2008-2009

The Parliament of the
Commonwealth of Australia

THE SENATE

Fair Work Bill 2008

(Government)

(1) Clause 12, page 10 (before line 25), before the definition of applicable award-derived long service leave terms, insert:

applicable agreement-derived long service leave terms: see subsection 113(5).

(2) Clause 16, page 34 (line 15), omit “However”, substitute “Despite subsection (1)”.

(3) Clause 16, page 34 (after line 28), at the end of the clause, add:

Meaning for pieceworkers for the purpose of section 206

(3) The regulations may prescribe, or provide for the determination of, the base rate of pay, for the purpose of section 206, of an employee who is a pieceworker. If the regulations do so, the employee’s base rate of pay, for the purpose of that section, is as prescribed by, or determined in accordance with, the regulations.

Note: Section 206 deals with an employee’s base rate of pay under an enterprise agreement.

(4) Clause 55, page 68 (line 8), omit “only if the”, substitute “only to the extent that the”.

interaction between NES and modern awards and enterprise agreements

(5) Clause 55, page 68 (lines 30 to 36), omit subclause (5), substitute:
Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

(5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the award or agreement entitlement) that is the same as an entitlement (the NES entitlement) of the employee under the National Employment Standards:

(a) those terms operate in parallel with the employee’s NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).

[interaction between NES and modern awards and enterprise agreements]

(6) Clause 61, page 72 (lines 5 and 6), omit subclause (1), substitute:

(1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).

Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.

[interaction between NES and modern awards and enterprise agreements]

(7) Clause 113, page 114 (line 3) to page 115 (line 19), omit the clause, substitute:

113 Entitlement to long service leave

Entitlement in accordance with applicable award-derived long service leave terms

(1) If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

Note: This Act does not exclude State and Territory laws that deal with long service leave, except in relation to employees who are entitled to long service leave under this Division (see paragraph 27(2)(g)), and except as provided in subsection 113A(3).
(2) However, subsection (1) does not apply if:

(a) a workplace agreement, or an AWA, that came into operation before the commencement of this Part applies to the employee; or

(b) one of the following kinds of instrument that came into operation before the commencement of this Part applies to the employee and expressly deals with long service leave:

(i) an enterprise agreement;
(ii) a preserved State agreement;
(iii) a workplace determination;
(iv) a pre-reform certified agreement;
(v) a pre-reform AWA;
(vi) a section 170MX award;
(vii) an old IR agreement.

Note: If there ceases to be any agreement or instrument of a kind referred to in paragraph (a) or (b) that applies to the employee, the employee will, at that time, become entitled under subsection (1) to long service leave in accordance with applicable award-derived long service leave terms.

(3) **Applicable award-derived long service leave terms**, in relation to an employee, are:

(a) terms of an award that (disregarding the effect of any instrument of a kind referred to in subsection (2)):

(i) would have applied to the employee immediately before the commencement of this Part if the employee had, at that time, been in his or her current circumstances of employment; and

(ii) would have entitled the employee to long service leave; and

(b) any terms of the award that are ancillary or incidental to the terms referred to in paragraph (a).

**Entitlement in accordance with applicable agreement-derived long service leave terms**

(4) If there are applicable agreement-derived long service leave terms (see subsection (5)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

(5) There are **applicable agreement-derived long service leave terms**, in relation to an employee if:

(a) an order under subsection (6) is in operation in relation to terms of an instrument; and

(b) those terms of the instrument would have applied to the employee immediately before the commencement of this Part if the employee had, at that time, been in his or her current circumstances of employment; and

(c) there are no applicable award-derived long service leave terms in relation to the employee.

(6) If FWA is satisfied that:

(a) any of the following instruments that was in operation immediately before the commencement of this Part contained terms entitling employees to long service leave:

(i) an enterprise agreement;

(ii) a collective agreement;

(iii) a pre-reform certified agreement;

(iv) an old IR agreement; and
(b) those terms constituted a long service leave scheme that was applying in more than
one State or Territory; and

(c) the scheme, considered on an overall basis, is no less beneficial to the employees
than the long service leave entitlements that would otherwise apply in relation to the
employees under State and Territory laws;

FWA may, on application by, or on behalf of, a person to whom the instrument applies,
make an order that those terms of the instrument (and any terms that are ancillary or
incidental to those terms) are applicable agreement-derived long service leave terms.

References to instruments

(7) References in this section to a kind of instrument (other than an enterprise agreement) are
references to a transitional instrument of that kind, as continued in existence by
Schedule 3 to the Fair Work (Transitional Provisions and Consequential Amendments)
Act 2009.

113A Enterprise agreements may contain terms discounting service under prior
agreements etc. in certain circumstances

(1) This section applies if:

(a) an instrument (the first instrument) of one of the following kinds that came into
operation before the commencement of this Part applies to an employee on or after
the commencement of this Part:

(i) an enterprise agreement;

(ii) a workplace agreement;

(iii) a workplace determination;

(iv) a preserved State agreement;

(v) an AWA;

(vi) a pre-reform certified agreement;

(vii) a pre-reform AWA;

(viii) an old IR agreement;

(ix) a section 170MX award; and

(b) the instrument states that the employee is not entitled to long service leave; and

(c) the instrument ceases, for whatever reason, to apply to the employee; and

(d) immediately after the first instrument ceases to apply, an enterprise agreement (the
replacement agreement) starts to apply to the employee.

(2) The replacement agreement may include terms to the effect that an employee’s service
with the employer during a specified period (the excluded period) (being some or all of
the period when the first instrument applied to the employee) does not count as service
for the purpose of determining whether the employee is qualified for long service leave,
or the amount of long service leave to which the employee is entitled, under this Division
or under a law of a State or Territory.

(3) If the replacement agreement includes terms as permitted by subsection (2), the excluded
period does not count, and never again counts, as service for the purpose of determining
whether the employee is qualified for long service leave, or the amount of long service
leave to which the employee is entitled, under this Division or under a law of a State or
Territory, unless a later agreement provides otherwise. This subsection has effect despite
sections 27 and 29.
(4) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.*

[long service leave]

(8) Clause 117, page 119 (lines 24 to 28), omit paragraph (2)(b), substitute:

(b) the employer has paid to the employee (or to another person on the employee’s behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee’s behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

[payment in lieu of notice of termination]

(9) Clause 121, page 122 (line 5), before “Section”, insert “(1)”.

[redundancy pay]

(10) Clause 121, page 122 (after line 11), at the end of the clause, add:

(2) A modern award may include a term specifying other situations in which section 119 does not apply to the termination of an employee’s employment.

(3) If a modern award that is in operation includes such a term (the *award term*), an enterprise agreement may:

(a) incorporate the award term by reference (and as in force from time to time) into the enterprise agreement; and

(b) provide that the incorporated term covers some or all of the employees who are also covered by the award term.

[redundancy pay]

(11) Clause 123, page 124 (lines 11 to 19), omit paragraph (3)(a).

[removing exclusion from notice of termination]

(12) Clause 186, page 176 (line 27), after “Note”, insert “1”.

[term about settling disputes]

(13) Clause 186, page 176 (after line 29), after the note at the end of subclause (6), add:

Note 2: However, this does not prevent FWA from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4).

[term about settling disputes]

(14) Clause 738, page 545 (line 16), after “employment”, insert “or other written agreement”.

[dealing with disputes]

(15) Clause 738, page 545 (after line 20), at the end of the clause, add:

;or (d) a determination under the *Public Service Act 1999* includes a term that provides a procedure for dealing with disputes arising under the determination or in relation to the National Employment Standards.

[dealing with disputes]

(16) Clause 739, page 545 (line 26), omit “76(4)”, substitute “76(4), unless:”
(a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to FWA dealing with the matter; or
(b) a determination under the Public Service Act 1999 authorises FWA to deal with the matter”.

[dealing with disputes]

(17) Clause 739, page 545 (after line 26), at the end of subclause (2), add:

Note: This does not prevent FWA from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4) (see also subsection 55(5)).

[interaction between NES and modern awards and enterprise agreements]

(18) Clause 740, page 546 (line 16), omit “76(4)”, substitute “76(4), unless:
(a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the person dealing with the matter; or
(b) a determination under the Public Service Act 1999 authorises the person to deal with the matter”.

[dealing with disputes]

(19) Clause 740, page 546 (after line 16), at the end of subclause (2), add:

Note: This does not prevent a person from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4) (see also subsection 55(5)).

[interaction between NES and modern awards and enterprise agreements]

(20) Clause 758, page 554 (lines 5 to 12), omit the clause, substitute:

758 Object of this Division

The object of this Division is to give effect, or further effect, to:
(a) the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4); and
(b) the Termination of Employment Recommendation, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982.

Note 1: In 2009, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).
Note 2: In 2009, the text of a Recommendation adopted by the General Conference of the ILO was accessible through the ILO website (www.ilo.org).

[extended entitlements]

(21) Clause 771, page 559 (lines 12 to 14), omit paragraph 771(c), substitute:

(c) the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4); and
(d) the Termination of Employment Recommendation, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982.

[extended entitlements]

(22) Clause 784, page 565 (lines 5 to 12), omit the clause, substitute:

784 Object of this Division

The object of this Division is to give effect, or further effect, to:
(a) the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4); and
(b) the Termination of Employment Recommendation, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982.

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[extended entitlements]