



Workplace Relations 2009

Significant Changes in the Law Governing Workplace Relations Commence in 2009.

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The changes introduced under the Federal Government's *Fair Work Bill 2008 (Cth)* (**the Bill**), will take effect on 1 July 2009, with the exception of the national employment standards and modern awards which are projected to commence on 1 January 2010.

As foreshadowed in the 2007 election campaign, Labor has undertaken a major overhaul of the Workplace Relations Act and, in so doing, has restored a number of protections to employees which had been removed or eroded under WorkChoices. The Bill establishes Fair Work Australia (**FWA**), enshrines ten minimum employment standards, opens up access to unfair dismissal protection, and gives a greater role to the unions in enterprising bargaining and access to the workplace.

This article will deal with each of the major reforms in turn.

Fair Work Australia

The centerpiece of the Bill, FWA, will replace the Australian Industrial Relations Commission (**AIRC**), the Australian Industrial Registry, the Australian Fair Pay Commission, the Australian Fair Pay Commission Secretariat and the Workplace Authority. FWA has been referred to as the new 'one stop shop' for industrial relations. Its functions include:

- ❖ handling queries / dispensing advice
- ❖ varying awards
- ❖ dealing with unfair dismissal applications
- ❖ making minimum wage orders
- ❖ making orders in relation to good faith bargaining



Existing members of the AIRC will be appointed to FWA, while the FWA Inspectorate will perform the functions of the Workplace Ombudsman.

In addition to FWA, Fair Work Divisions will be established in the Federal Court and the Federal Magistrates Court to deal with claims up to \$20,000.

The establishment of FWA is an attempt to simplify the current system, which has often proved difficult to negotiate due to the numerous interrelated organisations.

National Employment Standards

Ten National Employment Standards (NES) will operate to establish minimum standards in the following areas:

- ❖ maximum weekly hours of work (38 hours)
- ❖ the right to request flexible working arrangements;
- ❖ unpaid parental leave;
- ❖ annual leave;
- ❖ personal/carer's leave and compassionate leave;
- ❖ community service leave;
- ❖ long service leave;
- ❖ public holidays;
- ❖ notice of termination and redundancy pay;
- ❖ provision of a fair work information statement

The NES will operate in conjunction with modernised awards and agreements to determine employee rights. Any instruments governing employment relationships must comply with the NES.

Minimum wages are not included in the NES as they will be provided in modern awards.

Modern Awards

The AIRC is in the process of reviewing and simplifying awards. The resultant modern awards will provide a safety net for wages and entitlements, provide dispute resolution procedures, and contain flexible working arrangement provisions. The aim is to create a comprehensive set of awards which are simple to understand.

The flexibility clause is a response to concerns expressed by those not relishing a return to the rigidity of pre-WorkChoices awards. If it functions as intended, it will enable employers and employees to reach agreements that are suitable to both parties, all within the bounds of the award.



Modern awards will not cover employees earning over \$100,000 a year (indexed) who will be able to negotiate their pay and conditions without reference to awards.

Collective Bargaining

The Bill establishes collective or enterprise bargaining as the predominant means of making workplace agreements. There will no longer be a distinction between union and non-union agreements. There will be a single stream of collective 'enterprise agreements' which may deal with any 'matter pertaining' to the employment relationship. This means that matters falling outside the employer's control or which are unrelated to employment arrangements are not subject to bargaining and industrial action.

Employers must notify employees of their right to a representative (who can be a union or non-union representative). Additionally, any union may become a party to the bargaining process if it represents at least one employee in the business.

FWA has the power to enforce the procedural obligations of 'good faith bargaining,' which will underpin the making of enterprise agreements. This includes disclosing relevant information, attending and participating in meetings at reasonable times and refraining from capricious or unfair conduct.

Prior to approval, FWA will compare the agreement to any applicable modern award to determine whether each employee is "*better off overall*". This requirement is by definition more favorable to employees than the "*no disadvantage test*" under WorkChoices.

In recognition that some 'low-paid' employees in industries such as aged care and community services have little bargaining power, FWA will be empowered to facilitate bargaining for multi-enterprise agreements for these employees. There will also be capacity for FWA to make a workplace determination on the application of only one party.

Unfair dismissal

WorkChoices removed the right to make a claim for unfair dismissal for those employed by businesses with 100 or fewer employees. The Bill reinstates unfair dismissal rights for employees except for the following categories of employees:

- ❖ those not covered by an award or a enterprise agreement whose income exceeds \$100,000 (indexed);
- ❖ those dismissed due to genuine redundancy;
- ❖ those under fixed term; specific task or specific season contracts;
- ❖ those employed for less than six months.

Casual employees employed on a regular and systematic basis will no longer be excluded from making an unfair dismissal claim.



In a concession to small businesses with fewer than 15 employees, the Bill extends the qualifying period from six to 12 months. Additionally, a *Small Business Fair Dismissal Code* has been introduced which, if followed, provides a level of protection against claims for small business employers.

Union Right of Entry

The Bill gives officials of unions or organisations who hold entry permits the right, subject to certain conditions, to enter workplaces for the purpose of holding discussions with members and people eligible to be members of the permit holder's union or organisation.

Permit holders are also entitled under the Bill to enter premises at which a member is employed in order to investigate contraventions of agreements, awards or the Bill itself.

Conclusion

The Fair Work Bill confers more protections on employees than did the WorkChoices legislation. Employers will need to be more mindful of potential unfair dismissal claims, union rights in the workplace, and procedural obligations in the making of agreements. However a good understanding of the Bill will help employers understand their rights and avoid the negative consequences of contravening those of their employees.

In this article, we have highlighted some of the major provisions of the Bill. We will continue to monitor the progress of the legislation through parliament and advise our clients accordingly.

In the meantime, we recommend that clients contact the workplace relations practitioners at Wisewoulds for detailed advice in regard to their workplace relations requirements and issues.