Avant Law

Secure Jobs, Better Pay workplace reforms become law

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**Secure Jobs, Better Pay Act**), together with the recent *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth), usher in the most significant reforms to Australia's workplace law landscape since the enactment of the *Fair Work Act 2009* (Cth) (**FW Act**).

This article focuses on the reforms introduced by the Secure Jobs, Better Pay Act.

Key takeaways

The Secure Jobs, Better Pay Act makes significant amendments to the FW Act, including:

- amending the objects of the FW Act to include the promotion of 'job security and gender equality';
- introducing an express prohibition on sexual harassment in connection with work and a new dispute resolution framework allowing applications to the Fair Work Commission (**FWC**) to resolve sexual harassment disputes;
- introducing a prohibition on pay secrecy clauses and a workplace right to disclose (or not disclose) and ask about an employee's pay;
- limitations on the use of fixed term contracts;
- enhancing an employee's ability to seek flexible working arrangements and granting powers to the FWC to deal with disputes relating to flexible working requests, including through arbitration;
- enhancing multi-employer bargaining while simplifying the existing single enterprise agreement approval process; and
- the creation of two new expert panels of the FWC on pay equity and the community and care sector.

The *Key Commencement Dates* table at the end of this article provides details of when each of the amendments come into effect.

In our previous article *Secure Jobs, Better Pay Bill Introduced to Commonwealth Parliament* we outlined the changes initially proposed by the Secure Jobs, Better Pay Bill. This article provides more detail on the reforms as they have now passed into law with various amendments, and some of the practical implications of the reforms for employers and employees. Some of the reforms take immediate effect; some will be introduced at later dates.

Anti-discrimination and sexual harassment

Prohibition on sexual harassment

The Secure Jobs, Better Pay Act introduces a prohibition on sexual harassment in connection with work directly into the FW Act, which will take effect from **6 March 2023**.

The prohibition applies to workers and prospective workers (including employees, contractors, apprentices, trainees, students and volunteers) and includes sexual harassment perpetrated by third parties in the workplace (such as customers and clients). These reforms build on those introduced by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) which also recently passed both houses of Parliament.

For more information on those changes see our related article.

Under the new provisions of the FW Act, an employer may be held vicariously liable for sexual harassment by an employee or agent in connection with

employment unless it can establish that it took all reasonable steps to prevent the employee or agent from engaging in the sexual harassment. This largely replicates the existing position under the *Sex Discrimination Act 1984* (Cth) (**SD Act**) and places an employer's obligations in relation to sexual harassment squarely within the core piece of Federal workplace legislation, the FW Act.

The Secure Jobs, Better Pay Act also introduces a dispute resolution framework for sexual harassment that is modelled on the FW Act General Protections provisions. The framework allows an 'aggrieved person' to make an application in the FWC requesting the FWC to make a stop sexual harassment order or to otherwise deal with the dispute. Applications to the FWC can be made jointly by one or more aggrieved parties against one or more perpetrators or principals. In most cases, the FWC will deal with a dispute by conducting a mediation or conciliation. If the dispute is not resolved, the FWC will issue a certificate and an aggrieved party can elect to pursue their claim in the Federal Courts, or the parties can, by consent, proceed to arbitration in the FWC.

The Secure Jobs, Better Pay Act merges the existing provisions of the FW Act dealing with stop sexual harassment orders, which were introduced by the former Morrison Government, with the new prohibition on sexual harassment. While stop sexual harassment orders are designed to prevent future sexual harassment, the new laws permitting an application to otherwise deal with the dispute about sexual harassment are intended to remedy any past harm caused by the sexual harassment, including by agreed arbitration where orders for compensation and lost remuneration are available. A contravention of the prohibition on sexual harassment and a contravention of a stop sexual harassment order are both civil remedy provisions.

The timeframe for making an application regarding the prohibition on sexual harassment to the FWC is 24 months from the date of the contravention or the last of the contraventions. This is consistent with the time limits for bringing a sexual harassment claim under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).

The Secure Jobs, Better Pay Act also clarifies that:

- a person cannot pursue multiple remedies for the same sexual harassment under the FW Act and anti-discrimination laws (however, does not prevent a person who makes an application for a stop sexual harassment order only from subsequently pursuing a remedy under anti-discrimination law); and
- the new provisions do not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with the new provisions, such as State-based anti-discrimination legislation.

New protected attributes

The Secure Jobs, Better Pay Act inserts three new protected attributes into the FW Act: breastfeeding; gender identity; and intersex status, with effect from **7 December 2022**. The protections against adverse action in section 351 of the FW Act will now apply to employees and prospective employees who possess these attributes. This amendment brings the FW Act into alignment with other Commonwealth anti-discrimination legislation, such as the SD Act.

Pay secrecy

The Secure Jobs, Better Pay Act creates two new workplace rights for employees to disclose or not disclose, and ask any other employee (whether employed by the same or a different employer) about, their remuneration, or any terms of their employment reasonably necessary to determine remuneration outcomes. These provisions took effect from **7 December 2022**.

The Secure Jobs, Better Pay Act expressly provides that these are workplace rights within the meaning of the General Protections provisions of the FW Act (meaning that employees are protected from adverse action because they exercise these rights), and that a person is not prevented from exercising any of these workplace rights because the person, or another person, is no longer an employee of the employer.

In relation to pay secrecy clauses in employment contracts under the Secure Jobs, Better Pay Act:

- any existing term of an employment contract or industrial instrument that is inconsistent with the new workplace rights has no effect, meaning employers cannot seek to enforce such provisions by, for example, taking disciplinary action against an employee who discloses their remuneration to another person; and
- employers are prohibited from entering into new employment contracts that include clauses inconsistent with the new workplace rights, the contravention of which is a civil remedy provision.

Employers will need to amend their template contracts as soon as possible to ensure that any new employment contract they enter into does not contain pay secrecy provisions. Failure to do so will result in exposure to penalties for the employer and individuals involved in the contravention.

Fixed term contracts

The Secure Jobs, Better Pay Act introduces new limitations on the use of fixed term and maximum term contracts that will come into effect from **6 December 2023**, unless otherwise proclaimed. Under the new provisions, employers are prohibited from entering into fixed term contracts for the same or a substantially similar role for more than two years, or two consecutive contracts, contravention of which is a civil penalty provision. Specifically, fixed term contracts cannot:

- be for a period of longer than two years;
- be able to be extended or renewed for a period that in total across contracts exceeds two years;
- include terms allowing them to be extended or renewed more than once;
- be entered into where they are the second consecutive fixed term contract entered into with an employee, and the period of the contracts would exceed two years;
- be entered into where they are the second consecutive fixed term contract entered into with an employee, and the new contract contains an option for renewal, or the previous contract contains an option for renewal that has been exercised; or
- be entered into if the employee has already been engaged under two previous fixed term contracts and there was substantial continuity of the employment relationship between those contracts.

The requirement for 'substantial continuity' between the contracts is intended to ensure that periods between contracts, which do not intend to end an employment relationship, such as a break between semesters for academic employees employed by a university, do not break the connection between the contracts.

Any term of a contract entered into that is inconsistent with these new provisions will be invalid and the parties will otherwise be entitled to rely on and enforce the terms of the contract. This means that any purported fixed term

contract inconsistent with the new provisions will become an indefinite employment contract, terminable on notice in accordance with its terms.

Additionally, employers will now be required to provide any employee on a fixed term arrangement with a copy of the *Fixed Term Contract Information Statement.* As with the existing obligation to provide the *Fair Work Information Statement* to all employees and the *Casual Employment Information Statement* to all casual employees, this is a civil remedy provision.

There are several exemptions to the above provisions, which an employer will have the burden of establishing should there be a dispute, including:

- where the employee has specialised skills that the employer does not have and needs to complete a specific task;
- where the employee earns over the high-income threshold (currently $162,000, indexed annually on 1 July) for the first year of the contract;
- where an employee is engaged as part of a training arrangement;
- for the temporary replacement of permanent employees e.g. for long service leave or parental leave;
- where the employer is reliant on government funding, in certain circumstances;
- where the governance rules of a corporation apply to the employee's appointment and specify a length of time for the appointment; and
- where the employer is permitted to enter into a fixed term contract by a modern award or as prescribed by the *Fair Work Regulations 2009* (Cth).

The Secure Jobs, Better Pay Act also introduces anti-avoidance provisions that prohibit an employer from taking certain actions where the reason for the action is to avoid the operation of the new provisions, including terminating an employee or delaying their reengagement for a period, engaging someone else to perform substantially the same or similar work, or changing the nature of the work the employee is required to perform.

Where a dispute arises about a fixed term contract, parties will be able to apply to the FWC for assistance resolving the dispute, or, where applicable, for an order from the Magistrates' Court or the Federal Circuit and Family Court of Australia via the small claims procedure in the FW Act.

The amendments in relation to fixed term contracts will come into effect from **6 December 2023**, unless otherwise proclaimed. This means employers have 12 months to review all existing and any proposed future fixed term arrangements to ensure compliance with the new provisions. In many cases this will require the redrafting and renegotiation of contracts with existing employees as well as reviewing existing term contract templates for future use.

Flexible Work

The amendments to the FW Act in relation to flexible work expand the circumstances in which an employee may request flexible working arrangements to include situations where they or a member of their immediate family or household is experiencing family or domestic violence, and where an employee is pregnant. These provisions will take effect on **6 June 2023**.

Previously, employers were required to respond, in writing, to requests for flexible working arrangements within 21 days and could only refuse requests on reasonable business grounds. Where an employee makes a request for flexible working arrangements, employers will now be required to:

- respond to a request within 21 days;
- discuss requests with the employee and try to reach an agreement before refusing the request;
- where a request is refused, provide the employee with a written response that:
    - provides reasons for the refusal which includes how the particular business grounds are being relied on to refuse the request;
    - sets out what other changes the employer would be willing to make to accommodate the employee's circumstances or stating that there are no such changes the employer is willing to make; and
    - provides the employee with information on the dispute resolution provisions now available under the FW Act.

This is a civil remedy provision that exposes the employer and individuals involved in a contravention to penalties.

Where an employer refuses a request or fails to respond to a request within 21 days, an employee will now be able to make an application to the FWC. This marks a significant shift from the previous provisions in relation to requests for flexible working arrangements, under which employers could be liable for penalties where they failed to respond to a request within the 21-day timeframe, but decisions made by employers on reasonable business grounds were generally not reviewable, subject to the terms of an applicable award or enterprise agreement.

Overall, the new provisions require the FWC to encourage the parties to reach an agreed position on the flexible working request and unless exceptional circumstances apply, the FWC must first deal with the dispute by means other than arbitration.

Where the matter is referred for arbitration, the FWC will only be able to make an order requiring the employer to grant the request or make specified changes to the employee's working arrangements where it is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order. Contravention of any order made by the FWC is a civil remedy provision.

Bargaining

The Secure Jobs, Better Pay Act makes seismic changes to the collective bargaining provisions of the FW Act to invigorate multi-employer bargaining and simplify enterprise bargaining. Some changes to enterprise bargaining commenced on **7 December 2022** (such as those relating to the termination of enterprise agreements, initiating enterprise bargaining and dealing with errors in enterprise agreements), while the multi-employer bargaining reforms and changes to the better off overall test (**BOOT**) will commence on **6 June 2023**, or an earlier date to be proclaimed. The delay in the commencement of the multi-employer bargaining provisions gives employers time to brace themselves for the anticipated proliferation of collective bargaining.

Multi-employer bargaining streams

The Secure Jobs, Better Pay Act includes various measures to make multi-enterprise agreements (i.e. collective agreements that cover more than one employer) easier to negotiate. It does this through three 'bargaining streams':

Supported bargaining stream

The supported bargaining stream replaces the existing 'low paid' bargaining stream. It is intended to assist those in low paid industries, e.g. aged care, disability care, and early childhood education and care, and those who may

face other barriers to bargaining, such as employees with disabilities and First Nations employees.

Following an application for a supported bargaining authorisation, the FWC is required to consider whether it is appropriate for the relevant parties to bargain together.

The relevant factors the FWC must consider in making a supported bargaining authorisation are:

- the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector);
- whether the employers have clearly identifiable common interests;
- whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and
- any other matters the FWC considers appropriate.

In addition, the FWC must be satisfied that at least some of the employees who will be covered by the agreement are represented by a union.

A majority of employees from each employer must vote up the supported bargaining agreement for that agreement to apply to them.

If a supported bargaining agreement and an enterprise agreement both apply to an employee, the supported bargaining agreement will *replace* the enterprise agreement.

Single interest bargaining stream

The single interest bargaining stream is an existing multi-employer bargaining stream in the FW Act. It has been historically underutilised and was restricted to franchisees and employers who had obtained a Ministerial declaration regarding their having certain common interests.

The Secure Jobs, Better Pay Act removes barriers to accessing this stream and expands its application by allowing employers with 'clearly identifiable common interests' to bargain together. In essence, the new provisions make it much easier for parties to engage in, or be required to engage in, multi-employer bargaining.

The FWC is empowered to issue a 'single interest employer authorisation' on application by an employer or union if it is satisfied that the employers have clearly identifiable common interests, and it is not contrary to the public interest to make the authorisation. In considering whether employers are common interest employers, the following matters may be relevant:

- geographical location;
- regulatory regime; and
- the nature of the enterprises to which the agreement will relate, and the terms and conditions of the employment in those enterprises.

Employers with fewer than 20 employees will be able to 'opt out' of a single interest employer agreement, while employers with 50 or more employees will bear the onus of establishing that they are not a common interest employer or their operations and business activities are not reasonably comparable with other employers, to resist being included such an agreement.

After a multi-employer agreement has been approved by the FWC, unions will also be able to apply to the FWC seeking an order requiring other employers with common interests and comparable operations to join the agreement. Such an application will only be available in limited circumstances, including where a majority of employees want to be covered. The FWC retains to discretion to refuse to grant such an order, albeit in limited circumstances.

Cooperative workplaces bargaining stream

The cooperative bargaining stream captures multi-employer agreements that are not supported bargaining agreements or single interest bargaining agreements.

Bargaining in this stream must include at least one union.

Changes to the BOOT

The technicalities of the BOOT for the approval of enterprise agreements by the FWC have been relaxed. The FWC will now undertake a "global assessment" of employee entitlements under a proposed collective agreement, rather than a "line-by-line" analysis. In addition, the FWC will be required to be satisfied that only employees covered by the proposed agreement, and reasonably foreseeable employees, would be better off overall under the proposed agreement. If there is a material change in working arrangements or circumstances after an enterprise agreement has been approved and they were not properly considered during the bargaining process, parties will be able to apply to the FWC to have the BOOT reassessed.

Initiating bargaining for a single enterprise agreement

Where a single enterprise agreement passes its nominal term, employees or their union may initiate bargaining by making a request to bargain (provided the agreement passed its nominal expiry date less than 5 years prior to the request to bargain). This means that the relevant employees or union do not need to firstly seek a Majority Support Determination, making it easier to commence bargaining for replacement agreements.

Enterprise agreement approval

Various strict timeframes and procedural requirements for the approval of an enterprise agreement will be relaxed, including the requirement to take all reasonable steps to provide employees with access to a proposed enterprise agreement in the seven-day access period before a vote. The pre-approval requirements have been replaced with a broad requirement for the FWC to be satisfied that the relevant enterprise agreement has been 'genuinely agreed'.

There are also provisions allowing for the FWC to correct obvious errors in enterprise agreement to decrease reliance on undertakings submitted by employers in the approval process.

Terminating enterprise agreements

The Secure Jobs, Better Pay Act modifies the rules for terminating enterprise agreements that have passed their nominal expiry date. Those changes include requiring the FWC to only terminate such an agreement in limited circumstances, including where the continued operation of the agreement would be unfair for the employees covered by it, it does not, or is not likely to, cover any employees, or there is potential for employees' roles to be made redundant or render the employer insolvent or bankrupt. These reforms are also designed to reduce the capacity for employees to threaten an application to terminate an enterprise agreement during bargaining for a new enterprise agreement.

Zombie agreements

The Secure Jobs, Better Pay Act makes provision for the sunsetting of all remaining pre-FW Act transitional instruments (commonly known as "zombie" agreements) that are currently preserved by the FW Act.

Those instruments will automatically terminate after a 12-month 'grace period' on **7 December 2023**, subject to an application by an employer to extend that period.

What do these changes mean for your business?

These changes constitute a seismic shift in collective bargaining. On one hand, bargaining will be made easier through the relaxation of various technical requirements in the bargaining and approval process. On the other hand, the potential for workplaces that have not historically been involved in enterprise bargaining to be swept up in multi-employer bargaining marks a significant departure from the largely enterprise-centric model of collective bargaining under the FW Act.

As a consequence, many employers will be considering their existing industrial strategy. For those employers who do not have an industrial strategy due to their size or resources, now is the time to develop one.

Equal remuneration and expert panels

Equal remuneration orders

Under the previous provisions of the FW Act, the FWC was able to make an equal remuneration order varying modern award minimum wages where an application is made by an employee, an employee organisation, or the Sex Discrimination Commissioner and the FWC is satisfied on work value reasons. These provisions took effect on **7 December 2022**.

The Secure Jobs, Better Pay Act provides new guidance to the FWC when considering equal remuneration and work value cases and allows the FWC to make determinations at its own initiative. The FW Act will now require that the FWC's consideration of work value reasons is free of assumptions based on gender, and expressly includes a consideration of whether there has been a historical undervaluation of the work based on gender.

The amendments include examples of matters the FWC may take into account when considering equal remuneration cases, including comparisons within and between occupations. The provisions also clarify that such comparisons do not need to be with a historically male dominated occupation or industry and are not limited to similar work.

Expert panels

The Secure Jobs, Better Pay Act introduces two new expert panels of the FWC on pay equity and the care and community sector. The expert panels must be made up of a majority of members who have knowledge of, or experience in, their panel area. These provisions take effect from **6 March 2023**. The new provisions also require that decisions involving either pay equity or the care and community sector, including equal remuneration orders or orders to vary a modern award, are made by the relevant expert panel.

Other amendments

In addition, the Secure Jobs, Better Pay Act also:

- abolishes the Australian Building and Construction Commission and makes the Fair Work Ombudsman the workplace relations regulator for the building and construction industry;
- abolishes the Registered Organisations Commission and transfers its functions to the General Manager of the FWC;
- introduces a prohibition on advertising roles at less than the applicable lawful minimum rate of pay;
- expands the maximum scope of small claims proceedings from $20,000 to $100,000;
- clarifies that a term of an enterprise agreement will not be discriminatory where it introduces special measures to achieve equality; and
- strengthens an employee's rights in relation to requests for the extension of unpaid parental leave, including allowing parties to apply to the FWC to deal with a dispute in relation to a request.

We can help

If you have questions or would like more information about how the Secure Jobs, Better Pay Act will affect you or your business, please call **1800 867 113**, or to organise a confidential discussion, please **click here**.

About the Authors

Stephen Schoninger leads the employment and workplace law practice at Avant Law, based in Sydney. Stephen has over 18 years' experience practising exclusively in employment, industrial relations and discrimination laws. Stephen is called on for his ability to plainly advise on and pragmatically apply legal principles to manage and resolve complex issues arising in the workplace. Stephen advises employers and employees in the private and public sectors on all areas of workplace law and is an experienced litigator of work-related claims. Stephen also conducts workplace investigations and delivers workplace compliance training. He regularly presents seminars on topical employment and workplace law issues.

Blade Atton is an Associate in the employment and workplace law practice at Avant Law, based in Sydney. Blade has extensive experience as an employment law and industrial relations specialist. His expertise includes all areas of employment, industrial relations, discrimination and workplace-related privacy law. Blade is a commercial legal advisor with a pragmatic and client-focused mindset. Blade has experience acting for a diverse array of clients. He regularly advises on all aspects of the employment lifecycle and is a skilled litigator. He regularly conducts training and presentations for clients and external organisations on workplace law.

Savanna Russo is an Associate in the employment and workplace law practice at Avant Law, based in Sydney. Savanna has experience advising both employer and employee clients on all areas of employment law. She has particular experience advising small to medium businesses in a wide range of industries including allied health, banking and finance, professional services and construction. Savanna provides practical, solutions-focused advice and is known for her professional and empathetic approach.

Key Commencement Dates

Amendment	Commencement Date
Anti-discrimination and sexual harassment	
Prohibition on sexual harassment in relation to work	6 March 2023 (3 months after Royal Assent)
Prohibition of sexual harassment amendments relating to ILO Convention (No 190)	The later of 6 March 2023 or the date the ILO Convention (No 190) comes into force in Australia. These provisions will not come into effect if the Convention does not come into force before 6 March 2025.
Introduction of protected attributes of breastfeeding, gender identity, and intersex status.	7 December 2022
Pay secrecy	
Prohibition of pay secrecy terms in contracts	7 December 2022
Introduction of new workplace rights in relation to asking and disclosing remuneration	7 December 2022
Fixed Term Contracts	
Amendments limiting the use of fixed term contracts	6 December 2023 (12 months after Royal Assent) or by proclamation
Flexible Work	
Amendments to National Employment Standards regarding the right to request flexible working arrangements	6 June 2023 (6 months after Royal Assent)
Enterprise Bargaining	
Provisions regarding sunsetting of remaining transitional instruments	7 December 2022 with a grace period of 12 months before transitional instruments automatically terminate and the ability to apply to the FWC for an extension of that period for up to 4 years.
Amendments to enterprise agreement approval process	6 June 2023 (6 months after Royal Assent) or by proclamation
Amendments to provisions concerning the process of initiating bargaining	7 December 2022
Amendments to Better Off Overall Test	6 June 2023 (6 months after Royal Assent) or by proclamation
Amendments to provide for FWC assistance to parties in bargaining	6 June 2023 (6 months after Royal Assent) or by proclamation
Amendments regarding industrial action	6 June 2023 (6 months after Royal Assent) or by proclamation
Creation of supported bargaining scheme and amendments to low-paid bargaining provisions	6 June 2023 (6 months after Royal Assent) or by proclamation
Amendments related to the cooperative workplace bargaining stream and variation of cooperative workplace agreements to include employers and employees	6 June 2023 (6 months after Royal Assent) or by proclamation
Amendments relating to the employees who perform excluded work from multi-enterprise agreements	6 June 2023 (6 months after Royal Assent) or by proclamation
Equal remuneration and expert panels	
Inclusion of job security and gender equity in the objects of the FW Act	7 December 2022
Amendments regarding equal remuneration orders	7 December 2022
Introduction of new expert panels on pay equity and the care and community sector	6 March 2023 (3 months after Royal Assent) or by proclamation
Other amendments	
Increase in the monetary cap in small claims proceedings under the FW Act	1 July 2023
Prohibition of advertisements including a pay rate that contravenes the FW Act	7 December 2022
Abolition of the Registered Organisations Commission and consequential amendments	6 June 2023 (6 months after Royal Assent) or by proclamation
Amendments to abolish the Australian Building and Construction Commission, transfer powers to the Federal Safety Commissioner and other consequential amendments	6 February 2023 (2 months after Royal Assent) or by proclamation