Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023

On 29 March 2023, the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023* (**PWE Bill**) was introduced into Parliament by Labor. The summary of the changes in the Bill are set out in the table below.

Summary	Explanation of the change
Unpaid Parental Leave (UPL) in the National Employment Standards (NES)	
The PWE Bill makes various changes to add flexibility to the UPL entitlement in the NES	• The changes to the UPL entitlement in the NES in the PWE Bill are in relation to flexible UPL days, the commencement of UPL, the removal of the employee couple concept, and other minor changes. **Flexible UPL days** • Currently, employees have access to up to 30 days as flexible UPL days. The PWE Bill increases this to 100 flexible UPL days (or a higher number as prescribed by the FW Regulations to align with Labor's plans to continue to increase government paid parental leave entitlements to 26 weeks' PPL). • The intention of flexible UPL days is to facilitate a gradual return to work or assist parents to share caring responsibilities. • Flexible UPL days must be taken before or after the continuous UPL period (and cannot be taken during the continuous UPL period). Pregnant employees can take flexible UPL during the 6 week period before the birth of the child and this is deducted from their overall entitlement to flexible UPL. The PWE Bill allows these flexible UPL days to be taken in multiple blocks of one or more days. • Flexible UPL days are not intended to facilitate part-time employment or be a flexible work arrangement. Rather, employees are accessing a leave entitlement to assist them either before or after the continuous UPL period. • The notice that must be given by the employee ten weeks (or as soon as practicable) before commencing UPL must include the start and end dates of the continuous UPL period, as well as the total number of flexible UPL days that the employee intends to take. The employee must then confirm the start and end dates of the continuous UPL period and the date on which they intend to take flexible UPL at least 4 weeks before the start of each of those periods (or as soon as practicable). **Commencement of the UPL period** • Currently, the UPL must not start later than the date of birth or the date of placement of the child. The PWE Bill will allow employees to commence unpaid parental leave at any time in the 24 months following the birth of the child or the placement of the child. **Employee couples** • The PWE Bill removes the provisions relating to employee couples. For instance, the PWE Bill allows all employees to take up to 12 months UPL (and make a further request for 12 months UPL) regardless of how much leave their spouse or partner takes, up to a total of 24 months each. This means that both members of an employee couple could take UPL at the same time.

Summary	Explanation of the change
	Other minor changes • The PWE Bill changes 'unpaid special maternity leave' to be 'unpaid special parental leave', 'maternity leave' to 'parental leave', and makes other amendments to the UPL provisions to use gender-neutral language.
Permitted deductions	

Allowing employers and employees to agree to multiple deductions or ongoing deductions from their pay provided those deductions are principally for the employee's benefit	• There are various types of permitted deductions that may be made from an employee's pay under section 324. The first of these is where the deduction is authorised in writing by the employee and is principally for the employee's benefit, as long as the amount of the deduction is specified in the authorisation. The authorisation can be withdrawn in writing by the employee at any time.
	• The purpose of the changes in the PWE Bill is to reduce the administrative burden on employers in relation to permitted deductions of this type, where multiple deductions are made, or deductions are made on an ongoing basis.
	• Under the PWE Bill, employers can agree with employees in a written authorisation to make regular deductions for amounts that vary from time to time provided that the deduction is principally for the employee's benefit (rather than making an agreement on each occasion). Any written authorisation must specify:
	  • either (1) for a single deduction – the amount of the deduction, or (2) for multiple or ongoing deductions – whether the deductions are for a specified amount(s) or amounts as varied from time to time; and
	  • any information prescribed by the *Fair Work Regulations* (Cth) (**FW Regulations**) (which are not in the FW Regulations at this stage).
	• Despite the above changes, the general rule is that a deduction cannot be made for an amount that may vary from time to time where it is directly and indirectly for the benefit of the employer (or a related party). For example, a direct benefit is where the deduction is being paid directly to the employer, and an indirect benefit is where the deduction is paid to a subsidiary or related company of the employer.
	• The only exception to the general rule is where the deduction is reasonable under the FW Regulations. Currently, the FW Regulations provide that the following deductions are reasonable:
	  • a deduction where the employer (or a related party) provides goods or services to an employee in the ordinary course of the employer's business on the same terms or more favourable terms as those goods or services are provided to the general public (e.g. a health insurer offering health insurance);
	  • a deduction where the purpose is to recover costs directly incurred by the employer as a result of the employee's voluntary private use of the employer's property that is authorised or unauthorised (e.g. the cost of petrol purchased by the employee for the private use of a company vehicle).

Summary	Explanation of the change
	• Where employers made authorisations with employees prior to the PWE Bill commencing that sought to authorise multiple and ongoing deductions, the PWE Bill does allow for these to be retrospectively permitted deductions in limited circumstances where the safeguards outlined in section 90 apply.
Superannuation	

Introducing superannuation as part of the NES	• The PWE Bill introduces superannuation as a NES entitlement. The new obligation in section 116B of the FW Act requires employers to make contributions to superannuation funds for the benefit of the employee to avoid liability to pay the superannuation guarantee charge (**SGC**) under superannuation legislation in relation to an employee. All of the rules, requirements and exemptions in relation to this obligation remain in superannuation legislation.
	• The intent of this change is to introduce an additional mechanism where employees, unions or the FWO could recover unpaid superannuation. The change is intended to complement, not replace, the ATO's broad regulatory powers to recover SGC amounts where there is a superannuation guarantee shortfall. Labor has publicly stated that the ATO will remain the principal regulator in relation to superannuation.
	• The above NES entitlement does not apply to:
	  • the recovery of superannuation contributions above the SGC percentage (currently 10.5%);
	  • national system employers and employees who are only national system employers and employees due to a State's referral of power to the Commonwealth (as the referral only included superannuation to a limited extent); and
	  • deemed employees under superannuation legislation (e.g. certain types of contractors).
	• If the employer contravenes the NES entitlement, it could be subject to civil penalties and Courts can also make other orders such as compensation to their superannuation fund (rather than to the employee directly unless exceptional circumstances apply). An employee would not be able to pursue unpaid superannuation through the Courts where the ATO has commenced its own proceedings in relation to the unpaid superannuation (but would be able to pursue the unpaid superannuation where the ATO has used other enforcement activity other than court proceedings, or the proceedings were discontinued before a final order was made).
	• Amendments are also proposed to the *Fair Work Act 2009* (Cth) (**FW Act**) to clarify that an employer does not contravene a modern award if they elect to pay the SGC as it is entitled to do under superannuation legislation.

Summary	Explanation of the change
Workplace determinations	
The PWE Bill clarifies that an earlier EA is replaced by a later workplace determination	• The PWE Bill clarifies what happens to an earlier enterprise agreement (**EA**) that is replaced by a workplace determination. • Where the earlier EA applies to an employee in relation to particular employment and a workplace determination covers the employee in relation to the same employment, the earlier EA ceases to apply to the employee in relation to the employment, and can never so apply again.
Casual employees' long service leave (LSL) in the black coal mining industry	

Amendments aimed at ensuring casual employees are not treated less favourably than full-time or part-time employees	• The PWE Bill is intended to ensure that casual employees are not treated less favourably than full-time or part-time employees by:
	  • ensuring the casual loading is included in the calculation of the levy calculation and the payment for an employee's LSL entitlement;
	  • ensuring that week's where a casual employee does not work due to specific rostering arrangements are periods of qualifying service, and including a rule making power to allow for sufficient flexibility should it become apparent other non-rostered weeks should also be prescribed as qualifying service;
	  • changing the method of calculating a casual employee's working hours per week so that they more closely align to their actual working hours (i.e. the lesser of 35 hours per week, or the number of hours worked out under another calculation outlined in the PWE Bill).
	• There are also new provisions that provide for forms for employers to use to make returns to the Coal Mining Industry (LSL Funding) Corporation that are in a legislative instrument.

Protections for migrant workers	
Amendments aimed at ensuring migrant workers have access to the protections in the FW Act regardless of their immigration status	• The PWE Bill clarifies that a breach of the *Migration Act 1958* (Cth) (**Migration Act**) or any instrument made under that legislation, does not affect the validity of a contract of employment or contract for services. • The intention of this amendment is to ensure that migrant workers (including temporary migrant workers) working in Australia would have access to the protections in the FW Act regardless of their immigration status. For example, it is intended to preserve the rights a migrant worker has under the FW Act, even if they have contravened a condition of their visa or the Migration Act, or are no longer entitled to remain in Australia under a visa.