

PARLIAMENT APPROVES FAIR WORK BILL

On Friday 20th March the Australian Senate voted to pass the government's Fair Work Bill. There were some technical amendments and last minute negotiations on the definition of small business however, the Bill has largely been passed intact. Employment regulation in Australia is once again about to be comprehensively altered.

The changes to be introduced under the Fair Work Act have been analysed in previous editions of Employee Relations MONTHLY but it is worth reminding readers of the key changes.

Unfair dismissal and enterprise bargaining

Firstly, the changes under the Fair Work Act build upon the foundations of the *Transition to Forward with Fairness Act 2008*. The changes will be introduced in two phases commencing with the reintroduction of unfair dismissal laws and new arrangements for the making of enterprise agreements on 1 July 2009.

As expected the proposed changes to unfair dismissal laws open up the system to all employees, although an employer of less than fifteen *effective full-time* employees will be classified as a small business and required to comply with a different set of rules – the Small Business Fair Dismissal Code. Otherwise the wide discretion given to arbitrators to determine whether an employee has been 'unfairly' dismissed will once again apply.

Genuine operational reasons for a dismissal, i.e. reasons of an economic, technological, structural or similar nature related to the employer's business, are no longer acceptable grounds to quash an application of unfair dismissal. The consideration of whether or not a dismissal has been harsh, unjust or unreasonable will largely be limited to:

- The validity of the reason for dismissal based on the conduct or capacity of the person;
- Whether the person was warned about the performance or conduct;
- The opportunity to respond to the allegations

- The impact of the size of the employer's business and their access to expertise in human resource management; and
- The participation of a support person or representative for the dismissed employee.

Redundancy will not be considered unfair dismissal unless the employee could reasonably have been re-deployed within the organisation or a related entity. This is a new dimension to the law of dismissal and a potential trap for the uninformed employer.

Employees of a small business must have been employed at least 12 months before qualifying to make an application of unfair dismissal. All other employees must have been employed at least six months. The other exclusions currently under the law will continue to apply.

New rules regulating the negotiation and making of enterprise agreements will also commence on 1 July 2009. Good faith bargaining, a concept new to Australian employment law may force many reluctant employers to the bargaining table. Fair Work Australia will have power to order ballots of employees to assess their interest in collective bargaining and it may issue orders requiring an employer to meet confer and disclose information relevant to making an enterprise agreement.

The employer and employee collective agreement option will no longer exist. Unions will be the default bargaining representative in all negotiations for an enterprise agreement.

Agreements may include a wider range of subject matter than allowed under current laws. For example, payroll deduction of union fees and trade union training leave.

Agreements will not be approved unless they pass either the 'No disadvantage test' or from 1 January 2010, the 'Better off overall test'.

National employment standards

On 1 January 2010 the ten National Employment Standards prescribed in the Fair Work Act will apply to all employees in Australia. They are:

- Maximum of 38 ordinary hours of work per week.
- **Flexible work arrangements** for employee with pre-school age or disabled children to request changes to their working conditions to assist them to care for the child.

- **Parental leave** remains at 52 weeks unpaid but may be extended 104 weeks by agreement with the employer.
- Four weeks of **annual leave** and five weeks for regular shift workers.

The entitlement to cash-out annual leave has been amended to require only that an employee has as an accrued balance of annual leave of at least four weeks after cashing out leave. Modernised awards may include provisions to allow for cashing out of annual leave.

- **Personal and carers leave** entitlements will largely remain unchanged. An employee is entitled to ten days paid personal/carers leave in the event that person is ill and unfit for work or where they are required to care and support an immediate family member who is ill. The employee will also be entitled to 2 days unpaid carers leave and 2 days paid compassionate leave upon the death or serious illness of immediate family members.

An award free employee may agree with their employer to cash-out accrued paid leave as long as they maintain a balance of at least 15 days paid leave. Modern awards may include provisions to allow cashing out of personal and carers leave.

- **Community service leave** is an unspecified and unpaid period of absence to perform
 - jury service
 - a voluntary emergency management activity such as volunteer fire fighting, or
 - an activity prescribed in regulations

An employer must pay an employee absent on jury duty their ordinary rate of pay for a maximum of ten days absence.

- All employees are entitled to **long service leave** in accordance with applicable awards, agreements or State legislation.
- An employee is entitled to be absent from his or her employment on a day or part-day that is a **public holiday** in the place where the employee is based for work purposes. However, an employer may request that the employee work on the public holiday but the employee may refuse if the request is not reasonable.

The following days are public holidays

- New years day
- Australia day
- Good Friday

- Easter Monday
- ANZAC day
- Queen's Birthday
- Christmas day
- Boxing day
- Any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.

- The **notice period for termination of employment** remains unchanged. It is sliding scale based on period of continuous service up to a maximum of 4 weeks after 5 or years of continuous service.

Redundancy payments of up to 16 weeks pay will be introduced for all employers except small businesses that employ less than fifteen employees.

- A '**Fair work information statement**' published by Fair Work Australia must be provided to new employees as soon as practical after they commence employment. The statement must contain information on the national employment standards, modern awards, making agreements, the right to freedom of association and the role of the Workplace Authority and Ombudsman.

Modern awards

On 1 January 2010 'modernised' federal awards will commence operation. The modern awards will cover employers and employees according to industry or occupation. The awards will apply to constitutional corporations and their employees Australia wide. A nurse employed in Darwin will be paid the same rate of pay as a nurse performing the same duties in Melbourne, unless they are employed pursuant to the terms of an enterprise agreement.

Modern awards are intended to complement the national employment standards with ten conditions covering the following:

- (1) Minimum wages—including skill-based classifications and career structures, incentive based payments and bonuses, wage rates and other arrangements for apprentices and trainees;

- (2) The type of work performed—for example whether an employee is permanent or casual, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities, including part time employment and job sharing;
- (3) Arrangements for when work is performed—including hours of work, rostering, rest breaks and meal breaks;
- (4) Overtime rates for employees working long hours;
- (5) Penalty rates for employees working unsocial, irregular or unpredictable hours, on weekends or public holidays, and as shift workers;
- (6) Provisions for minimum annualised wage or salary arrangements that have regard to the patterns of work in an occupation, industry or enterprise as an alternative to the payment of penalty rates, with appropriate safeguards to ensure individual employees are not disadvantaged;
- (7) Allowances including reimbursement of expenses, higher duties and disability-based payments;
- (8) Leave, leave loadings and the arrangements for taking leave;
- (9) Superannuation;
- (10) Consultation, representation and dispute settling procedures.

The modern award together with the national employment standards will be known as the National safety net of terms and conditions.

The transition to this new set of national modern awards may take up to five years for existing employers and employees.

Award flexibility agreements

The Australian Industrial Relations Commission has developed a model 'award flexibility' clause (cited in (2) above) to be inserted in all modern awards.

In summary, the clause allows an employer and an individual employee to agree to vary the application of certain terms of the award such as overtime, penalty rates, work hours and allowances to meet the genuine individual needs of the employer and the individual employee. However, the agreements will be strictly regulated to ensure that the employee is better off overall.

Such agreements are unlikely to be a significant benefit to employers and may be terminated by either party with notice of four weeks.

Fair Work (Transitional provisions and consequential amendments) Bill

The Australian government has introduced into Parliament a Bill to deal with the transition from the current set of employment laws to the full implementation of its Fair Work Act on 1 January 2010 and beyond. In particular, the Bill proposes that Australian Workplace Agreements, certified agreements and collective agreements made under Work choices will continue in force until replaced by an enterprise agreement or otherwise terminated by the parties. However, the national employment standards will apply to all employees including those under such agreements. The Bill also establishes the interim arrangements for approval of agreements prior to the commencement of the national employment standards, modern awards and the definition of a small business for the next two years. The Bill will be debated when the parliament resumes on 25 May 2009.

Getting ready for 1 July 2009

The two most important tasks that employers must perform before 1 July 2009 are:

- (1) Deciding whether to make and lodge a workplace agreement, and
- (2) Establishing clear performance expectations of employees and reviewing the organisational structure.

Employers that are used to bargaining directly with employees through the use of either collective employee agreements, AWA or ITEA should negotiate and lodge replacement agreements as soon as possible. After 30 June this year this option will cease and you will be required to negotiate with the relevant union or unions.

If you are content to remain under an award then continue to do so as the changes under award modernisation will not commence until 1 January 2010 and are likely to be phased in over five years. If you are not covered by an award then you will be from 1 January 2010. Seek advice on how this is going to impact on your business. This is particularly important for businesses that operate in industries that trade on evenings and weekends or rely upon overtime. Penalty rates under the modern awards will increase costs to your business.

The decision to establish clear work performance expectations, reorganisation of staffing levels and *moving on* employees that are underperforming is important if you wish to minimise the risk of additional costs to your business.

Notwithstanding the best intentions in the world, the reintroduction of unfair dismissal laws will make it much more difficult to maintain a flexible and productive team of employees. The cost of terminating employment will go up on 1 July and therefore the hard decisions should be made now.

Please contact [Paul Maguire](#) to discuss your circumstances and to develop a strategy to suit your business.

Productivity Commission enquiry into executive remuneration

The Treasurer, Wayne Swan, has also announced that the Productivity Commission, headed by former competition regulator Professor Allan Fels, will initiate a broad-ranging general inquiry into remuneration of directors and executives. The regulatory framework is to be examined only as it applies to companies which are disclosing entities under the Corporations Act 2001. The terms of reference include such matters as:

- trends in the amount of remuneration packages as well as the type of remuneration paid, including the role of equity-based payments and non-recourse loans;
- the role of all stakeholders, including boards, executives and shareholders, in developing and approving remuneration packages;
- the function of remuneration consultants, including the possibility of conflicts of interest;
- the impact of the presence of large local institutional shareholders (such as superannuation funds) and the prevalence of retail shareholders;
- the relationship between remuneration packages and corporate performance; and
- any mechanisms that would better align the interests of boards and executives with those of their shareholders and the wider community.

The Commission will release a timetable for an issues paper, public hearings and submissions from the public within two weeks. All interested parties are invited to make submissions. The final report of the Commission will be tabled within nine months.

[\[More\]](#)



New in 2009

The industrial relations landscape is set to change and all employers will have to manage employment obligations under a new, tougher regulatory environment in 2009.

Therefore Maguire Consulting is pleased to announce a new specialist advice service created specifically for employers that unravels the complexity of employment regulation in Australia and enables you to easily comply with your legal obligations.

The employee relations online subscription service covers all employee relations issues including: industry pay rates, award conditions, leave and holidays, workplace agreements, termination of employment, employee tax and superannuation, health and safety.

Subscribers receive exclusive access to:

- fact sheets explaining employers' obligations under Australian employment laws
- downloadable guides, checklists, model policies, procedures and templates to apply in their own business
- a 1300 priority telephone line and e-mail access to expert advice
- regular updates and bulletins explaining changes to pay rates, award conditions, employment standards and state and federal laws.

Who should subscribe?

Employee relations online is tailored exclusively to employers and their industry groups.

Employment services businesses can access employee relations online now. Other industries will come online as interest arises.

Visit employeerelationsonline.com.au and take the tour. If the service interests you contact us and we will see how best employee relations online can be tailored to your needs.

Contact info@employeerelationsonline.com.au

Golden handshakes and corporate executives

Australian company law allows termination payments of up to seven times gross annual remuneration to be paid to departing directors before shareholder approval is required. The Australian government is proposing three key changes to the threshold for shareholder approval, namely:

- (1) reduction from a maximum of seven times annual pay to one year's pay;
- (2) shrinking the basis of the calculation from total remuneration to base salary;
- (3) extension of the new rules to all executives named in company remuneration reports.

What does this mean for employers?

According to Landers and Rogers Solicitors, if the Government's proposals are passed into law, termination payments made to departing company executives will become subject to shareholder approval where they exceed one year's base salary. Shareholder approval will most likely have to be sought whilst the contract is being negotiated between the company and the prospective executive/director. However, payments made under existing contracts will not be affected.

AROUND THE STATES - What's making news in State jurisdictions?

New South Wales

Boxing day holiday 2009

The NSW Government recently announced that the Boxing Day public holiday for 2009 is Monday 28 December.

[\[More\]](#)

IR Workshops for 2009

The NSW Office of Industrial Relations has published the calendar of workshops for the first half of 2009. The Office offers a range of free and paid practical workshops designed to help employers understand their obligations and apply good employment practices.

[\[More\]](#)

Victoria

Family responsibilities guidelines

Changes to Victoria's Equal Opportunity Act mean that employers must consider seriously any request for flexible work arrangements from staff members who have children or people who depend on them for care. Working part-time, job sharing, working from home, or starting and finishing earlier or later are all examples of flexible work arrangements.

The new laws came into effect on 1 September 2008. Read and download the guidelines.

[\[More\]](#)

Queensland

Easter and Labour Day

Some of the most frequently asked questions on public holidays, holiday general entitlements and trading hour's issues for South Australia are explained.

[\[More\]](#)

Western Australia

Employing Someone – An easy guide for small business

A new publication is available from Department of Commerce that may be of interest.

[\[More\]](#)

South Australia

The Occupational Health, Safety and Welfare Miscellaneous Amendment Bill 2009

The Minister for Industrial Relations, Hon Paul Caica MP, has requested that SafeWork SA undertake a community consultation on five occupational health, safety and welfare initiatives.

To facilitate this process, a Consultation Bill that addresses potential amendments to the Occupational Health Safety and Welfare Act 1986 (the OHSW Act) and the Criminal Law (Sentencing) Act 1988 (the Sentencing Act) has been drafted for community consideration.

[\[More\]](#)