

HOLD ONTO YOUR HATS – THE FAIR WORK BILL TURNS EMPLOYEE RELATIONS LAW ON ITS HEAD ... AGAIN

The Fair Work Bill, introduced into the Australian Parliament on 25 November sets the scene for a radical overhaul of employment regulation in Australia in 2009 and 2010. The Bill amends virtually every aspect of the Workchoices laws.

Most of the proposed amendments were included in the government's election policy '*Forward with fairness*' and therefore expected. However, key aspects of the Bill propose changes far greater than that suggested under the pre-election policy. If the Bill is passed into law without amendment Australian employers will be facing the most inflexible, highly regulated and union friendly law since the Accord with the Hawke government prior to 1993.

The National Safety Net

Firstly, the ten National Employment Standards, together with the ten conditions prescribed within modernised awards, will form the minimum safety net of terms and conditions. No surprise there. Employer's will not be able to deviate from this safety net unless the employee or employees are '*better off overall*' under either an enterprise agreement or an individual flexibility agreement. Individual flexibility arrangements under modern awards and enterprise agreements are designed to accommodate the needs of employees or very short-term adjustments to meet fluctuations in business operations. However, any agreed flexibility arrangement must ensure the employee is better off overall and may be terminated with four weeks' notice.

The **maximum number of ordinary hours** of work per week is 38. Under Workchoices the maximum hours could be achieved through averaging ordinary hours over twelve months but employers will be restricted under the Fair Work Bill to averaging the hours only in accordance with the terms of the applicable modern award or if the employee is not covered by an award, over 26 weeks.

The introduction of a '**Flexible work arrangement**' standard means that any employee with pre-school age children will have the right to request changes to

their working conditions to assist them to care for the child. The right to request is subject to a qualifying period of employment of twelve months and the employer may only refuse on '*reasonable business grounds*' and the reasons must be provided to the employee in writing.

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. This would seem to benefit only those employees that delay or do not take leave as it accrues.

Similarly with **personal and carers leave**, an 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.

All employers will be required to pay employees a maximum ten days ordinary pay when they perform **jury duty**.

Redundancy 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.

The terms of the modern awards are currently taking shape but we will have to wait at least until next year to view the final model and consider their impact as part of the national safety net. (*See Employee Relations MONTHLY June 2008 for a commentary on the award modernisation process currently underway*).

The National Employment Standards will commence operation on 1 January 2010 with the advent of the modernised awards.

Enterprise agreements

The following types of agreements may be made under the proposed law. All are collective agreements:

- Single enterprise
- Multi-employer
- Greenfields
- Single interest employers

The single interest employer agreement is a new concept and is distinguished from the multi-employer form of agreement in that it applies to two or more employers that are:

- (a) engaged in a joint venture or common enterprise; or
- (b) related bodies corporate; or
- (c) specified in a single interest employer authorisation that is in operation in relation to the proposed enterprise agreement concerned.

The Second Reading Speech introducing the Bill into the Parliament suggests that such an agreement could be used for franchisees or employers that substantial public funding.

Content of agreements

Employers, employee and unions may make agreements that are about:

- matters pertaining to the relationship between an employer;
- matters pertaining to the relationship between the employer and the employee organisation or employee organisations, that will be covered by the agreement;
- deductions from wages for any purpose authorised by an employee who will be covered by the agreement; and
- how the agreement will operate.

Enterprise agreements must include an individual flexibility clause to enable the employer and individual employees to *'... vary the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer.'*

Enterprise agreements must also contain a clause that *'...requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about major workplace changes that are likely to have a significant effect on the employees; and allows for the representation of those employees for the purposes of that consultation.'*

'Better off overall' test

The most radical alterations to employment regulation occur in the arrangements for enterprise agreements.

A subtle but significant alteration is in the application of the statutory test to approve the content of agreements. Commencing on 1 July 2009 it will no longer be sufficient to make an agreement that on

balance does not disadvantage employees in comparison to an applicable award. The agreement must place the employees *better off* than they were under the applicable award. How much better off and in what manner is not entirely clear? The Bill describes the test as follows:

"An enterprise agreement ... passes the better off overall test under this section if Fair Work Australia is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee." (Clause 193)

Bargaining representatives

Enterprise agreements may be made by employers and employees and employee organisations (registered trade unions). However, the negotiation of agreements must be conducted by the *'bargaining representatives.'*

Bargaining representatives may be the employer and the individual employees if they choose to appoint themselves. However, if an employee is a union member and does not appoint an alternative representative the union will automatically become the bargaining representative for that employee.

Employers must not refuse to recognise or bargain with a bargaining representative.

Good faith bargaining

The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:

- (a) attend, and participate in, meetings at reasonable times;
- (b) disclose relevant information (other than confidential or commercially sensitive information) in a timely manner;
- (c) respond to proposals made by other bargaining representatives for the agreement in a timely manner;
- (d) give genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
- (e) refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.

The good faith bargaining requirements do not require a bargaining representative to

- (a) make concessions during bargaining for the agreement; or
- (b) reach agreement on the terms that are to be included in the agreement.

Fair Work Australia will have very broad power to make orders to facilitate bargaining including orders that require bargaining representatives to meet and disclose information. It may also order that the scope (i.e. the number and type of employees to be covered by an enterprise agreement) be wider than the employer may want. It may also determine whether a majority of employees at an enterprise wish to negotiate an agreement using any method it believes appropriate.

Fair Work Australia will also be able to arbitrate on matters in dispute in the negotiation of an agreement in circumstances where there is a serious breach order in place against a bargaining representative, where industrial action has taken place and is threatening the economy or where there is no reasonable prospect of a agreement being reached in an authorised low paid multi-employer enterprise agreement negotiations.

Fair Work Australia and bargaining

Fair Work Australia will facilitate agreements using good faith bargaining orders, authorise who may participate in enterprise agreements, penalise individuals, business and unions if they do not bargain in good faith, settle disputes on the terms of enterprise agreements, arbitrate on terms of agreements where the parties are unable or reluctant to do so, and approve or disprove agreements if it decides employees are not better off overall in comparison to an award. This will be a very powerful government agency.

Transmission of business

The Fair Work Bill proposes to amend the arrangements that currently apply to employees that transfer to a new employer that acquires the business in which they are employed.

The Bill if passed will bind the new employer to the award or enterprise agreement that applied to that employee under the old employer indefinitely. If any new employees are recruited after the transmission of business and perform similar work they too will be entitled to the same award or enterprise agreement conditions.

This provision effectively reverses the decisions made on this subject by the Australian High Court which enabled a sensible and efficient transition of conflicting or overlapping terms and conditions of

employment where businesses are bought and sold or parts of a business are outsourced.

A further interesting change that has been proposed is to only impose a new six month qualifying period on an employee that is transferring to a new employer (and therefore restricting their right to claim unfair dismissal) if the new employer expressly does not recognise prior service.

Business will have to examine very closely the cost of employment of any person employed by a business that they intend to acquire as they will not be able to bring them into their business under their own terms and conditions.

Unfair dismissals

As expected the proposed changes to unfair dismissal laws open up the system to all employees, although an employer of less than fifteen people will be classified as a small business and required to comply with a different set of rules – the Small Business Fair Dismissal Code.

Genuine operational reasons for a dismissal are no longer acceptable grounds to defend an application of unfair dismissal. The consideration of whether or not a dismissal has been harsh, unjust or unreasonable will largely be limited to:

- (a) The validity of the reason for dismissal based on the conduct or capacity of the person;
- (b) Whether the person was warned about the performance or conduct;
- (c) The opportunity to respond to the allegations
- (d) The impact of the size of the employer's business and their access to expertise in human resource management; and
- (e) The participation of a support person or representative for the dismissed employee.

Genuine redundancy will not be considered unfair dismissal unless the employee could reasonably have been re-deployed within the organisation or a related entity.

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.

Right of Entry

There are significant expansions to the right of permit holders (usually union officials) to enter premises and inspect employers' employment records on the basis that there has been a suspected breach of award or an agreement.

A permit holder may also enter premises to hold discussions with employees as long as they have a member or the right to representative at least one person employed in the premises. This potentially allows various unions to enter a workplace to recruit new union members.

Industrial action

The right to take industrial action has largely remained unchanged. Employees and employers may only take protected industrial action during approved bargaining periods and subject to a ballot of the employees.

Employers may not take pre-emptive action in the form of a lock out unless it is in response to industrial action taken by employees.

Fair Work Australia will be able to issue orders to prevent or stop unprotected industrial action.

Conclusion

The Bill is expected to pass through the House of Representatives and then be referred to a Senate committee for consideration before further debate in the Autumn session of parliament.

Employers do not need to respond to the Bill although planning for the new era once it has been passed into law should be a priority in early 2009.

Maguire Consulting will provide further and detailed information on the new system next year including a series of seminars across Australia to prepare employers in managing employment arrangements under the new system.

[\[More\]](#)

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

New South Wales

Link between industrial arrangements and skill reform - report

A report commissioned by the NSW Government claims that the weight of existing evidence into completion rates of apprenticeships strongly

suggests that training-related provisions in awards can be the foundation of an effective skills formation regime. Further, the modernisation of awards is an opportunity to refresh and strengthen training-related provisions to improve the quality of VET outcomes.

[\[More\]](#)

Victoria

Workers Wages Protection Act

The Victorian Workers Wages Protection Act 2008 commenced operation on 1 December 2008. Any deduction from a Victorian employee's pay that is not freely given will breach the Act. If the employee has agreed to a deduction, the agreement has no effect if the deduction financially benefits the employer and is unreasonable in the circumstances. It is unlawful to pay employees in kind.

[\[More\]](#)

Queensland

Christmas and New Year Facts

The Queensland government has published a fact sheet describing the impact of the Christmas and New Year public holidays on employer obligations to their employees

[\[More\]](#)

South Australia

Changes to EEO

The Equal Opportunity (Miscellaneous) Amendment Bill 2008 has been introduced into the South Australian parliament. The Bill will amend the current act to make it unlawful to discriminate against voluntary carers, including indirect discrimination such as setting unreasonable requirements that are too difficult for a carer to meet.

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