

## SECURE JOBS, BETTER PAY & PROTECTING WORKER ENTITLEMENTS AUSTRALIAN INDUSTRIAL RELATIONS REFORMS IN 2023



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## INTRODUCTION

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Australian Parliament passed the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* ("**First Tranche of Amendments**") on 6 December 2022. The First Tranche of Amendments changes several existing sections of the *Fair Work Act 2009* (Cth) ("**FW Act**"), as well as other legislation, and introduces a range of new workplace laws (read the Harmers legal update on the First Tranche of Amendments here: <https://harmers.com.au/legal-update-36/>).

The commencement dates to enact amendments passed by the First Tranche of Amendments are staggered, with various amendments having already come into effect on 7 December 2022, and 7 January, 6 February, 6 March, 6 June and 1 July 2023. The last round of new laws to enact the First Tranche of Amendments is expected to occur on 6 December 2023.

Further, on 22 June 2023, the Australian Parliament passed the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023* ("**Second Tranche of Amendments**"), addressing issues concerning migrant workers, unpaid parental leave, superannuation and deductions from payroll.

This article is a summary of the main amendments to the FW Act introduced by the First and Second Tranches of Amendments.

## FIRST TRANCHE OF AMENDMENTS

### 7 DECEMBER 2022

On 7 December 2022, the first round of new laws was enacted by the First Tranche of Amendments. New objectives were introduced to the FW Act aimed to promote job security, gender equality, wage reviews and equal remuneration. New laws were also enacted about how the Fair Work Commission ("**FWC**") and the Fair Work Ombudsman ought to perform their functions. For example, both organisations are now required to provide guidelines, material and community outreach in multiple languages.

## PAY SECRECY

In order to help meet the new objectives of the FW Act, new workplace rights were codified for employees in relation to pay secrecy. Employees now have full discretion as to with whom they elect to share information about their pay or employment terms and conditions (such as hours worked for that pay), and an employer cannot take adverse action against an employee for having exercised this discretion either way.

## ANTI-DISCRIMINATION

Breastfeeding, gender identity and intersex status have been added to the FW Act as new protected attributes that cannot infect the decision-making of an employer as it relates to an employee with those attributes.

## RECRUITMENT

From 7 January 2023, the First Tranche of Amendments prohibited job advertisements from including rates of pay that undercut minimum entitlements mandated by the FW Act or industrial instruments such as Modern Awards or Enterprise Agreements.

### 6 FEBRUARY 2023 AND 6 MARCH 2023

## CONSTRUCTION AND REGISTERED ORGANISATIONS

The First Tranche of Amendments abolished the Australian Building and Construction Commission on 6 February 2023 and its functions were transferred to the FWC by way of the establishment of the National Construction Industry Forum on 1 July 2023. That forum will also operate as a statutory advisory body to the Federal Government on workplace issues within the building and construction industry.

On 6 March 2023, the First Tranche of Amendments also abolished the Registered Organisation Commission and transferred those functions to the General Manager of the FWC, while registered organisations continue to have the same reporting and compliance obligations under the *Fair Work (Registered Organisations) Act 2009*.





## SEXUAL HARASSMENT

This round of amendments expanded worker and volunteer protections against sexual harassment in the workplace. As a result of these amendments, vicarious liability can now be established against another person or company for sexual harassment if they cannot prove that they took all reasonable steps to prevent the conduct in question. The FWC has new powers to deal with disputes about sexual harassment, including by arbitration.

### 6 JUNE 2023

On 6 June 2023, amendments took effect regarding enterprise bargaining, industrial action and procedures governing requests for unpaid parental leave and flexible work arrangements.

## ENTERPRISE BARGAINING AND INDUSTRIAL ACTION

The FWC will be able to make an intractable bargaining declaration ("**IB Declaration**") under a new section 235 of the FW Act if:

- an application for a declaration has been made by a bargaining representative for the proposed agreement;
- the FWC has dealt with the dispute about the agreement under section 240 of the FW Act;
- the minimum bargaining period has ended; and
- the FWC is satisfied, amongst other things, that there is no reasonable prospect of the bargaining parties reaching agreement.

If an IB Declaration is made, the FWC may specify a post-declaration negotiating period during which the FWC can continue to assist the parties. The FWC is then required to make an intractable bargaining workplace determination. The FWC must make a determination as quickly as possible after either making an IB Declaration or the end of the post-declaration negotiating period (if there was one).

The FW Act now includes the following types of agreements as a result of the First Tranche of Amendments:

- **Single-enterprise agreements** – an enterprise agreement covering a single employer, or two or more related employers (engaged in a joint venture or common enterprise or are related bodies corporate). Single-enterprise agreements will no longer cover two or more employers subject to a single-interest employer authorisation.
- **Multi-enterprise agreements** – three types of multi-enterprise agreements are now available:
  1. supported bargaining agreements, which replace the provisions to make agreements under the current low-paid bargaining stream;
  2. single-interest employer agreements, which can be made if the FWC makes a single-interest employer authorisation, and
  3. cooperative workplace agreements, which can be made if two or more employers agree to bargain together.
- **Greenfields agreements** – the provisions relating to the parties to a greenfields agreement will not change as a result of the First Tranche of Amendments.

The First Tranche of Amendments also introduces two new requirements for genuine agreement:

1. that employees requested to vote on a proposed agreement have a sufficient interest in its terms and are sufficiently representative of the employees the agreement will cover; and
2. in the case of a proposed multi-enterprise agreement, before requesting that employees vote on the agreement, an employer must obtain the written agreement of the employee organisations that are bargaining representatives for the agreement or obtain a voting request order from the FWC.

As of 6 June 2023, the FWC is able to unilaterally amend an enterprise agreement after it is lodged if the FWC forms the view that the agreement no longer passes the Better Off Overall Test ("**BOOT**").

Additionally, the Australian Electoral Commission is no longer the single, default ballot agent in relation to applications for



protected action ballot orders. The FWC has authority to approve other eligible protected action ballot agents and it must review that approval at least every three years. As of the date of writing this article, the FWC has approved three additional agents to join the list of agents eligible to coordinate industrial action.

### **UNPAID PARENTAL LEAVE AND FLEXIBLE WORK ARRANGEMENTS**

The processes for requesting extended unpaid parental leave and flexible work arrangements have adopted similar amendments. Both request types are currently included in the National Employment Standards (“NES”) in sections 65 and 76 of the FW Act respectively. However, the FW Act did not previously provide an avenue for employees to challenge the refusal of a request for flexible working arrangements or a request for an extension of unpaid parental leave - both types of requests now incorporate dispute resolution into their respective processes under an amended section 739 and new sections 65B and 65C and 76B and 76C of the FW Act. The FWC has proposed to amend model award terms to highlight the two alternative and parallel avenues now available to resolve disputes over flexible work and unpaid parental leave.

As of 6 June 2023, there are limited circumstances in which an employer can refuse a flexibility request and employees now have the option of applying to the FWC to challenge an employer’s refusal. An employer may now only lawfully refuse a request for flexible work if:

1. the employer has discussed the request with the employee and genuinely tried to reach an agreement with them about making changes to their working arrangements to accommodate the reasons for the request;
2. the employer and the employee have not reached such an agreement;
3. the employer has had regard to the consequences of the refusal for the employee; and
4. the refusal is on reasonable business grounds.

Echoing the amendments enacted on 6 March 2023, the FWC

can arbitrate disputes in relation to unpaid parental leave as well as flexible work requests. A new Form F10C is to be used to request the FWC to deal with a dispute about a refusal of a request for flexible working arrangements, and a new Form F10B is to be used in the context of extending unpaid parental leave. In both instances, employees can bring a dispute to the FWC if an employer unreasonably objects to or does not respond to a request altogether within 21 days from the date of the employee’s request.

1 JULY 2023

### **SMALL CLAIMS**

As of 1 July 2023, a new procedure provides a low-cost, fast and informal means of resolving small claims in Court, such as those relating to underpayment of wages. The small claims procedure also reduces cost and complexity for employers responding to these claims. The monetary cap on the amount that can be awarded in such proceedings under the FW Act will increase from \$20,000 to \$100,000, and, where an applicant is successful, they may also have the ability to recover the filing fee from the other side.

6 DECEMBER 2023

### **FIXED TERM CONTRACTS**

From 6 December 2023, employers can no longer employ staff on fixed-term contracts that are for two or more years (including extensions) or may be extended more than once, excluding contracts for training arrangements or those expressly permitted by a Modern Award. Employers will not be able to circumvent this prohibition by delaying the extension or re-engagement of a contract or continuing a person’s employment on a “new” fixed-term contract for a role similar to that which the person concerned was previously employed.

From 6 December 2023, employers will have to give a Fixed Term Contract Information Statement to employees re-engaging on fixed-term contracts. That information statement will be downloadable from the FWC’s website.



## ZOMBIE AGREEMENTS

Separately, agreements in operation today that were made before the commencement of the FW Act in 2009 will automatically terminate on 7 December 2023 (also known as sunset). Employers must notify covered employees of the sunset date in writing, and that written notice must have been issued before 7 June 2023, providing six months' notice to affected staff.

Parties to an agreement may apply to the FWC to extend the sunset date for the agreement by up to four years for each application, subject to the zombie agreement satisfying the BOOT.

## SECOND TRANCHE OF AMENDMENTS

### UNPAID PARENTAL LEAVE

The Second Tranche of Amendments will amend unpaid parental leave provisions in the FW Act to create consistency with the *Paid Parental Leave Act 2010* which commenced in March 2023. These changes will allow employees (on ten weeks' notice or more):

1. to take up to 100 days (20 weeks) of flexible, unpaid parental leave;
2. to commence flexible unpaid parental leave at any time in the 24 months following the birth or adoption of the child; and
3. to take flexible unpaid parental leave before or after a period of continuous unpaid parental leave.

The Second Tranche of Amendments also removes the provisions relating to "employee couples". The change will allow employees to take up to 12 months of unpaid parental leave and request a further 12 months (up to a maximum total of 24 months), regardless of how much leave the other parent takes. By removing "concurrent leave" provisions, the Second Tranche of Amendments will allow employee couples to take unpaid parental leave at the same time without limitation.

## SUPERANNUATION

The Second Tranche of Amendments will insert a right to superannuation in the NES.

## PAY DEDUCTIONS

To ease the administrative burden on employees and employers in relation to employee pay deductions (section 324 of the FW Act), the Second Tranche of Amendments proposes to allow employees to specify whether an authorised deduction is for a specified amount or can be varied from time to time. The proposed reforms also introduce an additional "reasonableness" requirement and remove the requirement for employees to give their bosses written authority on each occasion a deduction is to be made.

## MIGRANT WORKERS

The Second Tranche of Amendments will confirm that temporary migrant workers are entitled to workplace protections regardless of immigration status (codifying recommendation 3 of the Migrant Workers Taskforce report of March 2019).

Under the amendments, a larger number of workers will be able to take legal action through small claims proceedings. The increase of the small claims cap aims will now allow more applicants to make small claims simply, quickly, cheaply and without legal representation if they choose so, and as an informal means to resolve claims under the *Fair Work Act* and in the courts.





## ON THE HORIZON

The Department of Employment and Workplace Relations has been engaging in public consultation in relation to the Third Tranche of Amendments, focusing on the following 11 proposals:

1. standing up for casual workers;
2. enacting same job, same pay provisions;
3. criminalising wage theft;
4. extending the powers of the FWC to include "employee-like" forms of work (for the gig economy);
5. giving workers the right to challenge unfair contractual terms;
6. allowing the FWC to set minimum standards to ensure the road transport industry is safe, sustainable and viable;
7. providing stronger protections against discrimination, adverse action and harassment;
8. establishing a single national framework for labour hire regulation;
9. addressing the small business redundancy exemption by winding scenarios under the Fair Entitlements Guarantee Scheme;
10. reforming enterprise bargaining provisions to close loopholes; and
11. repealing demerger from registered organisations amalgamation provisions.

## KEY ACTION POINTS FOR HUMAN RESOURCES AND IN-HOUSE COUNSEL

Employers are encouraged to keep updated as more tranches progress through Parliament.

If you require legal advice or assistance, please contact our Harmers Workplace Lawyers team on +61 2 9267 4322.

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