

The new Fair Work Bill & small business

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The new Fair Work Bill, which spans *just* 579 pages, represents a comprehensive reworking of the *Workplace Relations Act 1996* (Cth). Certain elements of the new provisions, such as the unfair dismissal laws, are expected to take effect from 1 July 2009. Others from 1 January 2010. For example, from 1 January 2010, the new 10 minimum employee entitlements will apply to most Australian workplaces. The Bill contains significant changes for Australian employers and workplaces with collective bargaining at the heart of the new legislation.

Further, the new Bill establishes a new industrial watchdog called 'Fair Work Australia' (**FWA**) and enshrines in law the notion of good faith collective bargaining. The principal objective of the Bill recognises the Rudd Government's intention to provide a balanced framework for cooperative and productive workplace relations.

Fair Work Australia

One of the significant aspects of the Bill is the establishment of Fair Work Australia (**FWA**) to act as a 'one-stop shop' for information, advice and assistance on workplace issues, by merging the functions currently performed by 7 government agencies.

A Fair Work Division will also be created in both the Federal Court and the Federal Magistrate Court. The FWA will include a tribunal with members having powers to review and vary awards, deal with unfair dismissal cases and make orders regarding industrial action.

Terms and conditions of employment

The Bill provides for a comprehensive safety net of minimum wages and employment conditions in two parts.

Firstly, it creates 10 National Employment Standards (**NES**) as minimum standards applying to all employees. These standards cover issues such as maximum weekly hours of work, leave, public holidays, notice and redundancy payments and the right to request flexible working arrangements.

It also creates Modern Awards which build on the NES and will cover a further 10 subject areas including minimum wages, work arrangements, overtime/penalty rates, allowances, leave and leave loadings, superannuation and dispute resolution as part of their guaranteed entitlements. Employers/employees will be able to agree on flexible working arrangements.

However, the Modern Awards will not apply to employees earning over \$100,000 per year.

Enterprise agreements

The Bill provides a new framework for enterprise bargaining based on 'good faith bargaining' which does not use any concept of union or non-union agreements but makes sure the FWA can make orders to ensure compliance with good faith bargaining requirements.

A workplace agreement will now be described as an 'enterprise agreement' with no distinction as to whether it is between a union and an employer or one made directly between an employee and an employer.

To facilitate the entry of both employees and employers into enterprise bargaining, the Bill will provide for a special low paid bargaining stream. An enterprise

agreement is made when it is approved by a majority of the employees to whom it will apply. Where an employer refuses to bargain, either a bargaining representative or an employee can make an application to the FWA to require the employer to bargain.

Anti-discrimination provisions

Discrimination protection has been added to prohibit adverse actions by an employer against an existing or former employee or future employee because of the individuals race, colour, sex, sexual preference, age, physical or mental disability, marital status, religion, political and social origin.

Unfair dismissal

The new Bill institutes different levels of unfair dismissal. Under *Work Choices*, employees in business with up to 100 workers could be dismissed for any reason without a right to challenge the dismissal.

The new Bill will provide a new scheme of protection to ensure good employees are protected from being dismissed unfairly. Operational reasons will no longer be a defence to a claim of unfair dismissal. These measures are discussed further below, in the section entitled "impact on small business".

Right of entry

Whilst the provisions relating to industrial action remain largely unchanged, there will be a significant change expanding a union's right of entry. A permit holder may enter premises to investigate a contravention of the Bill, a modern award or enterprise agreement.

Rights and responsibilities

The Bill incorporates the current provisions in the *Workplace Relations Act* relating to freedom of association, unlawful termination and other miscellaneous protections for

those participating in collective activities. Further, it provides certain sanctions where an individual takes adverse action because someone exercises one of those rights.

Impact on small businesses

Under the *Work Choices* legislation, small business employers were exempt from unfair dismissal claims. Previously, a “small business employer” was defined as a company with 100 or fewer employees.

The way in which the unfair dismissal laws will affect small businesses from 1 July 2009 is that the legislation will change the definition of a “small business”. Under the Bill, a small business will now be a business that employs less than 15 employees and includes part-time and long-term regular casual staff. The Bill defines a small business based on the number of employees regardless of the revenue the business earns.

However, the Bill adjusts the length of service required of employees before they are able to access unfair dismissal protection to 6 months for businesses that employ 15 or more employees, and 12 months for smaller businesses. Thus, employees who have worked for a small company with less than 15 employees for more than 12 months can make an unfair dismissal claim. The same is true for those who have worked for 6 months in large companies. A casual employee employed on a regular basis for at least 12 months will be considered a long-term casual employee. However, workers who earn more than \$100,000 per annum will not be covered by the Bill unless they are covered by an industrial award or an enterprise agreement.

The Bill also provides a “Fair Dismissal Code” setting out procedures that if followed will exempt small businesses from unfair dismissal claims. Under the new small business Fair Dismissal Code of Practice, small business owners who comply with the code when they dismiss a staff member will be exonerated from claims for unfair dismissal, where the dismissal is found to be fair and reasonable.

Conclusion

Concerns have been expressed by small business owners that they will be hit hard by the new 'one size fits all' awards as these could lead to job losses and higher operational costs. In particular, the measures of are concern at the present time, when rising unemployment and limited cash flows are already significantly impacting small business.

In any event, all employers should familiarise themselves with the new legislation, especially those provisions which relate to unfair dismissal. Only time will tell whether the new Rudd laws will lead to greater costs for employers leading to further rises in unemployment.