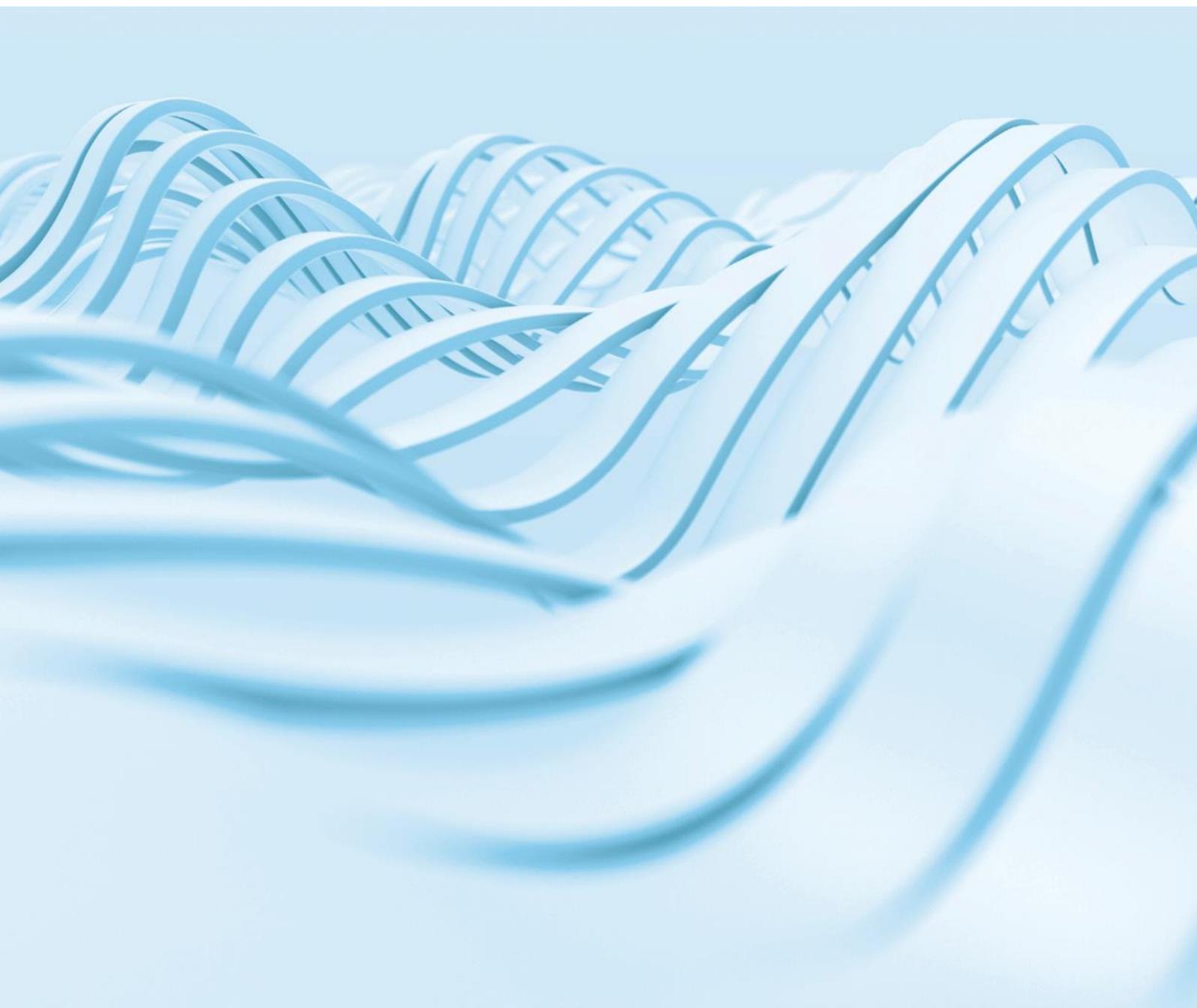




5-year Productivity Inquiry: A more productive labour market

Inquiry report – *volume 7*



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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.

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The Commission's report is divided into 9 volumes: an overview document (volume 1) that presents our policy agenda, and inquiry content volumes (volumes 2–9) that explain in greater detail the reforms that make up the policy agenda, including a modelling appendix. The full report is available from www.pc.gov.au.

Preface

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

At a conceptual level, this relationship is simple: the easier it is for firms to meet their skill needs and employ productive work practices, the better they are placed to respond to commercial opportunities, innovate, adopt technology 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 complex. 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 history as much as design.

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

Reforms could provide broad and enduring gains within a challenging and volatile landscape.

First, increasing the **supply of appropriately skilled workers** will be key, as will improving **matching between skilled workers and jobs in the labour market**.

- Education and training play a significant role in ensuring that students obtain skills that are valued in the labour market (discussed in volume 8).
- Skilled migration makes a strong contribution to productivity through an inflow of skills, ideas, and innovation into the labour market. The composition of the migrant intake could be better targeted to avoid mismatches between skills and labour market needs, and to improve the fiscal impacts of skilled migration.
- Occupational licensing, while playing an important role in setting minimum standards for training and experience, also restricts skilled labour supply if settings are overly stringent.

Second, productivity will improve where businesses are able to introduce **innovative and efficient work practices that enhance the value of employees**. As more **employers compete for more productive workers**, wages rise and resources flow to more productive areas of the economy.

- The workplace relations system can be improved to support innovation and better job-matching within enterprises. Making modern awards simpler, more flexible and streamlined would not only reduce compliance costs and the scope for non-compliance but also foster innovation. Removing barriers to effective agreement-making would generate productivity gains through efficient labour use and innovation.
- Platform-based business models can contribute to productivity growth, including through new and more efficiently delivered services. Fit-for-purpose safety and other measures would support gig workers without stymying the benefits of the business model.
- In the context of occupational licensing, scope of practice settings that are unduly restrictive can prevent workers from applying the full extent of their skills and capabilities.

1. Improving productivity in a challenging labour market

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 quality of skills and the matching of skills and jobs in the labour market are essential for productivity and economic growth. Where policy levers influence labour supply — such as in migration policy, or restrictions associated with licensing — the composition of the labour force and the quality of skills are more directly relevant to productivity than the size of the increase in participation.
 - 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.
- ✳ **Productivity is also dependent on efficient work practices and the movement of higher performing workers to more productive firms.**
 - The decline in job mobility is likely due to a number of factors, including dynamism in product markets, demographic change, and worker preferences.
 - 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 competition between employers in the labour market.

This chapter describes some of the key challenges for governments arising from today's labour market, including the matching of skills and jobs in the labour market; and the productive use of skills and labour resources. It then provides a guide to the remaining chapters of this volume.

1.1 The matching and use of skills in the labour market

The efficiency of the supply and matching of skills and jobs in the labour market is critical for productivity. 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.

Productivity 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. In a

competitive labour market, more productive employers would compete for skills and talent in the labour market by raising wages, thereby allocating labour resources to their most productive use.

It is also important that firms are able to employ efficient work practices so that employees' capabilities are used to their full extent.

Labour productivity and participation

The productivity of labour 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 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% 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, employed Australians work 10% fewer hours (a decline of four hours per day) compared with 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. People value leisure and there are many unpaid activities that are socially valuable.

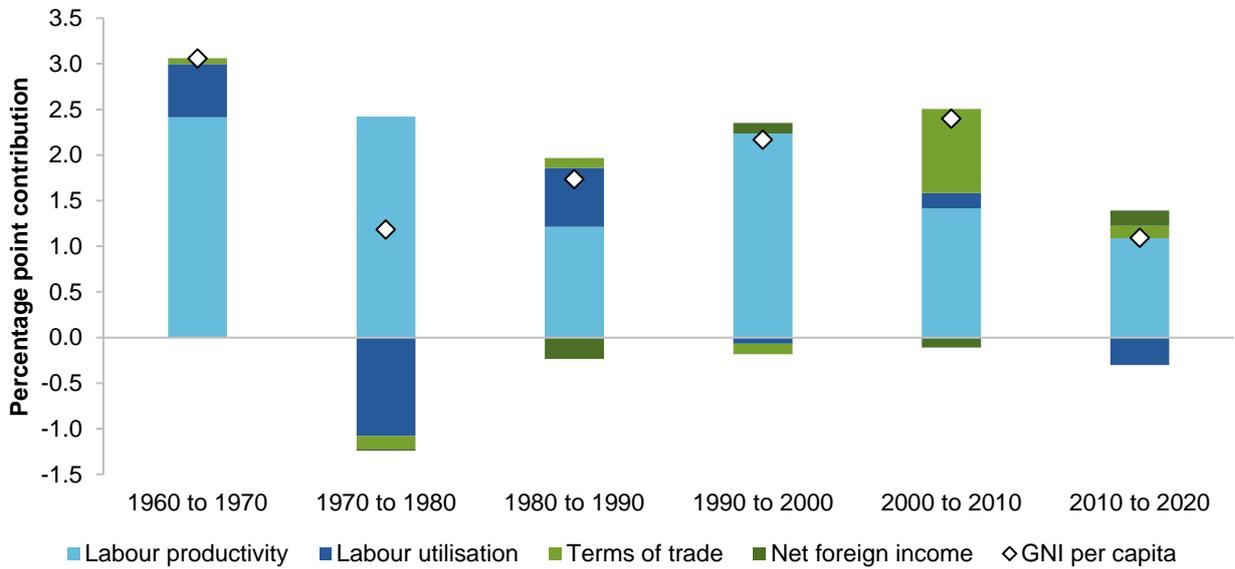
On the other hand, changes to labour force participation can influence productivity in either positive or negative ways. Productivity growth occurs when more output is generated per unit of input, and hence increasing the quantity of inputs is not necessarily a way to improve productivity. This is because, at some high level of labour participation, new entrants have on average fewer skills than people with strong footholds in the labour market. Some empirical evidence suggests that there is a trade-off between productivity growth and labour participation that is influenced by demographic and cohort effects (Boulhol and Turner 2009; McGuckin and van Ark 2005). On the other hand, 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.

Labour scarcity, which arises when vacancy rates are high and persistent, also can promote productivity:

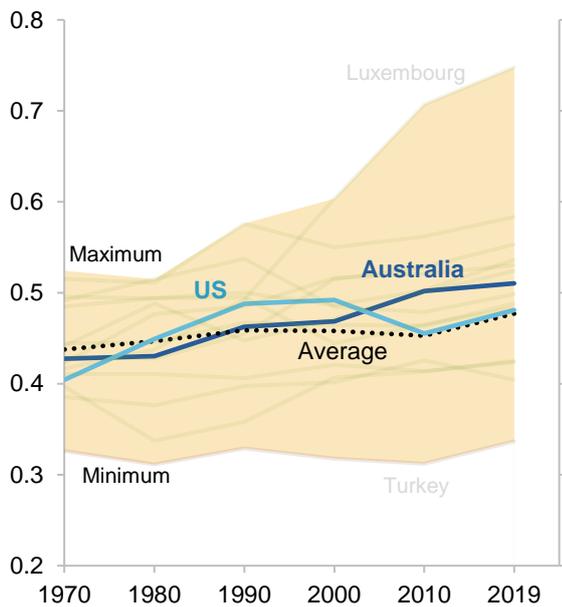
- Labour scarcity provides businesses with incentives to find more efficient ways to use their workforce, including by investing in productivity-enhancing capital.
- As businesses compete for better skilled workers in a tight labour market, this allows resources to flow to more productive areas of the economy, promoting overall productivity growth.

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

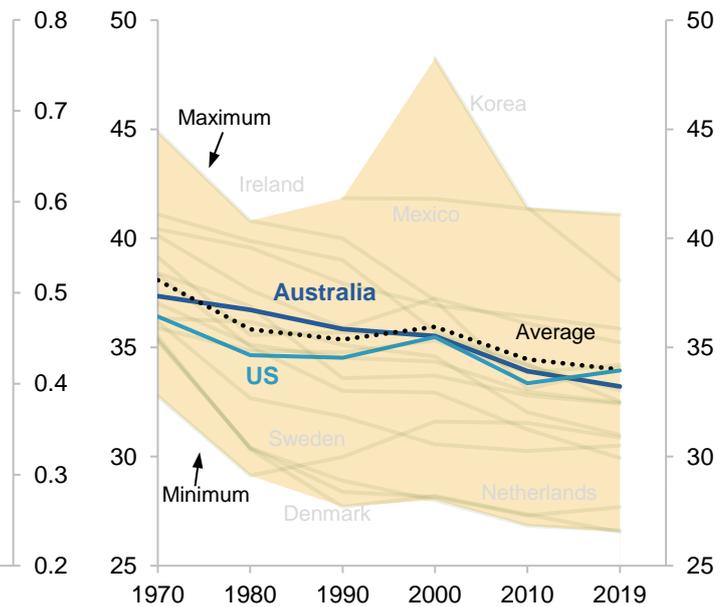
a. Labour productivity as a key driver of real growth in average national incomes



b. Employment to population ratio^a



c. Average weekly hours per worker^a



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 (2022a).

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 volume 8); and/or **improving labour market matching** between the existing supply of employees with the firms' demands.¹

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.² 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, and diffusion of knowledge from overseas. 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 wages³ 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.⁴ 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.

¹ 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'.

² 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).

³ 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)

⁴ 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 this 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).

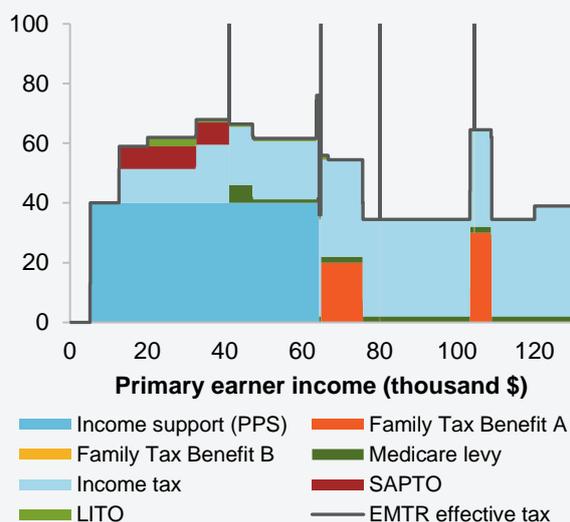
Reducing effective marginal tax rates is not straightforward. High EMTRs arise largely as a result of means-testing, which itself is a desirable characteristic of transfer policy design. In addition, any reform to EMTRs is complex, given that they vary with individual or household income and by family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

The Productivity 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.

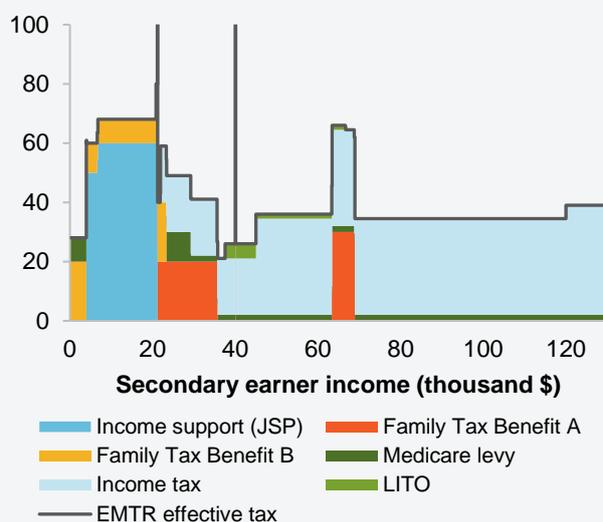
From a productivity perspective, benefits may accrue if the use of care services enables a better matching of parent skills to jobs, or if there are people with highly valued skills who are willing and enabled to increase their hours of workforce participation.

Effective marginal tax rates vary with household income structure

Sole parent with 1 child aged 6



Secondary earner in a couple with 1 child aged 6^a



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 2021a, 2021b). While the efficient allocation of labour is always important, it has become even more so as unemployment has declined.

Globally, migration patterns have yet to return to pre-COVID norms (DAE 2022). For Australia, enrolment levels for international students have begun to rebound (figure 1.2, panels b and c) while 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 2022a).

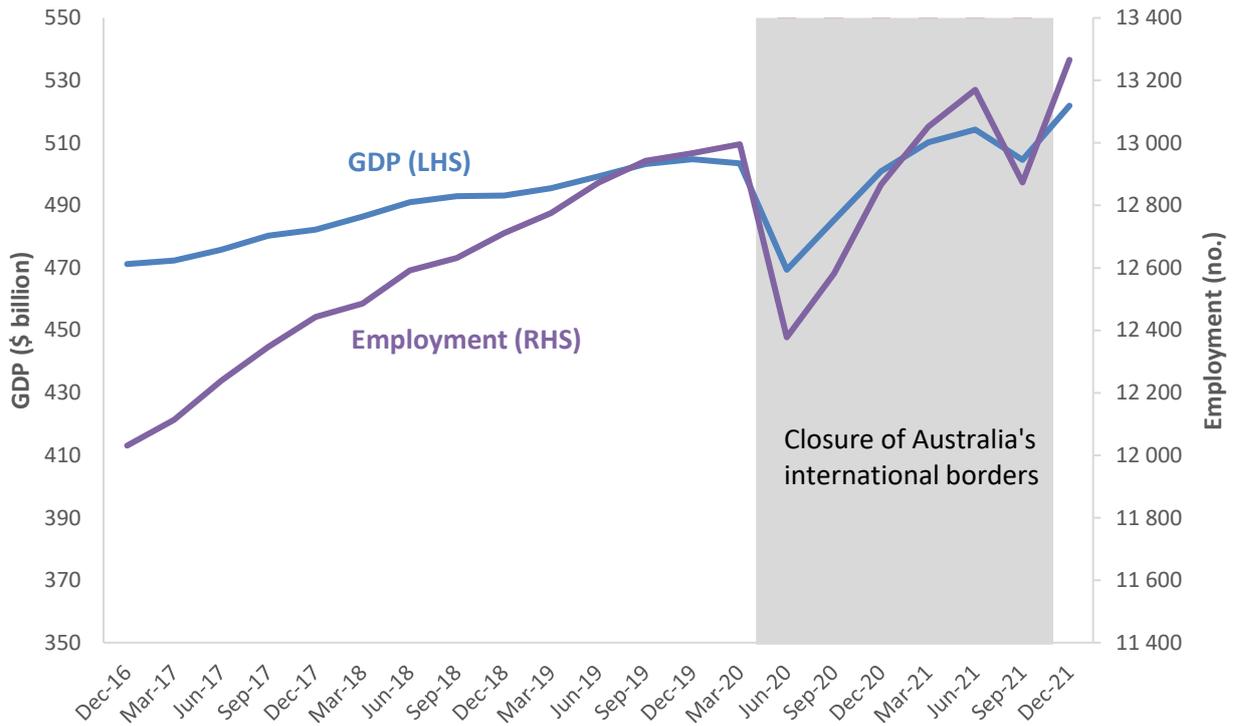
While migration is likely to recover, it is not guaranteed that Australia will retain its attractiveness to working migrants. Importantly for productivity, this could have significant implications for the *composition* of the migrant intake — Australia will need to compete to attract workers whose skills meet local demands, who are younger, and who bring valuable knowledge and innovations from overseas. Some indicative estimates of the potential productivity implications of migration are included in appendix A.

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 about 31 000 people missed work due to long COVID each day in June 2022 (Moore 2022). However, in addition

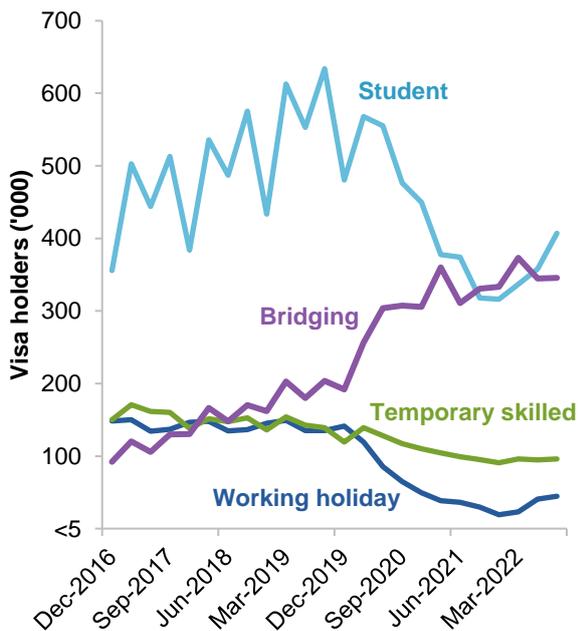
to absenteeism, it remains to be seen whether such symptoms will also result in people performing lower duties — making less use of their skills and capabilities.

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

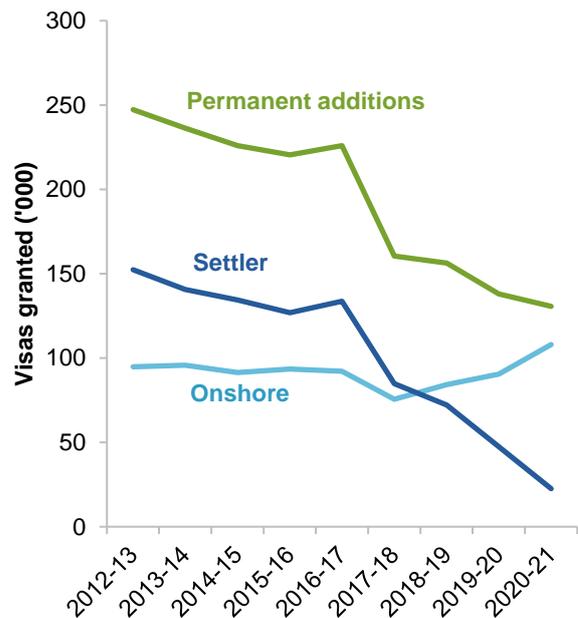
a. Economic activity and employment



b. Temporary migration



c. Permanent migration



Sources: ABS (2022b); DoHA (2021b, 2022c).

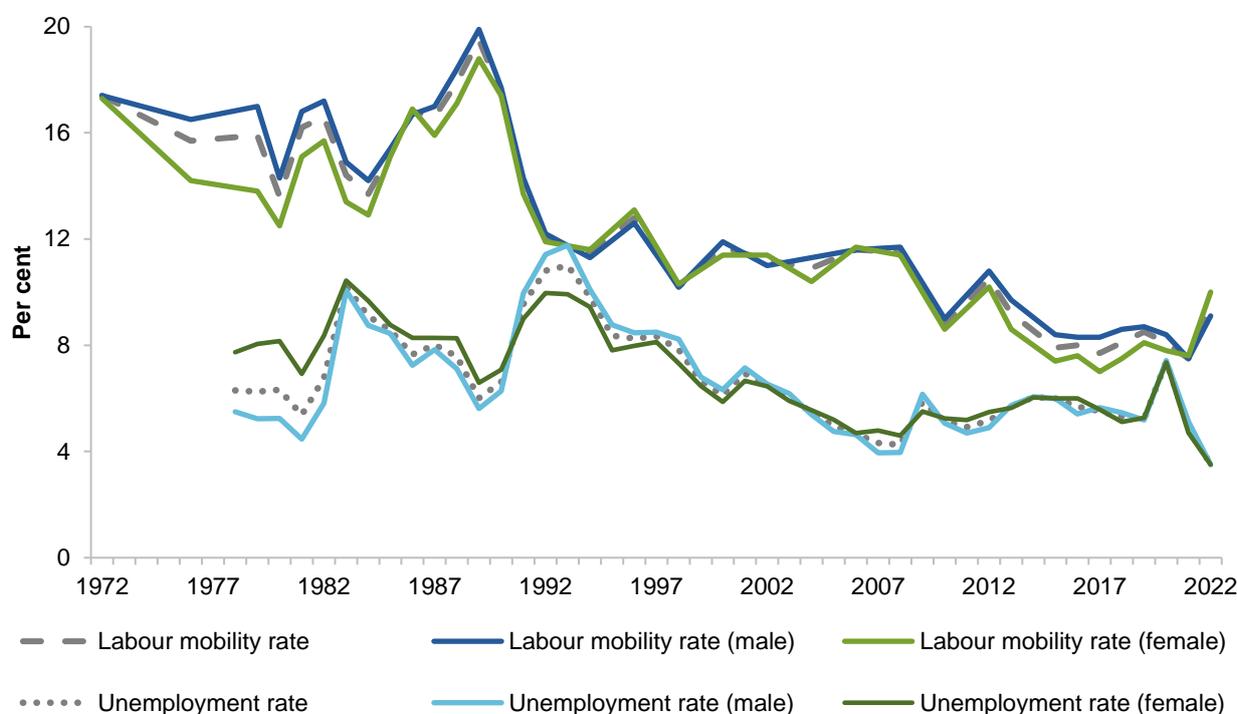
Declining labour mobility could inhibit better matching

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 1.4, 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.

Figure 1.3 – The relationship between job mobility and unemployment has varied^a
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.

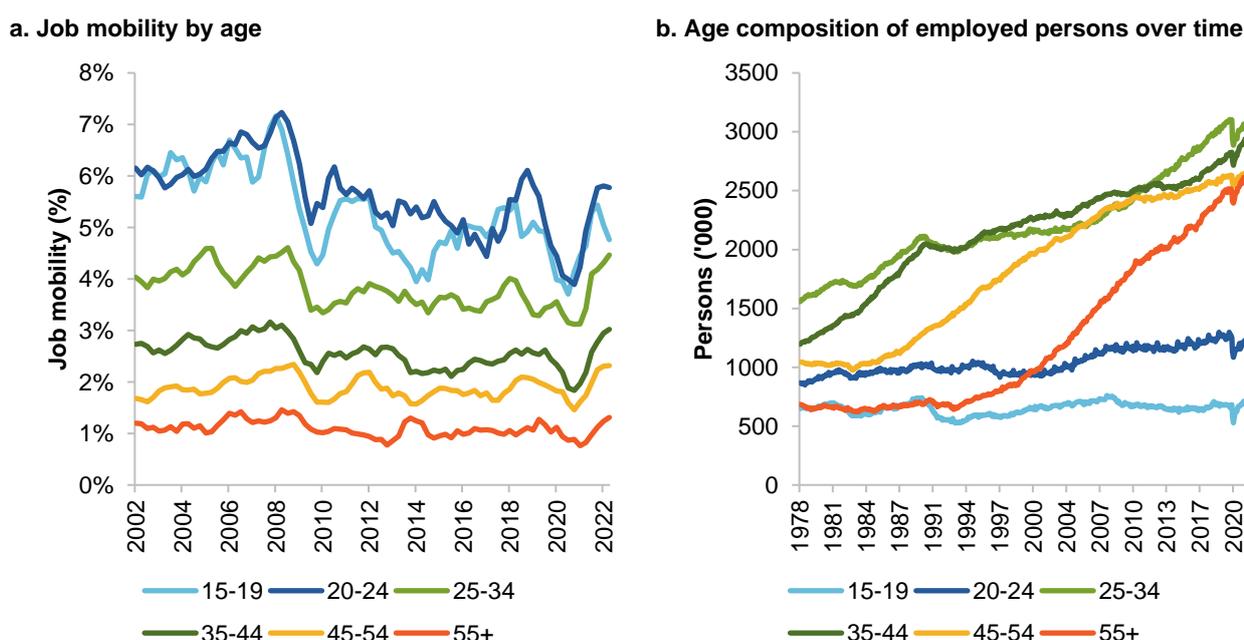
Source: ABS (2022c).

Job mobility has consistently been higher for people aged 15–24 years compared with 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 Productivity 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 1.4 – Mobility partly reflects ageing of the workforce



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

Trends in labour mobility will be determined in part by trends in competition and dynamism in product and service markets. As more firms enter a given product market, they provide new opportunities in the labour market. In addition, a greater degree of competition between firms allows more productive firms to gain market share and to expand their operations. As less productive firms exit, this should allow people to shift to where they are more valued and better utilised.

Regulation can also influence the allocation and utilisation of skills in the labour market. For instance, occupational licensing acts as a signal of proficiency and the quality of work output to employers and consumers, reducing information asymmetries. 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 the tasks an otherwise proficient individual is able to complete.

These types of restrictions do not confer any public benefit and removing them would 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. Some indicative modelling of the potential productivity implications of occupational licensing reform are included in appendix A.

The productive use of skills and labour

Workplace relations regulation has a bearing on both the use of efficient practices in the workplace and the allocation of more productive resources to more productive firms (where employers compete in the labour market). 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* (Cth)) and the National Minimum Wage (centrally set by an independent body). They have a broad scope of coverage and provide limited 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 (chapter 4), not least because they form the benchmark for minimum conditions that must be met in any employment arrangement regulated under the *Fair Work Act 2009* (Cth).

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. Some indicative estimates of the potential productivity implications of reforms to awards and enterprise bargaining are included in appendix A.

Challenges and opportunities posed by new forms of work

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.

1.2 Where we have focused

This volume of the Productivity Inquiry focuses on key labour market issues with significant implications for productivity.

First, policy has a role in improving the supply of valued skills in the labour market, in part by ensuring the quality of skills, and in part by reducing the misallocation of resources that occurs as a result of avoidable rigidities.

- The quality of **education and training**, both from education providers and through on-the-job training, can improve the supply of needed skills (volume 8). Still, complementary policies can reduce underuse of existing skills.
- The **composition of the migration intake** is likely to be a significant policy issue for productivity. The design of both the migration system and occupational licensing requirements can act as barriers to allocating and attracting labour to where it is most productive (chapter 2).
- The use of **occupational licensing** in Australia has implications for the quality of skills in the labour market — through its role of setting minimum standards for training and experience, and its potential to restrict skilled labour supply if settings are excessively stringent (chapter 3).

Second, policy can improve the productive use of people's skills.

- Australia's **workplace relations** system will affect how work practices will evolve over time (chapter 4). Recent developments in **platform work** present both opportunities for novel flexible work practices and challenges for regulation (chapter 5).
- In the context of Australia's occupational licensing systems, both the **recognition of international qualifications** and **boundary issues in scope of practice** can have a significant bearing on the extent to which workers are able to fully use their skills (chapters 2 and 3).
- Other factors that are likely to influence job mobility include the extent of **competition and dynamism** in product and service markets (chapter 1, volume 3) and the **business environment for investment**, particularly as it relates to market entry (chapter 2, volume 3).

2. Improving productivity through migration

Key points

- ✳ **Australia's skilled migration program already provides a significant productivity dividend. However, further refinement of its settings would improve productivity**
 - Australia's visa program streams make varying contributions to labour market outcomes and productivity. In the past decade, the migrant intake has shifted toward visas that make relatively poor contributions. Given the importance of labour market matching, policy should target quality.
 - Skilled occupations lists are difficult to accurately construct and update, with doubtful value as a criterion for permanent migration.
 - Employer-sponsorship provides certainty of employment outcomes and should use high wage thresholds (and for permanent migration, age) as the key criterion for eligibility rather than skill shortages.
 - The points-based permanent migrant stream can attract migrants with particular skills and characteristics, but needs to be better matched to the needs of employers.
 - All investor visas should be abolished as they impose net costs on Australians.
- ✳ **Addressing poor labour matching**
 - Expanding default recognition of certain international licenses and aligning skilled migration requirements with domestic occupational license recognition requirements would allow migrants to work in the high-skilled jobs they were trained for.
- ✳ **The most significant fiscal risks of migration relate to permanent rather than temporary visas**
 - Temporary migration visas with longer and more certain durations would help workers and employers meet their needs without requiring permanent migration.
 - International students should have the expectation that they will be able to test their skills in the Australian labour market after graduation, but this need not involve permanent migration.
- ✳ **Creating a safety valve for shortages in government-funded care services**
 - Government fiscal pressures limit the capacity to raise wages to address the large and increasing shortages in caring occupations, particularly aged care.
 - To address shortages, a permanent migration scheme with a binding wage threshold should be piloted, but be wound back if an alternative funding model that can sustainably support higher wages is implemented.

There is significant scope to improve Australia’s migration settings to obtain large fiscal and productivity benefits for existing citizens.

- A starting point for considering migration policy is clarifying the relationship between migration and productivity in the context of other policy objectives (section 2.1).
- An assessment of the effectiveness of current policy settings suggests significant limitations in existing policy settings (section 2.2).
- Temporary and permanent migration visas can be improved through enhanced targeting and better pathways from temporary to permanent migration (sections 2.3–2.10).
- Some key barriers in the labour market specific to migrants can be reduced, including by recognising overseas qualifications (section 2.11). Addressing these issues would give policy makers a more accurate understanding of how to target the migrant intake.

2.1 Policy objectives and trade-offs

Key objectives for productivity and wellbeing

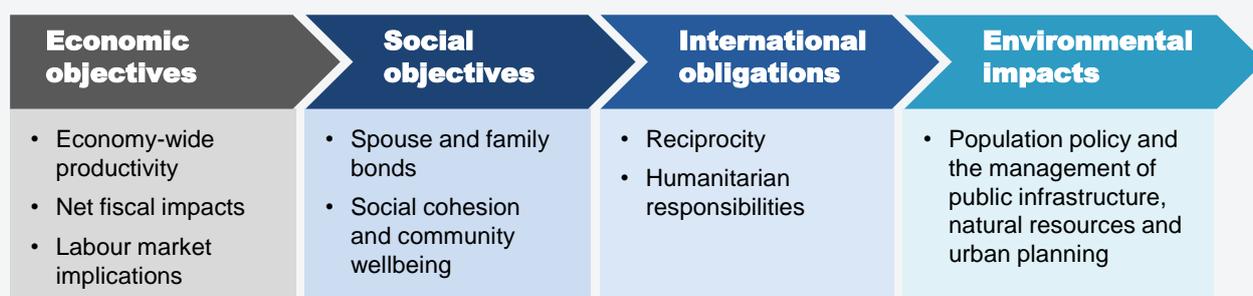
Several economic and social policy objectives should be considered in setting migration policy within a broader framework of public wellbeing (primarily for the benefit of domestic citizens, although their interests may coincide with those of migrants themselves) (box 2.1). Some benefits are intangible, including the contribution of migration to ‘Australia’s standing as a member of the global community’ (John Quiggin, sub. 102, p. 5).

Through a productivity lens, migration is an important avenue for attracting skills and knowledge, allocating labour to where it is most productive, and diffusing best practice from overseas. From a productivity lens, it is important that migration settings aim to improve the extent of matching of jobs and skills and produce fiscal benefits over migrants’ lifetimes. Both objectives are heavily influenced by the migrants’ labour market outcomes.

Box 2.1 – How migration serves public wellbeing

Migration affects several aspects of wellbeing

Migration affects public wellbeing across a number of fronts. From an economic perspective, migration affects the performance of the overall economy (such as more productive labour markets) and outcomes for individuals (workers, employers and consumers).



Box 2.1 – How migration serves public wellbeing

Whose wellbeing matters?

At a basic level, migration policy aims to improve the wellbeing of the incumbent citizens. However, the migrant's wellbeing is also relevant. Aside from being important in its own right, it is aligned with, and at times, forms part of the broader public benefit.

- Discrimination or exploitation against migrant workers entail broader costs relating to legal and social justice, concepts of fairness in workplace relations, the equitable nature of society, and the economic distortions in the labour market. Exploitation is not merely a matter of the migrant's wellbeing, but broader public wellbeing.
- There is a dynamic aspect to the impact of migrants. Long-run benefits can be greater than short-run ones, and any obstacles to successful transitions can forgo these. For instance, if a migrant's career is impeded during the early stages of their pathway to permanent migration, this reduces the benefits to Australia in subsequent periods. The labour market success of *permanent* migrants is in society's interest.

There are also potential trade-offs between the benefit of migrants and citizens.

- In the labour market, competition can lead to higher quality output, but can put downward pressure on wages. Broadly, this is more likely to benefit higher-skilled and higher-paid sections of the labour market, where individual productivity can be rewarded accordingly. If, however, migration significantly increases competition at the lower end of the income scale, and this exacerbates social exclusion of incumbent Australians, this could be considered a poor outcome of migration settings.
- In the context of Australia's tax and transfer system, everyone who participates in the economy (as a worker, consumer, employer or investor) has an impact on others. As such, all forms of migration has some form of fiscal impact, and the composition of the migrant intake will determine its overall fiscal implications.

Skills and job matching

One of the key productivity benefits of migration is that it contributes to the supply of highly valued skills, changing the composition of skills in the labour market and improving matching between skills and jobs.⁵

In the short term, the inflow of skills allows businesses to pursue commercial opportunities as they arise. In the medium term, businesses can adjust their investment plans and work practices based on the availability of skills in the labour market, which has been altered by different cohorts of migrants. In the longer term, the availability and movement of labour resources are key factors in shaping how Australian economy evolves.

Complementarity and shortages

The extent of labour market matching depends largely on complementarity of skills. 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 principally on the composition of the migrant intake, the incumbent labour force, and the forms of capital in the economy.

⁵ To the extent that migration neither increases the supply of particularly valued skills nor improve labour market matching, then it is more likely to add to workforce participation rather than enhance productivity growth.

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. (Borjas 1999, p. 1707)

The effects of migration may also change over time, as the mix of skills and technologies change across the economy.

The empirical evidence highlights the differing effects of migration on higher and lower-skilled incumbent workers. For instance, in the United States, Peri (2012, p. 348) 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.

At the same time, migration often targets labour shortages, 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. For these reasons, migration settings often hinge on attracting migrants where there are domestic skill shortages and incipient wage pressures that could limit economic growth. 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.

Migration can produce significant benefits in the absence of shortages, depending on the degree of skill and types of occupations involved.

- In skilled occupations, migration increases competition among professionals, which can provide incentives for workers to improve their skills or pursue further specialisation.
- Increasing the diversity of skills can lead to further differentiation of products and services. For example, while hairdressing could be considered a single occupation, hairdressers⁶ 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. Accordingly, 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 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.

One of the biggest concerns surrounding migration is the effects of low-skill migrants on low-skill incumbent workers. Those concerns partly reflect an assumption that incumbents' behaviour does not change to improve their prospects (such as engaging in training) and ignores the impact that additional labour has on additional demand. Moreover, workplace institutions mitigate outcomes for low-wage incumbents as they set floors in wages and conditions (Foged, Hasager and Yassenov 2022). The variations in such institutions between countries explains some of international variations in findings about the labour market effects of migration.

⁶ Similar arguments apply equally to other occupations such as cooks and chefs.

Australia's experience of job matching and migration

Empirical evidence suggests that, while migration may sometimes depress wages in some sub-markets (or limit wage growth), the size and frequency of any such effects should not be overstated. The overseas empirical evidence suggests that migration has a relatively small (negative or positive) effect on wages and employment of incumbent workers (PC 2016a, pp. 194–199). The evidence for Australia is generally neutral or positive:

- Broadly, Australian evidence suggests that immigration has not depressed wage growth for low-skilled workers (Brell and Dustmann 2019).
- 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 Productivity Commission’s inquiry on the *Migrant Intake into Australia* (PC 2016a).)
- 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.

However, there is also evidence that systemic mismatches can occur between migrant skills and jobs in the labour market.

- CEDA (2021a) point to survey evidence suggesting that 55% of skilled migrants work in their nominated field while 15% work at the same or higher skill level than their nominated occupation. The remaining 30% work in jobs that involve lower skills than those in their nominated occupation or are unemployed — a significant sign of mismatch. For migrants arriving between 2013 and 2018, the degree of skills mismatch in their first 18 months of arrival resulted in forgone wages of \$1.25 billion.⁷
- Deloitte Access Economics (2018) found that in Queensland, about half of skilled migrants are not using the skills and experience gained before arriving, often due to lack of recognition of their qualification (25%) or of their work experience (14%). They estimate the cost of forgone wages and economic activity at \$250 million in the decade to 2019.
- Tan and Cebulla (2022) undertook econometric analysis of South Australian data to show that migrants faced a greater risk of unemployment than others (despite comparatively higher levels of qualifications) with about 52% of those employed identifying as overqualified for their job. They found that labour market outcomes for skilled migrants are affected by employers’ relative ‘devaluation’ of some foreign qualifications.

⁷ CEDA use survey data on the numbers of people experiencing skills mismatch, their skill level and median wages by skill level. Assuming a 12-month duration for skills mismatch, they estimate that skills mismatch is the equivalent of \$1.25 billion in forgone wages in 2018 for migrants arriving between 2013 and 2018.

- Engineers Australia surveyed 817 migrants with engineering qualifications and found that 57% of skilled visa holders were working as engineers, while a further 26% were actively seeking work as an engineer (Engineers Australia 2021, p. 19). They identify several issues including employers' preferences for local experience.

The existence of such labour mismatch suggests that policy settings should re-assess the composition of the migrant intake in terms of the type and level of skills, as well as their complementarity to the incumbent labour market (sections 2.3–2.10).

In addition, the economic effect of skilled migration is shaped by the barriers that migrants face once they arrive in Australia. Tan and Cebulla (2022) found that labour market outcomes for skilled migrants are affected by employers' relative 'devaluation' of some foreign qualifications. Engineers Australia note that new migrants face difficulty in meeting employers' preferences for local experience (Engineers Australia 2021, p. 19). To the extent that any such difficulties are avoidable, or indeed reflect unintended consequences of regulation, there could be potential for productivity-enhancing reform (discussed in section 2.4).

Lifetime fiscal impacts

The fiscal outcomes of migration can also improve productivity to the extent that they lower average taxes and the distortions these have on investment, innovation, labour supply and the returns from training. The fiscal impacts of migration and skills matching are separate but related concepts. All things equal, both can be improved when migrants achieve better outcomes in the labour market (for instance, skills mismatches result in forgone wages, which in turn have negative fiscal implications). There are also circumstances where the direction of their effects does not coincide (discussed below).

Overall, Australia's skilled migration program accounts for the vast majority of permanent migration and has substantially higher net fiscal impacts than incumbent Australians as estimated over the lifetime (table 2.1).

Table 2.1 – Lifetime fiscal impacts vary between permanent visa subclasses

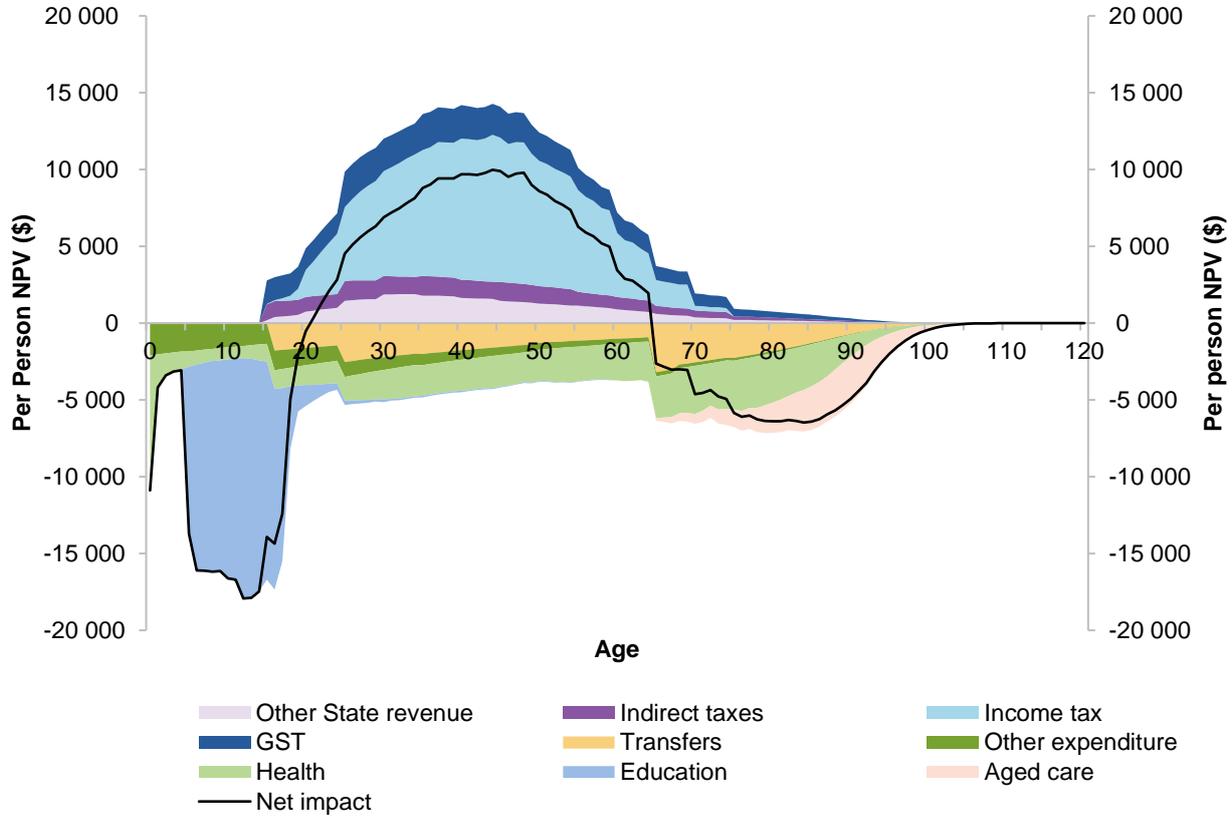
Number of visa places for 2022-23 and estimated lifetime net fiscal impacts

| Visa category | 2022-23 planned number of migrants (No.) | Estimated lifetime net fiscal impact (NPV\$ per person) |
|-------------------------|--|---|
| Skilled migration | 142 400 | 198 000 |
| Total migration program | 195 000 | 41 000 |
| Australian population | – | -85 000 |

Sources: Department of Home Affairs (2022); Varela et al. (2021).

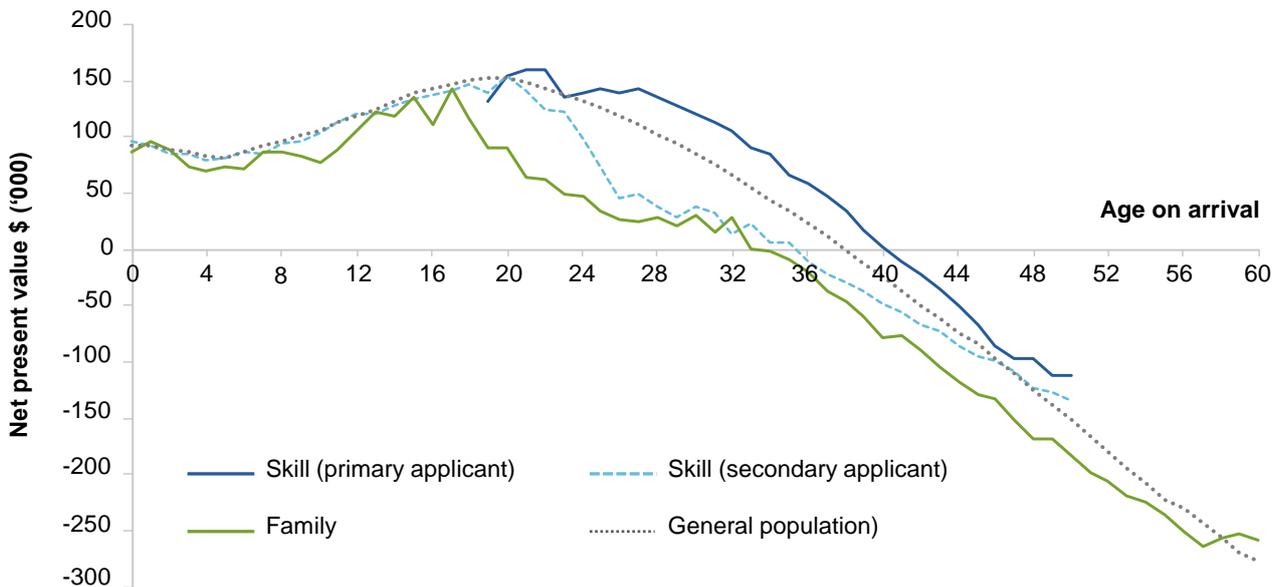
Most of the risk of negative fiscal impact occurs during childhood and after retirement (figure 2.1), so that the fiscal risk associated with migration relates mainly to permanent migration at older age groups. Migrants tend to have a net positive fiscal impact if they arrive as young adults because for much of their lifespan they work, contribute to taxes and use few (health and other) services (figure 2.2). Moreover, temporary migrants of working age are also likely to have net positive fiscal impacts as they are not associated with age groups with the greatest net fiscal liability and are not eligible for many free taxpayer-funded services.

Figure 2.1 – Typical interactions with the tax and transfer system
Estimated lifetime profile of fiscal revenues and expenses for an Australian born in 2018-19



Source: Varela et al. (2021).

Figure 2.2 – Key lifetime fiscal impacts by age on arrival
Net present value estimates of fiscal impacts per average permanent immigrant, net overseas migrant intake, 2013-14 dollars



Source: PC (2016b).

To improve fiscal impacts, permanent migration settings should aim to attract younger migrants. This requires the acknowledgement of migrants' fiscal contributions from the first year of their arrival (figure 2.1). This differs from the estimates of lifetime fiscal impacts for different visa subclasses produced by Varela et al. (2021) and PC (2016b) as there are many different pathways that conclude with the same permanent skilled visa. For instance, all things being equal, a migrant who had spent their early and mid-career in Australia on temporary visas only to subsequently take up permanent residency would have the same fiscal impact as if they had taken permanent residency immediately.

People who apply for skilled migration visas often have secondary and other applicants, typically spouses and dependent children, who have their own fiscal impacts. This suggests that improving the fiscal impacts of migration should take into account the entire migration 'unit', rather than the skilled worker alone. Such impacts should be considered alongside the non-economic objectives associated with visas for spouses and dependents given that it would be undesirable for migration settings to separate family members. At the same time, migration settings must balance the social benefits of such visas with the fiscal implications.

There can be trade-offs between the objectives of skill matching and fiscal outcomes. For example, a person with highly valued skills and high income migrating at an older age can still contribute significantly to productivity through their skills, networks and transfer of knowledge even if it is not for a long period, but nonetheless their subsequent retirement and use of services may produce net negative fiscal outcomes.

The treatment of secondary applicants in eligibility criteria also exemplifies the potential trade-off between fiscal impacts and job matching. For instance, a primary applicant with ideal labour market attributes might be:

- awarded a visa alongside secondary applicants who have negative net fiscal outcomes (thereby reducing the fiscal impact of the migration unit)
- or not awarded a visa due to the expected fiscal liability of their secondary applicants (thereby losing a skilled migrant who is highly valued in the labour market and would have otherwise been a prime candidate for the visa).

Key elements of design for the migration system

In pursuing policy settings that better promote productivity, it will also be important for policymakers to adhere to principles of good policy and system design. Some of the key design challenges for Australia's migration program are:

- to reduce complexity of the system overall
- ensuring integrity, including by protecting migrants from exploitation
- how to ration (permanent) visa places when oversubscribed
- addressing both short and long-term policy objectives.

While there are inherent trade-offs between different elements of system design, there are also opportunities for improvement.

Reducing complexity

Reducing the complexity of any administrative system is a worthy goal, given the implications for compliance and administrative costs. Australia's migration program has been described by many as being particularly complex (McIlroy and Read 2022; Universities Australia 2022), in part due to the number of visa subclasses,⁸

⁸ At the time of writing there were 22 skilled migration visa subclasses and 23 family and partner visa subclasses, among others for tourism, study, and humanitarian purposes.

and in part to the complex application processes and selection criteria. Many applicants for permanent migration engage migration agents to help navigate the system.⁹

To some extent, complexity arises because governments attempt to meet multiple policy objectives when shaping the composition of the migrant intake. Indeed, having very few visa subclasses to meet very many objectives would likely confuse policy decisions further.

There would be value in governments being explicit and transparent about what policy objectives and constraints drive migration policy. In particular, they should be clear about fiscal implications and the implications for productivity. This would not necessarily mean that economic constraints would override other objectives — rather, that social and other objectives should be met as efficiently way as practicable.

Designing efficient ways to achieve policy objectives will itself lead to some simplification of the visa system. And given that the economy-wide productivity and fiscal implications of migration far outweigh the compliance costs involved, the former should be given priority in driving reform.

Ensuring integrity

The integrity of the migration program is a perennial concern. For instance, given the risk that the Student visa could be used as a means of accessing paid work and not for study, restrictions are placed on working hours for Student visa holders.

Still, risks remain. Several incidents of underpayment have been uncovered for a range of visa holders, including those with restricted and unrestricted working rights (Cash 2015; Schneiders and Millar 2015; SEERC 2016). The enforcement of prevailing labour laws warrants continuous improvement. Moreover, any major reform to migration policy (including changes to institutional arrangements, incentives, or administrative processes) should involve an assessment of potential risks to integrity.

Managing oversubscription

Controls on the numbers of permanent migrants typically take the form of caps and eligibility criteria, with the cap the typical binding constraint in any given year if there is oversubscription. High levels of oversubscription is problematic as it increases the level of uncertainty faced by would-be immigrants, with potentially long-run impact on the attractiveness of a destination country. The backlogs that oversubscription raises introduce complications for governments. Permanent visas in Australia involve waiting periods of months (and sometimes years). Rolling backlogs make it more difficult to manage the migration intake over successive periods. A number of reforms could go some of the way to resolving these issues, including those discussed in section 2.10.

In contrast, temporary visas do not have caps, and inward flows are solely determined by eligibility criteria and the efficiency of visa processing.

Meeting immediate and future challenges

Migration policy needs to differentiate between and balance its short- and long-term objectives (box 2.2). If reforms were aimed only to meet the most immediate concerns, then in the current climate, it would likely target the labour shortages resulting from COVID-19-related disruptions. If aimed at longer-term challenges,

⁹ In 2018, there were 7402 migration agents registered with the Office of the Migration Agent Registration Authority (Joint Standing Committee on Migration 2019).

it would seek to address longer-term trends such as population ageing, and provide emerging skills and capabilities sought by more innovative firms.

Ideally, migration policy settings should provide some form of stability for prospective applicants, their families, employers, and communities. Pursuing long-term objectives requires some form of consistency of policy based on agreed principles but not the specific designs of all visa categories and the weight given to them. Some parameters will need to reflect contemporary conditions, *while at the same time*, addressing emerging trends and making provisions for longer-term needs.

Moreover, the overall migration program (and its system of visa subclasses) warrants regular review and revision.

Box 2.2 – Challenges for migration policy in the short and long term

In the immediate term, global migration patterns still reflect the aftermath of the COVID-19 pandemic, which disrupted both global and intra-Australian migration patterns, with international and state and territory borders closed for prolonged periods of time (chapter 1). In part, the effects of lower flows of migrants into Australia, especially by international students, was offset by the rise in bridging visas for temporary migrants already in Australia. Nevertheless, the net effect of changing migration patterns led to labour shortages in parts of the economy (such as hospitality and fruit picking) that typically rely heavily on migrant workers.

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 compared with 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 2021a). If Australia has become less attractive to migrants than prior to COVID-19, future migration decisions 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.

In the longer term, migration settings will need to address evolving and partly unpredictable labour market needs. In particular, the demand for services will continue to rise, as will their variety. Population ageing will place increasing pressure on the demand for disability, aged care and health services while at the same time, dependency rates may deplete the workforce able to deliver such services (CEDA 2021b). Governments can partly address these looming pressures through policy planning (as led by agencies as Jobs and Skills Australia) and by setting an efficient workplace relations framework (such that wage mechanisms allocate labour resources to where they are needed). However, migration is likely to have an ongoing role in filling skill gaps, given that:

- various advanced technical skills are likely to meet excess demand due in part to the importance of emerging highly-specialised skills that might not yet be reflected in formal training (Boyton 2022)
- certain skills may become scarce where wage mechanisms are unable to shift workers' preferences (and constraints) about the kinds of careers they wish to pursue and where they wish to live.

Box 2.2 – Challenges for migration policy in the short and long term

The former will be particularly important for encouraging innovation and diffusion. For example, some emerging occupations, such as technology product managers,^a are difficult to find in Australia (discussed in volume 4).

The migration system will also need to better meet the needs of technology businesses that have a global outlook and need a global pool of footloose highly-trained employees who work closely with local staff. While this may replace some need for permanent migration, it will increase the value of fast processing of intermittent temporary migration for teams to collaborate.

a. These managers combine business, technical and user experience skills to oversee a product's development in a way that meets customers' needs.



Finding 7.1

Reform objectives for productivity-enhancing migration settings

Skilled migrants stimulate productivity and make net fiscal contributions over their lifetimes whereas under current fiscal settings, incumbent Australians make negative net contributions. Both productivity and public wellbeing objectives would be enhanced by migrants with skills that complement domestic labour and capital. Consequently, reforms should be designed to improve the composition of the migrant intake — to target migrants with valued skills of prime working age — and to address undue barriers in the labour market for newly arrived migrants.

Several key elements of system design are vital considerations in producing productivity-enhancing reforms.

- The complexity of the migration program increases compliance and administrative costs, but some costs are unavoidable due to the number of policy objectives associated with migration. Designing efficient ways to achieve policy objectives will itself lead to some simplification of the visa system.
- Backlogs for permanent migration are the result of different approaches to eligibility, and should be factored into reform decisions about the design of permanent migration visas. Waiting times for temporary visa approvals should be as short as practicable.
- Reforms to migration policy should be set with both short and long-term objectives in mind, and the overall migration program warrants regular review and revision.

2.2 Strengths and weaknesses of the current system

The policy objectives and trade-offs discussed in section 2.1 provide a basis for assessing the performance of current migration policy settings and to identify opportunities for improvement. From a productivity perspective, key considerations include the expected net fiscal impacts of different visa subclasses and their contribution to labour market matching. It is also important to consider whether particular visas achieve other intended objectives.

This section considers temporary and permanent migration visas, as well as the use of skilled occupation lists. The analysis is not intended as an audit of the performance of the Department of Home Affairs in administering the migration system. Some migration visas are not examined at all — such as the humanitarian stream — because they have different objectives.

Temporary skilled migration

The net fiscal impacts estimated for temporary migration visas are typically positive (table 2.2). Employer-sponsored migrants under the Temporary Skill Shortage (TSS) visa subclass have the highest net fiscal impact on average. While student visas have the smallest (though still positive) fiscal impacts, the primary objective of these visas is to facilitate study rather than paid work (indeed, paid work is deliberately limited as a condition of the visa).

Table 2.2 – Fiscal impacts also vary between temporary visa subclasses

| Visa category | Estimated lifetime net fiscal impact per person (\$NPV) | Other details |
|--|---|--|
| Graduate (subclass 485) | 7 806 | Visa entails full-time working rights. Typical visa duration is between two to four years, depending on the qualification. |
| Student (subclass 500) | 217 | Visa entails limited working rights. Estimate does not include tuition fees paid to Australian education providers equal to \$32 000 on average. |
| TSS (subclass 482) | 38 601 | Visa entails full-time working rights and is dependent on employment (employer sponsorship). Typical visa duration is up to 4 years. |
| Working Holiday Maker (subclass 417 and 462) | 2 317 | Visa entails full-time working rights. Typical visa duration is one year. |

Sources: Department of Home Affairs (2022); Varela et al. (2021).

Temporary skilled migration is under-used

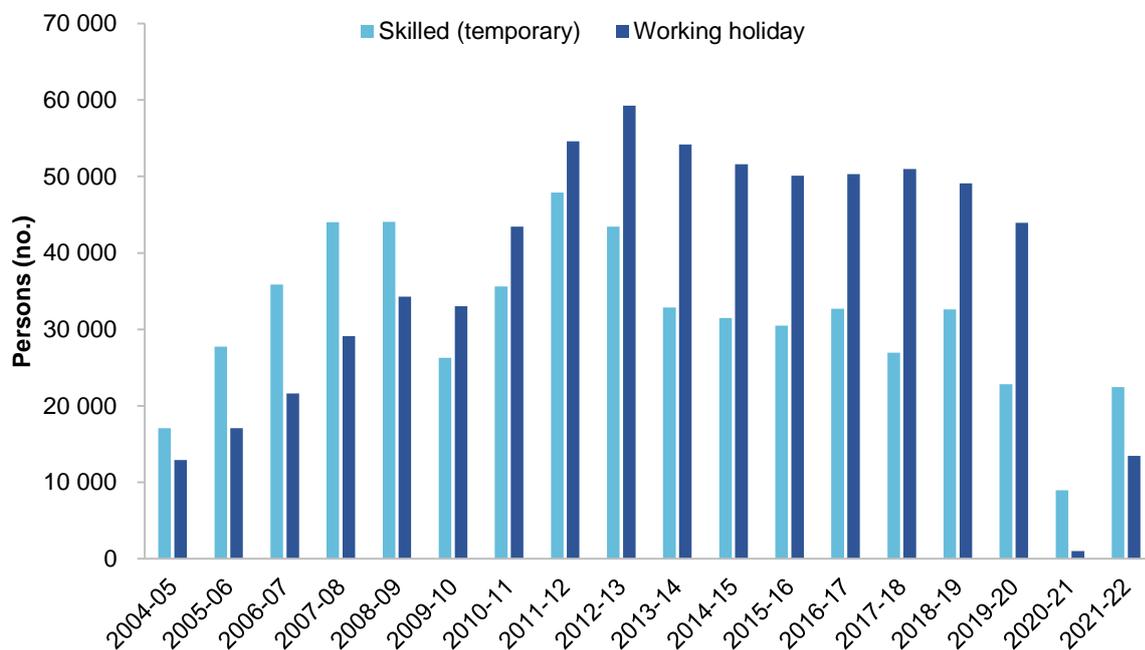
The use of temporary skilled migration declined over the decade leading up to the COVID-19 pandemic (figure 2.3), partly reflecting changes to the visa implemented by successive governments during the period. While numbers have shown signs of rebounding from the lows of 2020-21, they remain below pre-pandemic levels — despite historically low unemployment. Indeed, as CEDA (2022b) noted, temporary skilled migration was used to a much greater extent during the mining boom.

By contrast, working holiday visas consistently outnumbered skilled temporary visas over the past decade (figure 2.3). Overall, working holiday and student visa holders outnumber temporary skilled visa holders across all industries (figure 2.4). This suggests that much of Australia's temporary migration program is currently geared toward the supply of lower skilled labour.

In human services migrant workers typically hold working holiday, student and family visas. In Aged Care, 30% of workers are migrants, but less than 1% are sponsored for employment in this industry (Coates, Sherrell and Mackey 2022, p. 27). In caring professions more broadly, 38% 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 2022b).

Improving the administrative efficiency of the approval process would encourage greater uptake of temporary skilled migration. Waiting times are costly for employers seeking to temporarily fill skilled positions and limit the attractiveness of Australia as a destination for migrants.¹⁰ In January 2023, 50% of short-term TSS visas took 20 days or more to process, 10% took up to 3 months. Governments should weigh up the business and economic costs of delay against the administrative cost of increased resourcing, and give priority for temporary migrants that are critical to immediate business needs. Timely processing can also improve the value proposition of sponsored skilled temporary migration for employers. (It should be noted that the Department of Home Affairs has invested in additional staffing to decrease waiting times, and posts median waiting times to inform sponsoring businesses and migrants.)

Figure 2.3 – Temporary skilled migration is used less than during the mining boom^a



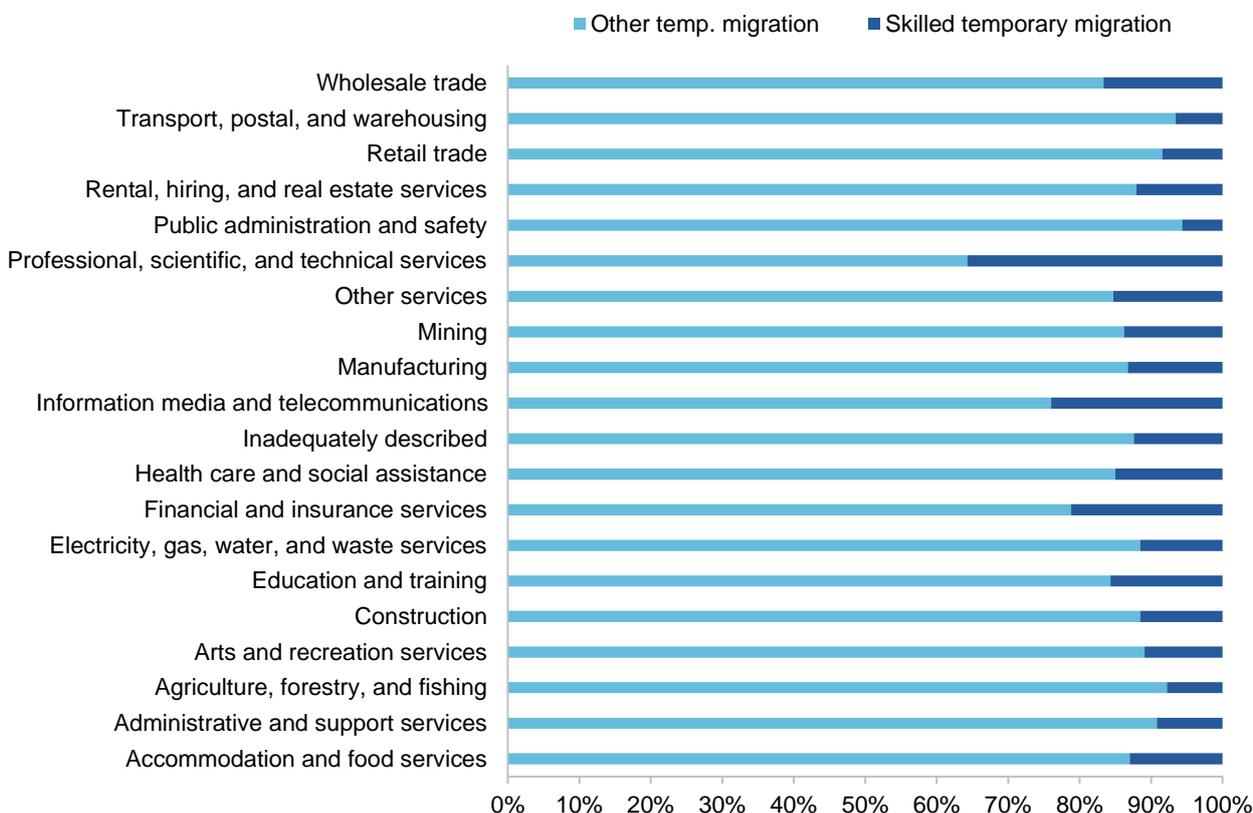
a. Estimates for 2021-22 are preliminary.

Source: ABS (*Overseas Migration*, 2021-22 financial year, Cat. no. 3407.0).

¹⁰ For TSS visas, about 90% of applications are resolved within 7 months for the short-term stream, and within 4 months for the medium-term stream (Home Affairs 2021c).

Figure 2.4 – Skilled temporary visa holders are outnumbered by other temporary visa holders in each industry

Proportion of temporary visa holders in each industry by type of visa, 2016



Source: Adapted from Coates et al. (2022).

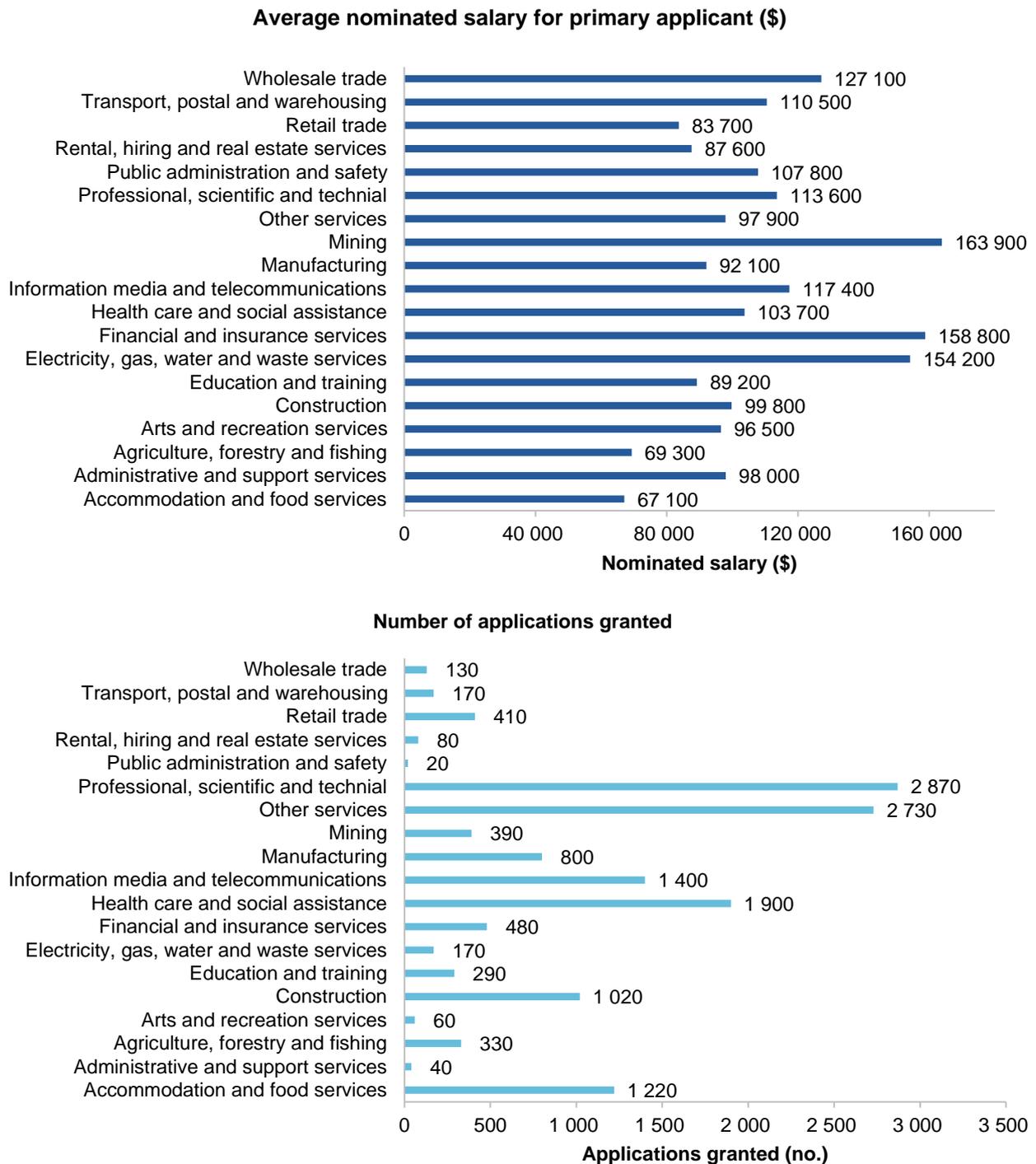
The re-design of the employer-sponsored temporary skilled migration, including how it is targeted, would have more fundamental effects. For instance, employer-sponsored temporary skilled migration is targeted, in part, by a salary threshold — The Temporary Skilled Migrant Income Threshold (TSMIT)¹¹ — that aims to prevent the use of sponsorship for low-wage occupations. However, while originally intended to reflect the median Australian income, the threshold has been held constant at \$53 900 since 1 July 2013 and would have risen to \$63 000 if indexed by the wage price index (Coates, Sherrell and Mackey 2022; Willox 2022).

Many sponsored workers are not affected by the TSMIT, even if it were indexed to the wage price index. On average, for visas granted in the September quarter of 2022, the nominated wage for temporary migrants across all industries is well in excess of this threshold (\$104 500), with the average for individual industries being in excess of \$80 000 except for in *Accommodation and Food Services* (\$67 100) and *Agriculture, Fishing and Forestry* (\$69 300) (Home Affairs 2022b, p. 6) (figure 2.5). However, at wage levels closer to the TSMIT (i.e. below median wages) employer-sponsored migration will include people with lower-level skills and experience — raising questions about the degree of complementarity to the existing workforce.

¹¹ In addition, employers must ensure that overseas workers are paid no less than an equivalent Australian worker.

Employer-sponsored temporary migration is also restricted to occupations in the relevant occupational skill shortage list. These lists significantly and adversely restrict the scope of (temporary *and* permanent) migration, which provides a strong motivation for their reconsideration (section 2.4)

Figure 2.5 – Average nominated salaries for temporary skilled migrants are relatively high in most industries, June to September 2022^a



^a For applications granted in 2022-23 as at 30 September 2022.

Source: Department of Home Affairs (2022b).

Permanent skilled migration

While it is difficult to directly estimate the extent of matching of jobs and skills among migrants, evidence from the Continuous Survey of Australian Migrants (CSAM) shows that after 18 months of settlement, 73% of skilled migrants were employed in either their nominated occupation (57%) or in a different occupation with an equivalent or higher level of skill (16%) (Department of Home Affairs 2020, p. 7). Among the 23% of all skilled migrants working at a lower level than their nominated field, this was more common in the state-sponsored scheme (31.5%) than for the onshore independent stream (26%), offshore independent (20%), or employer-sponsored (13%) (CEDA 2021a, p. 37).

Fiscal impacts are much more significant for permanent migration visas than for temporary — the longer durations entail greater opportunities to capture tax revenue over a migrant's working life, as well as greater risks of government expenditures later in life. The lifetime net fiscal impact of migration varies significantly between visa subclasses (table 2.3). Employer sponsored migrants have the highest net fiscal impact, while the Business Innovation & Investment visas are associated with the lowest (negative) fiscal impacts of the skilled migration streams.

From a fiscal perspective, the performance of the permanent migration program could be improved by adjusting the balance of visa subclasses in the migrant intake to favour the better-performing visa subclasses.¹² However, it is also important to consider how different visas contribute to labour market matching and whether they achieve other policy objectives. To the extent that it is clear why some visas perform better than others, this will help inform how reform could improve particular visa subclasses and/or whether the balance of the migrant intake should be changed.

Table 2.3 – Lifetime fiscal impacts vary between permanent visa subclasses
Number of visa places for 2022-23 and estimated lifetime net fiscal impacts of primary applicants for 2018-19

| Visa category | 2022-23 Planned number of migrants | | Estimated lifetime net fiscal impact for 2018-19 cohort (primary applicants) |
|----------------------------------|------------------------------------|----------------|--|
| | 2021-22 | 2022-23 | (Net Present Value, \$) |
| | No. | No. | |
| Employer Nominated | 22 000 | 35 000 | 557 000 |
| Skilled Independent | 6 500 | 32 100 | 386 000 |
| Regional | 11 200 | 34 000 | 279 000 |
| State / Territory Sponsored | 11 200 | 31 000 | 186 000 |
| Business Innovation & Investment | 13 500 | 5 000 | -117 000 |
| Global Talent (Independent) | 15 000 | 5 000 | – |
| Distinguished Talent | 200 | 300 | – |
| Total skilled | 79 600 | 142 400 | 198 000 |
| Australian population | – | – | -85 000 |

Sources: Department of Home Affairs (2022); Varela et al. (2021).

¹² This would require sufficient additional demand from applicants (and in some cases, sponsors) for different visa subclasses, and would also be subject to assumptions about the quality of additional applicants in each stream.

Business and investment visas

Business Innovation and Investment program (BIIP) visas are intended to attract foreign investment. However, these visas do not appear to have achieved this outcome or to have promoted innovation or genuine entrepreneurship (as discussed in chapter 2 of volume 3 and in PC (2016b)). In 2015, the Joint Standing Committee on Migration found that while the BIIP delivers some economic benefits, it failed on many grounds:

... based on the evidence, it is difficult to conclude that the programme meets any of the following key objectives:

- increase the export of Australian goods and services
- increase the production of goods and services in Australia
- introduce new or improved technology
- develop links with international markets
- increase the dispersal of business migrants across Australia through State and Territory government nomination. (Joint Standing Committee on Migration 2015, p. 30)

Moreover the mix of migrants using BIIP visas are inimical to productivity and fiscal outcomes. Compared with skilled worker visa holders, they have lower incomes, lower skills, poorer English language proficiency and are older. On average, the average business investment visa holder imposes a net fiscal cost of \$117 000 (Varela et al. 2021), which is well below that of other skilled migrants *and* of non-migrant Australians. Indeed, the estimated fiscal cost of the visa program could be greater, given that BIIP visa holders are more likely to be accompanied by secondary applicants.¹³

In 2021, the Australian Government (2021) announced a host of changes to the BIIP, which could improve its performance, but only at the margin.

- Age limits of 55 years were implemented, although they can be waived by the nominating party — the relevant State or Territory Government, or Austrade. The potential for State and Territory Governments to waive the age threshold disregards the fact that the majority of the fiscal risk at older ages is borne at the federal level (due to aged care and health services).
- English language requirements were implemented, albeit with the alternative option of paying a 2nd visa application charge, which may well be an entirely inadequate payment given future fiscal risks.
- Several investment thresholds were raised, including those relating to complying Investments, minimum net assets. However, these assets are owned by the visa holder and do not necessarily confer any benefit on Australians. As a highly open economy, Australia has far better ways of accessing foreign direct investment and in the volumes that make a difference.
- The minimum duration of investment was increased in some cases, including for provisional (temporary) visas, where investments now must be held for the duration of that visa. However, in several other cases, including for permanent migration visas, minimum durations were not changed.

It is unlikely that the recent (modest) changes to the BIIP will significantly improve outcomes. Overall, this set of visas performs poorly on almost all fronts.

¹³ Migrants under BIIP visas between 2012 and 2016 were on average accompanied by 2.4 secondary applicants, compared with an average of less than one for migrants under skilled-worker visa streams (Coates, Sherrell and Mackey 2021, p. 44).

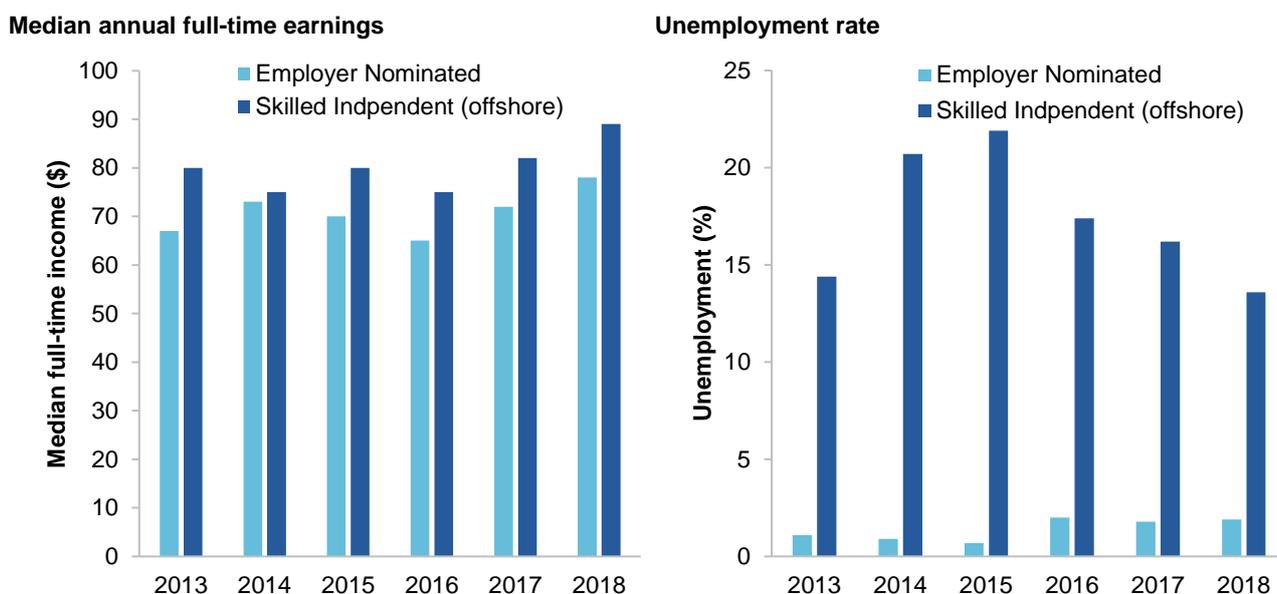
Sponsored and independent permanent visas

The bulk of the skilled permanent visa program is split between:

- the Employer Nominated visa (subclass 186), which requires an employer to formally nominate/sponsor an individual employee for permanent migration
- the Skilled Independent visa (subclass 189), which is based on a points system that rewards migrants' skills and attributes
- the Permanent Residence (Skilled Regional) visa (subclass 191), which also works on the basis of a points system but require a minimum duration of time spent in a nominated regional area
- the Skilled Nominated visa (subclass 190) which are allocated to State and Territory decision-making authorities allowing the application of additional criteria.

Employer-sponsored migrants have the highest net positive fiscal impact, followed by the skilled independent visa holders, though the latter have (slightly) higher wages when employed (figure 2.6).

Figure 2.6 – Skilled Independent visas have higher incomes and unemployment, 2013–2018



Source: Department of Home Affairs (2020) Continuous Survey of Australian Migrants (CSAM).

The fiscal results are counterintuitive given that the incentives faced by sponsoring employers only partly align with the public benefit, while the skill mix and incentives faced by skilled independent visa holders appear more likely to raise wages:

- While employers might expect to retain their sponsored worker for a significant period of time (say up to 5 or 10 years), they have no direct incentive to ensure the applicant has a successful career subsequently, nor any incentives related to the fiscal implications of the retirement phase. Accordingly, there is some potential for a disconnect between employer needs and net fiscal outcomes over the lifetime. There is a strong case that age restrictions should apply to any sponsored permanent migration visa, and potentially other attributes that are important for ongoing career success (such as English language skills).
- Similarly, employers have little to no incentive to consider the fiscal impacts of secondary applicants or the migration unit as a whole (although such impacts are not captured in the estimates in table 2.4).

- Employer sponsorship can also adversely affect labour mobility, at least temporarily, given migrant workers are unable to further test the labour market. This partly reflects the relatively high transaction costs borne by the sponsoring employers, which also leads to greater risk aversion about sponsorship (discussed later). 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.
- Moreover, compared with employer-nominated visas, skilled independent visas entail no geographic restriction on the migrant (as is the case for regional and state and territory programs) and requires no negotiation or sense of implied obligation to an employer. A priori, it would appear to be the most desirable form of skilled visa from the migrant's perspective. Therefore, it would be reasonable to expect the most capable and valued workers to opt into the skilled independent visa.
- In addition, employer-sponsored migration has been used for a range of occupations, not necessarily higher-skilled or higher-income occupations, particularly prior to the pandemic (figure 2.7). Cooks were the most common occupation among Employer Nominated visas awarded between 2012-13 up to 2019-20, while a significant number worked as motor mechanics and restaurant and café managers — occupations where the prospects for complementarity with incumbent workers are relatively low. (Non-complementarity is usually associated with lower wages.)

The most likely reasons for better outcomes are that employer nomination identifies positive hard-to-observe traits of a migrant that are not readily measurable through the points-based skilled independent visa stream, and that its lower tangible and intangible costs encourage its uptake by talented migrants. Employers are uniquely situated to observe the skills and attributes required for the job, including soft skills that may not be demonstrated by formal credentials. This is difficult to replicate by other means and, consequently, points-based systems face an inherent challenge of targeting skills and attributes valued for a particular occupation — other than rewarding paid work experience itself, which is done imperfectly (discussed below).

Employer-sponsored visas are also attractive to those migrants wanting greater certainty about their career and wages given that skill mismatch is higher for independent visas. While independent visa holders tend to get higher wages when employed, they also have higher unemployment rates (figure 2.6). CEDA (2021a) noted that the Australian permanent visa subclasses that relied on the broadest occupation lists and lacked employer involvement had the highest rates of skills mismatch (p. 10).

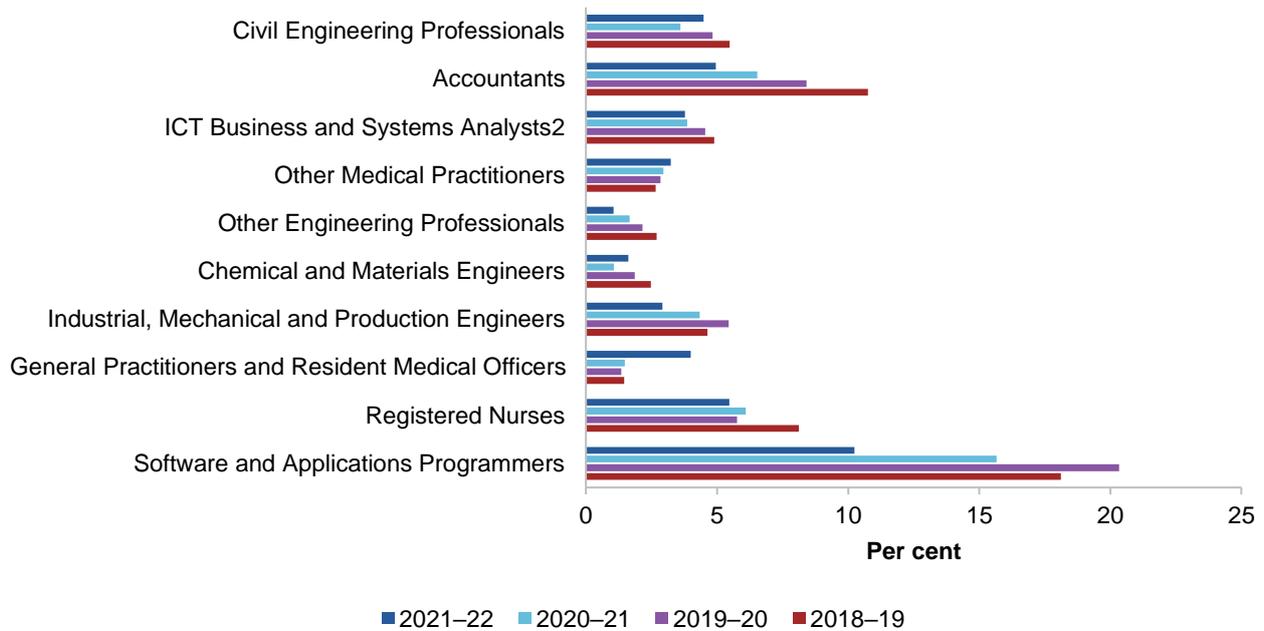
The pathway to permanent residency is also important given that about three quarters of Employer Nominated visas were awarded to applicants who had previously held a TSS visa (Coates, Sherrell and Mackey 2021). To the extent that the positive fiscal outcomes are a product of greater certainty about the applicant's ability to contribute in the workplace, this is likely to be greatly assisted by time spent on temporary skilled migration. In other words, a pathway to permanent residency that includes a period of temporary skilled migration may itself be valuable in identifying migrants with positive employment prospects (and this need not be unique to employer-sponsored permanent migration).

The (misplaced) intuition that the points-based skilled independent visa stream would necessarily be superior to the employer nominated stream is important in providing lessons for migration policy. Policy settings should, as much as possible, depend on evidence about outcomes and the underlying processes that lead to good employment and fiscal outcomes.

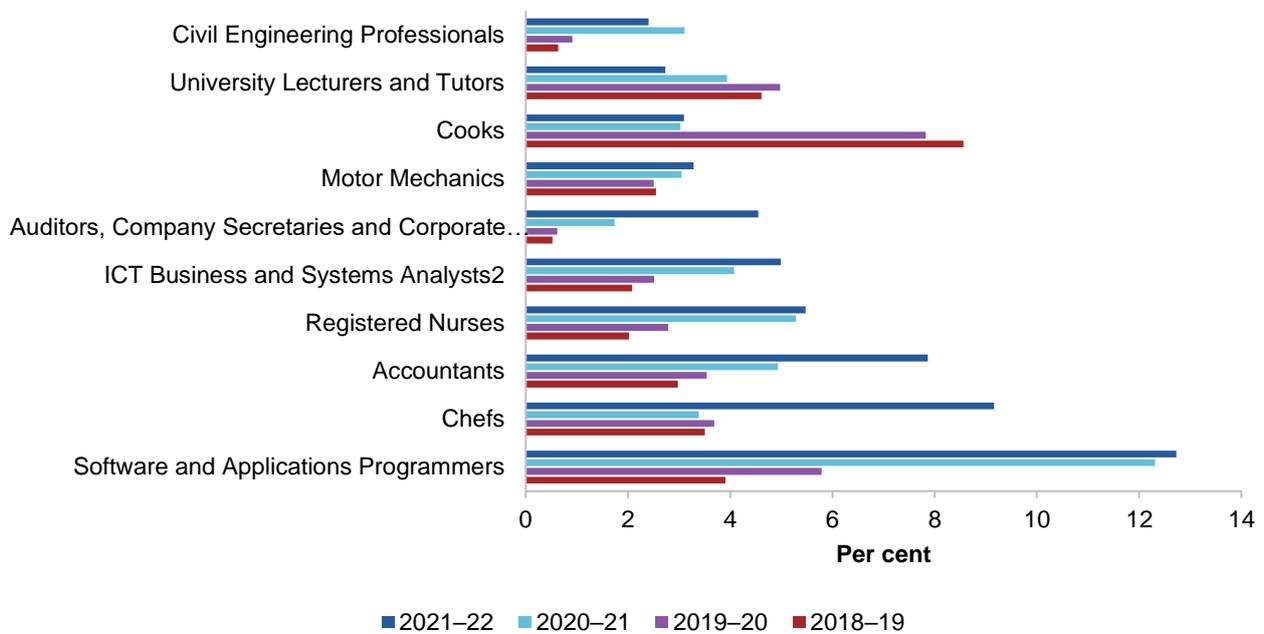
Figure 2.7 – Top 10 nominated occupations for permanent skilled visas before and after the pandemic

Primary applicants, 2018-19 to 2020-21

Skilled Independent visa



Employer Nominated visa



Source: Department of Home Affairs, Australian Migration Statistics, 2020-21.

Overall, the evidence suggests that **employer-sponsorship provides more certainty of labour market outcomes**, but **points systems can target valuable characteristics and higher-level skills**. There would be value in better targeting sponsorship towards higher-level skills and occupations, and accounting for the

fiscal risks related to age. The points-based system is more prone to labour market mismatch for some applicants, suggesting the selection mechanism could be better linked with the needs and preferences of employers in the labour market.

A key factor in the targeting of permanent skilled migration is its reliance on skilled occupation lists, which restrict skilled migration to occupations that are identified as being in shortage. Income thresholds may also be relevant in how Employer Nominated visas are used — similar to requirements for the TSS, employers must pay above the TSMIT threshold and ensure that overseas workers are paid no less than an equivalent Australian worker would.

Skilled occupation lists

Skilled occupation lists are used as a tool for rationing and allocation of sponsored temporary, sponsored permanent, and independent permanent migration, for both sponsored and independent visas (box 2.3). They are a key mechanism determining the types of imported skills. The performance of lists 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 have implications for labour market outcomes more broadly.

There are a range of conceptual and practical issues concerning the implementation of skills shortage lists.

Box 2.3 – 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.

Practical issues concerning skill shortages and occupational lists

Reliance on ‘skill shortages’ as a rationale for migration poses the risk that employers (either individually or at the industry-level) can claim shortages 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, the duration of the shortage, the number of job vacancies, and the critical nature of the occupation (Joint Standing Committee on Migration 2021, p. x).

Skills shortages are also subject to employer preferences. The Grattan Institute 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)

This is not to say that the concept of skill shortages is without value, although much depends on their definition. Problematically, skill shortages are often defined as difficulties in hiring at *current levels* of remuneration (Boyton 2022). Instead, shortages should be identified where employers have difficulties in hiring even *after significant wage increases* rather than 'at current levels'.

The Productivity Commission has previously highlighted practical concerns about the accuracy of skill shortage lists as they are used in vocational education. Shortages have remained on the National Skills 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 shows the importance of how lists are constructed and updated.

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).

Staying up to date

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,¹⁴ it is not possible for a shortage (or the occupation itself) to be identified (Joint Standing Committee on Migration 2021, p. 8). As described by VETASSESS:

... ANZSCO has only undergone minor revisions in 2009, 2013 and 2019 to address selected emerging occupations, specialisations and region-specific issues. That is, there has been little change over the course of two decades. (sub. 157, p. 3)

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 occupation lists can prevent migrant workers from taking up alternative 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 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.

¹⁴ 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.

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 some cases, additional visa subclasses are required to capture highly valued occupations that are excluded by the applicable skilled occupation list. As discussed in volume 4, the Global Talent (Independent) visa (subclass 858) is used to target 10 specific sectors, including ‘DigiTech’, ‘Agri-food and AgTech’ and ‘Financial Services and FinTech’.¹⁵ In addition, several technology companies were accredited as sponsors under the Global Talent (Employer Sponsored) program, which allows sponsorship that is not restricted to occupation lists (Home Affairs 2021d).¹⁶

Overall, skilled occupations lists are not useful tools for migration policy. However, if refined to better capture conceptually sound measures of shortages, such lists can (and already do) have other valuable uses. For instance, well-researched and regularly updated lists can be used for planning and forward-looking policy formation.



Finding 7.2 **Opportunities to improve current migration settings**

Australia’s visa program streams vary significantly in their contribution to productivity. In some cases, the balance of the migrant intake has shifted in the past decade toward visas that make relatively poor contributions.

Greater usage of temporary skilled migration would improve productivity. One way to facilitate greater uptake would be to continually improve the administrative efficiency of the approval process. Another, more fundamental reform, would be to re-design the employer-sponsored temporary skilled visa, including how it is targeted and how well it meets the needs of employers and employees.

Both employer-sponsorship and points-based systems can play important roles in permanent migration. Employer-sponsorship provides more certainty of labour market outcomes, but there would be value in better targeting sponsorship in terms of skills, occupations, and age. A well-functioning points-based system can also play an important role in attracting migrants with valuable skills and characteristics, as long as the selection mechanism is sufficiently linked with the needs and preferences of employers.

Skilled occupation lists have major limitations when used as a criterion for permanent migration: they are conceptually ill-founded in their current form and difficult to accurately construct and update. Nonetheless, outside of migration policy, adapted forms of such lists may be useful for workforce planning more generally.

¹⁵ There are 15 000 visa places available under this program in 2021-22 and workers do not need to be employer sponsored (Home Affairs 2021e). Places in the Global Talent Independent visa category were awarded in the following priority sectors: DigiTech (34%); Health Industries (23%); Energy (17%); Financial Services and FinTech (12%); Resources (7%); Defence, Advanced Manufacturing and Space (6%); Agri-food and AgTech (0.9%); Infrastructure and Tourism (0.4%); Education (0.3%); Circular Economy (0.1%) (Home Affairs 2021a, p. 11).

¹⁶ As at end February 2022, these include Amazon, Culture Amp and Refinitiv (Home Affairs 2022a).

2.3 A better targeted migrant intake

A coordinated suite of reforms is needed to improve the composition of the migrant intake and to better promote productivity.

The balance of the permanent migration intake needs to shift away from skilled visas that contribute poorly to (or indeed detract from) productivity, wellbeing and other objectives.

The migration program should form stronger links with the needs and preferences of employers in the labour market by **better recognising ongoing employment and income levels**, as well as (but not necessarily) employer sponsorship. To the extent that policy settings can more directly reward labour market outcomes, this reduces the need to rely on characteristics and identifiers to predict labour market potential (like credentials). It can also provide a means of **avoiding reliance on skilled occupation lists**.

For permanent migration, selection criteria and other mechanisms used to determine eligibility should be calibrated in **recognition of age-related fiscal risks**. Because such risks do not apply to temporary migration, a better-designed temporary skilled migration visa could improve the value proposition of temporary migration (for instance, given the costs of relocation) without the fiscal risks of permanent migration. In particular, **sponsored temporary migration of sufficiently long duration** can meet the needs of migrants and employers alike (while remaining compatible with pathways to permanent residency).

Improving the pathways from temporary to permanent residency can reduce the risk of underemployment given the evidence that qualifications are a necessary but not sufficient condition for access to skilled occupations in the labour market. In particular, this involves shifting away from the presumption that qualifications will, in their own right, lead directly to permanent residency. Rather, obtaining an Australian qualification might reasonably be accompanied by a temporary visa that allows sufficient time to test the labour market and undertake some early-career work, which could then feed into eligibility for permanent migration.

In light of this suite of changes, pathways from temporary to permanent migration should acknowledge **the relevance of migrants' first arrival** in Australia as the time from which their contributions to productivity and fiscal outcomes begin. At the same time, the targeting of the migrant intake would be improved if steps were taken to **avoid creating backlogs where possible**, particularly if merit-based systems are designed to allow the top-most qualified applicants to be accepted each year.

2.4 Abolish business visas

As noted above, BIIP visas have made small contributions to their primary purpose of attracting new investment to Australia and have been associated with poorer (negative) fiscal outcomes compared with other skilled visas. In some cases, the BIIP outcomes reflect policy settings that could be improved (e.g. by amending conditions regarding the type, threshold, and duration of investment). However, the outcomes reflect a flawed initial concept — the types of investment targeted by the Significant Investor and Premium Investor Visas are unlikely to benefit greatly from a designated visa stream.

There may be a valid role for a visa stream that caters to entrepreneurs (as opposed to employees), but this can and should be captured as part of an improved points test for the Skilled Independent visa.

Given the small number of such visas, the costs of business visas account for a small fiscal liability in absolute terms. However, each permanent visa granted under the BIIP scheme also crowds out an alternative visa. If all 5000 of the BIIP visas slated for 2022-23 were replaced with a Skilled Independent or Employer Sponsored visa

(with no other changes to those programs) the fiscal difference over the lifetime would be \$2.5 to \$3.4 billion in net present value terms. There is no case for retaining this category of permanent visa.

Removing the visa also limits the fiscal impact of secondary applicants given that they are much more commonly associated with BIIP visas. This is a straightforward way to shift the balance away from poorer performing skilled visas to those with greater contributions to job matching and fiscal returns.



Recommendation 7.1 Abolishing investor visas

The Australian Government should abolish the Business Innovation & Investment visa program. Temporary migration should be facilitated for people with genuine plans to start a business in Australia, while pathways to permanent residency should involve the revised Skilled Independent visa, based on a points test that better accounts for income levels and age.

2.5 Replace skill lists

As discussed above, skill lists are permeated with deep flaws. These have been widely recognised by most stakeholders, though many advocate repair rather than removal.

- 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.
- CEDA (2019) recommended greater transparency in the data and methods used to devise the lists; reviewing the ANZSCO codes to better align them with technology and labour market trends; and changing governance arrangements (similar to the Migration Advisory Committee in the United Kingdom) to undertake analysis, consultation and advice on the formulation of skilled occupation lists.

However, the Productivity Commission doubts that sufficient repair is feasible for the purposes for which the lists are intended for the reasons highlighted earlier. The conceptual underpinning of list of occupations with shortages is weak, it is hard to see how a bureaucratic process could keep up with the many changes in occupations that emerge over time, and they fail to deal with the heterogeneity within any occupation, however finely tuned. Above all, giving more weight to employer-nominated migration with income thresholds takes advantage of the specific needs of businesses, and include facets that are missing from lists. These include specific experience, proficiency in given tasks within an occupation, the capacity to communicate and subtle factors like connections with peers, personal skills and motivation.

Moreover, to the extent that an occupation is relevant to labour market success, that role, if any, can be incorporated into an empirically-based points-based system (as described below).

The Productivity Commission agrees with the Grattan Institute (Coates, Sherrell and Mackey 2021, p. 62) that skills lists have little place in migration policy and should be removed.

2.6 Using income levels as benchmarks and thresholds

Implementing wage thresholds, higher than the current TSMIT would be a simpler and more effective way of identifying skills and occupations valued by employers than skill lists, an idea first proposed by the Grattan Institute (Coates, Sherrell and Mackey 2021, 2022; Coates, Wiltshire and Reysenbach 2022). Under this proposal, employers in any industry could fill vacancies via a sponsored temporary or permanent visa (subject to planning caps), so long as the relevant wage thresholds were exceeded. The proposal would strengthen the link between labour market needs and migration flows, and promote productivity and positive fiscal outcomes given the link between these.

Government can manage the risks from setting higher income thresholds by setting sensible thresholds and, introducing carve outs from the threshold in exceptional cases. Other visa categories provide an automatic mechanism for catering for the needs of some employees and communities without the need for new policy.

Determining thresholds

Views about the desirable level of thresholds — which are already in use for some visa categories — depend on the design of the overall migration system. The Grattan Institute suggested a threshold of \$70 000 for employer-sponsored temporary migration and of \$85 000 for employer-sponsored permanent migration (Coates and Reysenbach 2022; Coates, Wiltshire and Reysenbach 2022), which is consistent with dropping skills lists altogether. These are reasonable thresholds given it also supports abandoning skill lists, but acknowledges setting the exact number requires judgment. (As argued below, the Productivity Commission also recommends that the permanent visa threshold should rise above \$85 000 once a certain age limit is reached).

Thresholds around the levels specified above are high enough to make skill lists redundant and to avoid concerns about displacing lower-wage incumbent workers, and low enough not to eliminate migration of many valued skilled workers. The two-tier nature of the thresholds takes account of fiscal considerations. Permanent migrants have rights to Australian social security and taxpayer-funded human services, so that these costs need to be offset by the returns they provide to the economy when they are working. There are no equivalent problems for temporary migrants, who must insure against the costs of government services.

All thresholds have boundary problems. There *will* be valuable migrants who fall just below the relevant thresholds, but this will always hold, including for the current TSMIT. Notably, wages for higher skill levels, occupations and industries are often above even relatively high thresholds (figure 2.8 and figure 2.9). In any case, thresholds should not be set rigidly. They will need to maintain some degree of relativity with movements in average wages over time or they will no longer have their intended effect, and if they are too high or too low, periodic reviews should alter their levels.

There are alternative thresholds to the Productivity Commission's (and the Grattan Institute's proposal), but none look superior. The Australian Industry Group (2022) and Australian Chamber of Commerce and Industry (2023) cautioned against large increases to the income thresholds, but this would work against eliminating skill lists. The ACTU had suggested the TSMIT be set in line with Average Weekly Earnings (equivalent to \$90 917 at the time of this report) (ACTU 2022a, p. 16)¹⁷ but would excessively undermine the role of the migration system in attracting skilled workers. An alternative approach would be a hybrid of the current migration system that maintained skill lists for some wage thresholds and removed them above a high level. For example, the Business Council of Australia suggested that above a threshold of \$92 000,

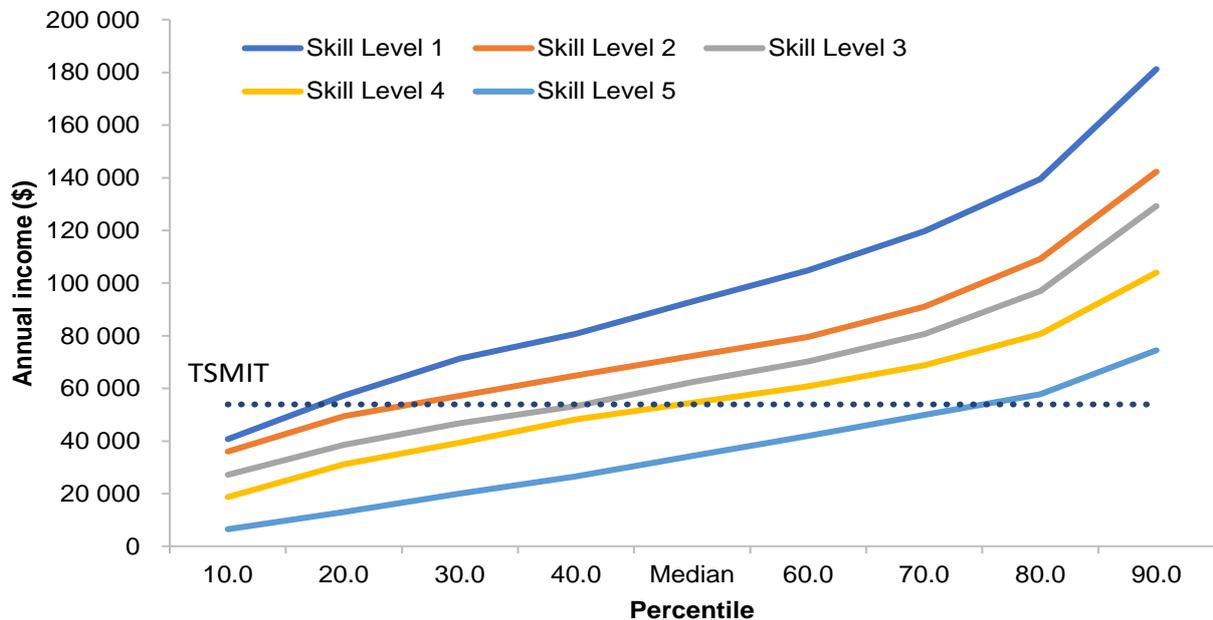
¹⁷ In 2018, the ACTU also suggested that consideration should be given to setting the TSMIT at level equivalent to Average Weekly Earnings, and that as a more immediate measure, the TSMIT be raised to \$60 000 in order to make up for a lack of indexation.

employer-sponsored migration could occur without restriction from a skilled occupations list; while for jobs paying between \$92 000 and a lower bound (to be determined by government) employer-sponsored migration could occur with the use of an improved occupations list (where the lower bound should be no more than \$65 000) (BCA 2022, pp. 14–16). This is an imaginative option, but is still subject to the flaws of skill lists (albeit reducing their risks). CEDA recommended creating a stream for high-wage, low-risk migration above a threshold of \$120 000, while also raising the TSMIT for temporary migration to \$66 000 (Ball 2022, p. 13).

While differentiating thresholds between temporary and permanent visas has a strong foundation, the question remains whether there are any other dimensions along which thresholds should vary.

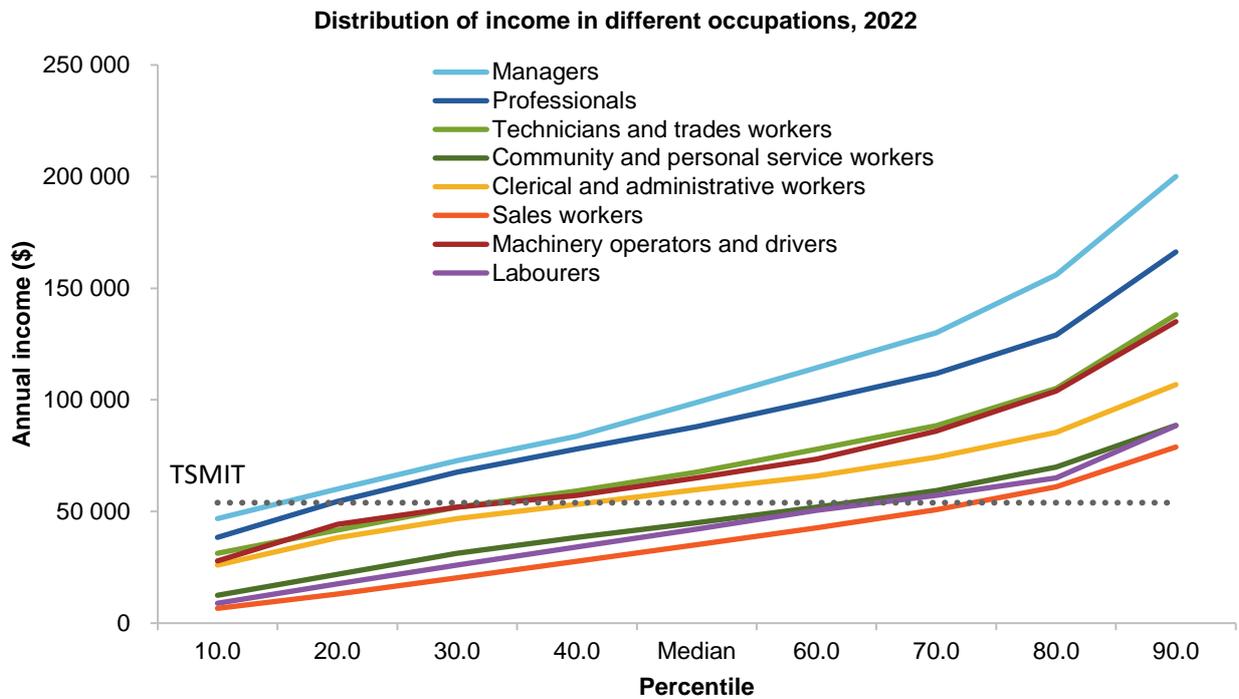
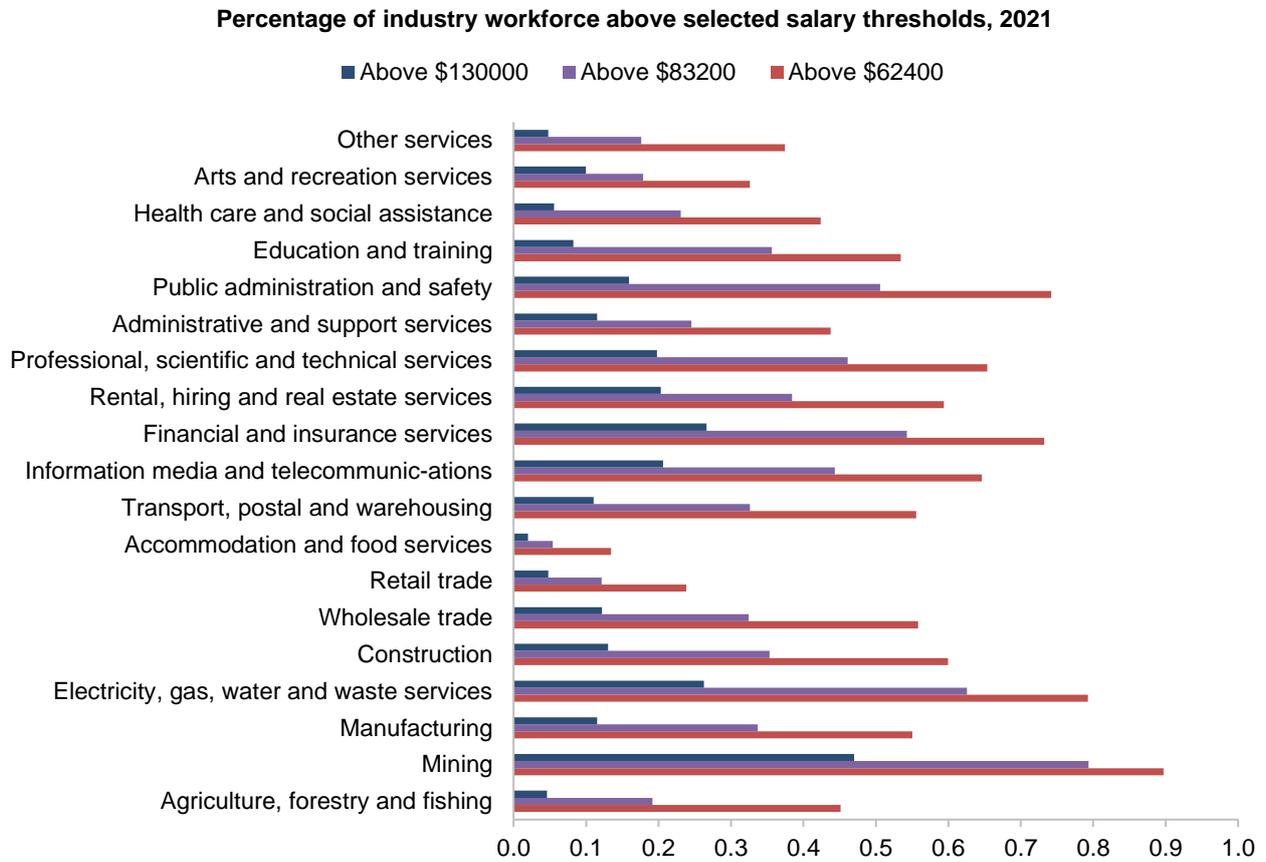
Figure 2.8 – Distribution of salaries compared with TSMIT

Annual income for all employees by skill level, 2022



Source: ABS (*Employee Earnings*, August 2022, Cat. no. 6337.0).

Figure 2.9 – Distribution of salaries by income and occupation, all employees



Sources: ABS (*Characteristics of Employment, Australia, August 2021, Cat. no. 6333.0*); ABS (*Employee Earnings, August 2022, Cat. no. 6337.0*).

Should there be a regional dimension?

There has long been a concern to meet the skill needs of regional Australia. These can be different, as evident during the resources boom, when there was an imperative to attract skilled labour to remote areas, and for professions like general practitioners that can be in short supply in some regional areas. However, arguments that the thresholds should be different across regions are not compelling:

- Shortages are often resolved through high wages. A floor for an employer-sponsored visa can readily be exceeded and so the proposed thresholds do not bind in that instance.
- Regional areas have long been served by visa streams other than employer sponsorship — such as working holiday makers for temporary migrants — which can relieve the needs for certain types of transient lower-wage workers. International students in regional universities can also provide labour in areas where there are regional universities.
- Regional skill shortages are often due to barriers to geographic mobility other than visa status.

Age is a consideration for income thresholds and eligibility for permanent employer sponsored visas

While \$85 000 for permanent employer-sponsored migrants is a good starting threshold, there are strong grounds for it to rise with age. While some employers may require more experienced people to fill higher-level vacancies, doing so via permanent (as opposed to temporary) migration comes at higher fiscal costs, given that modelling suggests skilled migrants have a negative expected fiscal impact above 48 years of age (Varela et al. 2021). This problem could be resolved by raising the income threshold with age, but removing eligibility for a permanent employer-sponsored visa at some older age. Complexity would be reduced (and certainty for applicants and employers increased) by only having a few age-dependent thresholds, rather than a continuously rising level. No age limit or relationship between age and income thresholds should apply to temporary employer-sponsored visas as there are no equivalent fiscal considerations.

The age limit for permanent employer-sponsored visas should consider the onshore labour market experience of applicants who were formerly in Australia on temporary visas. As noted in section 2.1, a migrant's true fiscal impact over their lifetime includes their stay from the 'date of first arrival', which may include continuous periods under temporary migration visas (including bridging visas). It would be counterproductive for permanent residency pathways to punish migrants for holding temporary visas (which allow migrants to prove their value in the labour market). Doing so may discourage some highly able people from applying for temporary migration visas if they see that as the pathway to permanency. Accounting for a migrant's age and continuous periods of temporary migration may require evidence of labour market outcomes over the duration of their stay.



Recommendation 7.2

Implementing wage thresholds for employer sponsored visas

The Australian Government should remove current list-based restrictions for employer-sponsored temporary and permanent skilled visas and set an income threshold well above the Temporary Skilled Migration Income Threshold rate. The income threshold that applies to temporary migration should be lower than for permanent. The income threshold for employer-sponsored permanent visas should increase with age, though at some older age, people would no longer be eligible for this visa category.

2.7 Reforming the points-based system

As for employer-nominated visas, being on a skills list would no longer be a *prerequisite* for eligibility for the points-based visa stream. However, any characteristic of an applicant, including their occupation, could independently feature in the model determining eligibility so long as its inclusion was a material and empirically-verified predictor of positive labour market and fiscal outcomes (as discussed further below).

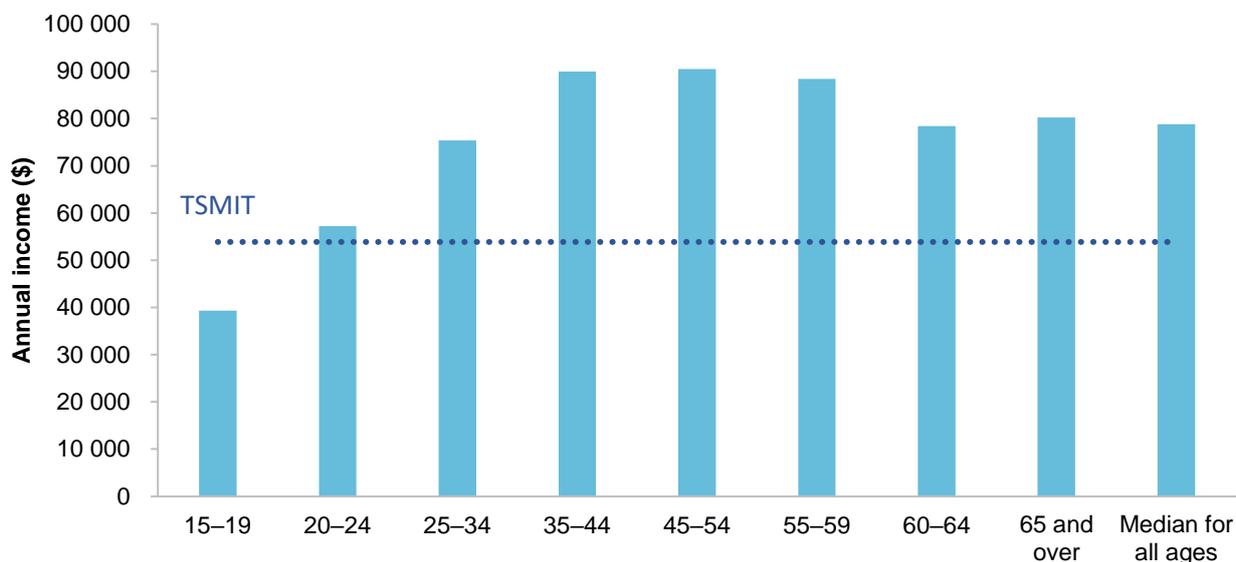
Prima facie, the points-based system could place more emphasis on ongoing employment and its quality (in terms of skill and income level) which would help to improve the composition of the skilled independent migrant intake.¹⁸

- Points could be awarded for current employment at a sufficiently high skill level, weighted by income level for a given age group. This would help to identify applicants who are outperforming their peers at different stages of their career.
- Points awarded for work experience could also be weighted by income level, to better reflect quality rather than simply duration.
- Additional points could be awarded to secondary applicants for their current ongoing skilled employment and according to current salary level. This would help to better acknowledge the impacts of secondary applicants.

Accounting for the interaction between age and income would be useful given that income varies over the people’s lifetimes. For instance, people earning an income of \$80 000 or \$90 000 would be well above the median if they were aged under 30 years, but below the median for those aged 35 to 55 years (figure 2.10). Any advantage given to applicants at those income levels would disproportionately favour those at older ages. A set of income thresholds or benchmarks would help identify high achievers within different age-groups.

Figure 2.10 – Salary thresholds have implications for the applicants affected

Median wages by age, 2022



Source: ABS (*Employee Earnings*, August 2022, Cat. no. 6337.0).

Such changes would also better acknowledge the role of age in the points system. For instance, more points are currently awarded for people in the 25–33 year age bracket than in the 18–25 year age group. This

¹⁸ The points system already recognises skilled employment experience. However, the points allocated to work experience are geared towards past experience, benefiting applicants who are 8 years into their career.

means that a person with a high-paying job at age 24 years is treated as less desirable than someone with the same job at age 26 years.

Continuous improvement of the points system

The points system should be reviewed regularly and subjected to ongoing econometric analysis to re-assess and refine the factors that lead to good labour market and fiscal outcomes.¹⁹ The evidence suggests that beyond the changes related to age and income discussed above, there are other factors whose weight in the points-based system should be re-assessed.

It is important that the weight given to different educational qualifications reflects their value in the labour market. For instance, if doctorate degrees are not associated with improved labour market outcomes, they should not be given additional points above Bachelor or Masters qualifications (although this may vary by field of study). At the same time, professional credentials (such as chartered status for engineers and accountants) have strong links to employment outcomes. Where there is evidence of a strong link with employment outcomes, such credentials could also be rewarded under the points system.

It may also be possible to refine the treatment of the migration unit, to better capture the fiscal effects of secondary applicants. This already occurs to some degree in the points system, but could be refined with better empirical evidence over time.

Table 2.4 – The points system for the Skilled Independent visa could be improved^b

| | Points | Potential improvement |
|--|--------|--|
| Age | | |
| At least 18 but less than 25 years | 25 | The points awarded for the 25–33 year age group should be in line with the 18–25 year age group. |
| At least 25 but less than 33 years | 30 | |
| At least 33 but less than 40 years | 25 | Additional points should be awarded according to current salary level, with the thresholds and points varying by age group. |
| At least 40 but less than 45 years | 15 | |
| 45 years and over | 0 | |
| Overseas skilled employment | | |
| Less than 3 years | 0 | The points allocated to work experience are geared towards past experience, benefiting applicants who are 8 years into their career. However, more emphasis could be put on current ongoing employment at a sufficiently high skill level, weighted by income level for a given age group, as this would produce a better indicator of labour market outcomes. |
| At least 3 but less than 5 years | 5 | |
| At least 5 years but less than 8 years | 10 | |
| At least 8 years | 15 | |
| Australian skilled employment | | |
| Less than 1 year | 5 | |
| At least 1 but less than 3 years | 10 | |
| At least 3 but less than 5 years | 15 | |
| At least 8 years | 20 | |

¹⁹ Some evidence suggests that past attempts to better target the migrant intake failed to improve outcomes. For instance, Tani (2020) highlights that migrants' skills and qualifications were often underutilised, at times, in spite of changes to policy that aimed to target particular characteristics.

| | Points | Potential improvement |
|---|----------|--|
| Educational qualifications | | |
| Doctorate | 20 | If doctorate degrees are not associated with improved labour market outcomes, they should not be given additional points above Bachelor or Master's qualifications. Given that doctorate degrees fill specific technical needs that could not otherwise be met, these needs should be met through facilitation of employer sponsorship. |
| Bachelor | 15 | |
| Diploma or trade qualification | 10 | |
| Occupational qualification | 10 | |
| English language skills | | |
| Competent | 0 | English language skills should be presumed to be proficient for migrants from English-speaking countries, or for those who have had certified English training in their home country. Tertiary education providers should be encouraged to certify students' English language skills as evidenced through the completion of their studies. |
| Proficient | 10 | |
| Superior | 20 | |
| Partner skills | | |
| Depending on age, English language, nominated skilled occupation, and skills assessment | 5–10 | It may be reasonable to consider the outcomes of partners. |
| Other^a | Up to 20 | |

a. An additional 5 points (each) is allocated to eligible applicants who meet the following criteria: Australian study requirements; professional year in Australia; credentialed community language; and study in regional Australia.

Source: Department of Home Affairs.

Other improvements may be possible, including to the treatment of English language skills. While the Productivity Commission (2016b) previously found that English language skills are a useful predictor of labour market success, it may be possible to more efficiently test and certify them. For instance, English language skills could be presumed to be proficient for migrants from English-speaking countries, or for those who have had certified English training in their home country. Australian tertiary education providers could be authorised and encouraged to certify students' English language skills as an additional part of the completion of their studies.



Recommendation 7.3 Improving Skilled Independent visas

For the Skilled Independent visa (subclass 189), the Australian Government should remove current list-based restrictions, but the points system should be able to award points for any factors shown to be associated with fiscal and employment benefits. Additional points should be awarded for ongoing employment in Australia according to income level, with different income benchmarks for different age groups. Moreover, the design of the points system should be updated regularly based on empirical research.

2.8 Meeting employment needs in human services and care work

The largely-publicly-funded human services sector (which includes aged and disability care) faces complex labour and skill needs. The sector has often relied heavily on migrant labour to meet service demand, reflecting both ongoing growth in demand (due in part to population ageing) and factors limiting domestic labour supply. Shortages of labour are endemic, affecting the quality of care for vulnerable people. It has proven particularly difficult to attract workers in aged care, an issue that is likely to intensify given policy initiatives to raise staff-to-resident ratios, accompanied by the pressures of an ageing population (CEDA 2021b, pp. 14–15). To meet the 2023 target for additional caring time for residents, caring staff numbers would need to rise by more than 12% from 2022 to 2023 (Sutton and Ma 2022). Capacity constraints, among other factors, have led to long and growing waits for access to services (PC 2022f). Adding to these workforce pressures, a recent survey found that 75% of workers were considering leaving the sector in the next five years (PC 2022b, p. 77). With regard to the aged care workforce:

Many recent reviews have diagnosed a plethora of issues that have made the sector a comparatively unattractive and difficult place to work. The sector has struggled to attract and retain enough staff to keep pace with the demand for care and support services as the number of Australians aged over 65 years has continued to grow. The past few years have seen the expansion of home care in particular, as more older Australians choose to live at home for as long as feasible. ... Based on the current trajectory, various projections point to an increase in this shortfall of care workers over the coming decades. (PC 2022c, p. 3)

Difficulties in recruiting in the disability sector are equally severe (NDS 2021).

The Productivity Commission's recommendations to increase the wage threshold for eligibility for Employer Nominated and Skilled Independent visas could aggravate these shortages by reducing the supply of lower-paid migrant workers in some caring occupations and industries. The degree to which this occurs depends on the relative importance of skilled migrants in caring occupations and associated industries, and the likelihood they will lose eligibility for migration under the new system. The evidence suggests that low-paid skilled migrants are *not* the main source of overall migrant labour supply in the relevant parts of the labour market:²⁰

- In 2016, skilled temporary and permanent migrants accounted for 36% of all migrants working as carers and aides, while they accounted for 43% of all migrants working in residential aged care. The remaining migrants working in these occupations and industries were predominantly from the humanitarian, New Zealand, student and family migrant streams, which are not affected by the proposed changes to skilled migration visas.
- Moreover, skilled migrants in caring occupations and industries are often employed as professionals. Their typically higher pay rates means many of these are likely to remain eligible for the new skilled streams. The share of skilled migrants working in lower-skilled occupations in caring industries is significantly lower than the shares shown above. For example, skilled migrants categorised as labourers and community and personal service workers (lower-skill occupations) comprise only about 25% of the total migrant residential aged care workforce.

²⁰ Based on data from ABS 2019, *Microdata: Australian Census and Temporary Entrants Integrated Dataset, 2016* and ABS 2019, *Microdata: Australian Census and Temporary Entrants Integrated Dataset, 2016*.

Moreover, the Fair Work Commission's interim decision to raise minimum award wages for direct care workers by 15% from mid-2023 will probably elicit some additional labour supply — or at least reduce the outflow of workers.

Notwithstanding these counteracting factors, a shift in visa eligibility thresholds would be likely to worsen staff shortages. There are several policy options.

One possibility is to leave it to the labour market to resolve any emerging shortages, letting wages rise so that people shift from other parts of the economy into the caring sector. However, while wage adjustments in labour markets are usually effective in moving labour around the economy, this dynamic may be less effective in this critical area:

- Governments are key funders of care services. While larger and more regular wage increases may be possible, the growing demand for care workers discussed above and the financial difficulties experienced by providers will magnify the fiscal pressures facing government.²¹ Governments have many competing spending priorities. This constrains their ability to increase spending on any one area without significant tax increases, which have their own negative impacts on growth and efficiency (via the marginal excess burden of tax).
- There are non-wage barriers to labour supply from incumbent Australians, such as geographic barriers (given that service delivery often takes place at the service user's location) and mismatch of skills and preferences (given that face-to-face care work, while technically lower-skilled, would not suit everyone's capabilities or preferences).
- Attracting and retaining carers may depend not only on entry-level wages, but expected incomes over a person's career. In some care positions, there is likely to be limited scope for the kind of income progression that might occur in other industries (via promotion to managerial positions, movement to higher-paying firms, or by increasing productivity at the individual level).

One measure that could sidestep the fiscal constraints governments face in meeting growing needs for aged care services would be a new model designed to ensure sustainable funding of aged care. In its report into Australia's aged care system, the Productivity Commission proposed re-balancing public and private contributions to create a sustainable source of revenue (PC 2011a, chapter 8). There are alternatives that could achieve similar outcomes, such as a universal competitive mandatory insurance scheme (Ergas and Paolucci 2011). The formula determining the combined private and public funding could be set at a level sufficient to pay the wages to attract workers to aged care from either Australian citizens or, where wages were high enough, from the new skilled visa streams.

In the absence of such new funding models and the risk of government fiscal constraints, there may be grounds for a specialist visa stream for caring skills that would set a lower wage threshold than recommended by the Productivity Commission for other skilled visas. For example, CEDA suggested an 'Essential Skills Visa' for areas of 'critical need' such as aged care, childcare, disability or healthcare, and require appropriate qualifications, English proficiency, and a job offer from an Australian employer (p. 20). They noted that this would recognise:

... there is considerable unmet demand for labour in areas like aged care, where there are currently no direct work-visa pathways. Eligible occupations would be tightly controlled, with regular enforcement and compliance to prevent misuse and exploitation. (Ball 2022, p. 13)

Canada has a similar scheme — the Home Support Worker Pilot — though it is more targeted than CEDA's model.

Essentially, targeting a visa by occupation or sector is similar in principle to the current use of occupational lists. However, its deliberately restricted scope would mean that the practical challenges of identifying

²¹ For example, 55% of residential aged care providers were making net losses in 2020-21 (DOHA 2022, p. 4). Losses per residential aged care resident for directly-provided government services were about five times the average (p. 122).

shortages would be limited — likely to services where governments play a significant role as provider, funder, and regulator. Reliance on the list would be limited to one visa stream, and only in the context of reformed Employer Nominated and Skilled Independent streams.

A visa stream that targeted human services would also need to ensure that applicants worked in those occupations for a significant period of time, without unduly restricting job mobility between businesses and agencies. (The capacity for mobility is critical to avoid the risk that an employer could lower employment standards by threatening visa cancellation if the worker did not comply.) This is similar in principle to the use of Regional Sponsored visas, which require a period of time be spent living in a regional area, but ultimately allowing broader movement later on. A period of 3–4 years may be appropriate as a minimum amount of time spent in the identified sectors.

Given that skilled migration is not the primary source of migrants working in lower-paid parts of caring occupations, the scale of any new specialist visa stream may not need to be large. It would also be undesirable to set in stone any new specialist visa category as there may be other developments in the caring occupations that increase domestic supply — such as better working conditions and improving the attractiveness of caring as a profession (Swerissen 2022). In addition, the Fair Work Commission has not ruled out additional minimum pay increases following its interim determination, which will affect the domestic supply of labour. Consequently, the specialist visa should be a pilot.



Recommendation 7.4

Meeting the needs of human services without stifling wage increases

The Australian Government should introduce a pilot of a special permanent visa subclass for occupations in human services sectors largely funded by government (such as aged and disability care), but only if these are facing likely enduring and significant labour shortages that are weakly responsive to wage increases. The visa subclass should be subject to the current Temporary Skilled Migration Income Threshold, and include a condition that the applicant remain employed in the relevant sector for 4 years.

The pilot should be evaluated for its impacts and need after several years.

It should also be abandoned if the Australian Government develops sustainable alternative funding options for aged care that are sufficient to meet the wage increases required to limit labour shortages.

2.9 Temporary migration and pathways to permanent residency

Temporary skilled migration plays two roles: it caters to workers and employers who have an immediate commercial need, with no intention of extension to permanence; and it presents a pathway for migrants to ‘try before they buy’ and decide whether they wish to adopt Australia as a permanent home. Between 2000-01 and 2013-14, 55% of temporary skilled visa holders transitioned to permanent residency (Treasury & Home Affairs 2018, p. 21). Both roles could be enhanced, particularly in the context of recommended changes to permanent migration.

Facilitating longer-duration temporary skilled migration

A better-designed temporary skilled migration visa could reduce employers' reliance on permanent migration — which produces less fiscal benefits and is subject to annual caps. A re-designed visa could also address the risk under the Productivity Commission's refined eligibility criteria for the permanent stream that the labour market could lose the skills and expertise of more experienced and older migrant workers (particularly if they are not attracted to the limited duration of the TSS visa).²²

Increasing the duration of temporary migration would better cater to the medium-term needs of migrants and sponsoring employers. As the Business Council of Australia noted:

Two years is too short a time for many migrants who are weighing up the costs and uncertainty involved in moving to Australia. It is also often too short a stint for potential employers, especially given the months it takes to process visas and then bring people into the country and get them up-to-speed. (BCA 2022, p. 26)

To the extent that the targeting of the TSS is improved, and applicants contribute complementary skills in the labour market, there is likely little downside risk from allowing longer durations of temporary skilled migration. An allowed duration of somewhere between 5 to 7 years would make the costs of relocation more worthwhile and extend the share of a migrant's career spent in Australia, while avoiding the fiscal costs of the retirement phase.

The exact duration should be subject to consideration of short-term impacts on State and Territory services, housing and urban planning, and Australia's overall ability to absorb increases in the population. However, there is likely to be significant value in gradually increasing the duration of the TSS to make the visa more attractive to migrants and more worthwhile for employers.

Temporary to permanent pathways

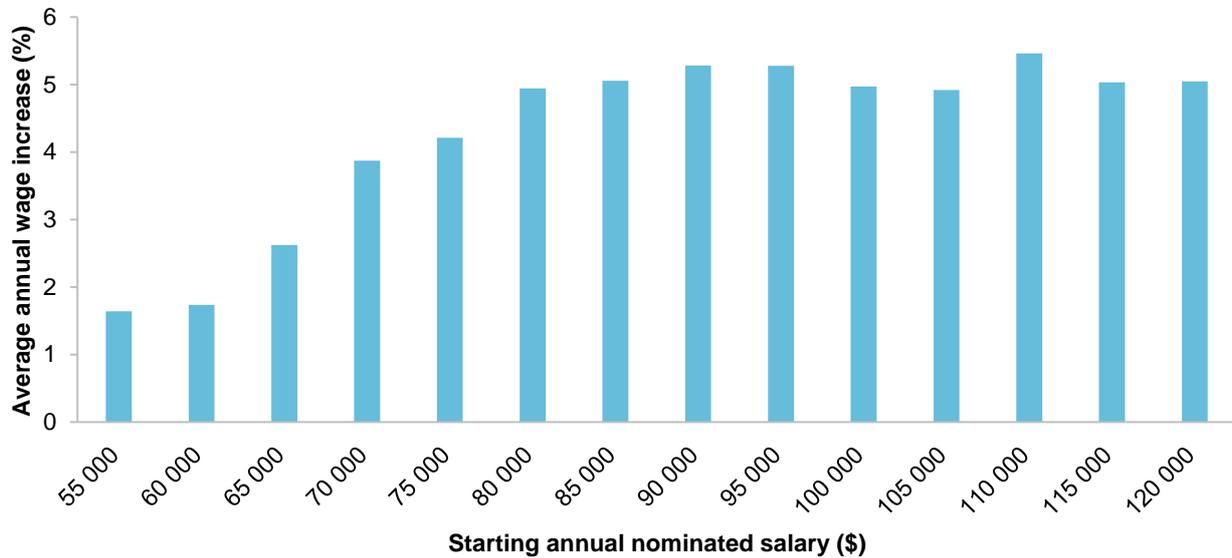
Strengthening the pathway from temporary to permanent migration help attract and retain talented skilled workers (BCA 2022; CEDA 2022b). The time spent by temporary migrants in the labour market allows them to test their relationship with their sponsoring employer(s) and their value in the broader labour market (particularly if changes are made to improve labour mobility, discussed in section 2.11). The evidence shows that temporary visa holders with higher incomes also achieve higher rates of wage growth (figure 2.11). For government, the labour market experiences of temporary migrants helps identify those most suited to gaining permanent residency.

These pathways could help to reduce underemployment among migrants with high-level qualifications, given the evidence of mismatches (discussed in section 2.1) suggests that qualifications are a necessary but not sufficient condition to work in skilled occupations. The risk of underemployment could be reduced by shifting away from the presumption that qualifications will, in their own right, lead directly to permanent residency.

²² The medium-term stream of the TSS visa has a duration of 4 years (or 5 years for Hong Kong residents) with the potential to apply for renewal, while the short-term stream is up to 2 years (Home Affairs 2021c).

Figure 2.11 – Temporary skilled migrants with higher starting salaries have stronger wage growth

Average annual wage increase during temporary skilled visa



Source: Coates et al. (2022).

Pathways for recent graduates

This shift to better recognition of employment and income in permanent migration is also relevant to international students who have completed an Australian qualification but lack proven experience in the labour market. As noted by Prof. Julia Horne:

The policy settings for this group have for many decades sought to largely prevent international students from settling in Australia rather than encourage them. Yet, the cohort is young and Australian-educated, thus potentially able to contribute in significant and long-term ways to Australia's future productivity. (sub. 169, p. 2)

A reasonable expectation might be that obtaining an Australian qualification would be accompanied by a temporary visa that allows sufficient time to test the labour market and undertake some early-career work. It would not necessarily guarantee permanent residency, but would improve the chances of eligibility for permanent residency. Australian qualifications should be considered as providing opportunities to begin a skilled career in Australia, rather than guaranteeing a retirement in Australia.

Australia is likely to face increasing competition for graduates, whose job prospects would often be as strong in Australia as overseas. Pathways for recent graduates have received renewed attention from policymakers in other advanced economies following the pandemic, including the United Kingdom, where temporary visa options open to recent graduates (including those studying outside the United Kingdom) were recently extended.²³ Canada too has a relatively clear pathway for international students to become permanent residents (VETASSESS, sub. 157, p. 12).

²³ The United Kingdom recently implemented a temporary visa to attract 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. The visa allows graduates to stay in the United Kingdom for 2 or 3 years, depending on their qualifications,

It is important that temporary migration options — such as the Graduate visa (subclass 485) — are of a sufficient duration to allow graduates to compete as legitimate candidates for entry-level positions.²⁴ This could be achieved by allowing an extended temporary visa for Graduate visa holders with proof of an employment offer (subject to skill and/or income requirements). This could help Australia retain more of the best and brightest locally-trained international students, specifically by rewarding those who successfully begin careers in highly-skilled and highly-paid occupations in Australia.²⁵

Age at application or arrival?

If the Productivity Commission's recommendations are adopted to ensure permanent migration visas account for age-related fiscal risks, this can have implications for the pathways to permanent residency. For instance, spending more time on temporary visas could be seen as detrimental to a migrant's chances of permanent migration, as they would apply for permanency at later ages. This would work counter to reforms intended to encourage more use of temporary migration, and to better use the pathways from temporary to permanent migration.

Accordingly, in designing thresholds and criteria for permanent migration, it would be valuable to acknowledge that migrants' cumulative contributions to productivity and fiscal outcomes accrue from the time of first arrival in Australia, rather than at the time permanent residency is granted. This could occur, for instance, by awarding additional points for past work experience that are weighted according to income level (as discussed above).



Recommendation 7.5

Improving temporary migration and pathways to permanent residency

The Australian Government should amend settings for temporary skilled migration to increase their duration to 6 years, subject to continuous employment (for a set percentage of a given year) with a sponsoring employer (with the ability to move to a new sponsoring employer under the same visa).

While temporary skilled migration visas should not come with an expectation of permanent migration, pathways to permanent migration should be available under revised Employer Nominated and Skilled Independent visas.

For international students, obtaining a qualification from an Australian tertiary education provider should be associated with some expectation of being able to test their skills in the Australian labour market, but not an expectation that their qualification alone will qualify them for permanent residency. The Australian Government should increase the duration of stay for Temporary Graduate visas (subclass 485) for graduates with Bachelor and higher level degrees, such that an extension to five years is guaranteed subject to proof of ongoing employment above a set wage threshold.

These changes should be subject to the revised employer-sponsored and independent skilled visas, both of which would place greater emphasis on age and income (recommendations 7.2 and 7.3).

without the possibility of renewal — 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 2022).

²⁴ Graduate visas (Subclass 485) are available in Australia, to graduates from Australian institutions who are current or recent holders of the Student (Subclass 500) visa.

²⁵ Particularly given that only 16% of Student visa holders transitioned to permanent residency between 2000-01 and 2013-14 (Treasury & Home Affairs 2018, p. 21).

2.10 Avoiding backlogs where possible

Backlogs are an inevitability in any system with caps and an excess demand for visas, but different designs of migration systems have varying implications for their severity and impact. Taking as given that governments set caps based on population policy, the main issue is therefore the degree to which visa criteria dampens demand. The more than such criteria fulfill that function, the more certainty that this gives an aspiring migrant that they will be a successful applicant in any given year, which in turn makes Australia an attractive destination.

Skills lists are one way of rationing places and their abandonment, if not replaced, would tend to expand demand and increase backlogs (VETASSESS, sub. 157, p. 4). However, there are superior ways of containing demand while meeting Australia's skilled migration needs. The Productivity Commission's proposals for permanent migration eligibility for sponsored and independent visas also include features (income, work experience and age) that reduce demand.

Regardless, oversubscription to visa programs should prompt governments to consider the scope of the migrant intake, particularly if the eligibility criteria have been well-calibrated to productivity and fiscal outcomes. If, over time, the Australian Government observes consistent oversubscription from applicants who meet well-designed criteria and eligibility mechanisms (i.e. that have high-level skills, ongoing employment and good career prospects) this would be useful in informing decisions about the scale of the migration intake.

2.11 Removing barriers that migrants face in the labour market

As discussed in section 2.1, some migrants find it more difficult to get jobs matching their skills than the broader population. These challenges may be reduced by providing settlement services and assistance with the labour market transition (including information provision) either by government or industry bodies, as suggested by Engineers Australia. While that may be warranted if the hoped-for labour market outcomes of a permanent migrant are not realised, the Productivity Commission's recommended changes to the permanent migration system (and the transition to it from temporary migration) should significantly reduce the need for such assistance.

A more difficult problem relates to employer preferences for Australian qualifications and local work experience (Engineers Australia 2021; Tani 2020, Chartered Accountants Australia, sub. 94, p. 3). However, there is likely to be limited scope for policy or regulation to alter such preferences unless they contravene anti-discrimination laws.

Governments are likely to be more influential in addressing barriers that stem more directly from policy and regulatory settings, which include the:

- effect that visa conditions may have on labour market mobility
- recognition of skills and qualifications.

Addressing barriers in the labour market would give policy makers a more accurate understanding of the characteristics to target in the migration intake. As noted by the Grattan Institute, barriers in the labour market at an early stage of a migrant's career can have ongoing consequences for their career path, and hence their lifetime earnings and fiscal impact (Coates, Wiltshire and Reysenbach 2022).

Visa conditions and labour market mobility

Given the required contributions to the Skilling Australians Fund Levy, the (modest) sponsorship application fee and the on-costs of hiring and training, employers will only be willing to sponsor migrants if there is a good prospect of reasonable tenure. Equally, many sponsored migrants will benefit from an uninterrupted period of learning on the job. They cannot freely move until a new sponsoring employer has an approved nomination. Therefore, by design, job mobility is constrained for employer-nominated migrants. Similarly, employers are subject to conditions if they wish to change the migrant's routine hours of work or their duties.

These rigidities involve their own impacts. For example, job mobility has economy-wide implications, as it is an avenue for resources to flow to more productive firms in a competitive labour market. For the visa holder, there is also a balance between expectations of attachment to the sponsoring employer and the risk that if the restrictions are too significant, they may be subject to an increased risk of exploitation.

Existing arrangements may not have the balance between the gains from enduring attachment to the sponsoring employer and the visa holder. For example, there are grounds for allowing a short period of unemployment accompanied by job search by a visa holder for another employer willing to sponsor them without violating the terms of the visa (Coates, Sherrell and Mackey 2022). Improving the job mobility associated with employer-sponsored visas should be considered regardless of other changes to those visa streams recommended in this report. However, such measures will be of greater importance if sponsorship is made available to a broader set of employers and industries (recommendation 7.2). To the extent that better job mobility reduce worker exploitation, improving settings for job mobility will be vital if employer sponsorship is to continue below the 'high income threshold' (as per recommendation 7.2).



Recommendation 7.6 Improving job mobility for employer-sponsored visas

The Australian Government should amend settings for employer-sponsored temporary and permanent visas to better allow workers to switch to competing employer-sponsors including by permitting a short period of unemployment while looking for a new sponsor.

Recognising migrants' skills and qualifications

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. This particularly relates 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 further barriers to obtaining employment in Australia through requiring additional assessment of their qualifications on top of any skill assessments for immigration requirements, sometimes at considerable cost to them. This can create a secondary layer of approvals for skilled migrants that, in some cases, could be made more efficient through two mechanisms:

- alignment between skills assessments and licence/registration processes
- mutual recognition of international qualifications and licenses.

The design of occupational licensing and its use in Australia in the context of other forms of regulation are discussed in chapter 3.

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 of enforcement and deregistration between jurisdictions. Information is more readily available to regulators about operators that had received sanctions or whose occupational licences had been disqualified in other jurisdictions.

Where mutual recognition is possible, it would 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) allows 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).

While the Productivity Commission's 2015 review into Mutual Recognition Schemes (between Australia and New Zealand) found many stakeholders supported recognition for registered occupations, in practice regulators sometimes maintained restrictions. They 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 2015b, 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 UNESCO Convention), which provides the framework for broad scale international mutual recognition.

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 co-operation 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 7.7

Expanding the default recognition of international licences

Australian governments and regulators should pursue further international mutual recognition of occupational licences by improving (and potentially formalising) links between Australian licensing bodies and those in similar countries.

Should international recognition be automatic?

The Productivity 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 to identify the issues 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 jurisdiction, and the impact of exemptions. It will be useful to assess the incremental expansion of the scheme and disruptions caused by COVID-19.

Expanding the number of 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.

Alignment of 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 2.4). This essentially redirects parts of the skilled migration intake towards unskilled occupations (CEDA 2022c, p. 11). This adversely affects a migrant's early career in Australia, which can have flow-on effects for their ongoing labour market prospects and productivity.

Box 2.4 – Skilled migrant limbo

The experiences of migrants nurses and electricians provide examples of the inconsistency between the outcomes of a skills assessment required to satisfy visa eligibility and occupational licensing requirements.

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

Box 2.4 – Skilled migrant limbo

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.

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 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.

Alignment between the requirements of skilled migration and occupational licensing would also reduce duplication of processes. Where the requirements are misaligned, skilled migrants are required to progress through two separate, but ultimately similar, processes to determine their suitability to work in Australia. This may involve providing the same documentation to two separate assessors and two different tests to as

required. By aligning the requirements, these processes would be streamlined, making it faster and less costly for skilled migrants to enter and begin work in Australia.

There may also be a case for some of the licensing regimes to adapt their approaches to recognising experience gained in trusted jurisdictions. As an example, the Nursing and Midwifery Board of Australia only considers the *initial* nursing qualification and specifies that only qualifications from a limited number of jurisdictions²⁶ are likely to meet the registration criteria. Contradictions arise for nurses who may have migrated from their home country (which is not accepted as a ‘trusted jurisdiction’) to a country that Australia accepts as a ‘trusted jurisdiction’. In such cases, if the migrant undertakes further education and gains registration and experience in the ‘trusted jurisdiction’, the Australian registration system would still focus on their initial qualification.²⁷ If the migration requirements were to move to the registration requirements, without a mutual recognition system in place, the pool of skilled migrant nurses available to work in Australia would be unnecessarily limited. In cases such as these, it would be more beneficial for the licensor to loosen their requirements and align with the skilled migration assessor rather than the other way around.

Potential redundancy of some assessments

Skills assessments are required as part of the Skilled Independent, Employer Nominated and TSS skilled visas. Assessments are undertaken for migration purposes as an integrity measure (i.e. to ensure an applicant who is qualified on paper is *actually* a qualified applicant). As described by VETASSESS:

The assessment of the credentials, relevant experience and other characteristics of migrants skilled in occupations on the lists, serves the purpose of providing employers with confidence that migrants have the qualities that match their needs. Which, in turn, makes it more likely that migrants work in roles that put their skills to their most suited and productive use. In this sense the lists also assist in making best use of migrants’ human capital. (sub. 157, p. 2)

However, this is less likely to be the case where employers have already hired and/or sponsored the applicants given that they are uniquely situated to determine and observe what skills and attributes are required for the occupation.

In addition, the assessment process can create compliance costs for all participants, including those using the system in good faith. The Business Council of Australia noted:

In some occupations, such as for chefs, there is a large backlog created by the fact that there are few assessors. ... For occupations without specific regulatory requirements, this is an additional administrative hurdle which adds limited value. Employers who are sourcing candidates from overseas are best placed to determine if a candidate meets the requirements for the role. (BCA 2022, p. 20)

Skills assessments are required for a range of occupations that do not have formal licensing in place. For these occupations, skills assessments for migration are undertaken by non-experts (i.e. those not qualified or practicing in the field). While such assessments can contribute to the integrity of the visa program, it is unclear how much additional value they add for applicants who have documented proof of formal qualifications or indeed have obtained employment or sponsorship in a highly-skilled field. In many cases, these processes would not justify the costs for both applicants and administration, noting that typical processing times are estimated to be between 12 and 20 weeks for non-trade occupations (VETASSESS 2023).

²⁶ Canada, Hong Kong, the Republic of Ireland, the United Kingdom and the United States are the only jurisdictions where qualifications are likely to meet the criteria.

²⁷ For example, a nurse with EU qualifications that migrated to the United Kingdom where their qualifications were recognised (pre-Brexit) and has worked as a nurse in the United Kingdom for several years may be unable to work as a nurse in Australia, despite UK qualifications being recognized by the NMBA.



Recommendation 7.8

Aligning migration and occupational license requirements

Australian governments and regulators should coordinate to align skilled migration requirements with occupational license recognition requirements, including by removing duplication of assessment where possible.

3. Occupational licensing and registration

Key points

- ✳ **Occupational licensing must balance the benefits to consumer protection and the costs of restricted competition. Ineffective or unnecessarily costly regulatory protections reduce productivity for little or no additional consumer benefit.**
 - Governments should not approach licensing reform as a choice between safety and efficiency. Rather, given the costs associated with licensing are potentially substantial, licensing should only be used where more cost-effective alternative options are unavailable, and its coverage kept to the minimum necessary to achieve its benefit.
 - Some deregulation has occurred in low-risk occupations, however, there has been a significant expansion of coverage and entry requirements for licences aiming to improve health and safety. The balance and design of regulation could be improved.
- ✳ **Better data and evidence of licensing outcomes, particularly their impact on health and safety risks, would inform more proportionate responses.**
 - Cost benefit analysis of licensing is often constrained by a lack of evidence, leaving regulators to rely on partial and anecdotal evidence from stakeholders on perceived health and safety risks.
 - Licensing is often used in conjunction with other consumer protections with little evidence or analysis of the additional net benefit it brings.
- ✳ **There is evidence of scope for productivity and competition gains from reforming scope of practice in several licensed occupations without compromising safety and service quality.**
 - Funding arrangements for nurse practitioners should be reformed to ensure they are providing services at their full capabilities. Trialling of pharmacist prescribing should be pursued by all states and territories, supported by rigorous evaluation and appropriate funding arrangements.
- ✳ **Substantial improvement to licensing policy, and consumer regulation more generally, will require governments to invest in a coordinated, long-term strategy to ensure licensing is fit-for-purpose in a modern service economy.**
 - While individual states and territories are responsible for driving this process, it will need to be supported by a national reform agenda with support from the Australian Government.
 - Priority should be given to further investment in digital licensing platforms that can underpin a better regulatory approach to licensing.

3.1 Licensing and productivity

In the labour market, occupations may be subject to formal licensing, registration, or regulated statutory minimum requirements (henceforth referred to as ‘licensing’) that act as a signal of proficiency and quality of work output to employers and consumers. When working efficiently, licensing helps to:

- address externalities such as safety outcomes and the quality of services
- decrease information asymmetries between consumers and businesses and/or between employees and employers
- enable targeted interventions for ongoing training and enforcement of compliance and disciplinary measures
- raise human capital formation where market signals fail to properly price skills and experience.

At the same time, by restricting the pool of workers who can provide particular services, licensing can limit entry into a market, restrict choice and increase prices. When licensing restricts entry into a market, it can act as a barrier to productivity growth that could occur *within* firms and *between* firms (Bambalaite, Nicoletti and von Rueden 2020).

- Within a firm, higher entry requirements can result in lower competition from new market entrants. This can restrict access to skilled professionals, reduce the incentive to innovate and produce an over-reliance on the licence as a signal of quality. Furthermore, within an occupation if a licence is overly rigid in its regulation of tasks, this may impede on-the-job skill formation.
- Between firms, productivity growth results when highly productive firms have a better ability to attract skilled workers compared with lower productivity firms. Licensing may act to reduce this reallocation of labour; particularly where professional skills overlap and further formal training disincentivises mobility among workers. For instance, highly skilled practitioners with many years’ industry and teaching experience may be valuable to a school but short in supply if these professionals are disincentivised to change career due to formal re-training requirements that are onerous and costly.

Much of the available evidence supports the idea that licensing stringency reduces market competition (figure 3.1).

While the international evidence on licensing and productivity may be difficult to apply directly to Australia,²⁸ the available evidence shows that the costs of licensing can be significant. A growing body of empirical literature generally finds that occupational licensing increases labour market rigidities, and hence likely decreases productivity, with findings relatively consistent across countries and occupations (box 3.1).

The administrative costs of licensing (e.g. the raising of fee revenue) can also be a significant economic cost — in 2014, total annual licensing fees were over \$600 million across the Australian economy.²⁹ Some have argued that licensing fees are necessary to fund regulatory activities (Senate Red Tape Committee 2018). From this perspective, licensing acts as an industry levy, and removing this source of revenue would either reduce the resources available for regulation or shift the costs of regulation to those outside the industry. However, this is generally not a strong argument to guide the design or use of occupational licensing, given the economy-wide impacts of licensing policy (both in terms of effectiveness and its costs) would outweigh the fiscal benefit of collecting licensing fees. Indeed, some governments have undertaken to remove fees

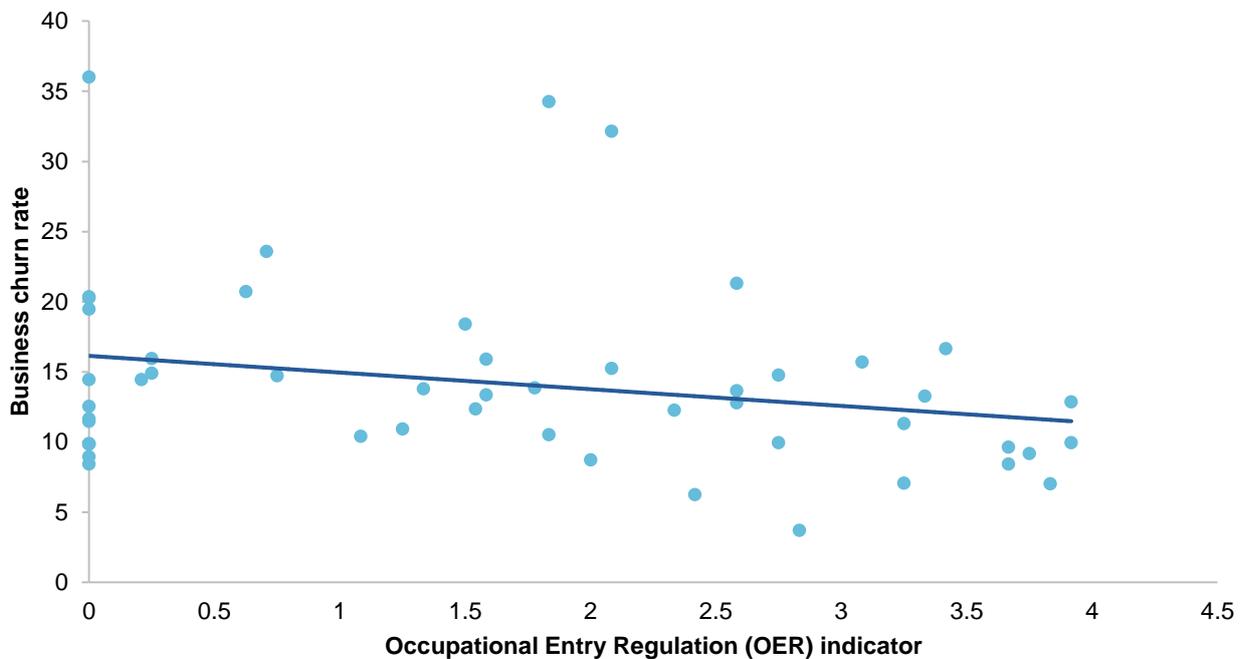
²⁸ The international evidence may be of limited applicability to Australia (given the differences in licensing regimes and labour markets) but some lessons can be drawn from international experiences (given the relatively consistent findings across countries). A significant amount of research would be needed to better understand the impact of all of Australia’s licensing regimes, across different occupations and jurisdictions.

²⁹ Estimates in 2014 dollars based on average licensing fees from the Productivity Commission’s *Survey of occupation-registration authorities* (PC 2015b). This would be the equivalent of roughly \$760 million in 2022 dollars.

from some permits in the post-pandemic recovery (such as the ACT's hawkker licence) or remove licensing requirements altogether (such as for commercial agents in New South Wales).

Figure 3.1 – Stricter licensing requirements are correlated with lower competition

Business churn and licensing stringency in Europe, 2014 – 2016^a



a. Each dot represents one country-sector cell, where sectors correspond to one of the occupations covered by the Occupational Entry Regulation (OER) indicator (e.g. architectural activities in Spain). The OER indicator measures different areas of regulation (administrative, qualification and mobility requirements) and different types of regulation (licensing, a situation in which only supervisors require a license, and certification). Business churn is defined as the sum of enterprise births and enterprise deaths divided by the number of active enterprises. The set of countries used includes Belgium, Finland, France, Germany, Hungary, Italy, Portugal, Slovenia, Spain, Sweden, and the United Kingdom.

Source: Bambalaite, Nicoletti and Rueden (2020).

It is likely that reform to occupational licensing would lead to significant productivity gains. CEDA (2022c) use the OECD's estimate of productivity gains from reducing occupational licensing stringency to estimate the potential benefit to Australia. Noting that the restrictiveness of licensing in Queensland is comparable to Germany or Canada (according to the OECD's Occupational Entry Regulation indicator), CEDA estimates that reducing licensing stringency would generate up to \$5 billion each year for the Australian economy, assuming similar scope for gains across all states and territories despite some variation in licensing stringency (p. 9).³⁰

While it is difficult to model the impacts of licensing reform accurately, indicative estimates suggest that significant economy-wide productivity gains could be achieved if labour productivity improved in industries that use licensing (such as 'construction', 'transport and wholesale', 'professional, scientific and technical services', 'school education' and 'health and social services') (volume 9). However, these estimates should only be taken as indicative of the potential economic gains, as they do not capture potential impacts on service quality and safety outcomes.

³⁰ This is not unreasonable given CEDA finds similar levels of licensing restrictiveness in New South Wales, and most states have/or are implementing similar licensing approaches to the occupations measured by the OER indicator, e.g. plumbers, nurses, electricians, architects, lawyers and civil engineers.

Box 3.1 – 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 United States. They found that long-distance migration (defined as greater than 50 miles) was 7% lower for individuals in state specific licensed occupations compared with individuals of quasi-national licensed occupations.

Blair and Chung (2019) estimated the effect of licensing on employment in the United States. 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%.

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% wage premium.

Similar results have been observed in the European Union 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% higher hourly wages.

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 less evident but can be difficult to measure

While the costs of licensing are often easily observable, the benefits are unlikely to translate to aggregate indicators of output and productivity. However, research in Europe and the United States has failed to find evidence of improved service quality in a range of industries using more targeted measures of quality such as medical records, consumer complaints, customer surveys and safety outcomes (Kleiner and Kudrle 2000; Powell and Vorotnikov 2012; Koumenta, Pagliero and Rostam-Afschar 2019; Farronato et al. 2020) although some evidence shows that licensing healthcare professionals can improve outcomes (Anderson et al. 2016). Some caution is needed when interpreting these results because the benefits of licensing are, by their nature, more difficult to estimate than costs. For instance:

- Quality can be difficult to accurately measure — Farronato et al (2020) failed to find evidence of quality implied by consumer reviews and re-use of the service. Some consumer safety or quality issues that take time to manifest, and the effect of a change in policy may not be captured unless sufficient time has passed (p. 32).

Box 3.1 – International evidence on licensing and productivity

- Where licensing aims to ensure minimum training or expertise, some of the associated benefit may relate to the more difficult and less common circumstances — hence aiming to avoid incidents of greater severity and lower likelihood. The change in the rate of such incidents may be difficult to measure.
- Licensing systems can vary greatly across countries, industries and occupations, which means indicators of licensing and quality may not always be relevant or comparable.
- The use of de-registration, negative licensing, and other restrictions as a means of prohibiting bad actors from practicing may only capture a small minority of practitioners. As such, its effect may be small at the aggregate level, and any additional assurance provided to the end-consumer may be difficult to measure.

Recent licensing reform in Australia

In Australia, about 18% of employed people were in an occupation requiring registration of some kind in 2011 (PC 2015b), which is similar to other advanced economies.³¹ 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.

While licensing reform is often pursued to expand coverage or increase requirements to better protect quality and safety, some deregulation has occurred where there are lower risks to the consumer and they are more easily alleviated through improvements in the functioning of competitive markets or alternative forms of consumer regulation (such as through the provision of information).

Between 1996 and 2000, under the National Competition Policy deregulation agenda, Australian governments either reformed or abolished a number of occupational licences, including for hairdressers, employment agents, podiatrists, real estate agents, dentists, veterinarians and conveyancing services. These reforms typically involved removing categories of protected work or reducing the scope of licensed practice to improve competition and lower prices (PC 2005).

There has been less deregulation activity since the initial wave of National Competition Policy reforms, although many jurisdictions have continued to implement changes focusing on reducing compliance burdens associated with licensing (for instance, by redesigning scope of practice or reducing renewal timeframes). In some cases, deregulation has involved the implementation of a ‘negative licensing’ system, which allows for the prohibition of businesses or individuals from practice in a particular occupation, but involves no prior approval nor a formal (positive) licence for practitioners.

In the past decade, state and territory governments have found additional scope to implement negative licensing. For example:

- in 2014, the Queensland Government implemented negative licensing for debt collectors who operate without face-to-face contact (under the *Debt Collectors (Field Agents and Collection Agents) Regulation 2014* (Qld))
- in 2015, unregistered health practitioners were regulated through a national code of conduct (COAG Health Council 2015)

³¹ In 2015, the average share of workers that were licensed across US states was 25% and the average share across EU countries was 22% (von Rueden and Bambalaite 2020).

- in 2016, a negative licensing regime came into effect for South Australia's tattoo industry, with the expressed aim to 'ban organised crime gangs and second-hand dealers and pawnbrokers from owning or controlling tattoo parlours' (Government of South Australia 2016, p. 35)
- in 2022, New South Wales introduced a negative licensing scheme for those who had no face-to-face contact with debtors and easing of licensing requirements for field agents.

The NSW Productivity Commission recommended that negative licensing be considered for occupations where there is low risk of consumer harm (as an alternative to formal licensing but in conjunction with other consumer protections) (NSW PC 2021). By contrast, licensing is often appropriate where there are material risks to public health and safety.

However, risk of consumer harm alone is not necessarily grounds for all forms of positive licensing — the additional requirements in a licensing scheme must be proportionate to the problem identified and clearly linked to reductions in consumer harm. Indeed, there are a variety of approaches used across advanced economies, with different requirements applied to low and high-risk occupations (box 3.2).

Australian jurisdictions also vary in their approaches. In 2008, the Productivity Commission identified nearly 100 occupations requiring licensing and found over 70 were not consistently licensed in all jurisdictions, while only 26 were (PC 2008, p. 489). This inconsistency continues today — for instance car repair mechanics are only licensed in New South Wales and Western Australia, and there is varied approaches to licensing motor vehicle salespersons, yard managers and car market operators (DMIRS 2019); likewise, low risk building trades such as fencing, plasterers and painters are only licensed in some states and to varying degrees (NSW PC 2021). Even where states and territories are broadly aligned on the use of an occupational licence, considerable variation can exist in terms of minimum requirements, regulatory frameworks, legislative instruments, terminology, and the classes or categories of work that are regulated.

In some cases, the challenge in licensing policy may be less about whether to license at all, but rather how licences should be designed. In other cases, the extent of safety risk (and the effectiveness of licensing as a solution) may be unclear.

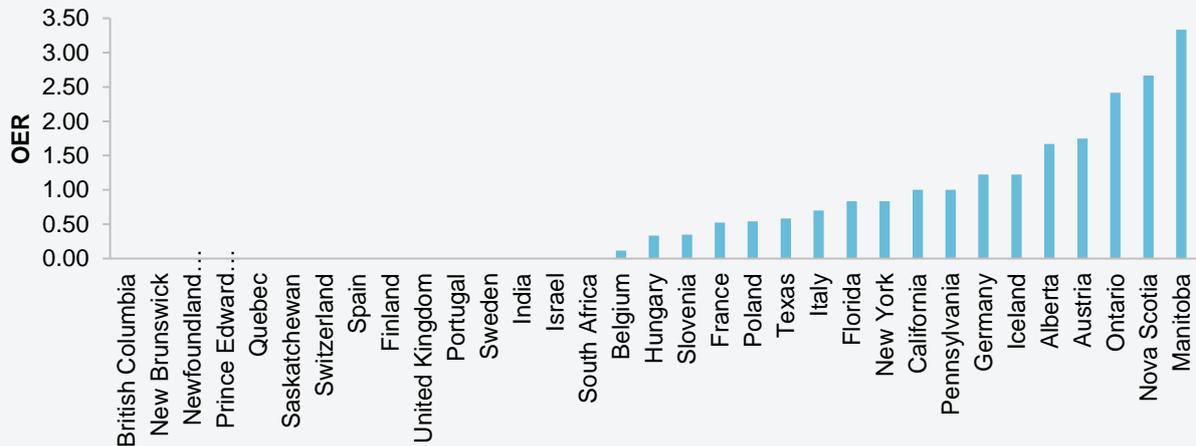
Box 3.2 – Occupational entry regulation indicators

Countries differ in their approach to licensing — there is no consensus on its role among other forms of regulation, with some countries favouring market mechanisms and self-regulation. Indeed, several forms of regulation would typically be used with regard to safety and quality of services. As such, it is not straightforward that more stringent licensing would always improve health, safety, or quality outcomes, particularly if those objectives are already achieved more efficiently by other means.

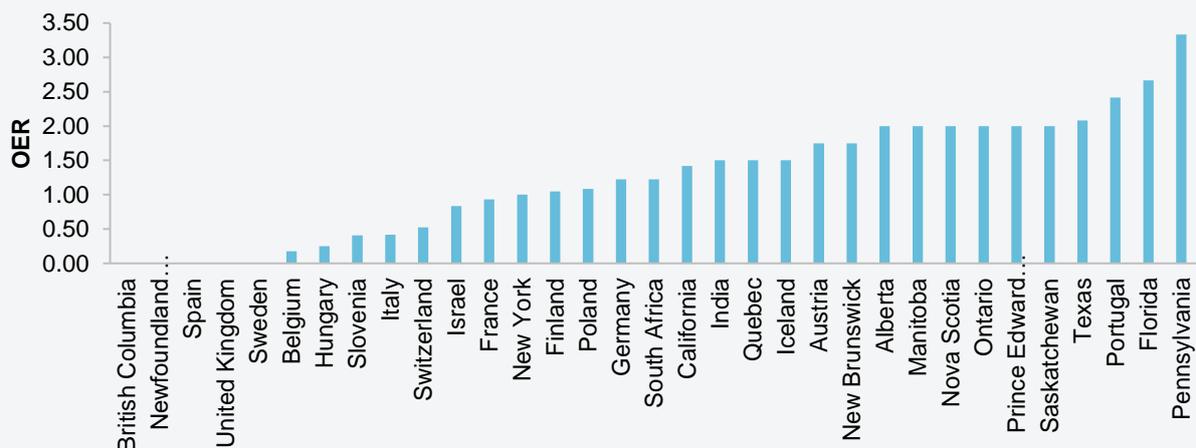
The OECD's occupational entry regulation indicator (OER) measures licensing stringency across a range of occupations and countries and finds considerable variation in both low-risk occupations such as hairdressers and even higher risk occupations like electricians. In fact, many European countries have little to no requirements for electricians to be licensed. These differences in single occupations often reflect broader trends in the different approaches countries take in regulating certain sectors. In the United Kingdom for instance, construction and building trades utilise industry-led certification schemes. In Sweden, company self-auditing schemes are relied upon, allowing electricians to be covered by a company's scheme rather than independently licensed.

Box 3.2 – Occupational entry regulation indicators

Hairdressers



Electricians



Source: von Rueden and Bambalaite (2020).

The next challenges for licensing policy

Australian governments recently introduced automatic mutual recognition to reduce interstate restrictions and alleviate rigidities caused by inconsistent licensing systems. However, national efforts to reform licensing systems themselves have largely failed, with ad-hoc reform driven by states and territories to varying degrees. A renewed approach to licensing reform is needed to ensure it is guided by the best available evidence and delivering licensing systems that are fit-for-purpose.

- Licensing has become more stringent in recent years in areas where safety is a concern, but such decisions are often informed by limited evidence of safety issues, the efficacy of increased licensing and scant consideration of alternative forms of regulation (section 3.2).
- At the same time, well-known issues regarding scope of practice between licensed occupations remain unresolved. In this context, reforms could reduce barriers to competition without compromising safety and service quality (and in some cases improving them) (section 3.3).

- The introduction of digital licensing provides another avenue for consumers to access information about services beyond that already provided by digital platforms and the internet. Government's will need to investigate these changes and re-evaluate the use of licensing where digital innovations may be providing better answers. Digital licensing also provides opportunities to improve data sharing for mutual recognition arrangements, current compliance activity, and analytics to both monitor trends in licensing and assess the effectiveness of reform (section 3.4).

3.2 Is licensing the best way of improving safety?

A challenge for policymakers is to balance objectives relating to service quality (such as public safety and consumer welfare) and those relating to competition (such as the creation of barriers to entry). The Harper review advised that:

Professional and occupational licensing can promote important public policy aims, such as quality, safety and consumer protection. ... Competition considerations should not override these objectives — but neither should they be ignored. (Harper et al. 2015, p. 140)

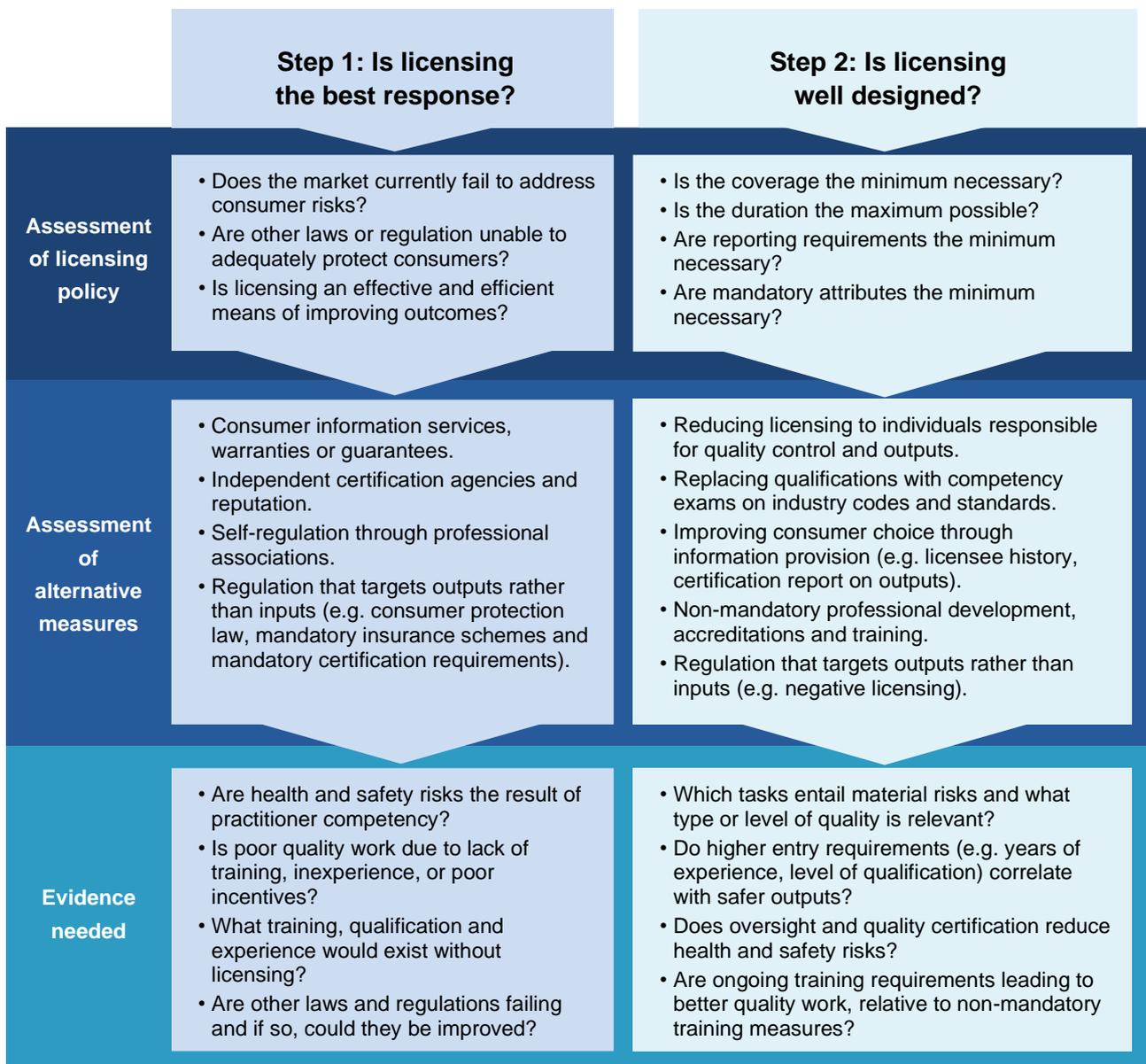
Productivity objectives are not necessarily in conflict with public safety. To the extent that restrictive regulations reduce the accessibility and quality of services, such restrictions can work against the very objectives licensing seeks to achieve — the quality and safety of services provided to consumers. Such trade-offs are particularly evident in sectors where public health and safety outcomes can be negatively influenced by:

- both poor quality service delivery *and* by the lack of access to services themselves
- poor incentives to produce high-quality work where consumer choice is constrained.

Governments should not approach licensing reform as a choice between safety and efficiency. Rather, given the costs associated with licensing have the potential to be substantial, licensing should only be used where alternative options are unavailable, and its coverage kept to the minimum necessary to achieve its benefit (IPART NSW 2014; PC 2015b).

If safety and other forms of service quality can be achieved or improved with less stringent licensing, this would likely result in significant productivity gains. However, determining the appropriateness of licensing among several regulatory options or pursuing a proportionate approach is often constrained by limited evidence. This is one reason jurisdictions can vary in licensing requirements.

Indeed, the failure of the National Occupational Licensing Scheme in 2014 was in part due to the inability for jurisdictions to agree on uniform licensing requirements and disagreement about a perceived 'lowest common denominator' approach being taken to nationally consistent requirements (PC 2015b, p. 35; ACCI 2018). For policy makers to pursue an outcomes-based approach to safety regulation consistently and effectively, improving current gaps in evidence and understanding of licensing outcomes will need to be prioritised (figure 3.2).

Figure 3.2 – Licensing in an outcomes-based approach to safety regulation^a

a. Adapted from PwC and IPART's licensing framework.

Sources: IPART (2014); PwC (2013).

The expanding role of licensing in health and safety regulation

Overall, Australia's licensing is relatively stringent where safety is concerned (CEDA 2022c). Health and safety concerns continue to be cited as the primary justification for licensing by industry and reform has tended to expand coverage rather than reduce it (Senate Red Tape Committee 2018, p. 12). Justifications for licensing are particularly strong in the healthcare sector because the potential for consumer detriment from a poor choice is significant and product information and quality verification are difficult to obtain (PC 2008, p. 93).

The relationship between licensing and safety outcomes can be less straightforward in other sectors. For instance, in building and construction, the mix of services involve both high and low risks to health and safety, and quality is verified at multiple stages of production. In addition, consumers vary in their knowledge and sophistication — in a large commercial construction project, for instance, there may be less potential for information asymmetry between subcontractors to contractors than there might be between individual consumers and service providers.

This can make determining the minimum necessary level of licensing difficult. For instance, a licence to contract for work can be useful to enforce compliance with building standards. However, it is less clear whether those carrying out the work should also be licensed if supervision and certification of quality and compliance are already provided by the contractor and/or licensed supervisor. While the licensing of practitioners might ensure a minimum qualification level (increasing the likelihood that standards *can* be met), it does little to ensure those practitioners deliver quality work on any given day. It also has the potential to restrict skill formation, flexibility, and innovation in how a business completes the work.

In the building and construction sector,³² licensing arrangements have become more stringent across most jurisdictions in the past five years, with either higher entry requirements or more extensive coverage for licensed work, including:

- In Victoria, the ability for plumbers to contract for work will now require additional 2 years of experience on top of passing a licence exam (DELWP 2018; Victorian Government 2019); Electricians require mandatory continuous professional development (CPD) and those doing line work now need a separate licence (ESV 2020), new licensing and registration for subcontractors and employees across a range of building trades (beginning with carpenters in 2023); further licensing reform has been proposed to restrict scope of practice for classes of building work and implement new licence categories developed for complex and/or high-risk work (Victorian Government 2021).
- In New South Wales, new registration requirements and mandatory CPD for Design Practitioners, Building Practitioners and Professional Engineers working on class 2 buildings (NSW Fair Trading 2023); introduction of medical gas licences that cover fitters, technicians, and mechanical services workers (NSW Fair Trading 2022); proposed expansion of building practitioner licensing to the commercial industry (DCS 2022).
- In Queensland, mechanical service occupational licences covering medical gas and air conditioning and refrigeration work (DHPW 2019).
- In Western Australia, the introduction of registration for professional and technical building engineers (DMIRS 2022b); proposed additional mandatory training in CPR and low voltage rescue for electricians (DMIRS 2022a); proposed introduction of tiered building licences to limit scope of work to specific building classes and expansion of licensing to remote areas previously exempt (DMIRS 2022c).
- In South Australia, an accredited professionals scheme for planners, building certifiers, land surveyors and other industry professionals involved in making development decisions (DIT 2019).

Strengthening licensing arrangements in building and construction may be justified where the benefits outweigh the costs and suitable alternatives are not available. In many instances, however, reforms are characterised by poor assessment of health and safety risks and inadequate consideration of whether alternative regulation already addresses the problem — largely as a result of insufficient evidence to inform policy (discussed below).

³² Building and construction is broadly defined and includes some trade licenses that also operate outside of construction.

These characteristics of licensing reform are not unique to building and construction but provide a useful case study of the challenges that most licensing regimes face when aiming to protect health and safety.

High risk ratings by default

When determining if licensing is appropriate, the Independent Pricing and Regulatory Tribunal of New South Wales (IPART) and PwC recommend conducting a simple risk assessment to determine the potential cost or detriment of the absence government action, and whether this detriment is sufficiently high to warrant licensing. This assessment depends on both the likelihood of a negative event occurring and the consequences of that negative event if it did occur (IPART NSW 2014, p. 45). Where 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 the extent to which licensing is appropriate.

Despite this, a risk assessment can still result in a high-risk rating where the probability of the incident cannot be accurately estimated, and hypothetical or anecdotal evidence is used to suggest the detriment is high. 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 entirely anecdotal. This typically includes reference to unquantified safety risks or claims of poor practice among competitors. Without quantifiable evidence to evaluate these claims, high-risk ratings become the default position in licensing assessment and typically outweigh consideration of negative impacts on competition and productivity (box 3.3).

In many cases, risk assessments that have been driven by anecdote have either led to more stringent licensing conditions, or have prevented deregulation. For instance in New South Wales, some building trades such as painters, plasterers and decorators continue to be licensed despite insufficient evidence of significant risks to safety or financial detriment (IPART NSW 2014; NSW Fair Trading 2018; NSW PC 2021).

High risk ratings can also become the default position where high profile incidents of public safety failure amplify the downside risks. Once licensing of an occupation has been introduced to protect health and safety it can be difficult to reverse or relax these requirements, regardless of whether there is evidence that skills and qualifications had been the cause of poor safety outcomes, or that licensing is the most effective solution. As such, concerns about public safety often lead to pressure to increase the stringency of licensing arrangements — this has been evident in the recent decision to extend mandatory licensing and registration to engineers (box 3.4).

Box 3.3 – 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 RAC work
- 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 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 qualitative evidence on unsafe work practices in relation to dangerous refrigerants and pointed to one death in India and two deaths in Victoria the cause of which 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).

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.

Box 3.4 – Licensing and registration of engineers

The Opal and Mascot Tower incidents

Over 2018 and 2019, separate incidents of structural cracking were discovered in the Opal and Mascot Tower's, leading to evacuation and concern about their potential collapse. Technical reports on the Mascot Tower were not made public but an independent report commissioned into the Opal tower incident found causes of the observed damage were largely related to changes made after the original design and exacerbated by construction issues (Carter, Hoffman and Foster 2019, p. 16).

Regarding certification of the building, the reviewers found no evidence that the building certifiers had been deficient in regard to statutory expectations but suggested there was evidence that checks for

Box 3.4 – Licensing and registration of engineers

compliance were either not taken or taken with insufficient rigour (Carter, Hoffman and Foster 2019, p. 14). It was recommended that review processes be primarily strengthened through:

- creation of a registry of engineers
- independent third-party certification of engineering designs
- regime of critical stage, on-site inspections by an independent registered engineer.

While the review largely focused on certification and approval in the design and construction of buildings, the incident has been commonly cited as evidence to justify broader mandatory registration of engineers that most states and territories have now implemented or are in the process of implementing (DISR 2019; DCS 2022; DMIRS 2022b).

Would mandatory registration of engineers have prevented the incidents?

While there is evidence that some designs and workmanship did not meet standards, this was often nuanced technical failings in conjunction with coordination issues between different practitioner expertise. The evidence did not establish that practitioners involved in this work had qualifications and/or experience below minimum requirements that could be attributable to the design and workmanship failings. As the reviewers themselves noted:

Australia is also home to some of the world's best architects, design engineers and construction companies who enjoy high international reputations for their work globally, including the firms associated with the design and construction of the Opal Tower. (Carter, Hoffman and Foster 2019, p. 14)

Indeed, the firm responsible for the structural design, WSP, is a global professional services firm of considerable reputation, market size and resources. It is doubtful they would employ engineers below minimum standards in qualifications and experience as set out by mandatory engineering registration.

Previous work by the Productivity Commission into public infrastructure investigated the validity of mandatory engineering registration in Australia. Similar high-profile engineering failures were mentioned by stakeholders, yet the evidence suggested these failures involved senior and accredited engineers (PC 2014c, p. 586). Queensland was the only state at the time to have a mandatory registration scheme in place but there was little evidence it had improved outcomes relative to other jurisdictions. The Commission concluded that mandatory registration was not justified given a lack of evidence that labour market mechanisms were failing to ensure a necessary level of quality:

Businesses that hire engineers are able to screen them during the hiring process, and to dismiss them if they are not proficient. In this sense, the conceptual grounds for mandating registration do not appear strong. (PC 2014c, p. 587)

There continues to be little evidence that mandatory registration is a necessary or efficient mechanism to improve engineering services to protect public safety.

Alternative avenues for reform

Subsequent court proceedings between the contractors involved in the work demonstrated critical failings in coordination. It was claimed that Evolution (who designed, manufactured, and installed the precast wall panels for the building) made changes to the shop drawings that proposed a change to the grouting that was subsequently identified as a cause for the structural defects. WSP denied approving these changes,

Box 3.4 – Licensing and registration of engineers

alleging that Evolution engaged in deceptive or misleading conduct by failing to expressly raise the design changes with WSP before commencing with the work (Supreme Court of New South Wales 2022).

This appears to reflect a perennial problem faced by many countries in how to effectively manage complex high-rise residential constructions. International research into the challenges associated with building complex structures have highlighted the challenge of maintaining the ‘golden thread’ of information. This is where information on the original design intent and subsequent changes are captured, maintained, and used to support safety decisions (Oswald et al. 2021). The details of this incident suggest reform aimed at improving accountability, coordination and information sharing between contractors is likely to have the greatest impact.

The role of licensing in the context of other safety regulation

In determining the role of licensing, IPART and PwC (2014) recommends policy makers consider all regulatory and non-regulatory options for achieving the desired objective. Indeed, safety regulation takes many forms aside from the licensing of practitioners, including product safety under the Australian Consumer Law, work health and safety law, and industry-specific codes and regulations (such as the national construction standards under the Building Code of Australia).

Establishing the minimum necessary regulation for a particular objective would ideally involve consideration of multiple forms of regulation, including less restrictive mechanisms (such as industry self-regulation) or more flexible approaches (such as risk-based regulation). Despite this, when health and safety claims lead to a high-risk rating, other forms of consumer regulation are often pursued as an *addition* to licensing rather than an alternative. For instance, recent licensing reform across most states and territories in building and construction have been driven by growing concern about defects and complaints in the industry, but this has occurred in addition to a range of other regulatory changes, and with little evidence of the benefit of further licensing (box 3.5).

The reform efforts have been led by the Building Minister’s Forum and guided by a report they commissioned into improving compliance with the National Construction Code (NCC). The report recommended several changes to the licensing of building practitioners that included an expanded range of licensed categories, additional competency and qualification requirements and compulsory CPD on the NCC (Shergold and Weir 2018).

These reforms were recommended alongside broader regulatory changes aimed at improving signals of product quality and enforcing accountability for services provided. The focus on output quality and consumer choice is a consequence of the performance-based approach of the NCC:

The code sets out explicit objectives, listed as a hierarchy of requirements. It is not intended to be overly prescriptive. Designers and builders have the capacity to find creative solutions to meet the performance requirements ... This is to be contrasted with traditional prescribed building codes that mandate specific construction practices. There are clear economic and aesthetic benefits to a performance-based approach: new techniques can be introduced to increase productivity; new products and innovative technologies can be applied to reduce costs or widen choice; and new creative architectural design is encouraged. (Shergold and Weir 2018, p. 9)

Box 3.5 – Defects and complaints in the building and construction industry

Efforts to reform the building and construction industry have been underway across most states and territories due to problems with product quality and public safety. This view has been prompted by high profile safety failures in multi-storey buildings, the high incidence of defects and complaints from home buyers, and industry feedback on the systematic failings in the current regulatory environment (Shergold and Weir 2018). In response, licensing changes have been recommended or implemented within a suite of regulatory reforms aimed at broadly improving standards in the sector (DISR 2019). However, it is unclear whether further licensing would create additional benefit given the lack of evidence establishing a clear link between quality issues and weak licensing arrangements.

Defects, complaints, and safety failings in multi-story buildings are a common issue internationally, despite considerable variation in the approach to licensing and registration (The World Bank 2013; Oswald et al. 2021). As CEDA points out, it is questionable whether further licensing is warranted given stringent licensing arrangements already in place have failed to stop a range of quality and safety issues including water ingress, leakage, structural weakness, and non-compliant cladding (CEDA 2022c). Indeed, mandatory registration of builders has been pursued since the 1960s to deal with building defects in Australia (Georgiou, Love and Smith 2000). Yet defects have remained a perennial problem and it remains unclear whether registration has produced benefits — research analysing insurance and pre-purchase inspection data of new homes and apartments in Victoria in the 1980s and 1990s found the number of defects were no different between owner-builders and registered builders (Georgiou, Love and Smith 1999; Mills, Love and Williams 2009).

While these findings should not be generalised to all cases of licensing and registration, they emphasise the importance of establishing the additionality of licensing i.e., the extent to which the introduction of mandatory entry requirements would lift standards beyond that already provided by the market through incentives for businesses to hire and train qualified individuals.

There is a stronger case for regulatory reform where intervention improves product information, processes for accountability and incentives for upskilling. A central concern highlighted by research and industry consultation has been the privatisation of building surveyors that occurred in the early 1990s. Private surveyors now service most of the sector but research and consultation has identified concerns about their independence, poor information sharing (with both consumers and regulators) and a weakened role for government oversight (Senate Economics References Committee 2018; Shergold and Weir 2018; Paton-Cole and Aibinu 2021).

Other issues identified as drivers of poor quality have included:

- poorly defined accountability and process in the design phase
- a lack of accountability during the project and once it has been delivered
- poor certification, data collection and information sharing
- a cultural environment emphasizing low cost/low value work, box ticking, and under investment in skilled labour. (Crommelin et al. 2021).

Some research has found defects are primarily the result of poor workmanship, but this is not necessarily a result of skill levels below a minimum threshold — it is typically linked to issues about accountability, motivation and communication (Johnston and Reid 2019, p. 11). For instance, Love et al. (2009) investigated the cause of errors in construction and engineering projects across Melbourne, Perth and Sydney and found the majority were intentional violations to increase operational efficiency. Some

Box 3.5 – Defects and complaints in the building and construction industry

international research has argued that while human errors are the immediate cause of defects in the building and construction industry, the originating issue lies in organisational practices:

... it would seem that defects are not caused primarily by lack of knowledge in the industry or by lack of education, thereby suggesting that increased efforts in training would not be expected to reduce the incidence of defects ... effort is needed to change procedures in project management, as these are more likely to have greater impact than either further training or changes in routines on the construction site. (Jingmond and Ågren 2015, pp. 213–214)

Research has also highlighted ongoing issues in available skills in the construction industry, but the evidence has been largely focused on skill shortages as opposed to skill gaps^a — where gaps have been identified, it is often because skills have not kept up with changes in technology and increases in the complexity of buildings (PC 2014c; Crommelin et al. 2021; Paton-Cole and Aibinu 2021). Indeed, licensing is likely to exacerbate skill shortages given the evidence that it can reduce the labour supply and create significant barriers for new entrants, migrants and those considering career transitions.

a. A *skill shortage* occurs when the demand for workers for a particular occupation is greater than the supply of workers who are qualified, available, and willing to work under existing market conditions. A *skill gap* refers to a situation where employers are hiring workers whom they consider under-skilled or that their existing workforce is under-skilled relative to some desired level (PC 2014c).

The inclusion of licensing reform through further prescription of qualification requirements and continuous professional development appears at odds with the performance-based approach applied to other regulatory reform. Indeed, there is no reason why a performance-based approach to business practices should not extend to the supply of labour inputs. This would involve finding opportunities to reduce reliance on prescriptive licensing arrangements and instead emphasise accountability to standards, access to training and improvements to market information so that business and individuals can make informed workforce decisions.

Research by Crommelin et al. (2021) investigating construction quality and defects found evidence that a lack of accountability and an emphasis on ‘box ticking’ weakened the incentive for practitioners to pursue higher quality in their work. While licensing may be justified where businesses are poorly placed to meet or determine standards, a performance-based approach would prioritise regulatory arrangements that incentivised high quality work while providing flexibility for businesses to achieve this by pursuing their own workforce solutions and opportunities for skill development.

The evidence on outcomes from licensing

The ability for regulators and policy makers to meaningfully assess the effectiveness of licensing relies on access to quality data and evidence. However, regulatory impact statements on licensing reform suggest regulators are overly reliant on anecdotal evidence and judgement calls on net benefits (box 3.6). While there are practical limits to more and/or better data, many fundamental questions about licensing are not investigated, despite the capacity to do so.

For instance, while it can be difficult to assess trends in safety incidents if they are relatively uncommon; where incidents are observed, it would be valuable to establish whether they were the result of an unqualified and inexperienced practitioner. And where skill gaps are observed, some assessment may be necessary to establish whether formal qualifications would be more appropriate than skills and experience developed on the job — for instance, plumbers appear to be providing some refrigeration and air conditioning services with no evidence of poorer quality or riskier work provided (box 3.3).

Without further evidence it is likely that many lower-level tasks could be performed by people in adjacent occupations without the need for further formal training. There is also an opportunity to better leverage the analytical potential of licensing systems. The extensive collection of practitioners information, compliance and auditing activities could be better designed and drawn upon to guide future licensing policy decisions.

Box 3.6 – Measuring the benefits in regulatory impact statements

Electrical regulation in Victoria

Energy Safe Victoria made changes to electrical safety regulation and electrical licensing over 2019 and 2020. In both Regulatory Impact Statements (RISs) provided, electrical fatality data was used to argue that the benefits in saving 2-3 lives per year (quantified by the statistical value of a life) outweighed the costs of the proposed regulation. In isolation, this may be achievable for each set of regulatory reforms, given that fatalities from electrical accidents have averaged 2.75 a year since 2003-04 in Victoria. However, both assessments used the same data and methods, implying a combined benefit of roughly 50 additional lives saved from electrocution over a 10-year period. Even if one assumes a perfect causal link between electrical regulation and reduced electrical fatalities, this additional benefit is impossible to establish given only 32 fatalities occurred over the decade to 2018-19 and there is no clear trend in annual fatalities over the total 16-year period of available data.

Refrigeration and Air Conditioning licences in Queensland

The RIS provided by the Queensland government on new refrigeration and air conditioning licences (box 3.3) pointed to a range of potential benefits, such as a reduction in safety risks, reduction of competition for licensed businesses, and long-term productivity gains from human capital formation. None of these benefits were quantified, 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).

Building practitioner registration in Victoria

The Department of Environment, Land, Water and Planning conducted a RIS of building practitioner registration in 2017. Through cost-benefit analysis they identified total costs of about \$27 million per year for current regulations. While they acknowledged in theory the potential for competition effects and a reduction in employment and output, a lack of data stopped them from quantifying this effect. Despite further difficulties quantifying benefits from builder registration due to data limitations and acknowledgement that registration requirements would not be the primary instrument to ensure quality in building construction — they nonetheless determined that the regulation was producing a net benefit:

Despite the lack of evidence about the reasons for incidents, and the potential link between these and the specific qualification requirements in the Regulations, the department is satisfied that this break-even point is achievable given the analysis of the extent of the problem detailed above and that this option therefore will result in an overall net benefit. (DELWP, p. 23)



Finding 7.3

Increased licensing is often based on poor evidence of safety risks

Licensing plays an important role in safeguarding standards of quality, particularly for both consumer protection and public health and safety grounds. However, it is not always the case that more stringent licensing is more effective, and in some cases, there is relatively poor evidence that the extent of licensing reduces health and safety risks. Policy advice has repeatedly emphasised proportionate and evidence-based approach to licensing, however this can be difficult to implement where data are lacking.

In the building and construction industry, licensing has been increasingly focused on protecting health and safety despite little evidence of its effectiveness. The lack of empirical evidence supporting licensing design has led to a ramping up of licensing stringency that has increased barriers to entry and is likely leading to considerable inefficiencies in the provision of skills and reduced productivity in the sector.

Priority needs to be given to understanding health and safety outcomes from licensing, including but not limited to:

- the extent that market mechanisms are failing to ensure adequate levels of skill or experience that are necessary to protect health and safety
- the extent that health and safety failings correlate with deficiencies in qualifications, training and experience; as well as qualitative investigation of what drives poor quality work and safety failings
- the additional benefit of licensing where consumer regulation already exists to improve accountability to the quality of outputs (i.e. certification, standards and codes of practice).

3.3 Addressing boundary issues and scope of practice

In occupations where licensing plays a necessary and important role, further challenges relate to designing the scope of occupational licences and the boundaries between different occupations (so-called 'scope of practice' issues). In determining which activities will be covered by a licence, the challenge is to ensure quality and safety in certain types of work without introducing undue barriers.

While occupational licences may have been well designed at their inception, they may require updating to take account of changes in technology, skills and work practices in the occupation.

Efficient boundaries for licences

Designing efficient boundaries in scope of practice involves a trade-off. For instance, if a particular licence is required to perform certain tasks, and the entry requirements are set high, this can ensure that a relatively high level of skill or knowledge is applied to those tasks. However, this also runs the risk of restricting service provision in cases where people with other licences or qualifications could safely provide *some* of the services covered by a licence.

Getting this balance right can be even more challenging when labour market needs differ geographically. For instance, New South Wales previously required car mechanics to hold a general motor vehicle repair licence that covered all types of work. This meant relatively straightforward work, such as wheel alignments, could only be done by a fully qualified mechanic, which added further pressure to regional skill shortages. Recent changes by NSW Fair Trading reformed the licence to include a range of trades certificates for individual classes of work (DFSI 2018). Changes to classes of repair work have also been made in Western Australia (DMIRS 2021a).

Providing a range of licence categories to correspond with specific tasks and skill levels can reduce the barriers to entry created by licensing. But this approach may also disincentivise workers to provide a broader range of services and can add significant administrative costs both for the worker and regulator where additional licences are sought. In Victoria, plumbers must apply for separate classes of licence for Stormwater roof plumbing and sanitary plumbing, which is not the case in other jurisdictions.

Little is known empirically about how this design challenge impacts labour market outcomes between jurisdictions. Either way, maintaining equivalence between regulated tasks and work practices creates an ongoing challenge for policymakers. In Victoria, metal roofing work can only be undertaken by a registered or licensed stormwater roof plumber — builders specialising in roof tiling could be technically capable of undertaking similar tasks but are not authorised to do so. While options to adjust scope of practice for metal roofing were considered by the regulator, a lack of data or evidence on non-compliance among builders completing roofing work stopped substantial reform being pursued (DELWP 2018, p. x).

Scope of practice in health

In the pursuit of high-quality care for all Australians, licensing of healthcare professionals involves a unique trade-off between standards of care and access to care.

- Licensing is highly desirable in pursuing standards of care because consumers have difficulty establishing the quality of medical services before and even after the event, and there are potentially severe consequences of poor services (PC 2008, p. 93). Furthermore, market incentives and signals of quality are a poor alternative to licensing when health services are publicly funded.
- However, unlike safety concerns in the purchase of a new home, protection of public health is also compromised without timely access to care. For instance, regional and remote Australians face barriers to accessible healthcare, in part due to workforce shortages of health professionals. In this way, the barriers to entry remain an important cost associated with extensive licensing of health professionals. This includes the challenges of attracting and recognising international health practitioners (discussed in chapter 2).

Health outcomes should be the primary focus of licensing in health, and to achieve this in the context of constrained supply of skilled labour, health professionals should be practising at their full scope according to their skills and experience. However, in practice, rapid changes to technology, skills and patient needs make it a challenge for regulation to keep pace.

The National Accreditation and Registration Scheme (NRAS) was designed to balance these priorities (box 3.7), but challenges have persisted in coordinated reform and responsiveness to workforce needs (Snowball 2014). Ensuring health professionals can optimally use their skills and knowledge is a perennial issue. In some cases, licensed highly-skilled practitioners have sole responsibility for performing tasks that could safely be delegated to other highly-skilled professionals under a different licence (for instance a nurse practitioner providing diagnosis and prescribing services traditionally done by a GP). This is particularly true in primary health where evidence suggests the most gains can be made by improving the distribution and provision of services, rather than funding a larger supply of medical practitioners (PC 2015a; DoH 2021; Breadon and Romanes 2022).

The COVID-19 pandemic has brought this challenge into sharp focus, with added pressure on regional and remote healthcare access, a sharp rise in GP waiting times indicating supply constraints and changing demand in services towards telehealth, mental health services, complex needs and long-covid. Both in Australia and internationally, the medical response to the pandemic (including vaccine rollouts) demanded flexibility in the workforce, ensuring practitioners were operating at their full capacity.

Past work on the healthcare workforce has identified a range of allied healthcare professionals that could be doing more through expanded scope of practice (PC 2015a). More recently, Grattan has argued for a longer-term plan to restructure the workforce according to a new model of care that prioritises a team based approach (Breadon and Romanes 2022). While larger scale reform may be warranted, more immediate improvements to the accessibility of quality care could be pursued through better utilisation of nurse practitioners and pharmacists.

Box 3.7 – How the NRAS regulates scope of practice

The NRAS was established in 2010 and attempts to strike a balance between flexibility and standards of care in governing scope of practice. The scheme created a national law that would be administered by the Australian Health Practitioner Regulation Agency (AHPRA) but enacted by the states to allow potential variations in regulation. This has ensured a base line of consistency in the regulation of healthcare professionals while providing some flexibility for states — for example mandatory reporting of practitioners in Western Australia and Queensland (Bennett et al. 2018, p. 169).

In setting scope of practice this flexibility also extends to individual health providers. The National Registration and Accreditation Scheme regulates the legal use of occupation titles and broad boundaries for scope (which states have some control to alter in practice), but individual health providers are responsible for setting scope of practice at the organisation and individual level (within the boundaries that AHPRA set) (ACSQHC 2015, p. 5). However, AHPRA and the professional boards retain some control over this process by settings standards of practice and a governance process that providers must follow in managing scope of practice.

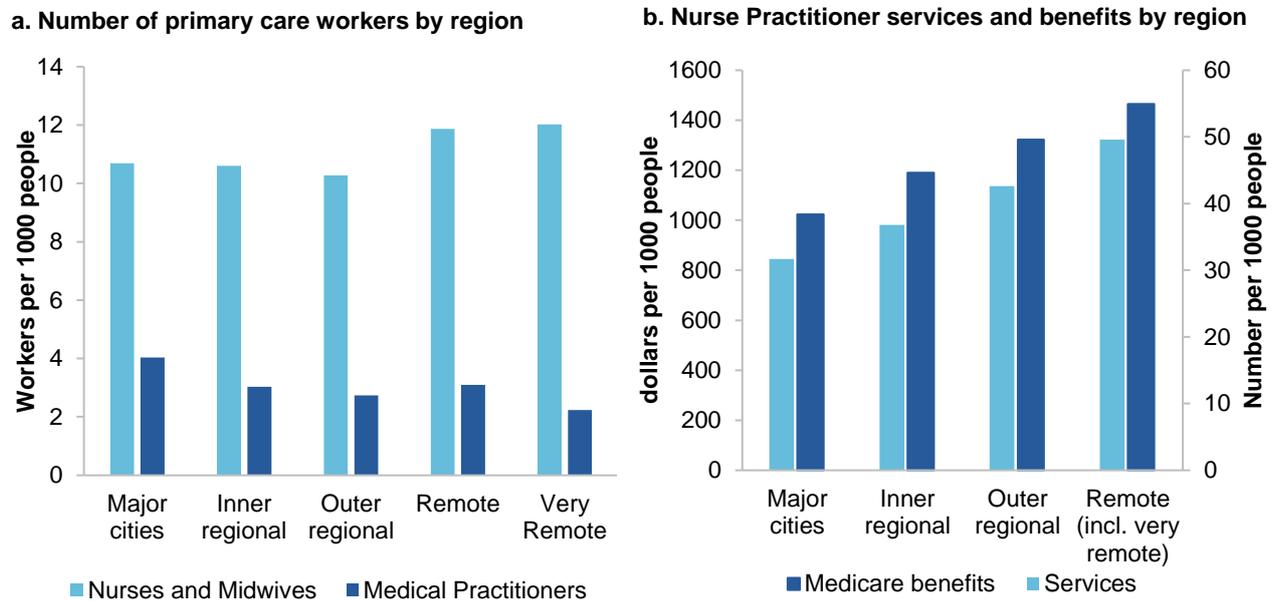
Expanding scope of practice for Nurse Practitioners

Nurses with advanced skills and training are often capable of taking on work traditionally done by medical practitioners and other tasks beyond the scope of a registered nurse. There are many state and organisation level versions of advanced nurse practice, but the Nurse Practitioner (NP) is the only legally protected advanced practice title authorised through the NRAS (Chief Nursing and Midwifery Officers Australia 2020). Endorsement as an NP requires 5000 hours (equivalent to 3 years) full-time experience in advanced nursing practice and completion of a masters with a clinical speciality. The scope of practice extends beyond the Registered Nurse role enabling NPs to conduct advanced health assessments and diagnoses, order and interpret diagnostic tests, prescribe some medications, and refer patients to other health care providers (Smith et al. 2019).

Research internationally and in Australia has investigated the outcomes of NP care and episodes of further scope of practice expansion. Compared with medical doctors, NPs are found to provide similar levels of care or better, with no evidence of poorer health outcomes (Stanik-Hutt et al. 2013; Petek and Thomas 2021). Furthermore, NPs can increase access to care, and reduce overall cost (Jennings et al. 2015; Martin-Misener et al. 2015, Smith 2022).

Beyond substitution for similar work, NPs can also effectively provide primary healthcare in identified service gaps, such as primary care in regional and remote areas, aged care and mental health (Clark et al. 2013; Xue et al. 2016; Alexander and Schnell 2019). Indeed, NPs are well positioned to play a stronger role in the delivery of regional and remote healthcare services given the significant contribution nurses and midwives already provide (figure 3.3). In remote areas of Australia, NPs are often the only health professional available (Department of Health 2021, p. 8)

Figure 3.3 – Nurses, midwives and nurse practitioners play a leading role in regional and remote healthcare^a



a. AIHW analysis of Department of Health, MBS claims data; and ABS, ERP.

Sources: AIHW (2021, 2022).

Despite the considerable benefits documented in NP roles, they remain underutilised in Australia. NPs make up only 0.7% of the registered nursing workforce, with only 1 NP for every 100 doctors (compared with 16 for every 100 doctors in the United States) (Maier et al. 2016; NMBA 2022). This likely reflects the ongoing barriers faced by NPs in properly utilising their skills and broader recognition and acceptance in their role.

While the national law broadly recognises the NP role and its potential to provide advanced services in diagnosis and prescribing, scope of practice remains restricted by two major funding issues:

- the limited number and value of Medicare Benefits Schedule (MBS) and Pharmaceutical Benefits Schedule (PBS) items NPs have access to that reduce the quality and continuity of care NPs can provide
- mandatory collaborative arrangements that require a doctors sign off on an NPs work to access Medicare billing for services.

Limited access to MBS and PBS

Since 2010 NPs have been given access to some MBS and PBS items to conduct consultations and deliver certain prescriptions. Despite this, the limited nature of access continues to be reported as a major barrier to effective primary care.

Although eligibility for the MBS and PBS appears to have enabled the development of privately practicing NP services, research suggests that the current structure of the MBS and PBS does not enable all privately practicing NPs to provide complete episodes of care and there is a challenge in maintaining a viable business model using only the MBS rebate. To overcome this, NPs may privately bill, which can lead to increased costs to consumers choosing to see an NP as their healthcare provider. (Department of Health 2021, p. 10)

In the Medicare benefits schedule review conducted over 2016 to 2020, expansion of NP funding through the MBS was proposed but ultimately rejected predominantly due to 'the lack of clarity regarding nurse practitioner scope of practice' (DOHA 2020, p. 1). It was therefore recommended that Nurse Practitioner's establish a scope

of practice and credentialing framework, potentially guided by the Nurses and Midwifery Board of Australia (NMBA), and investigate alternative funding models outside of the MBS that would be more appropriate.

'Credentialing' is an extra step in verifying the appropriateness of a practitioner beyond registration and endorsement, which establishes clinical privilege to engage in specific advanced practice established through a scope of practice. The Australian Commission on Safety and Quality in Health Care advises that formal credentialing is required where health practitioners are undertaking unsupervised practice, such as doctors, NPs, midwives and allied health professionals (ACSQHC 2015, p. 5). For instance, most states and territories have implemented credentialing frameworks for senior doctors that are particular to their own healthcare context (ACSQHC 2015, pp. 34–35). In some cases credentialing is used to promote quality standards, such as credentialing requirements for GPs to claim MBS services for mental health items (Department of Health 2021).

Quality standards for practicing NPs are regulated by the NMBA professional practice framework, which covers such things as standards for practice, code of conduct and ethics, decision-making framework, safety and quality guidelines, CPD and recency of practice. To the extent that further credentialing guidance is necessary to ensure standards of care are upheld for NPs working autonomously in primary care settings, states and organisations should implement credentialing policy that is suitable to each jurisdiction's context. However, autonomous practice is already undertaken by NPs in private practice settings (albeit with more restricted funding arrangements) and proposed expansion of funding for NPs has largely related to existing services within current scope of practice (Nurse Practitioner Reference Group 2019).

In practice, the NRAS and NMBA define the outer limits of practice, based upon the full competency of an endorsed NP and credentialing is independent of this. As such, it is not clear that the development of credentialing policies should be prerequisite for funding reform for NPs. If it is to be treated as a prerequisite, its progress should be prioritised. To the extent that the expansion of MBS eligibility is held up by the process of developing a national credentialing framework or other governance arrangements, this will delay improvements in patients' access to quality health care.

Mandatory collaborative arrangements

A related issue in the funding constraints imposed on NPs relate to mandatory collaborative arrangements. This refers to the legal requirement that NPs establish a collaborative arrangement with a medical practitioner (MP) or entity that employs MPs, in order to access MBS and PBS.

This arrangement can create inefficient and costly delivery of care where patients must pay out of pocket for simple procedures or wait to be signed off by a medical practitioner to access Medicare rebates. Research on collaborative arrangements has shown they may limit healthcare provision in regional and remote areas, create barriers in continuity of care and impose unnecessary legal requirements where collaboration already occurs (Schadewaldt et al. 2016; Currie, Chiarella and Buckley 2017, p. 538). Mandated collaboration can also exacerbate underutilisation of NP services because unclear legal liability creates perceived risks for medical practitioners to sign off on these arrangements (Ervin et al. 2019; Chiarella, Currie and Wand 2020).

In the United States, NPs in just over half the states in the United States are subject similar mandated supervision or contractual arrangements with a physician. Koch and Petek (2021) analysed many of the recent changes in state law that expanded NPs scope of practice by removing these arrangements and found no evidence that it harmed patients and some limited evidence that it provided health benefits.

The Australian Medical Association stated that if collaborative arrangements were removed:

There is a real risk that a patient's usual doctor can be excluded from decisions about a patient's care or decisions are made in the absence of all necessary information. Where care becomes

fragmented in this way, it increases the risk of poor patient outcomes due to misdiagnosis and missed diagnosis, delayed medical intervention and treatment, and adverse outcomes from the interaction of different medications and treatments. (Australian Medical Association 2021, p. 4)

At the same time, the principle of mandatory collaborative arrangements appears at odds with the original principle of the NRAS. States, organisations and individual practitioners are expected to uphold standards of care, while being entrusted with the flexibility to deliver health services in a manner that is responsive to individual context and capacity. Legally mandating collaboration to enforce continuity of care is inconsistent with this approach and there is little evidence it is having the desired effect of genuinely incentivising teamwork, information sharing and continuity of care.



Recommendation 7.9 **Address known issues in scope of practice**

Australian governments should work with the relevant regulators to re-examine boundary issues relating to occupational licences. In particular, where independent reviews have already highlighted problems or potential gains to service quality, safety, and productivity, governments and regulators should develop plans to implement those changes.

As an example, the Australian Government should work with the Australian Health Practitioner Regulation Agency to expand Medicare Benefits Schedule and Pharmaceutical Benefits Scheme items to nurse practitioner services that currently receive inadequate funding. Consideration should be given to amending requirements for collaborative arrangements and to credentialing policy, given their importance to the employment of Nurse Practitioners.

Expanding scope of practice for pharmacists

In Australia, only 19% (23 million visits) of all GP visits were considered less complex in 2011-2012 (Duckett and Breadon 2013, p. 21). A low complexity case involves only one problem that can be treated with one or two medications and requires no referral or further investigation. Many countries, including Australia, have recognised the opportunities in expanding scope of pharmacists practice to take on some of these cases, with several regulatory options available to expand scope of pharmacy prescribing in a way that balances access and quality of care (box 3.8).

One successful example of this has been the expansion of immunisation services provided by pharmacists. This expansion in scope has allowed community pharmacies — in addition to GPs — to begin administering vaccines over the last decade. From 2017 to 2019, the initial period in which pharmacy prescribing was introduced nationwide, pharmacy vaccinations grew from 0.1% of all vaccinations reported to 2.7%. The rate of pharmacy vaccinations has been highest for older Australians and those living in regional areas (Vette et al. 2020).

Box 3.8 – Expanding prescribing rights for pharmacists

Currently, pharmacists are trained and authorised to diagnose common medical conditions and supply low-risk medications for pharmacy only (schedule 2) and pharmacist only (schedule 3) medications. Expansion of pharmacist prescribing rights can occur where states authorise restricted access to prescription only medicines (schedule 4).

The Pharmacy Board of Australia has identified three models of non-medical prescribing that the Australian, state and territory governments can pursue to expand prescribing practice for pharmacists:

- prescribing via a structured prescribing arrangement (sometimes described as prescribing according to a protocol)
- prescribing under supervision (within a documented collaborative arrangement for example, between a pharmacist and the patient's GP)
- autonomous prescribing.

States and territories have adopted pharmacist vaccination via structured arrangements. This involved amendment to various state medicine and poison legislation to authorise limited prescription of certain medicines according to a protocol (following training and procedures set out in policy).

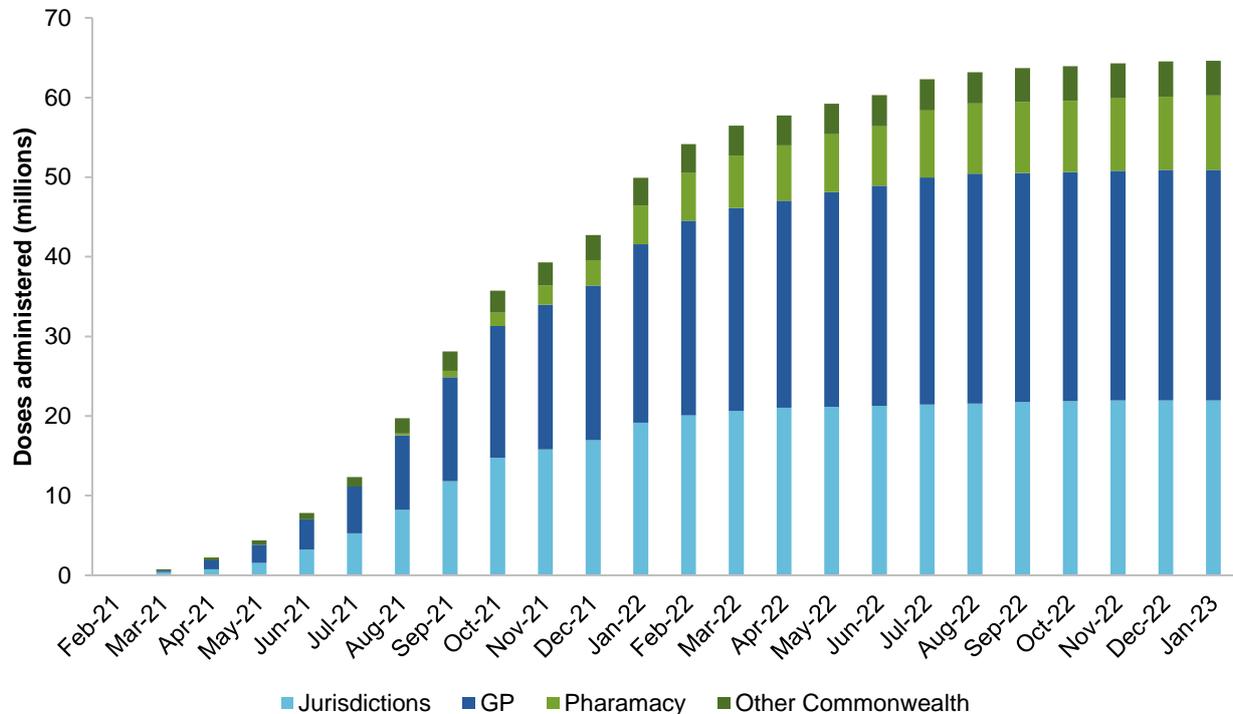
The detail of these amendments has varied in each jurisdiction according to the vaccinations permitted, age requirements, reporting and information sharing requirements, registration requirements for pharmacies and pharmacists and availability of funding through the National Immunisation Program. All states and territories provide some form of vaccination access through pharmacies for influenza, tetanus and measles, while access to vaccinations for other conditions, such as HPV and Hepatitis, is only provided in some jurisdictions.

While states and territories can pursue their own scope of practice reforms via structured or collaborative arrangements, autonomous prescribing would require registration and endorsement via changes to the national law. Before this change in national law could occur, the Pharmacy Board of Australia would need to develop accreditation standards for pharmacist prescribing education programs. The Pharmacy Board of Australia has indicated they will develop accreditation standards for completion by 2023 to support any future efforts at autonomous prescribing by states and territories — if current trials of pharmacy prescribing prove to be safe and effective.

Sources: Pharmacy Board (2022); NCIRS (2022).

This has also 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 regional and remote areas (Morrison 2022). As of January 2023, pharmacy providers have accounted for 14% of total COVID-19 vaccine doses administered since the pandemic began (figure 3.4) (DHAC 2023).

Figure 3.4 – Pharmacy vaccinations played a substantial role during COVID-19
Cumulative doses administered by channel



a. Data from the Australian Immunisation Register, as at 18 January 2023.

Source: Department of Health and Aged Care (2023).

Trialling pharmacy prescribing for low-risk conditions

With the successful expansion of pharmacy-administered vaccination, trials have begun in some states for prescribing medicines for low-risk emergency and repeat prescriptions. This began with Queensland trialling community pharmacy management of urinary tract infections (UTIs). Evaluation of the program found both patients and pharmacists reported significant value from the service because of improved accessibility and convenience. There were no indications that quality of care had been compromised and pharmacists were found to comply with treatment protocols (Nissen, Lau and Spinks 2022).

While these results are promising, more trialling and empirical investigation will be needed before generalised conclusions can be made to guide future policy. Some issues in the collection of data were also noteworthy and should be rectified in future trials.³³

Further reform and trialling of expanded scope of practice for pharmacists will soon commence in Queensland and New South Wales (and potentially in Victoria), with the aim of expanding the types of vaccines a pharmacist can administer and prescribe for many low-risk conditions. In North Queensland, trialling will also expand scope to include the provision of health and wellbeing services and prescribing medicines as part of chronic disease management programs (Queensland Health 2022).

³³ Outcomes for more than 4000 of those who participated in the trial were not followed up, with the reason for the failure to follow up unknown in almost two thirds of cases. Effort was made to prompt pharmacist to follow up patients, but it remains possible that a lack of reporting and ineffective or inappropriate treatment could be correlated and bias the results. Future reporting should ensure data collection methods are independent of trial subjects.

The North Queensland trial has faced some challenges with 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.

Funding coverage through MBS and PBS should also be considered, given access to affordable healthcare is a primary motivation for the trials. At the time of writing, the proposed trials in North Queensland will not be eligible for PBS and MBS coverage, requiring patients to cover the costs out-of-pocket (Queensland Health 2022). However, despite out-of-pocket fees charged in the Queensland UTI trial, participants reported high levels of satisfaction in the service attributable to convenience, and pharmacists reported that UTI services were predominantly provided on weekdays and during working hours (Nissen, Lau and Spinks 2022, p. 50). In this instance, differences in service cost were likely offset by the relative cost saving to the individual from convenience in the access to UTI services that would not have been possible through a GP appointment booking.

It is uncertain whether the cost saving from convenience would outweigh fees for more expensive services that are being proposed in Queensland and New South Wales. Furthermore, cost saving from convenience should not be prioritised if the aim is to improve access to healthcare — either for disadvantaged groups, or in areas where other services are unavailable. Funding arrangements under MBS and PBS should follow consistent principles regardless of the practitioners delivering subsidised services.

Will pharmacy-based prescription lead to over-medication?

Two key concerns have been raised about pharmacy-based prescription. First, there is a question of how well prepared pharmacists might be to take on the additional task of prescription. If changes to scope of practice are to improve access to quality care, it would have to involve an adequate standard of diagnosis, prescribing, and deprescribing. As such, it seems appropriate that recent trials focused on low-risk and repeat prescriptions and included sufficient safeguards and additional training.

Second, there is a potential for conflict-of-interest in community pharmacies, because funding primarily comes through medication mark-ups and dispensing fees (Duckett and Breadon 2013, p. 29). There are concerns this could produce moral hazard through the financial incentive to over medicate, which could also exacerbate current issues in antibacterial resistance (Nissen et al 2010, p. 31).

International evidence does not support this view, with research largely showing prescribing pharmacists in a range of settings provide comparable healthcare outcomes to usual medical prescribers (Weeks et al. 2016). Furthermore, some evidence suggests prescribing pharmacists can play a role in the withdrawal of inappropriate medication (Bužančić et al. 2022). In Canada, a trial of pharmacist prescription for UTI medication found pharmacists were consistent with guidelines and also optimised antibacterial therapy prescribed by a physician that was found to be inconsistent with guidelines (Beahm, Smyth and Tsuyuki 2021).

In Australia, antimicrobial resistance has emerged despite prescribing arrangements largely restricted to medical practitioners. While policy must not accelerate this trend, Australia's national strategy in combatting antimicrobial resistance has identified pharmacists as key players in antimicrobial stewardship interventions and community pharmacists have been identified as important educators on appropriate use of antimicrobials (ACSQHC 2018, p. 257). If properly implemented, stronger involvement of pharmacists in prescribing could create opportunities to develop better prescribing behaviours in healthcare.

Developing prescribing models that are appropriate to the practice setting will also reduce the risk of over-prescribing. For instance, it may be more appropriate to implement structured arrangements in community pharmacies and autonomous prescribing in larger hospitals where a pharmacist's scope of practice would be defined by the guidelines and practices of the hospital (Duckett 2019). Either way, where

independent prescribing is pursued, typical protections through standards, codes of conduct and credentialing will be essential. Ensuring there is a separation between prescribing and the supply of medicine will also be necessary to manage conflicts of interest (Pharmacy Board of Australia 2019). Because independent prescribing is a relatively new development in many countries, it will be important to prioritise data collection and evaluation of prescribing behaviour — particularly in the monitoring of over-prescription relative to current medical practitioner levels.



Recommendation 7.10 **Pursue trials into expanded scope of practice**

State and Territory Governments should undertake trials for expanded scope of practice in health services where supported by evidence. Where service funding is determined by an intergovernmental agreement (between state and federal levels) the Australian Government should allow the appropriate funding arrangements to encourage the use of evidence-based trials.

As an example, State and Territory Governments should undertake similar trials as those run in New South Wales and Queensland with regard to the prescription scope of pharmacists' providing vaccinations and low-risk medications. The Australian Government should ensure that the novel arrangements that are the subject of these trials are given equivalent funding through the Medicare Benefits Schedule or the Pharmaceutical Benefits Scheme, where the benefits are substantiated.

3.4 Laying the foundations for better occupational licensing design

The 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). Without clear evidence on the benefits of licensing in Australia, this is likely causing needless restriction to skills and reductions in productivity.

The Senate Committee acknowledged that a previous attempt at a national licensing system had failed because of concerns regarding the complexity and costs of the reform (PC 2015b, p. 35). 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; research into the health and safety benefits of occupational licensing; and expansion of automatic mutual recognition (Senate Red Tape Committee 2018, p. 18).

Since then, states and territories has successfully implemented automatic mutual recognition with the aim of improving interstate mobility. Other reforms recommended by the Senate Committee that would improve licensing schemes within jurisdictions have not been pursued. Prioritising these reforms has the potential to substantially improve productivity in services (section 3.1), but this will require a concrete plan for reform with clearer responsibilities between the Australian, state and territory governments, as well as better investment in data collection and a research agenda to build the evidence base on licensing outcomes.

A better approach to licensing reform

Implementing licensing reform is more complex when it involves multiple agencies. While it has been recommended that licensing reform be conducted by an independent body rather than the regulator to ensure no conflict of interest (PC 2011b) — in practice this has proved difficult. Previous work has found nearly 80% of occupation-registration authorities engage in regulation review (PC 2015b, p. 269).

Part of the challenge is appropriate resourcing and review scope. For instance, assessment of alternative consumer regulation to licensing would often involve consideration of policy changes outside the legislation a licensing agency is responsible for. Streamlining licensing arrangements into a central consumer service agency is one way states and territories can achieve better utilisation of resources and broader focus on licensing policy, but this is not always possible depending upon legislative requirements underpinning licensing schemes.

Industry-focused reform can also be useful. In building and construction for instance, national coordination exists through the Australian Building Codes Board and Building Ministers Meeting, which provides research and regulatory guidance. Recent efforts to improve compliance with the National Construction Code consistently across jurisdictions have been successful (DISR 2019). Despite this, assessment of licensing arrangements could have benefitted from broader guidance on best practice models and data on current licensing outcomes to clarify the role it plays in conjunction with other forms of regulation.

States and territories will need to prioritise broader reform agendas — this could usefully be supported by clearer responsibilities for licensing reform between the different levels of government and a stronger supporting role played by the Australian Government. One possibility would be to designate a central body that would be responsible for broader oversight and a national reform agenda. This body would not be responsible for implementing a nationally mandated scheme, but rather provide support and guidance on best practice to licensing and work towards national consistency where it is feasible. This body would also be responsible for developing a central database and research agenda on licensing in Australia (discussed below).

In the 25 years since the National Competition Policy review, the service economy has evolved rapidly — digital technologies provide new sources of market information and new products are changing the nature of health and safety risks. A renewed national effort at licensing reform will be needed to meet these challenges. The OECD argued that in light of these changes, consumer regulation should shift its focus from regulating inputs (e.g. entry requirements through licensing) to regulating outputs (e.g. negative licensing, certification, etc), because transaction costs have been reduced and information about quality is more accessible to consumers (Bambalaite, Nicoletti and von Rueden 2020, p. 12).

Exploring these options will require coordination among states and territories to consider the appropriateness of licensing arrangements and alternatives that may be available. There is a need to build a better foundation of evidence and cohesive policy advice to define what the limiting principles of licensing are and promote greater regulatory experimentation and evidence gathering where uncertainty remains. Laying this foundation will help to ensure that consumer protection regulation remains effective in the future while promoting productivity.



Recommendation 7.11

Improved process for regular review of licensing policy

Australian governments should conduct regular, independent review of occupational licensing systems in their jurisdictions, aiming to improve efficiency without compromising safety outcomes, considering efficient scope of practice as well as the optimal mix of licensing and other forms of safety regulation. Individual jurisdictions should drive the process, sharing the findings and conclusions publicly such that other jurisdictions may benefit. In some cases, the process of review and reform could usefully be driven by the coordinated efforts of all Australian governments, including through regular meetings at the ministerial level.

Digital licensing and data collection

Digital licensing provides opportunities to reduce administrative burden for business and individuals while improving information asymmetries faced by consumers. It can also lay the foundation for 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. Stronger emphasis on monitoring (i.e. collecting and publishing data) and evaluation would go a long way to produce a better understanding of the costs and benefits of licensing schemes.

New South Wales, Victoria and South Australia have implemented digital solutions for some occupations and similar plans are underway in Western Australia (DMIRS 2021b). If these separate digital platforms were to eventually integrate — either through shared IT resources or API connections — this would create the opportunity for a ‘single practitioner view’ across jurisdictions (discussed below).

A national approach to digital licensing does not necessarily require the immediate pursuit of a single, unified platform across states and territories. This would be costly given the complexity of the regulatory environment and diverse IT solutions underpinning it — in New South Wales alone, 90 agencies were identified in an IPART survey as agencies that administer licences (IPART NSW 2014, p. 29).³⁴ Even where agencies share a licensing function, considerable variation can exist in the policy area and functions of the agency. However, there would be substantial benefits to improving information sharing across governments and businesses, and establishing a better repository of data on licensing to inform policy decisions. States and territories should coordinate to ensure digital licensing systems have future integration in mind.

The administrative challenges of automatic mutual recognition (AMR) provide one example where a coordinated digital solution has been beneficial. Poor information sharing systems have been one reason why many occupations have been exempted from AMR, as the lack of immediate information on a practitioner has been seen as too risky for some regulators. For instance, teachers are currently exempt from AMR across all states and territories due to concern that teachers found to pose a safety risk to children in one jurisdiction could move interstate and begin teaching in another jurisdiction before employers or regulators are aware. This has necessitated greater coordination between states on a shared IT solution to ensure information sharing of cross border practitioners is tracked and notifications are timely. This work presents an opportunity to go further and establish a coordinated data sharing system that captures all information on a licensed practitioner, not just notifications for AMR purposes.

³⁴ This includes all licence types, not only occupational licences.

Single Practitioner View

Digital licensing can play a role in government initiatives aiming to create a single digital identity by extending a consistent national digital ID to registration and licensing schemes. This would help integrate and streamline information that a licensee must provide to regulators and provide accessible and better quality information for consumers about licensed workers. For instance, Services NSW has developed a licensing platform that brings together a range of licences across health, security, trades, real estate and gaming sectors. This can give practitioners the ability to update and manage their licences digitally, while potential consumers can use the platform to access an up-to-date snapshot of the practitioner's licences, qualifications, insurance, and compliance track record (figure 3.5).

The NSW licensing platform also demonstrates it is possible to consolidate data from various agencies and legislative arrangements. The platform currently brings together licences administered through NSW Fair Trading (responsible for the majority of occupational licences in NSW) and other agencies such as surveying licences through the registrar of the Board of surveying and spatial information and security licences through the Commissioner of Police.

A single practitioner view can provide an opportunity to consolidate several background checks that are undertaken and improve the administrative effectiveness of regulators compliance and enforcement capabilities. Currently, there is considerable overlap between national police checks, working with children checks and character checks performed by licensing agencies. Consolidating these character checks through digital integration can improve efficiency in the management of licensing systems and reduce the administrative burden on licensees (box 3.9). These challenges have been seen in the administering of Working With Children Checks (WWCC), with a report into the functioning of WWCC noting the administrative efficiency gains of integrating with the national police database:

[Current WWCC] arrangements do not currently enable agencies to access cardholders' national criminal records, meaning that continuous monitoring is restricted to records arising in the jurisdiction that issued the WWCC. The practical effect of this is that a cardholder could commit an offence in another jurisdiction that remains undetected until their WWCC is due for renewal, which, if known, would result in the cancellation of their WWCC.

Many submissions on Issues Paper No 1 noted that WWCC renewals are needed at regular intervals until continuous monitoring is expanded to include national criminal records, so that new relevant records are identified and assessed. For example, Victoria reported that, since their WWCC scheme commenced in 2006, approximately 54% of all negative notices were issued to existing cardholders, demonstrating the value of this type of monitoring. (Royal Commission 2015, p. 108)

Figure 3.5 – New South Wales' digital licence platform

A snapshot of publicly available information on licensed practitioners



✔ **Current**

Licence Contractor **Expiry** 22 Oct 2023

Number 51454682 **Address** 

^ **Licence, Classes and Conditions**

Contractor Licence

∨ [Condition \(1\)](#)

Classes (2)

| Class | Effective | Date |
|------------------------------------|-----------|-------------|
| Carpenter | Effective | 23 Oct 2017 |
| No conditions | | |
| Kitchen Bathroom Laundry Renovator | Effective | 14 Apr 2021 |
| No conditions | | |

∨ **About**

∨ **Insurance**

^ **Compliance**

Passed

| Type | Result |
|-------------------------|--------|
| Cancellation | ✔ |
| Compensation Fund Claim | ✔ |
| Disciplinary Action | ✔ |
| Penalty Notice | ✔ |
| Prosecution | ✔ |
| Public Warning | ✔ |
| Suspension | ✔ |
| Tribunal Order | ✔ |

^ **Timeline**

[Download full history](#)

- 14 Apr 2021

●

Class Approved

Kitchen Bathroom Laundry Renovator
- 14 Apr 2021

●

Licence Condition Applied

Only for contracts not requiring insurance under the home building compensation fund.

[Show less](#)
- 21 Oct 2020

●

Licence Renewed

3 Years
- 23 Oct 2017

●

Class Approved

Carpenter
- 23 Oct 2017

●

Associated Role Added

Licensee


- 23 Oct 2017

●

Licence Issued

3 Years

For more information, contact:

NSW Fair Trading

[Construction and Tradesperson](#)

If this is your licence, update and manage your licence with [Service NSW](#)

[Helpful links for you](#)

Source: Service NSW (2023).

Box 3.9 – Character checks for electrical licences in Western Australia

The Department of Mines, Industry Regulation and Safety (DMIRS) has proposed reform to electrical licences that would enable fitness and propriety checks to be required for licence renewal in addition to checks that are done at the initial granting of an electrical licence.

The proposed change is motivated by concerns that an individual's recent behaviours are unknown to the licensing authority that would disqualify them on character grounds. The DMIRS highlighted an incident in which a licensed individual committed a serious criminal offence for which they were later convicted while performing electrical work in someone's home. The Director of Energy Safety was only made aware of this when the individual applied for a separate licence through another licensing authority, who performed an updated character check and subsequently alerted the Director of Energy Safety. Had the individual not applied for the additional licence they would have remained licensed and able to practice as an electrician.

Even if the proposed change was implemented, electrical licences are typically renewed every five years, meaning it would still be possible for a person to commit a serious criminal offence and continue to practice for several years before renewal is required.

This proposal would add to administrative costs on the agency, while removing the incentive for DMIRS to pursue streamlining of licences in the future. Indeed, under this mechanism there would be rationale for shortening the renewal period to ensure more up to date monitoring of licence holders. The reforms also considered eventually replacing statutory declarations with a national police certificate for fitness and propriety checks, which would add about \$0.8 million in annual costs to licence holders.

Source: DMIRS (2022a).

The Australian Government has since established a national database for WWCC through the Australian Criminal Intelligence Commission that will allow states and territories to integrate their own systems and access continuous national records on WWCC holders (Australian Government 2022a, p. 177)

States and territories should work towards implementing a similar national solution for licensing and registration. This will require states and territories to coordinate when implementing or expanding their digital platforms, including by pursuing:

- technology neutral options for information sharing
- standardisation of licensing concepts and related data items across jurisdictions
- alignment of strategies and frameworks on cyber security, data sharing, and other data management practices
- investigating options to link licensing systems with WWCC and national police check systems.

The creation of an easily accessible and verified view of a practitioner's background and competency represents a significant improvement in market information. States and territories will need to reassess the rationale for licensing where information asymmetry may be better alleviated through improvements to consumer choice facilitated through digital licensing platforms.

Enabling a better evidence base

The increasing adoption of digital platforms also provides an opportunity to improve data collection on licensing and allow researchers and policy makers to fill the considerable gaps in knowledge that exist on the impacts of occupational licensing in Australia. Many of the costs and benefits of licensing have remained theoretical and

impossible to quantify with the available data (section 3.2), and scepticism exists in utilising any international research on the impacts of licensing (Senate Red Tape Committee 2018). The OECD has argued better data collection is a critical next step for Australian policy makers to pursue meaningful reform of occupational licensing — for instance through inclusion of licensing questions in the ABS Labour Force survey (OECD 2021, p. 51). In the United States, the pace of licensing reform has increased significantly since 2015, in part due to the availability of data and growing empirical evidence on licensing outcomes (Thornton, Timmons and Kukaev 2021). Australian research is needed to begin understanding the true costs of licensing schemes in Australia and enable policy makers to clarify the value in pursuing more ambitious reform.

The lack of data in Australia is a considerable barrier for regular review and assessment of licensing policy because each new initiative must either conduct a new survey or rely on a previous survey's data that is likely out of date and narrow in scope. Agencies conducting reform of individual licences in Australia rely on limited administrative and compliance data that is not fit for purpose — leading to judgement calls on the net benefit of licensing not backed by evidence (box 3.6).

In the United States, previous research had relied on an imputation strategy that would infer licence attainment based upon occupational affiliation and the state they worked in. The inability to directly measure licensure and certification was seen as a major barrier to empirical work and estimates using the imputation strategy were found to be biased (Gittleman, Klee and Kleiner 2018, p. 65). This began to change with the introduction of licensing and certification questions in the Survey of Income and Program Participation in 2008 and annual data from the bureau of labour statistics from 2015. Since then, the volume of research on licensing impacts has grown, with numerous studies conducted using this data to measure the labour market impacts of licensing in the United States (Bambalaite, Nicoletti and von Rueden 2020). The recent availability of administrative data has allowed integration with longitudinal business data, providing further accuracy to estimates and a more detailed picture of licensed workers and the businesses hiring them (Zapletal 2019). Researchers have also been able to combine this data with digital product and service platforms to provide insights into the quality impacts of licensing (Farronato et al. 2020).

If states and territories pursue integrated, standardised and technology neutral digital licensing (see previous section), high-quality administrative data could be made available for researchers and policy makers to utilise. Access to this data would also enable the ABS to link administrative data into integrated datasets³⁵ to provide a more complete picture on licensed workers. This data asset could be used to investigate the distributional impact of licensing on wages, impacts on firms by size and competition effects through changes in entry and exit rates.

Detailed administrative data would also create opportunities to explore the potential benefits of licensing. This would require states and territories to investigate other administrative data sources that could be used for analytical purposes or current data collection that could be improved. In building and construction, many Australian agencies are already tasked with collecting data on the quality of outputs, such as compliance, dispute and incidence data. Reform should focus on improving the analytical value of this data because it typically does not provide regulators with enough detail to understand the links between licensing design and outcomes. Furthermore, integration of this data into a national database would give policy makers a detailed view on the links between licensing arrangements, labour market outcomes and worker outputs. For example, it could provide a detailed view on the employment, wage and compliance impacts of mandatory CPD in building and construction trades that is currently being implemented across jurisdictions.

Current policy variation across states and territories could become a strength if utilised for research — for instance, different licensing requirements for a car repair mechanic could be used to investigate the

³⁵ For instance Business Longitudinal Analysis Data Environment (BLADE) and Multi-Agency Data Integration Project (MADIP).

incidence of road deaths related to mechanical failures; different levels and classes of licensed work in many trade occupations could be compared with labour market outcomes and compliance across jurisdictions; and differing thresholds for building licences and insurance requirements could be compared with defects and disputes. Laying the groundwork for more rigorous assessment of licensing design choices would reduce inefficiencies and have positive long-term impacts on productivity.



Recommendation 7.12

Digital licensing designed to enable future data sharing and analytics

State and Territory Governments should continue to develop digital licensing platforms, prioritising choices in technology and design to enable future integration, information sharing and analytics.

4. Effective workplace relations

Key points

- * **The workplace relations system has a fundamental role in driving productivity and wages, but needs repair to achieve those outcomes, including a greater emphasis on co-operation between parties.**
- * **The award system has grown in significance as enterprise bargaining has shrunk, but needs to become more efficient and flexible, in part because they set a floor on conditions in enterprise agreements.**
 - The modern awards objective should be simplified and, with the minimum wages objective, be the test used to judge award variations, which should be able to occur for all aspects of awards at any time.
 - An award review process that concentrated on material defects — including in the wage relativities of the hundreds of minimum wages — would be fairer and more efficient than the current more restricted criteria used by the Fair Work Commission to vary awards.
 - Award regulatory technology ('regtech') and education initiatives — such as tailored advice for small businesses on award compliance — can help businesses better navigate awards.
 - The Fair Work Commission should increasingly look at introducing menu options into awards that give employers choices about how to be compliant with the modern awards objective rather than specifying inflexible single options.
- * **Enterprise bargaining needs reform to provide the mutual benefits and productivity gains that were its original intent.**
 - Effective bargaining can be as much about the culture of a business as the law and is influenced by the willingness of employer and employee peak bodies to co-operate for changes that promote a resilient economy and productivity — as evidenced briefly by co-operation during the early stages of the pandemic.
 - While the 2022 Amendments to the Fair Work Act reduced some flaws in the Better of Overall test, it could be further improved by requiring that the Fair Work Commission approves an agreement if it passes a rigorous set of tests that leave most workers better off even if some are adversely affected.
 - Agreements may sometimes include conditions that limit the efficient management of a business. While it is difficult to anticipate and prohibit all the conditions that may do this, where a problem emerges, the Fair Work Act should be amended to limit the effect of such conditions.
 - In that respect, consultation clauses in some agreements are blocking initiatives to improve the productivity and efficiency of businesses. Allowing the model consultation term in awards to have legal effect over more stringent terms would resolve this. This would not prevent parties from negotiating alternative mutually beneficial alternatives, nor stifle employers' obligations to consult with employees about workplace changes.
- * **The revamped multi-enterprise bargaining streams may assist parties that have been left out of the single-enterprise bargaining system, but whether it succeeds in that objective, and its potential impacts on flexibility and productivity should be a focus of the scheduled review.**

4.1 An evolving workplace relations environment

The design of Australia's workplace relations (WR) system has wide-ranging impacts on co-operation between bargaining parties, wage determination and business decision making and costs — which in turn can affect productivity.

Our assessment of the WR system is against a background of significant change over the past decade and therefore narrower in its focus than the comprehensive inquiry into the system undertaken by the Productivity Commission in 2015 (PC 2015c). A greater reliance on awards has increased the need for an effective award determination process (section 4.2). There is a need for reforms to support enterprise bargaining, which is the form of arrangement seen as most suited to productivity and associated real wage growth (section 4.3). This is especially against the background of recent amendments to the *Fair Work Act 2009* (Cth) (FW Act) to expand the options for multi-enterprise agreements. Meanwhile, the gig economy has grown rapidly, challenging the distinction between employees and contractors (creating policy conundrums that are addressed in chapter 5).

At some level, what constitutes desirable labour market outcomes from a workplace relations perspective is uncontroversial. 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 2015c, 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** because this can 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 long and changing list of factors determining outcomes from workplace regulation (box 4.1), is a major challenge for policymakers. 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 when high thresholds have been met (as in the maritime industry),³⁶ but in general, a bespoke set of regulations adapted to each specific context would be unworkably complex.

³⁶ Discussed in the Productivity Commission's (2022d) inquiry report on *Lifting productivity at Australia's container ports*.

Box 4.1 – The effects of workplace relations regulation are highly context-dependent

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 regulate and often fund 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 regional and remote areas)
- union density (the share of employees in unions) remains high in some sectors, but overall reached a record low of 12.5% in 2022 (ABS 2022f)
- technological change and its potential to displace labour — both terms of hours of labour at the margin, and changes to job descriptions and requirements.

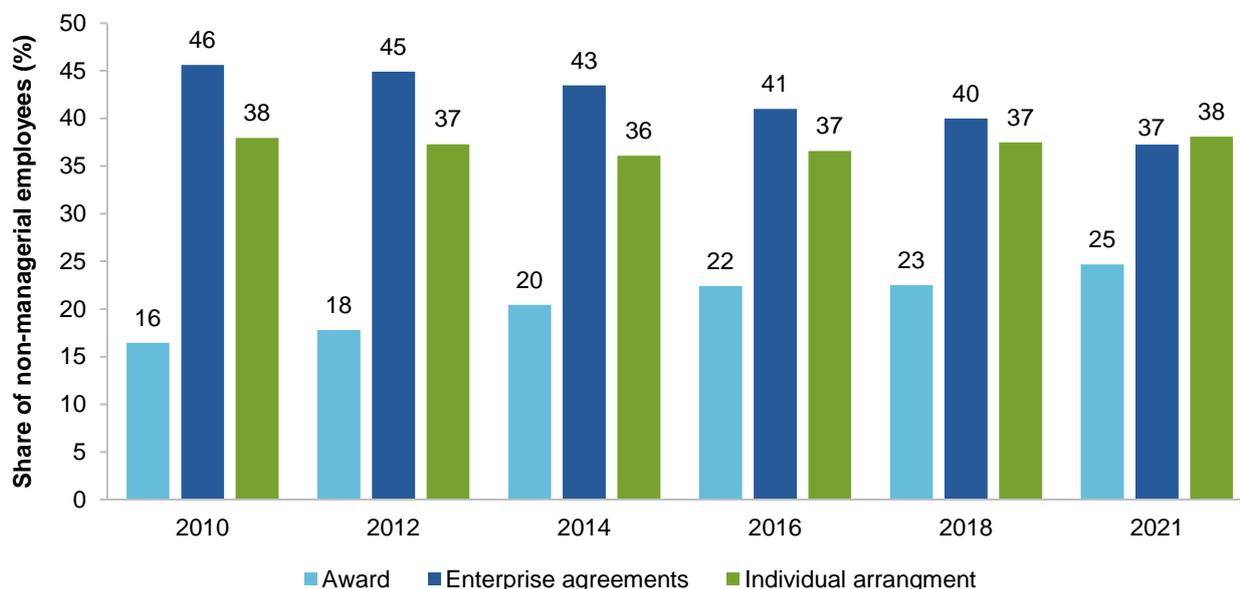
4.2 Awards are growing in policy significance

While only a minority of employees rely solely on awards to determine their wages and conditions, awards have grown in significance (figure 4.1). This has principally been driven by the waning attractiveness of enterprise bargaining, particularly for businesses with lower paid workers, such as health care and social assistance (for example, including aged care workers), administration and support services, and accommodation and food services.³⁷ Remarkably, the number of non-managerial employees on collective agreements barely changed in between 2010 and 2021, while the number reliant on awards grew by nearly 100%. The number of non-managerial employees on individual agreements has grown by 30%, maintaining their parity as a share of employment arrangements. Such agreements are a source of significant flexibility as they allow employees and employers to negotiate different wages and conditions so long as these exceed the award.³⁸

³⁷ 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 than historical experiences. During the middle of the 20th century and prior to the introduction of enterprise bargaining, awards directly set wages and conditions for more than 90% of employees (Mitchell 1998).

³⁸ Some individual arrangements include individual flexibility agreements, which offer more flexibility, and these are also used by some employees in businesses covered by enterprise agreements.

Figure 4.1 – Awards have grown in importance for non-managerial employees 2010–2021



Source: ABS (*Employee Earnings and Hours, Australia, various issues, Cat. no. 6306.0*).

The change in the latter industry partly reflects that some large employers returned to the award after the Fair Work Commission (FWC) terminated their enterprise agreements (EAs), such as in the case of McDonalds (a Fair Work era agreement) and Nandos (a pre-Fair Work era agreement). In 2018, 24% of accommodation and food services employees in large businesses (more than 100 employees) had their pay determined by an award, increasing to 54% in 2021. In the same timeframe, the share having pay determined by an EA declined from 65% to 37%.

Why the trend away from enterprise bargaining has occurred and its significance for future policy settings for enterprise bargaining is discussed later (section 4.3), but the shift has highlighted the importance of awards in Australia’s WR system. Notwithstanding its dramatic growth and that about 2.7 million employees were on the award in 2021, the award system has been a neglected aspect of public debate about workplace relations.

In the context of bargaining, awards provide a fall-back position in case negotiations fail or bargaining is deemed too costly and sets the benchmark level of wages and conditions that, under the Better Off Overall Test (BOOT), an EA cannot fall below, even if it is only for a single employee. The inextricable links between enterprise bargaining and awards means that any defects or virtues in awards tend to be inherited by agreements. Moreover, the FWC’s decisions about changes in the hundreds of minimum wage levels that are specified in more than 100 awards (and within awards across multiple classification levels) partly influence the wages of other employees because otherwise wage relativities would become increasingly compressed and out of step with the varying productivity of different employees. That link is often explicit as a significant share of agreements have annual wage increases linked to the minimum wage (DEWR 2022, p. 33). Outside their flow-on effects on enterprise bargaining, the award system is intended to meet social and equity goals (a specific feature of the modern awards objective in the FW Act) and to counter the bargaining power that employers could sometimes wield (Breunig and Rose 2019, pp. 25, 29).

Awards can affect productivity in varying ways. Given each award prescribes often unique wages and conditions, they affect wage relativities between tasks within a business, age groups, occupations, and industries. This may limit the efficient and productive allocation of labour across the economy. It may also

affect people's initial education choices and the incentives of workers and businesses to acquire skills over their working lives. Their complexity increases business costs. On the other hand, for employers within the coverage of a given award, the least productive businesses 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). Further, their prescriptive nature may reduce the costs of bargaining wage levels for some employers. As noted by the Hon. Reg Hamilton:

It may be that employers and perhaps unions should not use approved enterprise agreements as much as in the past and should now rely more on awards in some sectors where market rates are close to award rates given the difficult calculations required if penalties are to be rolled up in a single annual rate, for example. (sub. 50, p. 26)

While any given award is prescriptive in its requirements, viewed over time, the award system is more flexible than it might seem at first glance. As noted by O'Neil (2021, p. 425):

... during the pandemic awards proved to be a mechanism that could quickly facilitate broad changes without the need to wait for parliamentary processes or workplace-by-workplace negotiations.

While the 4 yearly award review³⁹ process is in its final stages, award review remains an ongoing feature of the awards system. As noted later, s.157(1) of the FW Act gives the FWC significant powers to vary *some* aspects of awards so long as the variations meet the modern awards objective. Moreover, on its own initiative the FWC added a temporary schedule (schedule X) to multiple awards to address some of the problems that the pandemic posed for employers and employees. It is possible (though untested) that changes in working arrangements in many businesses originate from award changes rather than enterprise bargaining. While workplace culture, not so much black letter law, is a central aspect of a productive workplace regardless of whether a workplace is award reliant or otherwise, a problem confronting enterprise bargaining in some industries is that poor culture can be reflected in highly restrictive terms in an agreement (PC 2022d).

In light of its central role in the workplace relations system and its far-reaching impacts, the effective functioning of the awards system is critical to a productive and adaptive economy.

An award system geared to a future economy

The FW Act sets out complex processes to make, vary or revoke an award, or to vary award minimum wages (box 4.2). There are opportunities to improve the criteria that must be met during these processes, including by:

- improving the clarity of the modern awards objective
- better facilitating variations to awards that improve outcomes under the modern awards objective.

Implementing a clearer modern awards objective

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. The modern awards objective is one source of the complexity of awards and a potential barrier to their adaptability. The FWC is required to balance ten considerations in the modern awards objective (defined in s.134 of the FW Act) when varying award minimum wages or when making, varying or revoking awards (box 4.2). As noted by the FWC, no single matter is given primacy:

³⁹ Before 2018, the Fair Work Commission was required to review all modern awards every 4 years.

The obligation to take into account the s.134 considerations [in the modern awards 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 considerations and not all of the matters identified will necessarily be relevant for a particular proposal to vary a modern award. (FWCFB 8092 *Pest Control Industry Award 2010* — Substantive claims [2019], 2 December 2019, at 13)

Box 4.2 – The modern awards 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 superannuation fund term or other aspects in an award. 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 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 or outworkers 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 FW Act, on the FWC's initiative or on application under s.158. The FWC must be satisfied that these 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.

There are three criteria from the FW Act that 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):

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

Sources: Australian Government (2008); Gillard (2008); Stewart et al. (2016); *Fair Work Act 2009* (Cth).

A more streamlined modern awards objective could reduce complexity, improve transparency and assume a broader community wellbeing perspective when determining appropriate award content (recommendation 7.13).

To that end, the modern awards objective could be made clearer and better targeted by replacing the paragraphs of s.134(1) with seven paragraphs that cover: a) the needs of the employed, b) the need to increase employment, c) the needs of employers, d) the need to achieve gender equality in the workforce, e) the needs of consumers, f) the need to ensure modern awards are easy to understand and g) the likely impact of any exercise of modern award powers on efficiency and productivity (recommendation 7.13). Such a change would give relatively greater prominence in award determination to the unemployed and consumers who are not often represented in FWC hearings. This does not mean the seven considerations need be given equal weight, nor that a given consideration be given *presumptive* primacy (PC 2015c, p. 374) — consistent with previous Full Bench rulings. Decision making would prioritise the wellbeing of the overall community and would be informed by consideration of likely benefits and costs (and the expected magnitude, incidence and persistence of effects) of award changes to stakeholder groups.

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

The FW Act can limit the degree to which the FWC can make improvements to awards. The FW Act (s.138) 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.

This has raised the issue of the distinction between award variations that are ‘*necessary*’ to meet the modern awards objective and variations that are ‘*desirable*’ to improve the objective’s outcomes variations. As Justice Tracey of the Federal Court highlighted:

That which is necessary must be done. That which is desirable does not carry the same imperative for action. While 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. (*Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480, 11 May 2012, at 46.)⁴⁰

The FWC has at times interpreted s.138 to include proposals to vary awards that *better* achieve the required objectives,⁴¹ though it cannot be assumed that this would characterise any decision about variations. Certainty could be achieved by amending the FW Act to allow award variations in awards that meet the modern awards objective, but that could be improved (recommendation 7.13).

This may appear to be a trivial change, but it can be likened to the difference between just meeting some standard and exceeding it. Excellence is achieved by the latter. The reform would provide an avenue for award revisions that flexibly maximised potential outcomes — especially as what is ‘desirable’ changes with economic and labour market developments.

⁴⁰ The distinction made by Justice Tracey in 2012 was 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.4 yearly review of modern awards—Plain language—*Shutdown provisions* [2022] FWCFB 161, 25 August 2022, at 43.

⁴¹ For example, the *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.

Award complexity and flexibility

Despite the significant streamlining of awards during the modernisation process, the Productivity Commission's 2015 inquiry into the Workplace Relations Framework found a broad range of flaws in awards, even in the presence of existing individual flexibility arrangements⁴² (PC 2015c chapter 8). Examination of the content of current awards suggests that this situation has not greatly changed since 2015.

Complexity can make it hard for employees to discover whether they have received the right pay and impose compliance costs on employers and create uncertainty about whether they have met the obligations set out in the FW Act. Moreover, the rigid imprint of history on current arrangements still plays a major role in their content.⁴³ There is relative inertia in the pay relativities, allowances, rostering and other arrangements that affect the organisation of a business and the wellbeing of employees, and, until recently, penalty rates. Labour markets can change much more rapidly than awards.

There are two broad, but associated, policy approaches to these issues. There are grounds for:

- a systematic process for appraisal of features of those awards that reduce productivity and economic prosperity, are unfair or no longer fit for purpose
- 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.

The first approach will often, but not always, entail the second.

Changing awards is not about tilting the conditions of an award in favour of one party or another. If changes to an award — for example, those arising from changes in work practices — raises productivity, the FWC would have a greater capacity to make larger changes to award wages.

Reforming the rigidities of awards, while retaining their basic features

Reinstatement of periodic reviews of all awards would be a costly exercise, particularly given that many awards are unproblematic. At the same time, with the abandonment of the 4 yearly award review process, the FWC has been left with a varied capacity to change award features. It has a high level of flexibility in amending aspects of awards that do not relate to modern award minimum wages, such as hours worked and rostering. But it is unable to vary the 100s of award minimum wages,⁴⁴ except:

- in its annual wage review, though typically the percentage increases in award minimum wages are the same across and within awards and so not a mechanism for revisiting whether the initial wages are appropriate across the more than 100 modern awards⁴⁵

⁴² 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.

⁴³ For instance, the *General Retail Industry Award 2020* contains the Broken Hill Allowance, an additional allowance payable to award-covered employees in Broken Hill in lieu of a fifth week of paid annual leave, which had been removed by the Fair Work Commission during the creation of modern awards. Four weeks paid annual leave is the minimum entitlement under the NES (SDA 2019).

⁴⁴ There are a few other exceptions, but these are esoteric.

⁴⁵ There have been a few (constrained) exceptions to this. For example, the annual minimum wage determinations for 2020 to 2022 were phased in at different times depending on the award — reflecting concerns that the potential disemployment impacts of the COVID-19 pandemic might be different across different industries. In addition, wage relativities were slightly compressed in 2022 because there was a flat \$40 a week increase for low-paid workers, but a 4.6% increase for employees above the \$869.60 weekly threshold.

- between annual wage reviews, but only for ‘work value reasons’ (alongside the requirement that varying award minimum wages outside the annual wage review is necessary to achieve the modern awards objective, and that the minimum wages objective is also met) under s.157(2) of the FW Act, which are factors deemed to justify an employee’s pay, including the nature of work, the level of skill or responsibility in doing the work and the conditions under which the work is done.

The reach of these restrictions is potentially wide given the large number of minimum wages set in awards and that they relate to almost all types of occupations, including academics, pilots and doctors. The requirement that work value reasons are necessary to justify consideration of award minimum wages revisions between the annual wage reviews embeds too narrow a framework for wage setting.

The 2022 FWC case relating to minimum wages for direct aged care workers provides an illustration of some of the difficulties. The FWC handed down an interim 15% increase in various award minimum wages based on work value.⁴⁶ In doing so, the FWC principally relied on two rationales for higher pay:

- that wages were low because of gender biases
- the skills required and the complexity of tasks to undertake aged care work had risen over the past two decades.

The framework underpinning work value reasons presumes that a given set of defined tasks has an objective value to society or the economy, and that a disinterested party — the Fair Work Commission in this case — is well-placed to determine this value independently of the actual outcomes of labour markets. The principle is that ‘aligning rates of pay in one modern award with classifications in other modern awards with similar qualification requirements will support a system of fairness, certainty and stability’.⁴⁷ At various times, work value cases have accordingly sought to find comparator rates that match skill levels. For instances, in successive work value cases, the so-called ‘C10 Metals Framework Alignment Approach’ — which takes the wage rate for a Certificate III classification in the manufacturing award as a starting benchmark — has been influential.⁴⁸ Work value is driven principally by the premise that it would be unfair and socially unjust to pay one set of workers with similar skills and tasks in one industry less than those in another. Accordingly, work value is largely a social goal and does not *necessarily* relate to the desirable outcomes of efficient labour markets.⁴⁹

Yet the latter should play a significant role in setting wage relativities, including when labour markets are not functioning well. For example, in the aged care market, governments loom large as rule-setters, price regulators and funders of services, such that they have a capacity to influence the labour markets of these services and are aware that wage cost pressures will be reflected in fiscal pressures. Even had there been no work value reasons, arguably the nature of the aged care labour market alone should have justified close examination of relative bargaining power and the potential for it to exert an inefficient downward pressure on wages in this sector. In this case, labour market considerations would suggest increases in minimum wages regardless of work value reasons, though pinning down the appropriate increase would be difficult, as it is

⁴⁶ *Applications to vary modern awards – work value – Aged Care Award 2010 – Nurses Award 2020 – Social, Community, Home Care and Disability Services Industry Award 2010 – Decision*, [2022] FWCFB 200, 4 November 2022
⁴⁷ [2022] FWCFB 200 at 192.

⁴⁸ The application of the C10 approach does not mandate that wages all be set equivalent to one or other of the relevant classifications in the relevant award but is a starting point ([2022] FWCFB 200 at 179). At times, the other benchmark is set by wages associated with different qualifications under the Australian Qualifications Framework.

⁴⁹ This is not to say that what happens in labour markets is free of the biases of employers, regulators and society generally. For example, Broadway and Wilkins (2017, p. 26) argue that it is likely that ‘award-wage decisions have been influenced by observed “typical” wages in industries and occupations, and male-dominated fields have benefited from a long history of strong unionisation that led to higher average wages’.

using the work value framework. In this case, work value and labour market reasons coincide in concluding that the minimum wages in the relevant industry awards probably anchor wages at too low a level.

However, the two frameworks may reach contradictory conclusions in other cases. The rationale for inertia in wage relativities based on work value reasons is likely to be problematic under certain labour market conditions. Minimum pay rates in certain awards for given classifications may become too high, affecting the viability of businesses that intensively employ such employees and the demand for the particular type of labour.

A potential saving grace of current arrangements is that the award system sets floors for wages at different classifications, rather than ceilings. It is therefore possible for an employer to vary wage relativities by paying more than the award wage for certain classifications. Nonetheless, this will have significant effects on the overall wage costs of the business. Moreover, the apparent capacity to freely raise wages for any given classification above its award level may be constrained in enterprise bargaining if employees collectively wish to protect the award relativities (Broadway and Wilkins 2017, pp. 9–10).

In this context, the FWC's settings for the hundreds of minimum wages across the more than 100 awards should give much greater prominence to the relevance of labour markets including, among other factors, the effects of the current wage relativities on the demands for skills, educational qualifications and occupations, the way labour is organised in businesses, and the incentives for labour mobility and training.

The restraints under s.157(2) of the FW Act and the FWC's practices in the annual wage review limit a wider consideration of the factors that should inform award minimum wages. As such, while work value reasons may still have relevance to a variation in award minimum wages *outside* an annual wage review, it should be removed as a *requirement* for any such variation. Instead, the FWC should have the same power to adjust award minimum wages in award reviews as the minimum wage panel currently has in the annual wage review (recommendation 7.13).

The new approach would not eliminate consideration of work value reasons so long as these were relevant to the criteria set out in the modern awards and minimum wage objectives, or with an equal remuneration order. Instead, it would open up wage determination to all of the factors that the FWC can consider when setting other aspects of awards. For example, the FWC's penalty rates decision⁵⁰ was based on consideration of the labour market and business effects of such rates and did not implicitly or explicitly apply a work value framework. The criteria were purely those set by the modern awards objective.

Adopting this broader approach introduces greater consistency in award decisions because the benefits to an employee of an award relates to all of its contents — and not just to minimum wages. Furthermore, the separation of modern award minimum wages from other aspects of awards makes it difficult to consider reforms to specific awards that seeks to trade these off against each other or that take into account the way labour markets are functioning.

Where a broader approach benefits both employers and employees, it would be conceptually in step with one goal of enterprise bargaining — the discovery of changes that overall create mutual benefits. However, notably, there is no equivalent to the BOOT in award changes, so it is possible that under this new model, the FWC could make a change to awards that leads to gains for many workers even if some are made worse off. In fact, even a net employee benefit is not required (for instance, in the FWC's changes to penalty rate in 2017, many rates were dropped without compensating increases in ordinary time wage rates).⁵¹ Conversely, in circumstances where a group of employees have low bargaining power and are unlikely to benefit from enterprise bargaining, then

⁵⁰ 4 yearly review of modern awards - *Penalty Rates*, [2017] FWCFB 1001, 23 February 2017.

⁵¹ [2017] FWCFB 1001.

changes to specific awards could be a vehicle for providing pay increases that are higher than those usually provided through annual wage reviews, as was the case with the *Aged Care Award 2010*.

Developing an adaptive award review process

Previous (now abolished) 4 yearly reviews of awards involved reviewing *every* clause from *every* award and were resource-intensive for parties wishing to participate in the process, as well as the FWC. Reviews that are excessively time-intensive may deter potential parties who wish to participate.

Future award review processes should be structured to avoid the pitfalls of the (now abolished) untargeted 4 yearly reviews of modern awards (PC 2015c, p. 341). A simpler approach would be that the FWC identify awards that have significant deficiencies in their wage relativities or some common flawed feature across awards ('hotspots' as described in PC 2015c, p. 369) and then modify these based on its own research and evidence presented by external stakeholders, such as union and employer groups. It could undertake this task at any time.

The FWC could particularly focus its assessments on aspects of awards that:

- overly restrict work practices and limit flexibility for employees as well as employers
- have wage relativities that are out of step with relative productivities and labour demand
- may disadvantage particular types of workers and businesses (say those in some regional areas).

For instance, the level of prescriptive detail applied to classification levels within awards 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 BOOT (as discussed further below).

Various stakeholders made suggestions about potential award reform options. For instance, the Ai Group proposed awards could be improved by moving sections to the NES:

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 excluded or lessened under any form of agreement or individual arrangement.⁵² 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*

⁵² The Productivity 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.

*Award 2010*⁵³ — had casual conversion clauses that allowed for conversion for eligible casual employees after six 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). However, whether much harmonisation is desirable, feasible, and whether the process to achieve it would be efficient is uncertain. Further detailed analysis and consultation would be required to evaluate the merits of enshrining more award features into the NES.

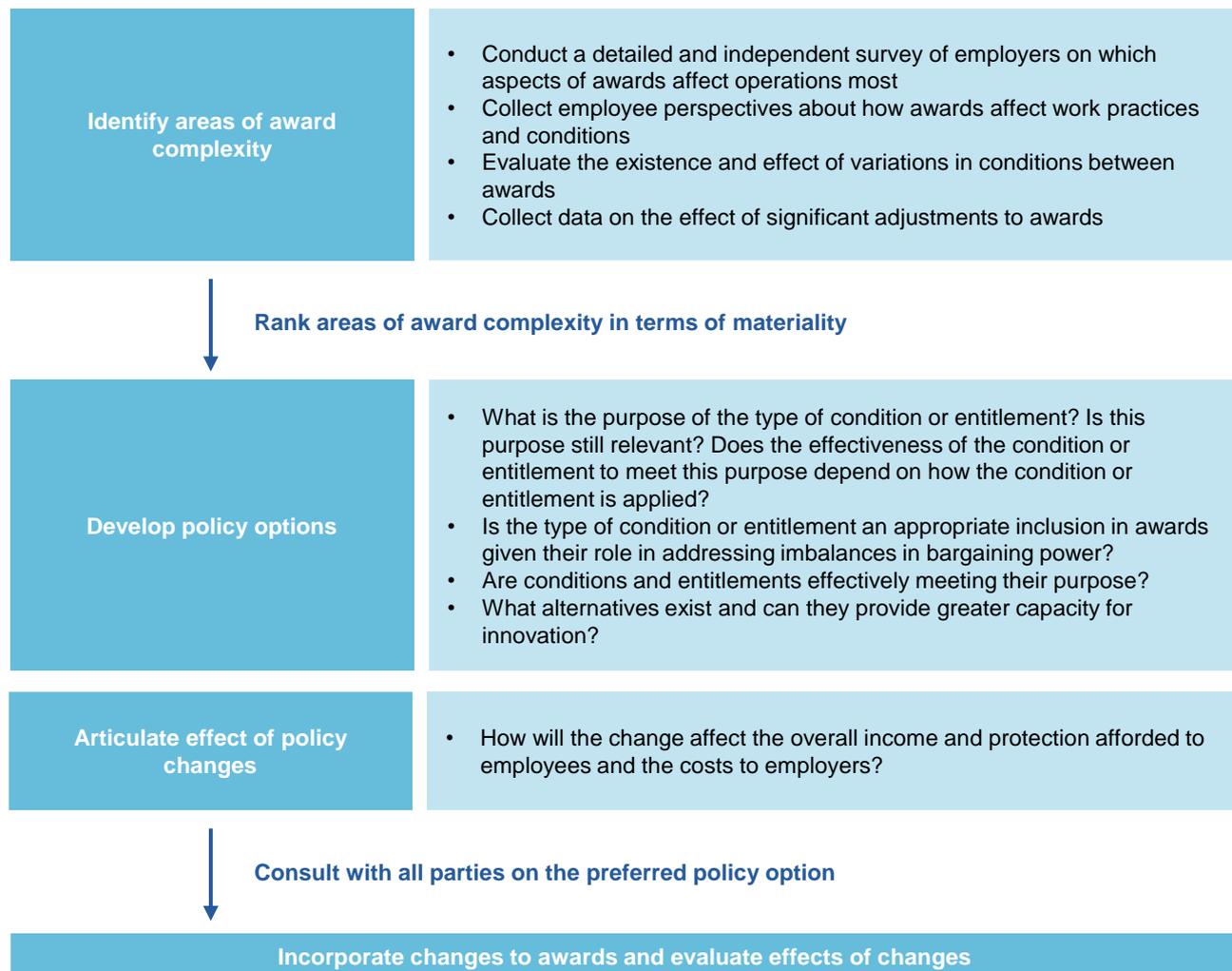
Ai Group (sub 43, p. 8) highlighted that the need to work hours continuously is less relevant, as specified in some awards, when an employee is working from home. Ai Group also stated that minimum engagement requirements, rest breaks and penalty rates did not 'reflect the realities of remote work or working from home arrangements' (sub IR179, p. 13). However, wholesale modification to awards based on greater working from home is complicated given many users of awards will still work at a physical workplace and the level of discretion workers have available to structure their work time while working remotely will vary. For instance, a remote call centre worker's working hours will be strongly affected by the employer's opening hours for phone support and the number of calls received. The Business Council of Australia (sub IR181, p. 15) suggested award simplification could focus on 'removing complexity in each of the awards, as opposed to previous attempts to combine awards into a smaller overall number'.

The FWC's evidence base will be key

Award review should be informed by quantitative and qualitative evidence and analysis and focus on material issues (figure 4.2), recognising that participating in award review processes can in itself be resource-intensive for parties. As an independent body and the ultimate maker, the FWC's practices are particularly important, and it should give considerable primacy to rigorous research, including undertaken internally or commissioned, in making its decisions.

In contrast, while interested parties — usually representing employer, employee or government interests — present evidence to support their held positions, not all of their evidence is robust or of the same quality. Indeed, FWC decisions frequently refer to deficiencies in evidence provided by some parties (PC 2015c, p. 341). Nevertheless, 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 (recommendation 7.13).

⁵³ *Manufacturing and Associated Industries and Occupations Award 2010* [MA000010] as at 4 December 2017 and *Building and Construction General On-site Award 2010* [MA000020] as at 20 November 2020.

Figure 4.2 – A new way of assessing and addressing award deficiencies

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



Recommendation 7.13

A more efficient and fairer approach to adjusting awards

The Australian Government should amend the *Fair Work Act 2009* (Cth) to:

- replace the paragraphs of s.134(1) with seven paragraphs that cover:
 - (a) the needs of the employed
 - (b) the need to increase employment
 - (c) the needs of employers
 - (d) the need to achieve gender equality in the workforce
 - (e) the needs of consumers
 - (f) the need to ensure that modern awards are easy to understand
 - (g) the likely impact of any exercise of modern award powers on efficiency and productivity.
- remove the need for work value reasons alone for variations to award minimum wages outside of the Annual Wage Review, allowing the Fair Work Commission to have the same power to adjust award minimum wages in award reviews as the minimum wage panel currently has in annual wage reviews
- make it explicit that the Fair Work Commission should make variations to awards that would *better* achieve the modern awards objective, rather than only being required to make changes that are necessary to comply with the objective
- require that when reviewing and varying modern awards, the Fair Work Commission should use robust analysis to set issues for assessment, prioritised on the basis of likely high yielding gains, and consult widely with the community on reform options.

The promise of awards as options

The FWC has promoted greater flexibility in awards by giving employers options about how to be compliant with an award, spurred by the disruption associated with the COVID-19 pandemic, but with long-run implications. The most notable recent case involved a variation in the *Hospitality Industry (General) Award 2020*.⁵⁴ The FWC agreed to give any relevant employer the option to pay a premium on the usual award pay rate (a loaded rate) to certain groups of full-time employees in exchange for giving up some overtime, penalty rate and split shift payments. The intention was to avoid making any employee in the given groups worse off, while leaving it in the hands of the employer whether to take up the option or not:

... we would expect that employers will weigh the administrative benefits and any short term additional regulatory burden when deciding whether to utilise the Loaded Rates Arrangements.

On balance, this factor weighs in favour of making the amended draft determination. ([2021] FWCFB 5371 at 112)

Various unions opposed changes to the award, primarily because they argued that some employees might be made worse off. The FWC decided that, on balance, and given other safeguards, this was not a valid concern (para 52). However, regardless of the merits or otherwise of the cases put by the various parties, the

⁵⁴ Decision by the full bench of the Fair Work Commission in relation to an application to change the hospitality award ([2021] FWCFB 5371).

most important aspect of the decision was that it reconfigured an award into a menu that increased flexibility about how to manage workplaces.

There are strong grounds for the FWC to take a similar approach in developing options in awards that let the employer choose the one that most suits their circumstances, but subject to the strict provisos that any option must still meet the modern awards objective, and that the employer undertakes appropriate consultation with affected employees (recommendation 7.14).⁵⁵ The instances where this applies should extend beyond loaded rates cases to any award where menus are likely to improve outcomes. This does not require changes to the FW Act.



Recommendation 7.14 **Introducing menus into industrial awards**

In making variations to awards, the Fair Work Commission should seek to include options that allow employers some choice about how they can meet award requirements, subject to meeting the modern awards objective and appropriate consultation with affected employees.

Reducing compliance costs and improving the process of creating awards through award ‘regtech’

While no panacea for unnecessary complexity, award regulatory technology (‘regtech’) is technology that can help businesses comply with awards or assist the FWC to adjust award content more efficiently. This would also recognise that many errors in payment are due to error, rather than deliberate actions. As noted by the Fair Work Ombudsman (FWO): ‘Underpayments often happen because of a mistake or payroll error’ (FWO 2023).

A related form of technology is used by some businesses to quantitatively assess whether proposed EAs pass the BOOT.

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 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.

⁵⁵ The loaded rate arrangement includes a straightforward consultation arrangement as spelt out by the Fair Work Ombudsman (FWO 2021).

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 (dsanz, 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 using software code to represent awards ('Rules as Code'), 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 employees to determine whether an EA makes employees are better off overall compared with awards (the Hon Reg Hamilton, sub. 50, p. 26). In this respect, coded rules and the software that uses them could also be used to facilitate the inclusion of reconciliation clauses in EAs. A reconciliation clause allows an employer to top up payments to any employee who, over some period of time, is subsequently found to be worse off than under the relevant award.⁵⁶ Absent such a clause, the FWC may refuse to approve an agreement because it *might* fail the BOOT under future working arrangements, reducing the flexibility of agreements (Townsend 2021).⁵⁷ However, the calculations required for reconciliation are complex. Coded rules lower compliance costs and provide greater certainty to employees, their representatives, employers and the FWC and FWO that reconciliation clauses are being used accurately

⁵⁶ For example, clause 41 of the *Commonwealth Bank Group Enterprise Agreement 2020* sets out the detailed factors that provides top-up payments if the employee was found ex post not to be better off compared with the award.

⁵⁷ The exact *specification* of a reconciliation clause, if present, will be important in determining whether an agreement passes the BOOT. For example, in [2017] FWCFB 1664, the Full Bench did not find the reconciliation clause in the employer's undertaking sufficient to pass the BOOT. The reason was that the FWC found that the undertaking did 'not create an enforceable right to any payment', because it placed the onus on the employee to request a review of their wages compared with the report. If an employee did not make a request, 'whether through ignorance or design, or perhaps because an affected employee simply lacks the time, information or ability to form a view, then no obligation to conduct a review, much less "make good" any shortfall, arises [in the agreement]'.

- 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. Simulations of the effects of proposed award variations may also identify unintended outcomes
- publishing machine-readable rules, which payroll software could read to automate calculation of employee entitlements after an employer inputs work characteristics such as the number of hours worked and the 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 and reduce compliance costs (Ai Group, sub. IR179, p. 13). Business users cannot be assured that, commercial reputation aside, software makers have complete incentives to avoid errors. In many instances, the terms of use for accounting software and award interpretation services impose limits on when the software company may be found liable, include indemnity clauses for software errors, and impose a monetary cap on liability — often the sum of subscription fees paid by the user in the past 12 months. Under a safe harbour 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 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, the Australian Government would need to communicate effectively to businesses to avoid misconceptions about the scope of the safe harbour. Moreover, any safe harbour would still need to maintain incentives for software developers to take care in their coding and some level of prudent oversight by employers of their payroll systems to ensure integrity in data entry and to check for manifest errors in outcomes. There would also be a need to avoid the risks that a few employers may strategically use errors to underpay employees. Overall, any safe harbour requires an even greater confidence that regtech solutions are highly accurate (finding 7.5).

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:

[a]n 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 unions and employer groups 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 January 2023, the FWC is examining standard clauses, references to loading or penalties, reasonable overtime, annual leave shutdown and the National Training Wage, having completed plain language redrafting for a number of awards with high coverage.⁵⁸

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).⁵⁹

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

⁵⁸ Awards that have already undergone redrafting include the *Cleaning Services Award 2020*, *Clerks – Private Sector Award 2020*, *General Retail Industry Award 2020*, *Hospitality Industry (General) Award 2020*, *Pharmacy Industry Award 2020*, *Restaurant Industry Award 2020*, *Security Services Industry Award 2020*, the *Fast Food Industry Award 2020* and the *Hair and Beauty Industry Award 2020*, which have high coverage (FWC 2022).

⁵⁹ A list of plain language principles can be found in FWC (2015, p. 23).

term — which may be different from a colloquial understanding — and to understand how terms relate to one another. (Box 4.3 shows 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), the Australian Services Union (ASU) and Ai Group.⁶⁰

Box 4.3 – 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 pay’) 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).



Finding 7.4

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.

⁶⁰ AM2022/8, Transcript of Proceedings 11 July 2022 and Ai Group (2022a)

**Finding 7.5****A 'safe harbour' for award compliance has implementation hurdles**

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:

- effectively communicated to businesses to avoid misconceptions about the scope of the safe harbour
- carefully designed to maintain strong incentives for software providers to develop accurate solutions and for employers to still have prudent oversight over their payroll systems, while avoiding the risks that a few employers may strategically use errors to underpay employees.

4.3 More efficient enterprise bargaining

When operating efficiently, enterprise bargaining allows employers and employees to vary wages and working conditions from those set out in the relevant awards to best suit their circumstances. While Australian evidence is scarce, international evidence suggests that enterprise-level bargaining (as opposed to more centralised forms of bargaining) is associated with higher productivity growth by allowing employers and employees to mutually benefit from the flexibility in the use of labour, and by improving matching of employers with employees.⁶¹ A well-designed enterprise bargaining system could improve the productivity and efficiency of businesses and translate to higher wages for employees — the intent of such bargaining arrangements when they first commenced.

However, with many significant changes since first introduced and in its current form and economic environment, enterprise bargaining does not seem to be delivering its intended outcomes. Its coverage of employees has declined (figure 4.1), particularly in the private sector. Wage and productivity growth has been slow.

In the ideal world, agreements are co-operative — securing benefits for employees and employers. If workplace relations law or the economic context changes, one party or the other may secure most of the gains, or the gains that might otherwise be attainable are no longer on the table because they are not allowed or the transaction costs of achieving them are too high. One party has claimed:

... a significant driver is the reality that, in most workplaces, enterprise bargaining is simply not worth the effort. Enterprise agreements generally do not deliver the much vaunted efficiencies or productivity benefits ... (de Flamingh and Ellery 2022)

⁶¹ 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, p. 3), 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, p. 1). 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 (Aglino and di Mauro 2020, pp. 17–18). 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 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, p. 25).

There are debates about the sources of these weakened incentives.

Some, particularly on the union side, suggest the decline is due to lower union representation, the power of employers to refuse to bargain, the circumvention of the system through surface bargaining⁶² and restrictions on permissible matters in agreements, among other factors (ACTU 2022b, p. 45; Pennington 2020; Stanford, Macdonald and Raynes 2022, p. 13; Stewart, Stanford and Hardy 2022, p. 5).

Others, particularly on the employer side, point to the increasing complexity, the application of the BOOT, delays in the agreement approval and bargaining processes and an inability for the system to provide meaningful productivity-enhancing outcomes (Ai Group sub. IR179, p.9; Business Council of Australia sub. IR181, pp. 14–15; de Flamingh and Ellery 2022).

These factors cannot have significantly influenced agreement making by the smallest businesses — those with less than 50 employees — because they have a relatively low propensity to have agreements in the first place (figure 4.3), and the share of employees covered has fallen only slightly (by 0.7%pts between 2012 and 2021).⁶³ Agreement coverage has fallen most for employees in larger businesses, particularly those sized between 50 and 1000 employees (by 13%pts between 2012 and 2021).

Complexity is likely to play one role in frustrating enterprise bargaining for these businesses and, where feasible, should be reduced. On the other hand, it is not clear that complexity has been the decisive factor behind the *decline* of enterprise bargaining as its high level of complexity pre-dated the decline. Indeed, there has been some simplification. Changes to the FW Act in 2018 to allow the FWC to overlook minor procedural or technical errors in enterprise bargaining processes when approving an EA.⁶⁴ Moreover, the median approval time for agreements without undertakings has fallen from 30 days in 2018-19 to 14 days in 2020-21.⁶⁵ The efficacy of the FWC's outreach can also be seen in the fall in the share of approved agreements that require undertakings,⁶⁶ which are amendments required by the FWC to ensure the EA meets the requirements of the FW Act.

Nevertheless, the provisions of the law remain complex, and bargaining is still time consuming and resource intensive for parties.⁶⁷ 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).

Overall, there is no obvious single explanation for the decline of employees covered by agreements among medium and larger businesses — it will likely be a range of the obstacles identified by stakeholders. In any case, even had coverage by EA not fallen, a key question is whether they deliver much when they exist. Many employers and employees will continue to form agreements because they have had them before. About 70–80% of new agreements made each quarter replace an existing agreement, which has increased

⁶² A strategy where one of the parties goes through the motions, with no intention of reaching an agreement.

⁶³ Based on data on non-managerial employees from the ABS *Survey of Employee Earnings and Hours*.

⁶⁴ *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth).

⁶⁵ 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.

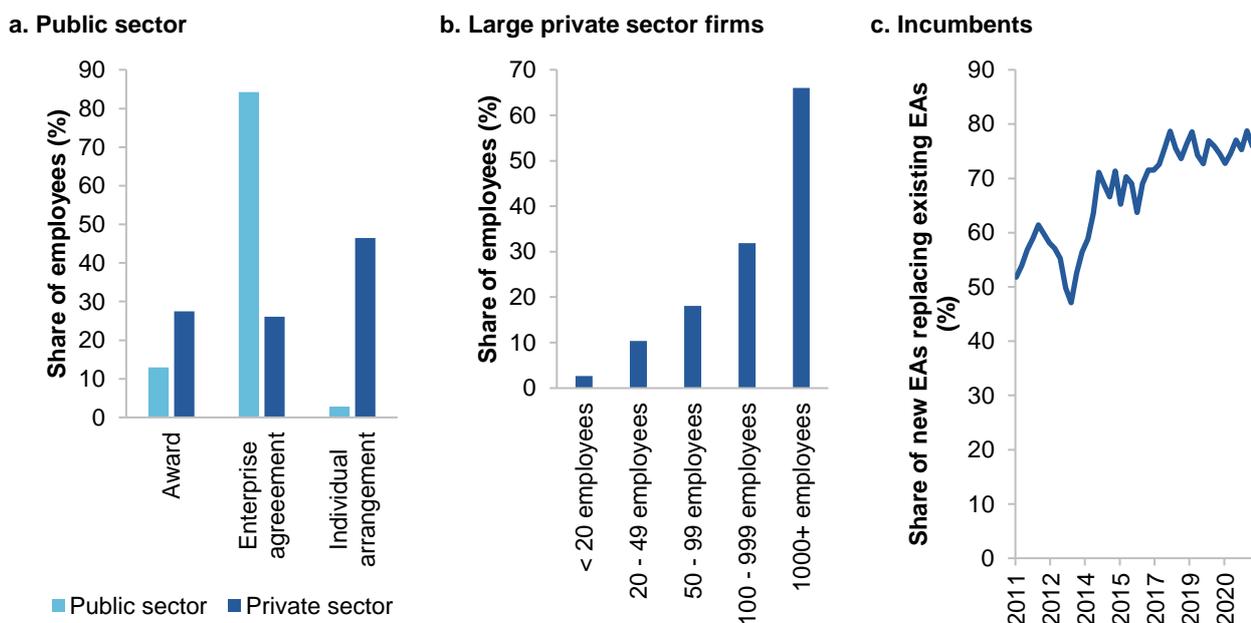
⁶⁶ If the FWC has concerns that an EA does not meet the requirements of ss.186 and 187 of the FW Act, it may accept a written undertaking that addresses this concern as part of the decision to approve the agreement. The share of approved agreements requiring undertakings fell from 66% in 2017-18 to 44% by 2020-21 based on unpublished data from DEWR's Workplace Agreement Database.

⁶⁷ Changes to bargaining introduced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) are due to commence in the 6 months to early June 2023. It remains unclear how the changes will affect the complexity and resource intensity of bargaining.

from about 50% of agreements in 2011 (figure 4.3c). Increasingly, employers and employees are leaving expired EAs in place, with 56% of employees covered by an agreement on an expired EA (figure 4.4). By their nature, expired EAs cannot include *new* productivity enhancing clauses, so the scope for them to improve productivity depends on whether existing clauses leave room for future flexibility.

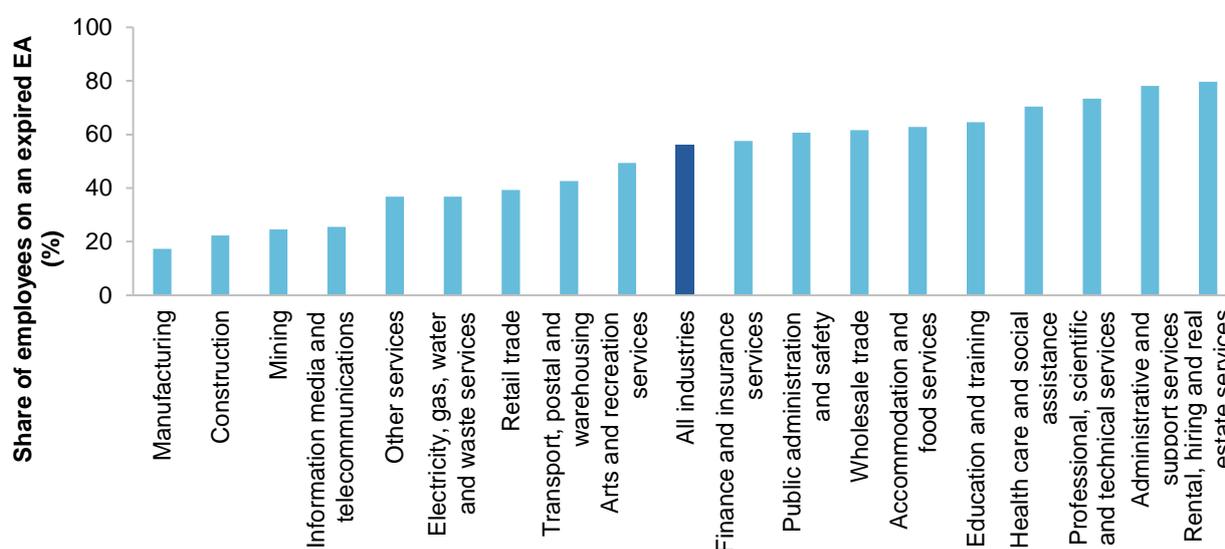
In other instances, the joint role of unions and senior management may play a role in rolling over an agreement even if the new agreement offers little additional benefit to any party. There is a strong relationship between union membership in an industry and the share of employees covered by an agreement, though it is possible for a non-union agreement to be negotiated. An employment lawyer has described an EA as a ‘cost of doing business’ and claimed that there is ‘no practical choice but to have an EA because of the industrial relationship in the sector’ (DeBoos 2022).⁶⁸ KPMG expressed the view that 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 (2020, p. 6).

Figure 4.3 – Users of enterprise bargaining



Sources: Unpublished TableBuilder data from ABS (*Employee Earnings and Hours, Australia, May 2021*, Cat. no. 6306.0); unpublished data from DEWR Workplace Agreement Database.

⁶⁸ That said, over the past decade there is only a weak relationship between declining union membership rates across industries and the corresponding change in the share of employees covered by EAs (based on ABS surveys of *Trade Union Membership and Employee Earnings and Hours*).

Figure 4.4 – Most EA covered employees are on an expired agreement

Sources: ABS (*Employee Earnings and Hours, Australia*, various issues, Cat. no. 6306.0); Department of Employment and Workplace Relations (*Trends in Federal Enterprise Bargaining – March quarter 2022*).

Accordingly, 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.

Refocussing bargaining to enable productivity gains

Notwithstanding concerns about the functioning of enterprise bargaining, 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 (as suggested by various case studies — box 4.4). Data from DEWR's Workplace Agreement Database also shows that 39% of all EAs approved since 2011 contained clauses that specifically link policies, procedures and/or practices to productivity. However, given the concerns expressed by all stakeholders about the state of enterprise bargaining, it is not clear whether these clauses have much substance or have had much impact.

Box 4.4 – Productivity improving clauses

In 2014, the Fair Work Commission undertook case studies on eight EAs 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

Box 4.4 – Productivity improving clauses

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 disputation.

Source: Fair Work Commission (2014).

EAs need to be adaptable (or allow workplaces to adapt) to changing technologies, skill types, occupations, and work practices, as well as broader challenges. The shock to working patterns associated with the COVID-19 pandemic 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). 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. Many businesses have now adopted some level of working from home as a policy, and some types of provision for it are now also included in some EAs. At the end of 2019, about 3% of agreements covering about 20% of employees had some provisions for home-based work or telework (Ross 2020, p. 7), though the first agreement specifying home-based work or telework as a right was approved in late 2022.⁶⁹ The incorporation of work from home policies in EAs may well grow over time and 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 co-operatively, drawing on the collaborative input of employees, their representatives and managers.

⁶⁹ The *Western Sydney University Professional Staff Agreement 2022* gives non-academic staff the right to remotely work two days a week (pro-rata for part-time employees) unless the request is unreasonable and disrupts the work of the unit. Hare and Marin-Guzman (2022) cite it as the first such agreement.

However, as noted above, the transactions costs of bargaining 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 potential constraints on productivity are the FW Act's treatment of permitted matters and the application of the BOOT, as discussed later in this section.

Restrictive enterprise agreement content

Certain clauses can frustrate business recruitment and innovation. Restrictive clauses like this can directly affect how an employer can backfill positions or temporarily outsource labour to meet the operational needs of the employer (for example, clauses restricting hiring and promotion in container terminal EAs). There are also clauses that indirectly affect how an employer chooses its capital/labour investment mix, by prohibiting changes to working arrangements through overly stringent consultation terms. In some cases, restrictive clauses can become endemic in a particular industry or type of work, and there may be justification for sector-specific intervention to address them (for example, chapter 9 of the Productivity Commission's inquiry into Australia's Maritime Logistics System) (PC 2022e). More broadly, it may be valuable to provide greater safeguards against unduly restrictive clauses.

Consultation terms in enterprise agreements

Under the FW Act, EAs must contain a 'consultation term' that requires the employer to consult with employees (and their representatives) about major workplace changes (such as those likely to have a significant effect on employees) and rostering changes or changes to ordinary hours of work (s.205). When an EA does not have a consultation term, a 'model consultation term' is applied to the agreement — either directly through an undertaking when the agreement is assessed by the FWC, or indirectly if a dispute arises regarding consultation requirements. In cases where an EA contains consultation terms that are laxer than the requirements of the model term, the FWC then applies the model consultation term to the agreement⁷⁰ — effectively setting the model consultation term as the lower bound for consultation terms in EAs.

The model consultation term requires employers to consult with employees (and their representatives) in the event of a definite decision to introduce a major change, or if a proposal to introduce a change to the regular roster or ordinary hours of work. Among other requirements (box 4.5), the term requires employers to consult as soon as practicable and give prompt and genuine consideration to the concerns of affected employees.

The requirement to have a consultation term is both best practice from a managerial perspective and a reasonable expectation from the employees' perspective. There are clear benefits to *genuine* consultation in the face of a major change or roster/ordinary hours changes. It may promote co-operation and better ways of achieving change in a business's practices, with benefits for productivity and employees. Accordingly, workplace relations law should continue to require genuine consultation.

⁷⁰ "The absence of a consultation term in an agreement, or inclusion of a term that does not meet the requirements in s.205, means that the agreement is taken to include the model consultation term" *Construction, Forestry, Maritime, Mining and Energy Union v BHP Coal Pty Ltd* [2020] FWC 3788, 20 July 2020 at 150.

Box 4.5 – The model consultation term

The FW Act allows for a model consultation term to apply to an EA in the absence of a consultation term in the agreement itself (s.205). The model consultation term as prescribed in Schedule 2.3 of the *Fair Work Regulations 2009* (Cth) sets out the requirement for employers to consult with affected employees following a *definite decision* to introduce a major change (exact details below) or when the employer *proposes* to introduce a change to the regular roster or ordinary hours of work.

Consultation for a major change

Employers are required to notify relevant employees (and their representatives) of a definite decision to introduce a major change to production program, organisation, structure or technology that is likely to have a significant effect on employees.

A significant effect on employees is defined as one of the following:

- the termination of the employment of employees
- a major change to the composition, operation or size of the employer's workforce or to the skills required of employees
- the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or
- the alteration of hours of work
- the need to retrain employees
- the need to relocate employees to another workplace
- the restructuring of jobs.

Once the employer has made a definite decision to introduce the change, they are required to discuss with relevant employees as soon as practicable, including how it will affect employees and any measures that the employer is taken to mitigate or avert any adverse effects on employees. The employer must include, in writing, any relevant information of the change and how it will affect the employees. As a result of the consultation, employers must give prompt and genuine consideration to any matters raised by relevant employees.

Consultation for a change to regular rosters or ordinary hours of work

Unlike a major change, employers are required to consult with employees about changes to a regular roster or ordinary hours of work when the employer *proposes* to make a change. The consultation requirements are much the same as those for a major change with the exception that employers are explicitly required to consider views about the impact of the change on employees in relation to their family or caring responsibilities.

Sources: *Fair Work Act 2009* (Cth); *Fair Work Regulations 2009* (Cth).

However, more stringent consultation processes are sometimes implemented in the form of a requirement for union approval⁷¹ or majority employee approval⁷² before a change can be implemented. Just as poor managerial decisions could result where consultation processes are ignored, productivity can suffer when consultation clauses give employees and their representatives de facto power to restrict or veto changes to business models that would be more appropriately determined by management.

The NSW Trains case (box 4.6) provides an illustration of the capacity under the FW Act for consultation clauses in EAs to incidentally limit technological change. While the issue of customer safety was raised as a key concern by the relevant union (though this was contested by the enterprise), the decision of the Full Bench of the Fair Work Commission did not rest on this as the relevant matter, but rather the terms of the EA. This could have given the relevant union the power to veto other changes that had no real or apparent impact on safety.

A further concern about restrictive clauses of the type included in the *NSW Trains Enterprise Agreement 2018* is that 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.

Safety is a separate issue, and one where there needs to be checks and balances against managerial prerogative. 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, 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 work health and safety (WHS) legislation and in some jurisdictions and circumstances, must be consulted during the creation of a return-to-work strategy. The Australian Council of Trade Unions, as the peak body for Australian unionism, also has two Members within Safe Work Australia (out of a total of 15). However, EAs 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 WHS or industry-specific safety regulators.

Using the model consultation term as the legally enforceable default

Removing the consultation clause requirement from agreements would be a blunt and counterproductive approach to resolving the problems by consultation clauses in some EAs (PC 2015c, p. 688). A better approach would be to limit the ability of stringent consultation clauses from having legal effect in any existing (or new) EA. This could be achieved by using the already present model consultation term as the only legally enforceable consultation term in EAs. This has the benefit of simplicity and flexibility. As the model consultation term is defined through regulations rather than legislation, it could be adapted more quickly to meet any problems associated with consultation processes.

⁷¹ Examples of agreements containing clauses that may require union approval in the consultation process include *NSW Trains Enterprise Agreement 2018*, *ACT Public Sector ACT Fire & Rescue Enterprise Agreement 2020-2024*, *Boskalis (Australia) Pty Ltd and The Maritime Union of Australia Division Propelled Dredging Enterprise Agreement 2018* (now terminated), *Smit Lamnalco Towage (Australia) Pty Ltd & Maritime Union of Australia Enterprise Agreement 2017*

⁷² Examples of agreements containing clauses which may require employee approval in the consultation process include *BMA Enterprise Agreement 2018*, *Emergency Services Telecommunications Authority Operational Employees Enterprise Agreement 2019*, *Jfk Interiors Australia Pty Ltd and CFMMEU Manufacturing Division Enterprise Agreement 2022-2025*, *Prima Architectural (VIC) Pty Ltd and CFMMEU Manufacturing Division Enterprise Agreement 2023*

Box 4.6 – Case Study – NSW Trains and the Australian Rail, Tram and Bus 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.^a 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, pp. 22–23). 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% salary increase for drivers, but a reduced salary for guards, reflecting that the technology had reduced the scope of their duties.^a 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’.^b

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.^c

While the Deputy President of the Fair Work Commission initially ruled in favour of NSW Trains, the decision was appealed by the RTBU. The Full Bench 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 with the RTBU^d — 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 Trains 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). In November 2022, the NSW Government and the RTBU agreed to modify the InterCity fleet to meet the union’s concerns, with the first trains rolled out from December 2022 (O’Sullivan 2022).

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

Sources: Fair Work Commission (*Australian Rail, Tram and Bus Industry Union v NSW Trains t/a NSW Trainlink* [2020] FWC 4359, 26 August 2020, [2021] *Australian Rail, Tram and Bus Industry Union v NSW Trains t/a NSW Trainlink* FWCFB 1113, 2 March 2021); RTBU (2022).

An alternative approach would be to include certain types of consultation arrangements in a list of unlawful terms in agreements. However, such prescriptive lists run into the complexities outlined in previous Productivity Commission analysis of the best ways of regulating the content of agreements across a wide range of

agreements and diverse industries (PC 2015c, pp. 676–679). (However, as noted above, in some industries there are grounds for remedying the systemic use of clauses that limit how management can run their businesses effectively — the maritime industry being an exemplar.)

The model consultation clause requires employers to provide genuine and prompt consideration to the views of employees when consulting on a major change to work practices, or on changes to rosters and ordinary hours. The term ‘genuine consideration’ (as used in the model consultation term) is now well-defined in case law as requiring input from affected employees without providing veto power.⁷³ This would temper impromptu changes by management that had major effects on employees by providing employees with an avenue to provide feedback — while removing any need for approval from unions or employees (e.g. the NSW Trains case) for decisions that reflect managerial prerogative. Further, the exercise of managerial prerogative does not preclude employers from agreeing to provide additional compensation to employees as a result of enacting a change.⁷⁴

Making the model term the only legally enforceable consultation term would not preclude bargaining parties from agreeing to other terms and having them in their EA. However, were there to be a dispute about this clause, the FWC would only consider the model consultation term, not the term in the EA.

Stipulating that the model consultation term be the only legally enforceable consultation term in EAs would go some way to further creating mutually beneficial outcomes from bargaining as employers and employee representatives would likely only agree to a term that is different from the model clause if they felt it would be beneficial to them.

Model clauses have clarity and simplicity, but sometimes there may be grounds for an enforceable upper limit in an agreement, depending on the context. There may be situations where employers agree to a consultation clause that restricts the introduction of technology or innovative work practices, which could still hamper productivity if the employer abides by the clause, despite it not being legally binding if a dispute arose. In these cases, the FWC could be given the power to authorise alternative consultation clauses and/or replace overly excessive clauses with the model consultation term, subject to it being satisfied that the agreement did not undermine managerial prerogative in essential aspects of the business. These issues warrant investigation not immediate implementation.

⁷³ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591, 11 June 2010, at 44 and 45; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2016] FCA 1009, 26 August 2016, at 60; *Construction, Forestry, Maritime, Mining and Energy Union v BHP Coal Pty Ltd* [2020] FWC 4322, 20 August 2020, at 212.

⁷⁴ For example, in *Construction, Forestry, Maritime, Mining and Energy Union (105N) v Anglo Coal (Capcoal Management) Pty Ltd* [2022] FWC 3043, (8 November 2022) where Anglo Coal had the prerogative to change employees’ rosters at short notice but still had to provide the agreed allowance of \$300 per changed shift.



Recommendation 7.15 Limit restrictive enterprise agreement content

The Australian Government should limit the ability for enterprise agreements to restrict productivity enhancing changes to technology or workplace practices that are best left to managerial prerogative by:

- leaving employers and employee representatives free to develop mutually beneficial consultation clauses in enterprise agreements, but amending section 205 of the *Fair Work Act 2009* (Cth) so that the model consultation term (as currently prescribed by Schedule 2.3 of the *Fair Work Regulations 2009* (Cth)) would be the only legally enforceable consultation term in an agreement if there was a dispute
- exploring a mechanism that enables the Fair Work Commission to specifically authorise an alternative enforceable term or limit an excessive term.

Recent changes to the Fair Work Act

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) ('the 2022 Amendments') introduced a suite of changes to the workplace relations system, including significant changes to remove some restrictions on multi-enterprise bargaining and the BOOT, and providing more powers to the FWC to intervene in protracted bargaining rounds. The full effect on bargaining and the broader economy from the 2022 Amendments will only be felt several years from now when most existing agreements have lapsed. On top of that, many aspects of the 2022 Amendments provide room for interpretation and discretion by the FWC, which may also require case law to be built up to fully assess the impact of the changes.

Multi-enterprise bargaining

Potentially the most significant of the changes to bargaining stemming from the 2022 Amendments are the measures taken to increase the availability of multi-enterprise bargaining. Previously, the FW Act allowed employers to engage in multi-enterprise bargaining if two or more employers agreed to bargain together. All employers (bar those in the low-paid bargaining stream) needed to have voluntarily participated in the multi-enterprise bargaining process as the FWC was restricted from implementing bargaining orders⁷⁵ to force employer participation other than if a low-paid bargaining authorisation was in effect. Employees participating in these bargaining processes were also unable to undertake protected industrial action. Given this and the complexity and narrowness of its features, multi-enterprise agreements accounted for just 0.5% of all current agreements in September 2022 (DEWR 2022).

Multi-enterprise agreements may increase under the 2022 Amendments. They removed many of the restrictions on the single-interest bargaining stream and the supported bargaining stream (previously the low-paid bargaining stream) and opened up the eligibility requirements into these streams to potentially include many more employers. Further changes include allowing employees bargaining under these streams to take protected industrial action, and the new (or enhanced in the case of supported bargaining) ability of the FWC to make an authorisation that forces employers to participate in multi-enterprise bargaining or be added to an existing multi-enterprise agreement.

⁷⁵ Under the FW Act, if a majority of employees wish to pursue an EA and the employer has not yet agreed, an employee representative can apply for a majority support determination that requires the employer 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.

The revamped single-interest bargaining stream has removed limitations on access to multi-enterprise bargaining to, 'support employers with clearly identifiable common interests to bargain together under a single interest employer authorisation in certain circumstances' (Australian Government 2022 p. xiii). The certain circumstances involve employers that are one of the following:

- related employers — those that are engaged in a joint venture, common enterprise or are related bodies corporate
- franchises
- common interest employers — those that have identifiable common interests, which may include similar geographical location, regulatory regime or reasonably comparable operations and business activities.

The supported bargaining stream includes similar requirements for employers with a common interest but is focussed on low-paid industries where 'employees and employers who may have difficulty bargaining at the single-enterprise level' (Australian Government 2022 p. xii). The main difference between the supported and single-interest streams is that through the supported bargaining stream, the FWC has additional powers to assist parties in coming to an agreement such as third-party arbitration.

Multi-enterprise bargaining *may* produce some benefits. It could, for example reduce transaction costs for some smaller enterprises, enabling them to take advantage of any economies of scale in bargaining, sharing the burden and resource intensity of bargaining across employers. Many small to medium-sized businesses do not have the internal capacity or prior knowledge to negotiate agreements and navigate the complexities of the bargaining system, which is why they rarely form EAs. Overcoming the barriers to entry to agreement making could enable more 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.

The new provisions may also improve the overall bargaining position of employees, allowing them to achieve more favourable conditions and wages (at least in the short run).

Nonetheless, the new multi-enterprise arrangements pose some risks that could constrain productivity growth and hence the scope for enduring real wage rises over time. As discussed above, the intent of enterprise bargaining is to develop bespoke agreements that take into account the market context and goals of a business and gives employers and employees options for 'win-win' improvements. Forcing unwilling employers or employees into multi-enterprise agreements in which they had no bargaining role may limit these shared productivity and other benefits. This may not just affect individual employers, but employees too may relinquish beneficial changes in working arrangements or higher wages.⁷⁶

Given that industrial action is the most important source of leverage for employee bargaining, the overall level of industrial disruption may also increase. Stoppages reduce the output and productivity of the businesses affected and 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 2015c, pp. 859–865), these developments occurred in the context of gradual moves towards a more flexible workplace relations system.

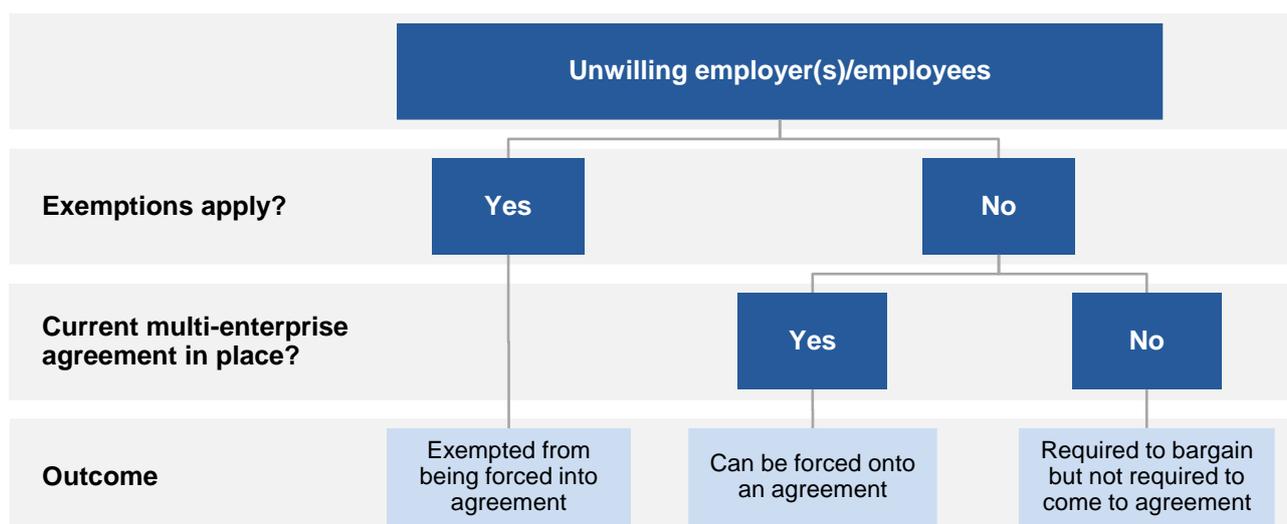
The biggest concern would be if multi-enterprise agreements became industry-wide agreements with the rigidities and risks to productivity and competition that these could entail (discussed in volume 3).

⁷⁶ In principle, businesses could sidestep the inflexibility of multi-enterprise bargaining and negotiate individual flexibility agreements for relevant employees — but this would likely involve significant transaction costs.

The 2022 Amendments include some exemptions and other safeguards that constrain protected industrial action during a multi-enterprise bargaining process and the capacity for the FWC to force unwilling employers or employees to participate in bargaining (figure 4.5). These relate to:

- **business size** — businesses with less than 20 employees (excluding irregular casual employees) are exempt from single-interest bargaining orders⁷⁷
- **current bargaining experience** — any employer that has a current single-enterprise agreement or is currently engaged in a single-enterprise bargaining process is exempt from forced single-interest authorisations.
- **industry** — businesses with employees in the general building and construction industry are exempt
- **previous bargaining experience** — an employer with previous experience of effective bargaining with its employees can be exempted from single-interest bargaining
- **the public interest** — the FWC must consider whether multi-enterprise bargaining is in the public interest, even where all parties are willingly seeking to bargain together
- **the requirement to bargain in good faith** — this requirement does not require a bargaining representative to make concessions or to reach agreement on the terms of a proposed EA (as per s.228(2) of the FW Act).

Figure 4.5 – Potential outcomes in the single-interest bargaining stream with an unwilling bargaining party^a



^a Exemptions include: employers with less than 20 employees, employers without a common interest, employers with a single-enterprise agreement in place, employees and employers in the general building and construction industry, employers and employees with previous experience of effective bargaining, multi-enterprise agreements that fail a public interest test.

Source: *Fair Work Legislative Amendments (Secure Jobs, Better Pay) Act 2022* (Cth).

These only partly address concerns about multi-enterprise agreements. While the first three safeguards unambiguously identify the employers exempted from bargaining orders, the FWC must exercise its discretion in relation to the other safeguards. Without established case law to draw from in these matters, it is not possible to judge whether the safeguards have their intended impact.

Moreover, while a bargaining representative is not required to reach an agreement, at the very least, employers would incur the costs of participating in the process (and even higher costs if industrial action was

⁷⁷ This makes at least 93.7% of employing businesses exempt as they have less than 20 employees, noting that additional businesses may also be exempt if they have more than 20 employees, but some are irregular casual employees. (ABS 2022, *Counts of Australian Businesses, Including Entries and Exits*, July 2018 – June 2022, Cat. no 8165.0).

taken). To the extent that participating in bargaining entails significant fixed costs, this could disproportionately affect medium-sized businesses with fewer resources to devote to compliance. And ultimately much or all of these costs would be passed on to consumers.

Bargaining efficiency related changes

The 2022 Amendments also changed the BOOT and gave the FWC more powers to intervene during prolonged bargaining rounds — changes that, in principle, will improve the efficiency of bargaining processes (both single- and multi-enterprise bargaining) and the potential for them to improve productivity.

The amendments make clear that the BOOT is a global assessment, not a ‘line’ by line’ assessment. The amendments also require the FWC to give primary consideration to common views of bargaining representatives when applying the BOOT. Together these enhance the capacity for beneficial trade-offs in agreements that amend award conditions. The FWC will also now have the ability to directly amend proposed EAs that fail the BOOT to make them compliant, avoiding the slowness and complexity associated with accepting (negotiated) undertakings by employers.

The 2022 Amendments have also sought to address the uncertainty in previous iterations of the FW Act about the application of the BOOT to current and prospective employees and to hypothetical working arrangements that might never realistically be envisaged. The FWC may now only consider patterns or kinds of work, or types of employment, if they are *reasonably* foreseeable at the test time.⁷⁸ This overcomes the far-reaching scope of the previous BOOT in relation to future employees. The new form of the BOOT would still be likely to avoid the problems apparent in *CFMEU v One Key* (box 4.7) in which an employer strategically sought to circumvent the BOOT by forming an agreement that, while meeting the needs of existing employees could adversely affect future employees.⁷⁹ Overall, this change should, at the margin, increase the attractiveness of enterprise bargaining, particularly for businesses reliant on, or close to, award conditions, while maintaining the role of the FW Act in avoiding conduct that harms employees.

The provision in the Amendments that give the FWC the capacity to short-circuit prolonged bargaining also could increase the attractiveness of bargaining. Previously, the FWC had only limited options to intervene. The 2022 Amendments allow bargaining parties that have not successfully reached an agreement within nine months to request that the FWC resolve any matters on which agreement has not been reached. The FWC is empowered to do so if there has been a resolved bargaining dispute regarding the disagreement and it is satisfied that there is no reasonable prospect of an agreement being reached without intervention. The main risk associated with this approach is that it might inadvertently lengthen some negotiations if a bargaining party believes that it might get a better outcome from waiting until nine months has elapsed. Whether this concern materialises should be examined as part of the proposed review (recommendation 7.16).

⁷⁸ As an illustration of the change, the explanatory memorandum indicates that an allowance for ‘*the holding of a liquor licence and work in a cool room, despite the enterprise not serving liquor or having a cool room*’ would no longer be a relevant matter for the BOOT, as the hypothetical working arrangement would not be reasonably foreseeable (Australian Government 2022 p. 5).

⁷⁹ The capacity under the 2022 Amendment for the FWC to re-test a previously approved EA against the BOOT should a future employee prove to be worse off than the award provides additional security for employees while encouraging employers to look closely at the terms of an agreement that might trigger such a subsequent intervention. The concerns relating to so-called Zombie agreements, which can preserve conditions well below the award (as occurred in *United Workers’ Union v Hot Wok Food Makers Pty Ltd* [2022] FWCFB 191, 21 October 2022) will also be addressed, with such agreements being terminated in December 2023 unless provided an extension by the FWC.

Box 4.7 – CFMEU v One Key

In 2015, One Key, a labour hire business, formed an EA 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 EA sought to pass the BOOT by providing an allowance of 0.1% of the hourly base rate of pay in the relevant award, paid on ordinary hours only. For the three relevant employees, the changes appear to have met the BOOT. The FWC approved the EA.

However, One Key then expanded its staff to more than 1000 employees within six months of the vote, who 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. Moreover, Justice 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.

Source: *Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd* [2017] FCA 1266, 8 November 2017.

Issues for examination by the proposed review

The 2022 Amendments include a requirement for a review of the operation of the amendments within two years. Among other aspects, the review should test the impacts of the amendments on bargaining processes, the trend in the uptake of EAs and productivity-enhancing provisions in agreements. Similarly, the review will need to assess the overall outcomes of multi-enterprise agreements on the community. Box 4.8 specifies some of the detailed questions that the Productivity Commission considers should be the central focus of the review. The review will need to recognise that two years may not be sufficient to test all of the impacts of the amendments, especially as case law about any contested parts of the legislation may not be fully developed.

Box 4.8 – Considerations for a review of bargaining changes

An effective review of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (‘the 2022 Amendments’) should examine how the changes to bargaining have affected the bargaining process and its use, the role of the Fair Work Commission (FWC) and the impacts on employers, employees, wages, productivity and broader economy.

Single-enterprise agreements

The 2022 Amendments seek to encourage single-enterprise agreements (Australian Government 2022b, p. 5). The review should consider the ease at which bargaining parties are able to create, implement, and

Box 4.8 – Considerations for a review of bargaining changes

vary (if necessary) single-enterprise agreements to determine if there are complexities that still remain that need to be addressed further.

Key questions

- To what extent have the 2022 Amendments increased the use of current single-enterprise agreements?
- Has there been efficiency improvements in the bargaining process and increased use of productivity-enhancing clauses?
- If the Amendments have not achieved these outcomes, what have been the obstacles and how can they be overcome?

Multi-enterprise bargaining

Given the greater scope for multi-enterprise bargaining under the 2022 Amendments, and its potential economic impacts, the review should examine the uptake of multi-enterprise bargaining and any impacts on productivity, wages, prices and competition.

Key questions

- To what extent have the changes to the single-interest and supported bargaining streams increased the voluntary use of multi-enterprise agreements?
- Are the exemptions to bargaining orders effective in restricting any negative impacts that multi-enterprise bargaining has on productivity, prices and competition or are there grounds for further (or reduced) limitations?
- Is the supported bargaining stream effective in encouraging new participants in the bargaining system and benefiting low-paid workers?

The role of the Fair Work Commission

Many of the 2022 Amendments provide the FWC with increased powers to make determinations while also allowing the FWC to exercise discretion when determining the precise limits for exclusions. The review should examine the effectiveness of the FWC's decision-making processes and results in light of their increased power and influence.

Key questions

- How has the FWC's decision making (and resulting body of jurisprudence) aligned with the intent of the 2022 Amendments and is there a need for more explicit direction in the legislation?
- Has the FWC's decision making in relation to the 2022 Amendments been consistent across all Members?
- Does the FWC have the appropriate capabilities to assess the potential competition impact of multi-enterprise bargaining or is there a need to amend the *Competition and Consumer Act 2010* (Cth) to allow the Australian Competition and Consumer Commission to have a role?



Recommendation 7.16 **Review of recent bargaining changes**

The review of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) should particularly focus on the:

- degree to which it has promoted single-enterprise bargaining and achieved productivity-enhancing improvements in workplaces
- use of multi-enterprise bargaining and its effect on wages, prices, competition, and productivity
- potential need for further clarification on elements reliant on the Fair Work Commission's discretion.

Future directions for bargaining reform

While the 2022 Amendments seek to address some key inefficiencies in the bargaining process, there is still scope for further reforms to increase the productivity gains from bargaining.

Workplace relations culture

Bargaining between employers, employees and their representatives is more the outcome of the culture of any business than legislative provisions. To some extent, such cultures can be affected through education — such as the FWC's Cooperative Workplace program (FWC 2023), but the broader economic and social environment is also key. That culture is affected by the regulatory environment, but also the willingness of governments, regulators, unions and employer peak bodies to co-operate for changes that promote a resilient economy and productivity — as evidenced briefly by (ultimately failing) co-operation during the early stages of the pandemic (Hamilton sub. 50, p. 37, O'Neil 2021).

The key point is that legislative change of the kind proposed in this review is just one ingredient to reform of enterprise bargaining and of the award system, and can only do so much.

Reforming the relationship between agreements and awards

By explicitly defining the BOOT as a global test, the 2022 Amendments have clarified that an EA passes the BOOT if a reduction in one benefit in an award is fully compensated by some other new benefit.⁸⁰

However, the 2022 Amendments do not significantly alter the BOOT. Consequently, it retains many of the complexities and problems that have emerged in past FWC decisions relating to its application. In particular, the BOOT retains the requirement that each and every employee must be better off than the award under a proposed agreement.

On face value, it appears that the test would not necessarily fail if one or a few employees were worse off so long as the class to which such employees belonged were made better off (s.193A(7)).

However, there are two drawbacks to this provision:

⁸⁰ 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.

- It only applies if there is no evidence to the contrary. Accordingly, if a few employees, or just one, could show they were worse off, then the BOOT would fail.⁸¹ Passing a BOOT where a few employees are worse off relies on either inaction or ignorance by the relevant employees or their representatives.
- Classes of workers are a slippery concept. In particular, if a given worker is worse off than someone else in their same class, their working patterns and entitlements must be different. If they are different, then that arguably defines them as a separate class, and the BOOT may still fail.⁸² It is difficult to determine classes given this, and doing so becomes increasingly difficult for smaller businesses with a wide mix of employees. The selection of classes requires the agreement to affect each member in the same way such that there is likely to be a common BOOT outcome.

As it happens, it probably does not matter much that a BOOT could fail for just one or a few employees (existing or genuinely prospective) because there is an easy remedy by simply changing the relevant EA (in the past through undertakings and following the 2022 Amendments, through unilateral minor modification by the FWC of the offending features of the agreement). Such a change would not be costly to employers given the small numbers of relevant employees. Failing the BOOT in this instance is an immaterial and transient nuisance.

Where the application of the BOOT is most harmful is where there is a *significant number* of employees made worse off, even when *most* are not. In these cases, it may not be possible to amend the agreement to pass the BOOT without forfeiting the gains to productivity and efficiency that underpinned the initial agreement. In that context, as a group, employees may be worse off and so would the employer.

There is an inconsistency between the requirement that EAs must make employees better off than the award and the capacity for the FWC to change awards that can make a significant number of employees worse off. The BOOT takes the award as sacrosanct while the award revision process does not.

Providing flexibility for when the BOOT applies

Through its 'all in, or none in' feature, the 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.

A middle ground between these two positions would be to expand the circumstances in which the FWC can approve an agreement that does not satisfy the BOOT. The FW Act (s.189) allows the FWC to approve agreements that do not pass the BOOT but only if it is in the public interest *and* there are exceptional

⁸¹ A case in point was of an employee in a bakery who could only work on Sundays and so was made worse off, because of her highly specific working patterns by a new EA that was otherwise generally favourable to its employees. That single exception was deemed enough to fail the BOOT (*Shop, Distributive and Allied Employees Association (006N) v Beechworth Bakery Employee Co Pty Ltd T/A Beechworth Bakery* [2017] FWCFB 1664, 6 April 2017). Similarly, the action that led to the failure of the BOOT for the *Coles Store Team Enterprise Agreement 2014-17* relied on a complaint by one employee, though ultimately the evidence suggested numerous employees would have been made worse off (*Duncan Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2016] FWCFB 2887, 31 May 2016).

⁸² In this instance, a class becomes divided into sub-classes which have the same effect in law as a class (*BGC Contracting Pty Ltd* [2018] FWC 1466, 12 June 2018, at 221)

circumstances.⁸³ An expanded criteria should consider the benefits of a proposed EA to employees overall, taking into account the relative impact on any employees that are made worse off (or are in line with award conditions).

Factors that would be relevant include:

- the relative size of the worse-off cohort compared with all employees covered by the agreement
- the significance of the disadvantage that the worse-off cohort would experience compared with the benefits to the better-off employees
- the size of the majority approval vote
- the wider economic benefits of the agreement
- whether the worse-off cohort voted to approve the agreement (as they might if they saw opportunities to change their patterns of work to benefit from the new agreement, or simply saw them as reasonable)
- whether a union(s) was involved as an employee representative and supports the agreement.

A decision to waive the BOOT would leave the FWC to decide on the weight it gives to each element, as currently occurs when considering changes in awards based on the modern awards objective. This would include deciding the value of the parameters in the first three criteria that would be relevant to a decision — such as the explicit required size of the majority approval vote (e.g. 90%). This would involve judgment supported by evidence and a careful assessment of the lessons from economic theory, on top of the lessons from the accumulation of case law.

Further safeguards could be explored such as allowing post-approval re-testing or re-voting if certain conditions are met, such as if the majority of employees (or class of employees) covered by an agreement did not originally vote on the agreement. In these circumstances future employees could have an agreement directly amended (or terminated) by the FWC to bring conditions back to award level.

When determining the appropriate mechanism to allow the sidestepping of the BOOT, there should be regard to whether undesirable outcomes as identified in *CFMEU v One Key* (box 4.7) could be repeated. Any new approach would also need to deal with the complexities that were apparent in *Hart v Coles*. In that case, 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 (in the *Coles Store Team Enterprise Agreement 2014–17*). These changes largely benefitted permanent employees working weekdays but highly disadvantaged employees working nights and weekends. The provisions of the FW Act made it straightforward for the FWC reverse its approval of the agreement in 2016.⁸⁴ A new arrangement would have to weigh up whether the total benefits to permanent employees working weekdays exceeded the losses to other employees, taking into account the distribution of the losses amongst those affected and their vulnerability.

In the event that this broader approach is not adopted, then alternative options would be to:

- define classes that are broader in their characterisation (such that idiosyncratic working patterns within employee classifications would not constitute their own class). A BOOT would require that the average outcomes for broadly agreed classes from a change in an agreement be better off overall
- 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

⁸³ s.189(3) specifies the exceptional circumstances to be where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement.

⁸⁴ [2016] FWCFB 2887.

change ‘could be a symbolic difference that may incline FWC members to treat the BOOT as setting a slightly higher bar’ (PC 2015c, p. 695).

Changes to the BOOT to increase flexibility could also 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.



Recommendation 7.17 Disentangle enterprise agreements from awards

The Australian Government should explore methods to further loosen the relationship of enterprise agreements with awards when there is genuine agreement between employees and employers. This should include an amendment to the Better Off Overall Test such that even if some employees are worse off from a change in an agreement, the Fair Work Commission could nevertheless approve an agreement if a range of public and private interest tests were met, including the degree to which the benefits to winners are larger than the losses to losers.

Any changes should have adequate protections in place to avoid undesirable outcomes as exemplified by the *Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd* case.

Proposals from stakeholders

The Business Council of Australia (sub. IR181, pp. 14–15) and the Ai Group (sub. IR179, p. 9) both proposed further reform in the bargaining process by simplifying the requirements on employers to explain the terms of a proposed agreement as required under section 180(5) of the FW Act. Under this section, employers must take all reasonable steps to explain the terms and the effect of those terms to the relevant employees in an appropriate manner taking into account their particular circumstances and needs. Following the *CFMEU v One Key* case (box 4.7), the FWC has placed more scrutiny on the content and method of the explanation given to employers where previously a signed statement from the employer that an explanation had been given sufficed (Ellery 2017). This has increased the burden on employers to not only follow the explanation requirements but also to provide the adequate evidence when applying to the FWC to approve an agreement.

The Business Council of Australia proposed several options to reduce the costs of section 180(5), including only requiring an employer to explain impacts of a new agreement where they vary from a predecessor agreement and that approval of an agreement by a registered organisation (typically a union) would suffice as evidence that an agreement had been adequately explained to employees (sub. IR181, pp. 14–15). However, while the various proposed simplifications would yield some efficiencies, they increase the risks of inadequate communication to employees and could undermine their capacity for informed voting on any agreement. Notably, as in the case of *Hart v Coles*, there could also be cases where one employer representative supports an agreement that makes employees represented by other parties worse off, and without adequate explanation of the terms, the worse-off employees may be uninformed as to the effect of the proposed agreement.

The issue highlights a more general tension in the design of any element of workplace relations law that the bulk of employers do not seek to circumvent the law, but that a small minority do so. Accordingly, there needs to be a balance between reducing transaction costs for employers and employees, while having sufficient clarity in, and enforcement of, obligations to address misconduct by any party to agreements. If this balance is not achieved, the willingness of employees to depart from award conditions or past ‘safe’ agreements may be undermined, working against the intent of encouraging productivity-enhancing EAs.

5. Platform work and the gig economy

Key points

- ✳ **Platform business models can benefit consumers and some workers, while contributing to productivity through new and more efficiently delivered services. Regulatory challenges associated with platform work should be addressed without unduly constraining its business model.**
 - Many forms of platform work are not directly comparable with employment relationships. Shoehorning platform work into other employment categories would put at risk its productivity impacts and its benefits for gig workers. But improved safety protection and access to dispute resolution are warranted.
- ✳ **The potential for collective bargaining between contract platform workers and platforms is subject to competition law (given that independent contractors are considered small businesses). Under current settings, it is unlikely that such bargaining would occur and result in binding conditions on pay.**
 - Competition exemptions for collective bargaining are conditional on passing the net public benefit test. It is unclear whether higher pay rates to workers are legally considered public benefits or detriments.
 - Platforms have little incentive to bargain with small groups of contract platform workers; large groups of contract platform workers may not pass the net public benefit test needed for a competition exemption.
 - As platform workers are paid for what they individually produce, they are incentivised to work at their highest productivity. They have little to trade away in collective bargaining, as platforms could unilaterally impose changes to working arrangements, subject to complying with terms in their contracts with platform workers.
- ✳ **For some platforms, current internal dispute resolution mechanisms appear to be opaque and lack due process. There is no effective external avenue for low-cost dispute resolution.**
 - Ineffective resolution arrangements may result in high turnover and poor outcomes for workers. Platform workers face difficulties in resolving disputes because of uneven bargaining power and may face high legal costs when attempting to pursue court-based remedies. Giving the Fair Work Commission the capacity for resolving significant disputes would provide a last recourse option to protect platform workers.
 - Consumer confidence in platforms also relies on assurance that platform operators can manage poor quality service by platform workers.
- ✳ **Some platform work incurs significant risks to worker and public safety. Insurance arrangements vary and in some cases, appear to be lacking.**
 - Where insurance is lacking, the policy response will depend on the extent of risk, feasibility of implementation and the ability to design a financially sustainable scheme.

5.1 Introduction

One of the key labour market developments since the Productivity Commission's Inquiry on the Workplace Relations Framework (PC 2015c) and Shifting the Dial (PC 2017b) has been the growth of 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 and Menulog) 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 5.1) 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 at least part time in this part of the labour market (Freudenstein and Duane 2020, p. 11). 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.

While platform work involves some challenges for workplace relations policy (section 5.3), it promises significant productivity and other efficiency benefits from better matching between consumers, greater flexibility, higher quality on-demand services and gains in efficiency from more competition between firms (section 5.2). Although there are legitimate concerns about some aspects of platform work, the policy response should not seek to classify all platform workers as employees and risk reducing key productivity benefits, including labour flexibility. Rather, a proportionate approach to addressing genuine issues in platform work would focus on addressing issues including:

- internal and external dispute resolution processes (as relates to suspensions, terminations and non-payment for work) (section 5.4)
- safety issues and insurance arrangements (section 5.5).

What is platform work?

There is no standard definition of 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.⁸⁵ For example, the ABS defines digital platform work as:

the provision of fixed duration labour services, in the form of tasks/jobs which are accessed by the worker through digital platforms and are paid per unit of work delivered through the same platform. (ABS 2022e, p. 4)

⁸⁵ 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.

Box 5.1 – Public data sources on platform work

Publicly available information on platform work is generally irregular, ad hoc and of variable quality. Some data is not directly comparable, as different definitions of when a worker is ‘working’ are used — such as the cumulative time a worker is actively completing a task (‘engaged time’) or to also include the time when a worker is logged in, searching for work — such as in ridesharing or food delivery — but has not found a task yet.

There would be value in more regular collection of detailed data on platform worker outcomes alongside other labour statistics and work health and safety 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). The ABS also publishes the Work-Related Injuries Survey every four years, covering all workers, though has high sampling errors (Safe Work Australia 2021a, pp. 39–40). Safe Work Australia (pers comms, 12 Dec 2022) also collects data on platform delivery drivers who were fatally-injured at work.

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 (Melbourne Institute 2021). Survey responses to platform work are also incomparable with other labour market questions because of a mismatch in reference periods.

In the future, transaction data provided to the ATO will allow the size of the gig economy to be better measured. Following the *Treasury Laws Amendment (2022 Measures No. 2) Act 2022* (Cth), some platforms will be required to directly report platform worker payments to the ATO for data matching. Required reporting begins on 1 July 2023 for ridesharing and short-term accommodation and on 1 July 2024 for all other reportable transactions.

Other sources include submissions, public hearings and responses to questions on notice relating to various government inquiries about platform work, including those held by the Senate, NSW Senate and the Victorian Government.

The United Nations Economic Commission for Europe defines ‘digital platform employment’ as:

... 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)

Most platform workers are classified as independent contractors (employer-employee models of platform work are rare). Many types of platform work are, in essence, a *digitalised* version of existing contracting

work. Contract platform work is characterised by the sharing of commercial risk and the absence of employee entitlements (for example, a minimum pay rate, paid or unpaid leave and workers compensation), although some platforms provide personal injury and public liability insurance.

Some submissions have highlighted the distinction between ‘horizontal’ and ‘vertical’ platforms (Mable, sub. IR152, p. 1; Per Capita, sub. IR162, p. 7). Horizontal platforms provide a marketplace where workers and clients can negotiate on the nature of work, pay rate and where the platform is not directly involved in allocating work to workers (IRV 2022, pp. 9–10). In contrast, vertical platforms directly allocate workers to clients and may set the price (paid by consumers) and pay rate (paid to workers) for services.

Some forms of platform work are characterised by greater platform control over 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 a worker’s level of performance.⁸⁶



Finding 7.6

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 — including small sample sizes, being from interested parties that do not provide the underlying data or both. The lack of data is an impediment to definitive conclusions about the sector.

5.2 The upsides of platform work

Platform 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 now 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

⁸⁶ 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 2022d). 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).

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 (generally) without 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 work in ridesharing.

The platform model has facilitated the entrance of many additional suppliers in markets such as urban transport, providing greater consumer choice. In particular, Uber has rapidly increased its patronage compared with taxi services (Roy Morgan 2019). Uber itself is now facing stiffer competition from rivals like Ola and DiDi (Roy Morgan 2020). The competitive pressures are greater than might seem apparent by just considering the number of platforms because platform workers on the same platform compete with each other. The overall growth of non-employing businesses offering taxi and other road transport services, which will include many rideshare drivers, provides a rough measure of rising competitive pressures (figure 5.1).⁸⁷ 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 each platform's level of control 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 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.⁸⁸

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. For instance, a food delivery worker may accept tasks on more than one platform, have multiple deliveries along a route, or both.

⁸⁷ Although a large number of contractors working for the same vertical platform might not compete with each other in the same way a large number of small businesses normally would.

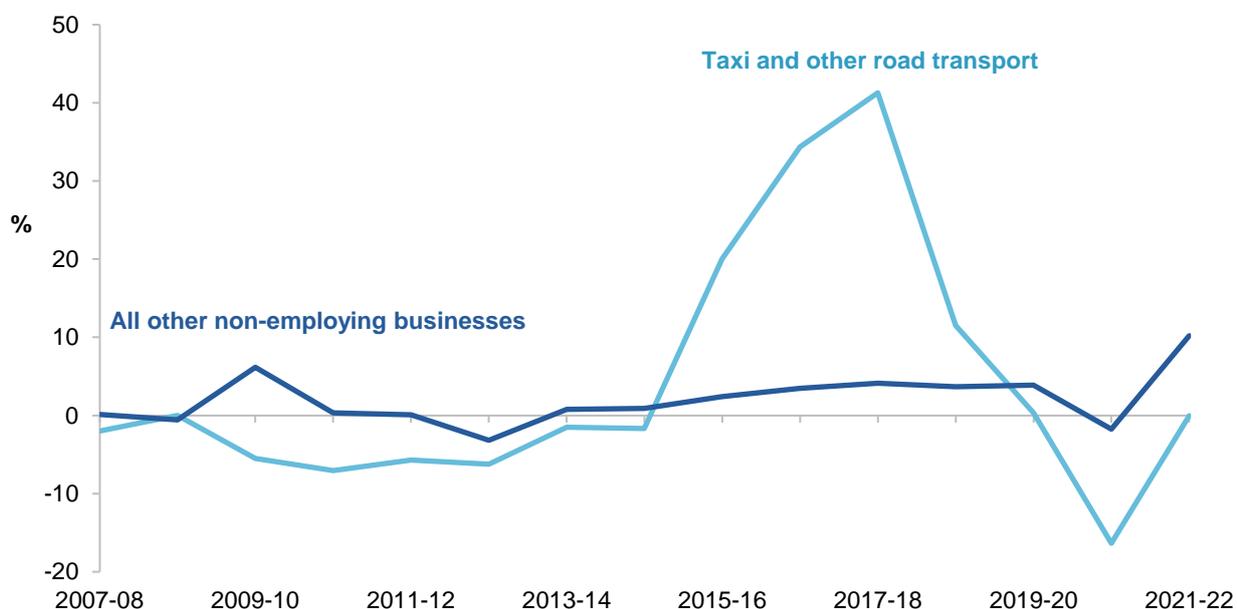
⁸⁸ As platform work operates on a task-by-task basis, most platforms only provide payment to workers at a piece rate via the platform after the task is complete. Some apps have a set rate per task that workers earn based on the pre-determined price of the service to the consumer, while others allow workers 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).

The low barriers to entry for workers in some forms of platform work can benefit people who find it difficult to access the formal labour market. About 60% of Uber Eats delivery workers found it difficult to obtain jobs 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 78% of rideshare drivers and 86% of food delivery platform workers 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% of Uber Eats delivery workers say that income derived from Uber Eats work was 'essential to them' (Accenture 2021, p. 11). Of course, dependence on platform income need not align with community norms about appropriate wages if a platform worker has no or few outside options.

Figure 5.1 – The number of taxi and other road transport businesses grew significantly from 2014 until COVID-19^a

Percentage change in the number of non-employing businesses



a. Most transport platform workers are engaged on an independent contractor basis and as such require an Australian Business Number. As such, the significant increase in the number of taxi and other road transport businesses since 2014 is likely to be a reflection in the growth of platform work.

Source: ABS (*Counts of Australian Businesses, Including Entries and Exits*, various issues, Cat. no. 8165.0).

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 that understand their care requirements, without the need to re-familiarise with a new carer. For instance, Hireup — which engages workers as employees — states that on average, the length of a care relationship via the Hireup platform spans 12 months (Hireup 2021, p. 10).

More competition

Platforms have enhanced competition and encouraged competitors to explore different pricing models and structures to attract consumers with different preferences in growing markets (table 5.1). 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 and some taxi networks use their lack of surge pricing as a product differentiator. 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 such pricing in the longer term, given that some new operators are loss-making and underwritten by venture capital (Ryder 2021).

Table 5.1 – Typical differences between contract and employee platform work

| | Employer-employee relationship Hireup (aged care) | Independent contractor to platform-branded service Most transport and food delivery platforms | Independent contractor advertising own services on platform Airtasker (misc. tasks) Mable (aged care) |
|--|---|--|--|
| How are workers recruited? | <ul style="list-style-type: none"> Employees are hired by the platform | <ul style="list-style-type: none"> Workers opt-in subject to meeting platform standards (e.g. own equipment) | <ul style="list-style-type: none"> Workers opt in to advertise services or accept offers, subject to some set standards (e.g. occupational licensing for Mable) |
| How are pay and conditions set? | <ul style="list-style-type: none"> Pay and conditions (e.g. minimum wage, loadings and superannuation) at or above relevant award and National Employment Standards | <ul style="list-style-type: none"> Price and pay rates typically set by platforms, as per contract between platform and worker. Exceptions include InDriver (customer proposed fares) | <ul style="list-style-type: none"> Workers set consumer price per task or negotiate with individual clients, as per contract between platform and worker |
| How are working hours set? | <ul style="list-style-type: none"> Employers roster staff or working hours arranged between casual staff and clients Minimum shift lengths for casual workers | <ul style="list-style-type: none"> Workers choose autonomously when and where to work, subject to safety measures, which may include maximum shift duration | <ul style="list-style-type: none"> Workers choose autonomously when and where to work, subject to safety measures, which may include maximum shift duration |



Finding 7.7
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 work can contribute to productivity growth and have broader benefits for consumers and workers.

People choose to engage in platform 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.

5.3 Regulatory challenges relating to minimum pay and conditions in Australia

As a nascent disruptive business model platform work 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 Productivity Commission’s Inquiry into Aged Care Employment (PC 2022b) provides an in-depth examination of these regulatory challenges in platform work within the Australian aged care industry.

Much public discussion about platform work, both in Australia and internationally, relates to employment status — whether a worker is an employee or independent contractor — which determines worker rights and entitlements and platform obligations, as relates to minimum pay and conditions, and work, health and safety (WHS) obligations. Independent contractors generally do not have access to employee entitlements (such as a guaranteed minimum wage). 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.

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.

The experiences of other countries provide lessons for Australia

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, mainly focusing on ridesharing and food delivery (box 5.2). These various approaches highlight a number of practical issues:

- 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 for ‘traditional’ employees, independent contractors and platform workers if the codified definition is imprecise.
- 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 United Kingdom example below).

Box 5.2 – Platform work regulation in international jurisdictions

United States

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

- **voter propositions** that definitively classify transport and delivery platform workers as independent contractors. One example is Proposition 22 in California, exempting such workers from California’s employment status test, though it is unclear whether the proposition is constitutional.⁹ Proposition 22 provides a minimum wage when a worker is actively completing a task and provides some liability insurance and personal injury insurance coverage
- **regulating minimum pay and conditions** for ridesharing, food delivery or both. Examples include in New York City, where the minimum payment rates (per mile and minute) account for worker expenses and utilisation, in Washington State for ridesharing (Uber 2022e) and in the City of Seattle for delivery platform workers (Seattle City Council 2022)
- **interpreting existing employment law.** 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 how the settlement will affect worker entitlements or Uber’s future liability.

Some federal departments have also released policy guidance related to platform work and contracting, including the Federal Trade Commission (2022) and the Department of Labor (2022).

Canada

In April 2022, the Digital Platform Workers’ Rights Act, 2022 (DPWR Act) was legislated in the province of Ontario, Canada. The DPWR Act defines digital platform work as the provision of for-payment rideshare, delivery, courier or other prescribed services by workers who are offered work assignment by an operator through a digital platform.

The DPWR Act provides digital platform workers 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

Box 5.2 – Platform work regulation in international jurisdictions

- 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.

United Kingdom

Policy developments within the United Kingdom has largely occurred within existing law. In February 2021, the UK Supreme Court ruled that Uber drivers were considered ‘workers’, a category separate to that of employees or independent contractors. No new legislation was required to classify Uber drivers as workers that receive these entitlements. Rather, the worker status already existed under UK employment law. In the United Kingdom, Uber is 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.

The ruling does not automatically apply to other platform workers — if drivers on other platforms or food delivery riders believed they should be classified as ‘workers’ they would need to allege misclassification through legal proceedings. For instance, Deliveroo riders are not legally considered ‘workers’ for the purposes of the United Kingdom’s collective bargaining laws, although as of September 2022, an legal appeal to the Supreme Court is ongoing (Criddle 2022).

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 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.

The Directive is currently undergoing negotiations with EU Member Countries before legislation is to be introduced (Chee 2022).

a. Proposition 22 passed and was later ruled as unconstitutional (Norton Rose Fulbright 2021). Platforms have followed the regulation specified in Proposition 22 while an legal appeal against the ruling is held (Allsup 2021).

Regulatory challenges relating to minimum pay and conditions in Australia

Like many other countries, most platform workers in Australia are classified as independent contractors rather than employees (exceptions include Hireup, a care platform and Milkrun, a rapid grocery delivery platform).

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 Productivity 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 2015c, pp. 813–815).⁸⁹ The *Fair Work Act 2009* (Cth) (FW Act) continues to set the bar at ‘reckless’ (s. 357(2)).

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.

Questions remain about 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, direct⁹⁰ 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 low pay (that is, after costs, pay close to or below 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 voluntary administration or liquidation, contract platform workers may be considered unsecured creditors,⁹¹ with low priority in making claims on assets to recover any owed amounts. These are the downside risks associated with any form of self-employment.

In Australia, employment status is determined through the common law

While classifying platform workers as employees would lead to pay, conditions and responsibilities (of platforms and platform workers) consistent with regulatory requirements specified in the FW Act, modern awards and the National Employment Standards, it would necessitate a significantly different business model to those used by most platforms. In some cases, it would remove aspects of platform work that are preferred by workers and that lead to better matching of services to consumers.

⁸⁹ The exact recommendation was also supported by the Australian Government’s Black Economy Taskforce (2017, p. 236).

⁹⁰ While platforms in care services (e.g. Mable) or freelancing and odd jobs (e.g. Airtasker) 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.

⁹¹ For instance, during Deliveroo’s exit of the Australian market in November 2022 (Ziffer and Janda 2022).

At the time of writing, the common law legal precedent from *Personnel Contracting* and *Jamsek* has established a high threshold for classifying platform workers as employees in rideshare and food delivery in Australia (box 5.3).

Box 5.3 – 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 precedents set by other legal cases — most recently by *Personnel Contracting* and *Jamsek*, which were heard in the High Court of Australia in February 2022, though these two cases did not involve platform workers.

Legal commentators suggested that the outcomes of *Personnel Contracting* and *Jamsek* gave pre-eminence to the written terms of the contract in determining employment status, when ‘the efficacy of [the contract] not challenged on the basis that it is a sham or is otherwise ineffective under general law or statute’ (Handaya 2022; MinterEllison 2022). Some suggested that the decision was a departure from the High Court’s previous application of the multifactorial test (Power and Selinger 2022). As such, the view was that it would be easier for businesses to engage workers as independent contractors (Longland et al. 2022). For instance, Prof. Andrew Stewart said that:

If you’ve undertaken to do some work on the basis of a comprehensive set of written terms, it’s those terms which will be the basis for determining whether or not you’re an employee or an independent contractor, not the reality of your working arrangements ... That is a big shift. (Hutchens 2022)

Employment status determinations within platform work

Some platform workers have challenged their employment status using unfair dismissal laws after they were deactivated by platforms. Under the national workplace relations system, unfair dismissal laws apply to employees and not to *genuine* independent contractors.

In November 2018, the FWC ruled that a Foodora delivery worker was unfairly dismissed (though Foodora had ceased Australian operations 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 Uber Eats driver for unfair dismissal 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.

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. (The previous decision, in May 2021, 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

Box 5.3 – Australia’s common law approach to determining employment status

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.

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

Should platform pay and conditions be regulated?

Most Australian platform workers do not have the legislated minimum pay and conditions that apply to employees that as they are engaged as independent contractors outside of national or state workplace relations systems. Pay rates and conditions for platform workers are affected by market conditions and their contracts with platforms (some platform workers will have more control over pay and working arrangements). The *Independent Contractors Act 2006* (Cth) (the ‘IC Act’) has limited contractor protections, including the ability for contractors to apply to the Federal Court or Federal Circuit and Family Court of Australia to review a contract if there are ‘unfairness grounds’ — one ground being if the remuneration rate is less, or likely to be less, than an employee performing similar work (section 2.4). The provision is rarely used (IRV 2020, p. 171).

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

Some platform workers may be eligible for the Victorian Government’s Sick Pay Guarantee scheme, which provides 5 days of sick leave, paid at the National Minimum Wage, for a defined list of casual or contract workers who do not have paid leave entitlements. While rideshare and food delivery platform workers do not appear to be eligible, some aged care and disability support platform workers may meet the criteria (Victorian Government 2023) (Victorian Government 2023). The Sick Pay Guarantee is a two-year pilot scheme, ending in early 2024.

Platforms have expressed varied perspectives on the regulation of pay and conditions. In their agreements with the Transport Workers’ Union (TWU), DoorDash and Uber expressed support for an independent body in Australia that would determine minimum standards (box 5.4). Mable described its operations in aged care as a ‘marketplace’ where parties directly form agreements covering the types of services delivered and the terms — including rates of payment. (sub. IR152, p. 1). Hireup argued that platforms in disability support play a significant role in all phases of a support relationship (including finding clients, arranging shifts, and accessing training and payment) and as such the platforms ‘very much act as employers to their support worker ‘employees’ (sub. IR109, p. 1).

Box 5.4 – 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
- There should be a three-stage approach towards achieving regulation of the on-demand transport industry.

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 (sic) 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.

The TWU further stated that it did not support creating a 'third category of worker' in Australia's workplace relations system as it could risk reclassification of employees into the hypothetical third category (TWU, trans., p. 9).

Sources: DoorDash (2022); TWU (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. About 40% 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 (for instance, in the evening for food delivery platform work) (figure 5.2). Changes in both the demand for services by consumers and the supply of platform workers will affect pay rates and prices (which are set by the algorithm) as well as the share of time that workers spend completing a task compared with being on-call, where a worker is logged on but does not have a task. As such, for workers, per-customer pay rates not only cover the time and effort required for fulfilling the service, but also waiting for a task offer and travelling to the pick-up point.

These complexities mean that it is impossible to determine the pay rate for platform work (on a per task basis) that would always 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 if so, 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).

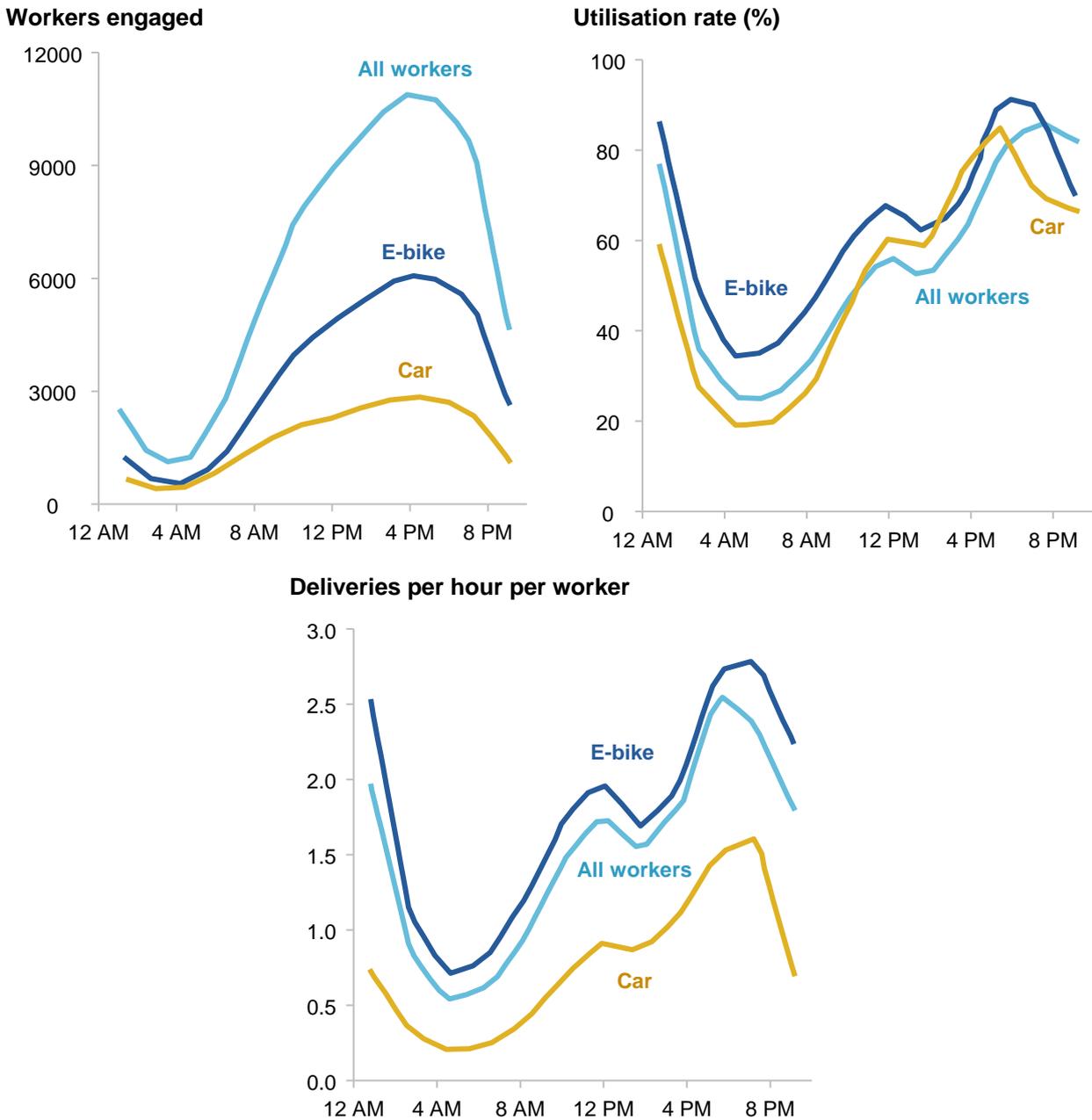
For instance, for ridesharing, it may also be necessary to design incentives such that drivers would not be rewarded for extending waiting times, or for choosing to drive in off-peak times where demand is low. In New York City (NYC), high-volume ridesharing platforms — including Uber and Lyft — are required 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. However, platforms can still set pay rates to drivers above the floor (for instance, if there is high demand from consumers).

The New York City Taxi and Limousine Commission 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).⁹² That said, more than 60% of rideshare drivers in NYC work full-time hours (providing about 80% of rideshare trips in NYC) (Parrott and Reich 2018, p. 3) — only 14% of Uber drivers in Sydney worked more than 30 hours per week in 2017-18 (AlphaBeta 2019, p. 16)⁹³ — and there are geographical differences between NYC and Australian cities.

⁹² In 2018, New York City’s minimum wage for large businesses was US\$15 per hour.

⁹³ Although this may be an underrepresentation of the number of hours worked by rideshare drivers if there is a high level of multi-apping.

Figure 5.2 – Food delivery platform activity is highly time-dependent^{a, b}
Activity on food delivery platforms in New York City, fourth quarter of 2021



a. The ‘workers engaged’ figure is the daily average of workers logged into a platform. The ‘utilisation rate’ is the share of working time (the time logged into a platform) a worker spends in during a trip, either retrieving food or delivering food to a passenger. The category ‘all workers’ includes food delivery platform workers using e-bikes, cars, motorcycles and those who deliver on foot. **b.** New York City data is used as an illustrative example, given lack of Australian data.

Source: NYC Department of Consumer and Worker Protection (NYC Consumer and Worker Protection 2022, p. 16).

Platform worker earning rates vary across industries and occupations

There is a wide dispersion of earning rates across platform workers in Australia (box 5.5).

Box 5.5 – How much do platform workers earn?

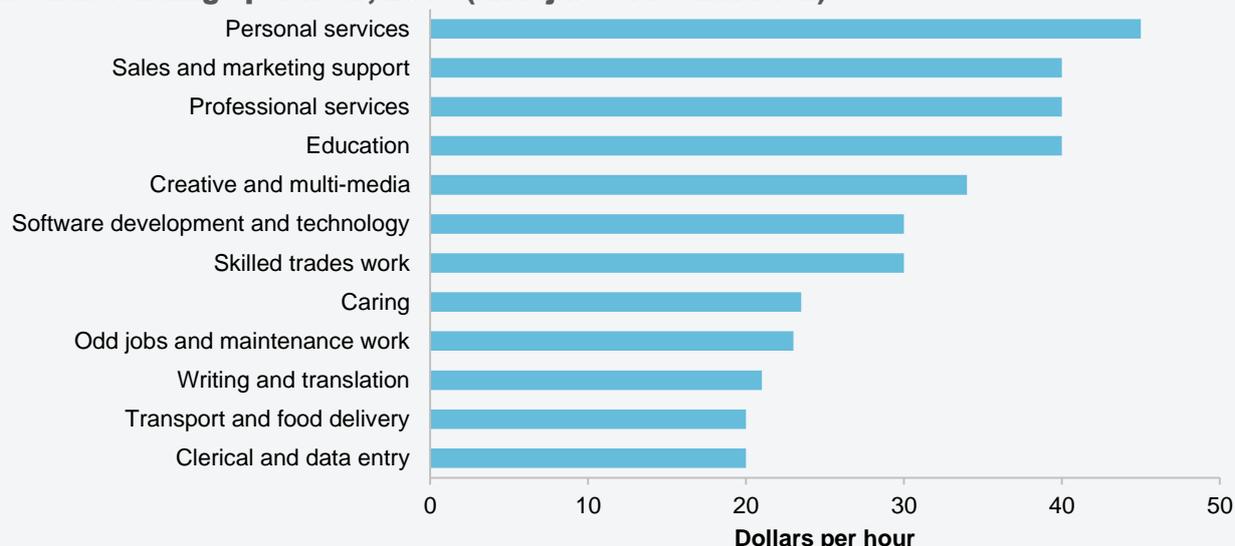
There is significant variation in platform workers' earnings, depending on the type of work completed and industry (figure below). In 2018-19, median wages across different industries varied between about \$20 and \$45 per hour, a high level of dispersion that is also a characteristic of *employee* wages across industries (ABS 2022a).

However, estimates of hourly rates are subject to error and uncertainty. Many platform 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 tightness of the general labour market.

Platform workers' earning rates vary by type of work^a

Median earnings per hour, 2019 (unadjusted for inflation)



a. 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).

Box 5.5 – How much do platform workers earn?

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
- Deliveroo workers made \$10 to \$11 per delivery^a
- 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), Uber Eats 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 (Accenture 2021, p. 3). (An average hourly rate for all hours worked was not reported for Uber Eats.)

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

- \$12.85 to \$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 care platforms were supplied to the Productivity Commission for its inquiry into Aged Care Employment (2022c) and through submissions to the Productivity Inquiry. The average rates per hour for weekdays after platform fees for workers engaged via Mable (sub. IR152, p. 2) were:

- \$114 per hour (\$112 per hour Monday to Friday) for allied health care
- \$57 per hour (\$55 per hour Monday to Friday) for nursing
- \$45 per hour (\$43 per hour Monday to Friday) for social support and domestic assistance
- \$48 per hour (\$46 per hour Monday to Friday) for personal care.

On Careseekers, the average pay rate for workers providing aged care was \$38 per hour and for disability support it was \$43 per hour (pers comms, 6 and 8 August 2022). Across both platforms, average pay rates were higher on weekends and public holidays (PC 2022c, p. 8).

Disability care workers on Hireup, who are engaged as employees, are paid at the applicable award rate under the SCHADS award and receive employee entitlements (such as superannuation, casual loading, minimum payments under broken shift allowances, penalty rates and workers compensation).

a. Deliveroo exited the Australian market in November 2022.

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, the evidence suggests that the per-task fees offered by *some* platforms in food delivery *may* be on average less than the adult minimum wage for casuals based on assumptions about how many tasks were completed per hour and available public data on earnings.⁹⁴

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 take-home pay for contract aged and disability support personal care workers on Mable⁹⁵ during weekdays is higher than the minimum weekday employee pay for a Level 3 home care worker with a Certificate III under the *Social, Community, Home Care and Disability Services Industry Award 2010* ('SCHADS award') accounting for casual loading and superannuation, though not including other allowances or the absence of workers compensation (PC 2022b, p. 8).⁹⁶ However, neither the distribution of average take-home pay on Mable, nor the share of employees paid above the relevant award minimum wage is known.

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 contract platform workers.

Better data on hours worked by platform workers is needed

Within a platform, there may be a wide variation in average hourly pay rates if some platform workers work during periods of lower demand, where prices and or the number of tasks is 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% of a sample of Sydney Uber drivers worked more than 30 hours per week and comprised 44% of total hours driven (AlphaBeta 2019, p. 16). In 2020, about 21% of Uber Eats 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 per week for

⁹⁴ The casual adult minimum rate is partly relevant because casual employees receive a 25% loading to compensate for the absence of paid leave entitlements and the varied times of work.

⁹⁵ Requiring a Certificate III or two years of demonstrated experience.

⁹⁶ As of the publication of Aged Care Employment (PC 2022c). This is pending the conclusion of the work value cases relating to the aged care industry at the Fair Work Commission. These cases include 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).

workers whose main platform was categorised as education, to 14.5 hours for transport and food delivery workers (being 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 (including time logged on without a task), 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 NYC work for both Uber and Lyft.⁹⁷ As such, studies that use data from only one platform are not able to fully track activity across ridesharing (Kousta, 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, the need for flexible hours of working, limited English language proficiency and lack of professional networks for new migrants. For instance, in the TWU's survey, about 73% of food delivery drivers were on some form of visa (TWU 2021, p. 13). In a survey of Uber Eats delivery workers, 29% said that visa restrictions acted as the largest barrier to them obtaining work as an employee, followed by limited skills and experience (23%) and limited English fluency (15%) (Accenture 2021, p. 12). This means that for many platform workers, their realistic job options, outside of platform work, would tend to be isolated to the low-wage part of the economy (such as café workers).

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 (nd), which pays weekly) 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 exceed the NDIS-imposed cap for funding on a service (Karp 2022).

Fee-setting methods can also affect the net earnings of platform workers (box 5.6).

Box 5.6 – 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 minimum rate. 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 net \$28.80 per hour, and consumers paying \$33.60 per hour, after platform fees (PC 2022c, p. 76). About 10.5% of workers on the Mable platform earn less than \$40 per hour after platform fees (Mable, sub. IR152, p. 2).

⁹⁷ As determined through administrative data provided by platforms to New York City's Taxi and Limousine Commission.

Box 5.6 – Fee-setting in platform work

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).

Platform workers who set their own fees can 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 do not have a capacity to set their own fees, their net earnings are vulnerable to variations in their business costs.

**Finding 7.8****There would be productivity costs in shoehorning platform work into other categories**

Categorising platform workers as employees would remove key benefits to efficiency and flexibility for workers. Many platform 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 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 (which would be outside the enterprise bargaining framework that applies to employees). However, 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 any collective bargaining framework and none have yet resulted in a binding floor price that applies to all workers on a platform.

This could reflect within-industry competition, or the probability (and potential nature) of expected future regulation by governments. It could also reflect that *some* platform workers have other ways of bargaining that do not centre on securing binding pay rates — by ‘voting 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% 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.⁹⁸ 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) 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 collective bargaining framework for businesses 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.⁹⁹ Other methods include going through the notification and authorisation processes (box 5.7), 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).

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

A platform has little incentive to engage in collective bargaining with small groups of platform workers and there is no legal requirement for a platform to engage with platform workers under collective bargaining

⁹⁸ Although platform workers covered by 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).

⁹⁹ 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.

arrangements in the CCA. However, a large enough group of workers may have the bargaining power to bring the platform to the bargaining table, though they would face several legal hurdles in doing so.

Whether a competition exemption is available for large-scale collective bargaining 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 an exemption to collective bargaining by platform workers might be seen as giving workers countervailing power to address apparent monopsony power by a platform. In some of its general competition investigations, the ACCC has expressed concern about monopsony power, as in the apparent behaviour of supermarkets in respects of their suppliers (ACCC 2020). It has advocated for the inclusion of a prohibition of unfair trading practices in the CCA, though that has not yet occurred. It is unclear whether the ACCC would regard platforms as exercising monopsony power over platform workers and even if convinced of this, whether it would regard an exemption a reasonable substitute for a prohibition of unfair trading practices. More generally, the position the ACCC has taken with respect to countervailing power (as in merger decisions), the ACCC has given most weight to the issue of whether any action by market participants substantially lessens competition. The ACCC has not yet made determinations in this area in relation to collective bargaining and platform workers.

While the collective bargaining class exemption allows businesses to lodge applications to *automatically* gain protections from some aspects of competition law, the ACCC actively monitors all lodgements and can withdraw the benefit of the class exemption from parties if such bargaining activity is likely to fail the net public benefit test.

However, a possible conceptual framework for determining whether exemptions should be given for large-scale collective bargaining by 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 and other sources of market supply. For example, negotiation of a collective agreement in relation to earnings between, say, Uber and its rideshare drivers, 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).

A major obstacle to collective bargaining for platform workers is the placement of the issue in competition law rather than workplace relations law. Under workplace relations law, the focus is on employee versus employer bargaining strength and the resulting balance between the returns to employers versus employees. The Modern Awards Objective of the FW Act does not refer to consumers at all (though we recommend that it should do), with the only explicit connection to their interests incorporated indirectly in s. 134(1)(h) which refers to inflation. (In contrast, under the CCA, consumers' interests are central.)

Moreover, in rideshare platforms, for example, arrangements for independent contractors share several common attributes with arrangements for employees of a large business (rather than for small competing businesses). For instance, there are often thousands of individual contractors with common contractual ties

to a single entity (the platform). The platform typically controls the customer-facing relationship, such that customers book a service under the platform's name, rather than choosing between competing contractors. In addition, platforms in these industries tend to control many aspects of how work is carried out.

In some sense, there are reasonable arguments that the coverage of platform workers by the CCA reflects flaws in the CCA. That said, platform workers are typically not employees in the conventional sense and so it is not straightforward to place them under the umbrella of workplace relations law either. Accordingly, platform workers bring into sharpest focus the tension between competition and workplace relations law, and deciding where the line should be drawn is somewhat arbitrary.

Box 5.7 – 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.

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 platform workers (or any other independent contractors or businesses) through the 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.^a

Box 5.7 – Obtaining a competitive exemption for collective bargaining purposes

a. The Transport Workers' Union has applied for (and received) authorisation for a number of collective bargaining arrangements relating to owner-drivers, albeit on a small scale. For example, see ACCC authorization numbers A91589, A91514 and A91427 (authorisations granted).

Source: ACCC (2021).

Internationally, there have been a few 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). For instance:

- In Canada, Uber and the United Food and Commercial Workers Canada (UFCW) union agreed to 'press provincial governments' to establish industry-wide standards including on a pay rate of at least 120% of the minimum wage during 'engaged time' (that is, when a driver is transporting a passenger) 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 — Uber drivers are legally 'workers', an intermediate category between employee and contractor. In August 2022, the GMB union claimed credit for increasing driver pay rates after fares were raised in London by 5%, although in an official statement, Uber suggested that higher fares were implemented to attract more drivers (GMB 2022; Levingston 2022).
- In France, rideshare drivers will receive a minimum of EU€7.65 per trip, following a sector-wide agreement between rideshare platforms and unions announced in January 2023 (Hummel 2023).

Contract platform workers may have little to trade away in collective bargaining

Regardless of the interpretation of the exemption provisions of the CCA or the option of covering platform workers through workplace relations law, collective bargaining in platform work presents fewer opportunities for higher returns to workers than in collective bargaining for many other workers. The productivity gains that can be associated with enterprise bargaining between employers and employees — including conditions that allow for greater managerial flexibility and avoiding industrial disputes — are not likely to be present in collective bargaining between platforms and platform workers.

In enterprise bargaining, greater monetary (or non-monetary) benefits for employees are the result of trading away entitlements that may limit productivity in the workplace. For vertical platforms, where the platform sets the pay rate — especially where algorithms adjust pay rates in real time in response to demand fluctuations — platforms are already providing close to the exact wage level and working conditions required to attract the workers they need.¹⁰⁰

As contract platform workers do not have any legislated minimum standards (outside of those established through the IC Act and any applicable state-based legislation), a platform could unilaterally implement the conditions without having to provide an increase in monetary benefits, subject to the contract between the platform and the worker and the capacity for the platform to attract and retain workers. Many, if not most, of the standard form contracts between platforms and platform workers have provisions that allow the platform to modify the terms of the contract, with little or no notice.

¹⁰⁰ If there is a worker shortage, the platform could temporarily increase pay rates to increase the incentive for more workers to be available to provide services.

Furthermore, as currently structured, pay arrangements in vertical platform work is transactional in nature, reflecting the homogeneous type of work and the highly prescribed arrangements for organising work through platforms. While platform work is not unco-operative, the goal of co-operative engagement between employees and employers that is a desired feature of workplace relations is not paramount, and would be unlikely to be facilitated by collective bargaining under the CCA. Co-operation and trust in standard employer/employee relationships create norms that improve managerial and worker conduct, reducing the need for costly monitoring. But in the platform world, it is generally difficult for platform workers to continually ‘shirk’ in the sense of getting paid for a task not done (particularly with telemetry data collection and performance rating systems), nor is it as easy for the platforms to engage in unfair practices specific to individual workers.

While workplace relation policy and the associated rules about bargaining have tended to reduce the incidence and costs of industrial disputes and lockouts, this is not an issue in the platform economy. Indeed, one goal of any bargaining under the CCA would have the opposite intent — to permit platform workers to legally withdraw their labour in a collective boycott so as to provide greater pressure on platform providers for improvements in conditions. That would not necessarily be bad, but its effect would not be higher productivity to the extent that this was the goal. Accordingly, large scale collective bargaining in platform work is unlikely to lead to productivity improvements as the mechanism for funding higher wages. Instead, at best, it would increase the bargaining power of platform workers, allowing them to extract some of any rents from platforms or from consumers through higher prices, which may or may not pass the net public benefit test specified in the CCA.



Finding 7.9

There are significant hurdles to securing binding agreements on pay for contract platform workers through collective bargaining.

Securing binding agreements on pay for contract platform workers through collective bargaining faces two main hurdles:

- Collective bargaining would be unlikely to provide sufficient productivity improvements to fund any material improvements in pay and conditions.
- While large-scale collective bargaining may increase the negotiating power of platform workers to increase their earnings by extracting profits from platforms or raising prices of services, such bargaining (or collective boycotts) by contract platform workers may not pass the net public benefit test under competition law — as such, bargaining groups may not be eligible for a competition exemption.

5.4 Improving dispute resolution between platforms and workers

Processes to resolve workplace disputes that may arise between the platform and worker have a significant bearing on how that working relationship operates in practice. Ineffective resolution arrangements may result in high turnover and poor incentives for workers. Consumer confidence in platforms also relies on assurance that platform operators can manage poor quality service by platform workers.

Workplace disputes between platforms and workers may relate to suspension or termination decisions, or (partial) non-payment for services or fines imposed by a platform, where a platform believes a worker has not completed a task to satisfaction or that there are risks to a consumer’s wellbeing. Some decisions may be based on performance thresholds or have some algorithmic involvement (particularly for some vertical

platforms). Other forms of disputes may arise where a contract platform worker believes that there are unfair contract terms in the services contract.

Current internal dispute resolution processes are flawed. The existence of appeal processes and the rationale for platform decisions are not always apparent to workers, while external remedies are only partial, costly and often not accessible to workers with limited English proficiency and limited legal knowledge.

Dispute resolution does not just involve the interests of platform workers. In some cases, suspension or termination from a platform is warranted. For instance, Mable (sub. IR152, p. 3) highlighted that the importance of consumer safety in aged care and disability care:

Because of the nature of the care economy, the principles of natural justice can be at odds with ensuring appropriate care to, at times, vulnerable clients. As such, in instances where there may be a risk to clients — due to a breach of any of the above instruments where an individual's welfare might be at risk — Mable will suspend or remove individuals from the platform.

Any dispute resolution process must consider consumer outcomes, including consumer safety and service quality, and will be different for horizontal and vertical platforms as there are differences in the amount of control a platform has over how a task is performed.

Internal dispute resolution is in a formative stage

Internal dispute resolution mechanisms vary by platform and jurisdiction, as does the information available to contract platform workers on public-facing websites. For instance, Airtasker states that it arbitrates disputes between a worker and consumer relating to task performance (Airtasker 2022) and Mable states that if a consumer and support worker cannot resolve a dispute that either party can contact Mable by phone (Mable 2020).

On some platforms, it may not be clear to workers about how to initiate an appeal or review by a platform representative — or that an appeal mechanism exists — beyond contact via email or through a webform, which are not modes of real-time communication. For instance, in Australia, Uber's webpage on deactivation¹⁰¹ does not include the word 'appeal' (though it states that workers can contact the support team for assistance) while in some jurisdictions in North America, Uber drivers (or other rideshare drivers) can be reactivated following a dispute resolution process.

- In New York City, Uber drivers can appeal eligible deactivation decisions to a driver panel, which comprises a selection of Uber drivers with high star ratings (Uber 2020).
- In Washington State, deactivated rideshare drivers can be represented by the Driver Resolution Center during state-regulated dispute resolution (rideshare platforms must notify deactivated drivers that they can appeal a deactivation). Upon request, platforms must provide a detailed response about why a driver was deactivated. Following that, if a driver wishes to appeal, dispute resolution occurs through a two-stage process. If a dispute is not resolved through the initial 'good faith, informal resolution process', there is a 'formal process that includes a just cause standard' (Washington State Legislature 2022).
- In Canada, Uber drivers can be represented by the UFCW union during deactivation appeals or in other disputes in internal processes, the costs of which are jointly funded by the UFCW union and Uber (Deschamps 2022).

In the United States and Canada, rideshare drivers who have been deactivated because of low ratings or high cancellation rates may be eligible for reactivation after taking a 'quality improvement course' (Uber nd).

¹⁰¹ As on <https://www.uber.com/au/en/drive/safety/deactivations/>, accessed 16 December 2022.

In New York City, the course is provided by the Independent Worker's Guild and free of charge to the deactivated driver, while in other jurisdictions, the driver may incur a fee to access the course.

External dispute resolution remedies are largely unattainable

External remedies for disputes for contract platform workers in Australia are only partial in scope and not an accessible mechanism for most platform workers. The existing arrangements include:

- unfair contract terms provisions within the IC Act or the Australian Consumer Law¹⁰² (the latter relating to standard form contracts where a party is a small business. Many of the contracts between platform workers and platforms would likely be considered standard form contracts)
- state and territory mediation and arbitration services
- state and territory tribunals.

Furthermore, it is unclear how these existing external dispute resolution remedies interact with arbitration clauses present within some contracts between a platform and platform worker. While arbitration clauses vary, they generally reduce or exclude the ability to pursue a claim through some statutory law avenues, common law avenues or both by requiring the worker to participate in binding arbitration through the platform's selected arbitration service, rather than to initiate court proceedings if a dispute is present.¹⁰³ Some arbitration clauses may also exclude the ability of an arbitrator to hear a class action.

Workers who choose to initiate arbitration under a platform's arbitration clause may be required to pay upfront arbitration fees. Arbitration costs, notwithstanding legal fees, potential damages or the opportunity cost of participating in arbitration, can include administration or filing fees (a lump sum) and the costs of having an arbitrator present at a hearing (which may be hourly or a lump sum comprising the length of an arbitration session) — the amount incurred by a worker and platform would depend on the exact fee schedule.

Some platforms may allow a worker to opt out of arbitration clauses, though this option may be time-limited and subject to strict requirements as to validly provide notice. For instance, in Australia, DoorDash provides an opt-out period of 30 days following the platform worker having agreed to the services contract, otherwise the platform worker is deemed to have agreed to the arbitration clause. Furthermore, if a platform worker wished to opt out, they would need to send notice in writing through post to a selected postal address — 'any attempt to opt out by email [would] be ineffective' — and workers could not opt out using an agent or representative (DoorDash nd).

Review of service contract under section 12 of the Independent Contractors Act

A contract for services can be reviewed by the Federal Court or Federal Court Circuit under section 12 of the IC Act — on the grounds of the contract being unfair, harsh or both. An application for review may only be brought by a direct party to a contract. Participants incur their own costs bringing or defending a case in the Federal Court or Federal Court Circuit unless deemed vexatious or without reasonable cause. Most platform workers would not likely have the financial means to use this remedy or knowledge of the remedy. This review mechanism is rarely used (IRV 2020, p. 167) and to the best of our knowledge, has not been used

¹⁰² The Australian Consumer Law is Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

¹⁰³ Though arbitration clauses, as contract terms themselves, may be unenforceable if a court finds the term to be unconscionable. For instance, in *Uber v Heller* [2020 SCC 16], the Supreme Court of Canada allowed a class action to proceed outside the arbitration clause because of the upfront administrative and filing fees (about US\$14 500) required for the lead plaintiff, a food delivery worker, to lodge arbitration in the International Chamber of Commerce in the Netherlands. The administration and filing fees would have 'represented most of [the plaintiff]'s annual income' and did not include legal fees, foregone earnings and other costs of participating (Supreme Court of Canada 2020, pp. 4–5). Platforms have largely responded by selecting domestic arbitration services.

relating to platform work. It is not clear whether a court could order reinstatement under the IC Act even if the court had found that there were unfairness grounds within the services contract.

Penalties for unfair standard form contracts where a party is a small business

The ACCC and each state and territory consumer protection agency administer the unfair contract terms laws in the Australian Consumer Law. Small business, including independent contractors, who consider they are subject to unfair contract terms in any standard form contract can also take their own legal action in state and territory tribunals and small claims courts. The *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) has recently amended the unfair contract terms laws so that, for conduct from 9 November 2023, a court is able to impose pecuniary penalties for contraventions of the unfair contract terms laws, in proceedings commenced by the regulators (ie. the ACCC and the state and territory consumer protection agencies). Independent contractors that take their own legal action are able to seek damages, injunctions or other orders (such as the variation of their contract). The ACCC notes that:

As an economy-wide regulator, the ACCC cannot pursue all matters that come to its attention. For example, in the 2021-22 financial year the ACCC received just under 380,000 contacts. The ACCC takes a strategic approach to enforcement and is selective in the matters it investigates. The ACCC assesses which matters it will investigate based on its compliance and enforcement policy and priorities, to direct its resources to matters that provide the greatest overall benefit to the public. In particular, the ACCC focuses on conduct that will, or has the potential to, harm the competitive process or result in widespread consumer or small business detriment. (ACCC, Pers. Comms., 1 February 2023)

Independent contractors may also be able to seek assistance from the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), or state and territory Australian Consumer Law regulators, or small business commissioners in their state, in formal or informal dispute resolution about potential unfair contract terms in standard form contracts.

The Inquiry into the Victorian On-Demand Workforce similarly has identified state civil and administrative tribunals as a potential avenue for recourse, but the Inquiry expressed doubts about whether such tribunals have jurisdiction over disputes relating to topics deemed as ‘workplace relations matters’ under section 7 of the IC Act (IRV 2020, p. 171).

State and territory mediation and arbitration services

State and territory small business agencies or commissions may offer mediation services, which, while not imposing binding decisions, aim to help parties reach an agreement. For instance, the Victorian Small Business Commission offers mediation services for small business, including for contract platform workers. Parties do not have to participate in the process if they do not wish to.

Some contract platform workers may have access to state and territory arbitration services — where the arbitrator can impose binding decisions — but such remedies are limited to certain states and types of platform work (the legislation governing such arbitration services may have exemptions from the IC Act).¹⁰⁴ For instance:

- in Victoria, platform couriers (including food delivery platform workers but excluding rideshare workers) can pursue arbitration by the Victorian Small Business Commission if mediation fails to produce a satisfactory result (IRV 2022)

¹⁰⁴ For instance, Part 5 of the *Owner Drivers and Forestry Contractors Act 2005* (Vic) and Chapter 6 of the *Industrial Relations Act 1996* (NSW).

- in New South Wales, a limited class of contract platform workers, including Amazon Flex drivers, are eligible for conciliation and arbitration under Chapter 6 of the *Industrial Relations Act* (NSW).

Improving internal and external dispute resolution in platform work

Given the gaps in, and barriers to using, dispute processes, there are grounds to create more systematic, low-cost and accessible means for parties to seek to resolve problems. In dispute resolution, best practice usually involves several tiers:

- robust internal dispute resolution is the first step as it can be quick, low cost and have the advantage that it requires suppliers to have a systematic approach to dealing with complaints
- external resolution by an independent body that can, if necessary, make determinations to resolve a dispute that has not been settled through direct engagement between the disputing parties.

Principles guiding best practice internal dispute resolution

Such internal dispute resolution principles are already well established. Within platform work, the Victorian Government will introduce voluntary standards in early 2023, including that related to dispute resolution (IRV (2022)). The Treasury, ACCC and ASIC have also published guidance (and regulation, for the latter) for internal dispute resolution, though not related to platform work. There is also an Australian Standard (AS 10022:2022) for complaint handling management in organisations, most recently updated in 2022. The Fair Work Ombudsman has set out detailed advice on effective dispute resolution (FWO nd).

Some common themes emerge — internal dispute resolution processes should be accessible, timely, fair and should provide complainants with substantive responses in writing. The digital nature of platform work should also be considered in dispute resolution — most platforms do not have a face-to-face presence where workers can raise issues with platform representatives. These features should be present in all internal resolution processes.

An external, independent dispute resolution body for platform work with conciliation and arbitration powers

As existing avenues for dispute settlement through the Australian Consumer Law, the IC Act and patchy state-based arrangements do not provide an accessible or systemic solution, there is a rationale for a new institutional arrangement to serve that role. As noted in box 5.4, the TWU and Uber have already supported the creation of an independent review body to cover on-demand rideshare and food delivery non-employee platform work and platforms.

Given that the disputes fall into a workplace relations framework, and given its existing strengths in investigation, conciliation and resolution of disputes, the FWC looks to be a natural home for an external resolution function. Housing the function in the FWC would avoid the fixed costs of a new institution. Notably, the FWC has a well-established process for dealing with unfair dismissals, with an emphasis on conciliation, but with the scope to take matters to a formal conference. It would adopt a similar approach to platform-related disputes, and workers would face no charges for the services.

The independent body within the FWC could be funded through general revenue — as is the FWC. However, there are grounds for using a combination of an industry levy¹⁰⁵ to cover the fixed costs of the complaints function and a charge per complaint for the relevant platforms. The latter would encourage

¹⁰⁵ This would be consistent with the levy arrangements of various other complaints hearing bodies, such as the Australian Financial Complaints Body.

platforms to improve internal processes so that the number of disputes escalated externally remain low. Given the small number of platforms, a levy approach would not entail large compliance and administrative costs. As noted above there are some existing ad hoc arrangements for conciliation and arbitration. Were the FWC to undertake this function for all contract platform workers and for all jurisdictions, these arrangements would become redundant. However, in the transition to the FWC taking over the role, it would be sensible for any lessons from the Victorian and NSW arrangements to be used in developing the FWC's conciliation and arbitration role. It is probably undesirable to extinguish the legal remedies available under the Australian Consumer Law and the IC Act, if for no other reason that it would require any new legislation to set out difficult to define boundaries for what constitutes platform work. In any case, it is unlikely any party would resort to remedies under these Acts given their cost and lack of accessibility.



Recommendation 7.18

Introduce independent dispute resolution for platform workers

The Australian Government should introduce an external, independent dispute resolution function within the Fair Work Commission that can provide conciliation and arbitration services relating to suspension or termination disputes or non-payment of earnings. The function should be funded by platforms and should be designed to encourage platforms to improve internal processes, rather than relying on the external body as the primary method of resolving disputes.

5.5 Platform work and safety

As noted above, while the efficiency-enhancing aspects of platform business models could be at risk under certain regulatory approaches, it is important to consider where legitimate needs for regulation remain. If platform business models were *only* viable because they avoid legitimate regulation, or because they can lower costs by not fully internalising risks to safety, then they would not be the source of properly-measured productivity gains. For instance, personal injury risks to platform work should be adequately insured, otherwise risk would be transferred onto public insurance programs, such as Medicare and the NDIS. As such, it is important to consider how genuine safety issues can be effectively addressed, and whether this can be achieved while retaining the benefits associated with platform work business models.

As with other forms of work, platform work involves safety risks for consumers and workers (box 5.8). 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. Safety outcomes are influenced by a number of factors including the systems and processes that platforms have in place for risk reduction, the tasks a worker performs and how they are performed. Platforms have various WHS obligations (box 5.9) and safe work regulators are well-placed to provide ongoing guidance on best practice for platforms (for instance, regarding fatigue management systems in ridesharing). Personal injury insurance and workers' compensation comprise one area of policy where platform work often differs from employment relationships. The remainder of this section will largely focus on personal injury risks and insurance.

Box 5.8 – What do we know about safety in platform work?

Aged Care Work — 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% of aged care workers reported a work-related injury or illness in the 12 months preceding 2016 (Mavromaras et al. 2017, p. 42). These injuries or illnesses were most commonly sprains or strains, chronic muscle or joint conditions and stress or other mental conditions.

Taxi and ridesharing work — 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% of respondents had been involved in a car accident, 66% had experienced some form of harassment and 17% 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 work — 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 2021a, p. 4). The deaths of food delivery workers in New South Wales in late 2020 prompted the NSW Government to set up a taskforce to improve safety in food delivery platform work. A TWU survey reported that 34% of respondents working on food delivery platforms had been injured while completing tasks (TWU 2021, pp. 10, 14). 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 (SIRA 2021a).

Box 5.9 – WHS laws apply to platforms and contract platform workers

Model WHS laws, which are implemented in all states and territories bar Victoria, state that the primary legal duty of care, to a worker as reasonably practicable, belongs to a person conducting a business or undertaking (PCBU). A PCBU may be the contract platform worker themselves *and* the platform they work on. A worker can be an independent contractor or an employee, as the model WHS laws are agnostic to employment status and are intended to be responsive to changes in the way people work (Stewart-Crompton, Mayman and Sherriff 2008, p. 63).

Safe Work Australia states that the model WHS laws apply to the platform economy and other non-standard working arrangements, but that the manner in which laws are applied depends on each case, including the contract terms of engagement (Safe Work Australia, pers comms, 28 October 2022).

Under Victorian occupational health and safety (OHS) law, platforms also have obligations to contract platform workers:

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?

Box 5.9 – WHS laws apply to platforms and contract platform workers

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)

While model WHS laws make clear that the primary duty of care is not limited to ‘any particular relationships’, the next review of model WHS laws will also provide an opportunity to identify recommended changes if needed to address WHS risk specific to platform work.

The previous review of model WHS laws (Boland 2018) recommended:

- continuous assessment of new industries, hazards and working arrangements (Recommendation 3)
- development of a new model Code on the principles that apply to duties (Recommendation 5).

In response to these recommendations, Safe Work Australia is developing guidance materials on principles applying to WHS duties and consultation relating to platform work (Safe Work Australia, pers comms, 28 October 2022).

Platforms’ obligations under State legislation and from state-based regulators

Platforms may also have obligations imposed by State WHS legislation and regulators. For instance, New South Wales introduced legislation in July 2022, which requires food delivery platforms to provide personal protective equipment (PPE) (meeting Australian standards) and to provide onboarding and induction training. Food delivery platform workers are also required to wear the provided PPE while working, to complete training, and maintain a record of completion.

In New South Wales, 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 considers 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).

Platforms can improve WHS systems and controls

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 New South Wales 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, better application design to reduce distractions while on the road.

A number of platforms have created worker safety groups, which can help bridge the generally limited contact between platform representatives and workers outside of the platform acting as an intermediary to allocate or to assist in task matching or when there is an incident or dispute.

For food delivery platform work, local governments may also have a role with urban planning and improving safety for ridesharing and food delivery platform work.

What personal injury insurance arrangements do platform workers have?

Access to personal injury insurance depends on whether a platform worker is an employee or contract platform worker. Platform workers who are employees, such as Hireup disability support workers, can lodge workers compensation claims. They may also have access to other support from their employer as part of meeting WHS obligations. For example, Hireup stated that it engages rehabilitation consultants to assist injured disability support employees and that it investigates ways that injured employees can modify their disability support work. Beyond those platform workers who are employees, the presumption is that many workers will not be covered.¹⁰⁶ A limited set of independent contractors are covered under 'deemed worker' provisions in workers compensation legislation, although coverage differs by state and territory.¹⁰⁷

While in principle, platform workers could take out their own personal injury insurance or income replacement insurance, they typically lack the buying power of platforms that benefit from economies of scale, 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. As such, their insurance arrangements will depend on the platform, as well as workers' risk appetite and financial means.

Some platforms provide commercial insurance, while 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:

- Doordash, Menulog and Uber Eats are signatories¹⁰⁸ to the National Food Delivery Platform Safety Principles — created by initial signatory platforms with Ai Group — 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' (Ai Group 2021). Hungry Panda has also signed up to the Safety Principles, though they are not an initial signatory to the Safety Principles (NSW Government 2022, p. 1).
- Mable, an aged care and disability support platform, states that work arranged through the platform includes liability, medical malpractice and personal accident cover arranged by Mable through an insurance broker (sub 152, p. 2).

The personal injury and liability risks from some types of platform work involving automobiles may be partially covered through compulsory third-party (CTP) insurance, which is a legal requirement to register a vehicle. 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 vehicle registration fees. However, some forms of CTP insurance explicitly exclude coverage for commercial activities, such as ridesharing and food delivery,

¹⁰⁶ For instance, the NSW State Insurance Regulatory Authority (2021a, p. 5) stated that there was a 'general view that people providing food delivery platform economy services are, in most cases, not likely to be covered by the [NSW's workers compensation] scheme'. There is only a limited body of case law (Safe Work Australia 2021b, p. 11). One exception related to a case in June 2022, in which 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. As such, the worker's family was eligible for the lump sum death benefit of \$834,000 payable under workers compensation (Bonyhady 2022). Some commentators have suggested that the decision may open the door to more platform workers being eligible for workers compensation, although eligibility would depend upon specific working arrangements.

¹⁰⁷ For instance, in New South Wales, those meeting the criteria specified in Schedule 1 of *Workplace Injury Management and Workers Compensation Act 1998 No 86* (NSW).

¹⁰⁸ Deliveroo was an initial signatory but exited the Australian market in November 2022.

although workers could choose to add additional coverage for commercial activities through different insurance products, albeit with a higher insurance premium.

Evaluating the risks of types of platform work to contract platform workers

Policymakers will need to consider the risks that workers face during platform work — including the probability and severity of risks and the history and number of incidents, injuries and fatalities by types of platform work, taking account of safety and risk management systems that platforms have in place. Specific aspects of the platform business model are likely to influence the type and degree of risk involved, as well as the potential solutions.

- Vertical platforms that have more control over assigning tasks to workers and price setting have greater ability to reduce risk through app and task design — particularly where the platform’s application is directly used by workers and is active during the completion of tasks.
- Some platform work is conducive to multi-apping, which could increase risk where it results in greater time pressures. For instance, during a ‘shift’, food delivery platform workers may search for tasks on different apps and may be able to complete or progress deliveries from multiple apps simultaneously where they are on concordant routes. A multi-apping food delivery platform worker may also interact more often with their phone (for instance, to accept orders and view directions on a map) in traffic.

Data will be important to quantifying risk. However, there is little publicly available data on safety outcomes and incidents, bar what is provided by platforms to various government inquiries on request (by nature, one-off) and the data that must be provided to WHS regulators to meet regulatory requirements (and then, what is later published by regulators). For instance, in Victoria, a ‘notifiable incident’ to Commercial Passenger Vehicles Victoria for ridesharing includes incidents involving the death or serious injury of any person or if a police officer or health professional is in attendance.¹⁰⁹

Safe Work Australia stated that there were limited datasets detailing safety outcomes for platform work (Safe Work Australia 2021a):

- The ABS work related injuries and illness survey, which is published every four years. However, it can have high sampling errors as most workers across Australia do not experience a work-related injury or illness within the survey period. There is little ability to disaggregate to platform work (and to types of platform work) due to the sample size.
- National workers compensation data compiled by Safe Work Australia about serious injuries largely excludes contract platform workers, the vast majority of whom are not eligible for workers compensation as they are non-employees.
- From 2019, Safe Work Australia’s work-related traumatic injury fatality data includes platform drivers who were fatally-injured at work, but does not contain data about non-fatal injuries (Safe Work Australia, pers comms, 21 Dec 2022).

Platforms have more detailed proprietary data, including usage data from both workers and consumers, incident reporting (including successful and unsuccessful commercial insurance claims) and feedback from platform-formed safety groups. Worker representatives may also have information on safety that is not visible to the platform, because of the generally limited contact between platforms and workers outside of assigning tasks, resolving disputes or communicating through platform-formed worker safety groups. Insights from these types of data can be used by platforms to reduce hotspots of risk within their platforms. That said,

¹⁰⁹ Under s.7 of *Commercial Passenger Vehicle Industry Regulations 2018* (Vic)

some platforms do not have a systematic mechanism to collect injury data where such injuries or incidents fall outside of the scope of coverage of insurance policies.

Another approach may be to directly survey platform workers, drawing on a sufficient sample. For instance, NYC's Department of Consumer and Worker Protection collected data on occupational injuries (and on work expenses) through a survey distributed to all food delivery platform workers in NYC in the last quarter of 2021, using worker contact details collected from platforms (NYC Consumer and Worker Protection 2022, pp. 24–25). The survey concluded that food delivery platform workers on e-bikes and mopeds had the highest non-fatal injury rate of 32 days away from work per 100 full-time equivalent workers, followed by food delivery platform workers using cars, with a rate of 12.2 days away. These rates were higher than related occupations in the United States — couriers and messengers (2.2 days) and driver/sales workers (2.1 days) — and were higher than that of nursing assistants (10.2 days) and construction laborers (2.1 days).¹¹⁰

Policymakers should improve data collection on accidents and injuries for platform workers, including strengthening reporting to WHS regulators and clarifying what incidents are 'notifiable occurrences' by law. Better data will better inform WHS regulators about areas where safety outcomes can be improved.

Personal injury insurance is less generous than workers compensation

If offered at all, alternative forms of insurance provided by platforms or personal injury purchased by a worker are typically less generous than workers compensation (Safe Work Australia 2021b, p. 9).

Workers compensation generally allows workers to claim the full or partial cost of approved medical treatments (which can include treatments and appointments from medical practitioners and allied health, such as physiotherapy) and to access some reimbursement of medical expenses ('provisional expenses') while the claim is investigated (SIRA 2022a). In comparison, alternative forms of insurance are generally lump sum payouts, with the payout value depending on the type of injury and loss of bodily function and by insurance policy. Where alternative forms of insurance do provide income replacement, this is generally short term and at a smaller amount compared with workers compensation.

The lump sum death benefit — is generally higher under workers compensation compared with personal injury insurance provided by platforms. For instance, as of October 2022, the lump sum death benefit under the NSW workers compensation scheme is \$871 200 and is indexed twice-yearly (SIRA 2022b). As of April 2022, the death benefit under the policies arranged by Uber and Menulog were \$500 000 and up to \$585 000 (Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales 2022, p. 92).¹¹¹

Moreover, most platforms consider that workers are 'working' *only* when they are actively completing a task, not when they are logged into the platform and searching for a task. For instance, Uber in its frequently asked questions for rideshare in the United Kingdom — where Uber drivers are legally considered 'workers', an intermediate category between employee and independent contractor — states that:

You earn the National Living Wage [the minimum wage in the United Kingdom] from the time you accept a trip on the app to the point at which the trip is completed: this is called the engaged time.

¹¹⁰ Nursing assistants and construction laborers were selected as comparators by the authors on the basis that 'nursing assistants ... have the highest rate of occupational injury in the U.S. of any major occupation' and that construction laborers were used as an 'illustrative example involving well-known risks' (NYC Consumer and Worker Protection 2022, pp. 24–25).

¹¹¹ The 'up to \$585 000' figure for Menulog is inclusive of funeral and dependant benefits. For the NSW workers compensation scheme and for the Uber policy, funeral and dependant or spousal benefits are in addition to the lump sum death benefit. Please visit the relevant platform's website for the details of the most up-to-date and official wording of their insurance policies.

Time waiting for a trip to be offered to you is not included in your National Living Wage calculation. This is because there is no requirement to accept any trips during this period. (Uber 2022a)

Where a worker is likely to be located when task-searching depends on the nature of their work — for instance, a rideshare worker is likely to be driving around, either on an existing task or if in a low-demand period, without a task, while a worker searching for clerical tasks is likely to be stationary and within an office or home setting.

Generally, personal injury insurance arranged by rideshare and food delivery platforms in Australia (where available) covers workers during task completion with a short grace period after a task is completed — it does not cover all times that a worker is online on a platform. For instance:

- Uber provides personal injury insurance that starts when a rideshare driver or food delivery worker accepts a task through the app and ends ‘15 minutes after that ride or delivery is completed or cancelled, whichever is earlier’ (Uber 2022c). At any other time, there is no coverage. There is also no coverage under the policy in the aforementioned 15-minute period if the worker has accepted another task from another platform unless the worker is also completing a task for Uber (Chubb 2022).
- Menulog provides personal injury insurance that starts when a food delivery worker accepts a task and ends ‘15 minutes following the completion of a Menulog delivery or if a courier or courier’s substitute undertakes any activity for remuneration unrelated to Menulog deliveries’ (Menulog nd).

The wording of insurance policies will ultimately determine what insurance obligations apply. While in traditional forms of work, a worker may only have work-related travel twice a day (to and from their workplace), those in ridesharing and food delivery platform work may be travelling to and from tasks, or searching for tasks while travelling, several times in a day. Even when a worker might consider themselves working by searching for a task while travelling in traffic, they might not be always covered by existing insurance. For instance:

- In April 2020, a NSW food delivery platform worker died as the result of a road accident and was not eligible for insurance coverage (which would have included a death benefit of \$400 000 to his family and funeral expense coverage). While the worker was logged into the app at the time of his death, he was only covered by insurance for 15 minutes after he had cancelled an order — his death had occurred 10 minutes after his coverage had lapsed under the eligibility criteria specified in the insurance policy (Begley 2021).
- In September 2020, a Victorian food delivery platform worker died as the result of a road accident (Burrows 2021b, p. 7). The time of death (and whether it was within the 15-minute window after the worker completed their final delivery) then became relevant in determining what were the platform’s insurance obligations (Burrows 2021b, p. 8).¹¹²

In Washington State, where rideshare drivers are eligible for workers compensation, coverage only applies during dispatch platform time — the time ‘a driver spends traveling from a dispatch location to a passenger pick-up location’ and passenger platform time (the time ‘when the driver is transporting one or more passengers on a trip’).¹¹³ There is no grace period after the completion or cancellation of a trip.

In California, Article 2 of Proposition 22 requires platforms to provide ‘occupational accident insurance to cover medical expenses and lost income resulting from injuries suffered while the app-based driver is online with a network company’s online-enabled application or platform’, not just when a platform worker is

¹¹² The platform later offered a cash payment of \$400 000 to a relative of the worker, but it is unclear from public information provided by the platform to the NSW Select Committee on the impact of technological and other change on the future of work and workers in New South Wales as to whether the death occurred within insurance coverage (Burrows 2021a, p. 5).

¹¹³ Engrossed Substitute House Bill 2076 (Washington State).

completing a trip or delivery request. As such, in California, Uber pays insurance premiums for Optional Injury Insurance coverage (while in other jurisdictions within the United States, premiums are deducted from worker earnings at a per mile rate during engaged time if a worker opts in (Uber nd).

Some platform workers lack information about insurance provisions

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):

- 46% of platform workers report that their main platform does not offer at least one form of work-related insurance
- 26% report that they do not know whether insurance is offered
- 40% of platform workers report that their main platform requires them to take out their own insurance
- 22% do not know whether there is a requirement for insurance.

Even when a platform worker knows that their platform provides insurance, they may not be aware of the full details of an insurance policy. There is likely to be a role for better information provision as there is no national platform work equivalent to the Fair Work Ombudsman's education function for employers and employees. For instance, in early 2023 Victoria will establish a Gig Worker Support Service that will provide information about platform conditions; maintain a list of platforms that have signed up to the voluntary Victorian standards for platform work; and help resolve disputes by making referrals to relevant federal and state agencies and community legal centres (Andrews 2022). The support service will also be available through translation and interpretation services.

Improving insurance arrangements in platform work with significant risk

In areas of platform work that bear significant risk to workers, and where insurance provision and outcomes are lacking, there are a number of options for policy. For many platform workers, public insurance provided through publicly-funded universal healthcare, the NDIS 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 — engaging workers as employees — providing services competing with platform workers may face a competitive disadvantage. The greater the risk, the more insurance benefits should approach those offered in workers compensation.

There have been various proposals to increase insurance coverage or the level of insurance for workers providing food delivery services. The options identified by the NSW State Insurance Regulatory Authority (SIRA) (2021a, pp. 4, 6–7) for improving insurance arrangements for food delivery platform work have likely broader applicability.¹¹⁴ Drawing on the SIRA proposals, there are three broad options that could inform arrangements for all types of platform work, though the choice of which may vary depending on the type of work. The options are:

¹¹⁴ SIRA noted that the risk profile of food delivery platform work is different from other platform work in part due to the use of bicycles, scooters or motorcycles, as well as the time pressures involved in food delivery work. This need not limit the application of these options to other platform work as insurance arrangements vary premiums based on risk.

- to **extend workers' compensation** — under workers compensation, platforms would pay premiums to insurers with workers injured during work filing claims under workers compensation. Platforms would also have 'return to work' obligations that they must fulfill
- **implementing an insurance scheme but not extending workers' compensation** — where there is an insurance scheme with features of workers compensation or compulsory third-party insurance
- **requiring platforms to provide a baseline level of personal injury insurance** — where minimum requirements are set by a government, with platforms required to source insurance meeting the standard for workers.

These options come with their own policy considerations (table 5.2) and are discussed in more detail in the following pages — though this is not a comprehensive review given the wide scope of the Productivity Inquiry. Any changes in policy relating to insurance arrangements should consider the demographics of platform workers affected (and their ability to navigate insurance claims and the legal system). For instance, SIRA (2021a) 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.

Table 5.2 – Considerations for insurance policy

| Consideration | Workers compensation | Industry-wide scheme | Insurance baseline |
|--|--|---|--|
| Requires extension of 'deemed worker' status to class of platform workers in legislation (State governments can extend workers compensation eligibility to some contractors through workers compensation legislation) | Yes | No | No |
| Requires a definition of a class of platform worker to be codified in legislation, including consideration of multi-apping | Yes (in workers compensation legislation) | Yes (in legislation establishing an industry-wide platform work insurance scheme) | Yes (in legislation establishing a mandatory insurance baseline) |
| Requires definition of time-based insurance coverage for platform work to be codified in legislation or insurance policy wording (in which timeframes are platform workers eligible for coverage) | Yes (insurer will have to interpret whether an injury that occurs after a task is completed falls within travel-related provisions in state workers compensation legislation, additional guidance may have to be given in legislation or legislation may require amending) | Yes (in legislation establishing an industry-wide platform work insurance scheme) | Yes (for instance, if a government requires that platform insurance includes coverage for a short period of time after completing a task. The industry standard in food delivery is generally 15 minutes after completion, with some exceptions within policies) |
| Requires governments to define level of insurance benefits | Yes (if benefits are to be different than defined in existing legislation or if clarification is needed in legislation) | Yes (in legislation establishing an industry-wide platform work insurance scheme) | Yes (in establishing minimum standards for insurance) |

| Consideration | Workers compensation | Industry-wide scheme | Insurance baseline |
|---|--|---|---|
| Requires platforms to meet 'return to work' obligations (including creating a return to work plan, reasonable modifications to tasks to assist a worker in their return to work) | Yes (platforms as employers would have return to work obligations) | Depends on legislation | Depends on legislation |
| Requires governments to determine insurance benefits in legislation (including the existence of provisional payments while a claim is assessed) | No (would be subject to existing workers compensation legislation) | Yes (to determine insurance benefits and whether provisional payments exist) | Yes (to determine what the baseline level of insurance would entail, including if there are provisional payments mandated while a claim is processed) |
| Requires governments to determine how scheme or insurance meeting government requirements are funded | Yes (governments would need to maintain financial viability of workers compensation scheme) | Yes (in legislation establishing an industry-wide platform work insurance scheme) | No (insurance premiums paid by platforms would be priced by commercial insurers, although in practice, a government would need to consult with stakeholders to evaluate whether the parameters of their chosen insurance baseline would be commercially feasible) |
| Requires governments to design a dispute resolution process relating to a denied insurance claim | No (would follow established workers compensation dispute resolution processes, which involve conciliation and arbitration processes before legal proceedings) | Yes | No (would follow insurer's established dispute resolution process — generally involving escalation to a complaints team, internal review or both, before escalation to the Australian Financial Complaints Authority, an industry-funded dispute resolution scheme, before legal proceedings) |

The system of workers compensation in Australia emerged and evolved during the 20th century — well before the advent of platform work. As such, any consideration to extend workers compensation would require that legislation be examined so that it is fit-for-purpose (such as how a measure of pre-injury average weekly earnings is calculated accounting for the potential of high variability in earnings over the span of weeks or months in some forms of platform work).

Furthermore, WHS matters have traditionally been considered as primarily state and territory responsibilities. WHS regulators are largely state-based, the model WHS laws are implemented through state legislation and with the exception of Comcare, workers compensation schemes are operated at a state level. As there are differences between states for insurance requirements and workers compensation eligibility, a problem from moving to better coverage through state-based WHS arrangements would be inconsistencies in the treatment of workers undertaking the same tasks and facing the same risks. This would create some compliance burdens for platforms.

One approach that *could* create a nationally consistent approach would be the use of mirror laws by states if all (or most) states agreed to a consistent approach to insurance for high-risk platform work, such as food delivery, similar to how model WHS laws already apply across all jurisdictions bar Victoria.

Defining classes of platform workers for insurance purposes

As there are no insurance requirements in the IC Act and as most contract platform workers are not currently eligible for workers compensation, any changes to require an insurance baseline, creating an industry-wide insurance scheme or extending workers compensation eligibility requires that there be a precise definition of classes of platform workers to avoid boundary issues with non-platform contract work. In the case of an industry-wide scheme or extending workers compensation, policymakers need to consider overlaps with other types of platform work if it is possible to simultaneously complete or progress more than one type of task (for instance, ridesharing and food delivery).

Legislating regulating platform work has involved codifying definitions of platforms and workers.¹¹⁵ Platform definitions often reference the online nature of task assignment and the type of tasks dispatched by a platform, with platform workers being defined in reference to platforms. For ridesharing, legislation may clarify that taxi services and limousine hire are not within scope of regulation when they are regulated separately.

What level of insurance benefits should be available?

If workers compensation were to be extended, the benefits available to a platform worker would follow that prescribed by existing legislation. Policymakers would also need to consider how income from other contracting platform work — in work that is not eligible for coverage under a state's workers compensation scheme — is treated for the purposes of calculating an average measure of pre-injury average weekly earnings. Otherwise, governments would need to determine what level of insurance benefits are sufficient — either in mandating a baseline level of insurance or in creating an industry-wide insurance scheme — including whether (and to what extent):

- lump-sum benefits are provided for fatalities (including death benefits and funeral expenses) and injuries
- medical expenses are reimbursed
- there are limits on out of pockets expenses
- there is an income replacement scheme
- there are payments to a worker's dependants upon death.

An industry-wide insurance scheme that differs from workers' compensation will also need to consider how provisional payments work while the claim is being processed and in turn, performance targets for the time it takes to process a claim. For instance, in New South Wales, after receiving initial notification of an injury under workers compensation, insurers must start provisional payments within 7 days unless there is a reasonable excuse not to (SIRA 2021b).

Under workers' compensation, platforms would have 'return to work' obligations

Under an extension of workers compensation, there are return to work obligations for organisations engaging or employing deemed workers, although these obligations vary by state. These obligations include making a personalised return to work plan for injured workers and investing work modifications for injured workers (for instance, if light duties are available). At an organisational level, it may mean appointing a return to work

¹¹⁵ For instance, as defined in Ontario's Digital Platform Workers' Rights Act 2022 (broad regulation of platform work), New York City's high-volume for hire services in subchapter 59D of the Rules of the City of New York (ridesharing) and subchapter 2 of chapter 15 of title 20 of the administrative code of New York City (food delivery platform work) and Washington State's Engrossed House Bill 2076 (ridesharing).

coordinator and creating and publicising a return to work strategy or program. For instance, in New South Wales, Tier 1 organisations — which some platforms could be categorised even based on the number of existing employees — must consult workers and any unions that represent them during the creation of the return to work program (SIRA 2022c).

Financial viability of an industry-wide insurance scheme or extending workers compensation for classes of platform work with significant risk

The financial viability of creating an industry-wide insurance scheme or to extend workers compensation for a class of high-risk platform work — such as food delivery — would need to be considered, particularly in how premiums are priced, given differences in platform work. Some platform workers will work the equivalent of full-time hours, while others may only work a few hours. One proposal considered by the NSW Government in 2021, which has not been enacted, was to fund an insurance scheme for food delivery workers through imposing a levy of about 4% on each eligible platform transaction — though the levy could have varied ‘depending on the service or platform’ (Cormack 2021).

In designing an insurance scheme, policymakers would need to consider (SIRA 2021a, 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 in specific platform work
- the interactions of a proposed scheme with existing public and private insurance schemes
- additional administration costs — for instance, if a government were to create a separate industry-wide insurance scheme for classes of platform workers.

Though not direct comparators for Australian cities, examples of funding arrangements for workers compensation funding for ridesharing include:

- in New York State, where high-volume rideshare platforms pay into the Black Car Fund, a workers compensation fund for the taxi, limousine hire and ridesharing industry. In June 2022, Uber stated that trips in New York incurred a surcharge of 3% to pay for workers compensation (Uber 2022b)
- in Washington State, rideshare platforms pay into the state’s workers compensation fund. The premiums paid by businesses are determined by a formula involving a base rate, the number of hours worked, and risk and experience ratings (Washington State Department of Labor & Industries 2020).

Dispute resolution for denied claims in an industry-wide insurance scheme

Governments would need to consider the desirable dispute resolution processes for any industry-wide insurance scheme. Under Comcare and state-based workers compensation schemes, there are review and conciliation processes that a worker can elect to use before pursuing their claim through court (or through arbitration processes, where they exist). For instance, in Victoria, conciliation involves the WorkCover agent, the employer and the worker who meet in a conference with a Conciliation Officer to attempt to resolve the dispute. If a Genuine Dispute Certificate is provided after an unsuccessful conciliation conference, the worker can apply for binding arbitration by the Workplace Injury Commission — which in limited circumstances, can be appealed to the Supreme Court of Victoria — or to initiate court proceedings.

Under commercial insurance arrangements, if a claim is denied there are generally internal complaint and dispute resolution processes that a worker can use to appeal a denied claim. If unsuccessful, a worker can escalate a dispute about a denied claim to the Australian Financial Complaints Authority (AFCA) (an external

dispute resolution body for the financial services industry) with powers to offer a binding determination to the worker, if conciliation fails. Otherwise, if a worker disagrees with the binding determination proposed by AFCA, they can pursue the claim through court.



Recommendation 7.19

Evaluate insurance arrangements for platform work with significant risks to workers

Governments should evaluate insurance arrangements of classes of platform work where there are significant risks to worker safety, drawing on data and consultation with platforms, workers and their representatives. Classes of platform work that are likely to be of initial interest are those with many workers or total hours worked and those where there are material risks to work health and safety.

Where insurance arrangements are insufficient, governments should consider at minimum mandating a baseline level of insurance to be provided and paid for by platforms, or creating an industry-wide insurance scheme, or extending workers compensation. Each of the policy options would be best funded by the covered platforms. The appropriate policy option will depend on the class of platform work and its risks, and implementation considerations such as the existing level of insurance provided by platforms and the financial sustainability of the scheme.

Appendix

A. Stylised simulations of economy-wide effects

The Productivity Commission used a whole-of-economy model to illustrate the potential effects of some of the recommendations in this report in a stylised way. This model is static, in that it does not capture dynamic effects over time. Rather, the results are interpreted as if the effects of a shock to the economy could happen overnight. While the simulations are stylised and there is a high level of uncertainty in the impacts of the proposed recommendations and other model assumptions, the simulations provide insight on how potential productivity improvements could flow through the economy's structure and the differential impacts across industries and household types. Further details of the model, simulations and effects of sensitivity testing are contained in volume 9.

Improving matching of permanent skilled migration¹¹⁶

While migrants are not separately identified as an individual labour type in the whole-of-economy model used in this inquiry, the effects of better matching permanent skilled migrants to jobs were simulated in a stylised way by increasing labour productivity in industries based on the extent to which they employ skilled migrants. The composition of the population (in terms of age group, sex and education level) in the simulation stayed the same — the assumption is that the size and composition of the permanent migration intake does not change, but the skills of migrants can be better utilised in the industries they are employed in. Industries employing a relatively higher share of workers with permanent skilled visas received a larger productivity improvement, with simulated labour productivity increases (relative to baseline labour productivity) of:

- 0.1% for 'construction', 'retail trade', 'hospitality', 'school education', 'public administration', 'other services'
- 0.2% for 'mining', 'other manufacturing', 'transport and wholesale', 'financial services', 'professional, scientific and technical services', 'health and social services'
- 0.3% for 'advanced manufacturing', 'technical, vocational and tertiary education'
- 0.6% for 'technology and telecommunications'.

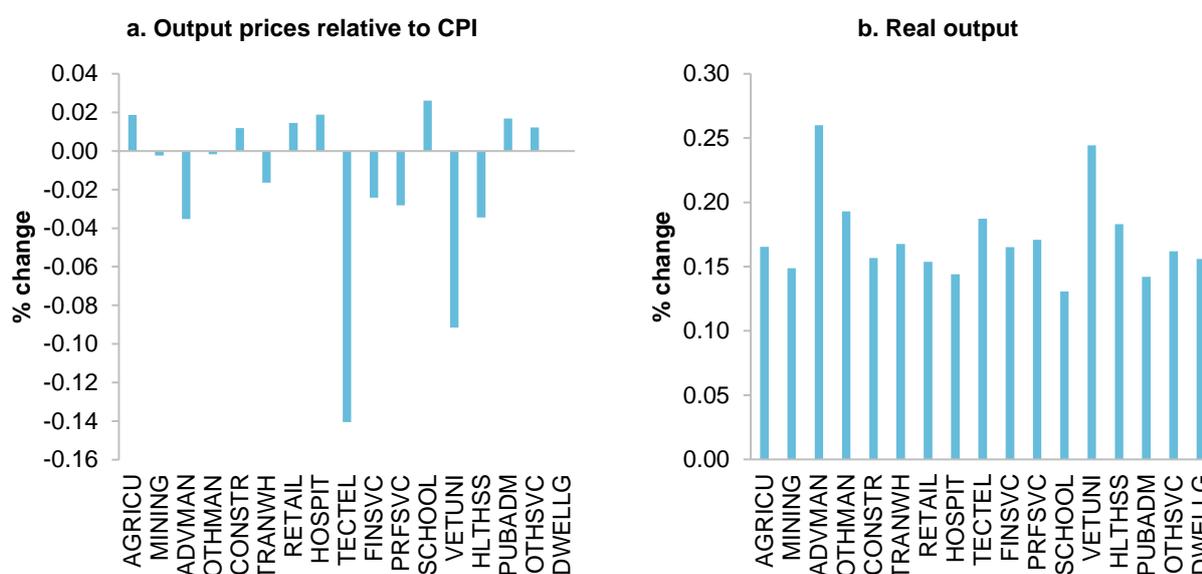
The change in prices relative to the economy-wide consumer price index (CPI) varied across the different industries. Industries with larger simulated labour productivity increases (including 'advanced manufacturing', 'technology and telecommunications', and 'technical, vocational and tertiary education') were better able to produce more output with the same amount of labour, and therefore experienced the largest reduction in their relative output prices (figure A.1, panel a). In some other industries with smaller simulated labour productivity improvements, the effects of increased demand (discussed below) on prices outweighed price falls from the increase in labour productivity, which led to a relative increase in prices.

Real output increased across these industries as the relative price changes induced greater demand. Real output increased across other industries as well, including those that did not experience a simulated productivity improvement (figure A.1, panel b). The overall demand increase across industries was due to

¹¹⁶ Referred to as simulation 7 in volume 9.

factors such as higher household incomes (elaborated on below), the need for more capital for production (and hence investment), and an increase in government expenditure (which was tied to the size of GDP). Real GDP and real gross national income increased by about 0.2% in the simulation. There was high uncertainty about the size of the effects; for example, sensitivity testing found that the increase in real GDP ranged from about 0.1 to 0.3% with changes to assumed shock sizes (chapter 4 in volume 9).

Figure A.1 – Estimated changes in output prices and real output by industry due to improved matching of permanent skilled migration^a



a. Industry abbreviations: AGRICU – agriculture, forestry and fishing; MINING – mining; ADVMAN – advanced manufacturing; OTHMAN – other manufacturing; CONSTR – construction; TRANWH – transport and wholesale; RETAIL – retail trade; HOSPIT – hospitality; TECTEL – technology and telecommunications; FINSVC – financial services; PRFSVC – professional, scientific and technical services; SCHOOL – school education; VETUNI – technical, vocational and tertiary education; HLTHSS – health and social services; PUBADM – public administration; OTHSVC – other services; DWELLG – ownership of dwellings.

Source: Productivity Commission estimates.

Although the industries with larger simulated productivity improvements required less labour, overall labour use in the economy was largely unchanged as workers were redeployed across other industries that experienced growth in demand. In the migration context, the simulation implies that more productive migrants in certain industries displace other workers, but the subsequent effects of these productivity improvements on demand and economic growth mean that displaced workers find employment in other industries (abstracting from skill or location mismatches that may occur in reality and take some time to resolve). This displacement occurs because there is no differentiation between migrant and local workers in this model, so the two are perfectly substitutable, given the same age, sex and education characteristics. However, if migrant workers were considered complementary to local workers rather than substitutes (for example, due to different knowledge and skillsets that complement the skills of local workers), then increased productivity of migrant workers in a particular industry may lead to increased demand for local workers in that industry as well.¹¹⁷

¹¹⁷ The Productivity Commission's *Migrant Intake into Australia* inquiry (PC 2016b, p. 191) suggested that at an aggregate level, taking together supply and demand effects, the addition of new migrants to Australia's population have had a negligible impact on

The overall increase in demand for labour increased real average wage rates (that is, wages relative to the economy-wide CPI) in the economy. Higher real household labour and capital incomes (which more than offset increased household saving and income taxes), contributed to higher household consumption and improved wellbeing. These effects were seen across people of different age groups, genders and education levels. The aggregate value of the wellbeing improvement was estimated to be worth about \$1.7 billion in 2018-19 dollars to households.

Reducing unnecessary occupational licensing requirements¹¹⁸

Reducing unnecessary licensing requirements would improve labour mobility and therefore enable better matching of jobs to people with the most suitable skills for the role. The impacts of this change were simulated by increasing labour productivity in the model. While occupational licensing affects *occupations* rather than *industries*, the limitations of the model's structure meant that the labour productivity improvements could only be simulated by industry. The simulated labour productivity improvements were applied to industries that are most likely to have occupational licensing requirements, and hence would benefit most from reducing unnecessary ones. In the simulation, it was assumed that each unit of labour (measured by hours worked) in the 'construction', 'transport and wholesale', 'professional, scientific and technical services', 'school education' and 'health and social services' industries was 0.8% more productive.

Improving labour productivity in the simulated industries led to a fall in labour hours required to produce the same amount of output in those industries. This contributed to a reduction in prices of those industries' goods and services relative to the economy-wide CPI, with the greatest reductions in the most labour-intensive industries (figure A.2, panel a).

The relative price falls induced greater demand in industries that experienced improved labour productivity. Output also increased more broadly across the economy, including in industries that did not directly experience an increase in labour productivity (figure A.2, panel b). This was due to growth in real household incomes, the need for more investment to meet greater demand for capital in all industries, and growth in government expenditure (which was tied to GDP). Real GDP increased by 0.3% and real gross national income increased by 0.4%. Sensitivity testing found that the change in real GDP ranged from 0.1 to 0.7% under changes to assumed shock sizes, demonstrating the uncertainty in these effects (chapter 4 in volume 9).

Hours worked in the industries with simulated productivity increases fell, but hours worked in industries that did not have a simulated increase in labour productivity increased due to greater demand. The net effect across all industries was such that total hours worked was largely unchanged. Falls in labour hours were largely for groups aged 65 and over, who chose to spend more time on leisure — labour supplied by these older age groups were calibrated in the model to be more responsive to income changes than other age groups. Hours worked among all younger age groups increased on average.

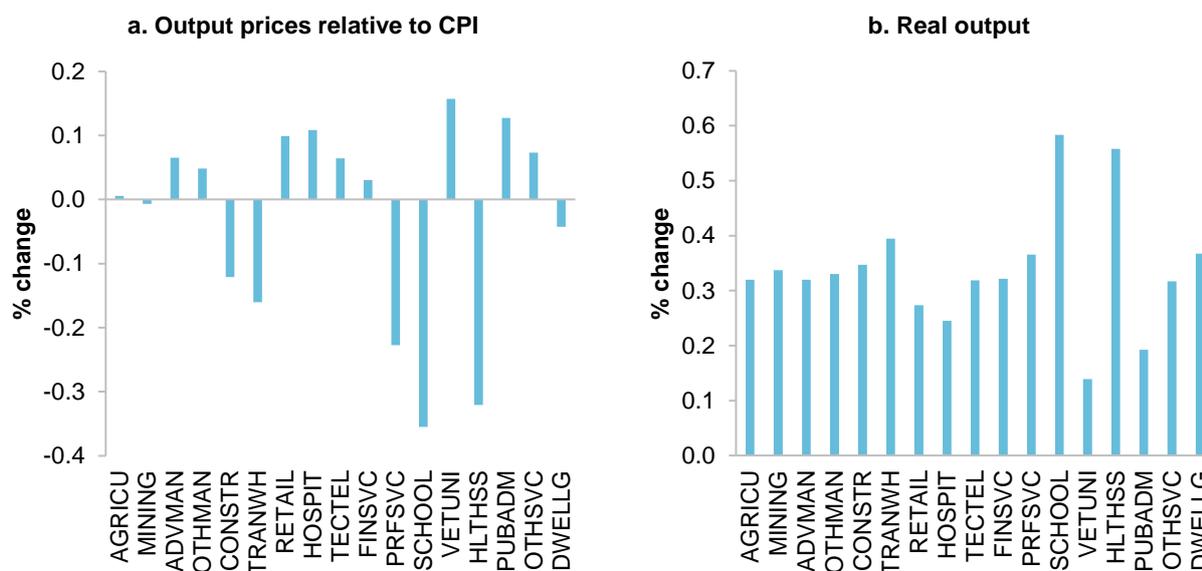
Across all groups, real disposable incomes increased (as real labour and capital income increases exceeded increases in saving and income tax), and households were able to consume more. The combined effects of greater consumption and increased leisure time for older groups meant that household wellbeing improved for all age groups, genders and education levels. The aggregate value of the increase in household wellbeing was

wages, employment and participation of the existing labour force. The size of migrant spillover effects on the productivity of local workers (which could arise from transfers of knowledge and exposure to new opportunities) were uncertain but likely small.

¹¹⁸ Referred to as simulation 6 in volume 9.

estimated to be about \$3.3 billion in 2018-19 dollars (that is, if this amount was given as extra income instead of the productivity shock, households would be as well off as they were estimated to be after the productivity shock).

Figure A.2 – Estimated changes in output prices and real output by industry due to reducing unnecessary occupational licensing^a



a. Industry abbreviations: AGRICU – agriculture, forestry and fishing; MINING – mining; ADVMAN – advanced manufacturing; OTHMAN – other manufacturing; CONSTR – construction; TRANWH – transport and wholesale; RETAIL – retail trade; HOSPIT – hospitality; TECTEL – technology and telecommunications; FINSVC – financial services; PRFSVC – professional, scientific and technical services; SCHOOL – school education; VETUNI – technical, vocational and tertiary education; HLTHSS – health and social services; PUBADM – public administration; OTHSVC – other services; DWELLG – ownership of dwellings.

Source: Productivity Commission estimates.

There are some limitations to the approach of modelling reduced occupational licensing requirements by increasing labour productivity in specific industries. It is likely that there are some occupations that would be affected by occupational licensing changes that are not covered by these industries. Conversely, some occupations in these industries would not be affected by these changes.

In addition, modelling only increases in industry labour productivity abstracts from other effects that could arise from removing unnecessary occupational licensing requirements. As discussed in chapter 3, licence requirements can also lead to wage premiums and reduce the equilibrium labour supply in affected occupations. These effects were not modelled under this simulation as the inquiry’s whole-of-economy model does not contain industry- or occupation-specific wages, with labour assumed to be perfectly mobile across industries. Sensitivity analysis of the effects of simulated productivity improvements in the presence of *economy-wide* wage floors and unemployment suggest that there could be greater gains in labour hours and production (discussed in chapter 4 in volume 9).

Reforms to awards and enterprise bargaining

Reforms to awards will allow significantly greater scope for flexibility in workplaces, reinforced by changes to the modern awards objective, which explicitly references productivity as a goal. Award changes reverberate across all other types of workplace relations as they form the minimum standards for many industries or occupations. To that extent, award reforms act to increase efficiency of labour markets across the whole economy. Independently,

changes in bargaining arrangements, especially changes to the better-off-overall-test and closer scrutiny of any clauses to agreements that overly restrict management's investment or other key business decisions will also improve productivity and encourage the uptake of enterprise bargaining.

Given the general impacts of workplace reform across the economy, the appropriate shock is a general shock to labour productivity, as modelled for the very long run reforms of the schooling system (in appendix B from volume 8).¹¹⁹ It is unlikely that the workplace relations reforms proposed in this review will produce the same productivity improvements, so the results for school reform should be scaled down. Assuming a scaling factor of between 0.10 to 0.25, the gains to real GDP would be of an order between 0.2 and 0.5 percentage points.

The Productivity Commission's 2015 report (PC 2015c) was a broader review of the entire workplace relations system compared with the tighter focus of this report. The 2015 report raised other potential changes to workplace relations in relation to industrial action, adverse action, unfair dismissal, governance arrangements, greenfield agreements, and individual flexibility agreements, among others. These changes would produce some additional benefits.

¹¹⁹ Referred to as simulation 5c in volume 9. This simulation assumed a 2% labour productivity improvement across the population, and an additional 3% labour productivity improvement in the 'school education' industry. The estimated real GDP effect of 2% was predominantly due to the former.

Abbreviations

| | |
|----------------------|--|
| ABS | Australian Bureau of Statistics |
| ACCC | Australian Competition and Consumer Commission |
| ACCI | Australian Chamber of Commerce and Industry |
| ACTU | Australian Council of Trade Unions |
| AFCA | Australian Financial Complaints Authority |
| AHPRA | Australian Health Practitioners Regulation Agency |
| Ai Group | Australian Industry Group |
| AMR | Automatic mutual recognition |
| ANMAC | Australian Nursing and Midwifery Accreditation Council |
| ANZSCO | Australian and New Zealand Standard Classification of Occupations |
| ANZSIC | Australian and New Zealand Standard Industrial Classification |
| API | Application programming interface |
| ASIC | Australian Securities and Investments Commission |
| ASU | Australian Services Union |
| ATO | Australian Taxation Office |
| BCA | Business Council of Australia |
| BIIP | Business Innovation and Investment program |
| BLADE | Business Longitudinal Analysis Data Environment |
| BOOT | Better Off Overall Test |
| CBA | Cost-benefit analysis |
| CCA | Competition and Consumer Act, 2010 (Cth) |
| CEDA | Committee for Economic Development of Australia |
| CFMEU | Construction, Forestry, Maritime, Mining, and Energy Union |
| COVID-19 | Coronavirus disease (an infectious disease caused by the SARS-CoV-2 virus) |
| CPD | Continuous professional development |
| CSAM | Continuous Study of Australian Migrants |
| CTP insurance | Compulsory third party insurance |
| DEWR | Department of Employment and Workplace Relations |
| EA | Enterprise agreement |
| ECEC | Early childhood education and care |
| EMTR | Effective marginal tax rate |

| | |
|---------------|---|
| EV | Electric vehicle |
| FDI | Foreign direct investment |
| FTA | Free trade agreement (also referred to as a preferential trade agreement) |
| FW Act | Fair Work Act, 2009 (Cth) |
| FWC | Fair Work Commission |
| FWCFB | Full Bench of the Fair Work Commission |
| FWO | Fair Work Ombudsman |
| GBE | Government Business Enterprise |
| GDP | Gross Domestic Product |
| GFC | Global Financial Crisis |
| GP | General practitioner |
| HILDA | Household Income and Labour Dynamics in Australia |
| IT | Information Technology |
| IC Act | Independent Contractors Act 2006 (Cth) |
| ICT | Information and Communication Technology |
| IPART | Independent Pricing and Regulatory Tribunal |
| MADIP | Multi-Agency Data Integration Project |
| MBS | Medicare Benefits Schedule |
| NCC | National Construction Code |
| NDIA | National Disability Insurance Agency |
| NDIS | National Disability Insurance Scheme |
| NES | National Employment Standards |
| NMBA | Nurses and Midwifery Board of Australia |
| NP | Nurse practitioner |
| NRAS | National Accreditation and Registration Scheme |
| NYC | New York City |
| OBA | Outcomes-based assessment |
| OECD | Organisation for Economic Co-operation and Development |
| OER | Occupational entry regulation |
| OSAP | Offshore Skills Assessment Program |
| OHS | Occupational Health and Safety |
| PBS | Pharmaceutical Benefits Scheme |
| PC | Productivity Commission |
| PCBU | Person conducting a business or undertaking |
| RAC | Refrigeration and air conditioning |
| RIS | Regulatory impact statement |

| | |
|---------------------|--|
| Regtech | Regulatory technology |
| SCHADS Award | Social, Community, Home Care and Disability Services Award |
| TSS | Temporary Skill Shortage |
| TSMIT | Temporary Skilled Migration Income Threshold |
| TWU | Transport Workers' Union |
| TTMRA | Trans-Tasman Mutual Recognition Agreement |
| UFCW | United Food and Commercial Workers Canada |
| UK | United Kingdom |
| UN | United Nations |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| US | United States |
| UTI | Urinary tract infection |
| WHS | Workplace Health and Safety |
| WR | Workplace Relations |
| WWCC | Working With Children Check |

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