Fair Work Amendment Bill 2012

Introduced into the House of Representatives on 30 October 2012
Portfolio: Education, Employment and Workplace Relations

Committee view

1.2 **The committee notes this bill engages a range of work-related rights and draws the Parliament's attention to its comments on the changes to existing time limits applicable to the lodging of claims relating to unfair dismissal and adverse employment action.**

Purpose of the bill

1.3 This bill makes amendments to the operation of the *Fair Work Act 2009* in accordance with a number of the Fair Work Act Review Panel recommendations contained in the *Towards more productive and equitable workplaces: An evaluation of the fair work legislation* of June 2012.

1.4 The bill also makes amendments in response to recommendations of the Productivity Commission in its final report on *Default Superannuation Funds in Modern Awards* (released on 12 October 2012), additional amendments to the structure and operation of the FWC and a number of technical amendments.

Compatibility with human rights

1.5 The bill is accompanied by a statement of compatibility which addresses in detail most of the human rights issues to which the bill gives rise. The statement notes that the bill is intended to promote the enjoyment of a number of rights, in particular the right to work (article 6 of the ICESCR), the right to just and favourable conditions of work (article 7 of the ICESCR), the right to organise and bargain collectively (article 8 of the ICESCR); non-discrimination in the enjoyment of the right to work (article 2 in conjunction with articles 6 and 7 of the ICESCR, as well the protections against discrimination in employment contained in the CEDAW, the ICERD, and the CRPD); and the right to a remedy for violations of the right to equality in work (ICESCR, CEDAW, CRPD).

1.6 The bill also proposes changes to the arrangements for the selection of default superannuation funds that are included in modern awards. The purpose is stated in the explanatory memorandum 'to ensure a transparent and contestable process that results in only those superannuation funds which are in the best interests of employees being included as default funds in modern awards' (p 13). These changes would appear to promote the more effective enjoyment of the right to just and favourable conditions of work, the right to social security and right to an adequate standard of living in relation to superannuation default funds.

Compatibility issues

Right not to be unjustly deprived of work (article 6(1), ICESCR)

Right of access to court or tribunal in determination of rights and obligations (article 14(1), ICCPR)

1.7 The bill involves a number of changes to existing time limits applicable to the lodging of claims relating to unfair dismissal and adverse employment action. The bill aligns the time limits for bringing unjust dismissal claims with the time limits for bringing claims of adverse employment action, by increasing the former from 14 to 21 days and reducing the latter from 60 days to 21 days. The grounds on which a claim of adverse action can be brought are set out in Part 3-1 of the *Fair Work Act 2009*. The grounds include action inconsistent with a workplace right under a modern award or enterprise agreement, action based on the lawful industrial action of a person who is a member or officer of an industrial association, or discrimination on the basis of an extensive list of grounds.

1.8 The statement of compatibility (p 8) notes that the bill 'shortens the time limit for applying to the FWC to mediate or conciliate a dispute about a dismissal in contravention of Part 3-1 from 60 days to 21 days'. It also notes that the Fair Work Commission will have a discretion to accept late applications 'in exceptional circumstances'. The statement justifies the reduction by referring to the alignment with the (currently shorter) time limit for unfair dismissal claims, arguing (p 8) that

> This will provide greater clarity to applicants and respondents and will require applicants to determine at the outset which claim they intend to pursue. Where an employee challenges a dismissal, it is in the interest of both the employee and the employer for the matter to be resolved quickly so that, in the event of a successful challenge, the employee can return to their original position with minimal impact on relationships and management of the business. Together with the amendment made by Part 1 of Schedule 6, this amendment balances the need to provide sufficient time for employees to consider the most appropriate application, and the need to provide certainty for employers in relation to the types of claims they may be exposed to. The FWC's discretion to accept late applications protects employees in relation to how the time limit is applied.

1.9 Given that in many cases employees may be in a position of less power and have less extensive knowledge about their legal rights than employers, the reduction from 60 days to 21 days is a very significant limitation on the existing rights of employees to seek remedies for alleged violations of their rights. The advantages of having the same time limit for related employment claims is understandable; however, it is not clear that it is appropriate for the alignment to be brought about by the drastic reduction in time limit for the significant rights that are protected under the general protections provisions of the *Fair Work Act 2009.* The suggestion that any unfairness can be alleviated because the FWC retains a discretion to allow late applications means that the right to a remedy is subject to an administrative discretion, the criteria for the exercise of which are not set out in the statement of

compatibility. In any event, if the reduction to 21 days is unreasonable, allowing for its discretionary waiver may not adequately secure the right to a remedy. The statement of compatibility provides no justification for aligning the time limits at 21 days – rather than 60 days – other than to refer to the desirability of resolving matters 'quickly'.

1.10 The proposed alignment and reduction implements Recommendation 49 of the June 2012 report of the Panel that reviewed the *Fair Work Act 2009*.[1] The Panel commented in relation to the changes that introduced the 60-day time limit (p 244):

> The effect of the change is that employees now have 60 rather than 21 days within which to consider making an application alleging their dismissal was unfair. This gives greater time and procedural fairness to employees, but leaves employers with an extra 39 days of uncertainty about whether an ex-employee will apply to FWA alleging their dismissal was unlawful.

1.11 In relation to the time limit that should be adopted under a harmonised time limit, the Panel noted (p 244):

> Stakeholders submitted a variety of suggestions about the appropriate time limits within which employees should be required to apply to FWA to deal with a general protections dispute.
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> Generally, employers submitted that the timeframes should be reduced. A number of employer representatives suggested that both section 365 (application for FWA to deal with a dispute involving dismissal) and section 372 (application for FWA to deal with a dispute not involving dismissal) be amended to prescribe a time limit of 14 days. ACCI recommended a time limit for both of 21 days. Yet more employers argued for both or either of the time limits to be reduced significantly.
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> Submissions from employee representatives and advocates tended to call for the timeframes to be increased or abandoned. (footnotes omitted)

1.12 The Panel stated in conclusion (pp 244-245) that :

> In considering aligning the time limits the Panel weighed up requests from employers to reduce the time limit for making an application to FWA alleging a breach of s. 365, with the evidence presented by unions in consultations that 14 days would not be enough time in which to assess and advise members on the merits of a general protections dispute. Based on a range of competing factors the Panel recommends the time limits be harmonised at 21 days.

[1] *Towards a more productive and equitable workplaces – Review of the Fair Work legislation*, June 2012, p 245.