Australian Higher Education Industrial Association

Member Update

Industrial News

The *Secure Jobs and Better Pay* Bill 2022 ('Bill')

No doubt members will be closely following the progress of the Federal Government's *Secure Jobs and Better Pay Bill 2022* (**Bill**) since it was introduced into the House of Representatives last Thursday.

The Bill represents a significant shift from the balance between employers and employees enshrined in the original *Fair Work Act 2009* and poses major challenges to the continuity of "institutionally appropriate" employment arrangements in the Higher Education sector.

Key concerns for the Higher Education Sector

- The most contentious aspect of the Bill is the shift away from the primacy of single employer enterprise agreement making to ***single interest multi-employer agreement*** bargaining - with single interest multi-employer agreements likely to become widespread.

- Under ***the proposed Bill,*** Universities with enterprise agreements past their nominal expiry date will find it difficult to: (a) avoid being forced to bargain; (b) have agreements unilaterally arbitrated (see below), or (c) from being rolled into a single interest multi-employer agreement.

- Unions will be able to apply to the FWC to compel employers (including universities) to bargain along with other universities if they can establish *inter alia*:

    - The Employers have clearly identifiable "*common interests*", and

    - A "*majority*" of employees wish to be covered by the proposed multi-employer agreement

"Common interests"

- The common interest criteria appear to be very broad and likely to result in industry wide agreements. The Fair Work Commission is required to have regard to the geographical location of the enterprises, the regulatory regime applying to the enterprises, the nature of the enterprises, and the terms and conditions of employment in those enterprises.

"Majority of employees"

- ***To commence bargaining*** - , The majority of employees <u>from the targeted universities must "want to be covered" by the proposed multi employer agreement.</u>. NOTE: its not the majority of targeted universities, rather an overall majority of employees. This may result in employees of larger universities dragging smaller employers into bargaining multi-employer agreements, due to the fact that larger universities have more employees.

- ***Subsequent adding of universities to bargaining*** **-** once commenced unions can seek to add "common interest" universities to the bargaining process if *inter alia* a majority of employees in each of the new universities wishes to be covered by the proposed agreement.

- **Variations *to multi-employer agreements*** – once approved by the FWC, unions can subsequently seek to vary single stream multi-employer agreements to extend the coverage of the agreement to a new "common interest" university and its affected employees where this has the support of the majority of employees of the new university being added**.**

- **Unilateral arbitration / intractable bargaining disputes** - the Bill also gives power to the FWC to compel Universities to explore union claims in conciliation. Where there is an '*intractable dispute'* the FWC will step in to finalise outstanding and contentious aspects of agreements through workplace determinations. The effect of this avenue is that once bargaining has commenced only union endorsed multi-employer agreements will be put to employees.

  Under the Bill universities will lose their ability to go directly to staff to vote on a proposed enterprise agreement.

  Intractable disputes will be referred to the FWC for resolution and ultimately arbitration. The Bill brings 'unilateral arbitration' into enterprise bargaining, where union intransigence can effectively force outstanding claims to be arbitrated and imposed on all parties.

Other concerns include:

- Better of Overall Test (BOOT) - while the approval process is simplified, the sting in the tail is that the FWC can reconsider the BOOT post approval should any employee(s) claim they are worse off under the EA than the Award. This open-ended ability to reconsider agreements will create significant uncertainty for universities.

- Industrial action – may be taken where a majority of the employees proposed to be covered by the multi-employer agreement choose to do so. This means that employees at larger Universities may effectively expose smaller Universities to industrial action. Such industrial action may be taken on matters that are not relevant to your university or your staff and reflect the concerns of other universities.

- Fixed term employment – the Bill will limit fixed term contracts for the same role to two consecutive contracts or a maximum duration of two years, while preserving the legitimate use of fixed term contracts in certain limited circumstances. These limited circumstances are similar but by no means identical to the "HECE" provisions enshrined in both sector Modern Awards and in Sector Agreements. While the explanatory memorandum to the Bill states that its provisions would allow "…*existing sector specific arrangements in modern awards that regulate the use of fixed term contracts to remain in place…and the Bill would not seek to displace these…*" it is not clear at this time whether the specified limitations set out in the Bill will be read in conjunction with the HECE provisions or not. If they to read in conjunction this will provide further restriction and/or operational complications in respect of fixed term contracts exceeding two years. We are particularly concerned of the adverse impact on research fixed term opportunities (which are tied to fixed term research funding schema). Far from achieving its aim of enhancing job security it may perversely lead to universities reducing non casual employment opportunities.

- Termination of enterprise agreements - whilst our sector has only terminated one enterprise agreement in over two decades of EA making, the availability of this reserved avenue has had an important moderating effect on union bargaining behaviour. The Bill effectively removes this lever.

Further discussion of these concerns can be found in the Appendix (below)

So what does AHEIA say about the bill

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AHEIA is pushing back on amendments that would remove institutional autonomy and the managerial prerogative of our member universities. Considering the long-standing history of wall-to-wall enterprise agreement coverage in the sector providing excellent wages and conditions, AHEIA is strongly advocating to Canberra in both submissions and representations as follows:

- For the Higher Education sector be carved out of the multi-employer agreement provisions of the Bill,
- Call for additional time to enable appropriate sector consultation in respect of the impact of these far reaching changes.
- Convey our resistance to centralised industry level wage fixation.

In addition, AHEIA will further seek:

- Safeguards to ensure that further restrictions are not introduced to the already highly regulated fixed term categories in existence in higher education; and
- That the BOOT not be made capable of being reconsidered post approval of agreements.

Further updates to follow…

APPENDIX– Summary of key Bill provisions affecting Higher Education Sector

Multi employer bargaining

Currently multi-employer bargaining does not take place in higher education, however, it is proposed that access be greatly expanded via three streams:

- the "single-interest employer authorisation"
- the newly named "supported bargaining"
- the newly named "cooperative workplaces" [i]

The potential introduction of single-interest employer authorisation (multi-employer bargaining) will affect our members due to the following concerns:

- Unions may be able to obtain authorisation from the FWC forcing a university to bargain in good faith and in conjunction with other universities provided the FWC is satisfied *inter alia* that:
    - There is an identifiable "common interest" – which includes considerations as to geographical location, regulatory regime or the nature of the business, but is otherwise very broad. The FWC has a limited discretion if it considers that the authorisation is contrary to the public interest. However, no mention is made about whether the employers are competing against each other and accordingly should not be collectively bargaining on employment terms; and
    - A "majority" of employees wish to be covered. Of concern is that a "majority" in this context is a majority across all employers to be covered rather than a majority in each individual university. As a result, employees at a larger university may be able to compel a smaller university and its employees to be joined into the bargaining of a multi-employer agreement .
- Unions may gain authorisation to add subsequent "common interest" employer(s) to the bargaining of a multi-employer agreement where inter alia a majority of employees in each new employer wish to be covered.
- A university would only be exempted from bargaining and coverage whilst it has an enterprise agreement not yet passed its nominal expiry date.
- Post approval variation - once a single-interest employer agreement is approved unions can apply to the FWC to essentially "rope in" additional employers with "common interest" subject largely to the support of a majority of the employees in each additional employer.

Better Off Overall Test (BOOT)

- On the one hand the BOOT is to be revised so that the FWC may approve an agreement as long as employees are "globally better off".
- However, the sting in the tail is that the FWC will be able to consider post approval claims by employees of changed practices/unforeseen circumstances said to have arisen since the EA was approved.
- This latter reconsideration process post EA approval will cause uncertainty for employers and risks causing unnecessary disruption and additional workload and transaction costs.

Industrial action

- all industrial action must be taken within three 3 months from the date of declaration of PABO ballot results. Unions can seek additional PABO's at the end and further industrial action can occur. This will mean that the unions will need to continually agitate to extend the PABO if bargaining is not completed within three months.
- It appears that in the case of multi-employer agreements, the majority of employees that must vote in favour of the proposed industrial action means a majority of the total number of employees who participate in the ballot, and not a majority at each individual workplace affected.
- Employers may only take response action (lockouts) as long as if it starts and finishes within the three-month period.
- New compulsory FWC conciliation conference for parties during the protection action ballot period - the FWC gets involved when unions apply for a ballot and ahead of ensuing industrial action, exposing universities to potential further legal and opportunity costs.

Intractable Bargaining Declarations

- A major change is that the FWC now has broad powers to direct bargaining parties where a 'bargaining dispute" exists to participate in mediation, conciliation, or it may express an opinion about the matter in dispute.
- It may also issue an "*intractable bargaining declaration*" if it is satisfied that no reasonable prospect exists that the parties will reach agreement on outstanding matters. In doing so, it may either:
    - Provide a further period to the parties to negotiate and finalise outstanding matters, or
    - Move to finalise the agreement through arbitration and the making of a *workplace determination*. This form of unilateral arbitration may be imposed on employers in both single and multi-employer bargaining streams.

Termination of enterprise agreements

- In essence, this avenue is lost to universities as employers must be at risk of insolvency or there must be a real threat to the viability of business. Unlikely that any university would be able to establish this.

Restrictions on the use of fixed term employment

- Amendments seek to limit circumstances of fixed term employment for all National System employees to a range of HECE - like (but not identical) circumstances.
- It is not clear at this time whether the limitations set out in the Bill are to be read in conjunction with the Sector's existing HECE provisions or not. If this is the case, it may provide further restriction and/or operational complications regarding fixed term employment contracts.

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[i] **Supported bargaining**

- Aimed at feminised and low paid industry sectors, for example, Aged and Child Care , the supported bargaining stream essentially renames and expands upon the "low paid bargaining authorisations" already in the FW Act.
- This stream is not likely to be of relevance to our members.

Cooperative Workplaces Stream

- enables employees and employers to jointly apply to the FWC to have their enterprise joined to another existing co-operative workplace agreement.
- This stream is not likely to be of relevance to our members.