Ai GROUP SUBMISSION

Fair Work Commission

Annual Wage Review 2023 – 2024
Post-budget Submission

17 May 2024

Contents

Abbreviations

2011 ERO Decision	*Re Equal Remuneration Case* [2011] FWAFB 2700
2012 ERO Decision	*Re Equal Remuneration Case* [2012] FWAFB 1000
2024 AWR	Annual Wage Review 2023 – 24
2023 AWR	Annual Wage Review 2022 – 23
2023 AWR Decision	*Annual Wage Review 2022-23* [2023] FWCFB 3500
ACTU	Australian Council of Trade Unions
ABS	Australian Bureau of Statistics
Ai Group	Australian Industry Group
AWR	Annual Wage Review
Commission	Fair Work Commission
CPI	Consumer Price Index
ERO Decisions	2011 ERO Decision, 2012 ERO Decision and *Equal Remuneration Case* [2012] FWAFB 5184
FTB	Family Tax Benefit
FW Act	*Fair Work Act 2009*
Gender Undervaluation Statement	*President's statement – Occupational segregation and gender undervaluation,* issued by Justice Ross, President on 4 November 2022.
GDP	Gross Domestic Product
MAMW	Modern Award Minimum Wages
NMW	National Minimum Wage
Panel	Expert Panel
PPI	Producer Price Index
RBA	Reserve Bank of Australia
SACS industry	Social and community services industry
SCHCDS Award or SCHADS Award	*Social, Community, Home Care and Disability Services Industry Award 2010*

Stage 1 Aged Care Work Value Decision	*Aged Care Award 2010, Nurses Award 2020, Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200
Stage 3 Aged Care Work Value Decision	*Aged Care Award 2010, Nurses Award 2020, Social, Community, Home Care and Disability Services Industry Award 2010* [2024] FWCFB 150
Stage 1 Report	Stage 1 Report: Gender-based Occupational Segregation: A National Data Profile (published 15 November 2023)
Stage 2 Report	Stage 2 Report: Gender Pay Equity Research (published 4 April 2024)
TMI	Trimmed Mean Inflation
WPI	Wage Price Index

1. Introduction

In this post-budget submission, Ai Group addresses several post-budget economic matters and advances supplementary submissions associated with the issue of gender equality.

Since we filed our submission in reply on 30 April, there has been updated Australian economic data, new economic forecasts issued by the RBA and Treasury, and the release of the 2024-25 Federal Budget. In this submission, Ai Group addresses these matters, as well as replying to several Questions on Notice as posed by the Commission on 6 May 2024[1].

This newly available data supports previous arguments made by Ai Group that the Panel should take a cautious and moderate approach to increasing the NMW and MAMW by not more than 2.8% this year.

Key economic indicators released in May continue to point towards a weakening in Australia's economic performance:

1. New forecasts issued by the RBA and Treasury predict that growth in key macroeconomic indicators will all decline to a low point around the middle to end of 2024, and will not return to long-term average performance at any point in the forward forecasts.

2. New CPI forecasts predict that inflation will remain above target for some time; though the impact of price suppressing measures in the 2024-25 Federal Budget has introduced uncertainty around the timeframe for inflation to return to the target band.

3. New employment and wages data points towards a continued weakening in the Australian labour market; and new retail data shows the industry continues to display very weak performance into 2024.

New income support measures announced in the 2024-25 Federal Budget, including energy bill relief and increases to Commonwealth Rent Assistance, will complement previously announced measures to support the incomes of the low-paid.

In line with these deteriorating economic circumstances, it remains critical for the Panel to adopt a cautious approach to adjusting wages. A minimum and award wage increase not above 2.8% would avoid unduly exceeding business capacity to pay, thus contributing to disemployment, in the current environment. It would also avoid unreasonably contributing to the persistence of inflation. In light of current inflation forecasts, and the Government's announced income support measures, it would also ensure a real increase in the disposable income of employees on the NMW and MAMW.

[1] FWC, Annual Wage Review 2023-24 Questions on Notice, https://www.fwc.gov.au/documents/wage-reviews/2023-24/c2024-1-annual-wage-review-questions-on-notice-6-05-2024.pdf.

2. New macroeconomic forecasts for the Australian economy

Charts 1 to 4 below summarise macroeconomic forecasts for the Australian economy issued in May by the Treasury and RBA. There are some minor differences between the two sets of forecasts, based on the differing methodologies used. Despite these differences, both paint a consistent picture of how the Australian economy is expected to perform:

- **Real GDP growth** is expected to continue to slow to the middle of 2024, before then commencing a progressive recovery through the 2024-25 financial year. Growth is not expected to return to its pre-pandemic average by the end of the forward forecasts.

- **Household consumption growth** is expected to have hit a bottom in early 2024, and will recover over the 2024-25 financial year.

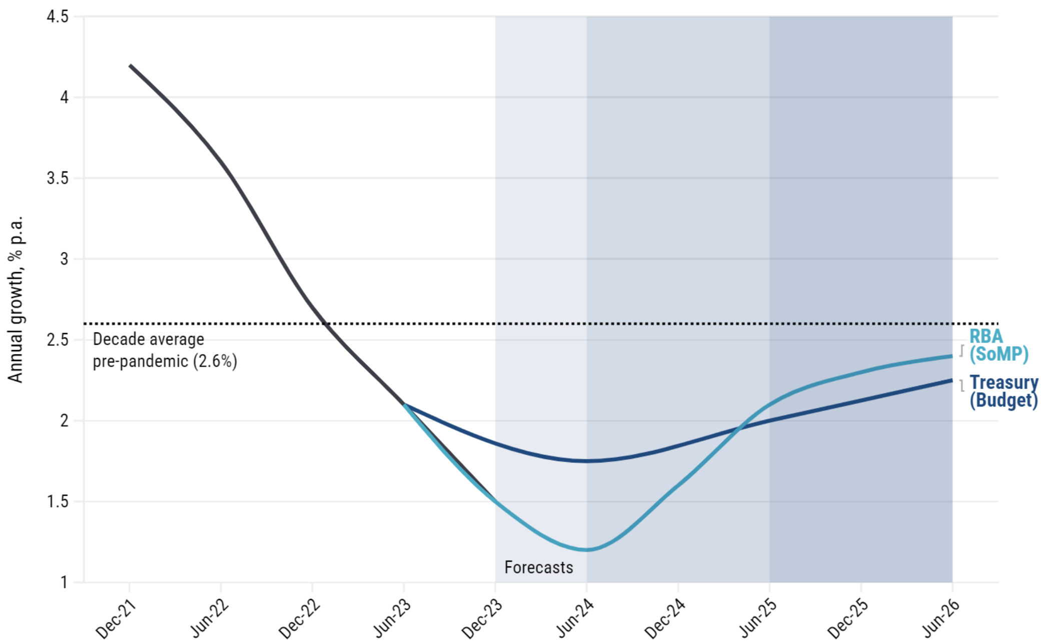
- **Business investment growth** will fall dramatically in the first half of 2024, before remaining flat for the next two years. It is not expected to return to its pre-pandemic average by the end of the forward forecasts.

- **Employment growth** will soften to a low by the end of 2024, before remaining flat for the next two years. It is not expected to return to its pre-pandemic average by the end of the forward forecasts.

Despite minor differences in quantum and timing, both the RBA and Treasury forecast essentially the same outcome over the coming cycle: After a period of strong post-pandemic growth, the Australian economy will continue to weaken to the middle of 2024, and subsequent medium-term conditions will recover but be poor by historical standards.

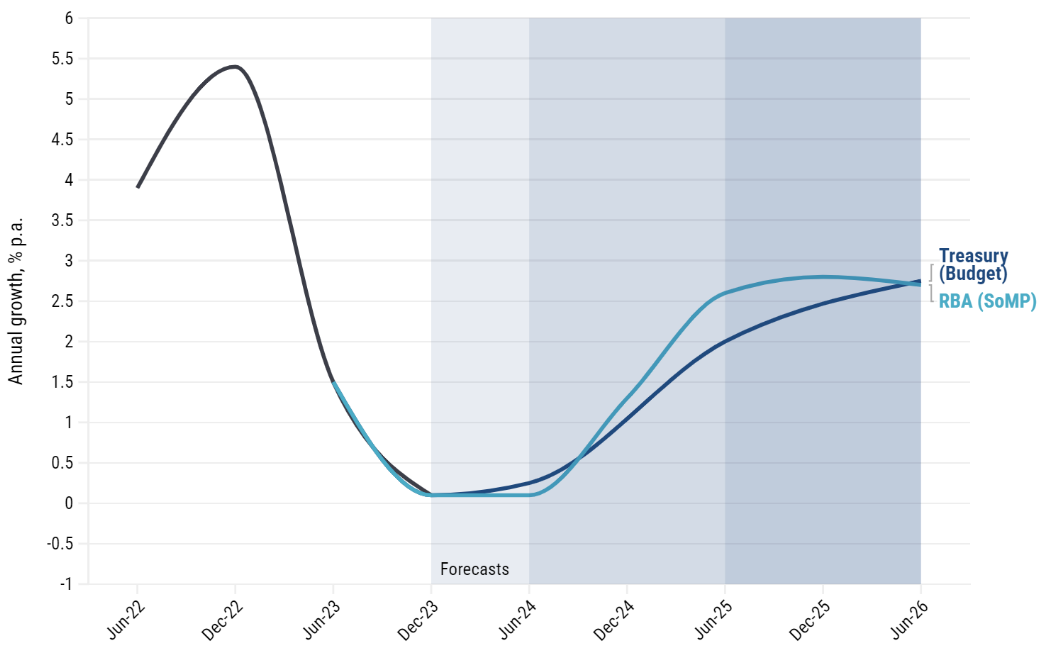
These new forecasts are consistent with arguments made by Ai Group in previous submissions that the Australian economy is slowing rapidly, and the economic outlook is weak.

Chart 1: Australian real GDP growth forecasts



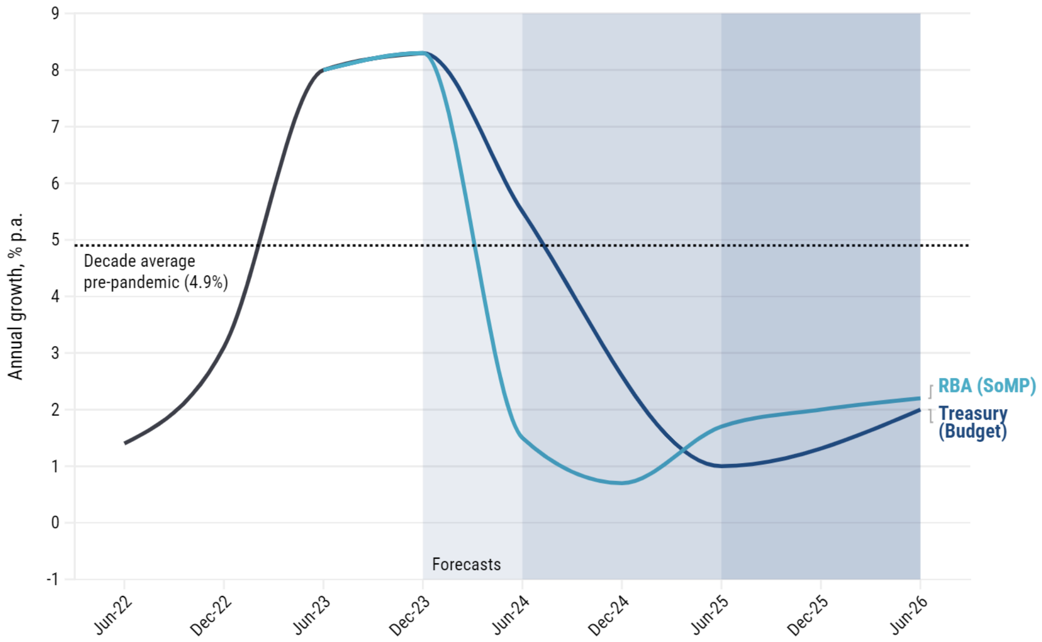
Source: RBA SoMP, Treasury Budget Paper No. 1 • Forecasts as of May 2024.

Chart 2: Australian household consumption growth forecasts



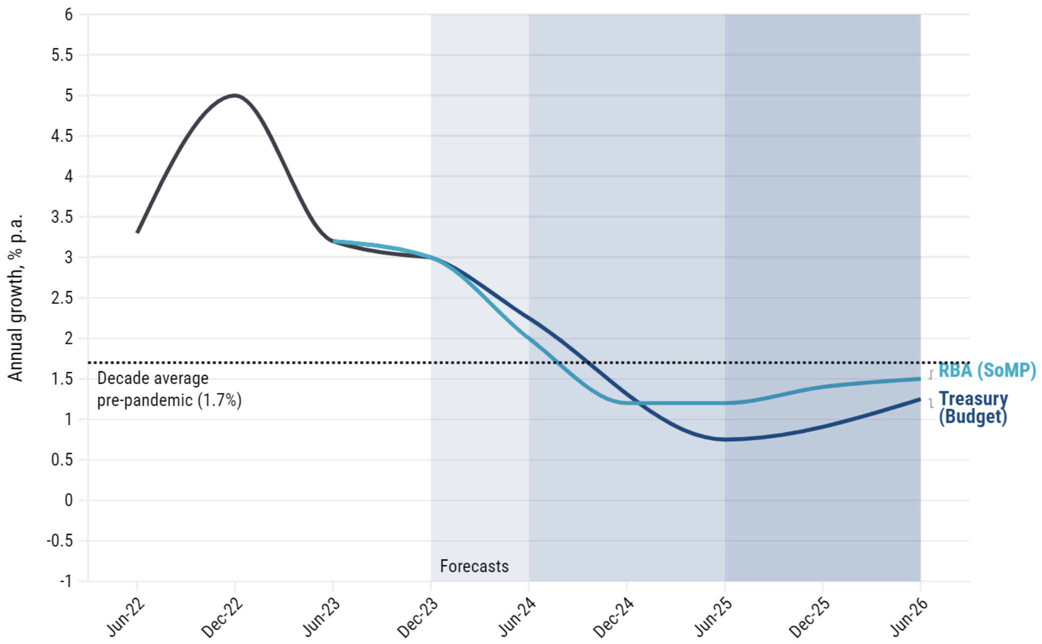
Source: RBA SoMP, Treasury Budget Paper No. 1 • Forecasts as of May 2024.

Chart 3: Australian business investment growth forecasts



Source: RBA SoMP, Treasury Budget Paper No. 1 • Forecasts as of May 2024.

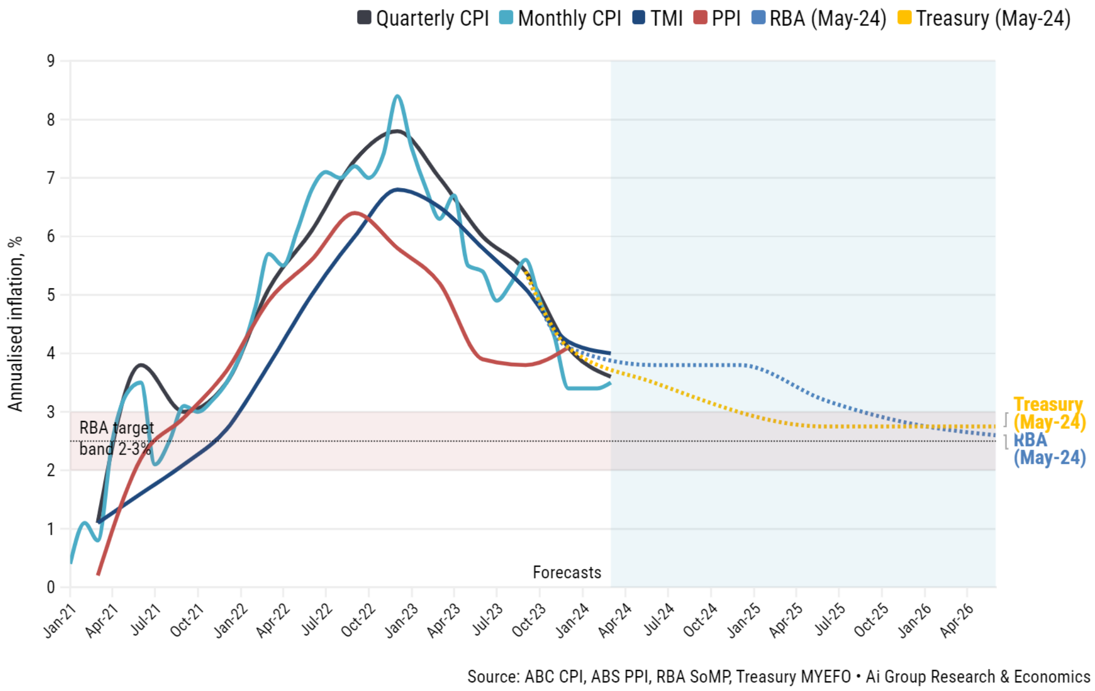
Chart 4: Australian employment growth forecasts



Source: RBA SoMP, Treasury Budget Paper No. 1 • Forecasts as of May 2024.

New CPI forecasts (Chart 5) also shed light on expected changes in inflation. The RBA and Treasury offer different forecasts for CPI – with Treasury predicting a return to band around the end of 2024, while the RBA expects it by late 2025. This difference reflects the Treasury forecast pricing in several price suppressing measures announced in the 2024-25 Federal Budget, including but not limited to the extension of temporary energy bill relief to households and small businesses.

Chart 5: Australian inflation and forecasts



Here, it should be noted that a difference exists between "inflation" (the tendency for prices to increase) and "CPI" (a particular measurement of a set basket of consumer prices). While the temporary price suppressing measures announced in the Federal Budget will mechanically reduce measured CPI, their effect on underlying inflationary pressures is more complex and uncertain.

These price suppressing measures are likely to have a much lower effect on either TMI (the RBA's preferred measure of inflation which excludes volatiles) or the PPI (a measure of intermediate goods prices). Forecasts for these alternate measures of inflation which incorporate the 2024-25 Federal Budget measures are yet to become available.

Greater caution should therefore be exercised in interpreting CPI forecasts in light of these Budget measures. The return of CPI to band, if partially achieved through price suppression measures of temporary duration, does not necessarily imply that inflationary pressures have been adequately controlled.

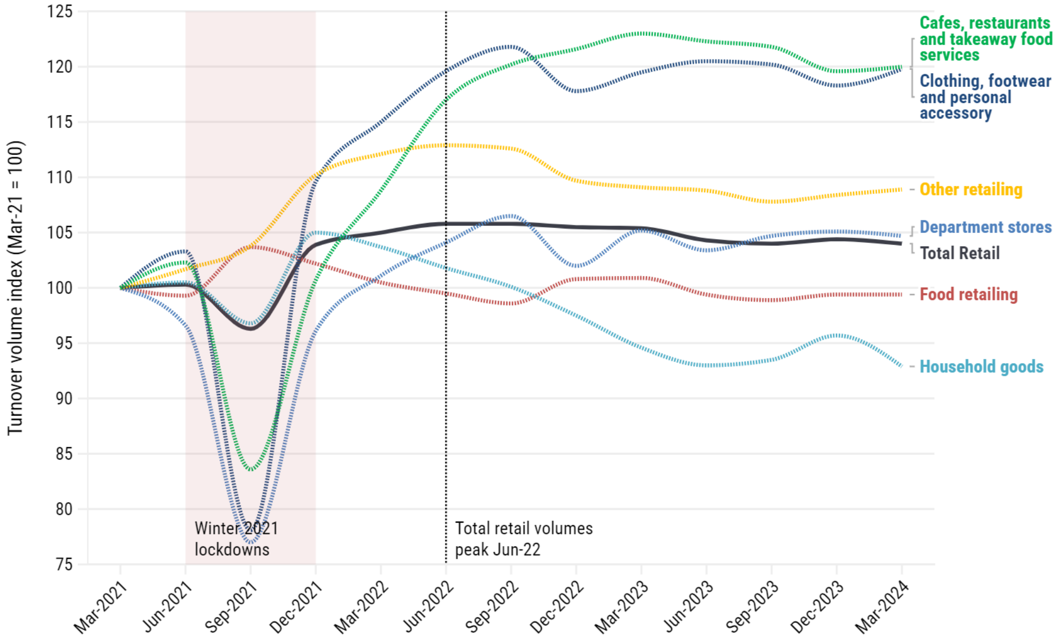
3. New economic data releases

Retail turnover continues to decline into 2024

New retail turnover data shows that the weak performance of the retail industry has continued into the first quarter of 2024. Retail turnover volumes peaked in the second quarter of 2022, and have since declined by 1.8%. The first quarter of 2024 posted another 0.4% decline. All sub-industries within the retail sector have posted declines over the last 12 months, with household goods particularly affected.

This new data shows that the more pronounced weakness in the retail industry, identified in previous Ai Group submissions for 2023, has persisted into early 2024.

Chart 6: Retail turnover volume indexes



Source: ABS Retail Trade • Ai Group Research & Economics

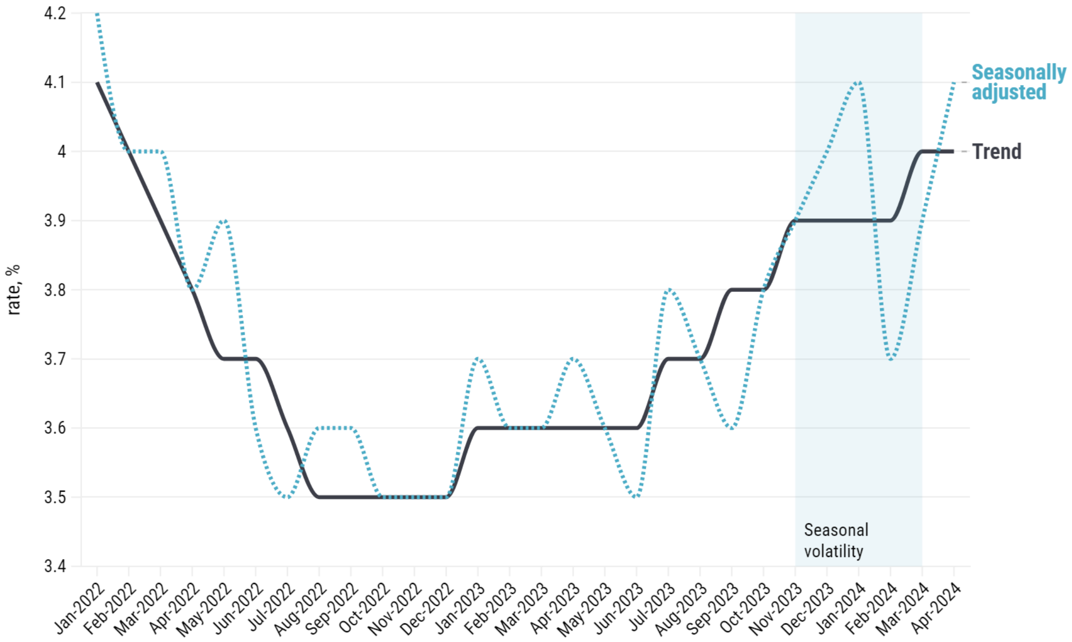
Labour market continues to gradually weaken into 2024

In previous submissions[2], Ai Group identified how changing seasonal patterns introduced a greater degree of volatility than usual around the holiday period, making monthly employment data more challenging to interpret. However, new employment data shows that as this seasonal effect is passing through, the weakening of the labour market continues. In April, the unemployment rate increased from 3.9% to 4.1% in seasonally adjusted terms, its highest rate since the start of 2022. Trend data, which reduces the impact of changed seasonality, shows that unemployment has been steadily rising since the middle of 2023.

[2] Ai Group Initial Submission, pp. 19-20; Ai Group reply submission, p. 6.

This new data shows that gradual weakening in the labour market since the middle of 2023, identified in previous Ai Group submissions, has persisted into early 2024.

Chart 7: Australian unemployment rates



Source: ABS Labour Force Survey (A84423134K, A84423050A)

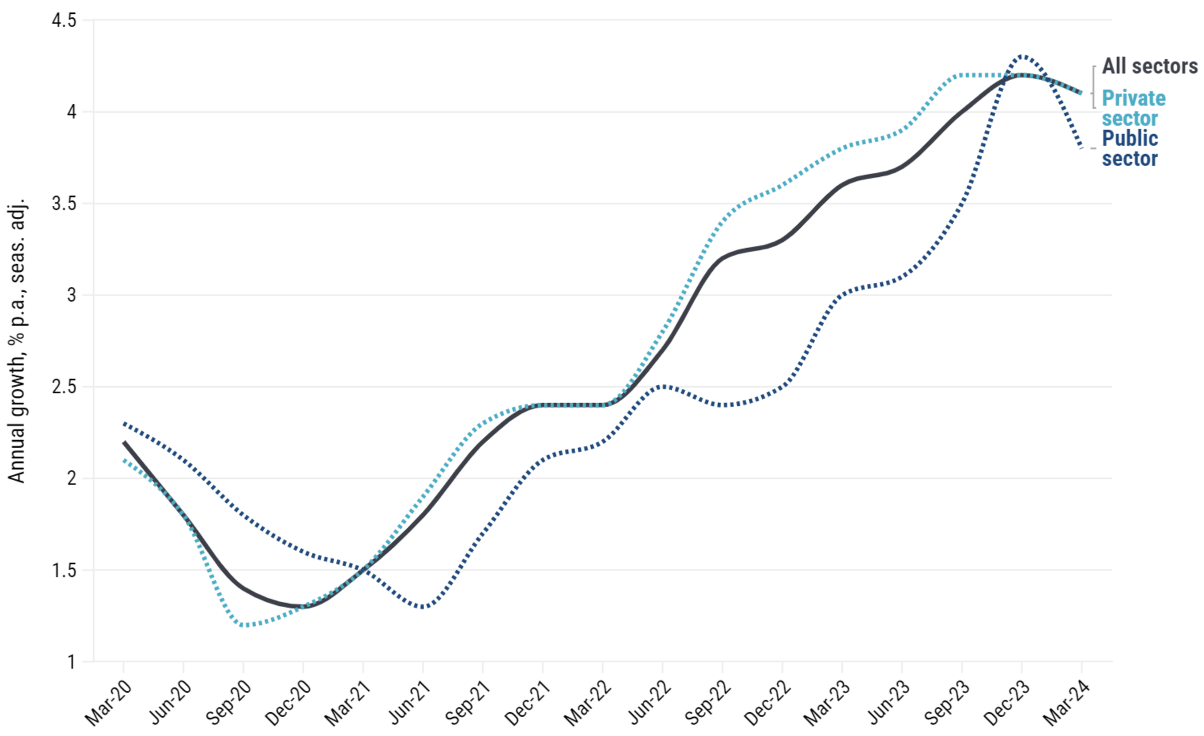
Wages growth may have peaked in late 2023

New data shows that wages growth may have peaked in late 2023. The WPI declined marginally from 4.2% to 4.1% growth in seasonally adjusted terms in the March quarter of 2024. This is the first fall in the WPI since the pandemic. Both the private and public sector WPIs slowed in the quarter, with the latter falling more rapidly due to the timing of several major public sector enterprise agreements and wage cap changes.

The private sector WPI indicator fell for nine out of 17 industries, and was flat for another four. This indicates that the slowing of private sector wages was broad-based, and not confined to a small number of large employing industries. This provides further evidence in support of Ai Group's arguments that the labour market is continuing to weaken in early 2024.

The March quarter WPI data may indicate that wages growth peaked in late 2023, though further observations will be needed to confirm this.

Chart 8: Public and Private Sector Wage Price Index



Source: ABS Wage Price Index

4. Measures announced in the 2024-25 Federal Budget

The 2024-25 Federal Budget, released on 14 May, contained several additional income support measures of relevance for the needs of the low paid. Those measures with the greatest impact on the low paid include:

- **Energy bill relief:** An energy bill relief rebate will be extended to all households, worth $300 over the course of FY 2024-25.

- **Commonwealth Rent Assistance:** The maximum rate of Rent Assistance payments will be increased by a further 10% from 20 September 2024. The value of this 10% increase will depend on the circumstances of the individual and their household. However, the value will range between $12.50 per fortnight (single, sharer, income support payment recipient) to $24.90 per fortnight (single, 3 children, FTBA recipient). This is equivalent to an increase in the range of approximately $325 to $650 per year.

These new income support measures complement those existing measures identified in Ai Group's initial submission[3] – including the reprofiling of the Stage 3 income tax cuts, and previous discretionary and indexation increases to Rent Assistance and JobSeeker rates.

These new measures will be of particular importance to lower-income households, who may have enjoyed lower- or no benefits from the Stage 3 reprofiling due to their lower income tax liability.

As both measures are *household* rather than *individual* payments, it is not possible to express their value directly in terms of an equivalent increase in an employee's pre-tax income. However, Ai Group notes that the value of the Stage 3 reprofiling for the median award employee was equivalent to an $809.10 p.a. increase in pre-tax income[4]. The combined value of the two new income support measures in the Budget is likely to be of a similar value quantum for individuals in lower-income households.

Ai Group submits that these discretionary increases in income support payments included in the Budget, and their greater relative importance for low-income households, should additionally be taken into account by the Panel in its consideration of the needs of the low paid.

[3] Ai Group Initial Submission, pp. 39-42.
[4] Ai Group Initial Submission, Table 5.

5. Responses to Questions on Notice

Business Performance

The Commission asks:

> "There was some consensus among parties that conditions were diverse or volatile across industries. However, parties did not agree on the capacity of business to pay an increase awarded in this Review… What should the Expert Panel conclude as to how the business sector is performing given the divergent conditions experienced and any recent improvement in business investment?"

As Ai Group has argued in its previous submissions, the slowing of the Australian economy has had variable impacts on different industries. The overall performance of Australian businesses obscures significant inter-industry variation. Minimum wage increases need to be set at a level which all employers can bear, to avoid employment losses that are likely to harm the most vulnerable individuals and households.

There are several ways in which business performance – and the related concept of business capacity to pay – can be measured. Output, wages, profits, employment generation and investment are relevant indicators. Table 1 below summarises headline annual growth rates during 2023 for these five indicators for all Australian industries.

As the data makes clear, industries that might be performing strongly by one indicator may still show weakness in others. An example is the information media & telecommunications industry, which saw strong output growth of 8.4%, but negligible profits growth of 0.2% in 2023. It is thus necessary to take a comprehensive view, that considers all indicators of business performance, when drawing conclusions regarding capacity to pay across different industries.

Utilising the data available in Table 1, Ai Group argues that three groups of industries which face more pronounced capacity to pay challenges can be identified:

- **Four industries which are in contraction:** Manufacturing, wholesale trade, retail trade and professional services all saw their real value-add decline in 2023.
- **Seven industries facing high wage pressures:** Construction, wholesale trade, retail trade, information media & telecommunications, rental hiring & real estate services, arts & recreation and other services all saw their total wages bill grow near or more than twice the rate of gross operating profits in 2023.
- **Four industries with weak employment generation:** Manufacturing, construction, wholesale trade, retail trade and professional services all saw hours worked increase by less than half of the all-industry average in 2023.

Table 1: Growth in select business indicators, 2023

	Real value-add	Total wages	Gross operating profits	Hours worked	Capital expenditure
Mining	0.8%	10.9%	-13.4%	10.0%	15.7%
Manufacturing	-0.5%	5.0%	2.8%	1.3%	24.7%
Electricity, gas, water and waste services	0.4%	9.8%	15.5%	4.4%	18.6%
Construction	3.1%	12.0%	4.9%	-0.6%	6.3%
Wholesale trade	-0.5%	6.4%	1.1%	3.0%	4.3%
Retail trade	-0.9%	8.9%	3.9%	2.4%	8.8%
Accommodation and food services	6.9%	15.4%	17.7%	8.7%	37.5%
Transport, postal and warehousing	7.5%	12.5%	12.3%	8.7%	20.0%
Information media & telecommunications	8.4%	12.4%	0.2%	3.9%	14.9%
Financial and insurance services	0.9%	9.5%	54.6%	3.5%	9.9%
Rental, hiring and real estate services	2.3%	5.2%	-4.4%	6.6%	8.8%
Professional, scientific and technical services	-0.6%	8.9%	16.2%	2.2%	4.7%
Administrative and support services	3.3%	7.1%	43.8%	4.3%	-12.6%
Public administration and safety	2.7%			5.6%	
Education and training	1.7%	14.0%		9.1%	49.0%
Health care and social assistance	3.1%	11.0%		11.2%	14.2%
Arts and recreation services	1.9%	15.8%	-1.7%	16.8%	18.9%
Other services	5.8%	9.2%	2.1%	4.1%	43.0%
All industries	**2.4%**	**9.6%**	**-2.9%**	**5.2%**	**16.2%**
All industries excl. mining	**2.7%**	**9.5%**	**6.1%**	**5.1%**	**16.3%**

Seasonally adjusted. Source: ABS National Accounts (Table 6), ABS Business Indicators (Tables 15 and 17), ABS Labour Account, ABS Private New Capital Expenditure

Manufacturing, construction, wholesale trade and retail trade are common to these three groups. For this reason, they can reasonably be considered at-risk industries with reduced capacity to pay relative to the average. Arts and recreation should also be considered to have more constrained capacity to pay, given the very wide split between growth in its gross operating profits (-1.7%) and total wages bill (+15.8%) in 2023.

Of these industries, only manufacturing saw capital expenditure growth that was materially above the all-industry average in 2023. This can be explained by the long lead times of this industry's "plant heavy" investments, which introduces lags of up to several years between investment decisions being made and capital expenditure occurring. Capital expenditure is known to be a lagging indicator that reflects the past health of an industry.

Interpreting Productivity Statistics

The Commission asks:

> "There is much debate among parties on the Australian economy's productivity performance and the extent to which increases in the NMW and modern award minimum wages are supportable having regard to that productivity performance. To avoid the use of different time periods or a particular data series being used by parties, can parties provide their

positions on Australia's productivity performance by reference to the charts and tables presented in the Statistical Report at Section 2 on Productivity and the information note on productivity growth published on 6 May 2024."

Ai Group has addressed issues related to the interpretation of productivity data in both our initial and reply submissions filed in the 2024 AWR. In these submissions, we argued that Australia's recent productivity performance has been both volatile and below its long-term trend.

Productivity is an especially technical domain of economic analysis, and faces challenging measurement and interpretation issues. Limiting this analysis to data available in the Commission's Statistical Report and information note would artificially foreclose access to data which offers critical insights necessary to understand recent productivity performance in Australia.

In the interest of simplicity, we summarise Ai Group's main propositions regarding recent productivity performance below:

- After several years of volatility during the pandemic, labour productivity declined significantly by 2.9% in the 2022-23 financial year[5].

- This decline fully reversed the gains in productivity recorded during the pandemic, with labour productivity having now returned to pre-pandemic levels[6].

- The post-pandemic decline in labour productivity was generalised across the economy, with most market sector industries reporting falls[7].

- Labour reallocation effects were responsible for only a small proportion of the fall in 2022-23. The majority of this was due to labour productivity losses occurring within industries[8].

- The principal cause was that output failed to keep pace with the record-level increase in hours worked occurring following the pandemic[9]. In layman's terms, the economy could not productively absorb all the additional labour which was taken on in 2022-23.

- The increase in GDP per hours worked in the third and fourth quarters of 2023 was due to an abnormally large reduction in hours worked[10]. Measured productivity improved primarily because low productivity hours at the margin were shed.

[5] Ai Group Initial Submission, Chart 17.
[6] FWC AWR Statistical Report version 5, Chart 2.1; Productivity Commission, *Annual Productivity Bulletin 2024*, Table 1.
[7] Ai Group Initial Submission, Table 3.
[8] Ai Group Initial Submission, Table 4.
[9] Productivity Commission, *Annual Productivity Bulletin 2024*.
[10] Ai Group Reply Submission, p. 12

- As the increase in labour productivity during the latter half of 2023 relied upon labour shedding, it is unlikely this rate of increase will be sustainable through 2024. Insofar as this rate could be sustainable, it would only be through a significant and continued deterioration in the Australian labour market.

- With labour productivity having fallen back to pre-pandemic levels, a return to trend productivity growth has clearly yet to occur.

6. The need to achieve gender equality

In this part of our submission, we respond to various aspects of the ACTU's Reply Submission as it relates to issues concerning gender equality. In summation, it is our position that:

- The Commission should not award any interim increases, as proposed by the ACTU, because:
    - There is an absence of an evidentiary basis upon which the Commission could soundly do so.
    - The Stage 1 and Stage 2 Reports do not, without more, establish a basis for granting the interim increases.
    - The nature and process of the AWR does not lend itself to (and has not lent itself to) considering the complex issues arising from the ACTU's claim.
    - The nature and process of the AWR does not enable a proper examination of the impact that the proposed claims would have on employers, which are likely to be significant.
- For similar reasons, the Commission should not take any other such step in the 2024 AWR, including by awarding award-specific increases on the basis of gender equality.
- If the Commission is minded to further consider issues associated with gender equality of its own motion (that is, in the absence of an application being made by a party in pursuit of specific award variations), it should initiate separate proceedings that are directed towards this issue. It should not be dealt with further in the 2024 AWR.

In the submissions that follow, we set out the bases for this position.

Overarching Comments

The task of the Commission in the AWR is to review the NMW and MAMW.[11] In doing so, in the context of its review of MAMW, the Commission must take into account (among other things) the need to achieve gender equality including by ensuring equal remuneration for work of equal or comparable value and eliminating gender-based undervaluation of work.[12]

In a Statement released for the 2024 AWR, the President of the Commission relevantly stated that it was not anticipated that all issues of gender-based undervaluation will be dealt with '*comprehensively … to finality*' in the 2024 AWR. Rather, it is a matter for the Panel to determine the extent to which gender equity issues are dealt with in the 2024 AWR.[13] The Panel in the 2023

[11] Section 285(2)(a) of the FW Act.

[12] The requirement to take this consideration into account arises in the context of the minimum wages objective in section 284(1)(aa) of the FW Act, and the modern awards objective section 134(1)(ab) of the FW Act.

[13] Statement [2024] FWC 278 at [3].

AWR expressed an intention to '*consider and, if necessary, address the outcomes of the research project*', which may or may not occur as part of the 2024 AWR.[14]

The Panel now has before it two reports[15] which may sharpen the Commission's focus as to the awards, classification levels and occupations to which further attention may be directed regarding the need or appropriateness of conducting any work value assessments. Alternatively, they may lend some support for the increases claimed by the ACTU.

However, the research (and in particular, the Stage 2 Report) relates only to how award wages have historically been set. At its highest, the reports might be said to reveal that wage setting in the context of the relevant industries or occupations has not been the subject of a *'comprehensive work value assessment'* (a matter that we do not concede because, in the time available since the Stage 2 Report was published, it has not been feasible to critically evaluate it).[16] In any event, it does not follow that the relevant existing MAMW necessarily suffer from gender-based undervaluation or that the rates do not properly reflect the value of the work. Further, neither the Stage 1 nor Stage 2 Reports go any way to informing the Panel as to the appropriate way in which any such issues should be remedied (including the potential impacts and flow-on effects of any remedial actions).

The Stage 1 Report and Stage 2 Report concede these propositions. For example, the authors of the Stage 1 Report have described the research set out therein as focusing on '*feminisation across industries and occupations, where undervaluation and pay equity issues are <u>most likely</u> to occur*', and providing an '*important basis for <u>targeting interventions</u>'*.[17] The Stage 1 report does not identify what appropriate interventions may be. It also concludes that *'<u>[m]ore robust and fit-for-purpose datasets are needed</u> for ongoing monitoring of pay, working conditions, workforce characteristics and dynamics in low-paid feminized occupations and industries. As well as ensuring sufficient sample size to provide a reliable workforce profile and track workforce change over time, future data sets should capture the <u>experiences of workers and employers</u>, to help understand the changing workforce circumstances and dynamics more comprehensively'* (emphasis added).[18]

In a similar vein, the purpose of the Stage 2 Report is described as being to '*<u>provide a foundation</u> for the Commission '<u>to determine</u> whether the Commission (or its predecessors, or, where relevant, State tribunals) <u>has ever undertaken a comprehensive work value assessment of classifications within the awards' identified in the Stage 1 report</u>*' (our emphasis).[19]

Further, any conclusions that the Panel might reach in the AWR as to how MAMW should be adjusted to deal with gender parity concerns would need to be counterbalanced against the impact that such measures would have on employers and the broader economy. Critically, however, the

[14] 2023 AWR Decision at [139].

[15] Being the Stage 1 Report, '*Gender-based Occupational Segregation: A National Data Profile – Final Report'* prepared by the UNSW Social Policy Research Centre published by the Commission on 15 November 2023 (**Stage 1 Report**) and the Stage 2 Report, 'Gender Pay Equity Research' prepared by staff of the Commission and published on 4 April 2024 (**Stage 2 Report**).

[16] Stage 2 Report at [12].

[17] Stage 1 Report at page 78.

[18] Stage 1 Report at page 79.

[19] Stage 2 Report at page 10.

Panel does not have before it *any* material in this regard. Notably, the 2024 AWR has not afforded parties an opportunity to call any evidence relating to these matters.

Any consideration of what steps, if at all, the Commission should take in respect of specific awards, should be given in the context of a separate process that is directed towards that question. It would not be appropriate to endeavour to deal with the matter through the 2024 AWR, having regard to the matters outlined above, the significant nature of the issues, the need to ensure the stability of the modern award system, and the potentially profound impacts on employers and the national economy should the Commission ultimately determine it necessary to make adjustments on gender equity grounds.[20]

The Need for Evidence

The ACTU asserts, in the context of the contents of the Stage 2 report, that '*[t]he Expert Panel can be satisfied that it is appropriate to take steps in each of the priority awards identified in the Stage 1 Report to correct gender-based undervaluation of work in those awards*'.[21]

For the reasons set out above and further below, contrary to the ACTU's assertion, the Stage 2 Report places the Commission in no such state of satisfaction. It does not evidence the existence of gender-based undervaluation in any of the awards considered, or place the Commission in an informed position as to what could or should be done by it to address any such issues.

In Ai Group's submission, the Commission does not yet have before it a sound, evidence-based foundation upon which to proceed (including on an interim basis) in the manner proposed by the ACTU (or otherwise). In the circumstances, it should not award the interim increases sought by the ACTU or take any other such similar steps at this time.

In the Gender Undervaluation Statement[22], Justice Ross, the then President of the Commission, stated (in the context of the Stage 1 Aged Care Work Value Decision[23]): (emphasis added)

> Although the Commission can vary a modern award on its own motion pursuant to s.157, <u>it is apparent from the Aged Care case that cases of this type require significant evidence from those with experience in relevant industries, supported by appropriate experts</u>.[24]
>
> …

[20] Section 134(1)(g) and (h) of the FW Act.
[21] ACTU Reply Submission at [172].
[22] President's statement – Occupational segregation and gender undervaluation, issued by Justice Ross, President on 4 November 2022.
[23] *Aged Care Award 2010, Nurses Award 2020, Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200.
[24] Gender Undervaluation Statement at [16].

> It is apparent from the Aged Care Decision, that the assistance of parties in making applications, gathering and testing evidence and making submissions is the most effective way of informing the Commission.[25]

The authors of the Stage 1 Report also identify '*the need for comprehensive, detailed, evidence-based understandings of feminised industries and occupations which may be affected by work value and pay equity issues*'.[26]

While we acknowledge the view expressed by the Panel in the 2023 AWR Decision that '*any issues of unequal remuneration for work of equal or comparable value or gender undervaluation relating to modern award minimum wage rates can no longer be left to be dealt with on an application-by-application basis outside the framework of the Review process*',[27] the aforementioned observations are apt.

Plainly, careful consideration should be given to the potential impacts on employers of any adjustments to the relevant minimum wages, including through evidence about this issue. Further, specific consideration should be given to the potential adverse impacts on employers that rely on Government funding and have limited (if any) means to absorb or offset increased employment costs.

This includes, for example, employers operating in various sectors covered by the *Social, Community, Home Care and Disability Services Industry Award 2010* (such as those providing disability services, as well as those who provide care to children and young people). Many such employers are typically not-for-profit organisations and the relevant sectors rely largely, if not exclusively, on funding from governments. These employers commonly report that those funding arrangements do not adequately cover the costs of delivering their services and further, that they are not guaranteed funding increases on account of changes to the relevant industrial instruments. Employers in these sectors provide critical services. Dramatic increases to their employment costs could have disastrous implications for their ability to continue to do so and, in turn, for those in their care.

Employers who are covered by the *Children's Services Award 2010* – such as those providing outside-school-hours-care and vacation care – are similarly limited in their capacity to absorb or offset increased employment costs arising from an interplay of factors. These include significant limitations in the procurement environment and contracts with schools on the ability of providers to increase fees charged to families (including when fees may be increased, and by how much). The types of services most likely to have difficulty offsetting increased employment costs include those that are either non-profit, have low enrolment or demand, are in remote regions, and/or with high overhead costs, but also other services more generally. For these services, an inability to offset the costs of an increase in staff wages may pose a threat to the viability of ongoing service operation. Such an outcome not only risks visiting hardships on employers and employees covered by this award, it would also have potentially profound adverse impacts on the broader economy and

[25] Gender Undervaluation Statement at [33].
[26] Stage 1 Report at page 11.
[27] AWR Decision at [120].

community given the importance of access to affordable early education and childcare for maintaining the ability for parents, and in particular women, to participate in the workforce as well as to the development of children.

Further, it cannot be assumed that employers in other parts of the economy will be in a position to accommodate wage increases of the magnitude contemplated by the ACTU. For example, we refer to the submissions made in section 3 earlier, regarding the weak performance of the retail sector. Careful consideration would need to be given to the potential ramifications of imposing increased employment costs on such employers too, as well as the impact that such increases would have on enterprise bargaining in the relevant sectors.

Any future process implemented to deal with gender-based issues should afford parties with a reasonable opportunity to call evidence and make detailed submissions dealing with all relevant matters, such as those outlined above. This is critical for ensuring the stability of the modern awards system. The AWR has not afforded the parties with such an opportunity and to that end, it is not an appropriate vehicle for dealing with these matters.

ACTU Proposal for Interim Adjustments

The ACTU proposal urges the Commission to proceed with '*interim*' steps and focus on '*priorities*'.

Ai Group strongly submits that the Panel should decline to do so, and should instead adopt a deferred and comprehensive approach that is informed by evidence. This submission is advanced on the bases articulated above and for the additional reasons that follow.

First, the proposed approach would permit additional time for businesses to plan for, and where possible provision for, the possibility of increases arising from any further proceedings that may be convened.

Second, insofar as many of the impacted industries are government funded, it would potentially facilitate an opportunity for employers to seek funding adjustments, for such proposals to be considered by Government and for any funding increases to be implemented. As we set out above, sectors that rely on Government funding are likely to be particularly limited in their capacity to absorb (or offset) increased wage costs. This consideration weighs heavily against the award of interim increases of the nature proposed by the ACTU.

Third, the ACTU appears to be of the view that the award of interim increases, following the Commission having done so in the Stage 1 Aged Care Work Value Decision, ought now be implemented as a matter of course in other proceedings in which the Commission is considering gender undervaluation issues. However, a significant difference between the Aged Care Work Value proceedings and the AWR that tells against the adoption of such an approach, is the absence in these proceedings of any evidentiary basis for awarding interim increases.[28]

[28] Ai Group Reply Submission at page 22.

Fourth, and as we explain in more detail below, the ACTU proposes that interim steps be taken by the Panel in the absence of the outer limits of the Commission's task first being defined. Such an approach creates an intolerable level of uncertainty for businesses to plan for change. Further, it is not possible for the Commission to make any proper assessment about the potential macroeconomic impact of the proposed increases.

As to this last point, the absence of any clear parameters being defined by the ACTU in relation to the increases it seeks is evidenced from the following: (our emphasis)

- In the context of limitations placed on the scope of the Stage 1 Report, the ACTU proposes a methodology for the <u>further expansion</u> of areas for the Commission to treat as '*priority awards*', to which its Group 3 Measures would be applied.[29]

- In relation to the Stage 2 Report, the ACTU states '*[i]t is hoped that the Commission is open to providing <u>additional research</u> in respect of other awards considered as part of the Commission's task in identifying and eliminating gender-based undervaluation of work*'.[30] To the extent further research may be warranted and/or intended beyond the 12 awards considered in the Stage 2 Report, Ai Group submits it is appropriate this scoping be undertaken such that the full extent of awards impacted is ascertained before measures are taken to address any undervaluation or other gender-based anomalies found to exist.

- The ACTU states the Group 1 Adjustment '*<u>does not foreclose the need to conduct a work value analysis in order to comprehensively address</u> any gender-based undervaluation of work*'.[31]

- In relation to the Group 3 Measures, the ACTU states that '*[a]ny findings made as part of the interim process in the Group 3 Measures (eg, as to a common denominator or replacement benchmark), which are intended to provide an adequate foundation on which to award an interim increase, would operate as <u>a starting point for the subsequent award-specific work value analysis</u>*'.[32]

- In relation to the package of adjustments it proposes, the ACTU states '*these interim adjustments are <u>not intended to address to finality</u> issues of gender-based undervaluation of work in these awards, <u>or to identify an outer limit</u> of the adjustments that might be justified in the event of a comprehensive work value assessment*'.[33]

[29] ACTU Reply Submission at [187] – [188].
[30] ACTU Reply Submission at [175].
[31] ACTU Reply Submission at [177].
[32] ACTU Reply Submission at [191].
[33] ACTU Reply Submission at [170].

Accordingly, it is apparent that at present there is no definitive position with respect to:

- Whether the Panel may be minded to determine, based on the Stage 2 Report, that a comprehensive work value assessment has not been undertaken in respect of any of the 12 awards reviewed;

- Whether any further research is proposed to be undertaken by the Commission to extend upon the Stage 1 and Stage 2 Reports;

- The total number of modern awards that may ultimately be impacted (including having regard to any further research that may be instigated by the Commission);

- The total number of occupations and/or classifications within modern awards that may be impacted;

- Of the total number of awards, occupations and/or classifications potentially impacted, those which may be subject of further comprehensive work value proceedings; and

- The types of measures that may be implemented in response to particular categories of undervaluation or other difficulty.

In relation to the last point, we have earlier noted that neither the Stage 1 or Stage 2 Report were designed to inform the Panel as to appropriate options and avenues for addressing any gender-based undervaluation issues that may exist at scale within the award system. Even within the ACTU's proposal, it is evident that the way forward may not be clear. For example, in respect of the Group 3 Measures the ACTU states '*for modern awards which are partly or wholly female-dominated but do not prima facie involve 'care' work, the SCHADS ERO benchmark is not readily applicable, and it will be necessary to consider whether the C10 Manufacturing Award benchmark is appropriate, and if not, <u>to identify a new benchmark'</u>* (emphasis added);[34] and further, the ACTU identifies difficulties aligning the SCHADS ERO benchmark and/or C1(a) rates alignment to the *Children's Services Award 2010* and concludes with the suggestion that a review of the classification structure may be warranted.[35]

Finally, the uncertainty described above clearly undermines the extent to which respondent parties such as Ai Group can properly consider and reply to the ACTU's proposal; or indeed consult its constituents (for the purposes of informing its position in this proceeding) as to the potential implications of the proposals.

The Specific Approaches Proposed by the ACTU

In the ACTU Reply Submission, the ACTU further expanded its claims, including to take into account the Stage 2 Report, and called on the Panel to make three categories of adjustments (being the '*Group 1 Adjustments*', '*Group 2 Adjustments'* and '*Special Adjustments'*) as well as take other

[34] ACTU Reply Submission at [185].
[35] ACTU Reply Submission at [220] - [221].

measures (referred to as '*Group 3 Measures'*). The consequence of the ACTU's proposal would be an array of different additional increases and outcomes across the dozen awards referred to.

The Commission has previously stated, in the context of prior AWRs, that considerations of fairness and stability tell against an award-by-award approach to minimum wage fixation.[36] In the 2012-13 AWR, the Full Bench stated that *'[t]he maintenance of consistent minimum wages in modern awards and the need to ensure a stable and sustainable modern award system would be undermined if the Panel too readily acceded to requests for differential treatment'*,[37] and described an award-by-award approach to minimum wage fixation based on sectoral considerations as '*inimical to the safety net nature of modern award minimum wages*'.[38] We respectfully agree.

Ai Group's proposal that the Panel decline to make interim increases in this Review, in favour of adopting a deferred and comprehensive approach that is able to proceed informed by evidence, is consistent with the maintenance of a stable and sustainable modern award system. Such an approach would facilitate a proper assessment by the Commission of the impacts of any determinations to adjust MAMW on gender equality grounds, and allow for some level of planning by employers and (where relevant) Government.

We respond further to the various aspects of the ACTU's claim as outlined in its Reply Submission as follows.

<u>Group 1 Adjustments</u>

'*Group 1 Adjustments'* are described by the ACTU as '*interim increases for classifications in modern awards which cover female-dominated 'care' work, applying the SCHADS ERO benchmark'*.[39]

The ACTU proposes Group 1 Adjustments for five awards, on the basis they cover female-dominated caring work and contain rates below the SCHCDS ERO benchmark (defined as Level 2, pay point 2 applicable to employees in the social and community services stream of the SCHCDS Award).[40] In doing so, the ACTU argues that '*there is a compelling justification for the application of the SCHADS ERO benchmark identified in the Aged Care Stage 3 decision*'.[41]

Ai Group submits that the Panel should be cautious in considering whether to adopt the SCHCDS ERO benchmark. In our view, it would not be appropriate, for the reasons that follow.

The first reason concerns the application of the benchmark in the context of the ACTU's Group 1 adjustments, including the way in which such application differs from the Commission's adoption of the ERO benchmark in the Stage 3 Aged Care Work Value Decision[42]. In this respect, proper regard should be had to the statement made at [173] of the Stage 3 Aged Care Work Value Decision that the adoption of such a benchmark rate '… *would provide a stable anchor point for a modern award*

[36] *Annual Wage Review 2015-16* [2016] FWCFB 3500 at [134].
[37] *Annual Wage Review 2012 – 13* [2013] FWCFB 4000 (**2013 AWR Decision**) at [77]
[38] 2013 AWR Decision at [79].
[39] ACTU Reply Submission at [169](1); ACTU Submission at section 5.1.2.
[40] ACTU Reply Submission at [176].
[41] ACTU Reply Submission at [176].
[42] [2024] FWCFB 150.

system which ensures gender equality in the valuation of work'. In this sense, it is not a substitute or (as the ACTU contends) a stepping-stone reference point, for interim increases in the absence of a work value assessment having been undertaken. Notably, the Full Bench had before it in the Aged Care Work Value case sufficient evidence to conclude that *'[t]he basis upon which the ERO rates were determined closely parallel the work value reasons upon which we are proceeding in this matter…'*.[43] That is not the case in this AWR, in which no work value assessments have been undertaken.

The second concerns the manner in which the Full Bench arrived at the benchmark, in the ERO Decisions.[44] In this regard, the following points are made:

- The benchmark was not arrived at in the context of a work value case. Rather, the proceedings concerned an application for an equal remuneration order under Part 2-7 of the FW Act,[45] seeking an equal remuneration order applying to employees in the SACS industry nationally, based on the wage rates and classification structure contained in the Queensland SACS award.[46] In response to the applicants' submission that the minimum wages in the modern award did not properly reflect the value of the work, the Full Bench concluded that *'[i]n order to succeed in their submission it would be necessary for the applicants to deal with work value and relativity issues relating to the classification structure in the modern award and potentially to structures and rates in other modern awards. No real attempt has been made to deal with those important issues'*.[47]

- Respectfully, the statement of the Full Bench in the Stage 3 Aged Care Work Value decision that '*the ERO rates have been authoritatively determined to be rates which ensure equal remuneration for work of equal or comparable value',*[48] needs to be carefully weighed in the context of how the ERO rates were determined. In the 2011 ERO Decision, the Full Bench reached a view that there was not equal remuneration for men and women workers in the SACS industry for work of equal or comparable value, by comparison with state and local government employment.[49] The Full Bench concluded that gender partly influenced, but was not the sole reason for, the pay gap.[50] Parties were then invited to make submissions on the extent to which wages in the SACS industry were lower than they otherwise would have been, because of gender considerations.[51] Several observations may be made in relation to this:

[43] Stage 3 Aged Care Work Value Decision at [170].
[44] The Full Bench of what was then Fair Work Australia handed down three decisions in the ERO proceedings, the ERO Decisions
[45] 2011 ERO Decision at [1].
[46] 2011 ERO Decision at [5].
[47] 2011 ERO Decision at [261].
[48] Stage 3 Aged Care Work Value Decision at [172].
[49] 2011 ERO Decision at [285], [291].
[50] 2011 ERO Decision at [282], [291].
[51] 2011 ERO Decision at [286], [291].

- First, the Full Bench's remedy was not directed at addressing work value issues per se; but instead, the extent to which gender may be found to have inhibited wages growth in the SACS industry.[52]

- Second, the extent of any gap attributable to gender was subject to widely varying estimates, of between 15 to 60 per cent,[53] and was ultimately determined in line with a joint position advanced by the applicants and the Commonwealth.[54]

- Third, the Commonwealth had made clear to the Full Bench that it was '*committed to meeting its share of the burden*' that would flow from '*any decision'* given in the case; and whilst the Prime Minister had announced funding of over $2 billion during the proposed six-year implementation period, there was '*no suggestion of a limit at the figure of $2 billion*'.[55] It was relevant to the Full Bench's conclusion as to the appropriate ERO rates, that *'[t]he Commonwealth has given a commitment to fund its share of the increased costs arising from the proposals. While some state governments are opposed, no government has indicated it will be unable to fund its share'*.[56]

- Fourth, the approach pre-supposes that payment at the level of government employment was a reliable benchmark for a gender neutral level of wages for the not-for-profit SACS industry. There was no evidence in the ERO proceedings in relation to this. As the then Vice President Watson concluded in a dissenting judgment in the 2012 ERO Decision, no such presumption could be made, and public sector wage levels had not been established as a reliable benchmark for gender neutral wages in the not-for-profit sector.[57]

<u>Group 2 Adjustments</u>

'*Group 2 Adjustments'* are described by the ACTU as '*interim increases of degree-qualified rates in all modern wards to the C1(a) and C2(b) classifications in the Manufacturing Award, as applicable'*.[58]

In the 2023 AWR Decision, in the context of its consideration of alignment of classifications requiring an undergraduate degree, the Commission stated that there was a '*gender dimension*' to this issue apparent in two ways. The first way concerned the level of award-reliance amongst women compared to men.[59] As to the second '*gender dimension'*, the Commission stated: (our emphasis)

[52] 2011 ERO Decision at [282; 2012 ERO Decision at [59] – [60].
[53] 2012 ERO Decision at [70] – [71].
[54] 2012 ERO Decision at [66] – [67]; see also [5].
[55] 2012 ERO Decision at [14].
[56] 2012 ERO Decision at [65].
[57] 2012 ERO Decision at [100] – [102].
[58] ACTU Reply Submission at [169](2); ACTU Submission at section 5.1.4.
[59] 2023 AWR Decision at [136].

> Second, as was pointed out in the *Gender undervaluation statement*, <u>there is a considerable overlap between the 29 modern awards containing undergraduate classifications and those applying to female-dominated industries</u>.[60]

This statement highlights the potential that the issues concerning female-dominated work, and alignment of under-graduate degree-qualified positions may overlap. The ACTU itself acknowledges that particular classifications or occupations in particular modern awards may be subject to more than one kind of adjustment.[61]

The Commission does not have before it any evidence as to whether these two issues may intersect, or the extent to which taking any measures in response to one issue might also in part address the other issue.

In Ai Group's submission, it follows that it is also necessary to consider whether any measures to address these issues may potentially overlap (in ways that could result in double- or over-compensation). Patently, any compounding or double-counting with respect to remedies that may ultimately be determined by the Commission to be appropriate would be neither fair, just nor appropriate.

Accordingly, the ACTU proposal for the Group 1 and 2 Adjustments, and the Group 2 Adjustments and Group 3 Measures, to occur in parallel (as though separate and distinct) is fraught with potential for this to be overlooked.

<u>Special Adjustments</u>

'*Special Adjustments'* are described by the ACTU as '*interim adjustments intended to address clear anomalies in particular awards*'.[62]

The ACTU has proposed three special adjustments to various rates of pay in the *Legal Services Award 2020*.[63]

The ACTU does not articulate a sound basis for these adjustments. For example, the Level 5 Legal Services Award adjustment is advanced "*<u>[i]f it is accepted</u>, on the basis of the Stage 2 Report, that the <u>intended</u> coverage of the award was legal, clerical and administrative work at all levels below that of a lawyer admitted to practice, then <u>it appears likely</u> that there has been <u>some undervaluation</u>…*' (emphasis added). The ACTU advances an adjustment on the basis of the acceptance of a proposition that *may* have been intended and which appears likely to raise some issue of undervaluation. This falls well short of acceptable justification upon which the Commission may properly be requested to exercise its wage setting powers, even on an interim basis.

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[60] 2023 AWR Decision at [136].
[61] ACTU Reply Submission at [170].
[62] ACTU Reply Submission at [169](4).
[63] ACTU Reply Submission at [256].

A further special adjustment is proposed to the cabin crew member rate in the *Aircraft Cabin Crew Award 2020*.[64] This proposal is made, relying on the submission of the Flight Attendant's Association of Australia and in circumstances where this classification has been excluded from the Commission's gender equity research to date.[65] Again, this falls far short of the standard of information the Commission ought properly have before it for the purpose of exercising its wage setting powers.

<u>Group 3 Measures</u>

The '*Group 3 Measures*' are described by the ACTU as '*measures designed to commence the process of addressing gender equity considerations with respect to rates of pay for employees in female-dominated occupations (which may not involve care work)*'.[66] The ACTU proposes that such measures may be commenced as part of the 2024 AWR and if necessary, carried through to completion by Commission-initiated proceedings.[67]

The ACTU proposals are insufficiently formed. The proposed Group 3 measures concerning the award of increases are not of themselves, and do not identify, an appropriate basis for the proposed increases (including on an interim basis). Other forms of proposed Group 3 measures require a greater level of detail and specificity to allow for proper consideration. By way of just some examples of this, in the context of the *Children's Services Award 2010* it identifies '*insufficient information to develop a specific proposal for the Support Worker Stream'* and has not identified an approach to recommend in respect of the Children's Services Employee stream.[68] It identifies '*two distinct information gaps with respect to gender considerations*' in the *Educational Services (Schools) General Staff Award 2020*.[69] In the case of home care workers providing disability care under the SCHADS Award, the ACTU states that '*a proper evaluation and resolution of this issue is required'*.[70]

As part of this, the ACTU proposes '*targeted consultations concerning the utilisation of invisible skills in the priority awards, with the aim being to establish a consensus as to a common denominator of skills exercised, but not recognised, in the classification structure of the relevant awards*'.[71] The ACTU proposes that the '*spotlight tool'* applied by Professor Junor in the Aged Care Work Value Case, and described in the Stage 1 and Stage 2 Reports, may assist in the identification of such skills.[72]

Whilst there may be merit in some consultation sessions being conducted for the purposes of discussing, in broad terms, how any process such as the one envisaged by the ACTU would be conducted, Ai Group is concerned that such an approach would not allow for a sufficiently robust process of eliciting and testing information which may be critical to any subsequent assessment made by the Commission of the value of the work to which the '*invisible skills'* relate. In the 2011 ERO Decision for example, the Full Bench noted that the applicants relied upon evidence given by

[64] ACTU Reply Submission at [275].
[65] ACTU Reply Submission at [272] – [273].
[66] ACTU Reply Submission at [169](3).
[67] ACTU Reply Submission at [169](3).
[68] ACTU Reply Submission at [220], [223].
[69] ACTU Reply Submission at [229].
[70] ACTU Reply Submission at [269].
[71] ACTU Reply Submission at [189].
[72] ACTU Reply Submission at [190]; ACTU Submission at [392] – [394].

Associate Professor Junor in relation to the method of identifying hidden skills. Her evidence involved the application of the method to the jobs of five witnesses in the case.[73] It is conceivable that a more appropriate manner of identifying '*invisible skills'* may be a part of any work value proceedings, in which interested parties are given the opportunity to call and test evidence.

[73] 2011 ERO Decision at [38].

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