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Secure Jobs, Better Pay Bill Is Now Law

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On 4 November 2022 we published a summary of the *Secure Jobs, Better Pay Bill 2022* (Cth) (Bill) as it was introduced into Parliament. You are able to access that summary here.

In passing the Bill, Parliament made a significant number of changes to it.

We have set out below:

- A list of key changes made to the Bill by the Parliament; and
- An updated high level summary of key aspects of the Bill.

Key Changes Made By The Parliament

In order to secure passage of the Bill through the Senate, the Government required the support of the Australian Greens and one other Senator. As a result, the following changes were made to the Bill:

- In dealing with a dispute regarding a *request for flexible work arrangements*, the Fair Work Commission (FWC) must first deal with the dispute other than by arbitration (except in exceptional circumstances).
- An employer who seeks to refuse an extension of *unpaid parental leave* on reasonable business grounds will be subject to additional requirements, and the FWC will have the power to arbitrate disputes about those refusals if they cannot be resolved at the workplace level. The requirements are very similar to those included for refusals of requests for flexible work arrangements.
- The FWC will only be allowed to make an *intractable bargaining declaration* after a minimum bargaining period (which is generally nine months) has elapsed.

- For multi-enterprise agreements:
    - an employer cannot ask employees to vote on a proposed agreement (or a proposed variation) unless each union bargaining representative consents to that in writing or, in the absence of that consent the FWC makes a *voting request order*;
    - the FWC will not be able to include an employer in a *single interest employer authorisation* (or add them to the coverage of a pre-existing single interest employer agreement (SIEA)) if:
        - the employer has fewer than 20 employees; or
        - the FWC is not satisfied that the employer's operations and business activities are reasonably comparable with those of the other employers covered by the SIEA.

          However, if the employer employs at least 50 employees, the FWC can assume that:

            - the employer's operations and business activities are reasonably comparable with those of the other employers; and
            - the common interest and public interest requirements are satisfied,

              unless the employer proves otherwise.
    - the FWC can exclude an employer from a proposed SIEA if:
        - the employer is bargaining in good faith for a proposed enterprise agreement that will cover the employer and the relevant employees, or substantially the same group of employees; and
        - the employer and the relevant employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered them, or substantially the same group of employees; and
        - on the day that the FWC will make the authorisation, it has been less than nine months since the most recent nominal expiry date of an agreement made by the employer and the relevant employees.
- The Government must commission a review of the amendments made by the Bill, including to identify and rectify any unintended consequences, and it must start within two years.

Set out below is a high-level summary of the key aspects of the Bill as passed.

New Objectives for The Act

The Bill seeks to amend the Act's objectives, including to promote job security and gender equality, the need to improve access to secure work across the economy, and the need to achieve gender

equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps.

Those principles would need to be taken into account by the FWC in exercising its functions, including when making decisions on pay and conditions.

Equal Remuneration Principles

The equal remuneration principles are intended to elevate gender equality principles in the federal workplace relations system by guiding the way that the FWC considers equal pay cases, including a prohibition on the FWC taking into account gender-based assumptions in the assessment of work value, and a requirement for the FWC to consider whether historically the work has been undervalued because of assumptions based on gender.

The Bill proposes that the FWC be able to make an equal remuneration order on its own initiative, or on application by an employee, an employee organisation or the Sex Discrimination Commissioner. In deciding whether there is equal remuneration for work of equal or comparable value, the FWC would be able to take into account, among other things, comparisons within and between occupations and industries to establish whether the work has been undervalued on the basis of gender. That comparison would not be limited to similar work, and does not need to be a comparison with an historically male-dominated occupation or industry.

These principles will be particularly relevant when the FWC reviews modern awards, or when it arbitrates industrial disputes about equal remuneration.

Prohibiting Sexual Harassment in Connection with Work

The Bill will make it unlawful for a worker (meaning any person performing any work in any capacity, whether paid or unpaid) to sexually harass:

- Another worker in a business or undertaking;
- A person who is seeking to become a worker in a particular business or undertaking; or
- A person who is conducting a business or undertaking,

if the harassment occurs in connection with the other person being a person of that kind.

Similar prohibitions already exist in state and other federal legislation.

Employers would be vicariously liable for unlawful sexual harassment engaged in by their employees unless they could prove that they took all reasonable steps to prevent the employee from doing the contravening acts.

The FWC will have the power to deal with a dispute about an alleged contravention of the unlawful sexual harassment provisions, including by making a stop sexual harassment order. The existence of this regime will not prevent an employee from choosing to make a claim about sexual harassment under other legislation instead, such as making a complaint to the Australian Human Rights Commission under the Sex Discrimination Act.

Restricted Use of Fixed and Maximum Term Employment Contracts for Non-Casuals

If the Bill is passed, an employer will be prohibited from entering into a fixed or maximum term contract with an employee that:

- Operates for a period greater than two years;
- Could operate and be extended / renewed for a period greater than two years in total; or
- That contains an option or right to extend or renew the contract more than once.

The Bill will also prohibit an employer entering into consecutive fixed or maximum term contracts to perform the same (or substantially similar) work, where there is substantial continuity of the employment relationship and the contract terms exceed in aggregate or any of those contracts contain an option for renewal or extension.

There are a range of situations in which these rules would not apply, including where the employee is engaged:

- In relation to a training arrangement; or
- To undertake essential work during a peak demand period; or
- To undertake work during emergency circumstances; or
- The employee's earnings under the contract are above the high income threshold (currently AU$162,000) for the year in which the contract is entered into.

The effect of these changes will be that going forward non-ongoing employees, including those under existing contractual arrangements, can only be employed on maximum or fixed term contracts for a period of up to two years. If an employee is engaged in contravention of these requirements, the term of the contract that provides for the contract to terminate at the end of an identifiable period will be of no effect (but the remainder of the contract will remain valid).

Additionally, the Fair Work Ombudsman will be required to prepare a Fixed Term Contract Information Statement that employers must supply to certain existing and prospective employees.

Pay Secrecy

The Bill will give an employee a new workplace right to disclose, or not disclose, to any other person their remuneration or any terms and conditions of their employment that are reasonably necessary to determine remuneration outcomes (such as working hours).

A contract term, or the term of an award or enterprise agreement, would have no effect to the extent that the term would be inconsistent with this right.

It will also be necessary to consider that it would be a contravention of the Act for an employer to enter into a contract or other written agreement with an employee that includes a term that is inconsistent with this right.

The immediate practical implication of these amendments, if passed, will be for employers to review their template employment agreements to ensure that, going forward, they do not contain any clauses which would infringe on this workplace right. It will also be necessary to consider whether certain content contained in contracts, such as information about bonuses or other matters that would contribute to remuneration outcomes, should be removed.

Flexible Work Arrangements

Currently, an employer can refuse a request for a flexible work arrangement on reasonable business grounds (for example, if it is too costly or impractical to accommodate the arrangement). Under the proposed changes, aside from slightly widening the cohort of employees who can apply, an employer will be required to genuinely try to make changes to accommodate the request. If the employer and employee cannot agree on the changes, then an employer may refuse it (but still only on reasonable business grounds).

An employee will be able to apply to the FWC to challenge an employer's refusal of a request or a failure to respond to a request. The FWC would be permitted to deal with the dispute as it sees fit, including through arbitration (although in most circumstances arbitration will not be able to occur unless the FWC has first dealt with the dispute other than by arbitration - for example, through conciliation). At arbitration, the FWC's powers would extend to ordering an employer to grant the employee's request or make specified changes to accommodate the request.

If these changes are passed, employers will need to very carefully scrutinise requests for flexible working arrangements and ensure that any decision to refuse a request is supported by robust grounds.

Terminating Enterprise Agreements that Have Nominally Expired

The Bill changes the matters about which the FWC needs to be satisfied in order to approve a unilateral application to terminate an enterprise agreement that has passed its nominal expiry date.

For example, the FWC in deciding whether to terminate an enterprise agreement would need to have regard to factors such as whether:

- The continued operation of the agreement would be unfair for the employees covered by the agreement; or

- Bargaining is on foot for a proposed new agreement that would cover the same (or substantially the same) group of employees as the expired agreement and, if so, whether the termination would adversely affect the bargaining position of the employees.

The Bill requires an employer to provide an undertaking (referred to as a 'guarantee of termination entitlements') in respect of employees who would, but for the termination of the expired agreement, be covered by that agreement. The employer would need to undertake that those employees will receive any termination entitlements that they would have been entitled to receive under the

terminated agreement if their employment is terminated on the grounds of redundancy or the insolvency / bankruptcy of the employer. The undertaking would remain in force for the time period specified in the undertaking, until another enterprise agreement covers the employee or for four years (whichever occurs first).

Major Changes to The Enterprise Bargaining System

Easier for Employees to Force Employers to the Bargaining Table

The Bill will allow a bargaining representative to initiate bargaining for an enterprise agreement to replace an existing enterprise agreement that nominally expired within the previous five years and that covered the same (or substantially the same) group of employees who would be covered by the proposed new agreement. This could be done simply by submitting a written request to the employer. Currently an employer can resist bargaining until such time as a majority of employees ask to bargain (known as a Majority Support Determination).

This mechanism would not apply to bargaining for a proposed greenfields agreement or where a single interest employer authorisation (see below) is in operation.

The practical effect of this change will be to make it much easier for employees to force their employer to bargain for replacement agreements shortly after an existing agreement expires.

FWC empowered to determine "intractable bargaining" disputes

The Bill empowers the FWC to deal with "intractable bargaining" disputes through arbitration in respect of matters where there is no reasonable prospect of the bargaining representatives reaching agreement. This will make it easier for the FWC to arbitrate over enterprise bargaining outcomes than under the current law.

This option will not be available:

- For multi-enterprise agreements unless a supported bargaining authorisation or single interest employer authorisation is in operation;
- Unless the parties have first unsuccessfully attempted to resolve the disputes, with the help of the FWC, through section 240 of the Act; and
- Unless bargaining has been on foot for at least 9 months.

Notifying and Taking Protected Industrial Action

Protected action for supported bargaining agreements or single interest employer agreements will need to be notified to employers 120 hours (five days) in advance of the action starting. For other kinds of agreements, the default notice period will remain three working days.

In effect, these amendments will provide employers with a short additional period of notice of protected action (in bargaining for certain types of agreements).

New and Re-Branded Types of Multi-Employer Enterprise Bargaining

Cooperative Bargaining

The Bill re-brands the existing process for making multi-employer enterprise agreements as "cooperative bargaining". Cooperative bargaining will be voluntarily entered into by the employers (as is currently the case for multi-employer bargaining).

Employees will not be able to take protected industrial action during bargaining for cooperative agreements.

Once a cooperative bargaining agreement is made, the FWC will have the power to add an employer and its employees to the coverage of the agreement, provided that the employees are allowed to vote and that a majority of those who cast a valid vote support coverage under the agreement.

Single Interest Employer Bargaining

This is a form of multi-employer bargaining during which industrial action will be available. It is triggered by the FWC making a single interest employer authorisation.

Employers with clearly identifiable "common interests" will be able to bargain together under a single interest employer authorisation, made by the FWC, in certain circumstances. This enhances the possibility of industry wide or sector bargaining.

Employers or employee bargaining representatives will be able to apply to the FWC to make a single interest employer authorisation, meaning that an authorisation could be granted over the objection of one or more employers.

While a single interest employer agreement can only be made with the agreement of employers proposed to be covered by it, employers, or employee organisations covered by the agreement, can then apply to the FWC to extend its coverage to new employers and their employees, subject to meeting the specified requirements (including demonstrating that the new employer and the already covered employers have clearly identifiable common interests, and that the addition of the new employer would not be contrary to the public interest).

Voting request orders

An employer will not be allowed to ask employees to vote for a proposed multi-enterprise agreement (or a proposed variation of a multi-enterprise agreement) unless:

- Each union bargaining representative consents to that in writing; or
- If that consent is not provided, the FWC makes a voting request order.

The FWC must make a voting request order if it is satisfied that:

- For each union that has failed to provide written consent - their failure was unreasonable in the circumstances; and
- If the request relates to approval of a proposed enterprise agreement - the making of the request would not be inconsistent with or undermine good faith bargaining.

Better Off Overall Test

The changes to the Better Off Overall Test (BOOT) will allow for a more holistic assessment of an enterprise agreement based on current and likely work patterns, rather than a clause-by-clause analysis of all hypothetical work patterns as is currently the approach taken by the FWC. It will also give primary consideration to any common view between employers and union bargaining representatives that the agreement passes the BOOT.

Affected parties will be able to apply to the FWC for reconsideration of whether an agreement satisfies the BOOT in certain circumstances, such as where the FWC had regard to patterns of work or types of employment in applying the BOOT and, at a later time, employees covered by the agreement engage in other patterns of work or different types of employment.

This change should be a welcome one for employers who are concerned about the current BOOT and its capacity to increase the overall costs of enterprise agreements. However, employers will need to carefully consider whether any proposed changes to work patterns or workforce composition under an enterprise agreement would create a real risk of a disaffected employee or union applying to the FWC to re-open the BOOT for that agreement.

More Changes Next Year

The Bill has implemented some major reforms in relation to employee entitlements and enterprise bargaining. However, more areas of potential reform have been flagged by the Government including in relation to labour hire and gig economy workers. We fully expect the Government to introduce further proposed amendments into Parliament next year.

If there are any queries you have regarding the amendments made by the Bill and the effects it will have on your organisation, please do not hesitate to contact us.

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