



## What you need to know about the Fair Work Bill 2008

*On 20 March 2009, the Commonwealth Parliament passed the Fair Work Bill 2008 (Bill). The Bill will entirely replace the Workplace Relations Act 1996 (WR Act) and will therefore set up a new industrial relations system for Australia. The Bill retains features of Work Choices while also fulfilling and extending upon the Forward with Fairness policy the Rudd Government took to the last election.*

All components of the Bill will become law on 1 July 2009 except for the new National Employment Standards (NES) and modernised awards which will begin on 1 January 2010.

### ▶ Unfair Dismissal

The Bill has removed the 100 employees or less exemption to unfair dismissal. Unfair dismissal is now available as follows:

- An employee who has been employed for at least 12 months by an employer with fewer than 15 full time equivalent employees (for a transitional period to 1 January 2011 after which time it reverts to a head count of 15 employees)
- An employee who has been employed for at least 6 months by an employer with 15 or more employees.

Employees who are not covered by an award or collective agreement and whose income exceeds \$100,000 indexed as at August 2007 are not eligible

to make an unfair dismissal application. The 'genuine operational reasons' exclusion has been replaced with 'genuine redundancy' requiring the employer to show:

- The job is no longer required to be done by anyone because of changes in the enterprise;
- The employer has complied with any obligation to consult about redundancy under any applicable award or enterprise agreement; and
- It is not reasonably possible to redeploy in the enterprise in all the circumstances.

Employees will have fourteen days to make an application to Fair Work Australia.

Small employers will be required to complete the 'Small Business Fair Dismissal Code'. In the event that the small employer satisfies the requirements of the 'Small Business Fair Dismissal Code' Fair Work Australia will prima facie conclude that there has been no unfair dismissal.

Legal representation will only be available where Fair Work Australia believes that it is appropriate. Fair Work Australia will encourage mediation as the preferred remedy to resolve unfair dismissal applications.

### ▶ Enterprise Agreements

Under the WR Act, parties can make Individual Transitional Employment Agreements (ITEA's), union collective agreements, employee collective agreements, union greenfields agreements, employee collective greenfields agreements and multi- employer agreements.

The Bill provides:

- That there will be no distinction between union



and non-union agreements.

- For a single type of collective enterprise agreement to be made between employers and employees.
- A relevant union can contact Fair Work Australia and request in writing to be covered by the agreement.
- Union related matters can be included in the agreements because agreements will be able to include any 'matters pertaining' to the employment relationship between the employee and employer and employer and a union.
- Unlawful content will still exist and it will cover such matters as discriminatory clauses, clauses that are inconsistent with the unfair dismissal laws, freedom of association, industrial action and occupational health and safety legislation.
- An employer is still entitled to make a greenfields agreement for a new business. However, the greenfields agreement must be made with the union nominated by Fair Work Australia, that would be eligible to represent the employees who will be employed by the new business.
- An individual flexibility arrangement and consultation about major changes clause will need to be included in agreements.
- Agreements will have a nominal expiry date of no later than four years after the date of operation.
- The agreement must be approved by Fair Work Australia.

In order for the agreement to be approved by Fair Work Australia, the following must be satisfied:

- The agreement must pass the "Better Off Overall Test" (**BOOT**). ie employees must be better off overall in comparison to the relevant award.
- It must be a genuine agreement, contain a nominal expiry date and dispute settlement clause.
- The agreement must not include any clauses that

contravene the NES or any unlawful content.

### ▶ *New Bargaining Regime*

The Bill introduces the concept of "compulsory bargaining" where the majority of employees want a collective agreement and the employer doesn't want an agreement at all. It also requires an employer who wants a collective agreement to negotiate with a union with only one member covered by the agreement.

Bargaining between the parties can occur at any time. However, if an existing agreement is in existence, the good faith bargaining principles will only apply for the last 90 days of the existing agreement.

Employers are required to advise employees at the commencement of the bargaining period that they have a right to be represented.

All employees have the right to appoint a bargaining agent to represent them. A union can only represent an employee if it has coverage to do so. There is a presumption that where the union is entitled to represent the employee that it will represent the employee. The employee would be required to elect that the union does not represent him/her.

In the event that parties are not bargaining effectively i.e. the parties are failing to meet regularly, respond to requests in a timely manner or are not giving genuine consideration to proposals, Fair Work Australia is authorised to issue bargaining orders, requiring parties to bargain in good faith. In order for Fair Work Australia to consider issuing a bargaining order, the party requesting the order must be able to demonstrate that they notified the other party of their concerns.

If there have been serious or consistent breaches of a



bargaining order, Fair Work Australia is empowered to make a workplace determination. Fair Work Australia will only make a workplace determination where no agreement will be reached in the foreseeable future.

Where parties cannot agree on an agreement they can do any of the following:

- Cease to engage in bargaining and the existing agreement will stand;
- Take protected industrial action; or
- Seek that Fair Work Australia makes a workplace determination, as outlined above.

## ▶ *New Institutional Framework*

### 1. Fair Work Australia

Fair Work Australia will replace the AIRC, the Australian Fair Pay Commission and the Workplace Authority.

Fair Work Australia will be responsible for:

- Dealing with unfair dismissal claims;
- Dealing with industrial action;
- Adjusting minimum wages and award conditions;
- Settling workplace disputes;
- Facilitating collective bargaining; and
- Approving enterprise agreements.

### 2. Fair Work Ombudsman

The Fair Work Ombudsman will replace the Workplace Ombudsman. The Fair Work Ombudsman is designed to ensure compliance with the Bill through education, advice and assistance. If required, the Fair Work Ombudsman will carry out investigations, issue compliance notices and court proceedings, if there has been a breach.

### 3. Fair Work Divisions of the Federal Court and the Federal Magistrates Court

The Fair Work Divisions of the Federal Court and the Federal Magistrates Court are intended to ensure that a single accessible compliance system is available for employers and employees. The Fair Work Divisions will have the power to make any order considered appropriate to remedy a contravention of the Bill and to enforce entitlements under a contract of employment that relate to the same subject matters as the NES or a modern award.

#### ▶ *Industrial Action*

Protected industrial action will continue to only be available during negotiations for an agreement. Parties will be able to take protected industrial action where the parties are genuinely trying to reach agreement and they are complying with any good faith bargaining orders in place.

Employer industrial action will continue to be defined as a lockout. Employer industrial action will only be protected where the employer locks out employees in response to industrial action.

Employers will be required to withhold four hours pay from employees for any unprotected industrial action up to, or including four hours. For industrial action longer than four hours, pay will be withheld for the duration of the industrial action.

Where there is a complete withdrawal of labour (i.e. a strike) and the action is protected, employers will withhold pay for the actual period of industrial action taken.

Where the employees are engaging in protected industrial action that involves partial restrictions the



employer will be able to choose to:

- Accept the partial performance by the employee and continue to pay the employee their full salary; or
- Lock out the employees; or
- Refuse to accept partial performance and if the agreement allows, stand the employees down until they are prepared to fully perform their duties; or
- Issue a 'partial work notice' and pay according to the actual work performed.

### ▶ *Right of Entry*

Under Work Choices, unions did not have a right of entry to a workplace where a non-union collective agreement or individual agreements were in place.

Under the Bill, any union that is eligible to represent an employee of a workplace will be entitled to enter that workplace in order to have discussions with the employee in regards to their industrial interests. The union is eligible to enter the workplace regardless of whether the union is covered by a modern award or agreement in relation to that workplace. Therefore unions who are not a party to the applicable enterprise agreement are entitled to enter the workplace. This may result in various unions entering the workplace to represent different employees.

Where a union enters a workplace to investigate an alleged contravention, the union is entitled to inspect and make copies of any document that is directly relevant to the alleged contravention. Union officials are also entitled to inspect non-union member's records subject to privacy law protections.

A union official may only enter a workplace where he/she holds a valid entry permit issued by Fair Work Australia and has given the employer written notice

at least 24 hours in advance (except in the case of outworkers in the clothing and textile industry).

### ▶ *Transfer of Business*

The Bill has made quite considerable changes to the transmission of business provisions under Work Choices.

There is a transfer of business from an old employer to a new employer if the following requirements are satisfied:

- The employment of an employee of the old employer has been terminated;
- Within 3 months after the termination, the employee becomes employed by the new employer;
- The work the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer; and
- There is a connection between the old employer and the new employer.

There is a connection between the old employer and the new employer where:

- There is a transfer of assets between the old employer and the new employer;
- The old employer outsources work to the new employer;
- The new employer ceases to outsource work to the old employer; or
- The new employer is an associated entity of the old employer.

The transferred instrument will continue to apply to the new employer until it is terminated or replaced or is otherwise ordered by Fair Work Australia. Under Work Choices the transferred instrument continued to apply for 12 months.



If after the transfer of business, the employer employs new employees those new employees will be covered by the transferring employee's instrument, be that an award or enterprise agreement, where:

- The new employee performs the same work as the transferring employee; and
- At the time the new employee is employed, no other award or enterprise agreement covers the new employee.

### ▶ *National Employment Standards*

The National Employment Standards (**NES**) form an important part of the Bill. The NES will replace the five (5) Australian Fair Pay and Conditions Standard (**the Standard**). The Standard included basic rates of pay, a 38-hour plus reasonable additional hours maximum working week, annual leave, personal leave and 12 months unpaid parental leave. Minimum wages will now be set by a new body to be called Fair Work Australia. The NES will override any inferior conditions in pre-existing agreements and guarantee:

#### **1. Maximum weekly hours of work**

Full time employees remain entitled to a maximum 38 hour week plus "reasonable" additional hours. Employees can average the 38 hours in accordance with their award or non-award employees can average the 38 hour week over a period of 6 months.

#### **2. Right to request flexible working arrangements**

The right to request flexible working arrangements is a new entitlement under the NES. Individuals who have the responsibility of caring for a child under school age or a disabled child under eighteen years of age are entitled to request flexible working arrangements. An employer can refuse this request on reasonable

business grounds and such refusal will not be subject to any form of appeal, except with the consent of the employer.

#### **3. Parental leave**

Under the Standard, one parent is entitled to 12 months unpaid leave. The NES provides that both parents can take separate periods of up to 12 months unpaid leave or one parent can take up to 24 months leave. Parental leave entitlements have been extended to same sex couples. Employers will be obliged to consult with an employee who is on parental leave about any decision that will have a significant effect on the employee's position.

#### **4. Annual leave**

The entitlement to 4 weeks annual leave for full time employees remains. Annual leave can be cashed out in accordance with an award or enterprise agreement. Non-award employees can also cash out their annual leave, provided that they leave a balance of at least 4 week's annual leave. Employers will only be allowed to direct employees to take leave at certain times where it is authorised by their applicable award or where the employee is not covered by an award, the employer will be able to reasonably direct the employee to take leave.

#### **5. Personal/carer's leave and compassionate leave**

The entitlement to 10 days' paid personal/carer's leave and two days compassionate leave per occasion remain. Casuals will now be entitled to receive unpaid carer's leave and compassionate leave in accordance with the Bill.

Modern awards may provide for cashing out of personal/carer's leave as long as 15 days leave



balance remains. Cashing out is not available for non award/agreement employees.

## 6. Community service leave

This is a new entitlement provided for under the NES. Employees are entitled to take community service leave for jury service with make-up pay and unpaid leave for other emergency services.

## 7. Long service leave

Employees remain entitled to long service leave under state legislation.

## 8. Public holidays

Public holidays are guaranteed but employers can request employees to work on a public holiday on “reasonable” business grounds.

## 9. Notice of termination and redundancy pay

Employers will be required to give written notice of termination.

Under the NES, employees will be entitled to redundancy pay on a sliding scale of up to sixteen weeks dependent upon the employee’s length of continuous service, except in a small business of less than 15 employees.

## 10. Provision of a Fair Work Information Statement

From 1 January 2010, an employer will be required to give the Fair Work Information Statement containing information about the NES, modern awards, agreement-making etc to all new employees but not existing employees.

## ► Award Modernisation

New ‘modern awards’ will be tailored to the requirements of the particular industry and occupation to which the award relates. This new framework of ‘modern awards’ will be in place on 1 January 2010.

The awards will not cover employees who earn over \$100,000 a year indexed as at August 2007. The Australian Industrial Relations Commission (**AIRC**), (soon to be Fair Work Australia) has been directed to create the new ‘modern awards’ by consolidating all existing awards industry by industry.

The following terms ‘may’ be included in modern awards:

- Minimum wages and classifications;
- Types of employment;
- Arrangements for when work is performed;
- Overtime rates;
- Penalty rates;
- Wage or salary arrangements;
- Allowances;
- Leave related matters;
- Superannuation;
- Procedures for consultation, representation and dispute settlement;
- Outworker terms;
- Industry specific redundancy scheme; and
- Incidental and machinery terms.

The following terms ‘must’ be included in modern awards:

- Coverage terms - including which employees, organisations, employers and outworkers are covered by the award;
- Flexibility terms which will enable employers and employees to agree on flexible arrangements that vary how the award works such that the employee



is better off overall;

- Terms about settling disputes;
- Ordinary hours of work; and
- Base and full rates of pay for pieceworkers.

The following terms 'must not' be included in modern awards:

- Objectionable terms, eg freedom of association;
- Terms about payments and deductions for the benefit of an employer;
- Terms about right of entry;
- Terms that are discriminatory;
- Terms that contain State-based differences; and
- Terms dealing with long service leave.
- Procedures for consultation, representation and dispute settlement;
- Outworker terms;
- Industry specific redundancy scheme; and
- Incidental and machinery terms.

## ▶ *Contact*

Should you have any questions or would like further information on the new Fair Work Bill 2008, please contact Tim Greenall, Special Counsel on +61 3 9242 4721 or at [tim.greenall@madgwicks.com.au](mailto:tim.greenall@madgwicks.com.au) or contact Laura Simmons-Stempel on +61 3 9242 4794 or at [laura.simmons-stempel@madgwicks.com.au](mailto:laura.simmons-stempel@madgwicks.com.au)

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