

27 March, 2013

Practice Group(s):

*Labour, Employment
and Workplace Safety*

Fair Work Amendment Bill 2013 Enters Parliament

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As discussed in our previous Legal Insight on 18 February 2013, the Commonwealth Government has followed through on its promise to move quickly in amending the *Fair Work Act 2009* (Cth) (FW Act) with the *Fair Work Amendment Bill 2013* (Bill) being introduced in to Parliament on 21 March 2013. The Bill contains a broad range of amendments aimed at making employment more flexible and family friendly, altering current right of entry provisions and, most notably, giving the Fair Work Commission (FWC) jurisdiction to deal with claims of bullying in the workplace.

Anti-bullying

The Bill seeks to add new provisions to the FW Act enabling a worker who is bullied at work to apply to the FWC for an order to stop the bullying. Under the Bill, a worker is "bullied at work" when there is repeated, unreasonable behaviour directed towards a worker or a group of workers, of which the worker is a member, that creates a risk to health and safety. These anti-bullying amendments are part of the Commonwealth Government's response to the House of Representatives Standing Committee on Education and Employment report *Workplace bullying "We just want it to stop"* and will no doubt represent a test for the FWC in dealing with the potential influx of claims.

Under the Bill, the FWC will be required to list an application for an order to stop bullying within 14 days of that application being made and will have the power to make whatever order it deems appropriate, other than a pecuniary penalty order, to prevent the bullying from continuing. Importantly, the Bill also seeks to remove the prohibition on multiple actions, meaning proceedings may still be commenced under the *Work Health and Safety Act 2011* (NSW) in relation to incidents of bullying even though the employee has made an application under the FW Act seeking an order to stop the same conduct. The FWC may refer a matter to a work health and safety regulator where it considers it necessary and appropriate.

Right of Entry

The Bill also has implications for employers in relation to right of entry provisions with the amendment of Part 3-4 of the FW Act. Part 3-4 will now regulate the location of discussions and interviews, as well as transport and accommodation arrangements for the facilitation of entry to remote premises by permit holders.

Under the Bill, interviews and discussions may be held in areas as agreed between the occupier and the permit holder or, failing agreement, in an area ordinarily used for meal or other breaks and provided by the occupier for that purpose. The Bill also enables the FWC to deal with disputes about the frequency of entry to premises for discussion purposes with the FWC able to place limitations on

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entry in circumstances where the frequency causes an unreasonable diversion of the occupier's critical resources.

An occupier will also be required to assist with transport and accommodation for permit holders at remote sites and will be limited on what they can charge a permit holder for such accommodation and transportation. Importantly for employers, the Bill does provide the FWC with the power to deal with disputes about aspects of accommodation and transport arrangements in cases where these arrangements would cause the occupier undue inconvenience.

Family Friendly Measures

The Federal Government has also promoted the Bill as providing greater flexibility for working families. This greater flexibility is facilitated through amendments to provisions regulating parental leave, rostering protections and the rights of employees to request flexible working arrangements.

The Bill amends the unpaid special maternity leave provisions of the FW Act meaning that any period of unpaid special maternity leave taken by an employee will not affect that employee's entitlement to unpaid parental leave.

Further, the Bill amends the concurrent leave provisions of the FW Act. These amendments will increase the maximum period of concurrent leave available under the current provisions from three to eight weeks. Employees will also be able to take the eight weeks' leave in separate periods of at least two weeks within the first 12 months of the birth or adoption of a child.

The right to request a change in working arrangements has been extended to encompass a wider range of care arrangements and there are also new content requirements for modern awards and enterprise agreements. These content amendments require employers to genuinely consult employees about major workplace change and changes to regular rosters or ordinary hours of work while also considering the views of the employee on the impact of these changes.

Implications for Employers

Now that the Bill has been tabled, employers will be able to take some initial steps towards compliance in anticipation of the amending provisions becoming law. The Bill's implementation will require employers to update their parental leave and bullying policies to reflect the new FW Act requirements with employees needing to be made aware of the type of conduct covered by the new anti-bullying framework. Employers will also need to analyse the potential impact that a more flexible workforce will have on their business and be mindful of the need to consult when making changes to an employee's ordinary hours of work.

It remains to be seen how the FWC will deal with the influx of bullying claims and how it will work in practice. All employers now deal with such complaints as a matter of course and this additional avenue of recourse involving complaints made against individual employees is bound to have enormous ramifications and involve significant management resources. It highlights the importance of effective training, policies and investigation procedures in relation to bullying in the workplace.

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