

Fair Work Amendment Bill 2014

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The Federal Government tabled the Fair Work Amendment Bill 2014 in parliament on 27 February 2014. The Bill has passed through the Lower House but is yet to pass through the Senate. It was last debated on 17 September 2015 (the last sitting day of parliament), and amendments to it are likely if it is to have any chance of passing.

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.

Potential amendments to the Bill

In a [sheet](#) of proposed amendments put forward by cross-bench Senators Muir, Day, Lazarus and Madigan, the following sections of the Fair Work Amendment Bill would be removed including **ALL** proposed amendments to the Fair Work Act in relation to:

- Unpaid parental leave
- 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 three areas that would remain in the Bill if and when the proposed cross-bench amendments are made are those relating to greenfields agreements (with some amendments likely), protected action ballot orders (with some amendments possible but not likely) and unclaimed money (with no amendments).

Potential further amendments

Greenfields agreement making

In a separate sheet of [amendments](#) proposed by cross-bench Senators Muir, Day, Lazarus, Madigan, Xenophon and Wang, it is proposed to extend the greenfields agreement negotiation deadline from three months as proposed in the original Bill to six months. Given the support of six senators it is therefore likely this greenfield change will have to be made to get the Bill through the Senate.

Protected action ballot orders

Labor Senator Doug Cameron, with the support of Senator Lazarus, has proposed an [amendment](#) to remove all of the Bill's protected action ballot order provisions, although those amendments otherwise have only limited support in the Senate.

Other proposed amendments

The Greens and the Liberal Democratic Party also proposed amendments which are unlikely to attract support from other Senators.

Senator Bob Day has revised his earlier proposed [amendment](#) to the proposed "prevailing industry standards" test for greenfields agreements, although at this stage that amendment has not garnered further support in the Senate and seems unlikely to be incorporated into the final Bill.

What is the likely outcome?

Based on parliamentary movements to date, it is possible that if and when the Bill passes through the Senate its only remaining provisions are those relating to:

Greenfield agreement making

- 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 greenfield 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.

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.

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.

How much support does the government need?

Based on the current Senate [composition](#), with an all-time high of 18 cross-bench senators out of 76, if the government wants to get any legislation through the Senate it needs 39 votes (if everyone votes that day).

Accordingly, the government ideally needs the support of at least six cross bench Senators (in addition to the 33 government Senators) to pass this particular Bill.

The vast bulk of non-government proposed amendments to the Bill have the support of just four cross-benchers, while non-government greenfields amendments have the support of six cross-benchers.

Independent Senator Jacqui Lambie has indicated she is willing to work with the new Coalition leadership to pass the Bill with amendments including those supported by Senator Xenophon in relation to greenfields agreements.

Parliament resumes on 12 October 2015, after which debate is expected to resume on the Bill. The passage of the Bill, including any proposed amendments, is uncertain at this stage. It is also unclear whether the new Minister for Employment, Michaelia Cash, on behalf of the Australian Government, will agree to various amendments proposed by Senators in order to secure passage of the legislation.

To view the Bill and the proposed amendments, click [here](#).

