

Notes on the New Fair Work Act

The federal government's Fair Work Bill has been passed, after much debate and with many amendments. At the same time, further legislation has been introduced to provide for the transition to the new system, expected to commence in July 2009. This special edition of Employment Matters outlines both these important developments.

On 20 March 2009, the Rudd Government finally secured parliamentary support for its Fair Work Bill, though only after last-minute negotiations broke a deadlock with the Senate over how to define a 'small business' for unfair dismissal purposes. More than 200 amendments were made to the original Bill, most proposed by the government itself following consultation with stakeholders.

The new Fair Work Act 2009 (FW Act) is now expected to take effect on 1 July 2009, replacing the Workplace Relations Act 1996 (WR Act). Before then, however, two further measures will need to be passed.

The first of these was introduced on 19 March 2009. The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (TPCA Bill) deals with the transition from the current system to the new Fair Work regime. Among other things, it provides for the repeal of the WR Act and outlines what will happen to 'old' awards and agreements.

A further Bill is scheduled for May 2009, to deal with consequential amendments to other federal laws. The government will be looking to have both these Bills passed by mid-June at the latest, following another Senate inquiry. There will also need to be new regulations and tribunal rules.

Discussions are also proceeding over the possibility of some States referring their powers to the Commonwealth, to enable the FW Act to deal with employers it would not otherwise cover – principally unincorporated businesses, but potentially also State public sector agencies.

This is almost certain to happen in Victoria, which has not had its own system since 1996. It remains to be seen whether other States follow suit, although Western Australia has already declined. Where any deals are done in time, consequential amendments to the FW Act will be included in the Bill scheduled for May.

FW Act: Main Features

None of the amendments accepted by the government have affected the main features of the new system. These remain:

- a new body, Fair Work Australia (FWA), to replace existing tribunals and agencies.
- the National Employment Standards (NES), setting minimum conditions for all national system employees, though only from 1 January 2010.
- a system of 'modern awards' to provide an additional safety net for most employees,

again commencing in January 2010.

- provision for the making of single- or multi-enterprise agreements (EAs), subject to new obligations to bargain in good faith, and a test that requires each employee to be better off overall than they would be under an applicable award retention of most of the existing restrictions on taking industrial action;
- broader access to unfair dismissal complaints, with employees excluded only if dismissed during a qualifying period of service (generally 6 months, or 12 months at a small business), or if they earn over an income threshold and are not covered by an award or agreement
- a new set of 'general protections' against other forms of discriminatory or wrongful treatment at work a slightly broader right for unions to enter workplaces, though still subject to many restrictions
- new rules on the extent to which employees retain their entitlements when transferring from one employer to another

At the same time, there were important changes in detail to the new legislation during its passage through the Senate. These are outlined in the sections that follow.

Changes to the NES

The most significant alterations relate to the new right to request flexible working arrangements. This will now apply not just to parents of school-age children, but to those with children under 18 who have a disability.

It will also now be possible for a dispute over an employer's refusal to accommodate such a request to be resolved by FWA or some other person, though only where the employer has consented to this in an EA, employment contract or other agreement. The same applies in relation to a refusal to allow a second year of unpaid parental leave.

In relation to long service leave, it remains the case that in the absence of any award entitlement, State or Territory laws can generally apply. If, however, there are collectively bargained arrangements at the commencement of the NES that operate in more than one State or Territory, and that are at least as favourable as the relevant State or Territory laws, FWA may make an order allowing those arrangements to continue.

Besides various clarifications to the notice of termination and redundancy pay provisions, the other change to the NES concerns the Fair Work Information Statement. This will now be issued by the Fair Work Ombudsman (FWO), and its content has been expanded to include information about termination of employment, individual flexibility arrangements and union rights of entry.

Modern Awards

A number of amendments were rejected in the Senate. These included proposals from the government to make it mandatory for awards to require consultation over major workplace changes, and to permit awards to include NSW-style controls on the safety of long distance transport work.

There was also an unsuccessful attempt to require individual flexibility arrangements, which vary the operation of selected award conditions, to be lodged with FWA. But FWA is specifically obliged to conduct research into the use of such arrangements.

In relation to the capacity for high income employees to agree not to be bound by an award, it is now expressly provided that this may be arranged before employment commences. But the high income threshold, which is intended to start at \$100,000 per year, indexed from August 2007, cannot be reduced from year to year.

Agreement-making

The most significant change concerns greenfields agreements. It was originally proposed that an employer wishing to make such an agreement must first notify every union with a potential interest. Following complaints from employer groups that this would hamper the making of agreements for new projects, especially in the resources sector, this requirement was removed.

The Bill was also amended to make it clear that there are no 'bargaining representatives' for such an agreement, and hence no obligation to bargain in good faith. But FWA may only now approve a greenfields agreement if the union(s) involved are entitled to represent the majority of employees to be covered by the agreement. Furthermore, it must be satisfied that approval is in the public interest.

Other Changes in this Area include:

- incorporating the requirement to 'recognise' other bargaining representatives in the good faith
- bargaining provisions, rather than having it as a stand alone requirement
- making it clear that the group of employees to be covered by an agreement must always be 'fairly chosen', though it will still be relevant to consider whether the selected group is 'geographically, operationally or organisationally distinct'
- allowing FWA to assume, in the absence of evidence to the contrary, that where a particular class of employees would appear to be better off under an agreement compared to an award, this would be true of each employee in that class
- removing the bar on the variation of agreements that have been approved on public interest grounds, despite failing the better off overall test giving FWA a discretion to refuse to approve any agreed variation to an agreement, though only on 'serious public interest grounds'
- permitting FWA to deal with (but not arbitrate) any dispute that arises over a proposed variation to an agreement

One further amendment that was initially adopted in the Senate was an opposition proposal to make it unlawful for an EA to restrict, control or dictate the use or non-use of independent contractors. But this amendment was dropped, as part of the deal that secured the passage of the Bill. Whether such a provision can validly be included in an agreement will depend on whether it meets the general 'matters pertaining to employment' test.

Industrial Action

Protected industrial action will not now be possible whenever a 'serious breach declaration' is in force in relation to the proposed agreement, because of a significant failure to bargain in good faith.

The strike pay provisions have also been clarified somewhat. In particular, an employer cannot insist on withholding all pay in response to a partial work ban that constitutes protected industrial action, while at the same time accepting the benefit of any work that is performed. The employer must make it clear that no work will be accepted while the ban persists. Alternatively, it can accept the work and make a proportionate deduction, or no deduction at all.

Unfair Dismissal

The government was persuaded to extend the time limit for lodging unfair dismissal claims, from 7 days after the date of dismissal to 14 days.

As previously noted, there was also considerable debate in the Senate over the definition of a 'small business employer', which affects both the qualifying period of service and the application of the Small Business Fair Dismissal Code.

In the result, the Bill was passed with no immediate change to the original definition, which refers to a business with fewer than 15 employees at the date of the dismissal, excluding casuals who are not employed on a regular and systematic basis.

Under a deal struck with Family First, however, the FW Act will be amended (through the TPCA Bill) to alter the threshold to 15 full-time equivalent positions. The calculation will be determined by totalling the number of ordinary weekly hours worked in the business (averaged over the four weeks preceding the dismissal), then dividing that total by 38. But this will only apply until 1 January 2011, when the definition will revert to the current standard.

The change will apparently not affect the small business exemption from redundancy pay obligations under the NES, for which the figure of 15 employees will continue to be determined on a simple headcount.

Right of Entry

A number of provisions were added to the legislation to strengthen protections for outworkers. These include new rights for union officials to enter premises to investigate suspected contraventions in relation to outworkers in the textile, clothing and footwear industry. Among other things, there is no general requirement in such a case to give advance notice of any entry.

In other respects, however, the government was intent on countering criticisms from business groups that it had unduly extended union rights of entry. The key reform remains: unions may enter any premises where they have members or potential members, regardless of whether those persons are covered by an award or agreement binding on the union. But there are tighter controls on permit-holders.

Documents may only be obtained from an employer if they are 'directly relevant' to an alleged contravention. Furthermore, records relating solely to non-union members may only generally be accessed with the consent of those workers, or by order of FWA. It is also made clear now that any personal information obtained by a union official must be treated in accordance with

the requirements of the Privacy Act 1988.

Finally, it will be considered a 'misuse' of entry rights if a permit-holder repeatedly enters premises with the intention or effect of obstructing or harassing an employer or occupier.

One other notable development was the removal of the longstanding provision for an employer to obtain a 'conscientious objection' certificate exempting it from any union right of entry for discussion purposes – a provision traditionally used by the religious order known as the Exclusive Brethren.

Other Amendments

Other changes incorporated in the final version of the FW Act include:

- in the provisions that allow FWA to vary the effect of an award or agreement that becomes applicable as a result of a transfer of business, a stronger emphasis on the need to consider the impact on the new employer's business
- a new requirement for deductions from wages to be authorised by the parent or guardian of any worker under 18
- the removal of any need for an employee or officer of an unregistered employer association to seek leave to appear before FWA

The TPCA Bill

As previously mentioned, the TPCA Bill deals with the many issues that arise in relation to the shift from the WR Act to the FW Act. That transition is complicated by two factors in particular.

The first is the multiplicity of old agreements, awards and other determinations that are still in force, originally made under different versions of the WR Act, the Industrial Relations Act 1988, or indeed State industrial laws. These are collectively referred to in the Bill as transitional instruments.

The second complication is that there are really two start dates for the new system: 1 July 2009, when the bulk of the FW Act is expected to take effect; and 1 January 2010, when the NES and modern awards will commence. Particular rules are needed for the bridging period between those two dates.

Accordingly, it is not a simple matter of repealing and replacing the WR Act. As explained below, parts of the Act will survive as a new statute on registered organisations. Other parts will continue in operation through the bridging period, or be preserved through the rules on transitional instruments.

Before getting to those matters, it is convenient to outline what will happen to the institutions that will ultimately be replaced by FWA.

Institutional Arrangements

The most straightforward transition is that the FWO will take over from the Workplace Ombudsman, as of 1 July 2009. Any investigations or proceedings on foot at that date will become the responsibility of the FWO, whose inspectors will be able to exercise the powers granted to them under the FW Act.

The Workplace Authority, by contrast, will continue in operation to complete the processing of any workplace agreements made or varied before 1 July, as well as any individual transitional employment agreements (ITEAs) lodged during the bridging period. It will not, however, have responsibility for EAs made under the new system, which will be handled by FWA. Its functions of providing education and advice on workplace laws will also pass to the FWO.

The Australian Industrial Relations Commission (AIRC) will work alongside FWA for at least the second half of 2009, while it completes the process of award modernisation. It will also finalise certain proceedings initiated 1 July 2009, such as unfair dismissal claims. All current AIRC members are automatically appointed to FWA.

The Australian Fair Pay Commission will conduct one last annual wage review in 2009, before handing that job over to FWA in 2010.

As for the Australian Building and Construction Commission, it is not mentioned in the TPCA Bill. But the government has previously indicated that its functions will be taken over in 2010 by a specialist unit in the FWO. What those functions will be, and whether any significant changes will be made to the Building and Construction Industry Improvement Act 2005, should become clearer after the release of a report the government has commissioned from Murray Wilcox QC.

Finally, there are the new Fair Work Divisions of the Federal Court and Federal Magistrates Court. From 1 July 2009, these will be responsible for hearing most applications in those courts that are brought under the FW Act, the TPCA Act and those parts of the WR Act that remain in force. It is unclear how many judges or magistrates will be appointed exclusively to these divisions.

Conduct Before 1 July 2009

As a general rule, anything done by or in relation to a federal system employer or employee before the commencement date of the FW Act remains subject to the WR Act as it stood immediately before that date.

So, for example, any dismissal that occurred before 1 July 2009 could only be the subject of an unfair dismissal or unlawful termination claim if the WR Act allowed that.

On the other hand, if an application is made to the AIRC after 1 July, but in relation to pre-commencement conduct, the general rule is that the application will be dealt with by FWA instead. The same applies to an appeal made after that date in relation to a pre-commencement decision by the AIRC. It will be dealt with by a Full Bench of FWA, although still applying the relevant WR Act rules and principles.

Processes Started Before 1 July 2009

As should already be apparent, there is no universal rule as to the continuation of processes started before 1 July 2009. In some instances, including unfair dismissal claims made before that date, the proceeding will be completed by the AIRC under the old WR Act rules (though any subsequent appeals lie only to a Full Bench of FWA).

The same applies to any workplace agreement made or varied before that date. Provided these are lodged within 14 days, the Workplace Authority will deal with them under a slightly modified

version of the WR Act rules, even if the lodgement takes place after 1 July.

With bargaining and industrial action, on the other hand, it is a different story. The approach taken here is that where bargaining has not been completed before 1 July, the parties must start again under the new provisions of the FW Act.

Hence, for example, any notice of industrial action will be of no effect to the extent that it relates to action to be taken after 1 July. Applications to suspend or terminate a bargaining period will be automatically discontinued, as indeed will the bargaining period itself. The same applies to applications for a protected action ballot order.

That said, where the AIRC or a court is in the process of dealing with an application under s 496 to stop industrial action, it can finish dealing with that. Where too a bargaining period has already been terminated on the ground of a threat to health or safety, or the economy, FWA will be able to proceed to make a workplace determination under the provisions of the FW Act.

Transitional Rules for the NES

When the NES come into effect on 1 January 2010, a term in a transitional instrument will be of no effect to the extent that it is 'detrimental' to a national system employee. Hence employers will need to ensure that they are fully compliant with the NES from that date, regardless of any previous agreements or arrangements.

But old awards and agreements will still be able to affect the operation of the NES in certain ways – for example in specifying an employee's ordinary hours of work, or allowing cashing out of annual leave, or stipulating the evidence required to substantiate a request for personal/carer's leave.

Where an uncertainty or difficulty arises as to the interaction of a transitional instrument with the NES, FWA will be able to vary the instrument to resolve the problem.

A further provision in the TPCA Bill concerns pre-NES commencement service. Generally speaking, any service with an employer prior to 1 January 2010 will count in determining NES entitlements; although where an employee has already had the benefit of a particular entitlement, they cannot 'double count' the service in question.

There are two major exceptions to this general rule. The first is that for paid annual leave or paid personal/carer's leave, an employee simply carries over whatever entitlement they have accrued prior to the NES. But the NES rules will subsequently apply to any taking or cashing out of that leave, regardless of the original source of the entitlement.

Secondly, pre-NES service will only count for the purpose of accruing the new entitlement to redundancy pay, if at the date of commencement the employee's 'terms and conditions of employment' (whether under an award, agreement or employment contract) provide an entitlement to redundancy pay.

There are also rules that determine what happens if an employee is in the middle of a period of leave when the NES commence.

Status of Old Agreements

Any agreement-based transitional instrument that is in operation when the FW Act commences will continue in force, until terminated or replaced. This covers a collective agreement, certified

agreement, workplace determination, s 170MX award, Australian Workplace Agreement (AWA) or ITEA made under the WR Act, as well as a preserved State agreement or an old IR agreement.

Such agreements do not just apply to the original parties, but to any new employees who fall within their coverage.

There is no sunset or 'drop dead' date for agreement-based transitional instruments – except those involving a non-national system employer, which cannot operate beyond 27 March 2011.

The permissible content of any old agreement is generally determined by whatever 'content rules' applied immediately before the commencement of the FW Act. Hence, for example, any workplace agreement made between 27 March 2006 and 30 June 2009 will remain subject to the 'prohibited content' rules in s 356 of the WR Act.

However, where an agreement confers any function or power on the AIRC, for example in relation to dispute resolution, the agreement will be taken to refer to FWA instead.

Old agreements will also generally be subject to whatever 'interaction rules' applied before the commencement of the FW Act, in determining whether it prevails or has priority over some other transitional instrument.

Modern awards will be generally be inapplicable while an old agreement remains in force. The main exception here is a pre-reform certified agreement (ie, a collective agreement made under the WR Act prior to Work Choices). This can operate alongside a modern award, though it will prevail over the award to the extent of any inconsistency.

As with EAs made under the FW Act, the basic rates of pay set by an old agreement cannot be less than the minimum rates set by a modern award or a national minimum wage order. If that requires a significant wage increase as from 1 January 2010 that would threaten the viability of a business, the employer can apply to FWA to phase in the increase.

Old agreements, like other transitional instruments, can generally be enforced under the compliance provisions in Part 4-1 of the FW Act. But no injunction can be granted by a court to restrain a breach of a transitional instrument.

Variation, Termination and Replacement of Old Agreements

Agreement-based transitional instruments cannot be varied by consent after the FW Act takes effect, with one exception. In 2008 the WR Act was amended to allow certain pre-Work Choices collective agreements to be varied and extended. The TPCA Bill specifically permits such variations to be made during the bridging period (ie, the second half of 2009), though not thereafter.

As for termination, the Bill adopts a standardised approach. For all 'collective agreement-based' instruments, the rules in the FW Act as to EAs apply. Hence they can be terminated either with the agreement of a majority of employees, or (but only after the nominal expiry date) by application to FWA.

Old collective agreements can also be replaced at any time by a new EA, regardless of whether the nominal expiry date is passed. But until that date, no protected industrial action can be taken in support of the new agreement.

As for old individual agreements, principally AWAs and ITEAs, termination may either be by mutual consent, or (but only after the nominal expiry date) by giving 90 days' notice to the other party.

Where an employee is covered by an old individual agreement that has passed its nominal expiry date but remains in operation, they are entitled to participate in bargaining for a new EA, including taking industrial action and voting on the new agreement. But if the EA is made, it will not apply to them while the old individual agreement remains.

One option in this situation is a 'conditional termination' of an expired individual agreement. If made by either the employer or employee, it will automatically mean that any new EA that is voted up will replace the individual agreement.

A conditional termination may also be made for an unexpired individual agreement, but only with the consent of both employer and employee. It has the additional effect of allowing the employee to participate in bargaining and industrial action regarding a proposed new EA, including any vote, something they would ordinarily be able to do.

Award Modernisation

The modern awards currently being formulated by the AIRC are expected, once they take effect on 1 January 2010, to replace all old awards (other than enterprise awards, as to which see below).

Until that happens, however, all current pre-reform federal awards and NAPSAs (notional agreements preserving State awards) will continue in force as award-based transitional instruments. In the case of NAPSAs, there is a sunset date of 1 January 2014. Any Australian Pay and Classification Scales (pay scales) derived from those instruments will also continue in effect, for employees not yet covered by a modern award.

Award-based transitional instruments have the same status as modern awards under the FW Act, for example in determining whether an employee is 'award/agreement free'. As with old agreements, they remain subject to whatever interaction or content rules applied immediately before the commencement of the FW Act. Once again, however, any reference to the AIRC having certain functions is taken to be a reference to FWA instead.

The TPCA Bill requires FWA to conduct a review of the modern award system after its first two years in operation, to determine whether the new instruments are operating effectively and without anomalies. This will occur ahead of the regular four-yearly review envisaged by the FW Act.

Importantly, the Bill guarantees that when a modern award takes effect, no existing employee will suffer any reduction in their take-home pay (for working the same hours or performing the same quantity of work) by reason of the new award. FWA is empowered to make 'take-home pay orders' to remedy any reduction in pay.

There is no comparable guarantee as to new employees hired after the award commences, or indeed as to any increase in business costs for employers. It is expected, however, that modern awards will contain transitional provisions to phase in any cost increases, or indeed reductions in entitlements.

Enterprise awards

The TPCA Bill establishes a process for the modernisation of enterprise instruments. These are enterprise-based federal awards and NAPSAs, together with any preserved State agreements (especially in NSW) that were derived from enterprise awards.

A person covered by such an instrument may apply to have it modernised, though this must be done by the end of 2013. It is up to FWA to decide whether to accede to the application, and if so what terms to include. This will require a comparison with any modern award that would otherwise apply.

If a modern enterprise award is made as a result of this process, it generally has the same effect as any other type of modern award, and provisions will be added to the FW Act to that effect. But no new enterprise awards can be created in the future.

Unless FWA specifically rejects an application to modernise an existing enterprise instrument, or the parties apply to have it terminated, it can continue to operate in its unmodernised form, together with any associated pay scales. But it cannot generally be varied, and as previously indicated all NAPSAs will expire at the end of 2013.

Transitional Arrangements for Non-national System Employers

As a result of the Work Choices reforms, Schedule 6 was added to the WR Act to deal with employers who were going to fall outside the new federal system, but who were bound at the time by federal awards or agreements. The TPCA Bill ensures that Schedule 6 can continue to operate, with some modifications, until 27 March 2011.

What Happens in the Bridging Period

During the second half of 2009, the Australian Fair Pay and Conditions Standard (AFPCS) in Part 7 of the WR Act will continue to set minimum standards as to wages, hours of work, annual leave, personal leave and parental leave. A term in any EA made during this period will be of no effect to the extent that it provides a less favourable outcome for an employee compared to the AFPCS.

Other WR standards on matters such as public holidays, rest breaks and notice of termination will likewise remain in operation.

EAs made during the bridging period will not be subject to the new 'better off overall test'. Instead a version of the current no-disadvantage test will apply, with agreements tested primarily against existing awards.

Employers who are eligible to do so may continue to offer ITEAs until the end of 2009, in accordance with current provisions in the WR Act. But no ITEA can have a nominal expiry date any later than 31 December 2009, and from next year there will be no provision for the registration of individual agreements.

Minimum Wages

Even after the AFPCS is replaced by the NES at the beginning of 2010, existing pay scales will remain in operation for any workers not yet covered by a modern award.

The TPCA Bill also provides for the continuation, at least until July 2010, of the standard federal minimum wage, the special federal minimum wage for workers with disabilities, and the default casual loading of 20% set by the WR Act.

By July 2010, FWA will be expected to have completed its first annual wage review. Besides adjusting modern award rates and any remaining pay scales, FWA must also make a national minimum wage order. This need not in the first instance set special minimum wages for award-free juniors or trainees; but that will need to be done by July 2011 at the latest.

Transfer of Employment

The existing transmission of business rules in the WR Act will continue to apply to any transmission that is completed before the FW Act commences, even if any transferring employees are not engaged by the new employer until after that date. Those rules include the provision, introduced by Work Choices, that limits the transmission of any award or agreement to a maximum of 12 months.

On the other hand, if the requirements for a 'transfer of business' (within the meaning of s 311 of the FW Act) are satisfied after 1 July 2009, it is the new rules that will apply – even if any transfer of employment has already happened.

Registered Organisations

The repeal of the WR Act does not affect the Registration and Accountability of Organisations Schedule. This will continue in effect as a separate statute, to be named the Fair Work (Registered Organisations) Act 2009.

The new Act will have two schedules, the first of which will be an amended version of Schedule 10, dealing with transitionally registered State associations. It will be possible to register under these provisions for a further 5 years, but no longer.

A second schedule will allow State-registered associations of employees or employers to apply to be 'recognised' as a federal organisation for the purpose of the FW Act. But this can only happen where the association has no federal counterpart, and where the State in question is prescribed by regulation.

Representation Orders

The new Fair Work (Registered Organisations) Act 2009 will contain expanded powers for FWA to make orders to resolve disputes over representation rights. It will be possible for a representation order to specify that a union has the exclusive right to represent the employees in a particular 'workplace group', or conversely that a particular union does not have that right.

The making of such an order will, among other things, affect a union's capacity to be a bargaining agent, to organise protected industrial action, to make greenfields agreements, or to exercise a right of entry.

In determining whether to make such an order, FWA must consider factors such as the history of award coverage and agreement-making for the group, the wishes of the employees concerned, and the extent to which a union has previously acted on their behalf.

According to the Explanatory Memorandum for the TPCA Bill, the new provisions are 'designed to ensure that organisations with a longstanding and active history of representing a workplace group should be able to continue to represent those employees'.

Important Disclaimer: The material contained in this publication is comment of a general nature only and is not and nor is it intended to be advice on any specific professional matter. In that the effectiveness or accuracy of any professional advice depends upon the particular circumstances of each case, neither the ASIAL, Chris Delaney & Associates Pty Ltd nor any individual author accepts any responsibility whatsoever for any acts or omissions resulting from reliance upon the content of any articles. Before acting on the basis of any material contained in this publication, we recommend that you consult your professional adviser.