Industrial Relations Reform Insights

GETTING ACROSS THE SHIFT IN ENTERPRISE BARGAINING

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Australian Business Lawyers & Advisors

Content

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Overview

Major Reset of Industrial Relations Landscape

In what will be the biggest reforms in more than a decade, the Federal Government has introduced into Parliament landmark IR reforms that will have an impact on all workplaces across Australia as part of its *Secure Jobs and Better Pay Bill 2022.*

In summary, the reforms to the *Fair Work Act* (FW Act) address:

- enterprise bargaining (which will be fundamentally altered)
- flexible work arrangement requests (which will now be subject to arbitration by the Fair Work Commission (FWC));
- limitations on fixed term contracting;
- prohibition of pay secrecy clauses in contracts and industrial instruments;
- changes to the rules pertaining to the taking of industrial action;
- overhaul of the Better Off Overall Test (BOOT) and Enterprise Agreement (EA) approval requirements;
- facilitation of gender-based pay equity claims;
- the introduction of new expert panels to address gender-based pay equity and the Community and Care sector;
- termination of enterprise agreements;
- expanded sexual harassment protections;
- abolition of the Australian Building & Construction Commission;
- the shift of the Registered Organisation's Commissions powers to the General Manager of the FWC;
- advertising positions at rates that could not satisfy any underlying industrial instrument safety net; and
- expansion of the small claims process for hearing underpayment claims up to a value of $100,000.

Whilst the scope of the Bill is broad, this represents just the first tranche of the Australian Labor Party (ALP) IR Reform agenda. Still to come next year remains policy regulation for (amongst other things):

- gig workers and independent contracting;
- the characterisation of who constitutes a casual employee;
- the road transport industry (where specific regulation is being pursued by the Trade Workers Union);
- giving effect to the ALP's 'same job same pay' election platform; and
- criminalisation of wage theft.

Through its representation of the Australian Chamber of Commerce and Industry, ABLA has been at the forefront of these changes, giving feedback to Government, employer groups and unions over the past few months and participating in numerous consultations arising from the Jobs Summit.

With this leading level of insight, we are pleased to update clients on the specific details of the changes and the impact these changes are likely to have on businesses.

In this publication we will focus exclusively on the significant changes to the enterprise bargaining framework. Two subsequent publications will focus on:

- the remaining reforms under the broad theme of 'gender equity'.
- the remaining reforms under the broad theme of 'job security'.

Multi-Enterprise Bargaining Reforms

We address each of the enterprise bargaining reforms below, which cut across both single enterprise agreements and multi-enterprise agreements.

Perhaps the biggest impact of the IR reforms is its shake-up of multi-employer bargaining.

Multi-employer bargaining is being expanded across three streams:

- the "*single-interest employer authorisation*" stream
- the newly named "*supported bargaining*" stream
- the newly named "*cooperative workplaces*" stream.

Each stream expands the ability for employees/unions to unilaterally compel their employer to join into bargaining with other employers or alternatively to become covered by existing multi-employer agreements.

The "single-interest employer authorisation" stream

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

- the employers subject of the application have clearly identifiable "common interests"; and
- the group of employees who will be covered by the agreement was fairly chosen; and
- at least some employees that will be covered by the agreement are represented by a union; and
- the employer and any unions affected have had the opportunity to express their views on the application; and
- a majority of employees of the relevant employers want to bargain with the employers that will be covered by the EA; and
- it is not contrary to the public interest to make the authorisation.

Where an employer does not consent to be added to the stream, the employers will only be exempted from these types of applications if they fall into one of the following categories:

- they are a small business employer;
- the employer is already covered by a single-interest employer authorisation or a supported bargaining authorisation in relation to the relevant employees;
- the employer has already made an application for a single-interest employer authorisation that has not yet been decided; or
- the employer is covered by an EA that has not yet passed its nominal expiry date at the time that the FWC is to make the authorisation.

In relation to whether employers have "clearly identifiable common interests", the FWC is required to consider:

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

Employees can take industrial action in support of these multi-employer agreements in the single-interest employer stream.

Once an employer is caught by a single-interest employer authorisation, the employer is compelled to comply with good faith bargaining obligations, which include (amongst other things) attending meetings at reasonable times, considering and responding to bargaining proposals in a timely manner and disclosing relevant information in a timely manner.

Moreover, where a single-interest employer agreement exists, either an employer or an employee bargaining representative can apply to the FWC to add a new employer to the EA, provided that:

- the employers covered by the agreement and the employer that is sought to be covered have clearly identifiable "common interests"; and
- it is not contrary to the public interest to add the new employers to the variation; and
- the employer and any unions already covered by the EA have had the opportunity express their views on the application; and
- a majority of affected employees to be added to the EA (that is, those engaged by the new employer) have agreed to be added to the EA.

Where a new employer does not consent to the variation application to extend the application of a single-interest employer agreement, the variation will not be available where:

- the new employer to be added is a small business employer; or
- the affected employees (to be added) are covered by another EA that has not yet passed its nominal expiry date.

This represents a seismic shift in the existing regime. Presently, multi-employer bargaining can only be conducted where the *employers wish to bargain together*. The amendments invert this process and permit *employees to dictate to employers* that they must bargain together.

Concerningly:

- In order to compel multiple employers to bargain together, it does not appear necessary that a majority of employees in each business that is subject to the single-interest employer stream must wish to bargain. Rather, all that is required is a majority of employees across the whole group of businesses. In theory, this means employees from a major company could compel other companies in a similar area or with similar businesses to bargain with them - even if a majority of employees in those other companies do not wish to bargain. The prospect for monopolist outcomes is real - particularly in industries where major players significantly outsize others (eg road transport).
- The requirement that there be "clearly identifiable common interests" between employers before they can be compelled to bargain together appears rather broad. The reforms talk about taking into account geographical areas and the nature of the business engaged in by employers with respect to whether the employers have a common interest. However, no mention is made about whether the employers are competing with each other and accordingly should not be collectively bargaining on employment terms. The early application of this "common interest" test by the FWC will be critical to determining how widely multi-employer bargaining is adopted.

It appears that this form of multi-employer bargaining will be particularly targeted at either:

- similar businesses in a particular geographic area (eg regional areas); and
- businesses that sit within an eco-system or supply chain of businesses, for instance:
    - Qantas and the array of subcontractors that feed into its primary airline business;
    - major transport companies that use a mix of employees and different contractors to service clients; and
    - possibly construction sites, where a principal contractor performs building services with the assistance of a suite of sub-contracting companies of different sizes.

Supported bargaining stream

The supported bargaining stream is a special stream of bargaining that renames and expands upon the "*low paid bargaining authorisations*" presently contained in the FW Act.

The stream is focused on enabling employees to apply to the FWC for an authorisation compelling their employer to bargain in conjunction with other employers if:

- the FWC is satisfied that it is appropriate for the employers and employees that will be covered by the agreement to bargain together, having regard to:
    - the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and
    - whether the employers have clearly identifiable common interests; and
    - whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and
    - any other matters the FWC considers appropriate; and
- the FWC is satisfied that at least some of the employees covered by the proposed agreement are represented by a union.

In relation to whether employers have "clearly identifiable common interests", the FWC is required to consider:

- geographical location of employers;
- the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises; and
- being substantially funded (directly or indirectly) by Commonwealth or State/Territory Governments.

The authorisations will not be able to cover any employees covered by an existing single-enterprise agreement that has not passed its nominal expiry date - unless the employer entered into the EA with the main intention of avoiding being specified in the supported employer authorisation.

Once an employer is subject to a supported bargaining authorisation, the employer is compelled to comply with good faith bargaining obligations, which include (amongst other things) attending meetings at reasonable times, considering and responding to bargaining proposals in a timely manner and disclosing relevant information in a timely manner.

Moreover, any supported bargaining EA automatically prevails over any other EA applicable to an employer, even if the other EA was bargained and approved first. That is, supported bargaining EAs prevail over all other EAs applicable to the employer with respect to the same employees.

Employees can take industrial action in support of these multi-employer agreements in the supported employer authorisation stream. This was not previously available for multi-employer agreements.

Where agreement is unable to be reached on terms to go into a supported bargaining stream EA, the existing provisions of s260 and s269-s279 of the FW Act (which presently apply to "*low paid bargaining authorisations*") enable a bargaining representative to apply to the FWC to make a supported bargaining workplace determination, which would compel an arbitrated outcome on the parties regarding outstanding matters in dispute.

Co-operative workplaces stream

Co-operative workplace agreements are to be defined as all multi-employer enterprise agreements that were not made through a supported bargaining authorisation process.

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

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

Once the application is made, the FWC must approve the variation to the cooperative workplace agreement if:

- the employers and unions covered by the existing cooperative workplace agreement have had an opportunity to express their views to the FWC; and
- a majority of the affected employees have approved of the variation; and
- it is not contrary to the public interest to approve the variation.

Under this stream, no protected industrial action is available.

These changes appear to have two primary impacts:

1. they continue to facilitate the making of multi-enterprise agreements as has been available in the past between multiple employers that are not considered "single-interest employers". Under these existing rules multi-enterprise bargaining is largely voluntary - with no industrial action, bargaining orders, scope orders or majority support determinations available; and
2. it allows an employer and employees to jointly request to have their workplace added to an existing cooperative workplace agreement, provided the relevant statutory pre-requisites outlined above are met.

These changes might be attractive to smaller businesses that wish to implement an EA in their business and have identified an industry-level EA that they consider would readily be able to be adopted by their business.

Enterprise Agreement approval requirements

The existing prescriptive requirements that must be met in order to have an EA to be approved have been extinguished. For instance, requirements about 'access periods', what documents need to be given to employees, what information needs to be explained and circulation of voting process information are to be removed from the FW Act. In their place, three broad requirements primarily emerge.

1. Statement of Principles

The FWC will have a very broad discretion to determine whether an EA has been "genuinely agreed".

In order to explain how this discretion will be exercised, the FWC will be required to issue a Statement of Principles that will outline the types of measures that would ordinarily be expected in order to secure genuine agreement. The Statement of Principles will address the following matters:

- informing employees of bargaining for a proposed enterprise agreement;
- informing employees of their right to be represented by a bargaining representative;
- providing employees with a reasonable opportunity to consider a proposed enterprise agreement;
- explaining to employees the terms of a proposed enterprise agreement and their effect;
- providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote;
- any matter prescribed by the regulations for the purposes of this paragraph; and
- any other matters the FWC considers relevant.

The intention is to simplify detailed and complex pre-approval requirements in order to encourage enterprise bargaining and ensure the FWC is not required to refuse to approve agreements due to minor or technical procedural deficiencies that did not affect how employees voted on the agreement.

It remans to be seen whether such a detailed statement will indeed simplify the approval process or will simply lead to new and different prescriptive requirements for the approval of EAs.

These new EA notification requirements will only apply to EAs where bargaining has started after the commencement of the IR Reforms.

2. Notice of Employee Representational Rights

The obligation to provide a Notice of Employee Representational Rights (NERR) and to wait until at least 21 days after the last notice is given before requesting employees to vote will no longer apply to bargaining for a proposed single-interest employer agreement, supported bargaining agreement or cooperative workplaces agreement.

The requirement to issue the NERR will remain, as it presently operates under the FW Act, in the case of a proposed single enterprise agreement.

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

3. Need for employees to have sufficient interest in the EA

In order to approve an EA, the FWC must also be satisfied that the employees who requested to vote on the EA:

- have a sufficient interest in its terms; and
- are sufficiently representative, having regard to the employees the agreement is expressed to cover.

Better Off Overall Test

Some progress but indefinite uncertainty in return

The BOOT will be revised so that the FWC is required to approve an agreement as being better off overall provided that employees are better off overall "globally", as opposed by comparing each entitlement in an EA against the underlying award.

Moreover, when assessing whether employees are better off overall, the FWC will:

- not be required to consider the circumstances of prospective employees;
- only be required to consider patterns of work that are reasonably foreseeable at the test time;
- will be able to assess the BOOT by references to classes of employees (as opposed to each individual employee) unless there is evidence that identifies individual employees are worse off under the EA;
- will give primary consideration to a common view (if any) relating to the BOOT expressed by specified bargaining representatives of the employer and employees; and
- will be able to directly amend or excise a term in an agreement that does not otherwise meet the BOOT.

However, in return for these improvements, employers will pay a significant price. The BOOT amendments also contain a provision empowering employees or unions to trigger a reconsideration of the BOOT at any time after the EA is approved, provided:

- prior to approval of the EA, the FWC gave consideration to a common view regarding whether the EA passes the BOOT;
- as part of this consideration, the FWC had regard to patterns or kinds of work, or types of employment engaged in, or to be engaged in, by award-covered employees at the test time; and
- at the *test time* or a *later time*, the award-covered employees engaged in other patterns or kinds of work, or types of employment to which the FWC did not have regard.

The reconsideration itself is quite complicated:

- the BOOT is reconsidered against the underlying award as at the time the EA was *originally approved*; but
- the award is tested against patterns of work and the EA terms as they stand *at the time the reconsideration is conducted*.

If the FWC is satisfied on any reconsideration that the circumstances of any employee does not meet the BOOT (on reconsideration) then either:

- the employer must give undertakings to rectify the concerns; or
- the FWC will of its own initiative vary the EA to rectify the concerns.

Any undertaking or variation will apply to all employees from seven days after the date of the variation moving forward (unless a different date is specified by the FWC).

The consequence of this is effectively that EA's will no longer 'lock in' terms and conditions of employment for the life of the EA. Instead, EA terms can be capable of continuous challenge or scrutiny, if there is any prospect of employees being worse off under the EA when compared to the award.

In many ways the changes to the BOOT are likely to create more uncertainty and confusion than presently exist. If the changes were designed to incentivise bargaining (as claimed), they have sadly not achieved their goal.

Initiating bargaining

Another significant change relates to when employers can be compelled to bargain in circumstances where the parties have previously bargained for a single enterprise agreement.

If an employer has been covered by an EA that expired within the previous five years (the earlier agreement), then any bargaining representative of employees covered by that EA can request that the employer commence bargaining for a new replacement agreement, provided that:

- the proposed agreement will replace the earlier agreement;
- the making of the earlier agreement did not cause a single-interest employer authorisation to cease to operate; and
- the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement.

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

Once the request has been made, two important consequences flow:

1. The employer is compelled to comply with good faith bargaining obligations, which include (amongst other things) attending meetings at reasonable times, considering and responding to bargaining proposals in a timely manner and disclosing relevant information in a timely manner.
2. Employees can take protected industrial action, subject to a protected action ballot order (PABO).

Arbitration of bargaining disputes - major change

Under the present FW Act, parties cannot ordinarily apply to the FWC to seek a binding decision on what terms should or should not be included in an EA.

The determination of what terms are included in an agreement is for the parties to agree to or for the employer to ultimately determine and put to a vote.

This will all change under the IR reforms.

Where there is "*no reasonable prospect of agreement being reached*", then a bargaining representative is able to apply to the FWC for an "*intractable bargaining declaration*". However, before making an application, a bargaining representative is still required to participate in the existing bargaining dispute processes under the FW Act (s240 disputes).

Once an intractable bargaining declaration is made, the FWC must either:

- arbitrate the outstanding matters between the parties, imposing an intractable bargaining workplace determination on them (which operates like an EA); or
- provide the parties with a post-declaration negotiating period to agree on terms, after which the FWC must arbitrate the outstanding matters between the parties, imposing a workplace determination on them to resolve any matters on which agreement had not been reached by the parties.

Parties that are subject to an intractable bargaining declaration will be unable to take protected industrial action.

This, for the first time under the FW Act, introduces 'unilateral arbitration' into enterprise bargaining, that is, a scenario where one party can effectively disagree to the claims made in bargaining and seek to have terms imposed on all parties by way of arbitration.

This form of arbitration is available in both single enterprise agreements and all multi-employer bargaining streams.

It signals a return to an arbitral-based bargaining regime more commonly experienced in the 1980s and 1990s (both Federally and in many States).

Industrial action

The Bill proposes to limit industrial action so that action by either employees or an employer will only be protected if taken within three months of a PABO.

This change is significant for three reasons:

1. It significantly minimises the availability of employer response action (lockouts). This is because often, employer response action is taken only after protracted periods of employee action. However, once a period of three months elapses from the issuing of the PABO (which may be about the time an employer might theoretically take its own response action), the ability to take industrial action is lost. At this point, the only party that could re-trigger industrial action are the employee bargaining representatives who could seek a further PABO.
2. It prevents protracted industrial action being taken by employees, without having recourse to additional PABOs.
3. It limits the prospects of protracted industrial action and is likely to instead incentivise earlier involvement of the FWC in scenarios where significant disputation arises - with a very real prospect of arbitration of matters that remain in dispute.

The Bill also requires the FWC to convene a conciliation conference between bargaining representatives every time a PABO is filed. Whilst this does not prevent protected industrial action being taken, it involves a third party in a dispute resolution process in response to each and every time employees seek to commence the process of taking industrial action.

The conciliation process must be held between when the PABO is applied for and when the date for the PABO voting closes - ensuring that the conciliation has been held before any industrial action is taken.

Finally, the process for conducting PABOs will be significantly overhauled. Presently, PABOs are conducted mainly by the Australian Electoral Commission, unless the FWC determines an alternative person (who is assessed as a 'fit and proper person') should conduct the PABO.

The reforms seek to establish a list of 'fit and proper persons' who may conduct PABOs. This enables bargaining representatives to more easily seek alternative persons to conduct their PABOs, provided the alternatives nominated are identified on the fit and proper person list.

Terminating enterprise agreements unilaterally

Over the past eight years, employers have increasingly sought to use the ability to terminate EAs, after passing their nominal expiry date (and without employee agreement), as leverage in protracted bargaining disputes with unions.

The practice expanded following the decision in *Aurizon Network Pty Ltd* [2015] FWCFB 540, where the FWC confirmed a broad capability to terminate EAs, unless the terminations were contrary to the public interest.

The threat of terminations can carry real consequences for employees. EAs tend to have higher rates of pay than the underlying award and usually confer other protections or benefits that don't form part of the award-safety net. Technically speaking, a workforce's terms and conditions can revert to a significantly inferior position after an EA has been terminated unless undertakings are given to maintain key conditions.

The ability to terminate EAs will be substantially curtailed.

Under the Bill, EAs will only be able to be terminated without employee agreement where they have passed their nominal expiry date and fall into one of the following three categories:

1. The FWC is satisfied that the continued operation of the EA would be unfair for the employees covered by the EA.
2. The FWC is satisfied that the EA does not, and is not likely to, cover any employees.
3. Alternatively, all of the following apply:
    - the FWC is satisfied that the continuing operation of the EA would pose a significant threat to the viability of a business carried on by the employer or employers covered by the EA; and
    - the FWC is satisfied that the termination of the EA would be likely to reduce the potential of termination of employment by reason of redundancy or insolvency for employees covered by the EA; and
    - if the agreement contains terms providing for entitlements relating to termination of employment by reason of redundancy or insolvency, the employer has given a guarantee to the FWC that it will continue to honour those provisions contained in the EA (unless the underlying award provisions on the subject matter are more beneficial). This guarantee must be given for the earlier of the following periods:
        - > four years;
        - > a shorter period the FWC may determine if appropriate; or
        - > until the employees become covered by another EA that covers the same or substantially the same group of employees.

These provisions will apply to all new and existing termination applications, provided that in relation to existing termination applications the FWC has not yet terminated (or refused to terminate) a particular EA.

Next steps

From here, the Bill will likely be referred to senate committees for the purposes of consultation and industry feedback. We are expecting the Government to try to finalise and pass the reforms before the end of the year.

For many businesses engaged in enterprise bargaining, there may be real benefit to fast-tracking or finalising any outstanding bargaining discussions before these reforms commence.

For other businesses who are struggling to secure bargaining representative/workforce consent to vary long-standing EA provisions, the introduction of arbitration as a means of resolving bargaining disputes might present a new and different means of finally removing historic practices that may no longer align with your operational demands.

At an overall level, it appears that the union movement (which has significantly influenced the ALP Reform agenda) has abandoned industrial action as its predominant philosophical focus and shifted to arbitration-based campaigns to secure better wage outcomes. The proposed reforms significantly curtail protracted periods of industrial action and instead promote arbitration as the means of resolving what the Bill describes as "intractable bargaining disputes".

Whilst this will likely help some big businesses, for many SME's, they are likely to be introduced to a world of conciliation and arbitration of bargaining disputes not previously known to them.

ABLA's experienced team of advocates thankfully specialise in industrial arbitration and are well placed to help businesses alike in navigating this new paradigm. Please get in touch to discuss the impact of these reforms on your business.

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