Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 – Industrial Action & Bargaining Disputes

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 a requirement for bargaining representatives to attend a compulsory conciliation conference in the Fair Work Commission (FWC) before or on the day voting closes on a protected action ballot.
- Establishes a new requirement to provide a minimum of 120 hours' notice before industrial action can be taken in the context of bargaining in the single interest or supported bargaining streams.
- Impose new restrictions on employer response action.

The Amendment Act also repeals previous provisions dealing with bargaining related workplace determinations and replace those provisions with a new regime that introduces two new concepts:

- an 'intractable bargaining declaration'; and
- an 'intractable bargaining workplace determination'

This Summary provides an overview of the changes to industrial action and bargaining disputes.

The new provisions in respect of multi-enterprise bargaining **commence from the earlier of 6 June 2023 or a day to be proclaimed.**

Industrial Action

Compulsory conciliation

The Amendment Act introduces a requirement for bargaining representatives to attend a compulsory conciliation or mediation conference in the FWC before or on the day voting closes on a protected action ballot (**PAB**). If a bargaining representative does not attend the conference, protected industrial action will not be available to whomever did not attend.

Industrial action in multi-enterprise bargaining

Industrial action will be permissible under two of the three multi-enterprise bargaining streams (supported bargaining and single interest bargaining).

When an application is made for a protected action ballot order (**PABO**) in one of these two multi-enterprise bargaining streams, the FWC must make separate PABOs in relation to the employees of each employer.

Industrial action can only be taken by the employees of an employer if at least 50% of that employer's employees on the roll of voters for the PAB vote, and at least 50% of the valid votes approve the industrial action.

Notice requirements for industrial action

The notice required to begin industrial action remains unchanged for single-enterprise agreements (i.e. 3 working days). Where industrial action is taken in relation to multi-enterprise bargaining, at least 120 hours' notice must be provided to the employer.

Employer response action

Employer response action (i.e. a lockout in response to employee industrial action) will now only be protected industrial action where it is in response to employee action authorised by a PABO.

This means that employers are no longer able to lockout employees in response to unprotected industrial action. Employers can still apply to the FWC if unprotected industrial action is occurring or threatened, and the FWC must order unprotected industrial action to stop (or not occur).

An employer will not be able to take employer response action if the employer did not participate in the new compulsory conciliation requirements outlined above.

When do these changes come into effect?

The new provisions in respect of multi-enterprise bargaining commence from the earlier of 6 June 2023 or a day to be proclaimed.

What should Growers do?

Growers engaged in enterprise bargaining are encouraged to:

- Be aware of the new obligations to attend compulsory conciliation before a PABO is made, and the consequences of non-attendance.
- Be conscious of the new notice period where multi-enterprise bargaining is occurring. Employee action that does not comply with the notice requirements will not be protected industrial action.
- Consider whether potential employer response action will be protected action based on the new limitation.

Intractable Bargaining Disputes & Arbitration

What has changed?

The Amendment Act amends the FW Act to empower the FWC to resolve intractable bargaining disputes. The Amendment Act introduces a process through which the FWC can exercise a significant new power to arbitrate (decide) terms when parties are unable to reach agreement.

The Amendment Act repeals previous provisions dealing with bargaining related workplace determinations and replace those provisions with a new regime that introduces two new concepts:

- an 'intractable bargaining declaration'; and
- an 'intractable bargaining workplace determination'

The FWC will be able to make an intractable bargaining declaration on application by a single bargaining representative.

Intractable bargaining declaration

In order to make an intractable bargaining declaration, the FWC must be satisfied that:

- it has dealt with the dispute (for example, by conciliation) under section 240 of the Act and the applicant participated in the processes to deal with the dispute
- the parties have bargained for a minimum period of 9 months or at least 9 months has elapsed since the nominal expiry date of the previous enterprise agreement
- there is no reasonable prospect of agreement being reached if the Commission does not make the declaration, and
- it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

If the FWC makes an intractable bargaining declaration, the FWC will then consider whether to provide the parties with a further period in which to negotiate following the declaration. This will be known as a 'post-declaration period'. Following a post-declaration negotiation period, the Commission may make an intractable bargaining workplace determination to resolve any matters that have not been agreed by the parties.

In making a workplace determination, the Commission must take into account the significance to the employers and employees of any arrangements or benefits in an enterprise agreement that applies to any of the employers in respect of the employees before the determination is made.

When is it available?

Intractable bargaining declarations will be available to bargaining representatives for:

- single enterprise agreements;
- multi-enterprise agreements in the supported bargaining authorisation stream; and
- multi-enterprise agreements in the single interest authorisation stream.

Intractable bargaining declarations will not be available to bargaining representatives for a multi-enterprise agreement in the cooperative workplace agreement stream.

When do these changes come into effect?

These changes will come into effect from the earlier of 6 June 2023 or a day to be proclaimed.

What should Growers do?

Growers will need to carefully consider their bargaining strategy in light of the expanded avenues for the FWC to apply pressure on industrial parties to make concessions in order to reach an agreement. Bargaining industrial issues most likely to be unresolved may need to be considered and identified at the outset, to best avoid any unwanted outcome being imposed by the FWC by arbitration.

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.