



FAIR FARMS

FOSTERING FAIR EMPLOYMENT PRACTICES
IN THE AUSTRALIAN HORTICULTURE INDUSTRY



Changes to Fair Work Legislation

Impacts for Employers

Agenda Topics

- ▶ Overview - how did we get here
- ▶ Fixed Term Contract Restrictions
- ▶ Flexible Work Provisions
- ▶ Changes to Requirements – Sexual Harassment
- ▶ Changes to Requirements – Parental Leave
- ▶ New Rules for Enterprise Bargaining
- ▶ Questions

How did we get here ??

December 2022:

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 passed both houses of Parliament.

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the “Act”) enacted.

SECURE**JOBS**
BETTER**PAY**



Key Changes and effective dates

- Fixed Term Contracts 6/12/23
- Flexible Work Provisions 6/6/23
- Pay Equality 7/12/22
- Prohibition on Pay Secrecy 7/12/22
- Unpaid Parental Leave 6/6/23
- Discrimination – Sexual Harassment 6/3/2023
- Enterprise Bargaining Agreements 7/12/22

▶ Key Dates - Commences 6th December 2023 (or earlier)

FWA amended to limit the use of fixed term contracts for the same role :

- ▶ Beyond two years (including renewals) or
- ▶ For two consecutive contracts, (e.g. 6 months x 2)

which ever is the shorter.

Amendments apply only to new contracts after 6th December 2023, however contracts entered into prior to the commencement of the legislation will be taken into account in assessing if there have been more than 2 contracts.

Several Exceptions :

This means fixed term contracts will continue to be available (without restriction) to:

- ✓ Apprentices and trainees
- ✓ Seasonal work (such as a harvest)
- ✓ Temporarily replacing another employee on extended leave (such as workers' compensation leave)

Fixed Term Contract Restrictions

Employers who do not comply with these restrictions :

- a) Run the risk of an employee being found to be a permanent employee
- b) May be subject to civil penalties with the breach of these restrictions
- b) When the time comes, an Employer must provide Fixed Term Information Statement to Employees to discharge Employer obligations.

What do you need to know and do ?

▶ Key Dates - Commences 6th June 2023

- ▶ Designed to strengthen an employee's right to request flexible working arrangements and negotiate workplace flexibilities
- ▶ The current eligibility requirements to request a flexible working arrangement under the FW Act S65 will remain the same
- ▶ However, the amendment to the Act extends eligibility to include:
 - ▶ • A pregnant employee; and
 - ▶ • An employee, or member of their immediate family or household, who is experiencing family and domestic violence

Right to Request Flexible Work

Employees (other than a casual employee) who have worked with the same employer for at least 12 months can request flexible working arrangements if they:

- ▶ are the parent, or have responsibility for the care, of a child who is school aged or younger
- ▶ are a Carer (under the Carer Recognition Act 2010)
- ▶ have a disability
- ▶ are 55 or older
- ▶ are experiencing family or domestic violence
- ▶ provide care or support to a member of their household or immediate family who requires care and support because of family or domestic violence, or
- ▶ are pregnant

Who can Request Flexible Work

Casual employees can make a request if:

- ▶ they've been working for the same employer regularly and systematically for at least 12 months
- ▶ there's a reasonable expectation of continuing work with the employer on a regular and systematic basis.

Who can Request Flexible Work

....

Meet with the Employee to discuss their request and either

- a) grant request in full
- b) discuss alternative arrangements which can be accommodated
- c) confirm changes in writing OR

If Employer refuses request, provide written explanation and outline the reasonable business grounds for the refusal including :

- what changes would be required to accommodate the request
- why as the employer you are unable to accommodate those changes

If you accept or refuse request you must provide written response within 21 days
S65(5A) outlines examples of reasonable business grounds

Flexible Work – What does this mean ?



As of 6th June 2023 the Employee will be able to lodge a dispute with the FWC about the Employers refusal of the flexible working arrangement request



Provide written response to the Employee within 21 days



Keep written validation and reasoning behind decision



Check your Flexible Working Arrangement Policies and Procedures

What do you need to know and do ?

▶ Key Dates - Commences 6th March 2023

FWA is amended in various ways :

- 1) There is the introduction of the **positive duty** to prevent sexual harassment at work, and
- 2) A new dispute resolution function for the FWC

Sexual Harassment in connection with work is PROHIBITED.

This amendment now protects and covers :

- ▶ Worker
- ▶ Potential Worker
- ▶ PCBU

Employers are required to take steps to ensure sexual harassment does not occur in the workplace

Where an employer and an employee cannot resolve a relevant dispute through conciliation or mediation, the Fair Work Commission will be empowered to settle the dispute, which may include compensation.

Changes to Requirements Sexual Harassment

REVIEW	Review your workplace policies and ensure that they are comprehensive, relevant and current
IMPLEMENTED	IMPLEMENT these policies through education and training to ALL employees and others who may enter the workplace such as contractors
ENSURE	ENSURE the business has up to date processes and procedures for complaints and workplace investigations handling
MONITOR	MONITOR these policies, procedures, processes are thorough, well documented and training of these processes is also captured

What do you need to know and do ?

▶ Key Dates - Commences 6th June 2023

Current :

12 months unpaid parental leave can request extension of an additional 12 months (unless their partner has already taken 12 months of leave)

Amendment places an obligation on Employers to discuss the extension request with the Employee.

- ▶ Request can be refused on “reasonable business grounds”
- ▶ Reasons must be provided in writing
- ▶ Where an alternate time period is agreed, that also must be in writing and provided to the Employee

Changes to Requirements Parental Leave

Reasonable business grounds as per the Act have not changed, however the amendments provide further guidance, including, that an employer can refuse the extension request because:

- ❑ that the extension of the period of unpaid parental leave requested by the employee would be too costly for the employer;
- ❑ There is no capacity to change the working arrangements of other employees
- ❑ It is impractical to recruit new or replacement employees
- ❑ The extension would be likely to result in a significant loss in efficiency or productivity
- ❑ It would likely have a significant negative impact on customer service

What does this mean ?



If the dispute cannot be resolved at the workplace, the FWC can deal with the “request for an extension of parental leave” dispute via :

Conciliation

Mediation

Mandatory arbitration



This may lead to a binding outcome determined by the FWC, which had not been contemplated by the business or employee.

What do you need to know ?

01

Review your workplace policies and ensure that they are comprehensive, relevant and current

02

Ensure that all relevant steps in the process are covered and documented for an extension request

03

Educate Employees in these policies, and ensure that you keep accurate leave records, and notes of any informal discussions pertaining to these requests

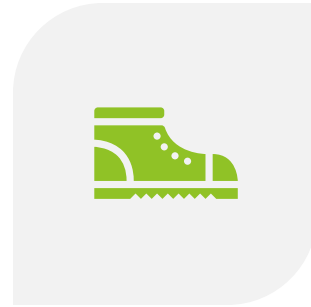
What do you need to do ?



TERMINATION OF
ENTERPRISE AGREEMENTS



MULTI-EMPLOYER
BARGAINING



WHAT IS THE BOOT



SUNSETTING OF ZOMBIE
AGREEMENTS

New Rules - Enterprise Bargaining

Process for terminating Enterprise Agreements after nominal expiry date

Changes took effect from 7th December 2022

- ▶ Changes apply to applications already before the Commission and to new applications.

Do any of the following apply * ?

- ▶ continued operation of the agreement **would be unfair for the employees**
- ▶ the agreement doesn't or is not unlikely to cover any employees OR
- ▶ **all** of the following apply:
 - ▶ the continued operation of the agreement poses a significant threat to the viability of the business
 - ▶ terminating the agreement is expected to reduce the risk of terminations of employment due to redundancy, insolvency or bankruptcy
 - ▶ if the agreement has terms about termination entitlements, the employer or employers it covers guarantees the termination entitlements to the Commission.

Termination of Enterprise Agreements

▶ Key Dates – Commences 6th June 2023

- Single-enterprise agreements. Agreements made between a single employer and their employees.
- Multi-enterprise agreements. Agreements made between a group of employees and multiple employers.

Multi-Employer Bargaining now to be renamed Cooperative Workplaces Bargaining Stream

- ▶ Voluntary Multi-Employer Bargaining stream must include
 - ▶ Some of the employees involved must be represented by a registered Employee Organisation and
 - ▶ The proposed EA must be approved at the workplace level by majority vote of each employers employees; and
 - ▶ The proposed EA must pass the BOOT

Single Enterprise & Cooperative Workplaces Bargaining Stream

- ▶ **Key Dates – Commences 6th June 2023**

FWC to be satisfied that under each new proposed Enterprise Agreement, each employee covered is better off overall vs modern award coverage

- ▶ The Amendment Act simplifies the operation of the BOOT :
 - ▶ Clarifies the BOOT is a global assessment
 - ▶ Clarifies that when applying the BOOT, the FWC is not required to undertake a line by-line comparison
 - ▶ Requires the FWC to only consider: patterns of work; or types of employment that are reasonably foreseeable as part of the BOOT

What is the BOOT ?

CURRENT ACTIVE
AGREEMENTS

ZOMBIE
AGREEMENTS

Agreements

Zombie Agreements

‘Zombie agreement’ is the name given to certain agreements made before the *Fair Work Act 2009* commenced (or fully commenced) **which continue to operate.**

These could cover collective agreements, Australian Workplace Agreements, Individual Transitional Employment Agreements

Prior to 1 January 2010

► **Key Dates – Commenced 6th December 2022**

Sunseting Covers :

All agreements made before 1 January 2010

- Enterprise Agreements made during the bridging period between 1 July 2009 and 31 December 2009

In very limited circumstances application to extend the Sunseting Date can be made to the FWC - these applications are highly conditional and will be required to meet the BOOT

Sunseting of Zombie Agreements

What do you need to do ?

By **6th June 2023** you **MUST** :

- ❑ Advise your Employees **in writing** that the current agreement is going to terminate at midnight on **6th December 2023, or**
- ❑ If you are intending on applying to the FWC for an extension **also** advise your Employees in writing of your intentions to do so by **6th June 2023**
- ❑ FWC will publish its decision on the FWC website
- ❑ Failure to properly notify Employees, the Employer then may face penalties

Sunsetting of Zombie Agreements

Sunseting of Zombie Agreements

If Employers do not seek an extension, this will mean that Employers with Zombie Agreements will be required to comply via :

- ▶ a) Adopting the relevant Modern Award/s or covering your Employees
- ▶ b) Negotiate a new Enterprise Agreement with your workforce

If you do **NOTHING**, your Zombie Agreement will terminate at midnight on the 6th December 2022

This means your business will automatically revert back to the relevant Award which covers your Employees as of 7th December 2023

There are things you can do to prepare :



Complete a comparison
of your Zombie
Agreement with the
current Award/s



List the individual provisions
side by side so you can
conduct a cost analysis : EA
vs Horticulture Award

Maximum Hours Worked /
Overtime Calculations

Public Holiday Substitutions /
Flexibility Arrangements



Work out where the gap is
and determine the cost or
benefit to the business
including: pay rates /
overtime rates / salaries etc



Determine new EA or the
Award will provide the best
Nett gain for the business

Zombie Agreements - How to Decide ?

Zombie Agreements - What to Do Now ?

Make your decision : EA or Award

- ▶ **If decision is move ahead with the Award :**
 - ▶ Seek specialist advice to ensure compliance with the termination process
 - ▶ Internally prepare for the termination of the Zombie Agreement
 - ▶ Base this on your payroll function and pay cycle for easier administration
 - ▶ Obtain details of relevant and current Award rates pay Classification Levels
 - ▶ Review documentation / contracts of employment etc and update with relevant Award details and Classifications
- ▶ **If decision is move ahead with a new Enterprise Agreement :**
 - ▶ Seek specialist advice to ensure compliance with the process

Seek Professional Advice

Seek Advice

- Full-time, part-time and casual employees will be able to access 10 days of paid family and domestic violence leave in a 12-month period.
- It is not pro-rated for part-time or casual employees.
- The full 10-day leave entitlement will be available upfront. It won't accumulate from year to year if it's not used.
- The leave will be available from:
 - 1 February 2023, for employees of non-small business employers (employers with 15 or more employees on 1 February 2023)
 - 1 August 2023, for employees of [small business employers](#) (employers with less than 15 employees on 1 February 2023).
- The leave renews every year on each employee's work anniversary. It doesn't accumulate from year to year if it isn't used.

Domestic Violence Leave

Key Dates : Commenced 7th December 2022

Employees and future employees have the right to:

- share (or not share) information about:
 - their pay
 - their employment terms and conditions that would be needed to work out their pay, such as their hours of work
- ask other employees (with the same or a different employer) about their:
 - pay
 - employment terms and conditions that would be needed to work out their pay, such as their hours of work.
- ▶ Employees can't be forced to give this information to another employee if they don't want to and can also exercise these rights even after they leave their employment.
- ▶ Employers can't take [adverse action](#) against an existing or future employee:
 - ▶ because of these rights, or to prevent an existing or future employee from exercising these rights

Pay Secrecy



Key Dates

SECURE JOBS BETTER PAY

key start dates

2022

7 December

- ✓ Changing the objectives in the Fair Work Act to include promoting:
 - job security
 - gender equality
- ✓ Prohibiting pay secrecy
- ✓ New protected attributes under the Fair Work Act:
 - breastfeeding
 - gender identity
 - intersex status
- ✓ Sunsetting of 'zombie' agreements
- ✓ Fair Work Commission has powers to correct errors in enterprise agreements
- ✓ Changes to how bargaining can be started through the Fair Work Commission
- ✓ Updates to rules for agreements to allow the Fair Work Commission to terminate an agreement after its nominal expiry date

2023

7 January

- ✓ Job advertisements can't include pay rates that would breach:
 - the Fair Work Act, or
 - a fair work instrument (such as an award or enterprise agreement)

6 February

- ✓ Abolition of the Australian Building and Construction Commission (ABCC)

6 March

- ✓ Prohibition of sexual harassment in the workplace
- ✓ Creation of 2 expert panels at the Fair Work Commission to focus on pay equity and the care and community sector

6 June

- ✓ Changes to agreement making
- ✓ Increased access to multi-employer bargaining through:
 - single-interest bargaining
 - supported bargaining
 - cooperative bargaining
- ✓ Changes to extending unpaid parental leave, including giving the Fair Work Commission the power to deal with disputes
- ✓ More employees being able to access flexible working arrangements
- ✓ Abolition of the Registered Organisations Commission (ROC), with its functions moving to the Fair Work Commission

1 July

- ✓ Creation of the National Construction Industry Forum
- ✓ Increase in monetary cap for recovering unpaid entitlements via the small claims process

6 December

- ✓ Limiting the length of fixed term contracts, with the Fair Work Commission having powers to deal with disputes
- ✓ Requirement to give Fixed Term Contract Information Statement



Fair Work
OMBUDSMAN



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QUESTIONS?

Fair Farms in 2023

Monthly Webinars Last Wednesday of the month at 12 noon

- Registration link emailed to members – check FF website
- Will cover 1-2 important/topical/relevant matters each time
- Growers can propose topics/issues of specific interest/need

Fair Farms Essentials Workshops – Australia-wide

- Modern Slavery in Horticulture;
- Working with Labour Hire Providers;
- Employing OS workers – obligations and responsibilities
- Regional issue/s tbc

Conferences

- 17 – 19 May 2023 – Banana Congress, Cairns
- 22 – 25 May 2023 – Northern Future Foods, Darwin
- 05 – 07 June 2023 – Hort Connections, Adelaide

**Thank you
for your time
today.**

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