BRIEFING NOTE

Anti-Discrimination and Special Measures

14 February 2023, ***BN11***

New Anti-Discrimination Provisions – stronger protection from gender discrimination in the workplace

Introduction

Previously, the anti-discrimination provisions in the *Fair Work Act 2009 (Cth)* (**FW Act**) provided protection against discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (**existing protected attributes**). The FW Act did not protect workers against discrimination based on the protected attributes of breastfeeding, gender identity or intersex status, and was therefore inconsistent with the provisions of the *Sex Discrimination Act 1984* (Cth) (**SD Act**), which do protect against discrimination on these grounds. This meant that if adverse action, including termination of employment, was taken against workers based on those attributes, they were unable to challenge that through the Fair Work Commission (**FWC**).

The recently enacted *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**) amends the FW Act to include breastfeeding, gender identity and intersex status as protected attributes (**new protected attributes)** – meaning workers cannot be discriminated against because they have those attributes, and bringing the FW Act into alignment with the SD Act. The inclusion of these new protected attributes will enable the FWC to protect workers from discrimination on these grounds at work, and will flow through to several parts of the FW Act. Workers with the new protected attributes will be able to bring general protections complaints in the FWC, which may be cheaper and more accessible than seeking remedies under the SD Act. Modern awards and enterprise agreements will also not be able to discriminate against workers based on the new protected attributes, and the FWC will need to take into account the need to prevent and eliminate discrimination on these three grounds while performing its functions and exercising its powers. This will lead to better protection from discrimination in the workplace, and improve economic and job security for workers.

These changes do not affect existing avenues for complaints through the Australian Human Rights Commission or applicable state and territory anti-discrimination processes.

Commencement Date

These changes became operative on 7 December 2022. The changes relating to enterprise agreements apply to enterprise agreements made on and after 7 December 2022. The changes to s351 apply in relation to adverse action taken on and after 7 December 2022.[1]

Definitions

Definitions of breastfeeding, gender identity and intersex status are now included in s12 of the FW Act. Breastfeeding is defined to include an act of expressing milk, an act of breastfeeding, and breastfeeding over a period of time. Gender identity and intersex status have the meaning given to those terms by the SD Act.[2]

The definition of 'breastfeeding' is non-exhaustive and is modelled on subsections 7AA(3)–(4) of the SD Act. It is intended to cover the processes surrounding the expression of milk, including preparation to express milk and storage of milk.[3]

Modern awards and enterprise agreements must not include discriminatory terms

The new protected attributes have been added to the existing protected attributes in sections 153 (1) and 195 (1) of the FW Act, meaning that modern awards and enterprise agreements cannot include terms that discriminate against employees on the basis of breastfeeding, gender identity or intersex status, alongside the existing protected attributes. This is subject to the existing exceptions in those sections[4] that state a term of an award will not discriminate if the reason for the discrimination is the inherent requirements of the employee's position, if it discriminates in relation to the employment of someone employed in a religious institution in good faith and to avoid injury to the religious susceptibilities of adherents, or if the term provides for minimum wages for junior employees, employees with a disability, or employees to whom training arrangements apply.

The General Protections

The new protected attributes have been added to the existing protected attributes in section 351 (1), meaning an employer must not take adverse action against employees or prospective employees on the basis of breastfeeding, gender identity or intersex status, alongside the existing protected attributes. For example, if someone was denied employment, had their employment terminated or was treated unfairly because they were breastfeeding or expressing milk whilst at work, this is now unlawful under the FW Act and they can bring an application to the FWC.

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[1] FW Act Sch 1 Part 13 Div 7 cl 61.

[2] See section 4 of the SD Act: ***"gender identity"*** means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth; ***intersex status"*** means the status of having physical, hormonal or genetic features that are:

(a) neither wholly female nor wholly male; or
(b) a combination of female and male; or
(c) neither female nor male.

[3] Revised Explanatory Memorandum [547].

[4] See s153 (2) and (3); and s195 (2) and (3).

This is subject to the existing exceptions in s351 (2), which is that s351(1) does not apply to action that:

- is not unlawful under any anti-discrimination law in force in the place where the action was taken;
- is taken because of the inherent requirements of the employee's position; or
- is taken against an employee of a religious institution in good faith and to avoid injury to the religious susceptibilities of adherents.

The first exception means that a person needs to be covered either by a Commonwealth law or applicable State or Territory law for the protection to apply. Given the SD Act provides protection for the attributes of breastfeeding, gender identity and intersex status[5] at a federal level, the first exception should not apply in relation to the new protected attributes.

Unlawful termination

The new protected attributes have been added to the existing protected attributes in section 772 (1) (f), meaning an employer must not dismiss any employee for reasons including breastfeeding, gender identity or intersex status. This is subject to the existing exceptions in s772 (2) which provide that termination will not be unlawful where the reason is based on the inherent requirements of the position, or where the person is an employee of a religious institution and the termination is done in good faith and to avoid injury to the religious susceptibilities of adherents.

The unlawful termination provisions can be used by non-national system employees and all other employees who cannot use the general protections provisions - for example, where the particular protected attributed is not protected by anti-discrimination laws in force in the jurisdiction where the discrimination occurs. As an example, anti-discrimination legislation in New South Wales and South Australia does not protect against discrimination on the grounds of political opinion or religion, and there is no Commonwealth law which provides protection for these attributes either. This means national system employees in NSW and SA who allege they were terminated on either of those grounds would not be able to bring a general protections dismissal application under s365, but would be able to bring an unlawful termination application under s773.[6]

Matters the FWC must take into account in performance of its functions

The new protected attributes have been added to the existing protected attributes in section 578 (c), meaning that breastfeeding, gender identity and intersex status are protected attributes the FWC must now take into account when considering the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination.

Extension to state referral employees and employers

New Part 6-4D (consisting of new sections 789HA and 789HB) ensures that the amendments to add breastfeeding, gender identity and intersex status as protected attributes in the FW Act have constitutional support to apply in relation to employees and employers that are in the national system by virtue of the States' referrals of industrial relations power (**State referral employees and employers**). The extension of these amendments to state referral employers and

[5] See sections 5B, 5C and 7AA of the SD Act.
[6] McIntyre V Special Broadcasting Services Corporation t/a SBS Corporation [2015] FWC 6768

employees (and in the case of s351, action taken in a referring state), rely on the external affairs power as enlivened by the various Conventions listed in new s789A, in the case that the State referrals would not provide full support.[7]

New Special Measures Provisions – ability to achieve substantive equality through bargaining

Introduction

Prior to the SJBP Act, the FW Act limited the ability of workers and unions to achieve substantive equality in the workplace through bargaining due to the definitions of 'matters pertaining to the employment relationship' and 'discriminatory terms.'

The SJBP Act addresses these issues by confirming that 'special measures to achieve equality' are matters pertaining to the employment relationship and are therefore matters about which an enterprise agreement may be made. It also clarifies that 'special measures to achieve equality' are not discriminatory terms and therefore are not unlawful terms in an enterprise agreement. These changes are consistent with other anti-discrimination laws, which expressly exclude positive discrimination measures from the concept of unlawful discrimination, and will align the FW Act with those laws. There are special measures provisions in the *Racial Discrimination Act 1975* (Cth) (***RD Act***)[8], *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) *and the Age Discrimination Act* 2004 (Cth).

These changes remove existing uncertainties and doubt in the current laws and provide confirmation that parties can bargain for measures to achieve substantive equality. This will allow and encourage workers and employers to collectively negotiate and bargain for terms in enterprise agreements which will accelerate progress towards achieving substantive equality. This will hopefully accelerate equal treatment, representation and participation across workforces of employees with particular protected attributes or a combination of attributes.

What are special measures?

Special measures provide greater equality by supporting groups who face entrenched discrimination so they can have similar access to opportunities as others. Special measures do not require equal treatment – rather they compel unequal, more favourable treatment. They are class wide provisions that apply to all people specified in that class (for example, all women, all First Nations people, all parents).

A special measure has two features:

- it acts as an exclusion from direct discrimination laws,[9] and
- it permits positive steps to be taken towards achieving substantive equality (such as by redressing historical disadvantage and creating more favourable conditions or conferring benefits on attribute holders).

[7] See Revised Explanatory Memorandum [562] – [566]

[8] Case law regarding special measures under the RD Act includes: Gerhardy v Brown (1985) 159 CLR 70, 133 (Pitjantjatjara could not trespass on Pitjantjatjara land, but white man without permission could trespass); Bruch v Commonwealth [2002] FMCA 29, [51] – Abstudy; Vanstone v Clark [2007] FCA 519 – holder of office under ATSIC Act had to be ATSI; Maloney (2013) 252 CLR 168 – dry areas

[9] Mahoney (2013) 252 CLR 168 at [304], [327] – special measures are not an exception to discrimination law – they are an integral part of it.

Substantive equality is concerned with both equal outcomes and opportunities (as opposed to equality of treatment, which is largely blind to inequality of outcome). The concept of 'substantive equality' has no settled legal meaning, but includes at least a redistributive dimension (aims to redress disadvantage and historical disadvantage) and a transformative dimension (such as permitting the creation of rules for extraordinary treatment of those with a protected attribute).

Commencement Date

These changes became operative on 7 December 2022. The changes allowing for the inclusion of special measures in enterprise agreements apply in relation to enterprise agreements made on and after 7 December 2022.[10]

Definition

'Special measure to achieve equality' is defined in new subsections s195 (4)-(6). A term of an enterprise agreement will be a special measure to achieve equality if:

- the term has the purpose of achieving substantive equality for employees or prospective employees who have a particular protected attribute or a combination of protected attributes;[11] and
- a reasonable person would consider that the term is necessary in order to achieve substantive equality.[12]

A term of an enterprise agreement is to be treated as having the purpose of achieving substantive equality if it is solely for that purpose, or for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.[13]

A term ceases to be a special measure to achieve equality after substantive equality for the employees has been achieved.[14]

Because s195 (4) (a) talks about employees who have a particular protected attribute or combination of attributes, terms are able to address intersectionality – for example they could be terms aimed at achieving substantive equality for women with a disability, women with family responsibilities, First Nations Women, women of colour, and LGBTQI+ women.

Permitted matters

Section 172 (1) of the FW Act requires that an enterprise agreement be made about permitted matters, which includes matters pertaining to the relationship between the employer and its employees, matters pertaining to the relationship between the employer and unions, authorised wage deductions, and matters about how the agreement will operate. Terms in enterprise agreements that are not about a permitted matter are of no effect.

This generally means that any term in an agreement needs to be expressly linked to an employee's terms and conditions of employment, and prior to the SJBP Act, clauses that specified broader aspirations, actions and goals (such as gender equality, or closing the gender

[10] FW Act Sch 1 Part 13 Div 7 cl 61.
[11] S195 (4) (a)
[12] S195 (4) (b)
[13] S195 (5)
[14] S195 (6)

pay gap) may not have been permissible if they were not sufficiently linked to other employment terms and conditions, or if they were not linked to procedural requirements such as an obligation to consult with workers in respect to those aims and goals. Under the previous provisions of the FW Act, there was doubt about whether measures to achieve equality were permitted matters for enterprise agreements, and whether they were or not would depend on the specific wording of the proposed term.

For example, the decision by the Full Bench of the FWC in *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* [2016] FWCFB 2894 found that gender quotas in relation to the number of applications to be considered for acceptance by an employer at the beginning of a selection process was not a matter pertaining to the employment relationship.

The SJBP Act removes this doubt and uncertainty by providing that the matters pertaining to the employment in s172(1)(a) include special measures to achieve equality,[15] and are therefore matters about which an enterprise agreement may be made.

Discriminatory terms

The FW Act requires that before approving an enterprise agreement, the FWC must ensure that the agreement does not include unlawful terms, which includes discriminatory terms. Section 195 of the FW Act states that a discriminatory term is a term that "discriminates" against an employee because of a protected attribute.

Prior to the SJBP Act, this meant that positive discrimination in order to achieve substantive equality would likely have been considered a discriminatory term. For example, clauses in an enterprise agreement regarding affirmative action measures that offered a set number of positions to women, or that provided for a higher rate of pay or superannuation to be paid to female employees to combat the gender pay gap across their industry, would likely have been unlawful as they discriminated against people who are not female.

The SJBP Act changes this by providing that a term of an enterprise agreement does not discriminate against an employee if the term is a special measure to achieve equality, to the extent that action that may be taken because of the term is not unlawful any anti-discrimination law in force in a place where the action occurs.[16]

Examples of special measures

Some examples of special measures that are commonplace are: older employees receiving longer notice of termination, women's only leadership training, parking spots for people with disabilities, and special allowance for Aboriginal and Torres Strait Islander employees to undertake further study.

Below are some examples of special measures that workers and unions could seek to include in enterprise agreements to achieve equality (note however that each would require additional consideration and would be dependent on the particular circumstances):

- women being paid a percentage amount more than men (eg 10%) in wages and/or superannuation until the gender pay gap in the enterprise is closed;

[15] S172A FW Act
[16] S195 (2) (c)

- People with family and caring responsibilities being able to work a different roster to other employees;[17]
- quotas for the amount of First Nations people to be hired to fill specific roles;
- Implementing a disability equality action plan and measuring progress against that plan;
- Sharing the results of pay gap reporting with workers and undertaking equal pay audits, including for discretionary pay such as bonuses;
- Introducing gender neutral job classification and evaluation systems which determine the value of job classes within an organisation, and correct for the historic undervaluation of female-dominated jobs; and
- Implementing gender neutral evaluation criteria for career progression, such as specific conditions for women returning from parental leave to compensate for career and wage progression breaks, to reduce the gender pay gap in discretionary pay and ensure women are not losing out on the basis of performance criteria such as 'work attendance' which don't acknowledge that women spend less time in paid work than men.

Making the most of new laws

The laws relating to anti-discrimination and special measures have now changed significantly. However, changing the words of the FW Act isn't the end of the story. The true application of the new legislative provisions will not be fully determined until they have been tested by the FWC. The union movement must selects and runs cases which support our preferred interpretation of the legislation and defend against cases which do not. Making sure that we run the best "test cases" to make sure the laws are operating for working people will require careful co-ordination and information sharing across the union movement.

Some of the key questions of interpretation that will be tested in early cases include:

- The interpretation of s195(4)(b), which requires that in order for a term to be a special measure to achieve equality, 'a reasonable person would consider that the term is necessary in order to achieve substantive equality'. Whilst this appears to be a high bar potentially raising complex issues of how parties can prove that a measure is necessary to achieve equality, the High Court has found that a small measure that goes part of the way to achieve substantive equality is sufficient.[18]
- The interpretation of s195(6) which provides that a term of an enterprise agreement ceases to be a special measure to achieve equality after substantive equality for the particular employees has been achieved. Substantive equality has no settled legal definition but contains redistributive and transformative elements. S195(6) is based upon provisions in the RD Act and reflects the principle that you can't have a special measure once substantive equality has been achieved. How exactly this is measured, and what comparisons it may require with other groups of employees, is unclear. In *Gerhady v*

[17] See London Underground Limited v Edwards (No.2) Court of Appeal 21 May 1998. The employer employed 2000 train drivers, 21 of which were women. One was a single mother. A new roster system was introduced which required all train drivers to work long hours. All drivers, bar Edwards herself, could comply with the new roster. A special measure would include that single parents could work a different roster.

[18] Gerhady v Brown (1985) CLR 70. The High Court found that excluding non-Pitjantjatjara people from Pitjantjatjara land was necessary for the purpose of promoting and taking a step towards substantive equality.

Brown, the High Court found that the special measures may need to continue indefinitely if they were to preserve and protect the culture of the Pitjantjatjara peoples. Justice Mason said:

"[This] is a question which can only be answered in the fullness of time and in the light of the future development of the Pitjantjatjara peoples and their culture. The fact that it may prove necessary to continue the regime indefinitely does not involve an infringement of the proviso. What it requires is a discontinuance of the special measures after achievement of the objects for which they were taken. It does not insist on discontinuance if discontinuance will bring about a failure of the objects which justify the taking of special measures in the first place."[19] [i]*s*

[i] *The information in this document does not constitute legal advice and should not be taken to include all requirements or obligations relevant to the entitlement.*

[19] Gerhady v Brown (1985) CLR 70 [498]