

SECURE JOBS, BETTER PAY BILL

What does it mean for your business?

May 2023

LANDER
& ROGERS

OVERVIEW

INTRODUCTION

The historic *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Secure Jobs Bill**) passed Parliament on 2 December 2022. It introduces the most significant and wide-ranging changes to Australia’s workplace relations framework since the introduction of the *Fair Work Act 2009* (Cth).

While it provides for significant amendments to the *Fair Work Act 2009* (Cth) (**Fair Work Act**) and associated legislation, the most topical and controversial aspects relate to the expansion of access to multi-enterprise agreements and multi-employer bargaining.

In this update, we set out the aspects of the Bill which affect bargaining, enterprise agreements and industrial action. The major changes and their likely impacts in this area are as follows (*use the links to jump to the relevant section*).



Contents

Use the links below to jump to the relevant section of the document.

What should your organisation be doing?	7
The expansion of multi-employer arrangements	7
Changes to starting enterprise bargaining	4
Changes to procedural requirements for enterprise agreement-making	4
Changes to the “better off overall test” in enterprise agreement approvals	4
Changes to protected industrial action processes	4
New powers for the FWC to resolve enterprise bargaining disputes	4
Greater limitations on the termination of enterprise agreements	4
The sunseting of zombie agreements	4

OVERVIEW

OTHER IMPORTANT AMENDMENTS

Contents

Use the links below to jump to the relevant section of the document.

Click to navigate

An express right to discuss pay, ban on pay secrecy clauses and job ads below minimum wage	5
Limitations on the use of fixed-term contracts and (another) information statement	5
Increased protection against sexual harassment, discrimination and greater rights to seek flexible work arrangements	5
Enhancing the small claims process	
The abolition of regulators and repeal of legislative instruments	6
New objects for the FW Act and new Panels	6
Increased protection for firefighters	6



KEY CHANGES AND THEIR IMPLICATIONS

The expansion of multi-employer arrangements

This includes the ability for multiple employers with a “common interest” and who are “reasonably comparable” to be “roped into” bargaining for, and coverage under, an agreement.

> Steps for your organisation to take now

Changes to starting enterprise bargaining

This includes the new ability for employees to initiate bargaining for a new agreement in some circumstances — as opposed to previous arrangements, where employees and their representatives would be required to obtain a majority support determination from the Fair Work Commission (FWC) in the face of employer opposition to bargaining.

Changes to procedural requirements for enterprise agreement-making

This includes removing the current “seven-day access period” for agreement and voting details in advance of an agreement vote, and replacing this with a Statement of Principles that will be published by the FWC, which the FWC will apply in determining whether an agreement has been “genuinely agreed” by the relevant employees. However, current requirements regarding the issuing of a Notice of Employee Representational Rights (NERR) to employees, and waiting 21 days before a vote is held on the agreement, will continue to apply to single-enterprise agreements.

Changes to the application of the “better off overall test” (BOOT) in enterprise agreement approvals

This includes the FWC applying a new “global” assessment, rather than a line-by-line comparison, of the proposed agreement and relevant modern award. Also, the FWC will only be required to consider reasonably foreseeable patterns of work or types of employment rather than unlikely theoretical scenarios when comparing entitlements for the purposes of the BOOT. However, the FWC will be able to reassess whether an enterprise agreement passes the BOOT if there are changes to relevant patterns of work or types of employment that weren’t assessed by the FWC when it originally approved the agreement.

Changes to protected industrial action processes

This includes 120 hours’ notice of protected action for certain multi-employer arrangements, with current arrangements of three days’ written notice remaining in place for single-enterprise agreements. Also, the AEC will no longer be the default provider for protected action ballots, with applicants being able to utilise other providers, generally with FWC approval. Bargaining parties will also be required to attend conciliation in the FWC during the protected action ballot period. Importantly, where multi-employer bargaining permits protected industrial action, ballots for this action will be conducted on an employer-by-employer basis — meaning majority support requirements at each employer for the action, not majority support for the action taking all of the employers as whole.

New powers for the FWC to resolve enterprise bargaining disputes

This includes the FWC being able to make “intractable bargaining declarations” and then arbitrating where it is satisfied that there are no reasonable prospects of the bargaining parties reaching an agreement (provided prescribed minimum timeframes have already been met, including a nine-month minimum period from the nominal expiry of the last agreement or from when bargaining commenced, whichever is the later).

Greater limitations on the termination of enterprise agreements

This includes new tests that the continued operation of the agreement would be unfair to employees, and that the proposed termination would not adversely affect the bargaining position of the employees (ie. agreement termination cannot be used by the employer as a bargaining tactic).

The sunseting of zombie agreements

Particular industrial instruments (eg. old pre-Fair Work Act agreements) will automatically “sunset”, or terminate, on 7 December 2023, with employer obligations to provide written notice of this “sunsetting” to affected employees, and the ability to seek a limited extension of a sunset period.

OTHER IMPORTANT AMENDMENTS

Express right to discuss pay, ban on pay secrecy clauses and job ads below minimum wage

The FW Act now prohibits contractual clauses which seek to prevent employees disclosing their remuneration and advertisement of jobs attracting a wage below minimum rates of pay.

- Employees now have the ability 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 is a “workplace right” for the purposes of the general protections provisions and will operate 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.

> Steps for your organisation to take now

Limitations on the use of fixed-term contracts and (another) information statement

Employers are prohibited from entering into a fixed-term contract which:

- is of more than two years’ duration (including any extension/renewal period);
- contains more than one extension/renewal option; or
- is the second successive fixed-term contract with the employee for the same or substantially similar work, in circumstances where:
 - the sum of both contract terms will exceed two years; or
 - one of the contracts contained an option for renewal or extension

The prohibitions capture both true fixed-term and maximum-term/outer-limit contracts. The Explanatory Memorandum to the Secure Jobs Bill suggests a second contract will be successive despite a short break between contracts that is not intended to end the employment relationship (eg. sessional contracts in the higher education sector). There are extensive anti-avoidance provisions, prohibiting actions to change the timing or terms of a fixed-term contract (so that the employee is not performing “the same or similar work” for the employer); ending one employee’s employment in accordance with their fixed-term contract and engaging another employee

to do the same or similar work; or terminating an employee’s employment or delaying re-engaging an employee for a period.

There are exceptions to the prohibition, including:

- engaging an employee who has specialised skills required to complete a specific task
- in relation to apprentices or trainees
- for essential work during a peak period, including seasonal work
- emergency situations or where a permanent employee needs to be replaced for a period of leave
- where an employee earns more than the high income threshold, calculated from the first year of the contract

Employers will also be required to provide to new employees before, or as soon as practicable after, entering into a fixed-term contract, a new Fixed Term Contract Information Statement (to be drafted by the Fair Work Ombudsman).

The FWC will have the ability to conciliate or, if both parties agree, arbitrate disputes in relation to fixed-term contracts.

The prohibitions are civil penalty provisions which attract maximum penalties of \$66,600 for body corporates and \$13,320 for individuals (or 10 times that amount if a “serious contravention”).

> Steps for your organisation to take now

Increased protection against sexual harassment, discrimination and greater rights to seek flexible work arrangements

The amendments prohibit sexual harassment in connection with work and provide the FWC with the ability to arbitrate a stop-sexual harassment application by consent, or otherwise issue a certificate allowing an application to be made to the Federal Courts; add the protected attributes of breastfeeding, gender identity and intersex status to the existing anti-discrimination provisions; and expand the circumstances in which an employee may request flexible work arrangements and give the FWC the power to arbitrate flexible work arrangements.

Find more information on the changes relating to sexual harassment [in this article](#) and in this [guide](#).

Flexible work arrangements

Personal circumstances giving rise to a right to request flexible work arrangements will be expanded to include where a member of the employee’s immediate family or household experiences family or domestic violence, or where the employee is pregnant.

Refusal of requests will only be possible where:

- the employer and employee have been unable to reach agreement

SECURE JOBS, BETTER PAY BILL

- the employer has had regard to the consequences of the refusal for the employee; and
- the refusal is based on reasonable business grounds

If a request cannot be agreed upon reasonable business grounds:

- the employer must make genuine efforts to identify an alternative arrangement; and
- the employer must provide a detailed written explanation of the particular business grounds relied upon in refusing the request and how they apply, any changes that the employer would be willing to make to accommodate the employee's personal circumstances and the availability of the dispute resolution processes

Where a request is refused or is not responded to within 21 days, the employee will be able to have the refusal of their request dealt with by the FWC via non-binding dispute resolution in the first instance and arbitration in exceptional circumstances. Where the FWC considers the employer has not provided an adequate response, it may order that the employer take further specified steps, grant the request or make alternative arrangements to the employee's working arrangements to accommodate their circumstances.

> Steps for your organisation to take now

Enhancing the small claims process

The compensation cap for small claims proceedings under the FW Act will be increased from \$20,000 to \$100,000.

The abolition of regulators and repeal of legislative instruments

The Registered Organisations Commission and the Australian Building and Construction Commission has been abolished and the *Code for the Tendering and Performance of Building Work 2016* repealed.

New objects for the FW Act and new Panels

The amendments to the FW Act include the introduction of new objects regarding job security and gender equity; the provision of guidance for the FWC in its approach to equal remuneration and work value cases; the establishment of a new Pay Equity Expert Panel and a Care Community Sector Expert Panel to determine equal remuneration cases and certain award cases.

Increased protection for firefighters

Amendment of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) to update the worker's compensation presumptive liability provisions for firefighters.



WHAT SHOULD YOUR ORGANISATION BE DOING?

Planning and preparing for “multi-employer arrangements”

Employers should review their current workplace relations framework as a priority, particularly if they may be at risk of being “roped into” [these arrangements](#) once they commence. For example, employers should be assessing the following:

- Do you have current in-term enterprise agreements in place? Or are you operating under expired (or soon to expire) agreements?
- Are you about to commence, or are in the process of, bargaining for new agreements? Do you have agreement to bargain with relevant union/s?
- Do you operate in sectors/industries where the new supported bargaining stream is a focus (eg. aged care, child care, disability support)?
- Are you aware of competitors in your market who you may share “common interests” with (eg. similar geography, regulatory framework, nature of operations, employee terms and conditions)?
- Are the operations and activities of your business reasonably comparable to others in your market? If not, what steps would you need to take to satisfy the FWC that this is not the case? Employers should be prepared to answer this question, given the onus will

be on the employer to satisfy the FWC that they are not “reasonably comparable” to other relevant employers, if they have 50 or more employees. Otherwise, can you satisfy the FWC it is not in the public interest?

- Are you able to rely on any of the exclusions to multi-employer arrangements (eg. do you operate in the construction industry, are you a small business)?
- Do you know if your employees would be strong supporters of multi-employer arrangements?

Fixed-term contracts

In relation to [fixed-term contracts](#), employers should:

- review the manner in which they are utilising fixed-term labour and ensure this will not fall foul of the new provisions
- update their standard form contracts to amend fixed-term clauses; and
- ensure any fixed-term employees are provided a Fixed Term Contract Information Statement upon commencement. Employers should ensure that the reasons for engaging an employee on a fixed-term contract are clearly documented, particularly in the case of second fixed-term contracts.

Flexible work arrangements

While requests for [flexible work arrangements](#) will need to be considered on a case-by-case basis, employers should establish processes for assessing and responding to such requests and ensuring human resources and managerial staff are appropriately trained in how to give genuine consideration to requests for flexible arrangements and actively engage in discussions with employees within the 21-day period.

Standard form contracts

Standard form contracts should also be urgently reviewed to ensure they do not fall foul of the pay secrecy prohibitions and avoid exposure to a civil penalty.



SECURE JOBS, BETTER PAY BILL

WATCH THIS SPACE

The Government has also announced its intention to deliver a second tranche of workplace relations reforms this year to “close the loopholes that are undermining job security and wage growth”. We expect this second round of reforms is likely to see amendments to reverse the effect of some “favourable business” decisions of the High Court of Australia in relation to casual employment and independent contractors, and a renewed push to legislate “same job, same pay”.

For more information on the Secure Jobs Bill and its implications for your organisation, please contact a member of Lander & Rogers’ [Workplace Relations & Safety](#) team.

Key contacts



Amie Frydenberg

Partner

Workplace Relations & Safety

D +61 3 9269 9359

M +61 412 997 932

E afrydenberg@landers.com.au



Emma Purdue

Partner

Workplace Relations & Safety

D +61 3 9269 9471

M +61 438 830 929

E epurdue@landers.com.au



Emily Bowly

Senior Associate

Workplace Relations & Safety

D +61 3 9269 9648

M +61 409 306 007

E ebowly@landers.com.au

ABOUT US

Founded in 1946, Lander & Rogers is one of the few remaining truly independent Australian law firms and a leader in legal tech innovation.

With offices across the eastern seaboard of Australia, Lander & Rogers has grown organically resulting in a unified firm with a strong focus on client and staff care.

We believe legal services involve more than just the law – practical, commercial advice and exceptional client experience are equally important to our clients and to us.

Lander & Rogers advises corporate, government, not-for-profit and private clients in insurance law and litigation, family law, workplace relations & safety, real estate, corporate transactions, digital & technology and commercial disputes.

The firm is global in approach, working closely with a network of leading firms to provide advice to clients, both domestically and abroad. Lander & Rogers is also the exclusive Australian member of the largest worldwide network of independent law firms, TerraLex.

Disclaimer

All information on this site is of a general nature only and is not intended to be relied upon as, nor to be a substitute for, specific legal professional advice. No responsibility for the loss occasioned to any person acting on or refraining from action as a result of any material published can be accepted.

Brisbane

Level 11 Waterfront Place
1 Eagle Street
Brisbane QLD 4000

T +61 7 3456 5000
F +61 7 3456 5001

Canberra

Level 11
15 London Circuit
Canberra ACT 2601

T +61 2 5138 8000
F +61 2 5138 8001

Melbourne

Level 15 Olderfleet
477 Collins Street
Melbourne VIC 3000

T +61 3 9269 9000
F +61 3 9269 9001

Sydney

Level 5
33 Alfred Street
Sydney NSW 2000

T +61 2 8020 7700
F +61 2 8020 7701



landers.com.au