

## ACWA – ESSA Update

### New Workplace Laws Tabled in Parliament

by Graham Lilleyman, November 2022

The federal Labor government has tabled their proposed amendments to the Fair Work Act 2009 ('the Act'). The changes, which are likely to be passed into law, will impact every business to some degree.

In this article we will summarise the changes and make some comments on the likely impact.

Whilst there may be some fine tuning of the laws and the usual political argy bargy, the government only needs the support of the Greens and one other Senator from the crossbench to pass them and so it seems with the current makeup of the Senate is likely to at some point either late this year or in the first quarter of next year.

The changes as they are proposed, are likely to increase the administrative burden faced by employers when employing staff.



### Enterprise Bargaining

The enterprise bargaining system has become overly bureaucratic and administratively difficult in the last few years due to poor drafting of the associated legislation and how that has been interpreted by the Fair Work Commission ('the FWC'). This has resulted in a significant decline in new enterprise bargaining agreements being made.

The proposed changes include;

1. Establishing a system of enterprise bargaining which will allow unions to rope numerous employers into industry wide enterprise bargaining agreements. For example, a single childcare centre may get roped into an enterprise agreement which covers another 50 childcare centres. Given that the instigation of the enterprise agreement is likely to come from unions, this means that individual employers may have an involvement in enterprise bargaining as part of a large group. Previously as a smaller operator, they may not have had to deal with this issue and just operated under the Modern Award that covered your industry.

There are several different ways that employers can be caught up in the new system but as this is the most complex and wide ranging reform in the package, there may be some fine tuning of the proposed laws so we will reserve further comments at this time until the position becomes clearer.

2. The Better Off Overall Test ('the BOOT') test will change from a test very much based around each individual employee to a global test over the whole business. This is a good thing, assuming it is sensibly applied, as the way the test had been interpreted in recent times by the FWC has made it unworkable in many industries.

3. The capacity for employers to unilaterally terminate enterprise agreements after their nominal expiry date has passed will be curtailed. The government feels that the capacity to terminate agreements without the consent of the other party to the agreement gives employers an unfair advantage in the negotiation process when replacement agreements are being negotiated.

The changes to enterprise bargaining laws are probably the most controversial of the proposed new laws. Whilst business groups are suggesting that there will be a big increase in industrial action, it is difficult to see this emerging except for larger companies in limited number of industries. It will still take a vote of staff to authorise industrial action and with union membership being so low these days, it is unlikely to impact small and medium businesses to any great degree.

### **Termination of "Zombie" Agreements**

Collective agreements that were made during the "Work Choices" era of 2007-2009, and agreements made during the "bridging period" between the former Workplace Relations Act 1996 and the Fair Work Act 2009, effectively the period between 1 July 2009 and 31 December 2009, are commonly known now as zombie agreements.

Older agreements made before the Work Choices era, and some formerly state enterprise agreements are also included in agreements that will be impacted by the changes.

Some of these agreements are now very old and out of date, or they undercut and reduce employee entitlements when compared to the Awards upon which they were based.

The new laws propose that there will be a sunset clause inserted into the legislation which will result in the agreements terminating after a period of 12 months from the commencement date of the amendments. Businesses will either have to enter into a new enterprise agreement or they will revert back to the Modern Award that covers the business.

Whilst many of these types of agreements have already been terminated by other means, for those businesses that are still relying on these types of agreements, the impact on their operations will be significant.



### **Prohibition of Preventing Employees from Discussing their Remuneration**

Employers will no longer be able to insert clauses into contracts of employment which prevent employees from discussing their remuneration arrangements with other people, including other employees of the business in which they are employed.

The purpose of this change is to make it easier for staff to compare their remuneration and as such make it harder to have arrangements which vary between employees undertaking the same or similar duties.

It will be unlawful for employers to put such clauses into new contracts of employment and those that already exist will have no legal effect.

### **Flexible Working Arrangements**

Certain employees currently have the capacity to request their employer provides them with flexible working arrangements. However, under the current laws, when there is no agreement as to the claim, the process of resolving the dispute is limited.

Under the proposed new laws, employees will have the capacity to file a claim in the FWC and they will arbitrate the matter.

Whilst flexibilities can arise in a number of ways, get ready for some pretty interesting claims relating to working from home.

There is no way of pre-empting how these new provisions will play out, but what happens will be very important to many businesses and given the difficulty of some businesses are having getting back to work, we can expect some early and interesting outcomes.

### **Limitations Placed on Rolling Fixed Term Contracts**

Whilst there will be some limitations and exemptions from the general rule, employers will no longer be able to enter into fixed term contracts that continue for more than two years across a contract length including extensions. Furthermore, a fixed term contract can only be extended once.

The intention of the changes is to prevent employers from continually engaging permanent employees on short term continually rolling contracts.

It will be an offence and subject to significant penalties if this provision is breached.



## **Sexual Harassment at The Workplace**

The changes will result in a greater focus on preventing sexual harassment at the workplace. The FWC will be charged with a role of addressing sexual harassment at work and will be able to issue Orders against persons who offend against the legislation. It's a little difficult to understand what effect these Orders might have because, if it can be established that a person has sexually harassed another employee, they will often have their employment terminated. Not much point in issuing an Order against an employee that is no longer employed at the business, but maybe that is just me over thinking it.

The legislation makes it clear that an employer can be held vicariously liable for the actions of the perpetrator if they have failed to take "all reasonable steps" to prevent the harassment from occurring in the first instance. The amounts awarded to employees in compensation for being sexually harassed have greatly increased in recent times and are now often in excess of \$100K.

The proposed laws also make it clear that the actions of third parties, such as customers, can be dealt with by the FWC.

In many ways these powers are similar to those already held by the Human Rights Commission, but giving the FWC the capacity to deal with such claims is likely to open up the jurisdiction to a wider audience and make claims more common. Employers need to be mindful of this and take pro-active action to minimise the risk.

## **Australia Building and Construction Commission Abolished**

The ABCC, which is effectively the industrial relations Police for the construction industry is to be abolished.

The duties and responsibilities of the ABCC will be transferred to the Fair Work Ombudsman. How the Ombudsman uses its enforcement powers and what degree of license the CFMEU take from the changes are yet to play out. There are likely to be some nervous employers in the industry.

## **Other Matters**

There are a few other changes dealing with pay equity, industrial action and other matters with limited effect, but these changes overall are the most significant in a decade and will require most employers to review their current arrangements.

Further updates will be provided as the legislation proceeds through the Parliament.

## **Contact ACWA ESSA HelpLine:**

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## YOUR ACWA MEMBERSHIP INCLUDES IR & WAGE ADVICE



ACWA has a service agreement with **ESSA** (Employment Services & Solutions Australia) and HR Legal to provide Industrial and Wage advice to all current financial ACWA members.

***\*\* ACWA financial members, for authorisation purposes, must provide your ACWA Membership carwash or company name and main contact name \*\****

In today's changing industrial environment and the introduction of modern awards by the IRC it is important for members to stay informed and comply with all conditions of employment.

**ESSA** will maintain an ACWA specific Phone Line and email advice line, manned by trained industrial relations consultants, during normal business hours (EST) to answer queries about:

1. current terms and conditions of employment for the industry including award coverage
2. annual wage increases,
3. changes arising from the new National Employment Standards
4. changes arising from Upcoming Modernized Awards;
5. general information regarding termination of employment and unfair dismissal (with any litigation to be referred to HR Legal);
6. general information about Discrimination, Bullying and OH&S (with any litigation to be referred to HR Legal).

Individual ACWA members will each be entitled to free telephone support per current membership year with additional work being charged at discounted rates. Support includes:

1. telephone advice (via the dedicated ACWA Phone Service) or dedicated email advice;
2. review of documentation which involves less than 15 minutes reading, the preparation of short written correspondence by email (not requiring formal legal advice).

It is anticipated that the majority of our members seeking to clarify wage rates, or get general information about agreement making and termination can obtain such advice without charge.

However, time limits will be applied where the matter requires specific detailed advice or representation, or information about past underpayment of wages.

If the advice you seek is more detailed than described above, or if you have reached the limit of your free time allocation, you will be notified in writing (by email or letter) that any additional advice will be chargeable directly to you and the charge rates will be specified.

ESSA will consult with HR Legal as required to provide professional and seamless advice.

### **Contact ESSA:**

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