Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023

On 29 March 2023, the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (Cth)* (Bill) was introduced into Parliament.

The Bill proposes changes to the matter below (among other things), which are relevant to Growers:

1. Changes to unpaid parental leave (UPL
2. Introducing a right to superannuation within the National Employment Standards (NES):
3. Changes to payroll deductions for authorised purposes, including for union fees:
4. Clarification that the Fair Work Act 2009 (Cth) (**FW Act**) applies to migrant workers: provisional commencement date is the day after Royal Assent.

The contents of the Bill and the information contained in this summary are potentially subject to amendment by the Parliament.

1. Unpaid Parental Leave

Proposed changes to flexible UPL

The FW Act currently allows an employee to take up to 30 days as flexible UPL.

Flexible UPL can be taken a day at a time, within the first 24 months of the child's birth or adoption placement. Flexible UPL days are an exception to the requirement that UPL must be taken in a single continuous period. The proposed amendments would:

- Increase the number of days that can be taken as flexible UPL from 30 to 100 days, unless a higher number of days is provided by the regulations.
- Allow pregnant employees to take flexible UPL 6 weeks before the expected birth of the child. Any flexible UPL accessed would be deducted from the employee's overall entitlement to flexible UPL. The means a pregnant employee may, for example, work part-time hours by combining periods of work with periods of flexible UPL before the birth of the child.
- Allow employees to commence flexible UPL before or after a period of continuous UPL. Currently, in order for an employee to access both continuous UPL and flexible UPL entitlements, the employee must take continuous UPL first and then take flexible UPL. The proposed change would allow, for example, an employee to access a period of flexible UPL before the birth of the child, take a period of continuous UPL, then access their remaining flexible UPL entitlements.

Notice requirements for the taking of UPL

When taking UPL, employees are required to provide their employer with the following notice:

- 10 weeks prior to commencing leave: notice of the start and end dates of the continuous UPL period and the total number of flexible UPL days that the employee intends to take.

  If it is not practicable for the employee to give 10 weeks' notice, notice may be given as soon as reasonably practicable, including after the leave has started, where:

  - the employee's first period of leave is taken prior to the child's date of birth or expected date of birth (whether the leave is flexible or continuous UPL); or
  - the employee's first period of leave is continuous UPL. If the employee's first period of leave being taken is flexible UPL commencing after the birth of the child, an employer needs to agree to reduce the notice period.

- 4 weeks prior to commencing leave: confirm the start and end dates of the continuous UPL and notice of a date on which they will take flexible UPL. If this is not practicable, the employee may give the notice as soon as practicable – including after the leave has started.

The proposed changes to flexible UPL is intended to align the entitlement to the recent changes to the government-funded paid parental leave scheme made by the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023* (Cth), which increased the number of flexible paid parental leave from 30 to 100 days.

Accessing UPL for employee couples

The FW Act currently expresses the entitlement to take UPL differently depending on whether or not an employee is a member of an 'employee couple.' The FW Act defines an employee couple as two national system employees who are the 'spouse or de facto partner of each other'.

The Bill will remove the current limitations on employee couples taking concurrent leave and extending their period of UPL. This will mean that:

- Eligible employees can take up to 12 months of UPL and request a further 12 months of UPL, regardless of how much leave their spouse or de factor partner takes, up to a total of 24 months each.
- All eligible employees will be able to take UPL at any time during the 24-month period starting on the date of birth of the child.
- The current limit on employees taking no more than 8 weeks of concurrent leave will cease to apply, and an employee can take any amount of their leave at the same time as their partner.

Implementing gender neutral language

References to gendered language such as 'he', 'she' and 'maternity leave' will be replaced with gender-neutral terms such as 'the employee' and 'parental leave'.

2. Superannuation

The Bill seeks to introduce a requirement under the NES for employers to make contributions to a superannuation fund for the benefit of an employee so as to avoid liability to pay the superannuation guarantee charge under superannuation legislation. The key proposed provision is as follows:

> ***116B Employer's obligation to make superannuation contributions***
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> *An employer must make contributions to a superannuation fund for the benefit of an employee so as to avoid liability to pay superannuation guarantee charge under the Superannuation Guarantee Charge Act 1992 in relation to the employee*.

The proposed provision is intended to extend an enforceable right to recover unpaid superannuation to all NES covered employees (and not just employees covered by a modern award or enterprise agreement that contains an entitlement to superannuation). The explanatory memorandum to the Bill (**EM**) notes that:

- Unions or the FWO could also seek to recover unpaid superannuation on behalf of an employee.
- The proposed change is not intended to replace the Australian Taxation Office's (ATO) existing powers to recover superannuation amounts. The existing arrangement in respect of the FWO referring matters involving unpaid superannuation to the ATO will continue to operate.

The Bill proposes a provision which would prevent an employee, union or the FWO, from commencing proceedings to recover superannuation amounts, to the extent that such claim overlaps with an existing proceeding commenced by the ATO.

However, the Bill does not prevent a claim from being made by an employee, union or the FWO, in circumstances where the ATO has:

- utilised enforcement activity other than court proceedings; or
- discontinued its own court proceedings and no final order for recovery was obtained.

Where a court awards compensation relating to a breach of the proposed provisions, the court must take into account the principle that compensation should usually be paid to a superannuation fund for the benefit of the employee. The EM provides examples of where it would not be appropriate to pay compensation into an employee's superannuation fund, namely:

- if the employee's account is closed, for example if the employee has reached preservation age and has withdrawn all their superannuation;
- if an employee earned superannuation while visiting Australia on a temporary visa and has departed the country; or
- if the employee is deceased.

Unfortunately, the Bill does not contain comparable protections for employers who may have relied upon an ATO Ruling, or other guidance material released by the ATO, in determining whether superannuation payments would be payable in certain situations. Instead, the EM merely notes that 'it is anticipated that a court would have due regard to any relevant administrative guidance produced by the ATO regarding the interpretation of superannuation obligations on which the employer has relied'.

The proposed NES entitlement to superannuation does not apply to:

- the recovery of superannuation contributions above the minimum superannuation contribution amount (currently 10.5%);
- national system employers and employees who are only national system employers and employees due to a State's referral of power to the Commonwealth; and
- deemed employees under superannuation legislation (e.g. certain types of contractors).

3. Employee Authorised Deductions

There are various types of permitted deductions that may be made from an employee's pay under section 324 of the FW Act, where the deduction is: authorised in writing by the employee, is principally for their benefit, and is the same amount as specified in the authorisation. The authorisation can be withdrawn in writing by the employee at any time.

The proposed amendments are intended to clarify the circumstances in which employees can validly authorise salary deductions and to permit greater flexibility in relation to the deductions that can be authorised by an employee.

The Bill will insert a new provision which allows an employee to agree in a written authorisation for multiple or ongoing deductions (rather than making an agreement on each occasion). Where an employee authorises multiple or ongoing deductions, the deduction may be authorised for a specified amount or amounts, or for amounts as varied from time to time. This means that an employee can pre-emptively authorise the amount of deduction to be increased over time. Specifically, a written authorisation must:

- for a single deduction: specify the amount of the deduction; or
- for multiple or ongoing deductions: specify whether the deductions are for a specified amount or amounts as varied from time to time; and
- include any information prescribed by the Fair Work Regulations 2009 (Cth) (FW Regulations).

Despite the above changes, the general rule is that a deduction cannot be made for an amount that may vary from time to time where it is directly or indirectly for the benefit of the employer (or a related party). For example, a direct benefit is where the deduction is being paid directly to the employer, and an indirect benefit is where the deduction is paid to a subsidiary or related company of the employer.

The only exception to the general rule is where the deduction is 'reasonable' under the FW Regulations. Currently, the FW Regulations provide that the following deductions are reasonable:

- A deduction where the employer (or a related party) provides goods or services to an employee in the ordinary course of the employer's business on the same or more favourable terms as those goods or services are provided to the general public (e.g. a health insurer offering health insurance).
- A deduction where the purpose is to recover costs directly incurred by the employer as a result of the employee's voluntary private use of the employer's property that is authorised or unauthorised (e.g. the private use of a company vehicle, mobile phone, or corporate credit card).

4. Protection for Migrant Workers

The Bill proposes to introduce a new provision in the FW Act which clarifies that a migrant worker in Australia is entitled to the benefit of the FW Act, regardless of their migration status.

The proposed change would also seek to give effect to Recommendation 3 of the Report of the Migrant Workers' Taskforce:

> *It is recommended that legislation be amended to clarify that temporary migrant workers working in Australia are entitled at all times to workplace protections under the [FW Act].*

The following provision is proposed:

> **40B Effect of the Migration Act 1958**
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> *For the purposes of this Act, any effect of the Migration Act 1958, or an instrument made under that Act, on the validity of a contract of employment, or the validity of a contract for services, is to be disregarded*.

It is intended that the proposed provision above would seek to make clear that the following scenarios would not affect the validity of an individual's contract of employment or contract for services for the purposes of the FW Act, namely:

- Where an individual does not have a right to work in Australia for the purposes of the Migration Act.
- Where an individual has contravened the Migration Act or breached a condition of their visa.
- Where an individual is no longer entitled to remain in Australia in accordance with their visa.