Updated on 13 October 2015

Fair Work Amendment Bill 2014

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The Fair Work Amendment Bill 2014 finally passed through parliament on 13 October 2015, having been tabled back in February 2014. It is now awaiting Royal Assent before taking effect.

The government had to agree to comprehensive cross-bench amendments to the original Bill in order to get it through the Senate.

Successful amendments to the Bill

A sheet of successful amendments put forward by cross-bench Senators Muir, Day, Lazarus and Madigan, also supported by the Opposition, the Government and the Greens, was passed. Those amendments removed the following sections of the Fair Work Amendment Bill in their entirety, including **ALL** proposed amendments to the Fair Work Act relating to:

- Annual leave loading on termination
- Accrual of leave while on workers' compensation
- Individual flexibility arrangements (IFAs)
- Transfer of business
- Union access to workplaces (right of entry)
- Unfair dismissal hearings and conferences.

The only four areas that remain in the Bill following the cross-bench amendments are those relating to:

- Unpaid parental leave;
- Greenfields agreements (with amendments to the government's originally tabled provisions);
- Protected action ballot orders; and
- Unclaimed money.

Successful greenfields amendments

In a separate sheet of successful amendments put forward by cross-bench Senators Muir, Day, Lazarus, Madigan, Xenophon and Wang, the greenfields agreement negotiation deadline was extended from the three months proposed in the original Bill to six. After that time, a business can take its offer to the FWC for endorsement without union approval subject to meeting the required tests.

Independent Senator Glenn Lazarus proposed an amendment that the Bill's greenfields provisions be reviewed two years after implementation (ie 2017) which also succeeded.

Unsuccessful amendments

- Labor Senator Doug Cameron, with the support of Independent Senator Glenn Lazarus, proposed an amendment to remove all of the Bill's protected action ballot order provisions but this did not gain further support and those provisions remain as originally drafted.

- Senator Bob Day revised his earlier proposed amendment to the "prevailing industry standards" test for greenfields agreements but that did not gain support in the Senate and was not incorporated into the final Bill.

- Labor Senator Doug Cameron proposed a sheet of amendments relating to greenfields agreements which did not pass. The amendments would have:
    - allowed a bargaining party for a greenfields agreement (after a negotiating period had elapsed) to ask the FWC to make a determination in relation to that agreement;
    - empowered the FWC to resolve greenfields disputes on its own initiative if it deemed that to be in the public interest; and
    - allowed bargaining representatives to agree to the FWC arbitrating a greenfields outcome.

- The Greens and the Liberal Democratic Party also proposed amendments which did not attract support from other Senators.

What was in the final Bill?

After the agreed amendments by cross-bench Senators were made, the Bill passed through the Senate on 13 October 2015. Its only remaining provisions are those relating to:

Unpaid parental leave (Part 1 of Schedule 1 of the Bill)

- Requiring employers, when refusing requests for an extra 12 months of unpaid parental leave (after an initial 12 months has been taken), to give the employee a "reasonable opportunity" to discuss the request. A phone or skype discussion would fulfil this obligation although a text or email would not.

- The unpaid parental leave provisions are set to take effect the day after the Bill receives Royal Assent. They will apply to requests for extra unpaid parental leave made after the commencement date.

Greenfields agreement making (Part 5 of Schedule 1 of the Bill)

- Applying good faith bargaining principles to greenfields agreements for the first time.

- Enabling an employer to take a proposed agreement to the FWC for approval after a notified **six-month** negotiation period without union approval (up from the original Bill's three-month negotiation period).

- Applying an additional test for greenfields agreements approved by the FWC without union consent – known as the "prevailing industry standards" test. This test would require agreements to meet the prevailing terms and conditions in the industry for equivalent work, taking into account geographical location.

- The greenfields agreement-making provisions are set to take effect the day after the Bill receives Royal Assent. They will apply where an employer agrees to bargain for a greenfields agreement after the commencement date.

- Following a successful amendment by Independent Senator Glenn Lazarus the Bill's greenfields provisions be reviewed two years after implementation (ie 2017).

Protected action ballot orders (Part 7 of Schedule 1 of the Bill)

- Allowing applications for protected industrial action ballot orders to be made only after bargaining has commenced. Bargaining for this purpose would only commence when the employer agrees to or initiates bargaining or a union obtains a majority support determination from the FWC proving that the majority of employees at the enterprise want to bargain collectively with their employer.

- The protected action ballot order provisions are set to take effect the day after the Bill receives Royal Assent. They will apply to applications for a protected action ballot order made after the commencement date.

Unclaimed money (Part 10 of Schedule 1 of the Bill)

- Clarifying that where the Fair Work Ombudsman has collected unpaid or underpaid moneys on employees' behalf, where amounts exceed $100 and have been unclaimed for more than six months, the FWO must pay interest to the employee.

- The unclaimed money provisions would apply to money received by the Commonwealth after the provisions commence, which will be on a date to be proclaimed.

What was in the original Bill?

The original Bill proposed the following amendments to the Fair Work Act 2009:

Unpaid parental leave

- Requiring employers, when refusing requests for an extra 12 months of unpaid parental leave (after an initial 12 months has been taken), to give the employee a "reasonable opportunity" to discuss the request. A phone or skype discussion would fulfil this obligation although a text or email would not.

Annual leave loading on termination

- Requiring the amount paid for untaken annual leave upon termination to be at the employee's base rate of pay rather than having leave loading applied even if leave loading would have been paid on leave taken during employment. This means annual leave loading would not be paid on untaken leave at termination unless the payment of leave loading on termination was expressly provided for in an award or agreement.

Accrual of leave while on workers' comp

- Removing the ability to accrue any leave for a period during which employees are absent from work and in receipt of workers' compensation payments. This includes annual leave and all other types of leave.

Individual flexibility arrangements (IFAs)

- Requiring mandatory flexibility clauses in both modern awards and enterprise agreements to allow flexibility in relation to all areas covered by the "model" flexibility clause. This would allow for flexibility in relation to instrument clauses covering: arrangements about when work is performed; overtime rates;

penalty rates; allowances; and leave loading if terms about those matters are included in awards or agreements.

- Requiring employees, upon entering into an IFA under a flexibility clause, to lodge a written statement explaining why the IFA meets their genuine needs and leaves them better off overall.

- Extending the notice period for terminating an IFA by either party from the current 28 days to 13 weeks.

- Confirming that non-monetary benefits can be taken into account when determining whether an IFA leaves an employee better off overall.

- Providing that an employer does not contravene a flexibility term if they "reasonably believe" they have complied with the term.

Greenfield agreement making

- Applying good faith bargaining principles to greenfield agreements for the first time.

- Enabling an employer to take a proposed agreement to the FWC for approval after a notified three-month negotiation period without union approval.

- Applying an additional test for greenfield agreements approved by the FWC without union consent – referred to as the "prevailing industry standards" test. This test would require agreements to meet the prevailing terms and conditions in the industry for equivalent work, taking into account geographical location.

Transfer of business

- Providing that a transferring employee's old industrial instrument ceases to apply to them in their new employment with a "related entity" of the old employer if the transfer was at employees' own initiative. This would apply whether the old employer was a private sector company or a state public sector organisation considered a "related entity" of the new employer as defined by the Corporations Act 2001.

Protected action ballot orders

- Allowing applications for protected industrial action ballot orders to be made only after bargaining has commenced. Bargaining for this purpose would only commence when the employer agrees to or initiates bargaining or a union obtains a majority support determination from the FWC proving that the majority of employees at the enterprise want to bargain collectively with their employer.

Union access to workplaces (right of entry)

- Removing entirely the 1 January 2014 requirements for employers / occupiers to facilitate union access to remote worksites by providing them with transport and accommodation.

- Removing the 1 January 2014 provisions giving unions "default" access to employee lunch rooms for discussion purposes in the absence of agreement between the parties on an alternative location.

- Amending the basis of entry for discussion purposes according to whether the union is covered by an enterprise agreement onsite. If a union is covered by an enterprise agreement, they continue to enter sites based on the current Fair Work Act rules as they stand. If a union is not covered by an enterprise agreement onsite, its officials can still enter to hold discussions with members or eligible members but must be invited in by a member or prospective member, with a new system of "invitation certificates" coming into effect when an invitation is in doubt.

Unfair dismissal hearings and conferences

- Removing the requirement for the FWC to hold hearings to set aside unfair dismissal claims in particular circumstances, such as where the applicant has failed to comply with FWC instructions.

Unclaimed money

- Clarifying that where the Fair Work Ombudsman has collected unpaid or underpaid moneys on employees' behalf, where amounts exceed $100 and have been unclaimed for more than six months, the FWO must pay interest to the employee.

To view the Bill and the amendments, click here.

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