LEGISLATION PASSED: HUGE CHANGES TO EMPLOYMENT LAW ON THE WAY

BY SIMON OBEE | 6 December 2022 |

In this article we summarise the key changes that will be made to employment law over the next year, following the successful passage through Parliament of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022,* the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022* and the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.*

We also indicate the dates that the changes will come into effect and what steps employers need to take to prepare for the changes.

Key changes include:

- A positive duty to eliminate sex discrimination and sexual harassment in the workplace
- A new offence of subjecting someone to a hostile environment on the grounds of sex
- 10 days paid family and domestic leave for all employees (including casuals)
- Bans on pay secrecy clauses
- A right to discuss pay with colleagues
- Limits on use of fixed-term contracts
- Greater rights for employees regarding flexible working
- Significant changes regarding enterprise agreements and enterprise bargaining (likely only to impact employees who have an enterprise agreement in place, enter into an enterprise agreement in the future or who operate in an industry with a union presence)

Respect at Work Bill

The Respect at Work legislation introduces two key changes to the law.

Positive duty to eliminate sexual harassment and discrimination

The new legislation places a positive duty on employers to implement measures to eliminate, as far as possible, sex discrimination and sexual harassment.

This duty will not be enforceable until 12 months after the Bill receives "royal assent" (ie the date the Bill achieves final approval - likely to be in the next few days - so not before December 2023).

The significance of this change is that whereas the law currently "bites" when there is an incident of sexual harassment in the workplace (and holds employers liable if it is found that they did not do all they reasonable could to prevent it from occurring), under these new duties, an employer will have breached their duty (and can be subject to financial penalties) even if no sexual harassment has occurred.

Regulators will be able to assess whether the employer is currently taking active steps to eliminate any potential sexual harassment and discrimination in the workforce, even before an incident has occurred.

It will therefore be imperative that an employer can show that they are regularly taking active steps to prevent against harassment and discrimination (see "to do" list below).

Prohibition on subjecting others to hostile workplace environments on the grounds of sex

Another key change is that there will be a new prohibition on subjecting others to hostile workplace environments on the grounds of sex.

Whereas previously unlawful sexual harassment had to be directed towards someone (inappropriate comments about someone's appearance, non-consensual touching of a person, etc) the new offence will apply even if behaviour is not directed at a specific person.

For example, offensive material displayed at the workplace or general office banter or chat that is found to be hostile, could fall foul of this provision.

To do: we would recommend that all employers consider doing the following:

- *Update policies and procedures for dealing with sexual harassment (including complaint processes, etc)*
- *Implement a risk- based approach to sexual harassment (eg regularly consider whether particular work practices or events contain the risk of sexual harassment and have records of measures taken to control the risks)*
- *Carry out regular training for staff and managers on appropriate behaviour, how to deal with complaints, etc*
- *Carry out and keep records of periodic audits of your systems and process in this area to show that they are working satisfactorily*

We will have materials and resources to assist with these matters available shortly.

Paid family and domestic violence leave

10 days paid family and domestic violence leave will be introduced for all employees (including casuals) from 1 February 2023 (for non-small businesses) and from 1 August 2023 (for small-businesses of less than 15 employees).

The 10 days paid leave will be available in full each year, it does not accrue or carry over from year to year.

When an employee takes this leave, it should not be referenced as as family and domestic violence leave in payslips - more regulations are to follow to give greater guidance on this.

To do: update policies, procedures and contracts as necessary. We will have updated documents available to assist with this shortly.

Fair Work Act (Secure Jobs, Better Pay)

As noted above, the new legislation introduces a whole raft of new changes including:

- Bans on pay secrecy clauses
- A right to discuss pay with other colleagues
- Limits on use of fixed-term contracts

- Greater rights for employees regarding flexible working
- Significant changes regarding enterprise agreements and enterprise bargaining (likely only to impact employees who have an enterprise agreement in place, enter into one in the future or who operate in an industry with a union presence)

We deal with each of the changes below.

Pay secrecy clauses

Effective immediately from the date of royal assent (ie in the next few days) pay secrecy clauses can no longer be introduced into new employment contracts.

Employees also will now have a positive right to choose to disclose (or to choose not to disclose) information about their remuneration to any other person as a workplace right.

Given it is a workplace right employees will be protected from being adversely treated in relation to their exercise of this right. For example, you could not now dismiss someone for discussing their pay with a colleague.

For any contracts with existing pay secrecy clauses, these will remain valid until the contract is varied. Given that contracts are technically varied whenever an employee receives any form of pay rise, such a clause will fall away at this point.

From **June 2023** employers can receive a financial penalty for entering into a contract with a pay secrecy clause (of up to $63,000).

To do: review contracts and policies for offending provisions and amend as necessary.

Gender equality

The objects of the FWA and modern awards will be amended immediately from royal assent to include an objective of greater gender equality in the workplace. This means that any decisions the Fair Work Commission (**'FWC'**) makes (including in relation to minimum wages, etc) will have gender equality at the heart.

The FWC will also now have greater powers to make Equal Remuneration Orders to increase wages across whole industries where the FWC considers workers in industries with a large proportion of women (or men) are underpaid compared to work of comparable value in another industry with greater numbers of the opposite sex.

This power has only been used once before to increase wages for certain employees covered by the SCHADS Award (which typically covers more women than men, and was found to have lower wages than in industries involving work of comparable value where more men than women were employed). However the door could now be open to further orders.

Key takeaway: we may see more orders to increase wages in low paid industries with high proportions of female workers eg aged care, childcare, health, etc.

Anti-discrimination

Some minor changes will be made to align the Fair Work Act 2009 (Cth) (**'FW Act')** with other anti-discrimination legislation by including protections against discrimination on the basis of breastfeeding, gender identity and intersex status as protected attributes.

To do: review policies to ensure they reflect all protected characteristics. We will have updated documents to assist with this available shortly.

Sexual harassment
A new ability for employees to bring claims in the FWC for sexual harassment is being introduced. Currently employees have to bring claims in state/territory tribunals, in courts or in the Australian Rights Commission. Often the process is long-winded and expensive.

Previously employees could only bring a claim for a "stop" order, to prevent ongoing harassment in the FWC. Going forward employees will be able to bring a claim for previous sexual harassment, including claims for damages.

Pursuing this matter through the FWC will be a more simple claims process (like unfair dismissal and general protections claims) and the general rule is that each party will pay their own legal costs.
A claim for sexual harassment will be able to be brought by an employee (or prospective employee) against employers and work colleagues **as well as against third parties such as a customer, client or member of the public,** so long as there is some connection at the time the conduct occurs to the employee performing work.

These changes will take effect in March 2023.

Key takeaway: a more simple claims process could lead to an increase in claims numbers, make sure that processes and policies for dealing with and eliminating sexual harassment are fit for purpose (see further comments above).

Job security
A new objective will be introduced into the FW Act and modern awards to ensure job security is at the heart of all of the FWC decisions including in how modern awards are drafted.

Limitations on fixed-term contracts
From December **2023** employers cannot:

- Use one or more fixed-term contract for a period totalling more than 2 years
- Use more than two successive fixed-term contracts (ie can only renew once)

There will be limited exceptions including:

- Employees who are engaged to perform a distinct and identifiable task involving specialised skills;
- Employees who are engaged by way of a training arrangement (eg apprenticeship)

- Employees who earn more than the high income threshold ($162,000 p.a.)
- The contract is wholly or partly funded by government funding (or a type of funding allowed by the regulations) and the funding is for a period of more than two years and there are **no reasonable prospects** that the funding will be renewed after that period.

The use of fixed-term contracts simply as a method to move on difficult employees quickly (as a quasi-probationary period) or as a substitute for ongoing employment will no longer be possible.

Employers must provide employees with a Fixed Term Contract Information Statement.

To do: if your business uses fixed term contracts it will be important to review practices to ensure that you will be compliant with the new rules and/or to consider other models of engaging staff.

Flexible work requests and request to extend unpaid parental leave

Key take-away: more detailed requirements will exist for employers when responding to flexible-working requests, employees will now have ability to challenge refusal to agree to flexible-working requests in the FWC. Similar provisions will be introduced in respect of a request to extend periods of unpaid parental leave.

Currently, employees with at least 12 months service have rights to request flexible working arrangements (eg flexibility with hours, working from home, etc) if they satisfy certain criteria eg caring responsibilities, etc.

From **June 2023** employees will be able to request flexible work arrangements in a wider range of circumstances, including on the grounds of family and domestic violence.

The steps an employer will have to take once a request has been received will now be much more onerous:

- Employers must first discuss the request with the employee and genuinely try to reach agreement on the request (including informing the employee of <u>alternative arrangements</u> that the employer is willing to make which may accommodate).
- Employers must give the employee a written response to the request within 21 days.
- Employers can only refuse on reasonable business grounds.
- Employers who refuse a request must in their written response to their employee:

    a. explain the reasons for the refusal including the reasonable business grounds being relied on;
    b. state any alternative arrangement (other than those requested) that the employee would be willing to accommodate or state that no such changes exist; and
    c. explain that an employee has a right under the FW Act to challenge the refusal.

At the moment, an employee cannot challenge an employer's refusal to agree to a flexible work request (so long as the employer has followed the correct process). Going forward an employee will have a right to apply to the FWC to challenge a refusal, and the FWC will have powers to order the employer to accommodate it.

Similar provisions will be introduced re: dealing with requests for an extension of unpaid parental leave (ie for a period of longer than 12 months). Employees will be able to challenge a refusal to accept a request in the FWC.

To do: ensure policies and procedures for dealing with flexible working requests and unpaid parental leave are updated to reflect new changes. We will have resources available to assist with this shortly.

Advertising for jobs with rates below those contained in a modern award or enterprise agreement prohibited

Effective immediately from royal assent, a new offence will be created of advertising for a job and including pay rates in the advert which are below those required by a modern award or enterprise agreement. This only applies where pay rates are mentioned in the job advert.

Expansion of small claims process

The small claims process is a cheap and informal way for employees to bring underpayment claims at court. The current cap on the value of a small claim is $20,000. Changes to the FW Act increases the cap to $100,000 per claim. This change is effective immediately on royal assent.

Enterprise agreement reforms

Enterprise agreements are agreements that are entered into between an employer and its workforce which then replace the terms of a modern award that would otherwise apply. Except where noted below, the changes referred to will come into effect on a date declared by the Government, but at the latest June 2023.

Multi-employer enterprise agreements

Key take-away*: at the moment employers cannot be forced to enter into enterprise agreement bargaining for an enterprise agreement with other employers, employers only ever do this voluntarily.*

Going forward, unions can force employers to have to bargain for a multi-employer enterprise agreement.

The risks for employers will be greatest in industries that have a heavy union presence, given that it is likely that a successful application to the FWC will require a union to coordinate employees at multiple workplaces.

The provisions are complicated, but in essence the amendments to the FW Act will allow a union to apply to the FWC for an order compelling two or more employers to “bargain” for a joint enterprise agreement.

The FWC will grant application if:
- the employers have “common interests”; and
- majority of employees at each workplace want to bargain for a multi-employer agreement

It is not clear how the “common interests” test will be applied, but it could possibly compel employers who are competitors with each other to have to bargain with employees for common terms and conditions.

There are exceptions if:

- The employer has less than 20 employees
- the employer has an enterprise agreement that has not yet passed nominal expiry
- the nominal expiry of an employer's enterprise agreement has passed but employer is bargaining for a new enterprise agreement (in which case a nine month 'grace period' will apply)

If the FWC grants a multi-employer authorisation then employers will be required to bargain in good faith with employees (attend meetings, share information, etc). Plus, the FWC will now have greater powers force an enterprise agreement on parties, where no agreement can be reached (see further below).

Employers will not be able to ask employees to vote on the multi-employer agreement unless the union agrees.

Once the multi-enterprise agreement has been made, unions can apply for other employers to be joined to the agreement subject to similar tests (common interests, majority of employees agree). This process can be started without any input of the employer and therefore gives unions significantly more powers.

Enterprise agreement approval requirements

Key take-away: requirements regarding the approval of enterprise agreements are being relaxed, including a relaxation of the BOOT test.

But, there will also be stricter requirements for employees who vote on the enterprise agreement to have a "sufficient interest" in the enterprise agreement for it to be approved and a new power for employees to apply for the BOOT test to be reconsidered, even after the enterprise agreement has been approved by the FWC!

Currently there are strict rules the FWC must consider when deciding whether to approve an enterprise agreement regarding how the enterprise agreement was explained to employees, dates provided documents, etc.

These rules will be replaced by a more simple "Statement of Principles" (still to be published).

Better Off Overall Test simplified

When considering whether it will approve an enterprise agreement, the FWC applies the "better off overall test" (the "BOOT" test) and will not ordinarily approve the agreement unless all employees will be better off overall under the enterprise agreement than if a modern award applied to their employment.

The BOOT test 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 enterprise agreement against the underlying award "line-by-line"

Going forward the FWC will now:

- only be required to consider the circumstances of "reasonably foreseeable employees" (not every conceivable employee that could be employed in future, even if very unlikely);

- only be required to consider patterns of work that are reasonably foreseeable at the test time (not every conceivable working pattern that could arise, even if very unlikely).

Better Off Overall Test - reconsideration after approval

However, in turn for this more relaxed approach at the time the BOOT is considered, the FW Act will now contain a provision empowering employees or unions to trigger a reconsideration of the BOOT at any time after the EA is approved, where employees are now doing different types / patterns of work.

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

- the employer must give undertakings to rectify the concerns; or
- the FWC can vary the EA to rectify the concerns itself.

The certainty of terms and conditions that an approved enterprise agreement previously provided will be significantly eroded.

Need for employees to have sufficient interest in the enterprise agreement

Going forward, in order to approve an EA, the FWC will need be satisfied that the employees who were 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.

Key take-away: It will be harder for approval of "small cohort" agreements where a vote is held when it only covers a small number of employees, and then greater numbers of employees are employed thereafter.

Employees can initiate enterprise bargaining more easily

If an employer is covered by a single enterprise which has a nominal expiry date that expired within the previous five years, then a union who was a bargaining representative for the purposes of bargaining for that agreement can request that the employer commence bargaining for a new replacement agreement. Employers will then need to bargain in good faith.

Previously it would be up to an employer to decide whether or not to commence bargaining for a new enterprise agreement. Employees would have to apply to the FWC for a "majority support determination" showing that the majority of employees in the workplace wished to bargain, if employer did not wish to bargain with them.

This change is effective immediately on royal assent.

FWC has new powers to dictate terms of an enterprise agreement where agreement cannot be reached

Prior to these amendments coming into force, employees or employers cannot ordinarily apply to the FWC to seek a binding decision on what terms should or should not be included in an enterprise agreement.

The determination of what terms are included in an agreement is for the parties to agree, and then for the employer to put the enterprise agreement to the employees to vote upon.

Going forward, where there is “*no reasonable prospect of agreement being reached*”, then a bargaining representative (eg a union) will be able to apply to the FWC for an “*intractable bargaining declaration*”. This, for the first time, will allow the FWC to dictate the terms of an enterprise agreement, even where a party disagrees with those terms.

Harder for employers to terminate enterprise agreements unilaterally

Currently, it is very easy for an employer to terminate an enterprise agreement after it has passed its nominal expiry date.

If the enterprise agreement contains more beneficial terms than an award - for example, a commitment to keep wages a certain % above the award rates - this means that a workforce’s terms and conditions can revert to a significantly inferior position after an enterprise agreement has been terminated.

The ability for employers to terminate enterprise agreement will now be reduced so enterprise agreements will only be able to be terminated without employee agreement where they have passed their nominal expiry date and the continuing operation of the enterprise agreement risks viability of the employer’s business.

This change is effective immediately on royal assent.

'Zombie agreements'

All enterprise agreements approved prior to 1 January 2022 will automatically terminate in 12 months time, calculated from the date of royal assent of the bill (likely to be in the next couple of days)..

There is an ability to apply to delay the termination for a further 4 years but only if the employees would be better off overall under the terms of the enterprise agreement than the modern award that would apply if the agreement was terminated (will be rare?).

Employers must give employees written notice of the fact that the enterprise agreement is terminating within the next 6 months.

To do: if you have a zombie enterprise agreement in place, start getting ready for transition to an award or implementing a new enterprise agreement; give notice to staff.

Other changes

Other changes introduced by the Bill include:

- Industrial action- change of rules so that there must be a conciliation before industrial action is taken.
- Powers of the Registered Organisations Commission and Australian Building and Construction Commission will be transferred to the FWC and FWO.

Even more changes to come in 2023…

Further changes are likely to come next year including those dealing with:

- gig workers and independent contracting;
- the characterisation of who constitutes a casual employee;
- 'same job same pay' and labour-hire regulation
- further criminalisation of wage theft.

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