AMMA Summary of Fair Work Amendment Act 2013

Disclaimer: The following is a summary of the Fair Work Amendment Act 2013 after it had passed through both houses of federal parliament and received Royal Assent. The summary is released for the purpose of informing internal AMMA staff and members only and is not for broader distribution. The contents of this document do not contain legal advice, and the precise legal meaning of some of the Act’s provisions will evolve with the caselaw.

Introduction to the Act

Most of the amendments contained in the Fair Work Amendment Act 2013 when it passed through federal parliament on 27 June 2013 were not recommended by the Fair Work Act review panel. Instead, they reflect the Government’s ‘policy priorities’, according to the original Explanatory Memorandum to the Act.

The legislation was initially tabled in federal parliament on 21 March 2013 and was amended as part of the parliamentary process on 6 June 2013. First one sheet and then another of government amendments to the Bill were accepted on 6 June 2013 in the House of Representatives while Opposition and Greens amendments were voted down. The government subsequently tabled a supplementary Explanatory Memorandum explaining its latest amendments.

This Act has now passed into law. Some of its final provisions took effect on 1 July 2013 while others will take effect on 1 January 2014 (for details see below).

GREENFIELD AGREEMENTS AND INTRACTABLE INDUSTRIAL DISPUTES

While proposed amendments relating to the arbitration of intractable disputes and provisions relating to greenfield agreements were expected to be included in amendments to the Fair Work Amendment Bill 2013, they were not. As such, no further amendments have been proposed that would make any changes to the Fair Work Act 2009 in relation to greenfield agreements or the arbitration of industrial disputes.

However, amendments tabled by the government on 6 June 2013 which were adopted into the Act before it passed through parliament will allow for the consent arbitration of dismissal-related general protections applications and unlawful termination applications, but only if both parties consent to the Fair Work Commission arbitrating those matters rather than the courts (for details see below).
CONSENT ARBITRATION OF DISMISSAL-RELATED GENERAL PROTECTIONS MATTERS AND UNLAWFUL TERMINATION MATTERS

- These provisions are brand new amendments made to the Fair Work Amendment Bill 2013 on 6 June 2013 which have now been accepted into law. These provisions will take effect on 1 January 2014.

- They will allow the Fair Work Commission to arbitrate dismissal-related general protections applications brought under s365 of the Fair Work Act as well as unlawful termination claims brought under s773.

- With the consent of both parties, the above matters would be able to be heard and arbitrated by the Fair Work Commission rather than the Federal Court or the Federal Magistrates Court. In the event parties do not consent, such matters, if arbitrated, would be arbitrated by the courts as usual.

- Orders the commission could make in relation to such applications would include:
  - Reinstatement;
  - Payment of compensation;
  - Payment for lost remuneration;
  - Orders to maintain continuity of the person’s employment;
  - Orders to maintain the period of the person’s continuous service.

- The latest amendments to the Act would also limit appeals of Fair Work Commission decisions in this area as well as allow costs orders to be imposed.

- However, there are suggestions that such outcomes in the Fair Work Commission would be subject to challenge given the Fair Work Commission is not a court.

REGISTERED ORGANISATIONS AND DISCLOSURE

- Amendments to the Bill adopted on 6 June 2013 include some changes to the Fair Work (Registered Organisations) Amendment Act 2012 in relation to commencement dates for disclosure obligations on the part of officers of registered organisations.

- The amendments are understood to not substantially alter the requirements on registered organisations under the above Act as currently drafted.
SPECIAL MATERNITY LEAVE

- These amendments took effect on 1 July 2013.

- The amendments implement the Fair Work Act review panel’s recommendation 4, which was to repeal s80(7) so that taking unpaid special maternity leave does not reduce an employee’s entitlement to unpaid parental leave under s70.

- The amendments specify that taking a period of ‘unpaid special maternity leave’ will not reduce an employee’s entitlement to unpaid parental leave.

- This will apply to periods of leave that start after 1 July 2013.

PARENTAL LEAVE

- This amendment took effect on 1 July 2013.

- This change was not recommended by the Fair Work Act review panel.

- It will entitle parents to take eight weeks of unpaid leave concurrently instead of three weeks as is presently the case. The concurrent leave is then deducted from the couple’s combined 12-month entitlement to unpaid parental leave.

- The eight weeks’ concurrent leave can be taken in separate periods of at least two weeks each, or shorter periods if the employer agrees.

- It can be taken any time within the first 12 months of the birth or adoption of a child.

- Under the new s74(2), employees will be required to give 10 weeks’ written notice to the employer of an intention to take the first period of unpaid leave from the eight-week total.

- However, only four weeks’ written notice is required for subsequent periods of leave taken from the eight-week total. Importantly, if that amount of notice is not practicable, employees must notify the employer as soon as practicable, which can be AFTER the leave has started.
RIGHT TO REQUEST FLEXIBLE WORKING ARRANGEMENTS

• These amendments took effect on 1 July 2013.

• These amendments are a partial response to the Fair Work Act review panel’s recommendation 5, which was to amend s65 of the Act to extend the right to request flexible working arrangements to a wider range of caring and other circumstances, and to require that the employee and the employer hold a meeting to discuss the request unless the employer agrees to the request.

• Importantly, there is no requirement in this Act for employers to meet with employees to discuss any requests that are refused.

• The Act does, however, extend the right to request flexible working arrangements to a wider range of caring circumstances, including to an employee who:

  - Is the parent, or is responsible for the care of a child who is of school age or younger;

  - Is a carer (within the meaning of the Carer Recognition Act 2010);

  - Has a disability;

  - Is 55 or older;

  - Is experiencing violence from a member of the employee’s family; or

  - Provides care or support to a member of his or her immediate family or a member of his or her household who requires care or support because the member is experiencing violence from the member’s family.

  - ‘Family’ includes those related by blood, marriage, adoption, step or fostering as well as those who usually reside in the same household.

  - References to ‘family violence’ are not defined. However, the explanatory memorandum to the Act says family violence may include but is not limited to:

    - physical violence;

    - sexual assault and other sexually abusive behaviour;

    - economic abuse; and

    - emotional or psychological abuse.
• Consistent with the existing right to request flexible working arrangements provisions, the Fair Work Act and this Act do not specify the type of evidence that an employee must provide in relation to a request under s65. However, if evidence is not provided with the request, it would be open for the employer to make a reasonable request of the employee for evidence to satisfy a reasonable person that the employee is entitled to make a request under s65.

• In the case of an employee that is experiencing violence from a member of their family, without limiting what might be reasonable in the circumstances, evidence that could be provided might be a document issued by the police, a court, a doctor, district nurse, maternal and child health care nurse, a family violence support service or a lawyer. This is the type of evidence that is specified in a number of existing enterprise agreements which contain clauses about family violence.

• Employers retain the right to refuse requests for flexible working arrangements on ‘reasonable business grounds’.

• For the first time, the Act includes a ‘non-exhaustive’ list of what might constitute reasonable business grounds including:
  
  - Excessive costs associated with implementing the arrangements;
  
  - No capacity to reorganise working arrangements;
  
  - Impracticality such as the need to recruit replacement staff;
  
  - Significant loss of efficiency or productivity; and
  
  - Significant negative impact on customer service.

• The Act also makes explicit that an employee who is returning to work after taking leave in connection with the birth or adoption of a child is entitled to request part-time work to assist with the caring of the child. In addition to the right to request part-time work, those employees can request to change the patterns of their work such as taking longer work or meal breaks or adjusting their start and finish times.

CONSULTATION ABOUT CHANGES TO WORKING HOURS

• These amendments will take effect on 1 January 2014.

• They were not recommended by the Fair Work Act review panel.

• They introduce new content requirements for modern awards and enterprise agreements.
Modern awards

- Under the amendments, modern awards must include a term that requires employers to genuinely consult with employees about changes to their regular roster or ordinary hours of work.

- ‘Regular roster’ is not defined. However, the requirements will not be triggered where the employee has irregular, sporadic or unpredictable working hours.

- The obligations will apply regardless of whether the employee is permanent or casual.

- The award term must also allow for employees to be represented in consultations by an elected employee rep or a union rep.

- ‘Consultation’ requires the employer to:
  - Give information to employees about the change;
  - Invite employees to give their views about the impact of the change (including but not limited to the effects on their family and caring responsibilities); and
  - Consider any views put forward by employees about the change.

- The provisions will apply to modern awards that are in operation on or after 1 January 2014, including awards that don’t already include a consultation term.

- The FWC must, by 31 December 2013, make a determination varying modern awards to include the relevant term, with determinations coming into effect on 1 January 2014.

Enterprise agreements

- Currently, all enterprise agreements have to include a term requiring the employer to consult about ‘major workplace changes that are likely to have a significant effect on employees’.

- This will be extended under the Act by adding an extra requirement to consult about a change to employees’ regular roster or ordinary hours of work.

- Employees are also entitled to be represented in relation to consultation over those issues under an enterprise agreement by a union or employee rep.
• Employers and employees will still be able to negotiate a consultation term for inclusion in enterprise agreements but it must be in accordance with the above amendments.

TRANSFER TO A SAFE JOB FOR PREGNANT WORKERS

• These amendments took effect on 1 July 2013.

• These amendments were not recommended by the review panel.

• Currently, a pregnant employee with at least 12 months’ service who has pregnancy-related risks can apply for a transfer to a safe job for the duration of the risk period.

• The Act extends this right to any pregnant employee, regardless of their length of service.

• Under the changes, pregnant employees must provide their employer with evidence they are fit for work but that it is inadvisable for them to continue in their role during the risk period because of illness or risks arising from the pregnancy or hazards associated with the role. The employer may require such evidence to be in the form of a medical certificate.

• If there is no appropriate safe job available and the employee is otherwise entitled to unpaid parental leave (ie they have at least 12 months’ service), they will be entitled to ‘paid no safe job leave’ for the duration of the risk period.

• Where such employees are transferred to a safe job for the risk period, the job must have the same ordinary hours of work or an agreed number of different hours. Employees must be paid their full base rate of pay for the hours worked during the risk period.

• If there is no appropriate safe job available and the employee is NOT otherwise entitled to unpaid parental leave (ie they do not have at least 12 months’ service), they will be entitled to ‘unpaid no safe job leave’ as long as they provide evidence they are pregnant and have the associated risks as specified above.

MODERN AWARDS OBJECTIVE – PENALTY RATES

• These amendments will take effect on 1 January 2014.

• These changes were not recommended by the review panel.

• They will apply to modern awards made or varied after the provisions commence.
The current s134 of the Fair Work Act says the FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account various factors.

Added to the list of factors needing to be taken into account under s134 will be the need to provide additional remuneration for:

- employees working overtime;
- employees working unsocial, irregular or unpredictable hours;
- employees working on weekends or public holidays; or
- employees working shifts.

These will become formal considerations for the FWC when it sets award rates and conditions.

ANTI-BULLYING MEASURE

These amendments will take effect on 1 January 2014. They were originally proposed to take effect on 1 July 2013 but were deferred through a government amendment to the Bill that was accepted on 6 June 2013 before it passed through parliament.

Some other changes were made to the Amendment Bill’s original anti-bullying provisions via government amendments accepted on 6 June 2013. These mainly go to excluding from the jurisdiction some applications that concern the Defence force, security agencies or Australian Federal Police. This is in recognition of the national security issues that could arise from such applications being made.

None of the anti-bullying changes included in the Act in its final form were recommended by the Fair Work Act review panel but are a response to the House of Representatives inquiry into workplace bullying that was completed in late 2012.

The changes introduce a new jurisdiction for the Fair Work Commission (FWC) to deal with bullying complaints.

The changes will apply to a person who ‘reasonably believes’ they have been bullied at work, allowing them to apply to the FWC for orders to stop the bullying.

If the FWC is satisfied the worker has been bullied AND there is a risk they will continue to be bullied, it can make an order to stop the bullying.
The FWC is not allowed to order reinstatement, compensation or penalties associated with any initial applications.

The FWC can, however, refer matters to a work health and safety regulator where necessary and appropriate.

It is understood the FWC will rely on the national code of practice currently being finalised under nationally harmonised OHS laws in carrying out its functions. This code, currently in draft form, is called Preventing and responding to workplace bullying.

What is bullying?

The term ‘bullied’ is defined in the new s789FD in the Act, which says a worker is bullied at work if an individual or group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member, and that behaviour creates a risk to health and safety.

‘Reasonable management action’ when carried out in a reasonable manner will not result in a person being ‘bullied’, according to the Explanatory Memorandum.

Powers and functions of the Fair Work Commission

Within 14 days of receiving an application, the FWC must start to look into the matter and can do so by:

- Taking steps to inform itself of matters under s590;
- Conducting a conference under s592; or
- Deciding to hold a hearing under s593.

The FWC can, as part of looking into the matter:

- Contact the employer or other parties to the application;
- Conduct a conference or hold a formal hearing; and
- Make a recommendation or express an opinion.

The tribunal can make any orders it considers appropriate to stop the bullying.

Orders will not necessarily be limited to or apply only to the employer but could also apply to co-workers and visitors to the workplace.
• Orders can also be based on behaviour such as threats made outside the workplace if those threats relate to work.

• Examples of orders that can be made by the FWC include:
  - That the individuals stop the behaviour;
  - That the employer regularly monitors the behaviour;
  - That the employer ensures compliance with a company’s workplace bullying policy;
  - For the employer to provide information and additional support and training to workers;
  - For the employer to review its workplace bullying policy.

Civil remedy provisions for breaching bullying orders

• Under the changes, it will be an offence for a person to engage in conduct that contravenes an order of the FWC, including an order to stop the bullying.

• This will be a civil remedy provision in the same way as are breaches of modern awards or enterprise agreements.

• Under s539 of the Fair Work Act, there are provisions for making applications for orders for civil remedy provisions. Under the amendments, those who can apply to the courts if an order to stop the bullying has been contravened are:
  - A person affected by the contravention;
  - An industrial association (ie a union); or
  - An inspector.

• The courts that can hear such matters relating to breaches of orders are the Federal Court, Federal Magistrates Court, or an eligible state or territory court.

Interaction with work health and safety and other laws

• It is understood the FWC will rely on the national code of practice on Preventing and responding to workplace bullying currently being finalised under nationally harmonised work health and safety laws.
Additionally, the Fair Work Act amendments in relation to bullying will not preclude any investigations or prosecutions relating to the same conduct being brought under work health and safety laws or the criminal law.

The definition of a ‘worker’ who has been bullied under the Fair Work Act is the same definition of ‘worker’ as used under the various state Work Health & Safety Acts which includes:

- An employee;
- A contractor;
- A sub-contractor;
- An outworker;
- An apprentice;
- A trainee;
- A student gaining work experience; or
- A volunteer.

However, a government amendment to the Bill on 6 June 2013 excludes members of the Defence force from the definition of worker for the purposes of these provisions.

Under the bullying jurisdiction contained in the Amendment Act, s115 of the Work Health and Safety Act in each participating state will not apply to applications for orders to stop the bullying. Section 115 ordinarily prohibits bringing civil proceedings under the WHS Act if they have already been commenced in relation to the same matter under another state or commonwealth law. In other words, that section ordinarily prohibits multiple actions.

However, under the amendments in the Fair Work Amendment Act 2013, access to those other remedies will not be blocked by an application to the FWC for orders to stop the bullying.

Additionally, if a worker suffers discrimination, adverse action or dismissal as a result of raising a bullying matter, they will be able to pursue remedies under the Fair Work Act or the Work Health & Safety Act.
RIGHT OF ENTRY

- These amendments will take effect on 1 January 2014.

- The entire schedule of right of entry amendments as detailed below were expected to be removed from the Bill on 6 June 2013. The government had posted to the parliament website a [sheet] of amendments that would have removed the entire right of entry schedule. However, those amendments were never formally tabled or adopted and never made their way into the Act before it passed through the parliament.

- This means that the right of entry changes as originally tabled in the Fair Work Amendment Bill 2013 have been passed through the federal parliament and into law and will commence on 1 January 2014.

- The provisions contained in the final version of the Act were a partial adoption of the Fair Work Act review panel’s recommendations to give the Fair Work Commission greater powers to resolve disputes about right of entry but went much, much further.

Location of union meetings

- The Act provides for interviews and discussions by unions with workers to happen in an area agreed between the union and employer/occupier. It will no longer be up to employers to designate a reasonable meeting place.

- If there is no agreement between the parties on the location, the ‘default’ location for interviews and discussions will be any room or area in which one or more of the persons who may be interviewed or participate in the discussion ‘ordinarily’ take meal or other breaks and which is provided by the occupier for the purpose of taking meal or other breaks.

- Workstations and other rooms may not be meeting places unless agreed between the parties.

- Employers can continue to request a permit holder take a particular route to a meeting as long as that request is reasonable. If a permit holder does not comply with such a reasonable request, they will not be able to remain onsite.

- However, the Act leaves it open for the Federal Government to prescribe additional Regulations around the ‘reasonableness’ test applying to a request to take a particular route. The FWC can also deal with a dispute about whether a request to take a particular route is reasonable.

- Under the current s508 of the Fair Work Act, the federal industrial tribunal may restrict entry rights if the permit holder or union has misused those rights. According to the original Explanatory Memorandum to this Act, misuse under the new s508 could include a permit holder repeatedly seeking to have discussions
with a person in a lunch room to encourage them to become a union member when that person has made it clear they don’t want to participate.

**Frequency of entry to hold discussions**

- Under the current s484 of the Fair Work Act, unions are entitled to enter premises to hold discussions with one or more employees who are members or eligible to become members of a union.

- Under the Act’s changes, an employer or occupier would be able to dispute the frequency with which permit holders from the same union enter their premises to hold discussions (new s505A(1)). These provisions do not apply to entry under s481 of the Fair Work Act to investigate suspected breaches.

- Under the changes, the FWC could deal with a dispute about frequency of entry by mediation or conciliation, by making a recommendation or by expressing an opinion.

- The FWC can also deal with the dispute by arbitration, including making one or more of the following orders:
  - Imposing conditions on an entry permit;
  - Suspending an entry permit;
  - Revoking an entry permit;
  - Making an order about the future issue of entry permits to one or more persons;
  - Any other orders it considers appropriate under the new s505A.

- However, the FWC can only make the order if the frequency of visits would require an ‘unreasonable diversion of the occupier’s critical resources’. According to the Explanatory Memorandum, this will have an ‘appropriately high’ threshold because disputes under s505A have the potential to displace a permit holder’s legitimate right to enter premises in the absence of any intentional misbehaviour or wrongdoing.

- The FWC can deal with a dispute about frequency of entry on its own initiative or by application from an affected permit holder; union; employer; or occupier.

**Accommodation and transport in remote areas**

- Where unions and occupiers are unable to agree on accommodation and transport arrangements for union access to remote sites, the employer will be
required to facilitate access by providing transport and accommodation, for which it can then charge back ‘commercial’ rates.

- This is limited to cases where the only realistic means for the permit holder to access the premises is by transport provided by the occupier or where the only accommodation available is that provided by the occupier.

- If public transport is available to the location, or access can ‘reasonably’ be achieved via travel on public roads in the union official’s own car or one provided by the union, the provisions would not generally apply, according to the Explanatory Memorandum to the Act.

- For instance, in the case of an agricultural property, if it is accessible by road, it would generally be reasonable to expect the permit holder to drive to the premises in their own car.

- Accommodation and transport arrangements can be entered into between an occupier and a union or an occupier and an individual union official.

- The employer does not have to comply with the obligations to facilitate access if:
  - Providing accommodation or transport would cause the occupier ‘undue inconvenience’; or
  - The request is not made in a reasonable period before the accommodation or transport is required.

- What will amount to ‘undue inconvenience’ will depend on the circumstances and is up to the FWC to determine but examples given in the Explanatory Memorandum are:
  - Where the premises are an offshore installation and all accommodation on deck is already occupied by employees and/or contractors; or
  - Where all commercially available accommodation at a remote location is fully occupied, as is private occupier-provided accommodation.

- In the above circumstances, an occupier would not be expected to remove, or cause to be removed, individuals currently occupying accommodation to make way for union officials.

Employers recouping transport and accommodation costs

- The new s521C(3) will limit the fee that an organisation can charge a union or permit holder for accommodation to no more than is necessary to cover the costs incurred by the occupier as a direct result of providing the accommodation. Civil penalty provisions apply for breaches.
• Similarly, transport costs charged to the permit holder are to be no more than is necessary to cover costs. It is not intended that incidental costs such as insurance premiums be included in charges to the union. Civil penalty provisions apply for breaches.

• A permit holder continues to be responsible for ensuring they comply with any workplace health and safety requirements onsite.

• Conduct by a union official engaged in while accommodated onsite or being transported to site will be considered conduct engaged in as part of the exercise of their rights to enter workplaces. Such conduct can be subject to an application for misuse of rights under s508 of the Fair Work Act.

• The changes will apply to union visits occurring after these provisions of the Act take effect on 1 January 2014.

Disputes about right of entry

• Under the Act in its final form, the FWC will be able to deal with an expanded range of disputes about right of entry including:

  - Whether an employer’s request for a permit holder to comply with specific OHS requirements or take a particular route to a meeting place is reasonable;

  - When permit holders’ rights to enter to investigate a suspected breach or to hold discussions may be exercised;

  - Whether accommodation is ‘reasonably available’;

  - Whether premises are ‘reasonably accessible’ in terms of transport;

  - Whether providing accommodation or transport would cause ‘undue inconvenience’ to the occupier; and

  - Whether a union’s request to provide accommodation or transport is made within a reasonable period.

FUNCTIONS OF THE FAIR WORK COMMISSION

• This change was not recommended by the Fair Work Act review panel.

• The change will expressly confer on the FWC the function of promoting more co-operative and productive workplace relations and preventing disputes.

• This is intended to provide greater clarity about the FWC’s functions in that regard, according to the Explanatory Memorandum.