that the Panel does not take the Stage 3 tax reforms into account, we are rather articulating *how* it should take them into account in light of the apparent oversight last year and existing principle concerning avoiding any direct discounting that would negate the intention of tax/transfer benefits to low paid households or unfairly impact on low paid employees who are ineligible to receive them.[108] Unlike the Stage 3 tax reforms, the impact of rent assistance increase and the increase to the base rate of JobSeeker were evidently taken into account by Panel in last year's decision, with the Panel observing that there were:

> " ..measures announced in the 2023-24 Budget intended to deliver targeted cost of living relief to support Australians facing pressure from high inflation and interest rates, and to lower inflation. The measures are primarily directed at those in receipt of welfare payments, some of whom will be low paid workers".[109]

To the extent the Ai Group may be taken to submit that there should be further offsetting next financial year on account of the benefit these measures provided in the current financial year, the submission should be rejected.

139. We disagree with Ai Group's position on page 28 of its submission that the employee living cost index "should not be considered a relevant indicator for the purposes of the AWR". The employee LCI measures the costs faced by employee households in aggregate (that is, all those households whose main source of income is wages and salaries), and reflects the combined influence of a number of different household compositions including families and single person households. The weightings given to particular expenditure items in LCIs for each household type reflect average expenditure of that household type in aggregate and not the expenditure of an 'average household' of that type.[110] The Panel is sensitive to this and clearly comprehends

[108] [2019] FWCFB 3500 at [243]-[245].
[109] [2023] FWCFB 3500 at [102]
[110] See ABS, Selected Living Cost Indexes Australia [Methodology]

the value and limitations of various measures of inflation and interprets them accordingly, for example:

> "The CPI and the LCI each provides relevant information about changes in the purchasing power of wages. The LCI is specifically designed to measure changes in living costs of specific groups in the community including those for whom the principal source of income is wages and salaries, while the CPI is designed to measure inflation for the household sector as a whole. The LCI more directly focuses on the impact of price rises on wage earner households and is a broader measure of the costs facing wage earners since it includes the impact of mortgage interest and consumer credit payments. However, it is more volatile measure. We think it is appropriate to have regard to each measure of inflation, noting the conceptual differences."[111]
>
> "We have taken into account each measure of inflation and the cost of living as presented in the Statistical report and in submissions. Further, as noted in last year's Review decision we accept that price increases and the cost of living at the aggregate level can mask the lived experience of low-paid workers. Price increases in non-discretionary purchases, such as rent and basic food staples, are more likely to affect the household budgets of the low paid."[112]

140. Ai Group does not identify what its preferred measure of cost of living changes is, but expresses dissatisfaction with measures or analysis that look at household costs, on the basis that some low paid individuals live in higher paid households. We discuss the household distribution of low paid workers at paragraph 130 of our reply submission. It is clear that most low paid workers do live in lower paid households, but some do not. This fact does not necessitate giving the expression "safety net" anything other than its ordinary and well understood meaning.

141. As we have often noted, where adult low paid workers do reside higher in income households, a question arises as to whether this is purely by choice or by necessity. Ai Group seem to urge the Panel to accept that the minority of low paid workers that do live in higher paid households have a right to enjoy and do enjoy the benefits of the higher incomes and living standards of their cohabitants, but make no allowance for the possibility that such workers might also experience some reductions in living standards as conditions affecting the household generally

[111] [2013] FWCFB 4000 at [206]
[112] [2022] FWCFB 3500 at [53]

change – including as a consequence of rising mortgage payments (an example of expenditure specifically cited by Ai Group as relevant to households that are not low paid). It also appears to have escaped Ai Groups attention that the housing group for the Employee LCI – which does not include mortgage payments but does include rents and utility charges that low income households would be expected to face – was the second largest contributor to rising costs in the year to March, at 6.8%. Such housing costs are given a weighting of 13.08% in the Employee LCI, yet as our initial submission shows the lowest two income quintiles were already spending over 20% of their income on rent alone before inflation peaked in December 2022[113] and by June 2023 rental costs accounted for over 30% (and up to 45%) of a single person income of $62,800 in every capital city except Hobart.[114]

6.2.2 ACCI

142. ACCI states at paragraph 8 of its submission that the position it puts forward for this Review is focussed on 'containing inflation and returning it to [*sic*] middle of Reserve Bank's target band of 2-3% as quickly as possible, as well as providing a reasonable allowance for workers to share the benefits of productivity growth."[115]

143. ACCI is not the central bank, and so its position on the return of inflation to target is irrelevant to monetary policy strategy. That notwithstanding, the Board of Reserve Bank of Australia has been very clear on its strategy to date. The Board's strategy can be articulated as returning inflation to the target band in a reasonable timeframe while holding on to as many gains in the labour market as possible.[116]

144. While the Board noted that the path of interest rates that will best ensure that inflation returns to target in a reasonable timeframe remains uncertain and that it is not ruling anything in or out, it is noteworthy that the overnight cash rate was left unchanged in the 7 May 2024 monetary policy decision and the forecast for inflation to return to target remains December 2025 as of

[113] At paragraph 118
[114] At paragraph 359.
[115] ACCI reply submission, para. 8, p. 2
[116] [Monetary Policy Decision | Speeches | RBA]

the May *Statement on Monetary Policy*[117], consistent with the forecast from the February *Statement on Monetary Policy,* released prior to the March quarter CPI release.[118]

145. The Panel would also be aware that the Fair Work Commission and the Reserve Bank of Australia have quite separate institutional mandates. While the RBA's mandate is return inflation to the target band, the Panel is required to take a range of matters into account in coming to a decision that sets fair wages. None of the independent considerations concerned are elevated above others in the expression of the Panel's task.

146. Continuing its discussion of inflation at paragraph 25 of its reply submission, ACCI raised in its submission that the March quarter CPI data has led a number of economists to revise expectations for RBA rate cuts, citing several private bank economists in support of this claim.[119]

147. While it is true that the market expectations of the cash rate have shifted, this is a routine occurrence and should be accompanied with appropriate caveats that forecasting is challenging and a highly uncertain exercise. Forecasts rely on the construction and estimation of the models used and the judgement of the analyst and should not be taken as categorical truth. There are also a range of views between forecasters on finer details even when the broad narrative and understanding of the direction of travel is consistent across institutions.

148. Forecasting the cash rate is also exceptionally difficult. As noted by Greg Jericho in *The Guardian*, through 2017 to 2019, markets were expecting the RBA to raise the cash rate, an eventuality that did not arise.[120] Further, markets also expected at different times a higher and lower peak cash rate than has eventuated (see Figure X).

149. ACCI cites Westpac's Chief Economist Luci Ellis as an authority in this debate. Ellis commented on 3 May 2024 that one argument for further rate hikes hangs on the upside surprise in the March 2024 inflation print and the Labour Force data. Ellis goes on to note that:

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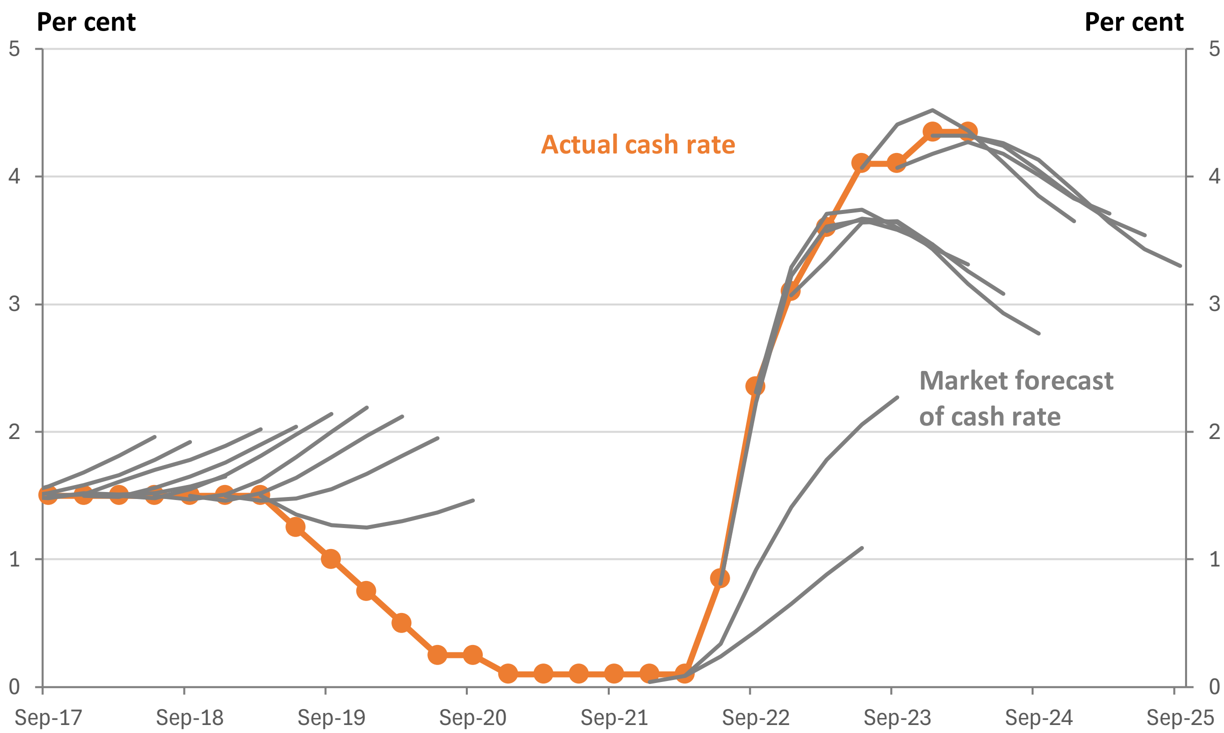
[117] Outlook | Statement on Monetary Policy – May 2024 | RBA
[118] Outlook | Statement on Monetary Policy – February 2024 | RBA
[119] ACCI reply submission, para. 25, p. 5
[120] Talk of interest rate cuts soon is optimistic – here's why the RBA may decide doing nothing is safer | Greg Jericho | The Guardian

"The nagging doubt around that course of action is that this was what happened last November, only to see a significant downside surprise in the December quarter inflation and real-side data. The result was the RBA's February 2024 forecast for trimmed mean inflation over 2025 reversed the upward revision in the November 2023 forecast round….it is understandable that policymakers might want to see the actual results, and a bit more progress on inflation, before even thinking about cutting rates."[121]

Figure 17: Market cash rate forecasts and RBA cash rate



Source: Reserve Bank of Australia and Greg Jericho

150. All of this is to suggest that it would be very easy to overstate the consequences of the inflation results for March 2024 and that caution should be taken in using market forecasts as inferences for decision making.

151. A similar view was expressed by Jim Chalmers during an interview with the ABC, where the Treasurer mentioned that:

[121] Could They? Should They? | Westpac IQ

> "There's no shortage of opinions at this time but everything that you read in the paper is not necessarily right. Often it's wrong this sort of commentary you get at budget time. And I thought there was a pretty big overreaction, frankly, to the inflation number last week…It moderated substantially in the quarter. In annual terms we're still ahead of the MYEFO forecast for inflation so we need a bit of perspective here."[122]

It is noteworthy that the reaction to the March quarter inflation results being what it was, the outcome was still ahead of the MYEFO forecasts from late 2023. Treasurer Chalmers' comments also go to the issue of there being a range of views among forecasters and that it is necessary to treat outcomes such as these with some caution and perspective when taking decisions of consequence.

152. ACCI's discussion of "the living wage and poverty", commencing on page 14 of its submission is unpersuasive. Insofar as it constitutes a reply to our initial submission, it states that our submission "exaggerates the potential for all minimum wages and most employees on modern award to be low paid and living in poverty", by reference to content in our submission that says nothing about the potential for either.

153. We strongly disagree with ACCI's position at paragraph 71 of its reply submission that the minimum wage, "by any reasonable assessment" affords those in full time employment with both a decent standard of living and a standard of living in excess of poverty levels. The current NMW at the C13 rate is $71.20 per week below the revised Budget Standard figure of $954 presented in Table 8.8 of version 5 of the Statistical Report and, based on Tables 8.4 and 8.6 thereof a mere $124 per week above the 60% poverty line. This is a standard of living that offers little if any financial reserves and exposes a rift between ACCI and ourselves in our conception of that which is decent, reasonable or indeed adequate.

154. Unlike the view taken by ACCI at paragraph 73 of its reply submission, we do not regard mere subsistence above a 60% poverty line as equating to an "acceptable standard of living", nor do we regard the standard of living of single parents working part time or single earner couples as irrelevant considerations in this Review. We recognise that the social safety has role to play in

[122] Interview with Patricia Karvelas, RN Breakfast, ABC | Treasury Ministers

supporting persons who are not working full time, but in circumstances where the combination of the social safety net and industrial safety net delivers poverty, we prefer advocacy to indifference. An increase to the minimum wage is shown in Table 8.5 of the statistical report to have a passthrough to all households- and for most of those dismissed by ACCI the passthrough is at a higher level than that experienced by a single adult household. The Panel is demonstrably capable of making a positive difference to the lives of the workers and their families reliant on minimum wages and should do so.

155. It is not clear what mileage ACCI expects from it claim at paragraph 74 of its reply submission that household disposable income for all household types listed in Table 8.6 of the statistical report rose "10 index points or more" to be "considerably higher" in 2023 than in the previous year. Table 8.6 does not measure "index points" as such, and ACCI have not presented an index of their own. At the time ACCI made this claim it was likely made in reference to Table 8.6 as presented in version 3 of the Statistical Report (16 April). That version showed the ratio of particular minimum wage levels to the 60% median income poverty line for 14 household types in nominal terms, as measured in the September Quarter. It is altogether unsurprising that a comparison between September Quarter 2022 and September Quarter 2023 shows that progress has been made against the poverty line for each household, given that the minimum wage levels it refers to were adjusted with effect for the first pay period after the first day of the quarter. This observation If anything undermines ACCI's general position that minimum wage adjustments are ineffective at lifting living standards. When looking at Table 8.6 as shown in version 5 of the Statistical Report (9 May), December Quarter comparisons are used and predictably, the ratios of each wage level to the poverty line have deteriorated as regulated minimum wages stood still while all other variables impacting on disposable income developed. Table 8.4 of the statistical report shows changes in nominal disposable income for the 14 household types between July 2022 and July 2023, as well as CPI. This reveals a maximum real gain of 1.7% over the year and a minimum of 0.2%, across the different household types. Since July of 2023, CPI increased by 1.2% in the September Quarter, 0.6% in the December Quarter and 1.0% in the March Quarter, eroding these gains.

156. Paragraphs 75-78 of ACCI's reply submission merely rehash material presented in their initial submission, which we have already answered in our reply submission.

157. Pages 16-17 of ACCI's reply submission contains a short discussion of the "stepping stone" effect of the minimum wage, the point of which appears to bolster its position that "the minimum wage is better aligned to the C14 rate"[123] than the C13 rate. That position is built upon two foundations:

a. That Wilkins and Zilio had shown in their 2020 study that "39.1 per cent of workers joining the workforce on the minimum wage move to higher paid employment within one year, 56.8 move after 2 years and 80 per cent moved by 5 years"[124]; and

b. These entry point and transition effects should not be made by difficult by uprating minimum wages.

These foundations, and thus the edifice of the ultimate position, are wobbly at best.

158. The modelling undertaken by Wilkins and Zilio in the study cited by ACCI did not actually specifically examine transitions from the C14 rate or the National Minimum Wage. It examined transitions from *low paid award reliant employment* to higher paid employment. The "low paid threshold" used in the study was two thirds of median hourly earnings of all employees.[125] The period of the study was the period covered by waves 8-18 of the HILDA survey, being 2008 to 2018, and the low paid threshold for each of those years is set out in Table 1 of the study.[126] We have set out in Table 3 below the low paid threshold used in the study in each year, along with the highest classification and rate from the *Manufacturing Award* and its predecessor pay scale for the corresponding year.

[123] At paragraph 82.
[124] At paragraph 80.
[125] Wilkins R & Zilio F (2020), Prevalence and persistence of low-paid award-reliant employment, Melbourne Institute of Applied Economic and Social Research, Fair Work Commission Research Report 1/2020, February, at 7-8.
[126] I*bid.* At Page 8 and 35.

Table 3: Low paid thresholds and selected award wages, 2008-2018

Year	Low Pay Threshold	Highest Classification Below Threshold
2008	$15.63	C11 ($15.62) From October C12 ($15.34)
2009	$16.44	C11 ($15.89)
2010	$17.00	C10 ($16.78) From July, C11 ($16.58)
2011	$17.54	C10 ($17.46) From July, C11 ($17.14)
2012	$18.18	C10 ($18.06) From July, C11 ($17.64)
2013	$18.67	C10 ($18.58) From July, C11 ($18.09)
2014	$18.67	C11 ($18.09) From July, C11 ($18.64)
2015	$19.30	C11 ($18.64) From July, C11 ($19.10)
2016	$20.00	C11 ($19.10) From July, C11 ($19.56)
2017	$20.12	C11 ($19.56) From July, C12 ($19.53)
2018	$20.81	C12 ($19.53) From July, C12 ($20.22)

Source: FWC, AIRC AFPC, Wilkins & Zilio

159. Table 3 shows that the transitions modelled by Wilkins and Zilio may have involved transitions from classifications high as C10 – the benchmark rate for a qualified tradesperson - to higher paid work during the modelling period. The most recent estimate from the Australian Government, based on May 2023 data when the national Minimum wage was equal to the C14 rate, was that 57,500 or 2 per cent of award reliant employees were paid that rate.[127] It seems highly unlikely that transitions from such a small group of employees would exert much influence over the results. Rather, the results tend to suggest that transitions to higher pay at a level that ACCI is evidently eager to protect have been shown to be possible from the C13 rate and higher. The National Minimum Wage is currently aligned to C13 ($23.23 per hour) compared to a low paid benchmark, using Wilkins and Zilio's formulation, of $26.07[128]. The closest award rate below this benchmark today is C11 ($24.87), which was also the case for much of the period examined by Wilkins and Zilio. Leaving aside the influences of employee characteristics on the extent of transitions and the probabilities of transition into non-employment modelled elsewhere in Wikins and Zilio' study, ACCI need not be concerned about that any "stepping stone

[127] See Australian Government submission at page 23.

[128] ABS Characteristics of Employment August 2023 (Table 2) shows median hourly of all employees as $39.50.

effect" has been diminished by the Panel's past decisions, including the decision to realign the National Minimum Wage to C13. ACCI's position that "the minimum wage is better aligned to the C14 rate" should not be accepted.

160. The discussion of secure work and social inclusion at pages 17-20 of ACCI's reply submission suffers from three fundamental flaws. Firstly, it rests on an assertion or presumption that the Panel's decisions will have disemployment effects. Such effects have not been proven. Secondly, ACCI'S framing of the requirement to take into account "the need to improve access to secure work across the economy" as involving an identical reasoning approach with respect to labour cost factors as is involved in taking into account "the need to promote social inclusion through increased workforce participation", involves a rejection of the relevant authorities on this issue[129]. Thirdly, ACCI's framing of the requirements as equivalent in this way effectively invites the Panel to accept the bizarre proposition that Parliament's decision to introduce the requirement to take into account "the need to improve access to secure work across the economy" was accompanied by an intent that amendment would be inconsequential. To the extent that we see a reduction of employment in award reliant industries that are highly demand responsive, this should be attributed to the monetary policy decisions of the RBA rather than a regular level shift in regulated minimum wages.

6.2.3 Australian Retailers Association

161. The algorithm proposed by the ARA for the fixation of modern award minimum wages should not be accepted for reasons advanced at paragraph 152 of our reply submission. It would be illuminating to know whether the ARA holds to its formulaic approach in light of the revision of the RBA's trimmed mean forecast to June 2024 of 3.8%, equal to its revised forecast for CPI, in the May Statement on Monetary Policy.

162. We believe some further nuance is required than what is provided on page 2 of the ARA's reply submission in discussing retail trade data and its relationship to inflation. We do not question the basic proposition that rises in living costs will have a negative impact on retail spending,

[129] See paragraph 132 of our reply submission at paragraph 459 of our initial submission.

particularly discretionary spending. However, some further context is required around the ARA's comment that 'Lower price inflation continues to constrain retailers, requiring greater sales volumes to offset business costs'.

163. Firstly, whilst the recent released ABS retail trade volume data for March 2024 shows that volumes have fallen in aggregate by 0.4% over the quarter, this is entirely due to falls in the Department Stores and Household Goods categories. All other retail categories either improved in the March Quarter (from between +1.3% for Clothing and Footwear to + 0.3% for Café's, Restaurants and Take Away Food) or stayed level (which was the case with Food). The falls in Department Stores and Household Goods may reflect in part the washing out of atypical gains in the December Quarter associated with the shift toward November spending (as referred to at paragraph 143 of our reply submission). So, at least for some retailers, the rise in volumes that the ARA has hoped for has materialised this quarter.

164. Secondly, the complaint that 'Lower price inflation continues to constrain retailers' in response to business costs needs to be viewed against the context presented in paragraphs 146-151 in section 4.8 of our reply submission, which shows that price has been the biggest driver of growth in retail turnover since December. This has continued in the March Quarter figures, which show a growth in turnover of 0.8% over the year to March notwithstanding a decline in volume of 0.4%. That is, 'lower price inflation' as referred to by the ARA nonetheless entails *some* price inflation. Indeed, the CPI release for the March Quarter includes rises of well above the headline rate 3.6% for a number of retail goods and service, including Bread (8.3%), breakfast cereals (6.4%), Eggs (8%), Non alcoholic beverages (5.4%), Take-away and fast food (6.6%), Beer (6.3%), hairdressing (7.1%) and Automotive Fuel (5.2%) - and none of the major CPI groups saw a reduction over the year[130]. The Panel should not be persuaded that Retail sector lacks the capacity to vary prices as a mechanism to respond to input costs.

165. The ARA uses the expression "employment downturn" in connection with the sector "hiring fewer people" in response to uncertain trading conditions. It seeks to substantiate this claim by reference to a change in the share of total employed persons employed in the sector in the

[130] ABS, March Quarter CPI Table 10.

February Quarter of 2023 versus the February Quarter of 2024. In our view, this measure is not appropriate to substantiate the claim made. Total employment in the retail trade sector, as measured in the Labour Force Detailed series[131], increased in the February Quarter by just over 46,000 persons (3.55%), to be only 0.25% lower than was seen in February 2023. Employment in the retail sector is indeed highly demand responsive and heavily reliant on a flexible labour model, but the most recent quarterly movement in employment in that sector has been to scale up rather than down.

166. Similarly, we do not consider that the ARA can credibly claim a link between the rise in the number of insolvencies in the retail sector and the "higher costs of doing business". It is true that there has been a rise in the number of retail insolvencies in the financial year to date relative to the same time last in the last financial year, however further investigation suggests that the drivers of the increase are substantially related to taxation obligations and other pre-existing factors rather than *current* trading conditions, and that some of the businesses concerned may not actually be destined to exit on account of insolvency.

167. We have analysed insolvency statistics released by ASIC[132] with particular reference to 2022-23 financial year to the end of April 2023 and the 2023-24 financial year to the end of April 2024. We define insolvencies here based on what the data set measures, which is the number of business that have entered administration or had a controller appointed for the first time in the relevant period. In aggregate we find 426 insolvencies in retail trade in the first period and 565 in the second, an increase of 32.6%. For perspective, historical ASIC statistics[133] from 2013/14 to the last non-pandemic effected of 2018-19 reveal an average of 654 insolvencies in retail trade per full financial year. It follows that the current level could certainly not be considered wildly off target.

168. Aside from the growth of 32.6% in total retail insolvencies, what distinguishes the two periods is the type of insolvency. In Figure 18 below we compare the *number* of insolvencies by type in the two periods. In Figure 19 we compare the *share* of insolvencies by type in those two periods.

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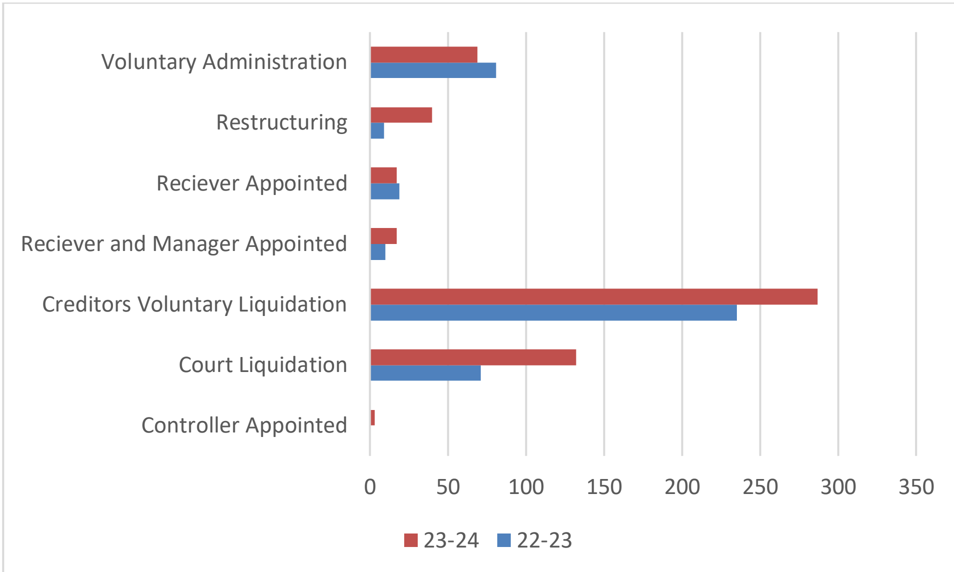
131 At Table 4

132 Series 1 and Series 2, available on the Statistics section of the ASIC Website

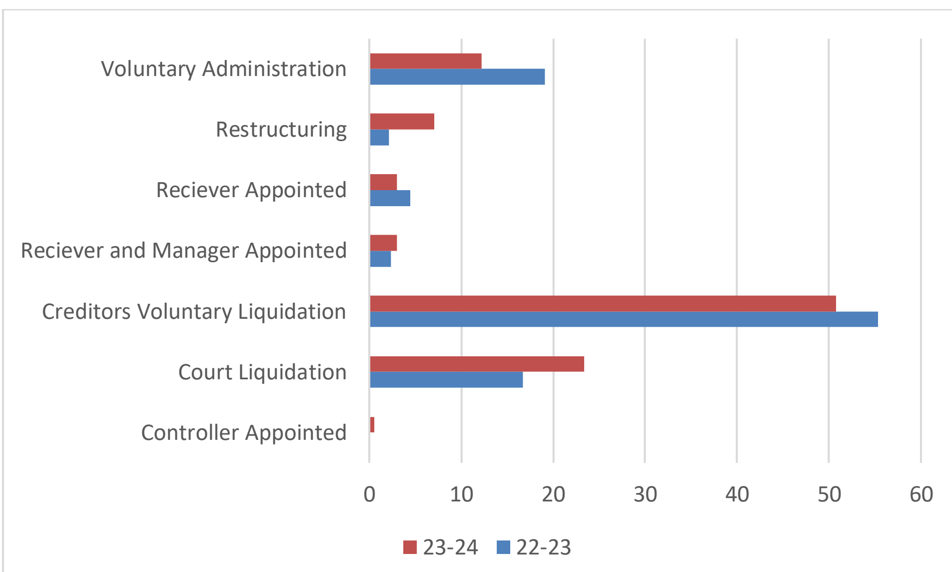
133 These historical statistics are accessible from a different section of the ASIC website.

Figure 18: Number of insolvencies by type, FY 22-23 to April vs FY 23-24 to April



Source: ASIC

Figure 19: Share of insolvencies by type, FY 22-23 to April vs FY 23-24 to April



Source: ASIC

169. The 139 additional insolvencies in the latter period is largely the result of Court Liquidation and Restructuring becoming more common forms of insolvency, as well as an increase in the overall

number of Creditor's Voluntary Liquidations. The additional number Court Liquidations and Restructuring (61 and 31 respectively) make up two thirds of the increase in the number of insolvencies between the two periods. There is reason to believe that both are heavily influenced by enforcement actions taken by the Australian Tax Office.

170. A report by the Joint Committee on Corporations and Financial Services concerning Corporate Insolvency in Australia[134] provides some important context in this regard. The report explains that during and immediately after the pandemic there were a number of supports available to businesses in recognition of the impact of social and trading restrictions. These included, for the period from March 2020 to the end of the calendar year, a temporary uplift in the statutory demand threshold from $2,000 to $20,000 and an extension of the time respond to a statutory demand from 21 days to 6 months. In addition, the JobKeeper wage subsidy system remained in place in some form until March of 2021. Meanwhile, the ATO paused enforcement actions (including wind ups), and deferred payment dates (including by varying existing instalment plans). From July 2022, the ATO gradually recommenced more normal recovery operations, after the debt owing to it had increased by $18.3 billion or 69% on July 2019 levels. The combination of policy change and ATO leniency was expected to first result in a number of non-viable companies being kept in operation, and thereafter a sharp rise in insolvencies once more normal operations were resumed.[135]

6.2.3.1 Restructuring

171. Another of the pandemic era reforms introduced, with effect from 1 January 2021, was small business restructuring. This is a permanent, rather than a temporary policy change. As noted above, an increase in restructuring is one of the drivers of increased insolvencies in the retail sector.

172. Restructuring provides a streamlined alternative to voluntary administration for small businesses and enables the directors to remain in control of the company during the restructuring period. If eligible to utilise this option (including where the debts owed do not exceed $1 million),

[134] July 2023, available from the Committee website.
[135] See Chapter 2 of the Report.

directors must resolve that that the company is *either* insolvent or *likely to be*. They may then appoint a restructuring practitioner, to assist with formulating a restructuring plan for approval by creditors. A review of the operation of the restructuring provisions published by the ATO in January 2023[136] indicates that the ATO was a creditor in 89% of cases where the provisions were used, and a major creditor (i.e. owed more than half of the total debt) in 79% of cases. Although there was slow uptake of the option at that stage of only 82 events, 66% of business who entered into restructuring had their plans approved and continued to trade, and the Retail Trade sector was the third largest user of the provisions.

173. Restructuring has been identified as a suitable pathway to negotiating debts to with ATO in the face of its renewed interest in enforcement activities, particularly as a device to resolve debts prior to ATO issuing director penalty notices that would require business closure or impose personal liability on directors.[137]

6.3.2.2 Court appointed liquidation

174. Creditors, including the ATO, are entitled to bring winding up proceedings in respect of unpaid debts where proper preliminary steps are followed. Generally, the ATO initiates approximately 1/6th of winding up proceedings.[138] Following the conclusion of the pause in enforcement activity in association with the pandemic, the number of winding up actions taken by the ATO has risen. Between January and July of 2023, it commenced 478 winding up proceedings, of which 100 were commenced in July alone[139], up from only 14 for the same 7 months of 2022.[140] The ATO confirmed the continuing escalation of enforcement action to the ABC in March of 2024, with a spokesperson commenting that "The ATO has a range of targeted strategies to address the growth in collectable debt — this includes a renewed focus on formal recovery actions, such as having their debt disclosed to credit reporting bureaus or court-imposed liquidation if a debt remains unpaid"[141] .

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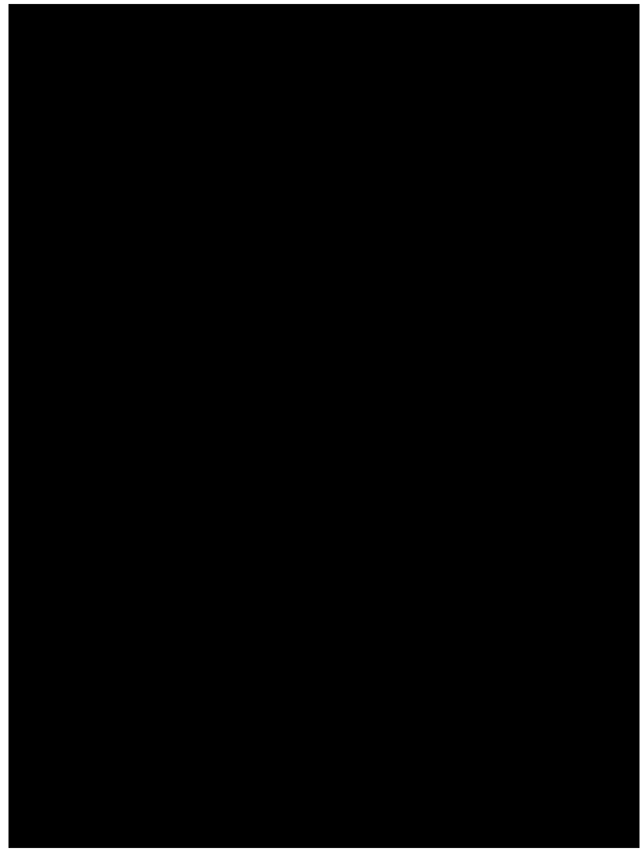
136 Australian Taxation Office, Review of small business restructuring process, Report 756, January 2023.
137 See Vincent B., and Sanderson, C., "What is a Director Penalty Notice – Latest Update April 2024", dissolve.com.au (accessed 9 May 2024)
138 Speech to Tax Institute Summit by Deputy Commissioner Vivek Chaudrey, 7 September 2023.
139 Ibid.
140 Mason, M, "Court actions reveal ATO crackdown on unpaid tax", AFR, 3/8/2023.
141 Khadem, N., "ATO chases small businesses for $34b in debt, insolvencies tipped to hit post-global financial crisis levels", ABS News online, 18 March 2024.

175. Insolvency practitioners have commented both on the scale and basis of recent ATO enforcement action. In August of 2023, Chris Baskerville of Jirsch Sutherland Insolvency reported that the rise in insolvencies "can be directly attributed to ATO enforcement action".[142] Craig Shepard of KordaMentha similarly observed in August of 2023 that there was:

> "…a ramp up of enforcement by the ATO following a couple of COVID-impacted years where there was limited to no enforcement action. That looks alarming but I don't think its that alarming. A lot of the companies are already finished, they're cleaning up companies that have already stopped trading"[143]

176. The Head of business restructuring for Revive Financial, Jarvis Archer has observed that "The ATO has come into 2024 really mad" and that it has been "Noticeably turning a corner in their approach to taxpayers with non-compliant debts, the options are now black and white: pay, close or restructure your debt", while citing a tendency for the ATO to offer shorter deadlines for payment that was customary and commencing winding up proceedings immediately after deadlines pass[144]. He estimated there were 130 such proceedings commenced in February of this year alone. Kate Conneely, of Cor Cordis likewise reported an uptick wind-up applications from the ATO but noted that this was mostly reserved for cases where taxpayers had "put their heads in the sand" rather than engaging with the ATO at an earlier stage.[145] Insolvency Australia Director Gareth Gammon noted in February of this year the "large legacy debts for the COVID-19 era" were a driver of FY24 insolvencies, identifying that "the ATO and the banks, in particular, are using all the tools in their arsenals to recover monies owed, making up for leniency during COVID years"[146]

[142] Insolvency Australia, "ATO and creditor action poses greatest risk to SMEs, says Insolvency Australia", 10/8/2023.
[143] Mason, M, "Court actions reveal ATO crackdown on unpaid tax", AFR, 3/8/2023.
[144] Khadem, N., "ATO chases small businesses for $34b in debt, insolvencies tipped to hit post-global financial crisis levels", ABS News online, 18 March 2024.
[145] Ibid.
[146] Chen, C., "ATO, bank debt crusade triggers 133% jump in court wind ups", Accountants Daily, 9 February 2024.



ACTU Australian Unions