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

FEBRUARY 2023

On 2 December 2022, the Federal Government passed the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) (**Bill**). On 6 December 2022, the Bill received royal assent and became the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJ BP Act**).

Key changes being introduced as a result of the new SJ BP Act include:

- multi-employer bargaining;
- broader powers of Fair Work Commission (**FWC**) to intervene in workplace determinations;
- sunsetting of 'zombie agreements'.
- enterprise agreement approval process (BOOT and pre-approval requirements);
- pay equity: equal remuneration orders and prohibition on pay secrecy clauses;
- restrictions to fixed/maximum term contracts;
- expanded scope for flexible working arrangements;
- sexual harassment and discrimination; and
- Abolition of the Australian Building and Construction Commission, establishment of the National Construction Industry Forum and carving out the building and construction industry from the multi-employer bargaining provisions of the SJ BP Act.

In an earlier article we discussed Zombie Agreements and in this article we will discuss other key SJ BP Act changes, including, multi-employer bargaining, restrictions to fixed/maximum term contracts, expanded scope for flexible working arrangements, pay equity (equal remuneration orders and prohibition on pay secrecy clauses), and sexual harassment and discrimination.

Bargaining

Multi-enterprise bargaining

With the exception of the sunsetting of 'Zombie Agreements', one of the most significant SJ BP Act changes, which comes into effect on **6 June 2023**, is the expansion of multi-enterprise workplace bargaining. The Minister for Employment and Workplace Relations, the Hon Tony Burke MP (**Minister Burke**), stated in the Bill's Explanatory Memorandum, that the underlying philosophy driving the Bill (and now the SJ BP Act) was that no employer should have a competitive advantage over another because of their labour arrangements.

The SJ BP Act does not introduce new streams of multi-employer bargaining, but reduces barriers to access the existing multi-employer bargaining streams, which includes:

1. single interest employer authorisations – now referred to as common interest employers:

While multi-enterprise bargaining (ie where employees at different companies within an industry can join together to collectively bargain for pay and working conditions) is currently permitted under the *Fair Work Act 2009* (Cth) (**FW Act**), it has largely been restricted to a process where only the employer can initiate bargaining. Under the SJ BP Act, unions will now also now be able to initiate multi-employer bargaining.

If the majority of an employer's employees support bargaining, and the employer employs at least 20 employees, then unions can compel employers to bargain for agreements that cover multiple common interest employers, potentially including, competitors, external companies within the supply chain, or internal group companies.

Under the SJ BP Act employers have the ability to resist multi-enterprise bargaining agreements if:

(a) there is an existing enterprise agreement in place that has not nominally expired; **or**

(b) employees are employed in the on-site general building and construction industry (subject to a few express carveouts); **or**

(c) the employer has less than 20 employees; **or**

(d) the employer employs at least 20 employees, **and**:

  (i) the desire of the majority of employees (ie the 50% plus 1) determines that bargaining is NOT supported; and

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(ii) the employer is able to convince the Fair Work Commission (**FWC**) that its operations and business activities are NOT clearly and reasonably comparable with the other employers who will be covered by the agreement.

Note:

- a public interest test will be applied by the FWC, where the FWC must be satisfied that it would not be contrary to public interest to grant a multi-employer authorisation.
- in determining whether employers have clearly identifiable common interests, matters considered relevant include, geographic location, nature of the enterprises (including existing terms and conditions), and the application of regulatory regimes.
- for employers with 50 or more employees, it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers that are covered by the agreement, unless the contrary is proved by the employer.
- in circumstances where less than nine months has passed since the most recent nominal expiry date of an agreement, the FWC has the discretion to refuse an application to add a new employer to a single interest employer agreement.
- there is a new requirement that employers negotiating as part of a multi-enterprise agreement, must obtain written consent from each union acting as a bargaining representative for the agreement prior to putting the agreement to an employee vote to either approve or vary the agreement - this effectively gives the unions an extraordinary veto power over multi-enterprise agreement voting.
- employees are also able to take protected industrial action or seek bargaining orders in support of single interest employer agreements and there are limits on employers'/employees' ability to remove themselves as parties to them. However, there is a new inclusion of an obligation to attend FWC mediation/conciliation before protected industrial action is taken (which applies to all forms of enterprise agreements except the 'cooperative' multi-enterprise stream – those where no supported bargaining authorisation or single interest employer authorisation are in operation in relation to the agreement immediately before the agreement was made).
- the FWC has been granted broader powers to intervene and make workplace determinations (effectively arbitrating an enterprise agreement) where bargaining is 'intractable'.

2. supported bargaining:

The SJ BP Act amends and renames the FW Act's low paid bargaining stream (which was rarely used), to that of the supported bargaining stream, with an aim to assist employees to bargain for multiple employer agreement coverage in industries that are low-paid (such as aged care and childcare) and have low agreement coverage.

The SJ BP Act simplifies the factors that the FWC is required to consider when granting a supported bargaining authorisation, to more readily allow multi-enterprise bargaining to commence. The previously lengthy list of relevant factors will be narrowed to focus on whether:

(a) the employers to the application have an 'identifiable common interest' (as detailed previously above); and

(b) the FWC is satisfied that it is appropriate to do so taking into account the pay and conditions in the relevant industry, including whether low rates of pay prevail; and

(c) the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process.

Replacement Agreements

In cases of existing nominally expired agreements, the SJ BP Act removes the need for, employers to issue a notice of employee representational rights to commence bargaining, or employee majority support determinations, with bargaining now being able to commence on written request from an employee bargaining representative.

This change results in a much simpler and less procedural approach to commencing bargaining, however, also removes opportunities for employers to resist bargaining.

Note, a replacement agreement is defined as one which will replace an existing agreement which had a nominal expiry date within the last 5 years and which covers a substantially similar scope of employees.

Negotiating a Single Employer Enterprise Agreement – PRIOR to 6 June 2023

If you have an enterprise agreement which has passed its nominal expiry date, or have been considering negotiating and adopting a single employer enterprise agreement, employers still have a small window of opportunity to negotiate such agreements, so long as the application is filed with the FWC prior to 6 June 2023.

All employers with nominally expired enterprise agreements should immediately start planning their future industrial arrangements, giving consideration to negotiating a new enterprise agreement or reverting to coverage and adherence to the relevant applicable modern award.

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Restrictions to Fixed or Maximum Term Contracts

In the second reading speech of the Bill Minister Burke identified that:

- the number of workers on fixed term contracts has increased by over 50% since 1998;
- more than half of all employees engaged on fixed term contracts are women; and
- more than 40% of fixed term employees have been with their employer for two or more years.

In a bid to encourage secure, permanent employment, and limit the use of rolling fixed term or maximum term contracts (**Fixed Contracts**), with effect **6 December 2023**, the SJ BP Act introduces prohibitions against engaging employees on Fixed Contracts:

- spanning for a period of two or more years (inclusive of extensions); **or**
- that may be extended more than once (even if the period of the Fixed Contract is not more than two years in duration); **or**
- where the employee has previously been engaged on two consecutive contracts for the same or substantially similar work (this applies irrespective of when a gap between contracts occurs eg a contract that finishes at the end of one semester and another contract that starts at the beginning of the next semester); **and**

introduces civil penalties for employer's breaching such provisions. Given the recent (with effect 1 January 2023) increase in maximum civil penalties applicable to breaches of a civil remedy provision of the FW Act are now are up to $16,500 per contravention for an individual or person of authority who was involved in the contravention, and $82,500 per contravention for the employer, it is crucial for employers to make themselves aware of, and implement processes to ensure compliance with, these new requirements.

If an employer enters into a Fixed Contract with an employee in contravention of the FW Act, any term providing for the contract to terminate at the end of a specified period is taken to have no effect. In other words, the Fixed Contracts is converted to a permanent employment contract (with all other contract provisions remaining unaffected), whereby employees will likely be entitled to notice and redundancy pay, and protection from unfair dismissal under the FW Act.

Exceptions

The exceptions, where Fixed Contracts may continue to be used include where:

- the employee is engaged to perform only a distinct and identifiable task involving specialised skills;
- the employee is engaged under a training arrangement;
- the employee is engaged to undertake essential work during a peak demand period;
- the employee is engaged to undertake work during emergency circumstances or during a temporary absence of another employee;
- in the year the contract is entered into, the employee's earnings under the contract exceed the high income threshold for that year (currently $162,000 but will be higher come 6 December 2023);
- the contract relates to a governance position that has a time limit under the governing rules of a corporation or association; or
- the contract is for a position which is funded in whole or in part by government funding, the funding is payable for a period of more than two years, and there are no reasonable prospects that the funding will be renewed.

Note:

- the prohibition will apply to a Fixed Contract entered into before 6 December 2023 if an employer entered into a subsequent contract after that initial contract ended, in circumstances which meet the 'consecutive contracts' restriction.
- the Fair Work Ombudsman will publish a Fixed Term Contract Information Statement (ie similar to the Fair Work Information Statement and the Casual Employment Information Statement) which will be required to be given to employees where they are offered a Fixed Contract, with failure of an employer to provide the new statement potentially attracting the imposition of a civil penalty!

What does this mean for your business?

- The ability of employers to engage employees on Fixed Contracts will be significantly curtailed.
- The onus will be on employers to establish that their Fixed Contracts are not in breach or otherwise exempt from the above prohibitions.

What should employers do now?

Employers should:

- review their current employment arrangements and conduct an audit of their employees on Fixed Contracts to determine how long they have been employed under such arrangements, including previous contracts.
- review template Fixed Contracts to remove any clauses that provide the option to extend or renew the term and when available, make provisions for the inclusion of the Fixed Term Contract Information Statement.
- \if seeking to rely on an exception against the prohibition on Fixed Contracts, consider including that exception within the terms of the contract and explain why the exception applies.

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- consider if they have projects that rely on fixed or maximum-term workforces that may be impacted by these changes, and plan ahead to structure their workforces in light of these changes.

Law Ensure offers a range of lawfully compliant Fixed Contracts, so contact us today if you wish to implement such contracts or require amendments to be made to any existing template agreements.

Expanded Scope for Flexible Working Arrangements

The FW Act has existing provisions regarding an employee's to request flexible working arrangements (**Request**) in certain circumstances, such as being over the age of 55, having a disability, or being a parent/having the responsibility for the care of a child who is of school age or younger. With effect **6 June 2023** the SJ BP Act introduces the ability for employees when pregnant to also make a Request, whilst the existing domestic violence provisions have been expanded to include any employee who is experiencing family and domestic violence.

The SJ BP Act also makes amendments to the process employers must follow after receiving a Request, directing that employers must provide a written response within 21 days of receiving the Request, which must include:

- having had a discussion between the employer and the employee; **and**
- stating if the employer grants of refuses the request; **and**
- if, an agreement is made to change the employee's working arrangements, setting out the agreed change; **or**
- if the employer refuses the request, setting out the reasonable business grounds that the refusal was based on.

Examples of reasonable business grounds may include that:

- the new working arrangements requested by the employee would be too costly for the employer;
- there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity; or
- that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

These reasonable business grounds remain unchanged, however, the SJ BP Act introduces provisions that the nature and size of the enterprise carried on by the employer is relevant when considering whether the employer has reasonable business grounds for refusing a request.

Lastly, where initial attempts to resolve Request disputes have failed at the workplace level, or where an employer has failed to respond to an employee's request within the mandated 21 day timeframe, the SJ BP Act introduces the power of the FWC to conciliate and arbitrate. It is most important to note that civil penalties now apply to an employer breaching a FWC order, so it is crucial for employers to ensure compliance with these new requirements.

Note: similar procedural changes have been made to extension of parental leave requests, with civil penalties also applying breaching an order of the FWC.

Pay Equity (equal remuneration orders and prohibition on pay secrecy clauses)

A key goal of the SJ BP Act is to address the gender and pay gap. In an attempt to meet this goal, reforms include:

- the prohibition on, and invalidation of, pay secrecy clauses in employment agreements with civil penalties applying for non-compliance, thereby allowing employees to openly share and discuss their remuneration and employment conditions with colleagues or competitors (protections under the general protection provisions of the FW Act are also afforded for employees who elect not to make a disclosure or who refuse to answer their co-workers if asked); and
- the establishment of two new expert panels within the FWC on pay equity and the care and community sector to tackle low pay in female dominated industries.

While it is not necessary to amend existing employment agreements, employers should be aware that existing pay secrecy clauses and employment conditions are now unenforceable, and the inclusion of pay secrecy provisions in employment agreements date on or after **7 June 2023** may result in imposition of civil penalties, or form the basis for general protections claims.

What should employers do now?

Employers should:

- review current template employment agreements and remove pay secrecy provisions, or amend clauses regarding the obligation to keep all contents of the agreement confidential.

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- give thought to how pay transparency might impact organisational reputation, the morale of staff and relationships between staff, and if as a result consideration should be given to whether any changes are required to remuneration.
- consider how gender pay equality within the workplace is managed.
- review policies and procedures to ensure that employees' rights to discuss or keep their remuneration confidential are not prejudiced. In particular, ensure that employees who exercise these rights do not receive prejudicial treatment.

Sexual Harassment and Discrimination.

The Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 (Cth) came into operation on **12 December 2022**, and together with the SJ BP Act has resulted in changes to the FW Act, the *Sex Discrimination Act 1984* (Cth) (**SD Act**), and the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). Changes include:

- with effect **7 December 2022**, under the FW Act, extension of the protections against discrimination under the general protection provisions of the FW Act to include the attributes of breast feeding, gender identity and intersex status.
- with effect **13 December 2022**, under the SD Act, a:
    - prohibition of conduct that subjects another person to a hostile workplace environment on the ground of sex;
    - positive duty on employers (or a person conducting a business or undertaking) to take reasonable and proportionate measures to eliminate, as far as possible, sexual harassment or harassment on the ground of sex, conduct creating a hostile work environment, or acts of victimisation against another person (**Positive Duty**).

    This will require measures to be taken to prevent the conduct being engaged in by duty holders, employees, workers, agents and third parties. Measures may involve, where appropriate:

    - implementing policies and procedures;
    - conducting regular training and education;
    - collecting and monitoring gender-based data;
    - conducting surveys;
    - providing appropriate support to workers and employees;
    - developing a sexual harassment strategy;
    - implementing a complaint's process;
    - monitoring employees' use of email and computer systems; and
    - providing appropriate support.

    The meaning of 'reasonable and proportionate measures' will vary between duty holders in accordance with their particular circumstances. Factors that may be considered include the:

    - size, nature and circumstances of the business;
    - duty holder's resources, financial or otherwise; and
    - practicality and costs associated with the steps.

    Note, this provison will not limit the positive duty that already exists in both Commonwealth and relevant State or Territory work health and safety law, to eliminate or manage hazards and risks to a worker's health, which includes risks to psychological health and therefore sexual harassment risks.

- with effect **6 March 2023**, under the:
    - FW Act, employees can make an application to the FWC for a stop-sexual harassment order. The FWC must first attempt to conciliate the dispute. If the dispute is not settled at that point, the FWC may, with the consent of both parties, arbitrate the dispute. If consent is not given by either party, the applicant will then have 60 days to make an application to the Federal Court.

      Note, the FWC will have the discretion to dismiss an application that is made more than 24 months after the alleged sexual harassment, although we expect that the FWC may be reluctant to dismiss sexual harassment claims based on the passing of time alone. This discretion will be in addition to the FWC's general power to dismiss an application that is frivolous or vexatious or has no reasonable prospects of success.

    - AHRC Act, the Australian Human Rights Commission (**AHRC**) has been empowered to promote and enforce the Positive Duty by:

      - publishing guidelines, promoting public understanding, and undertaking research in relation to the Positive Duty;
      - making inquiries into and issuing compliance notices in relation to a person's compliance with the Positive Duty;
      - applying to the Federal Circuit and Family Court of Australia for an order directing a person to comply with a compliance notice in relation to the Positive Duty;
      - unrelated to the Positive Duty, empowering the AHRC to inquire into any matter that may relate to systemic unlawful discrimination.

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- allowing representative bodies to make representative applications in the Federal Courts on behalf of persons who have experienced unlawful discrimination; and
- providing that the President of the AHRC has a discretion to terminate a complaint if the alleged unlawful conduct took place over 24 months ago (as opposed to the previous 6 months).

What does this mean for your business?

Employers should have already taken steps to protect workers from sexual harassment to comply with existing obligations to eliminate or minimise risks to health and safety under work health and safety legislation. The changes are a timely reminder to ensure this has been done and if not, to commence as soon as possible.

What should employers do now?

As a starting point, all businesses should:

- ensure they have robust policies, training and procedures in place to prevent or address sexual harassment in their workplace – it is critical that employees not only receive the policies, but that they understand them, and regularly receive refresher training.
- investigate (ideally using suitably skilled and qualified investigators, whether they are internal or external resources) complaints of sexual harassment in a timely, responsive fashion, and in compliance with published policies, and address the conduct if established, and then ensure the implementation of any required changes to policies and procedures during the reflection process.
- review and if necessary update policies and training in relation to anti-discrimination, to ensure that people managers are aware of the new protected attributes.

Law Ensure also recommends conducting safety audits of workplaces to proactively identify areas of risk of sexual harassment or sex discrimination.

If employers do not discharge the positive duty, employers will be exposed to risk:

- of sexual harassment or sex discrimination in their workplace (and where a complaint is made), and the potential imposition of civil penalties;
- of investigation by the statutory regulators for workplace health and safety; and
- of investigation by the AHRC of volitions and potential recommendations for prosecution for breaches of the new positive duty even where there is no employee complaint.

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