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16 November 2023

**By email:** [eec.sen@aph.gov.au](mailto:eec.sen@aph.gov.au)

**Contact**

Committee Secretary  
Senate Education and Employment  
Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Secretary

I refer to the proceedings before the Committee on 10 November 2023.

During the proceedings Ms O'Neill of the ACTU alleged that I had provided a paper to Universities which she described in pejorative terms.

Ms O'Neill sought to table a copy of the paper and I understand that the document was subsequently received by the Committee as a tabled document (document 4 on the Committee's list of tabled documents).

The document in question was not produced by me and does not represent my advice to universities.

I take great exception to the ACTU misleading the Committee in relation to this document and I ask that the document be removed from the list of tabled documents.

Yours faithfully

**Corrs Chambers Westgarth**

**Graeme Watson**  
Partner

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7 December 2023

**By email:** [eec.sen@aph.gov.au](mailto:eec.sen@aph.gov.au)

**Contact**

Committee Secretary  
Senate Education and Employment Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Secretary

Thank you for the letter from Senator Sheldon of 6 December.

As requested, please find **attached** a copy of the presentation slides used for the presentation I gave to AHEIA in December 2022. AHEIA has agreed to waive its legal professional privilege relating to this presentation.


I repeat that I take great objection to the ACTU making misleading representations about me and alleged advice I have given to AHEIA.


As is clear from the attached, my presentation did no more than provide details of the legislation that had passed parliament shortly beforehand.

I ask again that the document tabled by the ACTU be removed from the tabled documents as the basis of its tabling is incorrect and misleading.

Yours faithfully

**Corrs Chambers Westgarth**

  
**Graeme Watson**  
Partner



# AHEIA briefing

## *Employment and IR reforms*

9 December 2022

Graeme Watson, *Partner*

Eva Moore, *Associate*

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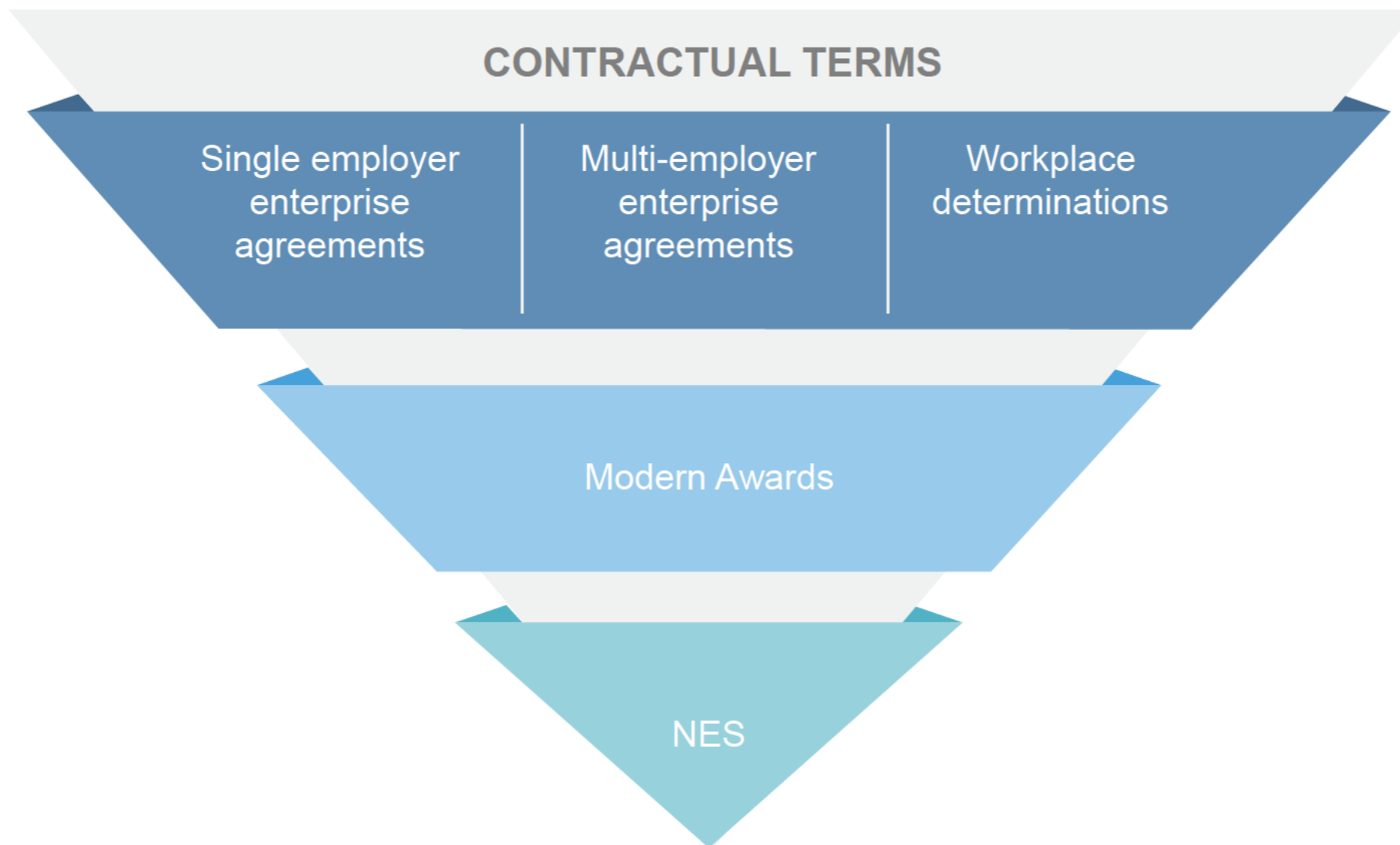
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# Reform commencement dates

*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>

# Tiers of regulation



# Bargaining reforms – single-employer

## 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.

## Intractable bargaining

The FWC may make declaration if:

- a section 240 conference has occurred;
- a minimum bargaining period of 9 months after the NED of existing EA or 9 months after bargaining starts, whichever is later;
- there is no reasonable prospect of the agreement being reached; and
- 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.

*Note that the right to terminate an enterprise agreement is effectively no longer available without employee agreement*

# 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>Proposed 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	<ul style="list-style-type: none"> <li>✓ In-term EA</li> <li>✓ Majority employee support required (to be covered by EA)</li> <li>✓ Employers can apply to be removed</li> </ul>
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	<ul style="list-style-type: none"> <li>✓ Majority employee support required (at both authorisation and EA coverage stages)</li> <li>✓ In-term EA</li> <li>✓ Agree in writing to bargain with union</li> <li>? EA expiry less than 9 months, good faith bargaining, history of EAs</li> </ul>



# Supported Bargaining Agreements v Single Interest Employer Agreements

## Supported Bargaining Agreements

## Single Interest Employer Agreements

### Relevant background and context

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Bill**) renames the current low paid bargaining stream to “supported bargaining”.

The supported bargaining stream has clearly defined objectives, being to:

- assist and encourage employees and their employers who require support to bargain and to make an enterprise agreement suitable to their needs;
- address constraints on the ability of those employees and their employers to bargain at the enterprise level; and
- enable the FWC to provide assistance to those employees and their employers to facilitate bargaining.

This stream is otherwise largely undefined as illustrated by the ‘requirements’ for entry.

The Bill significantly amends the current single interest bargaining stream by allowing a bargaining representative of an employee to be covered by the agreement to apply to the Fair Work Commission (**FWC**) for a single interest employer authorisation.

There is no longer any requirement for employers to obtain a declaration from the Minister allowing them to bargain together.

This stream is not supported by any stated objectives and is seemingly now defined by reference to the ‘reasonably comparable’ operations and business activities requirement.

# Supported Bargaining Agreements v Single Interest Employer Agreements

## Supported Bargaining Agreements

## Single Interest Employer Agreements

### How does bargaining commence?

BR or employee organisation with coverage under the rules applies for a supported bargaining authorisation (**SBA**)

Relevant employers or employee BR apply for a SIE authorisation

### Requirements for an authorisation?

- ✓ Prevailing pay and conditions (including whether low rates in industry/sector)
- ✓ Employers have clearly identifiable common interests
- ✓ If the likely number of bargaining representatives is manageable
- ✓ Some of employees represented by 'employee organisation'
- ✓ Any other matters the Commission consider appropriate

- ✓ Some of employees represented by 'employee organisation'
- ✓ Employers and BRs express views to FWC
- ✓ Majority of employees of the employer want to bargain
- ✓ Employers have clearly identifiable common interests and it is not contrary to the public interest
- ✓ Operations and business activities of each of those employers are reasonably comparable

Note: the FWC must also make an authorisation if employees specified in the application are employees in an industry, occupation or section declared by the Minister.

The Minister may make such a declaration if satisfied that doing so is consistent with the objectives of the supported bargaining stream.

# Supported Bargaining Agreements v Single Interest Employer Agreements

## Supported Bargaining Agreements

## Single Interest Employer Agreements

### Factors relevant to 'common interest'?

- ✓ Geographical location
- ✓ Nature of enterprises
- ✓ Terms and conditions in enterprises
- ✓ Funding (directly or indirectly) by Cth, State or Territory

- ✓ Geographical location
- ✓ Regulatory regime
- ✓ Nature of enterprises
- ✓ Terms and conditions in enterprises

### Which employers are exempt?

- ✓ Covered by an in-term EA (with some exceptions)

- ✓ 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'
- ✓ If named in another SIE authorisation or supported bargaining authorisation

### Can the FWC exempt other employees?

No

Yes, **'may'** do so where:

- ✓ Bargaining in good faith for an EA covering relevant employees
- ✓ History of effectively bargaining an EA in relation to relevant employees
- ✓ EA is less than 9 months past NED

# Supported Bargaining Agreements v Single Interest Employer Agreements

Supported Bargaining Agreements	Single Interest Employer Agreements
What is the effect of an authorisation?	
<ul style="list-style-type: none"> <li>✓ Employer cannot make any other agreement</li> <li>✓ Employer cannot initiate/agree to bargain for any other agreement</li> </ul>	<ul style="list-style-type: none"> <li>✓ Employer cannot make any other agreement</li> <li>✓ Employer cannot initiate/agree to bargain for any other agreement</li> </ul>
Can other employers be added to an authorisation?	
Yes, if it is in the public interest to do so, have regard to the same requirements as at authorisation stage (including whether this is a declaration in place by the Minister), except employee 'representation' limb	Yes, same requirements as at authorisation stage
Can PIA be taken?	
Yes, subject to employees of <u>the</u> employer authorising the specified action in PABO	Yes, subject to employees of <u>the</u> employer authorising the specified action in PABO
When is the agreement made?	
When a majority of employees of at least one employer vote in favour  Note: Each union BR must <b>agree</b> to the vote proceeding OR a voting request order permits the employer to make the request.	When a majority of employees of at least one employer vote in favour  Note: Each union BR must <b>agree</b> to the vote proceeding OR a voting request order permits the employer to make the request.

# Supported Bargaining Agreements v Single Interest Employer Agreements

Supported Bargaining Agreements	Single Interest Employer Agreements
<b>Which employers are covered?</b>	
Only employers whose employees vote by a majority to approve the agreement	Only employers whose employees vote by a majority to approve the agreement
<b>Can employers be added to the agreement?</b>	
<p>Yes</p> <ul style="list-style-type: none"> <li>✓ Majority of employees of employer who will be covered must agree</li> <li>✓ Employer and 'employee organisations' express views</li> <li>? Authorisation stage requirements may be considered</li> </ul>	Yes, same requirements as at authorisation stage
<b>When does an authorisation cease?</b>	
Appears to be indefinite but an employer can apply to be removed from a SBA and the FWC must make this variation if the employer's changed circumstances mean it is no longer appropriate for the SBA to cover them	When SIEA made <u>or</u> 12 months after authorisation made (if not extended)
<b>Is arbitration available?</b>	
Yes, including 'intractable disputes' arbitration stream	Yes, including 'intractable disputes' arbitration stream

## Fixed-term contracts

In relation to fixed-term contracts, the SJPB Bill prohibits:



**Fixed-term contracts**  
of more than 2 years



**Renewable contracts**  
of more than 2 years, or if  
the contract provides an  
option/right to extend or  
renew more than once



**Consecutive  
contracts** with a  
combined duration of 2  
years

## Fixed-term contracts – exemptions to prohibition

The fixed-term contract prohibition does not apply if:



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



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)



The employee is appointed under governance rules of a corporation



The employer is permitted by reference to the terms of a modern award



An exemption is provided in the Regulations

# SJBP Bill – key gender equity and sexual harassment reforms



## Gender equity objective

- ‘Gender equity’ and ‘job security’ to be included as central objectives of the FW Act and modern awards objective
- FWC to consider these objectives at all times when exercising its functions
- ‘Gender equity’ is included in the minimum wages objective



## Equal remuneration principle

- Additional guidance as to the factors the FWC may take into account when deciding whether work is of equal or comparable value
- No discrimination finding is required for FWC to determine that the work has been undervalued



## Sexual harassment FWC disputes jurisdiction

- Implements recommendation 28 of the Respect@Work Report by amending the FW Act expressly to prohibit sexual harassment in connection with work
- Employers will be vicariously liable unless they can prove they took all reasonable steps to prevent the actions in question
- New ‘sexual harassment disputes’ jurisdiction for FWC
- FWC may deal with disputes by:
  - mediation or conciliation; or
  - if mediation or conciliation fail, arbitration by agreement between the parties



# SJBP Bill – Flexible working arrangements

## SJBP Bill retains the following provisions

Employer to respond to a request for a FWA within 21 days

Employer able to refuse a request for a FWA on reasonable business grounds

Employee must be informed of the reasons for the refusal

## Additional provisions

Employee may request a FWA on the basis of the employee experiencing family and domestic violence

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

Employer must have had regard to the consequences of the refusal for the employee

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

## Conciliation

If there is a dispute between the employer and employee, conciliation is mandatory except in exceptional circumstances

If unable to be resolved, FWC empowered to arbitrate the dispute and make various orders

## Arbitration

The dispute must relate to an employer's refusal to grant or respond to a request for a FWA

Arbitration does not require the employer's consent and can occur at the request of the employee only

## Prohibition on pay secrecy

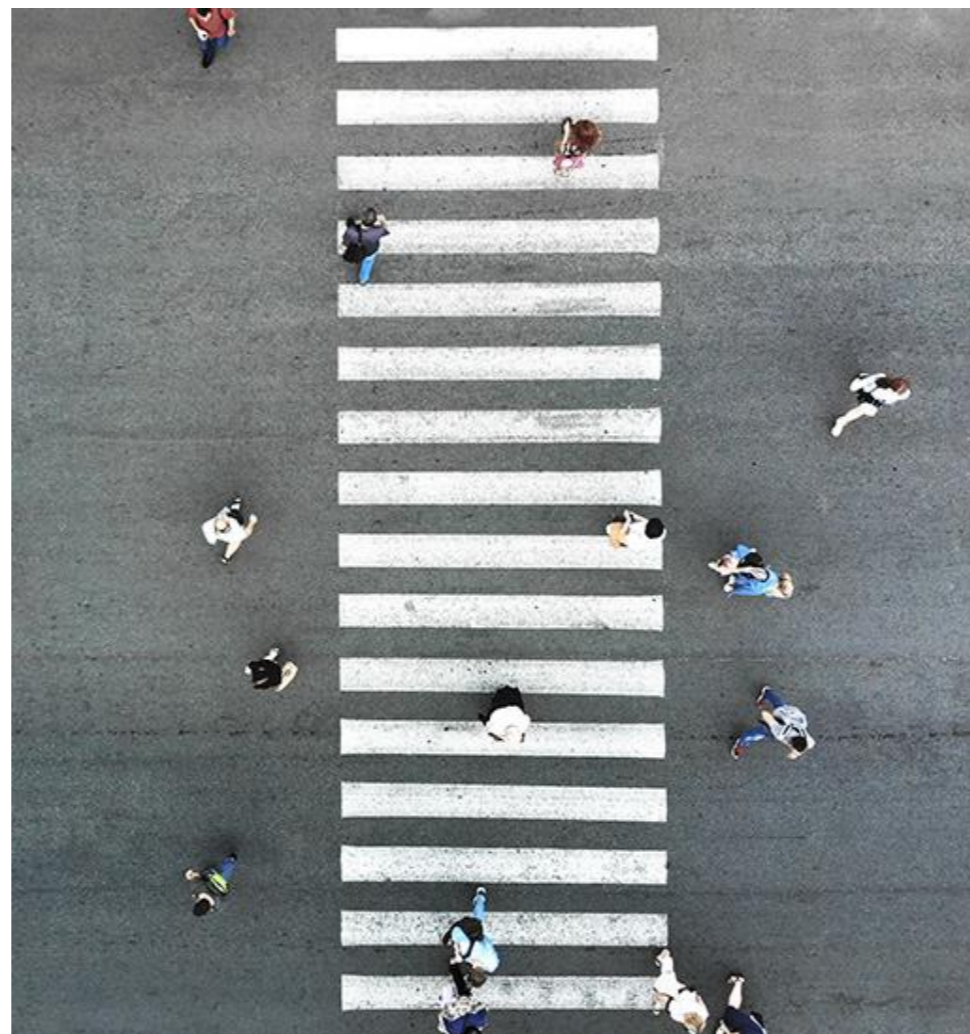
- SJBP Bill introduces a **prohibition on pay secrecy clauses** in employment agreements.
  - Prohibition will operate prospectively and will not invalidate existing arrangements until contract is varied.
  - Existing pay secrecy terms will not have effect.
  - Contravention carries civil penalty of up to 600 penalty units for serious contraventions by a body corporate.
- **New “workplace right”** which provides that employees and job applicants are able to:
  - disclose their own remuneration; or
  - ask another person about their remuneration.



# Upcoming developments

Same Job, Same  
Pay

Wage theft



Regulation of  
employee-like  
arrangements

Revised casual  
employment  
provisions

Right to Disconnect



# Questions

Sydney

Melbourne

Brisbane

Perth

Port Moresby

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