



NECA WEBINAR



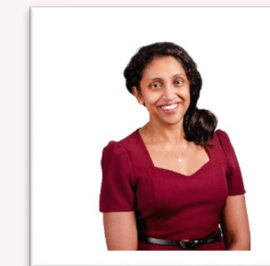
Major Changes in the Industrial Relations Landscape¹

8 December 2022

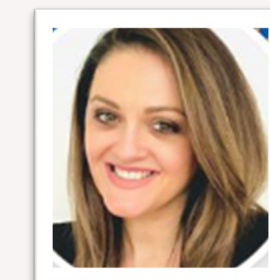
Webinar Agenda

- 1 IR Bills Overview
- 2 Enterprise Bargaining
- 3 Institutional Changes
- 4 Job Security and Gender Equality
- 5 Flexible Working Arrangements
- 6 Sexual Harassment and Discrimination
- 7 Family Domestic Violence and Paid Parental Leave

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1. IR Bills Overview

Fair Work Legislation Amendment (<u>Secure Jobs, Better Pay Bill</u>) 2022	Anti-Discrimination and Human Rights Legislation Amendment (<u>Respect@Work</u>) Bill 2022	Fair Work Amendment (<u>Paid Family and Domestic Violence Leave</u>) Bill 2022	<u>Paid Parental Leave</u> Amendment (Improvements for Families and Gender Equality) Bill 2022
Passed on 2 December Royal Assent – 6 December	Passed on 28 November Royal Assent – Not received yet.	Passed on 27 October Royal Assent – 9 November	Not passed yet

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

- New prohibition against **sexual harassment in connection with work** – applications can be made to the Commission

6 March or an earlier date to be fixed by proclamation

- **Expert Panels** relating to **pay equity** and the **care and community sector** are established

6 June or an earlier date to be fixed by proclamation

- The functions of the **Registered Organisations Commission** are absorbed by the Fair Work Commission.
- Amendments to **Agreement approvals** and the **better off overall test** provisions commence
- Amendments to the **bargaining and industrial action** provisions commence


7 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 December or an earlier date to be fixed by proclamation

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

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Fair Work Commission



2. Enterprise Bargaining

- A. Exemption
- B. Multi-Enterprise Bargaining
- C. Industrial Action
- D. Approval Process
- E. Others

A. Exemption

Enterprise Bargaining

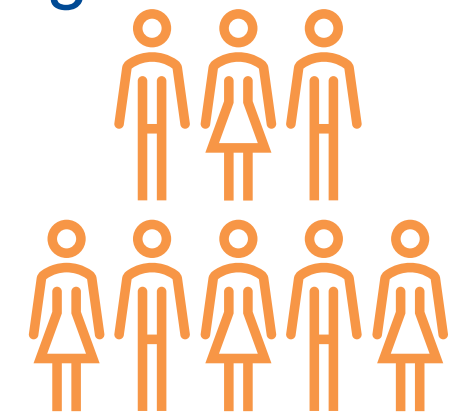
- ‘General building and construction work’: exempted from many of the Enterprise Bargaining provisions
- This is work done onsite, by an employee in the industry of general building and construction – as defined in the *Building and Construction General On-Site Award 2020*
- This work specifically excludes: work in the industry of electrical services as defined in the *Electrical Award 2022*

Electrical Work is NOT exempt.

B. Multi-Enterprise Bargaining

Enterprise Bargaining

- Changes to ‘single-interest employer authorisations’
- Employers with clearly identifiable common interests can be forced into bargaining
- Factors for ‘clearly identifiable common interests’:
 - Geographical location
 - Nature of business
 - Terms and conditions of employment in those businesses
 - Whether they are substantially funded, directly or indirectly, by Commonwealth, State or Territory
- FWC can’t compel an employer to bargain in this steam if:
 - It is a Small businesses (less than 20 employees)
 - The business has an EA that has not reached its nominal expiry date



B. Multi-Enterprise Bargaining

Enterprise Bargaining

- For employers with 50 or more employees, the onus is on the employer to establish it is not a *common interest employer*
- FWC may make single interest employer authorisation that does not specify some employers who were mentioned in the application where the FWC is satisfied that those employers are:
 - Bargaining in good faith
 - Have a history of effectively bargaining; and
 - Less than 6 months have passed since the nominal expiry date
- Another new requirement: Employers negotiating as part of a multi-enterprise agreement must obtain written consent from each union acting as a bargaining representative prior to putting the agreement to an employee vote

C. Industrial Action

Enterprise Bargaining

- In all of the streams, employees can take protected industrial action
- FWC will now be required to direct bargaining representatives to attend a FWC mediation or conciliation → FWC will be able to make a recommendation or express an opinion → But it is not binding
- Greater scope for FWC to appoint someone other than AEC to conduct protected action ballots as long as they are considered to be a 'fit or proper' person.
- Notice of intention to commence protected industrial action:
 - Single-enterprise agreements: still 3 working days
 - Multi-enterprise agreements: increased to 5 days (including weekends)

D. Approval Process

Enterprise Bargaining

Initiate Bargaining	Genuine Agreement
<p>Employees can initiate bargaining (via their bargaining rep) for single enterprise agreements where:</p> <ul style="list-style-type: none"> - Proposed EA replaces an existing one - Existing EA's nominal expiry date is within the last 5 years - Scope of existing EA is substantially similar to proposed EA 	<p>New 'genuinely agreed' to test:</p> <ul style="list-style-type: none"> - Statement of Principles: Prepared by FWC about what is required - FWC to consider 'Sufficient Interest': to prevent small groups of employees from making agreements which will subsequently cover larger numbers of new employees

D. Approval Process

Enterprise Bargaining

Better-Off-Overall Test (BOOT)	Amending EA & Correcting Errors
<p>FWC will be required to:</p> <ul style="list-style-type: none">- Conduct a global assessment- Consider only foreseeable patterns or kinds of work- Consider the common view (if any) of all bargaining representatives as to whether an EA passes the BOOT. <p>Reconsideration Process: Allows for EAs to be reassessed (even after they have been approved)</p>	<p>Amending EA:</p> <ul style="list-style-type: none">- FWC has the power to directly amend terms of an EA where it is satisfied that an amendment is. Can seek views of parties but does not need to be voted on. <p>Correct errors in EA:</p> <ul style="list-style-type: none">- FWC has the power to correct obvious errors, defects or irregularities in Eas- Address situations where incorrect version of EA was mistakenly submitted

E. Bargaining Disputes

Enterprise Bargaining

1

- Lengthy bargaining (more than 9 months) +
- No reasonable prospect of parties reaching agreement

2

- FWC can issue *intractable bargaining declarations*
- Can exercise discretion to allow parties negotiation period

3

- FWC can make a workplace determination

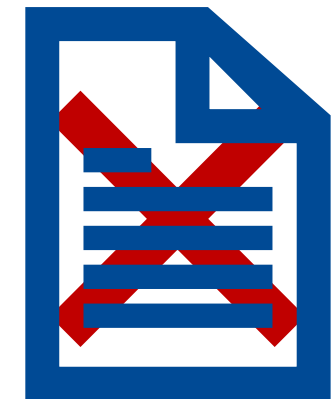
Unions can easily access FWC's jurisdiction to arbitrate on terms of EA – employers may be forced to concede or have unwanted terms imposed on them

F. Terminating EAs

Enterprise Bargaining

After nominal expiry

- Additional requirements and constraints on the FWC's discretion to terminate an EA past its nominal expiry date. Must meet the following criteria:
 - The continued operation of the EA would be unfair for the employees covered;
 - The agreement does not, and is not likely to, cover any employees; or
 - All of the following apply:
 - The continued operation of the EA would pose significant threat to the viability of the business;
 - Termination of EA would reduce the risk of terminations; and
 - The employer gives a guarantee that it will preserve termination entitlements under the EA



Zombie Agreements

- Automatic sunset period of 12 months for agreement-based transitional instruments to be terminated



3. Institutional Changes

- A. Abolishment of ABCC & ROC
- B. Creation of NCIF

A. Abolishment of ABCC & ROC

Institutional Changes

- ABCC will be abolished on 6 February 2023 – functions transferred to FWO
- Code for the Tendering and Performance of Building Work 2016 has been repealed along with other parts of the Building and Construction (Improving Productivity) Industry Act 2016
 - The Code no longer applies to any building industry participants – building contractor or building work
- ROC will be abolished in June 2023 – functions transferred to FWC

B. Creation of the NCIF

Institutional Changes

- The National Construction Industry Forum (NCIF) will provide advice to the Government about work in the building and construction industry on things like:
 - Workplace relations
 - Skills and training
 - Safety
 - Productivity
 - Diversity and gender equity
 - Industry culture

4. Job security & Gender Equity

- A. Job Security
- B. Gender Equity

A. Job Security -Fixed term contracts

Job security & Gender Equity

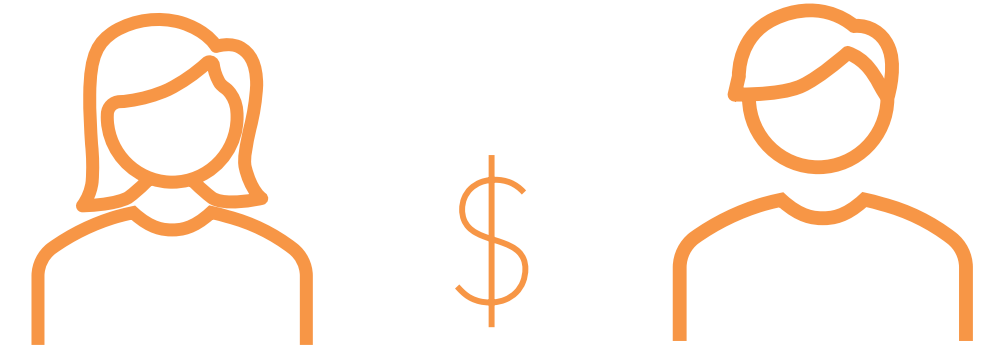
Prohibitions	Exceptions
<ul style="list-style-type: none"> - A fixed term contract of more than 2 years - A renewal clause in a fixed term contract that allows for it to continue past 2 years - An employee on consecutive contracts of employment where they are performing substantially the same work in those contracts <p><i>These apply even where there is a gap in the employment – where it was done to ‘break the continuity of employment’.</i></p>	<p>Employee:</p> <ul style="list-style-type: none"> - is engaged to perform only a distinct and identifiable task involving specialised skills - is an apprentice or trainee - undertakes essential work during a peak period or work during emergency or temporary absence of another employee - earns above the high-income threshold - undertakes work that is government funded - is engaged in a governance position - is covered by a modern award that includes terms permitting a fixed term contract

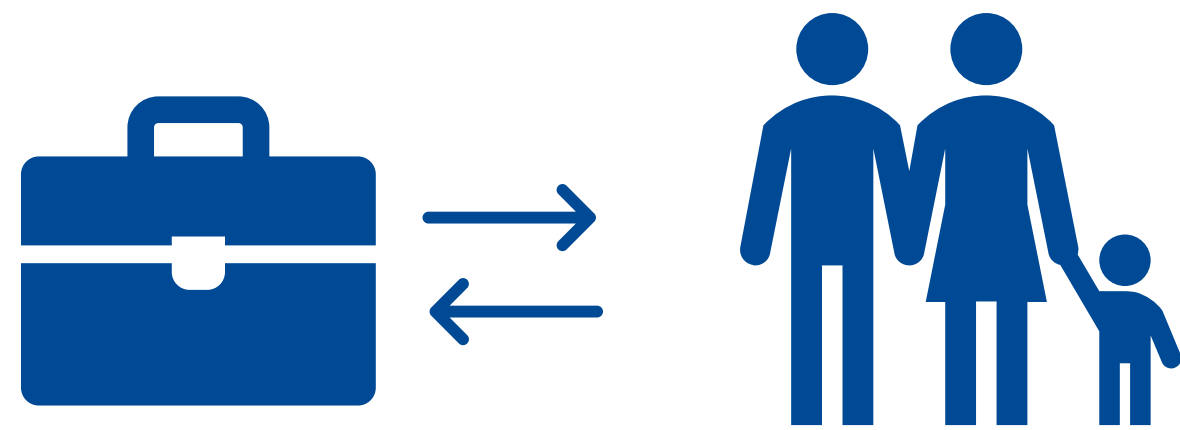
B. Gender Equity

Job security & Gender Equity

Addresses the gender wage gap:

- Pay Secrecy Ban
 - Employees are protected from adverse action if they disclose information about their salary or share terms of their employment with others
 - Any clause in an existing employment contract (future employment contract), policy, etc. is invalid
- Equal Remuneration Order
 - FWC can make an ERO on its own initiative
 - FWC must consider the following 'gender equality' factors:
 - Comparisons within and between occupations and industries
 - Whether work has been undervalued on the basis of gender
 - Provisions of any fair work instrument or state industrial instrument





5. Flexible Working Arrangements

- Those experiencing family and domestic violence can also access FWA
- To deter refusals and encourage genuine discussions between parties:
 - New requirements for employers to provide detailed reasons for refusal
 - New dispute resolution processes
 - Extended application of current civil penalties to breaches
- Employer can refuse FWA request on *reasonable business grounds*. This has been restricted to when:
 - the request is too costly for the employer
 - there is no capacity to change the working arrangements
 - it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the request
 - the changes are likely to result in a significant loss in efficiency or productivity
 - the changes would be likely to have a significant negative impact on customer service





6. Sexual Harassment & Discrimination

- A. Sexual harassment
- B. Discrimination

A. Sexual Harassment

Sexual Harassment & Discrimination

- Express prohibition against sexual harassment in connection with work
- Wider definition of 'worker' (as defined in the *Work Health and Safety Act 2011 (Cth)*)
- Stop sexual harassment order jurisdiction → a prospective employee can also make an application
- Dispute resolution function: Affected employee can ask the FWC to deal with the dispute via mediation or conciliation → unresolved → Consent to FWC arbitration or proceed to FC or FCFCA (with certificate)
- Joint applications can be made → where there is a common perpetrator or principal location where sexual harassment has occurred



*These provisions
will operate
concurrently with
existing State and
Territory laws.*

A. Sexual Harassment

Sexual Harassment & Discrimination

- Vicarious liability provision: An aggrieved person can seek remedy from employer + individual perpetrator where employer did not take all reasonable steps to prevent sexual harassment
- Employers will need manage the risk of sexual harassment similar to how they manage health and safety risks now that there is a positive duty to prevent it
 - Update policies
 - Support a “safe to speak up” culture
 - Training
 - Continuous monitoring of workplace environment

B. Discrimination

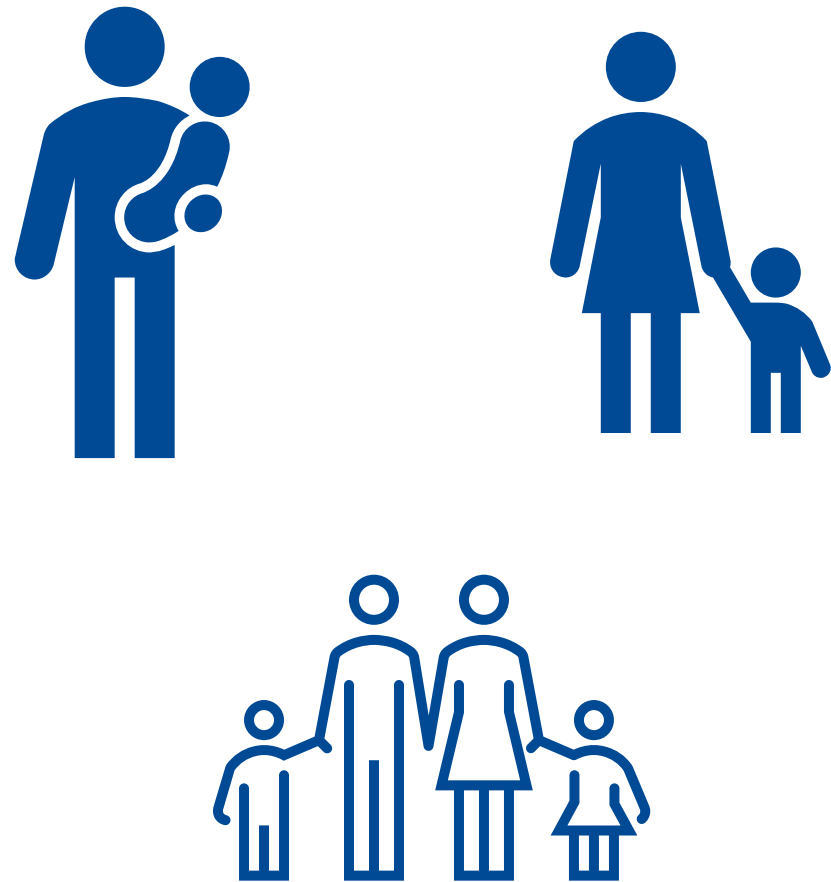
Sexual Harassment & Discrimination

- The changes here are to align the FW Act with other Commonwealth anti-discrimination legislation
- Additional protected attributes (for grounds of discrimination): *Breastfeeding, gender identity and intersex status*
- Special measure to achieve equality: Certain terms (that may appear to be discriminatory) are allowed to be included in an Enterprise Agreement where it has the purpose of achieving substantive equality for employees who have a particular attribute – provided that a reasonable person would consider the term necessary in order to achieve substantive equality.

But a term of the EA ceases to be a special measure to achieve equality after substantive equality for the group of employees has been achieved.

Other Changes

- Small Claims procedure
 - Increase in monetary cap on amount awarded under FW Act: \$20,000 → \$100,000
 - Enable court to award successful claimant any filing fees
- Prohibited non-compliant job advertisements
 - If advert includes a rate of pay that contravenes FW Act/Modern Award/EA, etc. a penalty can be imposed
 - If piecework (work paid at fixed rate), the advert must include the periodic rate of pay
 - Defence for employers: 'reasonable excuse' for non-compliance. Not defined in Act.



7. Family Domestic Violence Leave & Paid Parental Leave

A. Family domestic violence leave

- All employees will have access to 10 days of paid family and domestic violence leave
- This renews every year on the anniversary of the employee's commencement with the business
- Any unused leave does not carry over into the new anniversary year
- Starts:
 - Small business (fewer than 15 employees): 1 August 2023
 - Other businesses: 1 February 2023

B. Paid parental leave

- The Bill has not been passed yet but Government has already allocated funding
- Parental Leave Pay AND Dad & partner pay will be combined → Single 20-week pool of leave from 1 July 2023
- Both parents can decide how they want the leave taken
- Must be used within 2 years of birth/adoption
- Income threshold:
 - Single: Under \$156,647.00
 - Household: \$350,000.00

Only for employees who have a baby on or after 1 July 2023

Questions





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national
electrical and
communications
association