



Fair Work  
Commission

# Secure Jobs, Better Pay legislation

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

Presented by  
Justice Adam Hatcher  
President, Fair Work Commission

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

## Key dates for changes affecting the Fair Work Commission

### 7 December

2022

- **Job security** and **gender equality** are introduced into the objects of the Fair Work Act and the modern awards objective, and gender equality is introduced into the minimum wages objective
- The **Equal remuneration** provisions and the provisions relating to varying modern awards for work value reasons are amended
- **Pay secrecy** provisions commence
- Amendments to the **anti-discrimination** provisions to include breastfeeding, gender identity and intersex status
- Changes to applications for the **termination of enterprise agreements** after the nominal expiry date
- Sunsetting of "**zombie**" agreements
- Changes to **initiating bargaining**
- The Commission can deal with **errors in enterprise agreements**

### 6 March

2023

- Prohibiting **sexual harassment in connection with work**
- **Expert Panels** relating to **pay equity** and the **care and community sector** are established
- The functions of the **Registered Organisations Commission** are absorbed by the Fair Work Commission

### 6 June

- Changes to **flexible work** requests and requests for the **extension of unpaid parental leave** – the Commission may deal with disputes about flexible work

### 6 June or an earlier date to be fixed by proclamation

- Amendments to **Agreement approvals** and the **better off overall test** provisions commence
- Amendments to the **bargaining** and **industrial action** provisions commence

### 6 December or an earlier date to be fixed by proclamation

- **Fixed term contracts** are limited and the Commission can deal with disputes about these

Amended 2 February 2023



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## Where we are now

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## Our performance

- New internal performance targets started 1 July 2022
- Key performance indicators
- Achieving all benchmarks in 2022-23





## Adapting to the post-COVID world

- What is the new normal?
  - Fundamental review of our physical facilities and online hearing capabilities
  - Trialling new optimised online hearing rooms
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# Overview and implementation of legislative reforms

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## The main reforms

- **Sunsetting of “zombie” agreements** – 7 December 2022
  - **Sexual harassment jurisdiction** – 6 March 2023
  - **Expert panels on pay equity and the care and community sector** – 6 March 2023
  - **Absorption of ROC** – 6 March 2023
  - **Disputes about flexible work requests & requests for the extension of unpaid parental leave** – 6 June 2023
  - **Amendments to agreement approval – genuine agreement & BOOT** – date to be fixed, not later than 6 June 2023
  - **Amendments to bargaining and industrial action** – date to be fixed, not later than 6 June 2023
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## “Zombie” agreements

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# “Zombie” Agreements

- “Zombie” agreements will sunset on 7 December 2023
- On application, can extend default period to up to 4 years
- New extension application forms published
- List of zombie agreements on our records on website – the list includes the Commission’s records of pre-FW Act agreements that have not been terminated and are scheduled to sunset on 7 December 2023.





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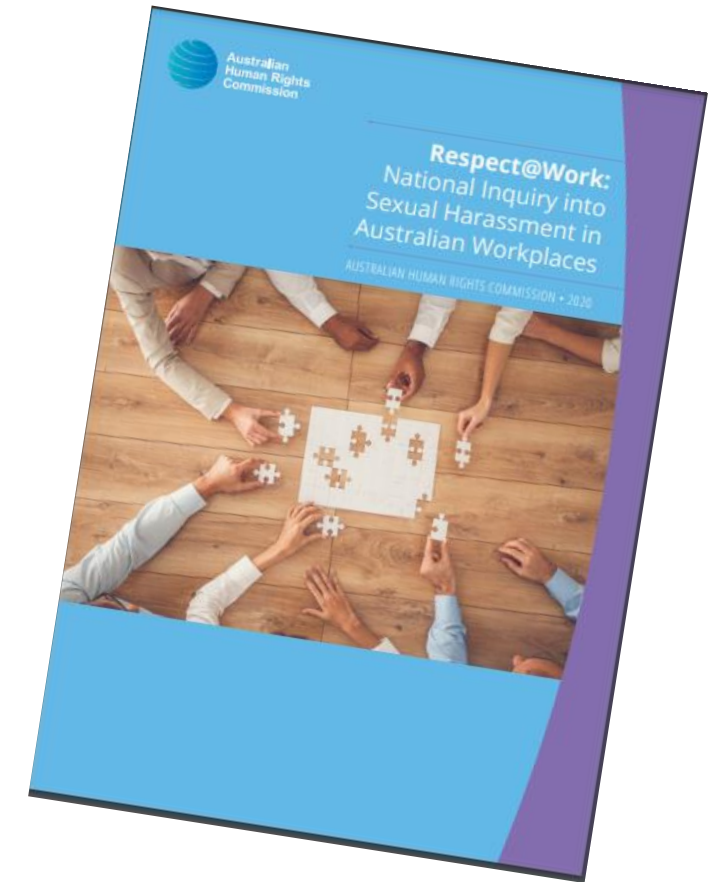
# Sexual harassment jurisdiction

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## Sexual harassment in the workplace

- The Australian Human Rights Commission released the Respect@Work Report in March 2020.
- From 11 September 2021, the Act was amended to address its Recommendation 29 (“stop sexual harassment” orders)
- From 6 March 2023, further amendments will commence to give effect to Recommendation 28 (prohibiting sexual harassment in connection with work)





## Sexual harassment disputes

- The Commission will have power to deal with:
    - Disputes about sexual harassment in connection with work
    - Applications for stop sexual harassment orders, or
    - Both
  - Aggrieved persons (or their industrial associations) can apply using the new Form F75.
  - Procedural Rules may allow for joint applications.
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# Implementing the extended sexual harassment jurisdiction

- Commissioner McKinnon – National Practice Leader
  - Working Group
  - Implementation report with new draft forms
  - Sexual harassment modules
  - Trauma-Informed Case Management Process
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## Disputes about flexible work requests & requests for the extension of unpaid parental leave

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## Strengthens the NES right to request flexible work arrangements

- Expands the circumstances in which an employee may request flexible work arrangements to include:
    - employees who are pregnant
    - employee, or a member of their immediate family or household, experiences family and domestic violence.
  - Strengthens employer obligation to consider and respond.
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## Strengthens the NES right to request an extension of unpaid parental leave

- Similarly strengthens employer obligations to consider and respond to a request to extend
  - Provides guidance on what constitutes “reasonable business grounds” on which an employer can refuse a request
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## Dispute resolution and enforcement

- Provides for the Commission to deal with a dispute about an employer's refusal of a request or failure to respond within 21 days
  - Can arbitrate without consent of the parties.
  - Specifies the orders the Commission may make in arbitration
  - Contravention of the NES provisions concerning requests for flexible work arrangements or the extension of unpaid leave now prohibited and subject to court civil penalties.
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# Implementation

- New and revised approved forms to be developed
  - Changes to the Rules likely to be necessary
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## Absorption of ROC

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## Absorption of the Registered Organisations Commission

- The regulatory powers and functions of the Registered Organisations Commissioner were transferred to the General Manager of the Fair Work Commission on 6 March.
  - Steering group – seamless transition
  - All existing staff transferred to the Commission
  - New Commission branch – *Registered Organisations Governance and Advice Branch*
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## Absorption of the ROC

- Ongoing inquiries, investigations and proceedings transferred to the FWC General Manager on 6 March 2023.
  - New enforcement options:
    - Infringement notices
    - Enforceable undertakings
    - Additional civil penalty provisions
  - General Manager required seek to embed a culture of good governance and voluntary compliance with the law within organisations.
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# Amendments to agreement approvals – Genuine Agreement & BOOT

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## Amendments to agreement approvals – genuine agreement

- The “genuine agreement” requirements for approval of enterprise agreements under section 188 have been substantially modified.
  - Principles-based approach to determining whether an agreement has been genuinely agreed rather than the previous prescriptive, rules-based approach.
  - Requires a “Statement of Principles” to be made by the Commission, which must be taken into account by the Commission in determining whether an agreement has been genuinely agreed.
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## Implementation – Developing the Statement of Principles

- Published a timetable for the process
  - Discussion paper
  - Consultations with peak councils
  - Public consultations held 14 and 15 February 2023
  - Draft Statement of Principles to be published for comment with timetable for responses
  - Finalised Statement of Principles to be published by week commencing 8 May 2023.
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## Changes to the Better Off Overall Test

- “Prospective employee” test replaced by “reasonably foreseeable employee”
  - Commission to only have regard to patterns or kinds of work, or types of employment, that are reasonably foreseeable at the test time.
  - Confirmed that Commission must undertake a global assessment
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# Changes to the Better Off Overall Test

- Sections 191A and B - Commission may amend an enterprise agreement to address a BOOT concern
  - Section 227A - applications to Commission for reconsideration of the BOOT
  - Section 227B - reconsideration of whether an enterprise agreement passes the better off overall test
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# Amendments to bargaining and industrial action

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# Enterprise bargaining

## Single enterprise agreement - Part 21

- Single employer, or
- 2 or more employers engaged in joint venture or common enterprise, or related

## Multi-enterprise agreements

- Supported bargaining agreements – Part 20
  - Replace the low-paid bargaining arrangements
- Single interest employer agreements – Part 21
  - Wider access to single interest employer authorisations
- Cooperative workplace agreements – Part 23
  - Multi-enterprise agreement made without supported bargaining or single interest employer authorisations
  - No protected industrial action available



# Enterprise bargaining

## Initiating bargaining

- s.173(2)(aa) and (2A): Employee bargaining representative can initiate bargaining by written notice to employer in certain circumstances (already in effect)

## Bargaining Disputes

- s.235: Intractable bargaining declaration
- s.269: Intractable bargaining workplace determination

## Protected Action

- Requirement of Commission conciliation once PABO granted.
  - s.437A: Protected industrial action for multi-enterprise agreements to be authorised by a PABO and taken on an employer-by employer-basis.
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## Greater resources for enterprise bargaining

- New National Practice Lead: Deputy President Hampton
  - Coordination of all bargaining and industrial action matter types from initiating bargaining until an agreement is made.
  - More members proactively focused on facilitating enterprise bargaining in all bargaining streams.
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## Reforms in the future – “but wait, there’s more”

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## Future reforms

- Gig economy (“Employee like”) and road transport workers protections
  - Minimum standards of work
  - New definitions of workers
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Thank you. Questions?

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