

Forward with Fairness Regime – Summary of the Fair Work Bill

The Fair Work Bill 2008 was introduced on 25 November 2008 as part of the Government's Forward with Fairness Regime.

The Bill introduces significant changes to the industrial relations arena particularly in the following areas:

- New rules for unfair dismissals
- National Employment Standards
- Modern awards
- Return of good faith bargaining in the workplace

The changes to unfair dismissal laws and bargaining rules will take effect from 1 July this year, ahead of the remaining reforms taking effect six months later, from 1 January 2010.

Unfair Dismissal

Under the new legislation, for all unfair dismissals from 1 July 2009, regardless of the size of the employer:

- reinstatement will be the remedy unless it is not in the interests of either party. Otherwise, compensation is capped at the lesser of six months salary or half the high income threshold (approximately \$53,200).
- unfair dismissal claims will not be available in cases of a genuine redundancy; and
- unfair dismissal claims must normally be lodged with Fair Work Australia within seven days.

A Fair Dismissal Code will apply to small business.

There will no longer be a 100 employee exemption and unfair dismissal will be available to employees after a six month probationary period, or a period of one year for employees of small businesses that is, those engaged by companies with less than 15 employees.

Rights to unfair dismissal remain unavailable to employees engaged on fixed term contracts, trainees engaged for specific tasks and when a demotion occurs that does not involve a significant reduction in remuneration or duties if the employee remains in the employment of the employer.

The Bill clarifies that a dismissal can occur in two instances:

1. if a persons employment has been terminated by the employer; or
2. if a person resigns as a result of being forced to do so because of the conduct of the employer (constructive dismissal).

Specific criteria have been outlined for Fair Work Australian to consider when deciding whether a dismissal is harsh, unjust or unreasonable which include:

- if there was a valid reason for the dismissal which can relate to capacity or conduct including safety and welfare issues;
- whether the employee was notified of the reason and given an opportunity to respond in relation to capacity or conduct;
- whether there was the ability for the employee to have a support person present in any discussions;
- whether the person had actually been warned about their performance if the dismissal related to the unsatisfactory performance; and
- the size of the employer's business and whether there are dedicated human resources staff are employed.

Unlawful Dismissal

The Bill significantly changes how laws relating to unlawful dismissal are outlined and extends employees rights. Employees have the right to make a claim for unlawful dismissal if their employment is terminated for reasons which include:

1. a temporary illness or injury (that is one that lasts less than three months);
2. membership (or not being a member) of an industrial association;
3. engaging or proposing to take industrial activity;
4. acting (or not acting) as an officer of an industrial association;
5. the persons race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
6. taking or proposing to exercise a workplace right including:
 - initiating a process or proceeding against the employer;
 - making a complaint or inquiry to a person or body about compliance with workplace law; or
 - seeking information as to the correct workplace entitlements owed to the employee.

The Bill enables employees to instigate proceedings against an employer for actions which injure an employee's prospects with the employer, including any prejudicial action. The employment relationship will no longer need to be terminated before an employee can seek a remedy for the above actions.

Initial applications for unlawful dismissal will be dealt with by conference in Fair Work Australia.

Remedies available to the court include reinstatement, compensation and injunctions. Additionally, the Court may order a penalty of up to \$6,600 for individuals and \$33,000 for corporations who are found to have breached their obligations.

National Employment Standards

From 1 January 2010, employees will be entitled to minimum employment conditions set out in the ten National Employment Standards (NES).

The NES are:

1. Maximum weekly hours of work
2. Request for flexible working arrangements
3. Parental leave and related entitlements
4. Annual leave
5. Personal/carer's leave and compassionate leave
6. Community service leave
7. Long service leave
8. Public holidays
9. Notice of termination and redundancy pay
10. Fair Work Statement

Details of each of the above minimum employment conditions are explained in further detail below.

1. Maximum weekly hours of work

Include a standard 38-hour week for full-time employees, with provision for requiring employees to work additional hours within the week, but not unreasonable additional hours.

2. Request for flexible working arrangements

Reinstates the former "right to request" flexible work until children reach school age, with employers only able to refuse on reasonable business grounds. The request must be in writing and set out the details of the changes sought and reasons for the change.

An employee is not entitled to make a request unless the employee has completed at least 12 months of continuous service immediately before making the request (for casual employees, the employee needs to have been engaged by the employer on a regular and systematic basis for a sequence of periods during a period of at least 12 months immediately before making the request and has a reasonable expectation of continuing engagement).

3. Parental leave and related entitlements

Parents to have a right to separate periods of 12 months unpaid leave, up to a total of 24 months (if parents want one parent to take a further 12 months after they have taken the first 12 months, then they must make a request, with employers only able to refuse such requests on reasonable business grounds).

If one of parent takes a period of unpaid parental leave, the other parent employee may take a period of unpaid parental leave (**concurrent leave**) during the first parent's period of leave, only if:

(a) the concurrent leave must be for a period of 3 weeks or less; and

(b) the concurrent leave must not start before, and must not end more than 3 weeks after the date of birth of the child (or the day of placement of the child if the leave is adoption related),

Unless the employer agrees otherwise.

A female employee is entitled to a period (the actual period has not been specified in the standards) of unpaid special maternity leave if she is unfit for work during that period because:

(a) she has a pregnancy-related illness; or

(b) she has been pregnant, and the pregnancy ends within 28 weeks of the expected date of birth of the child otherwise than by the birth of a living child.

4. Annual leave

Four weeks paid annual leave for full-time employees, pro rata leave for part-time employees and an additional week's leave for shift workers.

A modern award may include provisions for the cashing out of paid annual leave, requiring an employee (or allowing for an employee to be required) to take paid annual leave in particular circumstances or otherwise dealing with the taking of paid annual leave.

5. Personal/Carer's leave and compassionate leave

10 days a year of paid personal/carer's leave for full-time employees (pro rata for part-timers), plus 2 days a year of paid compassionate leave on the death or serious illness of a family member or a person the employee lives with, plus 2 days a year of unpaid personal leave for "genuine caring purposes" and family emergencies.

A modern award may include provisions for the cashing out of paid personal/carer's leave.

6. Community service leave

Paid leave for prescribed community service activities, such as paid leave for jury service and reasonable unpaid leave for emergency services duties. Other eligible community service activities are to be prescribed in the regulations.

An employee who engages in an eligible community service activity is entitled to be absent from his or her employment for a period if:

- (a) the period consists of one or more of the following:
- (i) time when the employee engages in the activity;
 - (ii) reasonable travelling time associated with the activity;
 - (iii) reasonable rest time immediately following the activity; and

(b) unless the activity is jury service—the employee’s absence is reasonable in all the circumstances.

7. Long service leave

Long service leave entitlements will reflect arrangements in current state laws or federal awards or agreements, while employees who accrue leave under the transitional arrangements won’t be disadvantaged.

8. Public holidays

Guarantees 8 national public holidays, plus public holidays prescribed in State law and local public holidays.

9. Notice of termination and redundancy pay

Minimum notice requirements of up to 4 weeks notice (progressing from 1 week for employees with less than 12 months service to 4 weeks for workers with more than 5 years service) for all employees plus an extra week for workers aged over 45. Employees in workplaces with 15 or more employees are also entitled to severance pay of up to 16 weeks after 9 years service and 12 weeks after 10 years service.

10. Fair Work Information Statement

Employers to provide all new employees with a Fair Work Information Statement containing prescribed information about rights and entitlements.

Award Modernisation

Modern Awards will commence from 1 January 2010 and will replace all existing Pre-Reform Federal Awards and NAPSAs (Notional Agreements Preserving State Awards), with the exception of single enterprise awards.

The modern award process remains on foot with the AIRC publishing, on 30 January 2009, a full list of the 39 industries and occupations, and their relevant awards and NAPSAs, to be dealt with.

Fair Work Australia must make a national minimum wage order which will cover those employees who are award-free (those currently covered by the federal minimum wage). The order will also have to set special national minimum wages (for example for non-award covered junior employees) and a casual loading.

A Minimum Wage Panel of Fair Work Australia will be required to adjust the national minimum wage and award wages annually, with adjustments generally taking effect from the first pay period after 1 July each year.

Modern awards will not apply to new employees with agreed guaranteed annual earnings of more than \$100,000 (indexed annually and pro-rata for part-time employees).

The full bench of the AIRC will sit in June and July for final consultation on the exposure drafts, with September 4 being the final date for making stage three modern awards.

Good Faith Bargaining

Collective agreements will be broadly similar to the current system with:

- agreements being subject to a form of '*better off overall test*' administered by Fair Work Australia;
- restrictions on content of agreements;
- there will be some compulsory provisions - including a flexibility clause allowing an employer and individual employee to make a '*flexibility arrangement*'; dispute resolution (including employee representation) and consultation on major change; and
- employee collective agreements being retained – although an employer can be compelled to negotiate a collective agreement with a union in some cases.

Unions are not parties to agreements. However, an employer can be compelled to negotiate a collective agreement with a union in some cases.

A union is automatically a bargaining representative for an agreement if it has a member in the workplace whose industrial interests it is entitled to represent, and the member does not appoint another person. Provided a union is a bargaining representative and notifies FWA, FWA must order that the union is covered.

In effect, this means that true non-union agreements are only possible:

- in workplaces where there are no union members, or
- where the union chooses not to be covered by the agreement.

Employers will no longer be able to bargain with one union in preference to another, including for Greenfields Agreements. So long as a union has a member in the workplace (or is entitled to represent employees' interests for Greenfields Agreements), the union can apply to be covered by the agreement.

Importantly, the new bargaining framework imposes a requirement on employers and employees to bargain in good faith. Good faith bargaining obligations will be:

- attending and participating in meetings at reasonable times;
- disclosing relevant information in a timely manner, subject to appropriate protection for commercial in confidence information;
- responding to proposals made by a party in a timely fashion;
- giving genuine consideration to the proposals of the other parties and providing reasons for their responses; and
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

Where a bargaining representative is not bargaining in good faith, Fair Work Australia will be able to make orders to ensure the integrity and fairness of the bargaining process. Any orders made by Fair Work Australia can be enforced by the Fair Work Divisions of the Federal Court or the Federal Magistrates Court.

Fair Work Australia will check the following before approving a collective agreement:

1. there is genuine agreement;
2. the group of employees to be covered has been fairly chosen;
3. it passes the Better Off Overall Test;
4. it has a nominal expiry date and dispute settlement clause;
5. It doesn't contain terms contravening the NES; and
6. it doesn't contain unlawful content.

The obligation to bargain in good faith will affect employers who have traditionally used AWAs or ITEAs, or those who have bargained directly with their employees for a collective agreement. But even employers who regularly bargain for union collective agreements are likely to have to adjust the way in which they bargain to meet the new requirements and still obtain the best commercial outcome.

Right of Entry

Unions will continue to have the right to enter premises with the Government committed to no change in this area however, the circumstances in which right of entry is permitted will be significantly broader.

For example, unions will have the right to inspect non-member records (where they relate to a suspected contravention) and a right of entry for discussion purposes where work is carried out on premises in relation to which the union is entitled to represent employees, and the employees wish to participate in discussions with the union. Unions will therefore gain the right to enter premises which are currently award-free.

Terms dealing with right of entry will be permitted in enterprise agreements, but only to the extent they relate to purposes not dealt with in the Bill (for example, to assist with dispute resolution).

FWA will retain its power to deal with disputes about right of entry, such as whether a particular room is reasonable.

Transfer of business

The Bill makes significant changes to the current circumstances in which a transmission of business (now called a transfer of business) occurs.

A transfer of business will occur where:

- an employee changes employer
- the work the employee does for each employer is the same or substantially similar, and
- there is a particular ‘connection’ between the old and new employers—either a transfer of assets used in connection with the work, or an outsourcing, or an insourcing or where the two employers are ‘associated employers’.

The types of instrument that can ‘transfer’ are:

- enterprise agreements,
- named employer responsiveness modern awards (other modern awards would continue to apply on their terms); and
- guarantees of annual earnings for high income employees.

The Bill returns to the pre-Work Choices position that an instrument that transfers continues to apply to the new employer until it is terminated or replaced (under Work Choices they applied for up to 12 months).

Instruments only transfer where the new employer takes on employees, and there is no obligation to do so. Where the new employer does take on employees, the application of the transferred instruments is generally confined to those employees, plus any new employees the employer takes on in the business where the workplace is instrument-free.

The Bill gives Fair Work Australia quite significant power to alter the coverage of instruments following a transfer of business. This includes power to order that an employer’s existing instruments cover the employees instead.

To obtain further information or discuss the implications for your business, please contact Andrew Bland at abland@blandslaw.com.au