Business Savvy Risk Management
ABN 51 121 504 827
Level 11, 65 York Street
Sydney, NSW 2000
P 02 8076 6067
E info@businesssavvy.com.au
www.businesssavvy.com.au

Secure Jobs, Better Pay

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth)

On 2 December 2022 the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* ('Bill') passed the Senate and the Bill received royal assent on 6 December 2022. This means that the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* ('Act') has now passed into law.

The Act represents the most broad-ranging suite of changes to the Australian industrial relations landscape since the introduction of the *Fair Work Act 2009 (Cth)* ('FW Act').

The Act will introduce a range of changes for employers with the key changes occurring in the following areas:

- Equal pay & pay secrecy;
- Flexible work & fixed term contracts;
- Enterprise bargaining;
- Enterprise agreement and 'zombie' agreements;
- Industrial action;
- Abolition of the ROC and ABCC;
- Sexual harassment and anti-discrimination.

This paper will attempt to explain the complex amendments.

EQUAL PAY & PAY SECRECY

Equal pay

New provisions have been introduced to address the equal pay objectives, designed primarily to bridge the gender pay gap.

Section 157 and Part 2-7 of the FW Act will be amended to stipulate how the Fair Work Commission ('Commission') considers equal remuneration and work value cases. The amendments now allow the Commission to make an Equal Remuneration Order ('ERO') on its own initiative. The Act also provides direction on the gender equality considerations that the Commission is to take into account, including:

- Whether the work value is free of gender based assumptions; and

- Whether the work has been historically undervalued as a result of gender based assumptions.

Any equal remuneration order made by the Commission will no longer include a 'male comparator', which was the previous approach of the Commission. Further, the Commission is also no longer required to find discrimination on the basis of gender in order to grant an order.

New provisions will also be inserted at Part 5-1 of the FW Act establishing a Pay Equity Expert Panel and a Care and Community Sector Expert Panel within the Commission.

The purpose of the Expert Panel is to determine equal remuneration cases and certain award cases. It is hoped that this will allow for the appointment of members with expertise in gender pay equity, anti-discrimination and the Care and Community Sector.

Pay secrecy

These provisions are one of the most interesting and have the potential to lead to some disharmony in the workplace.

With the intent of creating greater pay equity and to reduce the risk of gender discrimination, the Act introduces new prohibitions on pay secrecy terms in contracts of employment. Employees will now have workplace rights to:

- Discuss and disclose their remuneration or any terms and conditions of their employment that are reasonably necessary to determine remuneration outcomes; and
- Elect not to discuss or disclose any information when asked by their co-workers.

As outlined above, these new provisions create workplace rights for employees and will be a civil remedy provision. This means that any employer who inserts these clauses into new contracts of employment or attempts to enforce a clause contained in an existing contract of employment will be exposed to monetary penalties.

Whilst it will be interesting to see whether these amendments are successful in addressing the present disparity in wages on the basis of gender, the amendments also have the potential to lead to aggressive salary negotiations. We would encourage all employers to examine their workforce to ascertain whether there is any pay discrepancy between genders.

FLEXIBLE WORK & FIXED TERM CONTRACTS

Flexible working arrangements

There are a number of changes to flexible working arrangements included in the new Act.

Division 4 of Part 2-2 of the FW Act will expand the circumstances in which an employee may request flexible work arrangements. The amendments mean an employee is now able to request a flexible working arrangement where an employee, or a member of their immediate family or household, experiences family and domestic violence.

The procedure for dealing with these requests will also be amended by expanding the employer's obligations to discuss the request with the employee, provide reasons for refusing any decision and inform the employee of any changes in the working arrangements the employer is willing to make to accommodate the employee's circumstances.

If an employer rejects the flexible working arrangement request of the employee, the employee is now able to make application to the Commission to resolve the dispute. The Act stipulates that where a flexible working arrangement dispute arises, the first avenue of dispute resolution should be conciliation between the parties however if a conciliation is unsuccessful or, if it is an urgent matter, the new provisions provide that the Commission may deal with a dispute as it considers appropriate and can make binding decisions.

Fixed term contracts

The Act introduces a number of provisions to limit the use of fixed term contracts. In a similar vein to the changes made to casual employees, these changes are designed to encourage secure and permanent employment. The new amendments include the following:

- A fixed term contract must be for no longer than 2 years;

- Employers are not able to renew or extend the fixed term contract more than once;

- Parties to a fixed term contract are permitted to renew or extend their first fixed term contract, provided they are within the 2 year limit, but are prevented from subsequently entering a further fixed term contract.

The changes are civil remedy provisions and employees can also access the small claims jurisdiction in eligible courts to enforce the legislative provisions.

In addition, the Commission is also empowered to resolve disputes regarding an employee's status as a fixed term employee.

ENTERPRISE BARGAINING

Multi-enterprise bargaining

The amendments which have garnered the most amount of attention are those concerning multi-enterprise bargaining. Whilst multi-enterprise bargaining currently exists under the FW Act, the provisions are not often used and the new Act aims to increase the access to existing multi-enterprise bargaining streams.

Some of the key changes include:

- **Supported bargaining agreements:** This change replaces 'low-paid bargaining' with 'supported bargaining'. This is a type of multi-enterprise bargaining which is designed to assist industries with low agreement coverage.

- In accordance with this stream the Commission can make a supported bargaining authorisation, which requires multiple employers to bargain together, if it is satisfied that it is appropriate. In accordance with supported bargaining, employee organisations may apply to the Commission to have themselves and their employees added to a supported bargaining authorisation, without any consent from the employer.

- Employers and employees who are identified in a supported bargaining or single interest employer authorisation are only able to remove themselves from the multi-employer bargaining process in limited circumstances.

- The Act also grants the Minister the power to make a declaration in relation to a particular industry, occupation or sector in order to facilitate access to the supported bargaining stream. The Commission then **must** make a supported bargaining authorisation if specified in the Minister's declaration.

- **Single interest employer authorisations**: The Act makes clear that single interest employer agreements will now be a form of multi-enterprise agreement. The term 'single interest employer' has been repealed and instead replaced with 'common interest employers'. The common interest employers will be able to bargain together for a multi-enterprise agreement;

- In accordance with the amendments, employee organisations are able to make an application for a 'single interest employer authorisation' whereas previously it was only employers. This is designed to ensure that those employers with identifiable common interests can more easily bargain together.

- The practical effect of this change is that, in certain circumstances, the Commission may grant a single interest employer authorisation, which covers an employer, without its consent. Provided that the employer employs at least 20 employees and is not covered by a nominally expired agreement, then an employer may be compelled to bargain with other common interest employers.

- The Commission may however determine that an employer ought to be excluded where it is satisfied that the employer is bargaining in good faith, has a history of effectively bargaining and less than 9 months have passed since the nominal expiry date of the agreement. The amendments certainly place additional pressure on employers, however this amendment at least allows employers to reach a single enterprise agreement before potentially being forced into the multi-enterprise stream bargaining.

- The Act also provides employee organisations with significant power to apply to the Commission for an employer to be added to a multi-enterprise agreement after the agreement has been made, and employers are only able to avoid being joined on limited grounds. Employee organisations are also afforded significant power in the bargaining process. Under the new amendments, employers are to remain in the bargaining process until the employee organisation representatives consent to the EA proceeding to a vote or the Commission makes a voting request order.

The Act also provides for the further following changes to multi-enterprise agreements:

- ***Cooperative workplaces:*** Existing provisions will be amended allowing multi-enterprise agreements to be known as 'cooperative workplace agreements' and these agreements will replace the process of bargaining for and making multi-enterprise agreements where a supported bargaining authorisation is not in operation.

- ***Excluded work:*** A scheme will be introduced precluding multi-enterprise agreements from covering employees in relation to the performance of certain types of work. Work in the industry of 'general building and construction' as defined in the *Building and Construction General On-Site Award 2020* will be excluded from coverage by multi-enterprise agreements.

The above outline is designed to provide a snapshot of the major changes to the bargaining arrangements. We do encourage you to seek specific advice with respect to your entity.

Initiating bargaining

Division 3 of Part 2-4 of the FW Act will be amended to simplify the process for initiating bargaining where the proposed qualifying single enterprise agreement would replace an existing agreement that has a nominal expiry date within the past five years and that has a scope substantially similar to the proposed agreement. In those circumstances, the amendments would enable an employee to initiate bargaining for an agreement via a bargaining representative, simply by making a written request to the employer as opposed to making an application to the Commission.

Better off overall test

The test is to be amended to address some of the concerns which have arisen over time. Rather than the previous approach of a line-by-line comparison, the Commission will now undertake the BOOT as a global assessment.

In addition the Commission will now only have regard to patterns of work or types of work under the agreement, rather than any hypothetical working patterns.

One of the most significant changes is that the Commission is now able to amend an agreement after it has been voted on, in order for the agreement to meet BOOT. This change will undoubtedly make the process of applying BOOT more efficient, as employees would not need to vote on the agreement again after it had been modified by the Commission. An area of concern however is the amount of influence that bargaining representatives may have on an agreement after it has been voted on. Employers will need to carefully consider whether each element of the agreement satisfies BOOT in order to ensure that significant changes are not made to the agreement post voting.

Bargaining disputes

The scope for the Commission to provide effective assistance to the parties to resolve stubborn bargaining disputes will be increased by repealing the unused serious breach declaration provisions and introducing a new intractable bargaining declaration scheme.

The declaration scheme is designed to operate where negotiations have become intractable. The Commission will now have the power, after an optional period of time for the parties to continue to negotiate, to make a workplace determination. This gives the Commission new and much broader powers to determine the contents of enterprise agreements where bargaining has been protracted and there is no reasonable prospect of reaching agreement.

Enterprise agreement approval

The requirements that need to be met for an enterprise agreement to be approved by the Commission will be simplified, with various current steps being removed.

The key changes include the following:

- Under the Act, for single enterprise agreements, employee bargaining representatives will have the power (provided some pre-conditions are met) to initiate bargaining by serving written notice on the employer. Previously, bargaining only commenced when an employer agreed to bargain, initiated bargaining or where a majority support determination or scope order had been made by the Commission;

- The requirements to provide a notice of employee representational rights and to wait at least 21 days after the last notice is given before requesting employees to vote will no longer apply to bargaining for a proposed single interest employer agreement, supported bargaining agreement or cooperative workplaces agreement, but would be retained in the case of a proposed single enterprise agreement;

- A number of strict pre-approval requirements have been removed or simplified and the Commission must take into account the Commission's new Statement of Principles (which is still to be developed by the Commission) and make a determination as to whether the agreement has been 'genuinely agreed' by the employees.

ENTERPRISE AGREEMENT & ZOMBIE AGREEMENT CHANGES

Termination of enterprise agreements after nominal expiry date

The Act will be amended to clarify that the Commission can only terminate an agreement that has nominally expired on the unilateral application of a party in limited circumstances. The Act now requires that an application to terminate an enterprise agreement after the nominal expiry date meets one of the following criteria:

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

- The agreement does not, and is not likely to, cover any employees; or

- The continued operation of the agreement would pose a significant threat to the viability of the business and terminating the agreement would reduce the risk of terminations to any employees. In addition, each employer to the agreement would also need to give the Commission a guarantee that it would preserve termination entitlements contained within the agreement.

Sunsetting of 'zombie agreements'

The remaining transitional instruments preserved under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)* will automatically be abolished.

This means that a number of instruments made under the predecessor legislation, for example, Australian Workplace Agreements, workplace determinations, preserved collective State agreements and collective agreements will terminate. The sunset period will be 12

months post the commencement of Part 13 of Schedule 1 to the new Act or a further period if extended.

Dealing with errors in enterprise agreements

Unnecessary complexity in agreement-making will be removed by empowering the Commission, or a party on application to the Commission, to vary enterprise agreements to correct or amend obvious errors, defects or irregularities. The Commission will also be able to validate a decision to approve an enterprise agreement or variation where the wrong version of the document was inadvertently submitted for approval.

INDUSTRIAL ACTION

Industrial action

The new legislation is designed to address some of the inefficiencies in industrial action. A panel of ballot providers who are pre-approved to conduct Protected Action Ballots will be established, which will seek to de-escalate disputes before industrial action is taken and after it has been authorised. A new notice requirement will be implemented before commencing employee industrial action, with a minimum of 120 hours' notice for multi-enterprise agreements, but otherwise remains at 3 working days.

The crucial amendment is that once a protected action ballot order has been made there must be a compulsory mediation or conciliation conference of the parties before the Commission. This must occur before the ballot.

ABOLITION OF THE ROC & ABCC

Abolition of the Registered Organisations Commission

The *Fair Work (Registered Organisations) Act 2009* will be amended through repealing the provisions that establish the Registered Organisations Commission, as well as the Registered Organisations Commissioner position. The remaining references to the Commission will then be replaced with references to the General Manager of the Fair Work Commission or the Fair Work Commission.

Abolition of the Australian Building and Construction Commission

The Act will abolish the Australian Building and Construction Commission which has served as the regulator for the Australian building and construction industry.

The *Code for the Tendering and Performance of Building Work Act 2016* will be repealed when the Commission is abolished, to ensure workers in the building and construction industry have the same rights as other workers in relation to the enforcement of the Act. Specifically, the provisions providing higher penalties for building industry participants and broader circumstances under which penalties may apply will be removed and transitional arrangements will be provided.

The provisions relating to the Work Health and Safety Accreditation Scheme and Office of the Federal Safety Commissioner will however be retained.

SEXUAL HARASSMENT & ANTI-DISCRIMINATION

Prohibiting sexual harassment in connection with work

A new prohibition is to be inserted into the FW Act to implement recommendation 28 of the *Respect@Work* Report which applies to workers, prospective workers and persons conducting businesses or undertakings (PCBU). The prohibition applies to a wider definition of 'worker' under the *Work Health and Safety Act 2011* (Cth).

The new amendments also provide for broader powers to the Commission to deal with sexual harassment complaints including:

- Employees being able to seek a 'stop sexual harassment order' to prevent future harassment; and

- Similar to the general protections provisions, the Commission is then able to deal with the application by conciliation or mediation. If the Commission is satisfied that all reasonable attempts to resolve the dispute have been unsuccessful then it is able to issue a certificate. An applicant is then able to make an application to the Court to deal with the dispute or alternatively the parties may consent to the Commission arbitrating the dispute.

In addition, a positive duty will now be placed on employers to manage the risk of sexual harassment in the workplace and to take all reasonable steps to eliminate unlawful sex discrimination, sexual harassment, sex-based harassment, victimisation and work environments that are hostile on the grounds of sex.

Anti-discrimination and special measures

The Act also makes a number of minor changes to the anti-discrimination provisions including:

- The anti-discrimination framework in the FW Act (for example, general protections) will be strengthened by adding further protected attributes of breastfeeding, gender identity and intersex status, bringing the Act into alignment with other Commonwealth anti-discrimination legislation;

- The FW Act will be amended to confirm that 'special measures to achieve equality' are matters pertaining to the employment relationship and therefore, provided that a reasonable person considers the term necessary in order to achieve substantive equality, may be included in an enterprise agreement.

OTHER KEY CHANGES

Some of the other key changes include the following:

Enhancing the small claims process*:* The monetary cap on the amounts that can be awarded in small claims proceedings under the Act will be increased from $20,000 to $100,000. The court in a small claims proceedings can now award to a successful claimant any filing fees they paid to the court as costs, from the other party.

Prohibiting employment advertisements with pay rate that would contravene the Act: A new provision will be inserted prohibiting national system employers from advertising

employment at a rate of pay that would contravene the Act or a fair work instrument. It will require advertisements of piecework to include any periodic rate of pay to which the pieceworker would be entitled. Employers would not contravene the provision if they had a reasonable excuse for not complying.

WHAT DOES THE NEW ACT MEAN FOR EMPLOYERS?

The new Act represents the most wide ranging suite of changes to the industrial landscape since the introduction of the FW Act.

The above outline is designed to provide employers with a brief overview of some of the most crucial changes. We do however encourage every employer to seek specific guidance about what these changes mean for you and your employees.

Prepared by our Legal Team:

Andrea Willits

Partner

awillits@hilliardandberry.com.au

Simon Berry

Partner

sberry@hilliardandberry.com.au

Emily Berry

Paralegal