Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 – Enterprise Agreement Making & Better Off Overall Test (**BOOT**)

On 2 December 2022, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**Amendment Act**) was passed by the Commonwealth Parliament and received Royal Assent on 6 December 2022.
The Amendment Act introduces major changes to the Fair Work Act 2009 (**FW Act**) and other laws, particularly in relation to enterprise bargaining.

The Amendment Act introduces changes to pre-approval requirements for enterprise agreements and will change the application of the Better off Overall Test (**BOOT**).

This Summary provides an overview of the changes to enterprise agreement making and the BOOT.

Enterprise Agreement approval requirements and process

What has changed?

The Amendment Act 2022 amends the FW Act to remove some of the more prescriptive pre-approval requirements for enterprise agreements.

In short, some of the highly prescriptive rules regarding steps that must be taken for an agreement to be approved will be replaced with a broad requirement for the Fair Work Commission (**FWC**) to be satisfied that an enterprise agreement has been genuinely agreed to by relevant employees.

The FWC is required to publish a 'statement of principles' that will serve to provide guidance to employers as to how to seek approval of an agreement. The statement must be taken into account by the FWC when considering whether to approve an agreement. The statement of principles will not however impose strict obligations on the employer.

The statement must deal with the following matters:

- informing employees of bargaining for a proposed enterprise agreement;
- informing employees of their right to be represented by a bargaining representative;
- providing employees with a reasonable opportunity to consider a proposed enterprise agreement;
- explaining to employees the terms of a proposed enterprise agreement and their effect; and
- providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote.

The FW Act retains specific provisions requiring employers to explain the terms of a proposed enterprise agreement to employees in an appropriate manner taking into account the particular circumstances and needs of those employees (for example, those who are young, from a culturally and linguistically diverse background or who did not have a bargaining representative).

Prescriptive obligations regarding pre-approval steps that an employer must currently take within strict timeframes to satisfy the FWC that an enterprise agreement has been genuinely agreed to have been removed including:

- the requirement to take all reasonable steps to provide employees with access to the agreement during a 7 day 'access period' ending immediately before the start of the voting process; and
- taking all reasonable steps to notify employees, by the start of the 'access period,' of the time, place and method for vote.

Instead, these steps will be subsumed by the statement of principles and the overarching requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed.

The requirement to provide a Notice of Employee Representational Rights (**NERR**) will not apply to bargaining for a multi-enterprise agreement (i.e. a single interest employer agreement, supported bargaining agreement, or cooperative workplace agreement). A NERR, however will still be required to be provided for bargaining for a single enterprise agreement.

New requirement that proposed agreements are appropriately representative

There will be a new requirement directed at ensuring that proposed agreements are appropriately representative.

Relevantly, the Amendment Act provides that the FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to unless the FWC is satisfied that the employees requested to vote on the agreement:

- have a sufficient interest in the terms of the agreement; and
- are sufficiently representative, having regard to the employees the agreement is expressed to cover.

The above requirement is intended to prevent the making of what have been referred to as 'limited voter cohort agreements' that are made with a small number of employees but ultimately cover a much larger workforce of subsequently engaged employees.

Minor procedural or technical errors

The FWC would retain an ability to disregard minor procedural or technical errors in relation to certain requirements if it is satisfied that the employees were not likely to have been disadvantaged by the errors.

Dealing with errors in enterprise agreements

The Amendment Act also introduces provisions to enable the correction of obvious errors, defects or irregularities in enterprise agreements and to provide a simple remedy to address the situation where the wrong version of an enterprise agreement or variation has been inadvertently submitted to and approved by the FWC. The provisions dealing with errors in enterprise agreements commenced on 7 December 2022.

When do these changes come into effect?

The provisions set out above in respect of the changes to the agreement approval requirements and process commence from the earlier of 6 June 2023 or a day to be proclaimed.

The provisions dealing with errors in enterprise agreements commenced on 7 December 2022.

Better Off Overall Test (BOOT)

What has changed?

The Amendment Act will change or clarify the application of the BOOT by the Fair Work Commission (**FWC**) in its assessment of whether to approve an enterprise agreement (or variation).

The intention of the BOOT is to ensure each employee covered by an enterprise agreement is better off overall when compared to their relevant modern award.

The FWC will be required to:

- give primary consideration to any common views (if any) shared by a union bargaining representative for the agreement and the employer's bargaining representative, about whether an agreement passes the BOOT, However, the Commission must still undertake its own independent assessment in applying the BOOT;
- apply the BOOT as a global assessment of whether each employee concerned would be better off (i.e. not a line-by-line comparison between the proposed agreement and relevant modern award); and
- only have regard to the 'reasonably foreseeable' patterns or kinds of work, or types of employment, for both existing award covered employees and 'reasonably foreseeable employees' having regard to the nature of the enterprise/s to which the agreement relates

The Amendment Act enables the FWC to amend or excise a term in an agreement if it is concerned that the agreement does not otherwise meet the BOOT. The FWC must seek the views of the employer, award covered employees and bargaining representatives for the agreement and only make changes that are necessary to address the BOOT concern.

It is important to appreciate that the new power for the FWC to amend the agreement is not dependent upon the employer's consent. Accordingly, it will be important that employers/growers consider the potential impact of the BOOT when negotiating an agreement or considering whether to engage in bargaining.

Parties may seek a 'reassessment' of the BOOT

The Amendment Act enables employees and unions covered by an agreement to make an application to the FWC for a reassessment of the BOOT if there has been a change in patterns or kinds of work, or types of employment engaged in, by employees covered by an enterprise agreement compared to those (if any) considered by the FWC when the agreement was approved.

The 'test time' for a reconsideration of whether an enterprise agreement passes the BOOT is the time the original application for approval of the agreement (or variation) was made. This means that award variations made after the 'test time' will not be relevant to the reconsideration process.

If the FWC has a concern that an enterprise agreement does not pass the BOOT as part of the reconsideration process, it may accept an undertaking from the employer, or amend the agreement, to address the BOOT concern. The FWC must amend the agreement with retrospective effect if it considers retrospective amendment necessary to address the BOOT concern.

An employer would not be required to consent to the proposed variation to the agreement resulting from the FWC's reassessment of the BOOT.

A court will not be able to make a pecuniary penalty order in relation to conduct that contravenes a term of an enterprise agreement only because of the retrospective effect of a BOOT reconsideration amendment. However, an employer could be required to pay compensation for loss that an employee has suffered because of the retrospective contravention (i.e., an underpayment).

The ability for a union or employee to seek a reassessment of the BOOT will be a very significant change from current arrangements which essentially lock in the terms of an enterprise agreement once approved by the FWC (subject to any variation subsequently proposed by the employer and approved by employees).

When do these changes come into effect?

These changes will come into effect on 6 June 2023, or an earlier date to be fixed by proclamation.

They will then apply to any enterprise agreement 'made' (i.e. voted up by employees) on or after commencement.

The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have.