

**Compliance Alert:** Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

## Industrial Relations Reform: Significant changes to the Fair Work Act impact your current employer obligations

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* was passed by the Federal Parliament on 2 December 2022 and was formally accepted by the Governor-General on 6 December 2022.

The new laws will impact all Australian workplaces, with some parts requiring urgent attention from employers. These include:

- **Pay secrecy has ended** - Staff can now choose to discuss their pay with other staff. Pay secrecy clauses in existing contracts have no effect as of 7 December 2022, and employers can no longer offer new contracts containing pay secrecy clauses. Employers must update their employment agreements and contract templates immediately to reflect these changes.
- **FWC has more bargaining power** – From 7 December 2022, if the Fair Work Commission (FWC) considers that a party is not engaging in good faith enterprise bargaining, it can now issue a bargaining order.
- **Terminating an EBA after the nominal expiry date has new parameters** - From 7 December 2022, the FWC is has more power to prevent employers from terminating an enterprise agreement as a bargaining tactic, and to support an employee or union to terminate an unfair enterprise agreement. Employers should review their EBAs and consider their renegotiation options.
- **Job ads cannot offer less than the minimum wage** - From 7 December 2022, it is unlawful for an employer to advertise a pay rate below the minimum rate of pay, including the minimum rate of pay under an award or enterprise agreement.
- **FWC can make equal remuneration orders** - From 7 December 2022, the FWC must consider gender inequality when reviewing modern awards, and it can initiate orders to combat wage inequality without receiving an application. In addition, EBAs can now contain measures intended to achieve equality for employees with particular attributes.
- **Protected attributes have been expanded** - From 7 December 2022, the list of attributes protected from discrimination now includes gender identity, intersex status and breastfeeding. Employers should take a proactive approach to preventing workplace discrimination.

- **Workplace sexual harassment will be further prohibited through the FWC** - From 7 March 2023, a person subject to workplace sexual harassment will be able to seek compensation and penalties through the FWC. This is in addition to the existing right to seek a “stop sexual harassment order” and will not affect existing rights to make claims under other legislation. Employers should take a proactive approach to preventing workplace sexual harassment by reviewing their work, health and safety control measures and conducting a review of the workplace culture.

There are a number of further changes that will take effect at later dates in 2023. These relate to:

- Limiting the use of fixed-term contracts
- Expanding the grounds for requesting flexible working arrangements
- Expanding multi-enterprise bargaining provisions
- Expanding the application of the better off overall test (BOOT)
- Simplifying the approval process of employment agreements
- Arbitrating intractable bargaining disputes
- Ending enterprise agreements that pre-date the Fair Work Act
- Increasing the cap on small claims

*Further details are included in the Fair Work Commission’s statement attached.*

### **Legislative reform puts you at risk**

It’s critical to keep your policies, processes, employment agreements, EBAs and payroll systems up to date with current legislation. Honest, well-meaning Directors or Senior Executives can face the unwelcome surprise of penalties or legal expenses simply because they have been unaware of legislative changes affecting their workplace.

WorkPlacePLUS can help ensure you are meeting your employment obligations. For more information, please [contact us](#) today.

All AAPi members receive special member benefits through WorkPlacePLUS for support with HR and IR issues. For more information, contact Anna on (03) 9492 0958 or visit [WorkPlacePLUS.com.au](http://WorkPlacePLUS.com.au).



## President's statement

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### *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022*

Acting President Hatcher

Sydney, 8 December 2022

[1] On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (the Secure Jobs Better Pay Act) received Royal Assent. Relevantly, the Secure Jobs Better Pay Act amends the *Fair Work Act 2009* (FW Act), the *Fair Work (Registered Organisations) Act 2009* (RO Act) and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

[2] The amendments made by the Secure Jobs Better Pay Act will have a significant impact on the work of the Fair Work Commission (the Commission) including by making changes to existing functions and by conferring new functions on the Commission.

[3] This statement sets out a brief overview of the amendments in the Secure Jobs Better Pay Act that relate to the functions of the Commission and outlines the approach the Commission intends to take concerning consultation and engagement throughout the implementation process.

### **Approach to Implementation**

[4] The Commission is the national workplace relations tribunal. Its primary purpose is to exercise its functions and powers in accordance with the FW Act.

### *Organisation capability and performance*

[5] The Commission is fast, efficient and effective at dealing with cases and resolving disputes. On 4 November 2022, the former President, [Justice Ross issued a Statement](#) giving an update on the Commission's performance for quarter 1 of the 2022-23 financial year. The Statement noted that in quarter 1, the Commission was meeting or exceeding its Portfolio Budget Statement (PBS) targets. For the period of 1 July to 30 September 2022:

- the median time to approve enterprise agreements without undertakings was 12 days from lodgement, exceeding the PBS target of 32 days, and
- the median time from lodgement to first staff conciliation in unfair dismissal cases was 34 days, meeting the PBS target of 34 days

[6] That Statement also noted that the Commission is performing strongly against its internal benchmarks established under the 2022-23 performance framework, which has been operational since 1 July 2022. For the period of 1 July to 30 September 2022, the Commission received 7,686 lodgements and finalised 8,269 cases, with a clearance rate of 107 per cent. Further, 50 per cent of all cases were finalised within 7 weeks of lodgement and 90 per cent within 16 weeks of lodgement. The Commission is not currently carrying backlogs in any case type.

[7] The Commission has the systems and capabilities in place to implement the additional functions and other changes introduced by the Secure Jobs Better Pay Act.

*Working closely with our stakeholders on implementation*

[8] The amendments in the Secure Jobs Better Pay Act will have a significant impact on the work of the Commission. The amendments also have the potential to significantly impact those who use our services.

[9] The Commission is committed to implementing the amendments in an open and transparent way and with the needs of our users in mind. We will listen closely to our users and other experts to ensure that our users' needs are at the heart of the design of our services.

[10] We have established a dedicated section on the Commission's website for implementation of the reforms arising from the Secure Jobs Better Pay Act. This section will be updated regularly throughout the implementation process and will include:

- statements and information about the reforms
- implementation plans
- draft guidance, benchbooks, forms and other materials for comment
- other opportunities to comment, and
- an email address for feedback

[11] The Commission encourages active involvement from all interested parties. Feedback relating to documents published on the Commission's website can be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au).

[12] In addition, over the coming months we will engage directly with a range of stakeholders about the implementation of the reforms, including community organisations, our Workplace Advice Service partners, registered organisations, Peak Councils and the Commission's Reference Groups, including the Small Business Reference Group.

[13] The Commission is also committed to conducting a review of the implementation of the reforms to ensure that the reforms have been implemented in a way that meets the needs of our users and to identify opportunities to further improve the services we provide.

### **Commencement dates**

[14] The amendments in the Secure Jobs Better Pay Act that are relevant to the work of the Commission, commence in stages over the next 12 months. A number of commencement dates have not yet been proclaimed:

<b>Date</b>	<b>Amendment</b>
7 December 2022 (the day after Royal Assent)	<ul style="list-style-type: none"> <li>• Objects of the FW Act, modern awards objective, minimum wages objective</li> <li>• Equal remuneration</li> <li>• Prohibiting pay secrecy</li> <li>• Anti-discrimination and special measures</li> <li>• Termination of enterprise agreements after the nominal expiry date</li> <li>• Sunsetting of “zombie” agreements</li> <li>• Initiating bargaining</li> <li>• Dealing with errors in enterprise agreements</li> <li>• Communications to be available in multiple languages</li> </ul>
6 March 2023	<ul style="list-style-type: none"> <li>• Prohibiting sexual harassment in connection with work</li> </ul>
6 March 2023, or an earlier date to be fixed by proclamation	<ul style="list-style-type: none"> <li>• Expert Panels</li> </ul>
6 June 2023	<ul style="list-style-type: none"> <li>• Flexible work and unpaid parental leave requests</li> </ul>
6 June 2023, or an earlier date to be fixed by proclamation	<ul style="list-style-type: none"> <li>• Enterprise agreement approval and the Better off overall test</li> <li>• Bargaining disputes, industrial action, supported bargaining, single-interest employer authorisations, varying enterprise agreements to remove employers and their employees, and co-operative workplaces</li> <li>• Absorb the functions of the Registered Organisations Commission</li> </ul>
6 December 2023, or an earlier date to be fixed by proclamation	<ul style="list-style-type: none"> <li>• Fixed term contracts</li> </ul>

[15] As indicated above, the following amendments commenced on 7 December 2022:

- Objects of the Act, modern awards objective, minimum wages objective
- Equal remuneration
- Prohibiting pay secrecy
- Anti-discrimination and special measures
- Termination of enterprise agreements after the nominal expiry date
- Sunsetting of “zombie” agreements
- Initiating bargaining
- Dealing with errors in enterprise agreements, and
- Communications to be available in multiple languages.

[16] The Commission has already taken a number of steps to ensure that we can support our users from the date of commencement of these amendments. These steps, along with a short overview of the relevant amendments, are set out at **Attachment A**.

[17] At this stage, we have not updated the Enterprise Agreements benchbook. That document will require a significant number of amendments and we will publish a draft for comment in the coming months

### **Implementation of amendments commencing in 2023**

[18] In the coming months, we will publish further details of the Commission’s implementation plans for the amendments that commence in 2023, including:

- Expert Panels
- Prohibiting sexual harassment in connection with work
- Disputes relating to flexible work and extensions of unpaid parental leave
- Enterprise agreement approval and the better off overall test
- Bargaining disputes, industrial action, supported bargaining, single-interest employer authorisations, varying enterprise agreements to remove employers and their employees and co-operative workplaces

[19] The Commission will publish Implementation Reports to support engagement and consultation including on proposed procedural matters and draft materials.

[20] In relation to the Registered Organisations Commission (the ROC), the Commission's General Manager has commenced working with the ROC, to ensure that the Commission's absorption of the functions of the ROC is carried out in an orderly way. The General Manager will communicate directly with registered organisations in the coming weeks.

### **Enterprise agreements and bargaining**

[21] As noted above, there are a number of significant changes to the enterprise bargaining and enterprise agreement approval processes that will commence on 6 June 2023, or an earlier date to be fixed by proclamation.

[22] The Commission has commenced planning for the implementation of these changes. The Commission anticipates allocating additional Member resources to support the enterprise bargaining reforms. As with the other reforms, the Commission intends to consult broadly on implementation of the changes to enterprise bargaining and agreement approval.

[23] The current provisions relating to enterprise bargaining and agreement approvals (including the better off overall test) will continue to apply until the commencement date of the amendments. Over the coming months, the Commission will publish further information about the changes to the bargaining and agreement approval provisions.

[24] The former President's Statement of 20 October 2022 relating to enterprise agreement approvals, provided an update on the use of the online application forms for enterprise agreement approval. The former President expressed the provisional view at [29]–[31] that the online agreement forms would become the standard method of lodgment for all single and multi-enterprise agreement approval applications from 1 March 2023. However, the former President noted that if legislative change required amendment to the online forms, that date may change.

[25] The amendments in the Secure Jobs Better Pay Act will require the Commission to substantially amend the online agreement forms. Accordingly, the Commission will defer further consideration of mandating the use of the online agreement forms until the second half of 2023.

## **PRESIDENT**



## Attachment A – Amendments commencing the day after Royal Assent

Part	Immediate changes to Commission processes
<p><i>Objects of the Act, modern awards objective, minimum wages objective</i></p> <p>The Revised Explanatory Memorandum (the EM) (at [330]-[332]) describes the amendments in part 4 as follows;</p> <p>This Part would introduce job security and gender equality into the object of the FW Act. It would place these considerations at the heart of the FWC’s decision-making, and support the Government’s priorities of delivering secure, well-paid jobs and ensuring women have equal opportunities and equal pay.</p> <p>In accordance with established principles of statutory interpretation, the FW Act is required to be interpreted in a way that would best achieve the object of the FW Act wherever possible (see section 15AA of the AI Act). The FWC is also required under existing paragraph 578(a) of the FW Act to take into account the objects of the FW Act when performing functions or exercising powers under the FW Act. This includes, for example, the FWC performing functions or exercising powers in relation to dispute resolution, including arbitration, setting terms and conditions in modern awards and approving enterprise agreements.</p> <p>This Part would also introduce improved access to secure work and gender equality into the modern awards objective in section 134 of the FW Act as matters the FWC would be required to</p>	<p>The new objects of the FW Act and the amendments to the modern awards and minimum wages objectives will apply to applications currently before the Commission as well as to the Annual Wage Review 2022-23.</p> <p>Parties making submissions to the Annual Wage Review Expert Panel should address the new objects and objectives as part of the submissions process.</p>



<p>take into account when setting terms and conditions in modern awards. This Part would also introduce gender equality into the minimum wages objective in section 284 of the FW Act as a matter the FWC would be required to take into account when setting minimum wages.</p>	
<p><i>Equal remuneration</i></p> <p>Part 5 amends s.302 ('FWC may make an order requiring equal remuneration'), amongst other changes, to provide for matters the FWC may take into account in determining whether there is equal remuneration for work of equal or comparable value. The Revised Explanatory Memorandum notes that the amendments remove the requirement to establish 'a reliable male comparator'.</p> <p>Part 5 also amends s.157(2) (which provides for the FWC to vary a modern award for work value reasons) to clarify that consideration of work value reasons must be free of assumptions based on gender, and that work value reasons can encompass undervaluation of work due to historical gender-related reasons.</p>	<p>In relation to parts 4 and 5, the Commission will update its website in the coming weeks to provide further information about the amendments.</p> <p>There is currently no specific application form for equal remuneration applications. Interested parties can use the <a href="#">F1 Application Form</a> for making such an application. A specific form may be created in the coming months.</p> <p>Parties can continue to use the <a href="#">F46 Application to vary a modern award</a> for applications relating to s.157(2).</p>
<p><i>Pay secrecy and Anti-Discrimination</i></p> <p>The EM describes (at [408]) the Part 7 amendments as follows:</p> <p>'New clause 333B would create new workplace rights in the FW Act, allowing employees to ask one another about and to disclose their remuneration and relevant conditions. Employees would be able to use this information to assess whether their remuneration is fair and</p>	<p>In the coming weeks, we will update website information and the <a href="#">General Protections Benchbook</a> to include the new provisions.</p>

<p>comparable to that of other employees in the same workplace or industry.’</p> <p>The EM (at [544]-[545]) describes the Part 9 amendments as follows:</p> <p>‘Part 9 would insert three further protected attributes—breastfeeding, gender identity and intersex status—into the anti-discrimination provisions in the FW Act to bring the FW Act into alignment with other Commonwealth anti-discrimination legislation, such as the SD Act.</p> <p>This Part would also amend the FW Act to confirm that ‘special measures to achieve equality’ are matters pertaining to the employment relationship and therefore matters about which an enterprise agreement may be made. This Part would also clarify that ‘special measures to achieve equality’ are not discriminatory terms and therefore not unlawful terms in an enterprise agreement.</p>	
<p><i>Termination of enterprise agreements</i></p> <p>Part 12 makes new provision for FWC to terminate an enterprise agreement (EA) that has passed its nominal date, on application by an employer, employee or union covered by the EA.</p> <p>The EM at [649] states that the amendments:</p> <p>... would stop the practice of employers applying unilaterally ... for termination of a nominally expired [EA], where termination would result in reducing employees’ entitlements other than in prescribed circumstances. This includes situations where the threat of</p>	<p>Parties seeking to make an application to terminate an enterprise agreement can continue to use form <i>F24B—Application for termination of an enterprise agreement after the nominal expiry date</i>. In the coming weeks, the Commission will publish further updated forms to support these amendments. Further details will be published on the dedicated webpage.</p>

<p>termination may disrupt bargaining for a new [EA].’</p>	
<p><i>Sunsetting of zombie agreements</i></p> <p>Part 13 amends the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (T&amp;C Act)</i> so that remaining agreement-based transitional instruments, Division 2B State employment agreements and enterprise agreements made during the bridging period, terminate after a 12 month ‘default period’, unless that period is extended by the Commission.</p> <p>The amendments also require employers to give employees notice that the transitional instruments will sunset unless application is made to the FWC to extend the default period.</p>	<p>A new application form will shortly be published on the Commission’s <a href="#">forms webpage</a> for applications to extend the default period for the relevant transitional instruments.</p>
<p><i>Initiating bargaining</i></p> <p>Part 15 amends s.173 to enable an employee bargaining representative to initiate bargaining for a ‘single-enterprise agreement’ in certain circumstances, without the agreement of the employer to bargain or the FWC having made a majority support determination, scope order or low-paid authorisation (as presently required).</p> <p>The EM at [751] describes the amendments as follows:</p> <p>‘The proposed amendments would simplify the process for initiating bargaining where the proposed single-enterprise agreement would replace an existing agreement that has a nominal expiry date within the past 5 years and that has a scope substantially similar to the proposed agreement. The making of the existing agreement must also not</p>	<p>The Commission will shortly publish an amended form <i>F17 Employer’s declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement)</i>.</p>

<p>have caused a single interest employer authorisation to have ceased to be in operation. Where these conditions are met, the amendments would enable an employee, via a bargaining representative, to initiate bargaining for an agreement simply by making a written request to the employer. This method for initiating bargaining would not apply to a proposed greenfields agreement, a multi enterprise agreement (i.e. a cooperative workplaces agreement, supported bargaining agreement or single interest employer agreement).'</p>	
<p><i>Dealing with errors in enterprise agreements</i></p> <p>Part 17 provides for the FWC to vary an enterprise agreement to correct an obvious error, defect or irregularity. The EM at [809] states:</p> <p>‘This Part would remove unnecessary complexity in the agreement-making process by amending the FW Act to:</p> <ul style="list-style-type: none"> <li>• simplify the process for correcting any obvious errors, defects or irregularities in enterprise agreements; and</li> <li>• provide a simple remedy to address the situation where the wrong version of an enterprise agreement or variation has been inadvertently submitted to, and approved by, the FWC.</li> </ul>	<p>Parties seeking to make an application to vary an enterprise agreement to correct an obvious error should use the <a href="#">F1 Application Form</a>.</p>
<p><i>Communications to be available in multiple languages</i></p>	<p>Further information will be provided in relation to this new obligation in the coming weeks.</p>