



Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 – Fixed Term Contracts

On 2 December 2022, the [Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Act 2022](#) (Cth) (**Amendment Act**) was passed by the Commonwealth Parliament and received Royal Assent on 6 December 2022.

The Amendment Act introduces major changes to the Fair Work Act 2009 (FW Act) including significant restrictions on the use of fixed term contracts including:

- Limiting the use of fixed term contracts for the same role beyond two years (including renewals) or two consecutive contracts - whichever is shorter, subject to certain exceptions.
- The requirement for employers to provide a 'Fixed Term Contract Information Statement' to all employees entering a fixed term contract. Failure to do so gives rise to a civil penalty.
- Where a fixed term contract is made in breach of the new provisions, the employee would be considered a permanent employee and the expiry date of the fixed term contract would be of no effect.

The changes are scheduled to commence on 6 December 2023, or an earlier date to be fixed by proclamation.

This Summary provides an overview to the new restrictions on the use of fixed term contracts.

Limitation on the use of fixed term contracts

The Amendment Act amends the FW Act to limit the use of fixed term contracts:

- for a period greater than two years; or
- in the case of renewable contracts –
 - where the contract can be renewed so that an employee is employed for more than two years; or
 - the contract provides for an option or right to extend or renew the contract more than once.
- the employee is employed under consecutive contracts in certain identified circumstances (such as for a period greater than 2 years).

These restrictions do not apply to casual employees. If these rules are breached, the contract will still be valid, except for the term of the contract that provides for its expiry on a set date.

For the purposes of the Amendment Act, a fixed term contract includes, "...a contract of employment that includes a term that provides that the contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period)".

Exceptions

A range of exceptions are available to allow fixed term contracts beyond these limits, including where the employee is engaged under the contract:

- to perform only a distinct and identifiable task involving specialised skills;
- in relation to a training arrangement;
- to undertake essential work during a peak demand period; or
- to undertake work during emergency circumstances or during a temporary absence of another employee. Further exceptions include:
- if the amount of the employee's earnings under the contract is above the high income threshold for that year (currently \$162,000) in the year the contract is entered into;
- where the contract relates to a position for the performance of work that:
 - is funded in whole or in part by government funding or of a kind prescribed by the FW Regulations; or the funding is payable for a period of more than 2 years; and
 - there are no reasonable prospects that the funding will be renewed after the end of that period;
- a contract that relates to a governance position that has a time limit under the governing rules of a corporation or association of persons; or
- where a modern award that covers the employee includes a term that permits the contract.

What are consecutive contracts?

Under the Amendment Act a consecutive contract is a contract that comes into effect after another contract in the following circumstances:

- The previous contract included a term that provided that the contract would terminate at the end of an identifiable period (this also includes any contract that includes terms that allow for the termination of the contract before the end of the identifiable period); and
- The previous contract was for the employee to perform the same, or substantially similar, work for the person as the employee is required to perform; and
- There is substantial continuity of the employment relationship between the person and employee during the period between the previous contract terminating and the current contract coming into effect; and
- Any of the following apply:
 - The sum of the period for which the previous contract was in effect and the identifiable period for the current contract is greater than two years.
 - The current contract contains an option for renewal or extension.
 - The previous contract contained an option for extension that has been exercised.
 - The previous contract came into effect after another contract that included a term that provided that the contract would terminate at the end of an identifiable period, that was for the same work, or substantially similar work, and there was substantial continuity of the employment relationship between the person and the employee during the period between the initial contract terminating and the previous contract coming into effect.

Do the changes affect maximum term contracts?

Many employers prefer to engage employees under contracts of employment which provide a specific expiry date, but also contain notice provisions allowing the employer or employee to terminate the contract before the expiry date. These forms of contracts are often called “maximum term” or “outer limit” contracts.

The Amendment Act makes it clear that maximum term contracts are captured by the new fixed term contract laws by including any contract that contains any other terms that provide for circumstances in which it may be terminated before completion of the fixed term period.

Fixed Term Information Statement

Employers will be required to provide a Fixed Term Contract Information Statement (Fixed Term Statement) to all employees entering a fixed term contract. This obligation extends to employees who may otherwise fall into one or more of the exceptions to the limitations on fixed-term contracts set out above.

The Fixed Term Statement will be developed by the Fair Work Ombudsman and is yet to be released. This document will need to be provided to all new fixed-term contract employees, in addition to the Fair Work Information Statement.

What happens if a contract contains a prohibited term

The term of the contract that provides for its expiry on a set date which is in contravention of the new requirements would be of no effect, but the terms of the contract otherwise remain valid.

If a fixed term contract is made in breach of the new provisions, the employee is to be considered a permanent employee. The employee would retain the benefit of the terms and conditions of their contract while gaining access to relevant safety net provisions, including:

- Applicable entitlements to notice of termination and redundancy payments, either through the NES or any relevant industrial instrument (such as an enterprise agreement), calculated from the start of the employment relationship; and
- access to unfair dismissal proceedings.

The Amendment Act also contains anti-avoidance provisions. For example, an employer must not attempt to avoid any right or prohibition by:

- terminating an employee’s employment for a period;
- delay re-engaging an employee for a period; or
- changing the nature of the work or tasks the employee is required to perform or otherwise alter the employment relationship. The anti-avoidance provisions apply in addition to the FW Act’s adverse action protections.

Dealing with disputes

If a dispute about a fixed term contract arises that cannot be resolved at the workplace level, the FWC is empowered to resolve the dispute via conciliation, mediation, or consent arbitration.

In addition, the Federal Circuit and Family Court of Australia and Magistrates Courts would be empowered to deal with disputes under the small claims procedure.

When do these changes come into effect?

The changes will commence from 6 December 2023, or an earlier date to be fixed by proclamation.

The changes to fixed term contracts only apply to new contracts entered into after the commencement date. However, any contract that was in place prior to the commencement would be caught by the new provisions, if an employer entered into a subsequent contract after that contract ended, and both contracts were longer than two years or included an option for renewal.

What should Growers do?

Workforce planning and contract template reviews should be being considered now.

Any Growers that have staff on fixed term contracts are encouraged to:

- review their current practices and make sure they are compliant with the changes introduced by the Amendment Act.
- familiarise themselves with the exceptions to the limitations of fixed term contracts and consider if they apply to the business or specific employees.
- make sure there is a genuine operational reason for engaging the employee on a fixed term contract (a reason which does not involve the avoidance of unfair dismissal laws) which is fully explained in any contract.

The new provisions might also apply to labour hire assignments and the employers of labour hire staff, so growers may also need to consider these provisions in the context of the labour provided by and relied upon by labour hire providers and engage in appropriate management and workforce planning discussions.