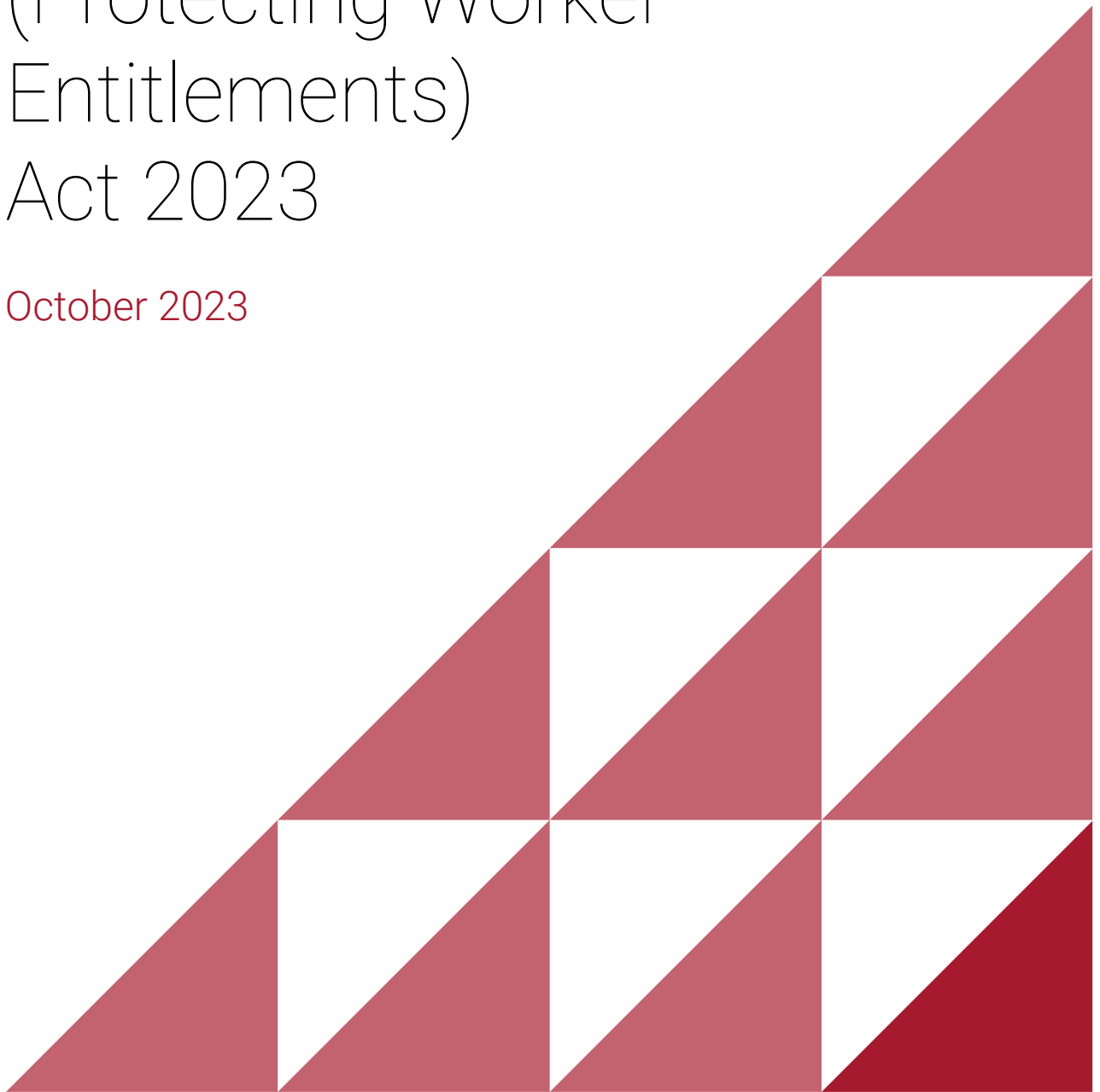


# Guide to the Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023

October 2023



# Table of contents

1.	INTRODUCTION.....	3
2.	UNPAID PARENTAL LEAVE .....	4
3.	SUPERANNUATION.....	4
4.	EMPLOYEE AUTHORISED DEDUCTIONS.....	5
5.	COAL MINING LONG SERVICE LEAVE SCHEME.....	5
6.	PROTECTION FOR MIGRANT WORKERS .....	6
7.	WORKPLACE DETERMINATIONS.....	7

# 1. INTRODUCTION

On 22 June 2023, the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* ([Cth](#)) (**Act**) passed through Parliament.

The Act amended the *Fair Work Act 2009* (Cth) (**FW Act**), regarding the matters below:

- Unpaid parental leave (**UPL**).
- Introducing a right to superannuation within the National Employment Standards (**NES**).
- Changes to payroll deductions for authorised purposes.
- Providing casual workers in the black coal mining industry with access to long service leave (**LSL**) entitlements.
- Clarification that FW Act applies to migrant workers.
- Clarification that when a workplace determination takes effect, the applicable enterprise agreement no longer operates.

The majority of changes commenced 1 July 2023. Changes to superannuation and the Coal Mining LSL Scheme commence 1 January 2024 and the changes to employee authorised deductions commence 30 December 2023.

This Guide assists in understanding these changes.

A copy of the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* can be accessed [here](#).

## 2. UNPAID PARENTAL LEAVE

### Changes to flexible unpaid parental leave

The Act increases flexibility for parents when they use their entitlement to UPL by:

- increasing the number of days that can be taken as flexible UPL from 30 to 100 days, unless a higher number of days is provided by the regulations;
- allowing pregnant employees to take flexible UPL 6 weeks before the expected birth of the child; and
- allowing employees to commence flexible UPL before or after a period of continuous UPL.

### UPL for employee couples

The Act removed limitations on employee couples wishing to take concurrent leave (ie, UPL at the same time) and extending their period of UPL.

This means:

- employees can take up to 12 months of UPL and request a further 12 months of UPL, regardless of how much leave their spouse or de factor partner takes, up to a total of 24 months each;
- all employees will be able to take UPL at any time during the 24-month period starting on the date of birth of the child (or date of placement, if adopting);
- there is no longer any limit on employees taking UPL at the same time and an employee can take up to 24 months of their leave at the same time as their partner.

### Commencement date

1 July 2023.

## 3. SUPERANNUATION

### A new NES entitlement

The Act introduced a new NES entitlement to the FW Act, for the payment of superannuation.

This extends an enforceable right for all NES-covered employees (not just those covered by an award) to recover unpaid superannuation.

## Who can commence proceedings?

Employees may commence proceedings.

Unions and the Fair Work Ombudsman may also commence proceedings to recover superannuation amounts on behalf of an employee. However, they will generally not be able to do so if the ATO has already commenced proceedings.

The Act does not prevent a claim from being made in circumstances where the ATO has used other enforcement activity other than court proceedings, or discontinued its own court proceedings if no final order for recovery was obtained.

## Commencement date

1 January 2024.

## 4. EMPLOYEE AUTHORISED DEDUCTIONS

The change to employee authorised deductions permits an employee to agree in a written authorisation for multiple or ongoing deductions (rather than making an agreement on each occasion) to be made from their pay.

Where an employee authorises multiple or ongoing deductions, the deduction may be authorised for a specified amount or amounts, or for amounts as varied from time to time.

This enables employees to pre-emptively authorise increases to deductions from their pay to facilitate payments to third parties.

## Commencement date

30 December 2023

## 5. COAL MINING LONG SERVICE LEAVE SCHEME

The Act provided for several changes to the Coal Mining Long Service Leave Scheme which seek to ensure that casual employees are treated no less favourably than permanent employees with regard to the accrual and access of LSL entitlements.

The key changes are:

- Including casual loading in the calculation of:
  - the levy payments made by an employer into the Coal Mining Industry (Long Service Leave) Fund (**Coal LSL Levy**); and
  - a casual employee's LSL entitlement.
- Introducing two new methods of calculating a casual employee's average working hours per week over a quarter (period of 13 weeks) for the purposes of

determining their LSL accrual rate, including in circumstances where the casual employee does not perform any work in a certain week (e.g. a week falling between two working weeks).

- Introducing new requirements for Coal Mining Industry (LSL Funding) Corporation to approve a Coal LSL Levy return form to be published on the Federal Register of Legislation.

### Commencement date

1 January 2024

## 6. PROTECTION FOR MIGRANT WORKERS

The Act introduced a new provision in the FW Act which clarifies that a migrant worker in Australia is entitled to the benefit of the FW Act, regardless of their migration status.

The change seeks to give effect to Recommendation 3 of the [Report of the Migrant Workers' Taskforce](#):

*It is recommended that legislation be amended to clarify that temporary migrant workers working in Australia are entitled at all times to workplace protections under the [FW Act].*

The amendments seek to make clear that the following scenarios do not affect the validity of an individual's contract of employment or contract for services for the purposes of the FW Act, namely:

- where an individual does not have a right to work in Australia for the purposes of the *Migration Act 1958* (Cth);
- where an individual has contravened the *Migration Act 1958* (Cth) or breached a condition of their visa;
- where an individual is no longer entitled to remain in Australia in accordance with their visa.

### Commencement date

1 July 2023

## 7. WORKPLACE DETERMINATIONS

The FW Act now makes it clear that when a workplace determination comes into effect in relation to an employee, any enterprise agreement that covers that employee in relation to that employment will cease to apply and can never apply again.

This change appears to be consistent with the Fair Work Commission's approach in relation to this matter, however it is not previously expressly stated in the FW Act.

### **Commencement date**

1 July 2023

# NATIONAL WORKPLACE RELATIONS POLICY AND ADVOCACY TEAM

This report has been prepared by Ai Group's National Workplace Relations Policy and Advocacy Team. The Team represents the interests of Ai Group Members through:

- Protecting and representing the interests of Ai Group Members in relation to workplace relations matters.
- Leading and influencing the workplace relations policy agenda.
- In collaboration with Members, developing policy proposals for worthwhile reforms to workplace relations laws.
- Making representations to Government and Opposition parties in support of a more productive and flexible workplace relations system.
- Writing submissions, preparing evidence and appearing in major cases in the Fair Work Commission (FWC).
- Representing Members' interests in modern award cases and reviews.
- Representing Ai Group Members collective interests in significant cases in Courts.
- Representing individual Ai Group Members in significant cases in the FWC and Courts.
- Keeping Ai Group Members informed and involved in workplace relations developments.
- Providing forums for Ai Group Members to share information on best practice workplace relations approaches, and to influence policy developments, e.g. through Ai Group's PIR (Policy-Influence-Reform) Forum and PIR Diversity and Inclusion Forum.
- Liaising with regulators including the Fair Work Ombudsman and Departmental officials.
- Writing submissions and appearing in numerous inquiries and reviews carried out by a wide range of bodies including Parliamentary Committees, Royal Commissions, the Productivity Commission, the Australian Human Rights Commission, the Australian Law Reform Commission, and others.
- Opposing union campaigns on issues which would be damaging to competitiveness and productivity.



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