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, drawing on material originally written by Aneisha Bishop of Piper Alderman, as well as other colleagues at the firm, including Sophia Bianchini, Mark Caile, Tim Capelin, Adam Celik, Dustin Grant, Emily Haar, Joseph Hyde and Essi Merivaara.

It does not comprehensively update the 7th edition of the *Guide*, but deals with a number of important legislative developments, including major reforms introduced by the Albanese Labor Government. It also summarises the effect of two High Court decisions in February 2022 that radically changed the common law rules for determining employment status, as well as noting changes to the high income threshold, the value of penalty units, and the minimum wage.

References to the *Fair Work Act 2009* (**FW Act**) are generally to the Act as in force from **1 March 2024**. 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 2020 *Respect@Work* report, including through the enactment of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (**Respect at Work Act 2022**).

The Albanese Government has also been highly active on many other fronts. Besides introducing or flagging changes in relation to family and domestic violence (**FDV**) leave, gender equality reporting, paid parental leave, modern slavery and labour hire licensing, in its first two years in office it has introduced four sets of major amendments to the FW Act and other legislation.

The first was the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act 2022**), which was passed with the support of the Greens and Senator David Pocock after five weeks of intensive scrutiny and debate, receiving royal assent on 6 December 2022. Among other things, it:

- abolished the Australian Building and Construction Commission (**ABCC**) and the Registered Organisations Commission (**ROC**);
- expanded the options for multi-employer bargaining and made it easier for the Fair Work Commission (**FWC**) to resolve 'intractable' bargaining disputes;
- changed the rules for the termination and sunsetting of enterprise agreements;

- addressed the lack of pay equity for female workers, including by making it harder to maintain secrecy about pay rates;
- strengthened the right of employees to request flexible working arrangements; and
- restricted the use of fixed and contingent term contracts.

Many of these reforms had been flagged in the policy platform that Labor took to the May 2022 election. Others, such as those related to enterprise bargaining, reflected commitments made by the government following a Jobs + Skills Summit in September 2022. Some of the amendments took effect immediately. But most were given start dates at different points over the course of 2023.

A second and less controversial batch of reforms was introduced by the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (**Worker Entitlements Act 2023**), which was introduced in March 2023 and received royal assent on 30 June 2023. It deals with matters such as superannuation, parental leave and the rights of migrant workers.

A third and much larger Bill, the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (**CL Bill**), was tabled on 4 September 2023. The government found it harder this time to secure parliamentary support. But on the final sitting day of the year, it reached an agreement with the Senate crossbench that saw selected parts of the Bill passed into law as the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (**CL Act 2023**), which received royal assent on 14 December 2023.

Besides less contentious reforms in relation to redundancy payments, work health and safety, and workers compensation for 'first responders', the CL Act will allow the FWC to make 'same job, same pay' orders for labour hire workers, and impose criminal liability for the underpayment of employees. It has also created new rights and protections for union workplace delegates.

The remaining proposals from the CL Bill were transferred to a separate Bill, to be debated in 2024. The Fair Work Legislation Amendment (Closing Loopholes No 2) Bill 2023 included significant changes as to the determination of employment status, the definition of casual employment, the regulation of independent contracting (notably in the road transport industry or through digital labour platforms), and increased civil penalties for breaching the FW Act.

On 7 February 2024 the government announced that it had secured the necessary support from the crossbench, in return for a large number of amendments. The Bill was rushed through the Senate a day later, with little time for scrutiny, much less debate. This was despite substantial changes being made to the Bill, including the addition (at the request of the Greens) of a new 'right to disconnect' from work. The Bill was passed by the House the following week and received royal assent on 26 February 2024, becoming the *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (**CL No 2 Act 2024**).

Institutional reforms (Chapter 1)

Fair Work Commission expert panels

Part 6 of Schedule 1 to the SJBP Act has significantly extended the use of expert panels within the FWC (see **1.15**). An Expert Panel for pay equity must be convened to deal 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' (s 617(6)–(7)). The panel must have a majority of members with expertise in gender pay equity and/or anti-discrimination (s 620(1B),(2A)). These may be regular members, and/or outside specialists appointed on a part-time basis.

An Expert Panel for the Care and Community Sector is to deal with any application under s 157 to make, vary or revoke a modern award in that sector (s 617(8)). No definition of 'Care and Community' is given, but the Explanatory Memorandum for the SJBP Bill suggested that the sector includes the aged care, early childhood education and care, and disability care sectors, while noting this was not an exhaustive list. Once again, the Panel must have a majority of members with knowledge and experience of the sector (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 (ss 617(9)–(10), 620(1D)).

Division 2 of Part 16 of Schedule 1 to the CL No 2 Act 2024 will also create an Expert Panel for the road transport industry, containing at least one member (who again could be an outside specialist) with relevant knowledge and expertise. The Panel will be responsible for setting and varying awards within the industry, and for exercising the new powers in relation to road transport contractors that are discussed later in this supplement.

The new Expert Panel is to be guided by a 'road transport objective' (s 40D), requiring consideration of the safety, sustainability and viability of the industry (and of supply chains within it); the need to avoid unnecessary adverse impacts on sustainable competition among road industry participants; business viability, innovation and productivity; and administrative and compliance costs. There is also to be a Road Transport Advisory Group to advise the FWC on matters relating to road transport (ss 40E–40G). These provisions are clearly intended to reassure industry groups that the FWC will operate in a way that is different to the former Road Safety Remuneration Tribunal (see **1.17**, **11.14**), even as it assumes the power of that body to regulate contract rates in the industry (and indeed a much broader range of conditions).

A further initiative in the CL No 2 Act is to establish a Digital Labour Platform Consultative Committee, to allow tripartite (government, business and workers) dialogue over workplace relations matters concerning digital platform work. This is to be created under a new Part 3 of the *National Workplace Relations Consultative Council Act 2002*.

Guidance material

Part 25AA of Schedule 1 to the SJBP Act amended the FW Act to 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)).

Oversight of registered unions and employer associations

In accordance with the policy Labor took to the 2022 election, Part 1 of Schedule 1 to the SJBP Act 2022 provided for the abolition of the ROC (see **1.17**). That body's functions in overseeing the management of registered unions and employer associations have reverted 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 updated the *Fair Work (Registered Organisations) Act 2009* to ensure that the FWC can exercise what the Explanatory Memorandum for the SJBP Bill described as the 'standard suite of investigative, compliance monitoring and enforcement powers' set out in the *Regulatory Powers (Standard Provisions) Act 2014*.

Regulation of the building and construction industry

Part 3 of Schedule 1 to the SJBP Act likewise provided 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* was 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 2016 Act has been renamed the *Federal Safety Commissioner Act 2022*. The *Code for the Tendering and Performance of Building Work 2016* has also been repealed. The ABCC's enforcement functions have been transferred to the Fair Work Ombudsman (**FWO**), along with responsibility for court proceedings previously initiated by the ABCC.

By virtue of Part 25A of Schedule 1 to the SJBP Act, a new Part 6-4D of the FW Act has created 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.

Coverage of the FW Act (Chapter 2)

In Western Australia, it had been unclear whether local government employers were covered by the FW Act, because they might or might not be classed as trading corporations (see **2.26**). But that uncertainty has now been resolved, with the making of declarations that they are non-national system employers: see *Industrial Relations Act 1979* (WA) Pt 2AA; *Industrial Relations (General) Regulations 1997* (WA) Sch 4. In December 2022, under the process set out in s 14(2)–(5) of the FW

Act (see **2.28**), those declarations were formally endorsed by the federal Minister: see *Fair Work (State Declarations – employer not to be national system employer) Endorsement 2022 (No 1)* (Cth); and see also *Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022* (Cth). For most purposes, therefore, local government employment in WA is now regulated by State industrial law, as in NSW, Queensland and SA.

Determining employment status (Chapter 3)

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 with their respective spouses, 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.

Under Part 15 of Schedule 1 to the CL No 2 Act 2024, the Albanese Government has moved to reverse the effect of the two High Court decisions, at least for limited purposes. As from 26 August 2024 (or earlier by proclamation), a new s 15AA(1) of the FW Act will require adjudicators, when determining whether a person is an employee or an employer, to ascertain 'the real substance, practical reality and true nature of the relationship'. This will entail consideration not only of the contractual terms governing the relationship, but of 'other factors relating to the totality of the relationship', including 'how the contract is performed in practice' (s 15AA(2)).

However, the new direction will only affect the status of workers engaged by persons or organisations who are national system employers by virtue of s 14 of the FW Act (see **2.22**), not referred employers (s 15AA(3)). The common law position declared by the High Court will also still govern the scope of other federal statutes on matters such as taxation or superannuation, as well as State or Territory laws on subjects like workers compensation or long service leave.

As a transitional measure, any individual considered at risk of becoming an employee for FW Act purposes as a result of s 15AA may formally 'opt out' of the provision before it takes effect (ss 15AB–15AE). But this only applies to a relationship that existed prior to s 15AA commencing. The individual concerned must also have (or at least claim to have) earnings that exceed the 'contractor high income threshold' prescribed under s 15C. That threshold, which is yet to be set, will also play a role in relation to the provisions described below on regulated work and unfair contracts.

Sham contracting (Chapter 3)

Part 9 of Schedule 1 to the CL No 2 Act 2024 has implemented the longstanding reform proposal to narrow the defence in s 357(2) of the FW Act against misrepresenting what is in fact an employment relationship as an independent contracting arrangement (see **3.20–3.21**). To escape liability, an employer must now prove that they reasonably believed the contract to be one for services, not employment. In determining the reasonableness of such a belief, regard must be given to the size and nature of the employer's enterprise, among other matters.

'Regulated work' under digital platforms or in road transport (Chapters 3 & 4)

Scope and general definitions

Part 16 of Schedule 1 to the CL No 2 Act 2024 will add a new Chapter 3A to the FW Act, with effect from 26 August 2024 (or earlier by proclamation). Besides containing more generally applicable provisions on unfair contracts for services, which are considered separately below, the Chapter will empower the FWC to set minimum standards and hear what are in effect unfair dismissal claims from a 'regulated worker' (s 15G) performing either digital platform or road transport work for a 'regulated business' (s 15F). The work must be performed under a 'services contract' (s 15H), rather than as an employee.

To satisfy constitutional requirements, the work must also be performed by or for a constitutional corporation (see **2.23–2.26**), for the Commonwealth, in a Territory, or in connection with interstate or overseas trade or commerce (s 15H(2)–(3)).

The effect on a regulated worker of a minimum standards order or collective agreement (see below) is to be disregarded in determining whether they are an employee (s 15K). The same applies to anything else done to comply with obligations under the new Chapter 3A (s 15KA). But it will still be possible for a worker to argue, whether under the common law or the new s 15AA (see above), that they are in fact an employee and thus entitled to the benefit of employment standards, rather than the lesser rights created by the regulated work provisions.

Under a separate but related set of provisions in a new Chapter 3B, the FWC will have new powers to regulate a 'road transport contractual chain'. This is defined in s 15RA(1) to mean a series of contracts or arrangements under which road transport work is performed for a party in the first contract in the chain by either a regulated contractor, an employee-like worker engaged through a digital platform, or an employee. One of the parties to the first contract must be a constitutional corporation.

To be regarded as a person 'in' a road transport contractual chain, and hence subject to the orders or guidelines to which further reference is made below, it is necessary to be a party to the primary contract or a secondary contract in the chain, and also for certain constitutional connections to be established. But employees are not taken to be 'in' the chain, and nor are persons arranging for goods to be transported for purely private or domestic purposes (s 15RA(2)–(7)).

Digital platform workers

The first type of regulated worker is an 'employee-like worker' (s 15P), performing 'digital platform work' (s 15N) that is arranged or facilitated by a 'digital labour platform operator' (s 15M). A 'digital labour platform' generally means an online enabled application, website or system which arranges, allocates or facilitates both the provision of labour services and payment for those services (s 15L). It does not matter whether the platform pays the worker directly or uses an associated entity, or contracts someone else, to process payments.

To be considered 'employee-like', a platform worker will need to satisfy any two or more of four criteria:

- low bargaining power in negotiating the contract for their services;
- lower remuneration than an employee would receive for comparable work;
- a low degree of authority over the performance of the work; and/or
- any other characteristic prescribed by regulations.

This is clearly intended to cover platforms in sectors such as passenger transport and food or parcel delivery that set the price for the work they facilitate, and/or control the way it is performed. But even platforms that do little more than help connect contractors with their clients could still be caught, at least in relation to lower-paid work.

Road transport contractors

The second type of regulated worker is a 'regulated road transport contractor' (s 15Q), working other than as an employee or an employee-like worker for a 'road transport business' (s 15R). The work performed must generally be in one of five sectors for which modern awards exist: road transport and distribution, long distance haulage, waste management, cash in transit, or passenger vehicle transportation (s 15S). In both instances, the worker must be contracted individually to

perform work, or perform all or a significant majority of the work required under a services contract with a company, partnership or trust to which they have a particular connection.

Minimum standards orders and guidelines

Under Division 3 of Part 3A-2 of the FW Act, the FWC will be empowered to set what are essentially award-like conditions for employee-like platform workers or road transport contractors, through a 'minimum standards order'. These orders must be expressed to cover businesses of a specified class or type, rather than by name. The tribunal may make an order either on its own initiative, or on application from a relevant business, a registered union or employer association, or the Minister.

In exercising this power, the FWC must have regard to a 'minimum standards objective' set out in s 536JX. It will also be obliged to go through extensive consultations.

Minimum standards orders may cover a wide range of matters, including payment terms, working time, insurance, consultation and representation. But they are specifically precluded from regulating overtime rates, rostering, matters that are 'primarily of a commercial nature', or work health and safety matters already dealt with by legislation. They must also not deem the workers that they cover to be employees, or otherwise change the form of their engagement.

Platform work orders are specifically allowed to prescribe penalty rates, payment for time before or between engagements, or minimum periods of engagement – but only if the FWC considers such provisions 'appropriate', given the type of work performed and the nature of the platform operators covered by the order.

Under provisions notable for their length and extraordinary detail, a minimum standards order may be suspended or deferred by order of either the Minister or the FWC, and then potentially varied or revoked (Pt 3A-2 Divs 3A–3C).

Instead of making a minimum standards order for particular work, the FWC will have the option under Division 4 of Part 3A-2 of formulating 'minimum standards guidelines' instead. Such guidelines will be subject to more or less the same rules as orders, except that they will not create legally enforceable obligations.

Road transport contractual chain orders and guidelines

Division 2 of Part 3B-2 will authorise the FWC to make a road transport contractual chain order setting standards for regulated contractors, employee-like platform workers and other parties in the chain (though not, as noted earlier, consumers or employees).

Such an order may, among other things, regulate payment times, fuel levies, rate reviews, termination, and cost recovery. But it may not deal with overtime rates, rostering or matters comprehensively regulated by work health and safety or other laws, nor change a worker's status (for example, by deeming them to be an employee).

Once again, there are astonishingly detailed provisions for the deferral or suspension of contractual chain orders (Pt 3B-2 Divs 3-4).

The FWC also has the option of issuing non-binding road transport contractual chain guidelines, instead of enforceable orders (Pt 3B-2 Div 5).

Collective agreements

Part 3A-4 of the FW Act will permit a digital platform operator or a road transport business to enter into a 'collective agreement' with a registered union over the terms on which regulated work is performed. The union must be entitled under its rules to represent the interests of one or more of the regulated workers to be covered by the agreement, but need not have actual members.

If registered with the FWC, such an agreement will create legally binding obligations. But it cannot specify terms and conditions inferior to those set by a minimum standards order. Nor can it deal with matters that are primarily of a commercial nature.

The workers covered will need to have been informed of the negotiations and to have had the agreement explained to them, before it can be approved by the FWC. But unlike an enterprise agreement for employees, there will be no requirement for any vote to occur. Before approving a collective agreement, or any variation to it, the FWC must be satisfied that the agreement would not be contrary to the public interest.

Any disputes over the negotiation of a proposed collective agreement can be referred to the FWC for conciliation. But the tribunal has no power to arbitrate.

Unfair deactivation/termination claims

Under Part 3A-3 of the FW Act, the FWC will be able to deal with claims from an employee-like worker that their platform access has been unfairly restricted, suspended or terminated, providing they have regularly worked for the platform for at least six months. Road transport contractors will likewise be able to claim unfair termination of their services contract if they had been providing services to the relevant business for at least 12 months.

To be eligible to seek redress, the worker will need to have an annual rate of earnings that is less than the 'contractor high income threshold', a figure to be set by regulations under s 15C. Applications will also generally need to be lodged within 21 days of the deactivation or termination.

In determining unfairness, the FWC will consider whether there was a valid reason for the deactivation or termination, and whether the worker was accorded procedural fairness. It must also have regard to whether the business has complied with a Digital Labour Platform Deactivation Code or a Road Transport Industry Termination Code issued by the Minister. Serious misconduct by either type of worker will preclude a deactivation or termination from being treated as unfair. Certain types of deactivation lasting seven days or less will also be excluded from review.

In terms of remedies, the FWC may order the restoration of platform access or the creation of a new services contract, as the case might be. It may also, if appropriate, require the business to compensate the reinstated worker for pay lost as a result of the deactivation or termination. Where reinstatement is not appropriate, road transport contractors may claim up to 26 weeks of earnings or half the high income cap as compensation. But that option will not be available to digital platform workers.

Exclusion of State and Territory laws

Division 3 of Part 3A-1 of the FW Act will create a new set of exclusions for State and Territory laws in relation to matters covered by the new Chapter 3A. Division 3 of Part 3B-1 does the same for the contractual chain provisions in Chapter 3B.

The exclusions are expressed in terms similar to those in Part 2 of the *Independent Contractors Act 2006* (see **3.17–3.19**), except that they apply in relation to the two types of regulated work, rather than just service contracts. They are also subject to similar exceptions, which means that laws on matters such as workers compensation or health and safety will not be automatically overridden.

Aside from any other effect these provisions might have, it is specifically stated in s 536JS that minimum standards orders are to override conflicting State or Territory laws, even those exempt from automatic exclusion. So if, say, a minimum standards order is made for workers undertaking parcel deliveries through a digital platform, a contract determination covering the same work under Chapter 6 of the *Industrial Relations Act 1996* (NSW) could not apply.

Casual employment (Chapter 4)

Part 1 of Schedule 1 to the CL No 2 Act 2024 will alter the definition of casual employment in s 15A of the FW Act to make it more 'objective', clarify the circumstances in which the status of a casual can change, and introduce a new and narrower 'pathway' for casuals to move to permanent employment, in place of the existing rules on casual conversion. These changes will take effect from 26 August 2024.

Definition of casual employment

Section 15A has been amended to take account of post-contractual conduct, not merely, as the current provision insists (see **4.3**), what has been initially agreed between employer and employee. This overturns one of the key changes introduced by the Morrison Government in 2021 and reverts to something like the test previously adopted by the Federal Court in the *WorkPac* cases (see **4.2**) – but with one critical difference.

The new s 15A(1) sets out a 'general rule' to determine whether employment is casual. As with the current definition, the starting point is that a casual is someone with no firm advance commitment to continuing and indefinite work. It will also be stipulated, for the first time, that an employee *cannot* be a casual unless they are entitled to a casual loading or specific rate of pay for casuals,

under either a fair work instrument (such as an award or enterprise agreement) or their employment contract.

In determining whether the necessary advance commitment existed, s 15A(2) will require consideration of the 'real substance, practical reality and true nature of the employment relationship', as well as any mutual understandings or expectations the parties might have, whether as part of the employment contract or otherwise. It will also be necessary to consider whether:

- the employer has the freedom to decide whether to offer work and, if they do, whether the employee can choose to accept or reject it (and whether this happens in practice);
- it is reasonably likely that continuing work of the kind performed by the employee will be available in the future;
- there are permanent employees performing the same kind of work; and
- the employee has a regular pattern of work.

It will be made clear that any original expectations or understandings may be inferred from the parties' post-contractual conduct; that no one factor is decisive in identifying any firm advance commitment; and that a pattern of work can still be regular even if it is not uniform or fluctuates by reason of, for instance, illness or recreation (s 15A(3)).

It was originally proposed that an employee could not be a casual if their contract were set to terminate at the end of an identifiable period, other than the end of a shift of work or a specified season. But as a result of crossbench amendments, the only bar now is that academic or teaching staff at a higher education institution, and who are not State public sector workers, cannot be casuals if engaged for an identifiable period (s 15A(4)).

The new definition differs from the pre-2021 law because it makes it clear that if an employee starts performing what from the outset is genuinely casual work, their status will not change automatically just because they reach a point where the original test is no longer satisfied. This is apparent from a new s 15A(5), which states that a person who commences casual employment will remain a casual employee until a specific event changes their status to permanent. That event can only be a change to permanent full-time or part-time employment under the provisions described below; a change of status ordered by the FWC when resolving a dispute, or under the terms of a fair work instrument; or the acceptance of a new offer of permanent work by the employer.

Changing to permanent employment: the 'employee choice' pathway

Under Division 4A of Part 2-2 of the current FW Act, casuals who have worked in the same job for at least 12 months may be entitled either to request or be offered conversion to permanent employment (see **4.5**). The CL No 2 Act will remove those processes, and instead create a new framework based on 'employee choice' which is much narrower in scope and less onerous for employers.

When the amendments take effect, a casual will be able to notify their employer in writing that they believe their job no longer meets the requirements of the definition in s 15A (s 66AAB). To do this they will need to have been employed for at least six months, or 12 months in the case of a small business employer (one with fewer than 15 regular employees: see **17.14**).

Under s 66AAC, an employer will have 21 days to consult with the employee and provide a written response. If the employer accepts the notification, they must inform the employee whether they will be engaged on a permanent full-time or part-time basis, when this will happen, and what their hours of work will be. The new employment cannot be for a fixed or contingent term (s 66A(2)), and must take effect at the start of the employee's next pay period (s 66AAD).

Alternatively, the employer can either dispute the assertion, or reject the proposed change as being inconsistent with statutory requirements for recruitment or selection, or on 'fair and reasonable operational grounds' (s 66AAC(4)). The latter may include the objection that 'substantial changes would be required to the way in which work in the employer's enterprise is organised', or that a switch to permanent employment would bring 'significant impacts on the operation of the employer's enterprise' (s 66AAC(5)).

Under this new regime, larger employers will no longer be required to conduct a review of long-term casual engagements and determine whether to offer a permanent position. Action will only be needed if an employee choice notification is received. And an employee can only activate the new process by claiming that their job *has already* become an ongoing one. Merely having received casual work on a regular basis for six or 12 months will not be enough.

Dispute resolution

A new s 66M of the FW Act will create a process for resolving disputes about employee choice notifications. The parties must first attempt to resolve the dispute at the workplace level, before referring it to the FWC. If conciliation is unsuccessful, the tribunal may arbitrate the dispute. Orders that the FWC can make will include that the employee continue to be treated as a casual employee, or be treated as a full-time or part-time employee from a specified date (s 66MA).

Sham casual arrangements

The CL No 2 Act will create protections against sham casual arrangements, which (with one exception) will be similar to those which already exist in relation to sham independent contracting (see **3.20–3.21**). These will prohibit dismissing an individual in order to engage them as a casual to perform substantially the same work (s 359B), or knowingly making a misrepresentation to a current or former employee to engage them as a casual (s 359C). The original CL Bill also proposed to make it unlawful to misrepresent what is in fact permanent employment as casual employment, in similar terms to s 357. But this was dropped by the government after consultation with employer groups.

Casual Employment Information Statement

The Casual Employment Information Statement, which must currently be given to all workers when commencing casual employment with a national system employer (see **5.7**), will be updated to reflect the new rights and protections created in the CL No 2 Act. Under an amended s 125B, it will need to be given to each casual when they commence work, and then reissued after they complete each 12 months of work. Employers who are not small businesses will also need to supply it at the six-month mark as well.

Labour hire (Chapter 4)

Labour hire licensing

Coming into government in 2022, Labor had proposed to create a national licensing regime for labour hire providers, to replace the existing schemes in Victoria, Queensland, South Australia and the ACT (see **4.12**). But rather than the Commonwealth legislating, it was ultimately agreed that Victoria will develop model legislation for potential adoption by other States and Territories. This will provide for a single, national regulator to administer the scheme, presumably using the same legislative approach as for bodies such as the Australian Health Practitioner Regulation Agency or the Office of the National Rail Safety Regulator.

Regulated labour hire arrangement orders

Labor also came to power promising to ensure labour hire workers cannot be paid less than directly engaged employees would have been for doing the same work. In the end, however, it chose not to implement this 'same job, same pay' principle directly. Instead, a new Part 2-7A of the FW Act, added by the CL Act 2023, permits the FWC to make 'regulated labour hire arrangement orders', on application by unions or other interested parties. These can most obviously be used to ensure pay parity for labour hire workers deployed to a host organisation which has previously negotiated (or been required through arbitration to adopt) above-award wage rates. While the new provisions have already commenced, no order can take effect before 1 November 2024 (s 306E(9)(e)).

Under s 306E, the main threshold requirements are that (a) an employer is supplying its employees, whether directly or indirectly, to work for a host organisation (who may or may not be a related entity); (b) the host has an employment instrument (an enterprise agreement, workplace determination or public service determination) that would apply to the employees if they were directly engaged by the host to perform the same kind of work; and (c) the host is not a small business employer.

However, no order can be made if the relevant work is being performed 'for the provision of a service, rather than the supply of labour' (s 306E(1A)). In reaching a view on this, the FWC must consider the following factors:

- the involvement of the supplying employer in matters relating to the performance of the work;
- the extent to which that employer or someone acting on their behalf directs, supervises or controls the work;
- the extent to which the 'regulated employees' use their employer's systems, plants or structures to perform the work;
- the extent to which either the employer or another person is subject to industry or professional standards or responsibilities in relation to the regulated employees; and
- the extent to which the work is of a specialised or expert nature.

The intent is evidently to distinguish between arrangements that would conventionally be understood as involving labour hire (albeit that term is not directly used in the legislation, other than to describe the type of order that may be made), and contracts for specialised services that may incidentally include the supply of workers to provide those services.

Even if the threshold criteria are met, the FWC must not make a regulated labour hire arrangement order if it is satisfied that it is not fair and reasonable to do so, having regard to any submissions made to it on certain specified matters. Those matters include the nature of the pay arrangements at both the host and the supplier; the history of their 'industrial arrangements'; the nature of any relationship between the host and supplier; the extent to which any joint venture or common enterprise is involved; and the terms of the supply arrangement, including its duration, the location of the work, and the industry involved.

If an order is made, its effect is to ensure that, subject to certain exceptions, the regulated employees are paid at least as well as they would be under the host's instrument (s 306F). The host must, if requested, provide any relevant information to the supplier to help it comply with its obligations in relation to this 'protected rate of pay' (s 306H).

Importantly, a regulated labour hire arrangement order will not apply to any supply for a period of three months or less – although that 'exemption period' can be either lengthened or shortened by the FWC on application by any affected party (ss 306G(1), 306J–306L). The stated intent is to exempt labour hire arrangements for 'surge work', or where a short-term replacement is needed. An order will also not apply in relation to employees who are covered by a registered training contract (s 306G(1)).

There are further and extremely detailed provisions concerning:

- the extension of an order to cover additional employers supplying workers to the regulated host, either while the FWC is dealing with an application that did not originally mention those employers (s 306EA), or by way of a later variation (s 306ED);

- the effect of a new instrument (such as a replacement enterprise agreement) becoming applicable to a host that is covered by an order (ss 306EB–306EC);
- the clarification or modification of an order (ss 306M–306N), for instance to prescribe an 'alternative protected rate of pay' that draws on the pay rates set by a different but more appropriate instrument applicable to the host or one of its related entitles; and
- the calculation of termination payments due to a regulated employee who has been covered by an order (s 306NA).

The FWC is empowered to deal with disputes about the operation of regulated labour hire arrangement orders, including by arbitration (ss 306P–306R). It is also required to publish guidelines as to the operation of Part 2-7A, to assist with education and compliance (s 306W).

To safeguard the operation of the new regime, there is also a series of anti-avoidance measures (ss 306S–306V). These prohibit, among other things, any 'scheme' to prevent the FWC from making a regulated labour hire arrangement order, as well as various tactics to avoid the operation of an order, including through short-term employment or labour supply contracts, or the engagement of independent contractors rather than employees.

In terms of how broadly Part 2-7A might operate, it seems clear that the primary target is arrangements in sectors such as mining and aviation, where unions have long claimed that employers have used both external and 'internal' contracting arrangements to escape the effect of union-negotiated pay and conditions. But it remains to be seen whether and to what extent other industries are affected as well.

Forced labour (Chapter 5)

The Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023, introduced in November 2023, proposes to establish an Australian Anti-Slavery Commissioner to oversee compliance with the *Modern Slavery Act 2018* (Cth) (see **5.2**), support victims and take other steps to combat slavery. The Albanese Government is also considering a review of the legislation which recommended extending reporting obligations to organisations with annual revenue of between $50m and the current threshold of $100m, and imposing penalties for a failure to report.

Child labour (Chapter 5)

In June 2023 the federal government formally ratified the Minimum Age Convention, 1973 (No 138), although Australia was already committed to observing its requirements by reason of its status as a 'fundamental' International Labour Organization (**ILO**) standard. There is to be a general minimum age of 15 for employment, though with exceptions for certain kinds of work. The official view is that existing law and practice in Australia already complies with Convention No 138. But given current State and Territory laws (see **5.3**), that is hard to accept, especially in the case of South Australia and

Tasmania. To achieve full compliance, it is likely that changes will be necessary to the laws in most jurisdictions.

In Victoria, changes already made by the *Child Employment (Amendment) Act 2022* (Vic) took effect in 1 July 2023. Among other things, a new employer licensing system now applies in place of the need to obtain permits for individual children.

Foreign labour (Chapter 5)

Besides flagging major changes to Australia's immigration system, the Albanese Government is moving to implement recommendations from the Migrant Workers' Taskforce that had been accepted by the previous LNP government, but never acted upon. The Worker Entitlements Act 2023 has introduced a new s 40B of the FW Act to make it clear that temporary migrant workers are entitled to the rights and protections conferred by the statute, even if working in breach of the *Migration Act 1958* (see **5.4**, **5.17**).

The Migration Amendment (Strengthening Employer Compliance) Act 2024, whose provisions are intended to take effect from July 2024, will create new criminal sanctions for some of the worst forms of exploitation, such as coercing a temporary migrant to breach their visa conditions or to accept an exploitative work arrangement, or inducing an unlawful non-citizen to work. Employers found to have underpaid migrants may have their right to employ such workers suspended, even where no sponsorship is involved. Section 235 of the *Migration Act 1958*, which criminalises performance of work in breach of a visa condition or by an unlawful non-citizen (see **5.4**), will be repealed. Workers will also be encouraged to report abuse without risking their capacity to stay in the country, by formalising a protocol that has been in place between the FWO and the Department of Home Affairs since 2017.

The Albanese Government has also, for the first time since 2013, increased the minimum salary that must be paid to the holder of a visa: see *Migration (Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Amendment Instrument (LIN 23/045) 2023*. The Temporary Skilled Migration Income Threshold has risen from $53,000 to $70,000, as from July 2023.

Gender equality reporting (Chapter 5)

The reporting regime established for larger employers by the *Workplace Gender Equality Act 2012* (see **5.6**) has been extended to cover the Commonwealth public sector, under changes made by the Respect at Work Act 2022.

Further amendments to the 2012 Act have been made by the *Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023*. Among other things, the Workplace Gender Equality Agency (WGEA) must now publish the aggregate gender pay gap information reported by individual employers, rather than just providing industry-level data. The extent of sex-based discrimination and harassment has also been included in the 2012 Act as a gender equality indicator,

although it had already been prescribed as such under regulations. Details as to this and the other indicators are now set out in the *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2023*.

A further change concerns the minimum standards, or 'gender equality standards' as they are now called, which may be prescribed under the 2012 Act. Under s 6 of a new *Workplace Gender Equality (Gender Equality Standards) Instrument 2023*, organisations with at least 500 employees must have policies or strategies in place that seek to achieve specified objectives in relation to all six gender equality indicators. The objectives include, for example, achieving gender equality in the employer's governing body and ensuring equal remuneration for male and female workers.

Unfair work contracts (Chapter 6)

As from 26 August 2024 (or earlier by proclamation), Part 16 of Schedule 1 to the CL No 2 Act 2024 will amend Part 3 of the *Independent Contractors Act 2006* (see **6.14**) to allow applications to a federal court for review of contract terms only from contractors whose earnings *exceed* the contractor high income threshold set under s 15C of the FW Act. Contractors with lower earnings will instead be able to seek review of any unfair terms by the FWC under a new Part 3A-5 of the FW Act, which is closely modelled on the 2006 Act. Applications will need to relate only to terms which, in an employment relationship, would relate to a 'workplace relations matter', as defined in s 536JQ. The FWC's only power will be to set aside or vary such terms, although it is unclear whether the tribunal will be able to do so with retrospective effect.

National Employment Standards (Chapter 7)

As a result of reforms by the Albanese Government, the NES (see **7.4**) have been expanded to include a right to *paid* FDV leave and, for some national system employees at least, a right to superannuation contributions. Both of these changes are dealt with below.

Modern awards (Chapter 7)

The 'four-yearly' review of modern awards commenced in 2014 (see **7.8**) had still not been finalised when, in September 2023, a further (though more limited) review was commenced by the FWC at the request of the Minister for Employment and Workplace Relations. The government had previously given a commitment to take this step, as part of the deal to secure Senator David Pocock's support for the SJBP Act 2022.

The review is being conducted pursuant to the FWC's power under s 576(2)(aa) of the FW Act to promote cooperative and productive workplace relations, and also, to the extent award variations are necessary, s 157. It has four main strands:

1. investigating minimum standards and potential gaps in award coverage in the arts and culture sector;

2. considering whether modern award provisions support the objective (added to s 3(a) of the FW Act by the SJBP Act) of promoting job security;

3. looking at how award terms can impact workers with caring responsibilities; and

4. making awards 'easier to use'.

The review is projected to be completed, at least in terms of the preparation of a final report, by June 2024: see *Modern Awards Review 2023–24* [2023] FWCFB 179. Given the ambitious timeframe, the stated need to avoid any reduction in entitlements, and the tendency of unions and employer groups to defend provisions seen as beneficial to their constituencies, it seems unlikely that there will be any radical moves to simplify awards. But it can be expected that the first three topics will each attract significant reform proposals.

High income threshold (Chapters 7 & 17)

From 1 July 2023, the threshold for both high income guarantees (see **7.20**) and unfair dismissal claims for award/agreement free employees (see **17.13**) has risen to $167,500 per year. That in turn means that the unfair dismissal compensation cap (see **17.23**) is now $83,750.

Bargaining and agreement making – introduction (Chapter 8)

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 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 in September 2022 also opened up the possibility of meeting employer concerns about the complexity of the process for getting agreements approved, while creating new options sought by unions in relation to collective bargaining and dispute resolution.

In the result, the SJBP Act 2022 created 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, some of which took effect immediately and others in June 2023, 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 (Chapter 8)

Introduction

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

The original FW Act allowed two or more employers to make a single-enterprise agreement (**single-EA**) if they were related corporations or conducted a joint venture or common enterprise, or if they obtained a 'single interest employer authorisation' from the FWC (see **8.4**). Alternatively, unrelated employers could make a multi-enterprise agreement (**multi-EA**).

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

While that last proposition remains true, the others must now be qualified. As from 6 June 2023, the SJBP Act has created two new types of multi-EA, a 'supported bargaining agreement' (**SBA**) and a 'single interest employer agreement' (**SIEA**), for which both bargaining orders and protected action are available. The old restrictions remain, however, for any multi-EA that does not fall into either of those categories. An agreement of that type is now 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, under the changes made by Part 23 of Schedule 1 to the SJBP Act a CWA does not need to involve or promote workplace cooperation. At least some of the employees covered by a CWA must have been represented in bargaining by a registered trade union (s 186(2A)), while as discussed further below, CWAs are not available in most of the construction industry (s 186(2B)); although neither of those limitations apply to a greenfields agreement. As explained later on, there is also a process 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 must agree to the change. As under the original Act, however, no bargaining orders or protected industrial action are possible in relation to a proposed CWA (amended ss 229(2), 413(2)).

Supported bargaining agreements

The new system of 'supported bargaining' (**SB**) has been created by Part 20 of Schedule 1 to the SJBP Act. It is based upon, but replaces, the 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 suggested 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 were specifically mentioned as examples. Unions and employers in the childcare sector have become the first to pursue an SBA: see *Application by UWU* [2023] FWCFB 176.

For an SBA to be made, the FWC must first grant an SB authorisation, which can be sought by an affected employer or union, or another bargaining representative (**BR**). The application must specify the employers and employees to be covered by the proposed agreement, which cannot be a greenfields agreement (amended s 242).

Under s 243, the FWC must 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 must be represented by a registered union. The FWC must also authorise SB if the relevant employees are employed in an industry, occupation or sector formally declared eligible by the Minister.

An employer cannot 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 (s 243A).

Once covered by an authorisation, an employer is not permitted to make, or initiate bargaining for, any other type of agreement (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 helps the prospects of gaining a multi-EA in four main ways:

- The FWC may issue a bargaining order, for example to remedy a failure to bargain in good faith (amended s 229(2)).
- The FWC has 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 can 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' enable the FWC to step in and arbitrate if it believes there is no reasonable prospect of the parties reaching agreement (s 235).

In theory, unions already involved in enterprise-level bargaining that has resulted in pay and conditions well above award rates may 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 might apply to proposed SBAs for industries such as retail, fast food or hospitality, where enterprise bargaining has been common for larger employers but not for many smaller ones, and where 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 – can still 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 are now eligible to make a new type of multi-EA, an SIEA.

It is possible to take protected industrial action in relation to an SIEA, if it is not a greenfields agreement (amended s 413(2)). The FWC also has the power to issue bargaining orders (amended s 229(2)) or arbitrate if protracted bargaining fails to produce an outcome (see below), except again in relation to greenfields agreements (s 255A). These features may make the new bargaining stream attractive to unions in sectors for which the SB system is not considered appropriate.

SIE authorisations could previously be obtained only by employers who operated under a single franchise arrangement, or who had successfully applied for a special type of ministerial declaration on the basis of having common interests. In practice, these declarations tended to be granted to bodies such as hospitals or schools funded from a common source and conducting their workplace relations through a central body. Division 10 of Part 2-4 of the FW Act has been amended to open up access to SIE authorisations in two main ways.

The first is that while franchisees are still automatically eligible to seek an authorisation (amended s 249(2)), other employers who agree to bargain together 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 Act previously spoke of it being relevant to consider whether the employers had 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' (s 249(1)(b)(vi)).

The second change is to allow applications by a union or other employee BR (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 (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 (s 249(1B)(d),(1C)); and
- the employer must not be covered by a current enterprise agreement (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 is presumed to meet the common interest and comparability tests, unless the contrary is proved (s 249(1AA),(3AB)). For those with between 20 and 50 employees, the burden of satisfying those requirements is 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 (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 (s 249(1)(b)(i)). The construction industry exclusion discussed below also applies to SIEAs (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 (s 250(3)).

Once covered by an SIE authorisation, an employer is not permitted to make, or initiate bargaining for, any other type of agreement (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 (s 251(1)–(2D)).

A variation to add an employer to an existing 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; that there was no coercion; and that each of the requirements for 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 (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 previous authorisation process (see eg *IEUA v Catholic Education Western Australia* [2023] FWCFB 177). 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 not contrary to 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 enable multi-EAs to be varied by consent to remove an employer or employees. Under 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 also sets 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 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 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, 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 for the SJBP Bill, 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 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 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

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' (ss 243A(4), 249A), nor varied to cover such work (ss 244(5), 251A). In addition, the FWC is not permitted to approve any multi-EA, including a CWA, that would cover employees in relation to this type of work (s 186(2B)), or approve a variation that would have that effect (ss 216BA(3)(a), 216CB(2), 216DC(4)).

General building and construction work is defined for this purpose in 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.

Franchise agreements

Prior to the SJBP Act, if multiple franchisees banded together to seek an SIE authorisation, the outcome would be a single-EA. But as the FW Act stood after the 2022 amendments, such an authorisation could only lead to a multi-EA.

Part 3 of Schedule 1 to the CL No 2 Act 2024 has now expressly brought employers carrying on similar business activities under the same franchise within the definition of 'related employers' in s 172(5A), while preserving the option for such employers to make a multi-EA. Hence franchisees, or unions seeking an agreement with them, now have the option of pursuing either a single- or multi-EA. Choosing the first option enables franchisees to conduct a single ballot to approve an agreement, rather than needing a successful vote at every individual enterprise. It also permits unions to obtain a majority support determination (see **8.20**) on the basis of a single vote or petition, without needing to establish the necessary support at each individual franchisee.

Moving from multi- to single-enterprise agreements

Part 4 of Schedule 1 to the CL No 2 Act has amended s 58 of the FW Act to permit employers and their employees to opt out of an existing SIEA or SBA by making a single-EA, even if the nominal expiry date of the multi-EA has not passed. However, the replacement agreement cannot be approved unless the FWC is satisfied that the affected employees would be better off overall than they would be under the old agreement (s 193(1)(b)).

Changes to the processes for making and varying enterprise agreements (Chapter 8)

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, were they 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 2022 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 serves as a 'notification time' for the proposed agreement (s 173(2)(aa)), protected industrial action is also 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 took effect on 6 June 2023, has made various changes to the rules governing the making and approval of enterprise agreements under the FW Act.

Employers are no longer required to provide employees with a Notice of Employee Representational Rights in relation to a multi-EA, though it is still necessary for single-EAs that are not greenfields agreements (amended s 173(1)).

More generally, s 180 has been amended to remove any 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 do 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 revised s 188. The FWC is also obliged to provide guidance to employers as to how an employer might ensure genuine agreement (s 188B). That guidance is set out in Schedule 1 to the *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023*. Besides restating the access requirements removed from the legislation, albeit with some flexibility as to timing where a union is prepared to agree to a shorter period, the Statement of Principles adds the requirement that there must have been 'an authentic exercise in enterprise agreement-making'.

One new restriction is that an agreement is not 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' (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**).

Section 211 has also been amended to ensure that the new procedural requirements 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 cannot now ask its employees to approve a proposed multi-EA, or a variation to such an agreement, unless one of two conditions is satisfied (ss 180A, 207A). Either *every* registered union involved in the bargaining process must give its consent, or the employer must obtain a 'voting request order' under 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.

Part 4 of Schedule 1 to the CL No 2 Act has created a similar requirement before employees can be asked to approve a single-EA that will replace an SBA or SIEA that is still within its nominal term (FW Act ss 180B, 240B).

The better off overall test

Part 16 of Schedule 1 to the SJBP Act has made a number of changes to the better off overall test (**BOOT**). None affect its operation in any substantial way, but they are intended to clarify and (potentially) simplify its operation.

A new s 193A(2) of the FW Act states 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 operated already (see **8.10**).

To dispel any suggestion that the test has been 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 is now obliged to give 'primary consideration' to any 'common view' held by the employer(s) concerned, their BRs and any registered union BR (s 193A(4)). This discounts 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 may now directly amend a proposed agreement to overcome its concern. However, the amendment must be 'necessary' to address the concern. When specifying an amendment, the FWC must also 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 (s 191A). Although the new provisions do not say so explicitly, it can be assumed that no amendment would be ordered if it would significantly change the operation or effect of the agreement.

The FWC is also 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 (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 permits a 'reconsideration process' to be undertaken by the FWC, if it is satisfied that employees covered by an agreement are engaging in patterns or kinds of work or types of employment to which the FWC had not had regard when it approved the agreement. The tribunal can then 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 now speaks 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 rectify an enterprise agreement on its own initiative, or on application by any employers, employees or employee organisations covered by the agreement.

Model terms

Once they are proclaimed to take effect, the amendments to ss 202, 205 and 737 of the FW Act in Part 5 of Schedule 1 to the CL No 2 Act 2024 will make it the responsibility of the FWC, rather than regulations, to prescribe model terms for enterprise agreements on flexibility, consultation and dispute settlement (see **8.29–8.31**, **9.8**).

Resolution of intractable bargaining disputes (Chapter 8)

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

The amendments in Part 18 of Schedule 1 to the SJBP Act 2022 removed those last two mechanisms and broadened 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 is 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' (**IBD**). Such a declaration may only be sought if the parties have engaged in good faith bargaining, the FWC has previously endeavoured to settle the dispute under s 240, and the BR seeking the IBD 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 an IBD, it may opt to give the parties time to make one last attempt to reach agreement (s 235A). Otherwise, or at the end of those negotiations, it is required to make an 'intractable bargaining workplace determination' under a revamped Division 4 of Part 2-5. After including any provisions on which the parties have already agreed, the tribunal must resolve the remaining matters by arbitration.

In the first case to make it to arbitration under this process, questions arose as to the extent to which parties might be able to renege on previously agreed terms and then seek better outcomes through arbitration: see *UFUA v Fire Rescue Victoria* [2023] FWCFB 180. To address that issue, Part 5A of Schedule 1 to the CL No 2 Act 2024 has amended s 274(3) of the FW Act to make it clear that if terms have been agreed as at the time an IBD application is made, those terms cannot be 'unagreed' in subsequent negotiations. By the time this change was made, however, the FWC had already ruled that in the *UFUA* case there were no agreed terms at all: see *UFUA v Fire Rescue Victoria* [2024] FWCFB 43. Fire Rescue Victoria had consistently indicated that any matters settled during negotiations could only be agreed 'in principle', given the need to seek final approval on funding from the Victorian government.

The 2024 amendments also sought to address concerns that employers might seek to drag out negotiations for a replacement agreement in the hope of getting to arbitration and persuading the FWC to 'roll back' conditions in the old agreement. Under a s 270A, the FWC must ensure that any term in a workplace determination created to address an unresolved matter is no less favourable to employees, or to any union covered by the old agreement, than any term dealing with that matter in the existing instrument. But no comparison is required in relation to terms dealing with wage increases.

Depending on the FWC's willingness to grant IBDs, and on how it approaches the task of arbitrating outcomes, its new powers have the potential to reshape bargaining practices. Use of the new process – or the threat of its use – may be especially significant in relation to proposed SBAs and SIEAs, given the difficulties in successfully negotiating multi-EAs. But it will also be interesting to see whether the prospect of arbitration, and the new rule about conditions needing to be preserved from previous agreements, constrain negotiations. Employers who foresee any prospect of going to arbitration may be advised to make any commitments to provide wage increases or other benefits conditional on securing concessions in return: that is, to insist that nothing is agreed until everything is agreed.

Effect of workplace determinations (Chapter 8)

The Worker Entitlements Act 2023 has added s 278(1A) to the FW Act to make it clear that where a workplace determination (see **8.24**) comes into operation, it permanently displaces any enterprise agreement that previously applied.

Termination and sunsetting of enterprise agreements (Chapter 8)

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 2022 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 has been 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 concerns 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 could 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 amended the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (**TPCA Act**) so that all zombie agreements would automatically cease operation at the end of a 'grace period' of 12 months, expiring on 6 December 2023, unless the FWC ordered otherwise.

The FWC was empowered, on application from an affected employer, employee or industrial association, to extend the life of a zombie agreement for up to four years. But it could generally only do this if satisfied that bargaining for a new agreement was underway but had not yet concluded, that the employee(s) would be better off under the agreement than the relevant modern award, or that it was otherwise reasonable to grant an extension. The FWC has highlighted 'the need to ensure that the integrity of the safety net provided for by the Act and modern awards is not undermined by very old agreements that no longer meet contemporary standards': *Re Pharmelite Pty Ltd* [2024] FWCFB 3 at [29]. Even where a case has been made for an extension, the tribunal has generally preferred to grant shorter periods than those requested, so as to encourage a faster transition to a new agreement, or to award conditions: see eg *Re HSU* [2023] FWCFB 158; *Re Coolangatta Tweed Tenpin Pty Ltd* [2023] FWCFB 207.

Compliance and enforcement (Chapter 9)

Criminal liability for 'wage theft'

Part 4 of the CL Act 2023 will insert a new s 327A into the FW Act, criminalising intentional conduct that results in a failure to pay a 'required amount' to an employee, or on behalf of them or for their benefit. The amount, which can include a superannuation contribution, must be payable under the FW Act, a fair work instrument (including a modern award or enterprise agreement), or a transitional instrument that has effect under the TPCA Act.

Corporate bodies will be liable for punishment in accordance with Part 2.5 of the Criminal Code. The Commonwealth, but not State or Territory governments, could also be held liable for wage theft related offences (s 794B).

The FWO will be able to investigate the possible commission of a wage theft offence, including the various 'related offences' (such as attempting, assisting or inciting commission) for which s 6 of the Crimes Act 1914 and Part 2-4 of the Criminal Code provide. But prosecutions can only be initiated by the Commonwealth Director of Public Prosecutions, on information provided by the Australian Federal Police. Proceedings must be brought within 6 years of the offence allegedly occurring (s 327C).

The punishment for an offence may be imprisonment for up to 10 years, or a fine, or both for individuals. Fines can run up to $1.5 million for individuals, $7.8 million for companies, or three times the underpayment amount if that would be greater.

It will be possible for anyone who self-reports conduct that may amount to the commission of a wage theft offence to reach a 'cooperation agreement' with the FWO (Pt 5-2 Div 3 Subdiv DD). Self-reporting would provide a 'safe harbour' and prevent subsequent prosecution.

Small business employers may also escape prosecution by complying with a Voluntary Small Business Wage Compliance Code declared by the Minister (s 327B), but to be developed by the FWO in conjunction with both employee and employer organisations. The FWO is also required to develop and publish a compliance and enforcement policy, outlining the circumstances in which they would be willing to make a cooperation agreement or accept an enforceable undertaking in relation to admitted contraventions (s 682(1)(da)).

The new wage theft provisions will not commence until the voluntary code has been declared, or in any case not until 1 January 2025.

Labor had previously promised that any wage theft laws it created would not override the existing criminal laws in Victoria and Queensland (see **9.22**). But there was no mention in the CL Act 2023 of any intent to preserve those laws. Without any explicit provision to that effect, the creation of the new federal offence greatly strengthens the argument that the State provisions are inconsistent with the FW Act and thus cannot be used to prosecute national system employers. The Victorian government, while expressing dissatisfaction with this state of affairs, has announced that it will repeal its *Wage Theft Act 2020*. The prosecution of a restaurant owner under that measure, which had prompted a constitutional challenge to the legislation, has also been dropped.

Civil penalties

The *Crimes Amendment (Penalty Unit) Act 2022* amended 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 rose to $275 and then, as a result of an indexation which took effect on 1 July 2023, to $313. Hence for any new breach of a civil remedy provision in the FW Act that carries a maximum penalty of 60 units, individuals can be fined up to $18,780, while for corporations (including registered unions) the maximum is $93,900. On 1 July 2026, and every three years after that, the value of a penalty unit will be indexed to match rises in the Consumer Price Index.

In December 2023 the federal government announced plans for a further increase, from $313 to $330. Assuming the necessary legislation is passed, it is that new figure that would be indexed to rise in 2026.

Part 11 of Schedule 1 to the CL No 2 Act has changed the penalties for contravening any 'selected civil remedy provision' in the FW Act, a term defined in s 12 to include those relating to the NES, modern awards, enterprise agreements, payment of wages, record-keeping and pay slips, and sham contracting. There is a fivefold increase in maximum penalties for these provisions, but only for corporations who are not small business employers (s 546(2AA)).

For contraventions of the same provisions that involve underpayments, applicants also now have the option of seeking a penalty of up to three times the value of the amount underpaid, if higher than the ordinary maximum for the contravention. But again, this only applies to larger employers who are corporations (ss 546(2A), 546A).

A further change has been to the definition of a 'serious contravention' in s 557A (see **9.17**). The concept has been extended to cover reckless and not just knowing contraventions, while the need to show a systemic pattern of conduct has been removed. Recklessness can be established through awareness of a substantial risk that the contravention may occur, together with knowledge of circumstances that make it unjustifiable to take the risk.

Given these changes, larger corporate employers may now face penalties of up to $495,000 for ordinary breaches of a selected provision, and nearly $5 million for serious contraventions – or even higher amounts, if large sums have been underpaid.

Compliance notices and notices to produce

Part 12 of Schedule 1 to the CL No 2 Act has amended s 716 of the FW Act to make it clear that a compliance notice issued by a fair work inspector or the FWO may specifically require a person to calculate (and then pay) an amount that has been underpaid.

There has also been an amendment to s 545(2) to make it clear that a court's powers to remedy a contravention of the legislation may include requiring a person to comply with a compliance notice, or a notice to produce information issued by an inspector or the FWO. A compliance notice is specifically now permitted to require a person to calculate the amount of any underpayment. In addition, under the changes to civil penalties mentioned above, the maximum fine for failing to comply with a compliance notice has doubled, or for larger corporations increased tenfold.

Union rights of entry

Part 16A of Schedule 1 to the CL Act 2023 makes changes to the right of entry provisions in Part 3-4 of the FW Act (see **9.14**). Section 494 has been amended to remove the need for a union official to have a permit when accessing premises in order to meet a request for assistance from a health and

safety representative (see **15.10**). Nor need the official give any notice. But they remain subject to the rules set out in ss 499–504 regarding their conduct while on the premises in question.

Further changes will be introduced by Part 10 of Schedule 1 to the CL No 2 Act, as from July 2024. Section 519 will be amended to make it easier for a permit holder to obtain an exemption from the need to give 24 hours notice of entry to investigate suspected underpayments, provided the FWC is satisfied that any advance notice would hinder an effective investigation. Where an exemption is misused, the FWC will be empowered to restrict the future issue of exemption certificates to the permit holder or their union, or to impose conditions on future entry permits.

A further amendment to s 502 will extend the prohibition on any person hindering or obstructing a permit holder who is exercising entry rights. It will cover acting in an 'improper manner' towards the permit holder, aligning the prohibition with the standards of behaviour expected of the permit holder under s 500.

Other reforms

Part 24 of Schedule 1 to the SJBP Act 2022 amended s 548 of the FW Act from I July 2023 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, the defendant may be ordered to pay the applicant's court filing fees by way of a costs order.

Part 25 of Schedule 1 to the SJBP Act also created a new prohibition 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. Advertisements for piecework jobs must also now specify any periodic rate of pay to which the relevant type of pieceworker is entitled (s 536AA).

Minimum wages (Chapter 10)

The last two annual wage reviews have seen significant increases, as the FWC's Expert Panel has sought to shield lower-paid workers from the effects of high levels of inflation – although the net effect has still been a fall in real wages. The most recent decision lifted base rates in awards by 5.75%: see *Annual Wage Review 2022–23* [2023] FWCFB 3500. The Panel also decided to change how the national minimum wage (see **10.9**) is set. Historically, it has been aligned with the wage rate for the C14 classification in modern awards, the lowest adult rate. But that classification is only meant to be a transitional one for new employees, and appears in only 43 awards (see *Review of certain C14 rates in modern awards* [2023] FWCFB 168). The Expert Panel decided to realign the minimum wage with the C13 rate instead, which is the lowest one for ongoing employment as an adult not engaged in training and with no disability that affects their capacity. That realignment, together with the 5.75% increase, has lifted the minimum wage to $882.80 per week or $23.23 per hour.

Pay deductions (Chapter 10)

With effect from 30 December 2023, the Worker Entitlements Act 2023 has amended s 324 of the FW Act (see **10.24**) to allow employees to authorise pay deductions for amounts that may vary from time to time, provided the deductions are principally for the employee's benefit. This obviates the need for a new authorisation each time the relevant amount changes. The requirements for such deductions to be authorised are set out in a new reg 2.12A of the *Fair Work Regulations 2009*, inserted by the *Fair Work Amendment (Employee Authorised Deductions) Regulations 2023*.

Gender pay equity (Chapter 10)

The SJBP Act 2022 introduced a number of reforms 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 equality' has been added to s 3(a) of the FW Act as a general object of 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'.

In the *Annual Wage Review 2022–23* [2023] FWCFB 3500, the first one affected by these changes, the decision to increase award rates by 5.75% was influenced by the view that this would narrow the gender wage gap, given the predominance of women amongst award-reliant workers. But the Expert Panel also noted evidence of a systemic problem in the way in which modern award minimum wages have historically been set in female-dominated industries, and foreshadowed that research being undertaken into this issue would inform future reviews. To date, that research has identified the need for further analysis of 13 modern awards, used to set pay in 29 large, highly feminised occupations: see FWC, 'Gender pay equity research — Stage 2 research to be conducted', President's Statement, 5 December 2023.

Part 5 of Schedule 1 to the SJBP Act dealt 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 (Chapters 10 & 13)

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 2022 has amended 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, such as the number of hours they work (s 333B(1)).
- Employees are now allowed to ask other employees (of either the same or a different employer) about their remuneration and other relevant conditions (s 333B(2)), though those employees are not compelled to respond. Both this and the freedom to disclose constitute workplace rights (s 333B(3)(a)), 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 has previously been 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 were also given a six-month grace period, ending on 7 June 2023, before being exposed to penalties for including such clauses in new contracts.

Superannuation contributions (Chapter 10)

The Worker Entitlements Act 2023 has included a right to superannuation within the NES, by adding a new Division 10A to Part 2-2 of the FW Act. As from 1 January 2024, there is a statutory obligation on employers to make sufficient contributions to avoid any charge under the superannuation

guarantee legislation (s 116B), something already required by modern awards (see **10.30**). However, the new Division does not apply to referred employers (s 116A). Employers who fail to make required contributions are also protected from liability under the NES or a modern award if they are ordered by the ATO to pay a charge which is ultimately contributed to a fund for the employee's benefit (ss 116C–116D, 149B(2)).

Modern award provisions dealing with superannuation are in the process of being reviewed, to reflect both the new NES provision and the 'stapled super fund reforms' (see **10.31**) introduced in 2021: see *Variation on the Commission's own motion – Modern award superannuation clause review* [2023] FWCFB 264.

Under the timetable established by previous amendments to the *Superannuation Guarantee (Administration) Act 1992* (see **10.29**), the percentage of an employee's ordinary time earnings which must be contributed has risen to 11% as of July 2023.

The Albanese Government has also announced plans to introduce 'payday super' from July 2026. Rather than being able to make quarterly payments, employers would need to make superannuation guarantee contributions on the same day wages are paid.

Flexible work requests (Chapter 11)

As part of the NES, s 65 of the 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 FDV or supporting such a victim (see **11.5**).

As from 6 June 2023, under changes made by Part 11 of Schedule 1 to the SJBP Act 2022, the two categories relating to FDV have been 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 is also now explicitly permitted to request flexible working arrangements (s 65(1A)(aa)).

More generally, the amendments have placed further obligations on employers when they consider an employee's request. The new requirements are based on the model provisions added to modern awards in 2018. Given the legislation, those provisions have now been deleted: *Variation on the Commission's Own Motion – Flexible Work Amendments and Unpaid Parental Leave* [2023] FWCFB 107.

Section 65A now requires employers to discuss any 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 must not only provide written reasons for any refusal, but identify the reasonable business grounds justifying that refusal. They must also 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.

Under the original FW Act, refusals could only be challenged if the employer consented to arbitration, or had previously done so (for example as part of an enterprise agreement). Section 44 has now been amended, however, to remove the bar on remedies being sought from a court for an employer's failure to have reasonable grounds for a refusal, or to comply with any of the other requirements in s 65A.

Section 65B also provides a less formal process for dealing with disputes regarding flexible work arrangements. Where an employer refuses a request for flexible working arrangements, or does not provide the necessary written response within 21 days, the employee and employer must first attempt to settle the dispute at the workplace level. If no resolution is reached, either party can apply to the FWC to resolve the dispute. The FWC is 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, s 65C empowers it 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 may also 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 must consider fairness as between the parties, and it must not make orders unless strictly necessary.

The right to disconnect (Chapter 11)

The idea of giving workers a 'right to disconnect' from the demands of their job, when not actually at work, has become accepted in other countries and is supported by evidence showing adverse health effects from constant connectivity. It was included in Part 8 of Schedule 1 to the CL No 2 Act 2024 at the instigation of the Greens.

The new right is set out in Division 6 of Part 2-9 of the FW Act, which will take effect on 26 August 2024, or a year later for small business employers.

Section 333M(1) will allow an employee to refuse to monitor, read or respond to any contact, or attempted contact, from their employer outside of working hours, unless the refusal is unreasonable. The same will apply to contact or attempted contact from a third party, such as a client, where it relates to the employee's work (s 333M(2)).

When considering whether a refusal is unreasonable, the following non-exhaustive list of matters must be considered (s 333M(3)):

- the reason for the contact;
- how the contact is made or attempted and the level of disruption it causes the employee;

- the extent to which the employee is compensated to remain available to perform work during the period in which the contact is made, or for working additional hours outside of the employee's ordinary hours of work;
- the nature of the employee's role and their level of responsibility;
- the employee's personal circumstances (including family or caring responsibilities).

Refusals will necessarily be unreasonable if the relevant contact is required by law (s 333M(5)).

If there is any dispute about an employee's right to disconnect, whether about the reasonableness of a refusal or otherwise, the issue must first be discussed and attempted to be resolved at the workplace level between the employer and employee. If the matter is not settled, either party or their representative may refer the dispute to the FWC, either to seek a stop order, or to deal with the dispute in some other way (s 333N).

If the application goes beyond a stop order, the tribunal may deal with the dispute as it sees fit, including by conciliation. But it can only arbitrate with the consent of both parties (s 333V).

Stop orders are dealt with in s 333P. At the request of either party, the FWC may issue any order it considers appropriate, other than the payment of money, to:

- prevent the employee from continuing to unreasonably refuse to monitor, read or respond to contact or attempted contract;
- prevent the employer from taking disciplinary or other action against the employee because of the employer's belief that the refusal is unreasonable; or
- prevent the employer from continuing to require the employee to monitor, read or respond to contact or attempted contact.

The FWC may dismiss frivolous or vexatious applications, while employers can apply to the FWC to have such applications dealt with expeditiously. The FWC may also refuse to deal with an application if it involves matters concerning defence, national security or certain covert operations.

Non-compliance with a stop order is a breach of a civil remedy provision (s 333Q). In theory, deliberate non-compliance could also constitute a criminal offence under s 675. The government attempted at the last minute in the Senate to add an amendment precluding that possibility, but was unable to do so without holding up passage of the Bill. To rectify that, an exception to s 675 has been proposed by the Fair Work Amendment Bill 2024.

The right to disconnect is specifically confirmed to be a workplace right for the purposes of the general protections against adverse action in Part 3-1 of the FW Act (s 333M(4)), meaning that employees will have a separate way of seeking remedies for any perceived victimisation.

All modern awards will be required to include a right to disconnect term (s 149F), which is defined in s 12 to mean a term providing for the exercise of the rights set out in s 333M. This should allow rules

tailored to different sectors. Although it is not stated explicitly, the intention is presumably that anyone who complies with the relevant award term can argue that they are acting consistently with the new requirements. The FWC is also required to produce guidelines as to the operation of the new rules (s 333W).

Enterprise agreements are specifically permitted to include terms on the right to disconnect that are more favourable to employees than the new statutory provisions (s 333M(6)).

Unpaid parental leave (Chapter 11)

The Worker Entitlements Act 2023 has made important changes to the NES entitlement to unpaid parental leave (**UPL**) under Division 5 of Part 2-2 of the FW Act (see **11.32**). The amendments, which apply in relation to children born or adopted on or after 1 July 2023, complement reforms that had already been introduced to the paid parental leave scheme, as outlined below. The key changes create greater flexibility for parents, though potentially also operational challenges for employers. They include:

- allowing employees to commence a continuous period of UPL under s 71 at any time in the 24 months following the birth or placement of their child (amended s 71(3));
- raising the amount of flexible UPL that may be taken outside a continuous period of leave from 30 days to 100 days, or any higher maximum prescribed by regulation (amended s 72A(1));
- repealing s 72A(8), so that flexible UPL may be taken before a continuous period of leave;
- allowing flexible UPL to be taken by a pregnant employee during the six weeks before birth (s 72A(2A)–(2C));
- repealing ss 72 and 72A(9), so that employee couples are no longer prohibited from taking more than 8 weeks of UPL concurrently;
- amending ss 75 and 76 to allow parents to request an extension to their period of continuous UPL, regardless of the amount of leave the other parent has taken; and
- ensuring that the provisions in Division 5 are worded in a gender-neutral way, including by renaming special maternity leave (see **11.33**) as special parental leave.

Part 25B of Schedule 1 to the SJBP Act 2022 has also, as from 6 June 2023, altered the framework for responding to a request under s 76 of the FW Act to extend a continuous period of UPL for up to 12 months beyond the employee's original entitlement. The amendments create a decision-making process and dispute resolution procedure similar to that described above in relation to flexible work arrangements. A new s 76A requires employers to provide a response to any extension request within 21 days, either granting the request, or refusing it only after discussion between the employer and employee and a genuine attempt to reach agreement. Employers must have regard to the consequences of refusing the request, 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 that outlined above for flexible work requests, including access to arbitration by the FWC (ss 76B–76C).

Parental leave pay (Chapter 11)

The *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023*, has made 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 amendments 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 weeks, and no more than two weeks (10 working 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 test, 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.

A further measure, the Paid Parental Leave Amendment (More Support for Working Families) Bill 2023, proposes to progressively increase the total amount of PPL as follows:

Entitlement	July 2024	July 2025	July 2026
Total PPL	22 weeks / 110 days	24 weeks / 120 days	26 weeks / 130 days
Maximum for 1 partner	20 weeks / 100 days	21 weeks / 105 days	22 weeks / 110 days
Maximum concurrent	2 weeks / 10 days	4 weeks / 20 days	4 weeks / 20 days

Paid family and domestic violence leave (Chapter 11)

As from 1 February 2023, or 1 August 2023 in the case of small business employers, the NES right to unpaid FDV 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*.

National system employees can take up to 10 days' leave in any 12-month period at their full rate of pay. Once the ILO's Convention concerning Violence and Harassment 2019 (No 190) comes into force in Australia, 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 Convention was ratified on 9 June 2023, which means the extension will take effect 12 months later.

The definition of FDV 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)).

The Respect at Work Act 2022 (Chapter 14)

Express prohibition of hostile working environments

One of the most substantial elements of the Albanese Government's Respect at Work Act was 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'.

A range of circumstances 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 lowers the threshold for finding a contravention.

A positive duty for employers to eliminate sexual harassment

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. The positive duty now requires all employers and other 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.

There are no 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 cannot 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)).

Expansion of the AHRC's investigative powers

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

- conduct inquiries if they 'reasonably suspect' a business or employer is not complying with the positive duty (s 35B);
- provide recommendations to employers or PCBUs to prevent a continued failure to comply with the positive duty (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 (s 35F).

Unlike other parts of the Respect at Work Act, the commencement of these provisions was delayed until 12 December 2023, to give employers and PCBU time to begin assessing and monitoring their compliance with the new positive duty.

Systemic unlawful discrimination

Under Division 4B of Part II of the AHRC Act, the AHRC is also 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

A further amendment to the AHRC Act allows unions and representative groups to make an application in a federal court 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)). The *Respect@Work Report* 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 2022

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.

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

Costs in federal anti-discrimination proceedings (Chapter 14)

The general rule that courts currently apply in anti-discrimination proceedings is to require the unsuccessful party to pay at least some of the successful party's costs.

The Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 proposed a costs protections provision modelled on s 570 of the FW Act (see **9.4**), which would have applied not just to claims under the SD Act, but other Commonwealth anti-discrimination laws. But in the face of criticism that it did not do enough to protect and encourage applicants, the provision was removed before the Bill was passed.

Under the Australian Human Rights Commission Amendment (Costs Protection) Bill 2023, introduced in November 2023, the Albanese Government has switched to what it calls a 'modified equal access' model. A proposed new s 46PSA of the AHRC Act would distinguish between applicants and respondents.

A successful applicant would be entitled to costs, except to the extent that any unreasonable act or omission on their part had caused the respondent to incur costs. By contrast, a respondent would be entitled to a costs order in their favour only if (a) the application was frivolous or vexatious; (b) the applicant had unreasonably caused the respondent to incur costs; or (c) the respondent was successful in the proceedings and did not have either a 'significant power advantage' or 'significant financial or other resources relative to the applicant'.

Anti-discrimination provisions in the Fair Work Act (Chapter 14)

One of the more significant changes made by the SJBP Act 2022 was to include a new prohibition on sexual harassment at work in the FW Act, to add to the provisions in the SD Act. This reform is dealt with separately below.

Under a separate set of amendments in Part 9 of Schedule 1 to the SJBP Act, the anti-discrimination provisions of the FW Act were expanded through a new Part 6-4E 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 Albanese Government initiated consultation over a further set of possible changes to the Act's anti-discrimination provisions. These included the possibility of expressly prohibiting indirect discrimination; defining 'disability'; broadening s 351 to cover all Australian employees and repealing the unlawful termination provisions in Part 6-4 (see **17.26**); clarifying some of the defences in s 351(2); and requiring all discrimination complaints under the FW Act to be the subject of conciliation by the FWC.

In the result, however, the only changes introduced and made by Part 8 of Schedule 1 to the CL Act 2023 involved adding FDV to the list of protected attributes under the FW Act. Employees or prospective employees are now protected from adverse action or dismissal on the basis of being victims of FDV (ss 351(1), 772(1)(f)). Awards and enterprise agreements must not contain terms which discriminate on that basis (ss 153(1), 195(1)). When performing functions or exercising powers under the FW Act, the FWC must also take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of subjection to FDV (s 578).

FW Act prohibition on sexual harassment at work (Chapter 14)

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 2022 has now repealed those amendments, so that Part 6-4B of the FW Act once again covers only bullying. Instead, from 6 March 2023 a new Part 3-5A has made sexual harassment unlawful. Under a dispute resolution framework similar to the one that applies to dismissal-related general protections claims, proceedings for breach of the prohibition must be brought first in the FWC and then, potentially, taken to 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) continues to apply (FW Act Sch 1 cl 60).

The new prohibition

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

Under a s 527D of the FW Act, it is 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.

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

Employers and other organisations are 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 (s 527E).

FWC proceedings

Where a person alleges they have been sexually harassed, they or a union acting on their behalf may initiate proceedings in the FWC (s 527F). This is 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 is empowered to conciliate or mediate any sexual harassment dispute submitted to it. It may also still make a 'stop sexual harassment order', if it considers an applicant needs that protection (s 527J).

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

The FWC can 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 (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 can make orders that an aggrieved person receive compensation or lost remuneration, with no limitation on those amounts. It also has 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 (s 527S(3)).

Court proceedings

Remedies for breach of the new prohibition on sexual harassment are 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 (s 527T(1)).

The time limit for court proceedings is generally 60 days from the issue of the certificate. The court may permit an application to proceed out of time (s 527T(3)), taking into account factors that might 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.

If the FWC issues a stop order, proceedings for breach of that order are not 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 (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 also has the power, unlike the FWC, to impose penalties of up to $93,900 per breach for corporations and $18,780 for individuals.

In accordance with the usual rules for proceedings under the FW Act (see **9.4**), orders for legal costs are 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.

Union delegates' rights (Chapter 14)

Division 1 of Part 7 of Schedule 1 to the CL Act 2023 has amended Part 3-1 of the FW Act to create new rights and protections for employees who act as a 'workplace delegate' for their (registered) union. Under a new s 350C, an employee who is appointed or elected as a delegate or representative in accordance with their union's rules is entitled to:

- represent the industrial interests of current or potential members of the union, including in disputes with the employer;
- reasonably communicate with current or potential members, in relation to their industrial interests;
- for the purpose of representing those interests, have reasonable access to the workplace and any facilities where the relevant enterprise is being carried on; and
- have reasonable access to paid time off, during normal working hours, to undertake training in their role – unless their employer is a small business.

In determining what is reasonable, regard must be had to the size and nature of the enterprise, the resources of the employer, and the facilities available at the enterprise.

Employers are expressly prohibited from unreasonably failing to deal with a union delegate, hindering, obstructing, or preventing the exercise of their rights, or knowingly making misleading representations to them when they are acting as a delegate (s 350A).

From 1 July 2024, each modern award will be required to include a term which regulates the exercise of workplace delegates' rights. This will provide more detail on how the new requirements are to be understood and implemented, whether generally or with specific reference to a particular sector or occupation (s 149E). An enterprise agreement will be deemed to contain the term on delegate rights from its underpinning award, or the most favourable term if there is more than one such award, unless the agreement itself offers greater rights to delegates (s 205A). Compliance with such a term in an industrial instrument will be taken to satisfy the rights afforded to workplace delegates in relation to the issues of communication, access and training (s 350C(4)).

As from 26 August 2024 (or earlier by proclamation), Division 2 of Part 7 of Schedule 1 to the CL No 2 Act 2024 will create similar rights and protections in relation to union delegates for contractors who are performing 'regulated work' (see above) through digital platforms or for road transport businesses.

Workplace safety (Chapter 15)

The CL Act 2023 made a number of changes to federal regulation of work safety and compensation of injured workers, including amendments to:

- the *Work Health and Safety Act 2011*, to increase penalties and introduce an industrial manslaughter offence;
- the *Safety, Rehabilitation and Compensation Act 1988*, to include a rebuttable presumption that any PTSD suffered by 'first responders' employed by the federal or ACT governments (including police officers, paramedics and firefighters) resulted, to a significant degree, from their employment; and
- the *Asbestos Safety and Eradication Agency Act 2013*, to address increases in silicosis and other silica-related diseases.

An industrial manslaughter offence (see **15.7**) has also been introduced in South Australia under the *Work Health and Safety (Industrial Manslaughter) Amendment Act 2023* (SA), and is expected to be proposed in New South Wales in 2024. That would leave Tasmania as the only jurisdiction without such a provision.

Fixed and contingent term employment contracts (Chapter 16)

Part 4 of Schedule 1 to the SJBP Act 2022 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 had little to say otherwise about that topic, with one major exception. This concerns what are persistently called

'fixed term contracts' in the government's explanatory material, although are better understood (for reasons explained below) to mean employment contracts for a fixed *or* contingent term.

Part 10 of Schedule 1 has created significant but complex new limitations on the capacity of employers to offer fixed or contingent term employment for periods of more than two years, as part of a new Division 5 of Part 2-9 of the FW Act. The new provisions took effect on 6 December 2023, at the end of a 12-month grace period to allow employers to adjust their employment practices.

Under 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. Although the term 'identifiable period' is not defined, it is apparent from other provisions in the new Division that it does not merely cover a contract for a specified duration, but also a contract to run for a 'season' of uncertain length, or until the completion of a specified task. So much is confirmed by a note to s 333E(1). It also appears to include a contract which depends on some other type of contingency, such as the availability or maintenance of funding from an external source.

The first and most straightforward situation in which a contract for an identifiable period may not be used is where the period exceeds two years (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 contract with an option to extend or renew the period of employment more than once, or for a total period that exceeds two years (s 333E(3)).

Thirdly, consecutive contracts will be prohibited where each contract is for an identifiable period, the job or position is substantially the same, there is 'substantial continuity' between the contracts, and one of three conditions is satisfied. These are 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 (s 333E(4),(5)). All 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 for the SJBP Bill, 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.

Section 333E(1)(c) currently ensures that the new limitations do not apply to the engagement of a casual employee. But as from 26 August 2024, when the new rules on such employment discussed earlier take effect, the exemption will only apply to casual engagements that last for the duration of a shift. Hence repeated fixed-term casual engagements to perform what is substantially the same job, without a sufficient break in between, may fall foul of the new restrictions.

Section 333F also contains a number of more specific exceptions. These will allow contracts for identifiable periods beyond two years or with more than one renewal 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 $167,500), or a pro rata amount for part-time or partial year employees;
- the work is wholly or partly funded by government or from a prescribed source, the funding is payable for more than two years, and 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 that covers the employee permits fixed or contingent term contracts to be used in circumstances that would otherwise be prohibited by s 333E; or
- the contract falls within a class prescribed by regulation.

Under the *Fair Work Amendment (Fixed Term Contracts) Regulations 2023*, this last power has been exercised to create new and time-limited exceptions for certain contracts entered into between 6 December 2023 and 30 June 2024. These include certain contracts funded by bequests or from philanthropic or charitable sources, or in relation to organised sports, high performance international sporting events, live performance, and higher education.

It is also possible that the FWC may at some point be invited to vary existing awards, either to extend or narrow the circumstances in which fixed or contingent term contracts can be used in particular industries or occupations. At present, provisions of this type are common only in education and certain types of government employment. Award-based exceptions may have effect even for employees to whom an enterprise agreement applies, though those agreements cannot themselves validly create exceptions that go beyond what the award (or the FW Act) would allow.

Entering into any of the prohibited types of contract constitutes a breach of a civil remedy provision. A prohibited contract is still enforceable, except that any term that provides that the contract terminates at the end of the identifiable period has no effect (s 333G). Essentially, the contract is treated as indefinite in nature and thus presumably terminable by reasonable notice (see **16.6**), even in the absence of an expressly agreed notice period.

An employer is also prohibited from ending an employee's employment in accordance with the provisions of their fixed or contingent 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 (s 333H).

Rather than going to court, employees or their unions can notify disputes about the new fixed or contingent term employment provisions to the FWC, providing that they have attempted to resolve the dispute at the workplace level first. The FWC must deal with the dispute, but it can only arbitrate with the consent of all parties (s 333L).

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

Finally, employers must provide each fixed or contingent term employee with a Fixed Term Contract Information Statement prescribed by the FWO when making such a contract (s 333K). That obligation applies even if the contract falls within any of the exceptions listed above.

The new restrictions do not apply to contracts entered into before the amendments take effect, unless a further fixed or contingent term contract is subsequently created that takes the total period of employment over two years (Sch 1 new cl 62). So employers could still offer employment for longer periods up until 6 December 2023; but beyond that date, renewals may not be possible without breaching s 333E.

Given these changes, many organisations will now need to reconsider the practice of engaging certain types of staff on rolling fixed or contingent term contracts, unless they earn over the high income threshold or one of the other exceptions applies.

Small business redundancy protection (Chapter 16)

As noted in **16.26**, the FW Act exempts small business employers from having to make redundancy payments under the NES. It has been a quirk of that provision that when a larger business becomes insolvent, the last employees to lose their jobs could miss out on redundancy pay, because by that time the business had slipped under the 15-employee mark and become a small business. To address that anomaly, Part 2 of Schedule 1 to the CL Act 2023 has amended s 121 of the FW Act to carve out the situation where an employer has only become a small business because of downsizing associated with insolvency.

Protected industrial action (Chapters 8 & 18)

As noted earlier, the changes to the bargaining rules made by the SJBP Act 2022 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 (s 437A). So rather than there being a single ballot of all relevant employees, separate

ballots 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 made 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 (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 (s 414(2)(a)); and
- where a protected action ballot order is made, requiring the FWC to convene an immediate conference for the purpose of conciliation or mediation in relation to the proposed agreement (s 448A), with employees and employers to be prohibited from taking protected action if their BRs do not attend (ss 409(6A), 411(3)).

This last change created concern that if just one BR did not show up for the mandatory conference, this would bar others from taking protected action as well. In response, Part 14A of Schedule 1 to the CL Act 2023 has amended s 409 of the FW Act, so that only the employee BR(s) who *applied* for the relevant ballot order will be required to attend the conciliation conference, in order for subsequent employee claim action to be protected. If any other BR fails to attend the conference, this will not render subsequent employee claim action approved in the relevant ballot unprotected.

The reforms in the CL No 2 Act 2024 will see the addition of a new s 19A into the FW Act, defining the concept of 'industrial action' as it affects regulated work (see above) performed by an employee-like platform worker or a road transport contractor, and covered by a minimum standards order. But this is relevant only to the operation of certain adverse action provisions (see eg s 342(1), table item 6A). Stop orders under s 418 can only be made in relation to action by or affecting employees, and there is no capacity for regulated workers or businesses to take protected industrial action.