



## *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* – Initiating single-enterprise bargaining & termination of enterprise agreements

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**) and other laws, particularly in relation to enterprise bargaining

Among other changes, the Amendment Act introduces changes to the Fair Work Act 2009 (**FW Act**) in relation to the processes of initiating bargaining and to the test for the termination of a nominally expired enterprise agreement where the employer has not obtained agreement

This summary provides an overview of changes to initiating single enterprise bargaining and the termination of enterprise agreements.

**These changes took effect from 7 December 2022.**

### Initiating single-enterprise bargaining

#### New method to initiate bargaining for single-enterprise agreements

The FW Act now enables a bargaining representative for an employee (generally a union) to initiate bargaining for a single-enterprise agreement to replace an expired enterprise agreement by making a written request to the employer.

Previously, where a union was seeking to make a single-enterprise agreement with an employer, the union was generally required to either obtain the agreement of the employer or make an application to the Fair Work Commission (**FWC**) for a majority support determination, where the employer had not agreed to bargain. This required the representative to demonstrate that a majority of employees to be covered by the agreement wanted to bargain, usually via a secret ballot, survey, written statements or a petition.

From 7 December 2022, a bargaining representative can make a written request to start bargaining where:

- the proposed agreement will replace an earlier single-enterprise agreement that has passed its nominal expiry date; and
- the earlier agreement has not passed its nominal expiry date by more than 5 years; and
- the earlier agreement was not a single interest employer agreement (a type of multi-enterprise agreement introduced by the Amendment Act); and
- the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement.

If the employer refuses to bargain in these circumstances, the bargaining representative can apply to the FWC for bargaining orders.

The new provisions do not apply if a single interest employer authorisation applied to the earlier agreement.

### Can unions still seek majority support determinations or consent from employers?

This new method of initiating bargaining by request is in addition to the existing methods. Unions and employees still have the option to seek consent from an employer or a majority support determination to start bargaining.

### When did these changes come into effect?

These changes took effect from 7 December 2022.

### What should employers/growers do?

Employers/growers covered by an enterprise agreement which has expired in the past 5 years (or is soon to expire) are encouraged to:

- Prepare for the possibility that the relevant union can require an employer to start bargaining with no warning beyond a written notification, even where there is little or no interest from the majority of affected employees.
- Consider whether it would be beneficial to start bargaining with employees for a new enterprise agreement to replace the earlier agreement before the multi-employer bargaining provisions of the Amendment Act commence (which will be 6 June 2023 unless the Minister proclaims an earlier date).

## Termination of enterprise agreements

### Changes to termination of enterprise agreements after their nominal expiry date

The Amendment Act implements a new test to be applied when a party seeks to terminate an enterprise agreement after its nominal expiry date.

The ability of any employer to obtain the termination of an agreement without the support of their workforce is significantly more confined than it was previously. Under the new provisions, the FWC must terminate an agreement if satisfied that it is appropriate in all the circumstances to do so, and one of the following criteria are met:

- the agreement's continued operation would be unfair to the employees covered by the agreement; or
- the agreement does not, and is not likely to, cover any employees; or
- each of the following apply:
  - o the continued operation of the agreement would pose a significant threat to the viability of the employer's business; and
  - o the termination of the agreement is likely to reduce the potential for redundancies or the bankruptcy or insolvency of the employer; and
  - o the employer gives the FWC a 'guarantee of termination entitlements' (see below).

When deciding whether to terminate the agreement, the FWC must also consider:

- the views of the employer, employees and unions covered by the agreement;
- where termination of the existing agreement is proposed in the context of bargaining for a replacement agreement, whether the termination of the existing agreement would adversely affect the bargaining position of the employees; and
- any other matters it considers relevant. If the application to terminate is opposed by any party, the matter must be dealt with by a Full Bench of the FWC.

### What is a 'guarantee of termination entitlements'?

Where an employer pursues an application to terminate an agreement on the basis that the ongoing operation of the agreement threatens the viability of the business, the FWC is not permitted to grant the application unless the employer provides a 'guarantee of termination entitlements'.

A guarantee of termination entitlements is an undertaking that the employer will preserve the more beneficial termination entitlements contained in the enterprise agreement if a protected employee is subsequently terminated on grounds of redundancy or because of the employer's insolvency or bankruptcy. The guarantee will remain in force either until a new enterprise agreement begins to cover the employees or for a period of 4 years (unless the guarantee specifies a shorter period approved by the FWC).

Failure to comply with the guarantee is a breach of a civil remedy provision.

### Can employers still seek to terminate enterprise agreements with approval from employees?

The Amendment Act only changes the process for the termination of enterprise agreements that have passed their nominal expiry date. An employer can also obtain a termination of an enterprise agreement where the termination has been approved by a majority of employees covered by the agreement.

### When did these changes come into effect?

These changes took effect from 7 December 2022.

### What should Growers do?

Growers seeking to terminate an enterprise agreement that has passed its nominal expiry date are encouraged to:

- Consider whether it is possible to obtain approval from a majority of employees to terminate the agreement.
- Where agreement cannot be reached, prepare to meet the onerous requirements of the new test, for example by gathering material evidencing the ongoing impact the enterprise agreement is having on viability of the business and how termination of the agreement may reduce potential redundancies in support of the application.