Industrial Relations Reform Insights

PAY EQUITY MEASURES

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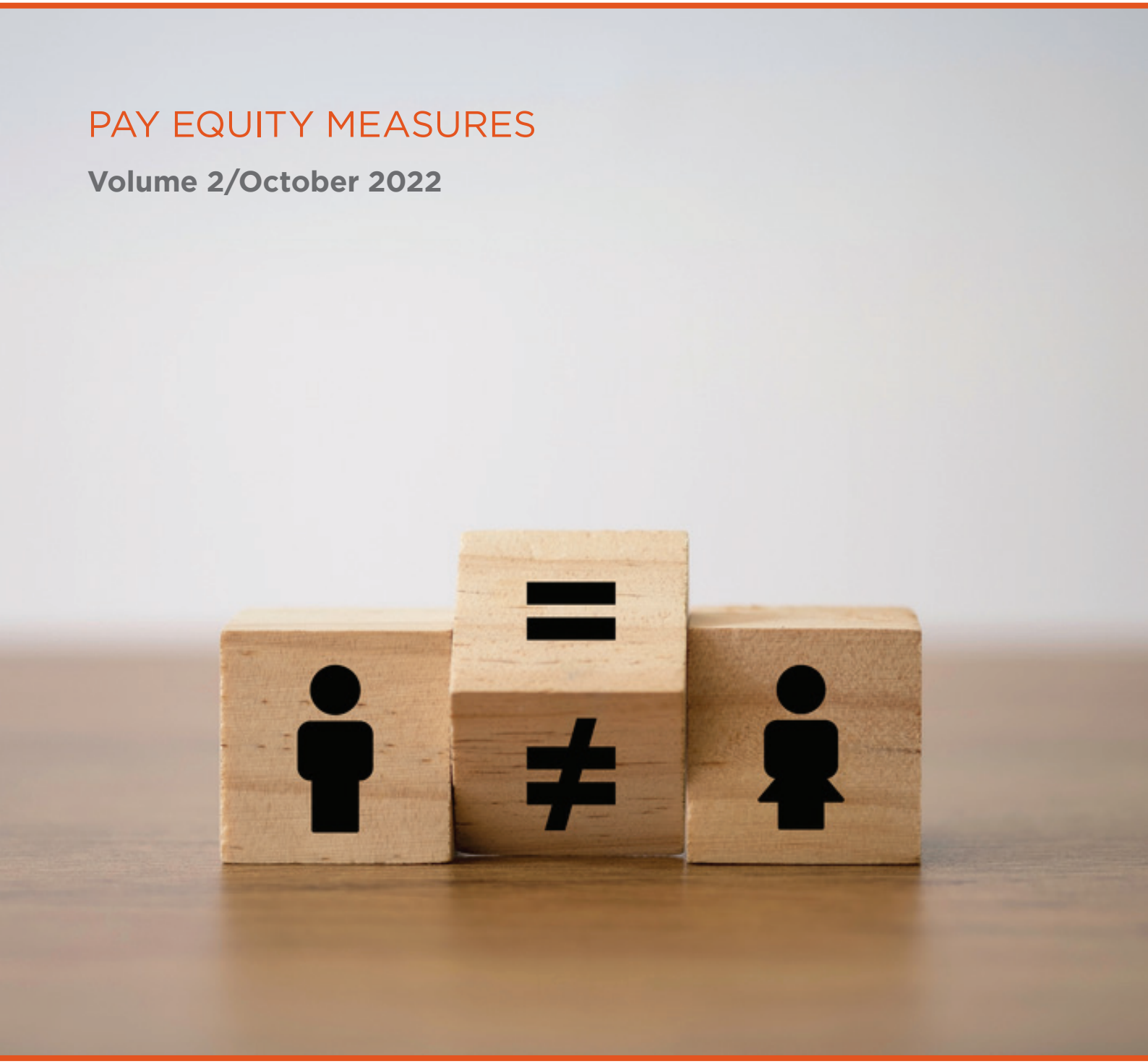

Australian Business Lawyers & Advisors

Content

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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 Bill, which focuses exclusively on those reforms 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 Bill significantly strengthens employees' rights to request flexible work arrangements with an overhaul of the existing regime, which will apply to all flexible work requests made six months after the Bill commences.

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 Bill proposes 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.

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 Bill proposes to introduce new workplace rights with respect to conditions of employment about rates of pay.

Firstly, all employees will 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 will 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 will be unlawful to include in a contract of employment or industrial instrument any clauses prohibiting persons from discussing their pay. Any such clauses are deemed invalid by the Bill and will have no effect.

Transitional provisions have been drafted so that existing contracts with pay secrecy clauses will not be 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 provisions. For existing contracts of employment that do not contain pay secrecy clauses, the new pay secrecy provisions will apply straight away.

All pay secrecy clauses in enterprise agreements (whether new or existing) will automatically have no effect after the Bill passes. No transitional period will apply.

Finally, six months after the Bill has passed, 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 will be 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 equity;
- 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 provisions 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 Bill also now:

- allows 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);
- requires 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); and
- enables 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

This Bill expands the existing provisions pertaining to sexual harassment and stop sexual harassment orders (available from the Fair Work Commission) in two key ways:

1. The Bill 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. The Bill 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.

Expanded anti-discrimination protections

The Bill adds 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 will mean 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), will now also cover breastfeeding, gender identity and intersex status.

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.

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