PVCA MEMBER ADVISORY: IR BILL SET TO PASS THIS WEEK

1 December 2022

BACKGROUND

Since the Jobs and Skills Summit in September the federal government has moved quickly on implementing its amendment agenda across workplace relations. The government introduced its Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 into the House of Representatives in late October and, after various amendments and tweaks, it is likely to pass through parliament this week.

This significant omnibus style Bill runs to around 270 pages and contains important changes to the *Fair Work Act* and related legislation. Many of these reforms were part of the policy platform Labor took to the May 2022 election. Other amendments reflect commitments made by the government following the Jobs and Skills Summit in September 2022, and several are new and surprising. Conversely some of the proposals are not controversial. During the progress of the Bill, the government has made concessions along the way to address various concerns of influential parliamentarians to ensure the passage of the Bill.

At the time of writing this Advisory I am watching Senate proceedings and the final punches being thrown for the purposes of "We told you so" if and when things don't work out as planned or as currently understood. Additionally, the "Dorothy Dixers" are being asked so as justify the breadth and depth of this omnibus style Bill.

While the stated basis for these amendments are to lift wages, productivity, and the general state of the Australian economy, it is not clear how some of the proposals will do so, or do so as quickly as stated. Much of the concern over the amending legislation has been due to the government failing to adequately and clearly outwardly communicate on the purposes and format of some of the more controversial proposals prior to or since their introduction. Yes, there was the symbolic two day Jobs and Skills Summit for the select few and with broadly described outcomes, but nothing beats well planned and well-paced Town Hall meetings to truly canvas the significant issues of regulatory impact, costs and benefits for both metropolitan and regional stakeholders of all shapes and sizes. No matter your political leanings, the Rudd-Gillard-Rudd government did take a more Town Hall approach to proposed significant workplace relations reform and it did reduce a lot of stress and misunderstanding by stakeholders. Taking the approach this government has with these reforms was always going to result in pushing a cake through a keyhole.

In this Advisory we provide a breakdown of those amendments relevant to the industry. The details provided are based on the level of clarity obtainable and decipherable at the time of writing this advisory, and on the basis that the Bill passes through the Senate and into legislation this week. I look forward to you attending the PVCA's upcoming webinar on this significant issue on 13th December 2022 to talk further about this amending legislation.

Charles Watson
GM – IR, Policy and Governance

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THE AMENDMENTS

THE OBJECT OF THE FAIR WORK ACT

All legislation has a purpose or an object usually based on government policy. Under the amendments the Object of the Act has been expanded so as to include the promotion of job security and gender equality in the Acts purposes.

This means the Fair Work Commission and related Courts will need to have regard to considerations concerning job security and gender equality issues when resolving interpretation issues and applying the Fair Work Act in its work.

ENTERPRISE AGREEMENTS AND MULTI-EMPLOYER BARGAINING

Probably the most controversial of the proposals are the amendments to the Fair Work Act and related scheme relating to enterprise agreements and particularly multi-employer agreements.

For context, and prior to these amendments, the Fair Work Act permitted multi-enterprise agreements. However, such agreements could only be made where two or more employers voluntarily agreed to bargain together. Effectively, two or more employers that are not single interest employers could make an enterprise agreement with the employees who would be covered by the agreement. Such agreements were not common and generally seen in ventures where multiple employers operated in the same workplace.

MULTI-EMPLOYER/SINGLE-INTEREST AGREEMENTS

Under the legislative changes, single-interest employer agreements will allow an employee bargaining representative to seek a single-interest employer authorisation, without an employer's consent (if supported by the majority of employees) so employees from multiple employers can be covered by a single-interest enterprise agreement.

The legislative amendments will allow the Fair Work Commission to authorise the bargaining for a single-interest agreement with multiple employers, if it is satisfied that employees want to be covered by one agreement and the nominated employers have clearly identifiable common interests. This includes a consideration of the geographical location, regulatory regime, the nature of the relevant enterprise, and the prevailing terms and conditions of employment.

If the negotiations for such agreements become protracted, a bargaining representative for such a proposed enterprise agreement, other than a greenfields agreement, may apply to the Fair Work Commission for a declaration (an intractable bargaining declaration). Although, an application for an intractable bargaining declaration must not be made in relation to a proposed multi-enterprise agreement unless a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the agreement. Further, if during the bargaining period industrial action is proposed, there is a 120 hour notice period for the taking of that industrial action.

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An employer can apply to the Fair Work Commission to remove its name from a single-interest bargaining authorisation if there has been a change in the employer's circumstances and the Commission agrees it is no longer appropriate for that employer to be specified in the bargaining authorisation. Conversely, it appears possible for a bargaining representative to make an application to add a previously unnamed employer into a bargaining authorisation.

Employers with fewer than 20 employees, will be excluded from the single-interest bargaining stream, and there will be a more stringent test for businesses who have fewer than 50 employees to be included in the stream. This will put the onus on employee representatives to argue why businesses with fewer than 50 employees should be covered by multi-employer agreements. However, the test would reverse for businesses with 50 or more employees.

Given our industry does not have an undervaluation of labour and most employers in our industry pay above Award minimums, and the significant number of companies within the industry with less than 20 employees, we will unlikely see multi-employer bargaining en-masse.

However, and with no promises, it remains to be seen what approach is taken by the relevant unions to these issues within the industry, as well as the approaches taken and interpretations given to the legislative amendments by the Fair Work Commission and related Courts.

There is, and will likely remain, a significant degree of uncertainty regarding the possible application of multi-employer/single-interest employer agreements and have had various amendments made to the legislative terms during its passage through parliament.

RELACING THE BOOT

The 'better off overall test' is applied by the Fair Work Commission as part of its consideration and assessment of a proposed enterprise agreement to determine if the agreement leaves employees better off overall when compared to the applicable Award. The government hopes its amendments to this test will result in renewed interest in enterprise bargaining where previously there was limited perceived benefit given the restrictive BOOT application.

For those businesses in the industry with enterprise agreements the new legislative amendments have altered the BOOT so it is to be applied flexibly as a global assessment rather than on a line-by-line comparison. The government believes this amendment is an attempt to restore the intended operation of the BOOT. This revisionary application would consider whether the terms of the agreement would be more beneficial to each employee if the enterprise agreement is applied in a workplace than if the only relevant award applied. Further, a new 'reconsideration process' allows employers, employees or their representatives to seek to have the BOOT reconsidered by the Fair Work Commission where there have been significant changes in working arrangements.

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SUNSETTING ZOMBIE AGREEMENTS

Zombie agreements, as the term suggests, are agreements that have passed their expiry date but remain on foot within workplaces. Specifically, there are some businesses that have agreements that were made and implemented under the Workplace Relations Act 1996 and related scheme, and although expired were never terminated or replaced. Although some commentators have stated those employees covered by 'zombie agreements' are underpaid and don't have access to the entitlements under the National Employment Standards, it is generally unlikely as those agreements are nevertheless required to meet at least the relevant minimum Award terms.

Under the new legislative amendments those pre Fair Work Act transitional instruments will be phased out and sunset after 12 months from the enactment of the amendments.
At that time, affected businesses would be bound by the relevant modern Award which sets employees' pay and conditions (alone or in combination with contracts of employment), or may opt to bargain for a new enterprise agreement better suited to their circumstances.

FIXED TERM EMPLOYMENT CONTRACTS

Although not as commented on publicly comparted to other components of the Bill, this amendment will prohibit employers from engaging an employee on a fixed term contract that cumulatively exceeds two years. This prohibition can also apply even if a gap in employment occurs, but there is a substantial continuity between the two periods of employment.

However, the amendments contain exceptions to the two-year Rule that include:

- Apprentices and trainees.
- Where an employee is engaging an employee who has a specialised skill required to complete a specific task.
- Where the employee is engaged to undertake essential work during a peak period (such as seasonal work).
- Where the employee earns over the high income threshold.
- Where the employment contract relates to work that is funded by government and is for longer than 2 years, but with no reasonable prospect that such government funding will be renewed.
- Where a modern award applies and permits a term longer than 2 years.

In the event a fixed-term contract exceeds the limitation period, employees may have entitlements to claim permanent ongoing employment. If an employer breaches these terms of the Act or implemented avoidance tactics, including delaying re-engagement, deliberately terminating an employee's employment for a period, engage another person to perform the same work, they may be liable to potential civil penalties.

The Fair Work Ombudsman will prepare a 'Fixed Term Contract Information Statement' and employers must provide a copy to the statement to new 'fixed term' employee before commencement or as soon as practicable after the contract commences. If any related dispute on this issue is not resolved at the workplace the matter may be referred to the Fair Work Commission and consent arbitration over the dispute can occur.

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PROHIBITING PAY SECRECY
These related amendments will introduce a positive ability that permits employees to disclose, or discuss with another employee, their remuneration or the terms of their employment. This amendment will also invalidate any contractual term that otherwise prohibits employees from discussing remuneration or employment terms.

A further aspect on this issue, the Fair Work Act will be amended to prohibit employers from advertising vacancies at a rate less than an Award minimum or that otherwise contravenes the Fair Work Act.

FLEXIBLE WORKING ARRANGEMENTS
These related amendments to the Fair Work Act expand the current basis for an employee requesting changes to their working arrangements. Specifically, an expanded operation enabling an employee to request a flexible working arrangement where they, or a member of their immediate family or household, are experiencing family and domestic violence and that extends beyond violence perpetrated by a member of the employee's immediate family or household.

Any such request by an employee will need to be responded to by the employer, and in writing, within 21 days that either grants the request, agrees to an amended request after discussion, or that refuses the request. If the request is refused, and only after discussions with the employee, the employer is required to provide the reasons behind the refusal, detail any changes the employer would accommodate, and explain them to the employee. Refusal of a related request under the Act is only permitted on reasonable business grounds, such as:

- The request is too costly.
- When there is no capacity to change the working arrangements of other employees to accommodate the request.
- If the requested working arrangements would result in a significant loss in efficiency or productivity, or have a significantly negative impact on customer service.

The nature and size of the enterprise carried on by the employer will be relevant factors as to whether the employer has reasonable business grounds for refusing an employee request. Any related dispute may be determined by the Fair Work Commission, and may include an arbitrated outcome.

DISCRIMINATION AND PROHIBITING SEXUAL HARASSMENT
For background and context, recent Human Rights Commission national surveying reports indicate 1 in 5 people have been sexually harassed at work in the last 12 months, and 1 in 3 workers in the last 5 years. A deeper dive evidences 46% of female workers aged 18-29 years, 60% of female workers aged 15-17, and 41% of female workers of any age have reported experiencing sexual harassment in the past five years. Additionally, employees continue to avoid raising the issues with their employers for fear of potential repercussions. Only one third of survey respondents felt their employers were doing enough to deal with the issue.

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In a bid to overcome the current situation the governments related amendments to the Fair Work Act and the Human Rights Commission (AHRC) jurisdiction have sought to implement the remaining recommendations from the Respect@Work Report delivered in 2020. Concurrent with and related to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, parliament has also passed the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*. Collectively, these legislative amendments mandate a positive duty on employers to take reasonable and proportionate measures to eliminate sexual discrimination, sexual harassment and victimisation.

Additionally, the amendments prohibit conduct that subjects another person to a workplace environment that is hostile on the grounds of sex. The use of the terms 'person' and 'second person' in the wording of the amendments means this provision will broadly cover any conduct that occurs in the workplace, including by clients and contractors.

There is also an express prohibition to protect people from hostile workplace environments will mean that businesses will now be required to stamp out any behaviours in the workplace which has the potential to result in an offensive, intimidating and humiliating environment for people of one sex.

As a result of these amending legislations, employers are going to have to treat this issue from a risk perspective. Merely having a policy will not be enough to protect an employer from claims, and will require employers to be able to evidence having taken reasonable steps to avoid such conduct from occurring. This means that an employer will have to consider ongoing and periodic training with employees on related issues.

The amendments remove the existing procedural barriers to progressing a complaint from the AHRC to the federal courts by ensuring that a representative body that has lodged a complaint on behalf of one or more affected persons in the Human Rights Commission is able to make an application to the federal courts. Previously if a representative put a claim on behalf of a group to the AHRC but the claim wasn't resolved, they were restricted from initiating an action in the federal courts on behalf of the group.

Additionally, minor amendments have been made to the Fair Work Act that mirror other federal and state anti-discrimination legislation. This includes inserting the protected attributes of 'intersex status', 'gender identity' and 'breastfeeding' into the Act as grounds for potential discrimination.

CONCLUSIONS

Overall the amendments to the Fair Work Act, and related legislation are extensive, are drafted without sophistication, and will take some time to fully review and consider. As stated previously, some are not particularly controversial while others lack clarity and have not been adequately or appropriately communicated with the business community prior to their introduction to parliament and with a truncated timeframe for passing through parliament.

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Members will need to consider the impact of the legislative changes on their businesses and their employees. We will continue to monitor and provide relevant updates and insights to members.

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DISCLAIMER

The content of this update, current at the date of publication, is intended to provide general guidance and consideration for Members only. The content does not constitute advice and should not be relied upon as such. Specific advice about your circumstances should be sought separately before taking any action. It is recommended that Members ensure any related decisions are made on current and up to date information.