

## Employment & Safety Alert

### Outcome of the Fair Work Act review and other workplace law changes

November 2012

In a final flurry of activity before the end of the parliamentary year, on Wednesday the Parliament passed:

- a Bill amending the *Fair Work Act 2009* (Cth) (**FW Act**); and
- new federal legislation protecting redundant employees of bankrupt or insolvent employers.

Operators and users of road transport services should also be aware that, from January 2013, new road safety laws and laws regulating heavy vehicles will take effect.

#### Fair Work amendments

The *Fair Work Amendment Bill 2012* (**FW Bill**) adopts some of the recommendations of the Fair Work Act Review Panel published on 2 August 2012, and the Productivity Commissioner's final report on Default Superannuation Funds in Modern Awards published on 5 October 2012.

The changes include renaming Fair Work Australia (**FWA**), which will now be known as the Fair Work Commission (**FWC**). The role of President of the FWC will gain additional powers and the FWC will see a change in structure, both of which could result in changes to its decision making approach.

We identify some of the other key changes made by the FW Bill below.

#### Superannuation

From 1 January 2014, the only superannuation funds that employers may use as 'default' funds are MySuper products. MySuper products must meet more rigorous licensing criteria than other funds, including in relation to investment strategy and members fees.

This will limit the default funds which may be included in any new enterprise agreements and will result in significant amendments to the provision of default funds in modern awards. Specifically, all modern awards will be required to include:

- a term that requires an employer to make contributions to a superannuation fund for the benefit of employees in order to avoid paying a superannuation guarantee charge; and
- a default term which requires an employer to make contributions on behalf of an employee who has not chosen a fund to a 'generic MySuper product'.

The FWC must review the current modern awards as soon as practicable after 1 January 2014, in conjunction with the next modern award review, in order to ensure compliance with these requirements.

Accordingly, from 1 January 2014, all employers must select a MySuper product as their default fund, except if contributions are made to a defined benefits scheme or public sector scheme, or in accordance with an enterprise agreement made before 1 January 2014. In addition, from 1 January 2014, employers will be required to review their current superannuation arrangements to ensure compliance with modern awards.

#### Unfair dismissal and general protections applications

Once the amendments come into effect (this date has not yet been proclaimed) unfair dismissal claims and general protections applications relating to dismissals must be made within 21 days of the dismissal, rather than 14 and 60 days, respectively.

The FW Bill also extends the FWC's powers to summarily dismiss an unfair dismissal claim and to award costs against an applicant:

- the FWC may dismiss an application for an order on the basis that the applicant unreasonably failed to attend a conference or a hearing, or failed to comply with a direction of the FWC; and
- cost orders may be awarded against a party if the FWC is satisfied that that party caused the other party to incur costs because of an unreasonable act or omission in connection with the conduct or continuation of the matter.

These provisions are aimed at deterring applicants from making or pursuing unmeritorious claims.

## Enterprise agreements

The FW Bill specifically prohibits 'opting-out' clauses in enterprise agreements; that is, terms that purport to allow an employee or employer to elect not to be covered by an enterprise agreement. This amendment operates retrospectively so that opt-out clauses in current enterprise agreements will be of no effect.

This amendment is consistent with FWA's approach to the approval of enterprise agreements to date.

## Industrial action

The most significant aspect of the FW Bill in relation to industrial action is a limitation on the conduct of protected action ballots, which may no longer be conducted by a show of hands. Further, employees who appoint themselves as bargaining representatives may be included in a protected action ballot, provided that they are members of the union.

## Other legislation

In other last-minute legislative activity, Parliament also passed the *Fair Entitlements Guarantee Act 2012* (Cth), which replaces the GEERS legislation and provides for the Commonwealth to make redundancy payments (up to four weeks per year of service) and payments in lieu of other entitlements to employees whose employers are insolvent or bankrupt.

From 1 January 2013 the Road Safety Remuneration Tribunal, established by the *Road Safety Remuneration Act 2012* (Cth), may hear disputes and make road safety remuneration orders, which will operate like awards and impose limitations on remuneration arrangements to ensure that transport workers are not incentivised to work in an unsafe manner. The Tribunal may make orders on its own initiative that affect employers generally. Each state and territory is also expected to pass enabling legislation, mirroring the Queensland *Heavy Vehicles National Law Act 2012*, which commenced on 29 August 2012, to establish a national harmonised law and regulatory framework for heavy vehicles. These laws will adopt a new fatigue management system; new approach to vehicle inspections; and impose new offences relating to issues such as defect notice removal or defacement, refusing an auditor access to records and tampering with speed limiters.

## Key message

Employers will need to familiarise themselves with these amendments, particularly those in relation to:

- superannuation and conduct in response to unfair dismissal applications; and
- where relevant, the regulation of heavy vehicles.

Employers should ensure that their current business practices meet these new legislative requirements.

For further information, please [click here](#) to contact our national Employment & Safety team.