CIRCULAR NO.	GEN/169/NAT/169/22
DATE:	27 October 2022
SUBJECT:	Secure Jobs Better Pay Bill introduced
ATTENTION:	Chief Executive Officer

The Labor Government has today introduced its omnibus *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Bill**), following on from the Jobs and Skills Summit, and further progressing the ALP's election commitments on IR matters.

Earlier this morning, Treasurer Jim Chalmers stated:

These changes that we're proposing today are about more agreement, not more conflict. They are about getting wages moving again in a sustainable way. And they are about getting the institutional arrangements right around the Fair Work Commission and in other ways, the processes right, to get more and better agreements.

You know, the enterprise bargaining system has not provided over a long period - really, the last decade or so - the kinds of wages growth that Australian workers need and deserve. And so something needs to give. Obviously, I'll work closely with the business community[1].

The Bill was introduced and read a first time by Minister for Employment and Workplace Relations, Tony Burke.

The key features of the Bill would amend the *Fair Work Act 2009* (**FW Act**) as follows:

- Changes to enterprise bargaining and the BOOT.
- Pay secrecy clauses will be banned.
- Gender equity will become a central objective of the Fair Work Act, including in the modern award system.
- Two new Fair Work Commission Expert Panels will be established, one on Pay Equity and one on the Care and Community Sector.
- A statutory Equal Remuneration Principle will be introduced.
- The Australian Building and Construction Commission and the Registered Organisations Commission will be abolished, with functions to be transferred to the Fair Work Ombudsman.

Proposals in detail

1. Enterprise Agreements and Bargaining

For employers, the more controversial aspects of the Bill are sure to be the proposal for industry-wide bargaining with protected strike action, along with lowering the threshold for dispute arbitration.

Employer groups and the Opposition have already voiced particular objection to these measures, claiming that the costs, particularly for small businesses, will be prohibitive and that wages risk becoming unaffordable.

The proposals around enterprise agreements and bargaining are as follows:

(a) Multi employer agreements

Although single employer agreements will still be the norm, a new framework would be introduced for 'supported bargaining' and 'cooperative workplace agreements'.

A supported bargaining stream would be created for those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low-paid industries such as aged care, disability

[1] ABC Radio National 27 October 2022

care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively.

It is proposed that when an application for a supported bargaining authorisation is made, the FWC will consider whether it is appropriate for the parties to bargain together, looking at the prevailing pay and conditions in the relevant industry, whether employers have clearly identifiable common interests, and whether the number of bargaining representatives would be consistent with a manageable collective bargaining process.

The FWC would then have additional powers to finalise an agreement, including convening conferences with a third party who has control over the terms and conditions that can be offered under an agreement.

An employer would be able to apply to the FWC to be added to, or removed from, a supported bargaining authorisation.

In a second stream, 'multi-enterprise agreements' would become known as 'cooperative workplace agreements'.

This stream would introduce a broader basis for multi-employer bargaining in any sector under amended "single-interest" employer authorisations. Employers with clearly identifiable common interests would be able to bargain together under a single interest employer authorisation in certain circumstances.

Employee bargaining representatives would also be able to apply for a single interest employer authorisation where there is majority support of the relevant employees. That is, employers could be compelled into bargaining if a majority of workers at each employer are found to be in support.

A union that had repeatedly breached the FW Act in the previous 18 months would be excluded from multi-employer bargaining (specifically aimed at the Construction, Forestry, Maritime, Mining and Energy Union).

Small business employers (with fewer than 15 employees) would be excluded from cooperative workplace agreement stream unless they chose to be part of it.

The FWC may also expand the number of employers included in a "single-interest" agreement based on a public interest test, taking into considerations factors such as economic ramifications, and stopping a "race to the bottom" on wages.

Unions would be given protections to take industrial action in support of their claims in multi-employer bargaining, with some conditions, including a minimum five days' notice for industrial action and a requirement to attend conciliation prior to taking action.

(b) Termination of enterprise agreements after nominal expiry date

The FW Act would be amended to clarify that the Fair Work Commission (**FWC**) can only terminate an agreement that has nominally expired on the unilateral application of a party in limited circumstances.

The amendments are designed to stop the practice of employers applying unilaterally to the FWC to terminate nominally expired enterprise agreements, where termination would result in reducing employees' entitlements.

Existing arrangements for the termination of enterprise agreements on the ground of 'significant threat to business viability' would be retained, with safeguards added to preserve employees' termination entitlements that are more favourable than those in the applicable modern award.

(c) Sunsetting of 'zombie agreements'

This amendment would provide for the sunsetting of all remaining agreement based transitional instruments, Division 2B State employment agreements and enterprise agreements made during the 'bridging period' for the FW Act.

(d) Initiating bargaining

The proposed amendments would simplify the process for initiating bargaining where a proposed single-enterprise agreement would replace an existing agreement that has a nominal expiry date within the past 5 years and that has a scope substantially similar to the proposed agreement.

Where the qualifying conditions are met, the amendments would enable an employee, via a bargaining representative, to initiate bargaining for an agreement simply by making a written request to the employer.

(e) Enterprise agreement approval

The requirements that need to be met for an enterprise agreement to be approved by the FWC would be simplified, including:

- Various steps that an employer must currently take within strict timeframes would be removed (for example, the requirement to take all reasonable steps to provide employees with access to the agreement during a 7 day 'access' period);
- The requirements 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 would no longer apply to bargaining for a proposed single interest employer agreement, supported bargaining agreement or cooperative workplaces agreement but would be retained in the case of a proposed single enterprise agreement;
- Where pre-approval requirements are removed, they would be replaced with a broad requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

(f) Bargaining disputes

The FWC would have broader scope to become involved in resolving bargaining disputes with the introduction of a new 'intractable bargaining declaration' scheme. Essentially, the parties would be required to attend compulsory conciliation, with possible arbitration where agreement cannot be reached.

The amendments would provide for the FWC to issue an intractable bargaining declaration if satisfied, among other things, that there is no reasonable prospect of the bargaining parties reaching agreement.

Following any post-declaration negotiation period, the amendments would provide for the FWC to make a workplace determination to resolve any matters on which agreement had not been reached by the parties.

The FWC would have the ability to determine any outstanding matters by arbitration where there is otherwise no reasonable prospect of the parties reaching agreement. In arbitrating a workplace determination, the FWC would, among other things, be required to:

- take into account the interests of the employers and employees who will be covered by the workplace determination;
- exercise its powers in a manner that is fair and just; and
- ensure that the workplace determination would, if it was an enterprise agreement, meet the BOOT against the relevant modern award.

(g) Better off overall test

The Better Off Overall Test (**BOOT**) would be simplified as follows:

- The FWC would be required to consider the views of specified persons and give primary consideration to any common view expressed by the bargaining representatives.
- The BOOT would be applied flexibly as a global assessment, not a line-by-line comparison.
- The FWC would only be required to apply the BOOT having regard to the patterns or kinds of work, or types of employment that were reasonably foreseeable at the time the BOOT was applied.
- The FWC would be empowered to amend or excise terms that would otherwise not meet the BOOT. This proposal would limit the use of undertakings.
- A new 'reconsideration process' would allow employers, employees or their representatives to seek to have the BOOT reconsidered by the FWC where there has been a material change in working arrangements, or where their circumstances were not properly considered by the FWC during the approval process

(h) Dealing with errors in enterprise agreements

The FWC would be empowered to vary enterprise agreements to correct or amend obvious errors, defects or irregularities.

(i) Industrial action

The Bill would seek to de-escalate disputes before industrial action is taken and after industrial action has been authorised. The FWC would be empowered to require bargaining representatives to attend a conference during the protected action ballot (**PAB**) period and enable the FWC to conduct a conference within a 14-day period before voting closes on a PAB.

The Bill would also extend the period in which industrial action can commence without the need for an extension.

2. Gender equality, sexual harassment and anti-discrimination

Gender equality is a key objective of the Bill, and several proposed measures are designed to help close the gender pay gap. These measures will add to legislation already introduced to establish 10 days of paid family and domestic violence leave.

(a) FW Act objective

Gender equity will be inserted as an objective of the FW Act, with the intention of a flow-on effect for pay decisions made by the FWC.

(b) Equal remuneration principle

A statutory Equal Remuneration Principle would enable the FWC to order pay increases for workers in low-paid, female-dominated industries.

Amendments to the FW Act would require that the FWC's consideration of work value reasons be free of assumptions based on gender, and include consideration of whether there has been historical gender-based undervaluation of the work under consideration.

(c) Prohibiting sexual harassment in connection with work

A new prohibition on sexual harassment would be included in the FW Act as recommended in the Respect@Work Report.

The FWC would have a dispute resolution function to enable people who experience sexual harassment in connection with work to initiate civil proceedings if the FWC is unable to resolve a dispute.

(d) Anti-discrimination and special measures

The Bill would strengthen the anti-discrimination framework in the FW Act by adding three further protected attributes—breastfeeding, gender identity and intersex status—to the existing provisions that provide protections against discrimination.

In respect to enterprise agreements 'special measures to achieve equality' would be inserted as matters pertaining to the employment relationship and therefore matters about which an enterprise agreement may be made.

3. Pay secrecy clauses

A new rule would make it unlawful for an employer to prohibit employees from talking about their pay. The objective is to address an assertion by the Government that secrecy clauses 'have long been used to conceal gender pay discrepancies'. A ban would be designed to 'improve transparency, reduce the risk of gender pay discrimination and empower women to ask their employers for pay rises'.

4. FWC expert panels

In somewhat of a return to the approach of the Rudd Labor Government, the Albanese Government will set up two expert FWC panels.

The proposed panels will be responsible for Pay Equity and the Care and Community Sector.

According to Minister Burke,

'One of the main causes of the gender pay gap is low pay and conditions in the female-dominated care sector. Care work is undervalued, underpaid, and increasingly insecure. This is making it hard to attract the new care workers we need – and to keep those already working in the sector in their jobs. These new panels will give the Fair Work Commission the specific expertise it needs to deliver pay equity'.

5. Fixed term contracts

Fixed term contracts with a period of two or more years (including extensions) would be unlawful, as would contracts which may be extended more than once. This provision would be a civil remedy provision and employers would be prohibited from engaging in avoidant behaviour.

6. Flexible work

The circumstances in which an employee may request flexible work arrangements would be expanded, to include situations where an employee, or a member of their immediate family or household, experiences family and domestic violence.

The procedure for dealing with requests for flexible work would also be amended, including by expanding the employer's obligations to discuss a request for a flexible work arrangement with the employee, provide reasons for any decision to refuse the request, and if the request is refused inform the employee of any changes in working arrangements the employer is willing to make that would accommodate the employee's circumstances.

The FWC would be granted the power to resolve disputes regarding flexible work arrangements, including by mandatory arbitration.

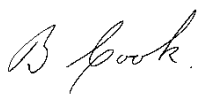
7. Enhancing the small claims process

The monetary cap on the amounts that can be awarded in small claims proceedings under the FW Act would be increased from $20,000 to $100,000.

Minister Burke has stated the Government's desire to pass the legislation this year, but given the Liberal Party's immediate initial objections, certain aspects of the Bill are likely to be vigorously debated and unlikely to pass through the Senate without at least some modifications.

SIAG will provide updates as the Bill progresses.

If you have any questions or if you require further information, please contact the SIAG National Advisory Service on 03 9644 1400 or 1300 (SIAG HR) / 1300 742 447. The Information provided in this email is generic advice. For advice in respect of your specific situation please contact us.



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