HERBERT SMITH FREEHILLS

7 December 2022
Summary of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*

On 2 December 2022, the Federal Government passed the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Bill**). On 6 December 2022, the Bill received royal assent and became the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**Act**). The passage of this Act marks the most extensive industrial relations reform seen since the introduction of the Fair Work Act some 13 years ago.

The Bill was tabled in the House of Representatives on 27 October 2022. It was amended and passed by the House of Representatives on 10 November 2022 and then amended further and passed by the Senate on 2 December 2022.

In summary, the key changes being implemented through the Act are as follows:

- **agreements covering multiple employers** – employers can be forced to bargain for agreements that cover multiple employers (including, potentially, competitors, external companies within supply chains, or internal group companies, among others) as the FWC can make supported bargaining authorisations and single interest employer authorisations to enable this. Employees are also able to take protected industrial action or seek bargaining orders in support of these agreements and there are limits on employers'/employees' ability to remove themselves as parties to them. Employee organisations are also given significant power in the negotiation of these agreements, as each employee organisation bargaining representative must provide written consent before a multi-enterprise agreement can be put to a vote (unless a 'voting order' is made by the FWC that permits the vote);
- **bargaining disputes** – broader powers for the FWC to intervene and make workplace determinations (effectively arbitrating an enterprise agreement) where bargaining is 'intractable';
- **industrial action** –the removal of limitations on protected industrial action in relation to multi-enterprise agreements, but the inclusion of an obligation to attend FWC mediation/conciliation before protected industrial action is taken (which applies to all forms of enterprise agreements except the 'cooperative' multi-enterprise stream where protected industrial action is not available);
- **terminating agreements** – materially reduced scope for termination of enterprise agreements, particularly during bargaining, and the sunsetting of 'zombie' agreements within 12 months of commencement (unless an extension is granted of up to 4 years);
- **enterprise agreement approval process (BOOT and pre-approval requirements)** – bargaining can start when an employee bargaining representative gives notice in certain circumstances (and without a MSD), certain pre-approval requirements have been removed, the 'genuinely agreed' test remains, there are limits on the use of start-up enterprise agreements (the voting employees must have a sufficient interest in its terms, and must be representative of the employees to be covered), the BOOT has been simplified and must involve a global (not line by line) assessment, the FWC can amend an enterprise agreement during the approval process rather than relying on employer undertakings, and parties may apply for a reassessment of the BOOT during the life of the enterprise agreement, e.g. if employees' work patterns change;
- **pay equity** – expanded scope for the FWC to make Equal Remuneration Orders, prohibitions on and invalidation of pay secrecy clauses in employment contracts with penalties for non-compliance, and the establishment of two new expert panels within the FWC on pay equity and the care and community sector to tackle low pay in female dominated industries;
- **Respect @ Work** – a new prohibition on sexual harassment in connection with work, with principals vicariously liable for acts of their employees or agents, and broader powers to the FWC to deal with sexual harassment disputes. This builds upon the introduction of a positive duty to prevent sexual harassment in the workplace under the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (which also recently passed through Federal Parliament);
- **discrimination** – minor amendments to the anti-discrimination provisions in the *Fair Work Act 2009 (Cth)* (**FW Act**) to reflect other Commonwealth anti-discrimination legislation. These include adding protected attributes (breast feeding, gender identity, intersex status) and clarifying the operation of special measures to achieve equality;
- **fixed/maximum term contracts** – prohibitions on fixed/maximum term contracts in certain circumstances, with anti-avoidance provisions and exceptions for certain roles, industries, and uses of such contracts;

- **flexible work requests** – expanded scope for employees to request flexible work arrangements, including a requirement for businesses to give reasons for any refusal of a flexible working request, limits on reasons for refusing a request, and FWC arbitration powers to deal with disputes;
- **unpaid parental leave extension requests** - expanded obligations on employers in response to requests for extensions of unpaid parental leave, including a requirement for businesses to give reasons for any refusal, limits on reasons for refusing a request, and FWC arbitration powers to deal with disputes;
- **the objects of the FW Act** – these have been expanded to include promotion of job security and gender equality;
- **abolishing the Australian Building and Construction Commission** – the ABCC would be abolished, with its remaining functions assumed by the Fair Work Ombudsman;
- **establishment of the National Construction Industry Forum** – with the role of providing advice to the Government in relation to work in the building and construction industry;
- **abolishing the Registered Organisations Commission** – the ROC would be abolished, with its functions transferred to the FWC; and
- **other matters** – there are a range of other discrete amendments, including a requirement that a review be conducted of the operation of the amendments (to commence within two years of royal assent, with a report to be provided to the Minister within 6 months of commencement of the review, which must be then tabled in each House of Parliament within 15 sitting days), prohibitions on advertising roles at less than the applicable minimum rate of pay, an expansion of the small claims proceedings division in the FW Act from $20,000 to $100,000, requirements relating to pay slips, and certain other changes.

The below table provides a more detailed overview of the key elements of the Act and what it means in practice for Australian employers. It of course does not serve as a substitute for legal advice.

Changes	What does this mean for you?	Commencement
Agreements covering multiple employers		
Overview The Act significantly expands the concept of multi-enterprise bargaining and provides employees and unions with greater powers to force employers to bargain for agreements that cover multiple employers (including, potentially, competitors, external companies within supply chains, or internal group companies, among others). This represents a substantial shift away from the long-held bipartisan focus on bargaining at the enterprise-level. Notably, employees employed in the on-site general building and construction industry are excluded from the multi-employer EA framework. This includes employees employed in general building and construction and civil construction (subject to a few express carve-outs). Employee organisations are also given significant power in the multi-enterprise bargaining stream, as the Act provides that before an employer puts a multi-enterprise agreement to a vote, the employer must first obtain written agreement from each employee	Changes to multi-enterprise bargaining represents a significant change to industrial policy in Australia. Moving away from enterprise-level bargaining presents numerous challenges to business and employers. It is a change that HSF predicted following release of the ALP's federal election platform back in 2019 (see here). It is first important to assess whether your organisation could potentially meet the tests for being compelled to participate in either the supported bargaining or single interest enterprise bargaining schemes. If so, then significant work will be required on your organisation's industrial relations strategy. This is because: • There will be fewer options to resist enterprise bargaining. Indeed, many organisations might be forced to participate in the enterprise bargaining process for the first time. • The intractable bargaining regime gives the capacity to determine bargaining outcomes even in respect	A day to be fixed, or the day after 6 months from the date of Royal Assent.

organisation bargaining representative. The only exception is where the FWC orders a vote where the failure of the employee organisation to provide written agreement is unreasonable, and the request to make such an order is not inconsistent with, and would not undermine, good faith bargaining for the agreement (similar rules apply to votes to vary a multi-enterprise agreement).

The new streams of multi-enterprise bargaining

There are two new "streams" of multi-enterprise bargaining:

- "**Supported bargaining agreements**" (which replace the previous "low paid authorisation" framework).

  Under this stream, the FWC can make a supported bargaining authorisation, requiring multiple employers to bargain together, if it is satisfied that it is appropriate to do so, having regard to a number of factors. Only one of those factors is whether low rates of pay prevail in the industry or sector. Other considerations include whether the employers to be covered by the authorisation have clearly identifiable common interests. The FWC will no longer be required to consider the history of bargaining in the industry in which employees work.

  The Act also grants the Minister power to declare an industry, occupation or sector eligible for the supported bargaining stream. The FWC **must** make a supported bargaining authorisation if an application is made in respect of employees in such an industry, occupation or sector specified in the Minister's declaration.

  Supported bargaining agreements prevail over single enterprise agreements (even if the single enterprise agreement has not passed its nominal expiry date). However, an employer cannot be covered by a supported bargaining authorisation in respect of employees covered by an agreement that has not nominally expired, unless the employers "main intention" in making the agreement was to avoid being specified in a supported bargaining authorisation.

  Employers are also prohibited from bargaining with employees for any other agreement while they are covered by the supported bargaining authorisation.

  of negotiations for supported bargaining agreements and enterprise agreements covering multiple employers pursuant to a single interest employer authorisation.

- Industrial action will likely be much more damaging, and the impacts will be more difficult to mitigate. This is because of the potential for industrial action to be coordinated across multiple different employers at the same time, potentially throughout entire supply chains, or industry sectors. Careful thought needs to be given to opportunities to reduce this impact, and legal responses to reduce the impact of the action.

- The bargaining dynamics will be different, given the potential involvement of other employers.

Employers and employees who are specified in a supported bargaining or single interest employer authorisation will have limited opportunities to remove themselves from the multi-employer bargaining process. The process will require the FWC to determine that because of a "change in the employer's circumstances", it is no longer appropriate for the employer to be covered (or where the employer employs less than 50 employees and the employees voted in favour of that removal). The onus will be on the employer to prove a "change in circumstances".

Further, employee organisations have significant power to apply to the FWC for an employer to be added to a multi-enterprise agreement after the agreement has been made. This can force an employer to join an agreement against the wishes of the employer. An employer may be able to argue that it is against the public interest for it to be forced into an agreement.

The change that requires all employee organisation bargaining representatives to consent to a multi-employer enterprise agreement being put to vote also affords employee organisations significant power in the bargaining process. Employers will essentially be 'locked-in' to the bargaining process until the employee organisation bargaining representatives consent to the EA proceeding to vote or the FWC makes a voting request order. Employers will therefore be unable to proceed to a vote against the wishes of employee organisations (or even one employee organisation despite others being in agreement), unless the FWC makes an order to these effect.

 **Changes**

 **What does this mean for you?**

 **Commencement**

- "**Single interest employer authorisations**"

  Under the Act, applications to the FWC for a "single interest employer authorisation" can be made by employee bargaining representatives (rather than just employers). The FWC can also grant the authorisation covering an employer without its consent (compelling it to bargain with other employers) provided it employs at least 20 employees at the time of the application and is not covered by an agreement that has not nominally expired (along with other requirements concerning competing single interest employer authorisations).

  Among other matters, the FWC must be satisfied that the majority of the employees who are employed by each of the employers who will be covered by the agreement want to bargain with the employers (similar to the existing MSD process), and that the employees have clearly identifiable common interests. A "public interest" test will apply where the FWC must be satisfied that it would "not be contrary to the public interest" to grant a multi-employer authorisation.

  Employers are also prohibited from bargaining with employees for any other agreement while they are covered by the single interest employer authorisation.

  The FWC may decide to exclude a particular employer from the authorisation where the FWC is satisfied that the employer is bargaining in good faith, has a history of effectively bargaining, and less than 9 months have passed since the nominal expiry date (effectively giving employers an opportunity to reach a single-enterprise agreement before being exposed to the multi-enterprise stream).

<u>Clearly identifiable common interests in the context of supported and single interest bargaining</u>

In determining whether employers have "clearly identifiable common interests", the matters which are specified as being potentially relevant include geographic location, and the nature of the enterprises to which the agreement will relate (including existing terms and conditions). For supported bargaining authorisations, Government funding is also

Responses to these challenges require careful planning well in advance of the commencement of bargaining, and will likely require some changes to bargaining tactics and strategy.

relevant. For single interest employer authorisations, the application of regulatory regimes is relevant. Importantly, for applications for single interest employer authorisations made by employee bargaining representatives, the Act provides that a clearly identifiable common interest will be **presumed**, unless proved otherwise, for employers who employ 50 employees or more (taking into account associated entities).

In the context of this test, the Act also requires that the operations and business activities of the employer being included in a single interest employer authorisation, or being roped-in" to an existing single interest employer agreement, be "reasonably comparable" with those of the other employers covered by the agreement or authorisation. The Act provides that if the application was made by an employee organisation or employee bargaining representative, then this will be **presumed**, unless proved otherwise, for employers who employ 50 employees or more (taking into account associated entities).

Protected industrial action in the context of supported and single interest bargaining

In each of these two streams, employees have the capacity to take protected industrial action or seek bargaining orders. For protected industrial action to be taken by employees of any given employer in support of a supported bargaining or single interest employer agreement, a majority of employees on the roll of voters at that employer must vote, and a majority must cast a valid vote in favour of the action.

'Roping-in' to existing agreements

There is also the capacity for supported bargaining agreements or agreements covering multiple employers made under a single interest employer authorisation to be varied after they are made to add additional employers (i.e. 'roping-in' additional employers and employees). An application to add additional employers can be made jointly by an employer not covered by the agreement and its affected employees, or solely by an employee organisation (that is, without the employer's consent).

Where an employer and affected employees seek to jointly add themselves to the agreement, the variation must be approved by a majority of affected employees by way of a vote (amongst other requirements). The vote can be conducted by a ballot or by an electronic method. The variation has no effect unless it is approved by the FWC.

 **Changes**  **What does this mean for you?**  **Commencement**

Where an employee organisation seeks to vary the agreement, the variation does not need to be put to a vote. The FWC can grant the variation provided that (amongst other requirements), the employer employed at least 20 employees at the time of the application for the variation, the majority of affected employees want to be covered by the agreement, and the affected employees are not covered by an agreement that has not nominally expired.

This effectively means that an employer can be forced into an agreement where the above conditions are satisfied without having been involved in the bargaining process. However, again, the FWC may refuse a variation where the FWC is satisfied that the employers are bargaining in good faith, they have a history of effectively bargaining and less than 9 months have passed since the nominal expiry date.

Exclusions from multi-enterprise bargaining

Employers can avoid being included in a single interest employer authorisation, or being "roped-in" to an existing single interest employer agreement, where they have agreed in writing with an employee organisation that is entitled to represent the industrial interests of one or more of the affected employees to bargain for a proposed single enterprise agreement that would cover the employer and those employees or substantially the same group of those employees.

The Act also allows an employer and affected employees to jointly vary a multi-enterprise agreement to remove themselves as parties covered by the agreement.

The variation is made when the majority of employees affected vote to approve the variation. The vote can be conducted by a ballot or by an electronic method. The variation has no effect unless it is approved by the FWC.

The FWC must approve a variation where:

- the employer complied with the specified process requirements prior to the employee vote;
- a majority of affected employees cast a valid vote to approve the variation;
- there are no reasonable grounds for believing that a majority of the affected employees did not approve the variation; and
- each employee organisation covered by the multi-enterprise agreement agrees to the variation.

Changes	What does this mean for you?	Commencement
Cooperative workplace stream The existing multi-enterprise agreement regime (which employees cannot be compelled to participate in, and which does not permit the taking of protected industrial action), is now known as the **cooperative workplace agreement stream**.		

Bargaining disputes

Changes	What does this mean for you?	Commencement
The Act removes the concept of bargaining-related workplace determinations (which allows the FWC to arbitrate a workplace determination in certain circumstances where there has been a "serious and sustained breach" of the good faith bargaining requirements and has issued a "serious breach declaration"). In its place are new provisions enabling the FWC to make "intractable bargaining declarations", and make "intractable bargaining workplace determinations". In other words, the FWC will have a new and much broader power to arbitrate enterprise agreements where bargaining has been protracted and there is no reasonable prospect of reaching agreement. The Act would enable the FWC to make an intractable bargaining declaration where: • An application has been made by a bargaining representative; • The application does not relate to a proposed multi-enterprise agreement (unless a supported bargaining authorisation or a single interest employer authorisation is in operation); • The FWC is satisfied that the FWC has dealt with the dispute as part of an application under s. 240 (an existing provision enabling the FWC to assist in resolving bargaining disputes), there is no reasonable prospect of agreement being reached if the FWC does not make the declaration, and it is reasonable to make the declaration taking into account the views of all bargaining representatives; and • It is after the end of the minimum bargaining period, being the later of: o 9 months post the latest nominal expiry date of any existing EA that applies to any of the employees that will be covered by the proposed agreement (if applicable); or	Bargaining leverage under the current FW Act bargaining framework largely depends upon an employer's ability to withstand protected industrial action, and employees' ability to take it. For example, employers who could implement contingency plans to withstand protected industrial action were well placed to continue with the 'status quo' and not accede to union / employee demands. This 'status quo' option will be diminished under the Act, and the potency of protected industrial action will also be diluted. It will be much easier to access the FWC's jurisdiction to arbitrate the terms of an enterprise agreement. For many employers, this means that they will be forced to concede matters during bargaining, or have terms imposed by the FWC, in circumstances where that would not have happened under the current legislation. Under the current legislation, this can only occur when protected industrial action has been terminated by the FWC, or after a "serious breach declaration" has been made (which has never occurred). The thresholds to obtain these types of orders are extremely high. This represents a significant loss of employer control over the content of their industrial instruments. Workplace determinations are very rare under the existing legislation, and an employer cannot be forced to put an agreement to vote. Under the Act, Workplace Determinations will become much more common. The FWC has on occasion shown reluctance to make a workplace determination with entitlements less beneficial than those in the enterprise agreement it replaces. Accordingly, this change may make it even more difficult for employers to "wind back" unsustainable terms and conditions. However, for some employers, this will be welcome news, given the capacity for the FWC to resolve intractable bargaining without the	A day to be fixed, or the day after 6 months from the date of Royal Assent.

Changes	What does this mean for you?	Commencement
○ 9 months after the day bargaining starts (which is the notification time for the proposed agreement, or if a supported bargaining authorisation or single interest employer authorisation is in operation, the date the authorisation comes into operation). The FWC must then make an "intractable bargaining workplace determination" as quickly as possible after making the declaration, or after the end of any negotiating period specified in the declaration. Importantly, the Act also adds a new factor to the list of factors that the FWC must take into account in deciding upon the terms of a workplace determination (whether that be an intractable bargaining workplace determination, or industrial action related workplace determination), being "*the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees*". This could make it more difficult to argue that any particular terms and conditions that are contained in any current enterprise agreement should not be included in the workplace determination.	need for protracted and damaging industrial action (or any of the other high thresholds for triggering a workplace determination). Either way, this will require some substantial re-working of industrial relations and bargaining strategies well ahead of the commencement of bargaining under the new regime.	
Industrial Action		
The Act, for the first time, permits protected industrial action to be taken in relation to multi-enterprise agreements, except for "cooperative workplace agreements". Protected action ballot applications made in the context of multi-enterprise bargaining will be treated as separate applications for each employer and voting will be assessed on an employer-by-employer basis. An extended notice period for protected industrial action of 120 hours applies in relation to multi-enterprise agreements. There is also a new requirement that when making a protected action ballot order, the FWC must also make orders directing the bargaining representatives for the agreement to attend a conference/mediation conducted by a FWC member or a delegate of the FWC. Protected industrial action will not be available to any party who contravenes that order (eg. if an employee's bargaining representative	The new capacity for industrial action to be taken in support of multi-employer agreements (except the cooperative stream) is significant. This means that multiple employers can be compelled to bargain together, and be subject to protected industrial action by employees as part of the bargaining. The extension of protected industrial action to multi-enterprise bargaining will be of concern to many employers, despite the obligation to first attend a conference/mediation in the FWC. Again, these changes will need to be considered by employers as part of their pre-bargaining strategic planning.	A day to be fixed, or the day after 6 months from the date of Royal Assent.

breaches the order, then the employee cannot take protected industrial action. If an employer breaches the order, then the employer cannot take protected industrial action).

Termination of EAs after nominal expiry date – The Act significantly reduces the ability to apply to terminate expired enterprise agreements by replacing the existing requirement that the FWC be satisfied that it is not 'contrary to the public interest', with a range of additional requirements and constraints on the FWC's discretion.

In particular, the FWC needs to be satisfied that the application meets one of the following three criteria:

- The continued operation of the agreement would be unfair for the employees covered;
- The agreement does not, and is not likely to, cover any employees; or
- All of the following apply:
    - The continued operation of the agreement would pose a significant threat to the viability of a business carried on by the employer;
    - Termination of the EA would be likely to reduce the potential of terminations of employment due to redundancy, insolvency or bankruptcy;
    - Each employer has given the FWC a guarantee of termination entitlements contained within the agreement (which effectively prevents a reduction in termination entitlements for a defined period).

The FWC must also have regard to any other relevant matter, including whether bargaining for a proposed replacement agreement is occurring and whether the termination would adversely affect the bargaining position of employees. This will make it very difficult to terminate expired enterprise agreements during enterprise bargaining (and the explanatory memorandum expressly calls out the intention that the Act prevent agreements being terminated as a bargaining tactic).

In addition to all of the above requirements, the FWC must only terminate an EA if it is satisfied

The effect of this change is significant, as it shifts the power balance between employers and employees. It will be very difficult, if not impossible, to terminate expired enterprise agreements during bargaining, meaning employees and unions will have no downside risk – the worst case scenario if a deal is not reached is that they will be entitled to the terms of the current agreement (as terms and conditions are unlikely to ever go backwards absent employee agreement).

It will now be even more difficult for employers to unwind agreements that have become unsustainable. Employers will need to factor this into pre-bargaining planning, and identify other ways to create leverage at the bargaining table.

Further, employers who consider themselves to meet the 'significant threat to the viability of the business' exception will ideally plan for and make the application independent of any bargaining process.

The day after Royal Assent.

Changes	What does this mean for you?	Commencement
that it is appropriate to do so in all the circumstances. If any of the employers, employees, or employee organisations oppose the termination, then the matter must be heard by a Full Bench (except in limited defined circumstances).		
Sunsetting of 'zombie' agreements - The Act provides for an automatic sunset period, following which Pre-FW Act and FW Act bridging period individual and collective agreements will terminate. The sunset period will be 12 months post commencement of Part 13 of Schedule 1 to the Act, or a further period if extended (extensions must be applied for by employers or employees covered by the agreement, or industrial associations entitled to represent the industrial interests of employees, and cannot exceed 4 years). Employers are required to give written notice to employees of the impending termination within 6 months of Part 13 of Schedule 1 to the Act commencing. Until now, these 'zombie' agreements have allowed some employers to pay wages under the agreement that are lower than would be required to be paid if the award applied (for example, if the agreement did not require payment of penalties or loadings).	The impact of this reform will vary by employer, employee and industry. Employers will need to identify whether they have any operative individual or collective agreements that were made under the Workplace Relations Act (before the FW Act coming into operation in July 2009) or during the 'bridging period' under the FW Act between 1 July 2009 to 31 December 2009. Employers who are covered by these agreements will need to compare their agreement with the relevant modern award, and assess whether it would help to apply to extend the sunset period for that agreement. The relevant modern award will then apply from the end of the sunset period. Employers covered by those instruments will also need to ensure that they comply with the obligation to give written notice of the sunsetting to employees. We anticipate that this reform will encourage employers, employees and unions to commence negotiations for a replacement enterprise agreement under the FW Act.	The day after Royal Assent.
Enterprise agreement approval processes (including the BOOT and pre-approval requirements)		
Bargaining can start when employee bargaining representative gives notice - Currently, bargaining only commences when an employer agrees to bargain or initiates bargaining or where a majority support determination or a scope order is made by the FWC. Under the Act, for Single-EAs, employee bargaining representatives will have the power to initiate bargaining by giving written notice to the employer where the proposed EA replaces a single EA that has nominally expired, no more than 5 years has passed since its expiry, and the proposed EA will cover the same or substantially the same group of employees, and a single-interest employer authorisation did not cease to be in operation because of the making of the earlier EA. This notification would then trigger the good faith bargaining	***Bargaining can start when employee bargaining representative gives notice*** - This change affords unions and other employee bargaining representatives significant power, as it enables unions to bypass the MSD process, and compel an employer to commence bargaining. This is a significant change from the current regime, in which employers alone have this power absent an order from the FWC. ***Genuinely agreed test and simplification of process requirements*** - While the amendments go some way to removing much of the prescription around the pre-approval requirements, employers will instead have to carefully follow the FWC's Statement of Principles and build those principles into their approval processes. Key to this will be the content of the FWC's Statement of Principles.	***Enterprise agreement approval*** - A day to be fixed, or the day after 6 months from the date of Royal Assent. ***Initiating bargaining*** - The day after Royal Assent. ***Better off overall test*** - A day to be fixed, or the day after 6 months from the date of Royal Assent. ***Dealing with errors in enterprise agreements*** - The day after Royal Assent.

requirements, and compel the employer to commence the bargaining process.

Process requirements - Various pre-approval requirements have been removed, such as the strict 7 day 'access period' prior to a vote. These obligations will instead be replaced by the broader 'genuinely agreed' test referred to below, meaning that these obligations have not necessarily gone away completely, and will still need to be undertaken by employers in some form.

NERR and 21 day rule - The requirements in relation to the NERR and the 21 day rule for holding the vote will only be required for single-EAs (and not greenfields agreements, or multi-enterprise agreements). The minor procedural and technical errors discretion has been retained for errors in these processes.

Genuinely agreed test - The Act retains an overarching requirement that the EA be "*genuinely agreed to*" by employees. Instead of prescriptive pre-approval requirements, the Act provides that the FWC must take into account the FWC's Statement of Principles (which will be developed by the FWC) in deciding whether the EA has been "*genuinely agreed to*" by employees. This Statement of Principles will include principles around informing employees of bargaining and their rights to be represented, providing them a reasonable opportunity to consider the EA, explaining the terms of the EA and their effect to employees, providing employees with a reasonable opportunity to vote in a free and informed manner, and any other matter the FWC considers relevant. Further, the Act provides that the FWC cannot be satisfied that a multi-enterprise agreement has been genuinely agreed to unless the approval of each employee organisation bargaining representative has been obtained prior to putting the EA to vote, or the vote was otherwise approved by a FWC voting request order (see section above relating to multi-enterprise bargaining).

Start-up EAs - The Act restricts the ability for employers to make start-up EAs by requiring the FWC to be satisfied that the employees voting on the EA have a sufficient interest in the terms of the EA and are sufficiently representative of the employees the EA is expressed to cover.

BOOT at approval stage - The BOOT has been simplified, and it will now be easier for agreements to pass the BOOT, particularly where the application is supported by all parties. Under the Act, the term 'prospective award covered employee' is replaced with the term 'reasonably foreseeable employee'. The

For instance, if the FWC's Statement of Principles follows the existing case law in giving guidance on the existing steps in the pre-approval process, many employers' processes may still be as burdensome. The Statement of Principles could also include additional specific requirements, such as an obligation to involve certain unions in the bargaining process (which is foreshadowed in the explanatory memorandum). Importantly though, the Statement of Principles is not determinative, so the FWC has broad discretion to find that an agreement has not been 'genuinely agreed to'. This does not bode well for start-up agreements (see below). Depending on the detail of the Statement of Principles, these amendments could actually result in less clarity as to what is expected of employers in the lead up to a vote on a proposed agreement. There is also the capacity for Government to make regulations that prescribe additional requirements that need to be met in order for agreements to meet the 'genuinely agreed' test, adding to the lack of certainty here.

Start-up EAs - Any employers considering start-up EAs that cover a larger number of classifications or employees than are currently employed by the employer will need to carefully consider the Act, as these amendments are likely to mean that these EAs will not be found by the FWC to be genuinely agreed to by employees. Similarly, there is a risk that the FWC will not approve an EA if no 'genuine bargaining' has occurred, such that employees do not have a sufficient 'stake' in the agreement.

BOOT at approval stage - Where the employer, unions and employee bargaining representatives are comfortable that the EA passes the BOOT, these changes are likely to mean that this view will be largely adopted by the FWC. Employers will therefore be incentivised to put additional effort into ensuring that employees and unions are prepared to 'speak in favour' of the agreement, and provide express endorsement. The amendments are welcomed in that they clarify that the BOOT should be undertaken on a global assessment of less beneficial and more beneficial terms (rather than a line-by-line assessment), and that only reasonably foreseeable patterns or kinds of work or types of employment need to be considered. However, the BOOT has not changed in many ways, in that each employee must still be better off overall (although the FWC can make the assumption that they are better off overall if they are in a class that is better off). Overall, this will necessarily remain a complicated test. We therefore expect to see many contested

 **Changes**

 **What does this mean for you?**

 **Commencement**

Act also clarifies that the FWC must undertake a global assessment (not a line-by-line assessment) of whether each employee is better off having regard to the more beneficial and less beneficial terms of the EA as compared with the relevant award. The FWC must also now give consideration to any views of the employer, employees and bargaining representatives. Where the common view of the employer and employee bargaining representatives is that the EA passes the BOOT, this must be given primary consideration by the FWC. The FWC may also only have regard to reasonably foreseeable patterns or kinds of work or types of employment (rather than hypothetical kinds of work that are not foreseeable). In considering what is reasonably foreseeable, the FWC must have regard to the nature of the enterprise to which the agreement relates (and must determine whether a particular pattern or kind of work, or type of employment, is reasonably foreseeable if a view about the matter is expressed by the relevant employers, employees, or bargaining representatives). The assumption that employees are better off overall if a class to which they belong would be better off overall has also been retained.

FWC can amend the EA during the approval process - Instead of an undertaking, if the FWC has a concern that the EA (or any variation to the EA) does not meet the BOOT, then the FWC has the power to directly amend or excise terms in approving the EA (or varying an EA) if the FWC is satisfied that an amendment is necessary to address their concern. Where the FWC intends to amend an EA, it must seek the views of the employer or employees covered and the bargaining representatives.

BOOT during the life of the EA - New provisions have been added to allow employers, employees, or unions covered by the agreement to apply to the FWC for a re-consideration of the BOOT where the employees covered by an approved EA work other patterns or kinds of work or other types of employment that were not previously considered by the FWC at approval stage. The same BOOT process is then undertaken by the FWC and the relevant Award and EA are assessed as they were at the approval stage (unless a variation to an EA has been made, in which case the award and EA are assessed at the time for approval of the variation). If the FWC considers that the BOOT is not met, then undertakings can be accepted, or the same FWC amendment process discussed above applies (whereby the FWC can amend the agreement if it is satisfied that an amendment is necessary to address concerns). The applications and much of the complexity with the BOOT analysis will remain.

FWC can amend the EA during the approval process - In recent times, EAs are often approved with undertakings. However, this amendment allows the FWC to make amendments to the EA (instead of merely accepting undertakings offered by the employer) if the amendment is necessary to satisfy its concerns about the BOOT. This gives employers much less control in the process (as this removes the option that is currently available to employers to refuse to give a particular undertaking and instead return to the bargaining table), and reinforces the importance of employers having a clear view on the likelihood of their proposed agreement passing the BOOT prior to putting it to a vote of employees.

BOOT during the life of the EA - Where there are changes to patterns or kinds of work or types of employment during the life of the EA, this new process allows for the EA to be amended by the FWC during the life of the agreement. This does increase uncertainty for employers somewhat, as compared with the current system where employers can rely on the FWC's approval of the agreement without this additional risk of any changes during its operative life. The risk of such an application will need to be considered by employers prior to changing patterns or kinds of work, or types of employment.

Dealing with errors in enterprise agreements – This reform provides a simple method for addressing inadvertent errors. Either party can make an application for variation, or the FWC can act on its own initiative.

 **Changes**

 **What does this mean for you?**

 **Commencement**

amendments will operate 7 days after the amendment, or a date specified in the amendment, which may be a day before the amendment is made (the FWC must specify a day before the amendment is made if the FWC considers that it is necessary to address the concern to which the amendment relates). If such an amendment is made to an agreement and the amendment has a retrospective effect, the Act specifies that there is no liability to pay a pecuniary penalty for past conduct.

Dealing with errors in enterprise agreements – The Act will simplify the process for correcting any obvious errors, defects or irregularities in EAs (including instances where the wrong version was submitted to, and approved by, the FWC). The FWC will have the discretion to vary an EA to correct an obvious defect or omission, or to vary an approval decision so that it applies to the correct version of an EA.

Pay equality and reducing the "gender pay gap"

A key goal of the Act is to address the gender pay gap. To do so, the Act proposes a number of reforms including:

- ***Amending the provisions relating to Equal Remuneration Orders*** (**ERO**) to provide greater flexibility to the FWC, by allowing the FWC to make an ERO on its own initiative. The amendments also provide guidance on the "gender equality" considerations the FWC is to take into account when considering if there is equal remuneration for work of equal or comparable value – namely, comparisons within and between occupations and industries to establish whether work has been undervalued on the basis of gender, whether historically the work has been undervalued on the basis of gender, and the provisions of any fair work instrument or state industrial instrument.
- ***Banning pay secrecy*** by introducing a positive ability for employees to disclose (or ask someone to disclose) their remuneration or terms and conditions of their employment that are reasonably necessary to determine remuneration outcomes. This positive ability will be a 'workplace right' for the purposes of the general protections provisions and will operate

In relation to pay transparency, employers will need to consider how transparency of wages might impact their reputation, the morale of staff and relationships between staff. Consideration should be given to whether any changes are required ahead of the commencement of these reforms.

Employers should be aware that the amendments include a civil remedy provision where an employer enters into a contract of employment which prohibits employees from discussing their pay. As such, employers should urgently review their template contracts of employment. More broadly, employers may wish to review their remuneration policies and company messaging around remuneration.

In relation to pay equality, it is also an opportune time to consider how your organisation approaches this topic, and whether there is any pay discrepancy between genders.

Amending the provisions relating to Equal Remuneration Orders - The day after Royal Assent.

Banning pay secrecy - The day after Royal Assent.

Enabling the establishment of two new FWC expert panels - A day to be fixed, or the day after 3 months from the date of Royal Assent.

 **Changes**  **What does this mean for you?**  **Commencement**

prospectively. The amendments also invalidate any contractual clause in an existing contract which prevents employees from discussing pay, and prohibits employers from including such clauses in new employment contracts. An employer may be liable for a civil penalty where they include a pay secrecy clause in a new employment contract. The provisions aim to increase transparency and reduce the risk of gender pay discrimination.

- ***Enabling the establishment of two new FWC expert panels*** to exercise certain functions in relation to pay equity and the care and community sector, to help tackle low pay and conditions in female dominated industries. The expert panels must consist of a majority of FWC members who have knowledge of, or experience in, such matters (i.e. gender pay equity, anti-discrimination, care and community sector). The Federal Government has allocated an additional $20.2 million to the FWC to fund the establishment of these panels.

Respect@Work reforms and sexual harassment

As anticipated, the Act implements the remaining recommendations in the Respect@Work report by introducing an express prohibition for a person to sexually harass another person in connection with work. Similar to the anti-bullying jurisdiction that has existed for some 10 years now, a person may make an application to the FWC to deal with a dispute about an alleged contravention of this Part of the FW Act, including by making a stop sexual harassment order. This process generally requires the FWC to deal with the dispute within 14 days of the application being made, and requires the FWC to first deal with a dispute by conciliation or mediation.

If, following taking such initial steps, the FWC is satisfied that all reasonable attempts to resolve the dispute have been unsuccessful, it may issue a certificate to that effect. The FWC is then empowered to arbitrate the dispute by consent, or otherwise an application may be made to a Federal Court to deal with the dispute within 60 days of a certificate being issued. An order may be made if a finding is that an aggrieved person has been sexually

The prohibition on sexual harassment in connection with work will operate in conjunction with the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*, which introduces a positive duty on employers and PCBUs to take reasonable and proportionate measures to eliminate, as far as possible, unlawful sex discrimination, sexual harassment, sex-based harassment, work environments that are hostile on the ground of sex, and victimisation.

Employers will be required to manage the risk of sexual harassment in the workplace in the same way that safety risks are managed, with risk identification, assessment, elimination, and ongoing review of the effectiveness of controls.

The Federal Government has allocated an additional $15.1 million to the FWC and Fair Work Ombudsman to promote compliance and enforcement. Note that employers can also be held vicariously liable for the acts of their employees and agents within this new jurisdiction (unless they can demonstrate that they took all reasonable steps to prevent such sexual harassment occurring). Steps such as

The day after 3 months from the date of Royal Assent.

Changes	What does this mean for you?	Commencement
harassed, and there is a risk that they will continue to be sexually harassed by the person(s). The Act clarifies that the sexual harassment provisions will operate concurrently with State and Territory law.	ongoing training, regular check ins with employees and updating policies and procedures are all part of an employer's toolkit to demonstrate that it has taken reasonable steps to avoid such conduct occurring.	
Anti-discrimination		
The Act makes a number of minor changes to the anti-discrimination provisions in the FW Act to bring them into line with other Commonwealth anti-discrimination legislation. The amendments involve: • inserting the protected attributes of "breastfeeding", "gender identity" and "intersex status" as grounds of discrimination; and • clarifying that "special measures to achieve equality", being a term that has the purpose of achieving substantive equality for employees who have a particular attribute, is a matter pertaining to the employment relationship and therefore may be included in an enterprise agreement (provided that a reasonable person would consider the term necessary in order to achieve substantive equality).	Although these reforms mirror employers' existing obligations under Commonwealth anti-discrimination legislation, the Act serves as a timely reminder to employers to consider updating their employment policies and training in relation to anti-discrimination.	The day after Royal Assent.
Changes to fixed/maximum term contracts		
Employers will be prohibited from engaging an employee on a fixed/maximum term contract of more than two years, two such contracts that cumulatively exceed two years, a contract that allows for renewal so that the employee will be employed for more than two years, or on consecutive contracts of employment (where the employee is performing the same or substantially similar work under the consecutive contracts). The prohibition also applies even if there is a gap in employment, but there is "substantial continuity" between two periods of employment. The purpose of these provisions is to prevent employers: • terminating then re-engaging an employee in order to break continuity of employment;	This Act presents a major change to how employers can structure their workforces. In sectors that use fixed/maximum term and seasonal work, including in the education, resources and agricultural industries, these changes have the ability to substantially impact common employment practices. The changes will require the introduction of processes to ensure that whenever a business engages a fixed/maximum term employee and no relevant exemption applies, the contract complies with the new provisions. This could include additional training and information sessions for HR practitioners and business partners whose duties include preparing contracts and hiring employees, and perhaps system-based solutions to monitor service and flag potential breaches.	A day to be fixed, or the day after 12 months from the date of Royal Assent.

Changes

What does this mean for you?

Commencement

- delaying re-engaging an employee for the purpose of breaking continuity of employment; and
- artificially changing the terms or duties in a contract to break continuity of employment.

This is not an absolute prohibition, and the Act contains exceptions to these prohibitions including but not limited to:

- engaging an employee under the contract to perform only a distinct and identifiable task involving specialised skills;
- engaging an employee in relation to a training arrangement;
- engaging an employee to undertake essential work during a peak demand period, including seasonal work (for example);
- engaging an employee to undertake work during emergency circumstances or during a temporary absence of another employee; and
- in the year the contract is entered into the amount of the employee's earnings under the contract is above the high income threshold for that year (currently $175,000 per annum as at 1 July 2024 – see the regulations for calculations);
- the contract relates to a position for the performance of work that:

  (i) is funded in whole or in part by government funding or funding of a kind prescribed by the regulations for the purposes of this subparagraph; and

  (ii) the funding is payable for a period of more than 2 years; and

  (iii) there are no reasonable prospects that the funding will be renewed after the end of that period;
- the contract relates to a governance position that has a time limit under the governing rules of a corporation or association of persons;
- a modern award that covers the employee includes terms that permit any of the circumstances mentioned in subsections 333E(2) to (4) to occur; or
- the contract is of a kind prescribed by the regulations for the purposes of this

The Act also contains significant penalties for breaching the new fixed/maximum term requirements, so it is critical that employers are aware of these requirements and implement effective processes to comply with them.

paragraph, which as at 30 October 2024, include the following:

- contracts entered into before 1 November 2025 where the employee is engaged to perform work in certain specified roles (see the regulations) in organised sport and high performance sport relating to international event organising bodies;
- contracts entered into on or after 1 November 2024 and before 1 November 2025 where the contract relates to a position for the performance of work whereby funding is provided in whole or in part by the government or a philanthropic entity, and where:
  - the contract is entered into on behalf of a philanthropic entity; or
  - the work primarily involves carrying out medical or health research;
- contracts entered into on or after 1 November 2024 and before 1 November 2025 where the contract is entered into on behalf of a public hospital and relates to a position for the performance of work whereby the majority of funding is provided by a philanthropic entity and for a charitable purpose; and
- contracts entered into before 1 November 2025 where, at the time the contract is entered into, the employee is covered by the Higher Education Industry Academic Staff Award 2020 or the Higher Education Industry General Staff Award 2020.

Under the Act, employers are prohibited from making changes to the timing or terms of a fixed/maximum term contract, or not re-engaging an employee, to avoid the operation of the section, with civil penalties attaching to those that contravene these safeguards. The FWC will also be given additional powers to deal with disputes under these new provisions and

Changes	What does this mean for you?	Commencement
employers will also be required to provide a "Fixed Term Contract Information Statement" to a prospective employee who is entering into a fixed/maximum term contract.		
Flexible work		
The FW Act currently has provisions that allow an employee to request a change to his or her working arrangements in certain circumstances, such as requesting a change in hours or location of work due to parenting/caring responsibilities, being over 55 years of age, or a disability. A number of changes have been made to these provisions in the Act, designed to facilitate better access to such requests, and reduce the ability of employers to reject those requests. First, the Act seeks to expand the operation of these entitlements by also enabling an employee to request a flexible working arrangement: • where the employee has experienced family and domestic violence; or • where the employee is pregnant. Second, the Act updates the procedures that govern how employees may request a flexible working arrangement from their employer. Specifically, an employer will be required to respond to the request within 21 days with a written response that either: • grants the request; • provides an agreed amended request (if, following discussion, the parties agree to amend the request); or • refuses the request with reasons. Third, if an employer refuses a request, they must provide the reasons for the refusal, the business grounds that underpin the refusal, and any changes the employer would be willing to make. The grounds for refusing a request have been tightened and a request can only be refused following discussions where the parties genuinely tried to reach agreement and the employer has had regard to the consequences of refusing such a request. Crucially, the Act defines "reasonable business grounds" to include (without limitation): • when the request is too costly for the employer;	Businesses must update their processes and train HR staff on these changes. The Act requires the provision of more detailed information and prescribes tighter timeframes for responding to a request and employers will need to familiarise themselves with and prepare for the introduction of these new regimes, including the dispute settlement powers. There are significant penalties for non-compliance.	The day after 6 months from the date of Royal Assent.

 **Changes**

 **What does this mean for you?**

 **Commencement**

- when there is no capacity to change the working arrangements;
- when the changes would be impractical by requiring changes to work arrangements of existing employees or the hiring of new employees;
- when the change would likely result in significant loss in efficiency or productivity; and
- when the changes would likely have a significant negative impact on customer service.

The Act specifies that the nature and size of the enterprise carried on by the employer is relevant to determining whether the employer has "reasonable business grounds" to refuse a request.

Finally, the Act provides for new mechanisms to dispute a refusal to grant a flexible working arrangement. An employee can access this new jurisdiction if the employer does not grant the request or does not respond in 21 days with a written explanation for the refusal. As is common with existing disputes clauses in modern awards and enterprise agreements, parties must now attempt to resolve the dispute at the workplace level and if not resolved there, a party can apply to the FWC to assist with resolving the dispute. The FWC will be given powers to first (unless there are exceptional circumstances) deal with the dispute by means other than arbitration, including conciliation and mediation. After mediation or conciliation (or where there are exceptional circumstances), the FWC may then arbitrate a dispute and issue orders relating to a refusal where there is no reasonable prospect of the parties resolving the dispute themselves, taking into account fairness between the employer and the employee before making any order. The Act specifically provides that a FWC order cannot be inconsistent with the FW Act or a term of a fair work instrument that applies to the employer or employee. Civil penalties are also introduced for breaching an order of the FWC.

Parental leave

Changes

Parental leave – the Act provides that an employee may request an employer to agree to an extension of unpaid parental leave for a further period of up to 12 months following the end of available parental leave.

Much like the changes to flexible work requests, the Act establishes the process of responding to such a request (including requiring a written response within 21 days, discussion of the request with the employee, and a genuine attempt to reach agreement in relation to the request) and a mechanism for disputes relating to requests for an extension of unpaid parental leave to be resolved through the FWC.

Requests can only be refused on reasonable business grounds (with the grounds of refusal to be explained to the employee).

Crucially, the Act defines "reasonable business grounds" to include (without limitation):

- when the request is too costly for the employer;
- when there is no capacity to change the working arrangements of other employees to accommodate;
- when the changes would be impractical by requiring changes to work arrangements of other employees or the hiring of new employees;
- when the extension would likely result in significant loss in efficiency or productivity; and
- when the extension would likely have a significant negative impact on customer service.

Finally, the Act provides for new mechanisms to dispute a refusal to grant the extension. An employee can access this new jurisdiction if the employer does not grant the request or does not respond in 21 days with a written explanation for the refusal. The parties must attempt to resolve the dispute at the workplace level and if not resolved there, a party can apply to the FWC to assist with resolving the dispute.

The FWC will be given powers to first (unless there are exceptional circumstances) deal with the dispute by means other than arbitration, including conciliation and mediation. After mediation or conciliation (or where there are exceptional circumstances), the FWC may then arbitrate a dispute and issue orders relating to a refusal where there is no reasonable prospect of the parties resolving the dispute themselves, taking into account fairness between the employer and the employee

What does this mean for you?

Businesses must update their processes and train HR staff on these changes. The Act requires the provision of detailed information and prescribes tighter timeframes for responding to a request and employers will need to familiarise themselves with and prepare for the introduction of these new regimes, including the dispute settlement powers. There are significant penalties for non-compliance.

Commencement

6 months from the date of Royal Assent.

Changes	What does this mean for you?	Commencement
before making any order. The Act specifically provides that a FWC order cannot be inconsistent with the FW Act or a term of a fair work instrument that applies to the employer or employee. Civil penalties are also introduced for breaching an order of the FWC.		
Objects of the FW Act		

Promotion of job security and gender equality are proposed to be added as objects of the FW Act.
The objectives of modern awards will also include:
• the need to improve access to secure work; and
• the need to achieve gender equality in the workplace by:
  ○ ensuring equal remuneration;
  ○ eliminating gender-based undervaluation of work; and
  ○ providing workplace conditions that facilitate women's full economic participation.
Similar objectives will be inserted into the minimum wage objectives in s. 284 of the FW Act.
	The FWC and Courts may have regard to considerations concerning job security and gender equality when resolving matters regarding the interpretation and application of the FW Act.
	The changes could also lead to applications to vary modern awards in order to ensure those awards meet the new objectives.
		The day after Royal Assent.

Abolishing the ABCC		
The Act will abolish the Australian Building and Construction Commission which has served as the construction industry's industrial watchdog since 2016. The Act: • provides for the abolition of the ABCC and provides workers in the building and construction industry the same rights as workers in other industries in relation to enforcement of the FW Act; • removes the higher penalties and broader circumstances for penalties	Whilst the increased ($70M) funding to the FWO might enable the FWO to pick up many of the FW Act enforcement activities that were undertaken by the ABCC, the reduced scope of prohibitions and lower penalties, as well as the absence of an industry specific regulator, may not deter construction industry unions, and we may see an uptick in industrial disruption on construction sites. As a consequence, it may be increasingly necessary for employers to pursue their own enforcement action in the context of any breaches of right of entry rules, unlawful industrial action, responding to instances of coercion and unlawful pickets and ensuring freedom of association on worksites.	A day to be fixed, or the day after 2 months from the date of Royal Assent.

Changes	What does this mean for you?	Commencement
that have applied to building industry participants; • retains provisions related to the Work Health and Safety Accreditation Scheme and Office of the Federal Safety Commissioner (FSC) in a renamed Act; • creates a regime for the orderly transfer of functions to the FSC and the FWO. The functions of the ABCC not repealed by the Act will be subsumed by the FWO. The Federal Government has allocated $69.9 million over the next four years to the FWO in order to manage these new responsibilities. The ABCC was substantially stripped of its enforcement powers and compliance responsibilities in July 2022 when the Federal Government introduced the *Code for the Tendering and Performance of Building Work Amendment Instrument 2022*. The new Code substantially decreased the power of the ABCC by: • Removing the power to issue Determinations of Compliance; • Removing requirements for Workplace Relations Management Plans (**WRMPs**) and the procedures for assessing WRMPs; • Preventing the Commission for accepting new WRMPs; • Providing that WRMPs are no longer required on any building projects; and • Removing the prohibition on being covered by a non-compliant enterprise agreement, or contracting for Commonwealth funded building work while covered by a non-compliant enterprise agreement. Code-covered entities will no longer be required to comply with WRMPs, ensure subcontractors are complying with the Code, maintain freedom of association policies, enforce certain right of entry requirements or report actual or threatened industrial action or Code breaches.	Further, in bargaining, it is very likely that construction unions will push for the return of previously Code 'prohibited content' into enterprise agreements, which will make for more difficult enterprise bargaining negotiations.	
Registered organisations		
Abolishing the Registered Organisations Commission - the Act will abolish the ROC as independent regulator of Unions and Employer		A day to be fixed, or the day after 6 months from the date of Royal Assent.

Changes	What does this mean for you?	Commencement
Associations, and the role of the Registered Organisations Commissioner. The General Manager of the FWC will replace the Registered Organisations Commissioner's role and mirror its responsibilities, including its management, compliance and monitoring functions. All ROC staff and funding will be able to be retained and transferred to the FWC.		
Additional enforcement options - the Act will expand regulatory powers in relation to the enforcement of the *Fair Work (Registered Organisations) Act 2009* (Cth) to mirror the powers of comparable Commonwealth regulators.	This will improve the regulator's ability to address any suspected non-compliance, including by giving it the ability to issue infringement notices and implement enforceable undertaking schemes.	The day of Royal Assent.
Establishment of the National Construction Industry Forum – the Act establishes the NCIF with the role of providing advice to the Government in relation to work in the building and construction industry.		1 July 2023.
Other		
Review of operation of amendments – The Act provides that the Minister must cause a review to be conducted of the operation of the amendments. The review must start no later than 2 years after Royal Assent, with a report to be provided to the Minister within 6 months of commencement of the review, which must be then tabled in each House of Parliament within 15 sitting days,		The day after Royal Assent.
Employment advertisements - The Act amends the FW Act to prohibit employers from advertising employment at a rate of pay that would contravene the FW Act or a Fair Work Instrument. This amendment principally seeks to protect migrant workers who are frequently targeted by job advertisements below minimum rates.	Before advertising for a position, employers should ensure that the rate of pay, and other workplace conditions, offered comply with the FW Act or other fair work instruments (including Modern Awards and Enterprise Agreements). Employers will not contravene this provision if they have a "reasonable excuse" for non-compliance.	The day after Royal Assent.
Enhancing the small claims process - The Act will increase the compensation cap for small claims proceedings under the FW Act from $20,000 to $100,000. An unsuccessful party may be liable for the other party's costs including filing fees paid to the court.	Small claims proceedings are an important aspect of the judicial system as they allow for a more informal determination as the court is not bound by rules of evidence. The increase in compensation cap will expand the scope of disputes that can be heard through this process.	The later of: (a) the day after Royal Assent; and (b) 1 July 2023.

Changes	What does this mean for you?	Commencement
Application, saving, transitional and miscellaneous consequential provisions - The Act of course includes various provisions dealing with transition to the new regime. In the interests of brevity we have not set these out in this note.		The day after Royal Assent.
***Amendments to the Safety, Rehabilitation and Compensation Act 1988* (Cth)** - The Act proposes minor amendments to the SRC Act to redefine an employee who is taken to be a firefighter. Specifically, the Act provides that an employee is taken to have been employed as a firefighter where the relevant authority is satisfied that firefighting or related duties made up a not insubstantial potion of their duties. Further, the Act expands the application of the SRC Act to: • include members of the ACT Fire and Rescue Service; and • to reduce the qualifying period for an employer to be taken to have contributed to oesophageal cancer.	These changes benefit workers. Employers affected by the SRC Act should ensure they are familiar with the increased scope for compensation.	The day after Royal Assent.
Amendments to pay slip requirements - The Act provides that regulations are to prescribe the requirements for pay slips in relation to paid family and domestic violence leave (FDV Leave). The *Fair Work Regulations 2009* (Cth) has subsequently been amended by the *Fair Work Legislation Amendment Regulations 2022* (Cth) (**First Amendment Regulations**) and the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023* (Cth) **Second Amendment Regulations**). From 1 February 2023, the First Amendment Regulations require that pay slips must not include any of the following information: • a statement that an employee has received a payment for FDV Leave; • a statement that an employee has taken a period of FDV Leave; and • an employee's FDV Leave balance. The First Amendment Regulations suggest that pay slips may record a particular kind of leave taken as 'special leave', 'miscellaneous leave' or 'leave – other'. From 4 February 2023, the Second Amendment Regulations provide for a new requirement that FDV Leave cannot be recorded as a period of leave taken at all (even if it is recorded as 'special leave', 'miscellaneous leave' or 'leave –	These changes require that payments for FDV Leave should not be identifiable on employee pay slips. Accordingly, employers should review how FDV Leave is recorded on pay slips to ensure compliance with the new requirements.	***Amendments to pay slip requirements*** - The day after Royal Assent. ***First Amendment Regulations*** - 1 February 2023. ***Second Amendment Regulations*** - 4 February 2023 (noting that employers may be liable to pay a civil penalty for non-compliance after 4 June 2023).

other'). An amount paid to an employee for taking a period of FDV Leave:

- must not be recorded as an amount paid to the employee for taking a period of leave; and
- must instead be reported as an amount paid for the employee's ordinary hours of work or for another kind of payment made in relation to the performance of their work (e.g. an allowance, bonus or overtime payment).

There is a grace period of 4 months until 4 June 2023 during which time FDV Leave may still be recorded as 'special leave', 'miscellaneous leave' or 'leave – other' on pay slips. After the grace period, employers may be liable to pay a civil penalty if they contravene the pay slip reporting requirements.

Contact directory

EIRS Australia Partners

Aaron Anderson
Brisbane
T +61 7 3258 6528
M +61 421 583 066
Aaron.Anderson@hsf.com

Miles Bastick
Sydney
T +61 2 9225 5722
M +61 416 225 755
Miles.Bastick@hsf.com

Steve Bell
Melbourne, Regional Head of EIRS Australia
T +61 3 9288 1236
M +61 419 351 022
Steve.Bell@hsf.com

Anna Creegan
Perth
T +61 8 9211 7135
M +61 409 991 049
Anna.Creegan@hsf.com

Rachel Dawson
Perth
T +61 8 9211 7569
M +61 409 774 557
Rachel.Dawson@hsf.com

Rohan Doyle
Melbourne
T +61 3 9288 1099
M +61 413 312 175
Rohan.Doyle@hsf.com

Wendy Fauvel
Brisbane
T +61 7 3258 6388
M +61 408 967 882
Wendy.Fauvel@hsf.com

Natalie Gaspar
Melbourne
T +61 3 9288 1091
M +61 427 044 689
Natalie.Gaspar@hsf.com

Michael Gonski
Sydney
T +61 2 9225 5083
M +61 409 987 121
Michael.Gonski@hsf.com

Nerida Jessup
Sydney
T +61 2 9322 4732
M +61 447 975 133
Nerida.Jessup@hsf.com

Shivchand Jhinku
Sydney
T +61 2 9225 5228
M +61 417 637 207
Shivchand.Jhinku@hsf.com

Olga Klimczak
Perth
T +61 8 9211 7624
M +61 431 535 640
Olga.Klimczak@hsf.com

Nicholas Ogilvie
Melbourne
T +61 3 9288 1380
M +61 407 156 438
Nicholas.Ogilvie@hsf.com

Drew Pearson
Sydney
T +61 2 9225 5492
M +61 403 437 599
Drew.Pearson@hsf.com

Anthony Wood
Melbourne
T +61 3 9288 1544
M +61 419 873 690
Anthony.Wood@hsf.com