



President's statement Protected action ballots

Justice Hatcher, President

Sydney, 5 June 2023

[1] On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the Secure Jobs Better Pay Act) received Royal Assent. Relevantly, the Secure Jobs Better Pay Act amends the *Fair Work Act 2009* (the FW Act).

[2] On 4 April 2023, I issued a [Statement](#) about facilitating enterprise bargaining and the agreement approval process. That statement dealt with the implementation of bargaining and agreements amendments and announced the appointment of Deputy President Hampton as the National Practice Leader for bargaining.

[3] My 4 April statement also noted that the Commission would publish further information about the bargaining and agreements changes. Since that statement the Commission has published a series of information packs about the new bargaining provisions which are available on the [Commission's website](#).

[4] This statement deals with protected action ballot matters including the approval of eligible protected action ballot agents.

[5] The Commission will publish 4 new forms relating to protected action ballots:

- F34– Application for a protected action ballot order
- F34B– Declaration in support of an application for a protected action ballot order
- F34C– Application for approval as an eligible protected action ballot agent
- F34D- Declaration by a proposed protected action ballot agent who is not an eligible protected action ballot agent.

[6] Further detail about each of these forms is provided below.

Protected action ballot order applications

[7] Before protected industrial action can be taken, it must be authorised by a protected action ballot (s 409(2)). From 6 June 2023 there are a number of changes to the process for applying for a protected action ballot order (PABO). We have published guidance about the changes in our information pack about [changes to protected action ballot order applications](#).

[8] As outlined in my 4 April statement, one of the major changes is that when a PABO has been issued, the Commission is required to make an order directing all bargaining representatives for the proposed agreement to attend a conference for the purposes of mediation or conciliation of the matters in dispute.

[9] The form F34– Application for a protected action ballot order has been updated to reflect this and other amendments. The changes mean that the bargaining representative(s) completing the F34 (the applicant) will need to provide the following details:

- the details of each of the bargaining representatives for the proposed agreement;
- all the existing enterprise agreements that cover the employees to be covered by the proposed enterprise agreement and the nominal expiry date of these agreements (s 438);
- the group or groups of employees to be balloted (s 437(3)(a));
- the questions to be put to employees who are to be balloted (s 437(3)(b));
- the name of the person or entity that the applicant wishes to be the protected action ballot agent (s 473(3)(c));
- if the Applicant does not wish the Australian Electoral Commission to be the protected action ballot agent, the directions that the Applicant proposes the Commission should give to the protected action ballot agent pursuant to s 450;
- the proposed date by which voting is to close (s 443(3)(c)).

[10] The form F34 asks the bargaining representative(s) applying for the PABO to provide the details of all bargaining representatives for a proposed agreement for the purposes of the compulsory conciliation conference. To ensure that the Commission has all of those details, the Commission will also issue directions to the employer(s) of the employees to be balloted seeking the relevant details. The compulsory conciliation conference must be conducted before the day by which voting in the protected action ballot closes and so these directions are likely to be issued soon after the PABO is made.

[11] The F34– Application for a protected action ballot order must be accompanied by an F34B– Declaration in support of an application for a protected action ballot order. If the proposed enterprise agreement is a multi-enterprise agreement, a separate declaration must be filed in relation to each employer of the employees proposed to be balloted. All forms will be available on the [Forms page](#) of the Commission’s website from 6 June 2023.

Eligible protected action ballot agents

[12] A protected action ballot agent is the person or entity that conducts a protected action ballot. A protected action ballot agent must be an *eligible* protected ballot agent unless exceptional circumstances justify the ballot not being conducted by an eligible protected action ballot agent (s 444(1D) of the FW Act).

[13] From 6 June 2023, the FW Act defines an eligible protected action ballot agent as either:

- the Australian Electoral Commission, or
- a person approved by the Commission under s.468A(2).

[14] The Commission will be able to approve ballot agents to conduct protected action ballots if we are satisfied they are a fit and proper person to be an eligible protected action

ballot agent and meet any other requirements prescribed by the *Fair Work Regulations 2009* (FW Regulations).

[15] The *Fair Work and Other Legislation Amendment (Secure Jobs, Better Pay) Regulations 2023* (amending Regulations) were made on 25 May 2023 and amend the FW Regulations. The amending Regulations do not prescribe any additional requirements for the approval of eligible protected action ballot agents.

[16] A person wishing to apply to be an eligible protected action ballot agent should complete the form F34C– Application for approval as an eligible protected action ballot agent. The form is divided into 2 parts:

- Part 1–The Applicant which asks for the details of the person who wishes to be approved as an eligible protected action ballot agent, and
- Part 2–Declarations which includes 2 versions of a declaration by the proposed eligible protected action ballot agent. The first version should be completed if the Applicant is an individual. The second version should be completed if the Applicant is a corporation or industrial association.

[17] When an application for approval as an eligible protected action ballot agent is received it will be considered by a Commission Member and a decision will be issued. The decision will be published on the Commission’s website. Many of these decisions will be issued ‘on the papers’, meaning that no hearing will be necessary. Interested parties are encouraged to subscribe to our [Announcements subscription service](#) for updates on the eligible protected action ballot agent process.

[18] The Commission will publish and maintain a list of eligible protected action ballot agents on our website. The Commission will also publish the names of persons who have applied for approval, and the date applications have been made, so as to give interested persons an opportunity to express any view as to whether the applicant is a fit and proper person to be an eligible protected action ballot agent.

[19] The Commission must review approval as an eligible protected action ballot agent at least every 3 years.

Protected action ballot agents in exceptional circumstances

[20] An applicant for a protected action ballot order can ask the Commission to appoint a protected action ballot agent who is not an eligible protected action ballot agent. The Commission can only appoint a person who is not an eligible protected action ballot to conduct a ballot if it is satisfied that there are exceptional circumstances that justify the ballot not being conducted by an eligible protected action ballot agent and:

- the person is a fit and proper person to be an eligible protected action ballot agent (s.444(1D)(b)), and

- the requirements prescribed by the FW Regulations are met (s.444(1D)(c)).

[21] New subregulation 3.11(1) of the amending Regulations provides that, for the purposes of paragraph 444(1D)(c) of the Fair Work Act, regulation 3.11 prescribes requirements that the Commission must be satisfied have been met before a person becomes the protected action ballot agent for a protected action ballot. A legislative note alerts the reader that the person must also be a fit and proper person to conduct a protected action ballot. New subregulation 3.11 is set out below:

3.11 Requirements for protected action ballot agent

(1) For the purposes of paragraph 444(1D)(c) of the Act, this regulation prescribes requirements that the FWC must be satisfied have been met before a person becomes the protected action ballot agent for a protected action ballot.

Note: The person must also be a fit and proper person to conduct a protected action ballot.

(2) The person must be capable of ensuring the secrecy and security of votes cast in the ballot.

(3) The person must be capable of ensuring that the ballot will be fair and democratic.

(4) The person must be capable of conducting the ballot expeditiously.

(5) The person must have agreed to be a protected action ballot agent.

(6) The person must be bound to comply with the Privacy Act 1988 in respect to the handling of information relating to the protected action ballot.

(7) If the person is an industrial association or a body corporate, the FWC must be satisfied that:

(a) each individual who will carry out the functions of the protected action ballot agent for the industrial association or body corporate is a fit and proper person to conduct the ballot; and

(b) the requirements in subregulations (2) to (6) are met for the individual.

[22] If the applicant wishes to nominate a protected action ballot agent who is not an eligible protected action ballot agent, they will be required to describe the exceptional circumstances that justify the ballot not being conducted by an eligible protected action ballot agent in the F34– Application for a protected action ballot.

[23] The proposed ballot agent will also need to complete an F34D– Declaration by a proposed protected action ballot agent who is not an eligible protected action ballot agent.

The proposed ballot agent will be required to make a declaration satisfying each of the criteria in subregulation 3.11. This is to be provided with the Form F34.

The determination of PABO applications

[24] The requirement for the Commission to determine PABO applications within 2 business days, where practicable has not changed. This requirement means that the Commission must expedite its consideration of the applications, and parties should be aware that tight timeframes for responses and, where required, hearings, must be applied. Applicants should also ensure that all elements of the application and associated documents are fully completed and served upon the other parties and ballot agents as required by the FW Act. An outline of the PABO application process is at **Attachment A**.

PRESIDENT



Attachment A– PABO application process

PABO allocation flowchart

