



The Labor Government introduced the Fair Work Bill into parliament yesterday... an end to Workchoices

Proposals include:

- Increased legislated minimum standards
- Increased access to unfair dismissal
- Increased emphasis on collective bargaining

Brief summary

Yesterday afternoon the Minister for Employment and Workplace Relations, Julia Gillard, introduced the 613 page Fair Work Bill 2008 (**Bill**) to parliament.

The Bill is set out in six parts, if passed certain elements take effect from 1 July 2009 and the remainder on 1 January 2010.

The principal objectives of the Bill are said to be the provision of a balanced workplace relations framework that will promote national economic prosperity and social inclusion. The Bill is said to guarantee a safety net of fair, relevant and enforceable minimum standards and conditions for Australians and it's stated aim is to achieve productivity and fairness through enterprise level collective bargaining.

Safety net

The Bill proposes the introduction of a new "safety net" to be made up of ten National Employment Standards (**NES**) and the modern award system effective on 1 January 2010. The majority of work standards contained in the NES are not fixed standards.

Rather, they are processes that will require workplace parties to arrive at definitions of standards which may later be subject to interpretation. In addition, modern awards will contain a flexibility clause which allow workplace parties to modify certain terms of awards and certain aspects of the NES. The flexibility built into the NES and modern awards will require parties at the workplace to negotiate standards, interpret standards and resolve disputes arising out of differing interpretation of those standards.

NES

The first tier of the proposed safety net is the NES which will provide minimum terms and conditions of employment to "all" employees. The NES cover: maximum weekly hours of work; the right to request flexible working arrangements; 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; and provision of a fair work information statement which will detail the rights and entitlements of employees under the new system and how to seek assistance and advice.

Modern awards

The second tier of the proposed safety net is the creation of a system of modern awards by the AIRC. Modern awards will be

industry or occupation based and they will be created only to cover industries that have historically been regulated by awards. Modern awards will not apply to employees with guaranteed annual earnings of more than \$100,000.

Modern awards will include an additional 10 conditions of employment tailored to meet the needs of the particular industry or occupation. These could include: minimum wage rates; types of employment; arrangements for when work is performed; overtime and penalty rates; allowances; leave related matters; superannuation; and procedures for consultation, representation and dispute resolution.

In addition, modern awards will contain a flexibility clause which will allow workplace participants to negotiate arrangements to meet their individual needs. The terms that can be varied by a flexibility agreement include: arrangements for when work is performed; overtime rates; penalty rates; allowances; and leave loadings.

Flexibility in the standards will require workplace participants at the enterprise level to engage in negotiations on how standards should be applied in relation to individual employees. Where standards are capable of multiple valid interpretations, there may be a need for dispute resolution to determine the appropriate interpretation

Unfair dismissal

The Bill contains protection against unfair dismissal to employees in certain circumstances. The Bill prescribes a process which must be followed to assess whether an employee can be dismissed for misconduct in certain circumstances. In particular, a small business owner who does not have a human resources management department and cannot readily deploy employees into other positions or workplaces can use the proposed *Unfair Dismissal Code* (Code) to assess whether there is justification to terminate the employment of the individual on the grounds of misconduct. The Code sets out the circumstances in which a summary dismissal is warranted including cases of theft, fraud and violence. For under-performing employees, the Code requires an employer to give the employee a valid reason based on the employee's conduct or capacity to do the job explaining why the employee is at risk of being dismissed and a reasonable chance to rectify the problem. Warnings are not required.

The Code is a one page checklist that must be completed and signed by the employer. An employer with fewer than 15 employees must complete the checklist, which is a paper process, to assess whether misconduct exists. How the form is completed and the validity of the issues

considered will likely leave broad scope for disagreement between workplace participants at the enterprise level. It is anticipated that this is an area where third party dispute resolution will likely be required.

If employed by an employer with fewer than 15 employees, an individual employee is not entitled to file an unfair dismissal claim unless they have been employed for more than twelve months. Where employed by an employer with 15 or more employees, an individual employee is entitled to file an unfair dismissal claim in the event that have been employed for more than six months.

Dispute resolution

Fair Work Australia will oversee the new workplace relations system. It will aim to provide the public with practical information, assistance and advice on workplace issues and ensure compliance with workplace law and will replace a number of Australian government agencies. Fair Work Australia will have the power to vary awards, make minimum wage orders, approve agreements, determine unfair dismissal claims and make orders on things such as good faith bargaining and industrial action to assist employees and employers to resolve disputes at the workplace.

As part of the Bill, it is proposed that workplace participants at the enterprise level will engage in alternative dispute resolution as

the primary mechanism by which to resolve workplace disputes. Alternative dispute resolution at the enterprise level will be an integral part of the new workplace relations system.

Parties are required to first try to resolve matters at the enterprise level. Only in the event that they are unable to do so are to parties to pursue third party ADR. There is no obligation on the parties to choose the AIRC and there are private providers of such services who may be expected to compete increasingly for business in this area. The parties may elect to either pursue private alternate dispute resolution mechanisms or seek the assistance of the AIRC.

One of the main functions of the AIRC will be dispute resolution. Its jurisdiction will be dependent upon the parties selecting the AIRC to resolve disputes. If the parties take their dispute to the AIRC, it is prohibited from arbitrating an outcome or making a determination about rights even if the parties agree that it should do so. If selected the AIRC will facilitate the parties resolving their own disputes, exercising mediation or conciliation powers, but it cannot arbitrate or impose orders upon the parties. The AIRC will also continue to conciliate unfair and unlawful termination cases and may arbitrate unfair termination cases if they are not resolved through conciliation.

Legal enforcement mechanism

The requirement to use the model dispute settlement procedure will not, however, preclude a workplace participant from their right to take action in a common law court. It is proposed that Fair Work Australia will assist employers, employees and their representatives comply with the new workplace relations laws and, where necessary, take steps to enforce the laws through the court system. Inspectors will be able to enforce breaches of terms of contracts of employment dealing with the NES or modern awards. In addition, a specialist Fair Work Division will be created in the Federal Court and Federal Magistrates Court.

It is proposed that the Fair Work Court Divisions will hear matters which arise under the new workplace relations laws. It is anticipated that the Fair Work Divisions will have flexible remedies, allowing the court to make orders considered appropriate to remedy a contravention, including injunctions rather than just imposing a penalty.

Enterprise collective bargaining

In addition to proposing an improved safety net, the Bill provides for an enterprise collective bargaining system focusing on promoting productivity

The Bill provides a new framework for Enterprise Bargaining that is premised on duty to bargain in good faith and empowers Fair Work Australia to make orders to ensure compliance with this duty. The Bill also provides that where an employer refuses to bargain with its employees, an employee bargaining representative can request Fair Work Australia to determine whether there is majority employee support for negotiating an Enterprise Agreement. If there is majority support, an employer will be required to bargain collectively with its employees in good faith. The duty to bargain in good faith will require that a bargaining representative must meet, attend and participate in meetings, disclose relevant information, bond to proposals and give genuine consideration to proposals of the other party.

In addition the Bill introduces a new scheme of bargaining for low paid employees. Employees in certain industries like Child Care, Community work, Security and Cleaning will have access to a specific bargaining stream. Fair Work Australia will have the obligation to facilitate the making of agreements and may arbitrate a first Collective Agreement if the parties consent or if there is no reasonable prospect of an agreement being negotiated.

What to anticipate

The Fair Work Bill will require a greater use of alternative dispute resolution strategies by workplace participants. In particular, we expect that HR managers and operations managers will be involved in increased workplace negotiation of what appropriate work standards should be given the flexible nature of the NES given that a flexibility clause will be contained in all modern awards. Employers will need to be mindful that issues with respect to consistency and discrimination could arise if workplace standards are not developed and implemented objectively. We will be monitoring the status of the proposed Bill and further updates will be provided. In the interim, should you have any questions, please contact either Kristen Lopes or Sam Ingui.

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