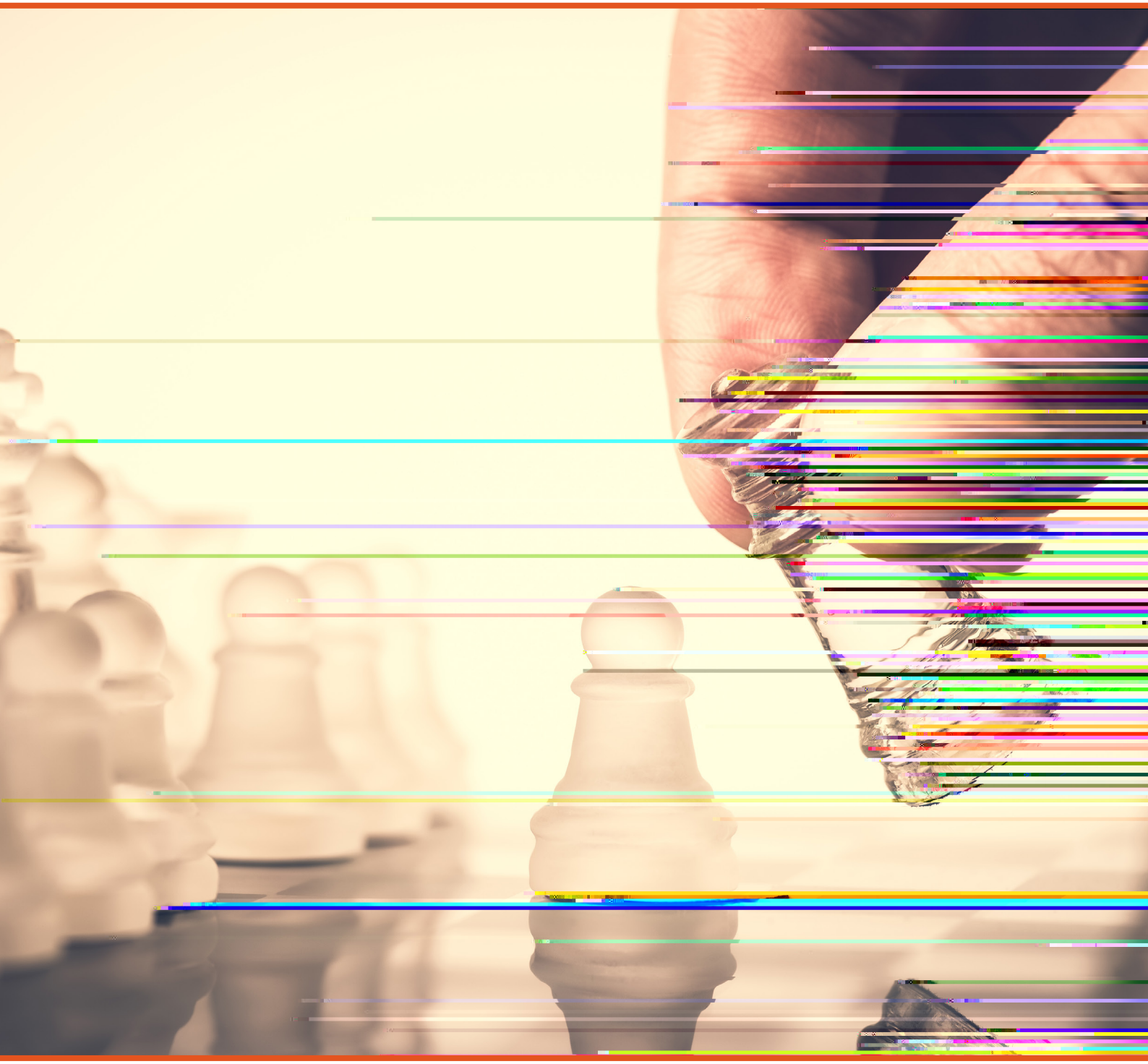

abla Australian Business Lawyers & Advisors

Content

Overview

The Parliament has today passed the *Secure Jobs and Better Pay Bill 2022*. The Bill is set to become an operative law in a matter of days, although some aspects have deferred start dates (as indicated further below).

Since our previous alert, a number of changes have been made to the proposed laws, including:

- changes to the pre-requisites required for an application for multi-employer bargaining to succeed (as part of the single interest authorisation stream)
- an introduction of greater union control over when single interest authorisation multi-enterprise agreements can be put to a vote, with union permission or a Fair Work Commission (FWC) order now required for a vote to proceed;
- confirmation and codification that once employers are caught in a single-interest authorisation multi-employer bargaining process, they can no longer proceed to make single enterprise agreements directly with their employees;
- the introduction of a new nine month grace period after an enterprise agreement (EA) expires, during which the FWC can exercise its discretion to not accede to applications to 1 63.2043 5-74 k0 Ta6.9 (o)-5.4 (vi)8 9 (

While the Bill is likely to receive royal assent in the coming day or days, the operation of the new laws have staggered commencement dates, to allow for some transition process.

The key commencement dates are as follows:

- Small claims procedure changes
- Regulation of pay secrecy clauses in new or varied employment contracts
- Rules pertaining to job advertisements with improper pay rates
- The limitations on termination of EAs
- Sunsetting of ‘zombie agreements’
- Changes to the Registered Organisations Commission and ABCC
- Changes increasing the ability to initiate bargaining
- Changes to the ability to seek equal remuneration orders.

- Sexual harassment orders and opening up of claims process for sexual harassment to FWC
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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
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There is, however, a ‘grace period’ during which employers can ask the FWC to exercise its discretion to not make a single interest authorisation. This grace period operates for a limited period of nine months after a previous enterprise agreement covering the relevant employees has passed its nominal expiry date, provided that:

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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:

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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 deritter n.8i)5.2 (t)3.9 (d)ilable in ter /Lang (en-US)/MCID 373 BDC BT-0.46 0.37

Better Off Overall Test

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.

However, in a late change to the laws, intractable bargaining declarations will only be available either:

- nine months after the nominal expiry date of the previous agreement applying to the relevant employees; or
- nine months after bargaining has been commenced, whichever is the later.

Industrial action

The Bill requires the FWC to convene a conciliation conference between bargaining representatives every time a protected action ballot order (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.

The process for conducting PABOs will also 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. [1]