Industrial Relations Reform Insights

PAY EQUITY MEASURES

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Australian Business Lawyers & Advisors

Content

Written by Luis Izzo, Managing Director, Tamsin Lawrence, Senior Associate and Rebecca Spiliopoulos, Associate

abla Australian Business Lawyers & Advisors

Overview

Pay Equity Measures

The Federal Government has introduced into Parliament landmark IR reforms that will have an impact on all workplaces across Australia as part of its *Secure Jobs and Better Pay Bill* 2022.

This is ABLA's second publication on the reforms, which focuses exclusively on those that broadly relate to the Government's 'Pay Equity' agenda. Specifically, these pay equity reforms comprise of:

- changes to the rules around flexible work arrangement requests;
- prohibition of pay secrecy clauses in contracts and industrial instruments;
- the facilitation of gender pay equity claims;
- the introduction of new expert panels to address gender pay equity and the Community and Care sector;
- expanded sexual harassment protections and
- expanded anti-discrimination protections.

Through ABLA's unique position in advising a range of industry bodies on legislative reform and policy matters (including a large number of employers in the Community and Care sector), we are pleased to share our insight and update clients on the specific details of the changes and the impact they are likely to have on businesses.

Flexible work arrangement requests

The reforms significantly strengthens employees' rights to request flexible work arrangements with an overhaul of the existing regime, which applies to all flexible work requests made six months after the Act commenced (June 2023).

Presently:

- eligible employees (parents, carers, disabled, 55 and over etc) have a right to make a flexible work arrangement request;
- the request must be responded to in writing by an employer within 21 days;
- employers can only refuse the request on reasonable business grounds; and
- once refused, there is no ability for an employee to contest the basis for the employer's refusal on reasonable business grounds.

The changes firstly expand on who is eligible to make a flexible working request by adding pregnant employees to the list of employees currently eligible to make a request.

The reforms also bring in a new regime whereby, once a request has been made by an eligible employee:

- Employers must first discuss the request with the employee and genuinely try to reach agreement on the request (including informing the employee of alternative arrangements that the employer is willing to make which may accommodate the needs behind the employee request).
- Employers must give the employee a written response to the request within 21 days. A failure to do so will be considered a refusal.
- Employers can only refuse a request where:
    a. an agreement cannot be reached with an employee;
    b. the employer has had regard to consequences of the refusal on the employee; and
    c. the refusal is based on reasonable business grounds
- Employers who refuse a request must in their written response to their employee:
    a. explain the reasons for the refusal including the reasonable business grounds being relied on;
    b. state any alternative arrangement (other than those requested) that the employee would be willing to accommodate or state that no such changes exist; and
    c. explain that an employee has a right under the Fair Work Act to challenge the refusal.

Employees can challenge any refusal by filing a dispute in the Fair Work Commission. The Commission may mediate, conciliate, make a recommendation, express an opinion or deal with the dispute by arbitration.

Where the Commission decides to arbitrate the dispute, it may impose a range of outcomes including:

a. requiring an employer to give an employee a written response or further details about the grounds of refusal;

b. making an order that the refusal was or was not based upon reasonable business grounds;

c. requiring an employer to grant an employee's flexible work request or make other specified changes to accommodate the request, to any extent; and

d. any other order that the Fair Work Commission considers appropriate.

When determining whether or not an employer has refused a request on reasonable business grounds, the FWC will take into consideration the specific circumstances of an employer, including the nature and size of the business.

The Fair Work Commission cannot however make an order that would be inconsistent with a provision of the Fair Work Act or a term of a fair work instrument that applies before the order is made.

This represents a significant shift in the regulatory framework because under the new arbitration provisions, employers can be compelled to change how they organise their labour to meet operational demand by the Commission in response to employee claims.

For instance, requests by employees to alter working arrangements or to work from home are likely to be the types of claims that will be arbitrated as part of these new reforms. Unless an employer can establish "reasonable business grounds" upon which it cannot accommodate an employee request, the employer may find themselves bound by orders of the Fair Work Commission to vary these types of working conditions in response to employee flexible work requests.

Historically, these types of flexible work arrangement requests appear to have been under-utilised, perhaps in part because of the inability to enforce the requests where an employer unreasonably refused.

The opening of access to arbitration is likely to see significantly greater usage of these types of requests in the future.

Employers will need to ensure they have robust policies and mechanisms for assessing and processing flexible work arrangement requests, in order to prevent claims from occurring and orders being issued to the employer to accommodate flexible work requests by the Commission.

Prohibition on pay secrecy clauses

The reforms introduce new workplace rights with respect to conditions of employment about rates of pay.

Firstly, all employees now have a right to ask other employees about their rates of pay (including matters required to ascertain pay such as a person's hours of work). This constitutes a workplace right (protected by the General Protections provisions of the Fair Work Act) under the reforms.

Secondly, all employees also have a right to disclose or not disclose their rates of pay (including matters required to ascertain pay such as a person's hours of work). This also constitutes a workplace right.

Thirdly, it is now unlawful to include in a contract of employment or industrial instrument any clauses prohibiting persons from discussing their pay. Any such clauses are automatically deemed invalid and will have no effect.

Existing contracts with pay secrecy clauses are not subject to the prohibitions on pay secrecy, however, once an existing contract is varied (including presumably through wage increases), it must comply with the new pay secrecy ban provisions. For existing contracts of employment that do not contain pay secrecy clauses, the new pay secrecy ban provisions apply straight away.

All pay secrecy clauses in enterprise agreements (whether new or existing) automatically have no effect under the reforms.

Finally, in June 2023 (six months after the Bill passes), it will also become an offence for an employer to enter into a contract with an employee that contains a pay secrecy clause. The penalty is up to $63,000 for an employer.

Gender pay equity claims

A suite of new provisions have been inserted into the Fair Work Act to facilitate the bringing of gender- based pay equity claims.

These include:

- the insertion of objects into the Fair Work Act seeking to promote gender equality;
- the insertion of a new objective that provide that modern awards should seek to eliminate gender- based undervaluation of work and provide workplace conditions that facilitate women's full economic participation;
- the insertion of the need to achieve gender equality in the objectives that the Fair Work Commission must take into account in setting minimum wages; and
- the introduction of new Expert Panels, to be comprised of specialist members, to hear and consider pay equity, Care and Community Sector, and pay equity in the Care and Community Sector cases.

All of these reforms are targeted at making it easier for unions and employees to access the existing equal remuneration order provisions of the Fair Work Act, under which applicants can apply for orders to ensure employees can receive "*equal remuneration for work of equal or comparable value*".

The reforms also:

- allow the Fair Work Commission to make an equal remuneration order on its own initiative (previously, it required an application to be made by certain parties);
- require the Fair Work Commission to make an equal remuneration order if it is satisfied that there is not equal remuneration for work of equal or comparable value in a particular case (previously, this was discretionary);
- enable the Commission to exercise these powers even if there is no similar work that the allegedly undervalued work can be compared to (eg no 'male comparator').

Since the introduction of the Fair Work Act in 2009, there have only been two equal remuneration applications filed in the Commission: One in the social, community, home care and disability services sector and one in the childcare sector (both of which ABLA was responsible for defending).

These reforms are likely to see an increase in these types of claims, with the aged care, childcare and health services sectors most likely to be affected.

Given ABLA's unrivalled experience in defending these types of claims, we will continue to update specific industry sectors on developments in this space as unions seek to prosecute claims under these new reforms.

Expanded sexual harassment provisions

The reforms expand the existing provisions pertaining to sexual harassment and stop sexual harassment orders (available from the Fair Work Commission) in two key ways:

1. Inserts for the first time a new broad-based prohibition on sexual harassment into the Fair Work Act. The new section is modelled on the existing prohibition on workplace sexual harassment that already exists in the Sex Discrimination Act, but is slightly broader. The Fair Work Act will prohibit sexual harassment in the workplace where harassment occurs "in connection with"

   a worker, a prospective worker or a person conducting a business or undertaking.

   This means it will cover conduct beyond that which occurs between two employees (which is the most common form of scenario subject to sexual harassment laws).

   Rather, the prohibition will extend to covering sexual harassment that is perpetrated against employee's and prospective employees by third parties. By way of example, the provision will apply to sexual harassment perpetrated by a customer, client or member of the public, against an employee, so long as there is some connection at the time the conduct occurs to the employee performing work or a function related to their work.

2. Facilitates employees and prospective employees, as well as unions (on an employee's behalf), applying to the Fair Work Commission or the Federal Court/Federal Circuit Court for relief to deal with a dispute about workplace sexual harassment beyond the existing stop sexual harassment orders. For instance, relief sought could include:

   a. compensation;

   b. payment for remuneration lost; or

   c. an order to take any reasonable action or course of conduct to redress any loss or damage suffered by an aggrieved person.

Presently, these forms of relief are only available under anti-discrimination legislation.

The amendments enable this relief to be granted by either:

- the Fair Work Commission (where at least two parties to the dispute agree to the Commission arbitrating the dispute); or
- the Federal Court/Federal Circuit Court (where no consent is provided for arbitration by the Commission).

The Fair Work Act's usual 'no costs jurisdiction' would apply to such claims, further facilitating the bringing of claims by aggrieved individuals. The sexual harassment changes to the Fair Work Act will take effect three months after the Bill commences.

Finally, the introduction of a sexual harassment offence into the Fair Work Act expressly does not limit the continuing operation of State and Territory laws dealing with sexual harassment (anti-discrimination, workplace relations, occupations health and safety and criminal laws). However existing laws which limit multiple application or complaints being brought under the Fair Work Act and State and Territory anti-discrimination laws will also apply.

Expanded anti-discrimination protections

The reforms have added three new forms of discrimination to the existing protections against discrimination in the Fair Work Act, to cover breastfeeding, gender identity and intersex status.

In particular, this means that the general protection provision, which makes it unlawful for an employer to terminate or take adverse action against an employee or prospective employee because they have a protected attribute (race, sex, age, marital status, pregnancy, religion, political opinion etc), now also cover breastfeeding, gender identity and intersex status.

Unpaid parental leave

The reforms introduce a new regime for responding to employee requests for an extension of unpaid parental leave, which will apply to all requests made six months after the Act commenced (June 2023).

Presently, when applying for an extension for up to 12 months beyond available parental leave an employee must:

- Make a request to their employer in writing to extend their parental leave period at least four weeks before the end of the available parental leave period.
- The employer must then respond to the employee within 21 days after the request is made in writing.
- The employer must give the employee a reasonable opportunity to discuss the request.
- The employer can then, in writing, accept the request or refuse the request on reasonable business grounds.
- If the employer refuses the request, they must give written details of the reason for the refusal.
- There are other provisions also in relation to employee couples - but we will not elaborate further on this point in this update.

The Bill as introduced a new regime whereby, once a request has been made by an eligible employee:

- A response from the employer must state that the employer either:
    - Grants the request; or
    - If following discussions between the employer and employee the parties agree on a different extension of leave than originally requested, the new agreed extended period; or
    - State that the request has been refused and explain the grounds for refusal.
    - Employers who refuse a request must in their written response to their employee:
        a. explain the reasons for the refusal including the reasonable business grounds being relied on;

        b. set out the extension of the period of unpaid leave that the employer would be willing to agree to or state that there is none; and

        c. explain that an employee has a right under the Fair Work Act to challenge the refusal.

The reasonable business grounds include (but are not limited to) the following:

a) that the extension of the period of unpaid parental leave requested by the employee would be too costly for the employer;

b) that there is no capacity to change the working arrangements of other employees to accommodate the extension of the period of unpaid parental leave requested by the employee;

c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the extension of the period of unpaid parental leave requested by the employee;

d) that the extension of the period of unpaid parental leave requested by the employee would be likely to result in a significant loss in efficiency or productivity;

e) that the extension of the period of unpaid parental leave requested by the employee would be likely to have a significant negative impact on customer service.

The Commission may mediate, conciliate, make a recommendation, express an opinion or deal with the dispute by arbitration.

Where the Commission decides to arbitrate the dispute, it may impose a range of outcomes including:

a. making an order that the employer has refused the request if they did not give the employee a written response to the request within 21 days after the request was made;

b. making an order that the refusal was or was not based upon reasonable business grounds;

c. requiring an employer to grant an employee's request or an order that the employer agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months (other than the period requested by the employee) immediately following the end of the available parental leave period; and/or

d. any other order that the Fair Work Commission considers appropriate.

Paid family and domestic violence leave

Under the reforms regulations will be made to requiring the taking of "paid domestic violence leave" to be reported as something else on an employee's pay slip, for example ordinary time worked, overtime or allowance. This change is directed towards preventing perpetrators from drawing inferences about employees taking paid family and domestic violence leave and any associated risks.

Where an employer records something other than "paid domestic violence leave" on an employee pay slip the reforms make clear that it will not be considered false and misleading conduct.

Next steps

There are some immediate next steps arising for employers out of this suite of pay equity reforms. These include:

- reviewing and amending any contracts that prohibit rates of pay being discussed amongst employees;
- reviewing and ensuring flexible work request policies and processes are up to date and provide the best possible guidance to managers so as to minimise claims in the Fair Work Commission arising from flexible work arrangement requests; and
- reviewing and amending sexual harassment policies to address the expanded definition of sexual harassment that now appears in the Fair Work Act and has also recently been included in anti- discrimination laws.

For businesses needing assistance with these matters, please contact our team of employment experts who are happy to help.

Luis Izzo
Managing Director - Sydney Workplace
02 9466 4274 | 0408 109 622
luis.izzo@ablawyers.com.au

Kyle Scott
Director
02 4989 1010 | 0422 286 133
kyle.scott@ablawyers.com.au

Nigel Ward
CEO and Director
02 9466 4788 | 0405 539 172
nigel.ward@ablawyers.com.au

Tamsin Lawrence
Senior Associate
02 9466 4266 | 0408 586 151
tamsin.lawrence@ablawyers.com.au

Julian Arndt
Associate Director
02 9466 4358 | 0408 848 163
julian.arndt@ablawyers.com.au

Kate Thomson
Senior Associate
02 4989 1003 | 0447 189 469
kate.thomson@ablawyers.com.au