

FAIR WORK BILL 2008

SECOND READING SPEECH

THE HON JULIA GILLARD MP

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS

I rise today one year on from the election of the Rudd Labor Government to deliver on a promise Labor made to the Australian people. Today we deliver the creation of a new workplace relations system, one that allows Australia to grasp the promise of the future without forgetting the values that made us who and what we are.

Over a century ago at Federation, Australians decided that we would be different to other nations. Democratic, yes. With parliamentary institutions, judicial independence and individual rights similar to those of other great democracies like the United Kingdom and the United States of America, but without their wide social inequalities.

And our Australian version of fairness began with industrial relations:

- with the concept of the living wage, determined first in the Harvester Judgement;
- with the idea that people's democratic rights don't cease when they step onto the factory, shop or office floor;
- with recognition of the need for time for family, relaxation and community; and
- with an end to divisive industrial conflict.

Before the November 2007 election, this set of values - which instill the essence of the Australian genius for fairness and enterprise - was attacked by the values contained in Work Choices.

The philosophy that underpinned Work Choices said, essentially: make your own way in the world; without the comfort of mateship; without the protections afforded by a compassionate society; against odds deliberately stacked against you. No safety net. No rights at work. No cooperation in the workplace to take the nation forward.

More than anything else, the 2007 election was a contest between these two visions of what Australia should be. And in November 2007, the Australian people settled the matter for once and for all. They chose to be true to the Australian ideal of a fair go. Their decision cost a Prime Minister not only his Government but his seat in this House.

They chose to reject Work Choices and all it stood for, and to put in its place the promises Labor made in its policy statement *Forward with Fairness*. They gave the Rudd Government the strongest possible popular mandate for the introduction of this Bill.

One year on from our election, the Rudd Government now delivers in full on those promises.

The Bill being introduced today is based on the enduring principle of fairness while meeting the needs of the modern age. It balances the interests of employers and employees and balances the granting of rights with the imposition of responsibilities. The Bill delivers:

- a fair and comprehensive safety net of minimum employment conditions that cannot be stripped away;
- a system that has at its heart bargaining in good faith at the enterprise level, as this essential to maximise workplace cooperation, improve economic productivity and create rising national prosperity;
- protections from unfair dismissal for all employees;
- protection and hope for a better future for the low-paid;
- a balance between work and family life; and
- the right to be represented in the workplace.

These rights are guaranteed by the legislation and overseen by a new industrial umpire, Fair Work Australia, that will operate with independence and balance.

Reflecting the Government's commitment to co-operative workplace relations, this Bill is the product of an unprecedented degree of consultation with employer and employee representatives and State and Territory governments.

One century on from Federation, and one year on from the election of the Rudd Labor Government, this Bill takes the Australian value of the fair go and builds around it a new workplace relations system ready to meet the needs of the nation in the 21st Century.

It's a good Bill for employees, for employers, for families and for the economy.

Only a Labor Government could have introduced this Bill because only Labor believes that the ideal of fairness should lie at the centre of our national life.

This Bill is simpler and shorter than Work Choices. It is easier to read and apply and is set out in six easy to follow parts.

OBJECTS OF THE BILL

The principal object of the Bill expresses the Government's intention to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

This Bill guarantees a safety net of fair, relevant, and enforceable minimum terms and conditions for Australian workers that can no longer be undermined by the making of statutory individual employment agreements of any kind, given such agreements can never be part of a fair workplace relations system.

The Bill aims to achieve productivity and fairness through enterprise-level collective bargaining underpinned by the guaranteed safety net, simple good faith bargaining obligations and clear rules governing industrial action.

This Bill seeks to assist employees to balance their work and family responsibilities by providing for flexible arrangements.

The Bill ensures freedom of association and recognises that employees have the right to be represented at work by a union. The Bill contains protections against discrimination.

TERMS AND CONDITIONS OF EMPLOYMENT

The safety net

The Bill provides for a comprehensive safety net of minimum wages and employment conditions that cannot be stripped away. The safety net is in two parts.

The National Employment Standards comprise the ten legislated employment conditions covering essential conditions such as weekly hours of work, leave, public holidays, notice and redundancy pay and the right to request flexible working arrangements.

Modern awards are currently being developed by the Australian Industrial Relations Commission.

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.

Individual flexibility arrangements

The Bill provides that each modern award must include a flexibility term to enable employers and employees to negotiate an individual flexibility arrangement to meet their needs that may vary the application of specified award terms. The Bill provides strict protections to ensure that any such individual agreement is entirely voluntary and that an employee cannot be disadvantaged.

Modern awards and employees on high incomes

The Government recognises that awards have less relevance to employees earning high incomes. Under the Bill, an employer and an employee who is guaranteed to earn more than the indexed high-earnings figure may enter a written guarantee that results in a modern award not applying. The Bill includes a number of important protections to ensure employees enter such an arrangement voluntarily.

Reviewing modern awards

The Bill requires Fair Work Australia to undertake four-yearly reviews of modern awards to ensure that they maintain a relevant and fair minimum safety net and continue to be relevant to the needs and expectations of the community.

The Bill allows adjustments to modern awards between the four-yearly reviews in limited circumstances, such as to deal with changes in the work value of classifications or to deal with a pressing new circumstance affecting a particular award.

Minimum wages

The Bill provides for minimum wages in modern awards to be reviewed every year by a specialist Minimum Wage Panel within Fair Work Australia. The minimum wages in modern awards will override any lower rates in an enterprise agreement made under the Bill.

The Bill also requires Fair Work Australia to make a national minimum wage order to provide minimum wages for all award free employees.

Special provisions for outworkers

The Government is aware that outworkers are an acutely vulnerable sector of the Australian workforce and require special protections, so the Bill ensures that awards may include special provisions dealing with outworkers. I also flag the Government's intention to carefully examine the provisions of the Bill concerning right of entry to investigate breaches of entitlements to ensure the Bill provides an effective compliance regime for vulnerable workers in the textile, clothing and footwear industry. The Government will seek necessary refinements to the Bill concerning this matter through the Senate processes.

Equal remuneration

The Bill strengthens the equal remuneration provisions to include the principle of equal remuneration for work of comparable value.

Transfer of business

The Bill provides for a simpler and fairer scheme to deal with the transfer of employment rights and obligations if there is a 'transfer of business' and a new employer takes on employees of the old employer.

ENTERPRISE AGREEMENTS

The Bill provides a new framework for enterprise bargaining which does not use any concept of union or non-union agreements. Instead, an agreement is made when approved by a valid majority of the employees to whom it will apply. A union that acted as a bargaining representative during the negotiations may apply to be covered by the agreement.

This new framework is premised on good faith bargaining and recognises that most workplaces already bargain in good faith without any intervention. However, where this does not happen, the Bill empowers Fair Work Australia to make orders to ensure compliance with the good faith bargaining requirements.

Bargaining for single interest employers

The principle category of bargaining is for single interest employers at the level of the enterprise. Single interest employers include joint ventures, common enterprises, related bodies corporate and employers specified in a single interest employer authorisation or declaration. A single interest employer authorisation or declaration can be made to bring certain very limited types of employers with a strong commonality of interest (such as franchisees of the same franchisor, or

employers who receive substantial public funding) into this stream, but only where those employers seek to be allowed to bargain together.

In the single interest bargaining stream, employees have the right to take protected industrial action. Employees may only take protected industrial action where they are genuinely trying to make agreements at the enterprise. Pattern bargaining is not permitted.

Fair Work Australia is empowered to make certain kinds of orders as part of its oversight of the bargaining process.

Majority Support Orders

Firstly, the Bill provides that where an employer refuses to bargain with its employees, an employee bargaining representative can ask Fair Work Australia to determine if there is majority employee support for negotiating an enterprise agreement. If so, the employer will be required to bargain collectively with its employees in good faith.

Scope orders

Secondly, the Bill provides that Fair Work Australia may make a scope order if it is satisfied that bargaining for a proposed enterprise agreement is not proceeding efficiently or fairly because the group of employees to whom a proposed agreement will apply has not been fairly chosen.

Good faith bargaining orders

Thirdly, the Bill sets out good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet, including: attending, and participating in, meetings at reasonable times; disclosing relevant information; responding to proposals; giving genuine consideration to the proposals of others and giving reasons for responses to those proposals; and refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

The Bill specifies that the good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining or to reach agreement on the terms that are to be included in the agreement. Parties are entitled to take a tough stance in negotiations.

In the very unusual case where a negotiating party completely ignores good faith bargaining orders, the other party may apply to Fair Work Australia to intervene

and to make a workplace determination. This will ensure there is no advantage to be gained by flouting the law.

Multi – employer bargaining

The Bill provides that where employees and employers genuinely wish to bargain on a multi-employer basis they will be free to do so. Protected industrial action and good faith bargaining orders are not available in these circumstances.

The Bill provides it is unlawful to coerce an employer to make a multi-employer agreement or to discriminate against the employer if they have not made a multi-employer agreement.

Bargaining for the low paid

The Bill provides a new scheme of bargaining for low paid employees. There is significant evidence that enterprise bargaining benefits employees, employers and the economy and we want more Australians to benefit from it. Currently, many employees in industries like child care, community work, security and cleaning struggle to bargain effectively with their employers. To facilitate the entry of these types of employees and their employers into enterprise bargaining, the Bill provides for a special low-paid bargaining stream.

Protected industrial action is not available, but Fair Work Australia will have the obligation to facilitate the making of agreements and will play a hands-on role to get the parties bargaining. For example, Fair Work Australia may convene and chair conferences, help to identify productivity improvements to underpin an agreement and generally guide the parties through the negotiating process.

The Bill provides for the possibility of a workplace determination in the low-paid stream in two circumstances – by agreement or if there is no reasonable prospect of an agreement being made. In the latter case, access to a workplace determination is subject to strict criteria, including that there is no enterprise agreement in place and that the employment conditions of the employees are substantially those set out in the safety net. When making a determination, Fair Work Australia must consider how productivity in the business may be improved and the need to maintain the competitiveness of the employer.

Representation in bargaining

The Bill provides that employees are entitled to have their union represent them in bargaining or can appoint another person, such as a colleague. Employers may also appoint a bargaining representative.

The Bill also requires employers required to give written notice to all employees of their right to be represented in the bargaining when the employer initiates bargaining or if a majority support determination, low paid authorisation or a scope order is made.

Agreement content

The Bill provides that all matters pertaining to the relationship between the employer and its employees, as well as to the relationship between the employer and a union representing those employees will be able to be the subject of bargaining.

Agreements can also deal with the deduction of wages for any purpose authorised by the employee and contain terms dealing with how the agreement will operate. This means salary-sacrifice and pay-roll deduction arrangements and terms setting out how the parties agree to conduct negotiations for a replacement agreement can now be included in agreements.

The Bill provides that only terms that are about the relationship between the employer and the employee will be able to be the subject of protected industrial action. For example, employees will not be permitted to take protected industrial action in pursuit of a claim that the employer should make a donation to a charity or should start to manufacture a particular product.

Required agreement content

The Bill provides that in order to be approved by Fair Work Australia, an enterprise agreement must contain:

- a flexibility term that allows individual flexibility arrangements, subject to specified protections;
- a dispute settlement process that must involve either Fair Work Australia or another person or body independent of the parties and that provides for the representation of employees in the process; and
- a term providing for consultation with employees about major workplace changes and that provides for the representation of employees in that process.

Approval of Agreements

The Bill provides that Fair Work Australia must not approve an agreement that includes terms that are inconsistent with unfair dismissal, right of entry, National Employment Standards and the general protections provisions of the Act. Fair Work Australia must also be satisfied that:

- the employer and a valid majority of the employees to whom the agreement will apply genuinely agree to the agreement; and
- each employee would be better off overall under the agreement in comparison to the relevant modern award.

Workplace determinations

There are times when, despite their best efforts, parties cannot reach agreement. To assist the parties, the Bill enables Fair Work Australia to exercise broad conciliation powers at the request of one of the parties.

Provided the parties have bargained in good faith, the Bill provides that they will be able to walk away without having a settlement imposed on them.

Where the parties agree, the Bill provides that Fair Work Australia may also make a binding determination on matters in dispute.

In those limited circumstances where protected industrial action is occurring in a bargaining context that has a particularly negative or dangerous impact, the Bill provides scope for Fair Work Australia to resolve the dispute by making a workplace determination.

Firstly, the Bill incorporates the long-standing capacity for a workplace determination to be made where industrial action is threatening (or would threaten) to endanger the life, personal safety or health or welfare of the population or part of it or to cause significant damage to the economy.

Secondly, a new ground in the Bill for the making of a workplace determination is where protracted industrial action is causing significant economic harm to the bargaining participants, or such harm is imminent. This provision is intended to apply only to the very small number of disputes where industrial action continues for an extended period, where the employees and the employer suffer greatly and yet the parties are so entrenched in their positions that there is no prospect of a breakthrough in negotiations.

RIGHTS AND RESPONSIBILITIES

General protections

The Bill incorporates the current provisions relating to freedom of association, unlawful termination and other miscellaneous protections into a streamlined and easy to follow Part titled General Protections. In doing so, the Bill provides more comprehensive protections for workers in some situations.

The Bill's general protections ensure that employees remain free to choose to be represented by a union, provide more comprehensive protections for those participating in collective activities (such as representing other employees or bargaining). The Bill provides sanctions where a person takes adverse action because someone exercises one of these rights.

The Bill will protect individuals who are subject to adverse treatment because they have or seek to exercise a 'workplace right' such as being entitled to the benefit of an award or agreement or making a complaint or inquiry.

Employees with carer's responsibilities will also now be protected from discriminatory treatment.

Unfair dismissal

Under Work Choices, employees in businesses with up to 100 workers could be dismissed for any reason without rights to challenge the dismissal. This resulted in clear injustices and real feelings of insecurity for workers who realised they could be dismissed at any time for no reason.

The Bill provides a new scheme of unfair dismissal protections to ensure good employees are protected from being dismissed unfairly, while enabling employers to manage under-performing employees with fairness and with confidence.

Employees of a small business will not be able to claim for unfair dismissal until after they have served a qualifying period of twelve months, while for larger businesses, the qualifying period is six months.

'Operational reasons' will no longer be a defence to a claim of unfair dismissal. However, a dismissal is not unfair if it is for reasons of genuine redundancy.

The Bill recognises that small businesses do not have the human resources support that larger businesses enjoy. The Bill provides for the publication of a simple *Small Business Fair Dismissal Code* which, if followed, will ensure a dismissal is not found to be unfair. The Code requires the giving of a warning, based on a reason that validly relates to the employee's performance or capacity to do the job, and a reasonable opportunity for the employee to improve his or her performance. The Code makes it clear the employer has the right to summarily dismiss an employee for serious misconduct.

The process for Fair Work Australia dealing with unfair dismissal applications will be streamlined and simplified.

Industrial action, secret ballots and strike pay

The Bill provides clear rules to govern industrial action. The Bill distinguishes between *protected* industrial action which may legitimately occur during bargaining and *unprotected* industrial action taken outside of bargaining.

The Bill requires employees to approve industrial action through a secret ballot, while streamlining the ballot process.

When protected industrial action occurs, employers must deduct pay for the *actual* period of time the employee stopped work. If partial work bans are implemented, employers will be able to issue a notice and deduct a proportion of pay, with any disputes resolved by Fair Work Australia. The Bill provides that pre-emptive lockouts – taken by the employer when the employees have not taken any industrial action – will no longer be protected action.

For unprotected industrial action, such as industrial action during the life of an agreement, the Bill provides that employees will face a mandatory minimum deduction of four hours' pay.

Right of entry

The Bill provides a fair and proper balance between the rights of employees and their union to meet in the workplace and the rights of employers to run their businesses without interference.

The Bill provides a right for members of a union that is eligible to represent their industrial interests (and potential members of that union) to meet with their union at the workplace during non-working hours for the purpose of holding discussions. No employee can be discriminated against for participating, or declining to participate, in such discussions.

The Bill provides that the right to enter premises to hold discussions comes with strict obligations, including the holding of a valid right of entry permit, the giving of 24 hours notice to enter and requirements for conduct while on site.

Unions will continue to be able to investigate alleged breaches of workplace obligations that affect a member or members of the union. This right is subject to strict requirements. 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.

The Bill includes new protections against misuse of information obtained by the union investigating suspected breaches.

COMPLIANCE AND ENFORCEMENT

The Bill establishes an integrated framework to oversee the new workplace relations system.

Fair Work Australia

The Bill establishes Fair Work Australia to act as a one-stop shop for information, advice and assistance on workplace issues, by merging the functions currently performed across seven government agencies.

Fair Work Australia will be independent and will be focused on providing fast and effective assistance for employers and employees.

Fair Work Divisions of the courts

Fair Work Divisions will be created in the Federal Court and the Federal Magistrate's Court to hear matters which arise under the new workplace relations laws.

The Courts will have new and more effective powers to deal with breaches of the Act and entitlements, including the power to make 'any order they consider appropriate' to remedy a breach as well as injunctions to restrain breaches.

A new user-friendly small claims jurisdiction will be provided where the Court will not be bound by the rules of evidence and may act in an informal manner.

Fair Work Ombudsman

The Bill establishes the Office of Fair Work Ombudsman, with functions including promoting harmonious and cooperative workplace relations and compliance by providing education, assistance and advice.

TRANSITION TO THE NEW SYSTEM

It is intended that the Bill will commence on 1 July 2009. However, consistent with election policy commitments, the National Employment Standards and modern awards will commence on 1 January 2010.

Separate legislation, the Transitional Bill, will be introduced in the first half of 2009 to set out transitional and consequential changes to ensure a smooth, simple and fair transition to the new scheme, while providing for certainty.

The Transitional Bill will:

- ensure that an employee's take home pay is not reduced as a result of the employee's transition onto a modern award by allowing for Fair Work Australia to make orders to deal with any such matter;
- provide that existing agreements will continue to apply until terminated or replaced by a new agreement made under the new bargaining framework;
- ensure a fair safety net with the National Employment Standards and minimum wages applying to all employees from 1 January 2010, including those covered by existing agreements; and
- allow parties to 'modernise' enterprise awards so that they can continue to operate in the new system and treat Notional Agreements Preserving State Awards (NAPSAs) derived from State enterprise awards in the same way.

NATIONAL SYSTEM FOR THE PRIVATE SECTOR

The Bill will apply to 'national system' employers and their employees, relying principally on the corporations' power of the Constitution.

The Government is working with the states and territories to achieve a national workplace relations system for the private sector.

The Bill will exclude State and Territory industrial laws but not in areas such as discrimination, workers compensation and occupational health and safety.

CONCLUSION

This Bill ensures balance and fairness in Australian workplaces.

Work Choices made the mistake of swinging the workplace relations pendulum to the extreme, destroying the employment safety net and stripping away basic industrial rights for employees.

The Fair Work Bill 2008 recognises the importance of balance. Balance in terms of supporting entrepreneurship, initiative and the growth of the businesses that produce our goods and services and employ others, while providing for fair and decent work for employees and a fair return for their labour.

With the introduction today of the Fair Work Bill, Work Choices is tantalisingly close to being gone forever, along with the careers of those who tried to foist it, without a mandate and without transparency, on an unwilling Australia people.

This Bill achieves the right balance in a way that is true to the values that made us who and what we are.

The world is a lot different to the one in which Australia devised the original conciliation and arbitration system more than a hundred years ago. Economic reform, globalization, new technologies and rising levels of education have rendered the old ways obsolete.

Today building greater opportunity for all Australians requires a degree of flexibility and responsiveness that would have been unimaginable to previous generations. Competition is sharper and innovation faster.

But in this new world, Australians voted for a workplace relations system that delivers a fair go, the benefits of mateship at work, a decent safety net and a fair way of striking a bargain.

That's what this Bill does.