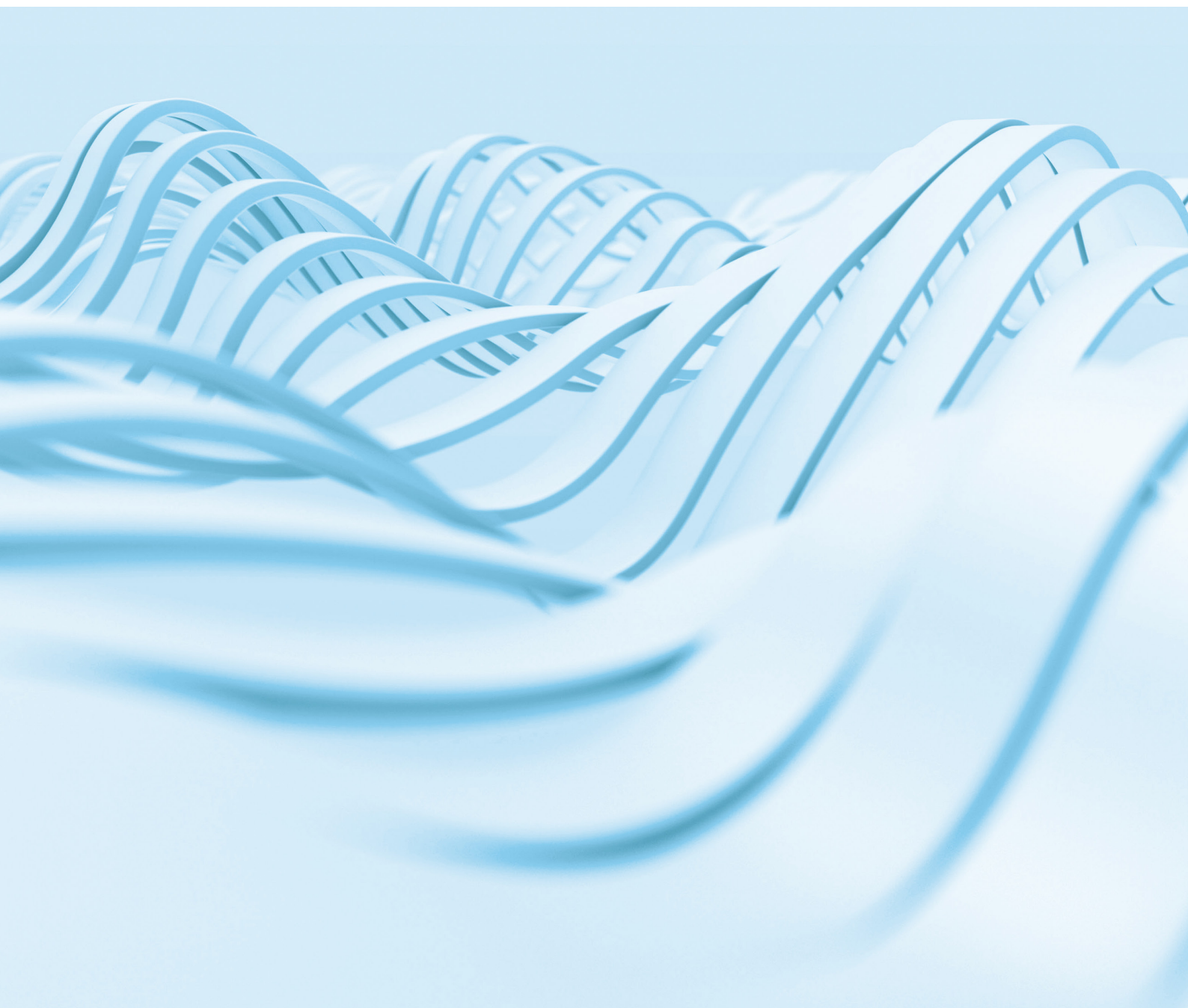




# **5-year Productivity Inquiry: A more productive labour market**

Interim report



**The Productivity Commission acknowledges the Traditional Owners of Country throughout Australia and their continuing connection to land, waters and community. We pay our respects to their Cultures, Country and Elders past and present.**

## **The Productivity Commission**

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website ([www.pc.gov.au](http://www.pc.gov.au)).

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## Opportunity for comment

The Commission thanks all participants for their contribution to the inquiry and now seeks additional input for the final report.

You are invited to examine this interim report and comment on it by written submission to the Productivity Commission, preferably in electronic format, by 21 October 2022.

Further information on how to provide a submission is included on the inquiry website: [www.pc.gov.au/inquiries/current/productivity](http://www.pc.gov.au/inquiries/current/productivity)

The Commission will prepare the final report after further submissions have been received and it will hold further discussions with participants. The Commission will forward the final report to the Government in February 2023.

## Public hearing dates and venues

Dates and venues will be listed on the inquiry website once confirmed.

## Commissioners

For the purposes of this inquiry and draft report, in accordance with section 40 of the *Productivity Commission Act 1998* the powers of the Productivity Commission have been exercised by:

Michael Brennan	Chair
Alex Robson	Commissioner
Stephen King	Commissioner
Lisa Gropp	Commissioner

## Terms of reference

I, Josh Frydenberg, Treasurer, pursuant to parts 2 and 3 of the *Productivity Commission Act 1998*, hereby request that the Productivity Commission undertake an inquiry into the Australia's productivity performance and provide recommendations on productivity-enhancing reform. This inquiry is the second of a regular series, undertaken at five-yearly intervals, to provide an overarching analysis of where Australia stands in terms of its productivity performance. The first report, *Shifting the Dial* was completed in 2017.

## Background

Australia's economy has performed strongly in recent decades enjoying robust growth in incomes and living standards following 28 years of consecutive economic growth interrupted by the COVID-19 pandemic. Australia's economic recovery from the pandemic has been world leading however to ensure Australians continue to enjoy higher living standards, we need to continue to focus on the task of lifting productivity.

Productivity growth is vital for Australia's future, particularly as the Australian and global economies emerge and begin to recover from the economic impacts of COVID-19. The 2021 Intergenerational Report makes it clear that future growth in income and living standards will be driven from productivity growth as the participation effects of young migration are offset by an ageing population. Global and domestic productivity growth in recent decades however has slowed. Changes brought about by the COVID-19 pandemic and the global and domestic policy responses will also provide a unique historical context for this Review.

Given the scale and nature of the economic shock caused by the COVID-19 pandemic, it is expected to have an enduring impact on Australia's productivity challenge. The acceleration in the uptake of technology by business and individuals has stimulated growth in remote work, online commerce, businesses' digital presence and innovative delivery of public services like health and education. The pandemic has affected business models in some key sectors and underscored the need for labour mobility across the economy.

In this environment, Australia needs policy settings that foster a flexible and dynamic economy, that is able to adapt in the face of economic challenges and opportunities. Policy settings should encourage the economy to adapt to the growing importance of digital technologies, including through developing a skilled labour force. They must also be forward looking and support an environment that promotes economic dynamism, entrepreneurship and appropriate risk-taking, and innovation and technological adoption.

Against this background, the Review can play a critical role in making high-value and implementable recommendations to support Australia's productivity growth. Lifting Australia's productivity growth will involve a combination of economy-wide and structural reforms, in addition to targeted policies in particular sectors to push Australian industries closer to the global frontier.

## Scope of the inquiry

The Commission is to review Australia's productivity performance and recommend an actionable roadmap to assist governments to make productivity-enhancing reforms. Each recommendation should qualitatively and quantitatively estimate the benefit of making the reform and identify an owner for the action and a timeframe in which it might occur.

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Without limiting related matters on which the Commission may report, its report to the Government should:

1. Analyse Australia's productivity performance in both the market and non-market sectors, including an assessment of the settings for productive investment in human and physical capital and how they can be improved to lift productivity.
2. Identify forces shaping Australia's productivity challenge as a result of the COVID-19 pandemic and policy response.
3. Consider the opportunities created for improvements in productivity as a result of Australia's COVID-19 experience, especially through changes in Australia's labour markets, delivery of services (including retail, health and education) and digital adoption.
4. Identify priority sectors for reform (including but not limited to data and digital innovation and workforce skills) and benchmark Australian priority sectors against international comparators to quantify the required improvement.
5. Examine the factors that may have affected productivity growth, including domestic and global factors and an assessment of the impact of major policy changes, if relevant.
6. Prioritise and quantify the benefit of potential policy changes to improve Australian economic performance and the wellbeing of Australians by supporting greater productivity growth to set out a roadmap for reform.
7. Revisit key recommendations and themes from the previous five yearly review in light of the above, where relevant.

The Commission should have regard to other current or recent reviews commissioned by Australian governments relating to Australia's productivity performance and include comparisons of Australia's productivity performance with other comparable countries. The Commission should support analysis with modelling where possible and qualitative analysis where data is not available, and this is appropriate.

## Process

The Commission should consult widely and undertake appropriate public consultation processes, inviting public submissions. The Commission should actively engage with Commonwealth, and state and territory governments. The final report should be provided to the Government within 12 months of receipt of these terms of reference.

**The Hon Josh Frydenberg MP**  
Treasurer

[Received 7 February 2022]

## **Acknowledgements**

The Commission acknowledges and thanks Ralph Lattimore, Hudan Nuch, Gwendaline Jossec, Cameron Eren, Anand Bharadwaj, Toby Markham, Andy McClure, James Smith, Shelby So and Jonathan Vandenberg for their work on this interim report and its underlying analysis. Rosalyn Bell and Commissioners Martin Stokie and Joanne Chong provided guidance and input to this interim report.

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## Foreword

A well-functioning labour market is critical to productivity growth and social wellbeing.

At a conceptual level, this relationship is simple: the more easily firms are able to meet their skill needs, the more easily they can respond to commercial opportunities and improve asset utilisation. And the more firms compete for productive workers, the more people can find work, move jobs, upskill, and receive better pay and conditions.

But the reality of achieving these objectives — particularly in an advanced and dynamic economy — is much more complicated. Labour market policy involves a unique set of economic, ethical and social challenges. It exists within the context of a unique regulatory framework — a product of evolution as much as design.

Policy must also reflect prevailing conditions. Full employment is a welcome development but will present challenges in the immediate term. It highlights the importance of having people in jobs that make best use of their skills and expertise, at a time when people are changing jobs less often.

The right reforms could provide broad and enduring gains within a challenging and volatile landscape.

**The supply of human capital — skilled and experienced workers — will be key.** While it is strongly influenced by education and training (discussed in Interim Report 5 of the Productivity Inquiry, *From learning to growth*) several other policy levers play a critical role.

- Migration allows the inflow of skills, ideas, and innovation into the labour market. The composition of the migrant intake will have a significant bearing on productivity — Australia will need to compete to attract workers whose skills meet local demands and who bring valuable knowledge and experience.
- Barriers and rigidities in the labour market can prevent the matching of valued skills to labour market needs. Unnecessary restrictions can arise with regard to occupational licensing where regulatory settings are mismatched with workforce skill needs.

**Improving workplace relations can benefit all parties, and the economy.** Despite its at times adversarial nature, the workplace relations system could be improved in ways that provide lasting benefits for all involved.

- Making modern awards simpler and easier to use would reduce compliance costs and the scope for non-compliance. This may require improvements to the awards themselves, and the processes for making and varying them.
- Enterprise bargaining remains complex and inefficient. Removing barriers to effective agreement-making may generate productivity gains through efficient resource allocation and innovation. At the same time, terms within enterprise agreements can affect the rate of adoption of innovation.
- Platform-based business models can make positive contributions to productivity growth, including through new and more efficiently delivered services. Regulation should evolve to meet the workplace relations challenge of innovative new business models, without stymying their potential contributions to productivity.

The Commission invites stakeholders to respond to all issues raised in this interim report. As an interim report, it reflects our early findings.



# 1. Reducing labour market rigidities and barriers

## Key points

- ✱ **A well-functioning labour market is a critical contributor to productivity growth, particularly through the matching of jobs and people with appropriate skills and know-how.**
  - The effect of participation on productivity is complex, and is driven, in part, by the skills composition of new labour market participants. Removing barriers or disincentives to labour supply can contribute to productivity growth if it leads to better jobs and skills matching by expanding the pool of available skills.
  - The design of Australia's migration system and occupational licensing requirements can act as barriers to allocating and attracting labour to where it is most productive.
  - While an efficient education and training sector can improve the supply of needed skills (discussed in a separate interim report), complementary policies can reduce underutilisation of existing skills.
- ✱ **Shifting Australia's skilled migration system away from one that relies heavily on restrictive skill shortage lists, and towards a system that better enables employer-sponsored skilled migration, could better support productivity growth.**
  - The composition of the migrant intake will have a significant bearing on productivity. Australia will need to compete to attract workers whose skills meet local demands and who bring valuable knowledge and experience.
  - Improving options for job mobility for sponsored migrants could also assist with the better matching of workers to jobs.
- ✱ **Improving recognition of qualifications and scope of practice can promote efficient utilisation of scarce skills.**
  - Occupational licensing must balance potential improvements to safety and quality of service against the costs imposed on employers and employees. Unnecessary restrictions can arise when regulatory settings are mismatched with migration policy or not updated to support workforce skill needs.

## 1.1 Introduction

The efficiency of the supply and matching of skills and jobs in the labour market is critical for productivity growth. The more easily firms are able to meet their skill needs, the more easily they can respond to commercial opportunities and improve asset utilisation. This requires appropriate skills to be available in the economy — a function of education, on-the-job training, migration, and workforce participation. It also

depends on the movement of people between jobs — to higher performing firms or tasks within firms, to jobs in different locations or to jobs that better match their skillset and capabilities.

## Labour productivity and participation

The productivity of labour is of interest because it has played a dominant role in driving real increases to income levels over the past 60 years (figure 1.1). Increasing labour utilisation — which measures the effect of workforce participation, unemployment and average working hours — also played a significant role in driving income levels in the 1960s and 1980s, as did a rising terms of trade, driven by global demand for commodities during the mining boom. But neither has made as sustained a contribution as labour productivity growth.

Trends in labour productivity and workforce participation both reflect the transformation of Australia's labour market. Since 1970, Australia's employment to population ratio has moved from below the average to above the average in the OECD, rising to 51 per cent in 2019, primarily due to an increase in the participation of women in the workforce over the past 40 years. Despite a net increase in participation, on a per capita basis, Australians work 10 per cent fewer hours (a decline of four hours per week) compared to 50 years ago.

One implication is that if productivity growth is slow, the associated drag on economic growth could theoretically be offset by increases in labour supply. However, sustaining an ever-increasing share of people in the workforce (and maintaining their income levels), is neither possible nor desirable.

On the other hand, changes to labour supply can influence productivity in either positive or negative ways. Productivity growth occurs when more output is generated per unit of input, and hence increasing the quantity of inputs is not necessarily a way to improve productivity. Some degree of *scarcity* of labour can promote productivity growth in some circumstances:

- The scarcity of labour can provide businesses with further incentive to find more efficient ways to use their workforce, including by investing in productivity-enhancing capital. Some empirical evidence suggests that a trade-off between productivity growth and labour participation, particularly in the short term, can exist and be influenced by demographic and cohort effects.<sup>1</sup>
- As businesses compete for better skilled workers in a tight labour market, this allows resources to flow to more productive areas of the economy, promoting overall productivity growth.

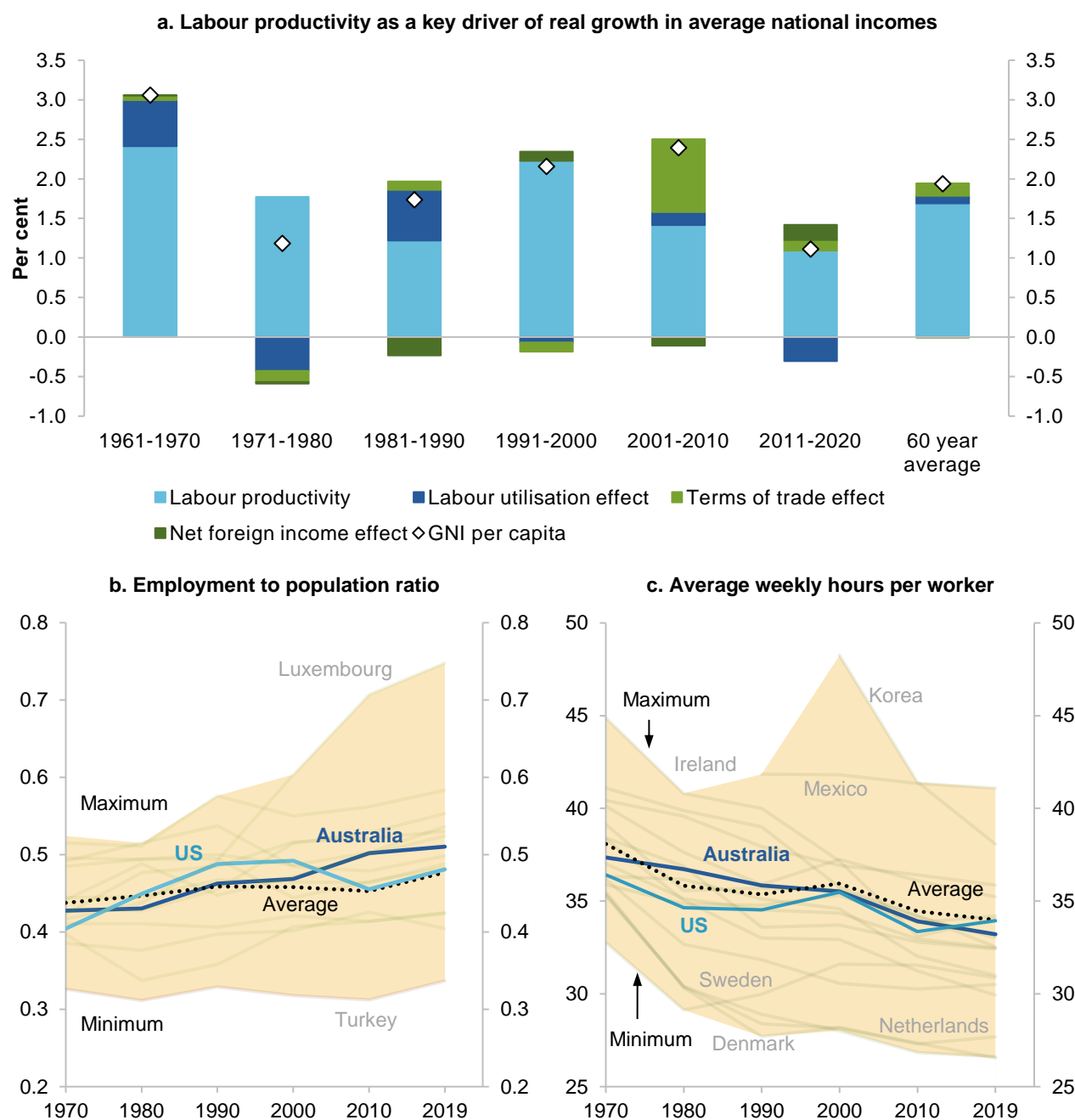
In other circumstances, an increase in the labour supply (such that labour is *less* scarce) can also promote productivity growth:

- Increasing the labour supply, or the availability of particular in-demand skills, can enable businesses to take advantage of commercial opportunities. Specifically, it can enable businesses to fill labour or skill gaps, and fully utilise assets.
- If highly productive workers are not in the labour market, or are working in a lower capacity than their skills and expertise would allow, then removing any barriers to their increased participation would contribute positively to productivity growth.

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<sup>1</sup> McGuckin and van Ark (2005) analysed productivity growth and labour market participation rates across 36 countries (all OECD countries and some member states of the EU who were not) including Australia, between 1970 and 2002. They conducted regressions over various intervals (from annual to 10-year measurement spans) and found that there was a statistically significant trade-off between the employment rate and productivity growth in the short run. The effect is short-lived, dissipating at different rates between countries. The results were consistent for workers of young working age (15-24 years) or older working age (55-64 years).

**Figure 1.1 – Labour productivity and participation have each contributed to real growth in incomes**



a. OECD membership has changed over time. To reflect this, the group of countries included in the 'OECD' calculations here changes based on the nearest decade at which the country ratified membership.

Source: PC (2022b).

In general, changes in the supply of labour can contribute to productivity through: **increasing the supply of valued skills** (or of employees with the needed characteristics); facilitating the **upgrading of the workforce**, including through training and education (discussed in a separate interim report); and/or **improving labour market matching** between the existing supply of employees with the firms' demands.<sup>2</sup>

This would suggest that removing barriers or disincentives to labour supply can contribute to productivity growth if it leads to better jobs and skills matching by expanding the pool of available skills.

One example relates to differences between the number of hours a person *wants* to work and their *actual* hours worked. This type of mismatch can affect productivity particularly if people face a trade-off between jobs that offer suitable (or flexible) hours and jobs that make better use of their skillset — for instance, if flexible hours were less available at senior positions.<sup>3</sup> Flexible working arrangements (such as working from home) can be used to reduce such mismatches. They may also be reduced in the longer term if the overall decline in average working hours were to continue. There is also scope for governments to adjust tax and welfare policies to provide additional incentives for people in certain circumstances to more closely align their actual hours of work with their preferred hours (box 1.1).

Similarly, immigration into Australia can promote productivity growth, particularly where it contributes to the supply of valued skills. Migration settings themselves can improve labour market matching by influencing the composition of the migrant intake. Where migration does not increase the supply of valued skills or improve labour market matching, increased migrant workers may simply add to workforce participation rather than enhance productivity growth.

Labour mobility is also a key factor in labour market matching, and hence with growth in wages<sup>4</sup> and productivity. Moving between jobs is beneficial where people and jobs are better matched. At the same time, labour mobility entails various costs for both employees and employers.<sup>5</sup> While it is typically not possible to identify an optimal level of mobility, unnecessary barriers to labour mobility cause both employers and employees to forgo benefits.

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<sup>2</sup> Adapted from the framework outlined by Criscuolo et al (2021a, p. 42) in their OECD Working Paper, described as a taxonomy of policy for 'spurring productivity growth'.

<sup>3</sup> Where increased participation does not improve the supply of skills or labour market matching, it is less likely to contribute to productivity, and hence less in the scope of this report (although may still contribute to other policy objectives).

<sup>4</sup> Labour or job mobility allows workers to take up new jobs offering more attractive pay or conditions. In the presence of high labour mobility, wages may rise even for workers who do not move jobs — given the 'prospect of credible job offers' and its effect on workers' bargaining power. (Deutscher 2019)

<sup>5</sup> Some workers may prefer job security. Switching to another job can incur adjustment costs as employees need time to adapt to new responsibilities and tasks, and may require employers to incur training costs, recruitment costs and the loss of institutional knowledge. In addition, where there is forced mobility, the benefits to workers and to productivity would depend on the existence of suitable alternatives — this may take time to realise and entail costs for those in frictional or structural unemployment.

**Box 1.1 – The influence of the tax and welfare system on labour supply**

Tax and welfare policies can have a direct bearing on incentives to work. Effective marginal tax rates (EMTRs) measure the loss resulting from income taxation combined with the withdrawal of transfer payments or income supplements, that are associated with earning an extra dollar of income. High EMTRs present a strong disincentive to increase work hours.

A number of submissions to the Inquiry have highlighted how the tax and welfare system can affect work decisions, particularly for parents who receive childcare subsidies and other means-tested income support payments, such as parenting payments or family tax benefit part A or B.

Availability of affordable, high-quality ECEC [early childhood education and care] services is fundamental to the ability of individuals with childcare responsibilities to work the maximum number of hours that they would like to work. It is central to Australia's ability to improve productivity (KPMG, sub. 60, p. 17).

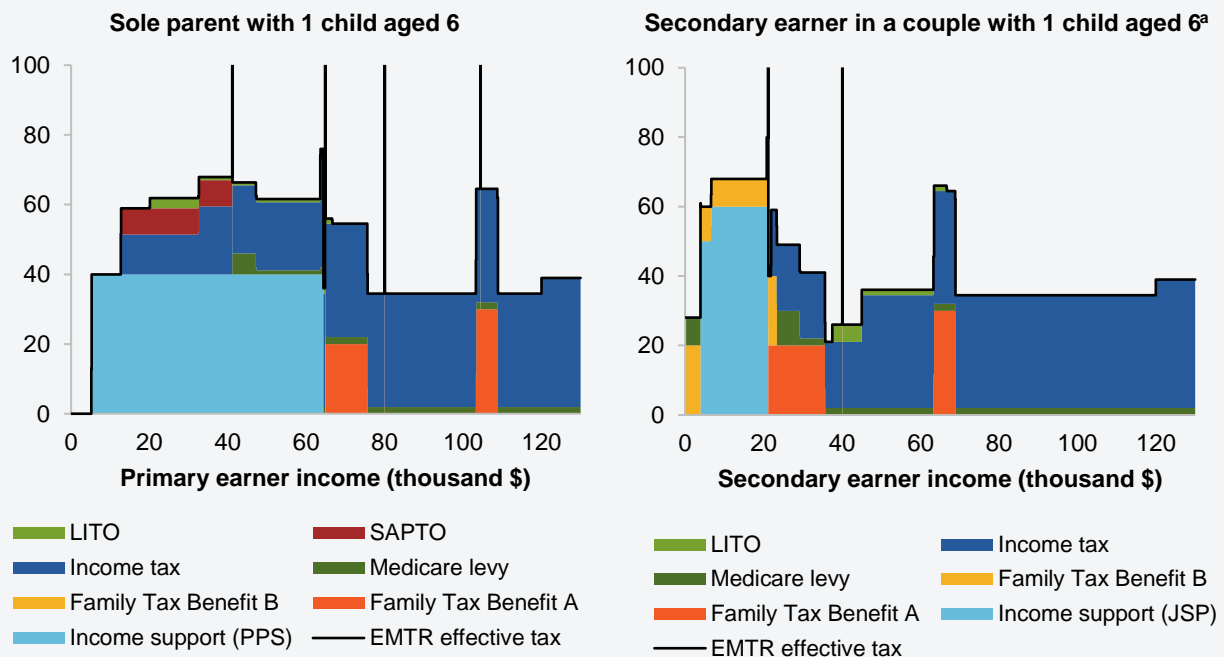
The cost of childcare combined with additional taxation and loss of family benefits means that for many women there is little or no financial benefit from increasing their paid work beyond three days a week. (Grattan, sub. 37, attachment 1, p. 34).

For some people, the choice to provide care to young children or other family members in lieu of paid work is a reflection of personal preference. For others, choices about care, workforce participation, and hours of paid work are influenced by the tax paid on additional hours worked and the rate of government assistance received (which can decline as household income rises).

Reducing effective marginal tax rates is not straightforward. High EMTRs arise largely as a result of means-testing, which itself is a desirable characteristic of transfer policy design. In addition, any reform to EMTRs is complex, given that they vary with individual or household income and by family type.

The Commission has previously noted that the interaction of tax and welfare policies provide powerful disincentives for many second income earners to work more than part-time (PC 2014a). While early childhood education and care is just one of a broad range of work, family and financial factors that influence parent work decisions, it is one factor that is within the influence of government.

From a productivity perspective, benefits may accrue if the use of care services enables a better matching of parent skills to jobs, or if there are people with highly valued skills who are willing and enabled to increase their hours of workforce participation.

**Box 1.1 – The influence of the tax and welfare system on labour supply****Effective marginal tax rates vary with household income structure**

a. Primary earner income fixed at \$40 000.

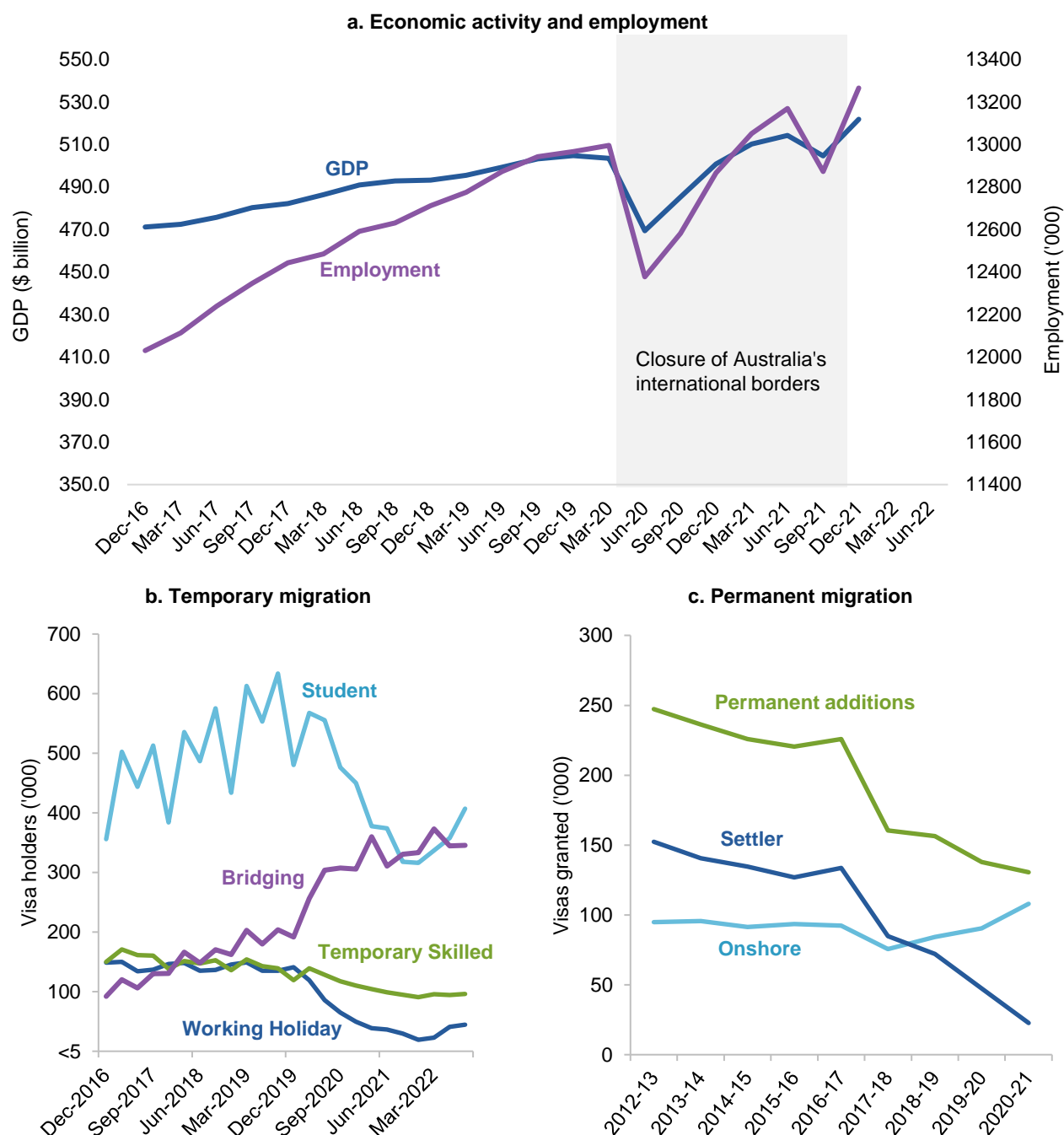
Source: Unpublished Treasury data.

**Recent shocks to the availability of skills and labour**

The COVID-19 pandemic severely disrupted global and intra-Australian migration patterns, with international and state and territory borders closed for prolonged periods of time. International borders remained closed even as Australia's economic recovery began in earnest (figure 1.2). This led to relatively strong growth in both employment and job vacancies, as well as historically low levels of unemployment in mid-2022. Labour scarcity increased in sectors (such as hospitality) that typically rely heavily on migrant workers, but also bodes poorly for the availability of workers in some other sectors in the future — for example, in the context of rising demand for services such as aged care (CEDA 2021b). While the efficient allocation of labour is always important, it has become even more so as unemployment has declined.



**Figure 1.2 – International borders remained closed as economic activity crashed and recovered**



Source: ABS (2022b); DoHA (2021, 2022b).

Globally, migration patterns have yet to return to pre-COVID norms (DAE 2022). For Australia, enrolment levels for international students have remained subdued (figure 1.2, panels b and c). Indeed, temporary skilled migration is being used to a much lesser extent than in previous periods of low unemployment (such as during the mining boom) (CEDA 2022b).

While migration may recover over time, it is not guaranteed that Australia will retain its attractiveness to working migrants. Importantly for productivity, this could have significant implications for the *composition* of

the migrant intake — Australia will need to compete to attract workers whose skills meet local demands, who are younger, and who bring valuable knowledge and innovations from overseas.

In addition, the health impacts of COVID-19 could have ongoing implications for labour supply and, potentially, to productivity growth over coming years. Extended periods of physical fatigue and cognitive disfunction are the most commonly reported symptoms of 'long-COVID.' Treasury estimates suggest around 31 000 people missed work due to long COVID each day in June 2022 (Moore 2022). However, in addition to absenteeism, it remains to be seen whether such symptoms will also result in people performing lower duties — making less use of their skills and capabilities.

### **Declining labour mobility could inhibit better matching**

Over the past 30 years, Australians have become less inclined to change employers (figure 1.3). Black and Chow (2022) note that 'job mobility' tends to change according to the business cycle (although recessions may also precede structural changes in the economy, with ongoing implications for the labour market). And while job mobility could intuitively be influenced by labour market conditions (such as the availability of alternative job options) both labour mobility and unemployment have experienced declining trends over the past 30 years. More recently, job mobility is likely to have been affected by the COVID-19 pandemic, both through disrupted economic activity as well as support programs that encouraged continued attachment between employers and furloughed employees.

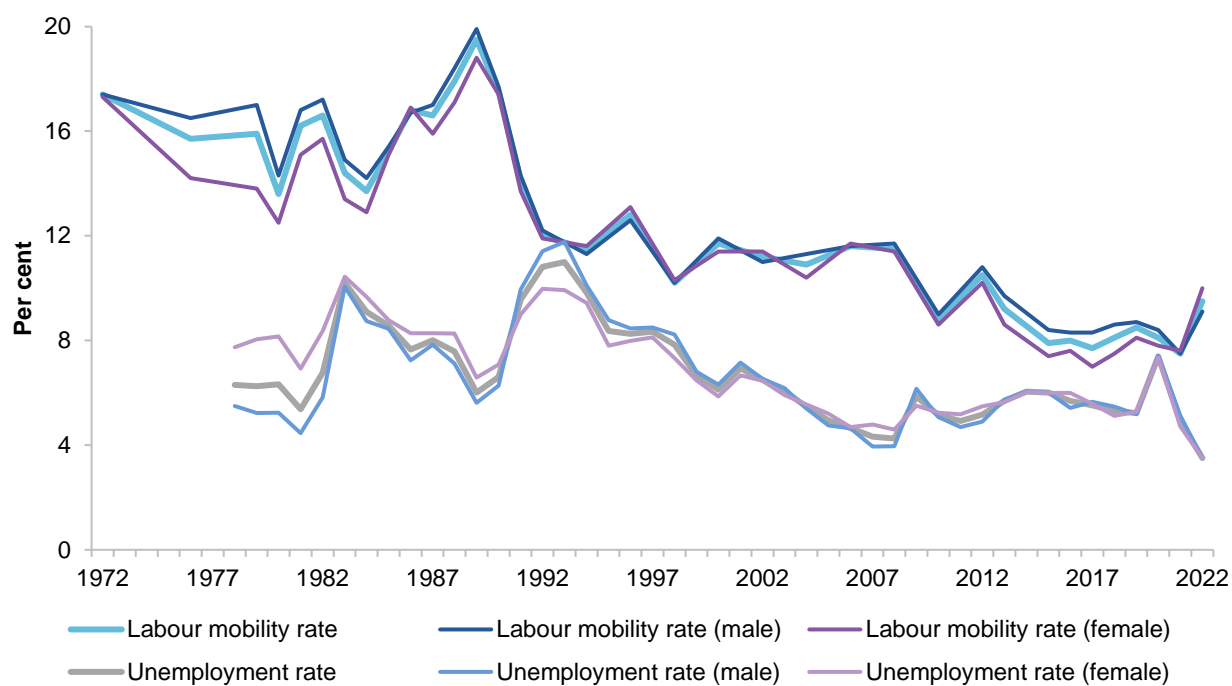
However, job mobility is not only a function of economic circumstances — demographic factors are also influential. Job mobility for people aged 15-19 and 20-24 years was significantly lower following the GFC, and declined more significantly than for older age groups in the past 20 years (figure 1.3, panel a). Despite the decline, Black and Chow find that:

Typically, younger workers have higher rates of job switching than older workers. This is because young people have less firm- and industry-specific human capital than more experienced older workers and so have more to gain by changing jobs and increasing the quality of a job match; an example of this is a university graduate who switches from casual employment to a full-time career in an industry related to their studies.

Job mobility has consistently been higher for people aged 15-24 years compared to older age groups (figure 1.4, panel a). However, younger people have comprised a declining proportion of the workforce over several decades (figure 1.4, panel b). This reflects population ageing, higher rates of tertiary education, and a significant increase in participation for those aged 45 years and older.

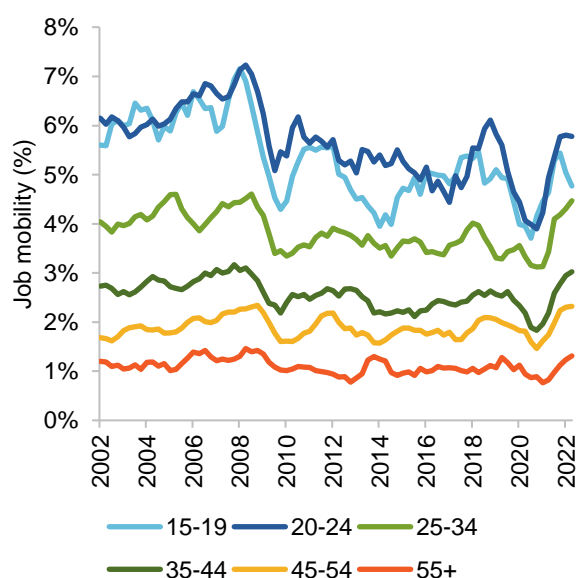
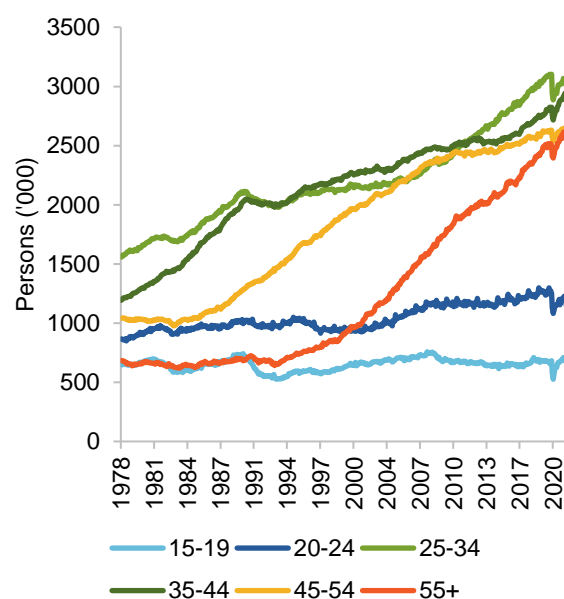
It is unclear how labour mobility will fare in the medium or long term. Structural factors such as population ageing suggest that the baseline level of labour mobility may be lower than in previous decades. Conversely, historically low levels of unemployment and high job vacancy rates may increase mobility in a 'buyers' market'. And the increased use of remote work will reduce geographic barriers to labour mobility for *some* occupations.

Some barriers to mobility may have worsened in recent years — for example, factors such as housing availability can weigh on geographic labour mobility, particularly the movement of workers into areas where job opportunities are expanding but where housing options are limited and expensive relative to incomes. As noted in the Commission's (2014b, pp. 22–23) report on Geographic Labour Mobility, housing supply could be improved in part by removing or significantly reducing inefficient housing-related taxes such as stamp duties, as well as relaxing unnecessarily restrictive planning and zoning measures.

**Figure 1.3 – The relationship between job mobility and unemployment has varied<sup>a</sup>****Share of employees who changed employers in the last twelve months; unemployment rate**

a. Data collection is not uniform between 1980 and 2021 — as such, some points are interpolated. Labour mobility data was not available for 1993, 1995, 1997, 1999, 2001, 2003, 2005, 2007, 2009, 2011 and 2014.

Source: ABS (2022c)

**Figure 1.4 – Mobility partly reflects ageing of the workforce****a. Job mobility by age****b. Age composition of employed persons over time**

Source: ABS (2022b); ABS (ABS 2022d).

## Opportunities to improve productivity via the labour market

Policy has a role in reducing the misallocation of resources that occurs as a result of avoidable rigidities and barriers in the labour market. Potential levers to influence the availability and allocation of skills include, but are not limited to:

- incentive structures that result in reduced participation of skilled workers
- how well migration policy settings determine the composition of the migration intake, linking domestic skills needs with the supply of skilled migrant workers (section 1.2)
- barriers to the efficient use of skills in the labour market, including potential inefficiencies in occupational licensing (section 1.3)
- the impact of the workplace relations system on labour allocation within firms, which is discussed in chapter 2.

## 1.2 Migration of skills

As noted above, immigration into Australia can promote productivity growth, particularly where it contributes to the supply of valued skills.

At the same time, migration entails concerns about reducing labour scarcity and thereby putting downward pressure on wage growth. Wages are an important mechanism in a well-functioning labour market — the adjustment of relative wages encourage workers to shift to jobs and industries where their skills are most valued. Perhaps for these reasons, migration settings often hinge on the concept of shortage. During the mining boom, for instance, migration was crucial in securing the skills needed to take advantage of commercial opportunities, while likely providing at least some downward pressure on the exponential growth in mining-related wages.

However, overall, the totality of empirical evidence suggests that in the Australian context, the potential for migration to depress wages should not be overstated, even if it is likely to be non-zero for particular labour sub-markets (box 1.2). The composition of the migrant intake is likely to be key in how migration affects wages and productivity. As such, it would be a risk to productivity to have migration settings that are overly restrictive (particularly in the current economic climate) as it could prevent better skills matching in the labour market.

### Box 1.2 – Migration and wages

The Commission's inquiry into the Migrant Intake into Australia concluded that at the time, overseas empirical evidence showed that migration had a relatively small (negative or positive) effect on wages and employment of incumbent workers, and that Australian evidence was 'scant' (PC 2016, pp. 194–199). Several analyses have been conducted since then. Broadly, Australian evidence suggests that immigration has not been a cause of depressed wage growth.

Brell and Dustmann (2019) found that:

... existing empirical evidence analysing the links between immigration and wages in Australia, which, while sparse, does not generally support adverse impacts on average wages or wages of low-skilled Australians

### Box 1.2 – Migration and wages

Crown, Faggian and Corcoran (2020) examined HILDA data from 2005-2015 for different Greater Capital City Statistical Areas (GCCSA). They regress pay and other outcomes in each GCCSA against worker characteristics, state and industry-specific characteristics, and the number of temporary work visa holders as a proportion of the population. They found no evidence of negative effects of the temporary work visa holders on the wages of high-skilled or low-skilled native workers. Nor did they find negative effects on the wages of previous migrants, who may be closer substitutes to new skilled migrants.

Breunig, Deutscher and To (2017) examined changes to migration supply in different skill groups (defined by education and experience). After controlling for experience and education, they found ‘almost no evidence that immigration harms the labour market outcomes’ of workers born in Australia. (The authors had been commissioned to undertake this analysis for inclusion in the Commission’s inquiry on the *Migrant Intake into Australia* (PC 2016))

CEDA (2019) examined labour market outcomes of local workers, including the unemployment rate, weekly wages, and annual earnings. They analysed the effect of successive waves of migrants arriving in Australia since 1996. They found that waves of migration did not adversely impact labour market outcomes of local workers. A positive relationship was found between migration and wages.

At the same time, evidence has shown that the risk of underpayment for many migrant workers is material in some industries (Cash 2015; Schneiders and Millar 2015; SEERC 2016). This risk extends beyond the design of skilled migration as it affects holders of other visas, including those with restricted and unrestricted working rights. As such, removing employer sponsorship from particular occupations could only go part way in reducing exploitation — improvements in enforcement would still be required.

## Composition is key

The effect of migration on productivity is complex. Conceptually, Borjas (1999) argued that migration is productivity-enhancing when migrants’ skills and capabilities are complementary to those of incumbents, leading to greater specialisation. This suggests that the implications for productivity depend largely on the composition of the migrant intake, the incumbent labour force, and the forms of capital in the economy.

There then exist two sets of conflicting incentives. On the one hand, the [economic surplus related to immigration] is larger if the host country admits immigrants who most complement the skilled native workers, or unskilled immigrants. On the other hand, the economic surplus related to migration is larger if the host country admits immigrants who most complement the native-owned capital, or skilled immigrants. (p. 1707)

In this framework, the implications of migration for productivity may depend on individual circumstances (regarding a migrant’s skills in relation to a firm’s labour force and capital endowment). The effects of migration may also change over time, as the mix of skills and technologies change across the economy.

Various empirical studies have shown the differing effects of migration on higher and lower skilled workers. In the US, Peri (2012) showed that the productivity gains from immigration were largely driven by task-specialisation of native workers induced by migrants, in that:

... productivity gains may be associated with the efficient allocation of skills to tasks, as immigrants are allocated to manual-intensive jobs, pushing natives to perform communication-intensive tasks more efficiently. (p. 348)

In Australia, Islam and Jaai (2014) examined wage differences between migrants and local workers, by occupational sectors and over the income distribution. They found wage differentials above the median for white collar migrant workers and negative wage differentials for blue collar migrant workers. They also found that English language proficiency played an important role in wage differences between migrants from English-speaking and non-English speaking countries.

This accords with other authors who infer that skilled migration to Australia led to a gain in GDP which was distributed disproportionately to workers whose occupations *complement* skilled migration rather than those who *compete* with skilled migrants (Brell and Dustmann 2019) or that that migrants specialising in technical skills may have induced incumbents to choose occupations that leverage English-language proficiency (Crown, Faggian and Corcoran 2020). Such findings do not suggest that labour market success or contributions to productivity are necessarily limited to those with the highest skill levels.

Another complicating factor is that in some skilled occupations that entail specialisation or differentiation of skilled services, migration can lead to productivity improvements regardless of whether shortages are observed in those occupations. For example, while hairdressing could be considered a single occupation, hairdressers<sup>6</sup> provide a diverse range of services requiring some specialisation. The barriers to entrepreneurship are relatively low, meaning that new practitioners are able to bring new service offerings to market. As such, migrant hairdressers would be less likely to depress wages than would be the case with a more homogenous group in direct competition for a finite number of job vacancies.

In addition, the economic effect of migration is shaped in part by the matching between jobs and skilled migrants — and by the barriers that skilled migrants face. Tan and Cebulla (2022) undertake econometric analysis of South Australian data to show that labour market outcomes for skilled migrants are affected by employers' relative 'devaluation' of some foreign qualifications. A report by Deloitte Access Economics (2018) suggested that in Queensland, 49 in every 100 skilled migrants are not using the skills and experience gained before arriving, often due to lack of recognition of their qualification (25 per cent) or of their work experience (14 per cent). Such findings reinforce the importance of the link between skilled migration policy settings and labour market needs.

## Improving skilled migration settings

Migration policy settings are a key determinant of the composition of skills in the labour market and the matching between skills and jobs. While all forms of migration have some effect on labour market outcomes, the visa subclasses that most directly regulate the composition of permanent and temporary skilled migration are the focus here for productivity.

- *Temporary skilled migration* allows employers to fulfill short-term skill needs, allowing better responsiveness to commercial opportunities. In particular, it can facilitate the short-term use of foreign expertise in the supply of services.
- *Permanent skilled migration* allows workers to add to the ongoing stock of skills in the labour market. This allows better responsiveness to commercial needs beyond short-term or once-off projects for individual firms.

Temporary and permanent migration are closely connected, in that temporary migration feeds into permanent migration. Policy settings in the permanent stream can affect the attractiveness of temporary migration. Poor take-up of temporary migration can lead to a reduced pool of talent to feed into permanent migration. Both depend on skilled occupation lists as a key eligibility criterion.

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<sup>6</sup> Similar arguments apply equally to other occupations such as cooks and chefs.

## Australia's reliance on occupation lists

Skilled occupation lists are used as a tool for rationing and allocation for both permanent and temporary migration (box 1.3). They comprise one of the main mechanisms that determine the types of skills that are brought into the labour market. The performance of such mechanisms is relevant to productivity in that:

- they may result in undue restrictions on the use of migration to fulfill labour market needs
- preferential access to skilled migration for particular industries has implications for the efficient allocation of resources
- changes to the size and composition of migration will have implications for labour market outcomes more broadly.

A range of conceptual and practical issues have been raised with regard to the current implementation of skills shortage lists in Australian migration policy.

### Box 1.3 – Occupational lists for skilled migration in Australia

Eligibility for temporary and permanent skilled migration is determined by different lists, depending on the visa subclass. They include:

- The Short-term Skilled Occupation List (STSOL): lists occupations selected to fill 'critical, short-term skills gaps'. This list has 216 occupations. A person who is qualified in an occupation listed on the STSOL can be sponsored for the short-term stream of the TSS visa.
- The Medium- and Long-term Strategic Skills List (MLTSSL): lists occupations 'of high value to the Australian economy' and aligned to the government's longer-term training and workforce strategies. There are 216 occupations on this list. Occupations on this list can be sponsored for the medium-term stream of the TSS.
- The Regional Occupation List (ROL): includes 77 other occupations. Occupations on this list can be sponsored for the medium-term stream of the TSS. The Regional Sponsored Migration Scheme (RSMS) was also based on an occupation list before the program was closed in 2019.

## Conceptual issues around skill shortages

While skill shortages are a common justification for migration, as noted above, they are not the only explanation of how skilled migration can be productivity-enhancing. In skilled occupations, migration increases competition among professionals, which can provide incentives for workers to improve their skills or pursue further specialisation — although countervailing this, access to experienced migrant workers can also reduce employers' incentives to provide on-the-job training. Migration can increase the diversity of skills in the labour market, which in turn can increase differentiation of products and services. In some cases, migration can enable the diffusion of innovation, particularly where foreign work experience helps Australian firms adopt global best practices, or where foreign specialists may be necessary to implement technology or innovative approaches that are new to Australia. These benefits hold regardless of the existence of 'shortages'.

This is not to say that the concept of skill shortages is without value, although much depends on their definition. The National Skills Commission defines a 'shortage' as:

... when employers are unable to fill or have considerable difficulty filling vacancies for an occupation, or significant specialised skill needs within that occupation, at current levels of



remuneration and conditions of employment, and in reasonably accessible locations.  
(Boyton 2022)

An overarching issue with this definition is that it presumes that supply should meet demand at any prevailing wage. This is in contradiction to the concept of an efficient labour market that allows offers of wages and conditions to adjust in order to attract workers, based on the value those workers bring to the business (i.e. their marginal productivity). Indeed, skill shortages should be identified where employers have difficulties in hiring *in the context of wage increases over time* rather than 'at current levels'.

Skills shortages are also subject to employer preferences. Grattan points to evidence that employers adjust their expectations of prospective hires depending on the state of the labour market.

When unemployment is high and workers are plentiful, employers are more selective about who they hire. When employer demand increases and unemployment is low, employers become more willing to hire people regardless of their education and experience. (Coates, Sherrell and Mackey 2022, p. 23)

As such, reliance on 'skill shortages' as a means of rationing migration entails the risk that employers (either individually or at the industry-level) can claim shortage rather than adjusting wages. To this end, a recent parliamentary inquiry recommended the development of 'accepted definitions of acute skill shortages' taking into account a range of factors, including recruitment difficulty, duration of the shortage, the number of job vacancies, and the critical nature of the occupation (Joint Standing Committee on Migration 2021, p. x).

### Practical issues with lists

The Commission has previously highlighted practical concerns about the accuracy of skill shortage lists as they are used with regard to vocational education. Shortages have remained on the National Skill Needs List for several occupations for up to a decade, despite some occupations requiring traineeships taking one to two years to complete (PC 2021a, p. 329). This demonstrates the importance of how lists are constructed and updated.

Where lists are slow to update, they risk excluding new occupations that may be more relevant to firms on the frontier of innovation. Unless an occupation is categorised via ANZSCO<sup>7</sup>, it is not possible for a shortage (or the occupation itself) to be identified (Joint Standing Committee on Migration 2021, p. 8). Indeed, it was only in late 2019 that the ABS provided advice regarding the ANZSCO classification of 'Data Scientist' for migration purposes (Coates, Sherrell and Mackey 2022, p. 24).

In addition, the current use of skill lists can prevent migrant workers from taking up alternate jobs, including those that would make similar or better use of their skills. This is because their visa status is tied to a strict definition of their occupation.

If the occupation lists were abolished, workers would no longer be forced to work in one specific occupation. Currently, if an ICT customer service officer is offered a new job focused on market research, they would have to demonstrate their ability to perform the job and gain a new visa.  
(Coates, Sherrell and Mackey 2022, p. 50)

More broadly, occupation lists are likely to cater to industries where several (larger) employers are able to establish the need for migrant skills, but may restrict access from individual firms that hold unique, legitimate commercial needs. In this sense, they can make skilled migration less responsive to the needs of frontier

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<sup>7</sup> The Australian and New Zealand Standard Classification of Occupations (ANZSCO) provides a basis for the standardised classification of occupation data for Australia and New Zealand.



firms. These effects are compounded when occupation lists are the basis for permanent migration, as it favours more static occupations rather than new forms of work that demand similar skills.

A further practical issue relates to the need for — and lack of — timely data to identify skills shortages in real time. The Grattan Institute points out that:

Crucial parts of the skills shortage story — such as vacancy and wage data for occupation groups — are scant. Without this information, it is very difficult to generate reliable lists of occupations in shortage beyond simply accepting claims from employers. (Coates, Sherrell and Mackey 2022, p. 23)

In addition, occupation lists can also entail significant compliance costs for both migrant workers and sponsoring employers. Eligibility is often governed by multiple lists, leading to administrative burden and regulatory misalignment (Coates, Sherrell and Mackey 2022; Joint Standing Committee on Migration 2021).

Overall, lists of occupational skill shortage tend to be broad, static, costly, and restrictive.

## Skilled migration settings which are conducive to productivity

Several recent reports have made recommendations as to how to reform skilled temporary and permanent migration settings in the post-COVID recovery. Many have echoed the need to focus on the key mechanisms responsible for rationing and allocation, ultimately recommending that skill lists be significantly improved or replaced altogether (box 1.4). Indeed, there are several different configurations that would improve migration policy and processes from a productivity perspective.

### Box 1.4 – Improve occupational lists or replace them

The Joint Standing Committee on Migration (2021, pp. 41–42) recommended that multiple lists could be combined in order to align pathways to permanent residence.

Those with skills in the medium and long-term stream of the TSS have a clear pathway to permanency, while those with skills on the short-term stream list do not have this clear pathway. Given perceptions about the arbitrariness of separation of occupations between the two lists, the Committee believes that combining the lists along with ensuring that all employer nominated visas provide a clear pathway to permanency will simplify the skilled migration system and provide greater clarity to both applicants and sponsors. This does not mean that the pathway should be the same for all skilled occupations or all visa holders but there should be a pathway and it should be clear.

CEDA (2019) made a range of recommendations regarding the process of constructing skilled occupation lists, their data sources and their governance:

The Federal Government should strengthen identification of skill shortages and eligible occupations for skilled visas in the skilled occupation list to increase confidence in the process by:

- Being more transparent about the data and methods used in assessing whether occupations are included on skilled occupation lists.
- Immediately reviewing the Australian and New Zealand Standard Classification of Occupations (ANZSCO) codes to ensure they align with current and emerging labour trends, particularly the impact of technology.

#### **Box 1.4 – Improve occupational lists or replace them**

- Establishing an independent committee, like the Migration Advisory Committee in the UK, to undertake analysis, consultation and advice on the formulation of skilled occupation lists. (p. 3)

The Grattan Institute (2021) recommended replacing occupation lists with a wage threshold as the basis for skilled migration. With regard to permanent migration, they recommended the Australian Government:

... stop limiting permanent skilled worker visas to migrants with experience in occupations listed as being in skills shortage. Instead ... these visas should be targeted at young, high-skilled workers with proficient English.

The Government should improve employer-sponsored visas by removing the occupation list and introducing a wage threshold. A shift to assessing income instead of occupation would better target permanent skilled migration at higher-wage occupations with valuable skills. It would also simplify the sponsorship process and provide greater certainty for both firms and workers. (Coates, Sherrell and Mackey 2021, p. 62)

Similar recommendations were made with regard to temporary migration policy (2022, p. 4).

### **Putting productivity at the centre of skilled migration**

As a starting point, productivity should be a key design objective of skilled migration policy and processes. This would help to guide policy design toward a range of desirable qualities (discussed below). It also establishes the importance of updating policy settings to reflect the labour market landscape — meeting the contemporary needs of Australian businesses.

#### **Meeting labour market needs through sponsorship**

Evidence suggests that better matching in the labour market could be achieved in part by increasing the use of employer sponsorship visa subclasses. CEDA (2021a) found that the Australia permanent visa subclasses that relied on the broadest occupation lists and lacked employer involvement had the highest rates of skills mismatch (p. 10). Tani (2020) highlights that migrants' skills and qualifications are often underutilised, at times, in spite of policy settings that target particular characteristics.

That said, employer sponsorship can have unintended consequences, requiring a number of solutions:

- As noted above, employer sponsorship is often linked to risks of illegality and exploitation. It is likely to require additional enforcement of prevailing labour laws.
- Sponsorship may have a negative effect on labour mobility, at least in the short term, given migrant workers are unable to further test the labour market. To some extent, this is a result of relatively high transaction costs borne by the sponsoring employers, which also leads to greater risk aversion in decisions around sponsorship. These issues could partly be resolved by reducing the cost to employers of sponsorship, and by allowing workers to switch to similar or better job offers after a period of time with their sponsoring employer, without applying for a new visa.

It is important for the shortcomings of employer sponsorship to be addressed, as employer sponsorship is a significant avenue for migration. Regardless of improvements to employer sponsorship, there are still potential benefits to having some migration via a well-functioning points-based system, as such a system can help attract migrants with characteristics that are particularly likely to lead to strong labour market

outcomes (such education and training, years remaining for potential contribution in the workforce, and language skills).<sup>8</sup>

### Using a wage threshold in lieu of an occupations list

The Grattan Institute recently proposed the replacement of this list with a higher wage threshold (\$70 000 pa) than currently exists, thereby focusing the visa to higher skilled occupations. Under this proposal, employers in any industry could fill any vacancy via a sponsored temporary visa (subject to a planning cap), so long as the occupation is of a sufficient value to the employer. The proposal would strengthen the link between labour market needs and migration flows.

A more liberalised approach to employer sponsorship and skilled migration may indeed be more straightforward to implement when it comes to highly-skilled and highly-paid occupations. However, it is not clear that employer sponsorship and temporary skilled migration should be ruled out for lower paid occupations, as suggested by Grattan's recommendations. Doing so would affect some jobs with significant social benefits (such as in human services) or located in less populated, regional areas (primarily for agriculture or hospitality). While it may be efficient to have resources flow to more productive areas of the economy, this would raise the following issues:

- Human services, such as aged and disability care, have relied heavily on migrant labour to meet service demand, owing in part to ongoing growth in demand (due in part to population ageing) and factors affecting domestic labour supply (including geographic factors as well as preferences for types of work). Any shortage of labour supply has potential implications for service quality for vulnerable people. To the extent that wage increases alone were relied upon to attract local workers to care services, particularly to regional areas, this could place pressure on public funding (or worse, be ineffective).
- Labour market conditions differ across jurisdictions and between urban, rural, and regional areas. Setting a wage threshold for employer sponsorship could have different implications in urban centres compared to regional and rural areas, given differences in income distributions. For instance, rural areas are likely to depend on some form of migration to fill skilled occupations — either international or interstate.<sup>9</sup> As such, the productivity implications of setting a high wage threshold for skilled migration may differ depending on geographic sub-markets.
- In human services, migrant labour is typically drawn from working holiday, student and family visas. In Aged Care, 30 per cent of workers are migrants, but less than 1 per cent are sponsored for the purposes of work (Coates, Sherrell and Mackey 2022, p. 27). In caring professions more broadly, 38 per cent arrived on a student visa (Eastman, Charlesworth and Hill nd). Relying upon 'sideways entrants' may not lead to optimal labour market matching, and prioritising skilled temporary visas for care work would likely produce better outcomes in terms of qualifications, experience and career motivation (CEDA 2022a). To address this problem CEDA suggest an essential skills visa to ensure there are pathways for migrants who are actively pursuing overseas employment opportunities in community sectors (p. 9).
- Applying a wage threshold in some sectors would risk sidelining migrant workers who, despite earning just below the income threshold, would provide skills typically not offered by a student or working holiday maker. This could be the case for chefs if more experienced and qualified workers arrive via skilled migration streams than through student or other temporary streams — for instance, census data suggests

<sup>8</sup> For instance, Canada has relatively clear pathways between temporary and permanent migration due to its universal points-based system. The system provides point weightings for characteristics such as age, English and French language proficiency, etc., as well as giving additional loadings for factors including employer sponsorship and the characteristics of any secondary applicants.

<sup>9</sup> Some businesses are themselves constrained to operate in particular locations (such is the case in mining, or service industries such as hospitality) increasing the importance of geographic labour mobility (PC 2014b, p. 64).

that the median income for a full-time chef on a temporary skilled visa was 23 per cent higher than the equivalent on a student visa.<sup>10</sup> Moreover, in general, skilled visa holders have historically been more likely to stay in the workforce in the longer term via permanent residency — between 2000–01 and 2013–14, 55 per cent of temporary skilled visa holders transitioned to permanent residency, compared to 16 per cent of international students (Treasury & Home Affairs 2018, p. 21).

Overall, from a productivity perspective, the composition of the migrant intake could be improved by replacing occupational lists as the basis for skilled migration, in favour of other mechanisms such as a sufficient income threshold. Some reforms would be simpler to implement with regard to *temporary skilled migration* as it is typically not subject to national caps on numbers. However, any removal of occupational skill lists from temporary skilled migration would have implications for the arrangements in the associated pathway to permanent migration (which would be inconsistent unless similar changes were made to permanent migration).

Moreover, the benefits of *liberalising* some areas of migration from the potential restrictiveness of lists is likely to create fewer trade-offs and unintended consequences than placing new income-based *restrictions* on migration. That is, while skilled migration policy could be improved for lower-income occupations (including to avoid mistreatment and exploitation) it would be valuable to retain access to temporary skilled migration and employer sponsorship for many such occupations.

A useful first step could be to:

- remove list-based restrictions on employer-sponsored temporary skilled migration above a suitable threshold income
- where holders of temporary skilled visas are transitioning to permanent residency through sponsorship, to remove list-based restrictions where the offered wage is above the same threshold
- improve job mobility for sponsored migrants generally, first, by reducing the net costs to employers of sponsoring migrants, and secondly by making it less costly for migrant workers to take up similar or better offers.

### Attracting the best skills in the current climate

A broad question pertaining to permanent migration policy is to what extent Australia remains an attractive destination for skilled migrants — and how well can Australian businesses compete for talent in the global labour market.

The recent evidence is mixed on Australia's attractiveness relative to other advanced economies. Global interest in migration to Australia has shown signs of a strong recovery post border closures, and the Australian Government has recently announced plans to boost the migration cap. However, several other countries have taken proactive steps throughout the pandemic to attract migrants by increasing their permanent migrant intake and reforming visa policies (CEDA 2022). If Australia has become less attractive to migrants than prior to COVID-19, migration decisions in the future may be more sensitive to the compliance costs associated with the migration system. Such costs affect all migrants, including those with skills that are highly sought after, who are likely to have labour market options elsewhere in the world.

<sup>10</sup> Comparisons of median wages reflect Commission estimates based on ABS, *Australian Census and Temporary Entrants, 2016*. Chefs have ranked among the top occupations granted temporary visas and were the second highest in the 2021-22 financial year (Home Affairs 2022a). Census data suggests that students made up a slightly greater share of employment compared to temporary skilled migrants

- Application charges for some visas are above cost recovery — in part to potentially also serve as a rationing mechanism. For migrants below 50 years of age, charges are higher on average for skilled migration visas than for family visas (Varela et al. 2021, p. 30).
- The compliance costs to both migrants and sponsoring employers can be a disincentive to application.
- Regardless of the stringency of migration policy, processing times should be relatively short and carry relative certainty to aid decision making.
- The ease with which qualifications and licenses are recognised or obtained has a bearing on migration incentives and labour market outcomes (section 2.3).

Another way that countries are attempting to attract skilled migrants is by allowing temporary visas for certain tertiary graduates. The UK recently implemented a new temporary visa — the High Potential Individual visa— to attract young and highly skilled migrants. The visa targets recent graduates from a list of universities ranked in the top 50 (on two or more ranking lists), regardless of their field of study and without the need for an offer of employment.<sup>11</sup>

Similar visas (Subclass 485) are available in Australia, although only available to graduates from Australian institutions who are current or recent international students.<sup>12</sup> The Australian Government has recently announced intentions to extend such visas, allowing graduates to stay and work in Australia for four years for some bachelor's degrees, and six years for PhD graduates (Galloway 2022). However, unlike the UK approach, the Australian visas remain restricted to those graduating from Australian institutions — as opposed to other similarly highly regarded institutions from around the world.



### **Finding 1.1** **Migration of skills**

Migration settings that are overly restrictive and prevent skills matching are a risk to Australia's productivity growth. This suggests that migration policy should not be unduly restrictive, particularly at a time when the economy is near full employment, there are skills shortages in a number of sectors, some other countries are competing vigorously for skilled labour, and there are additional factors beyond Australia's policy influence that potentially increase the costs of workers relocating to Australia.



### **Information request 1.1** **Improving migration pathways**

The Commission is considering how the Australian Government could improve productivity through adjustments in migration settings, and is interested in feedback on:

<sup>11</sup> The UK recently implemented a new temporary visa to attract recent graduates from a list of 50 designated universities, regardless of their field of study and without the need for an offer of employment. A High Potential Individual (HPI) visa gives recent graduates permission to stay in the UK for 2 years for most degrees and 3 years for doctoral qualifications. The HPI visa cannot be renewed — rather, they are intended for visa holders to test the labour market and potentially to transition to other streams of skilled migration (Government of the United Kingdom, 2022a).

<sup>12</sup> Holders of the Student (Subclass 500) visa.



### Information request 1.1 Improving migration pathways

- The potential to allow both temporary and permanent employer-sponsored skilled migration to take place without restrictions from a skill shortage list, such that employers can sponsor migrants in job vacancies that meet a threshold wage, regardless of occupation
- How such a threshold wage might be set, and how migration should be managed for jobs that do not meet the threshold wage
- How to improve job mobility for sponsored migrants generally, such as by reducing the net costs to employers of sponsoring migrants and by making it less costly for migrant workers to take up similar or better offers
- How to improve enforcement of labour laws as they pertain to underpayment and exploitation of migrant workers generally

## 1.3 Occupational licensing

In the labour market, occupational licensing acts as a signal of proficiency and quality of work output to employers and consumers. Obtaining an occupational licence usually requires an individual to have a certain level of qualification and/or recent work experience on top of any occupation specific requirements (for example, some licences require holders to regularly participate in continuing professional development). Some occupational licences are assessed by state and territory governments (e.g. construction licences), while others are assessed by a national (e.g. medical licence) or state and territory-based (e.g. legal practising certificates) regulatory board.

When working efficiently, occupational licensing operates as a mechanism to decrease information gaps, or asymmetries, between consumers and businesses and/or between employees and employers. However, in some cases, occupational licensing is used inappropriately to limit entry into a market. For example, by requiring additional licences to perform the same work in different geographic locations or to create boundary limitations on what tasks an otherwise proficient individual is able to complete. These types of restrictions do not confer any public benefit and removing them could increase productivity through more efficient labour market allocation. This is particularly important when there are pre-existing constraints on labour supply that arise from a labour market in full employment.

Occupational licensing is prevalent across many advanced economies. In the US, the proportion of the workforce covered by state licensing laws has grown from less than 5 per cent in the 1950s to at least 20 per cent by the turn of the century (Kleiner and Krueger 2010). In Australia around 18 per cent of employed people were in an occupation requiring registration of some kind in 2011 (PC 2015a), and similar estimates have been found in the EU (Koumenta and Pagliero 2019).

There is little Australian specific evidence on the influence of occupational licensing on labour market outcomes or productivity. The international evidence suggests that occupational licensing itself increases labour market rigidities, and hence likely decreases productivity (box 1.5). However, this evidence may be of limited applicability to Australia, given the differences in licensing regimes across countries. Evidence on the benefits of licensing (e.g. quality and safety improvements) has been mixed across a range of occupations studied, suggesting licensing systems need to be assessed on a case by case basis and any benefits that may arise should not be generalised.



### **Box 1.5 – International evidence on licensing and productivity**

#### **Licensing can reduce labour mobility, employment and increase wages of licensees**

Johnson and Kleiner (2020) analysed interstate migration of 22 occupations in the US. They found that long-distance migration (defined as greater than 50 miles) was 7 per cent lower for individuals in state specific licensed occupations compared to individuals of quasi-national licenced occupations.

Blair and Chung (2019) estimated the effect of licensing on employment in the US. They compared employment outcomes for neighbouring counties along state borders, where the occupation was licensed in one state but unlicensed in the other. They estimated that the presence of occupational licensing in a county reduced the equilibrium labour supply by an average of 17– 27 per cent.

Pizzola and Tabarrok (2017) investigated the wage premium for occupational licensing, looking at the delicensing of funeral services in Colorado that occurred in 1983. Using a difference-in-difference methodology and the delicensing event, the authors estimated that licensing requirements for funeral services created a 11–12 per cent wage premium.

Similar results have been observed in the EU for wage premia. Koumenta and Pagliero (2019) analyse data from the EU Survey of Regulated Occupations using a cross sectional regression for wages and control for human capital, industry, occupation and country fixed effects. The authors find that on average having a licence is associated with 4 per cent higher hourly wages.

#### **But licensing is associated with reduced productivity**

The OECD (2020) conducted an analysis across US and EU states on the impact to firm-level productivity from occupational licensing — or occupational entry regulation (OER) — using an indicator that captured administrative burdens, qualification requirements and mobility restrictions. The study found OER tended to be correlated with less dynamism and lower labour mobility among firms.

Using a model of firm productivity growth based on growth at the productivity frontier and distance of a firm from that frontier, the study found that significant reform (a 1-point reduction in the OER indicator) led to a 1.6 percentage point increase in labour productivity of the average firm. Furthermore, they find this association is stronger for firms closer to the productivity frontier, with the most productive firms experiencing nearly double the negative impact to labour productivity.

#### **Benefits of licensing are inconclusive but likely vary across occupations and countries**

In the US, a White House paper (2015, p. 58) surveyed a range of empirical studies spanning the United States on the impact of licensing on quality and found little evidence licensing improved this outcome.

Farronato et al. (2020) examined the effects of occupational licensing through an online platform which allowed service providers to verify and display their occupational licences. Using an event study and regression analysis they found consumer choices were affected by online reputation and prices much more than occupational licensing signals. Furthermore, by exploiting variation in licensing stringency across certain service categories and US states, they found licensing stringency is associated with fewer quotes and higher prices, but not higher customer satisfaction — which was proxied as service ratings and propensity to use the platform again.

Research findings of the effect of licensing on health and safety is mixed. Kleiner and Kudrle (2000) found little evidence that more stringent licensing for dentists across US states improved quality, as

### **Box 1.5 – International evidence on licensing and productivity**

measured by complaints to licensing boards and malpractice premiums. Anderson et al. (2016) looked at the incremental licensing of midwives across US states from 1900 to 1940. They found that licensing of midwives reduced maternal mortality by 6 to 7 percent.

Some caution is needed when interpreting these results for the Australian context because licensing systems vary greatly across countries, which means indicators of licensing and quality may not always be relevant or comparable. The White House paper notes this difficulty for licensing even across various US states and occupations:

...occupational licensing requirements vary considerably across States and occupations, and most of the empirical evidence on licensing comes from looking at very specific examples. While the aforementioned studies indicate that occupational licensing does not guarantee quality improvements, they likewise do not indicate that all licensing frameworks fail to increase service quality. (The White House 2015, p. 60)

## **Recognition of occupational licensing**

How licensing regimes are administered can also have implications for productivity. For instance, the expansion of automatic mutual recognition (AMR) in 2021 across seven Australian jurisdictions has reduced barriers to labour mobility between states and territories.<sup>13</sup> Essentially, AMR allows occupational licences to be recognised in another jurisdiction, without the need to formally apply for recognition — thereby reducing compliance costs and facilitating the flow of skilled workers. By default the AMR agreement automatically recognises all occupational licenses but allows states to apply for exemptions where they identify 'significant risks' (for instance, exemptions apply to 37 licence categories in New South Wales alone). Exemptions are subject to review and reapplication every five years.

With the introduction of the AMR scheme, many of the arbitrary geographical restrictions for occupational licensing between jurisdictions within Australia have been removed. As the exemptions to the scheme are reviewed and removed, there will be a further reduction in occupations that require multiple licenses to operate across jurisdictions. The remaining domestic geographic boundaries in occupational licensing may rise from scope differences between jurisdictions — discussed in the next section.

There are likely to be opportunities to further improve productivity by pursuing greater recognition of overseas occupational licensing, as well as through further reform to the design of licensing schemes, particularly relating to boundary issues in scope of practice (the scope of practice defines the activities and types of work that are covered by an occupational licence).

For migrant workers, occupational licensing presents additional barriers to securing employment in Australia, through requiring additional assessment of their qualifications on top of any skill assessments for immigration requirements. This can create a secondary layer of approvals for skilled migrants that, in some cases, could be made more efficient through two mechanisms:

- Mutual recognition of international qualifications and licenses
- Synchronisation between skills assessments and licence/registration processes

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<sup>13</sup> The AMR is in effect in all states and territories except Queensland. It covers occupations requiring a licence in the building and construction, mining, real estate and property, security, manufacturing and automotive sectors.



## Mutual recognition of international qualifications and licences

A necessary condition for mutual recognition between international jurisdictions is that there is sufficient alignment or equivalence of different licensing regimes, as this would preserve the benefits of licensing in promoting safety and quality of service. Indeed, mutual recognition improves coordination between jurisdictions with regard to enforcement and deregistration — such that information would be more readily available to regulators about operators who had received sanctions or whose occupational licences had been disqualified in other jurisdictions.

Where mutual recognition is possible, it could benefit productivity by lowering barriers to entry for skilled migrants, improving the availability of skills for Australian employers. It would also better allow foreign firms and contractors to provide services directly to Australia (i.e. trade in services).

Australia already has some such arrangements in place. The Trans-Tasman Mutual Recognition Agreement (TTMRA) provides for mutual recognition of occupational licenses between Australia and New Zealand. Furthermore, some occupational bodies have their own international mutual recognition of qualifications and licences with additional jurisdictions (e.g. Engineers Australia and Chartered Public Accountants Australia).

The Commission's 2015 review into Mutual Recognition Schemes (between Australia and New Zealand) concluded that recognition for registered occupations was supported by stakeholders. However mutual recognition practice was not utilised to its full extent. Some regulators were rejecting applications because of differences in jurisdictional occupation standards required to obtain or retain a licence despite the occupational activities being substantially the same and/or not making use of conditional licensing to account for differences in standards between jurisdictions (PC 2015a, pp. 131–144).

Expanding international mutual recognition schemes beyond New Zealand would not necessarily change the source countries of Australia's skilled migrants but could make the process of recognition more efficient, avoiding unnecessary costs of re-training, and allow better use of some migrants' skills once they arrive. The process of expanding mutual recognition schemes could usefully follow the principles established in the Global Convention on the Recognition of Qualifications concerning Higher Education (the UNSECO Convention) which provides the framework for broad scale international mutual recognition (box 1.6).

While other international agreements have addressed qualification recognition, the UNESCO Convention is the first to define that 'substantial difference' must be found for a qualification to not be recognised. This approach creates a positive default to recognise international qualifications, rather than not, putting the onus on the recognition authority to show that there are substantial differences between qualifications. If this approach were adopted and expanded to mutual recognition for international occupational licences, it would shift the onus onto regulatory bodies to show why an international licence is not equivalent for jurisdictions in which a mutual recognition treaty is in effect. This could be a useful approach to the (still incremental) expansion of mutual recognition to more jurisdictions, based on mutual recognition agreements and cooperation between regulators in multiple jurisdictions.

Even where international occupational licences substantially differ from the domestic licences, it may be useful in some cases for regulators to grant conditional or restricted licenses. This could involve, for example, restrictions that limit the tasks an international worker could perform if a domestic licence is broader than its international equivalent. Regulatory bodies would only have the power to refuse registration if false or misleading information were provided by the international licence holder, or equivalence could not be achieved by imposing restrictions or conditions.



**Recommendation direction 1.1**  
**Increase recognition of international licences**

The Australian Government should pursue further international mutual recognition of occupational licences.

**Box 1.6 – Global Convention on the Recognition of Qualifications concerning Higher Education**

During the General Conference of the United Nations Educational, Scientific and Cultural Organization meeting in November 2019, the Global Convention on the Recognition of Qualifications concerning Higher Education (the UNESCO Convention) was adopted.

The UNESCO Convention is the first globally scoped convention on the recognition of qualifications, setting out a framework to promote cooperation in qualification recognition and facilitate global mobility.

Article V of the UNSECO Convention details the extent of mutual recognition each State Party will recognise, provides mechanisms for how differences can be accounted for, and stipulates how recognised qualifications relate to employment.

- Article V.1 states that there needs to be substantial differences shown between the qualification for which recognition is sought and the corresponding qualification for the qualification to not be recognised.
- Article V.4 states that applicants with recognised qualifications can apply for further education (similar to any domestic holders of an equivalent degree) and use a professional title associated with an equivalent qualification, in accordance with domestic laws and regulations
- Article V.5 allows for partial recognition to be granted where a competent recognition authority can demonstrate substantial differences between the qualification for which recognition is sought and the corresponding qualification in the State Party.

Source: (UNESCO 2019)

## Should international recognition be automatic?

The Commission's 2015 review into Mutual Recognition Schemes concluded that the priority should be on extending *Automatic* Mutual Recognition within Australia and strengthening the TTMRA. While there has been a significant expansion of AMR since the 2015 review, there is still a lack of evidence on the effectiveness of the Australian scheme.

It would be valuable to assess the impacts of AMR within Australia, in part to identify what issues might be relevant to further expansion. For instance, it may be possible to assess how the experiences of participating jurisdictions have differed from those of non-participating jurisdictions, or what impact exemptions might have. It will be useful to assess the given the incremental expansion of the scheme and disruptions caused by COVID-19.

The Commission recognises that expanding the jurisdictions with (non-automatic) international mutual recognition agreements is also a higher priority than establishing AMR with international jurisdictions. Any expansion of AMR to international jurisdictions could be trialled with New Zealand, where the TTMRA has long been in place, to provide evidence of how effective an international AMR would be.

## Synchronisation between assessments

For jurisdictions where mutual recognition is yet to be implemented, or substantial differences are found between international and Australian occupational licensing, it would be valuable to align requirements for migration with the requirements of regulatory bodies. At present, connections between the requirements of the skills assessment and the licensing/registration requirements do not exist — they are effectively separately assessed. This can result in skilled persons immigrating through a skilled visa but not able to work in Australia in their preferred occupation — either as their qualifications are not recognised or the occupational licence requires Australian work experience (box 1.7).

### Box 1.7 – Skilled migrant limbo

Lack of consistency between the outcomes of a skills assessment required to satisfy a visa requirement and the requirements for occupational licensing can leave a skilled migrant in labour market limbo — where they have been allowed to migrate to Australia but are unable to work in their chosen field. This can lead to skilled migrants working in relatively low skilled jobs, undermining productivity gains associated with the migration program. Assessment requirement for nurses and electricians provide two examples of this inconsistency.

#### Nurses

Nurses and midwives who want to work in Australia must be registered with the Nursing and Midwifery Board of Australia (NMBA). For a nurse or midwife with international qualifications to migrate to Australia, they must undergo assessment of their international qualifications by the Australian Health Practitioner Regulation Agency (AHPRA) and a separate skills assessment by the Australian Nursing and Midwifery Accreditation Council (ANMAC).

The outcome of the AHPRA assessment is the determinant for registration with the NMBA, whereas the ANMAC assessment is used to determine an applicant's ability to immigrate to Australia.

### **Box 1.7 – Skilled migrant limbo**

Both assessments are designed to test the suitability of the applicant to be able to work in Australia as a nurse or midwife, however, the ANMAC skills assessment takes into consideration work experience, which AHPRA (as governed by the Health Practitioner Regulation National Law) does not consider. Assessment by AHPRA can only consider whether the international qualifications are substantially equivalent to an Australian qualification.

For relevant but not substantially equivalent international qualifications, an outcomes-based assessment (OBA) was established in 2020, consisting of both multiple choice and clinical examinations (NMBA 2020).

#### **Electricians**

To be legally certified as an electrician in Australia requires a state or territory electrical license. To obtain an Australian electrical license, applicants must show evidence of their attainment of a Certificate III in an electrical trade course from a recognised training provider.

On the other hand, to satisfy the requirements of Australia's migration program, internationally qualified electricians can have their overseas qualifications and work experience recognised through the Offshore Skills Assessment Program (OSAP) or the Temporary Skills Shortage Skills Assessment (TSSSA).

But OSAP and TSSSA recognition are not deemed to be equivalent to the Certificate III requirement, and hence suitably recognised internationally qualified electricians cannot legally operate in Australia. Rather, internationally qualified electricians are required to undertake at least 12 months of Australian work experience under the supervision of a licensed electrician in order to apply for a Certificate III and obtain an unrestricted electrical licence to work unsupervised.

The requirement for 12 months of work experience can leave internationally qualified electricians in limbo if they are unable to find an employer that will provide them with supervised work experience.

While expansion of mutual recognition of international licences may be a long-term solution for many jurisdictions, a useful future policy objective in the interim could be to adapt migration assessments to make them consistent with the criteria for any relevant registration tests. The licensing regimes for nursing and electricians highlight lessons that could be considered among licensing regimes more broadly. For instance, registration processes can often be improved through better bridging processes. In cases where regulators require further Australian work experience for licensing, skilled migration could be closely linked to actual employment opportunities to ensure internationally qualified practitioners can acquire the local work experience needed for the licence. Such changes would increase the employability of migrants entering through the skilled migration pathway, with flow on benefits to productivity.

### **Boundary issues in licensed occupations**

A challenge in occupational licensing reform has been defining a scope of practice that efficiently sets the activities or types of work that a practitioner will need to be licensed for, such that the gains from the licensing regime (which are designed to ensure quality and safety in certain types of work) are maximised, while the costs associated with the licensing regime (such as those related to regulatory burden and the creation of undue barriers to entry for workers) are minimised. Both IPART and PwC (2014) argue that best practice with respect to efficiency is consistent with setting licensing coverage that targets the fewest number of activities (the minimum necessary).

However, putting this principle into practice is not straightforward.

- To the extent that there is limited evidence available to guide the assessment of risk, or it is not possible to accurately estimate the probability of safety risks occurring, it is difficult to establish what the ‘minimum necessary’ scope of regulation might be. As noted by the Senate select committee on red tape (2018), the evidence base provided by industry participants as part of regulatory assessments is often anecdotal.
- Safety regulation takes many forms aside from the licensing of practitioners, including product safety under the Australian Consumer Law, national construction standards under the Building Code of Australia, work health and safety law, and industry-specific codes and regulations. Establishing the minimum necessary regulation for a particular objective would require consideration of multiple areas of regulation. It should also entail consideration of whether less restrictive mechanisms (such as industry self-regulation) or more flexible approaches (such as risk-based regulation) are appropriate.

As a result, stakeholder concerns alone can be relatively influential in prompting regulators to expand licensing. The introduction of new regulations related to Refrigeration and Air Conditioning work in Queensland was largely based on anecdotal evidence, while links between genuine safety issues and licensing were not well-established (box 1.8).

### **Box 1.8 – Refrigeration and Air Conditioning licences in Queensland**

In 2020 the Queensland government introduced a new mechanical services licensing framework that covered new specialist streams in plumbing, refrigeration and air-conditioning and medical gas. Two changes were significant for Refrigeration and Air Conditioning (RAC) work:

- The introduction of an occupational licence class for Refrigeration and Air Conditioning work, and
- The inclusion of a minimum two years relevant experience to obtain a contractor licence.

This licensing framework was implemented as an addition to the national refrigerant handling licence (RHL) issued by the Australian Refrigeration Council that is required for individuals who install, service or repair air conditioning equipment. RAC industry bodies argued that current arrangements allowed ‘periphery’ trades such as plumbers and electricians to complete similar work in Queensland:

Underestimating the vital importance and safety requirements of a skill based trade licence instead of a mechanical service licence will undoubtedly determine the HVAC&R industries survival and parity alongside other peripheral trades like plumbers and electricians... since the establishment of the ARCTick licensing scheme in 2005 to handle refrigerants, this has seen the proliferation of lesser qualifications in a Certificate II training packages for split/systems installers (substandard courses offered over 1 and 2 days). The substandard courses have resulted in unsafe, inefficient works carried out by electricians, plumbers’ even gardeners (TPWC 2018, p. 47).

However, supporting evidence of unsafe outcomes in Australia, let alone Queensland, either does not exist, or is not well founded. Stakeholders gave anecdotes on unsafe work practices in relation to dangerous refrigerants and pointed to one death in India and two deaths in Victoria whose cause had yet to be determined but according to the Australian Refrigeration Association was ‘highly likely...a result of unlicensed persons working on a non-compliant refrigeration system containing a flammable refrigerant’ (TPWC 2018, p. 48).

### **Box 1.8 – Refrigeration and Air Conditioning licences in Queensland**

The Queensland government also cited concerns for the potential for legionella bacteria to spread in air-conditioning systems, which can pose significant health risks in hospitals and aged-care facilities (DHPW 2019, p. 4). But no evidence on the incidence of this risk or link with unlicensed workers was publicly provided and it remains unclear whether licensing would be more effective than other regulatory intervention, such as testing and treatment activities under health and safety laws.

The benefits of these licensing changes, such as a reduction in safety risks, reduction of competition for licensed businesses, and long-term productivity gains from human capital formation, were not quantified by the Queensland Government. But it was assumed they would be larger than the estimated \$21 million it would cost if *three quarters* of unlicensed workers undertook training to become licensed in RAC and the further \$1 million from licensing fees (DHPW 2019, p. 35).

More should be done by independent health authorities to determine the health risks and appropriateness of licensing for RAC work. Furthermore, efforts to develop data on licensing is critical to determine the employment and quality impacts from licensing, that potentially undermine productivity gains from human capital formation.

Source: Transport and Public Works Committee (2018); Department of Housing and Public Works (2019).

Recent efforts at licensing reform highlight the challenges in designing efficient boundaries in licensing schemes (see box 1.9). These efforts often lack coordination across state and territory borders, which can lead to restrictions on movement of available skills and labour across borders for no obvious benefit.

Lack of coordination is a perennial problem for licensing reform. A 2018 Senate inquiry into occupational licensing in Australia found that the current state and territory led licensing system in Australia remains complex, duplicative, inconsistent and burdensome (Senate Red Tape Committee 2018, p. 17). The Senate Committee also acknowledged that a previous attempt at reform of the national licensing system had not progressed (because of concerns regarding the model and regulatory costs). Nevertheless, they recommended a renewed approach to reform amongst states and territories, with a focus on measurable outcomes (rather than the mechanism of achievement); the identification of best practice models for occupations; and research into the health and safety benefits of occupational licensing (Senate Red Tape Committee 2018, pp. 2, 17).

### **Box 1.9 – Regulatory approaches to reforming boundary issues**

#### **Expanding scope of practice within licensed occupations**

Where there is considerable overlap in skills and potential for shared responsibilities, expanding scope of practice for some practitioners can improve the supply of licensed services which in turn improves access (and potentially lower prices) to services for consumers. For instance, pharmacies — in addition to General Practitioners (GPs) — offering prescription services have expanded in scope over the last decade to improve access to healthcare, such as vaccines (Vette et al. 2020). This enabled the inclusion of pharmacy vaccination in the COVID-19 vaccine national rollout strategy and its implementation was subsequently brought forward to assist with roll-out in rural and remote areas (Morrison 2022). As of

### **Box 1.9 – Regulatory approaches to reforming boundary issues**

September 2022, pharmacy providers accounted for 14 per cent of total COVID-19 vaccine doses administered since the pandemic began (DHAC 2022).

In North Queensland, an expanded scope of practice will be trialled for pharmacies to include prescription for low-risk medication to boost access to healthcare. There is disagreement over the safety and integrity of the trial amongst major stakeholders, including peak medical bodies that represent doctors and pharmacists respectively (Toomey, Burns and King 2022). These disagreements should not be used to scuttle further experimentation with reform, but rather they highlight the importance of constructing well-designed trials that produce an evidence base for rigorous, independent evaluation of the outcomes.

#### **Flexibility in licensing and making use of available skills**

A licence's scope of practice often encompasses classes of work of very different skill levels (i.e. low and high skill). This can lead to a situation where relatively low skill jobs can only be carried out by high skilled labour. For instance, New South Wales previously required car mechanics to hold a general motor vehicle repair licence that covered all types of work. For rural repair shops, this meant relatively straightforward work, such as wheel alignments, could only be done by a fully qualified mechanic. Recent changes by NSW Fair Trading reformed the licence to include a range of trades certificates for individual classes of work (DFSI 2018) (A similar scenario played out in WA, (DMIRS 2021a)). While this reform may improve the supply of certain skills in the labour market, it also adds regulatory complexity into the car repair industry and highlights the need for rigorous and ongoing assessment in the scope of practice of licenses to ensure the costs of targeted licenses do not outweigh the benefits to the industry and consumers.

#### **Finding opportunities to expand supervisory licensing**

The scope of practice can also be improved where direct licensing of practitioners is relaxed in favour of expanded supervisory roles. This can provide a supply of lower skilled workers without compromising safety and potentially expanding opportunities for human capital formation.

For instance, several training programs offer senior GP supervision for interns and international graduates. This provides a training pathway for new GPs and can direct new medical graduates to areas in need. Recently, GP shortages in rural and regional areas have been intensified by the pandemic (Fitts et al. 2020), leading one regional clinic to argue that supervision programs should be mandatory for senior GPs (Dalton and Schubert 2022). A mandatory scheme would likely generate detrimental outcomes because the benefit of an expanded supply of medical staff would be at the cost of patient care currently provided by senior GPs.

Furthermore, unwilling GPs would have no incentive to provide quality supervision under a mandatory scheme, which could exacerbate quality issues already documented in GP supervision programs (Ingham et al. 2019). Given supervision programs are either unfunded or unconnected to supervision outcomes, strengthening incentives for senior GPs would be a better solution. Ingham and Johnson (2022) argue that the addition of an Medicare Benefits Scheme (MBS) time-based item number for intern services under supervision may provide a better incentivised structure by ensuring resources are tied to supervision activities.

#### **Improving pathways to licensed work**



### **Box 1.9 – Regulatory approaches to reforming boundary issues**

The boundaries that are set by licences in trade work can exacerbate inefficient entry pathways. This can occur when licences have requirements for different classes of work or levels of responsibility that create further rigidities for practitioners wishing to provide a broader set of skills or transition into a new career.

The NSW Productivity Commission (2021) points out that the narrow focus on apprenticeships as the pathway to licenced trade work can impede efficient job matching:

Largely for historical reasons, apprenticeships are designed around the needs of young male school leavers. Other cohorts, such as older people and women, have few alternative pathways to these occupations. As a result, many miss out on the jobs they are best suited for, while chronic skills shortages persist.

For many trades in New South Wales, acquiring an occupational licence requires a VET qualification. An apprenticeship is the default pathway leading to that qualification—there are few alternatives...the standard three- or four-year apprenticeship model, combined with low wages, inflexible training delivery, and the requirement to already work in the industry, imposes a high barrier to entry. (pp. 97–98)

Competency-based progression has been promoted as one remedy to the rigidity of apprenticeships. This involves providing a pathway to completion whenever a student can demonstrate the necessary skills, instead of basing completion on a fixed time constraint, i.e., mandatory years of training. Despite the Council of Australian Governments advocating competency-based progression as early as 2006, there has been poor implementation of this model due to a range of issues, including resource constraints for accelerated learning and incentives for employers to prolong apprenticeships to obtain cheaper labour (Clayton et al. 2015, pp. 6, 14). Indeed, recent stakeholder feedback in NSW suggests apprentices often acquire the relevant skills within two years of training, yet 3 or 4 years continues to be the norm in practice (NSW PC 2021, p. 101).

The reliance on time-based progression is also evident in trade licenses where a tiered system is used for incremental advancement to higher levels of responsibility. For instance, plumbers in Victoria must first be registered as a plumbing practitioner, which allows them to carry out plumbing work. A plumbing licence is an additional requirement for those wishing to supervise registered plumbers or certify work over the value of \$750. Pre-requisites for this licence were recently reformed to include an additional 2 years of experience on top of passing a licence exam (DELWP 2018; Victorian Government 2019).

### **Improving data collection**

Stronger emphasis on monitoring (i.e. collecting and publishing data) and evaluation would go a long way to promoting a better understanding of the costs and benefits of licensing schemes. This could include expanding data collection and sharing arrangements for administrative data across states and territories. The increasing adoption of digital licensing creates opportunities to build a national licensing database and potential for further matching across other administrative data sources. This would improve data sharing for mutual recognition arrangements, current compliance activity, and analytics to both monitor trends in licensing and assess the effectiveness of reform.

Useful examples of national coordination exist in some sectors. In the electrical trades for example, the Electricity Regulatory Authorities Council combines data from state and territory electricity regulators to



provide yearly reports on fatalities involving electricity. These reports are often used by electrical licensing regulators to inform cost benefit analysis of new reforms. In building and construction, national coordination exists through the Australian Building Codes Board and Building Ministers Meeting, that provide research and regulatory guidance. This type of national coordination could be strengthened to consolidate data sharing, independent studies and regulatory guidance on occupational licensing. Laying the groundwork for more rigorous assessment of licensing design choices would reduce inefficiencies and have positive long-term impacts on productivity.



### **Finding 1.2** **Occupational licensing**

While occupational licensing can introduce labour market rigidities and dampen productivity growth, the extent of this is likely to vary substantially between industries, as are the public health and safety benefits of a licensing regime. Decisions about scope of practice, in accordance with best practice principles for regulatory reform, should be evidence based and take into account broader costs and benefits of action. The lack of empirical evidence supporting licensing design in Australia is likely leading to considerable inefficiencies.

Australian states and territories have made significant progress in establishing automatic mutual recognition of occupational licensing (AMR). Subject to further evidence that may substantiate any risks associated with AMR, it would be valuable to expand the scope of AMR to include all Australian jurisdictions and a broader range of occupations. This would not only lead to improvements in labour mobility at the margin, but in the longer term, such a system would set a useful foundation for international recognition of licences, trade in services, and more efficient administration of licensing of future occupations.

In the context of full employment, governments will increasingly need to consider where scope of practice boundaries could be adjusted in order to make better use of scarce skills, with due consideration of evidence that may substantiate potential risks to public safety. Australia's experiences during the early years of the COVID-19 pandemic demonstrated that changes can be made safely.



## 2. Effective workplace relations

### Key points

- ✳ **Employees and employers have strongly aligned interests in improving productivity to increase both profits and wages. However, they also have incentives to use bargaining power to achieve one-sided gains. In this context, the workplace relations system should aim to support minimum standards of fairness while ensuring that opportunities to improve productivity are not eroded or destroyed by conflict, distorted incentives, or burdensome red tape.**
  - As labour markets evolve, along with Australia's economy, it will be important that regulatory and institutional arrangements remain fit for purpose to address contemporary and future challenges.
  - The design of the workplace relations (WR) system can affect many factors directly relevant to productivity — investment, wages, decisions about how to organise firms, and the degree of cooperation between employees and managers. It has many indirect effects on productivity because of the complex and often protracted and convoluted regulatory processes it entails.
- ✳ **Where further award simplification is feasible, it could improve the flexibility of employment conditions to better meet employer and employee needs and reduce compliance costs and barriers to starting new businesses.**
  - Award complexity can confuse workers and employers, increasing both compliance costs and the scope for non-compliance. Award regulatory technology ('regtech') and education initiatives — such as tailored advice for small businesses on award compliance — can help businesses better navigate awards.
- ✳ **The enterprise bargaining system remains unnecessarily complex and inefficient. Removing barriers to effective agreement-making has the potential to generate productivity gains through efficient resource allocation and innovation.**
  - Limiting the reach of the Better Off Overall Test could increase efficiency in agreement approvals.
  - The capacity to include clauses in agreements that restrict technologies and beneficial work practices is counter to productivity and makes agreements a less attractive model for workplace bargaining. The question of how to *practically* limit this capacity demands close attention.
- ✳ **Platform-based business models can benefit both consumers and some workers, while contributing to productivity through new and more efficiently delivered services. Governments should attempt to address the regulatory challenges associated with platform-based work without unduly constraining its business model.**
  - Many forms of platform-based work are not directly comparable with employment relationships. Shoehorning platform work into other employment categories would risk removing benefits to both efficiency and flexibility for workers.
  - Some types of protection for workers are warranted, such as insurance, safety and dispute resolution.

## 2.1 Introduction

The workplace relations (WR) system shapes both the labour market generally, and at the firm level, affects how businesses organise their labour, their investment decisions, and the regulatory compliance costs they bear. It also influences the safety, skill formation, quality and motivation of their employees. All these have productivity consequences. And while a full inquiry into workplace relations is beyond the scope of this review, this interim report attempts to take a *productivity lens* to some contemporary issues in workplace relations.

At some level, what constitutes desirable labour market outcomes from a workplace relations perspective is uncontentious. Labour markets function well when people can find work, acquire skills, and move jobs with relative ease; where employers can hire the workers they need, and skills are put to their most productive use (both within firms and across industries); where greater contributions to productivity are rewarded via better pay and conditions; and when there are adequate worker protections, recognising that labour is a unique input subject to ethical and community norms (PC 2015b, p. 2, 2017a, p. 85).

However, there are diverging views about how the WR system should best contribute to these outcomes. In part, this reflects that judgments about fairness are subjective, and that bargaining can involve compromises between competing demands. It may also reflect the inevitable trade-offs of regulatory design — attempts to encourage efficient and fair bargaining outcomes and deterring potential misconduct by parties can have unintended consequences, incidental effects on compliance cost, and place excessive demands on regulatory resources.

While adversarial workplace disputes can sometimes arise, this masks the fact that **employees and employers generally have strongly aligned incentives to improve productivity**, to increase both profits and wages. An important role of the WR system is to ensure that productivity opportunities are not destroyed by poor incentives, conflict, unnecessary complexity and high compliance burdens.

The balance of bargaining power, the impact of workplace relations on productivity, and the nature of firm and union conduct varies according to:

- economic conditions (which determine both commercial opportunities and skill shortages) will vary over time (for instance, as consumer preferences change) and at any given point in time, will differ between industries and geographic regions
- the role of labour in production processes, which has evolved as Australia shifted to a services-centric economy, and will continue to change as technology progresses. Three aspects of the services sector particularly influence workplace relations — it tends to be less capital intensive, has a greater share of lower-skilled workers, and governments often fund and regulate them (as in education, aged and disability care, the public service, emergency services, and much of healthcare)
- broad trends that influence labour supply, such as the supply of particular skills (via education, training, and migration), population growth and ageing, and participation
- factors that affect individual workers, such as search costs, impediments to participation and mobility, and thin markets (such as in rural and regional areas)
- union density (the share of employees in unions) remains high in some sectors, but overall reached a record low of 14.3 per cent in 2020 (ABS 2020)
- technological change and its potential to displace labour — both terms of hours of labour at the margin, and changes to job descriptions and requirements
- the degree of competition between firms, which has varied across industries (PC 2022a).

As labour markets evolve, along with Australia's economy, it will be important that regulatory and institutional arrangements remain fit for purpose to address contemporary and future challenges.

The long and changing list of considerations underpins a major challenge for workplace relations regulations. The generic law must be sufficiently flexible that it can address most of the workplace issues that arise in quite different contexts. While bargaining may often proceed without problems, at other times, bargaining agents have used excessive power to attempt to game bargaining arrangements or have engaged in some form of misconduct. There may be grounds for some carveouts from the generic law (as in the maritime industry), but in general, a bespoke set of regulations adapted to each specific context would be unworkably complex.

## The productivity implications of Australia's workplace relations framework

Some basic principles to help maximise the potential for a WR system to achieve both its fairness and productivity goals include:

- **certainty about regulations and minimum standards.** Establishing minimum standards can help to ensure fairness and, notwithstanding Australia's strong social safety net, guard against the possibility that excessively low wages threaten living standards and efficiency. Enshrining agreed basic standards can reduce the transaction costs associated with bargaining. And enforcing these standards helps to guard against deliberate or reckless non-compliance, ideally while minimising the cost to those complying in good faith
- **flexibility** such that firms and employees can improve efficiency by adopting mutually beneficial work practices; and that the regulatory framework avoids undue restrictions on managerial decisions, given the potential to impede innovation
- **efficient administration.** Navigating complex or overly adversarial processes can be a source of uncertainty, delay and impose other costs for employers
- **setting wages and conditions that are reasonably aligned with the best use of labour.** Wages and conditions provide powerful incentives for training and mobility between businesses, industries and locations. To the extent that they reflect the need for skills and capabilities, this helps allocate labour to more productive and valued jobs and occupations.

Australia's unique approach to workplace relations has evolved over several decades (box 2.1).

### Box 2.1 – Australia's unique workplace relations system

The national workplace relations (WR) system covers most of the 11.3 million employees within Australia, with the exception of some state and local public sector employees (who are instead covered under state and territory laws) and some employees in Western Australia (WA) who are covered separately under the WA state WR system.<sup>a</sup> The *Fair Work Act 2009* (Cth) (the 'FW Act') is the primary piece of legislation governing the national system.

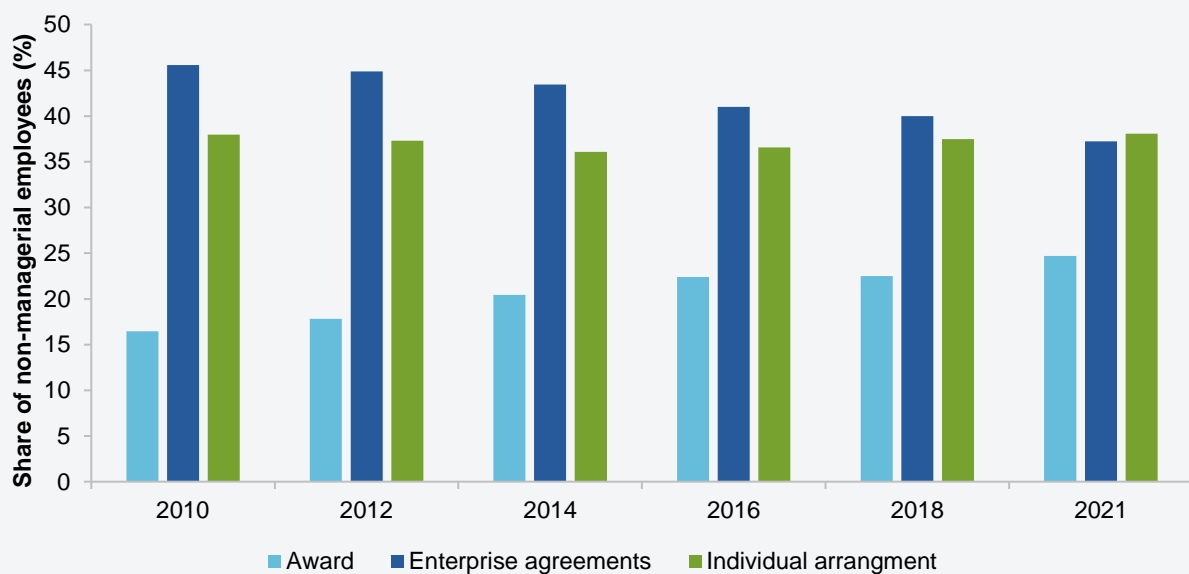
All employees under the national system are entitled to the National Employment Standards (NES) and the National Minimum Wage (NMW), with most employees also covered by an award that provide a higher level of minimum pay and conditions, varying by industry or occupation. Above an award, employees may be covered by a collective agreement or by an individual arrangement.

### Box 2.1 – Australia’s unique workplace relations system

Employee status also confers access to other rights and entitlements under various federal and state legislation, including recourse under unfair dismissal laws, workers compensation, and provisions relating to with enterprise bargaining under employment law, including the right to take protected industrial action.

#### Most employees are on an enterprise agreement or an individual arrangement, although the share of employees on awards have increased

##### Share of non-managerial employees



Source: ABS (*Employee Earnings and Hours, various editions*).

There are a further 1 million independent contractors in Australia, most of which are not included in the national system or state WR systems and instead are covered by the *Independent Contractors Act 2006* (Cth) (the 'IC Act').<sup>b</sup> The number of independent contractors remained much the same from 2008 to 2021, through their share of total employment has fallen from 9.1 per cent to 7.8 per cent over this period.

An independent contractor differs from an employee in that they usually negotiate their own fees and working arrangements and work under a services contract. While independent contractors do not have the same level of protections and entitlements as employees, the IC Act provides protections against unfair and harsh contracts. Contracts can be reviewed in the Federal Court or Federal Circuit Court on the basis of 'unfairness grounds', though this is rare: since 2014, only 16 claims had been filed, with 15 of those claims withdrawn or dismissed (IRV 2020, p. 167).

The IC Act specifies separate rights and obligations for independent contractors and limits the ability of states and territories to treat independent contractors as employees or to extend employee entitlements on 'workplace relations matters' (as specified in section 7 of the IC Act) unless granted an exemption.

Whether a worker is an employee or independent contractor is determined under common law, as a definition of an employee is not codified by legislation. Under common law, the multi-factorial test is used

### Box 2.1 – Australia’s unique workplace relations system

to determine employment status, although broadly, the written terms and conditions of the contract are given primacy under the precedents set by the *Personnel Contracting* and *Jamsek* High Court cases of February 2022.

**a.** The WA workplace relations system is separate from the national system and covers employees of sole traders, unincorporated partnerships, unincorporated trust arrangements and incorporated associations or other not-for-profit organisations that are not trading, or non-for-profit organisations that are financial corporations in Western Australia (DMIRS 2021b). Employees of constitutional corporations are covered under the national system. **b.** There are rare cases where independent contractors are covered by the national or state WR systems. For instance, in the national WR system, the *Textile, Clothing, Footwear and Associated Industries Award 2020* applies to outworkers who are employees, independent contractors, and holders of business name registrations. Eligible NSW owner-drivers in the Transport industry are covered by determinations made by the NSW Industrial Relations Commission, as specified in coverage clauses in determinations.

Source: ABS (Labour Force, Detailed, August 2022); ABS (Characteristics of Employment, August 2021); ABS (Forms of Employment, November 2013); *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

The different forms of wage setting will be relevant to different sections of the workforce. Each poses potential costs and benefits to productivity.

**Across all employees**, minimum standards are set via the National Employment Standards (NES) (legislated through the *Fair Work Act 2009*) and the National Minimum Wage (centrally set by an independent body). They have a broad scope of coverage and provide no room for flexibility for individual circumstances. While this level of centralisation is useful in prescribing a minimum standard, from a productivity perspective, it is important that other mechanisms exist alongside the NES to allow wages and conditions to meet more specific needs.

At the **industry and occupation level**, modern awards stipulate minimum conditions and wages that are customised for specific industries and sometimes occupations. Modern awards are designed to coexist with enterprise and individual bargaining, such that parties can negotiate on employment terms above the minimum standard. Unique to Australia, awards effectively establish hundreds of minimum wage levels — *across* the more than 100 awards and *within* awards across multiple classification levels (above the wage floor for the lowest paid). This method of centralised wage setting has several potential implications for productivity.

- In the context of bargaining, awards provide a fall-back position in case negotiations fail or bargaining is deemed too costly. By providing a starting point, they can narrow the scope of bargaining towards conditions that are above an agreeable minimum. The WR system under the Fair Work Act 2009 (the ‘FW Act’) is intended to encourage enterprise bargaining as a method of generating productivity and wage growth.<sup>14</sup>
- For firms within the coverage of a given award, the least productive firms would not be able to compete simply by lowering wages or conditions — if forced to exit, the reallocation of resources would promote aggregate productivity (Braun 2011).

<sup>14</sup> Section 3(f) of the FW Act states that one objective of the Act is ‘achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action’.

- Given that award minimum wages are generally increased during the annual wage review (although at times by a smaller increment compared with the National Minimum Wage), wage growth is centralised for about 23 per cent of the workforce and can affect wage negotiations for workers earning slightly above award wages. In workplaces that do not use individual or collective bargaining, the centrally regulated processes of setting awards and the National Minimum Wage become primary wage-setting mechanisms.
- Given awards affect wage relativities between occupations and industries, they can influence how labour is allocated across the economy. This places a significant importance on centralised processes and how well they respond to changing market needs.

**Individual level** bargaining allows employers and individual employees to negotiate wages and conditions above those set out in the NES, the relevant award, or applicable enterprise agreement. Individual bargaining improves productivity by allowing more productive workers to attract higher wages, providing incentives for workers to improve and demonstrate their efficiency. It also allows trade-offs to be made that suit the specific needs of the individual worker.

Collective bargaining at **the firm level** (for example, enterprise bargaining and greenfields agreements) allows firms and their employees to negotiate wages and conditions according to their specific circumstances. This provides a greater degree of flexibility than wage setting at the industry or sector level. Bargaining at this level is likely to improve the matching between firms and workers, as more productive firms can offer higher wages and better conditions to attract more productive workers. Moreover, it can be a source of innovation in determining new ways of working that benefit both employers and employees overall.

The **efficiency of each wage setting processes** also affects productivity, as bargaining processes require resources that can be used elsewhere. As such, firms face a trade-off between the level of flexibility they can achieve through bargaining and the time and resources required. Reliance on modern awards removes costs associated with the bargaining process, but allows less flexibility than bargaining and imposes other costs that reflect their content and the ongoing processes for their amendment.

The remainder of this chapter will focus on productivity improvements in awards (section 2.2), enterprise bargaining (section 2.3) and how to regulate platform-based work (section 2.4), although there are other improvements that can be made across the WR system as detailed in the Commission's Inquiry into the Workplace Relations Framework (2015b) that may remain relevant today.

## 2.2 Continuing to improve modern awards

In 2010, the 'modern awards' system was implemented, following a significant reduction in the number and complexity of awards. Under the *Fair Work Act 2009* (Cth), the Fair Work Commission (FWC) was established as the body responsible for varying, creating or revoking modern awards. Modern awards not only set minimum pay and conditions for many employees, but also act as a reference point for enterprise bargaining through the Better Off Overall Test, such that no employee can be disadvantaged under an enterprise agreement compared with the otherwise applicable award. (The BOOT is discussed further in section 2.3).

In the past decade, the share of employees who have their wages determined solely by awards has increased from 16.1 per cent in 2012 to 23.1 per cent in 2021 (ABS 2022a).<sup>15</sup> Over the same period, the

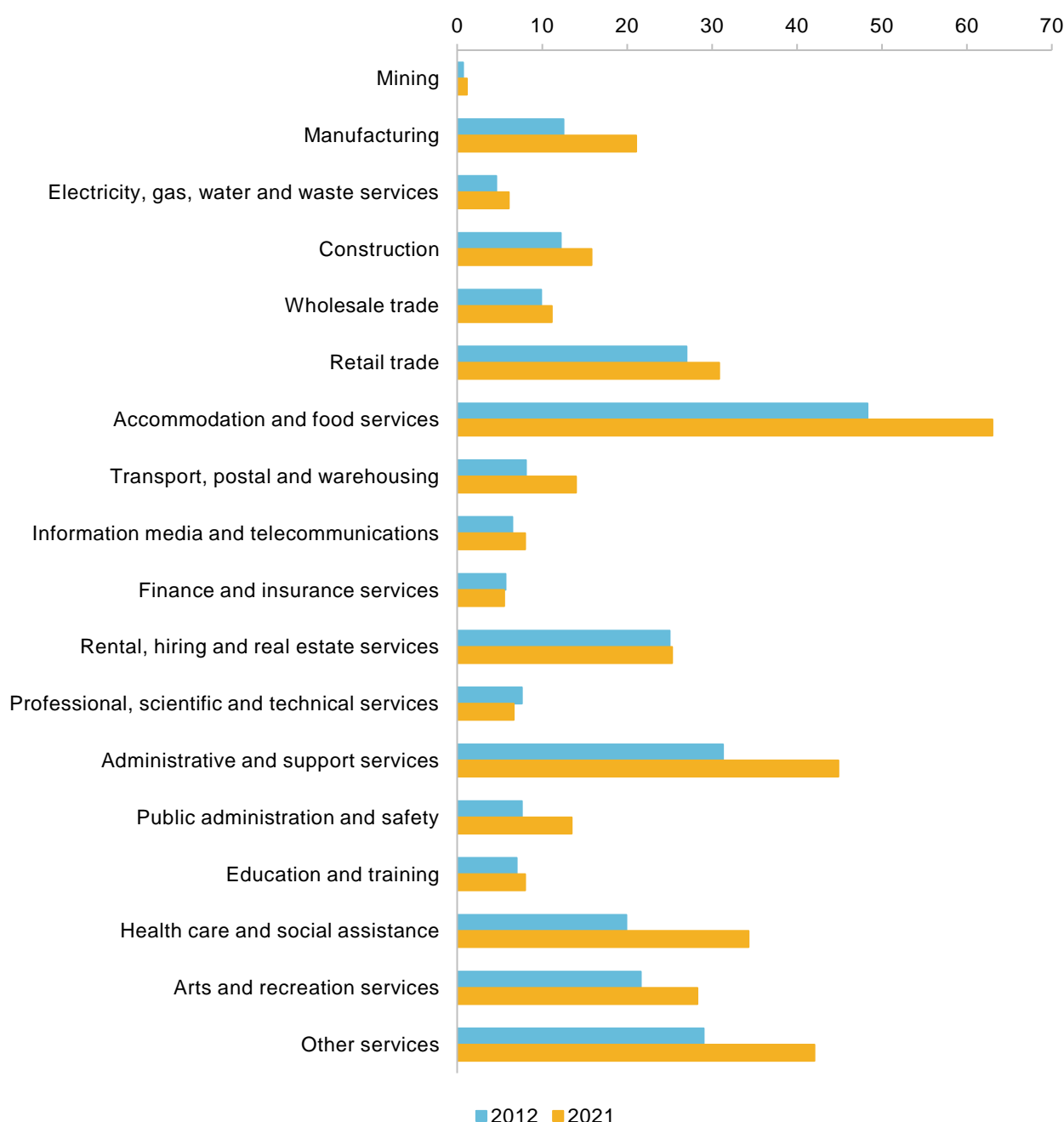
<sup>15</sup> Although the share of people whose wages and conditions are solely determined by awards has risen in the past decade, these numbers still represent a much lower share of award reliance — during the middle of the 20th century, awards directly set wages and conditions for more than 90 per cent of employees (Mitchell 1998), before the introduction of enterprise bargaining.



share of workers covered by enterprise agreements has declined, from 42.0 per cent to 35.1 per cent, while the share of employees on individual arrangements has been relatively stable. Reliance on awards is particularly high in some industries, such as in accommodation and food services, administrative and support services and healthcare and social assistance (figure 2.1).

**Figure 2.1 – The share of employees on award-only arrangements has greatly increased for the accommodation and food service sector in recent years**

**Share of non-managerial employees whose wages are determined by awards only**



Source: ABS (Employee Earnings and Hours, Cat. No 6306.0, May 2021)

Some of the growth in award reliance from 2012 to 2021 can be attributed to the accommodation and food services industry, where there has been a marked increase in the share on employees whose wages are solely determined by the award (figure 2.1). Some of the change within the accommodation and food services industry has likely been driven by some large employers returning to the award following the expiration of enterprise agreements, such as McDonalds and Dominos, or termination of pre-Fair Work era enterprise agreements, such as Nandos. In 2018, 24 per cent of accommodation and food services employees in large businesses (more than 100 employees) had their pay determined by an award, increasing to 54 per cent in 2021. In the same timeframe, the share having pay determined by an enterprise agreement declined from 65 per cent to 37 per cent.

## Improving the process of award determination

The FW Act sets out processes to make, vary or revoke an award, or to vary award minimum wages (box 2.2). There are opportunities to improve the criteria that must be met during these processes, including by:

- improving the clarity of the modern awards objective
- removing the work value justification as necessary for varying award minimum wages
- better facilitating variations to awards that improve outcomes under the modern awards objective

### Box 2.2 – The modern award system

#### The processes for varying, creating or revoking a modern award

There are different processes for varying, creating or revoking a modern award, depending on whether changes relate to award minimum wages, the default fund term or other aspects in an award (figure below). For award minimum wages, the process will also depend on whether changes are made during the annual wage review — where an Expert Panel reviews the National Minimum Wage and modern award minimum wages — or outside of the annual wage review.

The FW Act defines in which circumstances the FWC can make, vary or revoke awards on its own initiative, or on application by an eligible party. Eligible parties are generally employers, employer organisations, employees, unions and outworkers (if applicable) that are affected by the award.

- An award may be made, varied (other than to vary minimum wages or a default fund term) or revoked under s.157(1) of the Act, on the FWC's initiative or on application under s.158. The FWC must be satisfied that the change is necessary to meet the modern awards objective. Additional criteria apply to changing the coverage of a modern award or to revoke an award.
- Outside of the annual wage review, award minimum wages can be varied under s.157(2), on the FWC's initiative or on application under s.158, if the variation is justified by work value reasons and if the variation of award minimum wages outside of the annual wage review is necessary to achieve the modern awards objective. The minimum wages objective also applies.

There are three criteria from the FW Act which may apply to award variation, depending on whether the determination is relating to minimum wages (and if so whether the determination is outside of the annual wage review):

- **modern awards objective** which must be satisfied by awards in tandem with the NES (s.134).
- **minimum wages objective** which applies if the FWC is setting, varying or revoking award minimum wages (s.284).

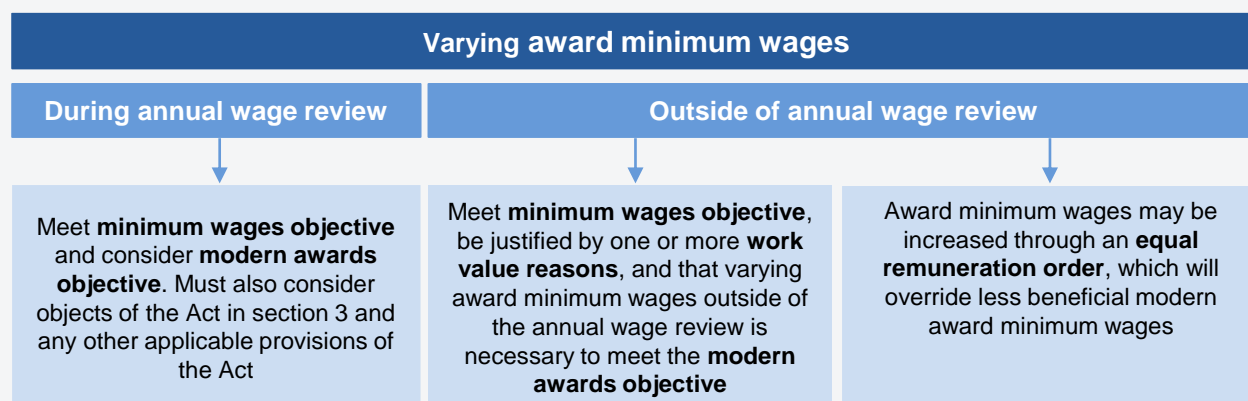
### Box 2.2 – The modern award system

- **work value reasons**, one or more of which the FWC must meet if choosing to vary minimum wages outside of an annual wage review (s.157(2A)).

The FWC can also make a determination to vary an award, including award minimum wages, to remove an ambiguity or uncertainty or to correct an error under s.160, or upon referral by the Australian Human Rights Commission under s.161.

Minimum wages may also be increased by an equal remuneration order made under s.302, which will override less beneficial modern award minimum wages.

### Criteria for varying, making or revoking an award minimum wages



Source: Australian Government (2008), Gillard (2008), Stewart et al. (2016), FW Act.

### Implementing a clearer modern awards objective

Determining award pay rates and conditions involves trade-offs. While the minimum standards set out in awards play an important role in the context of community norms regarding fairness, the awards system entails various other economic effects and compliance costs. In order to balance multiple objectives, the FWC is required to consider the modern awards objective (defined in s.134 of the FW Act) when varying award minimum wages or when making, varying or revoking awards. Nine criteria are specified in the FW Act for informing the FWC's decisions about award content, with many ensuing tradeoffs.

While the existing modern awards objective recognises these trade-offs, different members of the FWC have given greater weights to different aspects of the modern awards objective in their award determinations. For instance, in a 2019 decision<sup>16</sup> regarding the *Pest Control Award 2010*, the Full Bench of the FWC re-iterated that:

The obligation to take into account the s.134 considerations [in the modern award objective] means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process. No particular primacy is attached to any of the s.134

<sup>16</sup> 4 yearly review of modern awards—Pest Control Industry Award 2010—Substantive claims [2019] FWCFB 8092, 2 December 2019, at 13.

considerations and not all of the matters identified will necessarily be relevant for a particular proposal to vary a modern award.

A more streamlined modern awards objective could reduce complexity and improve transparency when determining appropriate award content. Streamlining to focus on the effect on stakeholders could allow the FWC to better specify the likely benefits and costs (and the expected magnitude, incidence and persistence of effects) of award changes.

To that end, the modern awards objective could be made clearer and better targeted by replacing paragraphs s.134(1)(a)-(h) with five paragraphs that cover: a) the needs of the employed, b) the need to increase employment c) the needs of employers d) the needs of consumers and e) the need to ensure modern awards are easy to understand (PC 2015b). Such a change would give relatively greater prominence in award determination to the unemployed and consumers who are not often represented in FWC hearings.

### **Removing the requirement to meet one or more work value reasons to vary award minimum wages outside of the annual wage review**

The FWC may only vary award minimum wages outside of the annual wage review if changes are necessary because of one or more of the following work value reasons (defined in s.157 of the FW Act):

- the nature of work
- the level of skill or responsibility involved in doing the work
- the conditions in which the work is done

These work value reasons set a high bar for adjusting the relativities between wage levels in different awards. Changes in award wage relativities would be merited if the wage relativities were shown to have a weak original basis or if conditions in an industry (or across industries) have changed since their setting. Such wage relativities have been influenced by historical awards and the award modernisation process.

Overall, meeting work value reasons should not be required in order for the FWC to vary award minimum wages outside of the annual wage review, although the FWC would still need to meet the remaining existing criteria of the minimum wages objective and the modern award objective.

### **Allowing for award variations to improve outcomes beyond ‘the extent necessary’ to achieve the modern awards objective**

Amending the FW Act to allow award variations that represent an improvement to outcomes (where existing award content already achieve the modern awards objective) could help achieve better outcomes under awards. S.138 of the FW Act states:

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

Although the FWC has at times interpreted s.138 to include proposals to vary awards which *better* achieve the required objectives,<sup>17</sup> making this explicitly allowable under the FW Act could more greatly encourage the FWC to consider award variations which represent an improvement over the status quo.

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<sup>17</sup> For example, see Appeal by Australian Municipal, Administrative, Clerical and Services Union [2013] FWCFB 1228, 5 March 2013, at 39. and in Menulog Pty Ltd [2021] FWCFB 4053, 12 July 2021. Menulog's claim that a new on-demand delivery services award would 'better achieve' s.134(1)(g) of the modern awards objective compared with varying an existing award was not rejected by the FWC, although the FWC asked that Menulog provide further submission and evidence for the claim, among Menulog's other claims relating to the modern awards objective.

In 2012, Justice Tracey of the Federal Court highlighted a distinction between award variations that were ‘necessary’ to meet the modern award objective and variations that were ‘*desirable*’ to improve the objective’s outcomes:<sup>18</sup>

That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable.

The distinction made by Justice Tracey in 2012 was later referred to again in a 2022 Full Bench of the FWC ruling regarding the wording in the plain language redrafting of shutdown provisions in awards:<sup>19</sup>

... the distinction between that which is “necessary” and that which is merely “desirable” is apposite to s 138, including the observation that what is “necessary” to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations [listed in the modern awards objective] to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.

## Award complexity and flexibility

Despite the significant streamlining of awards during the modernisation process, the Commission’s 2015 inquiry into the Workplace Relations Framework found that awards were ‘relatively inflexible’, even in the presence of existing individual flexibility arrangements<sup>20</sup> (PC 2015b, p. 365, Volume 1). Examination of the content of current awards suggests that this situation has not greatly changed since.

Different approaches could be taken to reduce award complexity and improve flexibility. These include further simplifying or streamlining awards, reducing the compliance costs of using awards through award regulatory technology (‘regtech’), and making awards easier to understand through education programs and the continuation of the FWC’s plain language redrafting program.

### Can awards be further simplified?

To the extent that some aspects of awards limit effective labour allocation and responsiveness, award simplification can improve labour flexibility, make awards easier to understand and comply with, and reduce compliance costs. However, there are natural limits to award simplification given that, in practice, different occupations and industries often require different approaches to working conditions (for instance, to account for specific safety issues) or may have use for different forms of pay loadings (for example, risk-related pay and working on weekends).

Award simplification could most usefully focus on aspects of awards that:

- are overly complex and therefore difficult to understand, apply, or be traded-off for wages in enterprise bargaining
- overly restrict work practices and limit flexibility for employees as well as workplaces
- go beyond their primary role as a fall-back position for bargaining

<sup>18</sup> Shop, Distributive and Allied Employees Association v National Retail Association (No 2) [2012] FCA 480, 11 May 2012, at 46.

<sup>19</sup> 4 yearly review of modern awards—Plain language—Shutdown provisions [2022] FWCFB 161, 25 August 2022, at 43.

<sup>20</sup> Individual flexibility arrangements are clauses in awards that allow employers and employees to agree to variations of when work is performed, wage rates, overtime rates, penalty rates, allowances and leave loadings.

- may disadvantage particular types of workers and businesses (say those in some regional areas)

Some stakeholders proposed award complexity could be reduced by moving sections that are common to many awards to the NES. Ai Group stated that:

Matters that are primarily dealt with in the NES should be largely removed from awards and replaced with references to the NES provisions, just like what has occurred with casual employment definitions and casual conversion provisions. A similar approach should be taken with annual leave, personal/carer's leave and other topics that are primarily dealt with in the NES (Ai Group 2022, pp. 1-2).

The NES provides a set of rights and entitlements for all employees, which cannot be abrogated under any form of agreement or individual arrangement.<sup>21</sup> In this way, placing an entitlement in the NES instead of individual awards could represent a strengthening or weakening of an entitlement for different classes of employees relative to the existing awards if there is a great deal of variation in how an entitlement is specified between different awards. For instance, some awards — such as the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Building and Construction General On-site Award 2010*<sup>22</sup> — had casual conversion clauses which allowed for conversion for eligible casual employees after 6 months of employment, rather than after 12 months as specified in the NES.

Some award terms could be more easily transferred to the NES than others, including administrative provisions that could apply consistently across awards (for instance the cashing out of annual leave) or extensions to existing NES provisions currently provided in multiple awards (such as any expansion of the right to request flexible working arrangements). Further detailed analysis and consultation are required to appropriately evaluate the merits of doing so.

The level of prescriptive detail applied to classification levels within awards also calls for scrutiny. Many awards prescribe detailed descriptions of tasks and responsibilities for different occupations and levels. This can be useful in aligning with technical qualifications in some occupations. However, in others, this degree of prescriptive detail is likely to be unnecessary and may present a barrier to evolving work practices. For example, the Banking, Finance and Insurance Award (2020) stipulates different pay levels for people managing 5-10 staff or 10 or more staff — a distinction that may or may not be relevant to the degree of responsibility in many modern workplaces. Excessively prescriptive terms of this kind can also be a source of undue inflexibility for bargaining to the extent that proposed agreements are tightly tied to the award via the Better off Overall Test (as discussed further below).

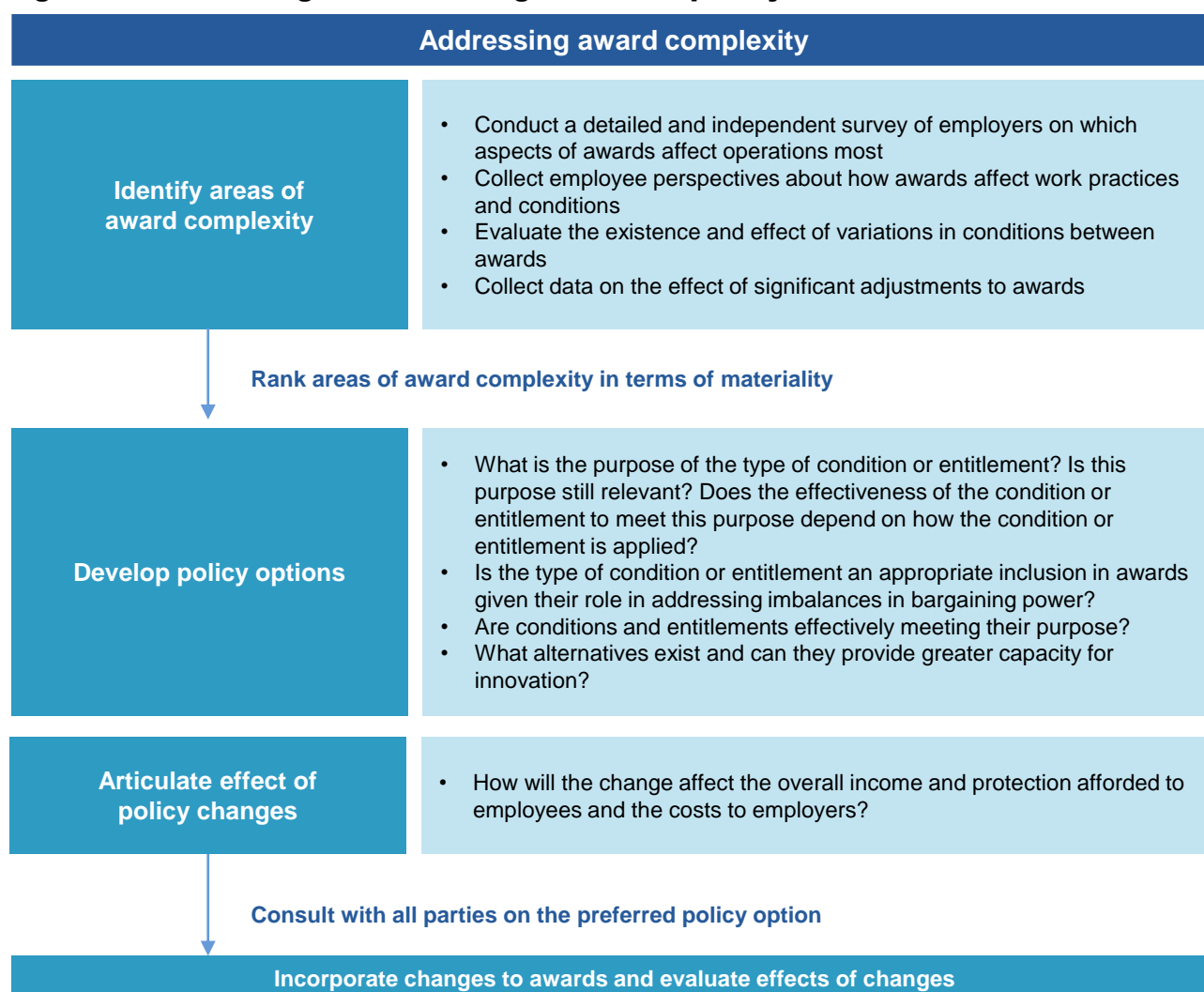
### The FWC's evidence base will be key

Any award simplification process should be informed by quantitative and qualitative evidence and analysis (figure 2.2). The FWC could play a prominent role given it is an independent body, can use a wider group of analysts, and involve longer-term analysis. In particular, it could undertake and commission its own independent research and analysis to determine the priorities for simplification and the effects of changes on employees, employers and others.

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<sup>21</sup> The Commission is also undertaking an inquiry on Carer Leave, which examines the potential impact of amending the National Employment Standards to provide for an additional entitlement to unpaid carer's leave, with a draft report expected to be released in early 2023.

<sup>22</sup> Manufacturing and Associated Industries and Occupations Award 2010 [MA000010] as at 4 Dec 2017 and Building and Construction General On-site Award 2010 [MA000020] as at 20 November 2020.

**Figure 2.2 – Assessing and addressing award complexity**

Source: Adapted from PC (2015b, pp. 348, 369).

The FWC should continue to use information and ideas provided by stakeholders, including via applications to vary awards. The FWC should also survey employers on the aspects of awards that restrict work practices and consult with employees on where awards could be improved. For instance, Ai Group (sub 43, p. 8) highlighted that the need to work hours continuously is less pressing when an employee is working from home.

Award simplification could draw on beneficial changes to working practices during the COVID-19 pandemic. For instance, in 2020 the FWC published a Draft Award Flexibility Schedule, which included provisions for employers and employees to enter into agreements about various flexible working practices, such as working from home arrangements and changing the span of ordinary working hours (with the intention of trialling provisions for 12 months) (Ross 2020). Although stakeholder views were mixed — and as such, the initiative was not progressed,<sup>23</sup> this initiative provides an example of how awards could be modified for award flexibility.

<sup>23</sup> Clerks-Private Sector Award 2020 [2021] FWCFB 3653, 24 June 2021, at 5.





### Information request 2.1

The Commission is interested in understanding to what extent Australia's system of modern awards could be further simplified or streamlined. The Commission is seeking views on which aspects of awards are working well, and which aspects of specific awards are overly complex or limit labour flexibility.

## Reducing compliance costs and improving the process of creating awards through award 'regtech'

While no panacea for undesirable complexity, award regulatory technology ('regtech') is technology (primarily software) that can help businesses comply with awards or assist the FWC to adjust award content more efficiently. A related form of technology is used by some businesses to quantitatively assess whether proposed enterprise agreements pass the better off overall test — that all employees are better off under the agreement relative to the otherwise applicable award.

For employers, award regtech includes 'award interpretation services', which can calculate the amount of pay owed to an employee that is paid exactly at the award, without an employer needing to manually code pay rates (such as the hourly rate at ordinary hours, penalty rates and allowances) into software. Award interpretation services — such as PaidRight and Tanda — claim that their tools can calculate new pay rates following an award variation, for example following the FWC's Annual Wage Review. Such services tend to focus on high coverage awards, particularly those in the retail and hospitality sectors. Award regtech can also be used to identify where employees have potentially been paid below the minimum wages specified in awards.

To date, award regtech has mainly been developed by private sector payroll software providers. However, government can still play a role in supporting award regtech, including to improve the existing public FWC and Fair Work Ombudsman (FWO) tools and calculators that help users navigate awards. For instance, the FWC has developed the Modern Awards Pay Database API (an 'application programming interface'), which is a mechanism that allows software developers to directly extract values for the minimum rates of pay, allowances, overtime and penalty rates in an automated manner, rather than having to manually update payment values coded in software following the annual wage review or other changes to award minimum wages.

Further development of award regtech solutions would benefit from continued collaboration between government, developers, and award users. As an example, during the development of the Modern Awards Pay Database API, the FWC consulted digital service providers on the technical design of the API and gathered information on how the API could be used in practice by digital service providers (dspanz, sub. 18, p. 2). Digital service providers were also able to test the Modern Awards Pay Database API before the API was publicly released.

For the FWC, award regtech could improve the award drafting process through analysing the effects of proposed pay-related award determinations on different stakeholder groups, aiding the process of considering effects on the modern awards objective and minimum wages objective. Award regtech could also help identify potential ambiguities in award content. In the longer term, the Australian Government will play a central role in exploring the feasibility of applying a Rules as Code approach to awards, which could improve the process of handing down award determinations by quantifying potential outcomes and improving the drafting of awards.

## Exploring the feasibility of applying a Rules as Code approach to awards

Rules as Code is a label applying to various government initiatives that involve the coding or marking up of legislation during drafting, with the aim of improving drafting processes and how legislation is provided in digital formats (Waddington 2020). Despite misperceptions, Rules as Code does not typically involve or refer to the use of AI to create or interpret law.

Various examples of Rules as Code exist outside of awards. For instance, the coded rules for the NSW Energy Security Safeguard allow policymakers to visualise the relationships between different parts of the legislation and to simulate policy scenarios using an interactive dashboard (Harinath, Ipsen and Parameswaran 2021).

In the awards space, a Rules as Code approach *could* potentially involve:

- using coded rules to quantify the effect on different stakeholders of creating, varying or revoking an award before an award determination is handed down
- using coded rules to model the working patterns of hypothetical employees to determine whether employees are better off overall (the Hon Reg Hamilton, sub 50, p. 26)
- using coded rules to identify legal ambiguities or uncertainties in award content. The process of converting awards to code may highlight ambiguities in the written text, which can be remedied by drafters, or simulations of proposed award variations may identify unintended outcomes
- publishing machine-readable rules, which payroll software could read to automate calculation of employee entitlements after input of work characteristics such as the number of hours worked and timing of shifts. There are existing award interpretation services offered by the private sector that can calculate pay owed to employees who are paid exactly award rates, but some services may be limited to high coverage awards, such as awards used in the retail and hospitality sector.

The complexity of Australia's awards system means that determining the feasibility of a Rules as Code approach (or limitations thereof) is not straightforward. Feasibility is unlikely to be clear until other areas of regtech tools and API development by the Australian Government are more advanced. However, the potential for regtech to improve compliance and reduce compliance costs suggest that this should remain an area of priority.

As award regtech becomes more advanced, risk management and quality assurance procedures become increasingly important. Given the automated nature of regtech, small errors in code can compound into 'systematically erroneous outcomes' (Colaert 2018). Parties involved in the regtech chain — for example, the developers of the software solutions and the governments that provided APIs and other information — have some level of control over compliance outcomes and, ideally, would have appropriately strong incentives to improve those outcomes.

### Award regtech and a safe harbour

Some stakeholders have proposed that the establishment of a 'safe harbour' would encourage the take-up of award regtech. Under this proposal, employers who relied on regtech solutions that calculated wages under award conditions and later found that the software had incorrectly calculated employee payments could avoid legal penalties for non-compliance, providing them with regulatory certainty.

On the other hand, a safe harbour would significantly reduce incentives for employers to proactively check their own compliance. Accordingly, to avert risks to employees of underpayment or a reduction in conditions, the likelihood of coding errors and inaccurate interpretations of the award would need to be very low for any regtech product.

In evaluating the potential use of a safe harbour, it is important to consider that errors may occur in various parts of the payment process. The end user could be the source of error, say, if the incorrect number of hours were entered, or if an employee were classified under the incorrect award, or if the incorrect classification grade within an award were used. If a safe harbour were to be introduced, its exact conditions would need to be effectively communicated to businesses to avoid misconceptions about the scope of the safe harbour, which could otherwise introduce incentives for non-compliance, and the government would need to consider how to encourage a very high accuracy of award regtech solutions.

### **Making awards easier to understand**

Other channels that can help employers and employees better understand their obligations and rights under awards (but do not involve modifying the legal meaning of award content) include education and advice initiatives and improving the presentation, design and wording of awards.

For example, the FWO operates the Employer Advisory Service program, which provides free personalised advice to small businesses about how to meet their award obligations. The FWC is undertaking a plain language redrafting program, where existing modern awards are redrafted using plain language principles. Such programs are particularly valuable for industries where awards have high coverage; where awards are relatively complex; or where the users are predominantly small businesses. Industry associations and workplace relations consultants also play a major role in assisting businesses navigate the WR system.

### **Plain language award redrafting**

Employers and employees should not require legal training to use and understand awards. In establishing the plain language redrafting program — involving a redraft of selected modern awards — a Full Bench of the FWC stated that:

An award should be able to be read by an employer or employee without needing a history lesson or paid advocate to interpret how it is to apply in the workplace. (FWC 2016, p. 5)

Plain language makes an award easier to understand but without altering the legal effect of text (FWC 2022). The process also involves input from employer groups and unions on proposed changes to wording — so that stakeholders can raise possible changes in legal meaning from the updated text and can comment on the practicality of the proposed wording.

The redrafting process has applied to both individual awards and to terms that are common to several awards. As of July 2022, the FWC is redrafting the Hair and Beauty Industry Award and examining standard clauses, references to loading or penalties, reasonable overtime, annual leave shutdown and the National Training Wage.<sup>24</sup>

Principles that are used to draft plain language awards include discussing only one topic within a clause, using shorter words and sentences, making clear obligations by using ‘must’ rather than ‘shall’ and avoiding archaic language and excessively long paragraphs. To preserve legal meaning, some complex language may be preserved if there is no codified definition or ‘common understanding’ of a term (FWC 2015, p. 1).<sup>25</sup>

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<sup>24</sup> Awards that have already undergone redrafting include the Cleaning Services Award, Clerks Award, General Retail Industry Award, Hospitality Industry (General) Award, Pharmacy Industry Award, Restaurant Industry Award, Security Services Industry Award, and the Fast Food Industry Award, which have high coverage (FWC 2022).

<sup>25</sup> A list of plain language principles can be found in FWC (2015, p. 23).

Alongside simplifying language and clauses, redrafting can also involve improving the award presentation by changing the structure and design of awards, so that users can more easily find information that is required. For example, the guidelines suggest that awards should avoid subparagraphs where possible, which are perceived as being ‘overly legalistic’ by award users (FWC 2016, p. 14).

Plain language drafting will also aid the development of award regtech. Awards that are easier to understand (and do not sacrifice legal precision) can reduce the cognitive effort required to ‘translate’ award content into machine-readable rules. To successfully ‘translate’ award content into code for award interpretation software or to create machine-readable rules, software developers will need to understand the legal definition of a term — which may be different from a colloquial understanding — and to understand how terms relate to one another (see box 2.3 for an example of code conversion).

The process of translating awards into code will also involve resolving possible legal ambiguities, either by consulting with legal specialists or by raising ambiguities with the FWC which can vary awards ‘to remove ambiguity or uncertainty or [to] correct error’. For example, Tanda, a company providing award interpretation software, has applied to the FWC to clarify the treatment of leave and absence hours in the *Clerks — Private Sector Award 2020*, although their interpretation has been disputed by the Australian Chamber of Commerce and Industry (ACCI), Australian Council of Trade Unions (ACTU) and the Australian Services Union (ASU).<sup>26</sup>

### **Box 2.3 – Case study: Rules as Code for vacation pay entitlements as prescribed in Canadian labour legislation**

As a proof of concept, the Canada School of Public Service created a set of ‘coded rules’ using sections 12 and 13 of the Canada Labour Standard Regulations which determine vacation pay entitlements. The coded rules could then be integrated into apps, such as creating an online tool to calculate the amount owed to an employee after answering a set of questions.

To create a coded version of the legislation, the team needed to identify the legal definition of key terms (such as ‘length of service’), the relationship between terms (such as ‘employee’ and ‘medical leave’) and importantly, to clarify any uncertainties in language that were encountered (McNaughton 2020, pp. 6–8). A decision tree was also used to visualise how variables interacted in the legislation to obtain the final output, which was the total vacation pay entitlement accrued to an employee.

A prototype tool was then created using the coded rules, where the total payable amount (if applicable) could be calculated after answering a number of questions — including when the employee started, their total annual compensation and whether the employee had taken medical leave.

Source: McNaughton (2020)

<sup>26</sup> AM2022/8, Transcript of Proceedings 11 July 2022

**Finding 2.1****Further progress is needed in helping businesses comply with awards**

In addition to award simplification, it will be important for the Australian Government to continue to pursue avenues to help businesses comply with awards through the provision of specific advice, information and other increasingly sophisticated tools.

The introduction of 'safe harbour' provisions associated with awards regtech (regulatory technology) is likely to be problematic unless award interpretation technology is significantly more advanced. Any safe harbour proposals would need to be carefully designed to avoid incentives for non-compliance with awards and to encourage accuracy of award regtech solutions.

## 2.3 More efficient enterprise bargaining

When operating efficiently, enterprise bargaining allows for firms and employees to vary wages and working conditions from what is set out in their relevant award to best suit their circumstances. Each enterprise agreement (EA) is assessed by the Fair Work Commission to ensure that the EA was genuinely agreed to by the employees it covers and that they are all better off under the proposed agreement than they would be under the award.

However, whereas award modernisation created a more streamlined and simpler system, there has been no similar simplification of bargaining processes. The FW Act has been subject to little change since its commencement more than a decade ago and nor have there been major operational changes in the FWC. The provisions of the Act remain complex, and bargaining is still time consuming and resource intensive for parties. This is notwithstanding the fact that the objectives clause for enterprise bargaining in the FW Act indicates that the framework for collective bargaining should be 'simple, flexible and fair' (s. 171). In this context, it is not surprising that fewer employees are covered by enterprise bargaining, though the decline has not been uniform across industries.

While enterprise bargaining has declined across industries (figure 2.3), experiences of bargaining vary significantly between businesses, and the process has improved for many. The median approval time for agreements without undertakings has fallen from 30 days in 2018-19 to 14 days in 2020-21.<sup>27</sup> The efficacy of the FWC's outreach can also be seen in the fall in the share of approved agreements that require undertakings,<sup>28</sup> which are amendments required by the FWC to ensure the EA meets the requirements of the FW Act (figure 2.4). However, the bargaining process can be drawn out when disputed. For more 'complex' agreements that require undertakings to be accepted by the FWC, median bargaining times in 2020 and 2021 ranged from 134 days to 184 days.

Bargaining is predominantly used by the public sector — where 84 per cent of employees are on EAs (figure 2.5 a) — and larger private sector firms, with 66 per cent of employees in large business (1000+

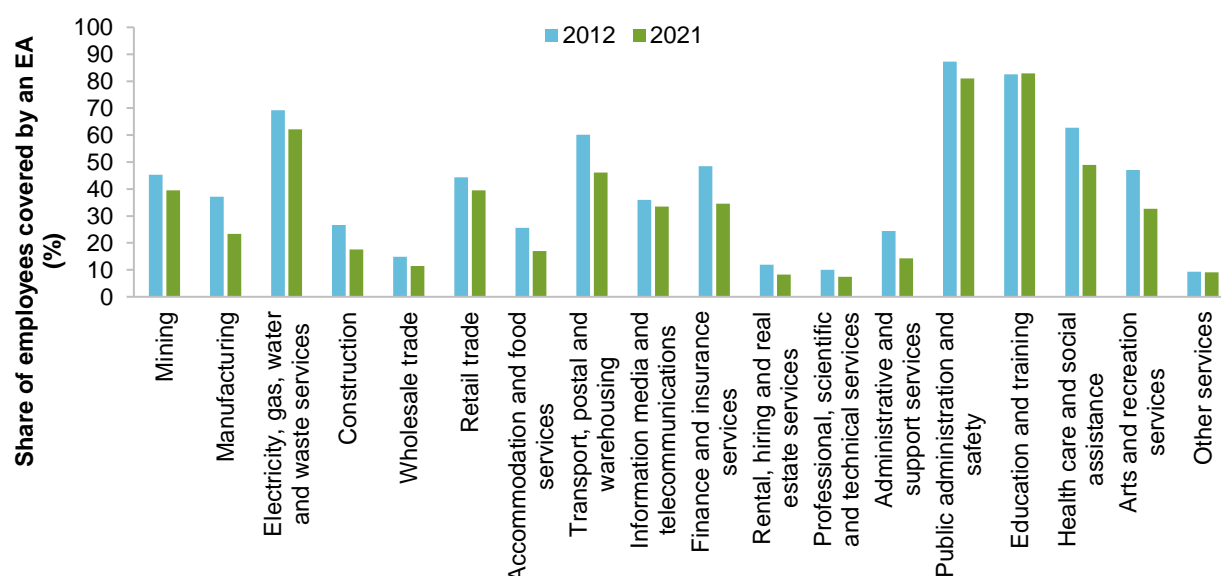
<sup>27</sup> Many of the delays in approving EAs occur when the applications are not complete (not all the required forms and evidence are submitted) or non-compliant (the agreement process or content does not meet the requirements of the FW Act) (FWC, pers comms, 13 July 2022). The FWC has increasingly been working with businesses to help them understand the requirements to submit agreements that are complete and compliant, which has likely contributed to the fall in approval times.

<sup>28</sup> If the FWC has concerns that an enterprise agreement does not meet the requirements of ss.186 and 187 of the FW Act, it may accept a written undertaking that addresses this concern as part of the decision to approve the agreement.

employees) on an EA (figure 2.5 b). Activity in the bargaining system is also dominated by incumbents, with around 70-80 per cent of new agreements made each quarter replacing an existing agreement, which has increased from around 50 per cent of agreements in 2011 (figure 2.5 c). The presence of unions is also linked to bargaining activity: 72 per cent of current agreements are union-related, with these agreements covering 93 per cent of all employees on a current agreement (DEWR, 2022).

**Figure 2.3 – Enterprise bargaining has declined across most industries**

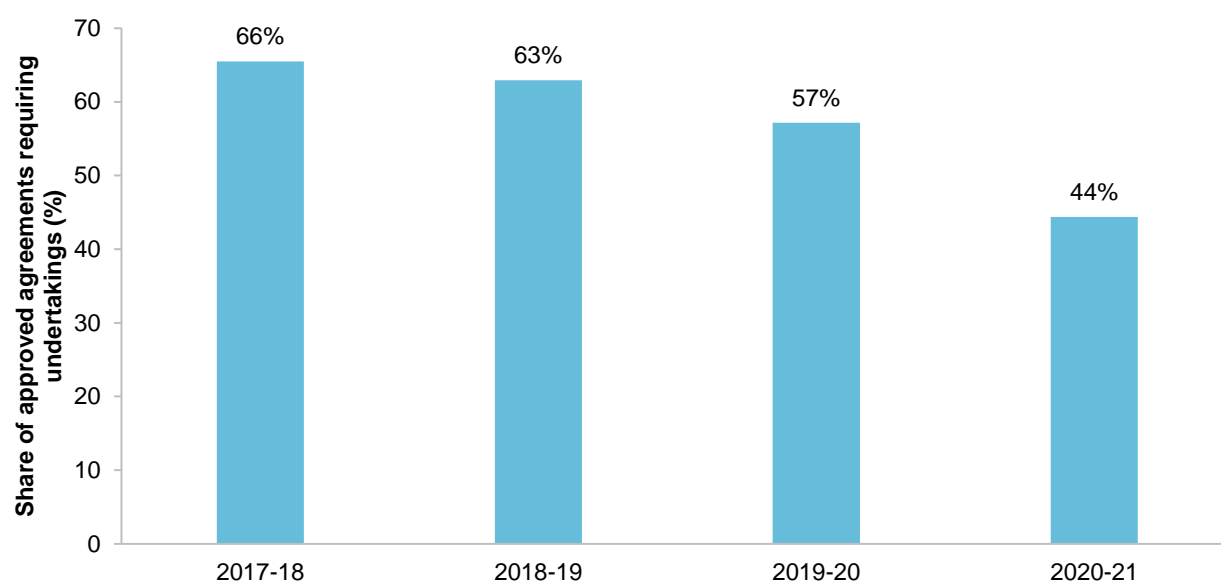
**Percentage of non-managerial employees covered by enterprise agreements by industry**



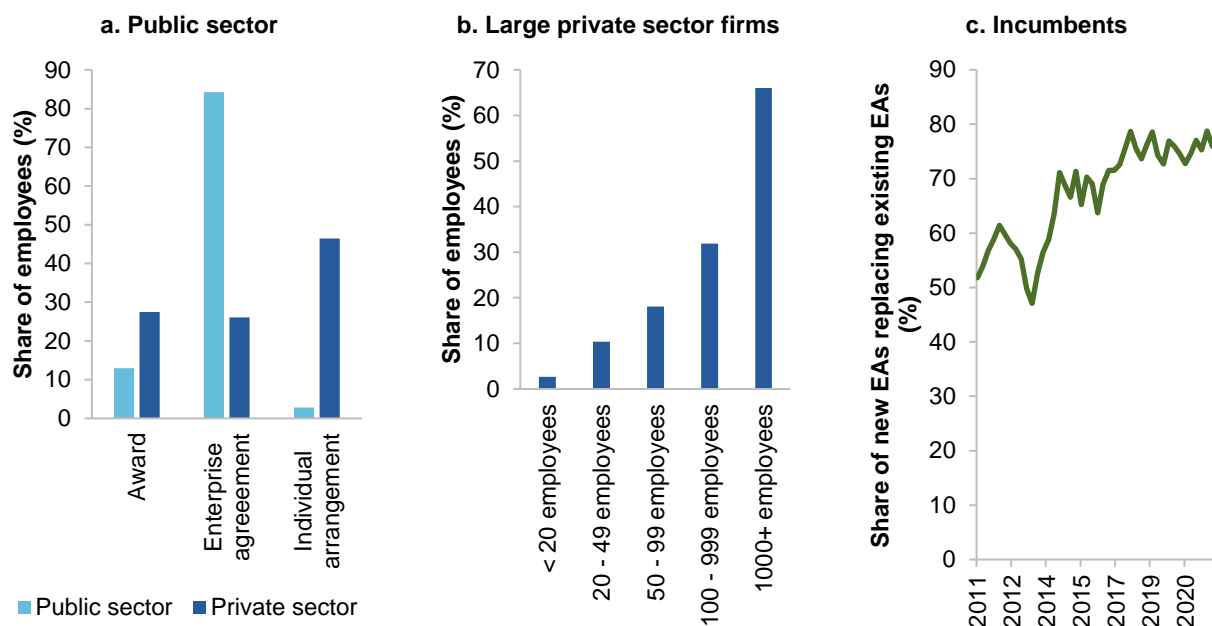
Source: ABS (*Employee Earnings and Hours*, various editions).

**Figure 2.4 – Fewer agreements are requiring undertakings to be approved by the FWC**

**Share of approved agreements requiring undertakings by financial year**



Source: DEWR, Workplace Agreement Database (unpublished data).

**Figure 2.5 – Users of enterprise bargaining**

Source: ABS (*Employee Earnings and Hours, May 2021*; unpublished TableBuilder); DEWR Workplace Agreement Database (*unpublished data*).

Increasing the use of enterprise bargaining will not in itself necessarily lead to better outcomes. Given the trade-offs between flexibility and the costs of bargaining, some employers and employees may prefer to rely on either awards or on individual bargaining. However, addressing some of the flaws in the existing bargaining arrangements could help to secure mutually beneficial bargaining outcomes.

While Australian evidence is scarce, international evidence suggests that firm-level bargaining (as opposed to more centralised forms of bargaining) is associated with higher productivity growth, by allowing productivity to be aligned with wages and conditions, and by improving matching of firms with workers.<sup>29</sup>

The bargaining process can also be resource intensive and may not be viable or productivity enhancing for every firm. Longer bargaining times could result in workers being left without pay rises and businesses unable to implement changes to work conditions they require.<sup>30</sup>

<sup>29</sup> While the empirical evidence principally relates to Europe, where regulatory arrangements for workplace relations vary from Australia, it still suggests that moving away from prescriptive models encourages productivity. Analysis from the OECD shows that economies with a high coverage of centralised bargaining systems have lower productivity growth when compared with economies with decentralised firm-level bargaining systems (OECD 2019), noting that many other OECD economies have significantly more centralised bargaining arrangements than Australia. This is supported by firm-level empirical research showing higher productivity gains are achieved by firms that engage in firm-level bargaining than those that rely on sector-wide or centralised bargaining (Garnero, Rycx and Terraz 2018). Firm-level productivity was found to increase in more decentralised multi-level bargaining structures of Europe by leading to a better matching of employers and employees than possible under a centralised bargaining structure (Aglion and di Mauro 2020). The increased matching of employers and employees may be facilitated by firm-level bargaining by allowing firms greater opportunity to pass on productivity gains into wages than what is possible under a centralised system as firms are able to set wages relative to their own productivity rather than industry-wide productivity levels (Crisciolo et al. 2021b).

<sup>30</sup> Data from the Department of Employment and Workplace Relations' Workplace Agreement Database shows that median bargaining time for agreements made between Q1 2020 and Q1 2022 that didn't require undertakings (i.e. those that passed through the FWC without amendments) ranged from 70 days to 152 days.



For many firms, the cost associated with prolonged bargaining could outweigh the benefits they could receive. This would particularly be the case for smaller firms, firms with highly individualised employees (where they could rely on individual arrangements), and firms that are operating close to or at the award level of wages and conditions.

## Bargaining could be refocussed to enable productivity gains

Individual clauses and terms in EAs can lead to improved workplace practices and productivity gains by increasing flexibility, improving staff retention and development, and increasing service quality and efficiency (box 2.4). EAs need to be adaptable (or allow workplaces to adapt) to changing technologies, skill types, occupations, and work practices, as well as broader challenges (such as those related to COVID-19 or climate change transitions).

### Box 2.4 – Productivity improving clauses

In 2014, the Fair Work Commission undertook case studies on eight enterprise agreements to identify how individual clauses can promote productivity improvements. They identified three broad aspects of agreements that employers, employees, and their representatives saw as productivity enhancing.

#### Promoting flexibility

Staff retention was greater where clauses provided employees with the flexibility to decide their hours of work or gave them additional leave entitlements. Increased staff retention can improve productivity by lowering recruitment costs and increasing the gains from on-the-job training and experience. Flexibility in hours worked can also improve relationships between managers and employees, which increases staff performance.

#### Skill development

Clauses that provided structure and/or resources for skill development — either through training opportunities or linking skill development to classification level — were associated with productivity improvements, through improvements to both service quality and staff retention.

#### Incentives and engagement

The *Alcoa Australia Rolled Products Yennora Agreement 2013* contained clauses that provided a mechanism to engage employees in implementing work practices favourable to innovation and efficiency. Other agreements used productivity allowances to encourage more efficient practices, while also enshrining employer-employee consultation into the agreement which was seen to increase industrial harmony, lowering time lost to dispute.

Source: Fair Work Commission (2014).

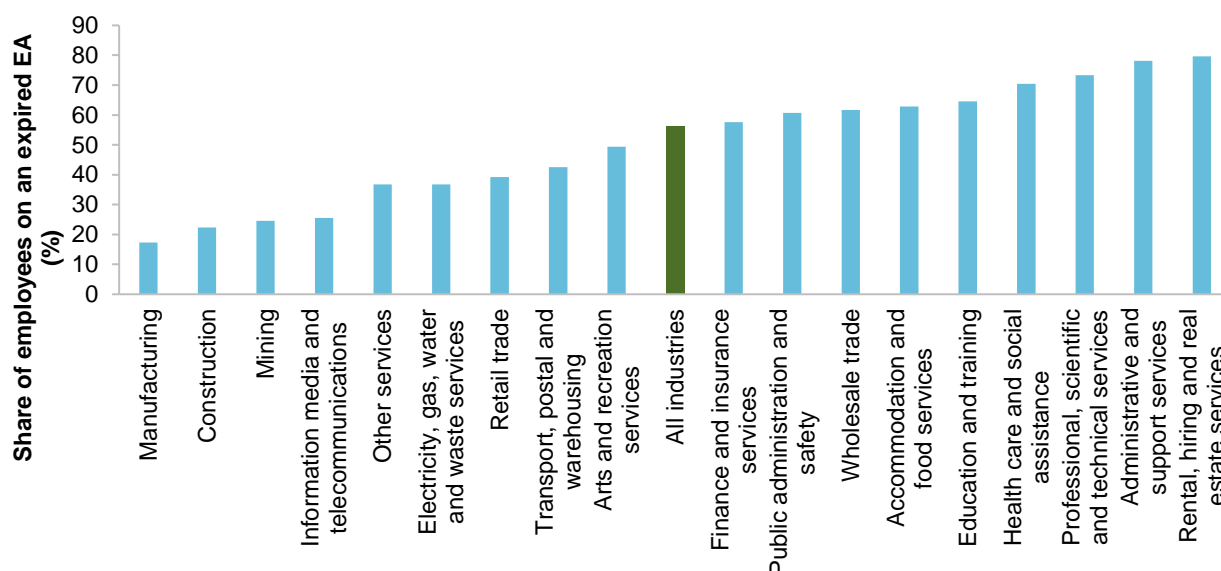
The shock to working patterns associated with COVID-19 exemplifies the potential need to adapt EAs as economic conditions change. The pandemic illustrated that large shares of the workforce could work from home effectively, giving them flexibility, cutting commuting times and for many, increasing their productivity (PC 2021b). However, for many businesses, working from home was a necessity imposed by lockdowns and other restrictions, rather than a new mindset about how to organise their workforces. While many businesses have now adopted some level of working from home as a policy, it seems clear that these policies will also feature in new EAs, and indeed may motivate a greater interest in using this industrial instrument. Working

from home can be mutually beneficial for businesses and employees, depending on how it is managed. EAs also allow for those arrangements to be locked in over the length of the agreement, providing certainty to employees, and allowing them to make decisions on equipment and infrastructure to increase their ability to work from home without reducing their productivity.

This is just one example. There are many other aspects of EAs where productivity may be lifted by adding, modifying and sometimes removing clauses, ultimately resulting in better outcomes for all — employers and employees, and ultimately consumers. Ideally, given the shared objective of raising productivity within the workplace, such changes should develop cooperatively, drawing on the collaborative input of employees, their representatives and managers. However, in some instances, transactions costs may be high, or workplace relations law may incidentally create tensions between the bargaining parties or restrict the areas where they are allowed to bargain. The result is that EA content may forgo productivity and other benefits for the parties. Two sources of this are the FW Act's treatment of permitted matters and the application of the Better Off Overall Test, as discussed later in this section.

For many employees and businesses, improvements in bargaining would require a shift in the mindset of bargaining parties. In many cases, though not all, bargaining processes have increasingly been used as a risk management exercise with the primary bargaining item being to negotiate pay rises rather than addressing the broader goal of how to identify and secure productivity improvements that could underpin faster wage growth, as was the original intent of the system (KPMG 2020). Increasingly, employers and employees are leaving expired EAs in place, with 56 per cent of employees covered by an agreement on an expired EA. By their nature, expired EAs cannot include new productivity enhancing clauses (figure 2.6).

**Figure 2.6 – Most EA covered employees are on an expired agreement**



Source: ABS (*Employee Earnings and Hours*, various editions), Department of Employment and Workplace Relations (*Trends in Federal Enterprise Bargaining – March quarter 2022*).

## Restrictions on technology and innovation

Certain clauses can frustrate business recruitment and innovation. Restrictive clauses like this can directly affect how a firm can backfill positions or temporarily outsource labour to meet the operational needs of the firm (for example, clauses restricting hiring and promotion in container terminal EAs). There are also clauses that indirectly affect how a firm chooses its capital/labour investment mix, by prohibiting changes to working

arrangements unless there is agreement from unions (for instance, consultation clauses in the *NSW Trains Enterprise Agreement 2018*). These clauses have effectively created the power to veto changes to business models (and any associated efficiency gains) that would stem from technological upgrades. Clauses that prohibit technological or work role changes may also affect the ability of firms to respond to the challenges of climate change (such as employment security clauses in power station EAs).

On the other hand, unions play an informal role in safeguarding employees where new productivity-enhancing technologies or work practices are alleged to pose safety risks to employees or the public (as was claimed in the instance described in box 2.5), where unions may be notified of – or identify – such risks. Unions also have a formal, but constrained, investigative role under the right of entry arrangements of the FW Act and the WHS legislation. However, enterprise agreements are not the appropriate mechanism for *regulating* safety and the FW Act includes no positive role for such regulations to be included in agreements. Rather, safety breaches are appropriately resolved with the involvement of Work Health and Safety (WHS) or industry-specific safety regulators.

### **Box 2.5 – Case Study – NSW Trains and the Australian Rail, Train and Bus Industry Union**

The NSW Government announced a procurement contract for new trains for the InterCity fleet in August 2016, with the roll-out intended to begin in 2019 (Gerathy 2016).

One of the technological improvements of the new InterCity fleet was the inclusion of CCTV technology for monitoring the exterior of the train before the train leaves the platform (Metcalf Rail Safety Ltd 2020, p. 3). The new InterCity fleet also included traction interlocking on the cab door, which meant that the operating model could not be exactly the same as the current model involving a driver and a guard.<sup>a</sup> In the current model, the Guard is responsible for looking out the cab door to check that passengers have embarked and disembarked safely and that the train can depart safely (Metcalf Rail Safety Ltd 2020, p. 22). At various times, the NSW Government has explored a driver-only operation, and a driver and customer service guard model, where the guard would have a more customer-focused role (van der Broeke 2016; Metcalf Rail Safety Ltd 2020, p. 1).

One of the operating models proposed by NSW Trains would require a reclassification of the existing roles, which would involve a 4 per cent salary increase for drivers, but a reduced rate for guards, reflecting that the technology had reduced the scope of their duties.<sup>b</sup> NSW Trains stated that the driver-only model would have had substantial savings, while the savings from the proposed driver and customer service guard model were ‘only marginal’.<sup>c</sup>

The Australian Rail, Tram and Bus Industry Union (RTBU) disputed the change in roles and took the matter to the Fair Work Commission, citing Clause 12 in the *NSW Trains Enterprise Agreement 2018* (‘the Agreement’), which requires the RTBU’s in-principle approval for various changes to the Agreement. The RTBU’s interpretation was that changes to employees’ pay and conditions, including restructuring, were within the purview of Clause 12.<sup>d</sup>

While the Deputy President of the Fair Work Commission initially ruled in favour of NSW Trains, the decision was appealed by the RTBU. In the appeal, a Full Bench of the Fair Work Commission ruled that the new role classifications fell within the purview of Clause 12 of the Agreement, preventing NSW Trains from implementing its proposals in respect to the new InterCity Fleet without an in-principle agreement

### **Box 2.5 – Case Study – NSW Trains and the Australian Rail, Train and Bus Industry Union**

with the RTBU<sup>e</sup> — effectively giving the RTBU the power to veto changes to the operating model (and any associated efficiency gains) that stem from the design of the new trains.

The RTBU has cited safety concerns from the design of the new InterCity fleet (McKinney 2020), although NSW Government has disputed this (TfNSW 2021). In June 2022, the NSW Government offered to retrofit guard compartments into the new InterCity fleet, in exchange for ceding the right to veto changes to work practices or technology (Hutchinson 2022).

a. [2020] FWC 4359 at 10 b. [2020] FWC 4359 at 11 c. [2020] FWC 4359 at 11 d. [2020] FWC 4359 at 31 e. [2021] FWC 1113 at 26.

Source: Fair Work Commission ([2020] FWC 4359, [2021] FWC 1113), RTBU (2022).

### **Placing boundaries on what can be bargained**

Under the FW Act, enterprise agreements must contain a 'consultation term' that requires the employer to consult with employees about major workplace changes (such as those likely to have a significant effect on employees, rostering changes, or changes to ordinary hours of work) (s.205). This consultation must include providing information, inviting employees to give their views, and considering employees' views about the change. While such requirements for genuine consultation are reasonable, the examples above show that clauses in some agreements can give employees and their representatives the power to *restrict* decisions that often would be more appropriately determined by management.

The issue of what should be permitted matters in agreements has long been vexed. In principle, it is undesirable that an agreement could be used to stifle (or threaten to stifle) technological improvements or limit productivity-enhancing improvements. Notably, even if restrictive clauses are ultimately not used to limit innovation and productivity improvements, giving employees and their representatives the power to do so — and using that as leverage for pay rises — could reduce business incentives to invest in cost-reducing technologies. Accordingly, a hidden cost of such restrictive clauses stems from missed opportunities to adopt innovations.

The FW Act provides that terms have no effect in an enterprise agreement if they are unlawful or if they are not about a permitted matter. Terms that have no effect do not void existing EAs, but they are not enforceable; while unlawful terms prevent an EA from being approved and void any existing EAs that contain them. The current set of unlawful matters do not include any provisions that would preclude an EA that incorporated clauses restricting productivity.

Equally, there is ambiguity about when such clauses would be considered permitted matters, given the breadth and vagueness of permitted matters. For example, matters pertaining to the employer-employee relationship are permitted matters, which includes terms relating to staffing levels, especially if some link to safety is asserted. As staffing levels can be inextricably linked to technology and productivity, existing law readily enables clauses that could have the effect of limiting productivity initiatives.

However, the FWC's decisions on disputes about the scope of 'matters pertaining' have built up a body of jurisprudence that provides some boundaries. For instance, following the full bench decision in the case of *AMWU v Visy Board Pty Ltd* [2018] FWC 8, there is now much greater clarity that an agreement must not include a general prohibition on the engagement of labour hire. But, as shown in box 2.5, restrictive clauses with significant adverse productivity impacts have survived.

The question is whether it would be practically feasible to amend the FW Act so that permitted matters did not include productivity-impeding clauses, or to go further and make such clauses unlawful. The Commission's 2015 inquiry into workplace relations was pessimistic about legislative changes that would either identify a 'blacklist' of matters that should not be permitted in agreements or a 'whitelist' of allowable EA terms that would restrict the terms to those that would not impede efficiency (PC 2015b, pp. 676–677).

However, it is worth reconsidering the issue, especially given that the inherent problem has not gone away, and could potentially worsen if new forms of automation and digital technologies more fundamentally affect how workplaces are organised. Two broad options could be explored:

- introduce carve-out arrangements from the FW Act for industries where agreements have clauses that are commonly inimical to productivity and efficiency. The Commission's maritime inquiry highlights and seeks to address issues specific to container terminal industry EAs, which may justify special (but proportionate) measures. These EAs include significant restrictive clauses that affect the productivity of labour, including favouring tenure over merit in career advancement (PC Maritime Freight Report, pp. 269–274). In that industry, there are grounds for a shortlist of unlawful terms (though this is only a draft recommendation in that inquiry)
- consider whether the FW Act could provide more guidance about permitted matters that would reduce the scope for productivity restricting terms in agreements. This need not go so far as a 'blacklist', but could specify some types of clauses that would not be permitted, and could otherwise require that a major criterion for rejecting a clause as a permitted matter would be that it has a significant adverse impact on productivity. This would still leave case law to define many of the boundaries of permitted matters, but with a greater focus on efficiency as a desirable element of the content of agreements. An amendment to highlight the importance of productivity for decisions relating to rejections of permitted matters would be consistent with (but extend beyond) the objects clause (s. 171) of enterprise agreement making — which only specifies the general desirability of delivering 'productivity benefits' — but without prescription of the circumstances in which that could arise or any specific instances.

The last option could apply to existing agreements without the need for renegotiation — the clauses in question would simply cease to be permitted matters and would cease to be enforceable.

In making any changes, it may be helpful to better explain the meaning of the word 'productivity', which is currently undefined in the Fair Work Act (getting no mention in the explanation of terms in s. 12 of the Act). There has been a tendency for employer groups to suggest that increases in hours worked or some other reduction in conditions are productivity improvements, which is not true (PC 2015b, pp. 790–792). This understandably may make employees and their representatives sceptical of clauses intended to improve productivity. Clarifying what is meant by productivity could help pave the way for more positive attitudes to its relevance for enterprise bargaining, while assisting the decision-making of the Fair Work Commission.

In addition, the practical definition and interpretation of productivity should consider safety outcomes as a key output. That is, genuine productivity gains could not be measured on market inputs and outputs alone if they have a significant impact on safety. Nonetheless, it may be clearer to separate safety from conventional outputs for given inputs, and to take account of both when considering whether restrictive clauses are genuine permitted matters.

Centring bargaining around the desirability of productivity would refocus the bargaining system and reduce complexity, which in turn could reinvigorate enterprise bargaining.



## Finding 2.2 Reforming bargaining matters

The capacity to include clauses in agreements that restrict technologies and beneficial work practices is, on its face, counter to productivity and makes agreements a less attractive model for workplace bargaining. There are several possible mechanisms that could be used to address the costs posed by such clauses, however, any such mechanism should reflect the need for bargaining to be mutually beneficial.

## Rebooting the BOOT

The Better Off Overall Test (BOOT) is performed by the FWC when approving agreements to decide whether a proposed EA makes *each current and prospective* award covered employee better off than the relevant modern award (s.193 of the FW Act).<sup>31</sup>

Complications with the BOOT were highlighted by the FWC's decision to reverse its approval of the *Coles Store Team Enterprise Agreement 2014–17* in 2016.<sup>32</sup> Coles and the Shop, Distributive and Allied Employees Association had mutually agreed to higher hourly base rates and longer meal breaks, among other provisions, in exchange for lower penalty rates. While on average, these changes made workers better off, the FWC ruled that a significant number of workers would be worse off (as they predominantly worked during times that would have seen them earn the higher penalty rates in the award). However, the most important aspect of the ruling by the Full Bench was clarification that the BOOT would have failed even if *just one* existing or prospective award-covered employee would be worse off after the agreement.

This created a precedent that the FWC would be obliged to reject an agreement endorsed by the business and a majority vote by employees that made just one employee worse off than the relevant award by any amount (or indeed, foreseeably a prospective employee), even if the remaining employees were made substantially better off. As one commentator has put it, 'the BOOT needs to fit all feet (not just the majority)' (Winckworth 2016).

A further feature is that the BOOT does not necessarily relate to the outcomes for employees from the current operations of the business, but to some hypothetical future that might arise in 'a dynamic business environment'. For example, if a business did not open on weekends, an agreement that reduced penalty rates on weekend could fail the BOOT because there would be a potential for weekend operations at some later time.<sup>33</sup> Taken on its own, this feature could desirably prevent gaming in agreements in which there was an intention to reduce benefits below award conditions for whole classes of prospective employees whose future pattern of work was expected to be different from current ones (box 2.6). However, when combined with the other requirements of the BOOT, the need to consider hypothetical or imaginary futures adds significant additional complexity to assessing an agreement's compliance with the FW Act, and in many cases risks becoming unworkable.

In its current form, the BOOT affects the capacity of employers and employees (and their representatives) to use EAs to jointly consent to mutually beneficial variations in awards. Awards often include many complex

<sup>31</sup> This report does not consider the application of the BOOT to the individual flexibility provisions of modern awards and agreements, which involve a mix of parallel and unique issues.

<sup>32</sup> *Duncan Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* (C2015/4999).

<sup>33</sup> See para 111 of *Loaded Rates Agreements (2018)* FWCFB 3610 and para 6 of *Beechworth Bakery Employee Co Pty Ltd T/A Beechworth Bakery*, [2016] FWCA 8862.



terms and conditions for pay and non-pecuniary benefits that are dependent on the type of worker, when they work, and their precise tasks. Awards can also specify certain conditions on employees' working patterns that may grant benefits. These can include certainty about total hours worked and rostering, guarantees of pay for a quantum of hours during a split shift even if the employee does not work the hours, the timing and duration of breaks, and job search entitlements on termination and redundancy.<sup>34</sup> These features of awards may affect the efficiency of a business by changing how it would otherwise run. For example, this might include when the business is open (which in turn affects its efficient use of its physical capital), whether it uses split shifts, and how it manages continuity of operation.

A more restrictive BOOT also limits the extent to which an enterprise agreement can simplify award terms, noting that reducing complexity from otherwise having to use multiple awards was a major motivation for using EAs (PC 2015b, p. 662). The BOOT consequently increases compliance costs in the workplace relations system. No matter how red tape arises, it is harmful to the efficiency of Australian businesses.

The present BOOT also affects businesses' motivation for enterprise bargaining.

- By limiting bargaining options, a business has less to gain from making an agreement.
- For businesses with pay and conditions close to the award, EAs may be a casualty of the complexity, uncertainty and delays that application of the BOOT may entail. The BOOT can slow down the bargaining process because businesses and employee bargaining representatives have incentives to avoid subsequent rejection of an agreement by the FWC. It can also slow down the approval process as the FWC takes more time to test or approve agreements, which delays the realisation of any productivity or other efficiency benefits. Significant delays can also arise if a matter requires undertakings by the business to address an inconsistency with the BOOT or if there are appeals based on varying interpretations of what is a complex test.

Since the FWC's clarification that the BOOT literally applies to every current or prospective employee, several large employers have left the enterprise bargaining system, relying instead on modern awards (for example, McDonalds, Bunnings, and Dominos). The managing director of Bunnings has argued that the 'never-ending cycle of review and bargaining isn't productive for business and isn't great for our team and it's tied us up in knots' (Marin-Guzman 2020).

This has prompted calls to improve the FWC's decision-making speed and reduce complex processes, including making changes to the BOOT to make it easier for firms that are close to the award to engage in bargaining.<sup>35</sup>

### Loosening the BOOT's application

Through its 'all in, or none in' feature, the existing BOOT lies on one end of a spectrum of arrangements for determining the distribution of benefits for employees covered by an agreement. At the other end, were there no BOOT, the requirement that an agreement lodged with the FWC must be approved by the majority of voting employees provides protection against weakening award conditions, but would not prevent disadvantaging a sizeable share of the workforce. There are a range of models lying between these two ends of the spectrum that may be simpler to implement and allow greater scope for productivity-enhancing flexibilities, while still acting in the interests of most employees.

One option is to test whether *classes* of current and prospective employees are better off overall as a result of changes to award conditions in any EA (in line with PC 2015b, p. 700). By using classes as the basis for

<sup>34</sup> For example, as described in *Loaded Rates Agreements* (2018) FWCFB 3610.

<sup>35</sup> Businesses paying their employees well above the award will often meet the BOOT if they make changes to an EA that eliminates or reduces some condition in the relevant award.



the test, the need to ensure all employees be better off would disappear. A class would comprise a group of employees whose working patterns and tasks were similar (for example, casual employees working on weekends, or a given classification of employee). The concept of class could also be flexible enough that highly individualised employees in smaller firms could all be deemed their own class.

Loosening the BOOT's application could allow for agreements to be put in place without an individual employee holding up the proposed agreement. It would shift the focus of bargaining back onto overall improvements for employees, while still preventing any significant group of employees being disadvantaged. In the latter respect, it is unlikely that the *Coles Store Team Enterprise Agreement 2014–17* would meet a BOOT of this kind because it would have led to material reductions in earnings for a large group of casual employees working on weekends. If it is deemed desirable to reduce those benefits, then arguably this should be pursued through award modification instead (as occurred for Sunday penalty rates applying to a range of industries, such as fast-food outlets).<sup>36</sup>

The BOOT could be further modified by reducing the relevance of future hypothetical classes of employees to the test. For any given EA, hypothetical classes could be restricted to the patterns of work and tasks that are either already apparent in other enterprises or could reasonably be foreseen to arise during the period of the agreement for the business concerned. This would provide an incremental increase in certainty for bargaining parties and would not constitute a radical change, since wholly new classes of workers are unlikely to form quickly in any case. Such an incremental change avoids the risks associated with more radical changes (that is, the potential for undesirable strategic behaviour by bargaining parties if future classes were entirely disregarded in a BOOT — box 2.6).

A small additional step would be to move from a BOOT to a 'no disadvantage test', such that a proposed agreement would fail if it disadvantaged a class of worker compared with the relevant modern award. The difference is slight because an obligation to be somewhat better off (say, one cent more per year in wages due to an agreement) is very close to not being disadvantaged (no increase or decrease in wages). Nonetheless the change 'could be a symbolic difference that may incline FWC members to treat the BOOT as setting a slightly higher bar' (PC 2015 p. 695).

### Box 2.6 – CMFEU v One Key

In 2015, One Key, a labour hire business, formed an enterprise agreement with only three employees. The agreement allowed for variations in 11 modern awards. However, on the day of the vote, no employees fell within the coverage of most of those modern awards (Ellery 2017). The enterprise agreement sought to pass the BOOT by providing an allowance of 0.1 per cent of the hourly base rate of pay in the relevant award, paid on ordinary hours only.<sup>a</sup> For the three relevant employees, the changes appear to have met the BOOT. The FWC approved the enterprise agreement.

However, One Key then expanded its staff to more than 1000 employees within six months of the vote, who may or may not have been better off. The CFMEU, which was not aware of the agreement prior to it being struck, applied to the Federal Court of Australia for it to be quashed or declared void (Ellery 2017).

The Federal Court ruled that there was no genuine agreement from employees as One Key did not take reasonable steps to explain the terms and effect of the agreement, and in particular the interaction that the agreement would have with the 11 awards that would cover future employees.<sup>b</sup> Moreover, Justice

<sup>36</sup> 4 yearly review of modern awards — Penalty Rates, AM2014/305, [2017] FWCFB 1001.

### Box 2.6 – CMFEU v One Key

Flick observed that the business ‘unquestionably’ secured consent to the agreement with the ‘intent’ to subsequently cover other employees and ‘thereby preclude a genuine bargaining process or any industrial action during the period of the agreement’ (para 124 of [2017] FCA 1266).

Consequently, the decision by the Fair Work Commission to approve the agreement was overturned and the agreement was deemed to be invalid. The case highlights the importance of maintaining checks and balances in the FW Act to reduce potential gaming by any bargaining party.

a. [2017] FCA 1266 at 20. b. [2017] FCA 1266 at 89.

Source: *Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd* [2017] FCA 1266

The changes to the BOOT discussed above could make the bargaining system more attractive for the subset of workplaces whose wages and conditions are largely determined by awards, and could thereby allow greater scope for productivity and efficiency improvements. However, there may be scope for further changes.

### Could super-majority votes be used to allow more flexibility?

It may be worth exploring whether an agreement that is supported by a *large* majority of covered employees would not be subject to the BOOT at all. The advantage of any such model is that it would require no assessment of the BOOT, but by virtue of the supermajority would be unlikely to repeat the outcome identified in *Hart v Coles*. However, there would still be some risk that some class of worker would be made worse off compared with the award if the relevant majority of workers and their representatives were seeking to secure increased wages and conditions at the expense of the excluded class. However, the higher the required majority, the less likely this is. A practical concern would be determination of the super-majority share that would be required, which would involve judgment supported by evidence and a careful assessment of the lessons from economic theory.

A further possible issue is whether such a change could lead to bargaining involving a small group of employees that is subsequently extended to a large number of employees, who by virtue of their occupational grades, tasks and rostering would not have consented to the agreement. It is likely that the precedent set by *CFMEU v One Key* (box 2.6) would still invalidate this approach because it would not meet the need for a genuine agreement, but that should be subject to further investigation.

### Is an additional level of bargaining necessary?

The FW Act allows employers to engage in multi-enterprise bargaining if two or more employers agree to bargain together. All employers must be voluntarily participating in the multi-employer bargaining process as the FWC is restricted from implementing bargaining orders<sup>37</sup> to force employer to participation other than through low-paid bargaining. Employees participating in these bargaining processes are also unable to

<sup>37</sup> Under the *Fair Work Act 2009*, if a majority of employees wish to pursue an enterprise agreement and the employer has not yet agreed, an employee representative can apply for a majority support determination that requires the employer is to commence bargaining. If the employer refuses to participate, the employee representative can seek a bargaining order to require the employer to meet the good faith bargaining requirements. Bargaining orders cannot be made for multi-employer bargaining situations unless the conditions of a *low-paid authorisation* are met.

undertake protected industrial action. There are two additional paths to multi-employer bargaining that have more explicit procedures and requirements set out in the FW Act (box 2.7).

The impact of changes to multi-employer bargaining would depend very much on its design features. Depending on design, multi-employer bargaining could:

- risk diminishing the productivity benefits associated with firm-level bargaining. When wages and conditions are set for a group of firms in a 'one size fits all' approach, this could prevent more productive firms from attracting higher productive workers, discouraging the pursuit of firm-level and economy-wide productivity improvements.
- require firms to compromise some of their firm-specific requirements and flexibilities to ensure an agreement is suitable with the other firms involved. This would be more of a concern where bargaining occurs across diverse workplaces.
- potentially encourage cost-collusion and broader forms of anti-competitive conduct among businesses, ultimately increasing prices and/or reducing quality for consumers.

On the other hand, such a system could:

- reduce transaction costs for some small employers, enabling them to take advantage of any economies of scale in bargaining, sharing the burden and resource intensity of bargaining across firms. The potential benefit could be greatest for smaller firms that often do not have the internal capacity or prior knowledge to negotiate agreements and navigate the complexities of the bargaining system. Overcoming the barriers to entry to agreement making could enable smaller participating employers to draw on existing EAs and rely on the more sophisticated workplace relations capabilities and resources of larger enterprises to achieve flexibilities and productivity enhancing clauses, without having to go through the process entirely by themselves
- improve the overall bargaining position of employees, allowing them to achieve more favourable conditions and wages (at least in the short run), but potentially reducing the possibility of productivity driven real wage gains over the medium to longer term.

Despite mechanisms in the FW Act allowing multi-employer bargaining, it is rarely used. There were 48 current multi-employer agreements in March 2022, or just 0.4 per cent of all agreements (DEWR, 2022). The strict administration requirements and/or restrictions placed on the available options likely reduce the appeal of multi-employer bargaining for both employees and employers, contributing to their lack of use. As such, any changes to the FW Act to increase the use of multi-employer and industry/sector wide bargaining are likely to have uncertain implications for productivity (depending largely on the approach taken) and should be undertaken with caution and be subjected to detailed, rigorous and transparent analysis.

One stream of multi-employer bargaining relates to low-paid employees who have historically not participated in enterprise bargaining (box 2.7). The FWC may provide a low-paid authorisation if a set of criteria is met. However, the current criteria to access a low-paid authorisation may limit the uptake of multi-employer bargaining. While some of the criteria have a strong basis (such as taking into account the bargaining power of the parties), the relevance of others, such as the history of bargaining, is less obvious and may be open to modification. Expanding access to low-paid streams by softening requirements for the FWC to consider less relevant criteria, provided they give primacy to the public interest, could remove red tape with a marginal impact to productivity.

However, removing restrictions on protected industrial action and bargaining orders would pose significant risks to productivity and real wages if it led to wider industrial action, with impacts on the broader economy. In the extreme, multi-employer agreements could morph into industry-wide agreements, undermining competition across industries, weakening the growth prospects of the most productive enterprises in any

industry, and creating wage pressures that cascade into other industries. Given that industrial action is the most important source of leverage for employee bargaining, the overall level of industrial disruption could also be expected to increase. Stoppages do not just reduce the output and productivity of the businesses affected, but have flow-on effects through disrupted supply chains. And while cultural attitudes, institutions and laws that underpinned industry-wide determination of wages and conditions have changed over time, and the high levels of industrial disputation observed in the 1980s have largely disappeared (PC 2015b, p. 861ff), these developments occurred in the context of gradual moves towards a more flexible workplace relations system.

The broader expansion of bargaining orders alone would not pose as significant a risk as their combination with protected industrial action. Such orders may force businesses to participate in multi-employer bargaining in good faith. However, this would not necessarily result in agreement, so in principle, firms need not be ‘trapped’ into inappropriate outcomes in terms of wages or conditions. The requirement to bargain in good faith does not require a bargaining representative to make concessions or to reach agreement on the terms of a proposed enterprise agreement (s.228(2) of the FW Act). But given the realities of workplace relations in some sectors, the practical impact could differ markedly from what might be expected in theory, and there is significant scope for unintended consequences. At the very least, firms would incur the costs of participating in the process (and even higher costs if industrial action were protected). To the extent that participating in bargaining entails significant fixed costs, this could disproportionately affect smaller businesses with fewer resources to devote to compliance. And ultimately much or all of these costs would be passed on to consumers.

### **Box 2.7 – Existing multi-employer bargaining options**

#### **Low-paid bargaining**

Low-paid bargaining is designed to assist low-paid employees that have not historically had the option to bargain.

Before low-paid bargaining can begin, representatives must seek approval from the FWC for a low-paid authorisation to compel employers to participate. When assessing the low-paid authorisation application the FWC takes into account:

- whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level
- the history of bargaining in the industry in which the employees who will be covered by the agreement work
- the relative bargaining strength of the employers and employees who will be covered by the agreement
- the current terms and conditions of employment of the employees who will be covered by the agreement, as compared with the relevant industry and community standards, and
- the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises

There have been three applications made for a low-paid authorisation with only one being successful. Of the failed applications, one was deemed not in the public interest as not all employees were low-paid,

### **Box 2.7 – Existing multi-employer bargaining options**

while the other was not seen to improve access to bargaining as employers were willing to bargain individually.

#### **Single-interest bargaining**

If there are multiple employers operating with a single-interest and under the same regulatory structure (e.g. franchises) a multi-enterprise bargaining process must also be approved before bargaining can commence. In single-interest bargaining the employers must make an application to either the Minister responsible for FW Act or the FWC. The FWC can only authorise a single-interest employers if they are satisfied that the businesses are operating under the same franchise, while the Minister is able to authorise single-interest employers subject to:

- the history of bargaining of each of the relevant employers, including whether they have previously bargained together;
- the interests that the relevant employers have in common, and the extent to which those interests are relevant to whether they should be permitted to bargain together;
- whether the relevant employers are governed by a common regulatory regime;
- whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with its employees;
- the extent to which the relevant employers operate collaboratively rather than competitively;
- whether the relevant employers are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory;
- any other matter the Minister considers relevant.

Sources: *Fair Work Act 2009* (Cth.); [2011] FWA FB 2633 at 36; [2014] FWC 6441 at 130; [2013] FWC 511 at 155.

## **2.4 Regulation and digital platform work**

One of the key labour market developments since the Commission's 2015 Inquiry on the Workplace Relations Framework (PC 2015b) and *Shifting the Dial* (PC 2017b) in 2017 has been the growth of digital platform work — also known as on-demand work, gig work or work conducted as part of the gig economy.

While ridesharing and food delivery platforms (e.g. Uber, Didi, Menulog, Deliveroo) are among the most well-known examples, platform work in Australia now spans many industries, including clerical and data entry, creative and multimedia, health care, sales and marketing, software development and professional services (McDonald et al. 2019, p. 38). Within transport — the pioneer sector for platform work — there have been further inroads into package delivery and freight services, such as Amazon Flex and Uber Freight (the latter not yet operating in Australia), as well as small goods delivery.

There is a dearth of publicly available data on platform work generally (box 2.8) including on the number of platform workers in the labour market (and given the rapid evolution of this type of work, statistics age quickly). Estimates from 2019 suggested that about 250 000 people were working in this part of the labour market (Commonwealth Treasury 2022, p. 4). While this is relatively small, this number represents a tripling in the size of the workforce since 2015 and would have made the 'gig economy' a bigger employer than the mining sector at the time, although many people in the 'gig economy' would not work comparable hours (Freudenstein and Duane 2020, p. 11).

While platform work involves some challenges for workplace relations policy, it promises significant productivity and other efficiency benefits emanating from better matching between consumers, greater flexibility, higher quality on-demand services and gains in efficiency from more competition between firms. Although there are regulatory challenges associated with platform work, policy should not seek to shoehorn all platform workers as employees — which would risk reducing or removing key productivity benefits, including labour flexibility — but to address issues in a proportionate manner.

Some policy ambiguities include whether platform workers are (or should be categorised as) employees, uncertainties about the workplace responsibilities of platform owners for minimum pay and conditions or workers' health and safety, and lack of clarity about how disputes between parties could be effectively managed. There are also some misapprehensions about the functioning and outcomes of the gig labour market that have a bearing on appropriate regulation of this growing part of the labour market.

### What is platform work?

There is no standard definition for platform work, or what the 'on-demand' economy comprises. Many definitions emphasise the exchange of labour where producers and consumers are matched using a digital platform — a website or app — and where payments are generally incurred per task.<sup>38</sup>

The United Nations Economic Commission for Europe (UNECE) in its Handbook on Forms of Employment has defined 'digital platform employment' as referring to:

... to employment performed through an online tool or an app that matches supply and demand for employment, strongly based on an algorithm. An important aspect to consider in this context is that digital platform employment is about the assignment of individual tasks (smaller or larger), rather than about jobs. Although many platforms treat workers as independent workers, all status in employment categories are potentially relevant to digital platform employment, and classification depends on the nature of economic risk and authority experienced by workers in relation to the platform (UNECE 2022, p. 40).

The United Kingdom's Department for Business, Energy and Industrial Strategy has defined the 'gig economy' in much the same way, as:

... [involving] the exchange of labour for money between individuals or companies via digital platforms that actively facilitate matching between providers and customers, on a short-term and payment by task basis (Lepanjuuri, Wishart and Cornick 2018, p. 12).

Most platform workers are classified as independent contractors (employee-employer models of platform work are used in some rare cases) and many types of platform work is, in essence, a *digitalised* version of existing contracting work. Such platform work is characterised by many features of independent contracting, including the sharing of commercial risk and the absence of employee entitlements (for example, a minimum pay rate and workers compensation), although some platforms provide personal injury and public liability insurance.

<sup>38</sup> This chapter explicitly excludes digital platforms or digital marketplaces in which users sell or rent goods to consumers (e.g. AirBnB, Facebook Marketplace and Gumtree) and is distinct from the ACCC's use of the term 'digital platform' to refer to internet search engines, social media services, online private messaging services, digital content aggregation platform services and some electronic marketplace services.



Some forms of platform work are characterised by greater platform control of how a service is performed, such as the possibility of account suspension or termination for having a low rating and or by adjusting service fees based on.<sup>39</sup>

### Box 2.8 – Public data sources on digital platform work

Information on platform work is generally irregular, ad hoc and of variable quality. There would be value in more regular collection of detailed data on platform worker outcomes alongside other labour statistics and WHS outcomes, especially as the relevance of existing data quickly ages. The ABS has developed a new survey module on digital platform work and workers to be run from July 2022, with initial data expected to be published in the second half of 2023 (ABS, pers comms, 5 September 2022).

Aside from information published by interested parties, the main source of information about platform work is a 2019 national survey commissioned for the Inquiry into the Victorian On-Demand Workforce (IRV 2020, p. 31), though published results exclude some important dimensions of platform work, such as distribution of hours worked and demographics.

The Household Income and Labour Dynamics in Australia (HILDA) survey has also included information about platform work, starting from 2020, though its reliability is limited by the underrepresentation of recent migrants in the survey's sample and by sample size (MIAESR 2021). Survey responses to digital platform work are also incomparable with other labour market questions because of a mismatch in reference periods.

Other data sources include submissions and hearings to various government inquiries relating to platform work, including those held by the Senate, NSW Senate and the Victorian Government.



#### Finding 2.3

#### Digital platforms appear to be expanding quickly, but data is limited

Platform work is rapidly expanding, but poorly defined. There is a lack of publicly available data on the size of the digital platform workforce and the characteristics of its workers. What statistics are available have limitations, with sample sizes and/or are from interested parties that do not provide the underlying data. The lack of data is an impediment to definitive conclusions about the sector.

<sup>39</sup> The performance thresholds that lead to account suspension or termination can be opaque and vary between platforms. That said, Uber states that having a low aggregate rating may lead to removal of access from some or all of the Uber platform (Uber 2022a). DiDi states that a low passenger/user rating, high cancellation rate or low completion or acceptance rate may lead to suspension or permanent deactivation (DiDi Australia 2021). DiDi also states that some drivers may be subject to a lower services fee, based on acceptance rate, completion rate and other factors within a given measurement week (DiDi Australia 2022).



## The upsides of platform work

Platform-based work can enhance productivity through several channels, including better matching, improved consumer choice and more competition between platforms (and traditional businesses) that improve the quality and variety of available services.

### Better matching

By reducing search and other transaction costs, the use of the platform technology itself (including algorithms and real-time price signals) has allowed for better matching between suppliers and consumers. Competition from businesses based solely on platform technology has led to diffusion of digital technologies into more traditional businesses: technology used in rideshare and food delivery platforms (matching customers with nearby drivers) are now used in apps in the taxi industry. For instance, instead of searching for an available taxi on a street or telephoning a taxi booking service, apps nowadays allow people to ‘virtually’ hail a ride and time their walk to the curb to match the arrival of the vehicle with the help of GPS tracking, improving the user experience. Real-time price signals — commonly referred to as surge-pricing or demand-responsive pricing — are a common feature of ridesharing and are designed to induce a greater labour supply response to increase the number of drivers (and rides) available.

### Greater flexibility and choice for workers

Digital platforms often have lower barriers to entry and exit than traditional employment models, with workers being able to join and leave the platform without traditional hiring processes or restrictions on the number of people that can offer their services on the platform. Workers can supply labour without a hiring and rostering process, often bringing their own equipment. For instance, many rideshare drivers use their own car, although some drivers enter into financing or rental agreements specifically to enter ridesharing. This has facilitated the entrance of a significant number of additional suppliers in markets such as urban transport (figure 2.7), increasing competition and providing greater consumer choice. In ridesharing, labour flexibility has allowed platforms to address labour shortages and improve worker retention by giving workers time-limited bonuses or temporarily higher pay rates (Rana 2021).

There is variation in the level of control each platform has over its workers. Many platforms offer workers the flexibility to choose when they work, allowing them to choose the day of the week, time of day, and duration of their shifts, often only setting maximum shift hours for safety reasons. In practice, workers often only work during times of high demand (e.g. food delivery) as the effective hourly rate is otherwise low or are encouraged to be provide services during peak times (e.g. surge pricing). Some platforms may require workers to accept work in ‘blocks’ of hours. There are also platforms that operate solely as a conduit between the consumer and the worker, allowing the two parties to organise the time and duration of work without the platform’s input.<sup>40</sup>

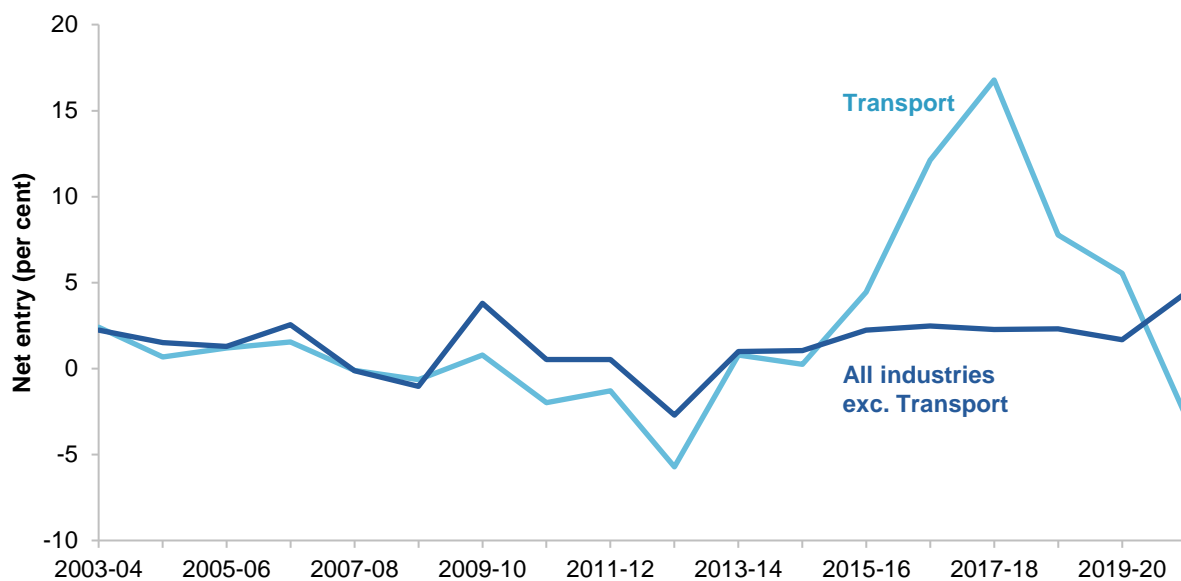
<sup>40</sup> As digital platform work operates in a task-by-task basis, most platforms only provide payment to workers at a piece rate via the platform after the task is complete. Some apps have a set rate per task that workers earn based on the pre-determined price of the service to the consumer, while others allow workers to negotiate with the consumer on their price and thus their fee or to respond directly to a consumer’s offer. Digital platforms then collect either a share of the consumer price or an additional fee on top of the consumer price. In some cases, the consumer of services is the platform, such as in Amazon Flex, where workers deliver packages for Amazon, and FedEx’s proposed platform for delivery (Marin-Guzman 2022).

Digital platforms offer workers more flexibility in how they provide their services compared with traditional employee-employer relationships. Some platforms allow workers to choose for themselves or negotiate with consumers on how to complete tasks. Platforms tend not to restrict workers from providing services on other platforms, even for competing platforms — however, some platforms may use the acceptance rate of tasks or other inputs as a method of allocating work through algorithms. The nature of platform work in ridesharing and food delivery (involving down time between customers) lends itself to ‘multi-apping’ where a digital platform worker can offer services and sometimes perform tasks in two or more competing apps at the same time.

The low barriers to entry for workers in some forms of platform work can benefit people having difficulty accessing the formal labour market. About 60 per cent of Ubereats delivery workers found it difficult to obtain jobs where potential hires were engaged as employees (Accenture 2021, p. 12). Some workers rely on platform work as their main source of income or find that such income is important. About 77.6 per cent of rideshare drivers and 86.1 per cent of food delivery platform workers to who responded to a Transport Workers’ Union (TWU) say that platform work was their main source of income (TWU 2021, p. 10,14), while 57.1 per cent of Ubereats delivery workers say that income derived from Ubereats work was ‘essential to them’ (Accenture 2021, p. 11).

**Figure 2.7 – Transport platform-based work grew significantly from 2014 until COVID-19<sup>a</sup>**

**Annual percentage change in the number of businesses**



<sup>a</sup> Most transport platform-based workers are engaged on an independent contractor basis and as such require an Australian Business Number. As such, the significant increase in the share of employing businesses that have entered into the transport industry since 2014 is likely to be a reflection in the growth of platform-based work.

Source: ABS (*Counts of Australian Businesses, Including Entries and Exits*, various editions).

## Higher quality services

Some digital platforms have underpinned greater consumer empowerment, improving the quality of service. In aged and disability care, platforms allow people to choose individual carers. This reduces people's search costs in finding carers that meet their preferences and understand their care requirements, without the need to re-familiarise such requirements with a new carer. For instance, the *Hireup* platform — which engages workers as employees — states that on average, the length of a care relationship spans eleven months (2021).

## More competition

Platforms have been competition enhancing and have encouraged competitors to explore different pricing models and structures to attract consumers with different preferences in growing markets (figure 2.8). In ridesharing, real-time fares are typically set by a platform in response to consumer demand, driver supply and to maximise profit. However, some rideshare platforms have departed from such pricing models. For example, *InDriver* allows for a negotiated fare, where the user proposes a fare and drivers place bids; 13CABS states that there is no surge pricing for taxis in their network. For ridesharing, where there are many platforms and taxi fleets competing, consumers have experienced lower prices (including through discounts and promotions). Some have questioned the sustainability of pricing in the longer-term, given that some new operators are loss making and underwritten by venture capital (Ryder 2021).

**Figure 2.8 – Typical differences between platform work and traditional employment**

	Employer-employee relationship Hireup (aged care)	Independent contractor to platform-branded service Most transport and food delivery	Independent contractor advertising own services on platform Airtasker (misc. tasks), Mable (aged care)
How are workers recruited?	<ul style="list-style-type: none"> <li>Employers hire</li> </ul>	<ul style="list-style-type: none"> <li>Workers opt in subject to set standards (e.g. own equipment)</li> </ul>	<ul style="list-style-type: none"> <li>Suppliers opt in to advertise services or accept offers, subject to some set standards (e.g. occupational licensing for Mable)</li> </ul>
How are pay and conditions set?	<ul style="list-style-type: none"> <li>Pay and conditions (e.g. minimum wage, loadings and superannuation) at or above relevant award and NES</li> </ul>	<ul style="list-style-type: none"> <li>Prices and pay rates typically set by platform. Exceptions include InDriver (customer proposed fare)</li> </ul>	<ul style="list-style-type: none"> <li>Suppliers set consumer price per task or negotiate with individual clients</li> </ul>
How are working hours set?	<ul style="list-style-type: none"> <li>Employers roster staff or working hours arranged between casual staff and clients</li> <li>Minimum shift lengths for casual workers</li> </ul>	<ul style="list-style-type: none"> <li>Workers choose autonomously when and where to work, subject to maximum shift duration.</li> </ul>	<ul style="list-style-type: none"> <li>Workers choose autonomously when, where, and how long to work.</li> </ul>



#### **Finding 2.4**

#### **Platform business models are efficiency-enhancing**

By improving the matching of services to consumers, consumer choice, competition, and the quality and variety of available services, platform-based work can contribute to productivity growth.

People choose to engage in platform-based work for different reasons, including:

- low barriers to entry where workers have difficulty getting jobs in the formal labour market — some workers use platform work as their main source of income
- autonomy over hours of work — some workers find that attractive pay rates are available for short durations of peak demand, or through multi-apping, or as a supplement to their main source of income
- choice in tasks where platforms have less control over the type of tasks completed by a worker.

## **What are the regulatory challenges?**

The gig economy provides many benefits for consumers and workers and has the potential to make a significant contribution to productivity growth, particularly in the services sector. But as a nascent disruptive business model it poses challenges for regulatory frameworks and extant business models. Identifying and dealing with genuine risks to social wellbeing will require nuance and balance to ensure the benefits of the gig economy are not unduly suppressed. The Commission's Inquiry into Aged Care Employment (forthcoming) (2022c) also provides a detailed examination of these regulatory challenges as they relate to the aged care industry and digital platform work.

### **Is a platform worker a contractor?**

Much public discussion has related to the matter of employment status — whether a worker is an employee or independent contractor — which determines worker rights and entitlements as well as platform obligations. In some industries, platforms simply improve the matching process between an independent contractor and consumer for services, leading to better consumer choice with on-demand services. In other industries, such as ridesharing and food delivery, where platforms have a high degree of control over how work is performed and where workers are independent contractors, there may be concerns relating to conditions, work health and safety obligations and dispute resolution, which would need to be carefully addressed.

Most platform workers are classified as independent contractors by platforms, although Hireup, a care platform and Milkrun and Voly, grocery delivery platforms, engage platform workers as employees. While the 'gig economy' is relatively novel, Australia has long-used independent contracting in a number of occupations, including heavy vehicle freight, some health services (GPs and some allied health professionals), and many trades. The value of contracting largely relates to occupations where someone with specialised skills and assets can provide services to many different clients. There are longstanding concerns about the misrepresentation of an employee-employer relationship as that of a contractor (i.e. 'sham contracting'). The Commission has previously recommended strengthening regulation of sham contracting — such that the legal definition of sham contracting be changed from one where an employer has 'recklessly' made a misrepresentation to a test of 'reasonableness' (PC 2015b, pp. 46–47, Volume 1).<sup>41</sup>

<sup>41</sup> The exact recommendation was also supported by the Australian Government's Black Economy Taskforce (2017, p. 236).

Platforms have often been introduced into occupations where independent contractors, labour hire and other non-traditional employment arrangements were all relatively common. As such, the introduction of platforms in those occupations have changed the dynamics of work but have not raised questions about the employment status of workers.

Policy development internationally and in Australia about platform work has largely focused on food delivery and ridesharing, and on questions regarding fairness, the responsibilities of platforms and the rights of platform workers, particularly at the lower end of the income scale or in occupations that entail physical safety risks. Rideshare and food delivery in Australia tend to involve platforms with ongoing, direct<sup>42</sup> relationships with individual contractors, sharing *some* similarities with employee-employer relationships. For occupations like food delivery and ridesharing services, platform contractor work can often entail relatively low pay (that is, after costs, close or below to the National Minimum Wage) and some elevated level of risk to personal safety, while operating outside the scope of National Employment Standards, awards, and often of any form of bargaining on rates and conditions. For those whose main source of income is made via platform work, further drawbacks may include variable and fragmented hours of demand and the lack of sponsored professional development opportunities — in general, the downside risks associated with any form of self-employment.

Internationally, different approaches to the employment status of platform workers have included introducing or modifying legal tests to identify employees and independent contractors or introducing a third, intermediate category of worker between an employee and independent contractor (box 2.9). Classifying platform workers as employees would lead to pay, conditions, and responsibilities (of platforms and platform workers) consistent with regulatory requirements specified in the Fair Work Act, awards and the NES, but would significantly change the business model for most platform work. In some cases, it would remove aspects of platform work that are preferred by workers (as described above) and that lead to better matching of services to consumers.

### **Box 2.9 – International policy developments in the treatment of platform work**

Several international jurisdictions have recently regulated the workplace relations aspects of platform work, have had legal test cases clarify some worker entitlements, or are in the process of creating and passing legislation to do so. These various approaches to policy issues face several challenges in meeting their stated regulatory goals:

- A codified legal test that determines employment status must be worded carefully. A poorly-worded test may not be specific enough to address policy issues and could be too open to changes in platform business models to avoid coverage or cause reclassification of employees to other forms of employment or, conversely, could impose excessive regulatory burden or stifle the productivity-enhancing aspects of platform work.
- Introducing a third category of worker could create additional uncertainty about the definitions of employment status if the codified definition is imprecise.

<sup>42</sup> While platforms in care services (e.g. Mable) or freelancing and odd jobs (e.g. Airtasker) serve allow consumers to choose individual service suppliers, the relationship between consumer and worker is less direct in other occupations. For rideshare and food delivery, consumers are more interested in finding the next available worker, rather than choosing, say, the most skilled and qualified delivery person. As a result, platform workers arguably have a more direct relationship with the platform than with customers.

### **Box 2.9 – International policy developments in the treatment of platform work**

- Providing universal minimum standards to all (or a defined subset of) platform workers would require that such standards are tractable for those types of work.
- Adopting a status quo approach where legal test cases are used to clarify existing employment legislation would not address policy concerns if existing legislation is not fit-for-purpose or if test cases fail. In some successful cases, test cases may only clarify access to entitlements for a subset of platform workers (as in the UK example below).

Examples of policy developments in international jurisdictions are listed below.

#### **United States**

In the United States, policy developments have largely occurred at the state or local level. These include:

- propositions to definitively classify transport and delivery platform workers as independent contractors while providing a minimum wage and some benefits. This includes Proposition 22 in California to exempt such platform workers from California's employment status test. The proposition passed in 2020. It was later ruled as unconstitutional (Norton Rose Fulbright 2021), although platforms have followed the regulation specified in Proposition 22 while a legal appeal against the ruling is being held (Allsup 2021). In Massachusetts, a similar proposition was to be put to voters in November 2022, but the wording of the regulation was later deemed to violate state law and removed from the ballot (Browning 2022b, 2022a).
- regulating minimum pay rates for ridesharing in New York City (for high-volume ridesharing platforms) (NYC Taxi and Limousine Commission 2022) and in Washington State, where rideshare drivers have minimum pay rates and paid sick leave (Uber 2022b). In Seattle, from January 2024, delivery platform workers — including Ubereats and DoorDash — are entitled to minimum pay rates per mile and minute while completing a delivery, with pay rates to be increased by inflation every year (Seattle City Council 2022). New York City also intends to set a minimum rate for third party food delivery work by 1 January 2023 (The New York City Council 2021).
- interpreting existing employment status legislation. In September 2022, Uber paid US\$100 million to settle a backpay claim relating to unemployment insurance taxes in New Jersey. The New Jersey Labor Commissioner has stated that the settlement means 'these [Uber] workers in New Jersey are presumed to be employees' (Metz 2022). However, it is unclear what the effect of the settlement will be on worker entitlements, or on Uber's future liability for unemployment insurance taxes in New Jersey.

In September 2022, the Federal Trade Commission (FTC) released a policy statement signalling areas of potential enforcement actions within platform work. The areas include where there is potentially misleading disclosure of pay and costs; unfair or deceptive practices, including in relation to artificial intelligence or algorithms; unfair contractual terms or restriction of labour mobility; and anticompetitive mergers or practices (FTC 2022).

The Department of Labor is also expected to release an updated worker classification rule by the end of 2022, which would determine whether a worker is an employee or independent contractor (Rainey 2022).

#### **Canada**

In April 2022, the *Digital Platform Workers' Rights Act, 2022* (DPWR Act) was legislated in the province of Ontario, Canada. The DPW Act defines digital platform work as the provision of for-payment ride



### **Box 2.9 – International policy developments in the treatment of platform work**

share, delivery, courier or other prescribed services by workers who are offered work assignment by an operator through the use of a digital platform.

The DPWR Act provides digital platform work with seven rights:

- information from the digital platform operator, including how pay is calculated, what factors are used to assign work and the consequences of performance ratings, if used
- a recurring pay period and pay day
- a minimum wage
- amounts earned by the worker and tips and other gratuities, and limits to the circumstances in which platforms can withhold pay or deduct from earnings
- notice of removal from an operator's digital platform, requiring written explanation for removal and platforms to provide notice if access is removed for more than 24 hours
- work-related dispute resolution in Ontario
- freedom from reprisal.

#### **The United Kingdom**

In February 2021, the UK Supreme Court ruled that Uber drivers were considered 'workers', a form of employment under section 230 of the *Employment Rights Act 1996* (ER Act), which is separate from employees or independent contractors. The ER Act defines worker as an individual who has entered into, or works under, a contract of employment or any other contract whereby the individual undertakes to do or personally perform any work or services for another party to the contract who is not a client or customer of the individual.

No new legislation was required to classify drivers as workers that receive these entitlements. Rather, the worker status already existed under UK employment law. The result of the ruling was that Uber was required to provide its drivers a minimum wage and paid leave entitlements, where the minimum wage is calculated during the time that a driver is transporting a passenger. As of June 2022, a similar case is being brought to the employment tribunal by platform workers from Bolt, a ridesharing platform in London (Bradshaw and Cumbo 2022). Following the Supreme Court ruling, the Government of the United Kingdom (2022) published guidance detailing how a platform may be considered an employer of platform workers through 'control' of a worker through an app.

In contrast, Deliveroo riders are not legally considered 'workers' for the purposes of the UK's collective bargaining laws, although as of September 2022, the Independent Workers' Union of Great Britain (IWGB) is appealing to the Supreme Court to require that Deliveroo formally recognise the union for collective bargaining purposes (Criddle 2022). Previously, the Court of Appeal had ruled that Deliveroo riders were not considered 'workers' and as such, were not entitled to the trade union freedom right granted by Article 11 of the European Convention on Human Rights (Thomson Reuters Practical Law 2021). That said, Deliveroo has voluntarily recognised another union, GMB, although the relationship falls under a 'partnership deal' rather than the formal union recognition pursued by the IWGB (Criddle 2022; GMB 2022a).

#### **The European Union**

In December 2021, the European Commission proposed a Directive to ensure that digital platform workers were granted the correct legal employment status. The Directive involves a rebuttable



### **Box 2.9 – International policy developments in the treatment of platform work**

presumption that digital platforms are considered employers if they fulfil at least two of the following:

- effectively determine or set upper limits for the level of remuneration
- require the platform worker to respect specific binding rules with regards to appearance, conduct towards the recipient of the service or performance of the work
- supervise the performance of work or verifying the quality of the results
- effectively restrict the freedom to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or refuse tasks, or to use subcontractors or substitutes, or
- effectively restrict the possibility to build a client base or to perform work for any third party.

The people deemed to be working through these employers would hold the status of 'worker' and have the right to a minimum wage (where it exists within a Member Country), collective bargaining, working time and health protection, the right to paid leave or improved access to protection against work accidents, unemployment and sickness benefits, as well as contributory old-age pensions.

Source: Department of Labor (2021); *Digital Platform Workers' Rights Act, 2022* (Legislative Assembly of Ontario); *Uber BV v Aslam* [2021] UKSC 5; *Employment Rights Act 1996* (UK); European Commission (2021a, 2021b).

At the time of writing, the common law legal precedent from *Personnel Contracting* and *Jamsek* had established a high threshold for classifying platform workers as employees in rideshare and food delivery in Australia (box 2.10).

### **Box 2.10 – Australia's common law approach to determining employment status**

In Australia, some platform workers have disputed their classification as independent contractors and have contended that they should have the rights and entitlements of employees. Under Australia's common law approach, employment status determinations are affected by the legal precedents set by other cases that have determined whether a worker was an employee or independent contractor — most recently by *Personnel Contracting* and *Jamsek*, which were heard in the High Court of Australia in February 2022, though not involving platform work. The result of these two cases were to emphasise the written terms of the contract in determining employment status.

In November 2018, the FWC ruled that a Foodora delivery worker was unfairly dismissed, where unfair dismissal laws apply to employees and not to independent contractors. Foodora ceased operations before the ruling, back in August 2018. The Fair Work Ombudsman (FWO) had also initiated legal proceedings against Foodora, alleging sham contracting, although the proceedings were later discontinued following Foodora's cessation of operations (FWO 2019).

In December 2020, it was reported that Uber settled a case with a delivery worker after an appeal by a former Ubereats driver reached the Federal Court of Australia (Marin-Guzman 2021). The appeal to the Federal Court followed a decision by a Full Bench of the FWC in April 2020, which found that the driver was not an employee and therefore not protected by unfair dismissal laws.

### Box 2.10 – Australia’s common law approach to determining employment status

In August 2022, a Full Bench of the FWC overturned a previous decision about the employment status of a Deliveroo delivery worker, following an appeal by Deliveroo. In May 2021, the FWC had found that the delivery worker was an employee and unfairly dismissed. The Full Bench stated that they were bound by the precedent set by *Personnel Contracting* in overturning the previous decision:

As a matter of reality, Deliveroo exercised a degree of control over Mr Franco’s performance of the work, Mr Franco presented himself to the world with Deliveroo’s encouragement as part of Deliveroo’s business, his provision of the means of delivery involved no substantial capital outlay, and the relationship was one of personal service. These matters, taken together, would tip the balance in favour of a conclusion that Mr Franco was an employee of Deliveroo. However, as a result of *Personnel Contracting*, we must close our eyes to these matters.

a. Although Foodora ceased operations in August 2018, the case was still heard in November 2018 (Chau and Kontominas 2018).

Source: Stewart (2021, p. 81), Marin-Guzman (2021), *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, *Amita Gupta v Portier Pacific Pty Ltd, Uber Australia Pty Ltd t/a Uber Eats* [2020] FWC 1698, *Diego Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818, *Deliveroo Australia Pty Ltd v Diego Franco* [2022] FWC 156 (17 August 2022) at 54.

### Should platform pay and conditions be regulated?

Most Australian platform workers do not have legislated minimum pay and conditions as they are engaged as independent contractors outside of national or state workplace relations systems, instead relying on rates determined by markets.

In the food delivery and ridesharing industry, DoorDash and Uber have expressed support for an independent body in Australia that would determine minimum standards, following separate agreements with the Transport Workers’ Union (TWU) (box 2.11).

### Box 2.11 – DoorDash and Uber agreements with the TWU on principles of regulation

In May 2022, the TWU and DoorDash agreed to advocate for industry-wide standards set by an independent body and agreed to six core principles that should apply to transport platform work. The agreement included to develop a future Memorandum of Understanding and to jointly advocate to policymakers on a preferred policy option (DoorDash 2022). The six principles were that:

- Workers should not be prohibited from accessing appropriate work rights and entitlements
- Workers must have transparency
- Workers must have the opportunity to contribute to a collective voice
- Workers must have access to dispute resolution processes
- Appropriate resources should be allocated to ensuring industry standards are established and maintained, and to driver education and training
- Three stage approach towards achieving regulation of the on-demand transport industry.

### **Box 2.11 – DoorDash and Uber agreements with the TWU on principles of regulation**

In June 2022, the TWU and Uber agreed to four principles of regulation about on-demand delivery and rideshare platform workers who are independent contractors. The agreement also included commitments by the TWU and Uber to further discuss the operationalisation of the four principles of regulation, and to discuss, in good faith, industry standards in food delivery and sector standards in other Uber services, such as ridesharing and the delivery of goods.

The principles below are intended to cover on demand delivery and rideshare platform workers in the transport industry who are not engaged as employees. Employees already have entitlements under the Fair Work Act and other legislation ...

The TWU and Uber support the Federal Government legislating for an independent body, or a stream of an independent body, specific to platform work and comprised of industry experts, with the capacity to:

1. Set minimum and transparent enforceable earnings and benefits/conditions for platform workers based on the principle of cost recovery, taking into account the nature of the work.
2. Facilitate a cost effective and efficient mechanism to resolve disputes such as deactivation of relevant platform worker accounts. Any dispute resolution mechanism must be fit for purpose for platform work.
3. Ensure the rights of platform workers to join and be represented by the relevant Registered Organisation are respected and that platform workers have an effective collective voice.
4. Ensure that appropriate enforcement exists to meet these standards and objectives.

Source: DoorDash (2022), Uber and TWU (2022)

A limited set of platform work is already subject to existing state WR laws that set minimum entitlements. Amazon Flex drivers in NSW are covered under the *Transport Industry — General Carriers Contract Determination 2017* (NSW) and *Transport Industry — Courier and Taxi Truck Contract Determination (NSW)*, which include minimum pay rates by class of vehicle (Wolters Kluwer Australia 2022).

### **Comparing piece rates to hourly rates can be difficult**

It can be difficult to compare hourly earnings between platform work and other forms of employment, particularly if the former involves pay rates per customer, if workers choose their own hours of work, or if there is 'down time' between customers. For instance, about 40 per cent of platform workers stated that they did not know what they earned from their main platform (McDonald et al. 2019, p. 5).

In rideshare and food delivery, demand often spikes around particular times of day, where prices and demand are higher. This means that drivers who base their hours solely around peak times will have a higher hourly income than those whose chosen hours include off-peak times. Rideshare drivers and food delivery workers also experience waiting times between customers (which vary by location) and driving times to pick-up points. For workers, per-customer pay rates effectively not only cover the time and effort required for, fulfilling the service, but also waiting for customers and driving to the pick-up point.

This presents challenges in determining what pay rate for gig work (on a per task basis) would be commensurate with the award for employees in similar work. Conversely, if comparisons are made in terms of hourly income, assumptions would need to be made about reasonable waiting times or travel to pick-up points.

This context is relevant to determining whether (and how) pay should be regulated for rideshare, food delivery, and some forms of task-work. The treatment of down-time and time spent travelling to pick-up points would be crucial. It would be more straightforward to design any stipulated minimum pay rate for rideshare, food delivery, and other task-based work on a per-task basis, but to consider what typical downtime may look like per hour (or other unit of time).

For instance, for ridesharing, it may also be necessary to design incentives such that drivers would not be rewarded for extending waiting times, or for choosing to drive in off-peak times where demand is low. In New York City, high-volume ridesharing platforms — including Uber and Lyft — are required by law to pay drivers a minimum rate per mile and minute, which considers expenses incurred as a driver, as well as the average time spent without a passenger for a given platform (box 2.12). However, platforms can still set pay rates to drivers above the floor (for instance, if there is high demand).

For instance, the New York City Taxi and Limousine Commission (TLC) determines minimum pay rates for high-volume ridesharing platforms using administrative data provided by platforms to account for time where a driver is waiting for a trip offer. When the policy was introduced in 2018, the minimum pay rates — calculated per mile and per minute when a driver is transporting a passenger — were intended to result in an hourly wage of about US\$15 per hour after costs (New York City Taxi and Limousine Commission 2018, p. 3).<sup>43</sup> That said, more than 60 per cent of rideshare drivers in NYC work full-time hours (providing about 80 per cent of rideshare trips in NYC) (Parrott and Reich 2018, p. 3) — only 14 per cent of Uber drivers in Sydney worked more than 30 hours per week in 2017-18 (AlphaBeta 2019, p. 16)<sup>44</sup> — and there are geographical differences between NYC and Australian cities.

### **Platform worker earning rates vary across industries and occupations**

There is a wide dispersion of earning rates across platform workers in Australia (box 2.12). For example, a 2019 national survey of platform workers reported a median earning rate of \$20.00 per hour for transport and food delivery, compared with a median of \$56.85 per hour for professional services (McDonald et al. 2019, p. 43). (There is also variation in the distribution of earnings rates within industries). However, available evidence suggests that for the per task fees offered by *some* platforms in food delivery *may* be on average less than the adult minimum wage for casuals (about \$26 per hour) based on assumptions about how many tasks were completed per hour and available public data on earnings.

In other industries, platform workers may, on average, earn in excess of the otherwise-applicable award rate, reflecting that workers may adjust their rate to account for the absence of employee entitlements and conditions (such as casual loading, penalty rates, superannuation and minimum shift lengths). Such rates may also reflect the current high demand for skills and services — including the capacity for many to get jobs in the formal sector as an employee and the ability for workers to differentiate their services, such as by having more experience or areas of specialisation in an industry. For example, the average hourly rate, net of platform fees, for independent contractors on care platforms is higher than the equivalent weekday

<sup>43</sup> In 2018, New York City's minimum wage for large businesses was US\$15 per hour.

<sup>44</sup> Although this may be an underrepresentation of the number of hours worked by rideshare drivers if there is a high level of multi-apping.

employee pay under the *Social, Community, Home Care and Disability Industry Award 2010* (PC 2022c) even accounting for casual loading and superannuation.<sup>45</sup>

As such, relative pay and conditions established in awards for employees in the same industry or occupation and labour demand for such employee opportunities will also affect the pay rates commanded by contractor platform workers.

One reason for the wide variation in pay rates is that some platform workers work during periods of lower demand, where prices and or the number of tasks are often lower. There are some workers in ridesharing and food delivery who work close to, or exceeding, full-time hours and provide a disproportionately large share of the total service hours supplied.

For instance, in late 2017 to 2018 about 14 per cent of a sample of Sydney Uber drivers worked more than 30 hours per week and comprised 44 per cent of total hours driven (AlphaBeta 2019, p. 16). In 2020, about 21 per cent of Ubereats drivers worked more than 30 hours, however, a comparable figure for the total hours delivered was not published (Accenture 2021, p. 11).

A TWU survey found that average hours worked by their surveyed rideshare drivers and food delivery workers (across a range of platforms) were 34 hours and 38 hours per week (TWU 2021, p. 10,14). In comparison, a 2019 national survey of platform workers found an average of 14.5 hours per week worked by platform workers whose main platform was categorised as transport and food delivery (McDonald et al. 2019, p. 44). The same national survey found an average number of hours ranging from 3.4 hours for workers whose main platform was categorised as education, with transport and food delivery workers having the highest average hours worked per week.

Overall, evidence about the number of hours worked is limited by uncertainty about the representativeness of the relevant surveys, the age of data, and their sample sizes. Better data would reveal the *distribution* of hours worked, not just the average, and similarly for earnings. A further challenge is that where there are high levels of multi-apping, data from a single platform may present an underestimate of working hours. For instance, many rideshare drivers in New York City work for both Uber and Lyft.<sup>46</sup> As such, studies that use data from only one platform are not be able to fully track activity across ridesharing (Koustas, Parrott and Reich 2020, p. 13).

Where workers rely on these forms of work as their main source of income, this may be the result of barriers to other forms of work. In some cases, this may be associated with working restrictions in visas, limited English language proficiency and lack of professional networks for new migrants. For instance, in the TWU's survey, about 73.4 per cent of food delivery drivers were on some form of visa (TWU 2021, p. 13). In a survey of Ubereats delivery workers, 29 per cent said that visa restrictions acted as the largest barrier to them obtaining work as an employee, followed by limited skills and experience (23 per cent) and limited English fluency (15 per cent) (Accenture 2021, p. 12).

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<sup>45</sup> This is pending the conclusion of the work value cases relating to the aged care industry at the Fair Work Commission. These cases includes various applications by the Health Services Union and the Australian Nursing and Midwifery Federation to vary minimum award wages, amend clauses, and to add additional schedules in the *Aged Care Award 2010*, *Nurses Award 2010* and the *Social, Community, Home Care and Disability Industry Award 2010* (cases AM2020/99, AM2021/63 and AM2021/65).

<sup>46</sup> As determined through administrative data provided by platforms to New York City's Taxi and Limousine Commission.

### Box 2.12 – How much do platform workers earn?

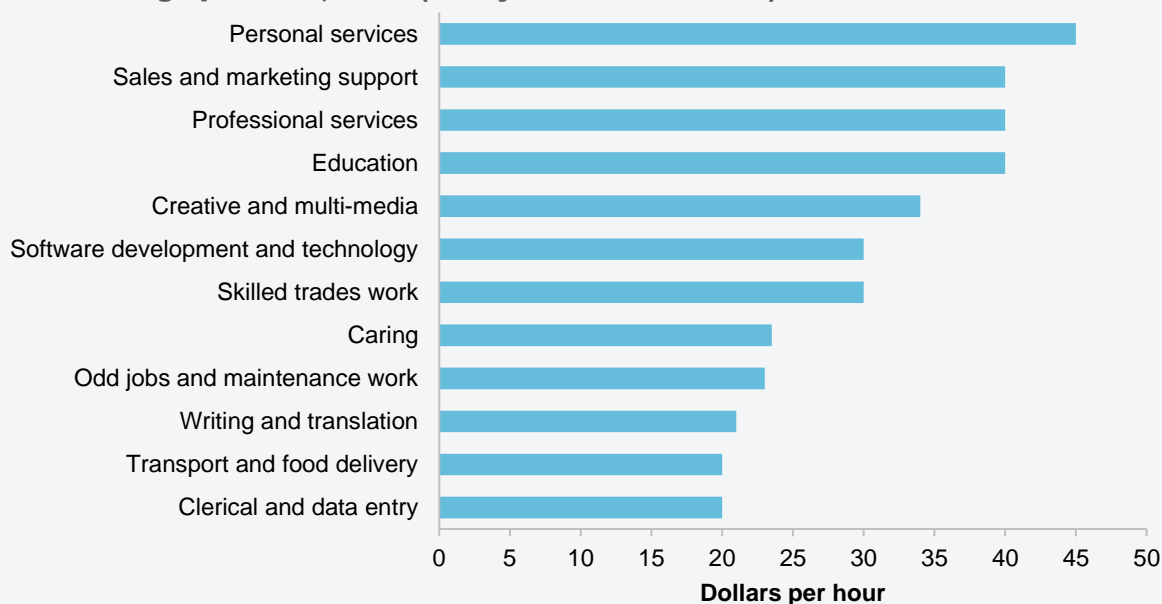
There is great variation in what platform workers earn, depending on the type of work completed and industry (figure below). In 2018-19, median wages across different industries varied between about \$20 and \$45 per hour.

However, estimates of hourly rates are subject to error and uncertainty. Many platform-based workers find it difficult to estimate their hourly rate as many are paid per task, rather than an explicit hourly rate (IRV 2020, pp. 37, 55). The estimation of an hourly rate is also complicated by:

- ‘downtime’ in searching for a job or travelling to and from a job, which is often not paid
- ‘multi-apping’, where workers are active on two or more platforms and choose the most profitable tasks, is also not collected in platform data, but likely to be considered in direct surveys of workers. This is one area where future ABS data collection may prove helpful
- the need to subtract costs from gross earnings
- the varying time periods to which estimates relate, which is problematic given the high growth rate of platform work and the dependence of rates on the state of the general labour market, whose tightness varies over time.

#### Platform workers’ earning rates vary by type of work<sup>a</sup>

Median earnings per hour, 2019 (unadjusted for inflation)



<sup>a</sup> Estimates from the National Survey are approximate only as it is unclear whether respondents reported gross or net earnings after cost, some respondents may work for platforms in different categories of work, data is categorised by the type of main platform, and the sample size is low (IRV 2020, p. 59).

Source: McDonald et al (2019, p. 43).

Other data on earnings provide insights into variations between workers and across platforms. The Select Committee on the Impact of technological and other change on the future of work and workers in New South Wales (2022, pp. 18–19) found that (in rounded figures):

- Ola drivers made \$25 or \$26 per hour



### **Box 2.12 – How much do platform workers earn?**

- Deliveroo workers made \$10 to \$11 per delivery
- Menulog workers made \$11 to \$12 per delivery
- EASI workers made \$8 to \$9 per delivery

Using administrative data, Sydney Uber drivers on average earned \$21.00 per hour (after costs) in late 2017–2018 (AlphaBeta 2019, p. 20).

For deliveries made during high demand periods (defined as ‘mealtimes’ by Accenture), Ubereats delivery workers who delivered by car earned on average \$20.74 per hour, those by motorcycle \$21.97 per hour and by bicycle \$21.92 per hour, leading to an average take-home hourly rate of \$21.55 (after costs) (Accenture 2021, p. 3). (An average hourly rate for all hours worked was not reported for Ubereats.

Submissions to the Select Committee on Job Security (2021) by platforms and unions provided average hourly earnings estimates between:

- \$12.85 to about \$21.00 per hour (after costs) for rideshare platforms
- \$10.42 to \$21.55 per hour (after costs) for food delivery platforms
- \$10.00 (after costs) to \$29.84 (before costs) per hour for parcel delivery platforms
- \$25.00 to \$31.52 per hour for disability and aged care platforms.

One consideration with ridesharing and food delivery is the time spent offering the service, but without a paying customer, and any surge pricing.

More recent data from contract care platforms were supplied to the Commission for its inquiry into Aged Care Employment (2022c) (forthcoming). The average rate per hour for weekdays after platform fees for workers engaged via Mable (for disability support and/or aged care was:

- \$42.10 per hour for social support, domestic assistance and personal care type services
- \$43.80 per hour for personal care workers

On Careseekers, the average pay rate for workers providing aged care was \$38 per hour and for disability support it was \$43 per hour. Across both platforms, average pay rates were higher on weekends and public holidays.

Support care workers on Hireup, who are engaged as employees, are paid at the applicable award rate and receive employee entitlements (such as superannuation, casual loading, penalty rates and workers compensation) (Select Committee on Job Security 2021, p. 57).

Given these barriers, there is likely to be a supply of workers to low-paid platform work with low barriers to entry, even in tight labour market conditions.

Fee-setting methods can also affect the net earnings of platform workers (box 2.13). Platform-based contract workers who can set their own fees are able to take into account their business costs, such as insurance, tax (the absence of) workers compensation and leave provisions, as well as training and licensing fees and professional service fees. However, where platform workers have a capacity to set their own fees, their net earnings are vulnerable to variations in their business costs.



In addition, some platform workers face uncertain cash flows due to the way payments are processed. Platform workers who are independent contractors do not have guarantees on a maximum period of time before they are required to be paid for their services, unless explicitly specified by a platform. Some platforms specify a specific cycle for payment (such as Amazon Flex, which pays weekly as of writing) and some platforms may also allow workers to 'cash out' payments on an ad-hoc basis subject to limits (such as Uber and Deliveroo). However, other platforms may not specify a maximum time for payment processing after a service is delivered. For example, in disability care, payments relying on NDIS funding are contingent on timesheet approval, and funding may be delayed if a client overspends on an NDIS plan or if a client exceeds the NDIS-imposed cap for funding on a service (Karp 2022).

### **Box 2.13 – Fee-setting in platform work**

The method of fee-setting varies by platform. Independent contractors traditionally agree prices for services directly with consumers, and the use of platforms does not always change this. In contrast, rideshare and food delivery, where the service is delivered under the platform's brand rather than the individual supplier, there tends to be a consumer price and worker pay rate set by the platform.

- On many transport and delivery platforms, consumers pay a price set by the platforms.
- On some care services, workers cannot charge consumers an hourly rate below a stipulated minimum. For instance, on Mable, the minimum agreed rate that workers can charge as at August 2022 is \$32 per hour before platform fees. This corresponds to workers receiving a minimum net \$28.80, and consumers paying \$33.60, after platform fees (PC 2022c).
- There may also be a 'soft floor' where a platform displays a recommended price that is equivalent to an award rate — for example, in Australia following an agreement between Airtasker and Unions NSW, however, the agreed price between a consumer and worker may still be below the recommended price (Unions NSW 2017).

### **Collective bargaining for contract platform workers**

Platform workers who are independent contractors could theoretically collectively bargain with platforms to determine binding pay rates and conditions that are tailored to a platform and the type of work performed. However, to the best of our knowledge, agreements in Australia between platforms and unions have focused on determining the agreed principles on which certain types of platform work should operate, such as industry-wide minimum standards determined by an independent body. Such negotiations have been undertaken outside the collective bargaining framework available to contract platform workers (which is separate to the enterprise bargaining framework that applies to employees). Negotiations in Australia have not yet directly resulted in a binding floor price that applies to all workers on a platform.

This could reflect workers' alternative employment options, within-industry competition and the probability and potential nature of expected future regulation by governments. Moreover, platform workers have other ways of bargaining that do not centre on securing binding pay rates. Workers vote with their feet if their conditions are not sufficiently attractive, as evidenced by relatively high churn rates. For example, within 6 months, about 40 to 50 per cent of Sydney Uber drivers had exited (Alexander et al. 2022, p. 181).

## Collective bargaining for contract platform workers operates under a different framework than that of enterprise bargaining for employees

A complicating factor for any use of collective bargaining for contract platform workers is that as independent contractors, collective bargaining would fall under competition law, not employment law. As such, individual platform workers — operating as businesses — are considered **competitors** to one another.<sup>47</sup> Without a competition exemption from the ACCC, businesses (such as platform workers) who join to collectively bargain with a target business (such as a platform) could violate competition laws. The ACCC (2014, p. 3) has stated that:

In the context of competition law, collective bargaining refers to an arrangement under which two or more competitors come together to negotiate terms and conditions (which can include price) with a supplier or a customer. Groups of businesses may sometimes appoint a representative, such as an industry association, or in some cases a union, to assist them in the bargaining process.

The CCA [*Competition and Consumer Act 2010* (Cth)] requires businesses to act independently of their competitors when making decisions about pricing and other terms and conditions of trade. By engaging in collective bargaining participants are at risk of breaching the CCA. Authorisation of collective bargaining is a transparent process by which the ACCC may grant protection from legal action where it is satisfied in all the circumstances that the proposed collective bargaining arrangement is likely to result in a public benefit that would outweigh the likely detriment to the public arising from any lessening of competition.

This business collective bargaining framework is distinct from enterprise bargaining by **employees**, where enterprise bargaining processes are enshrined in the FW Act, not in competition laws.

Although the collective bargaining framework for businesses was not specifically designed for some of the more common platform work situations — such as those involving many individual independent contractors, a platform that sets prices, and low barriers to joining, contract platform worker collective bargaining may be pursued through an exemption from competition laws.

The simplest way for independent contractors to obtain a competition exemption is through using the ACCC's collective bargaining class exemption<sup>48</sup> — other methods include going through the notification and authorisation processes (box 2.14) — although target businesses, such as a platform, are not legally obliged to bargain. The ACCC is able to 'withdraw the benefit of the class exemption from particular businesses (but not retrospectively) if it is satisfied that the business, or businesses, is engaging in collective bargaining conduct that substantially lessens competition and is not likely to result in overall public benefits' (ACCC 2021, p. 12).

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<sup>47</sup> Platform workers covered by provisions in Chapter 6 of the *Industrial Relations Act 1996* (NSW) may also have collective bargaining rights for the purpose of negotiating contract agreements — relating to contract conditions — under NSW industrial law, without requiring competition exemptions. For instance, the TWU stated that Amazon Flex drivers 'enjoy enforceable rates of pay along with rights to dispute resolution, union representation and collective bargaining' following a revised NSW Industrial Relations Commission determination which expanded coverage to eligible owner-drivers of vans with a carrying capacity between 1.5 and 3 tonnes (TWU 2022).

<sup>48</sup> Broadly, the class exemption enables a business or independent contractor with aggregated turnover of less than \$10 million in the preceding financial year, to form or join a collective bargaining group to negotiate with suppliers or customers about the supply or acquisition of goods or services without the risk of breaching competition laws.

To date, there has been no test of collective bargaining arrangements through the collective bargaining class exemption, or through notification or authorisation processes by contract platform workers, with or without union involvement (ACCC, pers comms, 21 Sep 2022).

### Competition exemptions and large-scale contract platform worker collective bargaining

Whether a competition exemption is available for large-scale collective bargaining by contract platform workers turns on two factors: whether collective bargaining by a bargaining group would substantially lessen competition and whether collective bargaining would likely result in a net public benefit. Under competition law, higher pay rates resulting from collective bargaining could be seen as a wealth transfer to platform workers (as individual businesses), and may or may not be seen as public detriment or benefit. The ACCC has not yet made determinations in this area in relation to collective bargaining and platform workers (box 2.14).

However, a possible conceptual framework for determining whether exemptions should be given for large-scale collective bargaining by contract platform workers could usefully focus on the degree to which:

- the platform controls key aspects of the transaction, such as setting consumer-facing prices and worker pay rates
- there is sufficient price competition in the markets in which current platforms compete, either from rival platforms or non-platform competitors.

Where competition in those markets is strong, the capacity for collective bargaining at the platform-specific level to raise consumer prices excessively is tempered by the competitive pressures of rival platforms. For example, negotiation of a collective agreement between Uber rideshare drivers and Uber the platform in relation to earnings may not substantially lessen competition in the market for on-demand passenger transport services.

A further issue is that whereas employees negotiating enterprise agreements have the right to take protected industrial action in support of their claims, a coordinated withdrawal of labour by contractor platform workers (a 'collective boycott') is legally complicated. The collective bargaining class exemption does not include an exemption for collective boycotts, meaning platform workers would have to go through the notification process or the authorisation process (ACCC 2021, p. 13).

#### **Box 2.14 – Obtaining a competitive exemption for collective bargaining purposes**

Competition exemptions for the purpose of collective bargaining (not enterprise bargaining) can be obtained through the collective bargaining class exemption (by lodging the notice form with the ACCC and any target businesses — such as a platform), or by going through the notification or authorisation process. The authorisation process involves a public consultation process and the publication of a draft and final determination by the ACCC.

Whether the ACCC grants an exemption in response to an authorisation application, allows a notification to stand, or withdraws the collective bargaining class exemption for a bargaining group is decided on a case-by-case basis. Broadly, bargaining groups are successful in obtaining a competition exemption if the ACCC finds that the arrangements are not harmful to competition and/or are likely to result in overall public benefits.

### **Box 2.14 – Obtaining a competitive exemption for collective bargaining purposes**

Although public benefit is not defined in the *Australian Competition and Consumer Act 2010* (Cth), the public benefits have been generally defined on a broad basis by the Australian Competition Tribunal (the Tribunal). The Tribunal has stated that public benefits include (ACCC 2019, p. 43):

... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress". Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass "progress"; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.

While public detriment has been defined by the Tribunal to include:

any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.

Unions cannot provide notice on behalf of contract platform workers (or any other independent contractors or businesses) through the collective bargaining class exemption or through the notification process. However, a union can act as a bargaining representative, regardless of which of the three processes the exemption is obtained through. If a union wished to obtain legal protections from potential liability under competition law for itself (in addition to the bargaining group), the union would need to go through the authorisation process. The Transport Workers' Union has applied for (and obtained) authorisation for a number of collective bargaining arrangements relating to owner-drivers, albeit on a small scale and not relating to platform work.

a. For example, see ACCC authorisation numbers A91589, A91514 and A91427 (authorisations granted) and AA1000617-1 (currently being considered).

Source: ACCC (2021)

Internationally, there have been a small number of cases where worker representatives have played a role in shaping the pay and conditions of platform workers (though the workplace relations contexts in all these cases have differed from Australia). In Canada, Uber and the United Food and Commercial Workers Canada (UFCW) agreed to 'press provincial governments' to establish industry standards including on a pay rate of at least 120 per cent of the minimum wage and a benefits fund, while establishing a dispute resolution mechanism for Uber platform workers (Bellon 2022; Uber Canada 2022). In the United Kingdom, Uber formally recognises the GMB union — in August 2022, the GMB union claimed credit for increasing driver pay rates after fares were raised in London by 5 per cent, although in an official statement, Uber suggested that higher fares were implemented to attract more drivers (GMB 2022b; Levingston 2022).



### Finding 2.5

#### There would be costs in shoehorning platform work into other categories

Categorising platform workers as employees would remove key benefits to both efficiency and flexibility for workers. Many platform-based occupations are a direct extension of existing independent contracting arrangements, which can involve relatively high rates of pay.

Other platforms offer pay rates close to, or under, the National Minimum Wage. Workers who rely heavily on these forms of work as a major source of income often face poor job prospects for reasons that would, in many cases, be better addressed directly.

Collective bargaining with platform providers could offer a route for platform workers to negotiate conditions, although no binding agreements on pay have been made in Australia. Regulation governing enterprise bargaining, including that relating to protected industrial action, is separate from collective bargaining arrangements for platform workers who are independent contractors.

## Improving dispute resolution

Disputes between the platform and worker can have major effects on workers' job security and livelihood. Ineffective resolution arrangements may also act as a barrier of entry by workers to platform work and therefore reduce the likely scale and broader economic benefits of the gig economy. Consumer confidence in platforms also relies on assurance that platform operators can manage poor quality service by platform workers.

Disputes may relate to whether a task was completed to satisfaction (and hence, whether the platform is required to pay out given rates), payment schedules and account suspension and termination actions.

Beyond a platform's own internal reviews, the other remedies available for disputes are only partial in scope, are costly and may not be known by workers, some of whom may have weak English proficiency and few parties to assist them:

- Independent contractors can bring a case for review of an unfair contract to the Federal Court or Federal Court Circuit under section 12 of the IC Act, which specifies 'unfairness grounds' (the grounds are not considered to be unfairness grounds if they are deemed to relate to 'workplace relations matters'). Participants incur their own legal costs of bringing or defending a case in the Federal Court, unless considered vexatious. Most platform-based workers would not have the financial means to use this remedy. This provision is rarely used (IRV 2020, p. 167) and to the best of our knowledge, has not been used relating to platform work.
- It is uncertain whether state civil and administrative tribunals have jurisdiction over some disputes relating to workplace relations matters under s.7 of the IC Act (IRV 2020, p. 171).
- Remedies are limited to certain states and types of platform-based work. For example, in Victoria, eligibility for dispute resolution in the Victorian Small Business Commission was expanded to platform-based couriers in 2020. The dispute resolution mechanism involves low-cost mediation and the

ability to apply for a 'binding resolution' if mediation does not provide in a satisfactory result (Victorian Small Business Commission 2020).<sup>49</sup> But other jurisdictions (bar NSW) do not have similar remedies.

Given these problems, there is merit for an independent dispute mechanism that can resolve disputes. Some platforms and unions have entered into agreements that include in-principle support for a dispute resolution mechanism. For example, the agreement between Uber and the TWU includes support for:

... an independent body, or stream of an independent body, specific to platform work and comprised of industry experts with the capacity to ... facilitate a cost-effective and efficient mechanism to resolve disputes such as deactivation of user accounts. Any dispute resolution mechanism must be fit for purpose for platform work (Uber and TWU 2022).

Similarly, an agreement between Airtasker and Unions NSW in 2017 includes that both parties will 'work with the Fair Work Commission to develop an appropriate dispute resolution mechanism' (Unions NSW 2017).

Internationally, Uber has used different forms of internal process for dispute resolution, such as:

- in New York City, France and the Netherlands — a 'Driver Appeals Panel' where a driver can appeal a deactivation decision to a panel of other drivers. In New York City, the appeals process includes optional representation by the Independent Drivers Guild (WEF 2020).
- In Canada — representation by the UFCW union in appealing deactivation or in other disputes in internal processes, which is jointly funded by the UFCW union and Uber (Deschamps 2022).



#### Information request 2.2

The Commission is interested in views on how dispute resolution could be improved for platforms and platform workers, and whether there need to be different approaches for different platform business models.

## Platform work and safety

As noted above, while the efficiency-enhancing aspects of platform-based business models could be at risk under certain regulatory approaches, it is important to consider where legitimate needs for regulation remain. If platform-based business models were *only* viable because they avoid legitimate regulation, or because they are able to lower costs by increasing risks to public safety, then arguably they would not be the source of genuine properly-measured productivity gains.

As with any type of employment, platform work involves safety risks for consumers and workers. For instance:

- While there is no public data on the health outcomes of aged care platform contractors, aged care work involves physical and mental health risks. For instance, about 14 per cent of aged care workers reported a work-related injury or illness in the 12 months preceding 2016 (Mavromaras et al. 2017, p. 42). These

<sup>49</sup> The legislation governing owner-driver dispute resolution in the Victorian Small Business Commission — *Owner Drivers and Forestry Contractors Act 2005* (Vic) — and Chapter 6 of the *Industrial Relations Act 1966* (NSW) are exempt from IC Act provisions.



injuries or illnesses were most commonly sprains or strains, chronic muscle or joint conditions and stress or other mental conditions.

- Taxi drivers are at high risk of motor vehicle accidents and musculoskeletal disorders (Burgel, Gillen and White 2012), the latter which may be exacerbated by long working hours (Murray et al. 2019). In a TWU survey of rideshare workers, 34.3 per cent of respondents had been involved in a car accident, 66.3 per cent had experienced some form of harassment and 17.1 per cent had been physically assaulted (TWU 2021, p. 14). (Most resulting injuries will not be covered by the catastrophic injury insurance schemes operating across states and territories.)
- Food delivery workers may be less protected in a transport accident if they are using a bicycle, motorcycle or scooter and may face time pressures to complete tasks (SIRA 2021, p. 4). A separate TWU survey reported that 33.7 per cent of respondents working on food delivery platforms had been injured while completing tasks (TWU 2021, pp. 10). Delivering on multiple platforms simultaneously — called ‘multi-apping’ — could pose additional risk through time pressures and the need to interact with multiple apps while on a bicycle or by motorised vehicle.

While platform workers experience a wide range of health and safety risks, disentangling how much of this is caused by platform work and how much is due to the type of tasks they perform is not clearcut. Regardless of causation, platform workers do not necessarily obtain access to the necessary supports if their health is affected and platform providers may not have the same incentives as conventional employers to make the ‘workplace’ safe.

## Ensuring sufficient insurance

While some platforms provide personal injury and or public liability insurance, other platforms require the worker to separately purchase a specified level of insurance or state that purchasing insurance is voluntary with the onus on the worker to purchase insurance either through the platform or an external insurance provider if they want coverage.

For instance, Deliveroo, Doordash, Menulog and Uber Eats are signatories to the platform-created National Food Delivery Platform Safety Principles, which states that signatories will provide ‘free, automatic insurance protections that cover delivery workers for accidental injuries that arise while delivering on food delivery platforms’ (Deliveroo 2021).

Insufficient insurance levels — or lack of worker knowledge about insurance coverage — is concerning in sectors where there are greater risks of harm or liability to the worker, customer or third parties that directly results from the performance of work, which could include aged care and ridesharing and food delivery.

In a 2019 national survey of platform workers (McDonald et al. 2019, p. 46):

- 45.5 per cent of platform workers report that their main platform does not offer at least one form of work-related insurance
- 25.6 per cent report that they do not know whether insurance is offered
- 39.7 per cent of platform workers report that their main platform requires them to take out their own insurance
- 22.4 per cent do not know whether there is a requirement for insurance.

That some workers are unaware of their insurance entitlements may mean there is a role for better information provision to platform workers, for example, to better inform decisions on choosing platforms and purchasing insurance. While the Fair Work Ombudsman has an education function to provide information to employers and employees about the nature of employee entitlements, there is no such equivalent for platform work.



## Evaluating the adequacy of insurance held by or covering platform workers

Insurance coverage for platform workers appears to be ad-hoc and incomplete. While there are explicit insurance requirements in some platform work, such as compulsory third-party motor vehicle insurance for rideshare drivers, private insurance is often not mandated for other platform types.<sup>50</sup> There is significant legal uncertainty about whether contractor platform workers are covered by workers' compensation, especially against a background of a limited body of case law (Safe Work Australia 2021, p. 11). The presumption is that many will not be covered.<sup>51</sup> A limited set of independent contractors are covered under 'deemed worker' provisions in workers compensation legislation, although coverage differs by state and territory. While in principle, platform workers could take out their own insurance, they typically lack the buying power of employers, do not have the capacity to limit the overall risk of the working environment to obtain lower premiums, and may not be able to afford the premiums. In any case, alternative forms of insurance provided by platforms or purchased by a worker are typically less generous than workers compensation (Safe Work Australia 2021, p. 9).

Indeed, for many platform workers, public insurance provided through publicly-funded universal healthcare, the National Disability Insurance Scheme and social security benefits will be the major source of insurance, so that flaws in private arrangements mean that taxpayers bear many of the costs. Incomplete insurance also means that non-platform businesses providing services competing with platform workers may face a competitive disadvantage. There have been proposals to increase insurance coverage or the level of insurance for workers providing food delivery services. For instance, the NSW State Insurance Regulatory Authority (2021, pp. 4, 6–7) published a consultation paper identifying five options to improve insurance arrangements for food delivery platform work, where the 'risk profile is different to other gig economy participants' (due in part to the use of bicycles, scooters or motorcycles, as well as the time pressures involved in food delivery work). The five options were:

- maintaining 'status quo' regulation, while improving education and awareness of insurance options
- requiring platforms to provide a baseline level of personal injury insurance that would meet a minimum standard relating to benefits paid out upon death or disablement or for income supplementation, while imposing a limit on out-of-pocket expenses
- implementing a scheme that would provide short-term income replacement, medical benefits for most injuries, lifelong medical care for catastrophic injuries and lump-sum benefits for fatalities
- implementing a scheme modelled on features of the compulsory third-party insurance (CTP) scheme for motor vehicles in NSW or on workers compensation
- extending workers compensation eligibility by amending legislation so that food delivery riders are considered 'deemed workers' for the purposes of workers compensation

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<sup>50</sup> Some forms of compulsory third-party (CTP) insurance explicitly exclude ridesharing coverage. In some states, drivers are required to purchase their own CTP insurance from insurers, while in others, CTP insurance is bundled with the payment of registration fees.

<sup>51</sup> For instance, the NSW State Insurance Regulatory Authority (2021, p. 5) stated that there was a 'general view that people providing food delivery gig economy services are, in most cases, not likely to be covered by the [NSW's workers compensation] scheme'. In June 2022, an insurer operating as an agent for NSW's workers compensation scheme ruled that a food delivery worker was engaged by Hungry Panda (a platform) as an employee at the time of his death, and as such, the worker's family was eligible for a payout (Bonyhady 2022). Some commentators have suggested that the decision may open the door to some more platform workers being eligible for workers compensation, although eligibility would depend on the specific context.

The role for policy and regulation would likely depend on the specific characteristics of the platforms and occupations, including how platforms offer tasks and the safety systems they have in place. Some key considerations for policy, would include:

- the risks that workers face during platform work (including the probability and severity of risks, as well as the history of incidents, injuries and fatalities)
- the level of existing insurance provided by platforms relative to alternative policy models. Considerations may include when coverage applies, the level and type of benefits and how they are paid out, the level of out-of-pocket expenses, whether there is income replacement or whether insurance is provided at all
- the characteristics of platform work including that workers may work across multiple platforms. For instance, during a 'shift', food delivery platform workers may search for tasks on different apps ('multi-app') and may be able to complete or progress tasks from multiple apps simultaneously.
- the demographics of platform workers affected by policy. For instance, SIRA (2021) noted that food delivery workers were more likely to be from culturally and linguistically diverse backgrounds, have lower levels of education attainment and be temporary residents.

In particular, if policymakers were to design insurance-type schemes applying to specific types of platform workers, they would also need to consider (SIRA 2021, p. 7):

- the relative costs and benefits associated with private or public underwriting
- the ability to implement principles of insurance pricing, such as risk-based pricing, risk pooling, price stability, and to encourage risk management by parties with the aim of lowering future claims (referred to as 'good claims performance').
- the ability to accurately price insurance premiums or levies to reflect risk
- the interactions of a proposed scheme with existing public and private insurance schemes



### Information request 2.3

The provision of insurance in platform work appears to be varied and patchy. The Commission seeks further information on the extent of insurance provision across different forms of platform work and views on what improvements could be made.

## Clarifying workplace health and safety obligations

Under model WHS laws — which are implemented in all states and territories bar Victoria — the person conducting a business or undertaking ('the PCBU') has the primary duty of care to a worker, as reasonably practical, where the worker can be an employee or contractor. Model WHS laws are drafted with the intention that the primary duty of care is 'responsive to changes in the nature of work and work relationships and arrangements' (Stewart-Crompton, Mayman and Sherriff 2008, p. 63).

For example, in considering food delivery platform work, Safe Work Australia (2018) indicated that:

The concept of 'worker' is broad and includes employees and contractors. Contractors can be a PCBU and a worker at the same time. A delivery rider is considered a worker if they 'carry out work for' the platform whose app is used to provide the delivery services and/or the food outlet whose food/drink is delivered. As PCBUs, platforms and food outlets must do whatever is reasonably practicable to ensure the health and safety of their workers.

The Inquiry into the Victorian On-Demand Workforce emphasised that platforms had obligations to workers under Victorian Occupational Health and Safety (OHS) law:

WorkSafe confirmed that platform businesses do have duties to workers, whether employment or independent contracting arrangements are used. Duties are also owed by clients, customers and procurers of services who engage workers, but vary depending on the nature of the arrangement between the parties – a central question is whether the worker is directly engaged as an employee or an independent contractor? Once this question is answered, secondary questions arise about the extent of the duties that the platform must fulfil. The OHS Act would impose obligations on a platform business to ensure, so far as is reasonably practicable, that the workplace is safe and without risk to health in relation to matters over which the platform business has management or control (IRV 2020, p. 117).

Under such laws, home care clients of contractor platform workers may also be considered PCBUs in relation to home care. In a submission to the Select Committee into Job Security, Safe Work Australia (2021) pointed out:

As PCBUs, the platform and the client would be concurrent duty holders. A gig participant [platform worker] may also, at the same time as being a worker for the platform or client, be a PCBU and officer in their own right, if using the platform as a mechanism to carry out work in their own business. Whether a gig participant is a PCBU in their own right is determined by looking at their working arrangements and the type of services being delivered. This will need to be assessed on a case by case basis.

In 2021, all state and territory WHS ministers committed to develop criteria to continuously assess new and emerging business models, industries and hazards to determine if legislative changes or new model WHS regulations or codes are required. There may also be grounds to implement a model Code proposed in a 2018 WHS review to provide examples of how PCBUs can meet their obligations for platform work (Boland 2018, recs. 3 and 5) The next review of model WHS laws in 2023 will also provide an opportunity to identify recommended changes if needed to address WHS risk specific to platform work.

While Safe Work Australia and some state and territory regulators have provided some guidance on how platforms and workers may meet their obligations as a PCBU, such guidance appears to have largely been limited to rideshare and food delivery platform work, where almost all workers are independent contractors (box 2.15). NSW has also introduced legislation which introduces personal protective equipment and specific training obligations and requirements for food delivery platforms and workers.

In some cases, existing resources may be adapted for worker and or platform uses. For instance, WorkSafe Victoria's home care occupational health and safety compliance kit can be applied to aged care platform work. However, workers and consumers may not be aware of the existence of such resources. Where WHS guidance relating to platform work is produced — or where existing resources are applicable to platform workers — Safe Work Australia and state and territory regulators will also need to consider how to best disseminate information and raise awareness of WHS issues.

### **Box 2.15 – Examples of WHS guidance and regulation relating to rideshare and food delivery platform work**

#### **Rideshare**

In NSW, the Point to Point Transport Commission regulates ridesharing (as well as taxis and hire vehicles). Although there are no national fatigue laws relating to rideshare drivers, the Point to Point Commissioner consider that service providers (rideshare platforms) are required to have oversight of fatigue through fatigue policies and an effective fatigue management system under NSW laws (Wing 2021, pp. 9–10).

The Point to Point Commission conducted a safety audit of Uber in 2020, issuing improvement notices and fines for not reporting ‘notifiable occurrences’. In response, Uber updated the ride matching system to stop further trips from being offered to workers who had been driving for more than 12 hours and 15 minutes; improved system processes relating to incident management and to reporting notifiable occurrences; and ensured that rideshare vehicles operating on the Uber platform were covered with a minimum of \$5 million in third-party damage cover (Point to Point Transport Commissioner 2022).

#### **Food delivery platform work**

Safe Work Australia’s webpages on the ‘gig economy’ (as accessed 12 August 2022) states that workers, platforms and food outlets are persons conducting a business or undertaking and provides information fact sheets about how they can respectively reduce WHS risks for food delivery platform workers.

SafeWork NSW and Transport for NSW created a Joint Taskforce on Food Delivery Rider Safety in collaboration with major platforms and Domino’s, following the death of four food delivery workers in NSW in late 2020 (SafeWork NSW 2020). The Joint Taskforce published a report with recommendations on WHS (2021, pp. 12–13) and published an Industry Action Plan where participants committed to platform-specific initiatives that would improve the safety of food delivery workers. For instance, Doordash said that it would investigate improvements to the user interface of its app for use when riding (Food Delivery Riders Safety Taskforce 2021, p. 9).

In NSW, food delivery platforms are required by law to provide high-visibility personal protective equipment (PPE) and to provide induction training relating to hazard and fatigue management, road safety, WHS duties and obligations and the proper use of PPE. Platform workers are required to wear or use the appropriate PPE when working (SafeWork NSW 2022).

Source: Point to Point Transport Commissioner (2022), Safe Work Australia (2018), Safe Work NSW (2022), *WHS Amendment (Food Delivery Riders) Regulation 2022* (NSW), Wing (2021)



#### **Finding 2.6**

#### **WHS regulators’ involvement with platform work will continue to be important**

Several forms of platform work entail heightened risks to personal health and safety. It will be crucial for Work Health and Safety regulators at all levels to continue to improve their monitoring and involvement with platform work, including in informing platform workers of their rights and responsibilities.



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