

FAIR WORK BILL FACT SHEETS

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Disclaimer: This guide has been prepared by the ACTU. As it summarises complex legislation readers should consult the text of the Bill. If errors are found please contact the ACTU.

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1. Which workers are covered by the Bill?

Like *WorkChoices*, the Fair Work Bill covers *national system employers*, including:

- constitutional corporations
- the Commonwealth as employer
- specified employers engaged in interstate trade and commerce (employing flight crew, maritime employees or waterside workers)
- employers in the Territories

The Bill will also cover some or all employees in the state systems if and when the states refer their industrial relations powers to the Commonwealth. This includes state public sector employees and employees of non-trading corporations, partnerships and trusts.

Some parts of the bill cover **all** employees. These include:

- Notice of termination
- Unlawful termination
- The National Employment Standard for Parental leave

State IR laws are overridden

The Bill “covers the field” and excludes the operation of general State or Territory industrial laws. General laws that those that apply to all employers or employees in a State or Territory.

This means the federal laws will exclude the operation, in respect to national system employers, of State laws relating to the establishment or enforcement of terms and conditions of employment, laws providing remedies for termination of employment, and State laws relating to leave (other than long service leave) or to unfair contracts.

What state laws continue to operate?

State laws that are preserved include laws on non-discrimination, superannuation, workers' compensation, OHS, outworkers, child labour, training arrangements (except where these laws contain matters that are covered by the NES or modern awards), workplace surveillance and business trading hours.

2. Fair Work Institutions

New institutions will replace the Australian Industrial Relations Commission and Registry, the Australian Fair Pay Commission, the Workplace Authority, the Workplace Ombudsman and eventually the Australian Building and Construction Commission. The Courts will have a greater role in disputes.

Fair Work Australia (FWA) will be independent of government with its President, Deputy Presidents and members appointed until age 65. Specialist members of the Minimum wage panel will be appointed for 5 years. FWA will:

- Set and adjust award wages and make minimum wage orders
- Regularly review and vary awards
- Make bargaining orders (scope orders, majority support orders and good faith bargaining orders) and, in limited circumstances, make workplace determinations settling bargaining disputes
- Supervise the taking of industrial action
- Approve agreements
- Conciliate and (in limited cases) arbitrate disputes
- Deal with disputes about right of entry
- Determine whether an instrument applies in a transfer of business
- Determine unfair dismissal claims.

FWA will be able to inform itself informally, and will have powers to convene compulsory conferences aimed at settling disputes.

The non-tribunal functions will be performed by the general manager and staff of FWA, who will take on some of the functions of the Australian Industrial Registry and the Workplace Authority.

The **Office of the Fair Work Ombudsman** will take over the work of the Workplace Ombudsman and, from 1 February 2010, the ABCC. The Office will be responsible for providing information and education and for enforcing the new laws. Fair Work Inspectors will be able to inspect documents and premises and prosecute breaches of the law, including breaches of common law contracts where the breach relates to a matter covered by an award or NES matter. In addition, Fair Work Inspectors will be able to issue compliance notices.

Fair Work Divisions of the Federal Court and the Federal Magistrates Court will determine claims relating to breaches of the NES, awards, agreements and workplace rights. The small claims procedures, where the rules of evidence do not apply and lawyers can only appear with permission of the Court, will be available for claims of up to \$20,000 (up from \$10,000 under the current law). The Courts will be able to make any orders considered appropriate to remedy a contravention, including injunctions and penalties. The Courts will also be able to enforce entitlements under a common law contract of employment that relate to the NES or modern awards.

3. The Safety Net: an overview

The new safety net will consist of **ten legislated National Employment Standards (NES)** and **modern awards**. This safety net comes into effect on 1 January 2010.

The National Employment Standards apply to all national system employees

1. A standard 38 hour working week for full time employees and the right to refuse unreasonable overtime
2. Up to 24 months unpaid parental leave
3. A right for parents to request flexible working arrangements
4. 4 weeks paid annual leave each year, plus an additional week for shift workers
5. 10 days paid personal / carer's leave each year, 2 days paid compassionate leave and 2 days unpaid emergency leave
6. Unpaid community service leave
7. All national and state public holidays
8. Long service leave
9. Notice of termination and, if employed in a business with 15 or more employees, redundancy pay.
10. A requirement that all employers provide new employees with information about their rights (a Fair Work Information Statement).

Modern awards set industry and occupational standards

The second part of the safety net is modern industry or occupational awards. These are currently being developed by the AIRC, and will contain wages rates, types of employment, hours of work, overtime and penalty rates, annualised wages, allowances, leave, superannuation and procedures for consultation, representation and dispute resolution. In making the modern awards the AIRC has been directed to ensure they do not extend to employees that, due to their seniority, have not traditionally been covered by an award.

Minimum wage orders will provide a wages and casual loading safety net for award free employees.

Application of the safety net

The NES apply to all employees in the federal system. Rights to unpaid parental leave and notice of termination apply to **all** employees in Australia. Awards apply according to their terms, but will not apply where an employee has accepted a guarantee of high income (see modern award fact sheet).

What is the relationship between the NES, awards and agreements?

Awards and enterprise agreements cannot contain terms that go below the NES. They can go above them: e.g. an agreement can provide for paid parental leave or for other types of community service



leave. Awards and agreements may also define terms that are used in the NES: e.g. an award can define a shift worker for the purpose of determining who gets 5 weeks paid annual leave or provide detail on the kind of evidence that employees are required to provide to obtain personal leave.

As soon as an enterprise agreement covers an employee, the award ceases to apply to that employee.

Regardless of the terms of an enterprise agreement, an employee covered by the agreement will remain entitled to the NES and to a wage no lower than the minimum award wage or minimum wage order.

How does safety net get varied and updated?

The NES are legislated minimum standards that can only be varied by Parliament. However awards can build upon the NES, so awards can be varied to improve upon matters that are also covered by the NES.

Minimum wages are reviewed each year (see minimum wages) and awards are reviewed at least once every four years (see modern awards).



4. Modern Awards

The AIRC is currently modernising all awards and this process will be completed by late 2009. The Bill presumes that all awards have been modernised.

Modern awards may contain ten matters:

1. Minimum wages
2. Types of work, including casual employment, regular part-time employment and shift work
3. Arrangements for when work is performed, including hours of work, rostering and rest and meal breaks
4. Overtime
5. Penalty rates
6. Provisions for annualised salaries, with appropriate safeguards
7. Allowances
8. Leave, leave loadings and arrangements for taking leave
9. Superannuation
10. Consultation, representation and dispute settlement procedures

Modern awards **must** contain:

- terms on ordinary hours of work
- a flexibility clause - allowing an employer and an employee to agree on an individual flexibility arrangement varying the effect of the award in relation to the employee
- a dispute settlement procedure.

Modern awards **must not** contain terms that:

- Are objectionable or discriminatory
- Require unreasonable deductions from pay
- Have different application in different states
- Deal with long service leave
- Deal with right of entry

How will modern awards be varied?

Fair Work Australia:

- Must adjust minimum wages every year



- Must review each award every four years. It can only adjust minimum wages in these 4 yearly reviews where justified by work value reasons.
- May review awards between the regular four-yearly reviews but only to remove ambiguity, uncertainty or discriminatory terms; or where necessary to maintain a fair and relevant minimum safety net of terms and conditions for employees.

Who can apply for a modern award to be varied?

An employer, employee or union that is covered by a modern award or has eligible members covered by the modern award. HREOC can apply to have discriminatory terms reviewed.

Who is covered by modern awards?

The Bill makes a distinction between awards *covering* employees and awards *applying* to employees. Most employees will be *covered* by an award in that they will fall within the scope of a modern award. However, an award will not *apply* to an employee where:

- there is an enterprise agreement that applies to the employee; or
- the employee is a high income employee.

What is a high income employee?

An employee will be a *high income employee* where they have a written guarantee from their employer that their annual earnings will exceed the high income threshold. This threshold is \$100 000, indexed from August 2007 (this will be in regulations). The employee must be told the consequences of the guarantee (that the award will no longer apply) and must agree to it.

In calculating the high income threshold, the following payments are included: wages, the agreed value of non-monetary benefits and superannuation top-ups. The calculation cannot include compulsory superannuation contributions, uncertain or 'at risk' forms of pay (such as bonuses or commissions) and overtime (unless the employer guarantees to pay it).

An employer or employee who has an enterprise agreement applying to them cannot sign a high income guarantee.

The effect of a high income guarantee is that the award does not apply to the employee. If the employer breaches the high income guarantee, the employee can enforce the guarantee in court.



5. Minimum Wages

Minimum wages will be set by FWA's Minimum Wage Panel and contained in modern awards. For those employees not covered by an award or agreement, FWA will set minimum wages and casual loadings through national minimum wage orders.

When setting minimum wages in awards or making a national minimum wage order, FWA will take into account:

- the performance and competitiveness of the national economy
- the need to promote social inclusion
- relative living standards and the needs of the low paid
- the principle of equal remuneration for work of equal or comparable value
- providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability

Annual wage reviews will be conducted by the Minimum Wage Panel (7 members, must include President and at least 3 Minimum Wage Panel Members) and will come into effect on the first pay period after 1 July each year. FWA must provide parties with the opportunity to make written submissions and comment on other submissions. The Minimum Wage Panel may investigate and report on a matter for consideration in an annual wage review. This research must be published.

Outside these reviews, award wages will not be varied except where FWA is convinced this is necessary to achieve the modern award objective, or where there are work value reasons that justify the variation.

Equal Remuneration Orders

FWA will be able to make orders to ensure that there is equal remuneration for men and women workers for work of equal or comparable value. An applicant does not need to show that there has been discrimination in how remuneration was set. They only need to show that there is not equal remuneration for work of equal or comparable value.

Who can apply for an equal remuneration order? An employee to whom the order will apply, a union entitled to represent an employee to which the order will apply or the Sex Discrimination Commissioner.

An equal remuneration order can only increase employees' rates of remuneration. A term of a modern award, agreement or FWA order that is inconsistent with an equal remuneration order will not have effect.

FWA can make orders that provide for equal remuneration to be phased in over a specified period of time if it isn't feasible to implement the whole increase in one go.

An employer who breaches an equal remuneration order is subject to civil penalties.

6. Unfair Dismissal

The Bill restores unfair dismissal rights for many workers. Regardless of the size of the business that employees them, all employees are protected from unfair dismissal provided the employees have served a qualifying period. The qualifying period is 12 months for small businesses and 6 months for everyone else.

As has always been the case under federal workplace laws, high income employees who are not covered by a modern award cannot bring a claim of unfair dismissal.

What is a genuine redundancy?

The Fair Work Bill will remove the ability of an employer to avoid an unfair dismissal claim by claiming the dismissal is for operational reasons. However a genuine redundancy will not be an unfair dismissal. A genuine redundancy occurs when the employer no longer requires the work done by the employee to be performed by anyone. An employer can only rely on this exception where it has complied with any consultation obligations in the relevant award or agreement and where there was no reasonable opportunity for the employee to be redeployed.

There are different rules for employees in small businesses

A small business is defined as a business with fewer than 15 full-time, part-time or regular and systematic casual employees. The count includes the employee being dismissed, and employees in any 'associated entity' (as defined in the Corporations Act).

Employees in small businesses must serve a longer qualifying period of 12 months before they have protection from unfair dismissal.

The Bill provides for a Fair Dismissal Code. If a small business employer can prove to Fair Work Australia that it complied with this code, Fair Work Australia cannot find that the dismissal was unfair.

Making an unfair dismissal claim

- Claims must be lodged within 7 days of the dismissal
- FWA will decide whether it has jurisdiction to hear the claim. If it does, it will hold a private conference. If the matter remains unsettled, it may hold a formal hearing.
- Lawyers will only be allowed with FWA's permission. This rule does not apply to union lawyers.
- Appeals can only be made to the Full Bench if it is in the public interest to do so or where there has been a significant error of fact.

Remedies for unfair dismissal

FWA can order reinstatement or compensation (up to 6 months pay).

7. Agreement-making: Types of agreements

There will be 3 types of enterprise agreements: single enterprise agreements; multi-enterprise agreements and greenfields agreements.

A **single enterprise agreement** is an agreement with a single employer or an agreement with *single interest employers*.

A **multi-enterprise agreement** is

- an agreement made with multiple employers where they voluntarily agree to bargain together; or
- an agreement made through the low paid bargaining stream (see Bargaining for the Low Paid).

Single interest employers are related corporations, joint ventures or common enterprises. They may also be employers who voluntarily apply to FWA for a 'single interest authorisation' or government-funded employers where the Minister has given her approval for them to bargain as a single unit.

A **Greenfields agreement** is a single or multi-enterprise agreement that applies to one or more *genuine new enterprises*, where no employees have yet been hired who'll be necessary for the normal conduct of the enterprise. An employer who wants to make a greenfields agreement must take all reasonable steps to notify relevant unions and must make the agreement with a union.

Unions and agreements

The distinction between union and non-union agreements is removed. Agreements (other than Greenfields agreements) are made between employers and employees. Unions who are a bargaining representative for an agreement can apply to FWA to be covered by that agreement. A union is automatically a bargaining representative for any properly enrolled member who is covered by the agreement, unless that member has advised the employer that they do not want the union to represent them.

A union that is covered by an agreement will have rights and obligations according to the terms of the agreement. It will be able to enforce the agreement (even without an affected member) and can apply to FWA to have the agreement varied or terminated.

Greenfields agreements can be made with any relevant registered organisation, and an employer seeking to make a greenfields agreement must notify all relevant organisations.

Expiry of agreements

Agreements can operate for a maximum of 4 years. FWA may terminate an agreement on its expiry date or on the day a new overlapping agreement commences operation.

Only one agreement can apply to an employee. If an earlier agreement covers an employee and a later agreement is made that also covers the employee then (unless the parties agree to terminate the earlier agreement) the earlier agreement will continue in force until it expires. From that date forth, the employee will be covered by the new agreement.

8. Agreement-making: What can parties bargain about?

Parties will be free to bargain over more matters than they could under the Workplace Relations Act. But there will still be some matters that aren't allowed in agreements.

Parties can make agreements on *permitted matters*. These are terms about:

- Matters pertaining to the relationship between the employer and the employees
- Matters pertaining to the relationship between the employer and the union
- Wage deductions authorised by an employee
- How the agreement will operate.

What happens if an agreement contains a non-permitted term?

FWA will not scrutinize agreements for terms that are not permitted. An agreement that contains a non-permitted term will be valid but the non-permitted term will not be enforceable and can be severed from the agreement by a court.

Protected industrial action taken in pursuit of an agreement that contains non-permitted matters is still protected, providing that the bargaining representative reasonably believed that the claims were permitted.

Terms that are unlawful

Agreements cannot contain *unlawful terms*. These are:

- Terms that breach the General Protections (see General Protections)
- Terms that seek to extend unfair dismissal protection to people who have not served the statutory qualifying period (12 months for employees in small businesses and 6 months for everyone else)
- Terms providing for the payment of bargaining fees to a union
- Terms providing additional rights of entry for compliance or discussion purposes
- Terms requiring a person to commit an offence under Commonwealth law.

Terms that can be in agreements

- Terms providing that contractors must be engaged on the same terms and conditions as regular employees
- Union training leave
- Paid time off to participate in union activities
- Terms dealing with deduction of union membership fees
- Terms requiring the employer to commence renegotiations of the agreement on a certain date
- Union participation in consultation meetings or dispute settlement procedures

Terms that can't be in agreements

- Terms prohibiting the employer from engaging contractors or casuals
- Terms requiring the employer to take corporate social responsibility initiatives that are unrelated to the work is performed.



If an agreement that is lodged with FWA contains an unlawful term, the employer may make an undertaking to fix it. This undertaking cannot disadvantage employees or significantly change the agreement. FWA must seek the views of the bargaining representatives before accepting an employer undertaking.

Can we bargain over right of entry?

It appears that unions can bargain for right of entry for purposes *other than* for discussions with employees or compliance. A union may, for example, be able to bargain for terms providing right of entry for inductions or for discussions with management

9. Agreement-making: How does bargaining work?

Initiating bargaining

There is no requirement to formally initiate bargaining. In practice, a union will simply ask the employer to negotiate.

Within 14 days of agreeing to bargain, an employer must notify its employees of their right to have a bargaining representative. An employer must also issue a representation notice where it wishes to commence bargaining by making a unilateral offer to its workforce.

Who are bargaining representatives?

A union will be presumed to be the bargaining representative of its members, unless the member indicates to his or her employer that they wish to be represented by someone else.

Employees who are not union members can nominate the union to be the bargaining representative and the union can accept. Employees can nominate themselves or anyone else to represent them in bargaining.

Employers must recognise and bargain with their employees' bargaining representatives.

What if an employer refuses to start bargaining?

If an employer refuses to bargain, the union can apply to FWA for a **majority support determination**. This is a determination by FWA that a majority of employees within the scope of the proposed agreement want to bargain with their employer. FWA has broad discretion in the way it determines whether there is majority support: e.g. by way of a petition or survey.

To issue a majority support determination, FWA must be satisfied that the majority of employees want to bargain and, if the agreement does not cover all the employees in the enterprise, that the group of employees was fairly chosen. FWA can inform itself in whatever manner it chooses.

What rights do bargaining reps have?

- Bargain for enterprise agreements
- Apply for protection action ballot orders
- Apply for scope orders, majority support determinations and bargaining orders
- Apply for serious breach declarations
- Represent a person in matters before FWA.

What if there is disagreement over who will be covered by the proposed agreement?

The employer, the employees or their bargaining representatives can apply to FWA for a **scope order**. To issue a scope order, FWA must be satisfied that:

- The applicant has been bargaining in good faith
- The applicant has notified the other party of its concerns
- Making the order will promote fair and efficient bargaining
- The group which is the subject of the scope order is fairly chosen; and
- It is reasonable to make the order.

A scope order will specify the employer(s) and employees or groups of employees that will be covered by the proposed agreement.

While there is no direct penalty for contravening a scope order, a party that does so may be open to having a bargaining order issued against it (see below).

What if the employer is not bargaining fairly?

The Bill requires all parties engaged in bargaining (including unions) to act in good faith. This means that all parties are required to:

- Attend and participate in meetings at reasonable times
- Disclose relevant information (other than commercial-in-confidence or commercially sensitive information) in a timely manner
- Respond to proposals made by a party in a timely fashion
- Give genuine consideration to the proposals of other parties, and provide reasons for responses; and
- Refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.

If one bargaining representative is not meeting the requirements above, the other bargaining representative can apply to FWA for a **bargaining order**. A bargaining representative can also apply for a bargaining order where it is concerned that the bargaining process is not proceeding efficiently or fairly because there are too many bargaining representatives. A party can apply for a bargaining order 90 days before an agreement is due to expire.

Bargaining orders are not available in relation to a proposed multi-employer agreement unless there is a low paid authorisation in place (see Bargaining and the Low Paid).

What's the effect of a bargaining order?

FWA will decide what kind of bargaining order to issue and will tailor the order to meet the specific problem. A bargaining order may specify the actions that a party is required to take in order to meet the good faith bargaining requirements: e.g. to meet with the other party on a particular date and time or, if an employer has terminated the employment of a union delegate who is a bargaining representative, to reinstate the employee. It may also provide for a party to refrain from engaging in a particular action that would breach the good faith bargaining requirements.

If an employer (or union) refuses to comply with a good faith bargaining order, they will be subject to civil penalties. If a party consistently breaches good faith bargaining orders, the other party may be able to get a *serious breach declaration*.

Serious breach declarations

If a party consistently and repeatedly refuses to meet the good faith bargaining requirements, the other party can apply to FWA for a **serious breach declaration**.

FWA will only make a serious breach declaration where a party has contravened one or more bargaining orders in a serious and sustained way and where there is no chance that the parties will agree on the terms of the proposed agreement in the foreseeable future.

Where a serious breach declaration has been issued, the parties have 21 days to reach agreement. If agreement has not been reached, FWA may make a **bargaining related workplace determination** (i.e. arbitrate).

Other assistance from FWA during bargaining

If there is a dispute about the making of the proposed agreement and the parties can't resolve it, a bargaining representative may apply to FWA for assistance. FWA may mediate or conciliate the dispute. It can also make a recommendation or express an opinion. It can only arbitrate the dispute if the bargaining representatives have agreed for it to do so.

How do employees approve a proposed agreement?

- An employer can ask employees to vote on a proposed agreement 21 days after it issued the representation notice (see above). The employer can select the voting method.
- Employees must have access to the proposed agreement for at least 7 days prior to the vote.
- The agreement is made if more than 50% of votes cast are in favour of the agreement.
- Voting for a multi-enterprise agreement occurs on an enterprise by enterprise basis.

Lodging agreements

Any bargaining representative can lodge a signed copy of the agreement within 14 days of the agreement having being approved by employees.

If a union who was a bargaining representative wants to be covered by the agreement, it must notify FWA.

10. Agreement-making: FWA approval of agreements

FWA will approve an agreement if the agreement:

- has been genuinely agreed to by employees
- does not contravene the NES
- passes the *better off overall test*
- contains the mandatory terms
- does not contain unlawful terms

What does 'genuinely agreed to' mean?

An agreement will be taken to have been genuinely agreed to if the employer issued the representation notice at least 21 days prior to putting the agreement to vote and gave employees access to the agreement at least 7 days prior to the vote. FWA must also be satisfied that there were no other grounds to suspect that the agreement was not genuine.

Terms that *must* be in agreements

Every agreement must include:

- A flexibility clause – a model flexibility clause will apply unless parties agree on an alternative one. Any flexibility clause must contain the safeguards in the Bill (e.g. must be in writing and able to be terminated with 4 weeks notice).
- A clause providing for consultation in the event of major workplace change and for representation of employees in that consultation. There will be a model clause but parties agree on an alternative clause.
- A dispute settlement procedure for disputes under the agreement or the NES. The clause must provide for a third party to settle disputes (this can be FWA) and must provide for employee representation. FWA will only be able to arbitrate disputes where the DSP in the agreement expressly provides for arbitration. The Government has indicated that it will publish a model DSP that provides for arbitration of disputes by FWA.
- A nominal expiry date (4 years or less).

What is the “better off overall’ test?

FWA will only approve an agreement if it passes the *better off overall test*. Each employee must be better off under the agreement than under the relevant modern award. The test is applied at the time the agreement is lodged and FWA will disregard any individual flexibility arrangement that may be in place (see modern awards). FWA may apply to test to classes of employees.

FWA may approve an agreement that does not pass the BOOT in exceptional circumstances, such as a short term business crisis. In such cases, the agreement can only operate for 2 years.

FWA will issue a decision approving the agreement

This decision will note which unions are covered, whether the model flexibility and/or consultation clauses are deemed to apply and any employer undertakings.

11. Bargaining and the Low Paid

FWA will be able to facilitate bargaining for multi-employer agreements for low paid workers.

To commence this process a bargaining representative or union that is entitled to represent the low paid workers must obtain a *low paid authorisation* from FWA.

FWA will issue a low paid authorisation where it is satisfied that it is in the public interest to do so, having regard to a range of factors which go to the likely success of the parties reaching agreement if the authorisation is granted. An employer can apply not to be covered by the authorisation.

FWA will specify the employers and employees to be covered by the proposed agreement. There is scope for FWA to add or remove employers after the authorisation has been given.

What's the effect of a low paid authorisation?

1. A bargaining representative can apply for **bargaining orders** where one or more of the other parties are not meeting their good faith bargaining requirements (see How does bargaining work?).
2. **FWA can facilitate the bargaining process** at the request of a bargaining representative: e.g. by mediation or conciliation or issuing recommendations. FWA can also direct third parties to attend conferences where it is satisfied that the participation of the person is necessary for the agreement to be made: e.g. government where there is public funding or a head contractor.
3. FWA can make a **workplace determination** (arbitrate) in certain circumstances. FWA can arbitrate a dispute if the parties agree and if FWA is satisfied that there is no prospect of the parties reaching agreement. Alternatively, FWA can arbitrate where:
 - The parties are unable to reach agreement
 - The employers named in the application have never been party to an enterprise agreement made under the Fair Work Bill
 - The employees are on the safety net (i.e. have conditions equivalent to the NES and awards)
 - Arbitration will promote bargaining and productivity; and
 - Arbitration is in the public interest.

In making a workplace determination, FWA will 'close the gap' between the parties: it will include any terms that have been agreed upon by the parties and arbitrate those matters that remain disputed. In arbitrating, FWA must ensure that the employers remain competitive. The workplace determination must pass the "Better Off Overall Test" (see approval of agreements).

12. Industrial Action

Industrial action will be protected where it is taken during bargaining (but after the expiry of the agreement) and where the bargaining representatives:

- are genuinely trying to reach agreement
- are not be engaged in pattern bargaining
- have obtained authorisation through a protected action ballot; and
- have given the employer 3 days notice.

Employee industrial action is defined in the Bill to include not attending work, performing work in a different manner to which it is customarily performed, work bans etc. **Employer industrial action** is defined as locking workers out.

Protected action ballot order

A bargaining representative seeking to take protected industrial action must apply for a protected action ballot order and notify the employer that an application has been made. An application will be able to be made 30 days before the nominal expiry date of an agreement. FWA will try to determine the application within 2 days. The applicant must be genuinely bargaining.

Protected action ballots

The Bill provides for the AEC to conduct ballots (paid for by the Commonwealth) or for bargaining representatives to nominate (and pay for) a non-AEC ballot agent. Industrial action will be authorised where at least 50% of the employees on the roll of voters vote and more than 50% of votes cast approve the action.

Only industrial action taken by employees who were balloted (and their union(s)) is protected. To be protected the action must be taken within 30 days of the date the results of the protected action ballot were declared, unless an extension has been granted by FWA.

When can protected industrial action be stopped?

FWA must suspend or terminate action within 5 days where the action is threatening to endanger the life, personal safety or health or welfare of the population or part of it; or to cause significant damage to the Australian economy or an important part of it. FWA, a bargaining representative or the Minister can apply for this order.

FWA may suspend or terminate action where the action has been prolonged, it is causing, or imminently threatening to cause, significant economic harm to the employer(s) and employees to be covered by the agreement, and where the dispute will not be resolved in the foreseeable future. In the case of a lockout, FWA need only be satisfied that the action is causing significant economic harm to the employees. FWA, a bargaining representative or the Minister can apply for this order.



Arbitration where industrial action has been terminated

If FWA terminates industrial action under any of the grounds above, it must make an *industrial action related workplace determination* (arbitrate). The arbitrated settlement will include any terms that the parties have agreed upon.

Suspension of industrial action

FWA must suspend action if satisfied that the suspension would be beneficial to the bargaining representatives because it would assist in resolving the issue ('cooling off'). A bargaining representative can apply for this order.

FWA must suspend action where it, and where it is having an adverse economic effect on employers or employees, or is threatening to cause significant harm to a third party. A third party or the Minister can apply for this order.

Stopping unprotected action (Stop orders)

Anyone who is affected (or likely to be affected) by unprotected industrial action can apply to FWA to stop the action. FWA must issue a stop order within 2 days. If a party contravenes a stop order, the other party can apply to the court for an injunction to stop the action.

Employees who take unprotected industrial action must have their pay docked for the period of the action, and for a minimum of 4 hours.

Stopping unprotected action (Pattern bargaining)

Industrial action will not be protected where it is taken in pursuit of a multi-employer agreement or pattern bargaining. Pattern bargaining is defined as bargaining for 2 or more agreements seeking common terms, and where the bargaining representative is not genuinely seeking to reach agreement with each employer.

A person affected by pattern bargaining can apply to FWA for a stop order or directly to the court for an injunction. A person will not be found to be engaging in pattern bargaining if they can prove they are genuinely trying to reach an agreement with a particular employer.

Stopping unprotected action (prior to nominal expiry of an agreement)

A person affected by industrial action taken prior to the nominal expiry of an agreement can apply to FWA for a stop order or directly to the court for an injunction. In addition, it is an offence, punishable by a fine, to take or organise action before the agreement. Breaches can be investigated and prosecuted by the Fair Work Inspectors as well as persons affected.



13. Strike pay

The Bill retains most of the *WorkChoices* arrangements dealing with payment for periods of unprotected industrial action, but makes some changes in respect to protected action.

Unprotected Industrial Action

The Fair Work Bill retains the current system that prohibits an employer from paying an employee who takes unprotected industrial action for the total period of time during a day in which unprotected action is taken, with a minimum deduction of four hours.

Protected Industrial Action

An employer is prohibited from paying wages during industrial action, but only for the period of the action. There is no minimum four hour deduction.

For partial work bans, the employer has the option of paying wages, advising it won't pay wages or advising employees that it will pay a percentage of wages. Unless the employer gives notice of a reduction in pay or refusal to accept part-performance the employees will be entitled to full pay.

FWA determine if the proportionate reduction is appropriate.

Overtime bans

An overtime ban is not considered to be industrial action unless:

- The employer requested or required the employee to work the period of overtime;
- The employee refused to work the period of overtime; and
- The refusal was a contravention of the employee's obligations under a modern award, enterprise agreement or a contract of employment.

14. Right of Entry

The Bill retains many of the *WorkChoices* arrangements - in order to enter a workplace without the consent of the employer or occupier, an official must hold a permit. Awards and agreements cannot include terms that expand right of entry, although agreements can confer rights on officials to participate in inductions, grievance procedures, and other agreed union activities at the workplace.

Officials who hold right of entry permits can enter premises during working hours for 3 purposes:

1. Entry for investigating breaches of the Act, awards and agreements

- Can enter where reasonable suspicion that that a properly enrolled member is affected by a breach of the Act (NES, general protections), or Fair Work Instrument (award, agreement)
- Can get an 'affected member' certificate from FWA (to preserve anonymity of member)
- Must give at least 24 hours notice (can get exemption from FWA)
- Can inspect work, processes, objects, and access any document relevant to the suspected breach that is kept on the premises or accessible from the premises;
- Can inspect a relevant non-member records but strict penalties for misuse
- If challenged the permit holder must be able to show suspicion was reasonably held

2. Entry to hold discussions

- Can enter to hold discussions with workers who are eligible to be members. Unlike *WorkChoices* there is no need for the employees to be covered by an award or agreement to which the union is bound.
- Must give at least 24 hours notice
- Discussions to be held only during mealtimes or other breaks
- Employer can request union meet in a particular room or take a particular route but request must be reasonable. FWA can hear dispute as to whether employer request was reasonable.
- While permit holders can not enter any part of premises that is used mainly for residential purposes, they will be able to enter that part of a residential premise that is used as a workplace.

3. Exercising right of entry under State or Territory OHS law

In order to exercise rights under the relevant state OHS law, an official must also hold a federal permit. The permit holder must give the employer at least 24 hours notice when intending to inspect employee records.

15. General Protections

The Fair Work Bill brings together a range of protections against discrimination and other forms of unfair treatment at work. They cover a range of existing protections in the Workplace Relations Act, including those relating to freedom of association, unlawful termination and sham contracting.

An employer must not take adverse action against an employee because they possess or exercise a workplace right.

What is a workplace right?

- an employment entitlement (e.g. a right to be absent from work when sick or a right to refuse to enter into an individual flexibility arrangement)
- performing a role or responsibility provided for by an industrial law or award/ agreement (e.g. being a nominated occupational health and safety representative)
- the right to engage in industrial activity, including joining and being represented by a trade union and participating in lawful industrial activities
- the right to make an inquiry or complaint in relation to their employment or to participate in proceedings under workplace laws.

What is adverse action?

Adverse action may involve refusing to employ a prospective employee, dismissing an employee, altering the position of an employee to the employee's prejudice or discriminating against an employee. It also includes where an employer threatens to take any of these actions.

Examples of employee actions that are protected:

- Performing representative roles in the workplace where these roles are provided for by law or in the relevant award or agreement: e.g. OHS representatives, harassment officers, union delegates
- Complaining to an employer about underpayment of wages or a safety issue
- Making an inquiry to a union about entitlements under an award or agreement
- Voting in a protected action ballot.

Protections against discrimination

Employer is prohibited from taking *adverse action* against an employee or prospective employee because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.



Other protections

An employer cannot deliberately or recklessly making false or misleading representations about someone else's workplace rights: e.g. an employer cannot tell an employee that he or she does not have a right to be represented by a union during bargaining.

A person must not coerce or threaten to coerce another person to exercise a workplace right.

An employer must not exert undue influence or undue pressure on an employee in relation to certain decisions made by employees: e.g. to sign an individual flexibility arrangement or accept a guarantee of annual earnings.

An employer must not offer inducements to employees to join or not join a union.

An employer must not misrepresent an employment or proposed employment relationship as an independent contracting relationship or dismiss (or threaten to dismiss) an employee in order to engage the person to perform the same work as an independent contractor.

Many of the general protections can also operate against unions. Unions cannot:

- charge bargaining fees
- discriminate against employers because of their industrial arrangements
- coerce employers to hire or not hire a particular person or to not engage or not engage a particular independent contractor.

Who is protected?

Generally national system employers and employees, but the unlawful termination provisions apply to **all** employees.

Enforcing workplace rights

An employee, union or Fair Work Inspector can enforce a workplace right.

- If the complaint involves dismissal, the party must lodge an application with FWA within 60 days. FWA can extend the timeframe if it is satisfied there are exceptional circumstances. FWA must conduct a conference to deal with a dispute. If FWA's attempts to conciliate the claim are unsuccessful and FWA believes that the application has a reasonable prospect of success, the applicant can initiate court proceedings.
- If the complaint does not involve dismissal, the party has the option of applying to FWA for it to conciliate the dispute (FWA can only conciliate where both parties agree) or proceeding immediately to court. The court can issue penalties, injunctions or order reinstatement.

The employer bears the onus of proving that it did not take adverse action against an employee for one of the unlawful reasons.

16. Transfer of Business

Under *WorkChoices*, the focus is on whether a new employer has taken over an old employer's business. It is complex and difficult to prove, and even where a transmission has occurred, employees' rights are only protected for 12 months.

The Fair Work Bill adopts a new approach to transfer of business, designed to protect employee entitlements in a broader range of corporate restructuring including outsourcing and insourcing.

Under the Fair Work Bill a transfer of business happens when:

- the employee's employment with the old employer is terminated
- the employee becomes employed by the new employer within 3 months
- the transferred employee performs the same or substantially the same work; and
- there is a connection between the old employer and the new employer.

When is there 'a connection' between the old and new employer?

- When the old employer transfers a business asset to the new employer
- When the old employer transfers the employees work to a new employer but remains the beneficiary of that work
- When the new employer transfers the employees work from the old employer to the new employer; or
- When the old employer transfers the employees' work to a second employer that is an 'associated entity' (as defined in the Corporations Act).

What happens when there has been a transfer of business?

The basic rule is that agreements, enterprise awards and workplace determinations that covered the old employer will continue to cover those employees if they move to the new employer.

Agreements follow the employees. New hires who perform the same work are also covered if the work would otherwise be award/ agreement free.

NES accrued entitlements transfer and length of service is unbroken. BUT the employer can decide not to recognise accrued annual leave or redundancy leave entitlements. The new employer must recognise service with the old employer for the purpose of parental leave, personal leave and flexible work for parents.

Enterprise awards follow the employees. New hires who perform the same work are also covered if the work would otherwise be award/ agreement free.

FWA can order for agreements or awards not to transfer, not to cover new hires or to be varied. Applications to FWA can be made by old/ new employers, employees or unions



Employees covered by a high income guarantee will continue to be covered by that guarantee.

New employers are presumed to recognise service with the old employer for the **unfair dismissal minimum employment period unless the new employer advises the employees, in writing that they require a new minimum period.**



17. Disputes settlement

The Fair Work Bill seeks to provide one dispute settlement procedure for dispute over the application of the NES or an award, or the application of the Act.

Disputes concerning alleged breaches of the Act (including the NES) or an award will be dealt with by the Courts.

Disputes about the application of agreements will be dealt with in accordance with the disputes clause in the agreement. There will be a model clause (which will provide for FWA to arbitrate disputes about the agreement) but the parties to the agreement can build upon or dilute the model. Every dispute clause must provide for a third party to deal with the dispute and for employees to be represented.

Disputes over the application of the NES and awards

- FWA will not be able to arbitrate disputes over the application of the NES or a modern award: i.e. disputes over how the NES or awards apply in a specific circumstance.
- If a worker's contract of employment contains a procedure for dealing with disputes over *matters* dealt with in the NES (e.g. annual leave), then FWA can conciliate the dispute. It can arbitrate the dispute with the consent of both parties.
- FWA is prohibited from dealing with disputes over whether an employer has 'reasonable business grounds' for denying a request for flexible working arrangements or a request for extended unpaid parental leave (both NES entitlements).
- All modern awards must contain a dispute settlement procedure. This DSP will provide for FWA to conciliate disputes (including through calling compulsory conferences of the parties) but will not provide for FWA to settle the dispute by arbitration unless both parties agree.

Breaches of the NES and awards

- A worker, union or Fair Work Inspector can lodge a claim with the Fair Work Divisions within the Federal Court and the Federal Magistrates' Court. Claims can also be taken to State Magistrates' Courts.
- There will be a small claims procedure within the court, for claims of up to \$20,000. When dealing with a small claims matter, the court may act in an informal manner. Lawyers will only be permitted with the court's permission. This rule does not apply to union lawyers.
- The courts may refer parties to FWA for mediation or conciliation. FWA will only be able to arbitrate where both parties consent.

The courts can make a range of orders, including penalties, reinstatement orders and injunctions. Injunctions can be used to prevent an employer from proceeding with a course of action (e.g. from implementing a major change when it has not followed the consultation procedure in the award). If the matter could have been resolved at FWA but one party refuses to participate in conciliation, then the court may award costs against that party.