THE FAIR WORK AUSTRALIA BILL

The following is analysis by Craig Buckley, Industrial Organiser of the AMIEU Federal Office, of the Bill that was introduced into the Federal Government.

The Bill will apply to national system employers and their employees. A national system employer is:

- A constitutional corporation
- The commonwealth
- A commonwealth authority
- Any body corporate in a territory
- Flight crew, maritime crew, waterside workers
- Any person who carries out activity in a territory, and who employs someone in connections with that activity

Legislation excludes the operation of state industrial legislation, including the IR acts, but does not exclude State laws relating to:

- Anti-discrimination
- Equal employment opportunity
- Non-excluded matters, such as workers compensation, OHS, outworkers, child labour, training, certain types of leave etc

TERMS AND CONDITIONS OF EMPLOYMENT

National Employment Standards

Comrades will already be familiar with the national employment standards, relating to:

- Maximum weekly hours
- Requests for flexible working arrangements
- Parental leave
- Annual leave
- Personal leave, carer's leave, compassionate leave
- Community service leave

- Long service leave
- Public holidays
- Notice of termination and redundancy pay
- Fair Work information statement

The NES cannot be excluded by a modern award or by an enterprise agreement. Ancillary or supplementary terms are permitted to deal with the same subject matter as a NES, but not to the detriment of the standard.

Modern Awards

Legislation makes a distinction between an award *covering* an employee, and that *applying* to that employee. An employee is covered by an award if his or her employment falls within the scope of the award; however, the award will not apply to the employee if his or her employment is subject to an operative enterprise agreement.

So an employee may be covered by an award, even though the award does not apply to him or her at a particular point in time (because the employment is subject to an EBA).

Terms that may be included (139):

- Minimum wages,
- Types of employment
- Hours of work etc
- Overtime
- Penalty rates
- Annualised wage arrangements
- Allowances
- Leave and leave arrangements
- Superannuation
- Consultation and dispute settlement

Coverage provisions must be included (143).

Terms that may not be included (150ff)

- Objectionable terms
- Unreasonable deductions to employer
- Right of entry
- Discriminatory terms
- State-based differences
- Long service leave

Modern awards will be reviewed every four years by FWA. There is some scope for the awards to be amended outside this 4-yearly review, with applications possible by employers and unions who represent employees under the award.

Enterprise Agreements

Some change to terminology. Bargaining process requires employers to notify employees of their entitlement to a bargaining representative, with a proviso that the "default bargaining representative" will be the union for union members, unless the employee gives notice to the contrary.

Unions must be given notice of an employer's intention to make a greenfields agreement. Section 179 provides that employer must not refuse to recognise or bargain with a bargaining representative.

If a union has been nominated as the 'bargaining representative' of employees, the union has the election as to whether it will be covered by the agreement or not, but it must notify FWA before FWA approves the agreement.

Agreements must be approved by FWA, which must be satisfied of a number of requirements, including that the agreement passes the BOOT, and that the agreement "would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives."

BOOT – for a non-greenfields agreement – must be satisfied that employee is better off overall if the agreement applies, as opposed to the modern award applying.

Certain terms of enterprise agreements are **unlawful:**

- Discriminatory terms
- Objectionable terms
- A term that permits a remedy for unfair dismissal for an employee prior to the minimum statutory period in the Act
- A term that excludes the application of unfair dismissal provisions, or modifies the application of such provisions in a way that is detrimental to a person
- A term inconsistent with the Act's provisions on industrial relations
- A term that provides for right of entry other than in accordance with right of entry provisions in the Act
- A term relating to right of entry under State OHS laws, other than in accordance with the Act

Enterprise agreements **must** contain provision for **individual flexibility arrangements,** which will be the model flexibility term prescribed in the regulations if no other clause is agreed. Terms must pertain to the employment relationship, but this has been broadened slightly in its wording to include matters pertaining to the relationship with an organisation. It is clear that union payroll deductions **may** be included in enterprise agreements

The base rate of pay under an enterprise agreement must not be less than the modern award rate, and the modern award rate is deemed if the agreement specifies a lesser rate.

Once the nominal expiry date is passed, anyone covered by the agreement may apply for it to be terminated, subject to a public interest test, but with the

additional requirement that FWA must consider it “appropriate” to do so, taking into account the views of the employer(s), unions, and employees.

Bargaining

Bargaining representatives, including employers are required to meet **good faith bargaining requirements:**

- Attending, participating in, meetings at reasonable times
- Disclosing relevant information, other than confidential or commercially sensitive information, in a timely manner
- Responding to proposals made by other bargaining representatives to the agreement in a timely manner
- Giving genuine consideration to the proposals of other bargaining representatives, and giving reasons for responses to those proposals
- Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

These requirements do not oblige a bargaining representative to

- Make concessions during bargaining
- Reach agreement on the terms to be included in the agreement

Resort can be had in the form of applications to FWA for orders if there are concerns that a party is not complying adequately with its good faith bargaining requirements. If these orders are contravened by a bargaining party, another party may apply for a serious breach order. There are fairly tight restrictions on such an order being made, but if a serious breach order is made, and the parties are subsequently unable to reach agreement, then FWA can make a determination as the terms of the agreement.

Special provisions for low-paid bargaining – to encourage those who have not historically had the benefit of collective bargaining to make enterprise agreements. These provisions generally make it easier for multiple employers to be included in a single bargaining process. In these “low-paid” situations,

there is also provision for FWA to make a determination as to the terms to be included in the agreement where the bargaining representatives do not agree.

Minimum Wages

The bill will retain a minimum wages structure similar to that under Workchoices. This will include a Minimum Wage Panel which will conduct annual reviews of minimum wages for non-award employees, and the wage rates in modern awards.

Transmission of Business Rules

Now referred to as a transfer of business. There are some positive steps here, which provide for certain industrial instruments to be transferred to a new employer, including enterprise agreements. There is also scope for applying for orders from FWA in advance of such transmission. A union for instance can apply for orders if it is *likely* there will be a transfer, and make orders that will apply to a corporation that is *likely* to be the new employer. But there is also scope for FWA to *vary* an instrument that is transferred with the transfer of the business.

RIGHTS AND RESPONSIBILITIES

Freedom of Association Provisions

Many of the FOA provisions have been extensively rewritten, and some terms defined to give a slightly broader scope to its application. If an employer dismisses an employee in breach of FOA rules, there is now a time limit for the lodgement of such application (presently there seems to be none) of 60 days.

Unfair Dismissal

Unfair dismissal rights have been restored for all workers, but distinction made between a normal employer and a small business employer (less than 15 workers). Not protected by unfair dismissal provisions unless employed for 6 months (regular employer) or 12 months (small business employer).

However, application must be made within 7 days, not 21! There is very limited scope for extending the time limit, only in exceptional circumstances, which is a much more difficult test to satisfy than the existing *Brodie Hanns* test.

For a small business employer, dismissal will be unfair if the small business employer has not followed the fair dismissal code. This seems quite nebulous. For other employers, the statutory criteria for determining whether a dismissal is harsh, unjust and unreasonable, remain effectively unchanged.

A genuine redundancy cannot be an unfair dismissal.

Remedies include reinstatement (which includes backpay) and compensation. FWA must **not** make a compensation order unless it decides reinstatement is **inappropriate.** This is a subtle change, may be an indication to FWA that they should hand out more reinstatement orders, but whether makes a practical difference remains to be seen. Compensation has always been the preferred soft option for the AIRC.

If a conference does not resolve the matter, FWA determines whether or not a hearing proceeds. The legislative intent seems to be against holding hearings, such that FWA **must not** hold a hearing unless FWA considers it appropriate to do so, taking into account the parties wishes, and whether a hearing would be the most effective and efficient way to resolve the matter. I suspect that this will not necessarily mean fewer hearings. Presumably our court structure has trials precisely because they are the most effective and efficient means of resolving disputes between parties where there are disputed facts. However, it remains the case that a worker no longer has an automatic right to a hearing.

Industrial Action

The legislation adopts different terminology, but retains much of the *WorkChoices* arrangements for having ballots for protected action. Again, the ability to make an application depends on the union not pursuing the inclusion

of unlawful terms in an agreement, no pattern bargaining, the union must be genuinely trying to reach agreement, not for multi-enterprise agreements, etc.

The minimum 3 days notice for industrial action still stands. FWA has the power to order the suspension or termination of industrial action, cooling off periods, to make orders in the case of significant harm to a 3rd party. The Minister also has the power to make a written declaration terminating industrial action in a range of circumstances, including that the industrial action threatens to cause significant damage to the Australian economy. Ballot process is similar.

Approval of industrial action requires at least 50% of those on the roll of eligible employees to vote, and of those, more than 50% must approve the action.

If the AEC is the ballot agent, then the Commonwealth pays for the whole cost of the ballot. If a union nominates another person (e.g. a former AIRC commissioner, as has been done by both the Queensland and South Australian branches), then the union applying for the ballot must pay for all of the costs of the ballot.

There are provisions which change the existing rules for payment for industrial action. This removes the idiosyncratic operation of *Workchoices* that meant a person who engaged in a go-slow would be entitled to no payment for the whole of their work, because they were engaged in industrial action for the whole of the time they were working. The change to the payment rules will restore efficacy to industrial action in the nature of overtime bans, partial work bans, and go-slows etc.

For **protected industrial action**, an employer does not pay the worker for the period of the industrial action, but with special provisions for bans, go-slows etc, permitting the FWA to resolve disputes over the amount of the payment. For **non-protected action**, a worker has four hours pay deducted for any industrial action of four hours or less duration. If more than four hours,

deduction is made of the period of industrial action (e.g. if a worker stops work for 5 hours, he loses 5 hours pay, if a worker stops for six hours, she loses six hours pay, but workers who stop for one hour, or two, still lose four hours pay.

Right Of Entry

Right of entry provisions deal with the same 3 basic situations as under *WorkChoices:* investigation of breaches, discussions with employees, and State OHS entry rights. Right of entry for discussions only requires that there are people on the site, whose industrial interests the union is entitled to represent, who wish to participate in discussions. There is no requirement for discussion purposes that a union be a party to an industrial instrument that applies to the site. The only exemption is for a small workplace where all employees hold conscientious objection certificates. It is still permissible for an employer to require that discussions be held in a particular room, but there has been some expanded scope to challenge the reasonableness of such request. That is, the legislation specifically provides that a request that a particular room be used for discussions is unreasonable if:

- The room or area is not fit for the purpose of conducting the interviews or holding the discussions
- The request is made with the intention of intimidating participants or discouraging persons from participating, or *making it difficult for persons to participate in the interviews or discussions, whether because the room or area is not easily accessible during mealtimes or other breaks, or for some other reason.*

FWA can deal with disputes about right of entry. The above provisions do not really change the existing state of the law – it already provides for these sorts of arguments to take place. However, specific inclusion of the detail in the legislation may make it easier to obtain orders.

Generally speaking at least 24 hours notice in writing is required for a right of entry to be exercised. Some of the summaries of the legislation being bandied about are claiming that this 24 hour written notice will also apply to State OHS right of entry entitlements. This is not strictly correct. The bill only says that 24 hours notice must be given if one is exercising state OHS entry rights to examine records or documents – this is also a requirement of the current state of the law. Entering under a State OHS permit for other purposes will not require notice.

ADMINISTRATION

Much of the rest of the act deals with administrative matters, including the establishment of Fair Work Australia, and the manner it will conduct itself, remedies available, and the jurisdiction of various tribunals and courts. One of the interesting rules is that a person may not be represented by a lawyer or a paid agent unless FWA expressly permits this. However, there is an exception where a person is represented by a lawyer who is an employee of an organisation, so I am reasonably pleased that the legislation will not make me redundant.

NATIONAL ORGANISER ACTIVITIES

Advice work for various branches.

Meetings and drafting work for the Queensland Meat Industry Labour Agreement, which has consumed a lot of time.

Versacold – agreement made, despite attempted legal intervention by NUW. NUW is pursuing an application in the Federal Court trying to have the agreement with the AMIEU invalidated. The NUW is not making any claim of wrongdoing by the AMIEU, but is challenging whether an agreement can legally made in the form chosen by the NUW.

Some Right of Entry permit training, with more to be done.