KHQ LAWYERS

WORKPLACE RELATIONS & SAFETY

SECURE WORK UPDATE

Your comprehensive guide to the changes in Australia's workplace relations law

Index

Introduction

Welcome to 2023 and happy new year!

Perhaps now after a break you can sit down and start to systematically deal with all the legislative changes in the industrial relations space with a clearer head.

This looks to be only the first of a number of tranches of reform by the Albanese Government to our workplace relations system over the next 12 months but it is fair to say that *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**the Amending Act**) together with the Respect@Work and paid family and domestic violence leave legislation have introduced some major changes to the Australian workplace relations system!

These changes will have a series of short, medium and long term implications for not only your compliance programs, but also ultimately your long term HR and workforce strategies in a "back to the future"-like return to a bygone era that genuinely preceded many current HR practitioners' careers. We truly are heading back to a time when unions and the tribunal played an everyday role in employment life.

This is not calculated to scare or exaggerate – it is just a fact in circumstances where it does not appear that any of these changes will be going away anytime soon. In circumstances where there is inevitably more to come, it is critical to get on top of this tranche now, so that you can reset your engagement with your people to remain proactive in looking after their needs rather than having a 3rd party take control of that narrative.

Please note that as much as you all know that we hate caveats, this is still only a detailed guide on our read of the legislation to date so, please, when you are dealing with the specific implications for your business, you will still need to get settled legal advice (yes preferably from us but just saying!)

Checklist: what you need to do now

We appreciate that this is longer than our usual updates but we wanted to give you the detailed understanding of the scope and significance of the changes across the various areas of our system. That detail is set out on the following pages, but, as an overview, what we would recommend all businesses do now (if you haven't already) at a minimum is go through the following checklist:

ISSUE	ACTION	DEADLINE
PAY SECRECY	1. Review all employment contracts and policies to remove any provisions that provide that: • employees' pay is confidential or may not be disclosed by them to others; and/or • employees may be subject to disciplinary or other adverse action in connection with pay disclosures. 2. Communicate to and train managers on the new obligations to ensure that they do not inadvertently take unlawful adverse action against any disclosing employees (eg. Review and implement changes to any frontline leader training that may include it).	Immediately (NB: penalty provision starts on 7 June 2023 but the provision is in force for all disclosures and contracts made or varied)
"WAGE THEFT" (ie. pay compliance)	3. Review your recruitment and remuneration strategies to remove any setting or advertising of pay levels that are beneath minimum lawful rates. 4. If you use "piece-rates" in your business (eg. Paying for units of output rather than an hourly rate), you must establish and advertise what the periodic hourly rate of pay will be too. 5. Review and update your pay auditing mechanisms to ensure swift and accurate identification and resolution of pay deficiencies. 6. Update your litigation defence processes to ensure timely access to payroll configurations, time and attendance records and payslips in response to litigated wage claims to be ready to deal with the current $20,000 small claims jurisdiction of the Federal and Family Circuit Court together with the increase in the threshold to $100,000 later this year.	Immediately - already in force

ISSUE	ACTION	DEADLINE
PAID FAMILY & DOMESTIC VIOLENCE LEAVE	7. Update leave policies to permit 10 days' paid family and domestic violence leave. 8. Review obligations for including and not including relevant information on payslips for family and domestic violence leave.	Immediately - already in force
EQUAL REMUNERATION	9. Review and update your organisational design and remuneration review policies to ensure pay outcomes create equal pay for the same job value. 10. Monitor the FWC website or other information services for any specific updates to your Modern Award(s) and/or other equal remuneration orders for any specific types of work that may apply to your business	Immediately (albeit in anticipation of further updates to the awards and national wage case throughout the year and beyond)
TERMINATION OF EXISTING ENTERPRISE AGREEMENTS - EA STRATEGY	11. If your current bargaining strategy has contemplated terminating an existing Enterprise Agreement (EA) as an option, you will need to reconsider and all but take this off the table unless you fit into the very narrow circumstances only permitted now by the Amending Act.	Immediately
RESPECT @WORK	12. Comprehensive review and update to your discrimination, harassment and bullying policies to include: • the new attributes of breastfeeding, gender identity and intersex • the "positive" obligation in respect of sexual harassment, and • alignment with new AHRC model provisions in terms of meeting that positive obligation. 13. Re-evaluate your front end engagement and communicate to and train all employees, contractors and visitors in respect of the new obligations and your business' revised expectations.	New attributes - immediately Remainder - by 7 March 2023

ISSUE	ACTION	DEADLINE
MAKING OF NEW EAs	14. Update your bargaining strategy to ensure you issue a notice of employee representational rights if a union requests the renewal of an EA that has passed its nominal expiry date. 15. If you have or wish to have a number of EAs operating in your business/corporate group, closely consider the implications of the new "sufficiently representative" and "sufficient interest" obligations in respect of the scopes of any future agreements. 16. Monitor the FWC website and other information services for the imminent publication of the FWC's new "Statement of Genuine Agreement Principles" and apply them in your bargaining approach and voting processes. 17. If you are covered by new EA(s) made from 7 June 2023 (or earlier if proclaimed), review and update your rostering procedures to ensure BOOT reviews are conducted when new rosters are introduced that may take you outside the original FWC BOOT approval parameters.	7 June 2023 (or an earlier date if proclaimed by the Government)
INTRACTABLE BARGAINING	18. Consider in your enterprise bargaining strategies where the new power for the FWC to arbitrate in intractable disputes could be a threat or opportunity for your business.	From 7 June 2023 onwards (or on an earlier date if proclaimed by the Government)
MULTI-EMPLOYER ENTERPRISE BARGAINING	19. Review your EA bargaining strategy (including considering getting in closer touch with your industry contacts) to ascertain whether you are exposed by, or alternatively could be helped by, industry-wide bargaining arrangements. 20. If you have existing single EAs that have passed their nominal expiry date, seriously consider commencing bargaining to renew them before the commencement of these new provisions for industry bargaining.	ASAP, but by no later than 7 June 2023 (or on an earlier date if proclaimed by the Government)

ISSUE	ACTION	DEADLINE
	21. If you do not have any EAs at all, seriously consider commencing bargaining for one that covers only your business. 22. If you think that industry bargaining may assist, consider whether you take a lead in the process, or whether it is better to "hide in the herd".	
FLEXIBLE WORK REQUESTS	23. Review and update policies to extend flexible work requests to situations of family and domestic violence (including de facto partners). 24. Review and update your flexible work policies to ensure that your business will consider and respond to flexible work requests properly in accordance with the new process and information requirements that will need to be included in that consideration process. 25. Keep tabs on FWC cases for particular case examples that come up where flexible work requests are approved or rejected in the context of the current NES and award requirements. Begin to apply those standards within your business.	7 June 2023
"ZOMBIE AGREEMENTS"	26. Review your EAs to see if you have any pre-2010 era EAs still operating. 27. Prepare and publish the required communications to employees about the sunsetting by 7 December 2023 or a planned application to the FWC for an extension for no more than 4 years of those zombie agreements.	7 June 2023

ISSUE	ACTION	DEADLINE
FIXED TERM CONTRACTS	28. Review and update your workforce engagement strategy and recruitment policies to remove any plans to rely on fixed term contracts of longer than 2 years (except in respect of limited exceptions for high income employees, parental leave replacements or specific task employees). 29. Update your fixed term contract templates to remove any scope to have a fixed term of any longer than 2 years (either as original made or as varied). 30. Prepare and include within your contract offer documentation, a copy of the Fixed Contract Information Statement as published by the FWO. 31. Monitor the FWC website or other information services to keep tabs on any changes to the Modern Awards in particular industries regulating the special use of fixed term contracts. 32. Update your EAs to ensure compliance with the 2 year limit.	7 December 2023 (or earlier if proclaimed by the Government - so essentially still best to begin preparing now)

We will now turn to the detail of the changes.

A. PRELIMINARY: CONTINUING STRUCTURE OF THE "SYSTEM"

Some preliminary points at the outset:

- The overall legislation will still be known as the Fair Work Act (**FW Act**). The Amending Act just amends that legislation.
- The Amending Act commenced on 6 December 2022 – some of the changes were immediate, while others will be phased in over the next 6 to 12 months.
- The Fair Work Ombudsman (as the cop on the beat) (**FWO**) and the Fair Work Commission (as the dispute resolution provider) (**FWC**) will have expanded jurisdictions (eg. The FWO to take over from the Australian Building and Construction Commission and the FWC will have expanded roles in dealing with equal remuneration and Repsect@Work issues). This creates a great many opportunities for the Albanese Government to meet its election commitment to "rebalance" the FWC, and for those new members to play a very hands-on role in your business, largely as a consequence of the far broader individual and collective grievance mechanisms.
- The small claims jurisdiction of the Federal Circuit and Family Court of Australia will increase from claims of up to $20,000 to up to $100,000. We expect to see a great many more wage claims lodged in the Court, simply because this will enable rapid resolution. Penalties are not (and have not ever been) available to be sought or enforced in this jurisdiction, but rather it's about getting alleged underpayments sorted out. However this is usually already all done and dusted without lawyers quickly and at the first mention hearing, rather than through the kinds of elongated processes that you have otherwise been used to.
- The Federal Court and the High Court will continue to hold ultimate jurisdiction over all FW Act related matters, including originating motions for enforcement of the FW Act as well as judicial review of decisions of the FWC as has previously been the case.

We thought it would perhaps be most useful to set out the changes in order of their commencement and transitional application so you can prioritise what you need to concentrate on first!

B. IMMEDIATE CHANGES IN EFFECT SINCE 7 DECEMBER 2022

Safety net changes (equal remuneration, pay secrecy, paid family and domestic violence leave) and new anti-discrimination attributes

1. Safety Net

(a) *Objects of the FW Act – secure work and gender equality in the exercise of functions by the FWC*

The principal object of the FW Act now includes the need to "promote job security and gender equality". This therefore becomes something that the FWC must consider in all matters before it in promoting the object of the Act in the exercise of all of its functions: see s.587 of the FW Act.

The Modern Award Objective has similarly been amended to require consideration by the FWC in making or varying the modern awards to include:

- *"the need to improve access to secure work across the economy"; and*
- *"the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation".*

These changes significantly strengthen the FWC's authority to lean towards outcomes that meet these objectives in the exercise of its discretion. This includes when resolving competing claims as part of the national wage case or in changes to modern awards, or even in bargaining-related or flexible work arbitrations.

(b) *Prohibition on pay secrecy*

It is now unlawful to prevent an employee by any means (ie. whether by a term of a contract or simply by direction) from disclosing to any other person (that is, not just another employee, but to anybody else such as their union):

- the employee's remuneration; and
- any other terms and conditions of employment that are reasonably necessary to determine remuneration outcomes (eg. their hours of work).

Any terms of a contract that have such provisions are of no effect from the time that they are next renegotiated, and it is also now expressly a workplace right to be able to make such disclosures.

From 7 June 2023 onwards, it will also be an offence punishable by civil penalties to have such terms in contracts going forward (either as a new contract or the variation of a pre-reform contract).

As we note above, you should urgently review not only your organisation's contracts, but also your policies and other manager training and employee communications to ensure that any such provisions that seek to restrict an employee from telling other people about their pay and conditions are removed.

We note for completeness that these changes do not require an employee to disclose their pay to another person if asked, they merely permit an employee to do so if they want to. Similarly, they do not require an employer to disclose particular employees' salaries or their pay ranges or bands.

As with many of the other changes though, this change signals the potential for employers who have a long term strategy of deep employee engagement to succeed over those who allow that relationship to be taken over by others. As we have set out above, the time is now for consideration of how the changes impact employee engagement and ER and IR strategy.

(c) *Prohibition on advertising with a pay rate that would contravene the FW Act*

It is now unlawful to advertise a job with a pay rate that would contravene the FW Act or any fair work instrument. Civil penalties apply (with the amount aligned to the majority of other offences under the Act).

For piece-rate workers who may also be entitled to a periodic rate of pay, the advertisement must specify that periodic rate of pay (or a higher amount) or include a statement that a periodic rate of pay is also payable for the job.

(d) Equal remuneration for work of equal or comparable value

In addition to making equal remuneration orders following application by an affected employee, their union or the Sex Discrimination Commissioner, the FWC may now make these orders on its own initiative.

To that end:

- The FWC must by 7 February 2023 create an expert panel to deal with equal remuneration matters (although it is still empowered up until that date to make orders even without the panel).
- The FWC has an expanded list of allowable considerations – including:
    - whether work has been undervalued on the basis of assumptions based on gender either historically or across occupations and industries; BUT
    - this is not limited to consideration of similar work; there does not need to be a comparison with a historically male-dominated industry and there is no requirement that the FWC find there has been discrimination on the basis of gender; AND
    - the FWC may ultimately take into account anything it considers relevant in deciding whether there is equal remuneration for work of equal or comparable value.
- It will then continue to be an offence punishable by civil penalties to not comply with an equal remuneration order.

This gives the FWC significant power to, for example, decide that all jobs with comparable qualifications should be paid the same. If the FWC was to decide that all trades-level jobs (be they in aged care, carpentry or clerical administration or metal work) are of equal or comparable value, then the FWC is obliged by the FW Act to ensure that they are all paid the same.

While the apparent objective as to gender equality is laudable, the detail of the changes appear to us to go much further than that. They give far broader scope for unions to pursue any number of broader wages objectives. It will be very interesting (and indeed significant) to see whether, and to what extent, the FWC is persuaded that work in a particular industry has comparable value based on the market forces within that industry rather than merely the same "level" as the jobs within it.

This change has the potential to significantly impact the economics and price points for services in a great many industries, with potential economy-wide effects. That said, it is questionable whether an industry would be prepared to argue this point given that would require evidence of highly sensitive economic and business information (before they even got to the legal arguments).

(e) Paid family and domestic violence leave

Domestic and family violence leave has been extended to de facto partners and will now be paid for up to 10 days per year (non accumulating).

Payslips will also be the subject of regulation as to what can and cannot be put on a payslip in respect of paid family and domestic violence leave.

2. Anti discrimination – additional "attributes" and permissions for special measures in enterprise agreements

(a) Additional "attributes"

Breastfeeding, gender identity and intersex status have been added as protected attributes in the anti-discrimination provisions in s.351 and the unlawful termination provisions in s.771 of the FW Act.

(b) Special measures in EAs

Special measures to achieve substantive equality in respect of employees or prospective employees who have any otherwise discriminatory attributes (for example, gender or disability) may be added as a permitted term to an EA. The special measure must not breach an anti-discrimination law and so it appears that authorisation under State or Commonwealth equal opportunity law would be required if it would otherwise contravene that law.

These special measures will be taken to no longer be permitted terms from the point that that substantive equality in respect of the relevant attribute has been achieved. This would then make the term to be of no effect in accordance with s.253 of the FW Act, even if it remains within the EA.

3. Termination of EAs

(a) Sunsetting of "zombie" agreements

All EAs made before 1 January 2010 (a "**Zombie Agreement**") will automatically terminate ('sunset') at the end of 6 December 2023 unless application is made to the FWC to extend them.

If you have a Zombie Agreement that covers employees in your business, being not just one that applies, but any agreement that has not been terminated or replaced, you must, by 7 June 2023, notify your affected employees that:

- they are covered by the Zombie Agreement, and
- the Zombie Agreement will terminate on the sunset date unless an application to extend the agreement is made to the FWC (which can be for up to 4 years).

Once a relevant zombie agreement is terminated, the employees covered by those agreements will automatically revert to having a modern award apply unless either no modern award covers their employment or you make a new EA to replace the old one.

(b) New restrictions on terminating all other EAs after the nominal expiry date

The little room that was previously available to have EAs terminated after their nominal expiry date without employee agreement has all but ended.

The FWC may only now approve an application to terminate an EA that has passed its nominal expiry date against the wishes of the other party if:

- the continued operation of the EA would be unfair for employees covered by it (unfairness to the employer is not a consideration here); OR

- the EA does not, and is not likely to, cover any employees; OR
- all of the following circumstances apply:
    - the continued operation of the EA would pose a significant threat to the viability of a business carried on by the employer;
    - the termination of the EA would likely reduce the potential of terminations of employment for the employees covered by the EA;
    - if the EA contains terms providing entitlements relating to the termination of the employee's employment – the employer has provided a guarantee of termination entitlements in relation to the termination of the EA;

AND

- Only if the FWC is satisfied that it is appropriate in all the circumstances to do so.

In making its decision, the FWC must take into account:

- the views of the employer, the employees and each union covered by the EA;
- whether the application has been made before or after the commencement of negotiations for a new EA covering the same or substantially the same scope;
- whether bargaining for a proposed EA is occurring;
- whether termination of the existing EA would adversely affect the bargaining position of the employees that will be covered by the EA; and
- any other relevant matter.

Just before the Jobs and Skills Summit, Tony Burke was reported by The Australian Financial Review as saying that the termination of EAs was a breach of freely bargained obligations that would not be tolerated in commercial or consumer contracts[1]. Many of you will have experienced situations where EAs are not 'freely bargained', in that they are leveraged against damage to business in the form of protected industrial action. Additionally, even before the Amending Act, any termination had to be approved by the FWC and therefore an EA could not be ended in the way commercial contracts can and are.

As we say, it is now all but impossible (except in the most extreme of circumstances) for an employer to terminate an EA against the wishes of the employees or a union that it covers. Other than in situations where a company has no employees (and won't in the future) this option is just not available. There is no bar (yet) to creation of new companies or outsourcing, but the minefield of anti-phoenixing law, transfer of business provisions and adverse action in the context of EA workplace rights means IR strategy now needs to be carefully rethought.

[1] See *"The AFR View"* on 8 August 2022.

4. EAs - correcting errors, defects or irregularities

(a) *Correcting obvious errors*

Situations where EAs contained plain, or agreed, errors (such as few cases that came before the FWC where all parties agreed the stipulated pay rate was miscalculated and wrong) previously required an entire re-vote because the FWC only had the power to correct the EA where ambiguity existed. The Amending Act now allows the FWC to correct an 'obvious' error, defect or irregularity in an EA.

(b) *Valid approval of a draft EA in place of an EA erroneously put before the FWC*

The FWC will be empowered to approve such EAs provided it is satisfied that it would have approved the correct version of the EA, rather than the one that was erroneously the subject of the application to the FWC (even if the FWC has approved the wrong version of the EA).

5. Abolition of the Australian Building Construction Commission and the Registered Organisations Commission

(a) *ABCC*

The *Building and Construction Industry (Improving Productivity) Act 2016* (**BCIIP Act**) has been almost entirely repealed except for the maintenance of the Federal Safety Commissioner and will be renamed as the Federal Safety Commissioner Act 2022. This removes the ABCC and the elevated offences and penalty regime for the construction industry. Responsibility will be transferred to the FWO by 7 February 2023.

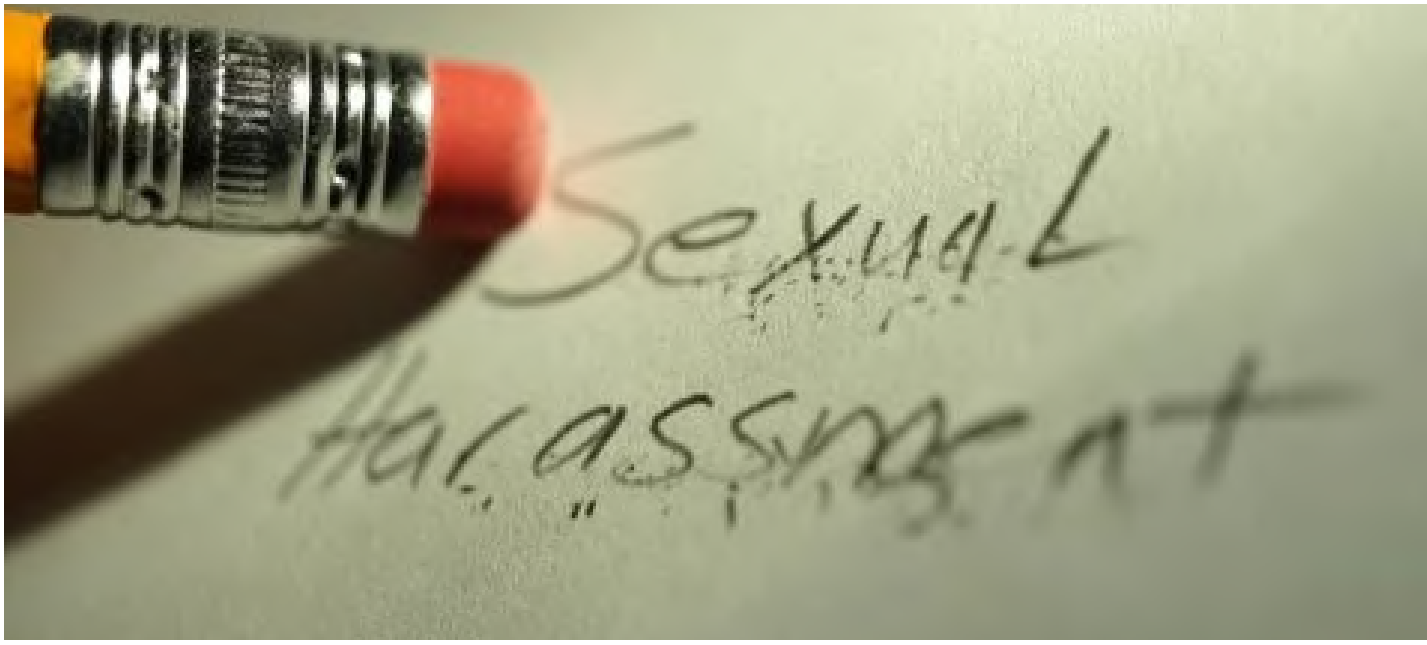
While not in the draft bill as initially proposed, the Amending Act creates a National Construction Industry Forum (**NCF**) to be established on 1 July 2023. The NCF will be constituted by the Minister for Workplace Relations, the Infrastructure Minister, the Industry Minister, an equal number of employee and employer representatives and any other person appointed by the Minister for Workplace Relations. Proceedings will be confidential except for what the union and employer organisations report back to their members, or if there are agreed communiques. It can be anticipated that the NCF will facilitate the 're-undergrounding' of the culture of the construction industry and do little more.

(b) *ROC*

The ROC's functions in the regulation of unions and employer associations will be returned to the FWC by a date of proclamation, or by 7 June 2023 at the latest.

C. RESPECT@WORK

Changes effective from 7 March 2023



1. Prohibiting sexual harassment in connection with work

(a) *Offence to sexually harass another person in connection with work*

It will be unlawful for a person to sexually harass a worker, a person seeking to become a worker or a person conducting a business or undertaking.

The current definition of "sexually harassed at work" has been repealed, but not replaced, however the definition of "sexually harass" remains (and appears to us to be derived from the *Sex Discrimination Act* 1984).

"Worker" is defined to be an individual who performs work in any capacity, including as an employee, contractor, outworker, apprentice, trainee, a student performing work experience or a volunteer. An employer may be vicariously liable for an offence unless the employer took all reasonable steps prevent the employee or agent engaging in the unlawful harassment.

This offence does not preclude the operation of any other State or Commonwealth law on the same subject matter, but it is still limited by the multiple actions regime of the FW Act, to the extent that it may involve dismissal.

(b) *FWC stop harassment orders*

The FWC will have powers akin to the anti-bullying jurisdiction to issue stop sexual harassment orders on application by an aggrieved worker or their union on their behalf.

An application may be made for up to 24 months after the last alleged contravention has occurred (provided that the first instance of the alleged harassment occurred after 6 March 2023). This means that the FWC will have a significantly expanded role in necessarily exploring, and then supervising by way of orders, the daily interaction between people in the workplace.

(c) *Federal Court/Federal Circuit and Family Court anti-harassment application*

Like the general protections regime and except in circumstances where an interim injunction is being sought, prior to an application to Court a person must make an application to the FWC to either resolve the matter by conciliation or obtain a certificate that all reasonable attempts to resolve the matter have been made. A person then has 60 days to apply to the Court.

A Court may order a civil penalty, compensation and/or any other orders the Court thinks fit.

All of these new avenues of redress do raise interesting questions as to the future of the law on constructive dismissal. In circumstances where employees now have a variety of avenues in which they can attempt to resolve experiences of unacceptable workplace behaviour, the situations in which an employee may argue they 'had no option' but to resign may be limited.

2. Respect@Work

(a) *Positive duty to eliminate sexual harassment*

While set out in a separate piece of legislation, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (**Respect@Work Act**) introduced a positive duty for employers to take action to prevent sex discrimination, harassment and victimisation in the workplace.

The new laws also give the AHRC the ability to enforce compliance with this new requirement, including the capacity to give compliance notices to employers who are not meeting their obligations.

The timeframe for making age, disability, and race discrimination complaints to the AHRC has also been extended to 24 months (previously 6 months).

For Commonwealth public sector organisations, reporting to the Workplace Gender Equality Agency on gender equality indicators is also required.

As we have said for some time, but particularly now to ensure compliance with the new laws, businesses will need to consider steps far beyond having a policy and generic "on commencement" training for employees and instead consider:

- implementing or updating policies that focus on far more proactive measures to prevent sexual harassment, discrimination, and related WHS risks (including measures like risk assessments for particular situational concerns, bystander obligations and complaint procedures);
- providing regular, training for all staff that is tailored to their preventative role – for example, bystander training and managerial and supervisory intervention training;
- providing pro-active reporting methods and monitoring programs to ensure a safe and thriving working environment;
- appointing leaders and/or contact officers to provide additional channels for early identification and resolution; and
- ensuring WHS practices identify the risk of discrimination and harassment occurring and consider appropriate control measures in situational contexts.

D. CHANGES EFFECTIVE FROM A DATE OF PROCLAMATION OR AT THE LATEST BY 7 JUNE 2023: EA MAKING

1. EAs - NOERR, "genuine agreement" and BOOT changes

(a) *Types of EAs - single, related and multi-employer*

The types of EAs that can be made are:

- an EA covering one employer;
- a “related” EA – similar to the existing rules for related companies and joint ventures, this agreement can continue to be made as if it was one employer without any multi-enterprise declarations being made; and
- “multi-employer” bargaining by way of either the “supported bargaining”, “single interest employer” or “co-operative bargaining” streams – see further below for detail on these streams.

Importantly, as soon as:

- a multi-enterprise bargaining authorisation is in place for either supported bargaining or single interest employer bargaining – then an employer may no longer commence, agree, request or make any other form of EA (such authorisations cannot be made until after the nominal expiry date of any existing single EA); and
- a multi-enterprise agreement begins to operate in respect of an employer and an employee it replaces the expired single-enterprise agreement and that single-enterprise agreement can never apply again.

These are just hugely significant changes. Just like the Coalition tried to do with *Work Choices* in seeking to exit employees from the award system forever once their first agreement under *Work Choices* was made, in the same way (but with reverse impacts!) the Albanese Government is preventing employers from ever going back to single enterprise bargaining once an industry agreement is in place. Over the medium to long term this could (and likely will) transition large swathes of the economy over to industry-level arrangements, including even those employers currently on single enterprise agreements.

This is a true remodelling of our workplace relations system unless there is some, equally significant, further change to the law in the future to unravel it. As we've said above, we don't want to be overly dramatic but we do genuinely consider that you should be thinking about the impact of these changes on your business now and considering how you will reframe your ER and IR strategies accordingly.

(b) Initiating bargaining - notice of employee representational rights

Currently, the FW Act provides that a notice of employee representational rights (**NOERR**) only needs to be issued after the employer commences bargaining, agrees to bargain or is required by a majority support determination or scope order to bargain. These obligations remain.

The Amending Act will now additionally require the employer to issue a NOERR where they receive a request in writing from a bargaining representative of an employee covered by an existing enterprise agreement (covering a single employer), in circumstances where the existing enterprise agreement has passed its nominal expiry date (but no more than 5 years have passed since the nominal expiry date, and the proposed replacement agreement will cover the same, or substantially the same, group of employees as the one it is replacing).

Put another way, if you already have an EA in place, provided that a union or other bargaining representative is initially seeking a similar agreement along the same lines of coverage with only your company as the employer, then the employer is compelled to bargain for a replacement EA. The requirement for either (a) the employer to agree to bargain or (b) there to be majority support amongst the employees (and a majority support determination) is gone.

We do note that, as we read the provisions, the time at which the proposed EA is to cover the same, or substantially the same, employees is at the time at which the request is **made**. Once that happens though, and there is a notification time for the EA, a NOERR issued and the good faith bargaining requirements begin to apply, there seems to be nothing to stop the bargaining representative introducing a claim during bargaining to increase or decrease the scope of the EA. Decisions in the current environment which have confirmed that coverage can change and is a matter for bargaining would seem to support the availability of that course.

(c) "Genuine agreement"

The 'complaint' (if it is one) that is said to be addressed here is that the current scheme, involving the access period and accompanying obligations to notify employees of the vote process etc, is overly prescriptive.

The 'cure' is to largely abolish these obligations (but to leave some of them) and then, in the Amending Act, create an even more amorphous and potentially ever-changing set of requirements. These are that:

1. A NOERR will still be required and a vote still cannot proceed until at least 21 days after the last NOERR has been issued.

2. The FWC must be satisfied that the EA has been voted on by a group of employees that:

a. has a sufficient interest in the terms of the EA – on existing case law this means that the employee must be paid in accordance with it (for example, employees on a higher wage than that prescribed in the EA are unlikely to have a sufficient interest);and

b. is sufficiently representative of the whole of the scope covered – there must be a sufficient mix of employees to represent the work types and levels covered by the EA (for example, a group of casuals voting on an agreement covering permanent employees or a group of just trades-level employees voting on an agreement covering unskilled work or work by other trades is likely to be seen as insufficiently representative).

3. The FWC is required to annually publish a Statement of Principles of genuine agreement which each FWC member must then take into account when assessing each new EA. The Statement will include what is required in relation to the following matters:

a. informing employees of bargaining for a proposed EA;

b. informing employees of their right to be represented by a bargaining representative;

c. providing employees with a reasonable opportunity to consider a proposed EA;

d. explaining to employees the terms of a proposed EA and their effect;

e. providing employees with a reasonable opportunity to vote on a proposed EA in a free and informed manner, including by informing employees of the time, place and method for the vote;

f. any matter prescribed by the regulations - which we are yet to see; and

g. any other matters the FWC considers relevant - so basically anything else too.

The stated purpose of the prescription that was introduced via the FW Act was to make it simpler for parties to know what was required of them to make EAs after numerous cases prior to 2009 that continually added new obligations. In the interests of alleged flexibility and avoiding undue technicality, it would seem that we have returned to this old system of the rules continually changing and the Statement of Principles being updated as the case law develops.

The Acting President of the FWC has published a draft timetable for the preparation of the Statement of Principles which indicates that a draft Statement will be published in the week of 27 February 2023, submissions in relation to the draft may be made until 27 March 2023, and the 'unofficial' final Statement will be published on the FWC website on 8 May 2023 (with the 'official' final Statement being published in late May 2023 once registered with the Federal Register of Legislation).

4. It is interesting that the Statement will be a legislative instrument that is not subject to the disallowance rules. The Amending Act inserts a requirement that the FWC must be separately satisfied that the employer has taken all reasonable steps to explain the terms of the EA and their effect to the employees who will be covered by it, including in respect of any special measures for the needs of particular employees (such as employees with English as a second language, those without a bargaining representative or young employees).

5. The FWC may continue to disregard minor procedural or technical errors provided that it is satisfied that employees were not likely to have been disadvantaged by the errors. Effectively this is codification of the FWC Full Bench decision in *Huntsman*.

6. The FWC must consider any further matters that are made under regulation – which we have not seen yet but which will again allow more matters to be added at any time if the Government wishes to.

To our mind, the practical effect of these new rules is that they ultimately put an "unfair dismissal"-like power back in the hands of the FWC which will significantly limit EAs being made without a union involved or where they are used as "baselines" for above-agreement remuneration. This is going to have a very significant impact in many sectors where such agreements have become prevalent in creating flexibility for employers who have direct relationships with their employees.

(d) *BOOT*

The BOOT will now be assessed against existing employees and any "*reasonably foreseeable employee*" (which in the absence of evidence of individuality to the contrary may be assessed by way of classes of employees).
This is to be a global assessment of whether each employee concerned would be better off than if the relevant modern award applied to the employee (in the context of the more and less beneficial terms) having regard to:

- the views of the employer, the employees and any bargaining representative – with the primary consideration of being any common view between the employer and an employee bargaining representative, other than a bargaining representative that is not a union; and

- the patterns of work or the types of employment that are reasonably foreseeable at the test time having regard to the nature of the enterprise to which the agreement relates.

The FWC can continue to accept undertakings but, additionally, the FWC may specify amendments which it considers necessary to address any BOOT concern and, provided that the FWC has first sought the views of the employer, any award-covered employees and a bargaining representative, the amendment becomes a term of the enterprise agreement (as an undertaking does). We note that the reference here is to **a** bargaining representative, rather than ***all*** of the bargaining representatives.

If at the test time, or at a later time, one or more employees engage or engaged in patterns of work or kinds of work or other types of employment which were not considered by the FWC in its decision, then the FWC may on application by an employee, the employer or a union covered by the agreement reassess the BOOT (including by considering undertakings or specifying amendments). No pecuniary penalty may be ordered in respect of any retrospective conduct that may be in breach of the new assessment, but this does not limit the power of a Court to issue other remedies such as compensation.

It seems to us that while the BOOT has allegedly been made to be "simpler" and "less technical", in reality the "revised" BOOT is still the same, albeit with the additional powers now for the FWC to impose its own amendments as well as an employee or union to come back to the FWC later and have the BOOT revisited during the life of the EA if new or changed circumstances occur or if circumstances in existence at the test time were not considered by the FWC.

This in our view appears to remove a very considerable amount of the certainty of having an EA in place if at any stage a union can simply go back and have the BOOT reconsidered and compensation then awarded to any affected employees (including retrospectively). This will be particularly so in the multi-enterprise bargaining space.

(e) *Union agreement or FWC permission to put a multi-enterprise agreement to a vote*

All multi-enterprise agreements that need a vote, either will need union agreement or an FWC application will need to be made and approved.

This change is clearly designed to prevent employers from doing new forms of employee-only agreements on an expanded basis.

2. Industrial action

(a) *Protected action ballots*

The FWC must provide that the ballot agent is the person identified by the applicant unless there are exceptional circumstances. This will enable unions to more easily use agents other than the Australian Electoral Commission.

(b) *Protected ballot orders for multi-enterprise agreements – common application but deemed to be separate by reference to each employer*

Multiple employers within the same scope will now be exposed to industrial action together and may be the subject of one application for a Protected Action Ballot Order (**PABO**). However, the FWC must treat a common application as being separate applications for each employer.

It seems to us that this means that a majority of the members employed by each employer will need to agree separately, employer by employer, to be able to take protected industrial action. This may result in a situation where some employers in a multi-enterprise agreement are subject to industrial action and some are not – either because applications were only made with regard to some employers or because only some employers' employees voted to approve the action.

(c) *Compulsory conciliation to occur after a PABO has been granted*

The FWC must direct the parties to attend a compulsory conciliation conference (or more than one) after a PABO has been granted and before the voting in the PABO closes. Failure to attend may result in industrial action being unavailable to the non-complying party.

The reality is that s.240 conferences almost always occur at the request of a party as soon as PABOs or notices of intention to take protected action occur. We do not expect this provision to make any material difference to the amount of protected action that then occurs.

(d) *Increase in time after a PABO to "use it or lose it" to 3 months*

Employees and their bargaining representatives will have a longer period in which they may commence industrial action that has been authorised by a vote. This has been extended to 3 months from the declaration of results, from the previous 30-day (subject to FWC extension) limit. Again, we expect this to have little practical impact in circumstances where the FWC has usually (if not almost always) been prepared to extend time under the current arrangements.

(e) *Extension of notice for multi-enterprise bargaining to 120 hours*

The period of written notice to be provided to employers regarding such action will be 120 hours (note this is **actual** rather than **working** hours). The default notice period for other types of action will stay at 3 working days.

3. Intractable bargaining - FWC declarations and workplace determinations to resolve

(a) *Repeal of serious breach declarations*

The current requirement to have a "serious breach declaration" made in relation to good faith bargaining under the FW Act (ie. a serious and sustained breach) in order to achieve a workplace determination will be abolished.

In its place will be a broader regime of "intractable bargaining", which after a final attempt during a "post negotiating period", a bargaining representative can seek to have a binding arbitration occur to resolve the matters that are unable to be agreed.

We note that the current regime for industrial action-related declarations and determinations still remain available too (eg. danger to the health or welfare of the population or the Australian economy or a significant part of it etc).

(b) *Intractable bargaining declarations*

An intractable bargaining declaration may be made by the FWC if the FWC is satisfied that:

- a compulsory FWC conciliation has been previously held under s.240 in relation to bargaining for the proposed agreement;
- 9 months has passed from either the later of:
  - the normal expiry date of the last agreement; or
  - the date that bargaining commenced or a supported or single interest bargaining authorisation came into operation;
- there is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and
- it is reasonable in all the circumstances having regard to the views of all of the bargaining representatives to make the declaration.

Other than the 9 month time period, this is a very easy bar for a union to hurdle in order to have the relevant declarations made. It is instructive though that Svitzer's recent attempt to seek an analogous approach to obtaining access to an industrial action-related workplace determination was rejected by the FWC as "opportunistic". It will be interesting to see whether the FWC holds unions to the same standard of account.

(c) *Post-declaration negotiating period - FWC discretion*

Once a declaration is made, the FWC will have discretion as to whether the parties will be provided with a further post-declaration negotiation period. After this period, it will have the power to make a workplace determination via a Full Bench. It remains to be seen what the FWC will consider to be a reasonable length of time in individual cases, but one would think that the circumstances would be rare for the FWC to not at least require some final period of (likely FWC assisted) bargaining in an attempt to reach an agreement before moving to proceedings for a workplace determination.

(d) *Intractable bargaining workplace determinations*

An intractable bargaining workplace determination may be made either after the later date of the initial declaration, or at the end of the post-declaration negotiating period.

The determination must include:

- coverage of the bargaining representatives;
- the existing core terms as currently provided by the FW Act – eg. up to 4 years for nominal expiry, permitted matters to pass the BOOT and any terms to ensure consistency with the NES;
- the agreed terms that had previously been agreed at the later time of the declaration of the end of the post-declaration negotiating period; and
- such other terms that the FWC is satisfied deal with the remaining matters in issue that had not been agreed.

For employers, the changes represent a substantial loss of control over enterprise agreements. The threshold for access to the FWC's jurisdiction to arbitrate bargaining disputes has been significantly lowered. It is now likely that employers will be forced to make greater concessions in the bargaining process, or face having terms imposed by the FWC (or at least having to defend or prosecute a costly case which will need to evidence all of their sensitive economic data in order to avoid materially adverse economic outcomes). Again, this requires a rethink of bargaining strategy now in preparation for the new world to come.

4. Multi-enterprise bargaining – "supported bargaining" authorisations

(a) *Repeal of low-paid authorisations and introduction of "supported bargaining"*

The supported bargaining provisions replace and expand upon what was previously known as the "low-paid" stream of multi-enterprise bargaining.

A supported bargaining authorisation is:

- of no effect to the extent that it seeks to apply to an employee that is already covered by a single EA that has not passed its nominal expiry date (except if the FWC is satisfied that the employer's main intention in making the single EA was to avoid being caught in a supported bargaining authorisation); and
- cannot be made in respect of the general or civil construction industries (but can be in respect of the metal and engineering construction industry).

The effect of a single bargaining authorisation being in place is that the employer is now obliged to reissue a NOERR and can only make a supported bargaining agreement.

This seems to indicate that any award-covered business in a low paid/vulnerable industry should be seriously considering whether it would be appropriate in the short to medium term to bargain for a single EA (subject naturally to not falling foul of the "main intention" limitation above).

That said, it may be that any resulting industry agreement via the supported bargaining stream would only 'level the playing field' anyway. In circumstances where labour costs could accordingly be simply passed onto clients on a common basis with competitors, "hiding in the herd" could in some circumstances actually be the better outcome.

As we say above, this is something that relevant businesses should be considering now as a part of their ER/IR strategy in light of the changes to come.

(b) *Supported bargaining authorisations – by the FWC (including by declaration by the Minister)*

The FWC must make a supported bargaining authorisation if it is satisfied that it is appropriate for some or all of the employers named in the application to bargain together having regard to:

- whether the employers have clearly identifiable common interests, such as:
    - a geographical location – eg. in a particular region in Australia;
    - the nature of the enterprises and the terms and conditions of employment in those enterprises – eg. in a particular industry; or
    - being substantially funded directly or indirectly by a Commonwealth, State or Territory Government; and
- at least some of the employees are represented by a union.

The Minister may also declare an industry or sector to be consistent with the objectives of supported bargaining, and if that occurs then the FWC must make an authorisation to give effect to that declaration.

(c) *Variations to a supported bargaining agreement to add employers*

This can occur by consent by putting a variation vote to the new employer's employees and then applying to the FWC for approval.

More importantly, this can also occur without consent of the employer as follows:

- a union may make an application to the FWC for the agreement to be extended to apply to the employer; and
- the FWC is satisfied that:
    - a majority of the employees of the employer want to be covered by the agreement at a time that the FWC chooses – NB: amazingly there appears to be no provisions for a formal vote and hence this could presumably be done with something as simple as a petition as is the case with current majority support determination applications;
    - it is appropriate for the employees to be covered by the agreement – NB: no mandatory criteria for consideration are prescribed, but the original "clearly identifiable common interest" would have to be the first port of call, together with any other matters that the FWC considers relevant in the exercise of its discretion such as the prevailing terms and conditions in the industry;
    - the agreement is not in the building or civil construction industry; and
    - there is no agreement already in place that has not passed its nominal expiry date.

It seems to us to be an extraordinarily easy process to "rope-in" an employer into an existing supported bargaining agreement – indeed it would seem to be even easier than getting the agreement voted up in the first place. This has enormous implications for the very rapid spread of industry-wide agreements becoming the new form of centralised wage fixing mechanism as soon as single EAs begin to expire.

5. Multi-enterprise agreements – "single interest employer" authorisations

(a) *Repeal of existing single interest authorisation provisions*

The single interest employer bargaining provisions replace and expand upon what was previously known as the "single interest employer" stream of multi-enterprise bargaining.

A single interest employer authorisation cannot be applied for:

- in respect of an employer with less than 20 employees unless the application is brought by the employer (NB: when calculating the number of employees, this is by reference to all permanent employees and regular casuals across the company as well as its associated entities);
- if it seeks to apply to an employee that is already covered by a single enterprise agreement that has not passed its nominal expiry date;
- if it seeks to apply in circumstances where the employer and union have already agreed in writing to bargain for a single EA in relation to an expired agreement (except if the employer agrees otherwise and the application is made by consent); and
- in respect of the general or civil construction industries (but a single interest employer authorisation can be made applied for and made in respect of the metal and engineering construction industry and building products etc).

The effect of a single interest employer bargaining authorisation being in place is that the employer is now obliged to reissue a NOERR and can only make a single interest employer agreement.

(b) *Single interest employer authorisations – new regime*

The FWC must make a single interest employer authorisation if it is satisfied that:

- at least some of the employees are represented by a union;
- the employers either:
    - carry on a similar business activities under the same franchise; or
    - have clearly identifiable common interests and it is not contrary to the public interest to make the authorisation, such as:
        - a geographical location – eg. in a particular region in Australia;
        - a common regulatory regime – eg. telecommunications services under the telecommunications access regime; or
        - the nature of the enterprises and the terms and conditions of employment in those enterprises – eg. in a particular industry;
- if the authorisation is sought by employers, then no employer has been coerced to provide their consent;

- if the authorisation is sought by an employee bargaining representative (including a union):
    - the FWC is satisfied that a majority of the employees who are employed by the employer at a time determined by the FWC and who will be covered by the agreement want to bargain for the agreement (this need not be by any formal vote); and
    - at the time of making the authorisation, the employer is not covered by an EA that has not passed its nominal expiry date or has not agreed already in writing to bargain with a union for an EA that would cover the same or substantially the same group of employees;
- the FWC is not otherwise satisfied that the employer should be excluded from the authorisation on the basis that:
    - the employers are bargaining in good faith for a proposed EA that will cover the same or substantially the same group of employees and the relevant employees;
    - the employers and the relevant employees have a history of effectively bargaining in relation to one or more EAs that have covered the employers and the same or substantially similar group of employees; and
    - on the day that the FWC makes the authorisation, less than 9 months have passed since the most recent nominal expiry date of that historical agreement.

It seems to us that common interest will not be difficult to prove, particularly given the last-minute amendments which assume that any business above 50 employees is presumed to have commonality with other similar businesses unless proven otherwise (with the onus on the employer to prove that).

Similarly, it seems to us that unions will have no interest in negotiating single EAs unless they are offered a premium over their planned industry agreements – they just have to sit and wait for the 9 months to expire and then make their application to bind in the employer to the single interest authorisation.

Yet again we reinforce the need to reconsider your bargaining and IR strategy in light of this change.

(c) *Variation to add an employer to a single interest employer authorisation*

The requirements are similar to the original authorisation, save that the FWC must continue to be satisfied that the requirements will continue to be met with the addition of the new employer.

(d) *Variation of a single interest employer authorisation to remove an employer*

The FWC must vary an authorisation to remove an employer if:

- the application is made by an employer – the FWC is satisfied that because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation; or
- the application is made by a bargaining representative of an employee – the FWC is satisfied that:
    - the employer has less than 50 employees;
    - the employees, on request of the bargaining representative, vote for the removal in which at least 50% of the employees vote and of those who vote that more than 50% of the votes approve the removal; and

- there are no other reasonable grounds for the FWC to believe that the removal of the employer has not been genuinely approved by the employees.

(e) *Variation of a single interest employer agreement to add an employer – by consent*

This may be achieved by a vote of the affected employees akin to an EA voting process, albeit that no NOERR appears to be required and the genuine agreement rules need not be applied except to the extent that all reasonable steps have been taken to explain the terms of the agreement and their effect prior to voting on it.

(f) *Variation of a single interest employment agreement to add an employer – by union application without the consent of the employer*

A union covered by a single interest employer agreement may apply to the FWC to bind a new employer to the agreement provided that the FWC is satisfied that:

- the employer has more than 20 employees and a majority of the employees want to bargain (as determined by the FWC in any manner that it thinks fit);
- the employer is not covered by another EA that has not passed its nominal expiry date or has not otherwise already agreed in writing to bargain with the union for the same or substantially similar group of employees;
- the employer does not undertake work in the general or civil construction industries;
- the employers are either:
    - franchisees; or
    - have the requisite common interest with reasonably comparable operations and business activities as the other employers covered by the EA and that it is not contrary to the public interest to make the variation;
- a valid majority of the employees who are to be covered by the EA genuinely agree to the EA by voting for it in accordance with the genuine agreement requirements for the making of an EA (as appropriate to the variation); and

- the FWC is not otherwise persuaded that:
    - the employer is bargaining in good faith for a proposed EA that will cover the same or substantially the same group of employees;
    - the employer and the relevant employees have a history of effectively bargaining in relation to one or more EAs that have covered the employers and the same or substantially similar group of employees; and
    - on the day that the FWC will approve the variation, less than 9 months have passed since the most recent nominal expiry date of that historical agreement.

It seems to us, given the ease by which the above variations can be obtained, that the obvious strategy of the unions will be to just make the initial single interest agreements with a few friendly employers, and then seek to bind the recalcitrant ones by this roping-in process after the agreement has already been approved.

In circumstances where the BOOT can also just be revisited, it isn't even an issue that the agreement doesn't quite fit the existing working circumstances of the new employers.

(g) Variation of a single interest employer agreement to remove an employer

A variation to remove an employer from an **agreement** (as distinct from an authorisation) can only be made jointly by the employer who is to be removed and its employees who are covered. The employees must be given a reasonable opportunity to vote for the removal and the FWC must be satisfied that there are no reasonable grounds to believe that a majority of the employees who cast a valid vote did not genuinely approve the variation.

However, for the variation to be approved, each union who is entitled to represent the industrial interests of one or more of the employees must also agree to the variation. It seems to us that this is so irrespective of whether the employees are members of those unions or not.

This essentially ensures that once a single interest employer agreement is made, the reality is that there will never be any practical capacity to escape it.

6. Multi-enterprise bargaining – "cooperative workplaces"

(a) No authorisation required

Cooperative workplaces may make multi-enterprise agreements provided that at least one of the employers is a member of an employer association and that at least one employee is represented by a union. Construction industry participants are again excluded from being able to make such agreements.

Cooperative workplace agreements cannot be made though if a supported bargaining or single interest employer authorisation in respect of the employer is in force.

Put together, this is essentially a voluntary scheme of multi-enterprise bargaining that is the scheme largely already in place.

(b) Approval rules

The agreement is subject to the same approval regime – ie. genuine agreement etc. Unions have a right to be heard in relation to the making of a cooperative workplace agreement.

E. CHANGES EFFECTIVE FROM 7 JUNE 2023 – FLEXIBLE WORK ARRANGEMENTS

1. Flexible work arragements

(a) *Expansion of grounds for flexible work requests*

An additional circumstance in which an employee may make a flexible work request is where the employee, or a member of their immediate family or household for whom the employee provides care and support, experiences family or domestic violence.

(b) *Employer's response to a flexible work request*

An employer continues to be required to provide a written response within 21 days to an employee's request for change in working arrangements. However, additional requirements are now that the response must state whether the request is granted, any agreed change that differs from the request or that the refusal is on reasonable business grounds. This applies to all flexible work requests, not just requests in respect of the new attribute above.

The employer may refuse the request for change in working arrangements only if:

- the employer has discussed the request with the employee and genuinely tried to reach an agreement with the employee about making changes to the employee's working arrangements to accommodate the circumstances in the request (NB: "genuinely try to reach agreement" is explicitly prescribed to exclude the law anywhere else in the FW Act as to what "genuinely trying" is! Ie. the existing caselaw on the extraordinarily low bar for a union to be "genuinely trying to reach agreement" for the purposes of obtaining a PABO does not apply here);

- the employer and the employee have not reached an agreement;

- the employer has had regard to the consequences of the refusal for the employee;
- the refusal is on reasonable business grounds, including that:
    - requested working arrangements would be too costly for the employer;
    - there is no capacity to change the working arrangements of other employees to accommodate the working arrangements requested;
    - it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the working arrangements requested;
    - that the working arrangements requested would be likely to result in a significant loss in efficiency or productivity or would be likely to have a significant negative impact on customer service; and
- the employer's written refusal to the change in working arrangements request must:
    - include details of the reasons for the refusal;
    - set out the employer's particular business grounds for refusing the request and explain how those grounds apply to the request;
    - set out the alternative working arrangements that the employer would be willing to make instead to accommodate the employee's circumstances; and
    - set out the availability of dispute resolution and FWC arbitration.

(c) FWC conciliation and arbitration

The FWC will be empowered to conciliate and arbitrate flexible work disputes, including proceeding immediately to arbitration in exceptional circumstances. In doing so, the FWC must consider fairness between the parties.

Orders may include that:

- if the employer has not responded appropriately, to reasonably do so;
- if the employer has not responded within 21 days, then the request is taken to be refused;
- the business grounds relied on are reasonable or not reasonable; or
- that the request is granted or granted with specified changes as determined by the FWC.

Contravention of FWC orders may be subject to civil penalties.

Dispute test cases are likely to build further on the already growing body of cases, including the recent decision of Commissioner Johns involving Ambulance Victoria, given the expansive obligations on employers under these amendments in considering and accommodating an employee's circumstances, responding to requests and genuinely trying to reach an agreement with the employee about making changes to the employee's working arrangements.

2. Request to extend unpaid parental leave

The new process for requesting an extension of unpaid parental leave is aligned with the new right to request flexible work regime above.

F. CHANGES EFFECTIVE 1 JULY 2023: SMALL CLAIMS

1. Expanded jurisdiction for the small claims process

(a) *Increase in maximum compensation from $20,000 to $100,000*

An applicant can apply to have their underpayment matter heard as a small claim. The jurisdiction has been expanded from $20,000 to $100,000.

(b) *Interest not included*

Interest will no longer count towards the $100,000 cap.

G. CHANGES EFFECTIVE FROM 7 DECEMBER 2023 (OR EARLIER BY PROCLAMATION) – FIXED TERM CONTRACTS

1. Fixed Term Contracts

(a) *<u>General prohibition on fixed term contracts of more than 2 years</u>*

A fixed-term contract is an employment arrangement that lasts for a specified period of time – there will typically be a start and finish date specified in the contract and it will apply irrespective of whether it is a maximum term contract (ie. one which allows for termination of the contract prior to the expiry of the fixed term) or a true fixed term contract (one which does not).

The maximum period of time that a fixed term contract can operate (either when originally made or as varied or in a pattern of consecutive contracts) for any employee other than a casual will be 2 years.

It is a civil penalty provision as part of the general protections provisions to have a term that goes longer than this period.

Fixed term contracts that exceed these thresholds will be prohibited except in limited circumstances, including where:

- the contract is to perform only a distinct and identifiable task involving specialised skills (we expect this to align with the current understanding of a contract for a specified task);
- the contract relates to a training arrangement;

- the employee is engaged to undertake essential work during a peak demand period;
- the employee is covering for another employee or to undertake work during an emergency (eg. for an employee on parental leave);
- the employee's earnings under the contract are above the high-income threshold (currently $162,000 per annum but this is indexed each financial year);
- the work is government-funded and there is no reasonable prospects that the funding will be renewed; or
- a modern award expressly permits such arrangements (this is expected in some industries, such as education).

Applications to resolve disputes about fixed term contracts must be referred to the FWC in the first instance. Arbitration can be by agreement, or the employee or their union will need to make a Court application for a breach of general protections.

(b) *Fixed term contract information statement*

All employees employed on a fixed or maximum term contract must be given a Fixed Term Contract Information Statement either before or as soon as practicable after the contract is entered into.

It will be a civil penalty provision to not do so.

(c) *FWC dispute resolution – conciliation only except where there is an agreement to arbitrate*

Disputes over fixed term contracts must first be addressed at the workplace level. After that, an aggrieved party can apply to the FWC. While the FWC may conciliate the matter, arbitration is only permitted by agreement.

If there is uncertainty in the interaction of these new provisions with an enterprise agreement, an application can be made under the transitional rules to have this resolved by the FWC.

While lengthy, we trust that this update provides a detailed guide to assist you in walking through and understanding the potential impacts for your business.

We otherwise intend to recommence our fortnightly "Zoom coffee series", an open forum to discuss key industrial relations issues (just a reminder that these sessions are not recorded). We will also do separate Zoom sessions on each part of the Amending Act and the Respect@Work legislation.

In the meantime, we obviously love talking about this stuff so please do just give us a call if you want to shoot the breeze or scope out how you might seek to address the particular issues that will affect your business. It's going to be a big year!

Cheers,
Chris, Claire, Michael, Gina and the KHQ Workplace Relations & Safety team.

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