

# RECENT CHANGES TO ENTERPRISE AGREEMENTS AND BARGAINING

The [Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Bill 2022](#) received Royal Assent on 6 December 2022, introducing a number of significant changes to the Fair Work Act 2009 (Cth) (and other associated legislation) with respect to enterprise bargaining and enterprise agreements. Key changes (including when they will commence) include:

Change	Details	Commencement
<b>Initiating bargaining</b>	<p>It is now much easier for unions or employees to initiate bargaining.</p> <p>Previously, bargaining only commenced where agreed to or initiated by the employer, or the Fair Work Commission (<b>FWC</b>) made a Majority Support Determination requiring the employer to bargain.</p> <p>Now, where a single enterprise agreement has passed its nominal term (but no more than 5 years have passed since this occurred), a bargaining representative for an employee (i.e. a union) can initiate bargaining simply by making a request to the employer to bargain for the proposed new agreement.</p>	7 December 2022
<b>Termination of enterprise agreements</b>	<p>It is now harder for employers to unilaterally terminate enterprise agreements which have passed their nominal expiry date.</p> <p>Previously, where an employer applied unilaterally to the FWC to terminate an agreement that had passed its nominal expiry date, the FWC could order such a termination where it was not contrary to the public interest to do so.</p> <p>Now, the FWC will only terminate agreements which have passed their nominal expiry date where the continued operation of the agreement was unfair on employees covered, the agreement does not cover any employees, or the continued operation of the agreement poses a threat to the viability of the business, and the termination of the agreement may reduce potential redundancies (provided the employer guarantees it will preserve termination entitlements).</p>	7 December 2022
<b>Sunsetting of zombie agreements</b>	<p>Agreements made prior to the Fair Work Act or during the bridging period (i.e. zombie agreements) will automatically terminate by 7 December 2023 (unless extended by application to the FWC).</p> <p>Employers covered by zombie agreements will be required to give notice to employees that the agreement will terminate automatically at least 6 months prior to the zombie agreement automatically terminating.</p>	7 December 2022 (although agreements will not automatically sunset until 7 December 2023)

<p><b>Bargaining disputes</b></p>	<p>The FWC will have greater power to intervene and resolve bargaining disputes.</p> <p>Currently, the FWC can only make a bargaining related workplace determination (i.e. arbitrate the terms of an enterprise agreement) where a serious breach declaration had been issued and the parties were unable to resolve all outstanding matters within 21 days.</p> <p>Now, the FWC can make an intractable bargaining declaration where bargaining has been protracted. The FWC will make such a declaration where bargaining has occurred for the 'minimum bargaining period' (being the later of 9 months after the nominal expiry of an existing agreement, or 9 months after bargaining commenced) and there is no reasonable prospects of agreement being reached if the FWC does not make the declaration. If the parties are unable to settle the matters at issue, the FWC can then make an intractable bargaining workplace determination (i.e. determine the terms of the enterprise agreement by arbitration). In other words, there is a much lower bar for the FWC to be able to arbitrate bargaining disputes.</p>	<p>7 June 2023 or earlier by proclamation</p>
<p><b>Multi-employer agreements</b></p>	<p>The recent changes to the Fair Work Act significantly expand the scope for multi-employer enterprise agreements. <b>We will provide a separate more in-depth update regarding these changes.</b></p> <p>At a high level, the changes mean that employers with "clearly identifiable common interests" can bargain together or upon application by a union be ordered to bargain together.</p> <p>The FWC will have limited power to refuse such an order.</p>	<p>7 June 2023 or earlier by proclamation</p>
<p><b>Industrial action</b></p>	<p>Protected industrial action will be able to be taken in relation to a multi-enterprise agreement.</p> <p>Although a protected action ballot order application may be made in relation to a multi-enterprise agreement, the FWC will only grant a protected action ballot order in respect of an employer where the requisite employees of that employer vote in support of that protected action (i.e. each employer is treated independently).</p> <p>When making a protected action ballot order, the FWC must also now direct the parties to attend a conference for the purposes of mediation or conciliation. The conference will be conducted by a FWC member (or delegate) and will be held prior to the protected action ballot occurring.</p>	<p>7 June 2023 or earlier by proclamation</p>
<p><b>Better off overall test</b></p>	<p>The changes will mean the BOOT will be relaxed. Rather than a line-by-line analysis when undertaking the BOOT, the FWC will instead conduct a global assessment.</p> <p>When conducting the BOOT, the FWC will also be limited to considering only foreseeable patterns of work, kinds of work or types of employment. Presently, consideration of hypothetical employees and kinds of work by the FWC can cause agreements to fail the BOOT.</p> <p>The FWC will be able to amend proposed agreements itself to enable it to pass the BOOT, rather than employers needing to provide undertakings or employees being required to vote again.</p>	<p>7 June 2023 or earlier by proclamation</p>

	Employers, employees or unions covered by an agreement will be able to apply to the FWC during the life of the agreement for the BOOT to be re-conducted where there has been a change to patterns of work or types of employment that was not contemplated during the original approval process.	
<b>Relaxation of procedural requirements</b>	Many of the prescriptive procedural requirements for the enterprise agreement process will be relaxed. Instead, the FWC will conduct a broader 'genuinely agreed' test.	7 June 2023 or earlier by proclamation

### Add to your to do list!

If you have enterprise agreements operating at your workplace, you should urgently review your current industrial relations strategy to have regard to these significant changes.

If you don't have enterprise agreements operating at your workplace, you should also review the implications of these changes on your industrial arrangements.

For more information, please contact



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