

RECENT IR CHANGES

- **INDUSTRIAL RELATIONS**

(THE HEAVY STUFF)

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RECENT IR CHANGES

There's been 3 major IR changes lately, with more to come (unfortunately).

- **Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022**
- **Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022**
- **Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022**
- **Can't get through them all, so we'll highlight the main aspects.**
- **The Information Sheets along with a document drafted by our partner lawyers, KHQ, is available from the BAV website.**

RECENT IR CHANGES

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

13 changes!

Take a sip now then take a deep breath!

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

Objects

- Part 4 of the Act seeks to amend the FWA's objects to include promoting job security and gender equity, and the objectives of modern awards to include the need to improve access to secure work across the economy, and the need to achieve gender equity.
- *This was implemented on 7/12/2022.*

Prohibiting pay secrecy

- Part 7 of the Act introduces provisions intended to promote pay transparency by prohibiting pay secrecy - a workplace right to disclose their remuneration or any T/Cs of their employment that are reasonably necessary to determine remuneration outcomes. Employees will also be free to ask other employees about that information.
- *This was implemented on 7/12/2022.*

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

Sexual harassment

- Part 8 of the Act - express prohibition for a person to sexually harass another person in connection with work.
- The Act allows for the FWC to deal with sexual harassment by:
 1. continuing to provide for mechanisms for workers to seek a “stop sexual harassment order” to prevent future harassment (this process generally requires the FWC to deal with the dispute within 14 days of the application being made); and
 2. dealing with a dispute through mediation and conciliation. If the matter remains unresolved, the parties can consent to arbitration in the FWC, or the worker(s) or their union can proceed to the Federal Court or the Federal Circuit and Family Court of Australia within 60 days of the FWC issuing a certificate confirming that the matter remains unresolved.
- The FWC will have the discretion to dismiss an application made more than 24 months after the relevant contravention (or the last of the contraventions) is alleged to have occurred.
- The amendments are also accompanied by a vicarious liability provision.
- *This will be implemented the day after 3 months 6/12/22.*

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

Anti-discrimination and special measures

- Part 9 of the Act introduces “Breastfeeding”, “gender identity” and “intersex status” definitions which will be included into the anti-discrimination provisions of the Fair Work Act.
- *This was implemented on 7/12/2022.*

Flexible work

- Part 11 of the Act expands the circumstances in which an employee may request flexible work arrangements to include situations where an employee, or a member of their immediate family or household experiences "family and domestic violence", as defined in section 106B(2) of the Act, or is pregnant.

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

- The Act also inserts a new section 65A, which requires an employer who receives a request for flexible working arrangements to respond in writing within 21 days and to:
 - meet with an employee to discuss their request; and
 - where the employer initially intends to refuse the flexible work request, seek to agree upon alternative changes to the employee's working arrangements and note the agreed changes in the employer's written response (if possible); or
 - if the employer still intends to refuse the request, outline the employer's reasonable business grounds for refusal and address the following:
 - changes to the employee's working arrangement that would accommodate (to any extent) the employee's circumstances and that the employer would be willing to make; or
 - that there are no such changes the employer could make to accommodate the employee's circumstances.

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

Importantly, the Act defines “reasonable business grounds” to include (without limitation):

- when the request is too costly for the employer;
- when there is no capacity to change the working arrangements;
- when the changes would be impractical by requiring changes to work arrangements of existing employees or the hiring of new employees;
- when the change would likely result in significant loss in efficiency or productivity; and
- when the changes would likely have a significant negative impact on customer service.

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

For the first time the Act introduces a dispute resolution mechanism for circumstances where an employer has:

- refused a flexible work request; or
 - not provided a written response to a flexible request within 21 days; and
 - the parties are unable to resolve the dispute through discussion at the workplace level.
- The Act stipulates that, where a flexible working arrangement dispute arises, the parties to the dispute must attempt to resolve the dispute by discussion. If that doesn't work, then a party can refer the matter to the FWC.
 - The FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances. If that fails, or there are exceptional circumstances, the FWC will have the power to deal with the dispute through mandatory arbitration, in accordance with new section 65C (Arbitration Clause), under which the FWC can make binding decisions, including an order the employer grant the request or make specified changes (other than the requested changes) in the employees .
 - *This will be implemented the day after 6 months from 6/12/22.*

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

Zombie agreements

- Part 13 provides for the sunseting (ending) of 'zombie' agreements – any operative individual or collective agreements that were made under the Workplace Relations Act (before the FW Act coming into operation in July 2009) or during the 'bridging period' under the FW Act between 1 July 2009 to 31 December 2009).
- The sunset period will be 12 months from 7/12/22, or a further period if extended after application by employers or employees covered by the agreement, or industrial associations, but can't exceed 4 years. Employers are required to give written notice to employees of the impending termination within 6 months of 7/12/22.
- *This was implemented on 7/12/2022.*

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

Procedural requirements for approving enterprise agreements

- Part 14 of the Act provides for certain changes to procedural requirements for approving enterprise agreements. More information on these changes can be found in the BAV Information Sheet and the KHQ document.
- *This will occur on a day to be fixed by proclamation, or otherwise the day after 6 months from 6/12/23.*

Better off overall test (BOOT)

- BOOT at approval stage
- Pat 16 of the Act simplifies the BOOT and clarifies that the FWC must undertake a global assessment (not a line-by-line assessment) of whether each employee is better off having regard to the more beneficial and less beneficial terms of the EA as compared with the relevant award.
- The FWC must also now give consideration to any views of the employer, employees and bargaining representatives and any common view of the employer and employee bargaining representatives is that the EA passes the BOOT this must be given primary consideration by the FWC. The FWC may also only have regard to reasonably foreseeable patterns or kinds of work or types of employment (rather than hypothetical kinds of work that are not foreseeable). The assumption that employees are better off overall if a class to which they belong would be better off overall has also been retained.

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

FWC can amend the EA during the approval process

- The FWC has the power to directly amend or excise terms in approving the EA (or varying an EA) if it is satisfied that an amendment is necessary to address its concern, after seeking the views of the employer or employees covered and the bargaining representatives.

BOOT during the life of the EA

- Employers, employees, or unions covered by the agreement can apply to the FWC for a reconsideration of the BOOT where the employees covered by an approved EA work other patterns or kinds of work or other types of employment that were not previously considered by the FWC at approval stage.
- *This will be implemented on a day to be fixed by proclamation, or otherwise the day after 6 months from 6/12/22.*

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

Bargaining disputes

- Part 18 introduces enhanced bargaining dispute powers for the FWC. The Act introduces new provisions enabling the FWC to make “intractable bargaining declarations”, and make “intractable bargaining workplace determinations”. In other words, the FWC will have a new and much broader power to arbitrate enterprise agreements in certain circumstances.
- *This will be implemented a day to be fixed by proclamation, or the day after 6 months from 6/12/22.*
- **Industrial action**
- Part 19 relates to industrial action.
- The Act, for the first time, permits protected industrial action to be taken in relation to multi-enterprise agreements, except for “cooperative workplace agreements”. Protected action ballot applications made in the context of multi-enterprise bargaining will be treated as separate applications for each employer and voting will be assessed on an employer-by-employer basis.
- An extended notice period for protected industrial action of 120 hours applies in relation to multi-enterprise agreements, for other agreements, 3 working days.
- FWC must also make orders directing the bargaining representatives for the agreement to attend a conference/mediation conducted by a FWC member or a delegate of the FWC.
- *This will be implemented a day to be fixed by proclamation, or the day after 6 months from 6/12/22.*

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

Bargaining

- The Act significantly expands the concept of multi-enterprise bargaining and provides employees and unions with greater powers to force employers to seek certain authorisations (supported/low paid; single interest) and to then bargain for agreements that cover multiple employers (including, potentially, competitors, external companies within supply chains, or internal group companies, among others), provided generally, among other things, a common interest – geographical location; regulatory regime; nature of the enterprise. This represents a substantial shift away from the long-held bipartisan focus on bargaining at the enterprise-level.
- The most likely to be relevant to our industry is the single interest employer authorisation/agreement. Noting this multi-employer enterprise bargaining won't apply where in respect of employers with less than 20 employees excluding casual but not regular casuals workers– unless they consent, where EA's are already in place, or in circumstances where the employer and union have agreed in writing to bargain for a single EA in relation to an expired agreement, unless they consent. That said, employers could be 'roped' into an authorisation/agreement by a union after an existing EA ends. See BAV Summary of Parts 20 and 21 of the Amending Act and APTIA Table, and the KHQ document, for more information.
- *This will be implemented on a day to be fixed by proclamation, or the day after 6 months from 6/12/22.*

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

Small claims

- Part 24 enhances the small claims process - the Act will increase the compensation cap for small claims proceedings under the FW Act from \$20,000 to \$100,000.
- *This will be implemented on 1 July 2023.*
- **Unpaid parental leave**
- Part 25B of the Act provides that an employee may request an employer to agree to an extension of unpaid parental leave for a further period of up to 12 months following the end of available parental leave. The process is much the same as flexible work requests.
- *This was implemented on 7/12/2022.*

Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022

1 main change

Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022

- 1. New NES entitlement of 10 days of paid FDV leave in a 12-month period. Key components:**
 - . All employees entitled to 10 days of paid FDV leave “up front” per year.**
 - . Expanded definition of FDV includes conduct by “a member of an employee’s household” or “a current or former intimate partner of an employee,” rather than just a “close relative”.**
 - . Rate of pay that is the “employee’s full rate of pay, worked out as if the employee had not taken the period of leave” – not calculated on “base rates”.**

Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022

Commencement?

- Employees who are not small business employees (i.e., employed by a business owner/company who employs 15 or more employees) and employed on 1 Feb 2023 gained 10 days paid FDV leave from that date; if employed on/after, then 10 days paid FDV leave from the day they commence employment. The entitlement resets on the day of the anniversary of when an employee's employment started.
- Small business employees (i.e., employed by a business owner/company who employs 14 or less employees) will not gain the benefit of paid FDV leave until 1 August 2023.
- **DOT and DET bus service contracts?**
- We have contacted DOT and DET's to have these new costs covered under relevant contracts. We will be in touch when we have their response.

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022

6 main changes

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022

1. Prohibiting a hostile work environment

- **The Act inserts a new section into the SDA, and it is now unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex, i.e., if:**
 - . **2 people engage in conduct in a workplace;**
 - . **A reasonable person would have anticipated the possibility of the conduct resulting in the workplace environment being offensive, intimidating or humiliating by reason of a person's sex.**

Anti-Discrimination and Human Rights **Legislation Amendment (Respect at Work)** **Act 2022**

- It needs to result in an offensive, intimidating and humiliating environment for people of one sex, but does not necessarily need to be directed at a specific individual. Conduct that could result in people of one sex feeling unwelcome or excluded by the general work environment and potentially breach the new prohibition includes displaying obscene or pornographic materials, general sexual banter, or innuendo and offensive jokes.

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022

2. Positive duty on employers

- A new positive duty that requires an employer or a person conducting a business or undertaking to take reasonable and proportionate measures to eliminate, as far as possible, conduct that includes:
 - discrimination on the ground of a person's sex;
 - sexual harassment or harassment on the ground of sex;
 - conduct that subjects a person to a hostile workplace environment on the grounds of sex; &
 - acts of victimisation that relate to complaints, proceedings, assertions or allegations in relation to conduct in the previous points.

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022

- In determining whether an employer or PCBU has taken *"reasonable and proportionate measures"* to eliminate sexual harassment, factors for consideration include the size, nature and circumstances of the organisation; its resources (whether financial or otherwise); and the practicability and cost of steps to eliminate such conduct.

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022

3. Enforcing the positive duty

- AHRC is to ensure that employers and Person Conduction a Business Undertaking (PCBUs) are supported to meet their obligations and achieve compliance. This includes preparing and publishing guidelines for complying with the positive duty and promote understanding, and public discussion, of the positive duty.
- AHRC can also monitor and assess compliance with the positive duty when necessary, including the option of conducting inquiries into a person's compliance if it 'reasonably suspects' that a person is not complying.
- The new AHRC powers came into effect 12 December 2022, giving employers and PCBUs 12 months to understand and begin to comply with the positive duty.

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022

4. Systemic inquiries into discrimination

- The Act inserts a new provision in the AHRC Act to provide the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination.**

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022

5. Representative claims

- The AHRC can receive applications from representative bodies (e.g. unions) to make applications to the Federal Courts on behalf of people who have experienced unlawful discrimination and after a complaint remains unresolved.

6. Timeframes for making a complaint

- The timeframe for making complaints under any of the AD Act, DD Act and RD Acts is extended from 6 months to 24 months after the alleged unlawful conduct took place.

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022

So what does that all mean for you?

- Shift in the existing legislative framework from *reactive* measures to *preventative* measures to eliminate, as far as possible, unlawful discriminatory conduct.
- **Employers need to closely examine the risk factors pertaining to their workplace environments and establish appropriate controls and performance standards to manage those risks under anti-discrimination and safety laws; look at training for staff; have a complaints/grievance handling framework in place to deal with and manage reports of sexual harassment; encourage or require employees to make reports if they experience, witness or hear about sexual misconduct. Your business needs to make it clear that they will be protected from victimisation for doing so.**