



President's statement

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 – Facilitating enterprise bargaining and the agreement approval process

Justice Hatcher, President

Sydney, 4 April 2023

[1] On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the Secure Jobs Better Pay Act) received Royal Assent. Relevantly, the Secure Jobs Better Pay Act amends the *Fair Work Act 2009* (the FW Act).

[2] On 8 December 2022, I issued a [Statement](#) setting out the Commission's approach to the implementation of the Secure Jobs Better Pay Act changes. That Statement noted that there are a number of significant changes to the enterprise bargaining and enterprise agreement approval processes that will commence on 6 June 2023, or an earlier date to be fixed by proclamation. An overview of these amendments is set out in **Attachment A** and a tabular summary of the various bargaining streams established by the amendments is set out in **Attachment B**. Both of these documents have been prepared by staff of the Commission and are provided for information purposes only.

Implementation of the amendments

[3] This Statement sets out how the Commission proposes to implement the amendments relating to enterprise bargaining and agreement approvals, including by establishing a bargaining practice group which will run separately to the enterprise agreements approval process. Further information and education materials will be available in the coming months. The [Commission's website](#) currently provides extensive information about bargaining for, making, approving and terminating enterprise agreements, which will be updated to reflect the amendments.

[4] Due to the increased focus in the Secure Jobs Better Pay Act on the Commission's role in facilitating bargaining, I have appointed Deputy President Hampton as the National Practice Leader for Bargaining. In this role, Deputy President Hampton will lead the Commission's practice in connection with all bargaining and industrial action-related matter types. Coordination of the renamed Collaborative Approaches Program will also form part of Deputy President Hampton's role.

[5] In the 8 December 2022 Statement, I said that the Commission anticipated allocating additional Member resources to support the enterprise bargaining reforms. I confirm this approach, which has been supported by additional Member appointments to the Commission. Two important aspects of this approach are emphasised:

- (1) Any bargaining representative (including an employer) that encounters difficulty in reaching an enterprise agreement may apply to the Commission to deal with the bargaining dispute under s 240 of the FW Act. If such an application is made, the Commission will make available the appropriate level of Member resources in order to facilitate the reaching of an agreement.

- (2) Where the Commission has made a protected action ballot order in relation to a proposed agreement, new s 448A of the FW Act will require the Commission to make an order directing the bargaining representatives for the agreement to attend a conference for the purposes of mediation or conciliation in relation to the agreement. This conference must occur on or before the date of the close of voting in the protected action ballot, and thus represents an opportunity for the Commission to facilitate the making of an enterprise agreement before any protected industrial action occurs. The Commission will ensure that the appropriate level of Member resources is provided for the conduct of such conferences in order to maximise the prospects of success in facilitating an agreement. There will be a corresponding expectation that bargaining representatives will likewise apply the appropriate level of resources to the required conference process.

[6] Deputy President Masson will continue as the National Practice Leader for Enterprise Agreement Approvals and oversee the implementation of the changes to the agreement approval process effected by the Secure Jobs Better Pay Act. The emphasis will be on maintaining the efficiency and timeliness of approvals for agreements which meet the statutory criteria.

[7] There will be a functional separation between the bargaining support and the enterprise agreement approval practice areas. This will ensure that no conflict of interest arises from the Commission proactively assisting in bargaining matters and subsequently dealing with agreement approval applications arising from the same matters.

[8] The Commission will publish further information about implementation of the bargaining and agreements amendments over the coming months to 6 June 2023. An initial audit of Commission forms that will be updated or made prior to 6 June is at **Attachment C**. I note that the Commission's online forms F16 and F17 will require significant amendment and an assessment will be made about how and when to make those amendments in due course. Any comments on this audit can be sent to consultation@fwc.gov.au.

[9] The Commission is in the process of establishing an Enterprise Agreements and Bargaining Advisory Group. The EAB Advisory Group will be comprised of representatives from the peak organisations and other groups that represent users impacted by these amendments, and will provide ongoing feedback to the Commission about the practical operation of the amendments.

[10] Interested parties are encouraged to subscribe to receive notifications on the [subscription services page](#) of the Commission's website. Any questions about the contents of this Statement or the Commission's implementation of the Secure Jobs Better Pay Act can be sent to consultation@fwc.gov.au.

PRESIDENT

Attachment A - Overview of the amendments

This overview has been prepared by staff of the Fair Work Commission for information purposes. It does not represent the views of the Commission on any issue.

Bargaining

[1] The Secure Jobs Better Pay Act includes a number of changes to the bargaining framework in the FW Act. Amendments relating to initiating bargaining for a single-enterprise agreement commenced on 7 December 2022. Further information about this change is available on the [request to bargain for a replacement agreement](#) page of the Commission's website.

Bargaining disputes

[2] Part 18 of the Secure Jobs Better Pay Act repeals the provision in the FW Act for 'serious breach declarations' and 'bargaining related workplace determinations' (which the Commission can make in some circumstances following a serious breach of a bargaining order by a bargaining representative).

[3] From 6 June 2023, the Commission will be able to make an 'intractable bargaining declaration' (IB declaration) under new s 235 of the FW Act if an application for a declaration has been made by a bargaining representative for the proposed agreement, the Commission has dealt with the dispute about the agreement under s 240 ('Application for the FWC to deal with a bargaining dispute'), the 'minimum bargaining period' has ended and the Commission is satisfied, amongst other things, that there is no reasonable prospect of the bargaining parties reaching agreement.

[4] If an IB declaration is made, the Commission may specify a 'post-declaration negotiating period' during which the Commission can continue to assist the parties (such as by conciliation) but cannot make an 'intractable bargaining workplace determination' (IB workplace determination). The Commission must make an IB workplace determination as quickly as possible after making the IB declaration or the end of the post-declaration negotiating period (if there was one).

[5] The Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [826]–[827] states:

The amendments would repeal the existing provisions for serious breach declarations and bargaining-related workplace determinations as these provisions have not been effective in assisting parties to resolve bargaining disputes and would no longer be required following the commencement of the new intractable bargaining provisions.

These amendments support the Jobs and Skills Summit outcome of giving the FWC the capacity to proactively help workers and businesses reach agreements that benefit them.

Industrial action

[6] The Commission's [Industrial Action Benchbook](#) sets out the current steps that must be completed before protected industrial action can be taken.

[7] The Secure Jobs Better Pay Act will make a number of changes to industrial action provisions including:

- removing the Australian Electoral Commission as the default agent to conduct protected action (PA) ballots
- giving the Commission the function of approving 'eligible protected action ballot agents', and requiring the Commission to review that approval at least every 3 years
- providing for an application for a protected action ballot order (PABO) in relation to a multi-enterprise agreement, to be treated as if it were a separate application for each employer
- providing that 120 hours' notice must be given before industrial action may commence in relation to a multi-enterprise agreement, and
- requiring bargaining representatives to participate in a Commission conciliation conference during the PA ballot period.

Multi-enterprise agreements – Supported bargaining arrangements

[8] The new supported bargaining arrangements replace the present low-paid bargaining arrangements. For a supported bargaining agreement to be made, the Commission must first make a 'supported bargaining authorisation'. A supported bargaining authorisation must generally be made where the employees specified in the application for the authorisation are employed in an industry, occupation or sector declared by the Minister, or having regard to:

- matters including prevailing pay and conditions in the relevant industry or sector, and
- whether the employers have clearly identifiable common interests.

[9] Once the authorisation is made, the Commission has powers to facilitate bargaining.

Multi-enterprise agreements – Single interest employer arrangements

The new single interest employer arrangements widen access to 'single interest employer authorisations'. For a single interest employer agreement to be made with 2 or more employers, the Commission must first make a single interest employer authorisation. A single interest employer authorisation can be made in certain circumstances including where the Commission is satisfied the employers have clearly identifiable common interests and it is not contrary to the public interest to make the authorisation.

Multi-enterprise agreements – Cooperative workplaces

[10] A cooperative workplace agreement is a multi-enterprise agreement made where there is no supported bargaining authorisation or single interest employer authorisation in operation. Protected industrial action cannot be taken in pursuance of a cooperative workplace agreement and the Commission cannot make bargaining orders or workplace determinations.

Existing Cooperative Workplaces Program

[11] The Commission currently offers a free program that helps parties build cooperative working relationships using interest-based approaches. The program focuses on areas where interest-based approaches can be most helpful including bargaining, consultation and problem-solving.

[12] The Commission offers:

- Training in interest-based approaches, in person and through our [Online Learning Portal](#)
- Workshops in collaborative workplace change
- Facilitation of interest-based bargaining and dispute resolution.

[13] Further information about the program is available on [our website](#). The Commission anticipates that the program will continue to provide assistance to bargaining parties under the new framework.

[14] Following the Secure Jobs Better Pay Act amendments that will create a ‘cooperative workplaces’ bargaining stream, the Commission has decided to rename the existing cooperative workplaces program as the Collaborative Approaches Program. The Commission’s website and associated materials will be updated to reflect the change in name.

Enterprise agreements

[15] The provisions relating to enterprise agreements are in Part 2-4–Enterprise Agreements of the FW Act. The objects of this Part are set out at s 171 (which is not amended by the Secure Jobs Better Pay Act):

171 Objects of this Part

The objects of this Part are:

- (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and

(b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:

- (i) making bargaining orders; and
- (ii) dealing with disputes where the bargaining representatives request assistance; and
- (iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

[16] The FW Act currently provides for single-enterprise agreements, multi-enterprise agreements and greenfields agreements as follows:

- *Single-enterprise agreements* – made between an employer and its employees or 2 or more employers that are ‘single interest employers’ and their employees. To be ‘single interest employers’, the employers must be engaged in a joint venture or common enterprise, related bodies corporate or named in a relevant ‘single interest employer authorisation’ that is in operation.
- *Multi-enterprise agreements* – made between 2 or more employers that are not single interest employers, and their employees.
- *Greenfields agreements* – greenfields agreements, in relation to genuine new enterprises, can be single-enterprise or multi-enterprise agreements and are made between an employer (or employers) and one or more employee organisations.

[17] When the Secure Jobs Better Pay Act amendments commence on 6 June 2023 (or as earlier proclaimed), the FW Act will include the following types of agreements:

- *Single-enterprise agreements* – an enterprise agreement covering a single employer, or 2 or more ‘related employers’ ie employers that are engaged in a joint venture or common enterprise or are related bodies corporate. Single-enterprise agreements will no longer cover 2 or more employers subject to a single interest employer authorisation.
- *Multi-enterprise agreements* – 3 types of multi-enterprise agreements will be available when the amendments commence. These are:
 - supported bargaining agreements (which replace the provisions to make agreements under the current ‘low paid bargaining’ stream)
 - single interest employer agreements, which can be made if the Commission makes a single interest employer authorisation, and
 - cooperative workplace agreements, which can be made if 2 or more employers agree to bargain together.
- *Greenfields agreements* – the provisions relating to the parties to a greenfields agreement will not change as a result of the Secure Jobs Better Pay Act amendments.

[18] Further information about each of the new agreement types and the related bargaining streams is at **Attachment B**.

Enterprise agreement approvals

[19] The Commission has already commenced the consultation process to ‘make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement’ (statement of principles), as required by new s 188B.

[20] The draft *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023* was published on 3 March 2023. Submissions in relation to the draft statement of principles were due by 30 March 2023, and any submissions in reply must be sent to consultation@fwc.gov.au by 13 April 2023. The final statement of principles will be published in the week commencing 8 May 2023 and will then be lodged with the Office of Parliamentary Counsel for registration.

[21] A [separate webpage](#) has been established for the statement of principles consultation process and submissions are being published on this webpage.

[22] The Secure Jobs Better Pay Act amendments also introduce 2 new requirements for genuine agreement:

- that employees requested to vote on a proposed agreement have a ‘sufficient interest’ in its terms and are ‘sufficiently representative’ of the employees the agreement will cover, and
- in the case of a proposed multi-enterprise agreement, before requesting that employees vote on the agreement an employer must obtain the written agreement of the employee organisations that are bargaining representatives for the agreement, or obtain a ‘voting request order’ from the Commission.

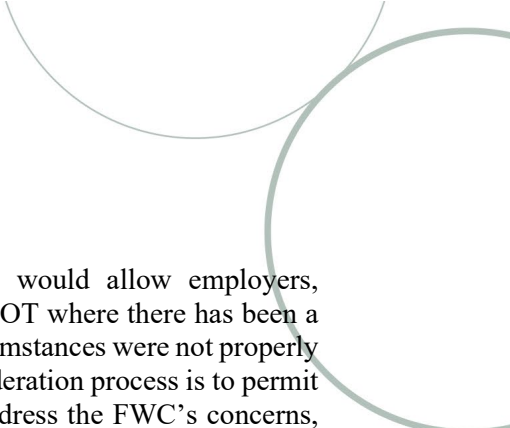
[23] The new provisions relating to genuine agreement will not apply to a proposed agreement for which the notification time occurs before commencement of the amendments.

[24] A number of changes are made to the pre-approval requirements in s 180. Section 173 (‘Notice of employee representative rights’ (NERR)) is also amended to confine the requirement that the employer give a NERR to employees at the prescribed time, to employees that will be covered by a ‘proposed single-enterprise agreement (other than a greenfields agreement)’. The requirement will no longer apply in relation to a proposed multi-enterprise agreement.

Better Off Overall Test

[25] Part 16 of the Secure Jobs Better Pay Act amends the Better Off Overall Test (BOOT). The Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [764]–[765] states:

These measures address concerns about the workability of the current framework, and include appropriate safeguards to protect employees. They implement a primary outcome of the Jobs and Skill Summit in removing unnecessary complexity in the agreement-making process for workers and employers.



The principal safeguard is the ‘reconsideration process’, which would allow employers, employees or their representatives to seek a reassessment of the BOOT where there has been a material change in working arrangements, or where the relevant circumstances were not properly considered during the approval process. The intention of the reconsideration process is to permit adjustments to the bargained outcome to the extent necessary to address the FWC’s concerns, not to reduce the entitlements or interfere with the working arrangements for employees who are not affected by the concerns, or unnecessarily disrupt the operations of the enterprise.

[26] The amendments include:

- replacing references to ‘prospective award covered employees’ with ‘reasonably foreseeable employees’
- inserting a new s 193A prescribing the manner in which the Commission is to apply the BOOT, including by specifying that the BOOT is a ‘global assessment’
- requiring the Commission to only consider patterns or kinds of work, or types of employment, that are reasonably foreseeable at the test time, having regard to the nature of the enterprise(s) to which the agreement relates
- requiring the Commission to consider the views of the parties relating to whether the agreement passes the BOOT and to give primary consideration to any common view shared by employee organisations and employers about whether the agreement passes the BOOT. However, the Commission must still undertake its own independent assessment in applying the BOOT (see Supplementary Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [30])
- enabling the Commission, in approving an enterprise agreement, to amend the agreement where this is necessary to address a concern that it does not otherwise meet the BOOT, and
- inserting a new Division 7A of Part 2-4 that introduces a BOOT ‘reconsideration’ process.

[27] The amendments to the BOOT will only apply to agreements made on or after commencement of the amendments.

[28] The Commission will provide further guidance about the enterprise agreement approval process including the new BOOT provisions in the coming months. It is important to note that the guidance will develop over time as the Commission commences dealing with applications for approval of enterprise agreements and decisions are published.

Attachment B

Bargaining Streams

From 6 June 2023 or an earlier date to be fixed by proclamation



Fair Work Commission

| | Single-enterprise agreement | Single-enterprise agreement (greenfields) | Supported bargaining agreement | Single interest employer agreement | Cooperative workplaces agreement |
|---|--|---|--|---|--|
| Overview | Made by one employer or 2 or more related employers with the employees who are employed at the time and who will be covered by the agreement. Employers are related employers if engaged in a joint venture or common enterprise or related bodies corporate. | Made by one employer or 2 or more related employers and each relevant employee organisation that the agreement is expressed to cover, in relation to a genuine new enterprise. Employers are related employers if engaged in a joint venture or common enterprise or related bodies corporate. | A type of multi-enterprise agreement where a supported bargaining authorisation was in operation. This type of multi-enterprise agreement replaces the low-paid bargaining stream. Supported bargaining agreements are made with support by the FWC to assist employers and employees who have had difficulty bargaining at the single-enterprise level and other employees who face barriers to bargaining. | A type of multi-enterprise agreement where a single interest employer authorisation was in operation. A single interest employer agreement may be made with multiple employers with common interests or that are franchisees. | A type of multi-enterprise agreement where there was no supported bargaining authorisation or single interest employer authorisation in operation in relation to the agreement immediately before the agreement was made. A cooperative workplace agreement covers multiple employers that have agreed to bargain together. |
| When does bargaining commence? | When one of the following occurs: • the employer agrees to bargain, or initiates bargaining • a majority support determination comes into operation • a scope order comes into operation • a bargaining representative makes a request to bargain to the employer, and the bargaining is for a single-enterprise agreement to replace one that has passed its nominal expiry date within the past 5 years. | When the employer who is a bargaining representative gives written notice to each employee organisation that is a bargaining representative for the agreement setting the starting day (of the 6-month notified negotiation period). | When the supported bargaining authorisation comes into operation. An application can be made by a bargaining representative or employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement. The FWC must be satisfied that it is appropriate for the employers and employees to bargain together, having regard to certain matters. The FWC must also make a supported bargaining authorisation if an application has been made and the Minister has made a declaration in respect of the industry, occupation or sector in which the employees are employed. | When the single interest employer authorisation comes into operation. An application for a single interest employer authorisation can be made by the employer, or by a bargaining representative of an employee who will be covered by the proposed agreement. The FWC must make the single interest employer authorisation if satisfied that certain criteria are met, including that the employers are certain franchisees or have clearly identifiable common interests (and if the latter, that making the authorisation is not contrary to the public interest). | When a group of employers decide to bargain together. |
| Small businesses included? | Yes. | Yes. | Yes. | Small businesses (less than 20 employees) only included by consent. | Yes, provided they consent, as all employers must agree to participate in the cooperative workplaces stream. |
| Must an employee organisation be involved? | No. | Yes. | Yes. To make a supported bargaining authorisation, the FWC must be satisfied that at least some employees who will be covered are represented by an employee organisation. | Yes. To make a single interest employer authorisation, the FWC must be satisfied that at least some employees who will be covered are represented by an employee organisation. | Yes. |
| Protected industrial action | Available. If a Protected Action Ballot Order (PABO) is made, conciliation by the FWC is mandatory. | Not available. | Available. If a PABO is made, conciliation by the FWC is mandatory. 120 hours' notice must be given before taking protected industrial action. | Available. If a PABO is made, conciliation by the FWC is mandatory. 120 hours' notice must be given before taking protected industrial action. | Not available. |
| Bargaining orders | Available. | Available, but only if the 6-month notified negotiation period has not ended. | Available. | Available. | Not available. |
| Bargaining disputes | A bargaining representative may apply for the FWC to deal with a bargaining dispute. | A bargaining representative may apply for the FWC to deal with a bargaining dispute. | A bargaining representative may apply for the FWC to deal with a bargaining dispute. | A bargaining representative may apply for the FWC to deal with a bargaining dispute. | A bargaining representative may only apply for the FWC to deal with a bargaining dispute if all bargaining representatives for the proposed cooperative workplace agreement have agreed to the making of the application. |
| Intractable bargaining declarations | Available. The FWC must be satisfied that it has dealt with the dispute under s.240 and the applicant participated in the FWC's processes to deal with the dispute, there is no reasonable prospect of agreement being reached without the declaration, and it is reasonable in all circumstances to make the declaration, taking into account the views of the bargaining representatives. | Not available. | Available. The FWC must be satisfied that it has dealt with the dispute under s.240 and the applicant participated in the FWC's processes to deal with the dispute, there is no reasonable prospect of agreement being reached without the declaration, and it is reasonable in all circumstances to make the declaration, taking into account the views of the bargaining representatives. | Available. The FWC must be satisfied that it has dealt with the dispute under s.240 and the applicant participated in the FWC's processes to deal with the dispute, there is no reasonable prospect of agreement being reached without the declaration, and it is reasonable in all circumstances to make the declaration, taking into account the views of the bargaining representatives. | Not available. |
| Variations to add employers/employees | Not applicable. | Not applicable. | A supported bargaining agreement may be varied to cover additional employers and employees upon joint application between the employer and employees to be added, or an application by an employee organisation entitled to represent the interests of the employees to be covered. The FWC must be satisfied that a majority of the employees support the variation. | A single interest employer agreement may be varied to cover additional employers and employees upon joint application by the employer and employees to be added, or an application by an employee organisation entitled to represent the interests of the employees to be covered. The FWC must be satisfied that a majority of employees support the variation. | An agreement can be varied to add an employer and employees by agreement between that employer and those employees. Before approving the variation, the FWC must be satisfied of certain matters including that it is not contrary to the public interest (and see below for limitations on variations in relation to the general building and construction industry). |
| Applies to general building and construction industry? | Yes. | Yes. | The FWC cannot make a supported bargaining authorisation if the agreement would cover employees in relation to general building and construction work. | The FWC cannot make a single interest employer authorisation if the agreement would cover employees in relation to general building and construction work. | The FWC can only approve a cooperative workplace agreement that covers general building and construction employees if the agreement is a greenfield agreement. Such a greenfield agreement cannot be varied to add employers and employees. A cooperative workplace agreement cannot be varied to add employees performing general building and construction work. |

This document has been prepared by staff of the Fair Work Commission only as an overview for information purposes. It does not represent the views of the Commission on any issue.

Attachment C – Forms to be amended or created

| Form name | Form number |
|---|-------------|
| Application for the Commission to deal with a bargaining dispute | Form F11 |
| Application for an order to stop etc (unprotected) industrial action | Form F14 |
| Application for approval of an enterprise agreement (other than a greenfields agreement) | Form F16 |
| Employer's declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement) | Form F17 |
| Declaration of employee organisation in relation to an application for approval of an enterprise agreement (other than a greenfields agreement) | Form F18 |
| Declaration of employee representative in relation to application for approval of an enterprise agreement (other than a greenfields agreement) | Form F18A |
| Application for approval of a greenfields agreement made under subsection 182(3) of the Act | Form F19 |
| Employer's declaration in support of application for approval of a greenfields agreement made under subsection 182(3) of the Act | Form F20 |
| Declaration of an employee organisation in relation to an application for approval of a greenfields agreement made under subsection 182(3) of the Act | Form F21 |
| Application for approval of variation of an enterprise agreement | Form F23 |
| Employer's declaration in support of variation of an enterprise agreement | Form F23A |
| Declaration of employee organisation in relation to variation of an enterprise agreement | Form F23B |

| Form name | Form number |
|---|--------------------|
| Application for a serious breach declaration | Form F33 |
| Application for a protected action ballot order | Form F34 |
| Application for the Commission's assistance to promote cooperative & productive workplaces & prevent disputes | Form F79 |
| New forms for variations to add or remove employers from the coverage of an agreement. | |
| New forms for applications to reconsider the BOOT under section 227A. | |
| New forms for single interest employer authorisations and supported bargaining authorisations | |