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

Enterprise Bargaining and Enterprise Agreements

Changes to the *Fair Work Act 2009* (Cth) effective from 7 June 2023:

Bargaining Disputes

The Fair Work Commission (**FWC**) has a new power to issue an 'intractable bargaining declarations' (**Declaration**) and 'intractable workplace determinations' (**Determination**).

The FWC can only issue a Declaration if it is satisfied, among other things, that:

- the minimum bargaining period has ended, and
- there are no reasonable prospects of the bargaining parties reaching agreement.

After the Declaration is issued, a 'post-declaration negotiating period' may be specified. During this time, protected action cannot be taken, however the FWC can provide assistance to the parties, for example with conciliation. After this period is concluded, then the Commission must make a Determination.

The FWC has more scope to intervene in long running bargaining disputes.

Rarely used existing provisions in the *Fair Work Act 2009* (Cth) (FW Act) related to 'serious breach declarations' and 'bargaining related workplace determinations' are repealed.

Industrial Action

Eligible employees can take protected industrial action in support of multi-enterprise agreements that is:

- a single interest employer agreement, or
- a supported bargaining agreement.

Employees are not able to take protected industrial action for greenfields agreements or cooperative workplace agreements.

Other changes to industrial action include:

- Applications for a protected action ballot order (PABO) are treated separately for each employer and Employees are required to vote to approve the protected industrial action.
- 120 hours' notice will need to be given before industrial action may commence in relation to a multi-enterprise agreement.
- The FWC can require parties to participate in a Commission conciliation conference during the Protected Action Ballot Period.

- Administrative changes to protected industrial action include tha7t the Australian Electoral Commission is no longer to be the default agent to conduct protected action ballots.

Multi-enterprise agreements – Supported bargaining arrangements

Supported bargaining arrangements replace the low-paid bargaining arrangements. For a supported bargaining agreement to be made, the FWC must first make a 'supported bargaining authorisation'. This is not likely to affect the Live Performance industry.

Multi-enterprise agreements - Single interest employer arrangements

The new single interest employer arrangements widen access to 'single interest employer authorisations'. Employees can compel employers to bargain together if there are 'clearly identifiable common interests' and if no exemptions apply.

Employee bargaining representatives are eligible to seek a single interest employer authorisation if:

- the employers subject of the application have clearly identifiable "common interests", and
- the operations and business activities of each of the employers are "reasonably comparable" with those of the other employers that will be covered by the agreement, and
- at least some employees that will be covered by the agreement are represented by a union, and
- the employer and any unions affected have had the opportunity to express their views on the application, and
- a majority of employees of each of relevant employer to be covered want to bargain with the employers that will be covered by the EA, and
- it is not contrary to the public interest to make the authorisation.

Employers are exempt from these types of applications if:

- they employ less than 20 employees (including associated entities),
- the employer is already covered by a single-interest employer authorisation or a supported bargaining authorisation in relation to the relevant employees,
- the employer has already made an application for a single-interest employer authorisation that has not yet been decided, or
- 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.

For single interest employer arrangements, an employer can only put an agreement to vote if either:

- all unions involved in bargaining agree to the agreement being put to vote, or
- the employer has obtained a "voting request order" from the FWC. The FWC is empowered to make these orders where a union has unreasonably failed to agree to an agreement being put to vote.

Employers can ask the FWC to exercise its discretion to not extend an existing multi-employer agreement to its business. This grace period operates for a limited period of nine months after a previous enterprise agreement covering the relevant employees has passed its nominal expiry date, 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.

Multi-enterprise agreements – Cooperative workplace agreements

The co-operative workplaces stream enables employees and employers to jointly seek to have their enterprise joined to another co-operative workplace agreement (that is, a multi-enterprise agreement that is not made through a supported bargaining authorisation process) through an application process with the FWC.

The process to apply for an existing cooperative workplace agreement to be varied and extend its coverage to a new employer **must be made jointly by the employers and employees**. This is done by the employer requesting the employees to be covered by the cooperative workplace agreement through a voting process, and a majority of those employees who cast a valid vote must vote in favour of the cooperative workplace agreement being varied.

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.

Protected industrial action cannot be taken in pursuance of a cooperative workplace agreement and the FWC cannot make bargaining orders or workplace determinations.

Initiating bargaining

A bargaining representative of an employee (for example, a union) covered by a proposed single enterprise agreement can write to an employer making a request to initiate bargaining for a proposed agreement (**Bargaining Request**).

A Bargaining Request can be made if a group of employees is seeking to replace an existing single-enterprise agreement (other than one made under a single interest employer authorisation) that has passed its nominal expiry date by no more than five years, and the 'replacement' agreement will cover the same or substantially the same group of employees as the existing agreement.

The use of a Bargaining Request simplifies the process by which employees can commence bargaining for a 'replacement' single-enterprise agreement compared to the previous requirements.

The Bargaining Request will initiate bargaining, meaning that a notice of employee representational rights will need to be issued by the employer and bargaining orders or protected action ballot orders may be sought from the FWC.

Bargaining Requests cannot be made in relation to a proposed greenfields agreement or a multi enterprise agreement (that is, a cooperative workplaces agreement or a supported bargaining

agreement) or a single-enterprise agreement in relation to which a single interest authorisation is in operation.

Better Off Overall Test (BOOT)

The FWC must give consideration to employer, employees and/or bargaining representatives in relation to the BOOT.

The BOOT will be a global assessment, and the FWC may only have regard to the patterns or kinds of work if they are reasonably foreseeable.

The FWC will have the power to amend an Agreement to make it pass the BOOT. This means that if there are terms of the Agreement which do not pass the BOOT, the FWC can excise them. It is much less likely that Agreements will not pass the BOOT.

Changes to Enterprise Agreement approval requirements

The process for the FWC to determine whether an enterprise agreement has been approved is simplified. The FWC has broader discretion to assess whether there has been genuine agreement.

The requirement to issue the Notice of Employee Representational Rights (**NERR**) will remain, as it presently operates under the FW Act, in the case of a proposed single enterprise agreement.

As is presently the case, minor technical or procedural errors in relation to the issuing of the NERR that do not disadvantage employees will not prevent an EA from being approved.

Flexible Work and Unpaid Parental Leave Requests

Requests for Flexible Working Arrangements

Employers will bear new obligations relating to requests from employees for flexible working arrangements. These changes both modify and build on the existing framework in the FW Act. Significantly, employees will also have a new right of appeal to the Fair Work Commission, which could result in the employer being forced into arbitration.

Employees with the following circumstances can request a change in their working arrangements:

- a parent or carer of a school age (or younger) child,
- another type of carer within the meaning of the Carer Recognition Act 2010,
- disabled,
- pregnant,
- aged 55 or older,
- experiencing family and domestic violence,
- or provides care to a family or household member experiencing family violence.

The existing and additional procedural obligations on employers when responding to these requests are as follows:

- the employer must have discussed the request with the employee,
- the employer must have genuinely tried to reach an agreement with the employee about making changes to the employee's working arrangements to accommodate the circumstances for which the request is sought,
- the employer must have had regard to the consequences of the refusal for the employee,
- the employer may only have refused the request on reasonable business grounds,
- the employer must have provided the employee with a written response within 21 days,
- the employer must detail the reasons for the refusal in the written response,
- the employer must specifically detail the business grounds they are relying on and how they apply to the request in their written response,
- the employer must specify what alternative changes they would be willing to make or otherwise state that no changes can be made, in their written response,
- the employer must include in their written response information about the FWC's ability to assist in resolving disputes.

The FWC will now be empowered to deal with disputes arising from requests for Flexible Work arrangements.

Requests for unpaid parental leave

Employees are entitled to take 12 months of unpaid parental leave for the birth of a child for whom they will have caring responsibilities. After those initial 12 months, employees are entitled to request a further period of up to an additional 12 months; however, the employer is not forced to agree to the requested extension.

Employers will only be able to refuse requests if the following requirements are met:

- the employer must have discussed the request with the employee,
- the employer must have genuinely tried to reach an agreement with the employee about the extension,
- the employer must have had regard to the consequences of the refusal for the employee,
- the employer may only have refused the request on reasonable business grounds,
- the employer must have provided the employee with a written response within 21 days,
- the employer must detail the reasons for the refusal in the written response,
- the employer must specifically detail the business grounds they are relying on and how they apply to the request in their written response,
- the employer must specify what alternative period of unpaid leave they would be willing to grant, or otherwise state that no extension can be allowed, in their written response,
- the employer must include in their written response information about the FWC's ability to assist in resolving disputes relating to requests for extensions of unpaid parental leave.

The FWC will now be empowered to deal with disputes arising from requests for Unpaid Parental Leave.