

Employment Update

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Fair Work Australia

by Martin Dunne

On 1 July 2009 Fair Work Australia ("FWA") commenced operations administering the *Fair Work Act* ("the Act") workplace reforms. Together with the Fair Work Ombudsman ("FWO") FWA replaces the Australian Fair Pay Commission, Workplace Authority and Workplace Ombudsman and assumes most of the responsibilities performed by the Australian Industrial Relations Commission ("AIRC").

The AIRC, which remains in operation until the end of this year, will continue the award modernisation process and hear claims regarding unfair dismissals which occurred before 30 June 2009.

Members of the AIRC have been transferred to roles within FWA.

Workplace Authority and Workplace Ombudsman staff have been transferred to roles within FWA and FWO.

Fair Work Australia in action

FWA has been quick to leave its mark since commencing operations with some of its most recent decisions dealing with issues including:

Access to records

- Ordering MHB Building Services to allow the CFMEU to inspect and make copies of documents including records for payments made to workers, invoices, bills or accounts and documents, including contracts of engagement, recording amounts payable for work performed.

Good faith bargaining

- Making a good faith bargaining recommendation between Flight Attendants Assn and Virgin Blue Airlines after the union applied for FWA to deal with a dispute about a proposed enterprise agreement.

- Restraining Defries Industries Pty Ltd from conducting an industrial agreement ballot or take further action until it had complied with an order to attend meetings with the National Union of Workers ("NUW").

Industrial Action

- Ordering Victorian paramedics to call off all industrial action "on the basis of probabilities rather than possibilities" that the public would be endangered if the action went ahead.
- Upholding an application by CFMEU that a lockout of 12 striking workers by Diamond Protection was illegal and should cease.

Secret ballot orders

- Extending a pre-July 1 secret ballot after the Australian Services Union applied under the transitional provisions giving FWA power to authorise industrial action as long as pre-July 1 laws on industrial action have been complied.
- Ordering an Australian Electoral Commission secret ballot to determine majority support for good faith bargaining between Cochlear and Australian Manufacturing Workers Union.

Registration of organisations

- Approving an application by NUW for rule changes that disband state branches and transfer responsibilities to a new federal branch.

Collective workplace agreement

- Making an interim order preventing Australian Precast Solutions and Abigroup from proceeding with a ballot for a workplace agreement until an application by the CFMEU for a bargaining order is heard.

- Inserting model flexibility and consultation terms into a workplace agreement covering ISS Facility Services workers.

Transfer of business

- Applying new expanded transfer of business provisions in finding 5 transferring employees were covered by their new employers certified agreement rather than their old industrial instrument.

Functions of Fair Work Australia

FWA deals with matters traditionally handled by federal workplace tribunals including:

- minimum wages and equal remuneration;
- unfair dismissal and unlawful termination protections;
- industrial action, right of entry and stand down;
- National Employment Standards ("NES"), modern awards, enterprise agreements and workplace determinations;
- transfer of business; and
- enterprise bargaining disputes – FWA's role will now be greater owing to the introduction of good faith bargaining.

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The new discrimination jurisdiction

The FWO has established a small unit to handle workplace discrimination matters under Section 351 of the Act which prohibits an employer from taking adverse action against an employee on the grounds of race, colour, sex, sexual preference, age, physical and mental disability, marital status, family or carer's responsibility, pregnancy, religion, political opinion, national extraction or social origin. The Act enables inspectors to investigate and seek a penalty.

Disputes

FWA may only deal with disputes expressly authorised by the Act.

Unless expressly authorised by the Act, FWA cannot arbitrate a dispute, and is restricted to mediation, conciliation, recommendation or expressing an opinion.

FWA decisions may be appealed to the Full Bench of FWA (with permission or leave), if in the public interest and questions of law may be referred to the Federal Court.

The Federal Magistrate's Court and Federal Court will have Fair Work Divisions to exercise judicial functions arising from the Act.

Fair Work Ombudsman and Fair Work Inspectors

The FWO investigates and prosecutes breaches under the Act. Recent examples of successful prosecutions involving employers who failed to comply with workplace obligations include circumstances where:

- nine teenagers were pressured to sign AWAs with reduced penalty rates;
- a bakery failed to keep proper time and wages records with sufficient details to allow inspectors to determine whether former workers had been underpaid; and
- migrants sponsored under 457 visas were underpaid.

Fair Work inspectors ("FWI") monitor compliance with the Act and instruments, enquire and investigate, commence court proceedings, represent employees in certain circumstances and have the following powers to:

- (a) enter premises, without force, on the reasonable belief that the Act or instrument applies to work performed on the premises or there are records or documents relevant to compliance purposes on, or accessible from the premises;
- (b) inspect any work, process or object and interview any person;
- (c) require production of a record or document;

- (d) inspect and copy any record or document kept on, or which is accessible from the premises;
- (e) take samples of any goods or substances; and
- (f) be accompanied by an assistant who cannot do anything that the FWI does not have power to do.

Although a person is not excused from producing a record or document on the ground of self incrimination, any evidence obtained is not admissible against the individual in criminal proceedings.

Enforceable undertakings and compliance notices

The FWO may accept a written undertaking given by a person who has contravened a civil remedy provision (unless the person has been given a compliance notice).

The FWI may give a notice requiring specified action to remedy the direct effects of a contravention of a NES, modern award, enterprise agreement, workplace determination, national minimum wage order or equal remuneration order and/or to produce reasonable evidence of compliance with the notice (unless the person has given an undertaking which has not been withdrawn).

The Federal Court, the Federal Magistrates Court or eligible State or Territory Court may enforce a written undertaking or review a compliance notice.

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