



FIRST IR AND FAIR WORK AUSTRALIA

THE NEW EMPLOYMENT SYSTEM AS AT 1 JULY 2009

SEMINAR

HOW FWA AFFECTS EMPLOYERS

SCOPE AND INTENT OF THE SEMINAR

The *Fair Work Act (FWA)* comes into force in a matter of months on 1 July 2009. The purpose of this seminar is to explain what the new Fair Work legislation is, what implications it has on the regulation of employment and thus the impact it will have upon you, the employer and your organisation. These changes and their implications to business are substantial. In addition, we will also cover what you have to do in preparation for the introduction of this legislation.

In two and a half hours we will provide an informative and condensed overview of the Fair Work Act, what it means and what Employers need to do to live with it? If you are an Employer, Business Manager, HR/ER Manager, or anybody connected with employment then these changes directly affect you. Essential information and accompanying notes will be provided at the seminar for your future reference.

Most importantly, the implementation of this legislation is such that doing nothing will not give you an advantage nor buy you additional time, in fact doing nothing could be detrimental to your organisation.

Key areas of address:

- what is the Fair Work Bill – its regulatory powers and application
- what are the key areas of change and how that relates to previous employment arrangements
- what preparation your organisation should be thinking about prior to 1 July 2009 and 1 January 2010 respectively

The key areas for change:

1. Fair Work Australia - the new National Employment System

Essentially Fair Work Australia creates one umbrella body, that is, a one stop shop in which all existing government agencies come under the one body. Previously there were seven different agencies as such the intent is that FWA will be more user-friendly for both employers and employees.

The FWA umbrella will be constructed of the following previously independent government bodies such as:

- The Australian Industrial Relations Commission
- The Workplace Ombudsman
- The Australian Industrial Registry

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- The Workplace Authority
- Australian Fair Pay Commission
- Australian Fair Pay Commission Secretariat
- Australian Building and Construction Commission (from 1 February 2010)

Outside of the FWA body there will be changes to the Federal Magistrate Court which will establish a FWA division; and similarly, the Federal Court will also establish a FWA division. Effectively you will be able to file applications with FWA regardless if the matter will be heard by the FWA Tribunal, the Federal Court, Federal Magistrate Court or the Ombudsman.

The existing small claims mechanism will be extended to the Fair Work Division of the Federal Magistrates Court and the monetary limitation of the small claims mechanism will be increased from \$10,000 to \$20,000.

A dedicated website will be set up that will contain relevant information such as minimum wage rates, collective bargaining obligations as well as the contacts for local offices.

Essentially all 'employers' will be respondent to the new National Employment System.

1. A safety net of minimum employment conditions that cannot be reduced;

- The New Safety Net will be based upon two foundations:
- Modern Awards, and
- The National Employment Standards (NES)

The Bill currently proposes to guarantee a safety net of enforceable minimum terms and conditions for workers that can not be altered through the making of individual statutory agreements such as ITEAs (previously referred to as AWAs).

Modern awards are currently being developed by the Australian Industrial Relations Commission. First IR has been representing several organizations in the construction of these modern awards. As such First IR has hands on, relevant and up-to-date information regarding both the implementation and construction of FWA and its instruments i.e. the Modern Awards.

Modern awards will build on the National Employment Standards and will cover a further ten subject areas, including: minimum wages, arrangements for when work is performed, overtime and penalty rates, allowances, leave and leave loadings, superannuation and procedures for consultation, dispute resolution and the representation of employees.

2. A system based upon enterprise bargaining:

As of the 31st of December 2009 no longer will employers be able to make ITEAs with their employees, the shift will be to Collective Agreements, now referred to as Enterprise Agreements. These are fundamental changes that essentially regress back to the early 1990s. The agreement making process will entail new:

- Good faith bargaining provisions, and
- Compulsory arbitration for 'low paid' sectors.

The Bill provides for the making of single enterprise agreements (SEAs) or multiple-enterprise agreements (MEAs). There will also be Greenfields agreements which must relate to a genuine new enterprise (i.e. new business or project or undertaking thereof). Greenfield Agreements must be made with a union.

A major change is that unions are not 'parties to agreements', however they are automatically a bargaining representative i.e. they have automatic coverage if there is a single employee who is a member of that union and will be covered by the agreement, and that employee does not nominate another bargaining agent.

Similarly, where there is more than one employee with alternate union representation, as a requirement of the Bill you must negotiate with all of these unions. Failure to negotiate with one or more unions i.e. favoring one over the other may be seen as not bargaining in good faith, ultimately resulting in penalties applying. These changes will fundamentally change the way many employers bargain.

Furthermore, agreements are no longer just about matters pertaining to employers and employees but also now include matters pertaining to the employer and union/bargaining agent. As such once an enterprise agreement has been made, an employee organization i.e. union that was a bargaining representative for the proposed enterprise agreement concerned may give FWA a written notice stating that the union wants the enterprise agreement to cover it.

The Bill introduces a new special bargaining stream for MEAs for low-paid employees. This stream can only be accessed through the authorization of FWA. As yet the Bill does not define what 'low-paid' workers are (other than not being covered by an Enterprise Agreement) however FWA will be provided with additional powers to authorize under this special bargaining stream. The intent is to facilitate multiple employer bargaining for certain kinds of employees, i.e. those who have not historically been involved in collective bargaining in areas such as: child-care, aged care, community services, security and cleaning, who are often paid the basic award rate. In this instance, a bargaining representative or an organization of employees with relevant coverage may apply to FWA for entry into the low-paid stream to bargain with a specified list of employers. Outcomes of bargaining in the low paid stream could include:

- A single agreement that applies to a number of named employers, which may have identical terms or some variations within it for different employers;
- A number of agreements in different terms applying to different employers; or a combination of these.

Lastly, the Bill requires employers to give written notice to all employees of their right to have their union represent them or appoint another person, such as a colleague. Employers may also appoint a bargaining representative.

3. Greater protections from **unfair dismissal** for all employees;

- Unfair or Unlawful Dismissal
- "Go Away" money is back
- Small Business Fair Dismissal Code

The Bill will effectively restore unfair dismissal protections to employees provided they have completed the minimum employment period of 6 months (or 12 months for small businesses i.e. less than 15 employees). What this means is that regardless of whether you are a small business, and/or if your employees earn under \$100,000, unfair dismissal laws will apply, and those employees will be able to bring claims against the organization.

The consideration of FWA in establishing if an employee was unfairly dismissed will be if the dismissal was harsh, unjust or unreasonable. The remedies for unfair dismissal have an emphasis on reinstatement as the primary remedy or dismissal pay as compensation to the person in lieu of reinstatement. 'Operational reasons' will no longer be a defense to a claim of unfair dismissal. The Bill currently stipulates that all applications must be made within seven days of dismissal.

There have been fundamental changes made to small business unfair dismissal provisions. Previously under Work Choices employees in businesses with up to 100 workers were exempt from unfair dismissal claims. Under *FWA* 'special arrangements' for business with less than 15 employees apply. Each full time, part time and long term casual employee will count as one employee. A long term casual employee is one who has been employed on a regular and systematic basis for at least 12 months. The *Small Business Fair Dismissal Code* sets out the

process for dismissal, in the event the employer follows this process then FWA will deem that the dismissal was not unfair.

4. Rights of Entry for Union Officials to your premises

The Bill provides that unions will have the right to enter premises to hold discussions with employees or to investigate a suspected contravention of the Bill or a workplace instrument. Unions will be able to look at and copy employment records of all employees but only where those records are relevant to the suspected breach being investigated. While many aspects of the current regime remain, including the requirement to give 24 hours notice of intended entry and to conduct inspections, the circumstances in which right of entry is permitted has been broadened.

There are three rights of entry:

- Breach or a suspected breach of an Industrial instrument;
- Consultation with employees, and
- OH&S

Unions may now be permitted right of entry where work is carried out on premises in relation to which the union is entitled to represent employees. As such unions may gain the right to enter premises which are award-free. Unions will also, have the right to inspect non-member records (where they relate to a suspected contravention).