



**AHEIA Conference 2023**  
***New Beginnings: The FW Act and Beyond***

4 May 2023

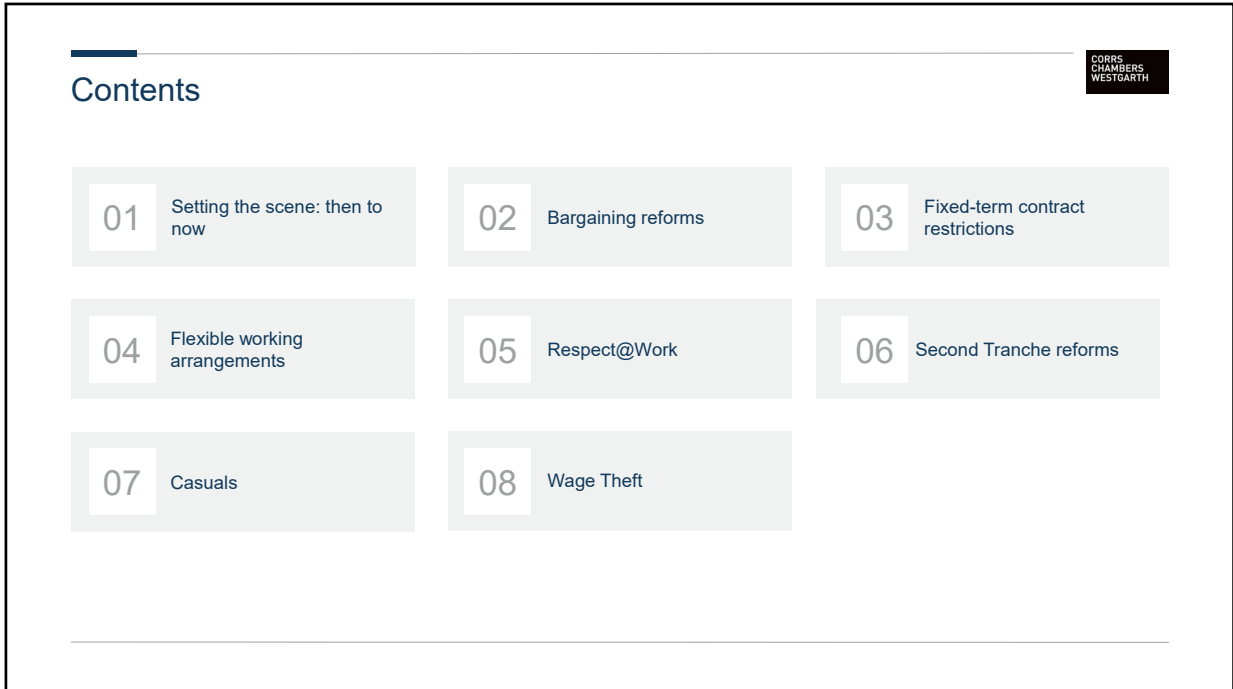
Jack de Flamingh, *Partner*  
t +61 2 9210 6192 m +61 403 222 954 e [jack.de.flamingh@corrs.com.au](mailto:jack.de.flamingh@corrs.com.au)

Christopher Leong, *Special Counsel*  
t +61 3 9672 3053 m +61 422 614 312 e [christopher.leong@corrs.com.au](mailto:christopher.leong@corrs.com.au)

[corrs.com.au](http://corrs.com.au)

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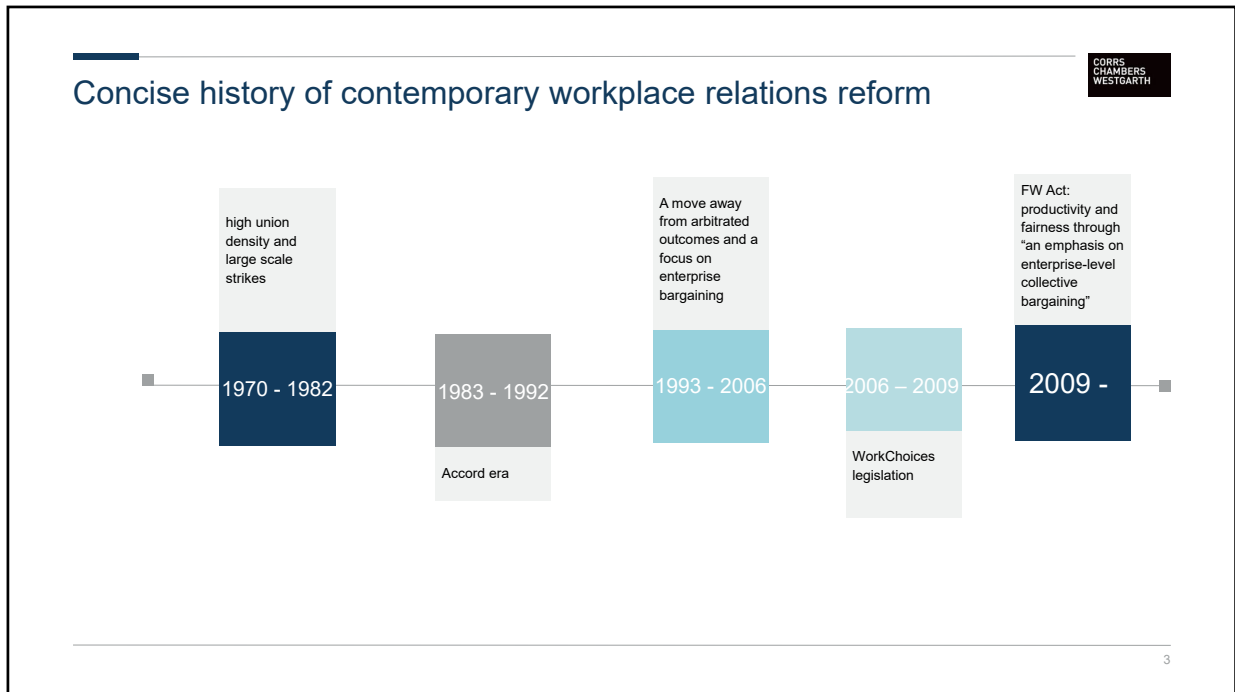


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## Prime Minister Keating, April 1993

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*"Let me describe the model of industrial relations which we are moving towards.*

*It is a model which places primary emphasis on bargaining at the workplace level and within a framework of minimum standards provided by arbitral tribunals.*

*It is a model under which compulsorily arbitrated wage increases would be there only as a safety net.*

*This safety net would not be intended to prescribe the actual conditions of work of most employees, but only to catch those unable to make workplace agreements with employers*

*Over time, the safety net would inevitably become simpler.*

*We would have fewer awards, with fewer clauses."*

- Prime Minister Keating, April 1993

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## 2009 onwards...

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*“achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action”*

*Object (f) of the “Object of this Act” – section 3, Fair Work Act 2009*



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## SJBP Act

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*Tony Burke, Minister for Employment and Workplace Relations –  
Second reading speech*

*“The introduction of this bill is about making a choice.*

*A choice to get wages moving and end the era of deliberate wage stagnation.*

*A choice to act to close the gender pay gap and take long-overdue steps to put gender equity at the heart of our workplace laws.*

*A choice to improve job security—and*

*A choice to wind up institutions which were established with a political agenda to promote conflict.”*



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## Multi-employer bargaining

Table summary – proposed new multi-employer bargaining schemes


Type of multi-employer bargaining scheme	Is the scheme voluntary?	Can Protected Industrial Action be taken?	Do good faith bargaining obligations apply?	Can compulsory arbitration be utilised?	Can employers be added to an agreement?	What protections are in place for employers to be exempt?
<b>new multi-employer bargaining schemes</b>						
Cooperative workplaces stream	Yes	No	No	No	Yes – with employer consent	✓ Voluntary
Supported bargaining stream	No, by application to the FWC by employers or bargaining representatives	Yes	Yes	Yes	Yes – both with or without employer consent	✓ In-term EA ✓ Majority employee support required (to be covered by EA) ✓ Employers can apply to be removed
Single-interest employer stream	No, by application to the FWC by employers or bargaining representatives	Yes	Yes	Yes	Yes – both with or without employer consent	✓ Majority employee support required (at both authorisation and EA coverage stages) ✓ In-term EA ✓ Agree in writing to bargain with union ? EA expiry less than 9 months, good faith bargaining, history of EAs

## NTEU commentary

The NTEU told a Senate inquiry that it may use multi-employer bargaining to cover non-university higher education providers, where it said staff are poorly paid and not covered by enterprise agreements.

However, it has not ruled out using the laws for universities. While enterprise agreements largely cover the sector, many regional university deals have expired.





## Single interest employer agreements

Bargaining commences	Relevant employers or employee BR apply for a single interest employer (SIE) authorisation
Requirements for an authorisation	Some of employees represented by 'employee organisation'
	Employers and BRs express views to FWC
	Majority of employees of <u>the</u> employer want to bargain
	Employers have clearly identifiable common interests
	if there is a common interest between employers, the operations and business activities of each of those employers are reasonably comparable
Which employers are exempt?	Not contrary to the public interest
	Employers employing less than 20 employees
	Covered by an in-term EA
	Bargaining for a single enterprise agreement pursuant to a written agreement with "employee organisation"
Can the FWC exempt other employees?	If named in another SIE authorisation or supported bargaining authorisation
	Yes, may do so where:
	1. Bargaining in good faith for an EA covering relevant employees
	2. History of effectively bargaining an EA in relation to relevant employees
	3. EA is less than 9 months past NED, or it is less than 9 months since bargaining commenced (whichever is later)

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## Single interest employer agreements

What is the effect of an authorisation	Employer cannot make any other agreement
	Employer cannot initiate / agree to bargain for any other agreement
Can other employers be added to an authorisation?	Yes, same requirements as at the authorisation stage
When is the agreement made?	When a majority of employees of at least one employer vote in favour
	Note: for a proposed multi-enterprise agreement, each union BR must <b>agree</b> to the vote proceeding OR a voting request order permits the employer to request
Which employers are covered?	Only employers whose employees vote by a majority to approve the agreement
Can employers be added to the agreement?	Yes, same requirements as at the authorisation stage
When does an authorisation cease?	When a SIE agreement is made or 12 months after authorisation is made
Is arbitration available?	Yes, including the "intractable disputes" arbitration stream

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## Intractable bargaining

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The FWC may make a declaration if:

- 01 A section 240 conference has occurred;
- 02 A minimum bargaining period of 9 months must have elapsed after the NED of existing EA or 9 months after bargaining starts, whichever is later;
- 03 There is no reasonable prospect of the agreement being reached; and
- 04 It is reasonable in all the circumstances, taking into account views of the bargaining representatives

Following an intractable bargaining declaration and expiry of any further negotiating period, FWC must make an intractable bargaining workplace determination, 'as quickly as possible'.

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## Initiating bargaining and termination

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### Initiating bargaining

Bargaining representatives (not just registered unions) can commence the process of bargaining without an employer's consent where:

- the proposed single-enterprise agreement will replace an earlier single-enterprise agreement;
- no more than 5 years has passed since the nominal expiry date of the former agreement; and
- the proposed agreement will cover the same, or substantially the same group of employees as the earlier agreement.

### Agreement termination

On application, The FWC is required to terminate an expired agreement if satisfied that:

- the continued operation of the agreement would be 'unfair' for the employees covered by the agreement; or
- the agreement does not, and is not likely to, cover any employees; or
- three criteria are satisfied:
  - the FWC is satisfied that the continued operation of the agreement "would pose a significant threat to the viability" of a business carried on by the employer(s); and
  - the FWC is satisfied that termination of the agreement would reduce the likelihood of terminations of employment because of redundancy; and
  - the employer has given the FWC a guarantee in relation to termination entitlements.

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## Fixed-term contracts

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In relation to fixed-term contracts, the SJBPA Act prohibits:



+ a requirement to provide employees with a fixed-term contract information statement

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## Fixed-term contracts – exemptions

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- A modern award covers the employee and includes terms that permits the (otherwise prohibited) fixed term contracts;
- In the year the contract is entered into, employee earns over the high income threshold;
- The employer is reliant on government funding to directly finance the employee (employer must receive the funding for more than two years with no reasonable prospect of renewal);
- The employee has a specialised skill;
- The employee is engaged in relation to a training agreement;
- The employer needs additional workers to do essential work during a peak demand period;
- The employee is engaged to work during an emergency, or to replace a temporary absence of another employee;
- The employee is appointed under governance rules of a corporation;
- An exemption is prescribed in the Regulations



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## Flexible working arrangements (FWA)




<b>SJBP Act retains the following provisions</b>	Employer to respond to a request for a FWA within 21 days
<b>Additional provisions</b>	Employer able to refuse a request for a FWA on reasonable business grounds
<b>Conciliation</b>	Employee must be informed in writing of the details of the reasons for the refusal
<b>Arbitration</b>	Employee may request a FWA on the basis of the employee being pregnant
<b>Additional provisions</b>	Employer must have discussed the request with the employee and genuinely tried to reach agreement with the employee about making changes to the employee's working arrangements
<b>Conciliation</b>	Employer must have had regard to the consequences of the refusal for the employee
<b>Arbitration</b>	Employer must provide a written response including the details of the reasons for the refusal, including the business grounds for refusing the request and setting out changes that the employer would be willing to make
<b>Conciliation</b>	If there is a dispute between the employer and employee, conciliation is mandatory except in exceptional circumstances
<b>Arbitration</b>	If unable to be resolved, FWC empowered to arbitrate the dispute and make various orders
<b>Arbitration</b>	The dispute must relate to an employer's refusal to grant or respond to a request for a FWA
<b>Arbitration</b>	Arbitration does not require the employer's consent and can occur at the request of the employee only

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## SJBP Act – key gender equity and sexual harassment reforms

 <b>Gender equity objective</b>	<b>Equal remuneration principle</b> 	<b>Sexual harassment FWC disputes jurisdiction</b> 
<ul style="list-style-type: none"> <li>'Gender equity' and 'job security' to be included as central objectives of the FW Act and modern awards objective</li> <li>FWC to consider these objectives at all times when exercising its functions</li> <li>'Gender equity' is included in the minimum wages objective</li> </ul>	<ul style="list-style-type: none"> <li>Additional guidance as to the factors the FWC may take into account when deciding whether work is of equal or comparable value</li> <li>No discrimination finding is required for FWC to determine that the work has been undervalued</li> <li>New Expert panels for gender pay equity and the Care and Community Sector</li> </ul>	<ul style="list-style-type: none"> <li>Implements recommendation 28 of the Respect@Work Report to prohibit sexual harassment in connection with work and applies to all "workers"</li> <li>Employers will be vicariously liable unless they can prove they took all reasonable steps to prevent the actions in question</li> <li>New 'sexual harassment disputes' jurisdiction for FWC and FWO investigative and enforcement powers</li> <li>Applications to FWC may be made jointly by multiple aggrieved persons, and the union</li> <li>FWC may deal with disputes by mediation or conciliation or, if that fails, arbitration by agreement between the parties (or can elect within 60 days to go to the Federal Courts)</li> </ul>

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## Reform commencement dates – First tranche

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*The date of Royal Assent was 6 December 2022*

Amendments	Commencement
<ul style="list-style-type: none"> <li>Pay secrecy</li> <li>Initiating bargaining (unilaterally by employee bargaining rep)</li> <li>Enterprise agreement termination</li> <li>Equal remuneration orders</li> <li>Anti-discrimination and special measures (eg. breastfeeding, gender identity and intersex status as protected attributes)</li> <li>New objects of FW Act</li> </ul>	<b>7 December 2022</b>
<ul style="list-style-type: none"> <li>Sexual harassment reforms</li> </ul>	<b>7 March 2023</b>
<ul style="list-style-type: none"> <li>Bargaining reforms (except for initiating bargaining and agreement termination)</li> <li>Expansion of PIA to multi-enterprise agreements (except cooperative workplace agreements)</li> </ul>	<b>On a date to be fixed between 6 December 2022 and 6 June 2023 or otherwise on 7 June 2023</b>
<ul style="list-style-type: none"> <li>Industrial action reforms (eg. protected action ballots for multi-enterprise agreements, ballot agents, compulsory conciliation, notice requirements etc) except for PIA for multi-enterprise agreements</li> </ul>	<b>On a date to be fixed between 6 December 2022 and 6 June 2023 or otherwise on 7 June 2023</b>
<ul style="list-style-type: none"> <li>BOOT reforms</li> </ul>	<b>On a date to be fixed between 6 December 2022 and 6 June 2023 or otherwise on 7 June 2023</b>
<ul style="list-style-type: none"> <li>Flexible working arrangements and parental leave extension request reforms</li> </ul>	<b>7 June 2023</b>
<ul style="list-style-type: none"> <li>Fixed-term contracts reforms</li> </ul>	<b>7 December 2023</b>

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## Second Tranche of IR reforms

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- Key issues set to be addressed in the Government's second tranche of IR Reforms include:**

- Redefining casual workers;
- "Same Job, Same pay";
- Criminalising wage theft;
- Regulating the "gig-economy"; and
- Stronger protections against discrimination.



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## Questions for reform

Topic	Questions
<b>Stand up for casual workers</b>	<ul style="list-style-type: none"> <li>How should an assessment of post-contractual conduct (that is, the pattern of work and nature of the relationship over time) be incorporated into the definition of casual employee?</li> </ul>
<b>Same Job, Same Pay</b>	<ul style="list-style-type: none"> <li>How should a 'same job' be identified?</li> <li>How should 'same pay' be calculated?</li> </ul>
<b>Criminalising wage theft</b>	<ul style="list-style-type: none"> <li>Should a wage underpayment offence apply to conduct which is more serious than an honest mistake, but falls short of deliberate underpayment?</li> <li>What is the appropriate penalty for a wage underpayment offence?</li> </ul>
<b>Extend the Powers of the Fair Work Commission to Include 'Employee-Like' Forms of Work</b>	<ul style="list-style-type: none"> <li>What is the best approach to defining the scope of the Fair Work Commission's new powers in relation to 'employee-like' forms of work, including with respect to factors around how workers are engaged?</li> <li>What kind of disputes should the Fair Work Commission be able to help resolve?</li> </ul>
<b>Provide stronger protections against discrimination, adverse action and harassment</b>	<ul style="list-style-type: none"> <li>What reforms do you want to see to the Fair Work Act's anti-discrimination and adverse action framework and why?</li> </ul>

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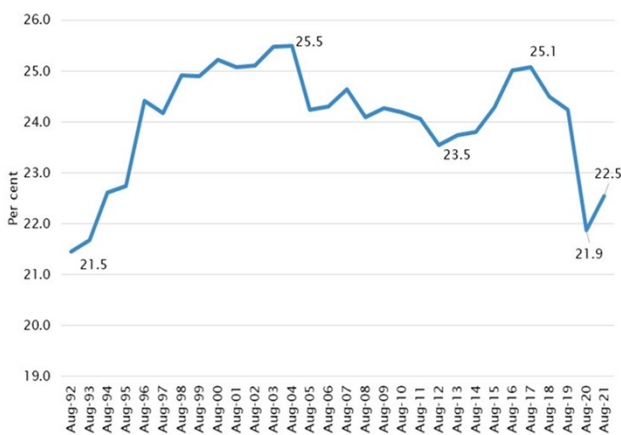


## Stand up for casual workers

### Key considerations regarding casual workers:

- Reforms should balance certainty and fairness for both employees and employers across different elements of the statutory framework including the statutory definition, the process to convert from casual to permanent employment and resolving disputes.
- An objective definition would include consideration of the terms of the contract of employment, and also consider the post contractual conduct, this is, the practical reality of the relationship between the employer and employee.
- The framework should provide employees with choice to convert to permanent employment and provide employers who act in accordance with their legal obligations with certainty of employment status and the associated wages and conditions.

**Chart 3: casual employee share of total employees, 1992-2021**



Date	Per cent
Aug-92	21.5
Aug-04	25.5
Aug-12	23.5
Aug-17	25.1
Aug-20	21.9

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## Criminalising wage theft

Implementation Options	Option 1: Knowledge-based wage underpayment offence only;
	Option 2: Recklessness-based wage underpayment offence only; or
	Option 3: Tiered approach
Scope	Option 1: This offence would cover employers <i>who know</i> they are not paying an employee the amount to which that employee is entitled
	Option 2: This offence would cover employers who are aware of a <i>substantial risk</i> that they are not paying an employee the amount to which that employee is entitled and proceed even though it is <i>unjustifiable to take that risk</i>
	Option 3: Two offences would be inserted into the Fair Work Act: a knowledge-based wage underpayment offence and a recklessness-based wage underpayment offence

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## Questions

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