Supplement for Stewart's Guide to Employment Law – Seventh Edition

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About this supplement

This supplement has been prepared by Andrew Stewart with the kind assistance of Aneisha Bishop of Piper Alderman, and drawing in part on material originally written by other colleagues at the firm, including Emily Haar, Mark Caile, Dustin Grant and Joseph Hyde.

It does not comprehensively update the 7th edition of the *Guide*, but deals with a number of important legislative developments, notably the passage in December 2022 of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**). It also summarises the effect of two High Court decisions from February 2022 that have radically changed the rules for determining employment status.

References to the 'current' *Fair Work Act 2009* (**FW Act**) are to the Act as in force from 1 February 2023, prior to many of the amendments described below taking effect. Where mention is made of new or amended provisions that are not yet in force at the time of writing, the text makes that clear. Numbered cross-references in bold are to paragraphs from the 7th edition of the *Guide*.

Overview of legislative developments

Prior to being defeated at the federal election held in May 2022, the LNP Government led by Scott Morrison did not seek to reintroduce any of the proposals jettisoned from its 2020 'Omnibus Bill' (see **2.19**).

It did secure the passage of what became the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (see **11.26**, **14.6**, **15.27**, **17.19**). But it was left to the incoming Labor Government led by Anthony Albanese to complete the implementation of the recommendations made by the Australian Human Rights Commission (**AHRC**) in its *Respect@Work* report. In December 2022 the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (**Respect at Work Act**) was enacted. As explained further below, this has, among other reforms, introduced:

- an express prohibition on having workplace environments that are hostile on the ground of sex;
- a lower threshold for a finding of sexual harassment on the grounds of sex;
- a positive duty on employers to take reasonable and proportionate measures to eliminate sex discrimination, as far as possible; and
- an expansion of the AHRC's investigative powers.

The last of those changes will operate from December 2023; the remainder have already taken effect.

Prior to this, the Albanese Government had already introduced the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022*, the effect of which is outlined below. So too are various reforms proposed in relation to paid parental leave, most immediately through the Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022.

But the most wide-ranging changes so far were advanced by the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (**SJBP Bill**), which was tabled on 27 October 2022. The government introduced 150 amendments of its own in the House of Representatives, and accepted other changes proposed by independents. Further amendments were made in the Senate, including to secure the support of the Greens and independent Senator David Pocock. On 1 December the Bill was passed in amended form by the Senate and approved the following day by the House of Representatives. It received royal assent on 6 December, becoming the SJBP Act.

Many of the reforms in the SJBP Act, which runs to nearly 300 pages, had been flagged in the policy platform that Labor took to the May 2022 election. Others, such as those related to bargaining and flexible work requests, reflected commitments made by the government following its tripartite Jobs + Skills Summit in September 2022.

The key changes are dealt with below in more or less the same order as the chapters in the *Guide* to which they relate. They include:

- abolishing the Australian Building and Construction Commission (**ABCC**) and the Registered Organisations Commission (**ROC**) (Chapter 1);
- expanding the options for multi-employer bargaining (Chapter 8);
- simplifying the processes for making and varying single-enterprise agreements (Chapter 8);
- making it easier for the Fair Work Commission (**FWC**) to resolve '*intractable*' bargaining disputes (Chapter 8);
- changing the rules for the termination and sunsetting of enterprise agreements (Chapter 8);
- expanding access to the small claims procedure for recovering underpayments (Chapter 9);
- prohibiting the advertisement of pay rates that contravene the FW Act (Chapters 9 and 10);
- increasing the value of a penalty unit (Chapter 9);
- addressing the lack of pay equity for female workers (Chapter 10);
- making it harder to maintain secrecy about pay rates (Chapters 10 and 13);
- broadening the capacity for employees to request flexible working arrangements and extend parental leave (Chapter 11);
- the introduction of paid family and domestic violence leave (Chapter 11);
- adding a prohibition on work-related sexual harassment to the FW Act (Chapters 14 and 15);
- extending the scope of the anti-discrimination provisions of the FW Act (Chapter 14);

- the changes to other anti-discrimination laws made by the Respect at Work Act (Chapter 14);
- restricting the use of fixed term contracts (Chapter 16); and
- expanding access to protected industrial action and altering the process for taking it (Chapter 18).

Some of these changes have already taken effect. But most will be phased in at different points over the course of 2023.

There are also many further changes still to come from the Albanese Government. A second set of amendments to the FW Act will soon, among other things, make the right to receive superannuation contributions part of the National Employment Standards (**NES**), and ensure that migrant workers are protected.

A further major round of FW Act amendments in the second half of 2023 is expected to address matters such as the use of casual employment, the principle of 'same job, same pay' for labour hire workers, minimum wages and conditions for 'employee-like' workers, and the imposition of criminal liability for the underpayment of employees.

The government has also agreed, as part of the deal to secure Senator David Pocock's support for the SJBP Act, that there will be a 'review' of the modern awards system in 2023, though no details of this have yet been announced.

Institutional reforms

In accordance with the policy Labor took to the 2022 election, Part 1 of Schedule 1 to the SJBP Act provides for the abolition of the ROC (see **1.17**). The ROC's functions in overseeing the management of registered unions and employer associations will revert to the FWC and its General Manager, in line with the position that applied prior to 2016.

Part 2 of Schedule 1 to the SJBP Act also updates the *Fair Work (Registered Organisations) Act 2009* to ensure that the FWC can exercise what the Explanatory Memorandum for the SJBP Bill describes as the 'standard suite of investigative, compliance monitoring and enforcement powers' set out in the *Regulatory Powers (Standard Provisions) Act 2014*.

Part 3 of Schedule 1 to the SJBP Act likewise provides for the abolition of the ABCC, as well as the repeal of the special rules applicable to bargaining and industrial action in the building industry (see **1.17**, **1.20**, **8.37**, **8.52**, **9.12**, **18.3–18.4**, **18.17**).

As part of that process, the *Building and Construction Industry (Improving Productivity) Act 2016* is being amended to remove all provisions bar those relating to the Work Health and Safety Accreditation Scheme and the Office of the Federal Safety Commissioner. The Act will be renamed the *Federal Safety Commissioner Act 2022*. The *Code for the Tendering and Performance of Building Work 2016* has also been repealed.

By June 2023, the ABCC's enforcement functions will be transferred to the Fair Work Ombudsman (**FWO**), a process that has indeed informally started. That will include taking over responsibility for court proceedings initiated by the ABCC.

From July 2023, and by virtue of Part 25A of Schedule 1 to the SJBP Act, a new Part 6-4D of the FW Act will also take effect. This creates a National Construction Industry Forum to provide advice to the Government about matters relating, but not limited, to workplace relations, skills and training, safety, productivity, diversity and gender equality, or industry culture.

Part 6 of Schedule 1 to the SJBP Act extends the use of expert panels within the FWC (see **1.15**). An Expert Panel for pay equity will be responsible for dealing with any claims for an equal remuneration order (**ER order**) under Part 2-7 of the FW Act, or any work value claim under s 157 that requires consideration of 'substantive gender pay equity matters' (new s 617(6)–(7)). The panel must have a majority of members with expertise in gender pay equity and/or anti-discrimination (new s 620(1B),(2A)). These may be regular members, outside experts appointed specifically under ss 626–627 to sit on the panel, or a mixture of the two.

There is also to be a separate Expert Panel for the Care and Community Sector, to deal with any application to make, vary or revoke a modern award in that sector (new s 617(8)). No definition of 'Care and Community' is given, but the Explanatory Memorandum for the original SJBP Bill suggests that the sector includes the aged care, early childhood education and care and disability care sectors. Once again, the Panel will need to have a majority of members with knowledge and experience of the sector (new s 620(1C),(2A)). A separate Expert Panel must be constituted to deal with pay equity claims relating to this sector, with an appropriate mix of expertise (new ss 617(9)–(10), 620(1D)).

Finally, Part 25AA of Schedule 1 to the SJBP Act contains amendments to the FW Act which require both the FWC and FWO to have regard to the need for any guidelines, other educational materials or community outreach to be in multiple languages, not just English (ss 577(2), 682(1A)).

The High Court's new rules for determining employment status

As foreshadowed in the 7th edition of the *Guide* (see **3.13**), the High Court has made it much easier for organisations to engage workers as independent contractors, even if in substance they look like employees and have no business of their own.

In *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 a majority of the court accepted that it is relevant to consider whether a worker has their own business, or is working in and for the business of another. But they also insisted that the question of employment status be determined by reference to the rights and obligations contractually agreed by the parties, not the reality of how those terms have been put into practice. Nor is it relevant to consider any disparity in bargaining power.

In *ZG Operations* this led to two truck owner-drivers being found to be contractors, although that conclusion was also reached because they were contracting through partnerships, rather than as individuals.

Personnel Contracting involved a labourer sent to work on a building site under an 'Odco' arrangement (see **4.11**). Unconstrained by precedent, the High Court found him to be an employee of the agency that engaged him. But for the majority, this was not because of the reality of how he was deployed and managed. It was a consequence of his contract giving the agency a right to control his work and not doing enough to dispel the impression that he was working in and for the agency's business. Had the contract been more carefully worded, the result might have been different.

The impact of these rulings is apparent from decisions such as *Deliveroo Australia Pty Ltd v Franco* [2022] FWCFB 156. A Full Bench of the FWC felt constrained to find that a food delivery rider was self-employed, on the basis of the contractual terms imposed by the digital platform through which he found work (see **4.14**). Had the bench been free to apply the previous law, it would have found him to be an employee, on the basis of the practical reality of the arrangement.

It remains to be seen whether the Albanese Government will respond to concerns over the High Court decisions and amend statutes such as the FW Act to insert a broader definition of employment. At present its only policy commitment is to empower the FWC to set minimum terms and conditions for 'employee-like' workers. This reform would effectively create an 'intermediate' category of worker (see **3.5**) and is intended to benefit self-employed transport workers in particular, though it may not be limited to that sector.

Protecting migrant workers

The Albanese Government has indicated that it will introduce legislation to make it clear that temporary migrant workers are entitled to the rights and protections conferred by the FW Act, even if working illegally. This would give effect to a recommendation by the Migrant Workers' Taskforce (see **5.4**, **5.17**).

Bargaining and agreement making – introduction

Labor's 2022 election policies said little about the rules in the FW Act governing enterprise agreements. But it was always likely in office to respond to union concerns about certain aspects of the current bargaining framework, such as the use of small and unrepresentative voting cohorts to approve non-union agreements (see **8.5**), and the tactical use by employers of applications to terminate expired agreements (see **8.40**).

Discussions at the Jobs + Skills summit also opened up the possibility of meeting employer concerns about the complexity of the current process for getting agreements approved, while creating new options for collective bargaining and dispute resolution in certain industries.

In the result, the SJBP Act now creates important changes across five main areas:

- multi-employer bargaining;
- the processes for making and varying agreements;
- protected industrial action;

- 'last resort' arbitration; and
- the termination of agreements.

These reforms, most of which will take effect some time in the first half of 2023 when proclaimed to do so, are discussed in the sections that follow. The exception is industrial action, which is left to the end of the Supplement.

Expanding the options for multi-employer bargaining

The most complex and contentious parts of the SJBP Act involve the government's attempt to deliver on its post-Summit promise to remove 'unnecessary limitations on access to single and multi-employer agreements'.

The current FW Act allows two or more employers to make a single-enterprise agreement (**single-EA**) if they are related corporations or conduct a joint venture or common enterprise, or if they have obtained a 'single interest employer authorisation' from the FWC (see **8.4**). Alternatively, even unrelated employers can make a multi-enterprise agreement (**multi-EA**).

The main differences between single- and multi-EAs at present (see **8.6**) are that bargaining orders cannot be made in relation to a multi-EA, and nor can protected industrial action be taken in support of such an agreement. Only one vote need be held to obtain the approval of all the employees covered by a single-EA, whereas no employer can be covered by a multi-EA unless its employees approve it as part of a separate vote.

The SJBP Act creates two new types of multi-EA: a 'supported bargaining agreement' (**SBA**) and a 'single interest employer agreement' (**SIEA**). Any multi-EA that does not fall into either of those categories will be called a 'cooperative workplace agreement' (**CWA**): see the new definition of that term in s 12 of the FW Act.

Cooperative workplace agreements

Despite the fancy title, a CWA does not need to involve or promote workplace cooperation. The major changes made by Part 23 of Schedule 1 to the SJBP Act to the current rules for multi-EAs under the FW Act are that at least some of the employees covered by a CWA will need to have been represented in bargaining by a registered trade union (new s 186(2A)), while CWAs will not be available in most of the construction industry (see further below). As explained later on, there will also be processes for varying a CWA to bring a new employer within its coverage, or to remove an employer. In each situation the employer and a majority of its employees will need to agree to the change. As under the current Act, however, no bargaining orders or protected industrial action will be possible in relation to a proposed CWA (amended s 413(2)).

Supported bargaining agreements

The new system of 'supported bargaining' (**SB**) is created by Part 20 of Schedule 1 to the SJBP Act. It is based upon, but replaces, the existing and largely unutilised scheme for 'low-paid bargaining' in

Division 9 of Part 2-4 of the FW Act (see **8.22**). The Explanatory Memorandum to the SJBP Bill suggests that the purpose of the new stream is to assist 'employees and employers who may have difficulty bargaining at the single-enterprise level', such as those in low paid industries who 'may lack the necessary skills, resources and power to bargain effectively'. Aged care, disability care, and early childhood education and care are specifically mentioned as examples.

For an SBA to be made, the FWC will first need to grant an SB authorisation, which can be sought by an affected employer or union, or another bargaining representative (**BR**) for the agreement (amended s 242).

Under a new s 243, the FWC will need to be persuaded that it is appropriate for the relevant employers and employees to bargain together, having regard to matters that include prevailing pay and conditions in the relevant industry or sector, and whether the employers have clearly identifiable common interests. Examples of common interests given in the section are geographical location, the nature of the relevant enterprises and the pay and conditions there, and 'being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory'. In addition, at least some of the employees to be covered by the proposed SBA will need to be represented by a registered union. The FWC must also grant an application for an SB authorisation if the relevant employees are employed in an industry, occupation or sector formally declared eligible by the Minister.

An employer will not be able to be specified in an SB authorisation while covered by an unexpired single-EA, unless the FWC is persuaded that the main purpose of that agreement was to avoid coverage by such an authorisation. Nor can authorisations be granted for most of the construction industry, as noted below (new s 243A).

Once covered by an authorisation, an employer will not be permitted to make, or initiate bargaining for, any other type of agreement (new s 172(7)), unless it can persuade the FWC to remove it from the authorisation on the basis of a change of circumstances (amended s 244(1)–(2)).

An SB authorisation can be varied to add a new employer, on application by the employer itself, a BR of an employee who would be covered by the proposed agreement, or a registered union (amended s 244(3)–(5)). The FWC must be satisfied that it is in the public interest to do so, taking into account whether the relevant employees are in an industry, occupation or sector declared by the Minister. If they are not, the FWC may have regard to the factors considered when making a SB authorisation. The FWC must not grant the variation, however, if the relevant employees are covered by a single-EA that has not yet passed its nominal expiry date.

Having an SB authorisation in place will help the prospects of gaining a multi-EA in four main ways:

- The FWC will be able to issue a bargaining order, for example to remedy a failure to bargain in good faith (amended s 229(2)).
- The FWC will have a special power to 'facilitate bargaining', including by requiring the attendance at a conference of any person (such as a head contractor or funding body) with 'a degree of control' over the employment conditions of the workers to be covered by the agreement (amended s 246).

- Employees will be able to take protected industrial action in support of the agreement (amended s 413(2)) – though only if their union or other BR has satisfied the normal requirements for such action, which include having the action approved in a ballot.

- As explained further below, the new provisions concerning 'intractable bargaining disputes' will enable the FWC to step in and arbitrate if it believes there is no reasonable prospect of the parties reaching agreement (new s 235).

In theory, unions already involved in enterprise-level bargaining that has resulted in pay and conditions well above award rates could seek to pursue what are in effect industry or sectoral agreements instead under the SB stream. But the expectation is that such unions will not be granted an authorisation to do so. It is less clear whether the same will apply to proposed SBAs for industries such as retail, fast food or hospitality, where enterprise bargaining has been common (at least for larger employers) but pay rates have remained relatively low.

Single interest employer agreements

Under the changes made by Part 21 of Schedule 1 to the SJBP Act, 'related employers' – that is, employers who are related corporations, or who carry on a joint venture or common enterprise – will still be able to make a single-EA (FW Act amended s 172(2),(5A)). By contrast, employers who can obtain a single interest employer (**SIE**) authorisation from the FWC will be eligible to make a new type of multi-EA, an SIEA.

Despite SIEAs being recategorised as multi-EAs, it will be possible to take protected industrial action in relation to this type of agreement (amended s 413(2)). The FWC will also have the power to issue bargaining orders (amended s 229(2)) and, if protracted bargaining fails to produce an outcome, step in to arbitrate (see below). These features may make the new bargaining stream attractive to unions in sectors for which the SB system is not considered appropriate.

SIE authorisations can presently be obtained only by employers who operate under a single franchise arrangement, or who have successfully applied for a special type of ministerial declaration on the basis of having common interests. In practice, these declarations tend to be granted to bodies such as hospitals or schools which are funded from a common source and conduct their workplace relations through a central body. Division 10 of Part 2-4 of the FW Act will be amended to open up access to SIE authorisations in two main ways.

The first is that while franchisees will still be automatically eligible to seek an authorisation (amended s 249(2)), other employers who agree to bargain together will no longer need to apply first for a ministerial declaration, but can go straight to the FWC. They must establish that they have 'clearly identifiable common interests', and that it is not contrary to the public interest for an authorisation to be granted (amended s 249(3)).

In determining whether employers have sufficiently common interests, the current Act speaks of it being relevant to consider whether the employers have a history of bargaining together, or of operating 'collaboratively rather than competitively'. The new rules make no mention of such matters. It is simply stated that matters that 'may be relevant' include geographical location,

'regulatory regime', the nature of the relevant enterprises, and the terms and conditions of employment there (amended s 249(3A)). As an additional requirement, however, the FWC must be satisfied that the employers' operations and business activities are 'reasonably comparable' (new s 249(1)(b)(vi)).

The second change is to allow applications by a union or other employee BR (new s 248(1)(b)). However, an unwilling employer can only be required to participate in SIE bargaining if it meets the eligibility criteria set out above. In addition, and among other things:

- the employer must have at least 20 employees at the time that the application for authorisation is made (new s 249(1B)(a));
- a majority of the employer's employees who would be covered by the agreement must want to bargain for the proposed SIEA, as determined through any method the FWC thinks appropriate (new s 249(1B)(d), (1C)); and
- the employer must not be covered by a current enterprise agreement (new s 249(1B)(e), (1D)(a)).

If an application for an SIE authorisation is made by an employee BR, an employer with more than 50 employees at that time will be presumed to meet the common interest and comparability tests, unless the contrary is proved (new s 249(1AA),(3AB)). For those with between 20 and 50 employees, the burden of satisfying those requirements will effectively be on the BR seeking the authorisation.

In determining how many employees an employer has for these purposes, regular (but not other) casuals are included in the count, as are all employees at related entities (new s 249(3AC)).

One other added requirement, for both employer and employee BR applications, is that at least some of the employees are represented by a registered union (new s 249(1)(b)(i)). The construction industry exclusion discussed below also applies to SIEAs (new s 249A). In addition, the FWC may choose to exclude an employer from an authorisation if it is in the process of negotiating a replacement for an enterprise agreement that expired in the previous nine months (new s 250(3)).

Once covered by an SIE authorisation, an employer will not be permitted to make, or initiate bargaining for, any other type of agreement (new s 172(5)).

An employer's name may be removed from an authorisation on application to the FWC by the relevant employer, or an employee BR. The FWC must remove the employer if satisfied that one of two circumstances applies. The first is that the employer's circumstances have changed so as to make it no longer appropriate to be specified in the authorisation, taking account of any views expressed by other employers named in the authorisation and any relevant employee BRs. The second is where the relevant employer has fewer than 50 employees, and its affected employees have genuinely voted in favour of the removal, at the request of the BR applying for the removal (new s 251(1)–(2D)).

A variation to add an employer to an SIE authorisation can be sought by the new employer, a BR of the new employer or its employees, or any other BR for the proposed agreement. The FWC must be satisfied that the existing employers and BRs have had the opportunity to express their views to the

FWC, there was no coercion, and each of the requirements set out above in relation to obtaining an SIE authorisation are met, including (for non-franchisees) whether the new employer has the necessary common interest with the employers already covered by the authorisation. Each of the reasons for refusing an authorisation may also apply here, including that it would be contrary to the public interest (new ss 251(3)–(8), 251A).

It is very difficult to be sure how widely the SIE stream will be used in practice, beyond the types of employers already covered by the current authorisation process. This is partly because of the imprecision of key concepts such as common interest and comparability, and the relative lack of guidance in the explanatory materials provided by the government. But there are also questions of practicality. A union with the level of organisation required to obtain majority employee support at multiple enterprises may well be regarded by the FWC as having the capacity to engage in bargaining for single-EAs instead. The SJBP Act does not seek to change the primacy given to enterprise-level bargaining, as described in the objects of the FW Act. Hence it may be difficult for such a union to persuade the FWC that it is in the public interest to grant an SIE authorisation. If single-interest bargaining takes off, it may be because employers in certain industries choose (or can be persuaded) to consent to the necessary authorisation being granted, rather than being forced to the bargaining table.

Varying the coverage of a multi-enterprise agreement

The amendments made by Part 22 of Schedule 1 to the SJBP Act will enable multi-EA's to be varied by consent to remove an employer or employees. Under a new Subdivision AE in Division 7 of Part 2-4 of the FW Act, an employer covered by an agreement, and any employees who will cease to be covered, may jointly make such a variation, which must be approved by the FWC to take effect. The FWC must be satisfied that the employer has provided employees with a reasonable opportunity to vote on the variation, that there was genuinely majority approval, and that each union representing affected employees agrees to the variation.

Division 7 of Part 2-4 will also set out processes for adding a new employer, although they differ according to the type of multi-EA involved.

For CWAs, the relevant requirements are set out in a new Subdivision AC. An employer can only be added with the agreement of both the employer and a majority of its affected employees, as determined by a vote following an explanation to the employees of the effect of the variation. For the agreed variation to take effect, the FWC must be satisfied that it is not contrary to the public interest, taking into account any views expressed by other employers or unions already covered by the agreement.

SBAs can likewise be varied by consent to add a new employer, on a similar basis to CWAs, under a new Subdivision AA. The FWC must, however, be satisfied that the employer and employees would have met the criteria for inclusion in the SB authorisation for the original agreement.

Significantly, a new Subdivision AB also contemplates a union covered by an SBA being able to 'rope in' an unwilling employer, provided it can show that a majority of the relevant employees want this to happen. According to the Explanatory Memorandum, this might be demonstrated by any method

the FWC believes appropriate, including a ballot or a petition of a representative sample of the group in question. Before it approves the variation, the FWC must be satisfied that it is 'appropriate' to add the new employer, taking into account the views of that employer, and those of each union covered by the SBA. The FWC may also have regard to the factors considered when deciding whether to make an SB authorisation.

Under a new Subdivision AD, SIEAs can also be varied to add a new employer, either on its own application or at the request of a union covered by the SIEA, and in each case with the agreement or support of a majority of affected employees. But here the criteria for FWC approval are stricter and more specific. The tribunal must essentially be satisfied that each of the requirements set out above in relation to obtaining an SIE authorisation are met, including (for non-franchisees) whether the new employer has the necessary common interest with, and operations and activities reasonably comparable to, those of the employers already covered by the SIEA. All the potential reasons for refusing an authorisation would also apply here, including the employer being engaged in discussions for a new agreement of its own, or the variation being contrary to the public interest.

Building and construction industry exclusion

One of the more startling provisions in the original SJBP Bill would have empowered the FWC to disqualify a person from being a BR for a proposed multi-EA, because of 'a record of repeatedly not complying with [the FW] Act'. Ultimately, however, this was removed and replaced by a more targeted exclusion, established by Part 23A of Schedule 1 to the SJBP Act. An SB or SIE authorisation may not be made under the FW Act in relation to any proposed agreement that would cover 'general building and construction work' (new ss 243A(4), 249A), nor varied to cover such work (new ss 244(5), 251A).The FWC is not permitted to approve any multi-EA, including a CWA, that would cover employees in relation to this type of work (new s 186(2B)), or approve a variation that would have that effect (new ss 216BA(3)(a), 216CB(2), 216DC(4)).

General building and construction work is defined for this purpose in a new s 23B to include both 'general building and construction' within the meaning of cl 4.3(a) of the Building and Construction General On-site Award 2020, and 'civil construction' within the meaning of cl 4.3(b) of the same Award. But the exclusion does not extend to a number of specific industries and occupations, identified by reference to the coverage of various modern awards. Employers and employees covered by these exceptions will be able to participate in multi-enterprise bargaining, subject to meeting all the other criteria set out above.

The exceptions are extensive, and include in particular metal and engineering construction (as defined in cl 4.3(c) of the Building and Construction General On-site Award); work on escalators, lifts, ventilation and air-conditioning; construction relating to particular renewable energy sources; and the asphalt industry.

Changes to the processes for making and varying enterprise agreements

Initiating bargaining for a replacement agreement

Previously, employee BRs could not force an unwilling employer to initiate bargaining for an enterprise agreement, unless they could show that a majority of employees to be covered by the proposed agreement wanted to bargain. Nor, in this situation, have they been able to take protected industrial action, since a 2015 amendment introduced by the Turnbull Government (see **18.20**).

Part 15 of Schedule 1 to the SJBP Act has now amended the FW Act to permit employee BRs to make a written request to initiate bargaining for a new agreement to replace an earlier agreement that has expired less than five years previously (s 173(2A)). If the employer refuses, the FWC can be asked to make a bargaining order to compel them to negotiate in good faith, even in the absence of any demonstrated support for a new agreement from a majority of employees (s 230(2)(aa)).

Because the written request will also serve as a 'notification time' for the proposed agreement (s 173(2)(aa)), protected industrial action will also be possible, at least once genuine attempts have been made to reach agreement.

However, this mechanism cannot be used for a multi-EA or a greenfields agreement, or if a BR is proposing a new agreement which would not cover substantially the same group of employees as the earlier one.

Information and voting processes

Part 14 of Schedule 1 to the SJBP Act, which will commence no later than 6 June 2023, will introduce various changes to the rules governing the making and approval of enterprise agreements under the FW Act.

Employers will not be required to provide employees with a Notice of Employee Representational Rights in relation to a multi-EA, though it will still be necessary for single-EAs that are not greenfields agreements (amended s 173(1)).

More generally, s 180 has been amended so that there will no longer be a specific obligation to provide employees with a copy of the proposed agreement and any material incorporated in it within the seven days preceding a proposed vote. Nor will details of the voting period necessarily have to be provided within that 'access period'. But the FWC must still be satisfied that what the employer has done in the lead up to the vote is sufficient to ensure that the employees have 'genuinely agreed' to the proposed agreement, pursuant to s 186(2)(a) and a new s 188. To provide guidance to employers, the FWC will be required to issue a 'statement of principles' as to how an employer might ensure genuine agreement (new s 188B).

The original SJBP Bill had also proposed to remove the specific requirement in s 180(5)–(6) to ensure that a proposed agreement is explained to employees in an appropriate manner, considering the particular circumstances and needs of those employees, for example, those who are young, from culturally and linguistically diverse backgrounds, or those who do not have a BR. But this change was dropped during the Bill's passage through Parliament.

One new restriction is that an agreement will not be taken to have been genuinely agreed unless the employees voting on the agreement have a 'sufficient interest in the terms of the agreement' and are 'sufficiently representative, having regard to the employees the agreement is expressed to cover' (new s 188(2)). The intent here is plainly to stop the practice of employers asking a handful of employees to approve an agreement, then rolling it out for a much larger group (see **8.5**) – or, as the Explanatory Memorandum puts it, to 'safeguard' against agreements which are 'not the result of collective bargaining in good faith'.

Section 211 will also be amended to ensure that the new procedural requirements will also apply in relation to proposals to have an enterprise agreement variation approved by the affected employees.

A further significant change concerns the approval of multi-EAs. An employer will not be able to ask its employees to approve a proposed multi-EA, or a variation to such an agreement, unless one of two conditions is satisfied (new ss 180A, 207A). The first is that *every* registered union involved in the bargaining process has given its consent. Alternatively, where that consent is lacking, the employer must obtain a 'voting request order' under a new Subdivision E of Division 8 of Part 2-4. The FWC must make such an order if satisfied that the failure of each relevant union to provide consent was unreasonable in the circumstances, and that the employer's request for a vote would not be inconsistent with, or undermine, good faith bargaining for the proposed multi-EA.

The better off overall test

Part 16 of Schedule 1 to the SJBP Act will make a number of changes to the better off overall test (**BOOT**), none of which will affect its operation in any substantial way, but which are intended to clarify and (potentially) simplify its operation. Once again, these changes are set to take effect by 6 June 2023 at the latest.

A new s 193A(2) of the FW Act will state for the avoidance of doubt that the BOOT requires a 'global' assessment of whether each employee or class of employees would be better off, by comparing the terms of the agreement that would be more or less beneficial to the employee than if the award applied. This is essentially how the test operates already (see **8.10**).

To dispel any suggestion that the test is being weakened, the Explanatory Memorandum notes that it is unlikely that a 'non-monetary, optional or contingent entitlement under the agreement' would compensate for any 'significant financial detriment' identified in the process of this comparison.

In considering the views put to it on the BOOT, the FWC will be obliged to give 'primary consideration' to any 'common view' held by the employer(s) concerned, their BRs and any registered union BR (new s 193A(4)). This would discount any opposing view put by any other type of employee BR, such as the unregistered Retail and Fast Food Workers Union.

Where it identifies a concern with the BOOT, and rather than seeking an undertaking to address the issue (see **8.11**), the FWC will be empowered to directly amend a proposed agreement to overcome its concern. However, the amendment to an enterprise agreement must be '*necessary*' to address the concern. Also, when specifying an amendment, the FWC must seek the views of the employers

that are covered by the agreement, the award covered employees for the agreement and any BR for the agreement (new s 191A).

The FWC will also be directed to have regard only to patterns or kinds of work, or types of employment, that were reasonably foreseeable at the time of the assessment (new s 193A(6)). This is intended to prevent the BOOT assessment being complicated by purely hypothetical possibilities that might arise if the employer changed its operations in ways that would be theoretically possible, but not expected to occur.

As a safeguard, however, a new Division 7A of Part 2-4 will permit a 'reconsideration process' to be undertaken by the FWC, if it is satisfied that employees covered by an agreement are engaging in patterns or kind of work or types of employment to which the FWC had not had regard when it approved the agreement. The tribunal will be able to accept an undertaking or make an amendment to the agreement to address any concern about it not passing the BOOT, in light of the new information. While any such amendment may be given a retrospective effect, no penalty may be imposed for any previous conduct that would not have otherwise contravened the agreement.

The drafting in the original SJBP Bill created concerns that it might be possible to circumvent the BOOT by formulating agreements with inferior conditions for employees hired after approval. These problems were addressed in the Senate, including to delete more complex revisions originally proposed by the government. In the process, references in s 193 to applying the BOOT in relation to 'prospective' employees were altered so that the provision will now speak instead of 'reasonably foreseeable' employees.

Correcting errors

Part 17 of Schedule 1 to the SJBP Act has made it easier for the FWC to correct obvious errors, defects or irregularities in enterprise agreements, or to rectify certain kinds of mistakes during the approval process (such as submitting the wrong version of an agreement for approval), without the need for a Full Bench appeal or a formal variation. The new provisions in ss 218A and 602A–602B of the FW Act also permit the FWC to be able to rectify an enterprise agreement on its own initiative, or on application by any employers, employees or employee organisations covered by the agreement.

Resolution of intractable bargaining disputes

Under the current FW Act, there are four mechanisms by which a dispute about a proposed enterprise agreement can be resolved by arbitration, without the consent of all parties concerned (see **8.24**). Two involve protected industrial action creating or threatening significant harm. The other two, triggered by declarations concerning low-paid bargaining or repeated breaches of bargaining orders, have never been utilised.

The amendments in Part 18 of Schedule 1 to the SJBP Act will now remove those last two mechanisms and broaden the circumstances in which compulsory arbitration is available for disputes over a proposed enterprise agreement, other than a greenfields agreement or a CWA.

Under a new s 235 of the FW Act, it will be enough for the FWC to be satisfied that there is no reasonable prospect of agreement being reached and that it is reasonable to make an 'intractable bargaining declaration'. Such a declaration may only be sought if the parties have engaged in good faith bargaining for at least nine months, the FWC has previously endeavoured to settle the dispute under s 240, and the BR seeking the declaration has participated in that process.

The FWC must also wait until a 'minimum bargaining period' has elapsed. This is a period of nine months running from the later of two possible dates: the commencement of bargaining (which in the case of an SBA or SIEA means the date the relevant authorisation takes effect); or the expiry of an existing agreement covering any of the relevant employees (or the latest expiry date if there is more than one such agreement).

Where the FWC is prepared to grant a declaration, it will have the option to give the parties time to make one last attempt to reach agreement (new s 235A). Otherwise, or if those negotiations failed, it will be empowered to make an 'intractable bargaining workplace determination' under a revamped Division 4 of Part 2-5. After including any provisions on which the parties had already agreed, the tribunal will resolve the remaining matters by arbitration.

Depending on the FWC's willingness to use it, the inclusion of this process in the FW Act might well do as much to reshape bargaining practices as anything else in the SJBP Act. Its use – or the threat of its use – will be especially significant in relation to proposed SBAs and SIEAs, given the difficulties in successfully negotiating multi-EAs.

Termination and sunsetting of enterprise agreements

Expired agreements

Section 225 of the FW Act permits any employer, employee or registered union covered by an expired enterprise agreement to apply unilaterally to the FWC to have the agreement terminated.

As a bargaining tactic, some employers have sought or threatened to seek to terminate expired agreements to push workers onto award standards, and potentially reduce terms and conditions (see **8.40**). As s 226 previously stood, the FWC was only required to consider whether it was 'not contrary to the public interest' to terminate an expired enterprise agreement, and to consider whether termination was appropriate after taking into consideration 'all the circumstances', including the views of the employees, employer and any relevant union, and the likely effect of a termination.

Part 12 of Schedule 1 to the SJBP Act has now amended s 226 to remove any reference to the public interest. Instead, the FWC must terminate an expired agreement if it is 'appropriate' to do so, and if one of three conditions are met:

(a) the 'continued operation [of the enterprise agreement] would be unfair for the employees covered by the agreement';

(b) the agreement does not, or is not likely to, cover any employees; or

(c) the continued operation would 'pose a significant threat to the viability of [the employer's] business', termination would be likely to reduce the potential for redundancies or an insolvency or bankruptcy event, and the employer has guaranteed that any redundancy entitlements in the agreement would continue after the termination.

Besides considering the views of affected parties, and any other matter it believes to be relevant, the FWC is directed to take into account whether bargaining for a replacement agreement has commenced, whether the application was made at or after the notification time for a proposed enterprise agreement that will cover the same group of employees as the existing agreement and whether termination would adversely affect the bargaining position of the employees in question.

Applications for termination of expired agreements must generally now, if opposed by any party, be dealt with by a Full Bench of the FWC, rather than by a single member (s 615(3)).

The purpose of the amendments is clearly to make it very difficult for employers to terminate expired agreements that provide wages and conditions in excess of award standards, other than in the limited circumstances set out in (b) or (c) above. Where that last exception is invoked, s 226A provides for any guarantee as to redundancy entitlements to remain enforceable in relation to dismissals for a specified period after the agreement termination is approved.

The SJBP Act has not, however, removed the ability for an enterprise agreement to be terminated at any point, including before its expiry, with the agreement of the employer(s) concerned and a majority of the affected employees.

'Zombie' agreements

A further change is the sunsetting of agreement-based transitional instruments made before the FW Act, Division 2B State employment agreements, and any enterprise agreements made under the FW Act during the 'bridging period' in the second half of 2009.

These have come to be known as 'zombie' agreements, with terms and conditions that may be substantially different (and often less beneficial) than those for which the modern awards system would otherwise provide.

Part 13 of Schedule 1 to the SJBP Act has amended the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* so that:

- all zombie agreements will automatically 'sunset' (terminate) at the end of a 'grace period' of 12 months, expiring on 6 December 2023, unless that period is extended following an application to the FWC;
- employers covered by a zombie agreement have six months (that is, until 6 June 2023) to notify affected employees of the sunsetting arrangement; and
- an employer, employee or industrial association covered by a zombie agreement may apply to the FWC prior to the sunset date, to extend the effective period of the instrument for a period of no more than four years.

The ability to continue zombie agreements for a period of up to four years will require the FWC to be satisfied either that bargaining for a new agreement is underway but has not yet concluded, or that the zombie agreement would leave employees better off overall than the relevant modern award.

Compliance and enforcement

Given Labor's pledge to address the issue of wage theft, it was surprising to see so little on matters of compliance and enforcement in the SJBP Bill. In particular, there was no new criminal offence for underpaying workers, or any increases in civil penalties (though see below).

The amendments in Part 24 of Schedule 1 will, however, amend s 548 of the FW Act to lift the monetary cap on the amounts that can be awarded in small claims proceedings (see **9.16**), from $20,000 to $100,000. Where an applicant is successful in such a proceeding, it will be possible for the defendant to be ordered to pay the applicant's court filing fees by way of a costs order. These changes will take effect from 1 July 2023.

Part 25 of Schedule 1 to the SJBP Act has also created a new prohibition, with immediate effect, on employment advertisements that include pay rates that contravene the FW Act or an award or enterprise agreement, unless the employer can show a reasonable excuse (s 536AA). Advertisements for piecework jobs must also now specify any periodic rate of pay to which the relevant type of pieceworker is entitled.

A more general change made by the *Crimes Amendment (Penalty Unit) Act* 2022 has been to amend s 4AA of the *Crimes Act 1914* to increase the value of a penalty unit, which was previously $222 (see **9.17**). For offences committed after 1 January 2023, the figure is now $275. Hence for a breach of a civil remedy provision in the FW Act that carries a maximum penalty of 60 units, individuals can now be fined up to $16,500, while for corporations (including registered unions) such a breach may cost up to $82,500. For serious contraventions, the maximum for corporations is now $825,000. On 1 July 2023, and every three years after that, the value of a penalty unit will be indexed to match rises in the Consumer Price Index.

Gender pay equity

The SJBP Act has introduced a number of reforms that are designed to help close the persistent gap between average male and female earnings. Under changes made by Part 4 of Schedule 1, the promotion of 'gender equity' has been added to s 3(a) of the FW Act as an object to the legislation. There are changes as well to the modern awards objective in s 134(1) (see **7.12**) and the minimum wages objective in s 284(1) (see **10.8**), to place a greater emphasis on the need to eliminate the gender-based undervaluation of work. Awards must also seek to provide 'workplace conditions that facilitate women's full economic participation'.

Part 5 of Schedule 1 to the SJBP Act deals more specifically with equal remuneration claims. Section 157 of the FW Act has been amended to confirm that any reconsideration of award rates on work value grounds must be 'free of assumptions based on gender' and 'include consideration of whether historically the work has been undervalued because of assumptions based on gender'. But the more substantial changes broaden the FWC's power to make orders to ensure 'equal remuneration for

men and women workers for work of equal or comparable value', to overcome some of the limitations imposed by the tribunal's interpretation of Part 2-7 of the FW Act (see **10.17**).

An Expert Panel can now make an ER order on its own initiative, not just on application (s 302(3)). There is no longer any strict requirement for a comparator group. Instead, adopting the approach taken under the Queensland industrial relations system (see **10.18)**, a lack of equal remuneration may be identified purely on the basis that the work of a group of employees had been historically undervalued on the basis of gender (s 302(3)(a)). If satisfied of a lack of equal remuneration, the FWC is also now obliged to make an ER order (s 302(5)), whereas it previously had a discretion to refuse relief.

These changes should revive the possibility of ER orders being sought to lift minimum and/or negotiated rates of pay in feminised sectors.

Prohibiting pay secrecy

The practice of maintaining confidentiality over individual pay arrangements within an organisation may both hide and perpetuate inequities in the remuneration of male and female workers, especially in managerial and professional jobs. To address that concern, Part 7 of Schedule 1 to the SJBP Act amends the FW Act to prohibit pay secrecy provisions.

There are four main components to the new provisions in Division 4 of Part 2-9:

- Employees must be free either to disclose, or *not* disclose, their remuneration and any other employment conditions that determine that remuneration (s 333B(1)).
- Employees are now allowed to ask other employees (of either the same or different employers) about their remuneration and other relevant conditions, including the number of hours worked (s 333B(2)), though those employees are not compelled to respond. Both this and the freedom to disclose constitute workplace rights, for the purpose of the adverse action provisions in Part 3-1 of the FW Act.
- Any provision in an employment contract, award or enterprise agreement that prohibits employees from asking about or disclosing their remuneration and other relevant conditions is treated as unenforceable (s 333C).
- Employers are prohibited from including any provision in an employment contract or other written agreement with an employee that is inconsistent with the rules above (s 333D).

The term 'remuneration' is not defined in the FW Act. But it is generally interpreted to cover not just wages, but 'all other monetary and non-monetary compensation paid as consideration for service under an employment contract': *Equal Remuneration Decision 2015* (2015) 256 IR 362 at [276].

Under cl 59 of Schedule 1 to the FW Act, pay secrecy clauses in employment contracts agreed to *before* the amendments took effect on 7 December 2022 remain enforceable, but only up to the point at which any variation to that contract is agreed. Employers will also have a six-month grace

period (that is, until 7 June 2023) before being exposed to penalties for including such clauses in new contracts entered into on or after commencement of the new rules.

Superannuation contributions

Labor has promised to 'include a right to superannuation within the [NES]'. This will presumably oblige national system employers to make sufficient contributions to avoid any charge under the superannuation guarantee legislation, something which is already a standard inclusion in modern awards (see **10.30**).

Flexible work requests

Part 11 of Schedule 1 to the SJBP Act deals with flexible work requests. As part of the NES, s 65 of the current FW Act allows an employee to request a change to their working arrangements if they are parents of school-aged or younger children or carers, have a disability, are over 55 years of age, or are a victim of family and domestic violence or supporting such a victim (see **11.5**).

As from 6 June 2023, the two categories relating to family and domestic violence will be expanded to align with the broader notion now reflected in the leave provisions mentioned below, which can include abusive and threatening behaviour, not just violence (s 106B(2)). A pregnant employee will also be explicitly permitted to request flexible working arrangements (new s 65(1A)(aa)).

More generally, the amendments will place further obligations on employers when they consider an employee's request and make it easier for employees to challenge refusals.

Under a new s 65A, employers will need to discuss the request with the employee, genuinely try to reach agreement to accommodate the employee's circumstances, and have regard to the consequences of the refusal for the employee.

If agreement cannot be reached, employers will be obligated not only to provide written reasons for any refusal, but to identify the reasonable business grounds justifying that refusal. Such grounds may include that (new s 65A(5)):

- the new working arrangement would be too costly for the employer;
- there is no capacity, or it would be impractical, to change the working arrangements of other employees, or recruit new employees in order to accommodate the requested arrangement;
- there would be a significant loss in efficiency or productivity; or
- the arrangement would likely have a significant negative impact on customer service.

Employers will also be able to consider the size and nature of their enterprise when deciding whether they have reasonable grounds for refusing a request. This recognises that what is 'reasonable' may differ significantly between businesses, depending on their specific circumstances.

Employers will also have to state what other changes (if any) to the employee's working arrangements they would be willing to make, and inform the employee of their right to dispute the refusal (new s 65(6)). A failure to do any of these things could result in penalties being imposed.

Under the current FW Act, refusals can only be challenged if the employer consents, or has previously consented (for example as part of an enterprise agreement), to arbitration. That limitation will be removed by the SJBP amendments.

A new s 65B will provide a process for dealing with disputes between employers and employees regarding flexible work arrangements. Where an employer refuses a request for flexible working arrangements, or does not respond within 21 days, the employee and employer will first have to attempt to settle the dispute at the workplace level. If no resolution is reached, either party will be able to apply to the FWC to resolve the dispute. The FWC will be empowered to deal with such disputes in any manner that it considers appropriate, such as by mediation, conciliation, making a recommendation, or expressing an opinion. Or it may arbitrate, though only generally if other means have been attempted first.

Where the FWC considers that arbitration is appropriate, it will be able to order the employer to provide a written response or additional details, or make any other order to achieve compliance with the obligations set out above. It will also have the power to determine whether reasonable business grounds existed to refuse a request and, if not, order that the request be granted or that alternative arrangements be put in place to accommodate the employee's request. In resolving such disputes the FWC will need to consider fairness as between the parties, and it must not make orders unless strictly necessary (new s 65C).

Extending the duration of unpaid parental leave

Part 25B of Schedule 1 to the SJBP Act also alters the existing framework for responding to a request for extending a period of the NES entitlement to unpaid parental leave (see **11.32**), inserting a new refusal process and dispute resolution procedure similar to that described above in relation to flexible work arrangements. Again, this will take effect on 6 June 2023.

A new s 76A of the FW Act will require that employers provide a response to a request for an extension of unpaid parental leave within 21 days, either granting the request, or refusing the request only after discussion between the employer and employee and genuinely trying to reach an agreement. As above, employers must have regard to the consequences of refusal, and may only do so on reasonable business grounds. The employer must explain the grounds for refusal and inform the employee of the dispute resolution options. The dispute resolution process mirrors the process outlined above for flexible work requests (new ss 76B–76C).

Paid parental leave

On 30 November 2022, the Albanese Government introduced the Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022, which proposes significant changes to the paid parental leave (**PPL**) scheme (see **11.35–11.37**) in relation to children born or adopted from 1 July 2023 onwards.

The Bill proposes to extend access to the scheme and allow it to operate in a gender-neutral and more flexible way, including by:

- abolishing the concept of 'dad and partner pay' and creating a single entitlement of up to 20 weeks' parental leave pay;
- allowing partners to divide that 20 weeks between them however they wish, subject to each partner taking no more than 18, and no more than two weeks (10 days) being taken concurrently;
- allowing single parents to claim the full 20 weeks;
- making all PPL days flexible, so that they can be taken during any one or more non-working periods of as little as a day following the birth or adoption, and regardless of whether the carer has otherwise returned to work;
- where a claimant (whether single or partnered) fails the individual income text, allowing them to qualify if their family income is less than $350,000 a year (a figure to be indexed from July 2024); and
- allowing a father or other partner to qualify for PPL even if the birth parent does not meet the eligibility criteria.

As foreshadowed in the October 2022 budget, the Albanese Government plans to introduce further legislation to progressively increase the total amount of PPL, until it reaches 26 weeks in 2026.

Paid family and domestic violence leave

As from 1 February 2023, the right to unpaid family and domestic violence leave in Subdivision CA of Division 7 of Part 2-2 of the FW Act (see **11.27**) has become a paid entitlement, by virtue of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022*. The exception is for small business employers (see **17.14**), to whom the new provisions will not apply until 1 August 2023.

National system employees can take up to 10 days' leave in any 12 month period at their full rate of pay. Once Australia's planned ratification of the ILO's Convention concerning Violence and Harassment 2019 (No 190) takes effect, the entitlement will extend to non-national system employees as well, under a new Division 2A of Part 6-3 of the FW Act.

The definition of family and domestic violence has also been extended to include conduct of a current or former intimate partner of the employee, or a member of their household (amended s 106B(2)).

Prohibition on sexual harassment at work

In 2021, the Morrison Government's *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* amended the anti-bullying provisions in Part 6-4B of the FW Act to empower the FWC to make stop orders in relation to sexual harassment at work (see **15.27**). This fell short of

implementing the recommendation in the AHRC's *Respect@Work* report that the FW Act should be amended to *prohibit* such harassment.

Part 8 of Schedule 1 to the SJBP Act now repeals those amendments, so that Part 6-4B of the FW Act will once again cover only bullying. Instead, from 6 March 2023 a new Part 3-5A will make sexual harassment unlawful, with a dispute resolution framework similar to the one that currently applies to dismissal-related general protections claims. This will see proceedings needing to be brought first in the FWC and then, potentially, the courts. However, for any sexual harassment that is part of a course of conduct that began before the commencement of the new provisions, the old law (including the availability of stop orders under Part 6-4B) will continue to apply (Sch 1 new cl 60).

The new prohibition

As with the 2021 provisions, the operation of Part 3-5A will not be limited to the harassment of employees, but will extend to a broader category of protected persons, utilising definitions from the *Work Health and Safety Act 2011* (Cth).

Under a new s 527D of the FW Act, it will be unlawful for one person to sexually harass another person who is:

- a worker carrying out work for a person conducting a business or undertaking (**PCBU**);
- a person seeking to become such a worker; or
- a PCBU,

but only if the sexual harassment occurred 'in connection with' being a worker, seeking to become a worker or being a PCBU.

Unlike the existing provisions in Part 6-4B, there will be no need to establish any link to a 'constitutionally-covered business'. The prohibition will apply throughout Australia, including to non-national system employers, because the Bill's provisions will be giving effect to certain international conventions. The new provisions will not, however, affect the operation of State and Territory anti-discrimination laws, criminal laws or work health and safety laws (new s 527CA). This means that an aggrieved person who has been subject to workplace sexual harassment can now choose the jurisdiction they wish to seek a remedy. However, the new amendments will prevent multiple sexual harassment complaints from being made under both the FW Act and any State or Territory anti-discrimination laws, if the complaints relate to the same conduct (new ss 734A, 734B).

Employers and other organisations will be vicariously liable for any contravention by one of their employees or agents, unless they can prove that they have taken all reasonable steps to prevent the contravention from occurring (new s 527E).

FWC proceedings

Where a person alleges they have been sexually harassed, they or a union acting on their behalf will be able to initiate proceedings in the FWC (new s 527F). This will be subject to an application fee and

a discretion on the part of the FWC to dismiss any application brought more than 24 months after the alleged contravention. Provision can be made in the FWC Rules for class action-like joinders of related, contraventions.

The FWC will be empowered to conciliate or mediate any sexual harassment dispute submitted to it. It will also still be able to make a 'stop sexual harassment order', if it considers an applicant needs that protection (new s 527J).

If the FWC is satisfied that all reasonable attempts have been made to resolve a dispute, but unsuccessfully, it will then issue a certificate permitting the applicant(s) to have the matter either dealt with by a court or arbitrated by the FWC (new s 527R).

The FWC will be able to arbitrate a dispute if at least one complainant and one respondent agree and jointly notify the FWC within 60 days of the certificate being issued (new s 527S(1)).

Besides being able to express an opinion on whether sexual harassment has occurred or whether any further action would be appropriate, the tribunal will be able to make orders that an aggrieved person receive compensation or lost remuneration, with no limitation on those amounts. It will also have the power to compel a person to undertake any other reasonable act or course of conduct to redress loss or damage suffered by an aggrieved person (new s 527S(3)).

Court proceedings

Remedies for breach of the new prohibition on sexual harassment will be available from the Federal Court or the Federal Circuit and Family Court. But with the exception of an application for an urgent injunction, an aggrieved person can only take their sexual harassment dispute to court if the FWC has issued a certificate of the type mentioned above (new s 527T(1)).

The time limit for court proceedings will generally be 60 days from the issue of the certificate. The court may permit an application to proceed out of time, taking into account factors than can be expected to include the reasons for the delay, whether there would be any prejudice to the respondent(s), whether there are issues of inequity or fairness, and the merits of the matter (new s 527T(3)).

If the FWC issues a stop order, proceedings for breach of that order will not be subject to the need for any certificate, but can simply be instituted in the Federal Court, the Federal Circuit and Family Court or an eligible State court, under the usual rules for breach of a civil remedy provision (new s 527K).

The remedies available from a court under Part 4-1 of the FW Act may include any order necessary to remedy the contravention, including the payment of compensation. The court will also, unlike the FWC, be able to impose penalties of up to $82,500 per breach for corporations and $16,500 for individuals.

In accordance with the usual rules for proceedings under the FW Act (see **9.4**), orders for legal costs will be available only where the application can be shown to have been vexatiously or unreasonably commenced, or where one party's unreasonable act has caused the other to incur costs.

Extension of anti-discrimination provisions in the Fair Work Act

Under a separate set of reforms in Part 9 of Schedule 1 to the SJBP Act, the anti-discrimination provisions of the FW Act have been expanded through s 789HB to include breastfeeding, gender identity and intersex status as additional protected grounds, for the purposes of:

- the protection of employees against discriminatory treatment (s 351);
- the permissible content of modern awards and enterprise agreements (ss 153, 195); and
- the FWC's obligation to promote diversity and eliminate discrimination when performing functions or exercising powers under the FW Act (s 172A).

The Respect at Work Act

Express prohibition of hostile working environments

One of the most substantial elements of the Respect at Work Act is the introduction of s 28M into the *Sex Discrimination Act 1984* (**SD Act**), which makes it unlawful for one person to subject another person to a hostile workplace environment on the ground of sex.

This means there is now an obligation on employers to prevent conduct that may result in an 'offensive, intimidating or humiliating' workplace environment by reasons of sex, even in situations where the conduct was not directed at a specific person. The type of conduct that could potentially breach this new provision includes the display of pornographic or obscene materials, general sexual banter or innuendo, and offensive jokes. According to the Explanatory Memorandum for the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, s 28M has been introduced because the 'existence of hostile workplace environments can create the risk of people experiencing other forms of unlawful discrimination such as sexual harassment'.

There are also a range of circumstances that must be considered when determining whether someone has breached the prohibition. These include (s 28M(3)):

- the seriousness of the conduct;
- whether the conduct was continuous or repetitive;
- the role, influence or authority of the person engaging in the conduct; and
- any other relevant circumstances.

Lowered threshold for finding harassment on the ground of sex

The definition of 'harassment on the ground of sex' (see **14.6**) in s 28AA of the SD Act has been amended to remove the requirement that the person must engage in conduct of a *seriously* demeaning nature. The conduct now only needs to be 'demeaning', which lower the threshold for finding a contravention.

A positive duty for employers

A new Part IIA of the SD Act places a positive duty on employers and any other PCBU to take *reasonable and proportionate measures* to eliminate sexual harassment as far as possible.

The introduction of this positive duty, in s 47C of the SD Act, is not entirely novel in the industrial landscape, as employers already have positive work health and safety obligations with which they must comply. Nevertheless, prior to this amendment, employers were only required under the SD Act to respond to conduct that had already occurred. However, this positive duty now requires all employers and PCBUs to take proactive steps to prevent sexual harassment in the workplace before it can even arise.

According to the Explanatory Memorandum, some proactive steps that could be taken by employers and PCBUs to meet this positive duty include 'implementing policies and procedures, collecting and monitoring data, providing appropriate support to workers and delivering training and education on a regular basis'.

In determining whether employers and PCBUs have taken reasonable and proportionate measures to eliminate sex discrimination in the workplace, the following factors *must* be considered (s 47C(6)):

- the size of an employer's business;
- the nature of their business;
- the business owner's resources;
- the practicality and costs involved to eliminate the conduct; and
- any other relevant circumstances.

Interestingly, the changes made by the Respect at Work Act do not contain any express civil or criminal penalties for failure to comply with this positive duty. However, the Explanatory Memorandum states that these obligations are not intended to exclude or limit the operation of any State or Territory laws regarding work health and safety or discrimination, and can operate concurrently. This means that a State or Territory work health and safety regulator could investigate a sexual harassment matter in a workplace, while an individual could make a complaint to the AHRC regarding the same conduct. However, a person will not be entitled to make a complaint or take action under both the federal SD Act and State or Territory work health and safety or discrimination laws where they deal with the same matter (SD Act ss 10(4), 11(4)). Further, where a person could be liable for an offence under both laws, they can only be prosecuted under one (ss 10(5), 11(5)). Given that the SD Act is predominantly civil in nature and has a limited number of offences, it is envisaged that the risk of overlap is minimal.

Expansion of the AHRC's investigative powers

Division 4A of Part II of the *Australian Human Rights Commission Act 1986* (**AHRC Act**) will be amended to broaden the powers of the AHRC to oversee whether employers are complying with their positive duty obligation. The new provisions will enable the AHRC to:

- conduct inquiries if they 'reasonably suspect' a business or employer is not complying with the positive duty (new s 35B);
- provide recommendations to employers or PCBUs to prevent a continued failure to comply with the positive duty (new s 35E); or
- give a compliance notice which specifies the actions that the employer or PCBU must take to address their non-compliance with the positive duty (new s 35F).

Importantly, while almost all the provisions in the Respect at Work Act have already taken effect, the AHRC's powers to conduct inquiries into compliance with the positive duty will not come into effect until December 2023. This effectively gives employers and PCBUs 12 months to begin assessing and monitoring their compliance with the new duty.

Systemic unlawful discrimination

Under Division 4B of Part II of the AHRC Act, the AHRC is now empowered to inquire into any matter that may relate to systemic (or suspected systemic) unlawful discrimination. This is unlawful discrimination that affects a class or group of persons and is continuous or repetitive (s 35L). The AHRC may perform its systemic inquiry functions when requested to do so by the Minister, or when the AHRC considers it desirable to do so.

Applications by unions and representative bodies: Respect at Work Act (Schedule 4)

The AHRC Act has also been amended to allow unions and representative groups to make an application in the federal court system on behalf of a person affected by unlawful discrimination or sexual harassment, provided that a complaint has been made to the AHRC first, and that complaint has been terminated (s 46PO(2A)). Representative applications are intended to provide a mechanism for genuine cases to be heard, given the complexity and costliness of the court system for individual applicants. The *Respect@Work* report also noted that representative applications may be particularly valuable in circumstances where a systemic problem affects a wide class of persons.

Victimisation

The SD Act was amended in 2021 to clarify that victimisation of a complainant (or a witness, etc) can form the basis of a civil action for unlawful discrimination, in addition to criminal proceedings (s 47A). To achieve consistency, the Respect at Work Act has added similar provisions to the other federal anti-discrimination statutes: see *Age Discrimination Act 2004* s 47A; *Disability Discrimination Act 1992* s 58A; *Racial Discrimination Act 1975* s 18AA.

Other changes in the Respect at Work Act

In addition to the significant changes described above, it is now an object of the SD Act to achieve 'substantive equality' between men and women (s 3(e)), not merely equality of opportunity.

The *Workplace Gender Equality Act 2012* has also been amended to extend its reporting obligations to cover the Commonwealth public sector.

The original Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 had a costs protections provision that was removed before it passed. Currently, the general process that courts follow is to award costs after a matter is settled, with the unsuccessful party generally required to pay the costs of the successful party. The proposed provision would have permitted each party to pay for their own costs unless the court decided to impose costs in certain circumstances. This change would have applied not just to claims under the SD Act, but *all* claims brought under Commonwealth anti-discrimination laws. However, in the face of concerns about this approach to awarding costs, the issue has been referred to the Attorney-General's Department to be reviewed. It remains to be seen whether the issue of costs orders is revisited in later reforms.

Limiting the use of fixed term contracts

Part 4 of Schedule 1 to the SJBP Act has amended s 3(a) of the FW Act to make promoting 'job security' one of the stated objects of the legislation. Despite its title, the SJBP Act has little to say otherwise about that topic, other than in relation to fixed term contracts.

Part 10 of Schedule 1 creates significant but complex new limitations on the capacity of employers to offer fixed term employment for periods of more than two years, as part of a new Division 5 of Part 2-9 of the FW Act. Despite the possibility of an earlier proclamation, the government has indicated that these provisions will not take effect until 6 December 2023, to allow a 12-month grace period for employers to adjust their employment practices.

Under a new s 333E(1), an employer must not enter into an employment contract with a term which provides for the contract to terminate at the end of an identifiable period, in any of three situations.

The first and most straightforward is where the period exceeds two years (new s 333E(2)). It does not matter that the contract has other terms which allow for termination before the end of the period. Hence, for example, a maximum term or 'outer limits' contract (see **17.15**) may infringe the prohibition.

Secondly, the prohibition covers a fixed or maximum term contract with an option to extend or renew the period of employment more than once, or for a total period that exceeds two years (new s 333E(3)).

Thirdly, consecutive fixed or maximum term contracts will be prohibited where each contract is for an identifiable period, the job or position is substantially the same in both the past and current contracts, and there is 'substantial continuity' between the contracts. It is enough that the total period is for more than two years; or the current contract contains an option for renewal or extension; or the previous contract contained an option for extension that has been exercised (new s 333E(4),(5)). This means that the prohibition will apply when the employment relationship exceeds two contracts, even if it does not exceed two years in duration. According to the Explanatory Memorandum, the reference to substantial continuity is intended to cover a situation where there is

a break between contracts, but the employment is expected to continue: for example, a break between teaching semesters, or a short period of unpaid leave.

Importantly, however, it is made clear that the main prohibition in new s 333E(1) does not apply to the engagement of a casual employee. The Explanatory Memorandum explains that this is 'to avoid unintended consequences, for example in circumstances where casuals enter into contracts on a shift-by-shift basis'.

A new s 333F also contains a number of more specific exceptions. These will allow fixed term contracts beyond two years where:

- the employee is contracted to 'perform only a distinct and identifiable task involving specialised skills';
- there is a training arrangement;
- the contract is to accommodate essential work during an emergency or a period of peak demand, or to cover a temporary absence of another employee (such as for illness or parental leave);
- the contract provides for payment in excess of the high income threshold (currently $162,000), or a pro rata amount for part-time or partial year employees;
- the work is funded by a government funding scheme of a kind prescribed by regulations and the funding is payable for more than two years, but there is no reasonable prospect that the funding will be renewed beyond that period;
- the work relates to a governance position that is time-limited by the governing rules of a corporation;
- a modern award provides that fixed term contracts of the relevant type are permissible (such as the awards covering schools and higher education); or
- the contract falls within a class prescribed by regulation.

It seems likely that this last power will be exercised to create new exceptions, as the need arises. It is also possible that the FWC may be invited to vary existing awards, either to extend or narrow the circumstances in which fixed term contracts can be used in particular industries or occupations.

Entering into any of the prohibited types of contract after the amendments take effect will constitute a breach of a civil remedy provision. A prohibited contract will still be enforceable, except that any term that provides that the contract terminates at the end of the fixed term will have no effect (new s 333G). Essentially, the contract will be treated as indefinite in nature and thus presumably terminable by reasonable notice, even in the absence of an expressly agreed notice period.

An employer will also be prohibited from ending an employee's employment in accordance with the terms of their fixed term contract and engaging another employee to do either the same or similar

work, where such a decision is made in order to avoid the operation of the new restrictions (new s 333H).

Rather than going to court, employees will have the option of raising disputes about the new fixed term employment provisions with the FWC, providing that they have attempted to resolve the dispute at the workplace level first. The FWC will be obliged to deal with the dispute, but it will only be able to do so by arbitration with the consent of all parties (new s 333L).

The FWC will also be empowered to vary an existing enterprise agreement to resolve any inconsistency, uncertainty or difficulty created by the new fixed term contract provisions (Sch 1 new cl 63).

Finally, the FWO will be charged with drafting a Fixed Term Contract Information Statement, which employers will need to provide to each fixed term employee at the time of making such a contract (new s 333K). That obligation will apply even if the contract falls within any of the exceptions listed above.

In terms of timing, the new restrictions will not apply to contracts entered into before the amendments take effect, unless a further fixed term contract is subsequently created that takes the total period of employment over two years (Sch 1 new cl 62). So employers will still be able to offer fixed term employment for longer periods up until December 2023; but beyond that date, renewals may not be possible without breaching the new s 333E.

Given these changes, many organisations will now need to reconsider the practice of engaging certain types of staff on rolling fixed term contracts. In some sectors, such as education, awards will still often permit such contracts, at least for certain types of staff. Managers and professionals earning over the high income threshold will also be unaffected. But for smaller businesses and non-profit organisations in particular, greater use may need to be made of indefinite contracts with provision for termination on notice.

Protected industrial action

As noted earlier, the changes to the bargaining rules made by the SJBP Act will permit protected industrial action to be taken in support of a multi-EA, if an SB or SIE authorisation has been obtained from the FWC (FW Act amended s 413(2)). But in accordance with the general rules for such action, employees can only take this step after genuine attempts have been made to reach agreement *and* their BR has obtained permission to hold, and secured endorsement from, a protected action ballot. In practice then, it will mostly only be union members who will be able to take action.

The amendments also make it clear that where a ballot order is sought in relation to two or more employers to be covered by a proposed multi-EA, there is taken to be a separate application for each employer (new s 437A). So rather than there being a single ballot of all relevant employees, separate ballots will need to be held for each employer, with the possibility of action being approved at some enterprises but not others.

Beyond that, Part 19 of Schedule 1 to the SJBP Act contains other changes to the rules on protected action. The government dropped a proposal in the original Bill that would have scrapped the ‘use it

or lose it' rule for taking action within 30 days from ballot results being declared (see **18.21**), and instead required a new application for a ballot order every three months. But other amendments that were adopted include:

- allowing the FWC to pre-approve ballot agents other than the Australian Electoral Commission (new s 468A);
- for employee claim action in support of an SIEA or SBA, requiring notice of at least 120 hours (equivalent to five days), as opposed to the three clear *working* days required for other agreements (new s 414(2)(a)); and
- where a PAB order is made, requiring the FWC to convene an immediate conference for the purpose of conciliation or mediation in relation to the proposed agreement (new s 448A), with employees and employers to be prohibited from taking protected action if their BRs do not attend (new ss 409(6A), 411(3)).