

PENDLEBURY WORKPLACE LAW UPDATE

Developments in HR & IR Law in Australia
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Developments in the Federal Government's IR Reform Agenda



Hello to all friends & colleagues of Pendlebury Workplace Law. Last week, in an address to the National Press Club, Workplace Relations Minister, Julia Gillard, provided further detail of the Federal Government's industrial and workplace relations reform agenda. The Minister stated that the Government's reforms would provide relief from the "harshest remaining aspects" of the WorkChoices legislation.

FEDERAL IR REFORM KEY PROPOSALS

Fair Work Australia

The Government intends to establish a 'one stop shop', to be known as **Fair Work Australia** ("FWA"). FWA will commence operation from 1 July 2010 and will perform the current functions of the Australian Industrial Relations Commission, the Australian Industrial Registry, the Australian Fair Pay Commission, the Workplace Authority, the Workplace Ombudsman and the Australian Building and Construction Commission. An independent judicial division, the Fair Work Court, will be created by establishing Fair Work Divisions within the Federal Court and the Federal Magistrate's Court.

Agreement-making

The concept of 'prohibited content' will be abolished. In its place, the Government intends to reinstate the 'matters pertaining'

rule to determine what can and cannot be included in a workplace agreement. Agreements will be able to include "any matter pertaining to the relationship between the employer and the employee or the employer and any union to be covered by the agreement". The current "no disadvantage test" will be replaced by the "**Better Off Overall Test**" which will change the test's emphasis from ensuring that no employee is worse off, to ensuring that a worker will be better off overall under the agreement than they would be under the applicable modern award.



Bargaining

Good faith bargaining will be mandatory under the Government's planned laws. Where parties are not bargaining in good faith, FWA will have the ability to make orders "to ensure the integrity and fairness of the bargaining process". A bargaining order could potentially



be made if, for example, an employer is refusing to meet with the employee's bargaining representative or to respond to the representative's correspondence or phone calls. The Fair Work Divisions of the Federal Court and the Federal Magistrate's Court will then be able to enforce bargaining orders.

Compulsory arbitration is not a feature of the Government's good faith bargaining system and will only be available where industrial action is threatening health and safety, or the economy, or is causing significant harm to the parties.

Multi-Employer Bargaining

Under a new initiative, aimed to benefit low-paid workers, Unions with relevant coverage or bargaining representatives, will be able to apply to FWA to bargain with a specified list of employers. FWA will then determine whether the proposed multi-employer bargaining is in the public interest. Individual employers will be able to seek exemption from the process and decisions to allow multi-employer bargaining will be subject to appeal.

Industrial Action

As with WorkChoices, protected action will not be able to occur without the approval by secret ballot of a majority of employees and with notice of 72 hours. Under the proposed reforms however, the current requirement that employers withhold a minimum of 4 hours of pay from employees who stop work during protected industrial action will not be mandatory. Employers will only be prevented

from paying a worker for any actual stop work period. Where employees engage in other forms of protected industrial action, employers will have some discretion as to whether they choose to pay full pay or, after notifying the employee, deduct wages proportionate to the duties the employee refused to perform, with any dispute to be handled by Fair Work Australia. In relation to employees who engage in unprotected industrial action, the minimum 4 hour deduction will remain.

Unfair Dismissal

A key element of the unfair dismissal regime will again be the number of employees in the business. Small businesses, defined as employers with fewer than 15 staff, will have to comply with a '**Fair Dismissal Code**'. This will be satisfied by a small business employer giving the employee a valid warning and providing the employee with an opportunity to improve their conduct or performance before terminating their employment. Summary Dismissals will be deemed lawful if the employer has reported the conduct in question to the police. An employee at a small business will also be subject to a 12-month qualifying period.

Larger businesses will not be able to rely on the Code and their workers will be entitled to make an unfair dismissal application after 6 months of employment. Dismissed employees will have 7 days to lodge an unfair dismissal claim with FWA. Hearings in this forum will be closed to the public and participation of lawyers will be restricted (extent unknown).

Proposed Timetable

The proposed bargaining and unfair dismissal rules will come into force on 1 July 2009, with the system fully operational on January 1 2010. The legislation will be tabled into Parliament by the end of year with transitional legislation to be introduced in the first half of next year.