Member Briefing

Fair Work Bill 2008

This handout is intended to be a summary and is provided for general information purposes only. It should not be treated as legal advice. The information is based on the Fair Work Bill 2008 (the Bill) as first introduced to Parliament on 25 November 2008. Before making any decision based on this information, please contact your local AMMA consultant to discuss its application to your company's circumstances.

December 2008

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1. NATIONAL EMPLOYMENT STANDARDS & MODERN AWARDS

The NES will replace the current Australian Fair Pay and Conditions Standard. Where there are differences in the application of the NES for award covered and award free employees, this is specified in the table. The National Employment Standards and modern awards will commence on 1 January 2010. Modern awards will not apply to high income employees, those that have traditionally been award free or those who are covered by an enterprise agreement.

Australian Fair Pay and Conditions Standard	National Employment Standards
Application	
Applies to all employees, including those covered by a pre-reform agreement where the agreement does not deal with a particular standard.	Will also apply to all employees, even those who have an agreement that deal with a particular standard. The transitional Bill will deal with the interaction between pre-reform and workchoices agreements and the NES
If an award or NAPSA provides a more generous entitlement than a particular standard, that entitlement will apply.	If a state or territory law provides a more beneficial entitlement in relation to flexible working arrangements or community service leave, those entitlements will apply.
All ancillary and machinery provisions for the standard (i.e. averaging hours of work) are provided in the legislation	Ancillary and machinery provisions for the standard are provided in awards, for award covered employees and as default provisions in the legislated standard for award free employees.
Wages	
Basic rates of pay and casual loadings.	Minimum wages not included in NES and will be provided in modern awards and National Minimum Wage.
Hours of Work	
Maximum ordinary hours of work of 38 hours per week and reasonable additional hours.	Same number of maximum ordinary hours per week and ability to request reasonable additional hours.
Ability to average hours of work over 12 months under a workplace agreement.	Averaging of hours over a specified period allowed under an award or enterprise agreement. Non award/ enterprise agreement employees can average hours over period of six months or less. Any hours above 38 in an averaging arrangement will be additional hours and must be reasonable.

Right to Request Flexible Working Arrangements	
No equivalent in the Australian Fair Pay and Conditions Standard	Right to request flexible working arrangements for an eligible parent or person with responsibility for the care of a child under school age to assist with the care of the child. An employer may refuse a request on reasonable business grounds. A refusal is not subject to review.
Annual Leave	
152 hours (four weeks) of paid annual leave per annum. Accrual rate and taking of annual leave based on capped nominal hours specified in *Workplace Relations Act*.	Same coverage and amount of annual leave. Accrual rate and taking of annual leave based on ordinary hours specified in *Fair* Work *Act* or, where applicable, in a modern award.
Shift workers are entitled to accrue an additional 38 hours each 12 months of completed continuous service. Definition of shift worker defined in the *Workplace Relations Act.*	Five weeks annual leave for shift workers, which is defined in Fair Work Act for non-award employees. Modern awards will determine if this extra applies for award covered employees.
Standard specified how and when paid annual leave may be taken.	Modern awards may provide rules for how and when paid leave is taken for award covered employees. Employer and award/agreement free employee may agree on how and when leave is taken.
Employer may request employee to take paid leave where there is an excessive accumulation of leave (8 weeks) or shut down.	Under the Fair Work Act an employer may require an award/agreement free employee to take leave if the requirement is reasonable, i.e. excessive accumulation of leave (amount unspecified) or shut down. Modern awards will provide terms for taking paid leave.
Cash out of up to two weeks annual leave every 12 months where provided for in a workplace agreement.	Cash out of annual leave for award free/agreement free employees (but not an enterprise agreement). Awards and enterprise agreements can also permit cashing out. In all cases, at least four weeks leave must be retained.
Personal Leave	
76 hours (10 days) of paid personal/carer's leave per annum (pro rata). Accrual rate based on capped nominal hours specified in *Workplace Relations Act*.	10 days of paid personal leave per annum. Accrual rate based on ordinary hours specified in [*Workplace Relations Act*] or, where applicable, in a modern award.

No more than 10 days leave can be taken as paid carer's leave in a 12 month period.	No annual limit on taking paid carer's leave
Unpaid carer's leave available where unpaid leave is exhausted	Unpaid carer's leave available where paid leave is exhausted
Limited cash out of personal leave allowed under workplace agreement.	No legislated cash out of personal leave for award free employees. Cash out of personal leave may be provided in a modern award or enterprise agreement but at least 15 days leave must be retained. Cash out is by written agreement.
2 days of compassionate leave for each permissible occasion	Compassionate leave entitlement remains the same
Parental Leave	
12 months unpaid maternity, paternity and adoption leave shared between the parents.	Entitlement extended to allow both parents to take separate periods of up to 12 months unpaid leave. Alternatively, one parent can request an additional 12 months unpaid leave. An employer may refusal additional 12 months unpaid leave on reasonable business grounds.
Community Service Leave	
No equivalent in the Australian Fair Pay and Conditions Standard, however it is unlawful to terminate an employee who is absent from work due to carrying out a voluntary emergency management activity.	Community service leave providing an entitlement to be absent for jury service or voluntary emergency service management activity.
Some state or territory legislation and awards provided entitlements in respect to jury service which apply as NAPSAs.	New obligation on employer to pay employees on jury service their ordinary hours of work, reduced by any amount of jury service pay. Payment is limited to first 10 days of jury service.
Public Holidays	
No equivalent in the Australian Fair Pay and Conditions Standard, however employee's are entitled to reasonably refuse to work on a public holiday under the *Workplace Relations Act*	Entitlement to be absent from work on a public holiday but an employee can be reasonably requested to work. If requested to work on a public holiday, an employee can reasonably refuse to work.

Notice of Termination	
No equivalent in the Australian Fair Pay and Conditions Standard, however employees are entitled to be given the required period of notice depending on age and length of service.	Notice of termination will remain an entitlement for employees at the same level specified under the Workplace Relations Act.
Long Service Leave	
No equivalent in the Australian Fair Pay and Conditions Standard, however, long service leave entitlements under state or territory legislation can still apply.	Long service leave entitlements in pre-modernised awards, NAPSAs or state and territory laws will continue. New legislated redundancy entitlement for employers with 15 or more employees based on scale previously determined by AIRC
Fair Work Information Statement	
Workplace Relations Fact Sheet to be provided to all employees (subsequently repealed by the Forward with Fairness Transition legislation	A Fair Work Information Statement must be given to each new employee before or after commencing employment.
Awards and NAPSAs	**Modern Awards**
Coverage	
Binding on named respondents, including unions and by common rule No $100,000 exclusion	New modern awards will apply on industry or occupational lines as determined by the scope of the award Excludes employees earning more than $100,000 (indexed from 2007) where the employer gives a formal guarantee that this amount will be paid to the employee
Content	
No mandatory requirement for an individual flexibility clause	Each modern award to include an individual flexibility clause
Review and variation	
No variation of awards except by award rationalisation or simplification process and to remove ambiguity, unless variation is essential to maintain the minimum safety net	Four yearly review of modern all modern awards. Variation of wages only where justified for work value reasons. Variation allowed outside four yearly review to maintain minimum safety net.

2. AGREEMENT OPTIONS & CONTENT

When bargaining for a new agreement under Forward with Fairness from 1 July 2009, the number of matters that can be the subject of negotiation and inclusion in an enterprise agreement will be significantly expanded. The changes represent a significant expansion of the 'matters pertaining' concept and will put employers at risk of demands for wider union right of entry, leave for union training and engagement of shop stewards.

There will be no provision for Individual statutory agreements, and no distinction between union and non-union collective agreements.

Workplace Relations Act requirements	Fair Work Bill requirements
Workplace agreements are described as either 'Individual transitional employment agreements' or 'collective agreements'.	Workplace agreements will now be described as 'enterprise agreements'.
Agreement Types	
• Individual Transitional Employment Agreements (ITEAs) • Employee collective agreements • Union collective agreements • Union greenfields agreements • Employer greenfields agreements • Multiple-business agreements	No formal distinction will be made between union and non-union agreements. Aside from a greenfields agreement, unions can only become covered by an agreement if it is a bargaining representative and gives written notice to FWA after the agreement has been made but before it has been approved. • Single enterprise agreement • made by a single employer, or two or more employers that are either related corporations, or have a joint venture or common enterprise. • can be made by two or more employers which have obtained a 'single interest employer authorisation', who have agreed to bargain together. • subject to a declaration by the Minister, other bodies 'which receive a common source of funding, do not compete with each other and which conduct their workplace relations activities through a central body' who have agreed to bargain together. • Multi-enterprise agreement • Greenfields enterprise agreements o can only be made with a union for one or more 'genuine new enterprises' where no employees have yet been hired.

Interaction with Awards	
A workplace agreement operates to the exclusion of awards.	An award cannot apply to any employment relationship covered by an enterprise agreement.
Required Content	
A workplace agreement must include: • a nominal expiry date; and • dispute settlement procedure. In the absence of a dispute settlement procedure, the agreement is taken to include the model dispute resolution process as provided in the Act.	An enterprise agreement must include: • a nominal expiry date; • a dispute settlement process; • a flexibility term; and • a term providing for consultation with employees about major workplace changes. In the absence of flexibility or consultation clauses, a model term prescribed by the regulations will apply.
Permitted Content	
Content that is not 'prohibited content' can be included.	Rather than prescribing what is prohibited, the Bill provides that an enterprise agreement can only validly deal with the following 'permitted matters': • matters pertaining to the relationship between an employer and that employer's employees who will be covered by the agreement; • matters pertaining to the relationship between the employer/s, and the employee organisation/s, that will be covered by the agreement; • deductions from wages for any purpose authorised by an employee who will be covered by the agreement; and • how the agreement will operate.
Illegal Content	
'Prohibited content' is a term of a workplace agreement that is unenforceable. The Act lists 30 matters which are not to be included in agreements. This includes (but is not limited to):	A term of an enterprise agreement is 'unlawful' if it is a 'discriminatory' or 'objectionable' term, or a term that in various ways seeks to get around the limitations imposed by the Bill in relation to matters such as the qualifying period for unfair

• breaches of freedom of association • bargaining fees; • union membership; • deduction of union dues; • trade union training leave; • rights of unions or employer organizations in dispute resolution; • right of entry; • renegotiation of a workplace agreement; • restriction on independent contractors or labour-hire arrangements; • requires employee to forgo annual/personal leave without written election • provision of employee information to unions unless required by law; • forgoing of paid compassionate leave for an amount of pay or benefit less favourable than the standard; • prohibits / restricts disclosure of the agreement's details by the parties; • provides a remedy for unfair dismissal; • is discriminatory; • does not pertain to the employment relationship; • Penalises employee for failure to provide evidence / notice to for sick/carer's leave; • Penalises employee for absence due to health or family's health; • any other matter specified in the *Workplace Relations Regulations 2006*	dismissal claims, the taking of industrial action, or the requirements for a union to obtain entry to a workplace for discussion or investigation purposes.
Effect of forbidden content	
A term of a workplace agreement that contains prohibited content is void and unenforceable (but does not make the entire agreement	Any term of an enterprise agreement that is not about a permitted matter, or is an unlawful term, has no effect but does not affect the validity of

invalid).	the enterprise agreement or the balance the content.
Penalties	
Employer, employee or agent may be subject to fines of up to $6,600 (for individuals) and $33,000 (for corporations), if, when negotiating a workplace agreement (or variation to a workplace agreement) they: ▪ try to include a term in that workplace agreement (or a variation to a workplace agreement) that includes prohibited content, and ▪ were reckless as to whether the term contained prohibited content.	No equivalent.

3. GOOD FAITH BARGAINING & DETERMINATIONS

From 1 July 2009, parties negotiating an enterprise agreement will be required to follow meet new good faith bargaining obligations. Fair Work Australia will be empowered to enforce these obligations by issuing orders against persons who are not bargaining in good faith.

Workplace Relations Act requirements	Fair Work Bill requirements
Representation	
No obligation to notify employees of right to representation An employee or employer may request a bargaining agent to represent them in agreement negotiations	Employers must provide written notice to employees of their right to representation. Employers and employees can appoint a person as their agent but a union will be the default bargaining agent of their member where an alternative appointment is not made.
Obligation to Bargain	
Employers can refuse to negotiate with employees	Employer must bargain with employees if collective bargaining is supported by a majority of employees. FWA can determine majority support (i.e. using evidence of union membership, petitions or a ballot) on the application of a bargaining representative.
Process Requirements	
No legislative requirement to bargain in good faith but employer must give bargaining agent 'reasonable opportunity' to meet and confer with employer during bargaining period (7 days before approval)	New legislative requirement to: • attend and participate in meetings at reasonable times; • disclose relevant information (other than confidential or commercially sensitive information) in a timely manner; • give genuine consideration to proposals of other bargaining representatives and provide reasons for responses to these proposals; and • refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining

Facilitation of Agreement Making	
No legislative requirement to bargain, however applicants must genuinely try to reach agreement during negotiations for some purposes (this is relevant for seeking secret ballot orders before taking protected industrial action).	Where one bargaining representative believes another is not meeting the requirements the representative must notify the other and give them reasonable time to respond. Where this is done, FWA will have the power to issue bargaining orders requiring representatives to bargain in good faith (see below).
Concessions?	
No requirement to make concessions or agree to proposed terms in an agreement.	New legislation provides that bargaining representatives are NOT required to make concessions during negotiations, or agree to terms that are to be included in the agreement.
Options on event of disagreement	
No avenue of assistance for parties where collective bargaining breaks down (other than where both agree to use AIRC or third party to settle dispute)	Legislation provides that where parties cannot agree on agreement content, they can: 1) walk away from bargaining (and current arrangements remain in force); 2) take protected industrial action; 3) jointly seek FWA's assistance through mediation or conciliation; or 4) Parties may seek a Bargaining Order in relation to good faith bargaining.
Bargaining Orders	
AIRC may terminate or suspend bargaining period if satisfied a party is failing to genuinely try to reach agreement or engaged in pattern bargaining; however there is no provision for directions regarding *negotiation process.*	Bargaining Orders can be enforced at any time during negotiations and may involve FWA making orders for bargaining agents to: • Take certain actions to ensure that they meet good faith bargaining requirements; • Refrain from undertaking certain action/s; • Take certain actions to deal with the effects of capricious or unfair conduct; • undertake any other actions, matters or requirements that Fair Work Australia considers appropriate of the purpose of

	promoting efficient and fair conduct when bargaining.
Who may apply for a Bargaining Order?	
A negotiating party may apply to the AIRC for suspension or termination of a bargaining period only	A bargaining representative (being the employer, employee, relevant employee organisation, or representative appointed by the employee) may apply for a bargaining order.
Preconditions for Making a Bargaining Order	
No equivalent provision (see conditions re termination or suspension of bargaining period)	For an order to be made FWA must be satisfied that: • Agent making the application to FWA has given the other agent written notice setting out their concerns and given them a reasonable time to respond; • A bargaining period is in operation; • That one or more of the relevant bargaining representatives have not met the good faith bargaining requirements; • The bargaining process is not proceeding, efficiently or fairly because there are multiple bargaining; and • that the application has complied with arrangements contained in the bill relating to good faith bargaining.
When Will Orders Operate?	
	If successful, orders will come into operation on the day on which they are made, and will cease when revoked, when an agreement is approved by FWA, or when bargaining has ceased
Consequences of Non-compliance	
No equivalent provision	Exposure to pecuniary penalties and other court orders

4. REPRESENTATION & MAJORITY SUPPORT

Employees entering into negotiations for collective agreements are entitled to have a bargaining representative and the employer is obligated to notify the employees within 14 days of this right. If an employee is a member of a union that is entitled to represent that employee, the union will automatically be their bargaining representative unless an alternative person is appointed. Similarly, employers can also appoint a bargaining representative.

Fair Work Australia will have new powers to determine majority support for negotiations, and the group of employees to which an agreement will apply.

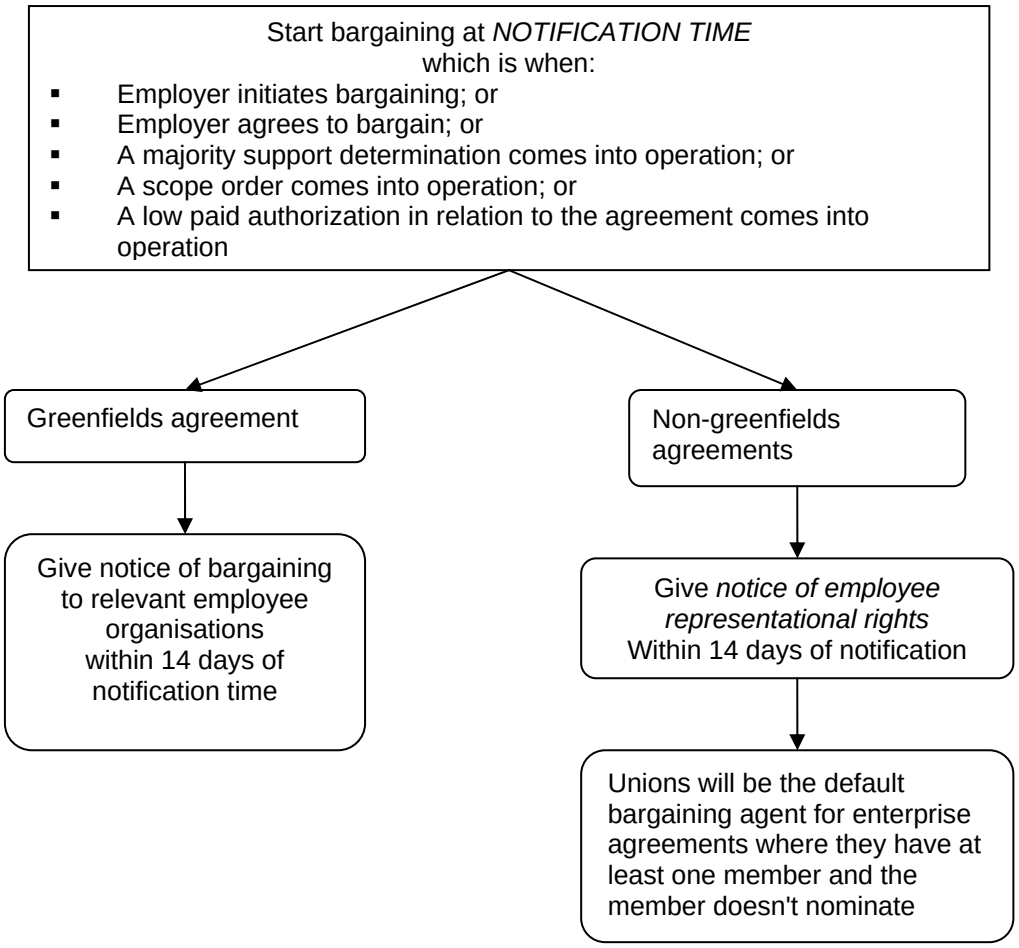
Workplace Relations Act requirements	Fair Work Bill requirements
Obligation to bargain (non-greenfields agreements)	
Employer only has to bargain when employer initiates bargaining or agrees to bargain	Employer will have to bargain where: • Employer initiates bargaining; • Employer agrees to bargain; • A majority support determination comes into operation; • A scope order comes into operation; or • A low paid authorisation in relation to the agreement comes into operation
Bargaining representatives	
An employee or employer may request a bargaining agent to represent them in agreement negotiations. No obligation to provide written notice, however the employer must give bargaining agent opportunity to meet and confer 7 days before agreement or variation is approved.	Employer must give all employees that will be *covered* by enterprise agreement (note: not just employees to whom agreement will *apply*) notice of their right to be represented by a bargaining representative. Representatives must meet the requirements of good faith bargaining.
Notice requirements	
As above.	Employer must give notice to employees as soon as practicable, and within 14 days of notification time;

Workplace Relations Act requirements	Fair Work Bill requirements
	Content of notice prescribed in Bill.
Default rules	
Employee must appoint union/agent as bargaining representative	If employee is a union member, union will be default bargaining representative
Employer Obligations	
The employer must give bargaining agent opportunity to meet and confer 7 days before agreement or variation is approved.	An employer must not refuse to meet to recognize or bargain with another bargaining representative for the agreement. A civil penalty applies, however this does not apply if the employer or the bargaining agent does not know, or could not be reasonably expected to know, that the other person is a bargaining representative for the agreement.
Majority Support Determinations	
No equivalent provision	A bargaining representative may apply to FWA on behalf of employee/s to make a determination that the majority of employees that will be covered by propose agreement, *want to bargain* with the employer. This is called a majority support determination
What is a 'majority'?	
No equivalent provision	FWA must be satisfied that there is 'majority support' amongst employees. If the agreement will not cover all the employees of the employer, it must be assured that the group that will be covered is geographically, operationally or organizationally distinct or that group was fairly chosen. FWA may use any method it considers appropriate to work out whether a majority of employees want to bargain. Methods may include a secret ballot, survey or written statements.

Workplace Relations Act requirements	Fair Work Bill requirements
Scope Orders	
No real equivalent, other than where parties can agree to use the AIRC or another dispute resolution mechanism.	Only applicable to single-enterprise agreements. A scope order will define the 'scope' of the proposed enterprise agreement; that is, which employees it will cover.
Application for scope order	
No equivalent provisions	Unless FWA determines, a bargaining agent may only apply for scope order after other bargaining representative/s have received notice of concerns and allowed appropriate time for them to respond May only apply if bargaining representative thinks bargaining is not proceeding "efficiently or fairly" because proposed agreement will not cover appropriate employees
FWA involvement	
No equivalent provision.	FWA may make a scope order if the applicant has met good faith bargaining requirements; the order will promote fair and efficient bargaining; and it is reasonable in the circumstances to make the order.
Effect of scope order	
No equivalent provision.	Scope order will set out which employer/s and employees will be covered by agreement, ensuring that, if the agreement will not cover all the employees of the employer, that the group that will be covered is geographically, operationally or organizationally distinct or that group was fairly chosen. Thus, an order may require an employer to include or exclude a class of employees for bargaining for an agreement.

Workplace Relations Act requirements	Fair Work Bill requirements
Variations	
No equivalent provision.	FWA may amend any existing orders (such as bargaining orders or majority support determinations) as appropriate. FWA may also extend the application of earlier orders issued so they continue to apply to the new proposed enterprise agreement as applicable to the scope order.
Further entitlements of representatives	
If an agreement is a union collective (or union greenfields) agreement, the workplace agreement binds the organisation or organisations of employee with which the employer made the agreement.	Unions may give written notice to FWA that they want to be covered by an enterprise agreement if they were a bargaining representatives for the proposed enterprise agreement. A copy of notice must be given to FWA and each applicable employer before agreement is approved by FWA.

DETERMINING REPRESENTATION



5. INDUSTRIAL ACTION

The Bill largely maintains the current arrangements for the taking of industrial action. Although the framework will no longer contain the concept of a bargaining period, protected industrial action will only be available during bargaining for an enterprise agreement.

Workplace Relations Act Requirements	Fair Work Bill Requirements
Definition	
Protected industrial action is described as action taken during a bargaining period by the employee, employee organisation or employer in supporting or advancing claims or responding to action by the other party.	Separates employee action into employee claim action (action for supporting or advancing claims) and employee response action (responding to action by the employer). Employer action is only listed as employer response action; there is no longer action by the employer for the purpose of supporting or advancing claims.
Availability: Bargaining Period	
Available during a "bargaining period" which commences when one party provided the other party with written notice that they intend to make a collective agreement.	The concept of a bargaining period has been removed from the Bill. The Bill defines protected industrial action as action which meets certain specified criteria taken during negotiations for an enterprise agreement after the agreement's nominal expiry date.
Protected Action Exclusions	
Excludes claims in support of prohibited content from protected action (which relate to agreement content). No industrial action during the term of an industrial agreement; no industrial action where employees are employed under AWAs.	▪ For "Employee claim action" Excludes claims in relation to unlawful terms (which relates to a discriminatory or objectionable term and removing unfair dismissal and other rights). Excludes action taken in relation to demarcation disputes. Excludes pattern bargaining. ▪ For "Employee response action" Excludes demarcation dispute, but is silent on pattern bargaining. No industrial action during term of industrial agreement.

Secret Ballot	
Protected action ballot process set out in lengthy detail (some 44 sections). Ballot order cannot be obtained unless applicant has genuinely tried to reach agreement, continues to do so, and is not engaged in pattern bargaining.	There will still be a requirement to have a protected action ballot; however, this process will be streamlined and simplified. Requirement that applicant must genuinely try to reach agreement remains.
Applications for a ballot can only be made during a bargaining period, which cannot be during the life of an existing agreement which has not reached its nominal expiry date.	Applications for a ballot can be made up to 30 days prior to the nominal expiry date of an existing agreement.
A range of documents are listed to accompany protected action applications.	Bill states that the regulations will list documents required to accompany application.
Ballot Costs	
Applicant for protected action pays 20% of protected action costs and government funds the rest.	Government will bear full cost of conducting ballots at Australian Electoral Commission. The applicant will be responsible for full cost of ballots conducted by alternative ballot agents.
Ballot Challenge	
If a party challenges an order for a protected action ballot, the order can be put on hold until the challenge is determined.	FWA will no longer be able to put on hold orders in the event of a challenge. Employers will have recourse to FWA if industrial action is taken after the ballot and it is found that the other requirements for protected action have not been met.
Notice required	
Notice requirement for protected action: 3 working days, from after ballot results declared.	Notice required is still 3 working days.
OHS Exception	
Occupational health and safety exception: ▪ action taken by an employee because of reasonable concern for his or her safety is not classified as industrial action; ▪ onus of proof on employee.	Burden of proof is no longer on employee to demonstrate that he or she acted out of reasonable concern for his or her safety.

Unprotected industrial action	
In cases of unprotected action: s 496 orders to be made in 2 days, otherwise interim orders.	In cases of unprotected action: Employer has choice between Injunction orders available from Federal Magistrates court/Federal Court or "stop orders" from FWA, still to be made within 2 days or otherwise interim orders.
Strike Pay	
Strike pay unlawful. Where any industrial action was less than 4-hours, 4-hours pay was to be deducted. Any industrial action that was over 4-hours, the total duration of the action was not paid.	Strike pay still unlawful. 4-hour rule for unprotected industrial action remains, however deductions for protected action are only for the duration of the action. Where employees are participating in partial work bans, the employer can issue a "partial work notice" and deduct proportionate amounts from employee's pay. FWA will have the power to settle any dispute about the proportion of wages that should be deducted. Employer may refuse to make payment to employees when the employer engages in employer response action.
Penalties	
It is a criminal offence to breach protected action provisions.	Protected action ballot offences will be subject to civil penalties.
Suspension or Termination of Action	
AIRC must order unprotected industrial action stop, not occur or be organised. In relation to protected action, the AIRC must suspend or terminate a bargaining period if necessary (i.e. if pattern bargaining or significant harm is occurring).	Circumstances in which protected industrial action might be suspended or terminated remain largely the same, but also a new ground: where protracted industrial action is causing significant economic harm. Where protected industrial action is terminated, FWA may arbitrate a workplace determination.

6. RIGHT OF ENTRY

The three reasons for which a union can exercise a right of entry to the workplace under the Fair Work Bill remain the same as that under the *Workplace Relations Act.* Entry to the workplace can be exercised by a union wishing to:

1. Investigate a suspected breach of the industrial legislation, awards or agreements;
2. Investigate suspected breach of a state or territory occupational health and safety law where a right to enter is conferred under that law; and
3. Hold discussions with eligible employees.

Similarly there will remain a requirement on a union to hold a permit, provide notice and produce the permit when requested. However, the rules that regulate a union's right to enter the workplace now operate differently due to the new coverage and application rules for modern awards. Additional rights are also afforded to unions once they have entered the workplace.

Workplace Relations Act Requirements	Fair Work Bill Requirements
Entry Permits	
An organisation must apply in writing to the Industrial Registrar for a permit before they may enter premises. Union official must be a "fit and proper person". This includes whether the applicant has received training about the rights and responsibilities of a permit holder, has ever been convicted of: - an offence against an industrial law or any other law involving entry onto premises; - fraud or dishonesty; - intentional use of violence against another person or intentional damage or destruction of property; or had any previous right of entry permit repealed, revoked, suspended or made subject to conditions.	FWA to issue entry permits after receipt of an application. Officials must be a fit and proper person to hold permit. Requirements for 'fit and proper' are the same.
Expiry of Entry Permits	
A right of entry permit will remain valid for a maximum period of 3 years from the date of	Similar to WRA: unless revoked, an entry permit will expire at the earlier of 3 years or when the

issue unless it is: ▪ revoked earlier; or ▪ the permit holder ceases to be a union official with his / her union.	permit holder ceases to be a union official of the relevant organisation.
Entry to investigate suspected breach	
The permit holder may only enter premises to investigate a suspected breach of industrial legislation, awards or agreements: • during working hours; • if the work is being carried out by one / more employees who are members of the permit holder's union; and • if the suspected breach relates to or affects that work or any of those employees. A permit holder must have reasonable grounds for suspecting that a breach has occurred or is occurring in respect of: ▪ the Act; or ▪ an AWA or ITEA (provided employee makes a written request to the union to investigate an alleged breach); or ▪ an award / collective agreement / an order of the AIRC which are binding on an employee who is a member of the permit holder's union; or ▪ an employee collective agreement, or an employer Greenfields agreement, that is binding on an employee who is a member of the permit holder's union.	Permit holder may enter premises, during working hours to investigate suspected contravention of the Act or a fair work instrument (i.e. a modern award, enterprise agreement, workplace determination or an FWA order) In order to investigate a suspected breach of a modern award, the award must apply to the union and the member they are entitled to represent. In order to investigate a suspected breach of an enterprise agreement, the agreement must either apply to the union or apply to the member they are entitled to represent. The fair work instrument in question must apply, or ***have*** applied, to the member. This means that non-union workplace agreements cannot exclude unions from workplaces if an agreement which has previously applied to the employee has been replaced by a new agreement. By virtue of the award modernisation process, an award may apply to more than one union, providing entry rights to both where they are entitled to represent the interests of the employees. There must be a reasonable suspicion of a contravention, and the permit holders bear the onus of proving the reasonableness of the suspicion.

Entry to Hold Discussions	
A permit holder may enter premises for the purposes of holding discussions with any eligible employees who wish to participate in those discussions during meal or other breaks. "eligible employees" includes an employee on the premises, carries out work that is covered by an *award* or *collective agreement* that is binding on the permit holder's organisation; and is a member or eligible to become a member of that organisation. Therefore, if all of the employees in a particular workplace are governed by AWAs they will not be "eligible employees" and the union cannot enter the premises to hold discussions with such employees.	A union can now enter a workplace to hold discussions with eligible employees if the work is covered by a modern award, even where a non-union collective agreement applies to the workplace or where the workplace is solely regulated by AWAs or ITEAs. A permit holder may enter premises during meal breaks to hold discussions with persons: - performing work on premises; - whose industrial interests the union is entitled to represent; and - who wish to participate Employers, with less than 20 employees, who are a member of a religious body who object to other memberships may apply for a Conscientious Objection Certificate
Rights of Permit Holders	
While on premises, permit holder may: ▪ inspect or view any work, material, machinery, or appliance, that is relevant to the suspected breach; ▪ interview employees who are / are eligible to be members of the permit holder's union about the suspected breaches; ▪ require the employer to inspect and make copies of any records relevant to the suspected breach (<u>other than records of employees who are not union members</u>) which are kept on those premises or are accessible from a computer that is kept on the premises by the employer. Permit holder may by written notice, while on premises or within 5 days, request relevant	While on premises, permit holder may: • Inspect work, process or object relevant to breach, interview persons: i. Who agree to be interviewed; ii. Whose industrial interests the union is entitled to represent • Inspect, and make copies, of records or documents relevant to a suspected breach that: i. Are kept on premises; ii. Are accessible from a computer kept on premises. Consequently, unions exercising their right of entry will be entitled to unfettered access to non-member records if it suspects that a breach of

documents or records, or access to them (except for non-union members), at a later date provided that at least 14 days is given to comply	the Act has occurred, without first being required to satisfy Fair Work Australia that it is necessary. Any access to these records will be regulated by Privacy laws, but could potentially afford unions with information that will assist them to pursue strong recruitment measures.
Inspection of documents may occur at an agreed location	Inspection of documents may occur at an agreed location
For the purposes of investigating a suspected breach, a permit holder may make application to the AIRC in respect employees who are not members of the permit holder's union to enter the premises and to inspect and make copies of records of such employees that are "relevant to the suspected breach";	Further, a permit holder may by written notice, while on premises or within 5 days, request relevant documents or records, or access to them, at a later date provided that at least 14 days is given to comply (s483)
Requirements for Permit Holders	
Permit holder may not enter, or remain on site, if they breach ROE provisions	Permit holder may not enter, or remain on site, if they breach the relevant provisions of the legislation.
Before entering, permit holder must give an entry notice to the occupier of the premises during working hours at least 24 hours and not more than 14 days before entering the premises.	Unless issued with an exemption certificate for entry, permit holder *must* provide an entry notice to *both* occupier and affected employer to investigate suspected breaches and occupier only in order to hold discussions
Such notice must specify: the section of the Act which authorises entry; particulars of the suspected breach or breaches (if applicable); the day of entry.	Entry notice must be provided at least 24 hours and no more than 14 days before entry – entry may only occur on day specified in notice (s490). Entry notices must specify the premises, date of entry and organisation and section relied on for entry (s518). Entry notice for investigation of suspected breach must specify particulars of suspected breach including whom the breach relates and who is affected by the breach. All notices must contain a declaration by the union that they are entitled to represent the employee.
If a union has reasonable grounds to believe that giving advance notice of entry might result in the destruction, concealment or alteration of relevant evidence it may apply to the Industrial	If issued with an exemption certificate, a copy must be provided to occupier or affected employer (or representative) before or as soon as practicable upon entering if those persons are

Registrar for an exemption certificate which will exempt it from this obligation. Before a permit holder is able to *inspect and make copies* of relevant records or to *make a request for the production of such records*, they must produce to the employer the "authority documents", which consist of the **permit holder's permit** and either: ▪ the entry notice; ▪ the exemption certificate; or ▪ an order of the AIRC. *Privacy Act 1998* provisions apply.	present Permit holder must produce authority documents (entry permit and entry notice or exemption certificate) *if* requested and *before* inspecting or copying records or documents *Privacy Act 1998* provisions apply.
Requests of employers/occupiers	
The employer or occupier may request the permit holder to: • produce "authority documents" for inspection; • comply with an OH&S requirement that applies to the premises; • conduct interviews in a particular room or area of the premises; and • take a particular route to reach a particular room or area of the premises. The last 3 points require the employer's request to be reasonable.	Permit holders must comply with a reasonable direction to conduct interviews in a particular room or area and to take a particular route. A 'particular room or area' is unreasonable where it is not fit for the purposes of holding discussions/interviews *or* where the request is made to intimidate, discourage or impose difficulties for participating persons. Permit holders must not enter premises used mainly for residential purposes
Right of Entry for OHS	
Equivalent to Fair Work Bill requirements	Official must be a permit holder in order to exercise Right Of Entry under OHS and entry must be exercised in relation to an employee on the premises.

	Permit holder must give written notice at least 24 hours prior to entry to occupier and any affected employer setting out intention and reasons for entry.
Prohibitions	
The Act prohibits permit holders who exercise or seek to exercise their rights of entry from intentionally hindering, or obstructing any person, or otherwise acting in an improper manner.	Similar to the WRA, a permit holder must not intentionally hinder or obstruct any person or act in an improper manner.
The Act prohibits a person (such as an employer) from refusing or unduly delaying entry by a permit holder who is entitled to enter the premises, and intentionally hindering or obstructing a permit holder in exercising their rights of entry. The Act provides the following example: "If an entry notice is given to the occupier and a person then destroys, conceals or manufactures evidence relating to the suspected breach, that conduct would amount to hindering or obstructing."	Employer (or any person) must not refuse, unduly delay, hinder or obstruct an entitled permit holder.
Powers of FWA and AIRC	
AIRC has power to make whatever orders it considers appropriate including to resolve disputes if satisfied an abuse of rights has occurred. AIRC can make orders on its own initiative, or on the application of a workplace inspector.	FWA *may* arbitrate disputes, including by making orders to impose conditions on entry notices, suspending and revoking permits and any other order considered appropriate
The Registrar must revoke the permit if satisfied that the permit holder made misrepresentations about entry rights; been ordered to pay a penalty; a court, person or body disqualified that person from exercising or applying for a right of entry for the purposes of that State industrial law or cancelled or suspended his / her right of entry under that State industrial law;	FWA *must* revoke or suspend permits where permit holder makes misrepresentations in breach of the Act, uses/discloses personal details without authorisation, breaches a privacy law in relation to employee record, breached OHS ROE laws etc. While there is discretion on behalf of FWA, the permits will be suspended for a minimum of 3 months in the 1st instance, 12

or the permit holder has, in exercising a right of entry under an OH&S law, engaged in conduct that was not authorised by that law.	months in the 2nd and 5 years in the 3rd instance. In this instance, FWA must ban any new permits being issued for the *minimum suspension period*

7. UNFAIR DISMISSAL

The Bill sets the framework for a more informal resolution of unfair dismissal claims. Reinstatement remains the primary remedy, but significant changes are made to the exemptions available to employers from claims and the range of employees able to make an application to Fair Work Australia (FWA).

Workplace Relations Act requirements	Fair Work Bill requirements
Object of Unfair Dismissal provisions	
Establish procedures for conciliation in relation to the termination of an employee's employment in certain circumstances. Provide for recourse to arbitration or to a court in some circumstances.	Establish a framework that balances: (i) the needs of business (including small business); and (ii) the needs of employees. Establish procedures l that: (i) are quick, flexible and informal; and (ii) address the needs of employers and employees.
Provide for remedies where a termination is found to be harsh, unjust or unreasonable.	Provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.
Assist in giving effect to the Termination of Employment Convention and ensure that a "fair go all round" is accorded to both employer and employee concerned.	Ensure that a “fair go all round” is accorded to both employer and employee concerned.
Excluded Employees	
Those employees which: • are engaged for specified period of time or task; • have a probationary period of 3 months (or what is reasonable); • are casual; • are trainees;	Those employees which: • are not covered by a modern award or employed under a collective agreement whose remuneration exceeds the nominated threshold • are dismissed due to genuine redundancy • are employed under a contract for a specified time, task, or season (when employment ends at the completion)

• are non-award employees; • are engaged on seasonable basis; • - remuneration exceeds specified rate.	• a training agreement applies
Excluded Employers	
Those employers with less than 100 employees	No equivalent exclusion
Qualifying period	
Application must not be made unless employee had completed six months qualifying period of employment.	The minimum employment period is 6 months, or if the employer employs less than 15 employees, one year. Casuals must meet same qualifying period as permanent employees, and have a reasonable expectation of continuing employment with the employer.
Grounds for unfair dismissal	
An employee whose employment has been terminated by the employer may apply to the AIRC for relief in respect of termination of employment which was harsh, unjust or unreasonable.	A person has been ***unfairly dismissed*** if FWA is satisfied that: • the person has been dismissed; and • the dismissal was harsh, unjust or unreasonable; and • the dismissal was not consistent with the Small Business Fair Dismissal Code; and • the dismissal was not a case of genuine redundancy.
Legal Representation	
The AIRC must ask a representative/legal practitioner if retained under a costs arrangement or contingency fee agreement.	FWA must grant permission for a person to be represented by a lawyer or paid agent.

The AIRC may order payment of costs where it should have been reasonably apparent that there was no reasonable prospect of success	FWA may make an order for costs against the representative in some circumstances where an application has been made by the other party. Application for costs order must be made within 14 days after: (a) FWA determines the matter; or (b) the matter is discontinued.
Applications	
Application must be lodged within 21 days after day termination took effect (AIRC has discretion to accept lat applications). Application fee of $50	Seven days within which to make application or such further period as FWA allows. Extensions in exceptional circumstances taking into account: • reason for delay • when first aware of dismissal • any action taken to dispute dismissal • prejudice to employer • merits of application • fairness to parties. Fees in accordance with regulations.
Conduct of Applications	
Matters conducted in the following order: i. Initial conciliation ii. Arbitration if not able to be conciliated	Informal and inquisitorial investigations, such as via phone calls with parties, requests for written information or face-to-face conferences (either at the employer's premises or at FWA). Where there are contested facts, FWA will hold a conference or conduct a hearing FWA may order a person's reinstatement, or the payment of compensation to a person, if:

The AIRC may make an order for a remedy. The AIRC must not make an order unless satisfied having regard to all circumstances of case including: • effect of order on viability of employer's undertaking, establishment or service • length of employee's service. • remuneration employee would have received if not terminated. • efforts of employee to mitigate loss suffered • any other matter AIRC considers relevant.	(a) FWA is satisfied that the person was protected from unfair dismissal at the time of being dismissed; and (b) the person has been unfairly dismissed. FWA may make the order only if the person has made an application.
Genuine Operational Reasons	
Application must not be made on grounds that include genuine operational reasons or for reasons that include genuine operational reasons, such as of an economic, technological, structural or similar nature relating to an employer's undertaking, establishment, service or business.	A person's dismissal will not be unfair if it was a case of ***genuine redundancy***, and: (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy. If the employee could have been redeployed in the enterprise (or an associated enterprise) it will not be a genuine redundancy.
Meaning of 'dismissed'	
The resignation of an employee is taken to be termination by the employer if the employee can prove they did not resign voluntarily but were forced to do so because of conduct engaged in by the employer.	A person has been ***dismissed*** if: (a) the person's employment with his or her employer has been terminated on the employer's initiative; or (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

Definition of 'harsh, unjust or unreasonable'	
In determination for purposes of arbitration whether termination was harsh, unjust or unreasonable, AIRC must have regard to: • whether there was a valid reason for the termination related to employee's capacity or conduct (including its welfare and safety of other employees); • whether the employee was notified of the reason; • whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; • if termination related to unsatisfactory performance whether the employee had been warned about that satisfactory performance • the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; • the degree to which the absence of dedicated human resource management specialist or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination. • any other matters that AIRC consider relevant.	Circumstances are virtually unchanged. Legislation states FWA must take into account: • whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and • whether the person was notified of that reason; and • whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and • any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and • if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and • the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and • the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and • any other matters that FWA considers relevant.
Conciliation	
The AIRC ***must*** attempt to settle the matter by conciliation.	FWA ***may*** conduct a conference or hold a hearing in relation to a matter arising, and to the extent that the matter involves facts the existence of which is in dispute. Where FWA conducts a 'conference' in relation to the matter: • FWA must conduct the conference in ***private***.

	• FWA must take into account any difference in the circumstances of the parties to the matter in: (a) considering the application; and (b) informing itself in relation to the application.
Arbitration	
If AIRC satisfied all reasonable attempts to settle by conciliation are unsuccessful, the AIRC may arbitrate the matter. The Applicant must elect to either proceed to arbitration to determine whether the termination was harsh, unjust or unreasonable or not to proceed.	FWA can hold a 'hearing' if it considers it appropriate to do so, taking into account: (a) the views of the parties; and (b) whether a hearing would be the most effective and efficient way to resolve the matter. If FWA holds a hearing it may decide *not* to hold the hearing in relation to *parts* of the matter. FWA may decide at any time (including before, during or after conducting a conference in relation to a matter) to hold a hearing.
Reinstatement	
Reinstatement primary remedy. If AIRC considers appropriate, it may reinstate employee by reappointing the employee to original position or appointing them to another position on terms and conditions no less favourable than those on which employee was employed before termination. The AIRC may also make: • an order that AIRC thinks appropriate to maintain continuity of employment • any order appropriate to cause employer to pay an amount in respect of the remuneration lost, or likely to have been lost,	Reinstatement preferred remedy. Provision remains unchanged. Provision remains effectively unchanged.

because of termination. In determining an amount in respect of remuneration lost the AIRC must have regard to: (a) the amount of income earned by the employee during the period between termination and the order for reinstatement; and (b) the amount of any income reasonably likely to be so earned by the employee during the period between order for reinstatement and actual reinstatement.	Change from consideration of income to ***remuneration***.
Compensation	
The AIRC may make an order requiring the employer to pay the employee an amount in lieu of reinstatement.	FWA must not order the payment of compensation to the person unless satisfied reinstatement is inappropriate; and considers an order for payment of compensation is appropriate in all the circumstances of the case.
In determining an amount the AIRC must have regard to: • effect of order on viability of employer's undertaking, establishment or service; • length of employee's service; • remuneration employee would have received if not terminated; • efforts of employee to mitigate loss suffered; • any misconduct of the employee that contributed to the decision to terminate; and • any other matter AIRC considers relevant.	Minor changes. In determining an amount, FWA must take into account all the circumstances of the case including: • the effect of the order; • length of the person's service; • the remuneration that the person would have received, had they not been dismissed; • the efforts of the person (if any) to mitigate the loss suffered; • the amount of any remuneration earned by other work during the period between the dismissal and the making of the order for compensation; • the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and • any other matter that FWA considers relevant.

If satisfied that misconduct contributed to decision to terminate the AIRC must reduce amount it would otherwise fix, on account of the misconduct.	If FWA is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, FWA must reduce the amount it appropriately.
Amount may *not* include component for shock, distress or humiliation or other analogous hurt.	Amount ordered by FWA must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt.
Capped at 6 months of the employees' wages.	Capped at half of high income threshold, or the remuneration received by the person during the 26 weeks before the dismissal (whichever is less)
No equivalent provision	An order by FWA may permit the employer concerned to pay the amount required in installments specified in the order.
Right of Appeal	
Appeal may only be made on grounds that there was an error in deciding to make the order.	FWA must not grant permission to appeal from a decision made by FWA unless it is in the public interest to do so. An appeal from a decision made by FWA can only be made on the ground that the decision involved a significant error of fact.

8. TRANSFER/TRANSMISSION OF BUSINESS

What was known as Transmission of Business under the *Workplace Relations Act* has been renamed Transfer of Business under the Bill. The Bill aims to provide a balance between protecting employees' terms and conditions of employment under applicable terms of employment and the interests of employers in running their enterprises efficiently.

Workplace Relations Act requirements	Fair Work Bill requirements
When does a transfer of business occur?	
The relevant provisions apply if a new employer becomes the successor, transmittee or assignee of the whole, or part, of a business of the old employer.	A transfer of business occurs if: • The employment of an employee of the old employer has terminated; • Within 3 months the employee becomes employed by the new employer; • The transferring employee performs substantially the same work; and • There is a connection between the old employer and the new employer (such as transfer of assets; associated entities)
Parties to transmission	
Relevant parties - **old employer, new employer** and **transferring employee**. A transferring employee must either: ▪ have been employed by the old employer at time of the transmission, and becomes employed by the new employer within 2 months of transmission; or ▪ had their employment with the old employer terminated no more than 1 month before the time of transmission for genuine operational reasons and has been employed by the new employer within 2 months of the transmission.	Same parties, but different definition for transferring employee. A transferring employee must: • Have been terminated by the old employer; • Within 3 months after the termination becomes employed by the new employer; and • The work to be performed is the same or substantially the same as the work the employee performed for the older employer.
Transfer of work requirements	
No equivalent provision.	'Transfer of work' from old to new employer can occur if: • Transfer of assets occurs

	• Work is outsourced • New employer ceases to outsource work to old employer i.e. brings work back in-house • New employer is associated entity of old employer
Transferable Instruments	
ITEAs, Pre-reform AWAs or Certified Agreements, AWAs lodged after 27 March 2006, Employee or union collective agreements, Awards, an Australian Pay and Classification Scale, NAPSAs. At the end of the 12 month transmission period the transmitted instrument ceases to operate and a transferring employee may be bound by any industrial agreement or award that is binding on the new employer and which is capable of applying to the transferring employee. Where there is no such industrial agreement or award capable of application, the transferring employee will be covered by the Standard.	An enterprise agreement approved by FWA, A workplace determination, and a named employer award (i.e. a modern award that is expressed to cover one or more named employers) are all transferable instruments.
Application of instruments to employees	
A collective agreement covering non-transferring employees can generally only apply to transferring employees after the transmission period has ended and they are no longer 'transferring employees'. However, if the transmitted instrument is an award, a transferring employee may agree to be bound by a collective agreement that binds the new employer in relation to its other employees. An ITEA, an AWA made at any time, a certified agreement lodged before 26 March 2006, a collective agreement or a preserved state agreement can be terminated by agreement between the new employer and the transferring employee(s).	No other instrument can apply to the transferring employee in regards to that work, other than those instruments which are transferred with the employees.

New non-transferring employees	
New non-transferring employees will be covered by an applicable award or NAPSA by default.	New provision states new non-transferring employees of the 'new' employer may be covered by transferable instrument if no other enterprise agreement or modern award applies to new employer, and they perform the same work as transferring employees.
New Agreements	
New employer can enter into a **new** collective agreement with the transferring employees during the transmission period unless the transmitted instrument is an ITEA, or AWA made at any time, where the collective agreement will not have any effect whilst the transmitted instrument operates. New employers can enter into ITEAs with the transferring employees during the transmission period provided both parties are eligible to make an ITEA. However, the new employer cannot make a transferring employee enter into an ITEA as a pre-requisite to being employed.	No equivalent provision.
Notice Requirements	
With limited exceptions, notice of transferring instrument must be given to the employee. The notice must be in writing and state all details relating to industrial instrument(s), date when transmission period ends etc. within 28 days of commencing employment with the new employer.	No equivalent provision.
Transfer of entitlements	
Except for parental leave, where accrued entitlements transfer, whether the old employer or the new employer will be responsible for the entitlements is a matter for agreement between those parties.	Leave entitlements etc. transfer across unless already paid out by old employer (including if an employee is on or has applied for parental leave with the old employer)
Employee Records	
Old employer must provide all employee records to new employer. The new employer must request records from the old employer and must	No equivalent provision.

comply with the record-keeping requirements	
Organisations covered	
No equivalent provision	If a named employer award applies to the new employer by virtue of a transferred employee, then any employer or employee organisations are covered by the award if they were immediately before the transfer. An employee organisation will also be covered by the award if any new non-transferring employees are covered by the award, and perform the same work as the transferring employee.
High Income Employees	
No equivalent provision	If the old employer guaranteed annual earnings for a guaranteed period to a transferring "high income" employee and some of the guaranteed period occurs post transfer and an enterprise agreement does **not** apply, the guarantee will have effect. New employer is not required to pay an amount of earnings at a rate that is more than the rate of the guarantee of annual earnings. If the employee is entitled to non-monetary benefits and it is not practicable for the new employer to provide them, the guarantee of annual earnings will be an amount of money equivalent to the agreed money value of those benefits.
Powers of Arbitration	
No equivalent in Work Choices	FWA may make orders relating to instruments covering new employer and transferring and/or non-transferring employees or to vary the transferable instrument

Period of transmission	
12 month transmission period except for Pay Scales which apply indefinitely. At the end of the 12 month transmission period the transmitted instrument ceases to operate and a transferring employee may be bound by any industrial agreement or award that is binding on the new employer and which is capable of applying to the transferring employee. Where there is no such industrial agreement or award capable of application, the transferring employee will be covered by the Australian Fair Pay & Classification Standard.	No equivalent provision.
Redundancy	
Transmitted preserved redundancy provisions **cannot** be terminated during the transmission period. A new employer will remain bound by transmitted preserved redundancy provisions until the earliest of the following: ▪ the end of a period of 24 months from the time the agreement ((between the old employer and the transferring employee) which contained the provisions) ceased operating ▪ the transferring employee ceases to be employed by the new employer ▪ the new employer and the transferring employee enter into a workplace agreement.	Redundancy provisions are part of NES

9. DISPUTE SETTLEMENT PROCEDURES

The Bill allows for a broader range of matters that can be subject to dispute resolution processes. Fair Work Australia (FWA) will have broad powers to facilitate dispute resolution which will include the ability to compel parties to participate. However, there can only be arbitration where parties agree, except in relation to disputes concerning right of entry, stand down provision, workplace determinations to terminate bargaining and unfair dismissal claims.

In general, there is a move away from voluntary dispute resolution processes towards alternative forms of resolution.

Workplace Relations Act requirements	Fair Work Bill requirements
Object	
Emphasis is on voluntary participation with no power for the AIRC to compel parties to attend conferences. Parties are encouraged to use alternative dispute resolution providers.	The Fair Work Bill provides a broader range of matters that can be subject to dispute resolution processes, and there is a move away from voluntary dispute resolution and providers towards intervention by FWA.
Model Dispute Resolution Procedure	
If no dispute settlement procedure in the agreement, the agreement is taken to include model provisions in Part 13 of the WRA, which includes the following features: • Parties must genuinely attempt to resolve the dispute at the workplace level; • When cannot be resolved, a party may elect to use an alternate dispute resolution process, provided by a mutually agreed person; • May also be conducted by the AIRC	FWA regulations must prescribe a model term dealing with disputes for enterprise agreements that will provide for the **binding resolution** of disputes. In negotiating an enterprise agreement, parties may use the model term for guidance, or use parts of it, in their enterprise agreement. The disputes procedure in an enterprise agreement applies over that in any applicable modern award, and must allow for the representation of employees. A disputes procedure in a modern award or enterprise agreement may also provide for the settlement of other workplace disputes (ie. not relating to the terms of an award, agreement or the NES).

Requirements for Dispute Resolution Procedures	
Generally, under WorkChoices, dispute resolution procedures apply only to disputes about: ▪ Terms of a workplace agreement ▪ Application of an award ▪ Entitlements under AFP&CS (but not classifications and rates of pay) ▪ Application of a workplace determination. A workplace agreement must include a dispute settlement procedure. In the absence of a dispute settlement procedure, the agreement is taken to include the model dispute resolution process as provided in the Act.	A modern award or enterprise agreement "must include a term that provides a procedure for settling disputes" about: ▪ Matters arising under the award/agreement ▪ In relation to the NES Terms must provide for FWA or an independent person to deal with the dispute and must provide for representation of employees in the dispute resolution process. If modern awards or enterprise agreements do not contain a dispute resolution procedure, the model dispute settlement procedure contained in the legislation applies. However FWA must not settle a dispute regarding 'reasonable business grounds' in relation to an employer refusal of a request for flexible working arrangements or extension to unpaid parental leave, unless those rights are terms of an enterprise agreement to which the dispute settlement procedure applies. "safety net contractual entitlement" – where a common law contract of employment refers to an entitlement under a modern award or the NES, and a dispute arises in relation to the application of that entitlement, FWA may deal with the dispute.
Bargaining Disputes	
Under WorkChoices, parties can request the AIRC to assist in resolving disputes where the parties are negotiating a workplace agreement. However the AIRC <u>cannot arbitrate</u> even if the parties agree to that course of action.	FWA may deal with a bargaining dispute in the following circumstances: ▪ For a single enterprise agreement or multi-enterprise agreement (low paid authorisation)

	where one bargaining representative applies; and ▪ For other types of agreement only where all bargaining representatives agree to FWA dealing with a dispute. FWA may only arbitrate in a bargaining dispute if all bargaining representatives agree.
Applications for Dispute Resolution	
A person may apply to the AIRC to have an alternative dispute resolution process conducted if the model process may be used and parties have been unable to resolve dispute. AIRC has no power to arbitrate disputes unless the parties agree.	FWA, or an independent person, may deal with a dispute if a party to the dispute makes application, and may only arbitrate if the term of an enterprise agreement (however described) allows it to do so.
Conduct of Dispute Matters under AIRC/Fair Work Australia	
Commission does not have such powers to: • "compel a person to do anything" ; • arbitrate the matter in dispute: • determine rights and obligations of a party; or • make an award or order, even if the parties agree that the Commission should do such thing. Commission must conduct all proceedings in private, and must not disclose documents or evidence tendered in proceedings.	If a dispute matter is before FWA in accordance with other provisions of the Bill, FWA may inform itself in relations to the matter in such manner as it considers appropriate, including: ▪ requiring a person to attend; ▪ inviting oral/written submissions; ▪ requiring production of relevant documents and records; ▪ taking evidence under oath; ▪ conducting inquiries or initiating research; ▪ conducting a conference or hearing Proceedings before FWA will **not** be bound by rules of evidence. Matters will be dealt with in private unless directed by FWA to be held in public.

	FWA may prohibit or restrict publication of evidence or documentary material, or the identity of persons appearing.
Alternative dispute resolution process includes: • Conferencing; • Mediation; • Assisted negotiation; • Neutral evaluation; • Case appraisal; • Conciliation; and • Arbitration.	FWA may deal with a dispute by: • mediation or conciliation; • recommendation or opinion; • arbitration (if agreed by parties), including making orders.
Commission cannot make an award or order in resolution of a dispute.	Where FWA deals with a dispute under 595(2), no "decision" is required. FWA is not bound to settle a dispute in the terms applied for. If a decision is made, it would be appealable.
Right of Entry	
Provides general power to deal with disputes about right of entry, including making orders for the purpose of settling disputes.	FWA may deal with disputes (without agreement) regarding right of entry provisions, including disputes regarding: ▪ a reasonable request by an employer that a permit holder comply with OH&S requirements; and ▪ a reasonable request by an employer that a permit holder use a particular room or area, or take a particular route to that room or area.
Under WRA, AIRC cannot act on its own motion.	FWA may deal with a right of entry dispute at its own initiative, or on application from any of the following: ▪ a permit holder or their organisation

	▪ an employer ▪ the occupier of a premises.
Under WRA, Commission has the power to revoke or suspend a right of entry permit, or impose "limiting conditions" on a permit.	FWA may deal with a dispute under this section by arbitration, including making any of the following orders: ▪ imposing conditions on the permit ▪ suspending or revoking the permit ▪ orders about future issues of permits to one or more persons ▪ any other order considered appropriate
WRA provisions are similar to those of FWA Bill in this respect	FWA may also deal with the dispute with resorting to arbitration using S.595(2). In dealing with a dispute under this section, FWA must take into account fairness between the parties, and not confer rights on a permit holder that are additional to, or inconsistent with other sections of the Bill.
Stand Down Provisions	
Stand down provisions are an "allowable award matter" dealt with in the same manner as other disputes about award matters, and thus provides for an employer to stand down an employee.	FWA may deal with a dispute in relation to stand down provisions of the Bill, or those of an enterprise agreement or contract of employment where these do not already contain such provisions.
Disputes arising in relation to stand downs may access the model procedure in Part 13 of the WRA, or else the employee has recourse to the Federal Court.	FWA may deal with disputes under this section by arbitration (with or without the agreement of the parties), or may use the non-arbitral provisions where authorised (i.e. where parties consent to FWA arbitrating a dispute)

10. COMPLIANCE

The Bill deals in detail with breaches of awards, agreements and the National Employment Standards, and introduces a single compliance system which purportedly covers all employers and employees, including those employees covered by common law contracts of employment. Penalties appear comparable to current arrangements, however a small claims jurisdiction has been created where rules of evidence and procedure will not apply, and Fair Work Inspectors have been provided enhanced rights to initiate civil proceedings.

<table>
<tr><th>Workplace Relations Act requirements</th><th>Fair Work Bill requirements</th></tr>
<tr><td colspan="2">Enforcement Bodies</td></tr>
<tr><td>Australian Fair Pay Commission

The Australian Fair Pay Commission (AFPC) is an independent body responsible for adjusting federal minimum and classification wages.

The AFPC’s primary functions are:
• wage-setting; and
• promoting public understanding of matters relevant to the Commission’s functions.

AFPC is supported by the AFPC Secretariat.</td><td rowspan="2">Fair Work Australia

Establishes a single compliance framework under Fair Work Australia (FWA) to administer and oversee most aspects of the new workplace relations system.

FWA replaces the Australian Industrial Relations Commission, Federal Court, and the Workplace Authority.

FWA will function similarly to pre-Work Choices AIRC, with some differences:
• not always required to hold a hearing to discharge its functions;
• provisions for FWA employees (other than Deputy President or Commissioner) to be given delegated authority to gather information or even conduct a conciliation conference.

Fair Work divisions of the Federal Court and Federal Magistrates Court to be established.

The Federal Court and the Federal Magistrates Court will be empowered to make any orders it finds appropriate, including injunctions in relation</td></tr>
<tr><td>Australian Industrial Relations Commission

The Australian Industrial Relations Commission (AIRC) is an independent, national tribunal dealing with employment issues.

The AIRC’s work includes:
▪ assisting employers and employees in resolving industrial disputes;
▪ handling termination of employment claims;</td></tr>
</table>

▪ modernising and maintaining awards; and ▪ dealing with applications about industrial action. The AIRC is required to act quickly, without regard to technicalities and in the public interest.	to alleged breaches of civil remedy provisions including breaches of a modern award or enterprise agreement.
Workplace Authority The Workplace Authority (WA) functions are to: ▪ promote an understanding of Commonwealth workplace relations legislation; ▪ provide education, assistance and advice to employees, employers and organisations in relation to their rights and obligations, and workplace agreements; ▪ promote the making of workplace agreements; ▪ accept lodgement of workplace agreements, analyse workplace agreements, and decide whether workplace agreements pass the no-disadvantage test; ▪ refer matters to the Workplace Ombudsman and workplace inspectors.	
Office of the Workplace Ombudsman Independent Commonwealth body responsible for securing compliance with Commonwealth workplace relations laws Ombudsman's duties encompass: ▪ assisting both employers and employees to understand their rights and obligations;	**Office of the Fair Work Ombudsman** Independent Commonwealth body responsible for securing compliance with Commonwealth workplace relations laws. FWO subject to general direction of Minister to the extent that the direction does not relate to performance of function or exercise of powers.

▪ promoting and monitoring compliance; ▪ investigating complaints and suspected contraventions; and ▪ commencing litigation to enforce Commonwealth workplace relations legislation, and representing employees in litigation to promote compliance with legislation. WO Workplace Inspectors have statutory powers to investigate suspected contraventions of the law.	FWO duties encompass: ▪ assisting employers, employees and organisations to understand and comply with their rights and obligations; ▪ promote harmonious and cooperative workplace relations and preventative compliance; ▪ provide education, assistance and advice to employees, employers and organisations; ▪ monitor compliance, investigate contraventions and enforce compliance through compliance notices and court proceedings. Fair Work Inspectors will have slightly broader statutory powers to investigate suspected contraventions of the law, including the right to demand a person's name and address.
Federal Court	
Federal Court and Federal Magistrates Court have jurisdiction under the Workplace Relations Act in relation to certain workplace matters.	The Fair Work divisions of the Federal Court and the Federal Magistrates Court will be empowered to make any orders it finds appropriate, including injunctions in relation to alleged breaches of civil remedy provisions including breaches of a modern award or enterprise agreement.
Discrimination Claims	
Provides remedies to employees of constitutional corporations where employment is terminated for a prohibited reason: ▪ temporary absence from work because of illness or injury; ▪ trade union membership or participation in trade union activities; ▪ non membership of a trade union;	The range of discriminatory grounds relating to employer actions is expanded from those currently available under the WRA. Prohibits employers from taking "adverse action", and provides a low cost avenue for claimants. Discrimination can be claimed on the grounds of

▪ seeking office as, or acting or having acted as an employee representative; ▪ filing a complaint, or the participation in proceedings, against the employer for a breach of a law or regulation; ▪ absence from work due to maternity leave or other parental leave; ▪ race, colour, sex, sexual preference, physical or mental disability, marital status, family responsibility, pregnancy, religion, political opinion, national extraction or social origin.	a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. The extended jurisdiction extends to all employees, regardless of whether they are employed by a constitutional corporation, thereby opening up avenues to employees who would otherwise be covered under State IR systems. Importantly, the provision applies both to employees and prospective employees in relation to an employer's refusal to employ, discrimination in the terms of employment offered or imposing other detriments. This new jurisdiction will allow employees to approach a court of their choice for a very broad range of remedies, including damages (no limit is imposed on damages that can be awarded by the court), reinstatement and any other order necessary to stop a further contravention of the Act or redress any loss suffered as a result of a contravention of the Act.
Penalties	
Maximum penalty for breach of award or workplace agreement is $6,600 for an individual or $33,000 for a corporation. Small claims jurisdiction exists in State Magistrates Courts for claims of up to $10,000.	Maximum penalty remains unchanged. Small claims jurisdiction has been extended to Federal Magistrates Court for claims of up to $20,000. Under the small claims jurisdiction the relevant court will not be bound by the rules of evidence or procedure and may conduct matters in an informal manner. Parties are able to be represented by lawyers in the small claims jurisdiction only with the leave of the Court.