

Mastering Change

NEW AUSTRALIAN EMPLOYMENT LAWS 2023-2024



BLACKBAY | LAWYERS

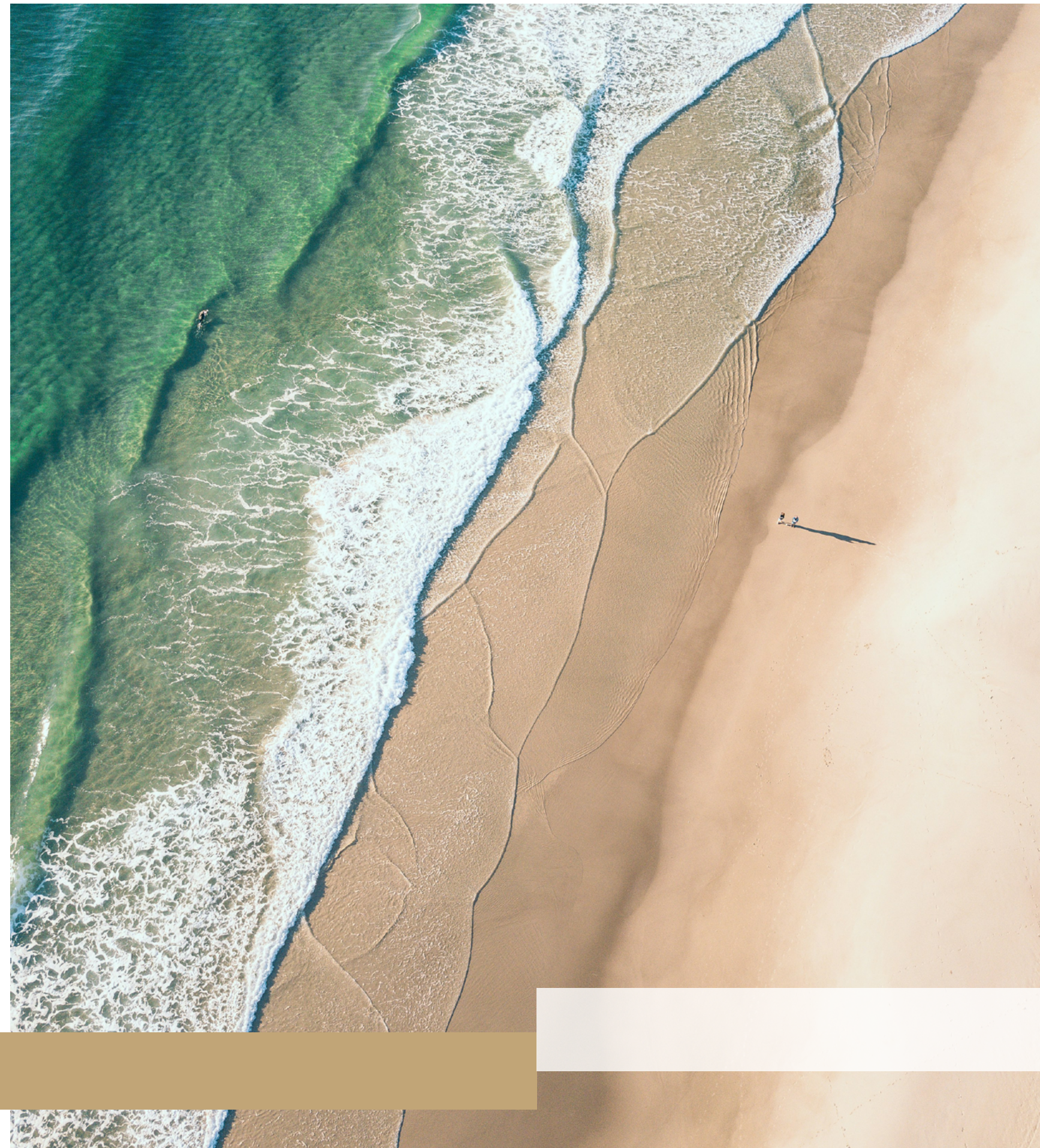


YEAR IN REVIEW:

A timeline of important changes to Australian workplace laws in 2023 and looking ahead in 2024

- In 2023, a series of important legislative changes and updates sent ripples across Australia's employment law landscape. From pay secrecy prohibitions, access to flexible working arrangements, limitations on fixed term contracts and an employer's positive duty to take measures to eliminate sexual harassment and discrimination, no sector remained untouched by the amendments.
- In this comprehensive timeline, the Employment Law team at BlackBay Lawyers delve into the 2023 legislative changes that continue to impact Australian employers and employees, and outline the important upcoming amendments set to become effective in 2024.
- Whether you are an employer or an employee, it is imperative that you have a clear understanding of the changes, your obligations under the various amending Acts and proposed Bills, and the role that they play in shaping the employment relationship across Australia. Scroll down to explore the core legislative amendments and ensure that you remain compliant with Australia's shifting employment law landscape.

- 7 January 2023 ○..... Advertising Pay Rates
- 1 February 2023 ○..... Paid family and domestic violence leave
- 6 March 2023 ○..... Prohibition of sexual harassment in the workplace and creation of expert FWC panels to focus on pay equity and the care and community sector
- 1 May 2023 ○..... Annual leave during temporary shutdown periods
- 6 June 2023 ○..... Requests for flexible work arrangements, prohibition on pay secrecy, changes to enterprise bargaining and zombie agreements
- 1 July 2023 ○..... Increases to national minimum wage and superannuation guarantee, increased paid and unpaid parental leave, enhanced protections for migrant workers
- 15 November 2023 ○..... Proposal of new 'asymmetrical' costs protection in sexual harassment claims
- November 2023 ○..... Compulsory Workplace Gender Equality Act Executive Summary and Industry Benchmark Report
- 6 December 2023 ○..... Limitations on fixed term contracts
- 12 December 2023 ○..... AHRC powers to investigate and enforce the positive duty to eliminate sex discrimination and sexual harassment
- 15 December 2023 ○..... Offence of wage theft, protections for employees experiencing family and domestic violence, small business redundancy pay exemption, regulated labour hire engagements, rights for workplace delegates
- 30 December 2023 ○..... Authorised salary reductions for employee benefit
- Looking forward to 2024 ○..... Changes still to come



7 January 2023

The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Secure Jobs, Better Pay Act) was passed in 2022 to amend various existing workplace laws and introduce a tranche of new laws throughout Australia.

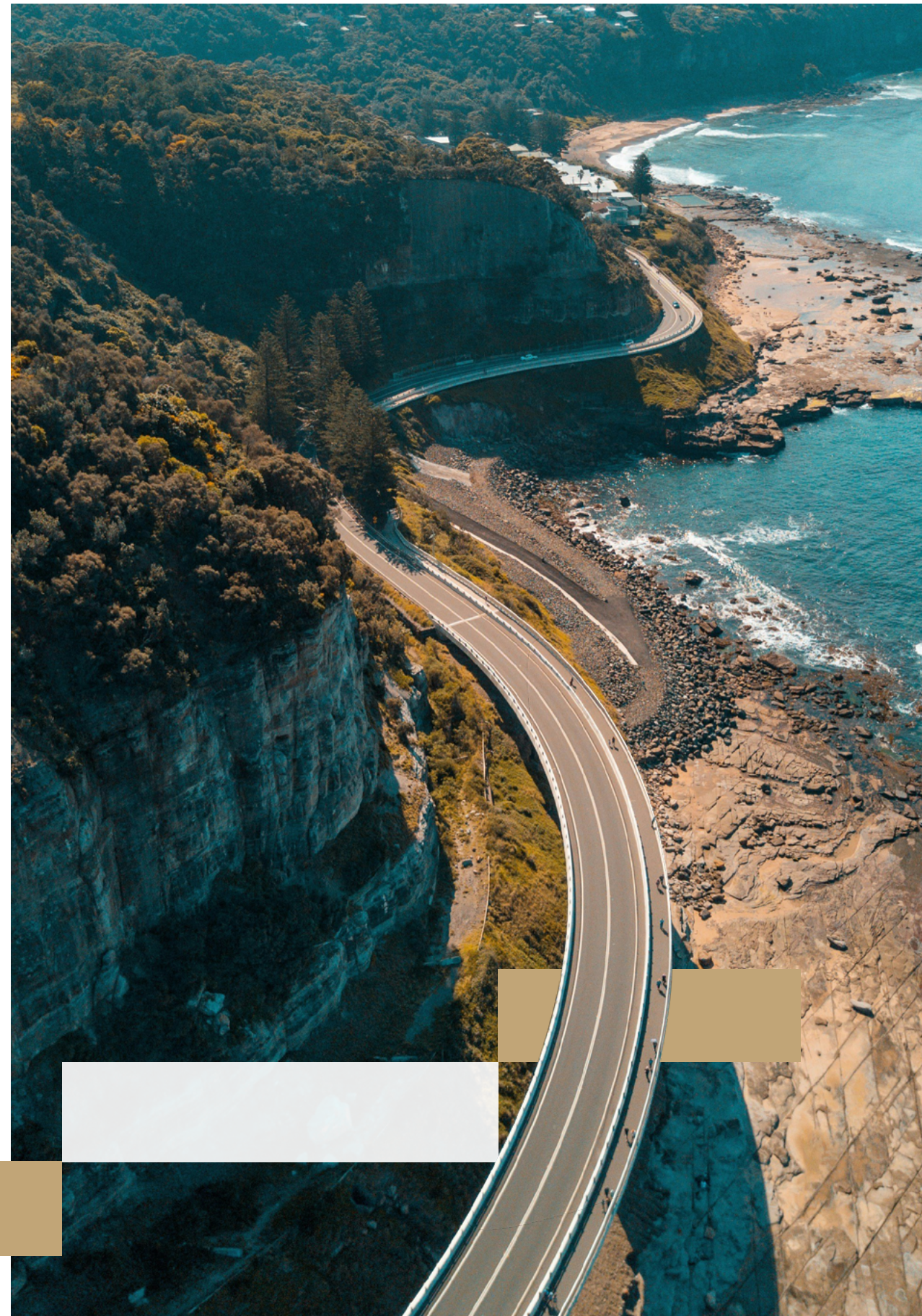
One such change was implemented on 7 January 2023, providing that job advertisements cannot include pay rates that would breach the *Fair Work Act 2009* (Cth) (FWA) or a fair work instrument such as an award or enterprise agreement. Further, any advertisements for roles paid by 'piece rates' (i.e. employees who are paid by results or output instead of an hourly or weekly pay rate) must specify the pay rate that is applicable or state that a periodic pay rate will apply.

1 February 2023

Under the Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022 (Cth), 10 days of upfront paid family and domestic violence leave is now available to non-small business employees.

The above Act also amended section 106B(2) of the FWA to expand the definition of family and domestic violence to: "...violent, threatening or other abusive behaviour by a close relative of an employee, a member of an employee's household, a current or former intimate partner of an employee, that (a) seeks to coerce or control the employee; and (b) causes the employee harm or to be fearful."

It is of note that the 10-day paid family and domestic violence leave also became available to employees of small employers (less than 15 employees) on 1 August 2023.



6 March 2023

The Secure Jobs, Better Pay Act inserted a prohibition of sexual harassment in the workplace within Part 3-5A of the FWA, rendering it unlawful for a person to sexually harass another person (second person) who is:

- a. A worker in a business or undertaking;**
- b. A person seeking to become a worker in a business or undertaking; or**
- c. A person conducting a business or undertaking;**

If the harassment occurs in connection with the second person being a worker in a business or undertaking, a person seeking to become a worker in a business or undertaking or a person conducting a business or undertaking.

The new prohibition protects "workers" as defined within the *Work Health and Safety Act 2011*, including individuals who work in any capacity, including as employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience, or a volunteer.

In addition to the above prohibition, expert panels at the Fair Work Commission (FWC) were also created to focus on issues of pay equity and the care and community sector.

1 May 2023

From 1 May 2023, many modern awards were subject to updated rules concerning taking annual leave during a workplace shutdown. Under the new regime, employers:

- a. May require employees to take paid annual leave during a temporary shutdown; and**
- b. Must provide at least 28 days' written notice of the temporary shutdown to all impacted employees.**

In addition:

- c. The requirement to take annual leave must be reasonable;**
- d. The notice period can be reduced through an agreement between the employer and the majority of the impacted employees; and**
- e. An employee who doesn't have enough paid annual leave to cover the whole period can enter into an agreement with their employer for other options for the days that are not covered. Such options may include using accrued time off, annual leave in advance, or leave without pay.**

6 June 2023

The Secure Jobs, Better Pay Act introduced a raft of new changes to the FWA taking effect on 6 June 2023. The most notable changes are set out below:

a. Changes to the process for responding to requests for flexible work:

From 6 June 2023, pregnant employees are included within the categories of employees who are able to request flexible work arrangements. The Secure Jobs, Better Pay Act also expanded the rights of employees experiencing family and domestic violence.

Under the changes, employers are now obliged to discuss any request for flexible work arrangements and make a genuine effort to reach an agreement. Additionally, employers can only refuse an employee's request where the employer has considered the consequences of the refusal for the employee, and the refusal is based on reasonable business grounds.

If the request cannot be resolved internally, an employer or employee may apply to the FWC to conciliate or arbitrate the dispute.

b. Prohibition on pay secrecy:

Employers are prohibited from including pay secrecy clauses in employment contracts entered into from 6 June 2023. Further, any pre-existing obligations within an employment contract or instrument cease to have effect.

Accordingly, employees now have the ability to disclose their remuneration, or the terms and conditions of their employment that are reasonably necessary to determine remuneration outcomes (i.e. an employee's hours of work). As a result of this prohibition, employers cannot take any adverse action against an existing or future employee because of this right, or to prevent an employee from exercising this right.

c. Changes to enterprise bargaining:

- The FWC now has the power to make intractable bargaining declarations where it is satisfied that there are no reasonable prospects of the bargaining parties reaching an agreement. If an intractable bargaining declaration is made, the FWC will consider whether to provide the parties with a further period to negotiate. After this period, the FWC may make an intractable bargaining workplace determination to resolve any remaining matters.
- The amendments simplified the "better off overall test" (BOOT). This test is designed to ensure that each employee covered by an enterprise agreement is better off overall when compared to their modern award. The Secure Jobs, Better Pay Act clarified that the BOOT will be applied as a global assessment of the proposed agreement and relevant award, and that the FWC will only be required to consider reasonably foreseeable patterns of work when comparing entitlements.
- In order to improve access to single-enterprise agreements, a bargaining representative who will be covered by a proposed single enterprise agreement can give an employer a written request to bargain if:
 - a. The proposed agreement will replace an earlier single enterprise agreement that has passed its nominal expiry date;
 - b. A single interest employer authorisation did not cease to be in operation because of the making of the earlier agreement;

c. No more than 5 years have passed since the nominal expiry date; and

d. The proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement.

• Unions can apply to the FWC for authorisations to bind employers into bargaining for multi-enterprise agreements. The FWC will, having regard to whether it is under the supported or single-interest bargaining stream, consider the following criteria:

a. Prevailing pay and conditions in the industry or sector (supported stream);

b. Whether the employers have identifiable common interests (supported and single-interest stream);

c. Comparable operations and business activities of the employers (single-interest stream); and

d. The manageability of bargaining (supported stream).

d. Zombie Agreements:

Zombie agreements (i.e. agreements made before the commencement of the FWA) will automatically 'sunset' on 7 December 2023 unless an application is made to the FWC for such an agreement to be extended.

Employers are also required to provide notice of terminating zombie agreements to affected employees.



1 July 2023

As of 1 July 2023, a further tranche of employment law changes came into effect under various pieces of legislation. Those changes included:

a. An increase of the national minimum wage to \$882.80 per week; or \$23.23 per hour. Minimum award wages increased by 5.75%.

b. The superannuation guarantee increased from 10.5% to 11%;

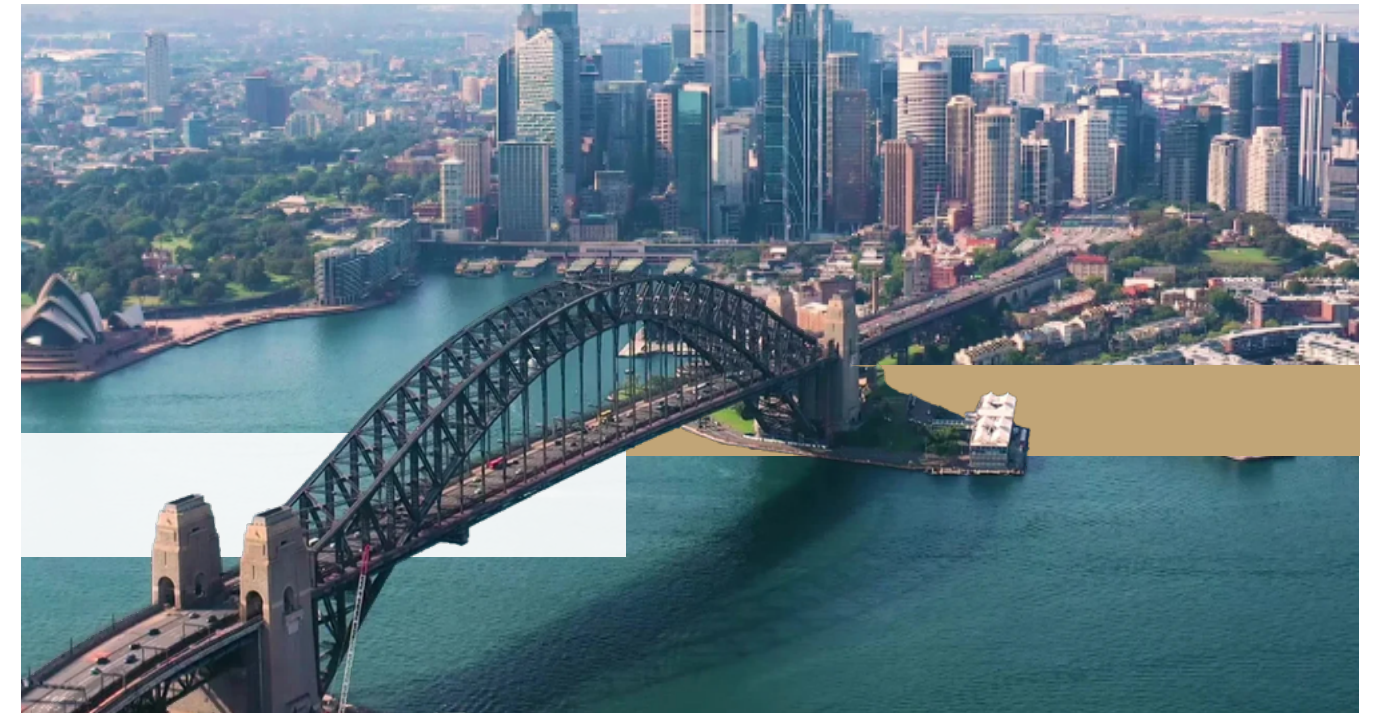
c. Under the Secure Jobs, Better Pay Act, the monetary cap for recovering unpaid entitlements via the small claims process increased from \$20,000 to \$100,000;

d. A number of changes to parental leave were introduced to give families greater flexibility and encourage both parents to access leave. The changes are summarised below:

1. Paid parental leave can now be taken for a period of up to 20 weeks. This entitlement is flexible, so that eligible employees can claim it within the 24-month period after the birth or placement of their child. Further, there is no longer a requirement to return to work in order to be eligible for the entitlement of paid leave. These changes form part of a proposed plan to expand the entitlement of paid parental leave to 22 weeks from July 2024, 24 weeks from July 2025 and 26 weeks from July 2026. This plan is subject to the passing of the Paid Parental Leave Amendment (More Support for Working Families) *Bill 2023*.
1. In addition, the Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023 (Protecting Worker Entitlements Act) introduced a number of changes to increase flexibility for employees intending to take unpaid parental leave. Under this *Act*:
 - Employees taking unpaid parental leave can now take up to 100 days of their 12 months leave entitlement flexibility during the 24-month period after the birth or placement of their child;
 - Pregnant employees are able to access their flexible unpaid parental leave up to 6 months before the expected birth of their child;
 - Employees cannot be prevented from taking more than 8 weeks of unpaid parental leave at the same time as their spouse or de facto partner; and
 - Both parents are able to take up to 12 months unpaid parental leave at any time within 24 months of their child's birth or placement.

e. The Protecting Worker Entitlements Act also clarified the rights and entitlements of migrant workers under Australian workplace laws – regardless of their migration status under the Migration Act 1958. This Act provided that a breach of the *Migration Act 1958* does not impact the validity of an employment contract or contract for services, including circumstances where a migrant worker has:

- Has breached a condition of their visa;
- Doesn't have working rights; and
- Doesn't have the right to be in Australia.



15 November 2023

The Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Costs Protection Bill) was introduced in Parliament on 15 November 2023. The Bill proposes to insert an 'asymmetrical' costs protection provision into the Australian Human Right Commission Act 1986.

The effect of the proposed amendment is that where an Applicant is successful in proceedings on one or more grounds, the Respondent must pay the Applicant's costs. However, if the Applicant is unsuccessful on all grounds, each party would bear their own costs. This is a deviation from current practice where costs 'follow the event', or that unsuccessful Applicants may be liable for their own costs as well as the Respondent's costs.

If passed, the Costs Protection Bill would serve to protect employees who are often deterred from bringing sexual harassment claims to Court because of the risk of an adverse costs order.

November 2023

Under the Workplace Gender Equality Amendment (Closing the Gender pay Gap) Act 2023 (Closing the Gender Pay Gap Act), a number of reforms were introduced to accelerate workplace gender equality in Australia. Under this Act, employers must share their Workplace Gender Equality Act Executive Summary and Industry Benchmark Report with their Board from November 2023.

The reforms introduced under the Closing the Gender Pay Gap Act apply to organisations that are already required to report annually to WGEA, including private sector employers and Commonwealth public sector organisations with 100 or more employees.

6 December 2023

From 6 December 2023, a number of new rules apply to employers when engaging employees on fixed term contracts – i.e, contracts that terminate at the end of a defined period. Those rules are summarised below:

a. Employers must give every employee engaged under a new fixed term contract a copy of a Fixed Term Contract Information Statement (FTCIS) upon entry, or as soon as possible after entry into the contract;

b. A fixed term contract cannot exceed 2 years. This limitation includes any extensions or renewals. If the fixed term contract operates for less than 2 years, it cannot contain a term or right to extend or renew the contract more than once;

c. An employee cannot be offered a new fixed term contract if the first three points below apply, and one or more of the fourth considerations apply:

- The employee's previous contract was also for a fixed term;
- The employee's previous contract and the new contract generally involve the same work;
- There is substantial continuity in the employment relationship between the previous and new contracts; and
- Either:
 - The previous contract contained an option to extend that was used;
 - The total period of employment for both the previous and new contract is more than 2 years;
 - The new contract contains an option to renew or extend; or
 - There was an initial contract in place prior to the previous contract that was for a fixed term, for the same or similar work, and there was substantial continuity in the employment relationship.

d. Finally, under the anti-avoidance protections, employers cannot take actions to purposefully avoid these rules by:

- Ending employment or not re-employing an employee for a period of time;
- Not re-engaging an employee and employing someone else to do the same or substantially similar work; or
- Changing the type of work or tasks that an employee performs or changing the employment relationship.

If an employer engages in the above conduct, it may be classified as an adverse action for the purposes of the FWA. A number of exceptions apply to the above limitations, including where specialised skills for a specific task is required.

12 December 2023

In 2022, new provisions were introduced to the *Sex Discrimination Act 1984 (Cth)* under the *Anti-Discrimination and Human Rights Legislation (Respect at Work) Act* to impose a positive duty on employers and persons conducting a business or undertaking to take reasonable and proportionate measures to eliminate, as far as possible, unlawful conduct such as:

a. Sex discrimination;

b. Sexual harassment;

c. Subjecting a person to a workplace environment that is hostile on the grounds of sex; and

d. Acts of victimisation that relate to complaints, proceedings or allegations in relation to the above conduct.

On 12 December 2023, the Australian Human Rights Commission (AHRC) was granted a number of powers to investigate and enforce the positive duty by:

a. Conducting inquiries into a business' compliance with the positive duty if it reasonably suspects non-compliance;

b. Compel the production of documents and information;

c. Examine witnesses under oath;

d. Issue compliance notices to specify an action that a business must take or refrain from taking;

e. Apply to the Federal Courts for an order to direct compliance with a compliance notice;

f. Enter into enforceable undertakings with a business and apply to the Federal Courts for an order to direct compliance with the undertaking; and

g. Apply to the Federal courts to direct the payment of damages to the Commonwealth or a person who has suffered loss or damage.



15 December 2023

On 15 December 2023, the Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Closing Loopholes Act) introduced a number of important changes to workplace laws affecting a range of employers and employees. Those changes included:

a. Small businesses redundancy pay exemption

Typically, small business who employ fewer than 15 employees are not required to pay redundancy pay to employees who have been made redundant. However, an issue arises where a non-small business becomes a small business as part of the process of 'downsizing' its workforce due to bankruptcy or liquidation. Under the changes, non-small businesses that become a small business employer in the above circumstances may still be required to provide redundancy pay to employees;

b. Labour hire regulations

Labour hire employers must now pay their employees supplied to a 'host employer' at least the same rate of pay that they would receive under that employer's enterprise agreement or other employment instrument. As such, labour hire employees are entitled to no less pay than the full rate of pay available if they were employed by the host employer.

Any orders made by the Commission will not come into effect until at least 1 November 2024;

c. Offence of wage theft

The intentional underpayment of wages will become a criminal offence. Employers will commit an offence if:

- They are required to pay an amount to an employee, or on behalf of an employee under the FWA or an industrial instrument; and
- They intentionally engage in conduct that results in failure to pay those amounts to or for the employee on or before the date they become due and payable.
- These laws do not apply to employers who unintentionally underpay their employees or pay incorrect amounts by mistake. The new offence will not commence before 1 January 2025.

d. Protections for employees experiencing family and domestic violence

The Closing Loopholes Act has strengthened the protections for employees experiencing family and domestic violence. It is now unlawful for an employer to take adverse action (such as dismissal) against an employee or a prospective employee because they are, or have been, experiencing family and domestic violence; and

e. Rights for workplace delegates now have new rights

Workplace delegates are employees who are appointed or elected under the rules of an employee organisation and represent members of that organisation within the workplace. Under the changes, workplace delegates now have new rights under the FWA and are entitled to:

- Represent the industrial interests of members and potential members of the organisation, including in disputes with the employer;
- Reasonable communication with members and potential members of the organisation about their industrial interests; and
- Reasonable access to the workplace and its facilities to represent those industrial interests.

30 December 2023

From 30 December 2023, employees are able to authorise salary deductions made by their employer that are recurring and are for amounts that vary from time to time under the Protecting Work Entitlements Act. Such deductions will only be allowed if they are principally for the employee's benefit.

This amendment is designed to provide greater flexibility for employees and employers to manage salary deductions for specific amounts which are in writing.



Looking forward in 2024:
CHANGES STILL TO COME

While 2023 was undoubtedly a significant year for employment law reforms, the ever-evolving legislative changes to the workplace are showing no signs of slowing as we enter 2024. Indeed, as of the date of this guide, superannuation has been recognised as an entitlement under the National Employment Standards and Australian employees have been granted the legal right to disconnect outside of their working hours.

Is it essential that both employers and employees are aware of the forthcoming and proposed changes to Australian employment laws in 2024. From proposed changes to the conditions of the gig-economy and the definition of casual employees, to the criminalisation of industrial manslaughter in July 2024 and the obligations to report of workplace data to WGEA on 1 April 2024, it is important to be proactive to ensure compliance. Employers should review all internal policies and agreements against the legislative amendments, educate all senior employees and management teams, update internal systems and consult with legal experts to ensure protection against a contravention of the FWA and other employment instruments.

By taking these measures, employers can demonstrate their commitment to cultivating a positive and respectful workplace environment and mitigate against potential damage caused by a breach of Australian workplace laws.

If you would like to understand the impact of the above changes to you or to your business, or discuss the upcoming 2024 changes to develop strategies to best adapt and respond, get in touch the Employment Law team at BlackBay Lawyers today.



(02) 8005 3077

www.blackbaylawyers.com.au

© 2024 BlackBay Lawyers. All rights reserved.