# Proposed workplace relations reforms — Secure Jobs, Better Pay Bill and Respect@Work Bill

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On 27 October 2022, the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (**Bill**) was introduced into Federal Parliament and was amended on 9 November 2022. The Bill is complex and contains the most extensive proposed changes to the Industrial Relations/Workplace Relations system since the *Fair Work Act 2009* (Cth) (**FW Act**) was introduced in 2010. If passed, it will have significant implications for employers of all sizes, across all industries.

The key changes relate to enterprise bargaining, pay equality, sexual harassment, flexible work arrangements, fixed term contracts, and various other changes.

This Bill is currently in the parliamentary process and may be subject to change after further consultation and debate.

Provided below is a summary of the proposed changes outlined in the Bill and the Respect@Work Bill, as well as changes made by the recently passed *Paid Family and Domestic Violence Leave Act*.

## Paid Family and Domestic Violence Leave Act[1]

*National Employment Standards (**NES**) — Family and domestic violence leave*

From 1 February 2023 (1 August 2023 for small business[2]), employees will be entitled to 10 days per year of family and domestic violence leave entitlement, rather than the current entitlement of 5 days unpaid leave.

## Respect@Work Bill[3]

*Sexual harassment and sex discrimination*

**Proposed changes:** The *Sex Discrimination Act* (Cth) will expressly prohibit conduct that subjects another person to sexual harassment or a workplace environment that is hostile on the ground of sex. It will also impose a positive duty on employers and persons conducting a business or undertaking to take 'reasonable and proportionate measures' to eliminate, as far as possible, unlawful sex discrimination (including sexual harassment) and victimisation. The Australian Human Rights Commission (**AHRC**) will monitor and assess compliance with the positive duty, and will have new powers to issue 'compliance notices' and enter into 'enforceable undertakings' with employers[4]. Representative applications will be able to be brought in federal courts on behalf of people who have experienced unlawful discrimination.

## Secure Jobs, Better Pay Bill[5]

*Sexual harassment and discrimination*

**Proposed changes:** Proposed changes: The Fair Work Commission's (**FWC**) powers to deal with claims of sexual harassment at work will be consolidated into a new part of the Act. The FWC's existing powers (introduced in November 2021) to make orders to prevent harassment from occurring (excluding compensation orders) remain unchanged, however the Bill now:

> prohibits sexual harassment and empowers courts to impose penalties if it occurs; and

> makes it an offence to contravene any FWC order made in these circumstances.

Unless the aggrieved person is seeking an injunction from a court, the person must go through the FWC process before lodging a court application. The FWC can conciliate and, by consent, arbitrate. The Bill clarifies that these provisions operate concurrently with State and Territory laws regarding sexual harassment.

*Sexual harassment and discrimination (continued)*

The Bill also makes minor changes to anti-discrimination provisions in the FW Act, including adding 'breastfeeding', 'gender identity' and 'intersex status' as grounds of unlawful discrimination. These new provisions will take effect three months after Royal Assent.

*NES — Requests for flexible working arrangements*

**Proposed changes:** The Bill extends the right to request flexible working arrangements to employees who are experiencing family and domestic violence (or have an immediate family or household member who is).

Employers will be obliged to try to reach agreement with employees who make a flexible work request, including making 'genuine efforts' to identify alternative arrangements when a request cannot be accommodated on reasonable business grounds. Employers must consider the consequences for the employee of refusing the request and provide a written explanation of the grounds for refusal and other changes they could accommodate. The nature and size of the employer's business will be a relevant consideration when determining whether the employer has 'reasonable business grounds' to refuse a request.

The FWC will have the power to conciliate and arbitrate if agreement cannot be reached or if the employer has not provided a written response within 21 days, including the ability to:

> order the employer to provide further details;

> grant the employee's request; or

> make other changes to accommodate the employee's circumstances. Non-compliance with a FWC order may result in the imposition of a civil penalty.

*Gender equality — Object of FW Act*

**Proposed changes:** Gender equality will become an object of the FW Act, with the FWC required to take this into account during annual wage reviews/award variations.

*Gender equality — Equal remuneration principle*

**Proposed changes:** The Bill requires the FWC to give consideration to certain matters in deciding whether to make an Equal Remuneration Order (**ERO**) for what were previously discretionary considerations. The FWC must consider the following criteria:

> comparisons within and between occupations and industries to establish whether the work has been undervalued on the basis of gender; or

> whether historically the work has been undervalued on the basis of gender; or

> any fair work instrument or state industrial instrument.

The FWC needs not limit itself to considering 'similar work', nor need it limit itself to consideration of a male-dominated occupation or industry. Further, the FWC is not required to make a finding of gender discrimination as a condition to making an ERO.

Previously, the FWC had discretion as to whether it would make an ERO, even if it was satisfied that the remuneration was unequal. Now, the FWC is obliged to make an ERO if it is satisfied that the remuneration in question was unequal.

If the FWC decides to vary a modern award based on work value reasons, the FWC must not make gender-based assumptions, but the FWC must consider whether historically the work in question was undervalued because of gender-based assumptions.

*Gender equality — Pay secrecy clauses*

**Proposed changes:** Pay secrecy clauses in employment contracts will be prohibited. Current clauses of no effect. Penalty provision for inclusion in new contracts. Asking or disclosing pay is a workplace right.

Pay secrecy refers to the employee's obligation not to disclose information to any other person regarding the employee's remuneration nor any terms and conditions of the employee's employment reasonably necessary to determine remuneration outcomes, for example, hours of work.

An employee may ask any other employee (whether employed by the same employer or a different employer) about any of the other employee's remuneration and/or any terms and conditions of the other employee's employment reasonably necessary to determine remuneration outcomes. An employee's right to ask is a 'workplace right' within the meaning of the General Protections division of the FW Act. This prohibits an employer, or prospective employer from taking 'adverse action' against an employee, or prospective employee if they exercise this new statutory right.

A pay secrecy term in a fair work instrument or employment contract has no effect. (The provision is silent on other work arrangements for example, contractor agreement and partnership agreement.)

If an employer enters into an employment agreement with a pay secrecy provision, then a contravention exposes an employer to a civil remedy of 60 penalty units or 600 penalty units for a serious contravention.

*Fixed and maximum term contracts*

**Proposed changes:** Fixed and maximum term contracts greater than 2 years (as a single contract or in aggregate) or more than 2 successive fixed or maximum term contracts (regardless of length) will be prohibited with the exceptions being:

> if permitted under a modern award;

> distinct tasks requiring specialised skills;

> training arrangements;

> cover during emergencies, peak periods or temporary absence of other employees;

> if the remuneration is above the high-income threshold when the contract is entered; and

> government-funded work where the funding is for more than 2 years and no reasonable prospect that funding will be renewed.

Employees entering into fixed term contracts must be provided with a Fixed Term Contract Information Statement (including parental leave replacement employees). The FWC can deal with any dispute but only arbitrate by consent.

This proposed change would be introduced after a 12-month transition period starting after the day after Royal Assent.

*Enterprise bargaining — Initiation of bargaining for replacement single employer agreements*

**Proposed changes**: Provision will be made for bargaining for a replacement single employer agreement to be formally commenced by a union simply giving a single employer a written request to negotiate a new agreement to replace a current agreement covering the same or substantially the same employees provided the current agreement is not more than 5 years past its nominal expiry date. The existing requirement for unions to obtain a majority support determination if the employer does not agree to bargain will be removed and the employer will be required to bargain in good faith for the proposed replacement agreement.

*Enterprise bargaining — Multi-enterprise agreements (overview)*

**Proposed changes**: There will be three streams of multi-enterprise agreements, i.e. Supported Bargaining Agreements (**SBA**s), Single Interest Employer Agreements (**SIEA**s), and Cooperative Workplace Agreements (**CWA**s). For SBAs and SIEAs, the FWC must be satisfied the employers named have, amongst other features, 'clearly identifiable common interests'. Examples include geographic location, the nature of the enterprises, or funded by federal or state governments. The building and construction industry is excluded from all multi-enterprise agreements.

*Enterprise bargaining — Supported bargaining stream*

**Proposed changes**: The current 'low paid' stream will be replaced by a 'supported bargaining' stream for multi-enterprise agreements. The FWC will be able to order that two or more employers and their employees will be covered by a proposed supported bargaining authorisation, leading to an SBA, if satisfied this would be appropriate taking into account pay and conditions in the relevant industry (including whether low rates of pay prevail), whether the employers have common interests and provided at least some of the employees are represented by a union. Employers with an agreement within its nominal life cannot be included (subject to anti-avoidance provisions). If an employer is named in an authorisation, it is prohibited from pursuing a single-enterprise agreement without an exclusion granted by the FWC and must bargain in good faith for a SBA. An employer may apply to be removed from the authorisation in limited circumstances.

A SBA then replaces any single-enterprise agreement that would otherwise apply to the employee. Other employers can later 'opt in' to the SBA if a majority of their employees support this. Unions may also apply for a SBA to cover workplaces where a majority of employees want to be covered (without the employer's consent) provided employees are not covered by another agreement that is still within its nominal life.

*Enterprise bargaining — Single-interest employer stream*

**Proposed changes**: The FWC may make a single interest employer (**SIE**) authorisation on application by an employer or union. The FWC may make the SIE authorisation without the employer's consent (other than small business employers or those covered by an agreement still within its nominal life) if it is:

> supported by a majority of employees;

> the employers have common interests (e.g. geographical location, regulatory regime, nature of the enterprises); and

> other requirements, including a public interest test, are met.

Employers can oppose the authorisation if it is less than 6 months after the nominal expiry date of their current agreement and they are already bargaining for a new agreement and have a history of effective bargaining.

If a SIE authorisation is made, the employer is prohibited from bargaining for any other agreement and must bargain in good faith for a SIEA. The FWC can also add employers/employees to an existing SIE authorisation by consent or on application by a union. An employer may apply to be removed from the authorisation in limited circumstances.

*Enterprise bargaining — Cooperative workplace stream*

**Proposed changes**: This part of the Bill deals with multi-enterprise agreements that have been made without a supported bargaining or SIE authorization having been made. Essentially this replaces the current 'multi enterprise' bargaining stream and is for parties where everything is done by consent, including an agreement later being varied to include additional employers.

*Enterprise bargaining — Industrial action*

**Proposed changes**: The existing rules regarding applying for a protected action ballot order (**PABO**) will continue for single (not multi) enterprise agreements. Protected industrial action can be authorised and taken in support of multi-enterprise agreements (except the CWA stream), provided the majority of relevant employees in the particular workplace have voted in favour.

In all cases when the FWC makes a PABO, it will now be required to direct the bargaining representatives to attend a FWC mediation or conciliation. The FWC will be able to make a recommendation or express an opinion, however this is not binding on the parties.

There will be greater scope for the FWC to appoint persons other than the AEC to conduct protected action ballots. An eligible protected action ballot agent is essentially a person (including a union official) who the FWC considers to be a 'fit and proper' person.

Notice of intention to commence protected industrial action is still 3 working days for single-enterprise agreements, but will be increased to 120 hours (5 days including weekends) for multi-enterprise agreements.

*Enterprise bargaining — Arbitrated outcomes*

**Proposed changes**: The FWC's power to arbitrate bargaining disputes (including determining the content of a new agreement) has been expanded to any proposed non-greenfields agreement (except multi-enterprise agreements without a 'supported bargaining declaration' or 'single interest employer authorisation') where the FWC is satisfied that:

> bargaining has become intractable;

> there is no reasonable prospect of agreement being reached following unsuccessful conciliation;

> it is reasonable to do so; and

> it is at least 6 months post the nominal expiry date of the current agreement or 3 months after the first application for conciliation was made, whichever is earlier.

Currently, the FWC may only arbitrate after it has issued a serious breach declaration or terminated protected industrial action.

*Enterprise bargaining — Approval process*

**Proposed changes**: Various current pre-approval requirements with strict timeframes (such as the seven-day access period) have been removed and will be replaced with a broader and less prescriptive requirement that the agreement has been "genuinely agreed". The FWC will prepare a 'statement of principles' regarding what is required including to ensure that employees are informed of their rights to be represented, have had the opportunity to consider and understand the agreement and voting is conducted in a free and informed manner. The FWC will also be required to consider whether employees who voted had a 'sufficient interest' in the agreement and are sufficiently representative of employees who will be covered. This is aimed at preventing small groups of employees from making agreements which will subsequently cover larger numbers of new employees.

The FWC will still be able to disregard minor procedural or technical errors which are unlikely to have disadvantaged employees and will also be able to correct an obvious error, defect or irregularity in agreements, e.g. incorrect cross-referencing or clearly wrong wage rate.

*Enterprise bargaining — Better off overall test (***BOOT***)*

**Proposed changes**: In applying the BOOT, the FWC must 'undertake a global assessment of whether each employee' would be better off compared to the relevant modern award. The FWC must only have regard to existing employees and 'reasonably foreseeable' work patterns. The FWC must give primary consideration to any common view expressed by the employer and the bargaining representatives as to the agreement passing the BOOT.

If the FWC is concerned the agreement does not pass the BOOT, the FWC can either seek an undertaking (as it currently does) or it can specify an amendment to the agreement to address its concerns. It can seek the parties' views, but ultimately the FWC can make the amendment and approve the agreement regardless of those views.

Parties will be able to apply the FWC for a re-consideration of the BOOT during the life of an agreement if the pattern of work on which approval was based has changed since approval or if new employees have commenced under different terms or conditions.

*Enterprise bargaining — Termination of agreements*

**Proposed changes**: The Bill significantly restricts the ability to apply to terminate an agreement that has passed the nominal expiry date to the following circumstances:

> the agreement does not and is not likely to cover any employees;

> the continued operation of the agreement would be unfair to employees covered; or

> the continued operation of the agreement would pose a significant threat to the viability of the business, termination would reduce the potential for redundancies or bankruptcy/ insolvency, and the employer(s) give an undertaking to preserve redundancy entitlements under the agreement for up to 4 years.

*Enterprise bargaining — Termination of agreements (continued)*

The FWC must also be satisfied that termination is appropriate taking into account all relevant circumstances including the views of the parties, whether bargaining is happening and whether termination would adversely affect the bargaining position of employees.

The termination application must be heard by a Full Bench if it is opposed by any union, employer or employee covered.

'Zombie' agreements6 will be automatically sunsetted (meaning that any applicable modern award will come into force) 12 months after the Bill receives Royal Assent unless an extension (up to 4 years) is granted by the FWC. The FWC can grant an extension if:

> bargaining for a new agreement is happening; or

> the employees, viewed as a group, would be better off overall (compared to the award) if the agreement continued.

Employers with zombie agreements will be required to notify covered employees of the sunsetting within 6 months of the Bill commencing. This is a civil penalty provision.

*Fair Work Commission Expert Panels*

**Proposed changes**: A Pay Equity Expert Panel and Care and Community Sector Expert Panel to be established to assess pay equity claims.

The FWC is no longer limited to appointing a maximum of six Expert Panel members in order to fulfill a greater range of functions. An Expert Panel must be constituted by a majority of FWC members, who have the knowledge or experience as required in gender pay equity, anti-discrimination and knowledge of, or experience in, the Care and Community Sector.

> The FWC must be constituted by an Expert Panel in order to make:

> an ERO in an industry including the Care and Community Sector; and

> a determination or order to vary a modern award in the Care and Community Sector.

The FWC President may:

> appoint an Expert Panel to consider 'substantive gender pay equity matters' in making a determination to vary a modern award;

> direct an Expert Panel to consider specified award variations, being (i) to update or omit name of employer, organisation or outworker entity, (ii) to remove ambiguity or uncertainty or correct error, or (iii) to consider a referral by the AHRC regarding a discriminatory provision of an industrial instrument;

> direct that a matter is relevant for the purposes of constituting an Expert Panel for pay equity, for the Care and Community Sector, and for pay equity in the Care and Community Sector; and/or

> direct that a matter is investigated, and that a report about the matter is prepared. Any report must be published.

*Australian Building and Construction Commission (**ABCC**) and Registered Organisations Commission (**ROC**)*

**Proposed changes**: Both the ABCC and ROC will be abolished from a date to be proclaimed, but no later than 6 months after the Bill receives Royal Assent.

The Fair Work Ombudsman (**FWO**) will have responsibility for regulating the building and construction industries. The role of the ABCC Commissioner will be retained but essentially only to provide advice to FWO. The provisions about the Federal Safety Commissioner for the building industry will be retained.

The ROC's functions are to be transferred back to the FWC. The FWC General Manager will have the power to issue infringement notices and accept enforceable undertakings.

*Small claims*

**Proposed changes**: The small claims procedure in the court system will be expanded to cover claims up to $100,000 plus interest. The current limit is $20,000. The court will have power to order a party to pay the court filing fee paid by the applicant but not other costs unless one of the legislated exceptions applies.

*Advertising jobs*

**Proposed changes**: The Act will impose penalties on employers if they advertise jobs at rates of pay which would contravene the Act, an award or an enterprise agreement. Special provisions apply when advertising piece work jobs.

## Final comments

The 2022/23 budget includes funding for the FWC and FWO to fulfil the additional functions listed above and for the Federal Circuit and Family Court to improve the small claims process for recovering unpaid entitlements.

The above forms the 'first tranche' of the Federal Labor Party's workplace relations reforms and do not deal with regulation of conditions for 'employee-like work' (including 'gig economy' workers), the 'Same Job, Same Pay' principle, wage theft, portable long service leave schemes or other matters which were also part of its election platform and are expected to be the subject of further consultation and proposed legislation.

# Contact us

If you would like to discuss how the proposed changes may impact your business, or if you require assistance understanding your obligations as an employer, please contact a member of our Workplace Relations team.


**Simone Caylock**
*Partner*
T: +61 3 9321 7894
E: SCaylock@rigbycooke.com.au

**Rob Jackson**
*Partner*
T: +61 3 9321 7838
E: RJackson@rigbycooke.com.au

**David McLaughlin**
*Partner*
T: +61 3 9321 7838
E: DMclaughlin@rigbycooke.com.au

**Sam Eichenbaum**
*Senior Consultant*
T: +61 3 9321 7886
E: SEichenbaum@rigbycooke.com.au

**Victoria Comino**
*Senior Associate*
T: +61 3 9321 7921
E: VComino@rigbycooke.com.au

**Elise Jasper**
*Lawyer*
T: +61 3 9321 7816
E: EJasper@rigbycooke.com.au

## References

*1. Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022, which was passed on 27/10/22 and will be effective from 1 February 2023.*

*2. Those who employ less than 15 employees, including in associated entities. This number may change.*

*3. Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, which implements recommendations from the Respect@Work report.*

*4. These new powers will take effect 12 months after the Act commences operation.*

*5. Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, introduced on 27/10/22.*

*6. Those made prior to the commencement of the Fair Work Act (1/7/09) and during the bridging period (1/7/09 – 31/12/09).*



**RIGBY COOKE** LAWYERS

Level 11, 360 Elizabeth Street
Melbourne Victoria 3000
T +61 3 9321 7888
www.rigbycooke.com.au