Articles

Will Pay Be Better and Jobs More Secure? Analysing the Albanese Government's First Round of Fair Work Reforms

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The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) may be just the first in a series of major reforms to the Fair Work system from the Labor Government elected in 2022. But its content says much about the priorities of what is shaping as an activist administration. Without traversing everything in the nearly 300 pages of amendments, we focus on important reforms concerning the equity and transparency of pay arrangements, the use of fixed or contingent term contracts, requests for flexibility in work arrangements, multi-employer bargaining, the processes for approving or terminating enterprise agreements, protected industrial action, and the resolution of bargaining disputes. Despite the Act's title, it has relatively little to say about job security, with many major reforms in that area still to come. It also remains to be seen how effective the amendments will be in addressing wage stagnation, even if they prompt a resurgence in collective agreement-making. But if there is one strong theme that links many of the reforms, it is that of making workplaces fairer and safer for women. The foregrounding of concerns around gender equality is striking, especially in legislation of this size and scope.

I Introduction

Prior to the May 2022 federal election, there were many calls to strengthen the protection for workers in the Fair Work Act 2009 (Cth) (FW Act) to address issues such as wage stagnation, job insecurity, inequality of various kinds and the decline of collective bargaining.[1] There was no precise equivalent to the 'Change the Rules' campaign by the Australian Council of Trade Unions

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1 See, eg, A Stewart, J Stanford and T Hardy (Eds), *The Wages Crisis in Australia: What It Is and What to Do about It*, University of Adelaide Press, Adelaide, 2018; J Bornstein, 'Employees Are Losing: Have Workplace Laws Gone Too Far?' (2019) 61 *JIR* 438; J Stanford, 'A Turning Point for Labour Market Policy in Australia' (2019) 30 *ELRR* 177; K Walpole, N Kimberley and S McCrystal, 'The Fair Work Act in 2020 Hindsight: The Current Multifaceted Crisis and Prospects for the Future' (2020) 33 *AJLL* 1; M Foley and R Cooper, 'Workplace Gender Equality in the Post-Pandemic Era: Where to Next?' (2021) 63 *JIR* 463; T Kennedy et al, 'Rebuilding Worker Power in Australia through Multi-Employer Bargaining' (2021) 31 *Lab & Ind* 225. See also J Fleming (Ed), *A New Work Relations Architecture: The AIER Model for the Future of Work*, Australian Institute of Employment Rights, Melbourne, 2022.

(ACTU), which featured so prominently in the period before the 2019 poll.[2] Nonetheless, with the labour movement calling for action on 'stalled wage growth and spiralling insecure work',[3] there was a clear expectation that an Albanese Government would make industrial relations reform a priority.

Even those optimistic about progress, however, may have been surprised by the pace and scope of legislative change during Labor's first twelve months in office. In marked contrast to the Liberal and National Parties, which during their nine years in office struggled to articulate policies in this area, let alone implement them,[4] the Albanese Government has well and truly hit the ground running.

The formal platform Labor took into the election was essentially limited to proposals addressing two broad issues, insecure work and gender inequality.[5] During the campaign, however, repeated media questioning also extracted a commitment from Anthony Albanese to back wage rises for award-reliant workers that would fully compensate for inflation,[6] which duly became one of Labor's first acts in office.[7] A further opportunity to expand the new government's agenda came with the 'Jobs + Skills' summit in September 2022, which brought business, unions and community groups together to discuss key policy challenges. This gave new Workplace Relations Minister Tony Burke the cover needed to announce a fresh set of commitments, notably to address concerns about the framework for bargaining and agreement-making under the FW Act. Despite saying little about this ahead of the election, it had always seemed likely that Labor would address concerns about employer 'misuse' of the rules governing enterprise agreements.[8] But discussions at the summit also opened up the possibility of dealing with employer complaints about the complexity of the process for getting agreements approved, while creating new options for collective bargaining and dispute resolution in certain industries. Significantly, one of the 'outcomes' announced from the summit was a pledge to remove 'unnecessary limitations on access to single and multi-employer agreements'.[9]

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2 See A Forsyth, 'Ten Years of the Fair Work Act: (More) Testing Times for Australia's Unions' (2020) 33 *AJLL* 122 at 132–6 (Ten Years of the Fair Work Act).

3 'FWC "Balance" among Federal Election Battlegrounds', *Workplace Express*, 11 April 2022. See also Australian Council of Trade Unions (ACTU), *Morrison's Record of Failure on Secure Jobs*, Report, ACTU, Melbourne, April 2022.

4 See A Stewart et al, 'The (Omni)bus That Broke Down: Changes to Casual Employment and the Remnants of the Coalition's Industrial Relations Agenda' (2021) 34 *AJLL* 132.

5 Australian Labor Party (ALP), *Secure Australian Jobs Plan*, Report, ALP, Canberra, 15 November 2021 (*Secure Australian Jobs Plan*); ALP, *Australian Women: Labor's Plan for a Better Future*, Report, ALP, Canberra, 2022.

6 D Crowe and A Thompson, 'Albanese Sparks Political Storm by Backing Wage Rise to Match Inflation', *The Sydney Morning Herald*, 10 May 2022.

7 J Chalmers, A Albanese and T Burke, *Government's Annual Wage Review Submission*, Media Release, 3 June 2022. Increases of between 4.6% and 5.2% were ultimately awarded: *Re Annual Wage Review 2021–22* (2022) 315 IR 367; [2022] FWCFB 3500.

8 See, eg, Senate Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act 2009*, Parliament of Australia, Canberra, September 2017 (Senate Report).

9 Australian Government, *Jobs + Skills Summit: Outcomes*, Report, Australian Government, Canberra, 1–2 September 2022.

In terms of implementing its policies, the new government faced a Senate in which (as matters initially stood) any initiative supported by the Greens required just one extra crossbench vote to pass.[10] Many of Labor's initiatives since taking office have, in fact, been able to garner bipartisan support, including a statutory right to family and domestic violence leave,[11] as well as changes to anti-discrimination laws,[12] paid parental leave,[13] gender equity reporting obligations for large employers[14] and work health and safety regulation.[15] But the first major test of the government's negotiating skills came with the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) (SJBP Bill). Tabled on 27 October 2022, this sought to give effect to some (though far from all) of the government's more contentious policy commitments.

When the government introduced no less than 150 amendments of its own in the House of Representatives,[16] it became apparent that the drafting of the Bill had been somewhat rushed. Nevertheless, while further amendments were agreed to in the Senate to secure the support of the Greens and independent Senator David Pocock,[17] the Bill took only six weeks to pass. On 6 December, it received royal assent, becoming the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) (SJBP Act).

Running to nearly 300 pages and with staggered commencement dates that saw some amendments taking immediate effect and others delayed until various dates in 2023, the SJBP Act covers a lot of policy territory. Among other things, it has given effect to Labor's commitment to abolish the Registered Organisations Commission (ROC) and the Australian Building and Construction Commission (ABCC), as well as removing the special rules on bargaining and industrial action formerly found in the Building and

10 That figure has now risen to two since Senator Lidia Thorpe's decision in February 2023 to leave the Greens and sit as an independent.

11 Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022 (Cth).

12 Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 (Cth). This gave effect to recommendations that the Morrison Government had failed to implement from the Australian Human Rights Commission (AHRC): K Jenkins, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces,* Report, AHRC, Sydney, 29 January 2020. For earlier reforms based on the Respect@Work report, see Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 (Cth).

13 Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023 (Cth).

14 Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023 (Cth) (Workplace Gender Equality Amendment Act).

15 Work Health and Safety Amendment Act 2023 (Cth).

16 'Labor Releases Further Amendments to Secure Jobs Bill', *Workplace Express*, 9 November 2022 (Labor Releases Further Amendments to Secure Jobs Bill).

17 J Massola, 'Labor Strikes Deal with David Pocock to Pass IR Laws', *The Sydney Morning Herald*, 27 November 2022. Senator David Pocock insisted, as part of the price for his support, that the government agree to a 'review' of the modern awards system. At the time of writing, no details had emerged on what this might involve, although it may be noted that the first of what was originally envisaged as a series of four-yearly reviews of modern awards, commenced in 2014, is still running in its tenth year: see *Re 4 Yearly Review of Modern Awards* (2022) 319 IR 54; [2022] FWCFB 189.

Construction Industry (Improving Productivity) Act 2016 (Cth).[18] The ROC's responsibilities for overseeing the management of registered unions and employer associations have been returned to the Fair Work Commission (FWC) and its General Manager,[19] while the Fair Work Ombudsman (FWO) has been tasked with overseeing compliance with the FW Act in the building industry, as well as taking over court proceedings initiated by the ABCC.[20] There is also a National Construction Industry Forum to provide advice to government about matters such as workplace relations, skills and training, safety, productivity, diversity and gender equality, and industry culture.[21] In addition, the SJBP Act has amended the FW Act to add a prohibition on work-related sexual harassment,[22] extend the scope of its anti-discrimination provisions,[23] expand access to the small claims procedure in s 548 for recovering underpayments,[24] prohibit the advertisement of pay rates below the legal minimum,[25] and 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.[26]

In this article, however, we have chosen to concentrate on explaining and analysing the provisions of the SJBP Act that:

- seek to address the lack of pay equity for female workers;
- make it harder to maintain secrecy about pay rates;
- restrict the use of fixed term and contingent employment;
- broaden the capacity for employees to request flexible working arrangements and extend parental leave;
- expand the options for multi-employer bargaining;
- simplify the processes for making enterprise agreements;
- extend access to protected industrial action and alter the process for taking it;
- make it easier for the FWC to resolve 'intractable' bargaining disputes; and

18 Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) (SJBP Act) Sch 1 Parts 1, 3. The 2016 Act has been renamed the Federal Safety Commissioner Act 2022 (Cth). The Code for the Tendering and Performance of Building Work 2016 (Cth) has also been repealed.

19 For background on the Registered Organisations Commission and its creation in 2016, see A Forsyth, 'Law, Politics and Ideology: The Regulatory Response to Trade Union Corruption in Australia' (2017) 40 *UNSWLJ* 1336. The Fair Work (Registered Organisations) Act 2009 (Cth) has also been amended to ensure that the Fair Work Commission (FWC) can exercise the investigative, compliance, monitoring and enforcement powers set out in the Regulatory Powers (Standard Provisions) Act 2014 (Cth): SJBP Act Sch 1 Part 2.

20 See 'FWO Less Likely than ABCC to Visit Sites: Parker', *Workplace Express*, 16 February 2023.

21 SJBP Act Sch 1 Part 25A.

22 Ibid, at Sch 1 Part 8.

23 Ibid, at Sch 1 Part 9.

24 Ibid, at Sch 1 Part 24.

25 Ibid, at Sch 1 Part 25.

26 Ibid, at Sch 1 Part 25AA.

- change the rules for the termination and sunsetting of enterprise agreements.

The Albanese Government is far from finished. A second tranche of amendments was introduced to Parliament on 29 March 2023 and passed three months later. The Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023 (Cth) makes the right to receive superannuation contributions part of the National Employment Standards (NES), ensures that temporary migrants working in breach of their visa obligations can still enforce entitlements under the FW Act, and creates greater flexibility in the taking of unpaid parental leave under the NES. It also includes other changes in relation to the authorisation of pay deductions, the interaction between workplace determinations and enterprise agreements, and long service leave entitlements for casuals in the black coal mining industry. Consultations have also been conducted on a third and even more significant set of reforms to be pursued in the second half of 2023. These include changes to the definition of casual employment, a 'same job same pay' principle for labour hire, the criminalisation of 'wage theft', and new powers for the FWC to regulate 'employee-like' forms of work.[27]

For now, however, our attention remains on the matters listed above — and on whether the SJBP Act can be said to live up to its name and herald both higher pay and greater job security.

II Pay Equity and Transparency

The pay gap between male and female workers in Australia remains stubbornly high. The most recent data from the Australian Bureau of Statistics (ABS) show a difference of 13.3% in average weekly ordinary-time earnings for full-time employees but a much higher 28.1% for total weekly earnings.[28] Even in sectors with a high share of female employment, men tend to be paid more. In 95% of occupations, men have a higher average salary.[29]

The SJBP Act has introduced a number of reforms to help close the gender pay gap. Under changes made by Part 4 of Sch 1, the promotion of 'gender equality' has been added to s 3(a) of the FW Act as an object to the legislation. There are changes as well to the modern awards objective in s 134(1) and the minimum wages objective in s 284(1) to place a greater emphasis on the need to eliminate 'gender-based undervaluation of work'. The modern awards objective also now speaks of the need to provide 'workplace conditions that facilitate women's full economic participation'. In the 2022–23 annual wage review, the FWC's expert panel described the reference to undervaluation as

27 See Department of Employment and Workplace Relations, *Workplace Reform*, Report, 17 August 2023, at <www.dewr.gov.au/2023-workplace-reform-consultations> (accessed 1 September 2023). The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth), tabled on 4 September 2023, came too late to be dealt with in this article.

28 Australian Bureau of Statistics (ABS), *Average Weekly Earnings, Australia, November 2022*, Cat No 6302.0, ABS, Canberra, 23 February 2023.

29 E Littleton and G Jericho, *The Times They Aren't A-Changin (Enough): It Is Past Time to Value Women's Work Equally*, Report, Centre for Future Work, Australia Institute, Canberra, March 2023, at 16–24.

adding 'an important new dimension' to the review.[30] Its decision to increase award rates by 5.75% was influenced by a view that this would narrow the gender wage gap, given the predominance of women amongst award-reliant workers.[31] But it also noted evidence that 'there may be a systemic problem, of pre-FW Act origins, concerning the way in which modern award minimum wages in female-dominated industries have been set'[32] and foreshadowed that research being undertaken into this issue will inform future reviews.[33]

The amendments also seek to promote the objective of pay equity through four further sets of changes, considered below, concerning equal remuneration orders (ER orders), work value claims, a new set of expert panels for the FWC and, perhaps most innovatively, restrictions on the use of pay secrecy obligations. A further reform that might be categorised as supporting pay equity, given its potential to deliver wage rises in low-paid, feminised sectors, is the introduction of 'supported bargaining'. That is discussed separately below in Part V.

Equal remuneration orders

Part 2-7 of the FW Act was intended to help address the objective of pay equity. In place of what had proved ineffective provisions in earlier federal legislation, it empowered what is now the FWC to make orders to ensure 'equal remuneration for men and women workers for work of equal or comparable value'. In 2012, this power was used to award significant pay increases to workers in the female-dominated social and community services sector.[34] But in 2015, the FWC reinterpreted Part 2-7 to mean that ER orders for a group of (mostly) female workers could only be made where it could be shown that they were earning less than a 'comparator' group of mostly male employees.[35] The inability to identify an appropriate comparison ultimately doomed applications for ER orders in relation to various types of childcare worker,[36] although significant pay increases for early childhood teachers were ultimately awarded on work value grounds,[37] on the basis discussed in the next section.

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30 *Re Annual Wage Review 2022–23* [2023] FWCFB 3500, at [40].

31 Ibid, at [175], [178].

32 Ibid, at [133].

33 Ibid, at [137]–[139].

34 *Re Equal Remuneration Case* (2011) 208 IR 345; [2011] FWAFB 2700; *Re Equal Remuneration Case [No 2]* (2012) 208 IR 446; [2012] FWAFB 1000; *Equal Remuneration Case [No 3]* (2012) 223 IR 410; [2012] FWAFB 5184. See further F Macdonald and S Charlesworth, 'Equal Pay under the *Fair Work Act 2009* (Cth): Mainstreamed or Marginalised?' (2013) 36 *UNSWLJ* 563; M Smith and A Stewart, 'Equal Remuneration and the Social and Community Services Case: Progress or Diversion on the Road to Pay Equity?' (2014) 27 *AJLL* 31.

35 *Re Equal Remuneration Decision 2015* (2015) 256 IR 362; [2015] FWCFB 8200 (*Re Equal Remuneration Decision 2015*). For critical analysis, see M Smith and A Stewart, 'Shall I Compare Thee to a Fitter and Turner? The Role of Comparators in Pay Equity Regulation' (2017) 30 *AJLL* 113 (Shall I Compare Thee to a Fitter and Turner?).

36 *Re United Voice and Australian Education Union* (2018) 274 IR 1; [2018] FWCFB 177; *Re Independent Education Union of Australia* [2021] FWCFB 2051.

37 *Re Independent Education Union of Australia* [2021] FWCFB 6021; [2021] FWCFB 6038 (*Re Independent Education Union of Australia 2021*).

The SJBP Act has now amended Part 2-7 to remove limitations that had been inherent in the original provisions or (on one view) created by the 2015 ruling. The FWC 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,[38] a lack of equal remuneration may be identified purely on the basis that the work of a group of employees has 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.

Work value claims

Section 157(2) permits the FWC to vary the minimum wage rates set by modern awards on 'work value' grounds, even outside the annual wage reviews. This involves considering the nature of the work, the skills or qualifications it requires, or the conditions under which it is performed. Historically, it was necessary in work value cases to show that something had changed since the last time the work had been formally valued.[39] But as part of its 2015 reconsideration of the ER order provisions in Part 2-7, a Full Bench of the FWC made it clear that the FW Act imposes 'no datum point requirement'.[40] So long as it can be shown that the relevant work is not properly valued (and indeed may never have been) for reasons based on gender or otherwise, an adjustment may be ordered. This proved to be the key for the successful claim mentioned above in relation to early childhood teachers.[41] It has also been the basis of an application in respect of the aged care sector that, pending a final determination, has seen some employees granted an interim wage increase of 15%,[42] which the Albanese Government has agreed to fund.[43]

The SJBP Act has now removed any doubt about that interpretation by inserting a new subsection (2B) into s 157. This states 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'.[44]

The new expert panels

Prior to the recent amendments, expert panels within the FWC were required only to conduct the annual wage review and (in theory) review award terms

38 See Industrial Relations Act 2016 (Qld) chap 5 and especially s 248; see further Smith and Stewart, 'Shall I Compare Thee to a Fitter and Turner?', above n 35, at 125–7.

39 See, eg, *Re Safety Net Review — Wages, June 2005* (2005) 142 IR 1, at 125.

40 *Re Equal Remuneration Decision 2015*, above n 35, at [292].

41 *Re Independent Education Union of Australia* 2021, above n 37.

42 *Re Aged Care Award 2010* (2022) 319 IR 127; [2022] FWCFB 200; [2023] FWCFB 93.

43 M Grattan, 'Government to Spend $11.3 Billion over Four Years to Fund 15% Pay Rise for Aged Care Workers', *The Conversation*, 3 May 2023.

44 As to the kind of evidence that may be required for this purpose, see I Ross, *Occupational Segregation and Gender Undervaluation*, President's Statement, FWC, Melbourne, 4 November 2022.

dealing with default superannuation funds.[45] But Part 6 of Sch 1 to the SJBP Act has now amended the FW Act to provide for an expert panel, rather than a regular Full Bench, to undertake three additional functions.

An expert panel for pay equity is now responsible for dealing with any claims for an ER order or any work value claim under s 157 that requires consideration of 'substantive gender pay equity matters' (new s 617(6)–(7)). The panel must have a majority of members with expertise in gender pay equity and/or anti-discrimination (new s 620(1B), (2A)). These may be regular members of the FWC and/or outside specialists appointed on a part-time basis.

There is also a second new expert panel for the care and community sector to deal with any application under s 157 to make, vary or revoke a modern award in that sector (new s 617(8)). No definition of 'care and community' is given. The Explanatory Memorandum for the SJBP Bill specifically referenced the aged care, early childhood education and care, and disability care sectors but added that this was 'not intended to be an exhaustive list'.[46] Once again, the panel will need to have a majority of members with knowledge and experience of the sector (new s 620(1C),(2A)). A third panel must be constituted to deal with pay equity claims relating to this sector, once more with an appropriate mix of expertise (new ss 617(9)–(10), 620(1D)).

Since these provisions took effect, a number of matters have been allocated to the new expert panels.[47] The government has also appointed a number of new part-time expert panel members, two of whom (Professor Marian Baird and Dr Leonora Risse) are academics with specific expertise in gender equality and pay equity.[48]

Prohibiting pay secrecy

The practice of maintaining confidentiality over individual pay arrangements within an organisation may both hide and perpetuate inequities in the remuneration of male and female workers, especially in managerial and professional jobs. To address that concern, an increasing number of countries have sought in various ways to promote greater transparency over pay arrangements, most commonly by imposing reporting or pay audit obligations on larger employers.[49] Australia already has this sort of reporting regime under the Workplace Gender Equality Act 2012 (Cth), which, as noted earlier, has

45 In practice, this second responsibility has never been exercised due to the refusal of successive governments to appoint the specialist part-time members needed to sit on the panel: see 'Industry Super Sector Calls for Resumption of Default Fund Allocation', *Workplace Express*, 6 November 2018.

46 Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth), Parliament of Australia, 2022 (SJBP EM) at para 380.

47 A Hatcher, *Pay Equity and the Care and Community Sector: Expert Panels*, President's Statement, FWC, Sydney, 14 March 2023.

48 'Burke Names FWC Expert Panel Members', *Workplace Express*, 6 March 2023.

49 For overviews, see Organisation for Economic Co-operation and Development (OECD), *Can Pay Transparency Tools Close the Gender Wage Gap?*, Report, OECD Employment, Labour and Social Affairs Policy Briefs, November 2021; International Labour Office (ILO), *Pay Transparency Legislation: Implications for Employers' and Workers' Organizations*, Report, ILO, Geneva, 21 June 2022.

recently been strengthened.[50] But as a number of US states have already done,[51] Part 7 of Sch 1 to the SJBP Act has now gone further by seeking to prohibit pay secrecy.[52]

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

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

The term 'remuneration' is not defined in the FW Act. But it is generally understood to cover not just wages or salary but 'all other monetary and non-monetary compensation paid as consideration for service under an employment contract'.[53] That would plainly include bonuses, incentives or share schemes.[54] As for terms and conditions that are 'necessary to determine remuneration', a note to s 333B(1)(b) suggests that this would permit disclosures or questions about hours of work, although that is a 'non-exhaustive example'.[55]

Under the transitional provisions in cl 59 of Sch 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. This could potentially spark

50 Workplace Gender Equality Amendment Act, above n 14.

51 See, eg, M Kim, 'Pay Secrecy and the Gender Wage Gap in the United States' (2015) 54 *Ind Rel* 648.

52 According to Kim, above n 51, the US laws have had a positive effect in closing the gender pay gap. But her findings have been contested: see, eg, I Burn and K Kettler, 'The More You Know, the Better You're Paid? Evidence from Pay Secrecy Bans for Managers' (2019) 52 *Lab Econ* 92.

53 *Re Equal Remuneration Decision 2015*, above n 35, at [276], citing *Oliveri v Australian Industrial Relations Commission* (2005) 145 IR 120, at [25]; [2005] FCAFC 36; *Rofin Australia Pty Ltd v Newton* (1997) 78 IR 78, at 81. See also *Australian Education Union v Victoria (Department of Education and Early Childhood Development)* (2015) 239 FCR 461, at [36]; 333 ALR 1; [2015] FCA 1196.

54 See *Re Equal Remuneration Decision 2015*, above n 35, at [289].

55 SJBP EM, above n 46, at para 411.

some interesting arguments as to whether a variation has occurred when, for example, a wage rise is granted, or the employee is promoted, or their duties are otherwise altered. If the contract in question is worded in such a way as to permit or accommodate the relevant change, there may technically be no variation. But if not, any continuation of a pay secrecy obligation would become unlawful. Clause 59(6) gives employers a six-month grace period (that is, until 7 June 2023) before they can be penalised for including an invalid term in a contract. But they could still be liable even before that date for taking adverse action against an employee for exercising or proposing to exercise one of their new rights.

It is hard to be sure just how much of a practical impact these new rules will have. In many organisations and professions, there is a culture of secrecy around individual pay that seems likely to continue, even if it cannot be buttressed by contractual restraints. Employers will need to be careful, however, not to seek too overtly to encourage the maintenance of that state of affairs. For example, an exhortation to 'respect the privacy' of other employees, as part of a policy that is not incorporated into employment contracts, may not breach s 333D. But it could potentially be regarded as misleading employees as to their workplace rights, in breach of s 345.

III Limiting Fixed and Contingent Term Employment

Part 4 of Sch 1 to the SJBP Act has amended s 3(a) of the FW Act to make promoting 'job security' one of the stated objects of the legislation. Despite its title, however, the SJBP Act has little to say otherwise about that topic, with one major exception: a new set of restrictions on 'fixed term' employment.

According to the ABS, only 3.4% of Australian employees are engaged for a specified period of time, a figure that has remained fairly stable over the past decade.[56] Nevertheless, there has been a persistent concern about the misuse of such contracts for jobs that should really be seen as ongoing.[57] As Labor's policy on secure work put it, in promising to limit their use:

> Fixed term contracts have a legitimate purpose. They allow employers to bring in staff to add skills and expertise required for a specific time period or project, or to manage an expected but temporary surge in work. But back to back, fixed term contracts have become another form of insecure work. For employees on these contracts, the lack of permanency and security makes it harder for them to plan for their future, including securing a bank loan or mortgage.[58]

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56 ABS, *Characteristics of Employment, Australia, August 2022*, Cat No 6333.0, ABS Canberra, 14 December 2022. It has previously been suggested that ABS data may significantly understate the prevalence of fixed term employment: see, eg, Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market*, Research Paper, Productivity Commission, Melbourne, May 2006, at 130–2.

57 See, eg, L Alexander, *Understanding Insecure Work in Australia*, McKell Institute Queensland, Discussion Paper, Sydney, 2019, at 5–7.

58 ALP, *Secure Australian Jobs Plan*, above n 5.

To address this problem, a new Div 5 of Part 2-9 of the FW Act is due to take effect on 6 December 2023, giving employers a 12-month grace period in which to adjust their employment practices.[59]

It should be emphasised from the outset that while the phrase 'fixed term contract(s)' appears in some of the new provisions, the headings throughout the Division and the explanatory materials prepared by the government, that is *not* the term used in the key sections outlined below. They speak instead of a contract for an *identifiable period*. That phrase is not defined — and nor, curiously, was it mentioned even once in the relevant section of the Explanatory Memorandum.[60] An 'identifiable' period is plainly broader than the concept of a 'specified period', a term used elsewhere in the legislation,[61] and which could easily have been adopted here had the intention been to catch only what would conventionally be understood as a fixed term contract. It must, by implication, include a loosely defined period such as a season, which may vary according to custom or circumstances, or a period whose duration is contingent on the occurrence or non-occurrence of some sort of event, such as the completion of a task or a project, or the non-renewal of funding or a head contract. So much is evident from some of the exceptions in s 333F outlined below, as well as Note 2 to s 333E(1):

> A contract referred to in this subsection includes (and is not limited to) a contract of employment for a specified period of time, for a specified task or for the duration of a specified season.

Strictly speaking, this note could be read as applying only to this one subsection, not the rest of the Division. But that would make little sense. In any event, the textual indications in favour of a broad interpretation throughout the Division are too strong to ignore.

Moving then to the restrictions, s 333E(1) will prohibit an employer from entering into an employment contract with a term which provides for the contract to terminate at the end of an identifiable period in any of three situations.

The first and most straightforward is where the period exceeds two years (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 may infringe the prohibition, even though it is terminable on notice.

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 fixed or maximum term contracts will be prohibited where each contract is for an identifiable period, the job or position is substantially the same in both the past and current contracts, and there is 'substantial continuity' between the contracts. It is enough that the total period

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59 The commencement provisions in s 2 of the SJBP Act would permit an earlier proclamation. But the government has made it clear that the full 12 months will pass before the restrictions take effect: 'Secure Jobs' Fixed-Term Limits Won't Apply for 12 Months: Burke', *Workplace Express*, 6 December 2022.

60 SJBP EM, above n 46, at paras 567–608.

61 See, eg, Fair Work Act 2009 (Cth) (FW Act) ss 66A(2), 123(1)(a), 386(2)(a).

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)). This means that the prohibition will apply when the employment relationship exceeds two contracts, even if it does not exceed two years in duration. According to the Explanatory Memorandum, the reference to substantial continuity was 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.[62]

Importantly, however, s 333(1)(c) makes it clear that the main prohibition does not apply to the engagement of a casual employee. The Explanatory Memorandum explained that this was 'to avoid unintended consequences, for example, in circumstances where casuals enter into contracts on a shift-by-shift basis'.[63] But that begs a question left unresolved by the Morrison Government's 2021 amendments to 'clarify' the definition of casual employment.[64] If a short fixed term contract can be casual, but longer ones are assumed not to be,[65] where is the dividing line between the two?[66] Can university teachers, for example, continue to be given casual contracts that operate for the duration of a semester or an academic year and require a commitment to a wholly predictable pattern of work? Is merely calling these contracts 'casual' enough to take them outside the new restrictions?

Section 333F contains a number of more specific exceptions, which employers would bear the burden of establishing. These will allow identifiable term contracts beyond two years where:

- the employee is contracted to 'perform only a distinct and identifiable task involving specialised skills';
- there is a training arrangement;
- the contract is to accommodate essential work during an emergency or a period of peak demand or to cover a temporary absence of another employee (such as for illness or parental leave);
- the contract provides for payment in excess of the high income threshold (currently $167,500 per year) 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 rules of a corporation;
- a modern award that covers the employee permits fixed term contracts

62 SJBP EM, above n 46, at para 581.
63 Ibid, at para 577.
64 Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth).
65 See. eg, *Casual Terms Award Review 2021* [2021] FWCFB 4144, at [137].
66 Stewart et al, above n 4, at 147–8.

to be used in circumstances that would otherwise be prohibited by s 333E;[67] or

- the contract falls within a class prescribed by regulation.

It seems likely that this last power will be exercised to create new exceptions as the need arises. It would not be a surprise, for example, if exceptions were created for employees brought to Australia on temporary skills shortage visas granted for more than two years, or for employers in sectors that routinely use fixed term contracts (such as professional team sports). It is also possible that the FWC may be invited to vary existing awards, either to extend or narrow the circumstances in which fixed term contracts can be used in particular industries or occupations.[68] At present, such provisions are relatively rare,[69] but that might change if the FWC can be persuaded to accept an industry or sector's 'need' for such engagements. There may also be disagreement and potentially litigation over the scope of the skilled worker exception, in particular how far it is confined by the requirement of a 'distinct and identifiable task'.

Entering into any of the prohibited types of contract after the amendments take effect will constitute a breach of a civil remedy provision. A prohibited contract will still be enforceable, except that any term that provides that the contract terminates at the end of the fixed term will have no effect (s 333G). Essentially, the contract will be treated as indefinite in nature[70] and thus presumably terminable by reasonable notice, even in the absence of an expressly agreed notice period.[71] An employer will also be prohibited from ending an employee's employment in accordance with the terms of their fixed term contract and engaging another employee to do either the same or similar work where such a decision is made in order to avoid the operation of the new restrictions (s 333H).

Rather than going to court, employees will have the option of raising disputes about the new fixed term employment provisions with the FWC,

67 The wording of this exception, in s 333F(1)(h), suggests it could apply to *any* employee covered by an award of this type, regardless of whether they are engaged under a type of contract permitted by the award. That this is not the intent is evident from the explanation that the exception is to apply where 'the employer is permitted to enter into *the fixed term contract* by a term specified in a modern award that covers the employee': SJBP EM, above n 46, at para 583 (emphasis added).

68 The power to do this is confirmed by a new s 141A.

69 See, eg, *Educational Services (Teachers) Award 2020 [MA000077]* (at 31 July 2023) cl 13; *Higher Education Industry—Academic Staff—Award 2020 [MA000006]* (at 31 July 2023) cl 11; *Higher Education Industry—General Staff—Award 2020 [MA000007]* (at 31 July 2023) cl 11. The other current instances are mostly found in government employment or in the awards for former government enterprises: see, eg, *Australia Post Enterprise Award 2015 [MA000137]* (at 30 June 2023) cl 18.

70 This reverses the approach previously taken to employees wrongly engaged on a fixed term contract in breach of a limitation in an industrial instrument: see, eg, *Independent Education Union of Australia v Australian International Academy of Education Inc* [2012] FCA 1512.

71 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, at 423, 429, 446; 131 ALR 422; [1995] HCA 24 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, at 190; 312 ALR 356; [2014] HCA 32. Termination of such a contract would also potentially expose the employer to an unfair dismissal claim, assuming the employee was eligible to bring one. The employer could not, in that situation, rely on the protection afforded by s 386(2)(a) in relation to the expiry of a contract for a specified period, task or season.

providing that they have attempted to resolve the dispute at the workplace level first. The tribunal will be obliged to deal with the dispute, but it will only be able to do so by arbitration with the consent of all parties (s 333L). The FWC will also be empowered to vary an existing enterprise agreement to resolve any inconsistency, uncertainty or difficulty created by the new fixed term contract provisions (Sch 1 cl 63). Enterprise agreements, it may be noted, will be able to impose tighter limitations than the new statutory restrictions. But unlike awards, they cannot create exceptions. So, where an agreement is in place in (say) the higher education sector, it will primarily be necessary to refer to the underpinning awards for any exceptions.[72]

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

In terms of timing, the new restrictions will not apply to contracts entered into before the amendments take effect unless a further fixed term contract is subsequently created that takes the total period of employment over two years (Sch 1 cl 62). So, employers will still be able to offer fixed term 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 term, seasonal or task-based contracts. In some sectors, such as education, awards will still permit such contracts, at least for certain types of staff. Managers and professionals earning over the high income threshold will also be unaffected. But for smaller businesses and non-profit organisations in particular, greater use may need to be made of indefinite contracts with provision for termination on notice. The same seems likely to apply to staff performing outsourced or subcontracted work under commercial arrangements that may or may not be renewed.[73]

IV Flexibility in Work Arrangements

Part 11 of Sch 1 to the SJBP Act, which took effect on 6 June 2023, significantly strengthens the NES right for an employee to request a change to their working arrangements. The categories of employee eligible under s 65(1A) to make such a request have been expanded to include a pregnant employee, while the references to family and domestic violence have been aligned with the definition in s 106B(2) concerning eligibility for leave

72 Note that the exception in s 333F(1)(h) refers to an award that *covers* the relevant employees. Hence, it does not matter for this purpose that while an enterprise agreement is in operation, the award may not actually apply.

73 If such staff are employed under indefinite rather than specified period or task-based contracts, this would make them eligible for redundancy pay under s 119 of the FW Act, unless their employer can invoke the 'ordinary and customary turnover of labour' exception. As to the scope of that exception, see, eg, *Berkeley Challenge Pty Ltd v United Voice* (2020) 279 FCR 249; [2020] FCAFC 113; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) v Delta FM Australia Pty Ltd* (2021) 308 IR 94; [2021] FCAFC 107.

entitlements, which includes abusive and threatening behaviour. But, the more significant changes concern the process for dealing with a request and the capacity of employees to challenge a refusal.

Under a new s 65A, which is based on a model award term formulated by the FWC to supplement the NES,[74] employers must discuss the request with the employee, genuinely try to reach agreement to accommodate the employee's circumstances and have regard to the consequences of the refusal for the employee. If agreement cannot be reached, employers are obligated not only to provide written reasons for any refusal but to identify the reasonable business grounds justifying that refusal.[75] 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.

One of the most criticised features of the original FW Act was that an employee could not go to court to challenge the basis for a refusal, and nor could the FWC arbitrate to resolve a dispute over a refusal without the employer's consent.[76] Both these restrictions have now been removed.

As far as court action is concerned, s 44 has been amended to remove the bar on remedies being sought for an employer's failure to have reasonable grounds for a refusal. A new s 65B also sets out a procedure for dealing with disputes over flexible work requests.[77] Where an employer refuses a request for flexible working arrangements or does not respond 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 or their representative may 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 under s 65C, though only generally if other means of resolution have been attempted first.

Section 65C provides that where the FWC considers that arbitration is appropriate, it can 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

74 *Family Friendly Working Arrangements* (2018) 276 IR 249; (2018) 282 IR 243. The FWC has varied the award terms formulated in this case to reflect the new National Employment Standards provisions: *Variation on the Commission's Own Motion: Flexible Work Amendments and Unpaid Parental Leave* [2023] FWCFB 107.

75 The examples of reasonable business grounds set out in new s 65A(5) match those in the previous s 65(5A). But a new note adds that it is relevant to consider the employer's 'specific circumstances', including the nature and size of their enterprise.

76 See E Broderick, *Supporting Working Parents: Pregnancy and Return to Work National Review*, Report, AHRC, Sydney, 25 July 2014, at 121–2; N Skinner, A Cathcart and B Pocock, 'To Ask or Not to Ask? Investigating Workers' Flexibility Requests and the Phenomenon of Discontented Non-Requesters' (2016) 26 *Lab & Ind* 103; I Campbell and S Charlesworth, 'The National Employment Standards: An Assessment' (2020) 33 *AJLL* 36 at 44.

77 It is unclear whether this procedure is an alternative to court proceedings or whether it must be followed before any court proceedings can be instituted, though the former seems more likely.

employee's request. In resolving such disputes, the FWC is required to consider fairness as between the parties, and it must not make orders unless strictly necessary.

Similar changes are made by Part 25B of Sch 1 to the SJBP Act to the process for handling a request for extending a period of the NES entitlement to unpaid parental leave. A new s 76A of the FW Act requires employers to provide a response to a request for an extension of unpaid parental leave within 21 days, either granting the request or refusing the request only after discussion between the employer and employee and a genuine attempt to reach an agreement. Employers must have regard to the consequences of refusal and may only do so on reasonable business grounds. The employer must explain the grounds for refusal and inform the employee of the dispute resolution options. The dispute resolution process mirrors the one just outlined for flexible work requests (new ss 76B–76C).

It will be fascinating to see how widely, if at all, these new dispute resolution mechanisms are invoked. One possible issue that could prompt FWC and/or court proceedings could be a refusal to permit an employee to do some, or all, of their work from home, where this is requested (for instance) to accommodate their caring responsibilities. Arrangements of this type became common during the worst of the COVID-19 pandemic, and not everyone has been happy to give them up.[78] The FWC, in particular, may prove to be a useful forum in which to challenge the insistence by some organisations on a full return to workplace attendance.

V Multi-Employer Bargaining

For some time, unions have argued that the FW Act framework of *enterprise* bargaining has not functioned as an effective mechanism for workers to obtain above-award wage rises.[79] On this view, the primary focus of the system on agreements between a group of employees and their direct employer has ignored the many ways in which business models like labour hire, outsourcing and franchising have been deployed to frustrate union efforts to engage in collective bargaining.[80] New opportunities, therefore, needed to be created to enable employees and unions to obtain agreements with more than one employer,[81] compared with the limited avenues which the legislation has

78 See, eg, D Allen and A Orifici, 'Home Truths: What Did COVID-19 Reveal about Workplace Flexibility?' (2021) 34 *AJLL* 77; S Williamson and A Pearce, 'COVID-Normal Workplaces: Should Working from Home be a "Collective Flexibility"?' (2022) 64 *JIR* 461.

79 See, eg, 'Wages Fix about Bargaining "Where the Power Is": ACTU', *Workplace Express*, 7 June 2017; 'Bargaining Should Extend across Industries: ACTU', *Workplace Express*, 16 April 2018; ACTU, *Congress 2018 Draft Policies and Resolutions*, ACTU D No 153/2018, ACTU, 2018, at 30–52 (*Congress 2018 Draft Policies and Resolutions*).

80 Forsyth, 'Ten Years of the Fair Work Act', above n 2, at 129–30. See further T Hardy, 'Reconsidering the Notion of the "Employer" in the Era of the Fissured Workplace: Traversing the Legislative Landscape in Australia', in R Blanpain et al (Eds), *The Notion of the Employer in the Era of the Fissured Workplace: Should Labour Law Responsibilities Exceed the Boundary of the Legal Entity?*, Wolters Kluwer, Alphen aan den Rijn, 2017, p 53.

81 S McManus, 'ACTU Secretary Speech to National Press Club' speech delivered at the *National Press Club*, Canberra, 28 September 2022.

allowed.[82] In the lead-up to the Jobs + Skills Summit, the ACTU lobbied strongly for the Labor Government to introduce greater scope for unions to engage in industry-wide and multi-employer bargaining, maintaining that this would help address the contraction of enterprise bargaining and suppressed wage outcomes seen over the last decade.[83] The government, acknowledging the existing 'significant barriers to effective bargaining', asked Summit participants to consider how the bargaining system could 'be revitalised to help boost productivity and sustainable wage growth'.[84] Although multi-employer bargaining was the major focus of controversy at the Summit,[85] the government announced plans to engage in immediate consultation with stakeholders on options for increasing access to multi-employer bargaining.[86]

In the weeks following the Summit, as the government developed its legislative proposals for multi-employer bargaining, union demands and employer resistance mounted. Union leaders increasingly linked their case for reform to the need for workers in feminised sectors to obtain access to wage increases through collective bargaining[87] and the imperative of combating business strategies such as outsourcing parts of their operations to undercut enterprise agreements.[88] Academics supported these positions, pointing also to international evidence linking industry and multi-employer bargaining systems to high levels of collective bargaining coverage.[89] Business groups

82 These included the low-paid bargaining stream (in which unions could initiate negotiations) and both single interest employer and multi-enterprise agreements (which only employers could decide should be negotiated). These various options are discussed below in the context of the SJBP Act provisions, which have altered them.

83 See, eg, D Crowe, '"Simmering Anger": McManus Wants Industry-Wide Wage Deals to Tackle Shrinking Incomes', *The Age*, 24 August 2022. See further A Pennington, 'The Fair Work Act and the Decline of Enterprise Bargaining in Australia's Private Sector' (2020) 33 *AJLL* 68; A Stewart, J Stanford and T Hardy, *The Wages Crisis Revisited*, Report, Centre for Future Work, Australia Institute, Canberra, 2022, at 39–42 (*The Wages Crisis Revisited*).

84 Treasury, *Jobs + Skills Summit*, Issue Paper, Australian Government, Canberra, 17 August 2022, at 4–5.

85 See, eg, D Marin-Guzman, 'Business Unites to Push Back on the ACTU', *The Australian Financial Review*, 30 August 2022. Although, note that the ACTU and the small business lobby group negotiated a pre-summit agreement to develop a simpler system of bargaining for that sector, including multi-employer agreements: see 'ACTU, COSBOA Make Deal on Multi-Employer Bargaining', *Workplace Express*, 29 August 2022.

86 'Labor to Move Swiftly on Multi-Employer Bargaining: Burke', *Workplace Express*, 1 September 2022; see also Australian Government, above n 9.

87 See, eg, McManus, above n 81; United Workers Unions, *Aged Care Needs Multi-Employer Bargaining Now!*, at <https://unitedworkers.org.au/aged-care-needs-multi-employer-bargaining-now> (accessed 5 September 2023).

88 See, eg, 'Qantas a "Textbook Case" for Multi-Employer Bargaining: Senator', *Workplace Express*, 19 September 2022. On approaches to reforming labour law to match bargaining units with fissured business structures, see M Barenberg, *Widening the Scope of Worker Organizing: Legal Reforms to Facilitate Multi-Employer Organizing, Bargaining, and Striking*, Report, Roosevelt Institute, Washington DC, 7 October 2015; Kennedy et al, above n 1.

89 See, eg, A Thompson, 'IR Experts Push for Strikes, Union Role in Multi-Employer Wage Deals', *The Sydney Morning Herald*, 22 September 2022. See also C Schnabel, *Union Membership and Collective Bargaining: Trends and Determinants*, Discussion Paper No 121, Labor and Socio-Economic Research Center, University of Erlangen-Nuremberg, Nuremberg, July 2020.

countered that Labor's plans would see the detachment of bargaining from productivity objectives, unsustainable wage outcomes, and a return to 1970s-style industry-wide strikes.[90] All of this positioning intensified further once the details of the government's plans were revealed with the introduction of the SJBP Bill,[91] continuing throughout the process of a Senate committee inquiry and the lobbying to secure (or prevent) agreement by key independent Senator David Pocock. His ultimate agreement to pass the Bill included important concessions by the government on its multi-employer bargaining proposals,[92] following a series of compromise amendments to which it had already agreed.[93] Parts 20, 21 and 23 in Sch 1 of the SJBP Act implemented the government's measures to open up the availability of various forms of multi-employer bargaining, with the overall goal to 'get wages moving' — especially in feminised sectors where the 'urgency of getting wages moving is most acute'.[94] These amendments took effect on 6 June 2023.

Supported bargaining

Part 20 has substantially amended the FW Act provisions, which formerly regulated the low-paid bargaining stream,[95] implementing in its place a supported bargaining stream in order to:

> assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively.[96]

A 'supported bargaining agreement' is defined in s 12 to mean a multi-enterprise agreement in respect of which a supported bargaining authorisation was in operation immediately before the agreement was made. Obtaining such an authorisation is, therefore, the gateway for employees and unions (and indeed employers) to access supported bargaining. Any bargaining representative (BR) for a proposed multi-enterprise agreement in this stream may apply for a supported bargaining authorisation, as may a union entitled to represent the industrial interests of employees in relation to

90 See, eg, the comments of Australian Industry Group chief executive Innes Willox reported in D Marin-Guzman, 'Union Pushes for Businesses to be Bound by Multi-Employer Deals', *The Australian Financial Review*, 13 September 2022. See also 'Resource Sector Seeks to Tease-Out Unions' Multi-Employer Plans', *Workplace Express*, 19 September 2022.

91 See, eg, J Massola and A Thompson, 'New IR Laws Drive Wedge between Government and Business over Strike Fears', *The Age*, 27 October 2022.

92 P Karp, 'David Pocock to Give Crucial Support to IR Bill after Deal on Jobseeker and Welfare', *The Guardian*, 27 November 2022.

93 See, eg, 'Labor releases further amendments to Secure Jobs Bill', above n 16.

94 T Burke MP, 'Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022: Second Reading', speech delivered at the *Parliamentary Debates, House of Representatives*, 27 October 2022.

95 FW Act (prior to SJBP Act amendments) Part 2-4 Div 9. The low-paid bargaining provisions failed to deliver on their objective of enabling employees stuck on awards to negotiate collective agreements: see, eg, F Macdonald, S Charlesworth and C Brigden, 'Access to Collective Bargaining for Low-Paid Workers', in S McCrystal, B Creighton and A Forsyth (Eds), *Collective Bargaining under the Fair Work Act*, Federation Press, Sydney, 2018, p 206.

96 SJBP EM, above n 46, at para 921.

work that will be performed under the agreement (s 242). The FWC must make a supported bargaining authorisation if two criteria are satisfied.

The first (and most significant) is that it is appropriate for some or all of the employers and employees that will be covered by the agreement to bargain together, having regard to (s 243(1)(b)):

- prevailing pay and conditions within the relevant industry or sector, including whether low pay rates prevail;[97]
- whether the employers have 'clearly identifiable common interests', which may include the geographical location of the employers, the nature of the relevant enterprises and the terms and conditions of employment in them, or the fact that the employers are substantially funded (directly or indirectly) by federal, state or territory governments (s 243(2));
- whether the likely number of BRs for the agreement would be consistent with a manageable bargaining process; and
- any other matters considered appropriate by the FWC.

Secondly, the FWC must be satisfied that at least some of the employees to be covered by the agreement are represented by an employee organisation (s 243(1)(c)).

There is one other pathway to the making of a supported bargaining authorisation (s 243(2A)): the FWC must make one where the application for it specifies employees who are in an industry, occupation or sector declared by the Minister under s 243(2B). That provision enables the Minister to declare such an industry, occupation or sector where satisfied that this would be consistent with the objects of the supported bargaining stream.[98]

However, restrictions on the FWC's powers to make a supported bargaining authorisation are set out in s 243A. First, an authorisation cannot be made specifying employees who are covered by a single-enterprise agreement that has not passed its nominal expiry date (NED), and an authorisation has no effect in respect of employees covered by such an agreement. However, these limitations do not apply if the FWC is satisfied that the employer's main objective in making the single-enterprise agreement was to avoid being specified in a supported bargaining authorisation. Secondly, no authorisation can be made in relation to a proposed agreement that would cover employees in relation to general building and construction work, as the government considers 'multi-employer agreements are not necessary or appropriate for

97 Or whether employees are paid at or close to award rates: ibid, at para 984.

98 The objects stated in s 241 now include the need to assist and encourage employees and their employers who require support to bargain and to address constraints on the ability of those employees and employers to bargain.

that industry'.[99] The rationale seems to lie in the success of construction unions in obtaining industry-wide outcomes under existing laws.[100]

As was the case in the former low-paid bargaining steam, once a supported bargaining authorisation is made, the FWC can provide assistance on its own initiative to the BRs for a proposed multi-enterprise agreement in the supported bargaining stream where this is considered appropriate to facilitate the negotiations (s 246(2)). This could include the FWC issuing directions to third parties to participate in conferences, where they exercise sufficient control over the terms and conditions of the relevant employees to necessitate their involvement in the negotiations (s 246(3)). The FWC's former powers in Part 2-5 Div 2 to make a workplace determination to resolve a dispute in low-paid bargaining negotiations have been subsumed by the new provisions for declaration and arbitration of intractable bargaining disputes, discussed in Part VIII below. As with low-paid bargaining, bargaining orders to enforce the good faith bargaining obligations are available in the supported bargaining stream (s 229(2)). But in an important change, protected industrial action is now also available, as discussed below in Part VII.

Finally, there are new provisions in the FW Act relating to the processes for addition or removal of employers (and their employees) to or from supported bargaining authorisations or supported bargaining agreements once they have been made. An employer can apply to be removed from an authorisation on the grounds that its circumstances have changed to the extent that the authorisation is no longer appropriate (s 244(1)–(2)). Employee BRs and unions with relevant coverage can apply to have new employers added to an authorisation, subject to a public interest test (s 244(3)–(4)).[101] More detailed provisions in relation to supported bargaining agreements are set out in Part 2-4 Div 7, Subdivisions AA–AB. These have the effect that once an agreement is approved by the FWC:

> [it] may then be varied to cover additional employers and their employees. A variation may be made jointly by the employers and their employees and approved by the FWC. Alternatively, an employee organisation may apply to the FWC for variation of a supported bargaining agreement to cover additional employers and their employees, if a majority of those employees want to be covered by the agreement.[102]

Single interest employer bargaining

Schedule 1 Part 21 of the SJBP Act has widened the opportunities for agreements to be reached covering two or more employers with a 'single interest'. Before explaining these arrangements, it should be noted that Part 21 has also amended the FW Act provisions, enabling single-enterprise

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99 SJBP EM, above n 46, at para 233; and see also SJBP Act Sch 1 Part 23A (Excluded Work); P Karp, 'Labor's Workplace Bill Passes Lower House after Further Concessions on Multi-Employer Bargaining', *The Guardian*, 10 November 2022. The term 'general building and construction work' is defined in s 23B by reference to the coverage of selected awards.

100 See, eg, 'CFMMEU's Pattern Deal Cleared by ABCC', *Workplace Express*, 13 October 2020.

101 See SJBP EM, above n 46, at paras 995–6.

102 Ibid, at para 925.

agreements to be made for two or more related employers. Previously, such an agreement could be made by employers engaged in a joint venture or common enterprise, related companies, or employers specified in an authorisation made by the FWC. Such an authorisation could be granted for franchisees engaged in similar business activities or employers with common interests who had obtained a ministerial declaration allowing them to bargain together.[103] The amendments have the effect that a single-enterprise agreement can be made under the FW Act by 'related employers' (and their employees), defined as employers involved in a joint venture or common enterprise or related bodies corporate (s 172(5A)).[104] In none of these circumstances is any FWC authorisation or ministerial approval required.

What is now described as the single interest bargaining stream is intended to 'remove unnecessary limits on access to single interest employer authorisations and simplify the process for obtaining them'.[105] A 'single interest employer agreement' is defined in s 12 to mean a multi-enterprise agreement in relation to which a single interest employer authorisation was in operation immediately before the agreement was made. The employers that will be covered by a single interest employer agreement or a BR of an employee who will be covered may apply for such an authorisation (s 248(1)). Hence, unions now have the opportunity to initiate the processes for single interest bargaining, whereas the former arrangements for similar types of bargaining could only be initiated by employers.

However, there are many requirements of which the FWC must be satisfied in order to make a single interest employer authorisation, including that:

- at least some of the employees to be covered by the agreement are represented by a union (s 249(1)(b)(i));
- the employers and BRs of employees have been able to express their views to the FWC (s 249(1)(b)(ii)); and
- where the application was made by two or more employers, it must be demonstrated that those employers have agreed to bargain together without any coercion to do so (s 249(1)(b)(iii), (1A)).

If the application is made by an employee BR, s 249(1)(b)(iv) requires that either the employers must have consented to the authorisation or the employers must be covered by s 249(1B). The effect of that provision is two-fold. First, it must be shown that a majority of the employees at each of the relevant employers want to bargain the proposed single interest employer agreement. Secondly, no authorisation can be made at the request of an employee BR in respect of any of the following:

- an employer with less than 20 employees;
- an employer that has already applied for a single interest employer authorisation (covering the same employees) that has not been decided;
- an employer that is already named in a single interest employer

103 FW Act (prior to SJBP Act amendments) Part 2-4 Div 10 s 172(2)(a), (5).

104 Franchise businesses and employers with common interests are included in the arrangements for single interest employer agreements discussed below.

105 SJBP EM, above n 46, at para 1006.

authorisation or supported bargaining authorisation (covering the same employees); or

- an employer to which s 249(1D) applies.

Section 249(1D) precludes an employer from being subject to a single interest employer authorisation if it is already covered by an enterprise agreement (covering the same employees) that has not passed its NED or the employer and a union entitled to represent the interests of any of the relevant employees have agreed in writing to bargain for a single-enterprise agreement covering those employees (or substantially the same group of employees). In addition, and for the same reasons discussed in relation to supported bargaining, the FWC cannot make a single interest employer authorisation for an agreement that would cover employees performing general building and construction work (s 249A)).

A further precondition for an authorisation is to meet the requirements of either s 249(2) relating to franchise business operations[106] or s 249(3) dealing with common interest employers (s 249(1)(b)(v)).

The common interests test requires the FWC to consider whether the employers who would be subject to a single interest employer authorisation 'have clearly identifiable common interests', taking into account factors including: '(a) geographical location; (b) regulatory regime; (c) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises' (s 249(3)(a), (3A)). The FWC must also be satisfied that it is not contrary to the public interest to make the authorisation.[107] Where the requirements of s 249(3) are met, s 249(1)(b)(vi) imposes a further condition: the operations and business activities of all of the employers to be covered by the proposed single interest employer agreement must be 'reasonably comparable' — although where an employee BR has sought the authorisation, this requirement is presumed to be met in relation to any employer that has 50 or more employees, unless it is proved otherwise (s 249(1AA)). This provision was included as one of the government's compromises to secure passage of the SJBP Bill, the Minister explaining that it was 'an extra marker where effectively for small businesses that have [between 20 and] 50 employees it becomes easier for them to argue ... they are

106 These requirements remain as they were prior to the amendments, ie, the FWC must be satisfied that the employers carry on similar business activities under the same franchise and are franchisees or related bodies corporate of the same franchisor (or any combination thereof). See, eg, *Re Ananth Pty Ltd* [2014] FWC 7836.

107 According to the Explanatory Memorandum for the original Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) (SJBP Bill) para 1023, the public interest would be likely to favour single interest employer authorisations where this form of bargaining would 'inhibit a "race to the bottom" on wages and conditions while discouraging authorisations that could adversely affect competition on the basis of factors such as quality (including service levels) and innovation'. However, the revised memorandum indicated that the FWC would consider public interest factors such as 'the objects of the FW Act (contained in section 3)', including promoting productivity, economic growth and fairness to workers Australians, and 'the objects of Part 2-4 (contained in section 171)' such as promoting 'collective bargaining in good faith, particularly at the enterprise level': SJBP EM, above n 46, at para 1074.

not reasonably comparable to the other businesses within a multi-employer bargain and to be able to get out' of the process.[108]

Even where all of the many requirements for the granting of a single interest employer authorisation have been met, the FWC can exclude specified employers (and their employees) from an authorisation if satisfied that the employers are bargaining in good faith for a proposed enterprise agreement that will cover them and their employees (or substantially the same group of employees); these employers and the relevant employees 'have a history of effectively bargaining' for enterprise agreements; and as at the day when the FWC makes the authorisation, 'less than 9 months have passed since the most recent [NED] of such an agreement' (s 250(3)). For these purposes, according to the SJBP EM:

> an employer is likely to have a history of effectively bargaining in relation to one or more enterprise agreements if one or more of those resulting enterprise agreements provided for terms and conditions that were more than a marginal improvement on those contained in the relevant award (i.e. they must do more than simply pass the [Better Off Overall Test]). The requirement would operate so that only enterprise agreements that provide genuine benefits to both the employer/s and their relevant employees would be relevant to the FWC's decision to exercise its discretion not to make a single interest employer authorisation that would specify the employer and its relevant employees.[109]

Similar provisions to those applying to supported bargaining[110] are now found in the FW Act relating to the addition and removal of employers from single interest employer authorisations (s 251) and single interest employer agreements (Part 2-4 Div 7 Subdiv AD). Under the relevant provisions, additional avenues are provided for removal of an employer with less than 50 employees from a single interest employer authorisation, where such removal is sought by an employee BR and a majority of the relevant employees support removal (s 251(2B)–(2D)); and for adding new employers to an authorisation, by satisfying similar requirements to those applicable to the initial making of the authorisation (s 251(3)–(8)).[111] Effectively, this is a process allowing unions to seek the 'roping-in' of new employers.[112] Finally, and as was the case with the previous FW Act provisions relating to agreements covering two or more single interest employers, bargaining orders can be sought to enforce the good faith bargaining obligations (s 229(2)). Protected industrial action is also available in the single interest bargaining stream, as are the new provisions for resolution of intractable bargaining disputes (see Parts VII and VIII below).

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108 Quoted in 'Labor Strikes Deal to Secure IR Bill's Passage', *Workplace Express*, 27 November 2022.

109 SJBP EM, above n 46, at para 1081.

110 See above nn 101–2 and accompanying text.

111 Note that employers may also apply to be added to a single interest employer authorisation.

112 For employer concerns as to how this process might work, see, eg, D Marin-Guzman, 'Into the Great Unknown: Business Braces for New Bargaining Laws', *The Australian Financial Review*, 2 December 2022 (Into the Great Unknown).

Cooperative bargaining

Schedule 1 Part 23 of the SJBP Act amended the former FW Act provisions for the making of multi-employer agreements, replacing these with the cooperative workplaces stream of bargaining. As before, bargaining in this stream can be entered into voluntarily by two or more employers and their employees (s 172(3)(a)). The result will be a 'cooperative workplace agreement', defined in s 12 to mean a multi-enterprise agreement in respect of which no supported bargaining authorisation or single interest employer authorisation was in operation immediately before the agreement was made. There are few requirements applicable to the making of cooperative workplace agreements, although one is that at least some of the employees to be covered by the agreement must be represented by a union in its negotiation (s 186(2A)). Neither this nor any other type of multi-enterprise agreement may cover general building and construction work (s 186(2B)). The FWC will oversee bargaining in the cooperative workplaces stream through training, workshops and facilitation of interest-based bargaining under what is now called its Collaborative Approaches Program.[113] Despite the title, however, there is no requirement for a cooperative workplace agreement of this sort to reflect or promote any particular form of cooperation. Entirely reflecting the cooperative nature of bargaining, there is no element of compulsion in this stream, whether through enforcement of the good faith bargaining obligations, access to protected industrial action or arbitration of intractable bargaining disputes by the FWC.

Assessment of the multi-employer bargaining reforms

While the new provisions for multi-employer bargaining undoubtedly enhance the options for employees and unions to make agreements for two or more employers, the SJBP Act amendments introduce a level of complexity that will limit the effectiveness of the single interest employer bargaining stream in particular. Starting with the supported bargaining stream, the new arrangements are indeed an improvement on the almost completely unworkable low-paid bargaining provisions. Obtaining authorisations to access supported bargaining should be possible for unions covering the sectors which this stream is intended to benefit most, including aged care, disability care and child care, where high levels of reliance on government funding will help satisfy the common interests test.[114] The addition of a ministerial power to declare an industry, occupation or sector suitable for supported bargaining expands its potential reach, while the availability of industrial action in this stream is another advantage over the former arrangements for low-paid bargaining.

However, the Labor Government has clearly expressed its preference for single-enterprise bargaining — not only over agreement-making in the

113 A Hatcher, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022: Facilitating Enterprise Bargaining and the Agreement Approval Process*, President's Statement, FWC, Sydney, 4 April 2023, at [11]–[14].

114 See, eg, 'Childcare Early Starter for New Supported Deal Regime', *Workplace Express*, 6 June 2023.

supported bargaining stream but also single interest employer bargaining. This priority was stated by the Minister when introducing the SJBP Bill[115] and is reinforced by the various provisions in both streams which preclude the making of authorisations where enterprise agreements are already in place (or, in respect of single interest employer authorisations, where there is a recent history of enterprise-focused bargaining).[116] It emerged in late February 2023 that the Australian Higher Education Industrial Association had advised universities of a strategy to lock in single-enterprise agreements (with 'a reasonable salary offer' and minimal other changes) ahead of 6 June 2023 to avoid the prospect of being drawn into multi-employer bargaining.[117]

On top of the legislative preference for enterprise bargaining, single interest employer bargaining will also be hampered by the many onerous requirements that must be met to obtain access to this stream. The common interests test will be the most difficult of these, narrowing the potential availability of single interest employer agreements, especially in the context of the kinds of fissured business arrangements which motivated the union movement to push for these reforms. Another major impediment will be the requirement to obtain majority employee support at each of the employers which a union wants to involve in single interest employer bargaining. This invites US-style 'union-busting' tactics to prevent workers from voting or signing a petition in support of a multi-employer agreement.[118] Once the public interest test is also taken into account, along with the many exclusions from single interest employer authorisations (and factors militating against the FWC granting them), it can be seen that there are ample opportunities for employers to contest the commencement of this form of bargaining.[119]

VI The Process for Making Enterprise Agreements

Initiating bargaining

The changes outlined in the preceding section concerning multi-employer bargaining expand the opportunities for employees to initiate negotiations for a collective agreement in the multi-enterprise context. However, the SJBP Act

115 Burke, above n 94: 'Bargaining at the enterprise level delivers strong productivity benefits and is intended to remain the primary and preferred type of agreement making.'

116 See 'Bill Misses Chance to Cast Off Single Enterprise "Shackles": UWU', *Workplace Express*, 14 November 2022.

117 See E Hannan, 'Uni "Road Map" for Pay-Deal Dodging', *The Australian*, 28 February 2023; see also 'Multi-Employer Changes Spurring Single Deal Talks: Ashurst', *Workplace Express*, 31 March 2023.

118 See further C Garden, 'Tactical Mismatch in Union Organizing Drives', in R Bales and C Garden (Eds), *The Cambridge Handbook of US Labor Law for the Twenty-First Century*, Cambridge University Press, Cambridge, 2020, p 199.

119 On negotiations for one such agreement between the Australian Manufacturing Workers' Union and members of the Heating, Ventilation and Air-Conditioning Manufacturing and Installation Industry Association, see 'Negotiations "Progressing Nicely" for HVAC Multi-Deal: AMWU', *Workplace Express*, 21 April 2023. The possibility of a interest employer agreement in this industry was repeatedly noted by the Minister while the SJBP Bill was under discussion: see, eg, 'Burke Set to Table Changes to Secure Jobs Bill', *Workplace Express*, 8 November 2022; T Burke, 'National Press Club Address', speech delivered at the *National Press Club*, Canberra, 16 November 2022.

has also expanded the grounds on which employees can seek to initiate negotiations in the context of single-enterprise agreements.

Under the FW Act, negotiations for a new single-enterprise agreement commence when an employer issues employees with a notice of representational rights (NERR) (s 173(1)). This is called the 'notification time' (s 173(2)). Once that time has passed, all BRs are subject to the good faith requirements, which set out the rules that are to be followed in bargaining, including the obligation to recognise and bargain with all BRs for an agreement (ss 228, 230).

An employer can choose or agree to issue an NERR at any time, including before the NED of any current enterprise agreement.[120] For employees, however, where they want to engage in collective bargaining, the statutory mechanism provided is the 'majority support determination' (MSD) (s 236).[121] This requires a BR to satisfy the FWC that a majority of employees who will be covered by a proposed agreement want to bargain for a new agreement. While MSDs are an important trigger mechanism for employee-requested bargaining, demonstrating majority support to the FWC is not always straightforward and can be difficult in the face of a resistant employer.[122] BRs must invest time and resources to ascertain how many employees who will be covered by the agreement are engaged by the employer, to organise those workers, and then to provide evidence to the FWC that a majority of workers support collective bargaining. All of this must occur before negotiations even commence.

If an employer does not agree to bargain, an MSD has been required irrespective of whether the employees were seeking a new enterprise agreement where no agreement previously existed or a replacement agreement. The two situations are substantively different. A first enterprise agreement creates a new instrument of collective regulation at that workplace. If an agreement already exists, the employer and employees have already demonstrated their willingness and capacity to engage collectively. Further, in large workplaces, the resource burden of organising an MSD for a replacement agreement is substantial.

Recognising this, the SJPB Act has introduced a new s 173(2A). Where a BR wants to negotiate for a replacement agreement to cover the same or substantially the same group of employees as an existing agreement, they can

120 The nominal expiry date (NED) of an enterprise agreement defines the nominal term of an agreement in which employees do not have access to protected industrial action. Once an agreement has passed the NED, it continues in operation until it is replaced by a later agreement or it is terminated by the FWC (s 54(2)).

121 Prior to 2015, employees had been able to take protected industrial action in support of their request for an employer to commence negotiations for a new agreement: *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297; [2012] FCAFC 53. This avenue was closed off by the Fair Work Amendment Act 2015 (Cth).

122 See, eg, A Forsyth et al, 'Establishing the Right to Bargain Collectively in Australia and the UK: Are Majority Support Determinations under Australia's Fair Work Act a More Effective Form of Union Recognition?' (2017) 46 *ILJ* 335; A Forsyth and B Ellem, 'Has the Australian Model Resisted US-Style Anti-Union Organising Campaigns? Case Studies of the Cochlear and ResMed Bargaining Disputes', in S McCrystal, B Creighton and A Forsyth (Eds), *Collective Bargaining under the Fair Work Act*, Federation Press, Sydney, 2018, p 45.

issue the employer with a request in writing to bargain provided that the existing agreement has passed its NED within the past five years.[123] The receipt of a request to bargain in accordance with s 173(2A) constitutes a notification time, requiring the employer to issue NERRs to the relevant employees (s 173(2)(aa)).

This change goes some way towards balancing the control held by employers over negotiations for a new agreement. Rather than having to wait for an employer to determine that the time is right to commence negotiations for a replacement agreement, employees and their representatives have been provided some much-needed agency in this decision outside of the MSD process.

Information and voting processes

Under the FW Act, all agreements (other than greenfields agreements) are 'made' between employers and employees before being lodged with the FWC for approval.[124] To make an agreement, the employees who will be covered by it must be asked to approve the agreement by voting for it (s 181(1)). The agreement will be made when a majority of those who cast a valid vote approve the agreement (s 182(1)).[125] Divisions 3 and 4 of Part 2-4 set out rules governing how employees are informed of their rights to representation in bargaining, when an employer can seek agreement from employees, and how employees are informed about the terms of the proposed agreement and the upcoming ballot. These rules are enforced at approval, where the FWC must consider whether the requirements have been complied with before approving a proposed agreement (s 186).

These statutory provisions have been a source of tension for employers and unions. A strict approach to the rules can lead to agreements being rejected on technical grounds, requiring employers to start the process again. However, an approach which is too lax risks compromising the interests of employees. Because the agreement-making process under the FW Act is employer-controlled and led, there is potential for employers to mislead employees into voting against their own interests.[126] Various solutions to balancing this tension have been enacted, including requiring strict compliance with some provisions through to greater discretion in determining

123 It should also be noted that the existing agreement cannot have been an agreement which had the effect of causing a single interest employer authorisation to cease to be in operation: s 173(2A(b).

124 As to the history of agreement-making in the federal system and the evolution of these provisions, see S McCrystal and M Bray, 'Non-Union Agreement-Making in Australia in Comparative and Historical Context' (2021) 41 *CLLPJ* 753.

125 Where the agreement is a multi-enterprise agreement, an agreement must be approved by a majority of those employees who vote at each separate enterprise covered by the agreement in order for the multi-enterprise agreement to apply at that enterprise: s 182(2).

126 See U Chaudhuri and T Sarina, 'Employer-Controlled Agreement-Making: Thwarting Collective Bargaining under the Fair Work Act', in S McCrystal, B Creighton and A Forsyth (Eds), *Collective Bargaining under the Fair Work Act*, Federation Press, Sydney, 2018, p 138.

which errors or omissions to overlook when approving an agreement.[127] However, the SJBP Act has enacted a very different approach to that taken previously.

In relation to multi-enterprise agreements, the SJBP Act removes the obligation on employers to commence bargaining by issuing all potentially covered employees with a NERR.[128] Presumably, this reflects the understanding that as a consequence of the changes to multi-enterprise agreement-making described above, such agreements will generally be negotiated with employee organisations. However, employers for multi-enterprise agreements will be still be covered by the agreement approval requirements discussed below, and these impose obligations to inform employees in respect of bargaining representation (s 188B(1)).

Notably, and in what is a significant change from previous legislation, the SJBP Act has introduced a new obligation to reach agreement with unions, or at least attempt to do so, before seeking employee approval of a proposed multi-enterprise agreement. Where a multi-enterprise agreement is negotiated, an employer cannot ballot employees to approve the agreement unless each employee organisation involved in the negotiations has provided the employer with written agreement to the ballot or the employer has obtained a voting request order from the FWC (s 180A). An employer may obtain a voting request order from the FWC where one or more employee organisations who are BRs for the agreement have failed to provide written agreement in circumstances where that failure is unreasonable and making the request of the employees concerned is not inconsistent with, or would not undermine, good faith bargaining (s 240A–B).

For all agreements (other than greenfields agreements), the SJBP Act repeals the requirement for a seven-day 'access period' before the agreement ballot. It also removes the associated requirements formerly found in s 180(2)–(4) that the employer notify employees of the day and time of the ballot before the access period and provide a copy of the proposed agreement and associated materials to the employees. These requirements now form part of a 'statement of principles on genuine agreement' created by the FWC by legislative instrument (s 188B) and considered by the FWC as to whether or not the employees have 'genuinely agreed' to the proposed agreement (ss 186(2)(a), 188).

The new version of s 188 stipulates a wider range of circumstances for the FWC to consider. First, it must take into account the 'statement of principles

127 For example, s 174(1A) (inserted in 2012) requires strict compliance with the obligation to issue the notice of employment representational rights without amendment. It was applied strictly by the FWC in cases such as *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* (2014) 242 IR 210; [2014] FWCFB 2042, until a discretion for the FWC to overlook technical non-compliance was introduced through s 188(2) in 2018.

128 The obligation to issue a notice of the right to be represented in FW Act s 173(1) now only applies to single-enterprise agreements. The required form of the notice has been updated by the Fair Work and Other Legislation Amendment (Secure Jobs, Better Pay) Regulations 2023 (Cth).

on genuine agreement' issued by the tribunal on 12 May 2023 as Sch 1 to the Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023 (Cth).[129] The principles include:

- an obligation to inform employees of their right to be represented and not to mislead employees about this right or the role of an employee organisation as the default representative;
- an obligation to give employees reasonable time to consider the terms of an agreement, which will be fulfilled if employees receive a full copy of the agreement and any incorporated material at least seven full calendar days before the day on which voting starts or a reasonable period agreed with one or more employee organisations acting as BR(s) for a significant proportion of the employees;
- an obligation to give employees a reasonable opportunity to vote on a proposed agreement in a free and informed manner. Notably, this includes ensuring that the voting process is secret; and
- lengthy guidance on the obligation to explain the agreement to employees in FW Act s 180(5).

The changes made to these requirements are more of form than of substance, but the shift to a legislative instrument has created the opportunity for the FWC to set out clear guidance for employers. In effect, the statement of principles sets out a roadmap for successful agreement-making while ensuring that the provisions can be applied in a flexible and adaptive manner.

Second, under new s 188(2), the FWC must be satisfied that the employees requested to approve the agreement:

(a) have a sufficient interest in the terms of the agreement; and
(b) are sufficiently representative, having regard to the employees the agreement is expressed to cover.

The inclusion of this provision responds to a series of cases where agreements have been challenged on the basis that the cohort of employees requested to vote on the agreement were not sufficiently representative of those employees who would eventually be covered by the agreement, or lacked interest in the terms of the agreement because they were paid substantially above agreement rates, or were to be moved to a position not covered by the agreement.[130] The impact of non-representative voting cohorts on genuine agreement was explored by the Full Federal Court in *One Key Workforce Pty Ltd v*

129 See *Approval of Enterprise Agreements: Genuine Agreement: Statement of Principles on Genuine Agreement*, Full Bench Statement, FWC, Sydney, 12 May 2023.

130 For unsuccessful challenges of this sort, see, eg, *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* (2015) 228 FCR 297; [2015] FCAFC 16; *Theiss Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FWCFB 2405; *Communications, Electric, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Fredon Industries Pty Ltd* [2021] FWCFB 3190. For cases that found no genuine agreement in similar circumstances, see *Re KCL Industries Pty Ltd* (2016) 257 IR 266; [2016] FWCFB 3048; *Broadspectrum (Australia) Pty Ltd v United Voice* (2018) 265 FCR 134; [2018] FCAFC 139; *United Workers' Union v Hot Work Food Makers Pty Ltd* [2023] FWCFB 4.

Construction, Forestry, Mining and Energy Union,[131] a case that is referred to in a legislative note to s 188(2). In the case, the Court found that an agreement had not been genuinely agreed in circumstances where three casual employees had approved an agreement purporting to cover workers from occupations and trades covered by 11 modern awards, where the employees concerned were not covered by those awards, such that their agreement lacked the requisite authenticity to satisfy the requirement of genuine agreement.

Given this background and the legislative note, it would seem clear that s 188(2)(a) is designed to ensure that the voting cohort for an agreement is one which will subsequently be covered by that agreement, and s 188(2)(b) ensures that the voting cohort is sufficiently representative of the categories of workers who will be covered by the agreement. However, the Explanatory Memorandum for the SJBP Bill explained that s 188(2)(a) is concerned with the 'stake' of employees in the agreement, such that 'employees would not have a sufficient interest in the terms of [the] agreement if no genuine collective bargaining in good faith occurred as part of the agreement-making process'.[132] This is substantively different to the text of the provision, and such an approach would be a seismic shift in the agreement-making provisions because there has been no substantive obligation under the FW Act for agreements to be the product of negotiation.[133] Notably, in the draft statement of principles on genuine agreement, the FWC originally applied the approach espoused in the Explanatory Memorandum by including the statement that 'an enterprise agreement will generally not have been agreed to by the employees covered by the agreement unless the agreement was the product of an authentic exercise in enterprise bargaining'.[134] However, the final version of the statement of principles changed the word 'bargaining' to 'agreement-making', pulling back from mandating that agreements be the product of bargaining.[135] How the FWC approaches both s 188(2)(a) and the concept of 'an authentic exercise in enterprise agreement-making' from the statement of principles will remain to be seen, and given the statement in the EM, is highly likely to involve judicial challenge regardless of which approach the FWC takes.

Third, the FWC must be satisfied that the employer has complied with the provisions dealing with the notice of employee representational rights (in the case of single-enterprise agreements) and the obligation to explain the agreement to the employees (new s 188(3)–(4A)). The FWC has the power to overlook minor procedural or technical errors in relation to aspects of the agreement-making process (new s 188(5)).[136]

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131 (2018) 262 FCR 527; 356 ALR 535; [2018] FCAFC 77.

132 SJBP EM, above n 46, at para 726.

133 See K Walpole, 'The Fair Work Act: Encouraging Collective Agreement-Making but Leaving Collective Bargaining to Choice' (2015) 25 *Lab & Ind* 205.

134 Draft Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023 (Cth) Sch 1 para 19.

135 Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023 (Cth) Sch 1 para 18.

136 This provision is similar in form to the now repealed s 188(2): see above n 127.

The better off overall test

The better off overall test (BOOT) imposed by ss 186(2)(d) and 193 of the FW Act as a prerequisite for the approval of an enterprise agreement protects the integrity of the minimum standards set by awards by ensuring that they cannot be undercut without appropriate forms of compensation. An agreement may reduce or remove particular award entitlements, but if so, those detriments have to be balanced by other benefits.

Especially since the FWC tightened its procedures for reviewing agreements following the ruling in *Hart v Coles Supermarkets Australia Pty Ltd*,[137] employer groups have complained about the test being applied inflexibly.[138] The Morrison Government's attempts to address this issue, as part of its Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth),[139] were derailed by the inclusion of an expanded public interest exception that would have allowed the FWC to approve agreements with below-award conditions, even in the absence of exceptional circumstances. So strong was the opposition to this proposal, which had not been raised with the tripartite working groups convened to discuss possible changes to the FW Act after the onset of COVID-19,[140] that the government dropped it before the Bill had even passed the lower house.[141] But the remaining changes to the BOOT, which (like most of the Bill) were ultimately not pursued, showed signs of being the product of constructive dialogue between unions and employer groups. It was not, therefore, a surprise to see some of the reforms — notably on the weight to be given to the views of BRs and the relevance of unlikely work patterns — resurface in Part 16 of Sch 1 to the SJBP, which took effect on 6 June 2023.

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 was already operating.[142] To dispel any suggestion that the test was being weakened, the Explanatory Memorandum noted that it is unlikely that a 'non-monetary, optional or contingent

137 [2016] FWCFB 2887 (*Hart*). See A Stewart, *Stewart's Guide to Employment Law*, 7th edn, Federation Press, Sydney, 2021, pp 160–1.

138 See, eg, 'Government Not Changing BOOT: Cash', *Workplace Express*, 20 April 2022; E Hannan, 'Wage Growth Won't Happen without Meaningful Change', *The Australian*, 23 April 2022.

139 Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) (Fair Work Amendment Bill 2020) Sch 3 Part 5.

140 P Karp, 'Industrial Relations Bill Will Allow Pay Deals That Leave Australian Workers Worse Off', *The Guardian*, 8 December 2020.

141 N Bonyhady, 'Government Dumps Controversial Pay-Deal Change from Proposed IR Overhaul', *The Sydney Morning Herald*, 16 February 2021. See further Stewart et al, above n 4, at 159–60.

142 *Re Armacell Australia Pty Ltd* (2010) 202 IR 38, at [41]; [2010] FWAFB 9985; *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* (2017) 262 CLR 593, at 619; 350 ALR 381; [2017] HCA 53; *Re Loaded Rates Agreements* [2018] FWCFB 3610, at [112].

entitlement under the agreement' would compensate for any 'significant financial detriment' identified in the process of this comparison.[143]

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 (new s 193A(4)). This discounts any opposing view put by any other type of employee BR. Given the important role played by the likes of the Retail and Fast Food Workers Union in ensuring appropriate scrutiny of proposed agreements,[144] it is hard to see the justification for privileging registered unions in this way.[145] More generally, given the objective nature of the BOOT, it is hard to see why *any* particular weight should be given to the subjective views of those involved in negotiating an agreement. Arguably, it should be sufficient that they have the opportunity to put evidence and arguments before the tribunal.

Where the FWC identifies a concern with the BOOT, and rather than seeking an undertaking to address the issue under s 190, a new s 191A empowers the FWC to directly amend a proposed agreement to overcome its concern. However, the amendment must be 'necessary' to address the concern. The tribunal is also required to 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. In theory, this new power could be used to make substantial changes to an agreement, to the point indeed where the employer(s) concerned would not have agreed to it. Presumably, however, those will be matters which weigh heavily against the FWC taking such a step. It is unfortunate, too, that the new power was not extended to permit the excision of any provisions identified by the FWC as contravening the NES. Employers are routinely given the option of undertaking not to rely on or enforce such a term, as an alternative to removing it and restarting the process for approval.[146] But this has the effect that employees can only know that a particular term has no effect by checking the undertakings appended to the approval decision. It would be far better if the FWC could simply delete it.

The FWC is also directed by a new s 193A(6) to have regard only to patterns or kinds of work, or types of employment, that were reasonably foreseeable at the time of the assessment. This is intended to prevent the BOOT assessment from being complicated by purely hypothetical possibilities that might arise if the employer changed its operations in ways that would be theoretically possible but are not expected to occur.[147] As a safeguard, however, a new Div 7A of Part 2-4 permits a 'reconsideration'

143 SJBP EM, above n 46, at para 780.

144 See A Forsyth, *The Future of Unions and Worker Representation: The Digital Picket Line*, Hart Publishing, Oxford, 2022, pp 100–2.

145 This and other proposals prompted strong criticism from the Retail and Fast Food Workers Union: 'Secure Jobs Bill "Worse than Work Choices": RAFFWU', *Workplace Express*, 3 November 2022.

146 See, eg, *Re Bupa Care Services Pty Ltd* (2010) 196 IR 1; [2010] FWAFB 2762; *Re Australian Industry Group* (2010) 196 IR 125; [2010] FWAFB 4337.

147 Cf *Re Officeworks Ltd* [2019] FWCA 6900, which is cited in the SJBP EM, above n 46, at para 785 as an example of the approach to be avoided, just as it was in support of a similar proposal in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth): Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth), Parliament of Australia, at p xlix.

process to be undertaken by the FWC if it is satisfied that employees covered by an agreement are engaging in patterns or kind of work or types of employment to which the FWC did not have regard when it approved the agreement. The tribunal may 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.[148] 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 have been altered so that the provision now speaks instead of 'reasonably foreseeable' employees.

Correcting errors

Part 17 of Sch 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),[149] without the need for a Full Bench appeal or a formal variation. The new provisions in ss 218A and 602A–602B of the FW Act also permit the FWC to be able to rectify an enterprise agreement on its own initiative or on application by any employers, employees or employee organisations covered by the agreement.

VII Protected Industrial Action

Part 3-3 of the FW Act allows employees to take 'protected industrial action' in support of their claims during negotiations for an enterprise agreement. The provisions allow for the exercise of legally sanctioned coercion by the bargaining parties and constitute the main source of bargaining power accorded to employees within the collective bargaining process.

The protected industrial action provisions are highly complex, involving multiple preconditions before action can be taken.[150] Furthermore, since the provisions were first enacted in 1993, access to protected action has been limited to that taken in support of single-enterprise agreement-making. In the most significant move to increase employees' ability to take protected industrial action since 1993, the SJBP Act expands access to protected industrial action to employees negotiating multi-enterprise agreements other than cooperative workplace agreements (ss 413(2), 437(2)(b), 437A, as

148 See 'Withdraw and "Rework" Contentious Part of Secure Jobs Bill: Expert', *Workplace Express*, 14 November 2022.

149 See, eg, *Australian Workers' Union v Job Connect Recruitment Pty Ltd* [2019] FWCFB 5132; *Victorian Hospitals' Industrial Association v Health Services Union* [2022] FWCFB 239.

150 See S McCrystal, 'Why is it So Hard to Take Lawful Strike Action in Australia?' (2019) 61 *JIR* 129.

amended). The full impact of this change is dependent on the extent to which bargaining for multi-enterprise agreements is permitted by the FWC. If authorised at any scale, the impact of the change will then depend on whether the employees concerned, some of whom may have no history of taking industrial action, are willing to explore the ability to coordinate industrial action across enterprises.

Other changes to the industrial action provisions impact the processes governing protected industrial action. For industrial action in the context of multi-enterprise agreements, the notice period for taking industrial action is set at 120 hours, by contrast to three days for single enterprise agreements (s 414(2)(a)(ii)). In respect of protected action ballots, which are a precondition to employee protected industrial action,[151] the amendments also provide for separate ballots for each enterprise where a BR has sought a ballot (s 437A). This change overcomes the problem with quorum that would have arisen if all workers represented by a bargaining agent were involved in a single ballot.[152]

In relation to ballots, the amendments do two other things. First, they provide ballot applicants with more say in who conducts a protected action ballot, requiring the FWC to include the applicant's preferred agent in the ballot order unless there are reasons not to do so (s 444). Second, they impose a new hurdle for employees seeking to take protected industrial action. Where the FWC makes an order requiring that a protected action ballot be held, it must also direct BRs to attend a conference for the purposes of mediation or conciliation in relation to the agreement (s 448A(1)). The conference must be held in private and be concluded before the end of the voting in the protected action ballot (s 448A(2), (4)). It is a precondition to legal immunity for any subsequent industrial action that BRs comply with the FWC order directing them to attend a conference (ss 408(6A), 411(3)).

Another amendment in the original SJBP Bill would have removed the requirement in s 459(1)(d) that at least one instance of any type of industrial action authorised by a ballot be taken in the first 30 days and replaced it with a mandate to hold a new ballot every three months. However, this was not in the final SJBP Act. The 30-day rule is a problem, forcing unions to escalate industrial action by reference to a statutory deadline rather than the state of negotiations.[153] But its replacement with a three-month ballot mandate was ill-considered, given the time and resources involved in repeating the whole ballot process so soon. On balance, the withdrawal of the proposal was the better outcome.

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151 See B Creighton et al, *Strike Ballots, Democracy and Law*, Oxford University Press, Oxford, 2020, chap 4.

152 Protected industrial action ballots require a minimum 50% turnout before they can approve proposed action: s 459(1).

153 See C Denvir and S McCrystal, 'Researching Labour Law "In Practice": Challenges in Assessing the Impact of Protected Industrial Action Ballot Procedures on Enterprise Bargaining Processes', in J Howe, A Chapman and I M Landau (Eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions*, Federation Press, Sydney, 2017, p 161.

VIII Resolving Intractable Bargaining Disputes

Unions have long argued that the FW Act (and previous legislation) did not include sufficient mechanisms to resolve long-running bargaining disputes, maintaining that this was another factor contributing to employer avoidance of agreement-making and the overall decline in new enterprise agreements.[154] Responding to these concerns, Sch 1 Part 18 to the SJBP Act replaces the former power to make workplace determinations settling bargaining disputes in circumstances of extreme breach of good faith bargaining obligations[155] with a new scheme for resolution of 'intractable' agreement negotiations.[156] A BR for a proposed enterprise agreement, other than a greenfields agreement,[157] can apply to the FWC for an 'intractable bargaining declaration' (s 234(1)). Such a declaration can also be sought for multi-enterprise agreements, but only if a supported bargaining or single interest employer authorisation is in operation (s 234(2)) — and therefore, not in respect of cooperative workplace agreements. The tribunal must be satisfied as to the following before making an intractable bargaining declaration: that it has already dealt with the bargaining dispute under s 240 and the applicant for the declaration participated in that process; that 'there is no reasonable prospect of agreement being reached if the FWC does not make the declaration'; and that it is reasonable to make the declaration in the circumstances and taking into account the views of all BRs (s 235(1)(b), (2)). According to the government, the last of these factors

> provide scope for the FWC to, for example, consider the dispute in the context of the whole of the relationship of the parties, the history of the bargaining, the conduct of the parties, the prevailing economic conditions, and the bargaining environment.[158]

In addition, the 'minimum bargaining period' must have ended, that is (s 235(1)(c), (5)–(6)):

- if one or more existing agreements apply to any of the relevant employees, the later of the day nine months after the NED of that existing agreement (or the latest NED for those existing agreements) and the day nine months after bargaining commenced (see below); or

154 See, eg, ACTU, *Congress 2018 Draft Policies and Resolutions*, above n 79; 'Reverse Umpire's Banishment to Sidelines: McManus', *Workplace Express*, 27 April 2018. For critiques of the limited avenues for arbitration of bargaining disputes under the FW Act and reform proposals, see A Forsyth, 'Could Canadian-Style Interest Arbitration Work in Australia?' (2015) 43 *ABLR* 121 (Could Canadian-Style Interest Arbitration Work in Australia?); S McCrystal, 'Deadlocked Bargaining Disputes: Industrial Action, Agreement Termination and Access to Arbitration', in S McCrystal, B Creighton and A Forsyth (Eds), *Collective Bargaining under the Fair Work Act*, Federation Press, Sydney, 2018, p 117 (Deadlocked Bargaining Disputes).

155 See Forsyth, 'Ten Years of the Fair Work Act', above n 2, at 122–5.

156 Note that the former provisions relating to arbitration following termination of protected industrial action (see McCrystal, 'Deadlocked Bargaining Disputes', above n 154) remain in place.

157 A provision already existed for arbitration of greenfields agreement disputes under s 178B: see Forsyth, 'Could Canadian-Style Interest Arbitration Work in Australia?', above n 154, at 128–9.

158 SJBP EM, above n 46, at para 847.

- if there is no existing agreement, the day nine months after bargaining started (for these and the above purposes, bargaining for a proposed agreement starts on the day that a supported bargaining or single interest employer authorisation comes into operation, or otherwise at the notification time for the proposed agreement).[159]

Under s 235A(1), the FWC can (if considered appropriate) specify in an intractable bargaining declaration that there will be a 'post-declaration negotiating period' of a duration determined by the tribunal. During this period, it can provide parties with assistance such as conciliation.[160] Arbitration can only occur — in fact, must occur as quickly as possible — once a post-declaration negotiating period has ended or if no such period was prescribed by the FWC in the intractable bargaining declaration after the declaration is made (s 269).

Arbitration in this context takes the form of an 'intractable bargaining workplace determination', for which the FWC must be constituted by a Full Bench (s 616(4)). Such a determination must include (s 270(1)) the 'core terms' set out in ss 270 and 272, including terms dealing with the matters that remained at issue between the negotiating parties, the terms which the parties had agreed upon (s 274(3)) and the mandatory terms delineated in s 273. The factors which the FWC must consider in arbitrating on any non-agreed terms remain as previously outlined in s 275, with the addition of considering (in evaluating the interests of the employer(s) and employees under the proposed determination) 'the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement' previously applicable to the parties (s 275(ca)).

Overall, the new provisions for settlement of intractable bargaining disputes offer bargaining parties — especially employees and unions — new options to access arbitration without having to establish fault (that is, an absence of good faith) on the part of another party. How willing the tribunal will be in practice to 'pull the trigger' and conclude that it is reasonable to intervene remains to be seen. Whether arbitration will lead to outcomes favourable to the interests of workers is also open to question, given the mixed history of workplace determinations by the FWC following termination of industrial action.[161] But it is clearly possible that the 'shadow' or threat of compulsory arbitration will encourage both earlier settlements and a greater willingness to compromise.[162]

IX Termination and Sunsetting of Enterprise Agreements

Under the FW Act, as with predecessor workplace relations legislation, enterprise agreements continue to operate until they are replaced by a later

159 As to the notification time, see text preceding n 120.

160 See also FW Act s 235A(2), enabling the FWC (after hearing the views of the BRs) to extend the post-declaration negotiating period.

161 Note in particular the arbitrations following the 2011 Qantas dispute: see A Forsyth and A Stewart, 'Of "Kamikazes" and "Mad Men": The Fallout from the Qantas Industrial Dispute' (2013) 36 *MULR* 785 at 800–2, 824–7.

162 See 'Arbitration Threat Will Bring Parties to Table: Lawyer', *Workplace Express*, 15 May 2023.

enterprise agreement or terminated by the FWC. Once made, an enterprise agreement can continue to operate indefinitely if no later agreement that covers the same group of employees is made or if the agreement has not been terminated (ss 54(2), 58(2)).[163]

Enterprise-level agreement-making leading to the creation of enforceable statutory instruments (separate and distinct from the creation of awards by industrial tribunals) has been possible since 1988,[164] with enterprise agreements becoming a significant feature of the industrial landscape after the Industrial Relations Reform Act 1993 (Cth).[165] In the following years, the legislation has allowed for the creation of multiple types of agreements, including a short window where agreements could be created without reference to a substantive award safety net.[166]

In the lead up to the passage of the FW Act, the then Australian Labor Party Government actively considered the inclusion of a provision that would sunset some earlier agreements. However, after strong lobbying on the part of business, the sunsetting plan was abandoned.[167] Instead, a provision was included to provide that employees covered by any statutory agreement were entitled to receive at least the minimum wage contained in any relevant modern award.[168]

Since the passage of the FW Act, the problem of substandard (or 'zombie' agreements as they have come to be known) has been highlighted. Agreements which operate below the safety net (except in respect of basic wage rates) continue to apply at many workplaces.[169] An attempt to sunset pre-FW Act agreements was included in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) but withdrawn prior to enactment.[170] It was only with the enactment of Sch 1 Part 13 to the SJBP Act that a sunsetting provision was finally achieved.

Transitional legislation now provides for the termination of all pre-FW Act agreements and FW Act agreements made during the 'bridging period' in the second half of 2009 that remain in operation on 7 December 2023. A failsafe

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163 Under ss 54, 58, an agreement will cease to operate when, by virtue of the approval of subsequent agreements, there are no employees employed by the employer who are covered by the earlier agreement. However, an agreement does not cease to operate simply because the employer does not presently have any employees covered by it.

164 Industrial Relations Act 1988 (Cth) ss 115–17.

165 See R Naughton, 'The New Bargaining Regime under the Industrial Relations Reform Act' (1994) 7 *AJLL* 147.

166 This was the effect of changes enacted in the Workplace Relations Amendment (Work Choices) Act 2005 (Cth): see A Forsyth and C Sutherland, 'Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19 *AJLL* 183.

167 J Gillard, 'Address to the Australian Labour Law Association', speech delivered at the Australian Labour Law Association Conference, Melbourne, 14 November 2008.

168 FW Act s 206; Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) (TPCA Act) Sch 9 item 13.

169 On 3 April 2023, the FWC published a list of 104,000 possible 'zombie' agreements: see FWC, *List of Pre-2010 Agreements (Possible 'Zombie Agreements')*, Report, 4 September 2023, at <www.fwc.gov.au/agreements-awards/enterprise-agreements/sunsetting-zombie-agreements/our-list-possible-zombie> (accessed 7 September 2023).

170 Fair Work Amendment Bill 2020, above n 139, at Sch 3 Part 1: see Stewart et al, above n 4, at 138–140, 162.

has also been included to allow the FWC to grant an extension of time (up to a maximum period of four years) in cases where bargaining is occurring for a replacement agreement for the same group of employees or the employees would be better off under the agreement than they would be under the relevant modern award, and it is otherwise appropriate and reasonable to do so.[171] However, it is likely that the vast majority of zombie agreements will be terminated on the main sunset date, with any tail of agreements maintained through extensions coming to a final end by 7 December 2027.

The sunsetting of zombie agreements removes a particular problem with pre-2010 substandard agreements. However, this has no effect on agreements created since then that have been approved when in circumstances where they did not pass the BOOT because they left a class of agreement-covered workers worse off or which have become inferior across time due to subsequent award changes.[172] For such agreements, the FW Act provisions providing for the FWC to order termination of agreements continue to apply. However, these provisions have been amended by Sch 1 Part 12 to the SJBP Act to address the situation where employers apply to the FWC for the termination of an agreement while bargaining is occurring for a replacement agreement — with the intention of impacting the outcome of those negotiations.

Section 225 of the FW Act allows an employer, employee, or employee organisation covered by an agreement to apply to the FWC for termination of that agreement if it has passed its NED. Under the original version of s 226, the FWC was required to terminate the enterprise agreement if it was satisfied that it was not contrary to the public interest to do so, and it considered it appropriate to do so, taking into account all of the circumstances. Since 2015,[173] this provision has been used by employers to seek termination of agreements during bargaining for a replacement where they have been unsuccessful in obtaining an replacement agreement through collective bargaining.[174] This was because termination of an existing agreement had the effect of removing all collectively negotiated terms and conditions of employment, leaving affected employees with only safety net terms and conditions under the NES and modern awards and any contractual entitlements. For employees in sectors with a strong history of agreement negotiations, this could constitute a significant diminution of wages and conditions if agreement termination was approved and workers had not, in the meantime, agreed to an employer's proposed replacement agreement. This

171 TPCA Act Sch 3 item 20A; Sch 3A item 26A; Sch 7 Part 8 item 30.

172 As was the case in *Hart*, above n 137; *Re Application by Vickers* [2017] FWCFB 5817.

173 The decision in *Re Aurizon Operations Ltd* (2015) 249 IR 55; [2015] FWCFB 540; upheld in *CEPU v Aurizon Operations Ltd* (2015) 233 FCR 301; [2015] FCAFC 126, overturned earlier FWC decisions applying *Re Tahmoor Coal Pty Ltd* (2010) 204 IR 243; [2010] FWA 6468, at [51]–[55], which had held that agreement termination was not appropriate during contested bargaining.

174 See, eg, *Re Peabody Energy Australia PCI Mine Management Pty Ltd* [2016] FWCA 1595; *Re Griffin Coal Mining Co* [2016] FWCA 2312; *Murdoch University* [2017] FWCA 4472; *Re REMONDIS Australia Pty Ltd* [2017] FWCA 254. The history of the agreement termination provisions is outlined in S McCrystal, 'Termination of Enterprise Agreements under the Fair Work Act 2009 and Final Offer Arbitration' (2018) 31 *AJLL* 131 at 139–144.

meant that employers could use agreement termination applications or just the threat thereof to enhance their position in negotiations.[175]

Reform of the agreement termination provisions to restrict the use of s 225 applications during contested bargaining was proposed in 2017[176] and again in 2020,[177] with neither being passed through Parliament. After the 2022 federal election, access to agreement terminations as bargaining leverage continued to be a politically charged issue, with the ACTU,[178] Minister Tony Burke[179] and an ill-advised press conference on the eve of the Jobs + Skills Summit by New South Wales Premier Dominic Perrottet keeping the spotlight on agreement termination as a bargaining tactic.[180] Unsurprisingly, the SJBP Act included provisions restricting access to agreement termination, which took effect from 7 December 2022. The amendments introduced a new s 226 providing that the FWC must terminate an agreement upon application by a party covered by an agreement in three circumstances:

1. If it is satisfied that the continued operation of the agreement is unfair for the employees covered by the agreement (s 226(1)(a)). This is designed to deal with substandard agreements which have fallen below the safety net (as described above).
2. If it is satisfied that no employees are, or are likely to be, covered by the agreement — allowing for the removal of obsolete agreements which have not been replaced (s 226(1)(b)).
3. If it is satisfied that the continued operation of the agreement poses a significant threat to the viability of a business carried on by the employer or employers; that termination would be likely to reduce the potential for employees covered by the agreement to lose their jobs; and that each employer covered by the agreement has given the FWC a guarantee of any relevant termination entitlements contained in the agreement (s 226(1)(c)).[181]

In any case involving an application for termination of an agreement which is opposed and where the agreement covers existing employees, the matter must

175 See, eg, 'Agreement Rebuff Could Trigger Termination Bid: Coates', *Workplace Express* 16 May 2017; E Hannan, 'Streets Ice Cream Move to Cut Wages Is Industrial Blackmail: ACTU', *The Australian*, 22 August 2017; Senate Report, above n 8, at chap 4.

176 Fair Work Amendment (Terminating Enterprise Agreements) Bill 2017, introduced to Parliament by independent MP Andrew Wilkie.

177 Fair Work Amendment Bill 2020, above n 139, at Sch 3 Part 8: see Stewart et al, above n 4, at 161–2.

178 'Unions Call for Urgent Labor Action on Agreement Terminations', *Workplace Express*, 11 July 2022.

179 'Jobs Summit Will Tackle Agreement-Termination "Rort": Burke', *Workplace Express*, 8 August 2022.

180 The premier threatened to 'tear up' the enterprise agreement covering Sydney trains during a long-running industrial dispute: T Rabe and M O'Sullivan, 'Perrottet Declares War on Rail Unions in High-Stakes Ultimatum', *The Sydney Morning Herald*, 31 August 2022; 'NSW Threat Vindicates Burke Anti-Axe Stance: Unions', *Workplace Express*, 1 September 2022.

181 A guarantee of termination entitlements is governed by s 226A and ensures that agreement provisions providing entitlements to employees in the event of redundancy, bankruptcy or insolvency are guaranteed even in the event that the agreement is terminated.

be heard by a Full Bench (s 615A(3)). In its determination, the FWC must be satisfied that it is appropriate in all of the circumstances to terminate the agreement (s 226(1A)), may have regard to any other matter (s 226(5)), and must consider the views of the employer, any employee organisation and any employees covered by the agreement (s 226(3)). The FWC must also have regard to whether the application was made at the commencement or after the commencement of negotiations for a new agreement covering the same, or substantially the same, group of employees; whether bargaining for the proposed agreement is occurring; and whether termination of the agreement would adversely affect the bargaining position of the employees that will be covered by the proposed agreement (s 226(4)).

The new agreement termination regime is the first legislative attempt to define the circumstances where agreement termination will be appropriate and where it will not be. The pre-existing provisions left the question entirely within the discretion of the FWC, with no guidance on how to approach applications made on a 'strategic' basis. The legislative intention behind the new provisions is no longer neutral, and applications for agreement termination are plainly not for use in contested bargaining. However, what remains to be seen is how the threshold questions around 'business viability' and a likelihood that agreement termination will reduce the potential for employment terminations are approached. In particular, for agreement termination to be removed as a bargaining tactic, the threshold of a threat to business viability must be high enough that a mere period of financial instability does not become grounds to threaten termination, and the threat to business viability must in a substantial way, be connected to the agreement itself.

X Conclusion: Improving Pay and Job Security?

Despite its title, which carries unfortunate echoes of an earlier and less successful initiative,[182] the SJBP Act has relatively little to say about insecure work. The limitations on fixed and contingent term contracts are undoubtedly significant. But many of Labor's main commitments on job security will not be addressed until its third tranche of major reforms is introduced in the second half of 2023.[183]

As for better pay, there is certainly reason to be optimistic about the prospects of lifting wages in a number of feminised sectors through some combination of work value claims, equal remuneration orders and supported bargaining. But how much of a dent those rises will make on the gender pay gap, together with the new restrictions on pay secrecy, is very much open to debate.

Beyond that, the Albanese Government will doubtless be hoping to see a rebound in collective bargaining to help address the wage stagnation that has become entrenched over the past decade.[184] It seems reasonable to suppose

182 The Howard Government's Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (Cth) proposed a large number of amendments to the Workplace Relations Act 1996 (Cth), but was rejected by the Senate.

183 Department of Employment and Workplace Relations, above n 27.

184 See Stewart, Stanford and Hardy, *The Wages Crisis Revisited*, above n 83.

that the enhanced ability of unions to initiate negotiations, coupled with the long overdue termination of pre-2010 agreements and (perhaps) a fear of getting caught up in multi-enterprise agreements, may cause many employers who have walked away from bargaining to become active again, or perhaps even to make first agreements. The limits on the capacity of employers to seek or threaten termination of expired, above-award agreements will also affect bargaining dynamics, as will the potential availability of last-resort arbitration — arguably one of the most important changes to the bargaining framework in the SJBP Act. But it is much harder to predict how much use will be made of the new single interest employer stream. Much will depend on how the FWC seeks to reconcile some of the contradictions in the new framework, especially in deciding how there can be a public interest in creating industry-wide conditions under a statute that still proclaims the primacy of enterprise-level negotiations. It is also possible that if employers are prompted in greater numbers to create their own agreements, these may be non-union deals that involve little, if any, bargaining. That, in turn, may have implications for the size of any wage increases that employees actually see, especially at a time when inflation is continuing to suppress the real value of employee compensation.[185]

If the SJBP Act were to be more accurately titled, then gender equality would have a strong claim for inclusion. The amendments are broad in their reach, not least in dealing with matters we have only briefly touched upon, such as the abolition of the ABCC. But one of the strongest threads that runs through the reforms, linking those on pay equity, pay secrecy, flexible work requests, extending parental leave and the new prohibition on sexual harassment, is that of making workplaces fairer and safer for women. The inclusion of 'gender equality' as an object of the FW Act clearly reflects that preoccupation, where the elevation of 'job security' to the same status might seem more symbolic, at least for the time being.[186]

There have been many legislative initiatives over the years targeted at women in the workplace, not least on sexual discrimination, gender equality reporting and (given the persistently unequal distribution of caring responsibilities) parental leave. But the SJBP Act may be the first major set of amendments to workplace laws not specifically aimed at 'female' issues that foregrounds women's concerns. Quite apart from the Act's scope, the speed of its passage and the innovative nature of some of its components (notably on pay secrecy), that focus on gender issues says something important about the priorities of an activist Labor government that is only just getting started in its quest to revamp labour regulation in Australia.

185 See G Jericho and J Stanford, *Minimum Wages and Inflation*, Briefing Paper, Centre for Future Work, Australia Institute, Canberra, April 2023.

186 This is not to deny that the inclusion of job security in s 3(a) might yet assume importance in resolving any doubts as to the interpretation and application of the new provisions on fixed term contracts, not to say other aspects of the legislation.