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Changes to Industrial Relations Laws 2023



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Introduction

The Federal Government has introduced key legislative reforms impacting the industrial relations landscape for businesses across the country. The Acts that bring about these changes are:

- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022
- Anti-Discrimination and Human Rights Legislation Amendment (Respect@Work) Act 2022
- Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022
- Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022.

This document outlines the following key changes and impacts:

- Enterprise Bargaining
- Institutional Changes
- Jobs Security and Gender Equity
- Flexible Working Arrangements
- Sexual Harassment and Discrimination
- Family Domestic Violence and Paid Parental Leave.

2.0

Timeline of changes

The changes discussed below will be implemented in accordance with the following timeline:

www.fwc.gov.au/about-us/secure-jobs-better-pay-act-whats-changing

Enterprise Bargaining

Majority of businesses will be impacted by this change. The only business exempt from it are those that do 'general building and construction work'. However, please note that with the way it is defined, it excludes work performed onsite and work that is in certain industries like electrical services.

Multi-enterprise bargaining

Under the current Fair Work Act 2009 (the "Act") multi-enterprise bargaining is permitted but is not commonly utilised by employers. The Amending Act seeks to increase the uptake of this type of bargaining by:

- Replacing 'low-paid bargaining' with 'supported bargaining' stream: This affects lower paid industries such as aged care and disability care.
- Streamlining 'single-interest employer authorisations': Employers with clearly identifiable common interests can be forced into an EA bargaining.

The matters considered for clearly identifiable common interests include geographic location, and the nature of the businesses to which the EA will relate. Small businesses (less than 20 employees) are exempt.

- Cooperative bargaining: A multi-EA is a cooperative workplace agreement if there was no supported bargaining authorisation or single interest employer authorisation in operation.

In addition to the above, the employer must obtain written agreement from each union involved in the EA to be able to request the employees to vote on a proposed EA. This places unions in a position of power as they can withhold consent for a vote to proceed if they are unhappy with any of the terms in the EA.

Bargaining Disputes

The Fair Work Commission (FWC) can issue an intractable bargaining declaration where there has been lengthy bargaining (more than 9 months) and it is satisfied that there is no reasonable prospect of the bargaining parties reaching agreement.

If such a declaration is made, the FWC would consider whether to exercise its discretion to provide the parties with a further period to negotiate. Following this period, the FWC can then make a workplace determination.

Industrial Action

The changes to the industrial action provisions include:

- Protected Action Ballot: The FWC is required to hold a compulsory conciliation conference between the bargaining representatives before the vote takes place.
- Industrial action authorised by a vote: Such an action will be able to commence anytime within 3 months from the declaration of the ballot results (instead of the current 30-day time limit).
- Bargaining representatives to attend conference: Reps must attend a conference conducted by the FWC during the protected action ballot period.
- Minimum notice period: For industrial action, the minimum notice period for multiple employers will be 120 hours (5 days). For other action, it will remain at 3 working days.

These changes will need to be considered by employers as part of their pre-bargaining strategic planning.

Terminating Agreements

Past nominal expiry date

There are additional requirements and constraints on the FWC's discretion to terminate an EA that has reached its nominal expiry date. The FWC must consider the following criteria moving forward:

- The continued operation of the EA would be unfair for the employees covered; or
- The agreement does not, and is not likely to, cover any employees; or
- All of the following apply:
 - The continued operation of the EA would pose significant threat to the viability of the business
 - Termination of EA would likely reduce potential terminations of employment due to redundancy, insolvency or bankruptcy
 - Each employer has given the FWC a guarantee of termination entitlements contained within the agreement [preventing a reduction in termination entitlements for a defined period]

Zombie Agreements

There will be an automatic sunset period of 12 months for agreement-based transitional instruments to be terminated.

The FWC has released the list of current zombie agreements:

www.fwc.gov.au/about-us/news-and-media/news/list-zombie-agreements-published

Should a business require the zombie agreement to continue to apply past December 2023, it must apply for extensions. Extensions cannot exceed 4 years. The relevant Modern Award would then apply after the sunset period ends.

Enterprise Agreement Approval Process

Initiate bargaining

Employees (via a bargaining representative) can write to their employer to initiate bargaining for a single-enterprise agreement (EA) in the following circumstances:

- Proposed EA is to replace an existing one
- Existing EA's nominal expiry date is within the past 5 years; and
- Scope of existing EA is substantially similar to the proposed EA.

This method of initiating bargaining will not apply to a greenfield EA, multi-EA or a single-EA in relation to which a single interest authorisation is in operation.

Genuine Agreement

Several pre-approval procedural requirements (such as the 7-day access period) have been removed, simplified or replaced by an overarching requirement that the FWC be satisfied that the EA has been 'genuinely agreed' to.

In considering the 'genuinely agreed' test, the FWC must consider:

- The Statement of Principles: Depending on the detail of the Statement, these amendments could potentially result in less clarity as to what is expected of employers procedurally.
- Sufficient interest: The FWC must be satisfied that employees who requested to vote on the EA have a sufficient interest in the provisions of the EA and that the provisions were sufficiently representative of the employees the EA is expressed to cover.

Better-off-overall test (BOOT)

The BOOT is amended to address issues in the way it has been applied over the years. The FWC will expressly be required to:

- Conduct a global vs a line-by-line assessment
- Consider only actual and reasonably foreseeable patterns or kinds of work, or types of employment at the time of the test
- Consider the common view (if any) of all bargaining representatives as to whether an EA passes the BOOT.

Additionally, a new 'reconsideration process' will allow for applications to reassess whether the EA passes the BOOT where there has been a material change to working arrangements or where relevant circumstances were not properly considered during the approval process.

This reassessment can be conducted prior the EA being approved or even after the EA has been approved.

Amend EA during approval process

If the FWC has a concern that the EA (or any variation to the EA) does not meet the BOOT, the FWC has the power to directly amend the terms if the FWC is satisfied that an amendment is necessary to address their concern.

It must still seek the views of the employer or employees covered and the relevant union.

This gives employers much less control in the process (removing the currently available option to employers to refuse to give a particular undertaking).

Correct errors in EAs

The Bill will also empower the FWC to correct obvious errors, defects or irregularities in EAs and address situations where the incorrect version of an EA was mistakenly submitted to and approved by the FWC – removing the current complexity in rectifying these issues.

What should you do?

Businesses should be aware of the changes and think about them as they strategise for their own enterprise bargaining. We recommend getting in touch with the Workplace Relations team at Business Solutions Hub to assist you in your enterprise bargaining process.

Institutional Changes

The changes here impact on the construction industry and any registered organisations.

Abolishment of the ABCC and ROC

The Australian Building and Construction Commission (ABCC) was abolished in February 2023 and the Registered Organisations Commission (ROC) will be abolished in June 2023 with their functions transferred to the Fair Work Ombudsman (FWO) and Fair Work Commission (FWC), respectively.

The Code for the Tendering and Performance of the Building Work 2016 (the Code) which has already been stripped back earlier this year, has been repealed along with other parts of the Building and Construction Industry (Improving Productivity) Act 2016.

This means Code-covered entities will no longer be required to ensure subcontractors are complying with the Code, maintain freedom of association policies, enforce certain right of entry requirements or report Code breaches.

Creation of the NCIF

The Amending Act establishes the National Construction Industry Forum (NCIF).

The NCIF's function is to provide advice to the Government about work in the building and construction industry on matters such as workplace relations, skills and training, safety, productivity, diversity and gender equity and industry culture.

What should you do?

With the abolishment of the ABCC, businesses that are building industry participants will no longer need to comply with the requirements previously prescribed by the Building Code and corresponding Act.

The building industry will no longer have a regulator with a sole focus on activities in this sector so it should prepare itself to take action and address any non-compliance with industrial laws, such as breaches of right of entry requirements, unlawful industrial action, freedom of association and coercion.

With the ROC's abolishment, businesses should be aware that the FWC will likely not have the same resources that the ROC did to deal with disputes relating to the Unions and Employer Associations. This could mean that such organisations are not held to as much scrutiny as they were previously.

Job Security and Gender Equity

Job security is focused on fixed term contracts and gender equity is focused on the pay gaps.

Job Security

As of December 2023, employers are prohibited from:

- having a fixed term contract of more than 2 years
- including a renewal clause in a fixed term contract that allows for it to continue past 2 years
- having an employee on consecutive contracts of employment where they are performing substantially the same work in those contracts.

The above prohibitions apply even where there is a gap in the employment and is to prevent an employer from terminating then re-engaging an employee to break the continuity of employment.

There are also anti-avoidance mechanisms preventing an employer from making changes to the timing or terms of fixed term contracts and civil penalties for the contravention of these safeguards.

Exceptions

The above prohibitions do not apply to an employment where the employee:

- is engaged to perform only a distinct and identifiable task involving specialised skills
- is an apprentice or trainee
- undertakes essential work during a peak period or work during emergency or temporary absence of another employee
- undertakes essential work during peak demand
- earns above the high-income threshold
- undertakes work that is government funded
- is engaged in a governance position
- is covered by a modern award that includes terms permitting a fixed term contract.

The Fair Work Commission [FWC] has been given additional powers to deal with disputes under these new provisions.

Gender Equity

Pay Secrecy Ban

Employees are currently protected from adverse action when they disclose information about their salary and share details about their employment terms with others. This change will invalidate any clause in an existing employment contract that promotes pay secrecy.

Civil penalties for contravention have been introduced.

Equal Remuneration Order (ERO)

The FWC will have greater flexibility to make an ERO on its own initiative. In deciding whether there is equal remuneration for work of equal or comparable value, the Fair Work Commission may consider:

1. Comparisons between occupations and industries
2. Whether historically the work has been undervalued on the basis of gender; and
3. Any fair work instrument or state industrial instrument.

What should you do?

- Employers need to review the make-up and composition of their workforce and audit the circumstances in which they are using fixed-term contracts.
- They need to identify the relevant exceptions that apply to them and should prepare a guideline and controls as to when a fixed-term contract can be offered.
- Fixed-term contract templates should be reviewed to ensure compliance (eg. by not having provisions referencing potential for multiple renewals).
- Employers should consider their existing contracts and new or varied contracts to ensure any terms inconsistent with the new workplace rights around pay secrecy are no longer included. The maximum penalty for contravention by a corporation is \$66,600 (or \$666,000 for a serious contravention).
- Additionally, members should review whether there is any pay discrepancy between genders and ensure upon the application of these changes, they issue a Fixed Term Contract Information Statement along with the contract similar to how an information statement is provided to other types of employees.

Flexible Working Arrangements

Expansion of access to Flexible Working Arrangements (FWA)

Current legislation allows employees such as those dealing with caring responsibilities, disabilities or over 55, to request flexible work arrangements after 12 months of continuous service [excl. casuals].

The changes expands the operation to enable an employee who is experiencing family and domestic violence to also access FWA.

Responding to a FWA request

The following key amendments are to deter refusals and encourage genuine discussions between employer and the employee:

- amend procedure to include new requirements for employers to genuinely try to reach agreement
- new requirements for employers to provide detailed reasons for refusal plus information on alternative arrangements
- new dispute resolution processes, such as mandatory arbitration [including orders from the Fair Work Commission to the employer to grant the request or make other changes to accommodate the employee's circumstances]
- extended application of current civil penalties to breaches.

Refusal of a FWA request

An employer will only be able to refuse a FWA request if an agreement could not be reached with the employee, or the refusal is based on reasonable business grounds. The definition of reasonable business grounds is being restricted to when:

- the request is too costly for the employer
- there is no capacity to change the working arrangements
- it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the request
- the changes are likely to result in a significant loss in efficiency or productivity
- the changes would be likely to have a significant negative impact on customer service.

Mechanism to dispute refusal of a FWA request

Employees will be allowed to access the Fair Work Commission's [FWC] jurisdiction if the employer refuses a FWA request or does not respond in 21 days in writing on the refusal.

Parties must first attempt to resolve the dispute at the workplace level before applying to the FWC to assist. The FWC will be able to arbitrate and issue orders where there is no reasonable prospect of the parties resolving the dispute themselves. The FWC must also take into account fairness between the employer and employee.

Civil penalties will apply where a FWC order is breached.

What should you do?

These changes around FWA only come into effect on 6 June 2023. This gives businesses time to prepare. In the next few months you should be reviewing your current practices for considering and responding to requests for FWA and include updating or implementing policies or procedures on FWA to ensure they align with the new changes.

Sexual Harassment and Discrimination

The Amending Acts introduce measures to prevent sexual harassment, sex discrimination and victimisation, and provides additional powers to the Sex Discrimination Commission. In this summary, we only discuss the amendments of the Secure Jobs, Better Pay Act.

Prohibition of Sexual Harassment

As of March 2023, there is an express prohibition against sexual harassment [as defined in the Sex Discrimination Act] in connection with work.

This includes:

- **Wider definition of 'worker'**

The wider definition of 'worker' as per the Work Health and Safety Act 2011 [Cth] will apply.

This includes individuals who are carrying out work in any capacity for a person conducting a business or undertaking [including employees, apprentices and contractors].

- **Stop sexual harassment order jurisdiction**

An employee may make an application about an alleged contravention under the Fair Work Act 2009 [the Act] and the Fair Work Commission [FWC] may make a 'stop sexual harassment order'.

A prospective employee is also able to make such an application.

- **New dispute resolution function**

An employee who alleges they have been sexually harassed, may ask the FWC to deal with the dispute via mediation or conciliation.

If this does not resolve successfully, the FWC must then issue a certificate to that effect and this certificate will be a precondition to the employee initiating civil proceedings in a court.

The FWC can only do this if the application is not solely for a stop sexual harassment order.

These new sexual harassment provisions will operate concurrently with State and Territory law.

This positive duty to prevent sexual harassment will require employers to manage the risk of sexual harassment, in a similar way to managing health and safety risks.

Discrimination

Changes are being made to the anti-discrimination provisions in the Act, to align it with other Commonwealth anti-discrimination legislation.

As of March 2023:

- **Additional protected attributes**

'Breastfeeding,' 'gender identity' and 'intersex status' will be included in protected attributes as grounds of discrimination.

'Gender identity' and 'intersex status' will be as defined in the Sex Discrimination Act 1984.

'Breastfeeding' definition will be contained within the Act itself and defined as 'the act of expressing milk, act of breastfeeding and breastfeeding over a period of time.'

- **Special measure to achieve equality**

The changes clarify that certain terms can be included in an Enterprise Agreement as a 'special measure to achieve equality' even if they may be a discriminatory term.

For example, a term that has the purpose of achieving substantive equality for employees who are female and have a physical or mental disability.

However, a term of an Enterprise Agreement ceases to be a special measure to achieve equality, after substantive equality for the group of employees has been achieved.

What should you do?

- Employers can meet the positive duty requirements by implementing or updating their policies and procedures to show they are going to meet this positive duty, providing training and education to employees and other relevant parties, conducting regular risk assessments, and having a clear and effective complaint-handling process.
- They can also ensure a safe and inclusive work environment by promoting equality, respect, and dignity, and by addressing any incidents of discrimination or harassment that are reported.

Family domestic violence and Paid parental leave

Family domestic violence leave

All employees will have access to 10 days of paid family and domestic violence leave:

- This renews every year on the anniversary of the employee's commencement with the business
- Any unused leave does not carry over into the new anniversary year
- Starts:
 - Small business (fewer than 15 employees): 1 August 2023
 - Other businesses: 1 February 2023

Paid parental leave

The changes to paid parental leave has not been approved as yet as in the bill has not been passed at the date of this document. But if it is, the changes will come into effect and apply to employees who have babies on or after 1 July 2023.

Parental Leave Pay and Dad & partner pay will be combined into a single 20-week pool of leave from 1 July 2023. Both parents can decide how they want the leave taken and how they will split it amongst themselves. The leave must be used within 2 years of birth/adoption.




Instead of just a single income threshold, there will now be a household income threshold of \$350,000 for households to be able to access this leave.

What should you do?

Businesses should review their policies and update them around the family domestic violence leave.






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