Australian Chamber of Commerce and Industry

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

Non-Bargaining Changes

Employer Guide

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Australian Chamber of Commerce and Industry

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1 Introduction

1.1 The workplace relations system has undergone significant changes following the enactment of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**). These include changes to:

a. employment contracts, by prohibiting pay secrecy terms and limiting the use of fixed term contracts;

b. flexibility in work, by requiring greater consultation about, and consideration of, requests for flexible working arrangements and extensions of unpaid parental leave;

c. job advertisements, by outlawing the advertisement of unlawful pay rates;

d. family and domestic violence leave, by restricting what information can be included on pay slips;

e. small claims proceedings, by increasing the maximum amount that can be awarded by courts in the small claims jurisdiction;

f. anti-discrimination, by including new attributes within the protection of employment laws;

g. equal remuneration and work value, by enabling higher pay increases for female-dominated industries; and

h. institutions, by abolishing the Australian Building and Construction Commission, abolishing the Registered Organisations Commission and establishing the National Construction Industry Forum.

1.2 This guide is intended to help employers navigate these changes and offer practical advice for complying with new obligations. It is important that employers are familiarised with these changes, particularly given that some of them impose significant obligations on employers with harsh penalties for non-compliance. These changes will affect businesses across a wide range of industries.

1.3 The guide should serve as a starting point for understanding new obligations and considering potential vulnerabilities for individual businesses. It does not cover every single aspect of the legislative changes, but rather the substantive provisions. Further advice should always be sought for the resolution of specific issues.

1.4 When reading the guide, it is important to check the commencement date under the title at the top of each section or in the table below. The footnotes throughout this guide assume that the provisions have commenced and reference the resulting section of the *Fair Work Act 2009* (**FW Act**).

1.5 The guidance in this document was finalised on **28 February 2023** and may be subject to future revision.

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Summary of Advice and Commencement

Topic	Change	Commencement	Advice	Page
Pay Secrecy	Employees cannot be prevented from disclosing or asking others about their pay.	7 December 2022	Contracts and workplace policies should all be updated to remove pay secrecy requirements as soon as possible.	4
Fixed Term Contracts	The use of fixed term contracts will be restricted in certain circumstances, subject to exemptions.	6 December 2023*	If you have employees on fixed term contracts, check whether they may be covered by an exemption to the new prohibition. If you are not covered by any exemptions, begin to make workforce changes to ensure you are not penalised.	14
Flexible Work Requests	Employers will bear additional procedural requirements for responding to flexible work requests and the FWC will have greater power to resolve disputes.	6 June 2023*	Employers should familiarise themselves with their new obligations and incorporate them into internal procedures.	27
Unpaid Parental Leave	Employers will bear additional procedural requirements for responding to requests for extended unpaid parental leave and the FWC will have greater power to resolve disputes.	7 December 2022	Employers should familiarise themselves with their new obligations and incorporate them into internal procedures.	36
Job Ads	Job advertisements that offer remuneration that is unlawful are prohibited and employers face penalties.	7 December 2022	Dialogue at businesses between those who are aware of minimum pay rates and those who advertise jobs should be strengthened.	41
FDV Leave	All employees will be entitled to 10 days of paid family and domestic violence leave.	1 February 2023 1 August 2023 (small businesses)	Employers familiarise themselves with this change and, in particular, the requirement that payslips cannot identify the use of family and domestic violence leave.	44
Protected Attributes	Breastfeeding, gender identity and intersex status will become protected attributes under the FW Act.	7 December 2022	Workplace anti-discrimination policies should be reviewed to ensure breastfeeding, gender identity and intersex status are included.	51

Small Claims	The maximum amount a court can award in a small claims proceeding will be increased from $20,000 to $100,000.	1 July 2023	Employers should refamiliarize themselves with the small claims process, anticipating greater use.	54
Equal Remuneration (including work value reasons and expert panels)	The FWC will have greater power to award pay increases in female-dominated industries.	7 December 2022	Employers in female-dominated industries should engage with their industry association in anticipation of a potential work value case or equal remuneration order.	58
ABCC	The ABCC will be abolished, and its functions transferred to the FWO.	7 December 2022	Employers in the building and construction industry should: (a) prepare for the possibility of needing to pursue their own enforcement action in the courts; and (b) expect trade unions to demand the inclusion of matters in enterprise agreements that were previously prohibited.	65
ROC	The ROC will be abolished.	6 June 2023*	Registered organisations should expect that the FWC may not be able to perform an advisory role to the same extent as carried out by the ROC.	70
National Construction Industry Forum	A new body will be established to advise the Federal Government on matters relating to the building and construction industry.	1 July 2023	Employers in the building and construction industry should strengthen their relationships with their relevant industry associations who may be likely to be appointed members of the National Construction Industry Forum.	72
Objects	New objects regarding job security and gender pay equity will be introduced.	7 December 2022	Employers in female-dominated industries should anticipate applications to the FWC for variations of their modern awards.	74

* These commencement dates could commence earlier on a date fixed by proclamation, although it is unlikely that this will occur. The Federal Government has given no indication for the possibility of early commencement.

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2 Pay Secrecy

Commencement: 7 December 2022

Transitional arrangements: Pay secrecy clauses included in new employment contracts from 7 December 2022 will have no effect, and from 7 June 2023 will attract financial penalties.

Highlights

- New employment contracts can no longer require employees to keep their pay secret.
- Employers cannot alter the position of an employee to their detriment (such as by dismissing or disadvantaging them) because they revealed their pay or asked their co-workers about their pay.
- Contract templates and workplace policies should all be updated to remove pay secrecy requirements.

Changes

New contract terms requiring pay secrecy are now "unlawful"

2.1 Pay secrecy clauses in employment contracts seek to prevent employees from talking about or revealing their pay and other conditions.

2.2 As a result of the new laws, pay secrecy clauses in new employment contracts and any other written agreements are "unlawful".[1] This means that employers who enter into a contract of employment or other written agreement which includes a pay secrecy clause from 7 June 2023 will be in contravention of the FW Act and may expose themselves to financial penalties of up to $165,000 (600 penalty units) for a serious contravention, or otherwise up to $16,500 (60 penalty units).[2]

2.3 The new prohibition extends to disclosure of other terms and conditions that are reasonably necessary to determine the employee's remuneration.[3] For example, contract terms that prevent an employee from disclosing the number of hours they work may also be unlawful if the employee is paid on an hourly basis.[4] This is because the overall remuneration of an employee who is paid on an hourly basis cannot be determined without knowing the number of hours the employee worked. Other examples of information that are reasonably necessary to determine the employee's remuneration may be:

a. details of the employee's roster or shift patterns;

b. what modern award or collective agreement that applies to the employee; and

c. the employee's classification under the relevant industrial instrument.

[1] FW Act ss 333C and 333D.
[2] FW Act s 539(2) item 10B.
[3] FW Act s 333B(1)(b).
[4] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [411] (**EM**).

2.4 The intention of the prohibition is to allow employees to use this information to assess whether they are being paid fairly and at a level that is comparable to that of other employees in the same workplace and in other workplaces in the same industry.[5]

2.5 New contract terms that prevent employees from asking other employees about their pay or related information are unlawful.[6] This extends to both their co-workers and employees of other employers.

2.6 While rare, terms which *require* employees to disclose their remuneration or related information are also unlawful.[7] Employees are not obliged to disclose their pay to anyone.[8] Employees cannot lawfully be prevented from asking one another about their remuneration,[9] but they are not entitled to an answer.[10]

2.7 An employee, prospective employee or an employee organisation (union) can commence proceedings against an employer for an alleged contravention of the new laws in the Federal Court or the Federal Circuit and Family Court of Australia. Alternatively, they could make a complaint to the Fair Work Ombudsman who also has standing to commence proceedings against the employer.[11]

Unenforceability of terms in contracts and fair work instruments

2.8 In addition to being "unlawful", a term of an employment contract, written agreement or other industrial instrument (such as a collective agreement) will be "void" (or will have "no effect") if it contravenes the new pay secrecy laws.[12] This means that an employer cannot go to court to try to enforce a pay secrecy clause in an employment contract or written agreement upon the commencement of this part of the FW Act. This can be distinguished from the *unlawfulness* of the terms, which only applies to new contract terms,[13] and relates to whether an employer can be liable for their existence.

2.9 Pay secrecy terms in fair work instruments (modern awards and enterprise agreements) created before or after 7 December 2022 will be unenforceable. For contracts entered into before 7 December 2022, pay secrecy terms will be enforceable until the contract is varied. For contracts entered into after 7 December 2022, pay secrecy terms will be unenforceable. These differences are outlined in the table below.

	Entered into before 7 December 2022	Entered into after 7 December 2022
Contract Terms	Enforceable	Unenforceable
FW Instrument Terms	Unenforceable	Unenforceable

[5] EM [408].
[6] FW Act ss 333B(2) and 333D.
[7] FW Act s 333B(1).
[8] EM [410].
[9] FW Act s 333B(2).
[10] FW Act s 333B(1).
[11] FW Act s 539(2) item 10B.
[12] FW Act s 333C.
[13] FW Act s 333D(a): "the employer enters into a contract …" (emphasis added).

Employees have a "workplace right" to disclose their pay

2.10 The FW Act now gives employees and future employees new "workplace rights" in relation to remuneration information that is remuneration and any terms and conditions of employment that are reasonably necessary to determine remuneration outcomes:

a. disclose their own information to any other person;

b. not disclose their own information to any other person; and

c. ask any other employee about their information.

2.11 This means that adverse action cannot be taken against an employee (or prospective employee):[14]

a. because they have exercised their workplace right to disclose their pay or other relevant information;

b. because they have exercised their workplace right to not disclose their pay or other relevant information;

c. because they have not exercised their workplace right to disclose their pay or other relevant information;

d. because they have not exercised their workplace right to not disclose their pay or other relevant information;

e. because they propose to exercise or not exercise a pay secrecy right;

f. because they propose to not exercise a pay secrecy right; or

g. to prevent the exercise of a pay secrecy right.

2.12 Adverse action cannot be taken against an employee, or prospective employee, (first employee) because another employee proposes to exercise one of these rights for the benefit of the first employee.[15]

2.13 Employers cannot therefore:

a. dismiss an employee or alter an employee's position to their prejudice (such as by reducing their status and level of responsibility),[16] or

b. discriminate against the employee,[17] or

c. in the case of a prospective employee, not hire them,

because the employee or the prospective employee exercised, or proposed to exercise, their workplace right regarding pay secrecy.

2.14 Examples of adverse action may include where:

a. an employer reduces a casual employee's hours because the casual employee asked their co-workers about their pay;[18]

[14] FW Act s 340(1).
[15] FW Act s 340(2).
[16] *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056.
[17] FW Act s 342.
[18] FW Act s 342(1); See *Community & Public Sector Union v Telstra Corporation Ltd* [2001] FCA 267 [17]-[18].

b. an employer transfers a part-time employee to a different site further away from their home because they disclosed to their co-workers at the original site how much more they were earning;[19] or

c. an employer issues a written warning to an employee for sending an internal email asking about their co-workers' pay.[20]

2.15 The general protections regime can be tricky to navigate for employers. Employers bear the burden of proving that the exercise or proposal to exercise these rights of employees was not the reason for taking any subsequent action if adverse action is alleged.[21] It is insufficient to demonstrate that there were other additional reasons for taking the subsequent action; the employee's exercise or proposal to exercise these rights cannot be any of the reasons for the action.[22]

2.16 For example, if an employer issues a disciplinary warning to an employee after they repeatedly behave unreasonably to their co-workers when persistently asking about their salaries,[23] creating a risk to their mental health and thereby meeting or approaching the threshold required for workplace bullying,[24] the employer will bear the onus of proving that the action was taken solely due to the inappropriate conduct (the workplace bullying of the co-worker) and not because the employee has exercised their workplace right.

Common Questions

Does the prohibition on pay secrecy apply to existing contracts?

2.17 The prohibition on contract terms that require pay secrecy only applies to contracts that are newly entered into on or after 7 June 2023, and such terms are void on and after 7 December 2022.[25] Terms in employment contracts or other written agreements requiring pay secrecy entered into prior to these changes are not unlawful or void, until those contracts are varied.

2.18 Contracts can be varied by written agreement between the employer and the employee or, in some cases, through the conduct of the parties. There are multiple potential triggers for a contract variation, including ones of which employers may not be aware. This creates a significant risk that an existing contract with a pay secrecy clause can be unintentionally varied, exposing the employer inadvertently to risk of a claim and financial penalty.

2.19 For instance, there is a risk of contract variation whenever the employer seeks to change something about the employee's work or its performance where that change is not allowed for under the terms of the contract. This could include a change in workplace/location, work duties,[26] and possibly in circumstances where the change is extremely significant, a change in working hours.[27]

[19] See *Byrne v Australian Ophthalmic Supplies Pty Ltd* (2008) 169 IR 236.
[20] See *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd* (1999) 140 IR 131.
[21] FW Act s 361.
[22] FW Act s 360.
[23] See *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd* [1999] FCA 1531 [95].
[24] FW Act s 789FD(1).
[25] FW Act s 333D(a).
[26] *Quinn v Jack Chia (Aust) Ltd* [1992] 1 VR 567.
[27] Cf *Quinn v Jack Chia (Aust) Ltd* [1992] 1 VR 567, 578.

2.20 Where the employment relationship significantly changes, the contract may be deemed to have terminated and a new contract entered into, rather than simply a variation of the original contract.[28] Whether the changes result in a new contract being created or the old contract continuing as varied, is a question of fact to be determined on a case-by-case basis.[29]

2.21 However, regardless of whether the change causes a variation or the creation of a new contract, any alteration to an employee's work or its performance may expose the employer to a risk of contravening the new pay secrecy laws if that contract contains a pay secrecy term. For this reason, it is recommended that employers urgently review template employment contracts, existing contracts and company policies and procedures (see the General Advice below).

When do the new "workplace rights" apply?

2.22 Workplace rights in relation to pay secrecy will apply to employees with:

a. employment contracts that were entered into on or after 7 December 2022; or

b. employment contracts entered into before 7 December 2022 where the contract doesn't include pay secrecy terms that are inconsistent with these rights.

2.23 Where a contract entered into before 7 December 2022 has pay secrecy terms that are inconsistent with these rights, and the contract is changed after 7 December 2022, these rights apply after the contract is varied.

How do I know if an employment contract contravenes the new pay secrecy laws?

2.24 Some pay secrecy clauses in employment contracts are obvious and easy to identify. Such terms may expressly refer to "pay secrecy" and state that details of remuneration are not to be disclosed to third parties. These clauses will be easy to identify and remove from employment contract templates moving forward.

2.25 However, other clauses seeking to enforce pay secrecy will be harder to identify. It may be the case that terms such as "remuneration" or "terms and conditions of employment" or similar references are included in a general "confidential information" clause. Contract clauses drafted like this will need to be amended to remove such references from the definition of "confidential information" or from the "confidential information" clause itself.

2.26 Employers should also look for clauses that seek to make the terms of the entire employment contract or other written agreement confidential. While any clause to this effect will risk contravening the new pay secrecy laws, if the clause is retained it must be carefully drafted to ensure that remuneration and other terms and conditions that are reasonably necessary to determine the employee's remuneration are expressly carved out. It's recommended that if included the clause expressly refer to the provisions under the FW Act, such as by stating that "nothing in this clause prevents the employee from exercising their right to disclose to other persons information relating to remuneration or terms and conditions of the employee's employment that are reasonably necessary to determine remuneration outcomes", or words to that effect.[30]

[28] *Quinn v Jack Chia (Aust) Ltd* [1992] 1 VR 567, 578.
[29] *Quinn v Jack Chia (Aust) Ltd* [1992] 1 VR 567, 578.
[30] FW Act s 333B(1).

2.27 Employers should also more generally seek legal advice before using confidentiality terms in employment contracts.

What information other than salaries and wages can be disclosed?

2.28 In addition to employees' remuneration, the workplace rights and restriction on contract terms apply to "any terms and conditions of the employee's employment that are reasonably necessary to determine remuneration outcomes". It is anticipated that "reasonably necessary" will be interpreted broadly. It could therefore include:

a. the weekly or daily ordinary hours of the employee;

b. roster patterns;

c. the applicable modern award or enterprise agreement;

d. the relevant award classification of the employee; or

e. access to other monetary benefits, such as penalty rates, overtime, allowances and loadings.

2.29 Importantly, it should not be presumed that the contract terms (or action in response to the exercise of the workplace rights) can lawfully restrict the disclosure of information that cannot on its own determine remuneration outcomes. For example, the disclosure of an employee's weekly ordinary hours could not, by itself, be used to determine remuneration outcomes; however, that information is still "reasonably necessary" to determine remuneration outcomes, even if no other information is known or disclosed. Contract terms therefore cannot prevent disclosure of the employee's ordinary weekly hours.

Do these rules apply to past employees?

2.30 The new laws expressly state that "a person is not prevented from exercising any of those workplace rights because the person, or another person, is no longer an employee of an employer". This means that a current employee cannot be disadvantaged for or prevented from asking past employees about their remuneration or related information.

2.31 Crucially, it also means that employers cannot enter into written agreements that require pay secrecy with persons whose employment is being terminated. The prohibition on pay secrecy terms applies not only to employment contracts, but also any other written agreements with current employees. This will therefore include deeds of termination and settlement. This is intended to ensure that employees will have the right to continue to choose to disclose their past remuneration when they leave a workplace.[31]

[31] EM [413].

Example 1

Jack is employed by Capital Ltd on 1 January 2024 but reveals his intention to resign on 1 March 2024.

On 1 February 2024, Capital Ltd asks Jack to sign a written agreement requesting that he keep his pay secret upon leaving the organisation, which Jack accepts.

Capital Ltd has breached the prohibition on pay secrecy terms by entering into a written agreement with an employee requiring pay secrecy.

2.32 If the written agreement was entered into following the conclusion of the employment relationship, when the person is no longer an "employee", the employer may evade contravention of the law.

Do these rules apply to prospective employees?

2.33 The prohibition on pay secrecy terms only applies to contracts of employment and written agreements that an employer "enters into".[32] Hence, if an offer is simply made to a prospective employee that requires pay secrecy, the employer will not be in breach of the law. The agreement will need to be executed by both parties. This is despite the fact that prospective employees seemingly have standing under the legislation to pursue claims against employers for breaches of the prohibition.

Are employees entitled to know other employees' pay?

2.34 Employees are entitled to *ask* others about their pay (and related information). However, they are not entitled to an answer. Other employees are free to decide whether or not to disclose their own pay. In fact, forcing employees to disclose their own pay when asked could also amount to adverse action (see above at paragraph [2.11]).

General Advice

Vary existing contracts

2.35 It is recommended that all contracts containing pay secrecy clauses be varied as soon as practicable to mitigate the risk of contravening the FW Act. Employers should immediately review their employment contracts to examine whether any clause limits an employee's ability to disclose, not disclose, or ask co-workers about, their pay or related information.

2.36 Although employers will only be liable for entering into new contracts containing pay secrecy clauses, the new laws will apply as soon as an existing contract is varied.

2.37 Similarly, while employers will be entitled to enforce pay secrecy clauses entered into prior to 7 December 2022, in practice this could create a two-tiered system within the workforce where new employees are provided greater rights and protections, causing frustration among ongoing employees. As time passes it will also be harder for managers to keep track of which employees can discuss their pay and which employees cannot, increasing the risk of inadvertently breaching the general protections provisions of the FW Act.

[32] FW Act s 333D.

2.38 Accordingly, employers currently engaging employees under contracts with pay secrecy clauses should issue contract variation letters as soon as practical. For more information see paragraphs [2.24]–[2.27].

Use of contract templates

2.39 Employers should immediately ensure that employment contract templates used for when new employees are hired are reviewed to remove any term that restricts the employee's ability to disclose their pay.

2.40 Attention should not only be given to terms requiring secrecy about wages or salaries, but also any other terms that may be arguably necessary to determine how much they are paid.[33] For example, terms that require employees to keep any of the information listed at paragraph [2.28] confidential, risk contravening the law.

Inform managerial employees

2.41 Employers should familiarise managerial employees with the new workplace rights. This will be important to ensure that adverse action or discrimination does not occur on behalf of the employer by a manager who is unaware of the new rules. This should be reflected in any relevant company policies and procedures.

Workplace policies

2.42 Employers should not only review their written employment contracts and contract templates but also their company and workplace policies. These policies can all form part of the employment contract. If a workplace policy prevents employees from asking for or disclosing to one another information about pay, there is a risk that the law will be breached.

2.43 Company policies can form part of the employment contract in several ways. One way is where the employment contract expressly note that the policies are contractual.[34] Alternatively, where there is no written employment contract, the employee may have been provided with the company policies and requested to sign to indicate their acceptance. In both of those circumstances, it should be obvious that any pay secrecy requirement contained within those policies are contractual and therefore unlawful if undertaken with a new employee.

2.44 Even if company policies are not expressly contractual or specifically signed by an employee, they can still be impliedly incorporated into the employment contract. This will occur where the contract, viewed objectively,[35] expresses language, context and a purpose that suggest that there was an intention for company policies to be legally binding.[36] For example, where a pay secrecy clause in a policy has clear language and sufficient emphasis is placed on the need for compliance, it is likely that it will be contractually binding.[37] Accordingly, employers should ensure that existing and future company policies do not contain secrecy requirements relating to information necessary to determine an employee's remuneration.

2.45 Even if the policy is not found to be contractually binding, failing to update policies and procedures to reflect changes to pay secrecy laws will increase the risks associated with general protection claims (see paragraphs [2.10]-[2.16]).

[33] FW Act s 333B(1)(b).
[34] See, eg, *Cicciarelli v Qantas Airways Ltd* [2012] FCA 56 [324].
[35] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52 [40]-[41].
[36] *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177 [35].
[37] *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177 [55].

Uncertainty about existing practices

2.46 In established businesses, employers may be uncertain about whether longstanding company policies or existing employment contracts impose pay secrecy requirements. In such circumstances it is recommended that employers communicate to employees an express intention for any such requirements to be no longer part of their contracts. While the employee must accept this variation (if such terms do exist) for it to take effect, a letter expressing this intention is likely to assist in discharging any future liability.

2.47 For example, if an employer is uncertain about whether existing contracts impose pay secrecy requirements, they should write to their employees proposing the following variation to their contracts:

> Pay Disclosure
>
> Nothing in this contract prevents the employee from exercising their right to disclose to or ask from other persons information relating to remuneration, or terms and conditions of employment that are reasonably necessary to determine remuneration outcomes, pursuant to section 333B of the *Fair Work Act 2009*.

Gender pay equity obligations

2.48 In addition to the new rules around pay secrecy, employers should remain aware of their gender pay equity obligations with the Workplace Gender Equality Agency (**WGEA**). Businesses with 100 employees or more are required to report their gender pay gap to WGEA. Businesses with 500 more employees will also need to commit to measurable targets in their workplaces and report progress to WGEA.

2.49 Further information from WGEA can be found here. The Federal Government has also committed to making further changes in this area of which employers should be aware.

Further Guidance

2.50 The Fair Work Ombudsman provides some advice relating to the prohibition on pay secrecy.

2.51 The Department of Employment and Workplace Relations (**DEWR**) has a factsheet on the prohibition.

2.52 The Fair Work Commission has extensive advice relating to adverse action and workplace rights in its general protections benchbook.

Summary of Changes

Before SJBP Act	After SJBP Act
Contract terms	
Employment contracts could contain pay secrecy clauses which prevented employees from disclosing their pay to their co-workers.	Any term of a contract that requires pay secrecy or prevents employees from asking other about their pay is void.[38]

[38] FW Act s 333C.

	Employers contravene the law and can be penalised if they enter into a new contract that includes a term that requires an employee to not disclose or not ask other persons about their remuneration or related information.[39]
Workplace rights	
Employees had no workplace right to ask their co-workers about their pay or disclosing their own pay to others.	Employees have a workplace right to disclose or not disclose their remuneration or related information.[40] Employees have a workplace right to ask any other person about their remuneration or related information.[41] These workplace rights mean that employers cannot take adverse action — such as dismissing, altering the position of to their detriment, or discriminating against — an employee who exercises, or proposes to exercise either right.[42]

[39] FW Act s 333D.
[40] FW Act s 333B(1).
[41] FW Act s 333B(2).
[42] See FW Act ss 340 and 342.

3 Fixed Term Contracts

Commencement: 6 December 2023

Highlights

- If you have employees on fixed term contracts, check whether they may be covered by an exemption to the new limitation on fixed term contracts.
- Make sure all new employees on fixed term contracts are provided with the Fixed Term Contract Information Statement.
- If you are not covered by any exemptions, begin to make workforce changes to ensure you are not penalised and do not try to avoid the prohibition through other means.

Changes

3.1 The new laws will mean that contracts of certain specified lengths will be unlawful,[43] subject to a series of prescribed exceptions.[44] In summary, the changes to the use of fixed term contracts are:

a. contracts for fixed periods of more than two years will be unlawful (paragraphs [3.4]-[3.5]);

b. renewable contracts — those that have a fixed duration that can be renewed for a further period, the sum of which is greater than two years, and those that can be renewed more than once — will be unlawful (paragraph [3.6]);

c. consecutive contracts — broadly, fixed term contracts that replace prior fixed term contracts for the performance of the same or substantially similar work — will be unlawful (paragraphs [3.7]-[3.12]);

d. there are exemptions for specialised jobs, training arrangements, temporary absences, high income employees, once-off government funded work, governance positions, and others (paragraphs [3.16]-[3.25]); and

e. employers will be required to give new employees on fixed term contracts the Fixed Term Contracts Information Statement (paragraph [3.13]).

3.2 Employers who contravene the laws will face financial penalties of up to $165,000 (600 penalty units) for a serious contravention, or otherwise up to $16,500 (60 penalty units).[45] Claims against employers can be pursued in the courts by employees, prospective employees, employee organisations (unions) and the Fair Work Ombudsman.[46] Employers who contravene the anti-avoidance provisions similarly face penalties of up to $165,000 (600 penalty units).

[43] FW Act s 333E.
[44] FW Act s 333F.
[45] FW Act s 539(2) item 10C.
[46] FW Act s 539(2) item 10C.

3.3 The changes will apply to contracts with a "fixed term" and those that are described as "maximum-term contracts", being contracts where there is an identifiable end date, but which allows the parties to terminate before that date.

Contracts fixed for a term of at least two years

3.4 The use of contracts that specify an expiry or termination date after a period that is greater than two years will be restricted.[47]

> **Example 1**
>
> An accountant is employed under a contract that terminates after three years.
>
> The employer may have contravened the law, subject to any available exceptions.

3.5 In simple terms, the new laws make fixed term, or maximum term, contracts that operate for more than two years unlawful, unless an exemption applies (see below).

Contracts that can be renewed or extended

3.6 Renewable contracts are those which can be renewed or extended after a period specified in the contract. These contracts will be unlawful if the total period for which the contract covers plus any further period for which the contract can be extended exceeds 2 years.[48] Additionally, unlawful renewable contracts include any contract that can be renewed or extended more than once.[49]

> **Example 2**
>
> A clerk is employed under a contract that will terminate after 18 months but can be extended for a further 12 months.
>
> The employer may have contravened the law, subject to any available exceptions.
>
> **Example 3**
>
> A clerk is employed under a 6 month contract, which could be renewed for a further 6 months and renewed for a further 6 months after that period.
>
> The employer may have contravened the law.

Consecutive fixed term contracts

3.7 Consecutive contracts are unlawful where one contract ends, a new contract is entered into, and a series of conditions are satisfied. Broadly, these can be understood as:

a. a fixed term contract condition;

b. a similar work condition;

c. a continuity of employment condition; and

[47] FW Act s 333E(2).
[48] FW Act s 333E(3)(a).
[49] FW Act s 333E(3)(b).

d. a duration condition.

3.8 The fixed term contract condition will be satisfied where the previous contract included a term that specified it would expire or terminate after a certain period.[50] For example, if the previous contract provided that it would expire after 12 months, this condition would be satisfied.

3.9 The similar work condition will be satisfied where the new contract requires the employee to perform the same or substantially similar work as they were performing under the previous contract.[51]

Example 4

An employee is engaged under a fixed term contract to perform clerical duties for a senior executive.

The employee is offered a new contract to perform clerical duties for a different senior executive by the same employer.

The similar work condition is still likely to be satisfied because the employee is engaged to perform the same or substantially similar work.

3.10 The continuity of employment condition will be satisfied where there is "substantial continuity of the employment relationship" during the period between the termination of the previous contract and the new contract coming into effect.[52] This condition is intended to ensure that the limitation on the use of fixed term contracts still applies to consecutive contracts that have a temporary break in between them, but the employment relationship largely continues.[53]

Example 5

A university lecturer is engaged under a fixed term contract that concludes at the end of a semester.

During the semester, the university lecturer is offered a new fixed term contract that will commence at the beginning of the following semester.

Although between the semesters the university lecturer is not engaged under a contract, it is likely that the continuity of employment condition will be satisfied because there is a substantial continuity of the employment relationship.

3.11 The duration condition will be satisfied in four possible circumstances. In each circumstance, there must be a substantial continuity between each consecutive contract.[54]

a. First, it will be satisfied where the sum of the lengths of the previous contract and the new contract exceeds 2 years.[55] For example, if the employee's previous contract expired after 18 months and then was offered a new contract for a further 18 months, this condition will be satisfied.

[50] FW Act s 333E(5)(a).
[51] FW Act s 333E(5)(b).
[52] FW Act s 333E(5)(c).
[53] EM [581].
[54] EM [582].
[55] FW Act s 333E(5)(d)(i).

b. Second, the condition will be satisfied where the new contract contains an option for a renewal or extension.[56]

c. Third, the condition will be satisfied where the previous contract contained an option for extension and that option was exercised.[57]

d. Fourth, the condition will be satisfied where the previous contract had replaced an older contract which had a specified length and both contracts required the employee to perform the same or substantially similar work.[58] That fourth type of circumstance in which the duration condition will be satisfied is illustrated in the example below.

Example 6

In January 2024, James is employed under a 6-month contract ("Contract A") as an accountant.

In July 2024, James' contract expires, but is offered a new contract ("Contract B") for a further 9 months to continue working as an accountant.

In March 2025, James is offered a further 3-month contract ("Contract C").

The sum of the lengths of Contract B and Contract C is less than 2 years.

Neither contract contained an option for renewal or extension.

However, Contract C is still unlawful because Contract B replaced Contract A, under which James was employed for a fixed period to perform the same work.

3.12 All four conditions must be satisfied for the limitation on consecutive contracts to apply. If any condition is not satisfied and the contract does not meet the definition of a renewable contract or a contract of more than two years, then the contract is likely to be lawful.

Additional employer obligations

3.13 Employers will bear a new obligation to provide employees contracted for a fixed term with a new information statement upon hiring.[59] The Fixed Term Contract Information Statement must be provided to all employees who are contracted for a specified period, irrespective of whether future contracts could give rise to issues relating to the prohibition.[60] The Fixed Term Contract Information Statement will be available online on the Fair Work Ombudsman's website.

3.14 There is also a new anti-avoidance provision relating to the limitation on the use of fixed term contracts.[61] In essence, employers will be liable for taking certain actions to avoid the prohibition, such as terminating an employee's employment for a certain period or intentionally changing the nature of the work the employee undertakes. If the avoidance of the prohibition is among *any* of the reasons for taking such actions, the employer will be held liable.[62]

[56] FW Act s 333E(5)(d)(ii).
[57] FW Act s 333E(5)(d)(iia).
[58] FW Act s 333E(5)(d)(iii).
[59] FW Act s 333K.
[60] FW Act s 333K.
[61] FW Act s 333H.
[62] FW Act s 333H(2).

Example 7

Peter is employed by Sally as an accountant on an 18-month fixed term contract.

At the conclusion of Peter's contract, Sally waits 2 months, then re-employs Peter as an accountant on another 18-month fixed term contract to avoid the prohibition by breaking the continuity of employment.

Sally will likely be liable for breaching the anti-avoidance provisions.

Example 8

Peter is employed by Sally as an accountant on an 18-month fixed term contract.

At the conclusion of Peter's contract, Sally engages a new employee, Jane, on an 18-month fixed term contract in the same position as Peter to avoid the prohibition.

Sally will likely be liable for breaching the anti-avoidance provisions.

Example 9

Peter is employed by Sally as an accountant on an 18-month fixed term contract.

At the conclusion of Peter's contract, Sally offers Peter a new 6-month contract to work in administration, so that Peter is not engaged to perform the same or similar work.

Sally will likely be liable for breaching the anti-avoidance provisions.

Exemptions

3.15 There are a series of exemptions to the limitation on the use of fixed term contracts. They are outlined below. In some cases, they may overlap with one another.

Exemption — distinct and identifiable tasks involving specialised skills

3.16 Contracts entered into with employees who are engaged to "perform only a distinct and identifiable task involving specialised skills" are exempt.[63] This exemption may at first appear broad, given that a great number of employees could be described as performing a "distinct and identifiable task involving specialised skills". However, caution should be taken when relying on it; the explanatory memoranda lack examples, and the interpretation of this provision is likely to be contested in the courts. The use of the word "only" suggests that the exemption may not apply to employees who perform distinct and identifiable tasks involving specialised skills among other general tasks. Specific advice should always be sought before relying on this exemption.

[63] FW Act s 333F(1)(a).

Example 10

An IT professional is engaged on a fixed term contract for 12 months that contains an option for a 6 month extension after the initial period and an option for extension for a further 3 months following that 6 month extension.

The IT professional is engaged solely to install a new digital security system at the business and not provide any other IT services.

While the fixed term contract would ordinarily fall within the prohibition on fixed term contracts because it can be extended more than once (a renewable contract), it may be lawful because the IT professional is engaged to "perform only a distinct and identifiable task involving specialised skills".

Exemption — training relationships

3.17 Contracts entered into with employees who are engaged under a training relationship are exempt.[64] For example, a carpentry apprentice on a fixed term contract for 3 years may be exempt.

Exemption — essential work during peak demand periods

3.18 Contracts entered into with employees who are engaged to undertake "essential work" during a peak demand period are exempt.[65] For example, a fruit picker engaged on multiple consecutive contracts during a period of high demand may be exempt.[66]

Exemption — emergency circumstances or temporary absences

3.19 Contracts entered into with employees who are engaged to undertake work during emergency circumstances or while another employee is temporarily absent are exempt.[67] For example, if an employee on an 18-month fixed term contract is offered a further 12-month contract to temporarily fill a position usually occupied by an employee who is taking long service leave, that second contract may be exempt.[68]

Exemption — high income threshold

3.20 Contracts entered into with employees who exceed the high income threshold are exempt.[69] The high income threshold for a full-time employee is currently $162,000.[70] A method for calculating the high income threshold for part-time employees will also be prescribed in the regulations for the purpose of this exemption.[71] This means that part-time employees will still meet the high income threshold if they were earning the same hourly income but working full-time hours instead.

[64] FW Act s 333F(1)(b).
[65] FW Act s 333F(1)(c).
[66] EM [583].
[67] FW Act s 333F(1)(d).
[68] EM [583].
[69] FW Act s 333F(1)(e).
[70] It will be readjusted on 1 July 2023; see *Fair Work Regulations 2009* reg 2.13.
[71] FW Act s 333F(2).

Exemption — government funded work

3.21 Contracts entered into with employees who contracts entered into with employees who perform work that is funded by government are exempt.[72] The work does not have to be entirely government funded and can be partly funded by other means.[73] However, the funding must be payable for a period of over two years and crucially,[74] there must be "no reasonable prospects" that the funding will be renewed at the end of that period.[75] This appears an extremely high bar to meet. To make this exemption even more difficult to rely on, the employer will bear the evidential burden of proving that there are no reasonable prospects of funding renewal.[76]

Exemption — governance positions

3.22 Contracts relating to governance positions that have time limits under governing rules of corporations or associations are exempt.[77] For example, if board directors of a company are employed under fixed term contracts, the exemption may apply.

Exemption — modern award permitted contracts

3.23 Some fixed term contracts permitted by modern award terms are exempt.[78] There are only a few dozen modern awards which appear to permit the use of fixed term contracts, most of which are public sector awards.

3.24 For example, the *Educational Services (Teachers) Award 2020* expressly permits that "[a]n employee may be employed for a fixed period of time for a period of at least 4 weeks but not more than 12 months on either a full-time or part-time basis" to "undertake a specified task which has a limited period of operation" or for other reasons.[79] Other awards, such as the *Sugar Industry Award 2020* and *Live Performance Award 2020* refer to fixed term contract employees;[80] however, it may be contested as to whether these awards include terms that *permit* the use of fixed term contracts contrary to the prohibition. Employers seeking to rely on such terms should seek advice.

Exemption — prescribed by regulation

3.25 The Minister can prescribe further exemptions by regulation.[81] For example, a particular industry may make representation to the Minister about their reliance on a specific type of fixed term contract that does not currently fall within the existing exemptions, allowing the Minister to use regulation to exempt it from the prohibition.

[72] FW Act s 333F(1)(f).
[73] FW Act s 333F(1)(f)(i).
[74] FW Act s 333F(1)(f)(ii).
[75] FW Act s 333F(1)(f)(iii).
[76] FW Act s 333F(4).
[77] FW Act s 333F(1)(g).
[78] FW Act s 333F(1)(h).
[79] *Educational Services (Teachers) Award 2020* cl 13.
[80] *Sugar Industry Award 2020* cl 42.5 and *Live Performance Award 2020* cl 58.
[81] FW Act s 333F(1)(i).

Consequences of utilising a fixed term contract

3.26 On commencement (December 2023), an employer will contravene the law if they enter into a contract of employment covered by the prohibition which does not fall into one of the prescribed exemptions.[82] The prohibition is a civil remedy provision, which means that the employer may therefore be liable for a civil penalty.[83]

3.27 In addition to liability, the term of the contract that provides that it will terminate after a specified period will be rendered void.[84] However, no other term of the contract will be invalidated, and the contract will therefore continue.[85]

Common Questions

What should businesses that employee people on fixed term contracts do?

3.28 If an employer is currently utilising fixed term contracts or plans to in the future, they should immediately begin to examine whether they may be eligible for any of the exemptions. For many businesses, this may be the exemption for contracts to perform essential work during peak demand periods.[86] For others, they may need to examine eligibility for the government funding exemption or high income exemption.

3.29 The General Advice listed below should be considered by employers currently using fixed term contracts.

What does an employer need to do to rely on one of the exemptions?

3.30 If an employment contract falls within one of the exemptions, the employer is not required to undergo any legal process to ensure its application. Rather, the exemption is what will be relied on by the employer were any dispute to arise in the future.

3.31 In such circumstances the employer will bear the evidentiary burden of proving that the fixed term contract falls within the exemption.[87] This means that employers will bear the burden of pointing to evidence that suggests a reasonable possibility that the exemption applies to the particular position.[88] Consequently, employers should not speculatively rely on exemptions without being confident about eligibility. It also means that those who are confident of their eligibility should gather the necessary documentation and evidence that proves they meet the criteria in case any future dispute arises. This will vary depending on what exemption is being relied on.

3.32 If an employer is seeking to rely on an exemption, it is advisable to expressly refer to it in the contract and outline the basis on which the exemption applies.[89] This may assist with demonstrating that the employer was fully aware of the limitation on the use of fixed term contracts but understood an exemption to be applicable. It has also been explicitly described as “best practice” by the legislature.[90]

[82] FW Act s 333E(1).
[83] FW Act s 333E(1) note 1.
[84] FW Act s 333G(1)(a).
[85] FW Act s 333G(1)(b).
[86] FW Act s 333F(c).
[87] FW Act s 333F(4).
[88] EM [586].
[89] EM [587].
[90] EM [587].

Can the exemption for government funded work be relied on if the employer receives a grant?

3.33 Although the exemption for government funded work only requires partial government funding,[91] this exemption is likely to be interpreted narrowly. For instance, employers will only be able to rely on this exemption where they can prove that there are "no reasonable prospects" that their funding for the work will be renewed. This high bar may prevent employers who may be unsure about future funding commitments from relying on the exemption. Again, this exemption should not be relied on unless the employer possesses documentation that can substantiate an argument that there were "no reasonable prospects" of funding renewal for the work performed.

What if no exemption applies but fixed term contracts are necessary for the particular position?

3.34 If no exemption applies to the fixed term contract which an employer wishes to enter into but strongly believes that there should exist an exemption for that kind of contract, they should contact their employer representative or ACCI. Representations may be able to be made to the Government encouraging a further exemption to be prescribed in the regulations that applies to that kind of contract.[92] However, these contentions for further exemptions should be consistent with the policy objectives of those already provided. For example, representations are unlikely to be made or succeed if the argument is simply that a specific industry is highly dependent on such contracts. Rather, there should be clear reasons as to why fixed term contracts are *necessary* in the particular circumstances, which the Government would be interested in protecting.

3.35 Alternatively, an employer may consider making an application to the Fair Work Commission to seek a variation of their industry award to include a term expressly permitting the use of a fixed term contract.[93] However, they will need to convince the Fair Work Commission that doing so is necessary to satisfy the modern awards objective.[94]

What should be done about employees currently on fixed term contracts?

3.36 The limitation on fixed term contracts provides that a person is in contravention of the law if "the person enters into a contract of employment" that is prohibited. Contracts that were entered into before the law came into effect are therefore not unlawful. This means that if an employer's employees are on fixed term contracts that last for three years but were entered into before the commencement of the prohibition, they will not be in breach of the law.

3.37 However, it is important to note that some contract variations can constitute entering into a new contract (see paragraphs [2.18]-[2.20] for more information regarding contract variations). Where employees are on existing fixed term contracts, considerable caution should be taken. Ideally, all employees on fixed term contracts should be phased off onto other contracts as soon as possible.

[91] FW Act s 333F(f)(i).
[92] FW Act s 333F(1)(i).
[93] FW Act s 333F(1)(h).
[94] FW Act s 157.

What happens to a person's employment if they are engaged under an unlawful fixed term contract?

3.38 If a fixed term contract is unlawful, only the term that specifies that the contract terminates at the end of a specified period will be rendered void.[95] The remainder of the contract will continue to be in effect.[96] This means that the employee will be deemed to be an ongoing (non-fixed term) employee who is therefore entitled to protection against unfair dismissal (subject to the exceptions to unfair dismissal protection). It also means that the parties can continue to enforce their contractual rights (except the expiry term) in the event of a dispute.[97]

> **Example 11**
>
> An IT professional is engaged under a contract including a term that specifies it will conclude at the end of a period of 3 years.
>
> No exemptions apply to the contract and the fixed term contract is therefore unlawful.
>
> After the three year period, the contract will continue to bind both parties; however, the term specifying the date of termination will be void.
>
> If the employer then prevents the IT professional from working after the 3 year period, the employee may be entitled to apply to the Fair Work Commission for an unfair dismissal remedy.

What happens if a dispute arises with an employee about the use of a fixed term contract?

3.39 If a dispute arises with an employee about the use of a fixed term contract, the parties are required to first attempt to resolve the dispute at the workplace level.[98] If the dispute remains unresolved at the workplace level, either party can refer the dispute to the FWC.[99] The FWC is required to deal with any dispute about fixed term contracts that is referred to it, but can only do so via arbitration (where binding orders can be made on the parties, as opposed to facilitated discussions and the giving of opinions) if both parties agree.[100]

3.40 Employers should bear in mind that they are always entitled to appoint a person to provide them with support or representation for the purposes of resolving the dispute, referring it to the FWC or engaging in the FWC's dispute resolution process.[101] This includes their industry association or relevant chamber of commerce. Equally, employees are also entitled to be represented, including by a union.[102]

What if a modern award permits the use of fixed term contracts but the employee is covered by an enterprise agreement?

3.41 Fixed term contracts are exempted from the prohibition where "a modern award that covers the employee includes terms that permit" their use.[103] Employees that have enterprise agreements applying to them are still covered by a modern award, even though the modern award does not apply to them.[104]

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[95] FW Act s 333G(1)(a).
[96] FW Act s 333G(1)(b).
[97] EM [590].
[98] FW Act s 333L(2).
[99] FW Act s 333L(3).
[100] FW Act s 333L(4).
[101] FW Act s 333L(5).
[102] FW Act s 333L(5).
[103] FW Act s 333F(1)(h).
[104] FW Act s 57.

3.42 In other words, employees can fall within the coverage provisions of a modern award and thereby be covered by it, although an enterprise agreement applies to them instead. This means that if a modern award permits the use of fixed term contracts, even if an enterprise agreement is what determines their pay and conditions, the fixed term contract will still likely be exempted from the prohibition.

3.43 However, it does not mean that enterprise agreements which permit the use of fixed term contracts are exempted from the prohibition. It must be the modern award that covers the employee which permits the use of fixed term contracts.

General Advice

Step 1 — Identify All Fixed Term Employees

Step 2 — Examine Whether Any Exemptions Apply

Step 3 — Transition Employees Onto New Contracts

Step 4 — Update Internal Processes

Step 1 — Identify all fixed term employees

3.44 Employers should review the working arrangements of their employees to identify all the positions that are filled by employees on fixed term contracts. This will include any worker who is an employee (rather than an independent contractor) engaged under a contract that stipulates a specified end period, expiry date or termination date. This will also include employees engaged under contracts that stipulate expiry dates and contain other terms which provide for circumstances in which the contract may be terminated before the end of the specified period.[105] It does not include casual employees.[106]

Step 2 — Examine whether any exemptions apply

3.45 Once it is known which employees are engaged fixed term contracts, they should each individually be examined alongside the available exemptions. It is important to bear in mind that each exemption is specific to the individual contract; simply because an employer is entitled to utilise the exemption for one position, does not mean the business can freely use fixed term contracts at large.

Step 3 — Transition unexempted employees onto other work arrangements

3.46 Employers should act early and start transitioning employees onto permanent contracts or making alternative workforce arrangements where no exemptions apply to them. These changes can take time to implement, and employers should want to avoid rushed changes to employee's contractual arrangements weeks before commencement.

[105] FW Act s 333E(1)(b).
[106] FW Act s 333E(1)(c).

3.47 Do not take measures to avoid the prohibition while continuing to engage employees under fixed term contracts if the exemptions do or may not apply. The anti-avoidance provisions are broad and include any alteration of the employment relationship, as well as intermittent disengagement and re-engagements of employees.[107] As mentioned, the employer will need to prove that *none* of the reasons for action taken in respect of employees under a fixed term contract were to avoid the prohibition, if a dispute were to arise.[108]

Step 4 — Incorporate the Fixed Term Contract Information Statement into internal processes

3.48 Employers must now incorporate the provision of the Fixed Term Contract Information Statement into their hiring procedure and onboarding process. Although it only needs to be given to those on fixed term contracts,[109] employers' minds should be turned to it with the hiring of every new employee to ensure that liability is avoided, which can lead to a $13,320 penalty for a non-serious contravention.[110]

Further Guidance

3.49 The DEWR provides guidance on the new limitations on the use of fixed term contracts which can be accessed here.

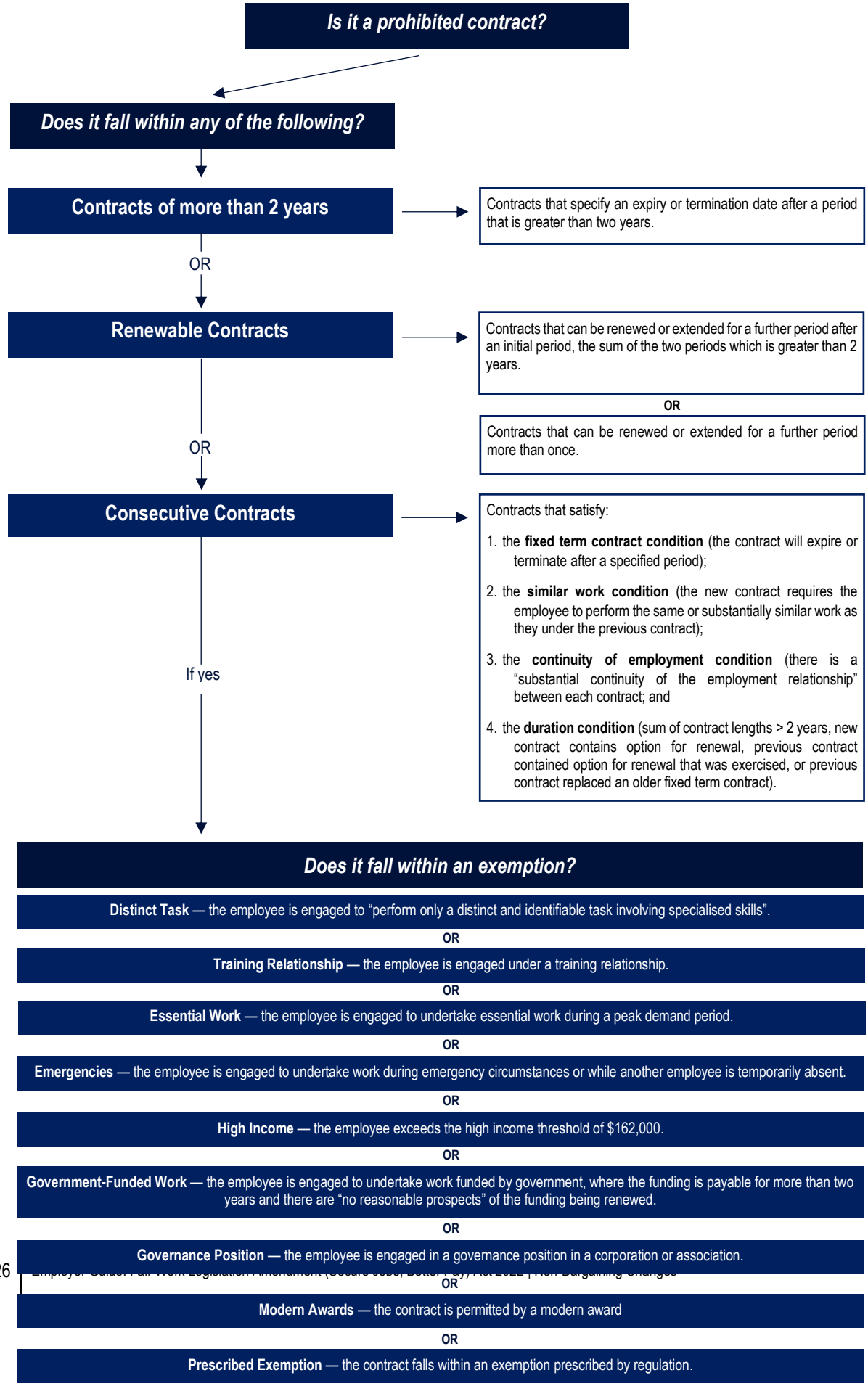
Summary of Changes

Before SJBP Act	After SJBP Act
Employers could hire employees on fixed term contracts without any limitation on how many consecutive contracts or the time period over which they are renewed.	Fixed term contracts for periods of over 2 years are prohibited.[111] Fixed term contracts that have options to be extended or renewed more than once are prohibited.[112] Fixed term contracts that replace prior fixed term contracts for substantially similar work are prohibited.[113] There are exemptions for: • specialised jobs, • training arrangements, • temporary absences, • high income employees, • once-off government funded work, • governance positions, • and others.[114] Employers must give new employees on fixed term contracts the Fixed Term Contract Information Statement.[115]

[107] FW Act s 333H.
[108] FW Act s 333H(2).
[109] FW Act s 333K.
[110] FW Act s 539(2).
[111] FW Act s 333E(2).
[112] FW Act s 333E(3).
[113] FW Act s 333E(4).
[114] FW Act s 333F.
[115] FW Act s 333K.

Flowchart 1 — Fixed Term Contracts

An employer utilises fixed term contracts for a particular role



Australian Chamber of Commerce and Industry

4 Flexible Work

Requests for Flexible Working Arrangements

Commencement: 6 June 2023

Highlights

- Employers have new obligations when responding to employee's requests for flexible work arrangements.
- The FWC now has the power to deal with disputes relating to requests for flexible work.
- Employers should familiarise themselves with their new obligations and incorporate them into internal policies procedures.

Changes

Overview

4.1 Employers will bear new obligations relating to requests from employees for flexible working arrangements. These changes both modify and build on the existing framework in the FW Act. Significantly, employees will also have a new right of appeal to the Fair Work Commission, which could result in the employer being forced into arbitration.

4.2 Under the National Employment Standards, employees are able to request a change in their working arrangements because of certain circumstances.[116] Those circumstances include if the employee is:[117]

a. a parent or carer of a school age (or younger) child;

b. another type of carer within the meaning of the *Carer Recognition Act 2010*;

c. disabled;

d. pregnant;

e. aged 55 or older;

f. experiencing family and domestic violence;

g. or provides care to a family or household member experiencing family violence.

4.3 The framework for dealing with requests for flexible working arrangements has now changed in the following ways:

a. employers have new obligations when responding to requests, including requirements to discuss any requests with employees and genuinely try to reach agreement;

[116] FW Act s 65(1).
[117] FW Act s 65(1A).

b. employers have new obligations when refusing requests, including requirements to set out which business grounds justify the refusal, specify any changes to working arrangements that could be accommodated, and provide employees with information regarding the FWC's capacity to deal with disputes relating to requests for flexible work (paragraph [4.4]-[4.8]); and

c. the FWC will now have the ability to deal with disputes relating to requests for flexible working arrangements on the application of either the employee or the employer after resolution has been attempted at the workplace level, first by means other than arbitration (paragraphs [4.9]-[4.13]).

New procedural obligations

4.4 Formerly, employers were only required to provide with a written response to any request for flexible working arrangements within 21 days, could only refuse requests on reasonable business grounds and must have provided details for the reasons for the refusal.

4.5 Now, including both the existing requirements and those which have been added, the exhaustive list of requirements for refusing a request for flexible working arrangements are as follows:

a. the employer must have discussed the request with the employee;[118]

b. the employer must have genuinely tried to reach an agreement with the employee about making changes to the employee's working arrangements to accommodate the circumstances for which the request is sought;[119]

c. the employer must have had regard to the consequences of the refusal for the employee;[120]

d. the employer may only have refused the request on reasonable business grounds;[121]

e. the employer must have provided the employee with a written response within 21 days;[122]

f. the employer must detail the reasons for the refusal in the written response;[123]

g. the employer must specifically detail the business grounds they are relying on and how they apply to the request in their written response;[124]

h. the employer must specify what alternative changes they would be willing to make, or otherwise state that no changes can be made, in their written response;[125] and

i. the employer must include in their written response information about the FWC's ability to assist in resolving disputes.[126]

4.6 These steps are also illustrated below in Flowchart 2 — Flexible Work Requests.

[118] FW Act s 65A(3)(a)(i).
[119] FW Act s 65A(3)(a)(ii).
[120] FW Act s 65A(3)(c).
[121] FW Act s 65A(3)(d).
[122] FW Act s 65A(1).
[123] FW Act s 65A(6)(a).
[124] FW Act s 65A(6)(b).
[125] FW Act s 65A(6)(c).
[126] FW Act s 65A(6)(d).

4.7 The additional steps are designed to reflect a model term that already appears in modern awards.[127] Accordingly, many employers who employ award-covered employees will simply have to ensure similar steps are taken for all employees.

4.8 The non-exhaustive list of reasonable business grounds has not changed (see paragraph [4.15]);[128] however, an additional statutory note has been usefully added that provides that the specific circumstances of the employer, including the nature and size of the enterprise, are relevant considerations in assessing whether business grounds are reasonable.

Fair Work Commission's role in resolving disputes

4.9 Employers and employees involved in a dispute arising due to a request for flexible working arrangements (whether because it was rejected, or the employer did not provide a written response within 21 days)[129] are required to first attempt to resolve the dispute at the workplace level by discussions between the parties.[130] This means that an employee cannot immediately seek the assistance of the FWC upon the refusal of a request. There is no requirement for a *formal* internal process to resolve the dispute before involving the FWC (although that may be advisable, as will be discussed below).

4.10 If no resolution is able to be reached at the workplace level, a party to the dispute may refer the matter to the FWC for their assistance.[131] Either party can refer the dispute; it does not have to be the employee.

4.11 Upon referral, the FWC is required to deal with the dispute;[132] however, it must first do so by means other than arbitration, unless there are exceptional circumstances.[133] This means that the FWC will generally first attempt to resolve the dispute through conciliation or mediation.

4.12 In conciliation, the FWC performs a facilitative role by attempting to encourage the parties to reach an agreement. In mediation, the FWC performs a similar role to that in conciliation, but also may offer its own opinion or recommendation about how the dispute should be resolved.

4.13 In arbitration, the last the FWC's options to resolve the dispute,[134] the FWC can make binding orders on the parties. In the making of arbitration orders, the FWC must take into account fairness between the employer and the employee.[135] These binding orders may include the following.

a. If the employer has not provided a written response to a request by an employee, the FWC can order that the employer is taken to have refused the request.[136]

b. If the FWC is satisfied that the employer did not respond adequately to the request, such as by failing to meet the procedural requirements, it may order that the employer take further steps.[137]

[127] EM [618].
[128] FW Act s 65A(5).
[129] FW Act s 65B(1)(b).
[130] FW Act s 65B(2).
[131] FW Act s 65B(3).
[132] FW Act s 65B(4)(a).
[133] FW Act s 65B(4)(a).
[134] FW Act s 65B(4)(b).
[135] FW Act s 65C(2).
[136] FW Act s 65C(1)(a).
[137] FW Act s 65C(1)(e).

c. If the employer refused the request, the FWC can make an order that the employer grants the request or make other specific changes to accommodate the employee's circumstances.[138] However, to do so, the FWC must be satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.[139]

Civil Penalties

4.14 If an employer breaches a binding order made by the FWC in arbitration, they can face penalties of up to $16,500 (60 penalty units).[140] Proceedings in the courts can be commenced by an employee, an employee organisation, or the Fair Work Ombudsman.[141]

Common Questions

What are reasonable business grounds?

4.15 The FW Act expressly states that business grounds for refusing a request may be reasonable where:[142]

a. the new working arrangements requested would be too costly for the employer;

b. there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;

c. it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;

d. the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity; or

e. the new working arrangements requested would be likely to have a significant negative impact on customer service.

4.16 This list is not exhaustive, meaning that there may be other business grounds that are considered reasonable. Where an employer seeks to rely on a business ground that does not neatly fit within one of those expressly listed in the FW Act, it may be useful to analogise with one of them. For example, if the reason why a request by an employee to finish work at 3PM on Fridays cannot be accommodated is because that particular employee is required to be present to supervise the safety of less experienced employees, the employer could compare those circumstances to the reasonable business ground of that "the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity" by describing how workplace safety is an equally, or arguably more, important concern as productivity.

4.17 The specific circumstances of the employer will be taken into account when considering whether business grounds are reasonable.[143] This includes the size and nature of the business. When describing the business grounds being relied on up and how they apply to a request in a response to an employee, employers should also outline the particular characteristics of the business which make the business ground reasonable.

[138] FW Act s 65C(1)(f).
[139] FW Act s 65C(3).
[140] FW Act s 539(2) item 5AA.
[141] FW Act s 539(2) item 5AA.
[142] FW Act s 65A(5).
[143] FW Act s 65A(5) "note".

What evidence of the business grounds is required?

4.18 For business grounds to be reasonable, the employer will usually need to identify a specific cost or adverse impact that goes beyond the inevitable small adverse impact of the granting of a request for flexible work arrangements.[144] These specific costs or impacts will generally need to be large enough to outweigh the employee's personal interests which would be improved through the requested changes in their working arrangements.[145] For example, it will not be enough to simply argue that a retail employee requesting Friday afternoons off will mean that the business will have fewer staff during those periods, negatively impacting customer service. Instead, the employer would likely have to demonstrate that the impact would be *significant* and could not be remedied by changing the hours of other employees to fill that vacancy.

4.19 Additionally, an employer will usually need to provide evidence that the change in working arrangements would objectively have the substantial cost or impact that is being argued as the basis for the refusal, were a dispute to end up in arbitration. An employer is unlikely to be able to rely on a mere opinion without research or proof to support it.[146]

4.20 Consequently, not only should employers begin to consider what flexible working arrangements they could not allow, but also how they might be able to demonstrate such a claim were a dispute to arise.

Will "floodgates" arguments be acceptable?

4.21 Often, employers may be reluctant to grant a request for flexible working arrangements on the basis of a 'floodgates' argument — that allowing an individual employee to change their working arrangements will encourage other employees to make similar requests, the totality of which cannot feasibly be managed or granted.

4.22 It is unlikely that were a dispute to arbitrated, this ground would be held to be reasonable. This is because the provisions relating to requests for flexible working arrangements are largely directed towards the changes of the individual employee's working arrangements, rather than foreseeable risks in the future. Furthermore, these arguments will not be easy to substantiate with evidence. They should be avoided.

Is the impact on other employees a relevant consideration?

4.23 Employers may be reluctant to grant a request for flexible working arrangements because they are concerned about the impact of the change on other employees in the workplace. Whether this ground is reasonable will depend on the nature of the impact on the employees.

4.24 If the change will have a tangible impact on the productivity of other employees, then it may be considered reasonable. However, employers will need to substantiate this argument with evidence.

4.25 If the change will only have an emotional impact on other employees, such as by making them frustrated with the employee working flexibly due to having to perform their tasks in their absence, then it is unlikely that this ground will be considered reasonable.

[144] *Australian Municipal, Administrative, Clerical and Services Union v Brimbank City Council* [2013] FWC 5.
[145] *Australian Municipal, Administrative, Clerical and Services Union v Brimbank City Council* [2013] FWC 5.
[146] *Police Federation of Australia (Victoria Police Branch) T/A The Police Association of Victoria v Victoria Police* [2018] FWC 5695, confirmed by *Police (Vic) v Police Federation of Australia (Vic)* [2019] FWCFB 305.

Are all discussions about flexible working arrangements considered "requests"?

4.26 An important distinction should be made between formal requests and informal requests. Formal requests for flexible working arrangements are those for which the procedural requirements apply, and employers will only be able to refuse on reasonable business grounds. Informal requests are those which may casually occur on a daily basis in workplaces.

4.27 A request will only be a formal request where it is in writing and sets out the details of the change sought and the reasons for the change.[147] If a request is made in this form, including if it is via an email or text message, the procedural requirements will likely apply to the employer's response.

4.28 On the other hand, if an employee asks orally or casually mentions during conversation that they would like to change their working arrangements to obtain greater flexibility, the employer is not strictly bound by the procedural requirements. However, caution should be taken even with these informal requests because they may indicate the employee's intention to put the request in writing in the foreseeable future. Employers should immediately begin to consider whether they could accommodate the requested change in the mindset that the procedural requirements will apply, such as precluding them from refusing the request unless it is on reasonable business grounds.

4.29 Employers should clarify how requests should be made by updating workplace/company policies and procedures.

When will the Fair Work Commission immediately deal with a dispute by arbitration?

4.30 The FWC must first deal with a dispute arising from a request for flexible working arrangements by means other than arbitration unless there are exceptional circumstances.[148]

4.31 It is unknown what circumstances may be considered sufficiently exceptional to justify first attempting to resolve the dispute through arbitration. However, in the context of general protections under the FW Act, the FWC has held that for circumstances to be exceptional, they "must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare."[149] The FWC further held that "[c]ircumstances will not be exceptional if they are regularly, or routinely, or normally encountered" and that "exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional".[150]

General Advice

Workplace policies and internal processes

4.32 The changes to how requests for flexible working arrangements are dealt with will require any workplace policies or procedures in place to be updated to ensure that the new procedural requirements are included.

[147] FW Act s 65(3).
[148] FW Act s 65B(4)(a).
[149] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 [13].
[150] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 [13].

4.33 A list of all the requirements, including both the former requirements and those which have now been added, is provided at paragraph [4.5]. To the extent that workplace policies or processes diverge from these requirements, they should be amended to reflect the current rules.

4.34 In addition, prior to any involvement in the dispute by the FWC, the employee and employer are required to attempt to resolve the dispute at the workplace level.[151] Accordingly, it would be prudent to establish an internal mechanism by which these disputes can be handled at first instance. This may also include an internal appeals process, in which the opinion of another managerial employee or person is sought.

Grounds for refusal

4.35 Employers should contemplate in advance what changes in the working arrangements of their employees they may be able to accommodate and what business grounds may prevent them from doing so. In other words, consideration should be given to the parameters that may determine any future changes to working arrangements. For example, an employer might think about what minimum staffing levels are required at any given time, taking into consideration issues such as the need for supervision of less experienced or trainee employees. These parameters will then help form the business grounds on which requests might be rejected.

4.36 Employers may also wish to include these parameters in their workplace policies, using language such as that certain changes "would not ordinarily be accepted" for specified reasons. Although the workplace policies could not serve as definitive and final statements of whether the business grounds are reasonable, were those grounds to be relied, they would demonstrate that the employer had already considered the issues involved and not decided them on a whim. Additionally, they may make employees more understanding of a refusal based on those grounds and therefore less likely to refer the dispute to the FWC.

Further Guidance

4.37 The Fair Work Ombudsman has published some advice relating to requests for flexible work.

4.38 The DEWR has also published advice.

Summary of Changes

Before SJBP Act	After SJBP Act
Role of FWC	
Eligible employees could request flexible working arrangements but if the employer rejected their request, unless provided for in their enterprise agreement, the FWC generally could not resolve the dispute.	The FWC has the power to deal with disputes, first by mediation or conciliation, then by arbitration, unless there are exceptional circumstances.[152] However, parties are first required to attempt to resolve the dispute at the workplace level.[153]

[151] FW Act s 65B(2).
[152] FW Act s 65B.
[153] FW Act s 65B(2).

	The FWC must only deal with the dispute on the application of a party (either party, not necessarily the employee).[154]
Procedural requirements for refusals	
Employers only needed to provide a written response to a request within 21 days and provide details as to why the request was refused (unless the model term in modern award applied).	Employers will now only be able to refuse requests for flexible working arrangements if all of the following requirements are met: • the employer must have discussed the request with the employee; • the employer must have genuinely tried to reach an agreement with the employee about the request; • the employer must have had regard to the consequences of the refusal for the employee; • the employer may only have refused the request on reasonable business grounds; • the employer must have provided the employee with a written response within 21 days; • the employer must detail the reasons for the refusal; • the employer must specifically detail the business grounds they are relying on and how they apply to the request in their written response; • the employer must specify what alternative changes they would be willing to make, or otherwise state that no changes can be allowed, in their written response; and • the employer must include in their written response information about the FWC's ability to assist in resolving disputes relating to requests for flexible working arrangements.

[154] FW Act s 65B(3).

Flowchart 2 — Flexible Work Requests

Employee who is:

1) a parent or guardian of a school age or younger child, a carer, disabled, pregnant, 55 or older, experiencing domestic violence, or provides care to someone experiencing domestic violence; **and**
2) a permanent employee with at least 12 months of service, or a casual employee of at least 12 months of service with a reasonable expectation of continuing employment on a regular and systemic basis;

may request in writing a change in working arrangements because of the circumstance described in (1) with details and reasons.

↓

Employer who wishes to refuse the request must:

- **(1)** Discuss the request with the employee
- **(2)** Genuinely try to reach agreement about changes to their working arrangements accommodate the circumstances
- **(3)** Have regard to the consequences of the refusal for the employee
- **(4)** Refuse only on reasonable business grounds
- **(5)** Provide a written response to the employee within 21 days
  - **(A)** Include details for the refusal
  - **(B)** Set out the particular business grounds being relied on
  - **(C)** Explain how the grounds apply to the request
  - **(D)** Explain the alternative changes which could be accommodated, or otherwise state that none can be

↓

Dispute arises in respect of the employer's refusal

↓

Parties must attempt to resolve dispute at workplace level

↓

If no resolution, either party can refer the dispute to the FWC

↓

FWC must deal with the dispute by conciliation or mediation

↓

If no resolution, FWC may deal with dispute by arbitration

5 Unpaid Parental Leave

Commencement: 7 December 2022

Highlights

- Employers have new obligations when responding to employee's requests for an additional 12 months of unpaid parental leave.
- The FWC now has the power to deal with disputes relating to requests for extended unpaid parental leave.
- Employers should familiarise themselves with their new obligations and incorporate them into internal procedures.

Changes

5.1 Employees are entitled to take 12 months of unpaid parental leave for the birth of a child for whom they will have caring responsibilities.[155] After those initial 12 months, employees are entitled to request a further period of up to an additional 12 months; however, the employer is not forced to agree to the requested extension.[156]

5.2 The procedural requirements for responding to requests for extended unpaid parental leave effectively mirror those for requests for flexible working arrangements.[157] Correspondingly, the changes to the procedural requirements for responding to requests for flexible working arrangements, as outlined in the foregoing section, have been replicated for the rules relating to responding to requests for extended unpaid parental leave.

5.3 This means that employers will now only be able to refuse requests for extended unpaid parental leave if all of the following requirements are met:

a. the employer must have discussed the request with the employee;[158]

b. the employer must have genuinely tried to reach an agreement with the employee about the extension;[159]

c. the employer must have had regard to the consequences of the refusal for the employee;[160]

d. the employer may only have refused the request on reasonable business grounds;[161]

e. the employer must have provided the employee with a written response within 21 days;[162]

[155] FW Act s 70.
[156] FW Act s 76.
[157] See FW Act s 76. Cf FW Act s 65.
[158] FW Act s 76A(3)(a)(i).
[159] FW Act s 76A(3)(a)(ii).
[160] FW Act s 76A(3)(c).
[161] FW Act s 76A(3)(d).
[162] FW Act s 76A(1).

f. the employer must detail the reasons for the refusal in the written response;[163]

g. the employer must specifically detail the business grounds they are relying on and how they apply to the request in their written response;[164]

h. the employer must specify what alternative period of unpaid leave they would be willing to grant, or otherwise state that no extension can be allowed, in their written response;[165] and

i. the employer must include in their written response information about the FWC's ability to assist in resolving disputes relating to requests for extensions of unpaid parental leave.[166]

5.4 Further, as with requests for flexible working arrangements, the FWC will now be empowered to deal with disputes arising from requests for extended unpaid parental leave.[167] The same requirements apply: the parties must first attempt to resolve the dispute at the workplace level through discussions;[168] and the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances.[169]

Civil Penalties

5.5 In arbitration, the FWC can impose binding orders on employers. If an employer breaches a binding order made by the FWC, they can face penalties of up to $16,500 (60 penalty units).[170] Proceedings in the courts can be commenced by an employee, an employee organisation, or the Fair Work Ombudsman.[171]

Common Questions

What are reasonable business grounds?

5.6 A non-exhaustive list of problems that may constitute reasonable business grounds for refusing a request for extended unpaid parental leave has been prescribed in the legislation. These include where:

a. the extension would be too costly for the employer;[172]

b. there is no capacity to change the working arrangements of other employees to accommodate the extension;[173]

c. it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the extension;[174]

d. the extension would be likely to result in a significant loss in efficiency or productivity;[175] and

e. the extension would be likely to have a significant negative impact on customer service.[176]

[163] FW Act s 76A(6)(a).
[164] FW Act s 76A(6)(b).
[165] FW Act s 76A(6)(c).
[166] FW Act s 76A(6)(d).
[167] FW Act s 76B.
[168] FW Act s 76B(2).
[169] FW Act s 76B(4)(a).
[170] FW Act s 539(2) item 5AB.
[171] FW Act s 539(2) item 5AB.
[172] FW Act s 76A(5)(a).
[173] FW Act s 76A(5)(b).
[174] FW Act s 76A(5)(c).
[175] FW Act s 76A(5)(d).
[176] FW Act s 76A(5)(e).

5.7 This list is not exhaustive, meaning that there may be other business grounds that are considered reasonable. Where an employer seeks to rely on a business ground that does not neatly fit within one of those expressly listed in the FW Act, it may be useful to analogise with one of them.

5.8 The specific circumstances of the employer will be taken into account when considering whether business grounds are reasonable.[177] This includes the size and nature of the business. When describing the business grounds being relied on up and how they apply to a request in a response to an employee, employers should also outline the particular characteristics of the business which make the business ground reasonable.

What evidence of the business grounds is required?

5.9 For business grounds to be reasonable, the employer will usually need to identify a specific cost or adverse impact that goes beyond the inevitable small adverse impact of the granting of a request for flexible work arrangements.[178] These specific costs or impacts will generally need to be large enough to outweigh the employee's personal interests which would be advanced by granting the extension.[179] For example, it may not be enough to simply argue that a retail employee extending their unpaid parental leave will mean that the business will have fewer staff in the future, negatively impacting customer service. Instead, the employer would likely have to demonstrate that the impact would be *significant* and could not be remedied by recruiting new employees.

5.10 Additionally, an employer may need to provide evidence that the extension in unpaid parental leave would objectively have the substantial cost or impact that is being argued as the basis for the refusal, were a dispute to end up in arbitration. An employer is unlikely to be able to rely on a mere opinion without research or proof to support it.[180]

When can an extension can be requested?

5.11 Employees cannot request the additional 12 months of unpaid parental leave immediately before they are due to return to work. Employees must give the request in writing to their employer at least 4 weeks before the end of the period of leave they are currently using.[181]

5.12 However, there is seemingly nothing that would prevent an employee from requesting the additional 12 months immediately upon the commencement of the initial period of parental leave.

Are all discussions about extensions of unpaid parental leave considered "requests"?

5.13 An important distinction needs to be made between formal requests and informal requests. Formal requests for extended unpaid parental leave are those for which the procedural requirements apply, and employers will only be able to refuse on reasonable business grounds. Informal requests are those which may occur casually in conversation when employees on parental leave communicate with their employer.

[177] FW Act s 75A(5) "note".
[178] *Australian Municipal, Administrative, Clerical and Services Union v Brimbank City Council* [2013] FWC 5, discussing requests for flexible work.
[179] *Australian Municipal, Administrative, Clerical and Services Union v Brimbank City Council* [2013] FWC 5, discussing requests for flexible work.
[180] *Police Federation of Australia (Victoria Police Branch) T/A The Police Association of Victoria v Victoria Police* [2018] FWC 5695, discussing requests for flexible work, confirmed by *Police (Vic) v Police Federation of Australia (Vic)* [2019] FWCFB 305.
[181] FW Act s 76(2).

5.14 A request will only be a formal request where it is in writing and sets out the details of the change sought and the reasons for the change.[182] If a request is made in this form, including if it is via an email or text message, the procedural requirements will likely apply to the employer's response.

5.15 On the other hand, if an employee asks orally or casually mentions the idea during a phone call, the employer is not strictly bound by the procedural requirements. However, caution should be taken even with these informal requests because they may indicate the employee's intention to put the request in writing in the foreseeable future. Employers should immediately begin to consider whether they could accommodate the requested extension in the mindset that the procedural requirements will apply, such as precluding them from refusing the request unless it is on reasonable business grounds.

General Advice

Workplace policies and internal processes

5.16 The changes to how requests for extended unpaid parental leave are dealt with will mean that any workplace policies or procedures in place will need to be updated to ensure that the new requirements are met. The exhaustive list of the requirements is listed above at paragraph [5.3]. Workplace policies or processes that diverge from these requirements should be updated to reflect the current rules.

5.17 In addition, prior to any involvement in a dispute by the FWC, the employee and employer are required to attempt to resolve the dispute at the workplace level.[183] Accordingly, it would be prudent to establish an internal mechanism by which these disputes can be handled at first instance. This may include an internal appeals process, in which the opinion of another managerial employee or person is sought.

Grounds for refusal

5.18 When employees take unpaid parental leave, it may be worthwhile for employers to consider in advance whether they could grant an extension or what business grounds may prevent them from doing so.

Further Guidance

5.19 The DEWR has released guidance relating to requests for extended unpaid parental leave.

Summary of Changes

Before SJBP Act	After SJBP Act
Role of FWC	
Eligible employees could request an additional 12 months of unpaid parental leave after the initial 12 months	The FWC has the power to deal with disputes, first by mediation or conciliation, then by arbitration.[184] However, parties are first required to attempt to resolve the dispute at the workplace level.

[182] FW Act s 76(2).
[183] FW Act s 76B(2).
[184] FW Act s 76B.

If the employer rejected their request, unless provided for in their enterprise agreement, the FWC generally could not resolve the dispute.	The FWC must only deal with the dispute on the application of a party (either party, not necessarily the employee).
Procedural requirements for refusals	
Employers only needed to provide a written response to a request within 21 days and provide details.	Employers will now only be able to refuse requests for extended unpaid parental leave if all of the following requirements are met: • the employer must have discussed the request with the employee;[185] • the employer must have genuinely tried to reach an agreement with the employee about the extension;[186] • the employer must have had regard to the consequences of the refusal for the employee;[187] • the employer may only have refused the request on reasonable business grounds;[188] • the employer must have provided the employee with a written response within 21 days;[189] • the employer must detail the reasons for the refusal in the written response;[190] • the employer must specifically detail the business grounds they are relying on and how they apply to the request in their written response;[191] • the employer must specify what alternative period of unpaid leave they would be willing to grant, or otherwise state that no extension can be allowed, in their written response;[192] and • the employer must include in their written response information about the FWC's ability to assist in resolving disputes relating to requests for extensions of unpaid parental leave.[193]

[185] FW Act s 76A(3)(a)(i).
[186] FW Act s 76A(3)(a)(ii).
[187] FW Act s 76A(3)(c).
[188] FW Act s 76A(3)(d).
[189] FW Act s 76A(1).
[190] FW Act s 76A(6)(a).
[191] FW Act s 76A(6)(b).
[192] FW Act s 76A(6)(c).
[193] FW Act s 76A(6)(d).

6 Job Advertisements

Commencement: 7 December 2022

Highlights

- Employers can no longer advertise jobs at pay rates that are unlawful.
- Dialogue at businesses between those who are aware of minimum pay rates and those who advertise jobs should be strengthened.

Changes

6.1 Employers are now prevented from advertising job opportunities at an unlawful rate of pay. This will apply where the rate of pay advertised would contravene the FW Act, a modern award or enterprise agreement.[194]

6.2 For example, a restaurant owner could be in breach of the law for instructing a manager to stick a poster on its shopfront window advertising a waitstaff position at $20 per hour. This is because this pay rate falls short of the minimum hourly rate for waitstaff under the *Restaurant Industry Award 2020*.

6.3 The purpose of this change is to encourage employers to consider their workplace relations obligations prior to advertising jobs and develop a broader organisational culture that prioritises compliance with the FW Act.[195]

6.4 The prohibition applies not only to jobs directly advertised by the employer, but also job opportunities which the employer causes to be advertised.[196] For example, if the employer instructs a third party job agency to advertise the position at below minimum wages, they will still likely have contravened the law.

6.5 The prohibition is intended to capture not only advertisements that offer amounts below base rates of pay, but also those that exclude any additional amounts payable under the relevant statutory instrument. For example, if an advertisement for a casual employment position does not advertise a pay rate that includes the casual loading, the employer may be liable.[197]

6.6 If the advertisement is offering a pieceworker position (someone who is paid by their quantity of production, such as the amount of fruit they pick) and who will also entitled to a periodic rate of pay, the advertisement is required to specify that periodic rate of pay or include a statement that the employee will be entitled to a periodic rate of pay.[198] For example, if a fruit picking piecework position offers a certain amount per kilogram of fruit that is picked, as well as a minimum hourly rate, the job advertisement must specify that minimum hourly rate or note that a minimum hourly rate is offered. These will usually be provided for under the modern award.

[194] FW Act s 536AA(1).
[195] EM [1165].
[196] FW Act s 536AA(1).
[197] EM [1169].
[198] FW Act s 536AA(2).

6.7 The only exemption to the prohibition is if the employer had a reasonable excuse.[199] However, given that the prohibition is new, it is not entirely clear what the courts may consider a reasonable excuse. It will depend on the specific circumstances of the employer and is not confined to physical or practical difficulties that impede compliance.[200] It will be determined from the perspective of a reasonable person. An example of a reasonable excuse might be where an employer sought advice regarding minimum pay rates but was misled.

6.8 Employers who breach the prohibition on advertising unlawful pay rates face penalties of up to $16,500 (60 penalty units).[201] Proceedings can be commenced in the courts by an employee organisation (eg, a trade union) or the Fair Work Ombudsman.[202]

Common Questions

Can advertisements offer bands of pay?

6.9 Often job advertisements will offer a band of remuneration rather than a specify amount. Even if only the lower end of the band falls short of the minimum rate of pay, the advertisement would likely be unlawful.

Does the prohibition apply to job opportunities spread by word of mouth?

6.10 The prohibition is not restricted to print or digital advertisements; however the term "advertisement" will take its ordinary meaning. Accordingly, informing people about job opportunities by word of mouth is unlikely to constitute a job advertisement for the purposes of the prohibition.[203]

If an employer makes a mistake about the correct pay rate, will they be liable?

6.11 As discussed (at paragraph [6.7] above), employers who contravene the prohibition will only escape liability if they have a "reasonable excuse".[204] Whether an excuse is reasonable will depend on the circumstances of the individual case and will be determined according to the standards of a reasonable person.[205]

6.12 An employer who pleads ignorance, arguing that they simply "did not know" what the correct pay rate was, is unlikely to avoid being held liable unless they took steps to ascertain the minimum pay rate that should be advertised. Employers will be expected to exercise some due diligence, such as by seeking advice or closely looking at the award.[206] It is not anticipated that an employer misreading or misunderstanding an award will be sufficient to constitute a reasonable excuse. As complex as modern awards can be to apply, employers are expected to be able to understand and comply with them when paying employees. This expectation now extends earlier to the point of advertising a position.

General Advice

6.13 Employers should begin to consider minimum pay rates before advertising any new or vacated position.

[199] FW Act s 536AA(3).
[200] EM [1180].
[201] FW Act s 539(2) item 29AA.
[202] FW Act s 539(2) item 29AA.
[203] EM [1174].
[204] FW Act s 537AA(3).
[205] EM [1180].
[206] EM [1180].

6.14 Crucially, employers must not forget additional amounts that increase minimum rates and must be advertised, particularly the loading for casual employees.

6.15 Employers should closely examine all job advertisements to ensure that the rate of pay that it offers does not contravene any minimum rate. As mentioned, this includes those which employers may be advertising through third party platforms or agencies.

6.16 Employers operating businesses that pay close to the minimum wage should pay particular attention to this new prohibition. Prior to the end of each financial year, these employers should be revisiting all of its job advertisements and any advertisement templates to ensure that the pay rates are updated to reflect forthcoming increases to minimum wages, which usually take effect on July 1 each year.[207] The rate of pay advertised must be compliant for the entire duration of the advertisement.[208] This means, for an example, that a job advertisement posted online on 1 June 2024 offering a pay rate that is at the time lawful, but becomes unlawful following the national minimum wage order on 1 July 2024, will immediately breach the prohibition on 1 July 2024 unless it is updated.

6.17 In larger businesses, it will be important to establish dialogue between staff that manage the remuneration of staff and those who advertise jobs. In some cases, the staff members who are responsible for job advertisements may not be very familiar with minimum wage requirements, which poses a risk of falling foul of the prohibition.

Further Guidance

6.18 The FWO has published advice relating to the job advertisement requirements.

Summary of Changes

Before SJBP Act	After SJBP Act
Employers could advertise jobs with pay rates that were in fact unlawful.	Employers are prohibited from advertising or causing to be advertising jobs at rates of pay that are unlawful.[209]

[207] FW Act s 286.
[208] EM [1173].
[209] FW Act s 536AA(1).

Australian Chamber of Commerce and Industry

7 Family and Domestic Violence Leave

Commencement: 1 February 2023 (non-small businesses), 1 August 2023 (small businesses)

Highlights

- All employees are now entitled to 10 days of paid family and domestic violence leave at their full rate of pay.
- Employers are required to keep information regarding the use of family and domestic violence leave confidential, including on employees' pay slips.

Changes

7.1 The entitlement to paid family and domestic violence leave (**FDVL**) was implemented by the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022*, which received royal assent on 9 November 2022. Further amendments regarding how the new entitlement will operate in practice were made in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* and all the changes to family and domestic violence leave commence at the same time — the beginning of February 2023.

Entitlement

7.2 All employees will be entitled to 10 days of paid family and domestic violence leave in each 12 month period under the National Employment Standards.[210] These 10 days are not provided on a pro rata basis for part-time employees; the full 10 days are available irrespective of the employment category.[211]

7.3 The definition of "family and domestic violence" is "violent, threatening or other abusive behaviour" by close relatives, members of the employee's household, current intimate partners and former intimate partners.[212]

7.4 Employers will be required to pay employees on paid family and domestic violence leave at their full rate of pay, calculated as if they had not taken the period of leave.[213] This means that if the employee would be entitled to any additional rates, such as overtime or penalty rates, and the employer must pay them an amount inclusive of those rates.

Casual employees

7.5 Critically, unlike personal leave, casual employees are entitled to 10 days of paid family and domestic violence leave. Employers must pay casual employees on paid family and domestic violence leave at their full rate of pay calculated as if the employee had worked the hours for which they had been rostered.[214] A casual employee is taken to have been rostered to work any hours for which they have accepted an offer by the employer to work those hours.[215]

[210] FW Act s 106A.
[211] FW Act s 106A(2)(c).
[212] FW Act s 106B(2).
[213] FW Act s 106BA(1)(a).
[214] FW Act s 106BA(1)(b).
[215] FW Act s 106BA(2).

Secrecy requirements

7.6 Employers are required to take steps to ensure that information concerning any notice or evidence that an employee has given to substantiate a claim for paid family and domestic violence leave is treated confidentially.[216] An employer is also prohibited from using such information for any purpose other than satisfying itself in relation to the entitlement, without the consent of the employee.[217]

Pay slips

7.7 New regulations have been prescribed relating to the inclusion of information about family and domestic violence leave on pay slips. Employers are prohibited from including any such information on pay slips.[218]

7.8 This prohibited information includes any statement that an amount paid to an employee is a payment in respect of the employee's entitlement to paid family and domestic violence leave.[219] It also includes a statement that a period of leave taken by the employee has been taken as a period of paid family and domestic violence leave.[220] Additionally, employers cannot include on a pay slip the balance of an employee's entitlement to paid family and domestic violence leave.[221]

Civil Penalties

7.9 If an employer includes information on a payslip that discloses the use of the entitlement, they can face penalties of up to $16,500 (60 penalty units).[222] Proceedings in the courts can be commenced by an employee or the Fair Work Ombudsman.[223]

7.10 If an employer contravenes the paid family and domestic violence leave provisions generally,[224] they can also face penalties of up to $16,500 (60 penalty units).[225] Proceedings in the courts can be commenced by an employee, a registered employee association, or the Fair Work Ombudsman.[226]

Small businesses

7.11 Importantly, for employees of small businesses, the entitlement does not commence until 1 August 2023. This provides small businesses with an additional 6 months to prepare for these changes. A small business is defined in the FW Act as an employer with fewer than 15 employees.[227]

Common Questions

What should be written on the pay slip of an employee who uses paid FDVL?

7.12 As noted, pay slips cannot include information prescribed by the regulations that relates to paid family and domestic violence leave.[228]

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[216] FW Act s 106C(1).
[217] FW Act s 106(2).
[218] FW Act s 536(2)(c).
[219] *Fair Work Regulations 2009* reg 3.47(a).
[220] *Fair Work Regulations 2009* reg 3.47(b).
[221] *Fair Work Regulations 2009* reg 3.47(c).
[222] FW Act s 539(2) item 34AAA.
[223] FW Act s 539(2) item 34AAA.
[224] FW Act s 757C.
[225] FW Act s 539(2) item 34AAA.
[226] FW Act s 539(2) item 34AAA.
[227] FW Act s 23.
[228] FW Act s 536(2)(c).

7.13 Instead, where an employee uses this entitlement, employers should ensure that the pay slip expresses that the employee was working ordinary hours during the leave period. Where an employee uses the entitlement during a period which attracts overtime payments or other monetary benefits, it is similarly recommended that the pay slips simply suggest that the employee worked during that period.

7.14 This approach minimises the risk of including any information that could be used to identify the use of the entitlement. Of course, it has its disadvantages; employees and employers examining old pay slips will be unable to the periods in which the leave entitlement was used because it will appear as if the employee had simply worked during the period. This could cause complications if evidence of the use of the entitlement ever needs to be presented to a court or tribunal. However, it is recommended that this problem should be addressed by properly retaining records elsewhere of leave balances and the use of the paid family and domestic violence leave entitlement (see paragraph [7.15], below).

How should employers keep track of leave balances?

7.15 Employers face two challenges when it comes to keeping track of family and domestic violence leave balances.

a. First, employers cannot include information on pay slips that identifies the use of the leave entitlement, which means that leave balances must be recorded separately elsewhere.

b. Second, employers have confidentiality requirements relating to notice and evidence of an employee's use of the leave entitlement.

7.16 Employers will need to find a way to keep track of employees' family and domestic violence leave balances without including them on pay slips and without recording them somewhere which could be accessed by other people. The regulations relating to employee records should also be borne in mind.[229] Some payroll providers may offer a solution in the future. In the meantime, employers should keep a separate record of leave balances in writing (digitally or physically) that can only be accessed by the employer and payroll staff.

When do employees become entitled to paid FDVL?

7.17 Unlike annual leave and personal leave,[230] paid family and domestic violence leave does not accrue progressively throughout the year. This means that, from the first day of the employee's service with an employer, they become entitled to the full 10 days of paid family and domestic violence leave.

7.18 In each new year of service, the balance of leave will "reset" to 10 days. The leave does not accumulate from year to year.[231] Nevertheless, it does mean that employees can sometimes use 20 days of paid family and domestic violence leave during the same calendar year. This will occur where the first 10 days is used during one a year of the employee's service and a further 10 days is used at the beginning of the succeeding year. For example, if an employee began working for an employer in September 2023, they could use 10 days of leave in August 2024 and a further 10 days in September 2024.

[229] See *Fair Work Regulations 2009* regs 3.31-3.44.
[230] See, eg, FW Act s 87(2).
[231] FW Act s 106A(2)(b).

What can FDVL be used for?

7.19 Employees can use the entitlement if they are experiencing family and domestic violence leave, need to do something to deal with the impact of it, and it is impractical to do so outside of their ordinary hours of work.

7.20 The FW Act defines "family and domestic violence" as "violent, threatening or other abusive behaviour by a close relative of an employee, "a member of an employee's household, or a current or former intimate partner of an employee" that "seeks to coerce or control the employee" and "causes the employee harm or to be fearful".[232]

7.21 Some examples of actions that employees may need to take to deal with the impact of family and domestic violence and cannot do outside of their ordinary hours of work may include:

a. relocating to a safer location, such as finding accommodation;

b. attending medical appointments;

c. meeting with police to report the behaviour; and

d. attending court hearings.

7.22 In summary, if the employee is experiencing family and domestic violence, there are a broad range of actions which can justify the use of the leave entitlement, as long as it needs to be done to deal with the impact of it and it is impractical to do so outside of the employee's ordinary hours of work. It is anticipated that phrases such as "needs to" and "impractical for" will be interpreted broadly by the courts.

Can employers request evidence of family and domestic violence?

7.23 Employers have a right to request evidence from employees who have given notice of their intention to use the paid family and domestic violence leave entitlement.[233] It can be evidence for any of the preconditions for the use of the entitlement, which are that, as discussed:

a. the employee is experiencing family and domestic violence,[234]

b. the employee needs to do something to deal with the impact of the family and domestic violence;[235] and

c. it is impractical for the employee to do that thing outside the employee's ordinary hours of work.[236]

7.24 However, it must be borne in mind that the confidential requirements will apply to any evidence provided (see paragraph [7.6]).

Can employees already on paid leave access paid FDVL instead?

7.25 If an employee is on annual leave or personal/carer's leave ("sick leave"), they are able to switch to paid family and domestic violence leave at any time.

[232] FW Act s 106B(2).
[233] FW Act s 107(3)(d).
[234] FW Act s 106B(1)(a).
[235] FW Act s 106B(1)(b).
[236] FW Act s 106B(1)(c).

7.26 Employees may wish to do so because paid family and domestic violence leave entitles them to the same pay that they would be receiving were they at work (such as receiving overtime or penalty rates), whereas other paid leave entitlements generally only provide employees with their base rate of pay.

7.27 Once an employee switches to paid family and domestic violence leave, from that point on, they are considered to no longer be using the initial leave entitlement. However, in order to switch to paid family and domestic violence leave, they will still need to satisfy the notice and evidence requirements.

Will employees accrue other leave entitlements while on paid FDVL?

7.28 Annual leave and personal/carer's leave accrue with each year of service of an employee.[237] A period of service by an employee includes all the time for which an employee is employed, not only days of work (eg, including weekends).[238] A period of service does exclude periods of unauthorised absences and some periods of unpaid leave,[239] but it does not exclude periods of paid family and domestic violence leave. An employee on paid family and domestic violence leave will therefore continue to accrue annual leave and personal/carer's leave during the period.

What happens if a public holiday occurs during a period of paid FDVL?

7.29 If a public holiday takes place during a period of annual leave or paid personal/carer's leave, the employee is taken to not be on leave and is paid for their absence on a public holiday instead (as they would be had they not been on leave).[240]

7.30 If a public holiday takes place during a period of paid family and domestic violence leave, it is expected that it will operate the same way as the other forms of paid leave. This means that employers should not deduct the public holiday from an employee's paid family and domestic violence leave balance and should pay the employee for the public holiday.

7.31 This reflects the Fair Work Ombudsman's advice in relation to paid leave.

Will superannuation be payable to employees for periods of paid FDVL?

7.32 Employers have an obligation to make superannuation contributions based on employees' "ordinary time earnings", which primarily includes their earnings in respect of ordinary hours of work.[241] To date, the Australian Tax Office has not yet advised whether paid family and domestic violence leave is included in an employee's "ordinary time earnings".

7.33 Nevertheless, the Australian Tax Office *does* currently advise that personal/carer's leave and annual leave payments are to be included in an employee's "ordinary time earnings". This is likely because under the National Employment Standards, the hours an employee works in a week are taken to include any hours of leave.[242] Accordingly, it is probable that periods of paid family and domestic violence leave will also be included in an employee's "ordinary time earnings" and superannuation will therefore be payable.

[237] FW Act ss 87(1) and 96(1).
[238] FW Act s 22(1).
[239] FW Act s 22(2).
[240] See, eg, FW Act s 98.
[241] *Superannuation Guarantee (Administration) Act 1992* s 6.
[242] FW Act s 62(4).

7.34 However, employers should bear in mind that "ordinary time earnings" includes earnings in respect of ordinary hours of work and generally excludes earnings in respect of overtime. This means that where paid family and domestic violence leave is payable to an employee for a period of overtime (an aspect for which this entitlement is unique, as discussed above at paragraph [7.4]), the employer may not be obligated to pay the employee superannuation for that component of the payment. This remains unclear but may be clarified.

General Advice

7.35 Most importantly, employers should familiarise themselves with the extensive advice as to how to support employees experiencing family and domestic violence.

a. The Fair Work Ombudsman has published the "Employer Guide to Family and Domestic Violence".

b. Safe Work Australia has published an information sheet which provides guidance for business about duties under work health and safety (WHS) laws and how to manage the risks of family and domestic violence at the workplace.

c. The Australian Human Rights Commission has published a fact sheet which also provides information regarding what workplaces can do to support employees experiencing domestic and family violence (pages 8-10).

7.36 Employers should also be aware of the national domestic, family and sexual violence counselling, information and support service, 1800 RESPECT, as well as the other help lines which are publicised by White Ribbon Australia.

7.37 Employers should then:

a. familiarise themselves with the new entitlement to paid family and domestic violence leave which is available to every employee;

b. if applicable, discuss with any payroll staff how pay slips will avoid using information that identifies the use of the leave in advance of the first claim; and

c. take measures to ensure that confidentiality can be maintained for any evidence provided to use the leave, as well as leave balances.

7.38 Employers should then develop internal policies and procedures to enable the use of the paid family and domestic violence leave (including the management of pay slips and leave balances) and support victims.

Further Guidance

7.39 The Fair Work Ombudsman has published extensive information about the new paid family and domestic violence leave entitlement.

Summary of Changes

Before SJBP Act	After SJBP Act
Employees were entitled to 5 days of unpaid family and domestic violence leave.	All employees, irrespective of whether they are casual, part time or full time employees, are now entitled to 10 days of paid family and domestic violence leave at their full rate of pay.[243] Employers are obliged to keep information regarding the use of family and domestic violence leave confidential,[244] including on employees' pay slips.[245]

[243] FW Act s 106A.
[244] FW Act s 106C.
[245] FW Act s 536(2)(c).

8 Protected Attributes

Commencement: 7 December 2022

Highlights

- Breastfeeding, gender identity and intersex status are now attributes protected from discrimination under the FW Act.

Changes

8.1 Three new protected attributes have been introduced into the FW Act: breastfeeding, gender identity, and intersex status.

8.2 Breastfeeding has been non-exhaustively defined in the FW Act to include both the act of breastfeeding, as well as breastfeeding over a period of time.[246] Hence, the definition is unlikely to be restricted to simply the act of breastfeeding a child but may also provide broader protection to individuals who choose to breastfeed.

8.3 Both gender identity and intersex status have been defined the same way as they are in the *Sex Discrimination Act 1984*.[247] Gender identity is currently defined as "the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth."[248] Intersex status is currently defined as "the status of having physical, hormonal or genetic features that are … neither wholly female nor wholly male; … a combination of female and male; or … neither female nor male."[249]

8.4 Most relevantly, these attributes will be added to the list of protected attributes for which employers are prohibited from taking adverse action against employees and prospective employees.[250] This means that employers will be prohibited from dismissing, injuring, altering the position to the prejudice of, or discriminating against an employee because of their breastfeeding, gender identity or intersex status.[251] Similarly, employers cannot refuse to employ or offer less favourable terms and conditions to prospective employees because of their breastfeeding, gender identity or intersex status.

8.5 The two primary exceptions to these prohibitions are if the action is not unlawful under an applicable anti-discrimination statute or where the inherent requirements of the particular position concerned required the discriminatory action.[252]

[246] FW Act s 12.
[247] FW Act s 12.
[248] *Sex Discrimination Act 1984* s 4.
[249] *Sex Discrimination Act 1984* s 4.
[250] FW Act s 351(1).
[251] FW Act s 342.
[252] FW Act s 351(2)(a)-(b).

8.6 Employers who take adverse action against employees because of their breastfeeding, gender identity or intersex status can face penalties of up to $16,500 (60 penalty units).[253] Proceedings in the courts can be commenced against them by the person affected, an industrial association (eg, a trade union), or the Fair Work Ombudsman.[254]

8.7 Employers are also now explicitly prohibited from terminating the employment of an employee because of their breastfeeding, gender identity or intersex status.[255] Importantly, the discriminatory reason does not need to be the sole or dominant reason, only one of the reasons for the termination.[256] Employers who terminate the employment of employees because of their breastfeeding, gender identity or intersex status can also face penalties of up to $16,500 (60 penalty units).[257] Proceedings in the courts can be commenced against them by the person affected, an industrial association, or the Fair Work Ombudsman.[258]

8.8 The FWC will now be unable to approve enterprise agreements that contain any terms which are discriminatory on the basis of breastfeeding, gender identity or intersex status.[259] This likely includes terms that are indirectly discriminatory, as well as those that are directly discriminatory.[260] Where such terms exist in a proposed enterprise agreement, the employer may be required to make undertakings to redress any discriminatory impact.[261] Similarly, modern awards can no longer include terms that are discriminatory on the basis of breastfeeding, gender identity or intersex status.[262]

General Advice

8.9 These attributes are already protected under Commonwealth anti-discrimination laws and should therefore already be included in workplace anti-discrimination policies. However, this should serve as an important reminder to employer to re-examine workplace policies to ensure that all protected attributes are included.

8.10 Employers should also use these changes as an opportunity to pay particular attention to any workplace practices that could risk discriminating against persons possessing any of these attributes, either directly or indirectly.

Further Guidance

8.11 For more information about workplace discrimination protections, see the guidance provided by the Fair Work Ombudsman.

[253] FW Act s 539(2) item 11.
[254] FW Act s 539(2) item 11.
[255] FW Act s 772(1)(f).
[256] FW Act s 772(1).
[257] FW Act s 539(2) item 35.
[258] FW Act s 539(2) item 35.
[259] FW Act ss 186(4) and 195(1).
[260] *Australian Catholic University Limited T/A Australian Catholic University* [2011] FWA 3693 [14].
[261] *Australian Catholic University Limited T/A Australian Catholic University* [2011] FWA 3693 [35].
[262] FW Act s 153(1).

Summary of Changes

Before SJBP Act	After SJBP Act
Unlike attributes such as sex, race, age and religion, the attributes of breastfeeding, gender identity and intersex status were not protected under the FW Act.	Employers are prohibited from taking adverse action against employees or prospective employees because of their breastfeeding, gender identity or intersex status.[263] Employers are now explicitly prohibited from terminating the employment of an employee because of their breastfeeding, gender identity or intersex status.[264] Modern awards and enterprise agreements cannot include terms that are discriminatory on the basis of breastfeeding, gender identity or intersex status.[265]

[263] FW Act s 351.
[264] FW Act s 772.
[265] FW Act ss 153 and 195.

9 Small Claims Process

Commencement: 1 July 2023

Highlights

- Courts can now award a maximum of $100,000 to successful plaintiffs in small claims proceedings rather than the existing $20,000.

Changes

Matters that can be brought to the small claims process

9.1 The small claims process is an avenue in the courts for employees to settle minor disputes. It is presently available for only two types of disputes: the recovery of small amounts of entitlements that an employer was required to pay,[266] and certain disputes relating to the casual conversion rules.[267]

9.2 Only amounts owed due to entitlements arising under the FW Act (such as the National Employment Standards), a modern award, an enterprise agreement, a workplace determination, an FWC order, or contractual terms relating to matters covered by the National Employment Standards.[268] However, employees cannot pursue monetary amounts owed under employment contracts generally through the small claims process, unless they fall within one of those areas. For example, an employee is unlikely to be able to pursue the recovery of an unpaid special bonus in a small claims proceeding that is provided under the employment contract to employees serving 12 months or more because bonuses are not covered by the National Employment Standards.

9.3 Employees can take to the small claims process disputes relating to whether they have been employed by an employer for a period of 12 months and whether the employee has worked a regular pattern of hours on an ongoing basis during the last 6 months,[269] both of which if satisfied, require the employer to offer the employee an opportunity to convert to a full time or part time employee.[270] Casual employees can also take to the small claims process disputes relating to whether their employer had reasonable grounds to not make a casual conversion offer,[271] whether they may request a casual conversion offer from their employer,[272] and whether their employer had reasonable grounds to refuse a request for casual conversion.[273]

[266] FW Act s 548(1A).
[267] FW Act s 548(1B).
[268] FW Act s 548(1A).
[269] FW Act s 548(1B)(a)(i).
[270] FW Act s 66B(1).
[271] FW Act s 548(1B)(a)(ii).
[272] FW Act s 548(1B)(a)(iii).
[273] FW Act s 548(1B)(a)(iv).

How small claims proceedings work

9.4 In small claims proceedings, the court is not required to strictly adhere to any rules of evidence or procedure.[274] The court is allowed to act in an informal manner and without regard to legal forms and technicalities.[275] This does not mean the court will not consider evidence; the dispute will inevitably centre around the provision of evidence to the court. Rather, it means that the court have wider discretion regarding which evidence it will allow to be admitted and how much weight will be given to it. Evidence is less likely to be ignored by the court for reasons such as hearsay. Naturally, these rules (or lack thereof) are significantly advantageous for unrepresented parties.

Legal representation in small claims proceedings

9.5 If parties do wish to be legally represented in a small claims proceeding, they must seek leave from the court.[276] Whether the court decides to grant leave is at its discretion. The court can also grant leave subject to certain conditions to ensure that no other party is unfairly disadvantaged.[277] For example, the court may grant leave for a party to be legally represented for only specific issues that are in dispute.

9.6 Unlike in the Fair Work Commission, there is no exhaustive list of factors in the FW Act that must be considered to determine whether the court will exercise its discretion to allow a party to be legal represented in a small claims proceeding.[278] See below for arguments and factors that have been persuasive to the court in the past.

Changes in SJBP Act

9.7 Only recent changes have been made to small claims proceedings.

9.8 First, the maximum amount that the court can award in a small claims proceeding has been increased from $20,000 to $100,000. This means that more claims will be able to be pursued in small claims proceedings, where employees seek payment for entitlements (of the types described above) worth less than a total of $100,000.[279]

9.9 Second, the courts are now able to order unsuccessful defendants (employers) to pay costs to successful plaintiffs (employees) for any filing fees paid.[280] This assists most successful plaintiffs (employees) in recovering some of their financial costs, noting that cost awards are generally unavailable in proceedings relating to matters under the FW Act and that parties in small claims proceedings are usually unrepresented.

General Advice

Workplace relations compliance

9.10 Most importantly, these changes to the small claims process should serve as a reminder to employers to ensure that regular compliance audits are undertaken to avoid any risk of underpayments.

[274] FW Act s 548(2).
[275] FW Act s 548(2)(a)-(b).
[276] FW Act s 548(5).
[277] FW Act s 548(6).
[278] Cf FW Act s 596.
[279] FW Act s 548(2)(a).
[280] FW Act s 548(10).

9.11 The Federal Government will soon introduce new laws to criminalise underpayments in certain circumstances (i.e., "wage theft"). Accordingly, employers be even more vigilant in monitoring their compliance with the FW Act, modern awards and enterprise agreements.

Consequences of higher maximum awards in small claims proceedings

9.12 The increased maximum amount that courts can award in small claims proceedings will mean that more claims will be pursued through the small claims process. The small claims process is often more friendly to employee claims because of its informality and lack of a need for legal representation. Employers will therefore now face greater risk of being involved in proceedings which are less favourable to them as a result of the higher maximum amount that the courts can award.

Obtaining leave for legal representation

9.13 In small claims matters, legal representation is the exception, not the norm.[281] Nevertheless, employers are encouraged to where possible, always seek legal advice and strongly consider seeking leave from the court to be legally represented. This is particularly the case with the higher maximum amount that can be awarded by the courts in small claims proceedings; where an amount close to $100,000 is being sought from a business, legal representation will be critical in defending against the claim.

9.14 As mentioned, there is no exhaustive list of factors that can be considered by the court when deciding whether to grant leave to allow a party to be legally represented. However, the following arguments, if applicable, should be brought to the court's attention when seeking leave because they have tended in favour of granting leave in prior decisions:

a. there is a purely legal issue in dispute, such as whether the court has jurisdiction to hear the matter;[282]

b. there is a question about the proper interpretation of legislation;[283]

c. there are complex legal or factual issues in dispute;[284]

d. there are issues for which the involvement of legal representatives would greatly assist the court;[285]

e. without legal representatives, the matter would have not proceeded as efficiently or expeditiously;[286]

f. a large volume of material is necessary to be filed, which will require the assistance of legal representatives to narrow down the issues in dispute;[287]

g. there would be an absence of significant prejudice to the other party were leave to be granted;[288] or

h. the competence of the proposed representative in the particular legal area.[289]

9.15 Conversely, factors considered by the courts that have tended against the granting of leave for a party to be legally represented include:

[281] *D'Sylva v Ellenbrook Family Medical Centre Pty Ltd* [2020] FCCA 1171 [22].
[282] *Hughes v Mainrange Corporation Pty Ltd* [2009] FMCA 1025.
[283] *Transport Workers' Union of Australia v Transit Systems WA Pty Ltd* [2012] FMCA 637.
[284] *Cangemi v Specialist Diagnostic Pathology Services Pty Ltd* [2014] FCCA 187.
[285] *Al Jorany v AHG Services (WA) Pty Ltd* [2019] FCCA 2598.
[286] *Al Jorany v AHG Services (WA) Pty Ltd* [2019] FCCA 2598.
[287] *Annese v General Crane Services Pty Ltd* [2019] FCCA 2661 [24]; *Evans v Oxford Shop Pty Ltd* [2020] FCCA 2730.
[288] *Annese v General Crane Services Pty Ltd* [2019] FCCA 2661 [37]; *Evans v Oxford Shop Pty Ltd* [2020] FCCA 2730 [44].
[289] *Evans v Oxford Shop Pty Ltd* [2020] FCCA 2730 [29].

a. the fact that the involvement of a legal practitioner goes against the norm of how small claims proceedings are conducted;[290]

b. where the issues in dispute are not complex;[291]

c. where no detailed analysis of competing statutory or industrial instruments is required;[292]

d. the ability of the court to assist self-represented litigants and their capacity to self-represent;[293] and

e. the unfamiliarity of the proposed legal representative with the area of law in question, thereby being of little assistance to the court.[294]

9.16 The courts have also specifically identified the following relevant but non-definitive factors, many of which mirror those above:[295]

a. the purpose of the small claims process being to provide quick, informal and just resolutions of disputes without undue technicality;

b. whether the other party is represented by a lawyer and any prejudice or unfairness the other party may suffer if leave is granted;

c. the familiarity, and competence, of the proposed legal representatives to provide assistance to the Court on the complexities or technicalities that may arise; and

d. whether the party seeking leave to be represented has an in-house lawyer or employee capable of conducting the matter satisfactorily.

9.17 Critically, a person is not taken to be represented by a lawyer if the lawyer is an employee or officer of the person.[296] This means that if a lawyer is employed at a business, they are able to represent the employer without leave from the court. If it seems unlikely that, given the factors listed above, the court will grant leave, but an employer still wishes to be legally represented, they should consider whether they employ a lawyer.

Further Guidance

9.18 The Fair Work Ombudsman has produced a step-by-step guide for employers responding to small claims. In addition to the above information about seeking legal representation, the guide should be followed closely.

Summary of Changes

Before SJBP Act	After SJBP Act
Employees could use the small claims process, which is more informal and less procedural, to recover amounts less than $20,000.	The maximum the courts can award to successful plaintiffs in the small claims process is now $100,000.[297]

[290] *D'Sylva v Ellenbrook Family Medical Centre Pty Ltd* [2020] FCCA 1171 [22].
[291] *D'Sylva v Ellenbrook Family Medical Centre Pty Ltd* [2020] FCCA 1171 [23].
[292] *D'Sylva v Ellenbrook Family Medical Centre Pty Ltd* [2020] FCCA 1171 [24].
[293] *D'Sylva v Ellenbrook Family Medical Centre Pty Ltd* [2020] FCCA 1171 [25].
[294] *D'Sylva v Ellenbrook Family Medical Centre Pty Ltd* [2020] FCCA 1171 [26].
[295] *D'Sylva v Ellenbrook Family Medical Centre Pty Ltd* [2020] FCCA 1171 [21].
[296] FW Act s 548(7).
[297] FW Act s 548.

10 Equal Remuneration

Commencement: 7 December 2022

Highlights

- The FWC has expanded scope to make equal remuneration orders which increase the pay of a particular class of employees in the pursuit of gender pay equity.
- Employers in female-dominated industries should engage with their chamber of commerce or industry association in anticipation of potential equal remuneration orders.

Changes

Work Value Reasons

10.1 The FWC is responsible for ensuring that the terms in modern awards continue to meet certain criteria set by the Parliament known as the "modern awards objective".[298] Broadly, the modern awards objective requires the FWC to ensure that modern awards provide "a fair and relevant minimum safety net of terms and conditions".[299]

10.2 Where modern awards are not meeting the modern awards objective, an employer, employee or organisation covered by a particular modern award can make an application to the FWC seeking a variation to its terms.[300]

10.3 The minimum wages under modern awards (but not other terms, leave, overtime and rostering provisions) can also be increased on another basis, in addition to not meeting the modern awards objective. The FWC can increase modern award minimum wages on the basis of "work value reasons".[301] These work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work and can be related to any of the following:[302]

a. the nature of the work;

b. the level of skill or responsibility involved; and

c. the conditions under which the work is done.

10.4 For example, the FWC recently decided that a 15% increase in the minimum wages of aged care employees was justified by work value reasons.[303]

[298] FW Act s 157(1).
[299] FW Act s 134.
[300] FW Act s 158.
[301] FW Act s 157(2)(a).
[302] FW Act s 157(2A).
[303] *Re Aged Care Award 2010* [2022] FWCFB 200.

10.5 Following the SJBP Act, the work value reasons for any change to modern award minimum wages are now required to be free of assumptions based on gender. This change is modelled on work value provisions in Queensland industrial relations legislation.[304] While it has not been argued that the FWC undervalued work due to assumptions based on gender, this change is intended to prevent it from occurring in the future.

10.6 The work value reasons must now also include consideration whether historically the work has been undervalued because of assumptions based on gender.[305] This change is intended to confirm a view that was expressed in a prior FWC decision about the meaning of the work value reasons provisions.[306] The FWC had previously held that the provisions allow for modern award minimum wages to be increased based on work value reasons that are formed following a wide-ranging consideration of historical reasons for gender inequity in the particular industry.[307]

Equal Remuneration Orders

10.7 The FWC is able to make orders that are intended to improve gender pay equity called "equal remuneration orders".[308] Equal remuneration orders can improve gender pay equity by increasing minimum wages for particular industries.

10.8 While equal remuneration orders are generally aimed at increasing minimum wages for particular industries by changing modern award rates, they also affect employees covered by enterprise agreements. This is because terms of enterprise agreements that are less beneficial than equal remuneration orders (such as pay rates that are lower) have no effect.[309]

10.9 For example, in 2011, the FWC decided to make an equal remuneration order in the social, community and disability services industry because it considered its work to be undervalued partly on the basis of gender.[310] The effect of the equal remuneration order was that the minimum wages under the Social, Community, Home Care and Disability Services Industry Award 2010 were lifted. However, it also meant that employers in the industry whose employees were covered by an enterprise agreement had to increase their wages, unless they were already more beneficial than the increased modern award wages.

10.10 In that case, the application for an equal remuneration order was brought by five trade unions. Affected employees and the Sex Discrimination Commissioner have also been entitled to apply for equal remuneration orders. Following the SJBP Act, the FWC will now be able to make an equal remuneration order on its own initiative.[311]

10.11 To determine whether work in an industry is undervalued, the FWC examines a principle known as "equal remuneration for work of equal or comparable value".[312]

[304] *Industrial Relations Act 2016* (Qld) s 248.
[305] FW Act s 167(2B).
[306] EM [347].
[307] *Equal Remuneration Decision 2015* [292].
[308] FW Act s 302.
[309] FW Act s 306.
[310] *Re Australian Municipal, Administrative, Clerical and Services Union* [2011] FWAFB 2700.
[311] FW Act s 302(3)(a).
[312] FW Act s 302(2).

10.12 Before the SJBP Act, this meant only work that was equal or comparable in every respect.[313] Generalised comparisons of work between industries could not be made and that the inevitable differences in pay that arise between employers and across industries were insufficient to justify an equal remuneration order.[314]

10.13 Now, the FWC is expressly empowered to:

a. take into account comparisons within and between occupations and industries to determine whether work has been undervalued on the basis of gender;[315]

b. consider whether the work has been historically undervalued on the basis of gender;[316]

c. not only compare work that is similar or compare it with historically male-dominated occupations or industries;[317] and

d. not have to establish that discrimination on the basis of gender is the explanation for pay discrepancies.[318]

10.14 These changes are designed to incorporate elements of the equal remuneration principle that exists in Queensland.[319] They are also clearly designed to provide the FWC with far greater scope to consider whether work is being undervalued on the basis of gender, contrary to its previous decisions. It is therefore reasonable to assume that more equal remuneration orders will be made in the future.

Common Questions

Which industries are likely to be most affected by these changes?

10.15 During the aged care work value case, the Fair Work Commission issued a statement[320] which outlined a series of modern awards which mapped on to industries which the Workplace Gender Equality Agency has determined as being female-dominated or having a majority of employees as females. This list is by no means binding or necessarily indicative of which modern awards will have their minimum rates increased on the basis of pay equity. However, it may be indicative of industries at risk of potential applications for increases of minimum rates on that basis.

10.16 The Fair Work Commission has identified the following awards as female-dominated or having a majority of employees as females in the healthcare and social assistance industry (79%):

a. Aboriginal and Torres Strait Islander Health Workers and Practitioners;

b. Aboriginal Community Controlled Health Services Award 2020;

c. Aged Care Award 2010;

d. Ambulance and Patient Transport Industry Award 2020;

e. Educational Services (Schools) General Staff Award 2020;

[313] *Equal Remuneration Case* (2012) FWAFB 1000 [99].
[314] *Equal Remuneration Case* (2012) FWAFB 1000 [99].
[315] FW Act s 302(3A)(a).
[316] FW Act s 302(3A)(b).
[317] FW Act s 302(3B).
[318] FW Act s 302(3C).
[319] EM [349].
[320] Fair Work Commission, President's statement, Occupational segregation and gender undervaluation (4 November 2022)

f. Health Professionals and Support Services Award 2010;

g. Local Government Industry Award 2020;

h. Medical Practitioners Award 2020;

i. Nurses Award 2020; and

j. Social, Community, Home Care and Disability Services Industry Award 2010.

10.17 The Fair Work Commission has identified the following awards as female-dominated or having a majority of employees as females in the education and training industry (64%):

a. Children's Services Award 2010;

b. Educational Services (Post-Secondary Education) Award 2020;

c. Educational Services (Teachers) Award 2020;

d. Higher Education Industry – Academic Staff – Award 2020;

e. Higher Education Industry – General Staff – Award 2020; and

f. Professional Diving Industry (Recreational) Award 2020.

10.18 The Fair Work Commission has identified the following awards as female-dominated or having a majority of employees as employees in the retail trade industry (57%):

a. Business Equipment Award 2020;

b. Commercial Sales Award 2020;

c. General Retail Industry Award 2020;

d. Hospitality Industry (General) Award 2020;

e. Meat Industry Award 2020;

f. Nursery Award 2020;

g. Pharmacy Industry Award 2020;

h. Seafood Processing Award 2020; and

i. Vehicle Repair, Services and Retail Award 2020.

10.19 The Fair Work Commission has identified the following awards as having a majority of employees as females in the accommodation and food services industry (53%):

a. Fast Food Industry Award 2020;

b. Hospitality Industry (General) Award 2020;

c. Registered and Licensed Clubs Award 2020; and

d. Restaurant Industry Award 2020.

10.20 The Fair Work Commission has also identified the Banking, Finance and Insurance Award 2020 in the financial and insurance services industry as having a majority of female employees (52%).

General Advice

10.21 While equal remuneration orders have not been widely sought in the past, the clear intent of the new provisions is to make it easier for applications to succeed. Employers in female dominated industries (particularly with employees covered by the Awards listed above) should familiarise themselves with these changes and speak with their chamber of commerce or industry association, if they have concerns about being drawn into this process.

Further Guidance

10.22 The Fair Work Ombudsman has produced detailed guidance regarding the new gender pay equity measures that were introduced by the SJBP Act.

Summary of Changes

Before SJBP Act	After SJBP Act
Who can apply for an order?	
Only an employee who would be affected, an employee organisation entitled to represent them, or the Sex Discrimination Commissioner.	The FWC can now also make an order on its own initiative.[321]
What work is considered?	
Only work that is equal or comparable in every respect.[322] Generalised comparisons of work between industries could not be made and that the inevitable differences in pay that arise between employers and across industries were insufficient to justify an equal remuneration order.[323]	The FWC is expressly enabled to take into account comparisons within and between occupations and industries to determine whether work has been undervalued on the basis of gender;[324] may consider whether the work has been historically undervalued on the basis of gender;[325] does not need to only compare work that is similar or compare it with historically male-dominated occupations or industries;[326] and is expressly not required to establish that discrimination on the basis of gender is the explanation for pay discrepancies.[327]

[321] FW Act s 302(3)(a).
[322] *Equal Remuneration Case* (2012) FWAFB 1000 [99].
[323] *Equal Remuneration Case* (2012) FWAFB 1000 [99].
[324] FW Act s 302(3A)(a).
[325] FW Act s 302(3A)(b).
[326] FW Act s 302(3B).
[327] FW Act s 302(3C).

11 Expert Panels

Commencement: 7 December 2022

Highlights

- New expert panels of the FWC will be established to oversee decisions relating to pay equity and the care and community sector.

Changes

11.1 For some time, the Annual Wage Review, which determines the amount by which minimum wages increase each year, has been overseen by an "expert panel". An expert panel is simply a bench of the FWC which is not only comprised of full-time commissioners, but also part-time experts which experience in areas such as economics.

11.2 There will now be a further three new expert panels.[328] They will oversee decisions relating to pay equity and the care and community sector. The FWC has already announced the transfer of some matters to the new experts panels.

General Advice

11.3 Employers in female-dominated industries, such as healthcare, aged care, social services, education, training, retail, as well as in the care and community sector, should familiarise themselves with these changes. It is likely that the establishment of these new expert panels will mean that more applications will be made to the FWC to increase minimum wages in these industries, either through equal remuneration orders or wage increases on the basis of work value reasons.

Further Guidance

11.4 The Fair Work Ombudsman has produced detailed guidance regarding the new gender pay equity measures that were introduced by the SJBP Act.

Summary of Changes

Before SJBP Act	After SJBP Act
There was only one Expert Panel of the FWC — that which oversees the Annual Wage Review.	There will now be an additional three new expert panels, overseeing decisions relating to pay equity and the care and community sector.[329]

[328] FW Act s 617.
[329] FW Act s 617.

12 Abolition of the ABCC

Commencement: 7 December 2022

Highlights

- The ABCC has been abolished and its functions transferred to the FWO.
- Employers in the building and construction industry should familiarise themselves with what powers have transferred to the FWO so that they can understand where complaints should be directed. They should prepare for the possibility of needing to pursue their own enforcement action in the courts.
- Employers in the building and construction industry should expect trade unions to demand the inclusion of matters in enterprise agreements that were previously prohibited under the Building Code.

Changes

12.1 The independent workplace relations watchdog specialised for the building and construction industry, the Australian Building and Construction Commission (**ABCC**), has now been abolished. This means that the Fair Work Ombudsman (**FWO**) is now the sole federal workplace relations regulator.

12.2 In addition to the general repeal of provisions which supported the existence and powers of the ABCC, two other areas of key changes were made. First, all court proceedings in which the Australian Building and Construction Commissioner (**ABC Commissioner**) or an Australian Building and Construction Inspector was a party will now be transferred to the FWO. Any court proceedings currently afoot on behalf of the ABCC will continue, but the FWO will be substituted in as the name of the party and will run the case. Second, by repealing large sections of the *Building and Construction Industry (Improving Productivity) Act 2016* (**BCIIP Act**), there will no longer be higher penalties that apply to participants of the building and construction industry. Instead, those industry participants will be subject to the same offences and penalties that apply to other industries under the FW Act.

12.3 Other changes include the retention of provisions related to the Work Health and Safety Accreditation Scheme and Office of the Federal Safety Commissioner; the forthcoming transfer of functions from the Federal Safety Commissioner to the FWO; and importantly, the transfer of functions of the ABCC to the FWO. The Federal Government has committed to spending $70 million over the next four years to support the transfer of these powers.

12.4 There are numerous key areas in which the FWO will lack the powers previously exercised by the ABCC which assisted in promoting compliance in the building and construction industry. These differences in powers — both information gathering powers and enforcement powers — and its impact are outlined in the tables below.

Differences in Major Information Gathering Powers			
Power	**ABCC**	**FWO**	**Impact**
Power to enter premises	If there is a reasonable belief that there are records or documents relevant to compliance purposes on the premises, or accessible from a computer on the premises. Also if a breach has occurred, is likely to occur, or occurring, even when work is not being performed on the premises. Also if there is a reasonable belief that a person who has information relevant to compliance purposes is at those premises.	Only if there is a reasonable belief that there are records or documents relevant to compliance purposes on the premises, or accessible from a computer on the premises.	The FWO's constrained ability to enter premises to gather information relating to suspected contraventions of industrial laws will mean that those contraventions in the building and construction industry will be harder to prosecute.
Application for examination/FWO notice	Can apply to an AAT presidential member for an examination notice to investigate suspected contraventions of the *Building and Construction Industry (Improving Productivity) Act 2016*, the FW Act, the *Independent Contractors Act 2006* and industrial instruments.	Can apply to an AAT presidential member for a FWO notice only to investigate matters relating to underpayments, unreasonable reductions in amounts owed, unreasonable requirements on employee to spend money, unfair dismissals, bullying, sexual harassment, discrimination, contraventions of the NES or coercion.[330]	The FWO's restricted breadth of matters which can be investigated means that many contraventions, such as those relating to right of entry permits and adverse action, will go unpursued in the building and construction industry.
Requirement to comply with examination/FWO notice	Non-compliance can result in a criminal offence, punishable by up to 6 months imprisonment and or up to a maximum of 30 penalty units.	Non-compliance can result in a civil remedy of up to 600 penalty units.	The penalty for non-compliance with FWO notices being entirely civil and non-criminal will likely lower deterrence in the industry.
Inadmissibility of certain records and documents	Information obtained is inadmissible in criminal proceedings against an individual, unless the crimes are Criminal Code offences relating to the BCIIP Act.	Information obtained is inadmissible in criminal proceedings against an individual.	The inability to use information gathered during investigations for the prosecution of industrial crimes will impede prosecutions.

[330] FW Act s 712AA.

Differences in Major Enforcement Powers			
Power	**ABCC**	**FWO**	**Impact**
Maximum Penalties	$222,000 for bodies corporate and $44,400 for individuals per contravention.	$66,600 for bodies corporate and $13,320 for individuals per contravention.	The CFMEU is likely to be more willing to contravene industrial laws given that, as noted by the High Court in *ABCC v Pattinson* it regards the penalties as "an acceptable cost of doing business'".
Publication of non-compliance	The ABC Commissioner has an express power to publish details of noncompliance with relevant (building) laws (including the name of the building industry participant who has failed to comply) if the ABC Commissioner believes it is in the public interest to do so.	The FWO has no express powers relating to the publication of non-compliance.	Given the abolition of this power, which existed as an additional deterrence measure, there is a risk of greater non-compliance with industrial laws.
Power to intervene in court proceedings	The ABC Commissioner may intervene in the public interest in a civil proceeding before a court in a matter that arises under the BCIIP Act or designated building law and involves a building industry participant or building work.	The Minister (but not the FWO) may intervene in matters under the FW Act if the Minister considers it in the public interest to do so.	The courts will no longer have the benefit of the expertise provided by a specialised building and construction industry body, or even an industrial regulator more generally.
Power to make submissions in FWC proceedings	The ABC Commissioner may intervene or make a submission in a matter before the FWC that arises under the FW Act or the FW Transitional Act if the matter involves a building industry participant or building work.	The Minister (but not the FWO) may make submissions in matters before the FWC if the matter is before a Full Bench and it is in the public interest to do so, or the matter involves public sector employment.	The FWC will no longer have the benefit of the expertise provided by a specialised building and construction industry body. However, the FWC has broad powers to inform itself.
Picketing	Picketing was expressly unlawful under the BCIIP Act with a higher penalty.	Picketing is only unlawful where the FWO can demonstrate that it is unprotected industrial action.	The constraint on the FWO to seek penalties against those engaging in picketing will mean that this common industrial tactic will be less impeded.
Cost Awards	The BCIIP Act enabled successful litigants to obtain cost awards against the other party.	The FW Act generally denies successful litigants from obtaining cost awards.	The inability for the FWO to recoup the significant legal fees spent on promoting industrial compliance will make enforcement more difficult and deterrence weaker.

General Advice

12.5 For employers in the building and construction industry, these are, of course, substantial changes to the workplace relations system. While some functions will be transferred to the FWO and the FWO already possesses many of the powers formerly exercised by the ABCC, the lack of an industry-specific regulator may lead to an increase in industrial activity on construction sites.

12.6 This is compounded by the lower penalties that the FWO can seek against unlawfulness in the building and construction industry, compared with the ABCC. Additionally, although the FWO has many of the powers formerly possessed by the ABCC, the FWO also lacks the strong compulsory examination powers of the ABCC.

12.7 Employers in the building and construction industry should immediately begin to refamiliarise themselves with the provisions of the FW Act that correspond to prohibited behaviour under the *Code for the Tendering and Performance of Building Work 2016* (**Building Code**) or BCIIP Act. For example, employers should become aware that unlike in the BCIIP Act, there is not explicit prohibition on unlawful picketing under the FW Act. Instead, employers will need to show that the unlawful picketing constituted industrial action that was not protected.

12.8 Employers should now become aware that complaints of workplace relations misconduct in the building and construction industry will now need to be made to the FWO, rather than the ABCC. Additionally, these employers should familiarise themselves with the ability of the Australian Competition & Consumer Commission (**ACCC**) to enforce competition laws against organisations that engage in behaviour such as collective boycotts. For example, the ACCC may be of assistance where organisations threaten industrial action in response to the engagement of particular contractors, such as only those with enterprise agreements or unionised workforces.[331]

12.9 Employers in the building and construction industry should also prepare for the possibility of needing to pursue their own enforcement action in the courts, in anticipation of a FWO that has its resources more spread and constrained. It cannot be assumed that the FWO will be able to maintain the level of industry enforcement as was carried out by the ABCC.

12.10 During bargaining, employers in the building and construction industry should expect trade unions to demand the inclusion of matters that were previously prohibited under the Building Code, and plan accordingly. For example, enterprise agreements in the building and construction industry may now be able to include clauses that impose limits on the rights of the employer to manage its business or improve productivity. Employers should therefore give greater consideration to how they intend to navigate these demands and the bargaining process at large.

Further Guidance

12.11 The ABCC published an E-Alert following its abolition. The Fair Work Ombudsman has also produced some guidance regarding the changes.

[331] See, eg, *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd (No 2)* [2022] FCA 1007.

Summary of Changes

Before SJBP Act	After SJBP Act
The building and construction industry had its own specialised and independent workplace relations regulator — the Australian Building and Construction Commission.	The ABCC has been abolished and the FWO will subsume its responsibilities, leaving now specialised regulator for the building and construction industry. There will no longer be higher penalties and offences available for unlawfulness in the industry.

13 Abolition of the ROC

Commencement: 6 June 2023

Highlights

- The ROC has been abolished and its functions transferred to the General Manager of the FWC.
- While Registered Organisations continue to be bound by the same compliance and reporting obligations, they should use transfer as an opportunity to ensure they are well informed of their current obligations.

Changes

13.1 The regulator of registered organisations, the Registered Organisations Commission (**ROC**), will now be abolished. Broadly, the functions of the Registered Organisations Commissioner will be transferred to the General Manager of the FWC.

13.2 While the FWC is already responsible for the registration of organisations, amalgamation of organisations, right of entry permits for registered organisation officials, workplace health and safety permits and more, it will now subsume the ROC's former responsibilities as well. These include matters relating to annual returns, elections, financial reporting, governance and disclosure obligations.

13.3 Registered organisations have obligations under the *Fair Work (Registered Organisations) Act 2009*, the breach of which can result in financial penalties, to:

a. keep records of its members, lists of offices, lists of officeholders and other prescribed records,[332] and lodge them annually with the ROC;[333]

b. lodge financial statements with the ROC after each financial year outlining loans, grant and donations made exceeding $1000;[334]

c. act with care and diligence,[335] in good faith,[336] not use a position improperly,[337] or improperly misuse information for personal gain or to cause detriment to others (obligations on the officers of registered organisations);[338]

d. if designated a reporting unit, provide certain information to the ROC on application,[339] prepare financial statements,[340] be audited etc; and

e. meet other requirements.[341]

[332] *Fair Work (Registered Organisations) Act 2009* s 230.
[333] *Fair Work (Registered Organisations) Act 2009* s 233.
[334] *Fair Work (Registered Organisations) Act 2009* s 237.
[335] *Fair Work (Registered Organisations) Act 2009* s 285.
[336] *Fair Work (Registered Organisations) Act 2009* s 286.
[337] *Fair Work (Registered Organisations) Act 2009* s 287.
[338] *Fair Work (Registered Organisations) Act 2009* s 288.
[339] *Fair Work (Registered Organisations) Act 2009* s 272.
[340] *Fair Work (Registered Organisations) Act 2009* s 254.
[341] See generally *Fair Work (Registered Organisations) Act 2009* and *Fair Work (Registered Organisations) Regulations 2009*.

13.4 These obligations will remain largely unchanged. However, they will now be managed by the FWC.

General Advice

13.5 Those organisations who are registered, these changes serve as an important reminder to reconsider whether all compliance obligations are being met.

Further Guidance

13.6 The Registered Organisations Commission has released a brief overview of the changes following its forthcoming abolition.

Summary of Changes

Before SJBP Act	After SJBP Act
Registered organisations were regulated by the Registered Organisations Commission.	The ROC has been abolished and its functions transferred to the General Manager of the FWC.

14 Establishment of the National Construction Industry Forum

Commencement: 1 July 2023

Highlights

- The National Construction Industry Forum will be established.
- Employers in the building and construction industry should direct any questions about this body to their relevant industry association who may be appointed members of the National Construction Industry Forum.

Changes

14.1 The National Construction Industry Forum (**NCIF**) is a newly established body that will advise the Federal Government on matters relating to the building and construction industry.[342] These matters may include workplace relations, skills, training, safety, productivity, diversity, gender equity and industry culture.[343]

14.2 The NCIF will be comprised of the Minister for Workplace Relations, the Infrastructure Minister and the Industry Minister. The Minister for Workplace Relations must also appoint an equal number of employee and employer representatives in the industry.

General Advice

14.3 Employers in the building and construction industry should be aware that the NCIF will not, and is not intended to, replace any of the functions of the ABCC. The purpose of the body is purely advisory.

14.4 They should contact ACCI or their relevant industry association who may be appointed as members.

Further Guidance

14.5 The DEWR has published a fact sheet discussing the National Construction Industry Forum.

Summary of Changes

Before SJBP Act	After SJBP Act
There was no specialised public body for providing advice to government about the building and construction industry.	The National Construction Industry Forum has been newly established which is a body that will advise the Federal Government on matters relating to the building and construction industry.[344]

[342] FW Act s 789GZD(1).
[343] FW Act s 789GZD(2).
[344] FW Act ss 789GZC and 789GZD.

15 New Statutory Objects

Commencement: 7 December 2022

Highlights

- Job security and gender pay equity are now objects of the FW Act.

Changes

15.1 The objects of the FW Act have been amended to include the promotion of job security and gender equity.[345] Similarly, the modern awards objective, which guides the FWC's decisions with respect to changes to modern awards, has been amended to include consideration of the need to improve access to secure work achieve gender equality.[346] Gender equality has also been included as an additional consideration under the minimum wages objective.[347]

15.2 Courts are required to interpret legislation in a way that best achieves its purposes or objects.[348] This means that when courts are interpreting an unclear provision in the FW Act, the interpretation that would best promote job security and gender equity may be favoured over interpretations that would harm or detract from these objectives. However, this does not mean that the courts can attach any particular weight to these new objectives; they must be considered alongside those already in place, such as "acknowledging the special circumstances of small and medium-sized businesses".[349]

15.3 The modern awards objective and minimum wage objective essentially provide a set of criteria which the FWC must consider when making decisions that amend modern awards and increase the level of minimum wages. As with the objects of the FW Act, while the new considerations of secure work and gender equality will need to be considered by the FWC when making decisions, they will need to be weighed alongside the existing criteria and are unlikely to be given any particular primacy.

General Advice

15.4 The impact of these changes is yet to be seen. They will impact the decisions of the FWC in highly disputed matters or the courts where there is ambiguity in the provisions of the FW Act.

[345] FW Act s 3(a).
[346] FW Act s 134(1)(aa)-(ab).
[347] FW Act s 284(1)(aa).
[348] *Acts Interpretation Act 1901* s 15AA.
[349] FW Act s 3(g).

15.5 The introduction of these the new considerations under the modern awards objective may lead to new applications for variations of modern awards to ensure that these considerations are satisfied. In particular, employers in female-dominated industries should strengthen their relationships with their chambers of commerce and industry associations, read the section of this guide on equal remuneration, and consider what evidence they might be able to provide to counter claims for pay and conditions under their modern award that are more burdensome on employers.

Further Guidance

15.6 The DEWR has produced a fact sheet which explains the changes to the objects of the FW Act.

Summary of Changes

Before SJBP Act	After SJBP Act
The objects of the FW Act, minimum wage objective and modern awards objective, did not mention job security or gender pay equity.	The objects of the FW Act, minimum wage objective and modern awards objective, now expressly refer to job security and gender pay equity.[350]

[350] FW Act ss 3, 134 and 284.

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and Industry