SERIES 1: ENTERPRISE BARGAINING and AGREEMENTS

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

The *Fair Work Amendment Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**Secure Jobs, Better Pay Act**) makes changes to the enterprise bargaining framework under the Fair Work Act 2009 (Cth) (**FW Act**). To encourage bargaining the Secure Job Better Pay Act reduces barriers to multi-enterprise bargaining, changes rules about initiating bargaining, simplifies agreement making and terminating agreements and expands the Fair Work Commission's (**FWC**) powers to resolve bargaining disputes, including by arbitration.

ENTERPRISE BARGAINING – EFFECTIVE FROM 6 JUNE 2023

1. Multi-Enterprise Bargaining

The Secure Jobs, Better Pay Act introduces new streams of multi-employer bargaining, but reduces barriers to access multi-employer bargaining streams. The three streams are:

- Cooperative workplaces
- Single interest employer authorisation
- Supported bargaining

Cooperative Workplaces stream (multi-enterprise bargaining on a voluntary basis)

This type of agreement-making may apply to live performance industry employers. It is similar to the industry-wide bargaining that LPA currently undertakes in an informal manner in respect of the *Performers' Collective Agreement* (PCA) and the *Casual Crew Collective Agreement*. However, it may enable PCAs to be more easily registered with the FWC.

This stream enables employers and employees to jointly seek to have their business joined to another cooperative agreement through an application process to the FWC. For example, if the PCA is registered as a cooperative EA a new production such as "MAMMA MIA!" could apply to the FWC to have the PCA apply to their production.

Benefits of this stream are:

- it is voluntary and requires the majority of employees to agree to multi-employer bargaining;
- no industrial action can be taken; and
- no scope orders or majority support determinations are available.

The Fair Work Commission (FWC) can approve a variation to a cooperative workplace agreement to add an employer and employees where:

- the employer and the affected employees have made an application for an employer to be added to the EA;
- the majority of affected employees cast a valid vote to approve the EA;
- the employer has taken all reasonable steps to explain the EA to employees, taking into consideration particular circumstances and needs of the employees; and
- employers and unions of the existing agreement have had the opportunity to express their views; and
- it is not contrary to the public interest.

Single interest employer authorisation (Employers can be compelled to bargain)

The single interest employer authorisation stream applies to employers who have 'clearly identifiable common interests' to bargain together for a multi-enterprise agreement. Factors the FWC can consider in determining common interests for the purposes of single interest authorisations are:

- geographical location;
- regulatory regimes;
- the nature of enterprises to which the agreement will relate; and
- the terms and conditions of employment in those enterprises.

This stream may be applied to live performance industry employers who do not wish to bargain or enter a cooperative EA. It is a little unclear how far reaching this stream will be, but it seems to be particularly targeted at:

- similar businesses within a geographic area (i.e. regional or city based);
- businesses that are joint ventures, or related bodies corporate;
- Business that sit in a supply chain (e.g. Qantas and the associated subcontract; and businesses that work in connection with the primary airline business).

Under this stream, employers or employee bargaining representatives can seek an authorisation from FWC requiring the employer to bargain in conjunction with other employers if:

- they have a common interest; and
- The operations of the employers are 'reasonably comparable'; and
- At least some of the employees that will be covered are represented by a union; and
- The majority of the employees of each relevant employer want to bargain with the employers that will be covered; and
- It is not contrary to the public interest.

When a single interest employer authorisation applies to an employer, the employer must not commence bargaining, agree to bargain, and cannot be compelled to bargain with their employees for **any other type of enterprise agreement.**

The FWC can exercise its discretion and not issue a single interest authorisation for a **period of 9 months after the expiry date of the previous agreement**, provided that:

- the parties are bargaining in good faith for a replacement agreement; and
- the parties have a history of effectively bargaining in relation to agreements to cover the same (or substantially the same) group of employees.

Procedures must be followed during the bargaining process to register agreements with the FWC such as:

- complying with good faith bargaining obligations
- complying with voting procedures

The single interest authorisation also allows **employees to take industrial action** during the bargaining period.

Once a single interest authorisation enterprise agreement exists, either an employer or a union can apply to the FWC for the agreement to cover new employers, if:

- the new employer has a "common interest" with those already covered;
- it is not contrary to the public interest to add the new employer;
- the employers and unions already covered have the opportunity to express their views; and
- the majority of employees to be added to the EA have agreed to be added.

If an employer does not wish to bargain, or be covered by the agreement, they will only be exempted if:

- they are a small business employer (less than 20 employees);
- the employer already has a single interest authorisation, or has made an application for a single
- interest authorisation which has not been decided;
- the employer is covered by an EA that has not yet passed its nominal expiry date at the time that the FWC is to make the authorisation; and
- if the employer has 50 or more employees, and they can establish that their business activities are not reasonably comparable with the other employers.

Supported bargaining stream

The supported bargaining stream replaces the current "low paid bargaining stream".

This stream also focusses on enabling employees to compel employers to bargain in conjunction with other employers with a similar process to the above single interest bargaining stream with the additional considerations of:

the prevailing pay and conditions within the industry (including whether low rates of pay prevail), and
whether the employer is substantially funded by Commonwealth/State or Territory Governments.

Parties are required to comply with good faith bargaining obligations. Employees can take industrial action during the bargaining period.

This stream is not likely to apply to the live performance industry. It is intended to capture low paid care industries.

Key Change to voting

A new requirement is that an employer negotiating as part of a multi-enterprise agreement must obtain written consent from each union acting as a bargaining representative for the agreement prior to putting the agreement to an employee vote to either approve or vary the agreement. This effectively gives the unions a veto power over multi-enterprise agreement voting.

2. Termination of enterprise agreements – immediate effect

The ability to terminate Enterprise Agreements will be substantially curtailed, which means that employers' ability to seek to terminate EAs after their nominal expiry date is passed will be much more limited.

In order for EAs to be terminated the FWC will need to be satisfied that:

- the continuation of the EA would be unfair for employees; or
- there are no employees that the EA will cover; or
- continuing the EA would pose a significant threat to viability of the business, terminating the EA would reduce likelihood of employee terminations and termination entitlements are guaranteed.

3. Ending 'Zombie' Agreements – immediate effect

Agreements made prior to the commence of the FW Act in 2009 (Zombie Agreements) will cease to apply 12 months after the legislation comes into effect.

The default period for the termination of the zombie agreement can be extended beyond 6 December 2023, for a maximum of four years, however, the FWC will need to be satisfied in all the circumstances that it is appropriate to grant the extension.

What does this mean for employers?

By 6 June 2023, LPA members who are covered by a zombie agreement will need to notify their employees in writing that they are covered by a transitional instrument and that this will terminate by default on 6 December 2023.

4. Initiation of bargaining for replacement enterprise agreement – immediate effect

Under the current legislation, if an enterprise agreement has passed its nominal expiry date and the employer does not wish to bargain for a replacement agreement, union bargaining representatives must get a majority support determination. Under the new legislation, union bargaining representatives could simply give the employer a written request to bargain (provided no more than five years has passed since the nominal expiry date).

This change would not be available to initiate bargaining for a proposed greenfields agreement, a multi-enterprise agreement (i.e., a cooperative workplaces agreement or a supported bargaining agreement) or a single enterprise agreement in relation to which a single-interest employer authorisation is in operation.

5. Initiating bargaining – single enterprise agreements – from 6 June 2023

If an employer is covered by a registered enterprise agreement that has expired within the last five years, the employees covered by that agreement can apply to the FWC to commence bargaining for a new replacement agreement. The change is available to initiate barging for a greenfield agreement, a multi-enterprise agreement or single interest enterprise agreement.

Once the request has been made, the employer is required to comply with food faith bargaining obligations and employees can take industrial action.

This may apply to LPA Members who have registered agreements that have not been replaced in the last five years.

6. Arbitration of bargaining disputes – from 6 June 2023

The FWC will be able to arbitrate bargaining disputes when parties are not able to reach agreement. An employer or a union can apply to the FWC for arbitration where the FWC can make a determination in respect of outstanding matters between parties.

This represents a significant change, as it introduces 'unilateral arbitration' where one party can effectively disagree to the claims made in bargaining and seek to have terms imposed on all parties by way of arbitration.

Bargaining disputes will not be able to proceed to arbitration until at least nine months after a previous EA has reached its nominal expiry date or nine months after bargaining commenced.

7. Industrial action – from 6 June 2023

Industrial Action will only be able to be taken within three months of a protected action ballot order (PABO). A PABO is permission given by the FWC for employers or employees to take industrial action.

Parties will be required to attend a conciliation at the FWC every time a PABO is filed. The Aim being to resolve a dispute before industrial action is taken.

For multi-employer agreements the warning period to be given to business for taking industrial action for multi-enterprise agreements from 3 days to 120 hours.

8. Better Off Overall Test (BOOT) – from 6 June 2023

The new legislation will remove technicalities in the Better Off Overall Test (BOOT) assessment. Instead of the current line by line analysis that the FWC conducts when assessing Enterprise Agreements, the BOOT will now be applied globally. The FWC will also now be required to consider foreseeable patterns of work, not the hypothetical analysis that is currently contemplated.

The FWC will be empowered to excise terms from the Agreement if they prevent it from passing the BOOT.

If employers engage in patterns of work not foreseen by the EA employees and unions will be able to apply to the FWC to reconsider its assessment of the BOOT at any time after an EA is approved. If the FWC finds that the EA does not meet the BOOT:

- the employer must rectify the concern in 7 days, or
- the FWC will vary the EA on its own initiative and the employer must comply within 7 days.

9. Changes to EA approval requirements – from 6 June 2023

The current requirements for EA approval are extinguished and will no longer apply. There will now be three broad requirements:

- **Statement of Principles** – the FWC will be required to issue a statement outlining the types of measures that would ordinarily be expected in order to secure genuine agreement.
- **Notice of Employee Representational Rights** – The requirement to issue a 'Notice of Employee Representational Rights' will remain, however the minor or technical requirements in relation to this will not be applicable.
- **Need for employees to have sufficient interest in the EA** – The FWC must be satisfied that employees who are voting for the EA have sufficient interest and are sufficiently representative.

What does this mean for LPA members?

LPA members who have an expired EA, may face more pressure to bargain for a new EA if they have not already taken steps to bargain.

From June 2023, LPA members:

- who do not employ performers under the PCA may face pressure to do so,
- who do not have any EA in place may be co-opted into multi-employer bargaining or enterprise level bargaining.

Do LPA Members need to take any action?

LPA members who have an EA that is past its nominal expiry date may consider negotiating a replacement agreement before the changes occur in June 2023.