

## Introduction of Fair Work Bill 2008 – Our First Impressions

On 25 November 2008, Julia Gillard introduced the *Fair Work Bill 2008* (“**Bill**”) into parliament. This bill will impact upon all employers operating in the federal system.

Gillard stated that the Bill is “shorter and simpler than Work Choices, it is easy to read and apply and it is set out in six easy parts.” The parts are:

### The Bill

Chapter 1 – Introduction

Chapter 2 – Terms and Conditions of Employment

Chapter 3 – Rights and Responsibilities of employees, employers, organisations etc.

Chapter 4 – Compliance and Enforcement

Chapter 5 – Administration

Chapter 6 – Miscellaneous

### Chapter 1 – Introduction

The Introduction provides general information about the Bill, its application and interaction with State and Territory laws along with geographical application. Interestingly the Introduction contains “The Dictionary” which contains a list of all defined terms within the Bill in one place.

### Chapter 2 – Terms and Conditions of Employment

Chapter 2 of the Bill deals with a number of significant matters, including:

- the National Employment Standards (“**NES**”);
- Modern Awards;
- Enterprise Agreements, and
- Transmission of Business.

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## ***The NES***

The NES and the Modern Award will combine to provide a safety net of terms and conditions of employment for employees generally.

The Government has previously published the NES which was the subject of previous EMA Notes. The NES will prescribe minimum standards dealing with:

- maximum weekly hours;
- requests for flexible working arrangements;
- parental leave and related entitlements;
- annual leave;
- personal/carers leave;
- community services leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay, and
- Fair Work Information Statement.

The provisions contained in the Bill fundamentally reflect those previously advised to Clients. There has been one change however and that relates to annual leave and the cashing out of annual leave. An employee may cash out annual leave (without a cap on the amount of annual leave an employee may cash out) but they must have at least four (4) weeks annual leave left at the time they cash out their annual leave.

## ***Modern Awards***

Existing federal awards and Notional Agreements Preserving State Awards (“**NAPSA’s**”) are subject to Award Modernisation. EMA Consulting has previously published an EMA Note on Award Modernisation.

The Bill puts more ‘meat on the bones’ in that it further clarifies what can be or what can’t be contained in a Modern Award. A Modern Award may include terms about any of the following matters:

- (a) minimum wages;
- (b) type of employment;
- (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
- (d) overtime rates;
- (e) penalty rates;
- (f) annualised wage arrangements;
- (g) allowances;
- (h) leave, leave loadings and arrangements for taking leave;
- (i) superannuation, and
- (j) procedures for consultation, representation and dispute settlement.

A Modern Award may also include terms about an outworker; an industry specific redundancy scheme; incidental or machinery matters; coverage terms; flexibility terms; terms about the settling of disputes and terms that provide for the automatic variation of allowances.

A Modern Award must not contain terms that are objectionable; that deal with payments and deductions for the benefit of the employer; about right of entry; are discriminatory; contain State – based differences or long service leave.

## ***Enterprise Agreements***

An employer may enter into an enterprise agreement with the employees and/or “with one or more relevant employee organisations”. The matters that can be contained in the agreement are matters “pertaining to the relationship between an employer...and that employer’s employees”; or matters “pertaining to the relationship between the employer...and the employee organisation”; or matters about deductions from wages (where authorised by the employee) and how the agreement will operate. There is otherwise no prohibited content.

An employer will be required to provide to each employee proposed to be covered by the agreement a notice of representational rights. The notice must specify that an employee “may appoint a bargaining representative” (which could be an employee organisation) – if the employee is a member of an employee organisation and does not “appoint another person” then the employee organisation would become the default bargaining representative.

The bargaining representative is a new concept. A bargaining representative will be the employer (together with their nominated representative) and either the employee organisation (if an employee is a member of the employee organisation) or the person nominated as the bargaining representative by the employee.

Prior to voting on any agreement (during the “access period”), the employer is required to take all “reasonable steps to ensure that” the employees have a written copy of the agreement and any material cross referenced in the agreement for the duration of the “access period”. The employees will ultimately vote on the agreement “by ballot or by an electronic method.” If a simple majority of the votes cast approve the agreement then the agreement is “made”. A “bargaining representative” must then apply to FWA for approval of the agreement – the application must be within fourteen (14) days “after the agreement is made” and must comply with the “procedural rules to accompany the application.”

FWA will approve the agreement, provided that the agreement “has been genuinely agreed to by the employees”; the terms do not contravene the NES and the agreement passes the “better off overall test”. FWA must also be satisfied that the agreement does not contain any “unlawful terms”; it contains a nominal expiry date (maximum of four [4] years) and that it contains a dispute and grievance procedure.

The “better off overall test” is a new concept – an agreement will pass the “better off overall test...if FWA is satisfied, as at the test time, that each award covered employee...would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.”

There are particular “approval requirements” for particular kinds of employees, including shift workers; pieceworkers; school based apprentices/trainees and outworkers.

In certain circumstances an agreement could be varied and/or terminated.

As advised during this EMA Note, there are a number of new concepts introduced through the *Fair Work Bill*, one of which is the ability of FWA to issue “good faith bargaining orders”. Proposed parties to an agreement are required to comply with certain “good faith bargaining requirements”.

Another new concept is “low paid bargaining”. “Low paid bargaining” has been designed to assist those “low paid employees and their employers” make an agreement.

## ***Transmission of Business***

The rules regarding transmission of business will change – however, they will not take effect until they have been proclaimed. Clients who are considering purchasing, selling or transferring their business or part of a business should speak to an EMA Consulting prior to completing any such action.

## **Chapter 3 – Rights and Responsibilities of employees, employers, organisations etc.**

### ***General Workplace Protections***

General Workplace Protections are provided for which include workplace rights, freedom of association and involvement in lawful industrial activities, other protections including discrimination.

Protection is provided for employers, employees, organisations and other associations of employers or employees. It also provides protections in some circumstances for other persons, including employers and employees in State industrial relations systems, independent contractors and the persons who engage them (principals).

Additionally, protection is provided from unlawful termination, freedom of association, sham arrangements in relation to independent contractors etc.

The principal protections have been divided into two (2) sections relating to:

- (1) workplace rights – employment entitlements and the freedom to exercise and enforce those entitlements, and
- (2) engaging in industrial activities –the freedom to be or not be a member or officer of an industrial association and to participate in lawful activities, including those of an industrial association.

Employers, employees and industrial associations are prohibited from taking adverse action against certain other persons because the other person has, or exercises a workplace right, or engages in industrial activity. Adverse action includes dismissal of an employee but also includes a range of other action such as prejudicing an employee or independent contractor and organising industrial action against another person. Coercion and misrepresentations in relation to workplace rights and industrial activities are also prohibited.

All of the prohibitions in this Part have civil remedy provisions.

### ***Unfair Dismissal***

The object of this Part is to provide a quick, flexible and informal process for the resolution of unfair dismissal claims. Reinstatement is the primary remedy for unfair dismissal.

A person will be protected from unfair dismissal if they are covered by a modern award or if an enterprise agreement applies to their employment. If neither of these criteria applies, a person will only be able to bring an unfair dismissal claim if their remuneration is less than the high income threshold (currently \$100,000 as indexed from 27 August 2007).

The minimum employment period required to be served before an application can be brought by an employee will be one (1) year for employees of a small business and six (6) months for all other employees.

Under the provisions of the Act, an unfair dismissal occurs when the FWA is satisfied that:

- the person has been dismissed;
- the dismissal was harsh, unjust or unreasonable;
- the dismissal was not consistent with the Small Business Fair Dismissal Code (small business only), and
- the dismissal was not a case of genuine redundancy.

### ***Industrial Action***

This chapter sets out when industrial action is protected industrial action. No action lies under any law in force in a State or Territory in relation to protected industrial action except in certain circumstances.

Included are rules about:

- when industrial action for a proposed enterprise agreement is protected industrial action;
- a prohibition on organising or engaging in industrial action during the nominal life of an enterprise agreement and remedies where industrial action is taken;
- orders that can be made by FWA in relation to industrial action that is not protected industrial action and the other remedies that are available;
- a prohibition on pattern bargaining and remedies that are available if pattern bargaining is occurring;

- the grounds for FWA to suspend or terminate protected industrial action;
- a process to allow employees to participate in a secret ballot to authorise the taking of protected industrial action, and
- restrictions on payments to employees during periods of industrial action.

### ***Right of Entry for Organisation Officials***

This chapter provides for the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State or Territory OHS laws. In exercising those rights, permit holders must comply with the requirements set out in this Part.

Permit holders may enter premises for the purpose of investigating suspected contraventions of the Bill or fair work instruments or to hold discussions with members and potential members of the organisation while on the premises. The Part sets out additional requirements for officials of organisations to meet when exercising rights under State or Territory OHS laws. These rules are largely unchanged.

### ***Stand Down of Employees***

Provision is made for the stand down of an employee without pay in certain circumstances.

Employers are able to stand down an employee without pay, if the employee could not be usefully employed because of one of the following circumstances:

- industrial action (other than industrial action organised or engaged in by the employer);
- a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown, or
- a stoppage or work for any cause for which the employer cannot reasonably be held responsible.

An employer can only stand down an employee if they cannot be usefully employed. This does not apply if the employer is able to obtain some benefit or value for the work that could be performed by an employee. These rules are largely unchanged.

### ***Notification and Consultation relating to certain Dismissals***

There is an obligation on an employer to notify Centrelink in writing if the employer has decided to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons. Such notice must be given as soon as practical after the decision is made and before the employees are dismissed.

There is also an obligation on the employer to notify or consult with a registered employee association (eg union).

### ***Employee Records and Payslips***

There is an obligation on an employer to make, and keep for seven (7) years, employee records. This includes records regarding pay, reasonable additional hours, overtime hours, leave, superannuation, termination of employment (where applicable) and other general matters.

An employer is required to give pay slips to each of its employees within one (1) working day of each pay day.

## **Chapter 4 – Compliance and Enforcement**

Chapter 4 of the *Fair Work Bill*, amongst other things, deals with civil remedies, the orders that a court could make and establishes a new small claims procedure.

The *Fair Work Bill* imposes obligations on employers, employees and other organisations (e.g. trade unions and employer associations). Should one of those parties breach their obligations under the *Fair Work Bill*, then they

may be subjected to a civil remedy. Some of the civil remedies, and one of the reasons, that a party may be taken to Court include:

- contravention of a Modern Award;
- contravention of an Enterprise Agreement;
- contravention of a Bargaining Order;
- contravention of a Workplace Determination;
- contravention of a National Minimum Wages Order;
- breaching Freedom of Association provisions;
- engaging in Industrial Action before the nominal expiry date of an Enterprise Agreement;
- not complying with certain instructions relating to, or interfering with, a Protected Action Ballot;
- not providing the appropriate information, or not providing access to that information, if a person has requested that information whilst that person is utilising their rights under the Right of Entry provisions of the *Fair Work Bill*;
- not keeping appropriate Employee Records, and
- contravening the Unlawful Termination provisions.

An employee, an employer, an outworker, an outworker entity, an employer organisation, an industrial association and/or an inspector may bring an action under the civil remedy provisions.

If a civil remedy action has been instigated then, depending upon the civil remedy proceeding, the matter would be dealt with by either:

- the Federal Court;
- the Federal Magistrates Court;
- an appropriate State or Territory Court;
- the Fair Work Division of the Federal Court, or
- the Fair Work Division of the Federal Magistrates Court.

The civil remedy applicant may choose to have their application dealt with under the Small Claims Procedure. The Court would be limited under the Small Claims Procedure to an award of \$20,000 (unless a higher amount is specified in the Regulations).

The time limit of six (6) years “after the day on which the contravention occurred” remains.

## **Chapter 5 – Administration**

Chapter 5 details the establishment of Fair Work Australia as an independent statutory agency introduced to oversee the new workplace relations system and also the establishment of the Office of the Fair Work Ombudsman to promote and monitor compliance with the Act.

Fair Work Australia will replace the Australian Industrial Relations Commission, the Australian Industrial Relations Registry, the Australian Fair Pay Commission, the AFPC Secretariat and the Workplace Authority.

The Office of the Fair Work Ombudsman will replace the Workplace Ombudsman and gives powers to inspectors and staff to investigate compliance.

### ***Fair Work Australia***

Part 5.1 deals with Fair Work Australia and establishes and confers the powers applicable to this department.

The functions of Fair Work Australia cover:

- the National Employment Standards;
- modern awards;
- enterprise agreements;
- workplace determinations;
- minimum wages;
- equal remuneration;
- transfer of business;
- general protections;
- unfair dismissal;
- industrial action;
- right of entry;
- stand down;
- other rights and responsibilities;
- the extension of the National Employment Standards entitlements;
- unlawful termination protections.

Fair Work Australia will also have to power to deal with disputes by arbitration where Fair Work Australia is expressly authorised by the provisions of the Act.

In performing their functions and powers, Fair Work Australia shall do so in a manner that is fair and just and must deal with matters quickly, informally and in a manner that avoids unnecessary technicalities and is open and transparent to promote harmonious and cooperative workplace relations.

Applications by parties to Fair Work Australia must be made in the correct form and utilising the correct procedural rules as set by the Act.

Fair Work Australia has the power to dismiss an application that is not made in accordance with procedural rules or where the application is not made in accordance with the Act or is frivolous, vexatious or has no reasonable prospects of success with the exception of dismissing a matter dealing with a dispute.

The Bill gives Fair Work Australia the power to determine when and where a matter will be dealt with, how parties will appear, either in person to attend before Fair Work Australia either or by written or oral submission. Fair Work Australia has the power to conduct conferences or hold hearings as appropriate to deal with matters.

Conferences on matters before Fair Work Australia will be informal and held in private. Though matters relating to unfair dismissal or general protection will generally be heard in public.

Fair Work Australia may only deal with a dispute if authorised to do so. Generally a matter will be held by mediation or conciliation or by making a recommendation or expressing an opinion.

Persons may only be represented by a lawyer or paid agent where Fair Work Australia grants permission. A lawyer is defined in the Act to mean a person who is admitted to the legal profession by a Supreme Court of a State or Territory and includes a lawyer who does not hold a current practising certificate. A paid agent means an agent (other than a bargaining representative) who charges or receives a fee to represent a person in relation to a matter. Where the lawyer or paid agent is a bargaining representative, or is an employee or officer of the person, organisation, peak council or bargaining agent they shall not be considered to be a lawyer or paid agent for the purposes of representation.

It is the intention of the Bill that Fair Work Australia operates efficiently and informally and where appropriate in a non-adversarial manner.

Fair Work Australia may grant permission for a lawyer or paid agent where it believes it enables the matter to be dealt with more efficiently, having regard to the complexity of the matter, or where it would be unfair not to allow the person to be represented because of the inability of the person to represent themselves effectively; or it would be unfair not to allow the person to be represented taking into account fairness between parties.

Permission is not required for written submission to Fair Work Australia with matters dealing with modern award and minimum wages.

Fair Work Australia has the power to revoke, vary or amend any decisions of Fair Work Australia.

Fair Work Australia may order a person to bear some of the costs where Fair Work Australia is satisfied that an application is vexatious or without reasonable clause or the application or response to an application had no reasonable prospects of success.

Fair Work Australia may also order costs against lawyers and paid agents relating to termination and unfair dismissal matters.

The Bill provides for penalties including 12 months imprisonment for offences relating to Fair Work Australia including insulting or disturbing a FWA member; using insulting language, etc.

### ***Fair Work Ombudsman***

Established to promote harmonious and cooperative workplace relations and ensure compliance with the Act and fair work instruments including providing education, assistance and advice to employees, employers and organisations.

Inspectors of Fair Work Ombudsman have powers to exercise compliance under the Act or a fair work instrument.

An inspector will have the right to enter a business premises if the inspector reasonably believes that there are records or documents that relate to compliance purposes on the premises.

### ***Employee records and payslips***

This Chapter sets out the obligation on an employer to make, and keep for seven (7) years, employee records. This includes records regarding pay, reasonable additional hours, overtime hours, leave, superannuation, termination of employment (where applicable) and other general matters.

An employer is required to give pay slips to each of its employees within one (1) working day of each pay day.

## **Chapter 6 – Miscellaneous**

### ***Multiple Actions***

Where there may be more than one remedy available for the same conduct or circumstances, it ensures that people have access to an appropriate remedy but also ensures that they are not entitled to more than one remedy.

### ***Disputes***

FWA will be able to deal with disputes provided that the award or enterprise agreement provides a procedure for dealing with the dispute, or a contract of employment includes a term that provides a procedure for dealing with disputes between the employer and employee, to the extent that the dispute is in relation to any matter contained within the National Employment Standards or Safety Net contractual entitlement.

If the parties have agreed, FWA will be able to arbitrate the dispute. FWA will also be able to deal with a dispute by mediation or conciliation or by making a recommendation or expressing an opinion.

### ***Extension of NES***

Some of the National Employment Standards entitlements will be extended to *non-national system employees*.

The affected standards are:

- unpaid parental leave and related entitlements;
- notice of termination or payment in lieu of notice.

State or Territory laws that provide employee entitlements in relation to the above two (2) are not excluded and continue to apply to non-national system employees where they provide more beneficial employee entitlements than the extended provisions.

## *Unlawful Termination*

The unlawful termination provisions that are contained in the Bill remain largely unchanged from the current provisions.

### **Summary**

The Bill does not deal with transitional arrangements. The government have foreshadowed that legislation dealing with the transitional and consequential matters will be introduced to parliament early next year.

It is intended for this Bill to come into effect on 1 July 2009, with the current "Standard" remaining until the NES comes into effect on 1 January 2010. Workplace agreements will still need to comply with the current "no-disadvantage test" against current Awards and NAPSAs until replaced with the Modern Award system on 1 January 2010. At this point the "better off overall" test will be applied.

We have set out a brief overview above, and will be presenting further EMA Notes and a comprehensive seminar early in 2009 to look at the Bill and its practical application to employers. If you have any questions in relation to the Bill or its potential application to your organisation, please do not hesitate to contact you EMA Consultant.

We welcome clients and contacts to forward to us your questions, concerns and issues, which will then be answered and published in future EMA Notes.