

The Fair Work Act 2009

On 20 March 2009, the Rudd Government finally secured parliamentary support for its Fair Work Bill, though only after last-minute negotiations broke a deadlock with the Senate over how to define a 'small business' for unfair dismissal purposes. More than 200 amendments were made to the original Bill, most proposed by the government itself following consultation with stakeholders.

The new Fair Work Act 2009 (FW Act) is now expected to take effect on 1 July 2009, replacing the Workplace Relations Act 1996 (WR Act). Before then, however, two further measures will need to be passed.

The first of these was introduced on 19 March 2009. The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (TPCA Bill) deals with the transition from the current system to the new Fair Work regime. Among other things, it provides for the repeal of the WR Act – except for Schedules 1 and 10, which will become part of a renamed Fair Work (Registered Organisations) Act 2009. The TPCA Bill also outlines what will happen to 'old' awards and agreements.

A further Bill is scheduled for May 2009, to deal with consequential amendments to other federal laws. The government will be looking to have both these Bills passed by mid-June at the latest, following another Senate inquiry. There will also need to be new regulations and tribunal rules.

Discussions are also proceeding over the possibility of some States referring their powers to the Commonwealth, to enable the FW Act to deal with employers it would not otherwise cover – principally unincorporated businesses, but potentially also State public sector agencies.

This is almost certain to happen in Victoria, which has not had its own system since 1996. It remains to be seen whether other States follow suit, although Western Australia has already declined. Where any deals are done in time, consequential amendments to the FW Act will be included in the Bill scheduled for May.

FW Act: main features

None of the amendments accepted by the government have affected the main features of the new system. These remain:

- a new body, Fair Work Australia (FWA), to replace existing tribunals and agencies;
- the National Employment Standards (NES), setting minimum conditions for all national system employees, though only from 1 January 2010;
- a system of 'modern awards' to provide an additional safety net for most employees, again commencing in January 2010;
- provision for the making of single- or multi-enterprise agreements (EAs), subject to new obligations to bargain in good faith, and a test that requires each employee to be better off overall than they would be under an applicable award;
- retention of most of the existing restrictions on taking industrial action;
- broader access to unfair dismissal complaints, with employees excluded only if dismissed during a qualifying period of service (generally 6 months, or 12 months at a small business), or if they earn over an income threshold and are not covered by an award or agreement;
- a new set of 'general protections' against other forms of discriminatory or wrongful treatment at work;

- a slightly broader right for unions to enter workplaces, though still subject to many restrictions; and
- new rules on the extent to which employees retain their entitlements when transferring from one employer to another.

At the same time, there were important changes in detail to the new legislation during its passage through the Senate. These are outlined in the sections that follow.

Changes to the NES

The most significant alterations relate to the new right to request flexible working arrangements. This will now apply not just to parents of pre-school age children, but to those with children under 18 who have a disability (s 65).

It will also now be possible for a dispute over an employer's refusal to accommodate such a request to be resolved by FWA or some other person, though only where the employer has consented to this in an EA, employment contract or other agreement. The same applies in relation to a refusal to allow a second year of unpaid parental leave (ss 739(2), 740(2)).

In relation to long service leave, it remains the case that in the absence of any award entitlement, State or Territory laws can generally apply to a national system employer. If, however, there are collectively bargained arrangements at the commencement of the NES that operate in more than one State or Territory, and that are at least as favourable as the relevant State or Territory laws, FWA may make an order allowing those arrangements to continue (s 113).

Besides various clarifications to the notice of termination and redundancy pay provisions, the other change to the NES concerns the Fair Work Information Statement. This will now be issued by the Fair Work Ombudsman (FWO), and its content has been expanded to include information about termination of employment, individual flexibility arrangements and union rights of entry (s 124).

Modern awards

A number of amendments were rejected in the Senate. These included proposals from the government to make it mandatory for awards to require consultation over major workplace changes, and to permit awards to include NSW-style controls on the safety of long distance transport work.

There was also an unsuccessful attempt to require individual flexibility arrangements, which vary the operation of selected award conditions, to be lodged with FWA. But FWA is specifically obliged to conduct research into the use of such arrangements (s 653(1)(b)).

In relation to the capacity for high income employees to agree not to be bound by an award, it is now expressly provided that this may be arranged before employment commences (s 333A). But the high income threshold, which is intended to start at \$100,000 per year, indexed from August 2007, cannot be reduced from year to year (s 333).

Agreement-making

The most significant change concerns greenfields agreements. It was originally proposed (in cl 175 of the Bill) that an employer wishing to make such an agreement must first notify every union with a potential interest. Following complaints from employer groups that this would hamper the making of agreements for new projects, especially in the resources sector, this provision was deleted.

The Bill was also amended (by deleting cl 177) to make it clear that there are no 'bargaining representatives' for such an agreement, and hence no obligation to bargain in good faith. But FWA may only now approve a greenfields agreement if the union(s) involved are entitled to

represent the majority of employees to be covered by the agreement. Furthermore, it must be satisfied that approval is in the public interest (s 187(5)).

Other changes in this area include:

- incorporating the requirement to 'recognise' other bargaining representatives in the good faith bargaining provisions (see s 228(1)), rather than having it as a stand alone requirement (as it was under cl 179 of the Bill);
- making it clear that the group of employees to be covered by an agreement must always be 'fairly chosen', though it will still be relevant to consider whether the selected group is 'geographically, operationally or organisationally distinct' (s 186(3)–(3A));
- allowing FWA to assume, in the absence of evidence to the contrary, that where a particular class of employees would appear to be better off under an agreement compared to an award, this would be true of each employee in that class (s 193(7));
- giving FWA a discretion to refuse to approve any agreed variation to an agreement, though only on 'serious public interest grounds' (s 211(1)(c)); and
- permitting FWA to deal with (but not arbitrate) any dispute that arises over a proposed variation to an agreement (s 217A).

One further amendment that was initially adopted in the Senate was an opposition proposal to make it unlawful for an EA to restrict, control or dictate the use or non-use of independent contractors. But this amendment was dropped, as part of the deal that secured the passage of the Bill. Whether such a provision can validly be included in an agreement will depend on whether it meets the general 'matters pertaining to employment' test.

Industrial action

Protected industrial action will not now be possible whenever a 'serious breach declaration' is in force in relation to the proposed agreement, because of a significant failure to bargain in good faith (s 413(7)(c)).

The strike pay provisions have also been clarified somewhat. In particular, an employer cannot insist on withholding all pay in response to a partial work ban that constitutes protected industrial action, while at the same time accepting the benefit of any work that *is* performed. The employer must make it clear that no work will be accepted while the ban persists. Alternatively, it can accept the work and make a proportionate deduction, or no deduction at all (s 471).

Unfair dismissal

The government was persuaded to extend the time limit for lodging unfair dismissal claims, from 7 days after the date of dismissal to 14 days (s 394(2)).

As previously noted, there was also considerable debate in the Senate over the definition of a 'small business employer', which affects both the qualifying period of service and the application of the Small Business Fair Dismissal Code.

In the result, the Bill was passed with no immediate change to the original definition in s 23, which refers to a business with fewer than 15 employees at the date of the dismissal, excluding casuals who are not employed on a regular and systematic basis.

Under a deal struck with Family First, however, the FW Act will be amended (through the TPCA Bill) to alter the threshold to 15 *full-time equivalent positions*. The calculation will be determined by totalling the number of ordinary weekly hours worked in the business (averaged over the four weeks preceding the dismissal), then dividing that total by 38. But this will only apply until 1 January 2011, when the definition will revert to the current standard.

The change will apparently not affect the small business exemption from redundancy pay obligations under the NES (s 121(1)(b)), for which the figure of 15 employees will continue to be determined on a simple headcount.

Right of entry

A number of provisions were added to the legislation to strengthen protections for outworkers. These include new rights for union officials to enter premises to investigate suspected contraventions in relation to outworkers in the textile, clothing and footwear industry (Pt 3-4 Div 2 Subdiv AA). Among other things, there is no general requirement in such a case to give advance notice of any entry.

In other respects, however, the government was intent on countering criticisms from business groups that it had unduly extended union rights of entry. The key reform remains: unions may enter any premises where they have members or potential members, regardless of whether those persons are covered by an award or agreement binding on the union. But this will be subject to a new power on the part of FWA to resolve any disputes between unions by making a 'representation order' for a particular 'workplace group' (TPCA Bill Sch 22 Pt 3).

There are also tighter controls on permit-holders. Documents may only be obtained from an employer if they are 'directly relevant' to an alleged contravention. Furthermore, records relating solely to non-union members may only generally be accessed with the consent of those workers, or by order of FWA (ss 482, 483, 483AA). It is also made clear now in s 504 that any personal information obtained by a union official must be treated in accordance with the requirements of the Privacy Act 1988. Finally, it will be considered a 'misuse' of entry rights if a permit-holder repeatedly enters premises with the intention or effect of obstructing or harassing an employer or occupier (s 508(4)(a)).

One other notable development was the removal of the longstanding provision (currently in s 762 of the WR Act) for an employer to obtain a 'conscientious objection' certificate exempting it from any union right of entry for discussion purposes – a provision traditionally used by the religious order known as the Exclusive Brethren.

Other amendments

Other changes incorporated in the final version of the FW Act include:

- in the provisions (ss 318–320) that allow FWA to vary the effect of an award or agreement that becomes applicable as a result of a transfer of business, a stronger emphasis on the need to consider the impact on the new employer's business;
- a new requirement for deductions from wages to be authorised by the parent or guardian of any worker under 18 (s 326(1)(d)); and
- the removal of any need for an employee or officer of an unregistered employer association to seek leave under s 596 to appear before FWA.