

December 2008

GLAD TIDINGS? – NEW LEGISLATION BRINGS JOY TO EMPLOYEES

Employees are set to benefit from legislative reform at both federal and State level. In the federal realm, the much trumpeted *Fair Work Bill 2008* ('the Bill') was passed by the House of Representatives on 4 December 2008. It will now go through the Senate process. In Victoria, without much fanfare, the *Victorian Workers' Wages Protection Act 2007* ('the Wages Protection Act') commenced operation on 1 December 2008.



In this edition of Employment Alert, we will summarise some important aspects of the FW Bill and briefly outline the Wages Protection Act.

Fair Work Bill 2008

Although the Bill represents a shift in favour of employee rights in a number of areas, including unfair dismissal and enterprise bargaining, it is not a return to the pre-Work Choices era. For example, small businesses will have a simpler way to deal with unfair dismissal claims, and there will be increased scope for individual flexibility within the award and collective bargaining systems. The Workplace Relations Minister, Julia Gillard, describes the Bill as "very much at the political centre".¹

Safety Net

The Bill sets out the twin elements of the safety net of minimum wages and conditions:

- The **National Employment Standards**, set out in the Bill, are to apply to all employees in the federal system, and will include increased unpaid parental leave, the right to request flexible working arrangements, and unpaid compassionate leave for casual employees. Modern awards and enterprise agreements will not be permitted to exclude the NES.
- **Modern awards**, currently under development by the AIRC, will include minimum wages, as well as other conditions such as overtime and penalty rates. For employees not covered by awards, national minimum wage orders will be made.

Modern awards will contain **award flexibility** clauses, enabling individual employees and employers to vary the application of the award in areas such as overtime rates, penalty rates, allowances, leave loading and when work is performed.

Modern awards will not apply to **high income earners** who have received from their employers a formal guarantee of annual earnings in excess of the high income threshold (expected to be \$100,000) – there are specific requirements as to what an employer must do to give such a guarantee, including advising the employee that the award will not apply.

Agreement-making

In March this year, the Government amended the *Workplace Relations Act 1996* ('WR Act') to put an end to the making of new **AWAs**. Under the WR Act, certain employers are now eligible to make **ITEAs** (individual transitional employment agreements), but no new ITEAs can be made after 31 December 2009.

The Bill does not mention AWAs or ITEAs. This means they will continue to operate in accordance with the WR Act (until terminated or replaced).

The Bill provides for the making of collective **enterprise agreements**, with the following key features:

- Enterprise agreements will exclude the operation of modern awards, but will be subject to the NES.
- They will be permitted to include a wider range of matters than is currently allowed.
- The maximum period of operation is to be reduced from 5 years to 4 years.
- Enterprise agreements will be required to include a "**flexibility term**", enabling certain conditions to be varied to meet the needs of an individual employee and employer (provided the employee is "better off overall").

¹ The Hon Julia Gillard, Speech to the Australian Industry Group, 8 December 2008.

- Enterprise agreements will be subject to the requirements of **Good Faith Bargaining**. This means that employers and employees (and unions and employer organisations) will be required to adhere to certain procedural requirements when negotiating an enterprise agreement. These requirements include attendance at, and participation in, meetings, disclosure of information, responding to proposals in a timely manner, giving genuine consideration to proposals, and “refraining from capricious or unfair conduct”. Fair Work Australia will be able to make good faith bargaining orders, requiring parties to take certain steps or refrain from particular conduct.
- Enterprise agreements will no longer be subject to the No-Disadvantage Test, but will instead be required to satisfy the **Better Off Overall Test**, which will be administered by Fair Work Australia (‘FWA’). The Bill provides very little guidance on how this test will be applied, simply stating that an enterprise agreement passes the test “if FWA is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee”. The Explanatory Memorandum clarifies that it is intended that FWA apply the test to classes of employees, not each individual employee.

Unfair Dismissal and Discrimination

The Bill reintroduces **unfair dismissal** rights for employees of businesses with 100 employees or fewer. There are a number of other important changes in the area of unfair dismissal, including the following:

- If a business employing fewer than 15 employees dismisses an employee, the dismissal will only be unfair if it was not consistent with the **Small Business Fair Dismissal Code**.
- Although previous announcements suggested that lawyers would be excluded from the process, in fact FWA may give **permission for legal representation** if it would otherwise be unfair or inefficient. Furthermore, in-house lawyers and legally qualified staff will be permitted to appear before FWA without the need to request permission.
- Before conducting a **hearing**, FWA will need to reach the view that it is appropriate to do so, taking into account the views of the parties and whether a hearing is the most effective and efficient way to resolve the matter.
- Employees who are dismissed for genuine redundancy reasons are excluded from claiming unfair dismissal. Although this is similar to the Work Choices “operational requirements” exclusion, the Bill lifts the bar as to what constitutes “**genuine redundancy**” by effectively requiring employers to consider redeployment options before dismissing an employee.²

The Bill includes new entitlements for employees to bring **discrimination claims** to Fair Work Australia. Redundancy selection processes could be challenged under these discrimination provisions. Job applicants and ongoing employees could also bring discrimination claims about adverse action unrelated to termination.

Transfer of Business

Complex rules have been developed over the years to address the issue of what award or statutory agreement applies where a business is sold, outsources its work or transfers assets.

Under the current WR Act, the new employer in a transferred business is bound by any award or collective agreement which applied to the incoming employees for a period of only 12 months at the most.

Under the Bill, enterprise agreements (and other relevant documents) will transfer to the new employer in a broader range of situations and will apply until terminated or replaced.

Workplace Determinations (Arbitration)

Julia Gillard has emphasised that the Bill does not re-introduce “automatic arbitration of disputes as provided for in previous federal systems and in current State systems”.³ However, FWA will have power to make “workplace determinations” in four types of situations:

- In cases of **serious breach of good faith bargaining**.
- Where protected **industrial action** is causing (or threatening to cause) significant economic harm to the employer or employee, or endangering the life or health of the population, or causing significant harm to the Australian economy.
- To make multi-employer “enterprise agreements” for **low paid employees** whose conditions are based on the safety net, where negotiations fail.
- At the **request of the parties** if they are unable to resolve a bargaining dispute.

² For more information on this, refer to Employment Alert, November 2008.

³ The Hon Julia Gillard MP, Speech to Australian Industry Group, 8 December 2008.

Industrial Action

The Bill also introduces changes to the law relating to industrial action. Under Work Choices, employers were effectively required to dock employees a full four hours' pay where the employees refused to work overtime or had partial work bans in place. The Bill gives employers a number of options in responding to employee industrial action, including deducting a proportion of pay for partial work bans.

Union Rights of Entry

Unions will have increased access to workplaces under the Bill. Work Choices restricted union rights of entry to workplaces where the union had members. Under the Bill, a union will be able to enter a workplace if employees at the workplace are eligible to join the union. However, these rights of entry are subject to permit, notice and conduct requirements.

The Next Step

A Senate inquiry on the Bill is expected to report back in February. The Opposition has flagged that it may seek amendments in the areas of union rights of entry, union bargaining fees, compulsory arbitration including in the low paid bargaining stream and transfer of business rules.

In her speech to Parliament, Workplace Relations Minister Julia Gillard announced the Government's intention that the Bill will commence from 1 July 2009. However, modern awards and the National Employment Standards will not commence until 1 January 2010.

We will keep you informed of the progress of the Bill through Parliament next year.

Victorian Workers' Wages Protection Act 2007

Under the Wages Protection Act, which came into operation on 1 December 2008, employers are:

- prohibited from paying employees in goods or services, without their express agreement;
- permitted to make deductions from employee wages, if the employee authorises the deduction to a third party – for example, a health insurance fund;
- subject to stringent requirements if a deduction is for the benefit of the employer (or a related party of the employer) – for example, accommodation, goods or services provided by the employer;
- prohibited from making deductions to compensate an employer for losses from the till, or for damaged or destroyed clothing, equipment or property, except in limited circumstances.

Employers should ensure they:

- have proper written authorisation from employees for any payroll deductions;
- include in employment agreements specific information about non-monetary components of remuneration packages;
- seek advice before making deductions for the benefit of the employer or a related party of the employer.

We wish all our readers a Merry Christmas and a Happy New Year!

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations contact the Workplace Relations team at Moores Legal.

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