

### Fair Work Bill 2008

THE DEPUTY PRIME MINISTER, JULIA GILLARD, INTRODUCED INTO FEDERAL PARLIAMENT ON 25 NOVEMBER 2008 THE FAIR WORK BILL 2008 WHICH IS INTENDED TO REPLACE THE CURRENT WORKPLACE RELATIONS ACT 1996.

#### KEY POINTS TO NOTE

- The Government will retain the current general structure of a unitary national system for the private sector with a safety net of legislated minimum conditions and modern industry awards able to be overlaid with collectively bargained agreements at an enterprise level.
- The Bill is significantly shorter than the *Workplace Relations Act* and easier to read.
- There will be a new institutional framework for administering the workplace relations system, including the establishment of a new independent body: Fair Work Australia (FWA).
- **Enterprise bargaining** – there is a new union-oriented regime for the making of collective enterprise agreements, including

union representation rights and good faith bargaining obligations. The capacity to conduct enterprise bargaining without engaging with the relevant trade unions will be very circumscribed.

- FWA will have a significant role in dealing with bargaining and bargaining disputes.
- There will be no provision for individual agreement making.
- **Industrial action** – the current regime concerning protected and unprotected industrial action has generally been retained with some changes in relation to an employer's right to oppose an application for a secret ballot order, payments during periods of protected action and the availability of employer industrial action in the form of lockouts.

#### In brief

- *The Labor Government has introduced its substantive workplace relations legislation, the Fair Work Bill 2008, into Federal Parliament.*
- *The Bill makes significant changes to National Employment Standards, awards, enterprise bargaining, industrial action, union right of entry, freedom of association, transfer of business, termination of employment and the institutions that administer the workplace relations laws.*
- *The Bill is expected to pass the Senate in early 2009 - possibly with amendments – and commence operation on 1 July 2009, with some aspects commencing on 1 January 2010.*
- *Employers must quickly consider the effect of the proposed new laws:*
  - *On their workplace relations and people strategies;*
  - *On their existing awards and enterprise agreements;*
  - *When developing new enterprise agreements, employment contracts and workplace policies;*
  - *In implementing workplace change programmes and restructuring.*

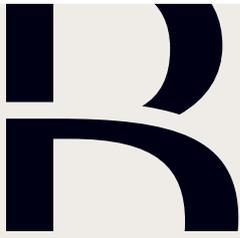
- **Union right of entry** – the most significant change is that union right of entry to hold discussions with employees no longer depends upon the relevant employees being subject to an industrial award or agreement which is binding on the union. This significantly expands the circumstances in which this right can be exercised.
- **Freedom of association** – the provisions about “workplace rights” are broadly similar to the current freedom of association provisions. However, the protections in relation to workplace discrimination have been significantly expanded to include a prohibition on taking any “adverse action” for a discriminatory reason (where previously this only applied in relation to termination of employment).
- **Transfer of business undertakings** – there are significant changes to the operation of transmission of business rules which make them easier to apply but lower the threshold for making out a transfer of business. New employees of the incoming employer may also be covered by a transferred instrument and there is no longer a 12 month limit on the period for which a transferred instrument will apply.
- **Unfair dismissal** – the exemption from unfair dismissal claims for employees within the first six month qualifying period has been retained. A new exemption has been introduced for employees who are terminated due to genuine redundancy (which has replaced the broader “operational reasons” exemption).
- **Enforcement** – the Federal Court and Federal Magistrates Court will have power to enforce a term of a common law contract which relates to any of the subject matters dealt with in the National Employment Standards (NES) or a modern award. The Federal Court will not be limited as to the relief available for breach of an industrial instrument. It has been given new powers to grant injunctions (including interim or interlocutory injunctions), award compensation or order reinstatement.

#### BACKGROUND

In March 2008 the Parliament enacted Labor’s transition workplace relations legislation which provided for the phasing out of Australian workplace agreements, the establishment of a no-disadvantage test for the making of new workplace agreements and arrangements for the award modernisation process.

The *Fair Work Bill* contains the remainder of Labor’s substantive changes to give effect to its “Forward with Fairness” workplace relations policy and implementation plan released in 2007.

The proposed *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*, which will explain how existing employers and employees move into the new Forward with Fairness system, will not be released until 2009.



## NATIONAL SYSTEM FOR THE PRIVATE SECTOR

The Bill will apply to “national system” employers and their employees, relying principally on the corporations power of the Constitution (ie employers who are financial or trading corporations). The national system will continue to apply to Commonwealth employees.

The Bill will exclude State and Territory industrial relations laws but not in areas such as discrimination, workers compensation, OHS and workplace surveillance. The current exclusion of State unfair contract laws remains in place.

Current arrangements for State public servants and local government employees will continue to apply which means that many such employees will continue to be covered by State industrial relations systems. However, the Government is working with the States and Territories to achieve a national workplace relations system for all of the private sector so that the Bill might also cover employers who are sole traders, partnerships or those incorporated entities not presently covered by the *Workplace Relations Act*.

## INSTITUTIONAL FRAMEWORK

The Bill creates a new institutional framework for administering the workplace relations system and establishes two new independent bodies: FWA and the Office of the Fair Work Ombudsman. FWA and the Fair Work Ombudsman will replace the Australian Industrial Relations Commission, Australian Industrial Registry, the Workplace Authority, the Workplace Ombudsman, the Australian Fair Pay Commission, and the Australian Building and Construction Commission.

FWA will assume a broad range of functions and powers previously vested in those bodies, including facilitating collective bargaining and approving enterprise agreements, dealing with industrial action, settling workplace disputes (including disputes about right of entry), adjusting minimum wages and award conditions, determining the application of workplace agreements in the context of a transfer of business, dealing with unfair dismissal claims and attempting to resolve unlawful termination claims in the first instance.

The Fair Work Ombudsman will investigate and enforce compliance with the NES and modern awards. Fair Work Inspectors will have powers to enter an employer’s premises to monitor compliance and bring court proceedings to enforce employment conditions relating to matters covered by the NES or a modern award. The Fair Work Ombudsman can establish specialist industry divisions to address unlawful behaviour in particular industries. Details about the proposed specialist division for the building and construction industry (which will replace the ABCC) will be confirmed following the completion of the Wilcox Inquiry in March 2009.

The Federal Court (through a specialist Fair Work Division) and the Federal Magistrates Court will continue to have a role in ensuring compliance with the legislation, including enforcement of terms and conditions in employment contracts relating to matters covered by the NES or a modern award. Employees will have access to a small claims procedure in the Federal Magistrates Court and State and Territory magistrates courts for recovery of sums up to \$20,000.

## THE SAFETY NET

The Bill provides for a safety net comprised of national employment standards, minimum wages and awards.

## NATIONAL EMPLOYMENT STANDARDS

The NES comprise 10 legislated minimum standards which will apply to all national system employees from 1 January 2010 and guarantee:

- maximum weekly hours of work;
- a right to request flexible working arrangements;
- parental leave and related entitlements;
- annual leave;
- personal/carer’s leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- provision of a Fair Work Information Statement.

For further details on the NES see our February and June 2008 *Employment Alerts* available at [www.blakedawson.com/](http://www.blakedawson.com/) publications.



#### MINIMUM WAGES

FWA will conduct annual wage reviews and make national minimum wage orders applicable to employees not covered by awards and agreements.

#### MODERN AWARDS

The Australian Industrial Relations Commission is in the process of making a series of “modern awards”, generally along industry lines, which will take effect from 1 January 2010 (see our March 2008 *Employment Alert*, available at [www.blakedawson.com/publications](http://www.blakedawson.com/publications), for more information on the award modernisation process). These are intended to supersede current federal and state awards, other than current federal enterprise awards.

FWA will conduct a four yearly review of modern awards to ensure they continue to meet the modern award objectives. Outside this review process, the scope for revocation, variation or changes to award coverage will be quite limited.

Modern awards will contain minimum wages which can be set or varied by determinations made by FWA in annual wage reviews. Otherwise, FWA can only vary

modern award minimum wages if FWA is satisfied that the variation is justified by work value reasons.

Modern awards will contain a flexibility clause allowing the employer and an employee to agree on an arrangement varying the effect of the award. The Bill also provides for a scheme whereby an employer and a high income employee with guaranteed earnings over \$100,000 pa (indexed) may agree that a modern award not apply to the employee.

A modern award will not apply to an employee, the employee’s employer or the relevant union when there is an enterprise agreement in operation applying to the employee.

The Bill is silent as to the status and continued operation of enterprise awards (ie federal awards which apply to a single employer). This will be dealt with in the further transitional legislation in 2009.

#### ENTERPRISE BARGAINING

##### COLLECTIVE AGREEMENTS

The Bill provides for the making of enterprise agreements through collective bargaining. There is no provision for individual agreement making. Indeed, the principal object provision of the Bill declares that statutory individual employment agreements can never be part of a fair workplace relations system.

Agreements are either single-enterprise agreements made between a single employer and a group of employees or multi-enterprise agreements made between two or more employers (voluntarily) and their employees. Multi-enterprise agreements will be available without being subject to a public interest test.

Union greenfields agreements (made between one or more employer and one or more unions in relation to a genuine new enterprise) are still available but not employer greenfields agreements.



#### ROLE OF UNIONS AND BARGAINING REPRESENTATIVES

The employer must notify all employees of their right to be represented by a bargaining representative in negotiations within 14 days of the employer agreeing to bargain, or initiating bargaining for an agreement.

If the employee is a member of a union (which is eligible to represent the industrial interests of the employee), the union will automatically become a bargaining representative in enterprise bargaining negotiations unless the employee appoints someone else and advises the employer of the appointment.

Once an agreement is approved by a majority of employees who cast a valid vote, any union that was a bargaining representative in relation to the agreement can notify FWA that it wants to be covered by the agreement and, if the agreement is approved, FWA must note in its decision that the agreement covers that union.

For a proposed greenfields agreement, the employer must notify all eligible unions that the employer intends to make a greenfields agreement. Each union is then a bargaining representative

for the agreement and the agreement will cover any union who makes the agreement (by signing it) with the employer.

An employer must not refuse to recognise, or bargain with, a bargaining representative.

The combination of these provisions will make it very difficult to have either a non-union collective agreement, or a single-union agreement where there is more than one eligible union.

#### CONTENT RULES

An agreement can be made about “permitted matters” which are:

- Matters pertaining to the relationship between the employer and its employees;
- Matters pertaining to the relationship between the employer and a union to be covered by the agreement (eg union training leave, paid leave to attend to union business, union involvement in dispute resolution);
- Deductions from wages authorised by the employee (eg salary sacrifice and union dues);
- How the agreement will operate.

A term which does not comply with these requirements has no effect but if included in an agreement will not prevent it from being validly made.

An agreement must contain:

- A dispute settlement procedure that requires or allows FWA (or another person) to settle disputes about any matter arising under the agreement or the NES. The procedure must allow for employee representation;
- A flexibility term that enables an employer and an employee to genuinely agree to an arrangement varying the effect of the agreement in order to meet their genuine needs so long as the arrangement results in the employee being better off than in the absence of the arrangement. Once such an arrangement comes into effect, it is taken to be a term of the agreement;
- A term requiring the employer to consult with employees about major workplace change and allowing for employee representation in relation to the consultation.

An agreement must not contain unlawful or discriminatory terms. Unlawful terms include terms providing for industrial action, right of entry or OHS right of entry other than as provided for elsewhere in the Bill.

An agreement must have a nominal term of not more than four years after the day it is approved by FWA.

#### GOOD FAITH BARGAINING AND THE ROLE OF FWA

Bargaining representatives must meet the good faith bargaining requirements specified in the Bill which include:

- Attending, and participating in, meetings at reasonable times;
- Disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- Responding to, and giving genuine consideration to, proposals of other bargaining participants and providing reasons for any responses;
- Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

A bargaining representative may apply to FWA for a bargaining order if the good faith bargaining requirements are not being met, the representative has given written notice setting out its concerns, a reasonable time has been given to respond, and those concerns have not been addressed.

FWA has broad discretion as to the types of orders made including the actions to be taken, or not to be taken, by bargaining participants to ensure they meet the good faith bargaining requirements. However, FWA is not empowered to make an order that requires particular content to be included or not included in a proposed agreement.

On application by a bargaining representative, FWA can also:

- Make a "majority support determination" if a majority of employees want to bargain with an employer who refuses to do so;
- Make a "scope order" defining who is to be covered by an agreement if FWA considers that the agreement will not cover appropriate employees, or will cover employees that are not appropriate for the agreement to cover;
- Make a "serious breach declaration" if a bargaining representative has breached one or more bargaining orders and certain other conditions are met (which may then lead to an arbitrated workplace determination);
- Make a "low-paid authorisation" requiring more than one employer to bargain with low-paid employees (which, in certain circumstances, may lead to an arbitrated workplace determination);
- Deal with a dispute over a proposed agreement if the bargaining representatives are unable to resolve the dispute. FWA will be able to arbitrate the dispute if the bargaining representatives agree that it may do so.

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## WORKPLACE DETERMINATIONS

The scope for a Full Bench of FWA to determine by compulsory arbitration terms and conditions to apply to bargaining parties (called workplace determinations) will be wider than under the previous regime. These can be:

- **Low-paid workplace determinations** – where the bargaining representatives subject to a low-paid authorisation cannot reach agreement on the terms of a proposed multi-enterprise agreement;
- **Industrial action related workplace determinations** – where the entitlement to take protected industrial action has been terminated by FWA or by a Ministerial declaration and the representatives have not settled the matters at issue at the end of the negotiating period;
- **Bargaining-related workplace determinations** – where a serious breach declaration has been made in relation to a proposed enterprise agreement and the representatives have not settled the matters at issue at the end of the negotiating period.

## APPROVAL PROCESS

The pre-approval and approval processes are similar to the current processes except that agreements will be approved by FWA and will come into operation seven days after approval.

An agreement will need to pass a “better off overall test” requiring that FWA be satisfied, at the time an application for approval was made, that each award covered employee will be better off overall if the agreement applies to the employee than if the relevant modern award applies.

## INTERACTION RULES

An agreement cannot exclude the NES but can supplement the NES if this is not detrimental to an employee in any respect when compared to the NES. A modern award does not apply when an agreement applies to an employee and only one agreement can apply to an employee at any one time.

## INDUSTRIAL ACTION

The Bill generally retains the current regime concerning protected and unprotected industrial action with some changes. Industrial action is prohibited during the nominal term of an enterprise agreement.

FWA will retain the power to make orders, or interim orders, to stop or prevent industrial action that is not protected. FWA is not required to specify in its order the particular industrial action to be stopped. Injunctions may still be sought from the Federal Court or Federal Magistrates Court.

Protected industrial action will continue to be available to employees during negotiations for enterprise agreements about, or reasonably believed by employees to be about, permitted matters. Preconditions remain in place for taking protected action, including that participants are trying to genuinely reach agreement, are complying with any good faith bargaining orders, and not engaging in pattern bargaining.

Protected industrial action is not available in relation to multi-enterprise agreements.

Protected action by employers, namely lockouts, may only be taken in response to industrial action by employees or bargaining agents. An employer can refuse payments to employees during the period of the lockout.

Secret ballots will still be required before employees may take protected action. The Federal Government will now bear the costs of the Australian Electoral Commission conducting such ballots. Costs of ballots conducted by alternative ballot agents must be paid by the applicant.

Employers will be unable to challenge an application for a secret ballot with FWA. Applications may only be made to stop industrial action following a ballot on the basis that the requirements for protected action had not been met. Protected industrial action must be taken within 30 days of the ballot; however this may be extended up to a further 30 days.

Applications for secret ballots may be made up to 30 days before the nominal expiry of a workplace agreement or workplace determination. Industrial action may not actually be commenced until after the nominal expiry date.

The regime for suspending or terminating industrial action is generally retained. Action may be terminated or suspended where the action is causing or may cause significant damage to the Australian economy (or part of it) or the action is endangering the life, safety or welfare of the community; or suspended only where harm is being caused to a third party. The Ministerial power to terminate industrial action will be restricted to disputes affecting “essential services” only.

There is a significant new ground for the termination or suspension of industrial action – where it is causing significant economic harm to the employer and employees.

FWA will retain the ability to settle disputes following termination of industrial action.

Strike pay will remain prohibited, with a minimum of four hours docking for unprotected industrial action. For protected action, only the actual time of the dispute may be docked. Employers may also respond to protected industrial action involving bans (partial performance) by docking a proportion of an employee’s pay, or withholding all of the employee’s pay.

#### RIGHT OF ENTRY

To a certain extent, the Bill maintains existing right of entry rules in terms of permit and notice requirements for proposed right of entry, compliance with reasonable OHS requirements that apply on the premises, compliance with reasonable requests to conduct interviews or hold discussions in a particular room or area of the premises and the powers of FWA to deal with right of entry disputes.

There are, however, significant changes which include:

- Right of entry to hold discussions will no longer depend upon the relevant employees being subject to an award or agreement which is binding on the union. This significantly expands the circumstances in which this right can be exercised.
- The prohibition on union rights of entry being dealt with in enterprise agreements will be limited to the types of right of entry specified in the Bill. This leaves room for union rights of entry for other purposes to be included in enterprise agreements.
- The Bill specifies a number of circumstances in which a request to hold interviews and/or meetings in a particular room or area will be unreasonable, including where the room or area is not fit for the purpose, or the request

# “There will be a change in approach to transfers of business undertakings.”

is made with the intention of intimidating, discouraging or making it difficult for persons who wish to participate in the interview or discussion.

- Unions will now have the right to inspect or make copies of any record or document related to a suspected breach, even where the record or document relates to non-members of the union.

## FREEDOM OF ASSOCIATION

The current freedom of association laws have been replaced by broader prohibitions on the taking of “adverse action” against a person because he/she has or exercises (or does not exercise) a “workplace right”, or because of his/her participation or non-participation in “industrial activities”, or on a discriminatory ground. These prohibitions apply to employers, employees, principals, independent contractors, and unions.

“Adverse action” is broadly similar to current prohibited conduct and includes dismissal of an employee, injuring an employee in his or her employment and altering the position of an employee to his or her prejudice.

“Workplace rights” are entitlements and the freedom to exercise those entitlements and include the benefit of a workplace instrument, participation in workplace proceedings and the making of complaints about the employment.

There continue to be prohibitions on coercion and exerting undue influence or pressure in relation to agreement making, and coercion in relation to the taking of industrial activity.

The protections in relation to workplace discrimination have been significantly expanded to include a prohibition on taking, or threatening, any adverse action for a

discriminatory reason (where previously this only applied in relation to termination of employment).

FWA may initially deal with disputes involving a contravention of these provisions. Contravention proceedings are heard in the Federal Court or Federal Magistrates Court. A reverse onus of proof continues to apply in proceedings for contraventions (except in the case of interim injunctions).

## TRANSFER OF BUSINESS

There will be a change in approach to transfers of business undertakings. The Bill changes the focus of the current transmission of business laws from the business activities of the old and new employers (and the test established by the High Court in *PP Consultants*) to the work being undertaken by the transferring employee and the connection between the old and new employer.

There will be a transfer of business if, within three months of the termination of an employee’s employment, the employee becomes employed by the new employer, performing the same or substantially the same work for the new employer and there is a connection between the old and new employer. A connection will be established if there is a transfer of ownership or use of assets, an outsourcing arrangement, an in-sourcing arrangement, or if employees are transferred between related entities.

Enterprise agreements, workplace determinations and named employer awards (ie modern awards that cover one or more named employers) are transferable. A transferred instrument prevails over any otherwise applicable enterprise agreement or modern award.

Importantly, new employees of the incoming employer may also be covered by a transferred instrument if no other enterprise agreement or modern award covers the work being performed. There is no longer a 12 month limit on the period for which a transferred instrument will apply.

#### TERMINATION OF EMPLOYMENT

An employee will be able to bring an unfair dismissal claim only if he or she:

- Has been employed by an employer for at least six months (or 12 months in the case of an employer who employs fewer than 15 employees); and
- Earns less than \$100,000 pa (indexed) or is covered by a modern award or enterprise agreement; and
- Has not been dismissed because of genuine redundancy.

A genuine redundancy is when the employer no longer requires the employee's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise. However, the dismissal will not be a case of genuine redundancy if it was reasonable to redeploy the employee within the employer's enterprise. The employer must also have consulted about the redundancy in accordance with a modern award or agreement.

A claim alleging unfair dismissal must be lodged within seven days of the dismissal. FWA will determine unfair dismissal claims by holding a conference or a hearing if there is a dispute about the facts. A hearing will only be held if FWA considers it appropriate after taking into account the views of the parties and whether it would be the most effective way to resolve the matter.

The remedy for an unfair dismissal will be reinstatement, or compensation (capped) where reinstatement is inappropriate. Very limited appeal rights are available.

A Fair Dismissal Code will apply for small businesses.

In addition to the broader freedom of association laws, the current unlawful termination provisions relating to termination for discriminatory and other prohibited reasons will be retained. The most significant change is that an employee can seek an injunction from a court to prevent an employer from taking action to terminate his or her employment for a discriminatory or other prohibited reason.

An application for unlawful termination must first be made to FWA within 60 days of the termination. FWA will conduct a conference to deal with the dispute. If the conference is not successful in resolving the matter the employee can then make an application to a court.



#### COMMENCEMENT OF FAIR WORK BILL AND TRANSITIONAL MATTERS

The Government intends the Bill to commence on 1 July 2009. However, the NES and modern awards will not commence until 1 January 2010. Separate legislation dealing with transitional and consequential changes will be introduced in the first half of 2009. The Minister has stated that this legislation will:

- Ensure that an employee's take home pay is not reduced as a result of the employee's transition onto a modern award by allowing for Fair Work Australia to make orders;
- Provide that existing agreements will continue to apply until terminated or replaced by a new agreement made under the new bargaining framework;
- Ensure the safety net of the National Employment Standards and minimum wages applies to all employees from 1 January 2010, including those employees covered by existing agreements;
- Allow the modernisation and continued operation of enterprise awards, including NAPSAs derived from former State enterprise awards.

Important aspects of the Bill will also be dealt with by Regulation – for example, the registration of organisations.

## PROGRESSION OF FAIR WORK BILL

The Government will seek that the Bill passes the House of Representatives by 5 December 2008. The Senate is then expected to refer the Bill to a Senate committee for its consideration of the proposed laws and report back to the Senate early in 2009. The Opposition Leader has indicated that the Opposition parties will not oppose the Bill where it is consistent with Labor's election policy. Nevertheless, at least some technical amendments are likely to arise in the Senate process.

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