

Fair Work Act Update



What are the key changes to the Fair Work Act now operating and what is coming up?

On 27 November 2015, a number of key changes to the Fair Work Act (FW Act) took effect as summarised below and in a comparison table.

Parental leave – more procedural fairness in requesting an extension of leave

- Where an employee requests an additional 12 months of parental leave, employers are now required to give an employee a reasonable opportunity to discuss the request.
- This will place a greater onus on the employer to genuinely consider the request and discuss options to facilitate the extended leave, if possible.
- The existing obligation that prevents an employer from refusing such an extension, except on genuine business grounds, will continue to apply.

Protected Action Ballot Orders (PABO) – bargaining must first commence before any protected action can take place

- Employee representatives cannot apply for a PABO until the employer has issued a Notice of Employee Representational Rights (NERR) to its employees.
- A NERR can only be issued after an employer either agrees to or initiates bargaining, or a majority support determination, scope order or low paid authorisation is issued by the Fair Work Commission (FWC).
- This reverses the J.J. Richards' decisions which confirmed that a union could take protected industrial action even though the employer has not agreed to bargain.
- This will mean a union will have to pursue a majority support determination to force bargaining to occur if the employer is refusing to bargain.

Greenfields agreements – less red tape

- Employers are now able to take a proposed Greenfields agreement to FWC for approval if a deal has not been reached within six months of bargaining commencing.
- This will enable a degree of certainty around negotiating timelines and may help to prevent delays of major projects.
- However, employers must have provided written notice to employee representatives (i.e. union), specifying the date that the negotiating period will commence. Once the notified negotiation period has ended, the employer can then apply to FWC for approval of the Greenfields agreement.

- During the negotiation period, bargaining for a Greenfields agreement will be subject to the good faith bargaining obligations.
- The Greenfields agreement will be subject to a Better Off Overall Test (BOOT) and must provide for pay and conditions consistent with those in the relevant industry for equivalent work.

Further changes on the horizon

The Federal Government has recently introduced a new Bill to Parliament that would make further changes to the FW Act including:

- clarifying an employer’s obligation to pay annual leave loading on termination of employment;
- right of entry provisions; and
- transfer of business rules.

	Prior to 27 November 2015	Now
PABO order	<p>Unions did not have to wait for the employer to issue the NERR to apply for a PABO.</p> <p>Unions used this as a tool to force employers to bargaining.</p>	<p>A union can only apply for a PABO if the employer has agreed to bargain or FWC has issued a Majority Support Determination, scope order or low-paid authorisation.</p> <p>Unions are prevented from applying for a PABO before an employer has agreed to bargain.</p>
Greenfields	<p>When negotiating Greenfields agreements, unions could seek excessive wage claims which the company could not agree to financially.</p> <p>Negotiations would commonly become protracted because a Greenfields agreement could only be submitted to the FWC for approval if it had been signed off by the relevant union negotiating its terms.</p> <p>This caused entire projects to be delayed which had significant cost implications.</p>	<p>An employer negotiating a Greenfields agreement can give the union notice of the negotiating period.</p> <p>The bargaining period is no less than 6 months.</p> <p>Good faith bargaining requirements apply during the 6 month negotiating period.</p> <p>At the end of the negotiating period, if agreement is not reached the employer can file the Greenfields agreement with FWC.</p> <p>The Agreement must meet the BOOT.</p>
Parental leave	<p>Employees could request an additional 12 months of parental leave.</p> <p>Request could be denied on reasonable business grounds.</p>	<p>This is unchanged but an employer must now give the employee a reasonable opportunity to meet and discuss the request.</p> <p>Request can still be denied on reasonable business grounds.</p>