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 FAIR WORK AMENDMENT ACT 2013

The Fair Work Amendment Act 2013 passed through federal parliament on 27 June 2013 and received Royal Assent on 28 June 2013. Some of its provisions took effect on 1 July 2013 while others took effect on 1 January 2014 (see below for full details of the amendments and implementation dates).

A regulatory requirement is that the Federal Government undertake a post-implementation review of legislation (where a regulatory impact statement is not done at the time the legislation is proposed) two years after it commences. Given the Fair Work Amendment Act 2013 was implemented in two tranches, the post-implementation review will also be conducted in two tranches.

The first tranche will be a review of amendments that took effect on 1 July 2013 which are those relating to: special maternity leave; concurrent parental leave; the right to request flexible working arrangements; and the right for pregnant workers to transfer to a safe job.

The second tranche will be a review of amendments that took effect on 1 January 2014 which are those relating to: consent arbitration of dismissal-related general protections and unlawful termination matters; consultation about changes to working hours; the modern awards objective in relation to penalty rates; the anti-bullying measure; and union access to workplaces (ie right of entry).

CHANGES THAT TOOK EFFECT ON 1 JULY 2013

The below changes will be part of a post-implementation review starting in June 2015 and finishing in July 2015.

Special maternity leave

- These amendments took effect on 1 July 2013.
• They implemented the Fair Work Act review panel’s recommendation 4, which was to repeal s80(7) of the Fair Work Act so that taking unpaid special maternity leave did 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.

• Those provisions apply to periods of leave starting on or after 1 July 2013.

Parental leave

• This amendment took effect on 1 July 2013 and was not recommended by the Fair Work Act review panel.

• It entitles parents to take eight weeks of unpaid leave concurrently instead of three weeks as was the case prior to 1 July 2013. 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, 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 are 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.

• They were a partial response to the Fair Work Act review panel’s recommendation 5, which was to amend s65 of the Fair Work 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 these amendments (nor currently under the Fair Work Act) for employers to meet with employees to discuss any requests that are refused.
These amendments extended 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 aged 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 Fair Work Amendment Act 2013 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 pre-1 July 2013 right to request flexible working arrangements, the Fair Work Act as it currently stands does 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 who 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 that 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 Fair Work Act following these amendments includes a ‘non-exhaustive’ list of what might constitute reasonable business grounds for refusing a request such as:
  - 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 amendments also make 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 also request to change their patterns of work such as taking longer work or meal breaks or adjusting their start and finish times.

**Transfer to a safe job for pregnant workers**

• These amendments took effect on 1 July 2013 although were not recommended by the Fair Work Act review panel.

• Prior to 1 July 2013, a pregnant employee with at least 12 months’ service who had pregnancy-related risks could apply for a transfer to a safe job for the duration of the risk period.

• These amendments extend that right to any pregnant employee, regardless of 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.

• 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 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.

- If there is no appropriate safe job available and the employee is NOT otherwise entitled to unpaid parental leave (ie they have less than 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.

**CHANGES THAT TOOK EFFECT ON 1 JANUARY 2014**

The below changes will be part of a post-implementation review starting in December 2015 and finishing in January 2016.

**Consent arbitration of dismissal-related general protections matters and unlawful termination matters**

- These amendments took effect on 1 January 2014.

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

- The amendments also limit appeals of Fair Work Commission decisions in this area as well as allowing costs orders to be imposed.
Consultation about changes to working hours

- These amendments took effect on 1 January 2014 although were not recommended by the Fair Work Act review panel.

- They introduced new content requirements for modern awards and enterprise agreements in relation to consultation with employees.

Consultation clauses in modern awards

- Under the amendments, modern awards must include a term requiring 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 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 apply to modern awards that are in operation on or after 1 January 2014, including awards that did not previously include a consultation term.

- All modern awards have been varied to include the new consultation term, with determinations taking effect from 1 January 2014.

Consultation clauses in enterprise agreements

- Prior to 1 January 2014, all enterprise agreements had to include a term requiring the employer to consult about ‘major workplace changes that are likely to have a significant effect on employees’.

- That requirement was extended under the Fair Work Amendment Act 2013 to include 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 by a union or employee rep.

• Employers and employees are still able to negotiate a consultation term for inclusion in enterprise agreements but it must be in accordance with the amendments.

**Modern awards objective – penalty rates**

• These amendments took effect on 1 January 2014 although were not recommended by the Fair Work Act review panel.

• They apply to modern awards made or varied after 1 January 2014.

• The pre-1 January 2014 provisions under s134 of the Fair Work Act said 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 by the FWC under the new s134 is 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 are now formal considerations for the FWC when it sets award rates and conditions.

**Anti-bullying measure**

• These amendments took effect on 1 January 2014.

• None of the anti-bullying changes included in the Fair Work Amendment Act 2013 were recommended by the Fair Work Act review panel.

• The changes introduced a new jurisdiction for the Fair Work Commission (FWC) to deal with bullying complaints from 1 January 2014.

• The provisions apply to a worker 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.

What is bullying?

The term ‘bullied’ is defined in the new s789FD of the Fair Work 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 having been ‘bullied’.

Powers and functions of the Fair Work Commission

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

- Taking steps to inform itself of matters under s590 of the Fair Work Act;
- 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 can 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;
- That the employer provides information and additional support and training to workers; or
- That the employer reviews its workplace bullying policy.

Civil remedy provisions for breaching bullying orders

- Under the amendments, it is an offence for a person to engage in conduct that contravenes an order of the FWC, including an order to stop the bullying.
- This is 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.
- Courts that can hear matters relating to breaches of orders are the Federal Court, Federal Circuit Court (formerly the Federal Magistrates Court), or an eligible state or territory court.

Interaction with work health and safety and other laws

- The definition of a ‘worker’ who can bring an application to stop the bullying under the Fair Work Act is the same as the ‘worker’ definition used under the various state Work Health & Safety Acts. This definition is broader than the traditional one of ‘employee’ and includes:
  - An employee;
  - A contractor;
- A sub-contractor;
- An outworker;
- An apprentice;
- A trainee;
- A student gaining work experience; or
- A volunteer.

- Members of the Defence force are excluded from the definition of worker for the purposes of the anti-bullying provisions.

- The Fair Work Act’s anti-bullying provisions do not preclude any investigations or prosecutions relating to the same conduct being brought under work health and safety laws or the criminal law.

- Section 115 of the Work Health and Safety Act in each participating jurisdiction (the Commonwealth and all states and territories except WA and Vic at this stage) will not apply to applications for orders to stop the bullying. Section 115 ordinarily prohibits bringing civil proceedings under the WHS Act if proceedings have already been commenced in relation to the same matter under another state or commonwealth law.

- Under the Fair Work Act, 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 an anti-bullying application, they will be able to pursue remedies under the Fair Work Act or the Work Health & Safety Act in each particular state.

**Union access to workplaces (ie right of entry)**

- These amendments took effect on 1 January 2014.

- These amendments 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 amendments provide for interviews and discussions by unions with workers to happen in an area agreed between the union and employer/occupier. From 1
January 2014 it is no longer up to the employer / occupier to designate a reasonable meeting place.

- If there is no agreement between the parties on the location, the ‘default’ location for interviews and discussions is 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.

- The amendments leave 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 s508 of the Fair Work Act, the FWC may restrict entry rights if the permit holder or union has misused those rights. According to the Explanatory Memorandum to the Fair Work Amendment Act 2013, misuse under 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 do not want to participate.

**Frequency of entry to hold discussions**

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

- Under the changes that took effect on 1 January 2014, an employer or occupier can dispute the frequency with which permit holders from the same union enter their premises to hold discussions (new s505A(1)). Those provisions do not apply to entry under s481 of the Fair Work Act to investigate suspected breaches (ie frequency of entry cannot be disputed by employers if it is for the purpose of investigating a suspected breach).

- Under the changes, the FWC can 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 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**

- Under changes to the Fair Work Act that took effect on 1 January 2014, if unions and occupiers are unable to agree on accommodation and transport arrangements for union permit holders to access to remote worksites, the occupier 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 do not generally apply.

- 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 occupier 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 in the Explanatory Memorandum are:

  - Where the premises is 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 permit holders.

**Recouping transport and accommodation costs**

- The new s521C(3) limits the fee that an occupier 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 also apply here 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 a site will be considered conduct engaged in as part of the exercise of their rights to enter workplaces. Accordingly, such conduct can be subject to an application for misuse of rights under s508 of the Fair Work Act.

- The changes apply to union visits occurring on or after 1 January 2014.

**Disputes about right of entry**

- Under changes that took effect on 1 January 2014, the FWC is 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 for an occupier to provide accommodation or transport is made within a reasonable time period.