

WORKPLACE LAW IN 2023

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**FAIR WORK LEGISLATION AMENDMENT
(SECURE JOBS, BETTER PAY) ACT 2022 (CTH)**

KEY DEVELOPMENTS

- Gender Equality and Respect at Work
- Changes to Enterprise Bargaining
- Restrictions on Fixed Term Employment Contracts
- To come: Widening coverage to ‘employee-like’ workers?

GENDER EQUALITY

EQUALITY-ENHANCING FAIR WORK PROVISIONS

- Pay secrecy clauses in employment contracts are prohibited: ss 333B-D.
- Refusals of requests for flexible work (under s 65) can now be contested before the Fair Work Commission (FWC), and the FWC can make orders requiring employers to grant the request.
- New discrimination grounds have been added: Breastfeeding, Gender Identity and Intersex status.

SEXUAL HARASSMENT AT WORK

- A new Part 3-5A prohibits sexual harassment 'in connection with' work. (Note: There were also changes to the *Sex Discrimination Act 1984 (Cth)* in 2022.)
- Workers and prospective workers can complain.
- Application to the FWC within 24 months of most recent contravention.
- FWC can issue a 'stop sexual harassment' order: s 527J.
- And/or hold a compulsory conference in private.
- FWC can arbitrate, and give compensation, with the agreement of parties.
- Or issue a certificate for parties to take the matter to court.

ENTERPRISE BARGAINING

CURRENT BARGAINING FRAMEWORK

Single- enterprise agreements

One enterprise only

Or several with a single interest authorization, on the application of employers only

Multiple enterprise agreements - low paid

Several employers, but only after a low paid authorization from the FWC

No entitlement to take protected industrial action

Multi-enterprise agreements

Several employers, but only where the employers agree

No entitlement to take protected industrial action

NEW BARGAINING FRAMEWORK AFTER 6 JUNE

Single- enterprise agreements

One enterprise only

Or several with a single interest authorization, on the application of employers **OR unions**

Multiple enterprise agreements – **supported bargaining**

Several employers, but only after a **supported bargaining** authorization from the FWC

Protected industrial action available

Cooperative workplace agreements

Several employers, but only where the employers agree

No entitlement to take protected industrial action

CONTENTIOUS ISSUES

- Do the changes mean that reluctant employers can be roped into multi-employer bargaining, and suffer industrial disruption?
- Only if:
 - They are not small businesses
 - They are not in the general building and construction industry
 - They don't already have a single enterprise bargain in place
 - A majority of their own staff want to bargain
 - The FWC has authorised multi-employer bargaining and named them in the group.

WHEN WILL THE FWC MAKE AN AUTHORISATION?

- Single interest employer authorisation:
 - Where the employers have 'clearly identifiable common interests' and it is not contrary to the public interest.
 - Common interests may include geographical proximity; regulatory regime; nature of the enterprise.
 - Public interest includes effects on competition in the marketplace.
 - FWC must hear the employer's own views.
 - The FW Act still favours single enterprise bargaining.

‘SUPPORTED BARGAINING’

- Replaces the largely unsuccessful ‘low paid’ bargaining stream.
- Covers sectors which ‘require support to bargain’.
- Employers must have a common interest.
- ‘Being substantially funded directly or indirectly by the Commonwealth, a State or Territory’ may constitute the common interest.
- Possible sectors: Aged care? Child Care? But NOT general building and construction.
- Employers already covered by single enterprise agreements are excluded.

PROTECTED INDUSTRIAL ACTION

- Employees engaging in 'single interest' or 'supported' multi-employer bargaining must make a Protected Action Ballot application – and employees are balloted separately at each employer entity.
- After a successful ballot, unions must give 5 days (120 hours) notice of action.
- All the usual constraints apply:
 - No action in supported of non-allowable matters;
 - No pay for periods of industrial action;
 - Susceptibility to termination or suspension of bargaining if it causes risks to safety or the economy.

RESTRICTIONS ON FIXED TERM CONTRACTS

Takes effect on 6 December 2023.

NO LONG FIXED TERMS

- Fixed and maximum term contracts cannot exceed 2 years.
- The time limit includes renewals
- Exceptions for contracts for specialised tasks, training, government-funded positions, and contracts permitted by modern awards.
- A contract longer than two years is treated as a continuing contract for the purposes of the FW Act and other statutes.
- Anti-avoidance provisions (s 333H) prevent employers from terminating contracts and delaying renewal; artificially altering tasks.
- These are civil penalty provisions (60pu or 600pu for serious offences).

STILL COMING?

More legislation is in the pipeline

'EMPLOYEE-LIKE' WORKERS

- Will the government do something about gig work?
- See *Deliveroo v Franco* [2022] FWCFB 156: The FWC full bench was very critical of the test to be applied to determine whether Franco could make an unfair dismissal application.
- Possible solutions?
 - A new definition of 'employee' in the FW Act?
 - A power for the FWC to deem certain workers to be employees for the purposes of certain provisions?
 - A new set of provisions dealing with specific types of non-employed work?

QUESTIONS? COMMENTS?