Fair Work Amendment Bill 2013

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Fair Work Amendment Bill 2013

Date introduced: 21 March 2013
House: House of Representatives
Portfolio: Education, Employment and Workplace Relations

Commencement: Various dates as set out in clause 2 of the Bill.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the Fair Work Amendment Bill 2013 (the Bill) is to amend the Fair Work Act 2009 (the Fair Work Act) to strengthen, and broaden the application of, the family friendly provisions of the Fair Work Act and to clarify the right of entry provisions in the Fair Work Act, in order to implement a second tranche of the Government’s response to the report, Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation.

The Bill also includes additional amendments designed to allow the Fair Work Commission (FWC) to deal with workplace bullying, in order to implement the Government’s response to the House of Representatives Standing Committee on Education and Employment’s report, Workplace Bullying: We Just Want it to Stop; inserts the need for penalty rates into the Modern Awards objective; adds a new function, the prevention of industrial disputes, to the FWC’s functions; and makes a number of technical amendments.

Structure of the Bill

There are seven Schedules to the Bill:

- **Schedule 1** deals with family-friendly measures including special maternity leave and parental leave, the right to request flexible working arrangements, consultation about changes to rosters, and the right of pregnant women to transfer to a safe job
- **Schedule 2** inserts penalty rates into the Modern Awards objective
- **Schedule 3** creates a new Part 6-4B in the Fair Work Act which enables a worker who is bullied at work to apply to the FWC for an order to stop the bullying
- **Schedule 4** is about the right of entry provisions in the Fair Work Act
- **Schedule 5** adds to the functions of the FWC, ‘promoting cooperative and productive workplace relations and preventing disputes’

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• **Schedule 6** contains technical amendments and
• **Schedule 7** deals with application and transitional matters.

**Background**

**Review of the Fair Work Act**

When it introduced the Fair Work Act in 2008, the Government undertook to conduct a post-implementation review within two years of its full implementation on 1 January 2010. The final report of that review was released on 2 August 2012.

The Review made 53 recommendations. About one-third of them, those that were generally accepted and not contentious, were implemented by the *Fair Work Amendment Act 2012*. This Bill implements further recommendations to do with family friendly provisions and union officials’ right of entry to workplaces.

**Prevention of bullying in the workplace**

A recent inquiry by the House of Representatives Standing Committee on Education and Employment into workplace bullying attracted wide interest. There was general agreement on the need for measures to prevent bullying; it was less clear what those measures should be. It was argued by some parties that the FWC was the appropriate body to handle complaints of bullying because it already had processes that were understood, relatively speedy and not costly.

The report of the inquiry recommended, among other things, that workers subjected to bullying should have a right to seek remedies through an adjudicative process. It did not specifically

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recommend that this be through the FWC. The amendments in Schedule 3 of the Bill are part of the Government’s response to the report.

Penalty rates

Penalty rates have been included in awards virtually since awards have existed. Generally they are a loading on wages for work at non-standard times and for overtime. Their purpose has been to compensate workers for work outside socially accepted hours and loss of leisure more generally; and to discourage ‘slack management’ and encourage foresight in work organisation so as to protect the leisure of workers.

Recently there has been public discussion of penalty rates, much of it in the context of the Review of Modern Awards, the FWC Penalty Rates Case and a Private Member’s Bill introduced by Senator Xenophon to exempt small business from the payment of penalty rates. (The Senate inquiry into the Bill received over 1200 submissions.) Schedule 2 of this Bill provides that the FWC, in ensuring that modern awards provide fair and relevant minimum conditions, must take into account the need to provide additional remuneration for overtime; unsocial, irregular and unpredictable hours; work on weekends of public holidays; and shift work.

Committee consideration

The Bill has been referred to the House of Representatives Standing Committee on Education and Employment. Details of the inquiry are at the inquiry web page. No date has been set for the inquiry to report.

The Bill was also referred to the Senate Standing Committee on Education, Employment and Workplace Relations for inquiry. Details of the inquiry are at the inquiry web page. The Committee reported on 14 May 2013, recommending that the Bill be passed. However, Coalition Senators issued a dissenting report, the content of which is considered in the discussion below.

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5. Ibid., recommendation 23, paragraph 6.128.
The Senate Committee for the Scrutiny of Bills considered the Bill and reported in its *Alert Digest* of 15 May 2013 that it had no comment on the Bill.¹⁴

**Policy position of non-government parties/independents**

The Coalition Senators’ Dissenting Report concludes that the Bill should be subject to significant amendment and a Regulatory Impact Statement. It notes that the broad impact of the Bill on all employers and employees means that a Regulatory Impact Statement is essential.¹⁵

It makes two recommendations about matters that are not in the Bill. The first is that recommendations of the Fair Work Act Review that protected industrial action not be allowed before bargaining has commenced (Recommendation 31) and that the Fair Work Act be amended so that the reason for adverse action is the subjective intention of the person taking the alleged adverse action (Recommendation 47) be implemented as soon as possible. The second is that no amendments be made to this Bill or to the Fair Work Act to expand arbitration.¹⁶

Views of the Coalition Senators on provisions of the Bill are dealt with in the discussion of the provisions below.

Australian Greens Senator Lee Rhiannon is a member of the Senate Standing Committee on Education, Employment and Workplace Relations and supported the majority recommendation that the Bill be passed.¹⁷

**Position of major interest groups**

Commentary on the Bill from employer groups has been largely negative. The Australian Chamber of Commerce and Industry (ACCI), the Business Council of Australia (BCA), and the Australian Industry Group (AiG) have all said that the Bill represents a missed opportunity for genuine reform, that the process has been rushed and not sufficiently consultative, that the Bill does not implement the most

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¹⁶ Ibid., pp. 29, 40.


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pressing of the recommendations of the review of the Fair Work Act, and that the Bill is biased. The Australian Mines and Metals Association (AMMA) has claimed that the Bill will cause ‘more litigation, more disputation and more confusion.’

Unions in general have welcomed the Bill. The Australian Council of Trade Unions (ACTU) notes that some of the measures do not go far enough, but supports the Bill.

Welfare groups have also welcomed the family friendly measures and the measures to address workplace bullying in the Bill.

More detailed responses are dealt with in the section on ‘Key issues and provisions’ below.

Financial implications

The Explanatory Memorandum stated that the financial impacts of the Bill would be revealed in the 2013–14 Budget. The General Manager of the FWC had indicated that the Commission would not be able to absorb the costs of the additional work associated with the anti-bullying measure. The Budget provides $21.4 million over four years in extra resources for the Commission to carry out this new function.

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or
declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible. The Joint Committee on Human Rights has no concerns with this Bill.

Key issues and provisions

Schedule 1—Family friendly measures

Schedule 1, Part 1—Special maternity leave

Under section 80 of the Fair Work Act, if a pregnant worker is unfit for work for reasons related to her pregnancy, she is entitled to unpaid special maternity leave. At present, such periods of leave are deducted from her entitlement to unpaid parental leave. The amendments in items 1 to 6 and item 9 of Schedule 1 of the Bill mean that unpaid special maternity leave will not be deducted from unpaid parental leave.

Items 8 and 11 insert notes to the effect that an employee can take paid personal/carer’s leave if she is entitled to it, rather than unpaid special maternity leave. Items 7 and 10 are amendments consequential to insertion of the notes.

Schedule 1, Part 2—Parental leave

The parental leave provisions in the Fair Work include concurrent leave entitlements so that if one member of an employee couple takes parental leave, the other member of the couple is entitled to a period of (unpaid) concurrent leave. Item 13 extends the period of concurrent leave from three weeks to eight weeks, and sets out provisions for how the leave is to be taken and the notice to be given.

Some employer groups have complained that this leave is difficult to manage and suggest that there will be compliance costs. Others, however, have said that it is acceptable.

Schedule 1, Part 3—Right to request flexible working arrangements

Currently, section 65 of the Fair Work Act provides that an employee who is a parent may request a change to his or her working arrangements to assist with caring responsibilities in relation to a child

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24. The Statement of Compatibility with Human Rights can be found at pages 3–12 of the Explanatory Memorandum to the Bill.
26. For example, Business SA and ACCI, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.
27. For example, AiG, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.

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under school age or a child under 18 with a disability. Item 17 amends section 65 with the effect of extending the existing right to request flexible working arrangements to employees who are parents of school age children, are carers, have a disability, are 55 or older, are experiencing violence from a family member or are providing care or support to a family member who is experiencing violence from a family member. Item 18 inserts a new subsection 65(5A) which sets out examples of what might constitute reasonable business grounds for rejecting such a request.

Most employer groups appear to support the existence of a general right to request flexible working arrangements, but question the need for broadening its application. Some have pointed out that there is no way to verify whether an employee is subject to violence from a member of their family, so that the provision can be abused.

Unions and community groups have welcomed the provisions. The ACTU suggests that they should be strengthened by a requirement that the employer make an effort to accommodate the request. The ACTU and the Shop Distributive and Allied Employees Association (SDA) propose that the phrase ‘domestic or family violence’ should be substituted for ‘violence from a member of the employee’s family’, as being simpler and covering circumstances which are known to arise.

Several groups have argued that the general protections available under the Act should be extended to include an employee’s status as a victim of domestic violence.

The provision as it stands does not allow a right of review of an employer’s refusal. Several groups have called for a right of review. SDA described the provision as ‘hollow’ without such review.

Schedule 1, Part 4—Consultation about changes to rosters or working hours

Part 3-2, Division 3 of the Fair Work Act deals with terms of modern awards. Subdivision C deals with terms that must be included in modern awards.

Item 19 inserts a new section 145A which requires all modern awards to include a term that requires employers to consult employees about changes to their regular roster or ordinary hours of work, and allows for representation of employees in the consultation. The term must require the employer to give employees information about the change, and to hear and consider their views about the impact of the change.

28. Ibid.
29. National Farmers Federation (NFF) and BCA, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.
30. ACTU and Shop Distributive and Allied Employees Association (SDA), Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.
31. For example, ACTU and SDA, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.
32. For example, Australian Domestic and Family Violence Clearinghouse, ACTU, SDA, and Carers Victoria, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.
**Items 20 and 21** insert a corresponding requirement for enterprise agreements.

In response to concerns that had been raised by employer groups, the Department of Education, Employment and Workplace Relations made it clear that such consultation was required only for changes to regular hours of work. It would not apply to a need for overtime that arose through temporary pressure of work. Nonetheless, the Coalition Senators’ Dissenting Report, responding to the concerns expressed, recommends that the provision be redrafted to provide more clarity.

Some employers remark that the provision merely reflects what already happens. Some have complained that it imposes compliance costs, that there is no evidence that it is needed, and that as it stands it would apply to even trivial changes. The BCA objected to the provision that employees can be represented, arguing that there is no place for unions or other third parties in such discussions.

Unions commented that the provision would be improved by a requirement that employers should have to try to accommodate concerns raised by employees.

### Schedule 1, Part 5—Transfer to a safe job

Section 81 of the Fair Work Act provides for transfer to a safe job for pregnant employees. The employer must transfer a pregnant employee who is entitled to unpaid parental leave (that is, she has worked for the employer for a period of 12 months) and who is otherwise fit for work, but for whom it is inadvisable to continue in her current job, to a job that is safe for her. If no safe job is available, the employee is entitled to paid no safe job leave.

**Schedule 1, Part 5** of the Bill extends a parallel right to women who are not entitled to unpaid parental leave – that is, they have not worked for the employer for 12 months. In this case, the no safe job leave would be unpaid.

Employers have objected that they may be forced to make arrangements for an employee who has worked for them only for a very brief time, and in particular may have to grant a substantial period of leave before the birth of a child to someone who is not entitled to leave after the birth.

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34. Coalition Senators’ Dissenting Report, op. cit., p. 35.

35. For example, Baking Association of Australia, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.


37. BCA, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.

38. For example, ACTU and SDA, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.

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The SDA observes that the provision fulfils an obligation under the International Labour Organisation Maternity Protection Convention. It notes that the current provisions are working well and it is unlikely that this extension will cause any problems.  

**Schedule 2—Modern awards objective**

Subsection 134(1) of the Fair Work Act sets out the factors that the FWC must take into account when ensuring that modern awards provide a ‘fair and relevant minimum safety net of terms and conditions’. Item 1 in Schedule 2 of the Bill adds a new paragraph 134(1)(da) which inserts a new factor, the need to provide additional remuneration for employees working overtime; or unsocial, irregular or unpredictable hours; or weekends and public holidays; or shifts.

Reaction to this amendment has been mixed. The AiG opposes inclusion of the provision, reiterating the arguments it made in the recent Penalty Rates Case (referred to above), especially with regard to the fast food industry. ACCI says that there is no need, in the light of the Penalty Rates Case, in which the FWC refused to remove penalty rates from awards, but goes on to warn that this clause could spread penalty rates to industries that do not at present have them. The BCA comments that it merely reflects the status quo – subsection 139(1) already provides that penalty rates may be included in modern awards.

The ACTU likewise regards it as confirming the status quo. However, the inclusion of the clause is welcomed as confirming the importance of penalty rates, ‘given the frequency and severity of attacks on penalty rates in proceedings before the Fair Work Commission.’ The function of the provision as allaying the fears of workers is suggested by the fact that it was first announced by the Prime Minister at a conference organised by the Australian Council of Trade Unions.

However, Sara Charlesworth has pointed out that many low paid community workers in fact have little protection from unsocial hours, and that their awards have little or no provision for penalty rates. This provision does not guarantee an improvement, but it will guarantee consideration.

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42. ACTU, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, *Inquiry into the Fair Work Amendment Bill 2013*, op. cit.
Schedule 3—Anti-bullying measure

Schedule 3 inserts new Part 6-4B into the Fair Work Act, which allows a worker who has been bullied at work to apply to the FWC for an order to stop the bullying.

In this part, new section 789FB provides that ‘employer’ and ‘employee’ have their ordinary meanings: that is, the provisions are not restricted to national system employers and employees.

New section 789FC provides that a worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order to stop the bullying. For purposes of this measure a ‘worker’ includes an employee, a contractor or subcontractor, an outworker, an apprentice or trainee, a student gaining work experience, or a volunteer. There is provision for an application fee.

New section 789FD defines bullying at work as repeated unreasonable behaviour by an individual or a group of individuals towards a worker or group of workers that creates a risk to health and safety. It does not include reasonable management action carried out in a reasonable manner. The inclusion of ‘repeated’ in the definition means that a single incident would not be covered. The measure applies to ‘constitutionally-covered businesses’: constitutional corporations, or the Commonwealth, or a Commonwealth authority, or a body corporate incorporated in a territory, or a business or undertaking conducted principally in a territory or a Commonwealth place.

New section 789FF provides that if the FWC finds that the worker has been bullied and there is a risk that the bullying will continue, it may make an appropriate order to prevent the bullying. In doing so it must take account of other procedures available to the worker and other processes that are under way or concluded. New section 789FG provides that contravention of such an order is a civil remedy provision and can attract a fine.

New section 789FH provides that proceedings under work health and safety laws can continue while the application is being considered: otherwise they would have ceased.

The AiG and AMMA oppose inclusion of this measure in the Fair Work Act on the grounds that bullying is not a workplace relations issue, and that the overlap with work health and safety laws creates the possibility of forum shopping.\(^{46}\) ACCI argues that the provisions have been rushed, that the FWC is not expert in the issues, and in particular that hearings in the FWC could prejudice criminal proceedings in the work health and safety framework.\(^{47}\) The BCA notes that ‘reasonable management action’ is not defined.\(^{48}\)

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46. AiG and AMMA, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work Amendment Bill 2013, op. cit.
47. ACCI, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.
48. BCA, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.

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ACTU argues that the FWC is an appropriate body to deal with bullying because it is responsive and efficient and understands workplace dynamics.\textsuperscript{49}

The Law Institute of Victoria expresses concern that the definition of bullying ‘at work’ could exclude bullying activity on social media which, while related to the workplace, does not actually occur at work. It also questions how any FWC orders will be enforced.\textsuperscript{50} SDA raises the circumstances where each member of a group in turn engages in bullying of an individual, so that no one of them can be said to engage in repeated behaviour.\textsuperscript{51}

The Coalition Senators’ Dissenting Report recommends that bullying by union officials of workers and employers should be included in the definition of workplace bullying.\textsuperscript{52} It also recommends that workers be ‘encouraged’ to take all reasonable steps to resolve their concerns before making a complaint to the Fair Work Commission.\textsuperscript{53}

**Schedule 4—Right of entry**

Part 3-4 of the Fair Work Act is about the rights of union officials who hold entry permits to enter premises to carry out their representative duties.

**New section 492** replaces the existing section 492 which sets out provisions for where interviews are to be conducted. It provides that the permit holder and the occupier of the premises can agree on a room or area. If they cannot agree, the default is that the room where employees take their meal breaks can be used. **New section 492A** provides that the permit holder should comply with a reasonable request by the occupier of the premises to take a particular route to the room or area.

**New subsection 505(1)** sets out more explicitly than the section it replaces the ability of the FWC to deal with disputes about the operation of Part 3-4. **New subsection 505(5)** sets out where the FWC can confer additional rights on a permit holder. Both of these subsections specify disputes about transport and accommodation.

**New section 505A** gives the FWC the power to deal with a dispute about frequency of entry to hold discussions; it may issue an order if it is satisfied that the frequency of visits is such as to require an unreasonable diversion of the occupier’s critical resources.

**New Division 7** at the end of **Part 3-4** requires occupiers of premises to enter into accommodation and/or transport arrangements for permit holders where the location of the premises is such that only the occupier of the premises can provide the accommodation and/or transport (that is in

\textsuperscript{49} ACTU, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, \textit{Inquiry into the Fair Work Amendment Bill 2013}, op. cit.

\textsuperscript{50} Law Institute of Victoria, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, \textit{Inquiry into the Fair Work Amendment Bill 2013}, op. cit.

\textsuperscript{51} SDA, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, \textit{Inquiry into the Fair Work Amendment Bill 2013}, op. cit.

\textsuperscript{52} Coalition Senators’ Dissenting Report, op. cit., p. 37.

\textsuperscript{53} Ibid., p. 39.
remote areas). The accommodation and/or transport must be provided at a fee which is no more than is required to cover costs.

The Coalition Senators’ Dissenting Report, apparently relying on early misunderstandings of this provision, recommends that provisions that make the employer responsible for travel expenses be opposed.54

The AiG concedes that right of entry has been an extremely contentious issue, but argues that the present arrangements are working well and should not be changed. The AiG and the BCA both argue that the test for the FWC to issue an order about frequency of visits – an unreasonable diversion of the occupier’s critical resources – is too strict.55

The AMMA argues that the new provisions present safety risks, demand unreasonable resources from employers (for example, because a union official being transported to an offshore rig would need to be accompanied at all times for work health and safety reasons), and will contribute to increased militancy.56

On the other hand, the Australian Manufacturing Workers’ Union (AMWU) and the Maritime Union of Australia (MUA) cite many examples of difficulties that have arisen when they have sought access to remote sites.57

There is a chorus of employer views that workers are entitled to occupy their lunch rooms without fear of harassment by union officials.58 However, use of the meals area is a default provision if the occupier of the premises and the permit holder cannot agree on an alternative.

54. Ibid., p. 31.
57. Australian Manufacturing Workers’ Union (AMWU) and Maritime Union of Australia (MUA), Submission to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013, op. cit.
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