Article Information

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Service: Bullying and Harassment, Employment & Labour, Employment Disputes & Litigation, Industrial Relations
Sector: Aged Care & Senior Living, Agriculture & Food, Defence, Education, Energy & Resources, Financial Services, Health & Life Sciences, Hospitality, Tourism & Gaming, Not-for-Profit

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The Secure Jobs, Better Pay Bill is here: How will the Bill impact bargaining and agreement-making?

On 27 October 2022, the Albanese Government's Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Bill) was tabled in Federal Parliament. In this fourth instalment, Piper Alderman's Employment Relations team unpacks the proposals relating to bargaining and agreement-making, as part of its series of insights into the Bill.

Labor's election policies said little about the rules in the *Fair Work Act 2009* (Cth) (**FW Act**) governing enterprise agreements. But it was always likely in office to respond to union concerns about certain aspects of the current bargaining framework, such as the use of small and unrepresentative voting cohorts to approve non-union agreements, and the tactical use by employers of applications to terminate expired agreements.

Discussions at September's Jobs + Skills summit also opened up the possibility of meeting employer concerns about the complexity of the current process for getting agreements approved, while creating new options for collective bargaining and dispute resolution in certain industries.

In the result, the Bill proposes important changes across five main areas:

- multi-employer bargaining;
- the processes for making and varying agreements;
- protected industrial action;
- "*last resort*" arbitration; and
- the termination of agreements.

Expanding the options for multi-employer bargaining

The most complex and contentious parts of the Bill involve the government's attempt to deliver on its post-Summit promise to remove "*unnecessary limitations on access to single and multi-employer agreements*".

The current FW Act allows two or more employers to make a single-enterprise agreement (**single-EA**) if they are related corporations, or conduct a joint venture or common enterprise, or have obtained a "*single interest employer authorisation*" from the Fair Work Commission (**FWC**). Alternatively, and even if not related in any of those ways, they can make a multi-enterprise agreement (**multi-EA**).

The main differences between single- and multi-EAs are that bargaining orders cannot be made in relation to a multi-EA, and nor can protected industrial action be taken in support of such an agreement. Only one vote need be held to obtain the approval of all the employees covered by a single-EAs, whereas no employer can be covered by a multi-EA unless its employees approve it as part of a separate vote.

The Bill proposes two broad alterations to these options, along with some awkward new terminology.

A new type of multi-EA: supported bargaining agreements

The more straightforward change involves dividing multi-EAs into two separate categories: "*supported bargaining agreements*" (**SBAs**) and "*cooperative workplace agreements*" (**CWAs**).

Despite the fancy title, a CWA is essentially just an ordinary multi-EA that is not an SBA. The major change from the current rules for multi-EAs is that there would be a requirement that at least some of the employees covered by the CWA had been represented in bargaining by a registered trade union. There would also be processes for varying a CWA to bring a new employer within its coverage, or to remove an employer from coverage. In each situation the employer and a majority of its employees would need to agree to the change. As under the current Act, no bargaining orders could be issued or protected industrial action taken in relation to a proposed CWA.

The more substantial reform is a new system of "*supported bargaining*" (**SB**), which is based upon, but replaces, the existing and largely unutilised scheme for "*low-paid bargaining*". The Explanatory Memorandum suggests that the purpose of the new stream is to assist "*employees and employers who may have difficulty bargaining at the single-enterprise level*", such as those in low paid industries who "*may lack the necessary skills, resources and power to bargain effectively*". Aged care, disability care, and early childhood education and care are specifically mentioned as examples.

For an SBA to be made, the FWC would first need to grant an SB authorisation, which could be sought by an affected employer or union, or another bargaining representative (**BR**) for the agreement.

The FWC would need to be persuaded that it was appropriate for the relevant employers and employees to bargain together, having regard to matters that include prevailing pay and conditions in the relevant industry or sector, and whether the employers have clearly identifiable common interests. Examples of common interests given in the Bill are geographical location, the nature of the relevant enterprises and the pay and conditions there, and "*being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory*". In addition, at least some of the employees to be covered by the proposed SBA would need to be represented by a union.

An employer could not be specified in an SB authorisation while covered by an unexpired single-EA, unless the FWC were persuaded that the main purpose of that agreement was to avoid coverage by such an authorisation.

Once covered by an authorisation, an employer could not make, or initiate bargaining for, any other type of agreement, unless it could persuade the FWC to remove it from the authorisation on the basis of a change of circumstances. An authorisation could also be varied to add new employers.

Having an SB authorisation in place would help the prospects of gaining a multi-EA in four main ways:

1. the FWC could issue a bargaining order, for example to remedy a failure to bargain in good faith;
2. the FWC would have a special power to "*facilitate bargaining*", including by requiring the attendance at a conference of any person (such as a head contractor or funding body) with "*a degree of control*" over the employment conditions of the workers to be covered by the agreement;
3. protected industrial action *could* be taken by employees in support of the agreement – though *only* by those whose union or other BR went through the process of having the action approved in a ballot; and
4. as explained further below, the Bill's proposals concerning "*intractable bargaining disputes*" would enable the FWC to step in and arbitrate if it believed there was no reasonable prospect of the parties reaching agreement.

In theory, unions already involved in enterprise-level bargaining that has resulted in pay and conditions well above award rates could seek to pursue industry or sectoral agreements instead under the SB stream. But the expectation is that such unions would not be granted an authorisation to do so. It is less clear whether the same would apply to proposed SBAs for industries such as retail, fast food or hospitality, where enterprise bargaining has been common (at least for larger employers), but pay rates have remained relatively low.

Single interest employer agreements

The other proposed type of agreement that may cover more than one employer is a "*single interest employer agreement*" (**SIEA**). This form of single-EA would apply to employers who are not automatically taken to have a single interest in one of the ways mentioned earlier (being related corporations, or carrying on a joint venture or common enterprise), but who are covered by a single interest employer (**SIE**) authorisation from the FWC.

Under the current FW Act, an SIE authorisation may be obtained only by employers who operate under a single franchise arrangement, or who have successfully applied for a special type of ministerial declaration on the basis of having common interests. In practice, these declarations tend to be granted to bodies such as hospitals or schools which are funded from a common source and conduct their workplace relations through a central body.

The Bill proposes to open up access to SIE authorisations in three ways. The first would allow applications by a union or other employee BR. But an authorisation could only be sought without employer consent if there were evidence that a majority of the employees to be covered by the proposed SIEA wanted to bargain. And a small business employer (one with less than 15 employees) could not be included without their consent.

Strangely, it would still be necessary under section 249(1)(b) for the FWC to be satisfied that the employers to be covered by a proposed SIEA had agreed to bargain together and not been coerced to do so. So even if an employer could not prevent a union applying for an authorisation, it could still effectively ensure that the application was denied by refusing to bargain. It is possible that this is a drafting oversight which will subsequently be corrected.

Secondly, while being a group of franchisees would still be sufficient for an SIE authorisation, other employers could be covered by one without the need for a ministerial declaration. The Bill does not propose to repeal section 247, which currently allows ministerial declarations to be sought and granted. But this too may be an error, since the new SIE provisions make no mention of any role or need for such a declaration.

Thirdly, the test for these non-franchisees to be permitted or compelled to bargain together has been broadened. It is still expressed in terms of the employers concerned having "*clearly identifiable common interests*". But whereas the current Act speaks of it being relevant to consider whether the employers have a history of bargaining together, or operating "*collaboratively rather than competitively*", those matters would no longer need to be considered. The only factors that the Bill indicates "*may*" be considered are geographical location, "*regulatory regime*", the nature of the relevant enterprises, and the terms and conditions of employment there.

On a broad reading of the concept of "*common interests*", a union might try to argue that unrelated employers undertaking outsourced work or involved in the same supply chain could meet the SIE test. But even if that were possible – and the Explanatory Memorandum gives no indication one way or the other – that would not matter if employer consent were still required.

Overall, the drafting of the new SIE provisions leaves it unclear whether they are meant to broaden access to single-EAs for employers, or to offer unions a new way of initiating multi-employer bargaining, or both.

Excluding bargaining representatives

One of the more startling provisions in the Bill is a proposed new section 178C, which would permit the FWC to make an order disqualifying a person from being a BR for a proposed SIEA or multi-enterprise agreement, or from seeking a change in the coverage of such an agreement. This could be done either at the FWC's own initiative or on application from an affected party. A disqualified BR would also be removed from coverage by any agreement successfully negotiated.

The criterion for disqualification is that it is not "*appropriate*" for the person concerned to be a BR or to apply to vary the coverage of a relevant agreement, because of a "*a record of repeatedly not complying with [the FW] Act*", in relation to the industry or sector to which the agreement relates. The FWC is directed to pay specific attention to any court findings as to civil remedy provision contraventions over the previous 18 months, the number of such contraventions, their seriousness, and any actions taken to rectify the breaches or improve organisational culture.

In theory, this provision could be used against employers, not just unions. In practice, it seems rather obviously (if tacitly) targeted at keeping unions such as the CFMMEU out of the new and expanded regimes for multi-employer bargaining.

Changes to the processes for making and varying enterprise agreements

Any employer who has been through an enterprise agreement approval process will know that the requirements for approval can be complicated. Calculating the number of days between the issuing of a Notice of Employee Representational Rights (**NERR**), when the seven-day access period starts (and ends), and ensuring the paperwork is filed within the 14-day deadline can cause any number of headaches.

The Bill proposes a number of changes which, if enacted as currently drafted, would simply the processes for making and varying agreements in some respects, and add to the complexity faced by employers in others.

Initiating bargaining for a replacement agreement

Under the current framework, employee BRs cannot generally force an unwilling employer to initiate bargaining for an enterprise agreement, unless they can show that a majority of employees to be covered by the proposed agreement want to bargain. Nor, in that situation, can they take protected industrial action.

The Bill proposes that employee BRs would be able to make a written request to initiate bargaining for a new agreement to replace an earlier agreement that had expired less than five years previously. If the employer refused, the FWC could be asked to make a bargaining order to compel them to negotiate in good faith, even in the absence of any demonstrated support for a new agreement from a majority of employees.

Because the written request would also serve as a "*notification time*" for the proposed agreement, protected industrial

action would also be possible, at least once genuine attempts had been made to reach agreement.

However, this mechanism could not be used for a multi-enterprise agreement or an SIEA, or if the BRs were proposing a new agreement which would not cover the same, or a substantially the same, group of employees as the earlier one.

Information and voting processes

Employees would not be required to provide NERRs in relation to a multi-enterprise agreement or an SIEA, though it would still be necessary (along with its associated requirement to wait 21 days before having employees vote to approve an agreement) for most single-EAs.

More generally, there would no longer be a specific obligation to provide employees with a copy of the proposed agreement and any material incorporated in it within the seven days preceding a proposed vote, or to provide details of the voting process within that "*access period*". Nor would the employer necessarily need to provide an explanation of the proposed agreement that met the needs of specific types of employees, such as young people or those from culturally and linguistically diverse backgrounds.

Instead, the FWC would simply need to be satisfied that what the employer had done in the lead up to the vote had been sufficient to ensure that the employees had "*genuinely agreed*" to the proposed agreement, a test that already appears in sections186(2)(a) and 188 of the FW Act. To provide guidance to employers, the FWC would be required to issue a "*statement of principles*" as to how an employer might ensure genuine agreement.

One new restriction, however, is that an agreement would not be taken to have been genuinely agreed unless the employees voting on the agreement had a "*sufficient interest in the terms of the agreement*" and were "*sufficiently representative, having regard to the employees the agreement is expressed to cover*". The intent here is plainly to stop the practice of employers asking a handful of employees to approve an agreement, then rolling it out for a much larger group – or, as the Explanatory Memorandum puts it, to "*safeguard*" against agreements which are "*not the result of collective bargaining in good faith*".

The new procedural requirements would also apply in relation to proposals to have an enterprise agreement variation approved by the affected employees.

The better off overall test

The better off overall test (**BOOT**) requires the FWC to be satisfied that each award-covered employee will be better off overall under a proposed enterprise agreement than they would be if the relevant award applied.

The Bill proposes a number of changes to the BOOT, none of which would affect its operation in any substantial way, but which are intended to clarify and (potentially) simplify its operation.

It would be stated for the avoidance of doubt – though this is plainly the case already – that the BOOT requires a "*global*" assessment of whether each employee or class of employees would be better off, by comparing the terms of the agreement that would be more or less beneficial to the employee than if the award applied.

To dispel any suggestion that the test is being weakened, the Explanatory Memorandum notes that it is unlikely that a "*non-monetary, optional or contingent entitlement under the agreement*" would compensate for any "*significant financial detriment*" identified in the process of this comparison.

In considering the views put to it on the BOOT, the FWC would be obliged to give "*primary consideration*" to any "*common view*" held by the employer(s) concerned, their BRs and any registered union BR. This would discount any opposing view put by any other type of employee BR, such as the unregistered Retail and Fast Food Workers Union.

Where it identified a concern with the BOOT, and rather than seeking an undertaking to address the issue, the FWC would be empowered to directly amend a proposed agreement to overcome its concern.

The FWC would also be directed to have regard only to patterns or kinds of work, or types of employment, that were reasonably foreseeable at the time of the assessment. This is intended to prevent the BOOT assessment being complicated by purely hypothetical possibilities that might arise if the employer changed its operations in ways that could theoretically happen, but were not expected to occur.

As a safeguard, however, the Bill also envisages that a "*reconsideration process*" could be undertaken by the FWC, if it were satisfied that employees covered by an agreement were engaging in patterns or kind of work or types of employment to which the FWC had not had regard when it approved the agreement. The FWC could accept an undertaking or make an amendment to the agreement to address any concern about it not passing the BOOT, in light of the new information.

Correcting errors

The Bill would make it easier to correct obvious errors in enterprise agreements, or to rectify certain kinds of mistake during the approval process (such as submitting the wrong version of an agreement for approval), without the need for a Full Bench appeal or a formal variation.

Protected industrial action

As noted above, the Bill would permit protected industrial action to be taken in support of a multi-enterprise agreement, if an SB authorisation had been obtained from the FWC. But employees could only take this step after genuine attempts had been made to reach agreement and their BR had obtained permission to hold, and secured endorsement from, a protected action ballot (**PAB**). In practice then, it would mostly only be union members seeking an SBA who could lawfully take action.

Beyond that, the Bill proposes some other important changes to the rules on protected action. One relates to the time during which action may be taken. Under the current legislation, a "*use it or lose it*" rule applies to any form of employee action approved in a PAB. Unless a nominated type of action has been taken within 30 days from the ballot results being declared, action of that sort cannot generally be taken thereafter, even if other forms of action have commenced.

The Bill would scrap that rule and substitute a simpler requirement that any form of approved action be taken within a period of three months from the ballot declaration. After that, the process would need to restart with a new application to the FWC for a PAB order. Any employer response action, in the form of a lockout, would also need to occur doing that three-month period. No further action could be taken by the employer, unless and until a new round of employee claim action was authorised and taken.

Other changes involve:

- allowing the FWC to pre-approve ballot agents other than the Australian Electoral Commission;
- for employee claim action in support of an SIEA or SBA, requiring notice of at least 120 hours (equivalent to five days), as opposed to the three clear working days required for other agreements; and
- where a PAB order is made, requiring the FWC to convene an immediate conference for the purpose of conciliation or mediation in relation to the proposed agreement, with employees and employers to be prohibited from taking protected action if their BRs do not attend.

Resolution of intractable bargaining disputes

Under the current FW Act, there are four mechanisms by which a dispute about a proposed enterprise agreement can be resolved by arbitration, without the consent of all parties concerned. Two involve protected industrial action creating or threatening significant harm. The other two, triggered by declarations concerning low-paid bargaining or repeated breaches of bargaining orders, have never been utilised.

What the Bill proposes is to remove those last two mechanisms and broaden the circumstances in which compulsory arbitration would be available for disputes over a proposed enterprise agreement, other than a greenfields agreement or a multi-EA for which no SB authorisation was in force.

It would be enough for the FWC to be satisfied that there was no reasonable prospect of agreement being reached and that it was reasonable to make an "*intractable bargaining declaration*". Such a declaration could only be sought if the FWC had previously endeavoured to settle the dispute under section 240 and the BR seeking the declaration had participated in that process.

Where the FWC was prepared to grant a declaration, it would have the option to give the parties time to make one last attempt to reach agreement. Otherwise, or if those negotiations failed, it would be empowered to make an "*intractable bargaining workplace determination*", which would have the same effect as an enterprise agreement. After including any provisions on which the parties had already agreed, the tribunal would resolve the remaining matters by arbitration.

Depending on the FWC's willingness to use it, the inclusion of this process in the FW Act might well do as much to reshape bargaining practices as anything else in the Bill. Its use – or the threat of its use – would be especially significant in relation to proposed SBAs, given the difficulties in successfully negotiating multi-EAs.

Termination and sunsetting of enterprise agreements

Expired agreements

The Bill proposes to make significant changes to how enterprise agreements can be terminated. At present, once an

enterprise agreement passes its nominal expiry date, it continues to have effect indefinitely, until replaced or terminated.

A practice has emerged where, as a bargaining tactic, some employers seek or threaten to seek to terminate expired agreements and push workers onto award-standards, thereby potentially reducing terms and conditions. A credible threat to do this may well help persuade employees to agree to new terms they might otherwise have been minded to reject.

The current provisions only require the FWC to consider whether it is "*not contrary to the public interest*" to terminate an expired enterprise agreement, and to consider whether termination is appropriate after taking into consideration "*all the circumstances*", including the views of the employees, employer and any relevant union, and the likely effect of a termination.

The proposed amendments would require the FWC to be satisfied that either:

- the "*continued operation [of the enterprise agreement] would be unfair for the employees covered by the agreement*";
- the agreement does not, or is not likely to, cover any employees; or
- the continued operation of the agreement would "*pose a significant threat to the viability of [the employer's] business*", termination would be likely to reduce the potential for redundancies or an insolvency or bankruptcy event, and the employer has guaranteed that any redundancy entitlements in the agreement would continue after the termination.

Besides considering the views of affected parties, and any other matter it considered relevant, the FWC would be directed to take into account whether bargaining for a replacement agreement had commenced and whether termination would adversely affect the bargaining position of the employees in question.

Applications for termination of expired agreements would also, if opposed by any party, generally need to be dealt with by a Full Bench of the FWC, rather than by a single member.

The purpose of the amendments is clearly to make it very difficult for employers to terminate expired agreements that provide wages and conditions in excess of award standards, other than in the limited circumstances set out in (b) or (c) above. Where that last exception is invoked, the amendments provide for any guarantee as to redundancy entitlements to remain enforceable in relation to dismissals for a specified period after the agreement termination is approved.

The Bill would not, however, remove the ability for enterprise agreements to be terminated at any point, including before its expiry, with the agreement of a majority of the affected employees.

"Zombie" agreements

A further change would see the sunsetting of agreement-based transitional instruments made before the FW Act, any remaining Division 2B State employment agreements, and enterprise agreements made under the FW Act during the "*bridging period*" in the second half of 2009.

These have come to be known as "*zombie*" agreements, with terms and conditions that may be substantially different (and often less beneficial) than those for which the modern awards system would provide.

The Bill proposes to:

- automatically "*sunset*" (terminate) all zombie agreements within 12 months, unless that period is extended following an application to the FWC
- give employers covered by a zombie agreement six months to notify affected employees of the sunsetting arrangement, and
- allow an employer, employee, or industrial association covered by a zombie agreement to apply to the FWC prior to the sunset date, to extend the effective period of the instrument for a period of no more than four years.

The ability to continue zombie agreements for a period of up to four years would require the FWC to be satisfied either that bargaining for a new agreement was underway but had not yet concluded, or that the zombie agreement would leave employees better off overall than the relevant modern award.

Now is the time to get prepared

The Bill, if passed in its current form, will significantly change how employers interact with their employees, particularly with how they can be engaged, managing allegations of sexual harassment, and bargaining for enterprise agreements. Such changes are significant enough that organisations may need to reconsider their broader workforce strategy in the short to medium term. Employers should start to review their present arrangements now, so that they can be better

prepared.

Piper Alderman will continue to monitor the Bill and its progress, and will be running a client webinar on 16 November 2022 to discuss the proposed changes and their possible impacts. Click here to register now.