SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Forshaw asked on 11 December 2008, Hansard page 8:

Question

Comparison between National Employment Standards (NES) and State/Territory legislation

I would like a comparison chart between the NES and the relevant state jurisdictions about where there is a difference.

Answer

The following table briefly sets out the main elements of NES entitlements and compares them to corresponding entitlements under State or Territory legislation. In many cases, the NES provide a similar entitlement to that that has historically been provided by State or Territory law (e.g. the quantum of annual leave, 4 weeks, is similar across all jurisdictions). In other cases, the NES provide an entitlement that differs from that available in other jurisdictions (e.g. the right to request flexible working arrangements).

There are instances where the law of a State or Territory currently provides an employee with an entitlement that is, in some aspects, more favourable than the NES. However, the NES will provide a set of minimum entitlements to all employees from commencement, that operates together with modern awards to provide a comprehensive safety net. The NES may be supplemented through modern awards or enterprise agreements.

Supplementing the NES through award modernisation

A modern award may include terms that supplement NES entitlements, where the Australian Industrial Relations Commission (AIRC) considers it necessary to include such terms to ensure the maintenance of a fair minimum safety net for employees covered by the modern award, having regard to existing award/NAPSA provisions for those employees (paragraph 32 Award Modernisation Request). However, the AIRC may only supplement the NES in this way if the effect of a term is not detrimental to an employee in any respect compared to the NES (clause 55(4) FW Bill).

This means that a modern award may provide more beneficial entitlements than the minimum standards provided by the NES. This may occur where an award has historically provided a more generous entitlement than the NES (whether through reference to State or Territory legislation or otherwise). For example, a modern award could provide for more beneficial payment arrangements for periods of leave.

Maximum weekly hours

	NES	NSW *Industrial Relations Act 1996*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT	NT
Entitlement	An employer must not request or require an employee to work more than: - for a full-time employee: 38 hours a week - for a non full-time employee: the lesser of 38 hours or their ordinary hours of work in a week, unless the additional hours are reasonable. Lists factors to be taken into account when determining if additional hours are reasonable.	Applies to employees whose hours are set by a State award. Ordinary working hours must not exceed 40 hours per week (s22).	Unless the instrument provides otherwise: The periods for which an employee under pre-Sept 2005 industrial instruments is required to work must not exceed 6 days in any 7 consecutive days, 40 hours in any 6 consecutive days or 8 hours in any day (s9). The periods for which an employee under specified post-Sept 2005 industrial instruments is required to work must not exceed 6 days in any 7 consecutive days, 38 hours in any 6	No express provision.	An employee is not to be required or requested to work more than their ordinary hours plus reasonable additional hours. Lists factors to be taken into account to determine if additional hours are reasonable (s9B). Ordinary hours are as specified in an industrial instrument. If no industrial instrument specifying ordinary hours, they are 38 hours per week (s9A). No restriction on the number of ordinary hours	Unless prescribed otherwise in an Act, award or agreement, an employee's maximum ordinary hours per week are not to exceed 38 (s47AC).	No express provision.	No express provision.

	NES	NSW *Industrial Relations Act 1996*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT	NT
			consecutive days or 7.6 hours in any day (s9A)		that can be specified in an industrial instrument.			
Averaging	A modern award or enterprise agreement may provide for averaging of hours of work. Award/agreement free employees may agree in writing to an averaging arrangement over a period not exceeding 26 weeks.	Applies to employees whose hours are set by a State award. Ordinary working hours may be averaged over 12 weeks, or over a period not exceeding 52 weeks in the case of seasonal employment (s22).	No express provision.	No express provision.	No express provision.	No express provision.	No express provision.	No express provision.
Payment of overtime	No express provision.	No express provision.	Must be paid overtime for hours worked in excess of those prescribed or for work before or after the fixed or recognised start and finish times each day (ss9 and 9A).	No express provision.	No express provision.	No express provision	No express provision.	No express provision.

Requests for flexible working arrangements**

	NES	NSW *Industrial Relations Act 1996*	Vic *Equal Opportunity Act 1995*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT	NT
Eligibility	A full-time or part-time employee with at least 12 months continuous service with their employer and long-term casual employees.	All employees whose conditions are set by a State industrial instrument.	All employees	An employee on parental leave.	An employee entitled to parental leave.	An employee on parental leave.	An employee entitled to parental leave.	No express provision.	No express provision.
Entitlement	Employee who is a parent, or responsible for the care, of a child under school age may request flexible working arrangements to assist the employee to care for the child. The employer may only refuse the request on reasonable business grounds.	An employee may make a written agreement with their employer to work part time. The agreement may include an entitlement for the employee to return to work full time (s76).	Employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate responsibilities employee has as a parent or carer. All relevant factors must be considered to determine if an employer has unreasonably refused to accommodate, including the	An employee on parental leave may apply to return to work part-time to enable the employee to continue to be the child's primary caregiver when not at work. The part time period applied for cannot continue beyond the child reaching school age (ss29B and 29C). The employer	An employee entitled to parental leave may, by agreement with their employer, reduce hours to an agreed extent in lieu of taking parental leave. (Sch 5, cl9)	An employee may request to return to work on a modified basis (days and/or hours) upon finishing parental leave (s38). The employer is to agree to the employee's request unless the employer is not satisfied the request is genuinely based on the employee's parental responsibilities or there are	An employee entitled to parental leave may, by agreement with their employer, reduce hours of employment to an agreed extent in lieu of taking parental leave (Sch 2, cl9).	No express provision.	No express provision.

	NES	NSW *Industrial Relations Act 1996*	Vic *Equal Opportunity Act 1995*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT	NT
			employee's circumstances and the nature of their role, the nature of the arrangements and the employer's size and financial circumstances. An employee may make a complaint to the Victorian Equal Opportunity and Human Rights Commission.	must not unreasonably refuse the application and, if refused, the employer must provide written reasons (s29D).		reasonable grounds to refuse the request because of the adverse effect on the business. Employee may subsequently request to return to ordinary working hours (may be refused if adverse effect on business), or employer may reasonably require employee to resume ordinary hours (based on operational or business grounds or if the child has reached school age).			

** Note: Under clause 66 of the Bill, State and Territory laws will continue to apply to the extent that they provide more beneficial entitlements to employees.

Parental leave

	NES	NSW *Industrial Relations Act 1996*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT	NT
Eligibility	A full-time or part-time employee with 12 months continuous service or 'long term casual employee' at date of birth or placement of child for adoption or, in specified circumstances, at the time leave starts.	Full-time, part-time and regular casual employees with at least 12 months continuous service with the employer.	An employee (other than seasonal employees, pieceworkers and non-long term casual employees) with at least 12 months continuous service with their employer and 'long-term casual employees'.	Full-time and part-time employees with at least 12 months continuous service with their employer.	Full-time, part-time and eligible casual employees with at least 12 months continuous service with their employer.	Full-time and part-time employees with at least 12 months continuous service with their employer.	No express provision.	No express provision.
Entitlement	Eligible employee entitled to 12 months unpaid parental leave if the employee has responsibility for the care of the child. An employee couple is entitled to up to 24 months' leave. Each parent is entitled to up to 12 months' leave. An employee who takes 12 months' unpaid	Eligible employee entitled to 52 weeks unpaid parental leave (s 54).	Eligible employee entitled to 52 weeks unpaid parental leave (s18). Employee entitled to or taking maternity leave may apply for an extension for a total period of up to 104 weeks (s29A). Employee entitled to or taking parental leave (other than maternity leave)	Eligible employee entitled to 52 weeks unpaid parental leave related to the birth or adoption of a child (Sch 5, cl 2)	Eligible employee entitled to 52 weeks unpaid parental leave (s33). Employee may request extension of parental leave by a further consecutive period of not more than 52 weeks (s33).	Eligible employee entitled to 52 weeks unpaid parental leave (Sch 2, cl 2)	No express provision.	No express provision.

	NES	NSW *Industrial Relations Act 1996*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT	NT
	parental leave may request an extension of up to a further 12 months' leave (although the other parent's leave will be reduced by the amount of the extension).		for the birth or adoption of a child may also apply for extension of up to a total of 104 weeks (taken as either or both 8 weeks short parental/adoption leave and 96 weeks long parental/adoption leave) (s 29A). A short-term casual employee is entitled to take 2 days unpaid carer's leave because of the birth of a child (s39B).					
Concurrent leave	For a period of up to 3 weeks leave at or around the time of birth or placement of a child, each member of an employee couple may take leave at the same time.	1 week at time of birth and 3 weeks at time of placement of the child with the employee for adoption.	1 week for birth-related leave and 3 weeks for adoption-related leave (s18).	1 week immediately after the birth or placement for adoption of a child (Sch 4, cl2).	1 week taken immediately after the birth or placement for adoption of a child. Employee may request an extension of this period for a further period of not more than 7 weeks (s33). (Same	1 week taken immediately after the birth or placement for adoption of a child with the employee (Sch 2, cl2).	No express provision.	No express provision.

	NES	NSW *Industrial Relations Act 1996*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT	NT
					requirements concerning approval of request to return to work on modified basis apply.)			

Annual Leave

	NES	NSW *Annual Holidays Act 1944*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT *Annual Leave Act 1973*	NT *Annual Leave Act*
Eligibility	Does not apply to casual employees.	No express exclusion of casual employees.	Does not apply to casual employees, pieceworkers and school-based apprentices and trainees.	Does not apply to casual employees.	Does not apply to casual employees.	Does not apply to casual employees or part-time employees who receive a loading in lieu of annual leave (s47AE).	Does not apply to an employee who receives a loading in lieu of leave under an award or agreement in addition to the employee's base rate of pay (s4).	Does not apply to public sector employees, casual employees or employees to whom an employment award applies that provides annual leave (s4).
Entitlement	4 weeks per year of service with an additional week for shiftworkers (as defined).	4 weeks credited to an employee at the end of each year of employment (s3).	4 weeks for each completed year of employment, with an additional week for shiftworkers (s11).	4 weeks per year of service (Sch 4, cl3).	4 weeks per year of service, up to 152 hours (s23).	4 weeks paid leave per year of employment (s47AE).	At the end of every year of employment, an employee is entitled to 4 weeks paid leave, with an additional week for shiftworkers (s5).	28 consecutive days leave annually (includes non-work days) after completing 12 months continuous service (s6). Up to extra 7 consecutive days for shiftworkers (s6).
Payment	Base rate of pay for ordinary hours of work in the period. Defined not to include incentive-	Payment at ordinary pay (s3). Ordinary pay generally includes shift allowances and	Employee must be paid at their ordinary rate (s13). Employee also entitled to 17.5%	Full pay for ordinary hours for the period of annual leave (noting that 'full pay' does not	Payment is to be made at the rate the employee would have received as his or her payment at	Payment is based on ordinary hourly or weekly rate of pay (that is, the wages paid to the employee	Paid at a rate equal to the employee's ordinary remuneration the employee would	Leave paid at rate equal to the employee's ordinary rate of pay plus a loading of 17.5%.

	NES	NSW *Annual Holidays Act 1944*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT *Annual Leave Act 1973*	NT *Annual Leave Act*
	based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amounts.	weekend penalties relating to ordinary time that would have otherwise been worked, but no other shift, penalty or overtime rates (s2). Ordinary pay is increased by bonus/incentive provided that ordinary annual pay (excluding bonus/incentives) does not exceed a set amount (s2).	annual leave loading if certain identified industrial instruments apply to an employee (unless the instrument provides otherwise).	include overtime, penalty rates, allowances or loadings) (Sch 4, cl5)	the time leave is taken, not including overtime, penalty rates or allowances.	in respect of his or her ordinary working hours) (s47AI).	have received for the period if the employee had not taken leave. Includes skill based allowances, board or lodging allowances, amounts under a bonus or incentive scheme usually paid with wages and the value of any board or lodging provided, but does not include penalty rates, overtime or allowances under an award or agreement that are not taken into account in deciding a rate of remuneration in relation to overtime (s6).	Includes over award payments, identified allowances, amounts under bonus or incentive scheme usually paid to an employee as part of weekly wage, an amount equal to the value of free board or lodging, skill based allowances and performance pay, but not district, site or climate allowances, penalty rates or overtime (s9).

Personal/Carer's and Compassionate leave

	NES	NSW *Industrial Relations Act 1996*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT	NT
Eligibility	Does not apply to casual employees (note casual employees entitled to unpaid carer's leave and unpaid compassionate leave).	All employees who have their sick leave set by a State award.	Does not apply to casual employees, pieceworkers and school-based apprentices and trainees. (Note casual employees are entitled to unpaid carer's and unpaid bereavement leave.)	Does not apply to casual employees. (Note casual employees are entitled to unpaid bereavement leave.)	Does not apply to casual employees.	Does not apply to a casual employee or a part-time employee who receives a loading in lieu (s47AE). Also does not apply if the entitlement is prescribed otherwise in an Act, award or agreement (s47AF).	No express provision.	No express provision.
Entitlement	Employees entitled to 10 days paid personal/carer's leave per year of service for personal illness/injury or to provide care/support to immediate family	Employees entitled to at least 1 week's paid sick leave per year of service (s26).	Employees entitled to 8 days sick leave for each completed year of employment and for each completed period of less than a year, 1 day per completed 6	Employees entitled to 10 days paid sick leave per year. Accrues progressively for first year and for each subsequent year, accrues at the start of each year. 5 days a	Employees entitled to 2 weeks paid leave (up to 76 hours) per year of service (s19). This entitlement may be taken as paid sick leave (s20) or paid carer's leave (s20A).	10 days paid personal leave for each completed year of employment. Accrues at set rate in first year of employment and annual entitlement credited on	No express provision.	No express provision.

	NES	NSW *Industrial Relations Act 1996*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT	NT
	or household member. Also entitled to 2 days unpaid carer's leave and 2 days paid compassionate leave per occasion (unpaid for casual employees).		weeks of employment (s10). May use up to 10 days sick leave each year as paid carer's leave (s39). If used annual entitlement, may take 2 days unpaid carer's leave per occasion (s39). Long-term casual employee entitled to 10 days unpaid carer's leave each year and other casual employees entitled to 2 days unpaid carer's leave per occasion. Also entitled to 2 days paid bereavement	year from accrued sick leave entitlement may be taken as leave to care for sick family member (Sch 3, cl6). Also entitled to 2 days paid bereavement leave on the death of a member of the employee's family (unpaid for casual employees) (Sch 3A).	Also entitled to 2 days unpaid carer's leave per occasion if cannot take paid carer's leave (s20B) and 2 days paid bereavement leave on the death of a member of the employee's family or household (s27).	anniversary of employment for second and subsequent years. 'Paid personal leave' means sick, carer's and bereavement leave (s47AF).		

	NES	NSW *Industrial Relations Act 1996*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA *Minimum Conditions of Employment Act 1993*	TAS *Industrial Relations Act 1984*	ACT	NT
			leave per occasion (unpaid for a casual employee) with unpaid bereavement leave to cover extra time reasonably required for travel (s40).					
Payment (where leave is paid)	Base rate of pay for ordinary hours of work in the period. Defined not to include incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amounts.	Full pay (not defined) (s26).	Full pay (s10). (Defined as payment in full for the time that an employee is absent from work.)	Full pay for ordinary hours of work for the period of the paid leave (does not include penalty rates, overtime, allowances or loadings) (Sch 3, cl5).	Payment is to be made at the rate the employee would have received as his or her payment at the time leave is taken, not including overtime, penalty rates or allowances (s18).	Payment is based on ordinary hourly or weekly rate of pay (that is, the wages paid to the employee in respect of his or her ordinary working hours) (s47AI).	No express provision.	No express provision.

Community Service Leave**

	NES	NSW *Jury Act 1977*	QLD *Industrial Relations Act 1999* and *Jury Act 1995*	SA *Juries Act 1927*	WA *Emergency Management Act 2005* *Juries Act 1957*	VIC *Juries Act 2000*	TAS *Juries Act 2003*	ACT *Juries Act 1967*	NT *Juries Act*
Eligibility	All national system employees.	Employees summoned to attend for jury service.	IR Act provisions apply to employees covered by certain identified instruments, unless the instrument provides otherwise.	Employees summoned to attend for jury service.		Employees summoned to attend for jury service.	Employees summoned to attend for jury service.	Employees summoned to attend for jury service.	Employees summoned to attend for jury service.
Entitlement	Entitlement to be absent from work for an eligible community service activity (i.e. jury service or voluntary emergency management activity).	Entitled to payment (see below).	Under the IR Act, an employee required to attend jury service is entitled to take jury service leave (s14A). Under the Jury Act, an employee who performs jury service is entitled to	Entitled to payment (see below).	Entitlement to payment where employee absent from work due to employee carrying out an 'emergency management response' (see below). An employee who performs jury service is	Entitlement to 'make up' pay (see below).	Entitled to be paid prescribed allowances and remuneration.	Entitled to fee in accordance with prescribed scale.	Payment for jury service at prescribed rate.

	NES	NSW *Jury Act 1977*	QLD *Industrial Relations Act 1999* and *Jury Act 1995*	SA *Juries Act 1927*	WA *Emergency Management Act 2005* *Juries Act 1957*	VIC *Juries Act 2000*	TAS *Juries Act 2003*	ACT *Juries Act 1967*	NT *Juries Act*
			remuneration and allowances under the prescribed scale. Employee may also receive 'special payments' to compensate employee who suffers injury, damage or loss arising out of their jury service. Subject to limitations. (s64).		entitled to be paid by the State the prescribed allowances and expenses.				
Payment	Employee (other than casual employee) absent from work on jury service leave is entitled to be paid at base rate of pay for	Employee entitled to be paid the prescribed rate. This comprises attendance fee and allowances. Attendance fee is only payable if the	Under the IR Act, when employee is on jury service, employer is to 'make up' pay to employee's ordinary amount – i.e. make up the	Employee entitled to be paid under prescribed scale if the employee is not paid wages or salary by their employer when the employee is	Where employee absent from work due to carrying out emergency management response, employer must pay the	Employee is entitled to be reimbursed by employer an amount equal to the difference between the jury service fee paid by the	Subject to providing satisfactory evidence to the Registrar, employee entitled to receive payment of amount of loss	Receives payment of prescribed fee for attendance (s51) and payment of expenses (s52).	If employee absent from work on jury service continues to receive their ordinary pay and leave credits from their employer,

	NES	NSW *Jury Act 1977*	QLD *Industrial Relations Act 1999* and *Jury Act 1995*	SA *Juries Act 1927*	WA *Emergency Management Act 2005* *Juries Act 1957*	VIC *Juries Act 2000*	TAS *Juries Act 2003*	ACT *Juries Act 1967*	NT *Juries Act*
	ordinary hours of work in the period of the absence, capped at 10 days. This amount will be reduced by any amount of jury service pay the employee has received. Other community service leave is unpaid.	employee's full wage is reduced during the period of service and then only to the extent of that deduction.	difference between the State-provided jury pay (amount stated on the court documentation) and the ordinary rate the employee would have been paid if the employee had not taken jury service leave (s14A).	absent from work on jury service. If the employer does pay the employee during the absence, the employer is entitled to be reimbursed an amount equal to the prescribed fee that would otherwise apply (s70).	employee at their ordinary rate of pay for the period the employee would have ordinarily worked (s92). An employee who performs jury service must be paid by their employer the earnings the employee could reasonably expect to receive during the period of jury service. Employer who so pays is entitled to be reimbursed the prescribed amount by the	State and the amount the employee could reasonably have expected to receive had the employee not been performing jury service. (s52).	of salary, wages or income, or other monetary loss, that employee incurred as a result of attendance at court, up to a specified maximum amount.		does not get prescribed payment. If this not apply, the employee will receive an attendance fee and may also receive payment if the employee has suffered financial loss.

	NES	NSW *Jury Act 1977*	QLD *Industrial Relations Act 1999* and *Jury Act 1995*	SA *Juries Act 1927*	WA *Emergency Management Act 2005* *Juries Act 1957*	VIC *Juries Act 2000*	TAS *Juries Act 2003*	ACT *Juries Act 1967*	NT *Juries Act*
					State. If the employer does not pay, the employee is entitled to receive the prescribed payments (s58B).				

** Note: Under clause 112 of the Bill, State and Territory laws will continue to apply to the extent that they provide more beneficial entitlements in relation to engaging in eligible community service activities (such as jury service) than the entitlements in the community service leave NES. For example, the intention is to ensure the continued application of State or Territory laws that entitle employees to be paid more for jury service than they would receive under the NES, such as where the jury service may continue beyond the 10 day cap or for certain casual employees (e.g. in Victoria) who may be entitled to payment from their employer under the NES (casual employees have no entitlement to payment under the NES).

Long Service Leave

Employees currently derive entitlement to long service leave from State and Territory legislation, awards, agreements and other industrial instruments.

The long service leave NES is a transitional entitlement pending the development of a uniform long service leave standard to be agreed with the States and Territories.

Employees who are not covered by an applicable award-derived long service leave term under the long service leave NES will continue to derive long service leave entitlements from applicable State or Territory legislation (subject to its modification or exclusion by certain industrial instruments).

Public holidays

	NES	NSW *Banks and Bank Holidays Act 1912*	QLD *Industrial Relations Act 1999* and *Holidays Act 1983*	SA *Holidays Act 1910*	WA *Minimum Conditions of Employment Act 1993* *Public and Bank Holidays Act 1972*	TAS *Statutory Holidays Act 2000*	ACT *Holidays Act 1958*	NT *Public Holidays Act*	VIC *Public Holidays Act 1993*
Entitlement	An employee is entitled to be absent from work on a day or part-day that is a public holiday in the place where the employee is based for work purposes. Employer may reasonably request an employee to work on a public holiday and an employee may refuse if refusal reasonable or if the employer's request is unreasonable. Lists factors to take into account when considering the reasonableness	Provides for specified bank holidays and allows for the appointment of days as public holidays (s19).	The *Holidays Act 1983* declares 10 days as public holidays and provides for a process to substitute public holidays in certain circumstances (s2). Other holidays may be gazetted (s4). Also, in a district where no holiday is appointed for an annual agricultural, horticultural or industrial show, an employer and employee must agree on a	The Act declares 10 public holidays, plus other days as proclaimed or substituted.	The *Public and Bank Holidays Act 1972* specifies 10 public holidays, plus any other day appointed or declared by proclamation (s7).	The Act provides for 10 statutory holidays to be observed in Tasmania (s4). Also provides for further statutory holidays in specific areas of the State (s5).	The Act provides for 11 public holidays, plus any day or part day declared or substituted (s3). Employees covered by specifically identified awards also entitled to a union picnic day public holiday (s5).	The Act provides for 11 public holidays plus additional public holidays appointed or altered by declaration (sch 2).	The Act provides for 11 public holidays and specifies 2 substitute days for New Years Day and Boxing Day if either of these days falls on a Saturday or Sunday plus additional or substituted public holidays by gazettal (ss 6 and 7).

	NES	NSW *Banks and Bank Holidays Act 1912*	QLD *Industrial Relations Act 1999* and *Holidays Act 1983*	SA *Holidays Act 1910*	WA *Minimum Conditions of Employment Act 1993* *Public and Bank Holidays Act 1972*	TAS *Statutory Holidays Act 2000*	ACT *Holidays Act 1958*	NT *Public Holidays Act*	VIC *Public Holidays Act 1993*
	of the request or refusal. The NES provides for 8 national public holidays and additional days/part days prescribed by State/Territory laws. Public holiday may be substituted under a State/Territory law, or an employer and employee may agree on substitution under terms included in a modern award or enterprise agreement. An award/ agreement free employee may also agree on a substituted day.		working day to be treated as a show holiday (s15, IR Act).						

	NES	NSW *Banks and Bank Holidays Act 1912*	QLD *Industrial Relations Act 1999* and *Holidays Act 1983*	SA *Holidays Act 1910*	WA *Minimum Conditions of Employment Act 1993* *Public and Bank Holidays Act 1972*	TAS *Statutory Holidays Act 2000*	ACT *Holidays Act 1958*	NT *Public Holidays Act*	VIC *Public Holidays Act 1993*
Payment	Employee absent from work on a public holiday is entitled to be paid at their base rate of pay for the ordinary hours of work the employee would have otherwise worked on that day. If the employee would not have worked on the day, not entitled to payment.	No express provisions concerning entitlement to be absent from work or be paid on a public holiday.	An employee who is ordinarily required to work on a day on which a public holiday falls is entitled to full pay for the time the employee would have worked on that day. This does not apply to a casual employee, a pieceworker or if the employee is rostered-off on the public holiday (s15, IR Act). Also provides for penalty rates to be paid to an employee who is bound by a relevant	No express provisions concerning entitlement to be absent from work or be paid on a public holiday.	An employee, who in any area of the State is not required to work on a day because that day is a public holiday in that area, is entitled to be paid as if required to work on that day (s30).	No express provisions dealing with entitlement to be absent or rate of payment on a statutory holiday.	No express provisions dealing with entitlement to be absent or rate of payment on a public holiday.	If an employee is not required to work on a public holiday they are entitled to be absent from work on that day without loss of pay (does not apply to casual employees). If an employee is required to work on a public holiday and does so and is paid less than the rate prescribed by the regulations, the employee shall be paid for each hour at twice the 'ordinary time rate of pay' (including	Employees are entitled to be absent from work on a public holiday without loss of pay. This applies despite any contrary provision of an Act, contract, agreement or arrangement relating to employment (s10). The entitlement is of no effect to the extent of inconsistency with the WR Act or any instrument given effect under the WR Act (s10).

	NES	NSW *Banks and Bank Holidays Act 1912*	QLD *Industrial Relations Act 1999* and *Holidays Act 1983*	SA *Holidays Act 1910*	WA *Minimum Conditions of Employment Act 1993* *Public and Bank Holidays Act 1972*	TAS *Statutory Holidays Act 2000*	ACT *Holidays Act 1958*	NT *Public Holidays Act*	VIC *Public Holidays Act 1993*
			industrial instrument if they work on a public holiday.					under contract) they would have received if had worked and was not a public holiday. If the employee does not work when required, the employee is not entitled to be paid for the public holiday. These provisions do not apply to public service or an employee covered by an award that provides for payment for, or for work on, a public holiday. (s11)	

Notice of termination and Redundancy

	NES	NSW *Employment Protection Act 1982*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA	TAS *Industrial Relations Act 1984*	ACT	NT
Notice of Termination								
Eligibility	All national system employees, subject to specified exclusions.	No express provisions.	Lists categories of employees who are excluded from this entitlement.	Employee not entitled if guilty of serious misconduct.	No express provision.	Entitlement applies if employee's terms and conditions of employment are not prescribed by or under any Act or Act of the Commonwealth or regulated by an order, award, determination or agreement having effect under any Act or Act of the Commonwealth (s46). Employee also not entitled where guilty of serious misconduct.	No express provision.	No express provision.

	NES	NSW *Employment Protection Act 1982*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA	TAS *Industrial Relations Act 1984*	ACT	NT
Entitlement	An employer must not terminate an employee's employment unless the employee has been given written notice of the day of termination. The time between giving notice and the day of termination must at least be the required minimum period of notice, or payment in lieu. Minimum period of notice is based on a sliding scale, relative to an employee's period of continuous	No express provisions.	Employer must give minimum period of notice when dismissing an employee, as prescribed in the legislation. Scale of required notice same as the NES.	Employer must not terminate an employee's employment unless required period of notice is given, or employee is paid compensation in lieu. Notice scale is same as NES.	No express provision.	Either party must give notice of termination of employment. If wages paid weekly, period is 1 week. If fortnightly, 2 weeks. Any other case, monthly (s47).	No express provision.	No express provision.

	NES	NSW *Employment Protection Act 1982*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA	TAS *Industrial Relations Act 1984*	ACT	NT
	service. An employee over 45 with 2 years continuous service gets an extra week's notice.							
Payment in lieu	Yes - full rate of pay, for the hours employee would have worked had employment continued to the end of the notice period.	No express provisions.	Yes. Payment at least equal to the total of the amounts the employer liable to pay had employment continued to the end of the notice period (including allowances, loadings and penalties) (s85).	Yes, but no provisions setting rate of payment.	No express provision.	No express provision.	No express provision.	No express provision.
Redundancy								
Eligibility	Employee entitled to redundancy pay if employment is terminated at the employer's initiative	No express entitlement to redundancy. However, a procedure involving notification of	Applies to employees covered by certain identified industrial instruments	No express provision.	WAIRC General Order of 1 August 2005 deals with redundancy-(cl4). Certain	Provisions apply unless entitlement prescribed otherwise in an Act, award or agreement or	No express provision.	No express provision.

	NES	NSW *Employment Protection Act 1982*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA	TAS *Industrial Relations Act 1984*	ACT	NT
	because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour, or because of the insolvency or bankruptcy of employer. Certain categories of excluded employees listed in the NES.	the Registrar must be followed by employers of certain State award/agreement employees which can lead to the Commission ordering payment of severance pay. The notice procedure need not be followed if the employer has less than 15 employees or provides redundancy pay in accordance with the scale in the Act.	(unless the instrument provides otherwise). Categories of excluded employees are listed in the legislation.		excluded employees are listed in the order.	determined otherwise by the Tasmanian Industrial Commission. An employee with more than one years' service with their employer whose employment is terminated on account of redundancy.		
Redundancy pay scale	Years continuous service – redundancy pay in weeks:	Years continuous service – redundancy pay in weeks:	Years continuous service – redundancy pay in weeks:	No express provision.	Years continuous service - severance pay in weeks:	Employee to be made redundant must be given not less than 4 weeks	No express provision.	No express provision.

	NES	NSW *Employment Protection Act 1982*	QLD *Industrial Relations Act 1999*	SA *Fair Work Act 1994*	WA	TAS *Industrial Relations Act 1984*	ACT	NT
	>1 0 1 - 2 4 2 - 3 6 3 - 4 7 4 - 5 8 5 - 6 10 6 - 7 11 7 - 8 13 8 - 9 14 9 - 10 16 10+ 12	45+ <45 1-2 4 5 2-3 7 8.75 3-4 10 12.5 4-5 12 15 5-6 14 17.5 6+ 16 20	>1 0 1 - 2 4 2 - 3 6 3 - 4 7 4 - 5 8 5 - 6 9 6 - 7 10 7 - 8 11 8 - 9 12 9 - 10 13 10 - 11 14 11 – 12 15 12+ 16 (sch3)		>1 0 1 - 2 4 2 - 3 6 3 - 4 7 4 - 5 8 5 - 6 10 6 - 7 11 7 - 8 13 8 - 9 14 9 - 10 16 10+ 12 (cl4.4)	notice or 4 weeks pay in lieu of notice (s47AH). Also entitled to 2 weeks pay for each completed year of employment, up to a maximum of 12 weeks' pay (s47AH).		
Payment	Base rate for ordinary hours of work.	Not specified.	Payment at least equal to the employee's week's pay (s85B).	No express provisions.	Ordinary time rate of pay not including overtime, penalties, allowances, bonuses and any other ancillary payments of a like nature (cl4.1).	Payment is based on ordinary hourly or weekly rate of pay (that is, the wages paid to the employee in respect of his or her ordinary working hours) (s47AI).	No express provision.	No express provision.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Cameron asked on 11 December 2008, Hansard page 12:

Question

Pattern Bargaining

How do the Bill's general protection provisions on pattern bargaining relate to the Government's obligations under ILO Conventions? Do they meet Australia's international obligations?

Answer

The Government's view is that the collective bargaining scheme provided by the Fair Work Bill is consistent with Australia's international obligations under the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention 87) and the Right to Organise and Collective Bargaining Convention, 1949 (Convention 98).

Currently under the *Workplace Relations Act 1996* multiple-business agreements cannot be made, even where this is the parties' preferred means of setting terms and conditions, unless the parties first obtain an authorisation from the Workplace Authority. Strict criteria are applied. The Workplace Authority Director must only authorise the making of a multiple-business agreement if the Director is satisfied that it is in the public interest to do so, having regard to whether the matters dealt with by the agreement could be more appropriately dealt with by a collective agreement other than a multiple-business agreement (ie, a single business collective agreement).

The Bill aims to achieve productivity and fairness through bargaining that principally occurs at the level of the enterprise. Multi-enterprise bargaining is permitted where both the employer and employees genuinely agree. The Bill also facilitates bargaining with multiple employers of low paid employees.

The Bill allows for multi–enterprise bargaining, the making of common claims and the entering into of multi-enterprise agreements where that is the genuine choice of both parties. However, employers and employees will not have access to protected industrial action in order to pursue multi-enterprise agreements, with the exception of the "single interest employers" set out in subclause 172(5). These "single interest employers" include employers engaged in a joint venture or common enterprise, and related bodies corporate – which have been able to bargain together for a single enterprise agreement under Commonwealth legislation since 1996.

It will also be unlawful to coerce an employer or employees to make a multi-enterprise agreement. In deciding whether to approve a multi-enterprise agreement, Fair Work Australia must be satisfied that both the employers and employees who will be covered by the agreement genuinely agreed to it and that no person coerced or threatened to coerce the employer to make the agreement.

The Government's view is that the approach taken in the Bill promotes fair and productive collective bargaining outcomes for all affected parties, while being consistent with the principle enunciated by ILO supervisory bodies that determination of the bargaining level is a matter for the discretion of the parties.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Cameron asked on 11 December 2008, Hansard page 12:

Question

Pattern Bargaining

Are you aware of any other country in the world where such prohibitions on pattern bargaining apply?

Answer

The Department is not aware of any other country that applies the approach to pattern bargaining described in the Fair Work Bill.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Cameron asked on 11 December 2008, Hansard page 12:

Question

General Protections – definition of related bodies

On this issue of related bodies: first of all, is there a definition of 'related bodies'? I am interested in this because you can have a company contracting out significant parts of its operations, the day to day management of which comes under the control of the contractor, while the strategic control, the economic control, stays with that parent company. Is that then a related body?

Answer

Clause 12 of the Bill provides that 'related body corporate' has the meaning given by section 50 of the *Corporations Act 2001*. Section 50 provides that:

Where a body corporate is:
(a) a holding company of another body corporate; or
(b) a subsidiary of another body corporate; or
(c) a subsidiary of a holding company of another body corporate;
the first-mentioned body and the other body are related to each other.

The term 'related bodies corporate' is used in Part 2-4 of the Bill (subclauses 172(5) and 249(2) refer). Broadly speaking, these provisions enable related bodies corporate (including those that are franchisees) to bargain together for an enterprise agreement. Section 322 of the *Workplace Relations Act 1996* currently enables, in some circumstances, related corporations to be treated as a single employer. The concept of a related bodies corporate being able to bargain for a single employer agreement was introduced by the *Workplace Relations and Other Legislation Amendment Act 1996*.

In relation to the scenario mentioned above, Part 2-8 of the Bill will apply to transfers of business that involve an employer (the old employer) or an associated entity of the old employer outsourcing work to the new employer or an associated entity of the new employer. The term 'associated entity' takes its meaning from section 50AAA of the *Corporations Act 2001*. This term is broader than the concept of 'related bodies corporate'.

The definition includes, but is not limited to the following structures:
- a principal entity controlling an associate entity;
- an associate entity controlling a principal entity, where the operations, resources or affairs of the principal are material to the associate;
- a principal entity and associate entity that are related bodies corporate; and
- an entity (the third entity) controlling both the principal and the associate entity where the operations, resources or affairs of the principal and the associate are both material to the third entity.

Part 2-8 of the Bill would also cover transfers of business involving corporate restructures where the new employer is an associated entity of the old employer. As paragraph 1227 of the Explanatory Memorandum to the Bill makes clear, this clause is intended to ensure that employers cannot intentionally avoid obligations under workplace instruments by transferring employees between associated entities.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Cameron asked on 11 December 2008, Hansard page 18:

Question

Suspension of protected industrial action

Regarding clauses 423, 424 and 426, is there any other place in the world where this type of provision applies? Are they consistent with Australia's ILO obligations? Why is there a significant difference between clause 426 and clause 424 in the tests applied?

Answer

Restrictions on industrial action in other countries

Governments of several countries, including Sweden, Spain, Italy and the United States of America, have established mechanisms for terminating industrial action that is causing harm.

Consistency with Australia's ILO obligations

The Department considers that the provisions of clauses 423, 424 and 426 are consistent with Australia's international obligations under the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention 87), the Right to Organise and Collective Bargaining Convention, 1949 (Convention 98) and the principles adopted by the ILO Governing Body Committee on Freedom of Association (CFA).

The Fair Work Bill provides that the parties to a bargaining dispute can seek the assistance of Fair Work Australia to resolve their issues. Where parties agree Fair Work Australia may make a binding determination to resolve matters in dispute. This is consistent with the findings of the CFA that a strike may be temporarily restricted by law until all procedures available for negotiation, conciliation and arbitration have been exhausted, provided that the restriction is accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage (Freedom of Association Digest, 1996, para 501).

Differences between clause 426 and clause 424

Clauses 423 and 424 provide for Fair Work Australia to suspend or terminate protected industrial action if it is satisfied that the action:

- has threatened, is threatening or would threaten to endanger the life, the personal safety, health or welfare of the population (or part of it) or cause significant damage to the Australian economy (or an important part of it) (clause 424); or
- is causing or is threatening to cause significant economic harm to the employer or the employees (clause 423).

Termination of protected industrial action under either of these provisions will result in the making of a workplace determination by Fair Work Australia if the matters in dispute remain unresolved after a compulsory period of post-industrial action negotiation (clause 266).

Clause 426 provides for Fair Work Australia to suspend (but not terminate) protected industrial action where that action is threatening to cause significant harm to a third party. Fair Work Australia must suspend protected industrial action if it is satisfied that industrial action is adversely affecting either of the bargaining participants and is threatening to cause significant harm to a third party. Clause 426(4) sets out the matters to be taken into account. Fair Work Australia must be satisfied that suspension of industrial action is appropriate having regard to the objects of the Act and the public interest. Fair Work Australia must specify the period of suspension, and may extend the period on application, having regard to the same criteria. Fair Work Australia does not have the power to terminate protected action under this provision and arbitration does not result from granting a suspension.

As Clause 424 and Clause 426 apply to different circumstances it is appropriate that different tests, thresholds and remedies apply.

The Bill recognises that employees have a right to take protected action during bargaining. These measures recognise that while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases where the impact of that action on a third party is so severe that it is in the public interest, that the industrial action cease temporarily or permanently.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Brandis asked on 11 December 2008, Hansard page 34:

Question

Privacy Act protections

This is not so much a question, but: Ms James, when I was asking you about where other than in section 504 we might find protections for documents other than employee records inspected or copied under section 482, you indicated you thought that the Privacy Act might contain some protections. Would you please take that question on notice and provide a full, written response to what provisions of the Privacy Act you assert contain the protections that you have described?

Answer

The Fair Work Bill 2008 (the Bill) contains specific measures for the protection of employee records.

In addition to the protections in the Bill, the *Privacy Act 1988* (the Privacy Act) may apply to a document which contains personal information that has been collected by a permit holder under clause 482 or 483 of the Bill. Personal information is defined in s 6 of the Privacy Act as information or opinion from which an individual's identity is apparent or can be reasonably ascertained. The National Privacy Principles (NPPs) in Schedule 3 to the Privacy Act apply to the collection, storage, use and disclosure of personal information by an organisation. Where a permit holder is an organisation as defined in s 6C of the Privacy Act, it is required to comply with the NPPs where it collects personal information to be held in a record[1].

Section 6A of the Privacy Act provides that any act or practice by an organisation that is contrary or inconsistent with the NPPs will result in a breach of the Act. The NPPs place a number of obligations on how an organisation should protect personal information including restricting its use and disclosure (NPP 2), requiring adequate security measures be adopted including de-identifying the information where appropriate (NPP 4), having open and accountable privacy practices (NPP 5) and allowing appropriate access to, and correction of, the information.

In relation to protecting the use and disclosure of personal information, NPP 2 requires that any use or disclosure should relate to the primary purpose for collecting the information, or a secondary purpose outlined in NPP 2.1. NPP 2 applies a stricter standard for when sensitive information, such as information about health, political/religious affiliations and membership of a trade union[2], can be used for a secondary purpose. Generally, personal information collected from a document obtained under s 482 or 483 of the Bill could only be used or disclosed in relation to the investigation of the suspected contravention or where such use or disclosure falls within a secondary purpose under NPP 2.

Where an alleged breach of the Privacy Act occurs, the Office of the Privacy Commissioner has the power to investigate complaints[3] and where a breach is found, either assist settlement of the complaint or make a determination requiring the organisation to undertake certain actions, including the payment of compensation to the individual[4].

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[1] Section 16B of the Privacy Act.
[2] See s 6 of the Privacy Act for the definition of sensitive information.
[3] Part V, Div 1 of the Privacy Act.
[4] Section 52 of the Privacy Act.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Cameron asked on 11 December 2008, EEWR Hansard page 50:

Question

Workplace Ombudsman's operational procedures

Does the Fair Work Bill 2008 or the Workplace Ombudsman's operational procedures allow support persons for complainants/witnesses?

Answer

The Fair Work Bill does not specify the processes that must be adopted by the Fair Work Ombudsman. The general powers and functions of the Fair Work Ombudsman are set out in clause 682. Clause 684 provides for Ministerial directions to be given by legislative instrument to the Fair Work Ombudsman about the performance of his or her functions. Clauses 704 and 704 enable the Fair Work Ombudsman to give written directions to inspectors about the performance of their functions or the exercise of their powers.

The Workplace Ombudsman has provided the following information about the manner in which the Ombudsman currently performs his functions.

Yes, the Workplace Ombudsman's operating procedures provide that an interviewee may elect to have a support person attend the interview with them; a support person may include a union or legal representative, a friend, or a relative.

Attendance at these interviews is voluntary and the interviewee is not obliged to answer questions put to them. The interviewee also has the right to terminate the interview at any stage of the process.

The only circumstance where the Workplace Ombudsman would have reservations about a support person attending with an interviewee is when the support person is also a potential witness.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Crossin asked on 11 December 2008, EEWR Hansard page 51:

Question

Small claims court

When does the Workplace Ombudsman refer claimants to the small claims court?

Answer

The Workplace Ombudsman has provided the following information.

Since March 2006, the Workplace Ombudsman has recovered over $67 million on behalf of 60,868 employees. The Agency has also lodged over 130 matters at court and finalised approximately 75, resulting in penalties amounting to over $2 million.

Of the 25,000 claims dealt with by the Workplace Ombudsman each year, the majority are resolved through voluntary compliance. If at the conclusion of an investigation a Workplace Inspector is unable to establish sufficient evidence to substantiate a claim, then it is open to a Workplace Inspector to recommend that a complainant use the 'small claims procedure' under the *Workplace Relations Act 1996*. The relevant Magistrates' Court is able to make judicial decisions as to the credibility of evidence put before it. This is of particular relevance in circumstances where the Workplace Ombudsman has been unable to make such a determination due to conflicting evidence.

In addition, where the Workplace Ombudsman believes that there has been a breach of Commonwealth workplace relations laws, there are some circumstances where the small claims process is the most appropriate avenue for the recovery of outstanding entitlements. The small claims process is generally much quicker, cheaper and simpler than other court proceedings. In addition, small claims actions need not rely on the normal rules of evidence, and generally operate in a much less formal way than other court proceedings.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

Better Off Overall Test

For the purposes of paragraph 186(2)(d), does better off overall mean terms and conditions that are greater than the safety net? Or does it mean terms and conditions that are equal to the safety net?

Answer

Clause 186 provides that Fair Work Australia (FWA) must approve an enterprise agreement if the requirements of that clause and clause 187 are met, including that it is satisfied the agreement passes the better off overall test (BOOT) (paragraph 186(2)(d)).

For example, an agreement (other than a greenfields agreement) will pass the better off overall test if among other things, each award covered employee and each prospective award covered employee 'would be better off overall if the agreement applied to the employee than if the modern award applied to the employee' (clause 193(1)).

"Better off" carries its normal meaning: that is, a person is to be better off overall than the person would be if they were employed under the award. The terms and conditions offered by an employee must, in their overall application to an employee, be greater than those offered to the employee under the award. Technically, it would not be sufficient if the agreement offered terms and conditions that, in their overall application to an employee, were exactly equal to the award. However, it would be sufficient if the overall additional benefit under the agreement was small.

Further, in approving an agreement, FWA must also be satisfied, among other things, that the terms of the agreement do not contravene clause 55 of the Bill, which states that an enterprise agreement must not exclude the National Employment Standards (NES). An enterprise agreement can supplement the NES but only if those terms are not detrimental to an employee in any respect when compared to the NES. An enterprise agreement can also include terms that modify the NES, but only as permitted by a provision of the NES.

The Explanatory Memorandum at paragraph 773 states that the guarantee concerning the application of the NES and the operation of the BOOT in relation to modern awards means that the safety net cannot be undermined by the terms of an enterprise agreement.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

Better off overall test

For the purposes of paragraph 186(2)(d), when assessing an agreement for compliance with the BOOT, is there a requirement in the Bill for Fair Work Australia to take into account any clause in a proposed collective agreement that deals with the relationship between a union and an employer, which provides a benefit to the employees?

Answer

Clause 186(2)(d) requires Fair Work Australia (FWA) to be satisfied when approving an agreement that, among other things, the agreement passes the better off overall test (BOOT). Clause 186(2)(c) requires FWA to be satisfied that the terms of the agreement do not contravene the National Employment Standards (NES). Each award covered employee and each prospective award covered employee must be 'better off overall if the agreement applied to the employee than if the modern award applied to the employee' (clause 193(1)).

The 'better off overall' test requires a consideration of all of the benefits provided to an employee by the proposed agreement (considered as a whole) against the benefits to the employee provided by the award (again, considered as a whole). FWA would be required to consider any benefit that would flow to an employee under a proposed agreement in making this assessment.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing

Question

s.482 and s.483

How does an employer's requirement to disclose a record or document pursuant to s.482 and/or s.483 interact with other legislative obligations that are not regulated by the *Privacy Act 1988*? Example: s.37 of the *Workplace Surveillance Act 2005* (NSW) obliges an employer to not use or disclose certain surveillance information or records except in defined circumstances. Such information or records may be relevant to a suspected contravention of the proposed Bill. If an employer does not disclose information to a permit holder in order to ensure compliance with the *Workplace Surveillance Act 2005*, is the employer in breach of the obligations set out at s.482 and or s.483?

Answer

Paragraph 27(2)(m) of the Fair Work Bill provides that State and territory laws about workplace surveillance will not be excluded by the Fair Work Bill. The effect of this provision is that State and territory laws about workplace surveillance continue to operate to the extent to which they are not directly inconsistent with the Fair Work Bill.

As a general principle, where there is a direct inconsistency between a State law and a federal law, section 109 of the Constitution would require the federal law to prevail over the State law to the extent of that inconsistency.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

Special low-paid workplace determinations

Section 263(3) refers to a requirement for FWA to be satisfied that no enterprise agreement applies, or has previously applied, to an employer who may be the subject of the workplace determination being sought.

(a) Does the above requirement apply only to an employer?

(b) Does the above requirement apply to a new employer taking over a workplace which has previously had an enterprise agreement, but to which the new employer has not previously been bound? Example: A new employer, who has not previously had an enterprise agreement, takes over a workplace that does have, or has had, an enterprise agreement apply to it. Is the new employer still considered as not having had an enterprise agreement applying to them?

(c) Does the term 'enterprise agreement' in this clause include AWAs or ITEAs?

Answer

The requirement in subclause 263(3) applies only to employers. The subclause would prevent the making of a special low-paid workplace determination if an employer specified in the application for the determination is covered or has previously been covered by an enterprise agreement or another workplace determination, in relation to the work to be performed by the employees who would be covered by the special low-paid workplace determination. If, for example, an employer becomes covered by an enterprise agreement because they 'take over' a workplace (i.e. there is a transfer of business) the enterprise agreement will be considered to 'cover the employer' for the purpose of clause 263(3).

The reference in the subclause to 'enterprise agreement' is a reference to a collective agreement made under the Bill and does not include individual agreements such as AWAs or ITEAs. The issue of the interaction of transitional instruments (such as old Act collective agreements) with provisions of the Bill will be dealt with in the Fair Work (Transitional Provisions and Consequential Amendments) Bill.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

Enterprise agreements that have ceased to operate

For the purposes of section 53(5), what is the definition of 'ceased to operate'.

Answer

Subclause 53(5) provides that an enterprise agreement that has 'ceased to operate' does not cover an employee, employer or employee organisation.

Clause 54 sets out when an enterprise agreement is in operation. Subclause 54(2) provides that an enterprise agreement ceases to operate on the earlier of the following days:

- the day on which a termination of the agreement comes into operation under clauses 224 or 227;
- the day on which an agreement ceases to apply to an employee under clause 58.

Subclause 58(2) sets out the interaction rules where more than one enterprise agreement covers an employer in relation to the employment of particular employees. In practical terms, subclause 58(2) has the effect that:

- where an enterprise agreement (the first agreement) that has passed its nominal expiry date applies to an employee and a new enterprise agreement (the second agreement) that covers that employee starts to operate, the second agreement will replace the first agreement from that time and the first agreement will cease to operate in relation to the employee;
- where the first agreement has not passed its nominal expiry date at the time that the second agreement starts to operate, the first agreement will continue to apply to the employee until its nominal expiry date at which time the first agreement will cease to operate and the second agreement will start to apply to the employee.

Subclause 58(3) provides for the interaction between a single-enterprise agreement and a multi-enterprise agreement. In practical terms subclause 58(3) has the effect that where a multi-enterprise agreement applies to an employee and a single-enterprise agreement that applies to the employee (in relation to the same employment) subsequently comes into operation, the multi-enterprise agreement ceases to apply to the employee and the single-enterprise agreement will then apply to govern the employee's terms and conditions. This rule operate regardless of whether the multi-enterprise agreement has passed its nominal expiry date.

Illustrative examples of how enterprise agreements cease to operate in various cases are provided at pages 32, 37 and 38 of the Explanatory Memorandum to the Bill.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

Re: s.545

(a) Does this section have the effect of removing the 6 month cap on compensation provided by s.665(3) of the current Workplace Relations Act 1996?
(b) Where a court finds that an employer has unlawfully terminated an employee, has the maximum penalty available increased from that of the current *Workplace Relations Act 1996*?

Answer

(a) The cap contained in current s.665(3) is not contained in the Fair Work Bill 2008.

Clause 545(1) provides that the Fair Work Division of the Federal Court and Federal Magistrates Court can make any orders they consider appropriate to remedy a contravention of a civil remedy provision. This is consistent with the approach in the existing freedom of association provisions in the *Workplace Relations Act 1996* (WR Act) which are now incorporated into the General Protections provisions.

(b) The current maximum pecuniary penalty for an unlawful termination in breach of s.659 is $11 000. Under the Bill, the maximum pecuniary penalties are 60 penalty units (currently $6,600) for individuals and 300 penalty units (currently $33,000) for a body corporate. These penalty levels are consistent with the maximum penalties in the WR Act for terminating an employee in breach of the freedom of association provisions.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

Unlawful dismissal

RE: s.366 (1) (a)
(a) Is the time limit for making a claim for unlawful dismissal 60 days?
(b) Does this represent an increase from the limitation of 21 days contained within the current *Workplace Relations Act* 1996?

Answer

(a) Yes. Fair Work Australia has discretion to accept applications after 60 days in exceptional circumstances.

(b) Yes. The 60 day time limit is designed as a balance between the 21 day lodgement period for the current unlawful termination provisions and the 6 year time limit that applies to current freedom of association provisions.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

General Protections

Re: s.347(b)(vi)

(a) Does this subclause protect an employee (person A) from 'adverse action' where they have made a false or misleading statement to another employee (person B) about the obligation for that other employee (person B) to pay a bargaining services fee?
(b) What penalties may a person face if they mislead or falsely represent the obligation for another person to pay a bargaining services fee?
(c) Who is entitled to bring action against a person if they mislead or falsely represent the obligation for another person to pay a bargaining services fee?

Answer

(a) No, the definition of 'adverse action' does not extend to an employee making a false or misleading statement to another employee. However, clause 349 expressly deals with misrepresentations about a person's obligation to engage in industrial activity (which includes paying or not paying a fee, including a bargaining services fee, to an industrial association). This is one of the examples given in the Explanatory Memorandum (see paragraph 1416).

(b) A person who misleads another person to pay a bargaining services fee is exposed to a maximum civil penalty of 60 penalty units, which is currently $6 600 (Part 4-1- clause 539, item11).

(c) A person affected by the contravention, an industrial association or an inspector is entitled to bring an action against a person who has mislead or falsely represented the obligation for another person to pay a bargaining service fee (Part 4-1- clause 539, item 11).

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

General protections

s. 344

This clause refers to the obligations of an employer and requires them to not exert undue pressure or undue influence on an employee in relation to a decision by them regarding matters at subclause (a) through (e) inclusive.

(a) Is there an equivalent or reciprocal clause that prevents an employee from exerting undue pressure or undue influence on an employer regarding matters at subclause (a) through (e) inclusive?
(b) If the answer to question (a) immediately above is yes, please identify.
(c) Is there an equivalent or reciprocal clause that prevents an industrial organisation from exerting undue pressure or undue influence on an employer regarding matters at subclause (a) through (e) inclusive?
(d) If the answer to question (c) immediately above is yes, please identify.

Answer

(a) & (b) There is no clause that is directly reciprocal and that imposes obligations on employers as against employees in the same terms as clause 344. However, clause 343 would prohibit coercion by an employee against an employer in relation to each of these matters. If the undue influence or undue pressure was in the form of 'adverse action' as set out in clause 342 then it would also be prohibited by clause 340.

As set out in the Explanatory Memorandum for the Bill (see paragraphs 1395 and 1396) the special provision in clause 344 and its use of this lower threshold (undue pressure or undue influence, rather than coercion) in respect of the limited matters set out in clause 344 is deliberate. Each of the items listed in clause 344 is an arrangement that is able to alter the application of the employment safety net to an employee. Clause 344 recognises that there should be higher obligations on an employer seeking to enter into such an arrangement with an employee that effectively modifies or alters their conditions under the safety net to ensure such arrangements are entered into freely.

(c) & (d) There is no clause that is directly reciprocal and that imposes obligations on industrial organizations as against employers in the same terms as clause 344. However, clause 343 would prohibit coercion by an industrial association against an employer in relation to each of these matters. If the undue influence or undue pressure was in the form of 'adverse action' as set out in clause 342 then it would also be prohibited by clause 340.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

General Protections

s.353

This section deals with bargaining services fees.

(a) Does the proposed Bill contain an equivalent clause, or a clause that has the same effect of, the current s. 801 (1) of the Workplace Relations Act 1996? If yes, please identify.

(b) Does the proposed Bill contain an equivalent clause, or a clause that has the same effect of, the current s. 802 of the Workplace Relations Act 1996? If yes, please identify.

(c) Does the proposed Bill contain an equivalent clause, or a clause that has the same effect of, the current s. 805 of the Workplace Relations Act 1996? If yes, please identify.

Answer

(a) Yes - subclause 353(1).

(b) Yes - clause 348. It would prohibit a person from coercing another person or a third person to pay or not pay a fee (including a bargaining services fee) to an industrial association. This is broader than current s.802 as it covers a wider range of fees than bargaining fees and prohibits coercing someone to not pay a fee.

(c) Yes - clause 349. It expressly deals with misrepresentations about a person's obligation to engage in industrial activity (which includes paying or not paying a fee, including a bargaining services fee, to an industrial association).

The Department would also draw the Committee's attention to Ms James' evidence at pages 37 and 38 of the Transcript of the 11 December 2008 hearing which provides a comparison between the existing provisions and those in the Fair Work Bill.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

Regarding clause 423

a) **In relation to the significant economic harm provisions of this section, under what circumstances will an employee suffer significant economic harm?**
b) **Where a single employee suffers significant economic harm, does this section allow Fair Work Australia (FWA) to determine a dispute by way of a workplace determination or any other similar form of arbitration?**

Answer

a) FWA would be able to make an order suspending or terminating protected industrial action if it is satisfied that the action is causing, or threatening to cause, significant economic harm to the employer (or any employers) or employees who will be covered by the agreement and the significant economic harm is imminent. FWA must also be satisfied that the protected industrial action has been engaged in for a protracted period and the dispute will not be resolved in the reasonably foreseeable future. In exercising its discretion to suspend or terminate the action FWA would be required to ensure that the rights of the negotiating parties to take protected industrial action are appropriately balanced against the welfare of the parties.

Subclause 423(4) of the Bill contains a non-exhaustive list of factors that FWA must take into account when determining whether the protected industrial action is causing or threatening to cause economic harm to a person. Factors listed in subclause 423(4) that would be relevant to FWA assessing whether protracted industrial action was causing or threatening to cause significant economic harm to an employee would include the following:

- the source, nature and degree of harm suffered or likely to be suffered
- the likelihood that the harm will continue to be caused or will be caused
- the capacity of the person to bear the harm, and
- the views of the person and the bargaining representatives for the agreement.

It is the nature of industrial action that the parties will suffer some form of economic disadvantage and industrial action will of course impact each employee differently. What may constitute significant economic harm to any individual employee will depend very much on the particular circumstances of that employee. Income levels, personal responsibilities, and the general economic climate may all be factors that will influence how significantly industrial action will affect an employee.

b) The circumstances in which FWA may make an industrial action related workplace determination are limited. The specific requirements are set out in Part 2.5 Division 3 of the Bill.

FWA may only make a workplace determination in response to industrial action where:

- FWA has terminated the protected industrial action; and
- after the post-industrial action negotiating period the bargaining representatives for the agreement have not settled the matters that were at issue during the bargaining agreement.

It is important to note that to make a determination FWA must have made an order terminating, as opposed to simply suspending, a period of protected industrial action.

The economic harm that a single employee would suffer would be one of the factors that FWA would consider in deciding whether to terminate protected industrial action. However, whilst the individual circumstances of an employee would be given appropriate consideration, FWA would also consider other factors, including the economic impact of the protected industrial action on a group of employees as a whole and the additional factors specified in subclause 423(4) of the Bill.

As terminating protected industrial action restricts the right of the employer and all the other employees to take further protected action, there are additional factors (contained in paragraph 423(4)(f) of the Bill) that FWA is required to take into account when determining whether to exercise its discretion in this matter.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

Transfer of business

(a) For the purposes of section 311(4), what is the meaning of 'outsource'?
(b) Does there need to be a relationship between the old employer and the new employer for there to be a transfer of business?

Answer

The term 'outsource' is not defined and has its ordinary meaning. The Macquarie Dictionary (fourth edition) defines 'outsource' as 'to contract (work) outside the company rather than employ more in-house staff'.

For the purposes of the Bill, a transfer of business will occur if all of the requirements in subclause 311(1) are satisfied. One of these requirements is that there must be a 'connection' between the old employer and the new employer (paragraph 311(1)(d)). Subclauses 311(3) – (6) set out the circumstances in which there is a connection. This can be an asset transfer between the old employer and the new employer (or their associated entities), an outsourcing of work to the new employer (or its associated entity), an in-sourcing of work by the new employer or the new employer is an associated entity of the old employer.

An illustrative example of how particular outsourcing arrangements will be covered by the transfer of business provisions is provided at the beginning of page 195 of the Explanatory Memorandum to the Bill.

SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE
INQUIRY INTO THE FAIR WORK BILL 2008

Senator Humphries asked in writing:

Question

When employees have genuinely agreed to an enterprise agreement

(a) What is the effect of clause 188?
(b) After an agreement has been approved by FWA, can a collateral challenge on the validity of the agreement be made by a third party at a later stage?

Answer

Fair Work Australia (FWA) must approve an enterprise agreement if the requirements of clauses 186 and 187 are met. For agreements that are not greenfields agreements, FWA must be satisfied that, among other matters, the agreement has been genuinely agreed to by the employees covered by it (paragraph 186(2)(d)). FWA cannot approve an agreement if it is not satisfied that it has not been genuinely agreed to by the employees covered by it.

Clause 188 sets out a non-exhaustive list of matters for FWA to consider when determining whether an enterprise agreement has been genuinely agreed to by the employees who will be covered by it.

Once an agreement has been approved by FWA, its approval can only be challenged through an appeal to a Full Bench of FWA or through seeking prerogative relief from the High Court (the usual practice of which is to refer such matters to the Federal Court).

Whether a 'third party' could bring such proceedings will depend, in the case of an appeal to a Full Bench of FWA, on whether the third party is a 'person aggrieved' by the decision to approve the agreement (see clause 604 of the Bill). Clause 604 is modelled on the current appeal provisions contained in the WR Act and is intended to maintain the existing jurisprudence in relation to AIRC appeals. Paragraphs 2320 - 2329 of the Explanatory Memorandum to the Bill provide further information on this point. In the case of prerogative relief, it is intended that the jurisprudence of the High Court would apply.