
Forward with Fairness or Work Choices Lite?

What do the Rudd Government's workplace relations changes mean for business?

Rob Stevenson

LLB(Hons)(QUT), LLM(Environmental Resources Law) (QUT)
Accredited Specialist (Workplace Relations)
Principal, Australian Workplace Lawyers

A. INTRODUCTION

Over the last 15 years in Australia, there has been a movement away from the historically entrenched industrial concepts of centralised wage fixation, conciliation and arbitration and award coverage to a greater emphasis on workplace bargaining. The pace of change accelerated in 2006 when the Howard Government significantly amended the *Workplace Relations Act 1996*. Despite being watered down before the last election, the "Work Choices" laws represented arguably the most significant change in Australian industrial relations law since federation. As Opposition Leader, Kevin Rudd promised before the last election that he would "rip up" Work Choices, but does "Forward with Fairness" reflect this promise or are the proposed changes more "evolutionary" than "revolutionary"?

This paper will outline:

1. key changes to the industrial landscape created by Work Choices;
2. the components of the Forward with Fairness regime including the new National Employment Standards, modern awards, industrial umpire, agreement making and termination laws; and
3. key issues that a business will have to consider in its legal relationship with its employees under the new system.

This paper does not purport to be an exhaustive expose of the new laws. Rather, the intention is to give practitioners an overview of the important changes occurring in our system of industrial relations to assist practitioners in understanding how the workplace relations system might apply to their clients and in identifying issues for clients to address.

B. SETTING THE SCENE

Employment and industrial relations law in Australia has changed significantly in recent years. Since federation, the emphasis has, for most of the last century, been on centralised wage fixing and the setting of terms and conditions of employment on an industry wide basis. This started changing with the introduction of limited forms of collective enterprise bargaining in the early 1990s by the Keating federal government. The process of decentralising industrial relations speeded up with the election of the Howard government in 1996 but it was frustrated in several of its legislative initiatives over several years by the Senate.



With its majority in both houses of parliament gained at the federal election in 2004, the federal government took the opportunity to undertake major changes to the structure of industrial relations which commenced in March 2006. Work Choices was not a whole new act but took the form of significant amending legislation. It is fair to say with the benefit of hindsight that these changes were not well explained to the public at large and the resulting negative publicity led to some of the more dramatic changes, such as the new statutory minimum terms of employment being the only benchmark for making statutory individual and collective agreements, being reversed early in 2007. Despite these changes, the legislation still suffered from a perception, whether fair or otherwise, that it was weighted in favour of the employer and it was undoubtedly one of the factors behind the change of government in 2007.

Whilst the Opposition said that it would reverse the legislation upon coming into office, it was clear that the major change of introducing a truly national system was here to stay. The stated intention of the then Opposition was to modify the Work Choices system as follows:

1. collective bargaining to return to its pre-eminent status as the main method of determining conditions of employment on condition that employees could not be made worse off when compared with the safety net comprised of the National Employment Standards and modern awards;
2. the reinstatement of unfair dismissal protection for a broader group of employees;
3. essentially no changes to the controls on industrial action; and
4. awards were to be modernised and simplified and a safety net of 10 National Employment Standards put in place.

At present, the *Workplace Relations Act 1996 (Cth)* ("**WR Act**") covers somewhere between two thirds and three quarters of the Australian workforce and primarily applies to anyone who works for a trading, financial or foreign corporation or a Commonwealth agency. It also applies to the Territories and Victoria which referred its industrial relations powers to the Commonwealth during the Kennett years in 1996. Otherwise, sole traders, partnerships and most State government agencies remain subject to the state systems, as do corporations (including incorporated associations) without the requisite level of trading or financial activities.

It is important to make clear at the outset that the comments in this paper obviously apply to federal system employers and not employers remaining, at least for the time being, within the state system. However, a future referral of state powers appears likely.

Having said that, some entitlements in the Bill such as those relating to unpaid parental leave and unlawful termination apply to all employees, whether or not employed by a national system employer, because those matters rely on the external affairs power for their validity rather than the corporations power.

It should also be pointed out that whilst the WR Act is national in its approach and operates to the exclusion of state industrial laws, certain state laws are not excluded such as those relating to superannuation, long service leave, discrimination, occupational health and safety, workers compensation, and child labour.

The Rudd Government has taken a measured approach to its changes and did not, apart from the abolition of Australian Workplace Agreements, make significant changes quickly after its election in late 2007.

The Fair Work Bill ("**Bill**") was introduced into parliament on 25 November 2008. The main changes are intended to take force from 1 January 2010 but the unfair dismissal and



bargaining changes will take effect from 1 July 2009. The Senate has now reported on the Bill without recommending significant amendment and the Bill is due to be passed by the end of March 2009. It remains to be seen whether any amendments will be made before the final passage of the Bill.

The Bill is a lot more readable than its predecessor, although it is still lengthy at 575 pages (as is the Explanatory Memorandum at 429 pages). It is proposed that separate bills will be introduced by the end of March to deal with transitional arrangements and also to address the registration of trade unions and employer associations (a topic which is not included in the Bill).

C. WORK CHOICES

1. Background

Prior to the advent of the Work Choices amendments to the WR Act in March 2006, the obligations of most private sector employers in Queensland were governed generally by the *Industrial Relations Act 1999 (Qld)* ("IR Act"). It was only where employees were covered by federal awards (primarily because their employer was a named respondent to a federal award) that their employment was generally governed by the terms of those awards and the WR Act. However, most minimum terms and conditions were still found in the state legislation.

2. A national workplace relations system

The single most important change wrought by the Work Choices amendments was to bring all trading corporations under the federal workplace relations regime. All constitutional corporations (i.e., trading, financial and foreign corporations) were covered by the new federal system with the states only retaining responsibility for unincorporated bodies and businesses (such as sole traders, partnerships and trusts with a non-corporate trustee) and non trading companies and associations incorporated under state law and state government employees. Employers covered by Work Choices were no longer subject to state employment laws with exceptions limited to such matters as workplace health and safety, workers compensation, child labour and long service leave laws. The position of incorporated not for profit associations which did not have a significant trading function was and remains problematic, relying on a case by case analysis of the significance of their trading income. In addition to constitutional corporations, Work Choices applied to:

- employers and employees in the territories and on Christmas and Cocos Islands;
- the Commonwealth, including its authorities;
- waterside, maritime and flight crew employers; and
- all employers and employees in Victoria.

3. Transitional arrangements

Existing state based workplace agreements (Queensland Workplace Agreements and certified agreements) and awards applying to employers entering the federal system continued to apply as transitional agreements under the new federal laws. State awards were originally preserved for a three year period whilst state agreements were to expire on either their original expiry date or after a period of three years, whichever came first. If those



employers moving into the federal system had not negotiated a new federal agreement within 3 years, then the employer would automatically be moved to the federal award applying to their industry.

Employers who were already under the federal system were largely unaffected by these changes. However, employers not covered by Work Choices (e.g. unincorporated entities) who had previously fallen under federal coverage were to have a transitional period of five years during which current awards would continue to apply and during which time those employers could make arrangements to incorporate or choose to remain under the state system.

4. Australian Fair Pay Commission ("AFPC")

Under the pre March 2006 system, the Australian Industrial Relations Commission ("AIRC") set minimum and award classification wages through its Safety Net Reviews. The Work Choices amendments established a new independent wage setting body called the Australian Fair Pay Commission. The AFPC was independent of the government and its task was to set and adjust the:

- federal minimum wage;
- minimum award classification rates of pay;
- federal minimum wages for juniors, trainees and employees with disabilities;
- minimum wages for piece workers; and
- casual loadings.

5. Australian Fair Pay and Conditions Standard ("AFPCS")

Under the pre March 2006 system, individual federal awards provided for terms and conditions of employment and there was no one consistent minimum standard that all awards must meet. Under Work Choices, the government enshrined minimum conditions (annual leave, personal/carers leave including sick pay, parental leave including maternity leave, and maximum ordinary hours of work) in federal legislation. These conditions, together with the minimum wages set by the AFPC, made up the AFPCS. The standards were:

a. Annual leave

There was a guarantee of four weeks paid annual leave per year, plus an extra week for shift workers in businesses that operate 24 hours, seven days a week and regularly require employees to work shifts on weekends.

b. Personal/carers leave

The legislation provided for 10 days of paid personal leave per annum after 12 months of employment and pro-rata for employees with less than 12 months of employment. Leave was to be cumulative and up to 10 days in any year could be taken as carer's leave. A further two days of unpaid carer's leave per occasion was available for those who had exhausted their personal leave entitlements or who were employed on a casual basis. In addition, two days of paid compassionate leave per occasion were provided. Compassionate leave was a broader term than bereavement leave. Employees could still be required to produce evidence such as a statutory declaration when claiming the leave.



c. *Parental leave*

The legislation provided for all full-time and part-time employees with at least 12 months continuous service and eligible casual employees to take up to 52 weeks of unpaid parental leave at the time of birth or adoption of a child. An eligible casual employee was one who had been employed on a regular and systematic basis for 12 months with a reasonable expectation of ongoing employment.

d. *Maximum ordinary hours*

The legislation provided for maximum ordinary hours of work of 38 hours per week which could be averaged over a period of up to 12 months plus reasonable additional hours. Employees were required to receive at least the minimum hourly wage set by the AFPC. Additional payment for hours over 38 hours per week and penalty rates would remain part of awards and agreements.

e. *Casual loading*

A minimum casual loading of 20% was introduced under the AFPCS.

6. Awards

Awards were to be simplified and only deal with specific conditions. Long service leave, superannuation, jury service and notice of termination were not to be included in new awards because they were the subject of specific legislation.

Awards could contain provisions dealing with:

- Ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours;
- Incentive-based payments and bonuses;
- Annual leave loadings;
- Public holidays but only those declared under the law of a state or territory, e.g. not a union picnic day;
- Allowances;
- Loading for working overtime or shift work and penalty rates;
- Redundancy pay for employers with 15 or more employees which would be allowable only in genuine cases of redundancy;
- Stand-down provisions;
- Dispute settling procedures;
- Type of employment, e.g. full-time, casual, regular part-time and shift work;
- Conditions for outworkers including non-conditions provisions such as chain of contract arrangements, registration of employers, employer record keeping and inspection; and
- Facilitative provisions allowing for variations to conditions as agreed.



The following were not allowable in awards:

- Skill-based career paths;
- Restrictions on apprenticeships/traineeships training arrangements;
- Enterprise flexibility provisions;
- Restriction of the engagement of independent contractors and conditions;
- Restriction of labour hire workers;
- Tallies; and
- Trade union training leave.

All federal awards were to be retained but were to be simplified. An Awards Review Taskforce was established to examine existing awards with a view to providing a more accessible and easily understood list of award classifications and pay rates.

7. Agreements

The existing system of certified workplace agreements judged against existing awards was replaced with a system of Work Choices Agreements which were to be tested only against the AFPCS. A self checking lodgment system for all new agreements was also introduced. These provisions lasted until 2007 when they were wound back to a more traditional fairness test and assessment procedure by the Workplace Authority (which itself underwent a name change in 2007 from the Office of Workplace Services). Work Choices agreements could operate for up to five years.

It was against the law to include clauses in agreements which:

- restricted the use of agreements or provided that any future agreement must be a union collective agreement;
- restricted the use of contractors;
- allowed industrial action during the term of agreement;
- provided for trade union training leave, bargaining fees for unions or paid union meetings;
- provided for union involvement in dispute resolution; and
- provided a remedy for unfair dismissal.

There were six types of agreements introduced by the Work Choices amendments:

- Employee Collective Agreements – agreements negotiated between a group of employees in a workplace and an employer;
- Union Collective Agreements – agreements negotiated between employers and unions that represent employees in a workplace;
- Australian Workplace Agreements – agreements between individual employees and their employer assisted by an employee bargaining agent;



- Union Greenfields Agreements – agreements that could be negotiated for new businesses, new projects and new undertakings which did not yet have employees between the new employer and the union that would cover future employees;
- Employer Greenfields Agreements – an employer could make an agreement without a union on the same basis as the Union Greenfields Agreements; and
- Multiple Business Agreements – where a number of businesses carrying on the same type of business wanted to offer employees the same working conditions, e.g. franchisees.

8. Australian Industrial Relations Commission (“AIRC”)

The role of the AIRC was significantly changed. It lost its minimum wage setting function and the power to approve workplace agreements. It retained a limited role in the resolution of workplace disputes and more restricted powers in relation to awards, right of entry, unfair dismissals, the conciliation of unlawful termination claims and the regulation of registered organisations.

In particular, the previously broad ranging compulsory powers of the AIRC to conciliate and arbitrate on industrial disputes were greatly restricted. An employer and employee could decide whether to use the AIRC to help resolve their dispute on a voluntary basis but the AIRC was not able to finally determine the dispute without the agreement of the parties. Greater emphasis was placed on dispute resolution through the use of private ADR providers. In practice, this system of voluntary dispute resolution was rarely used.

9. Industrial action

Whilst protected industrial action was not prohibited, it became significantly harder to initiate under the new system. The introduction of secret ballots prior to industrial action and the limitations on union rights of entry severely restricted opportunities to commence lawful industrial action. The enhanced capacity to suspend or terminate bargaining periods also meant protected action was much easier to stop. Work Choices also expanded the remedies for unprotected industrial action.

10. Termination of employment

Work Choices restricted unfair dismissal laws to businesses with more than 100 employees. A six month qualifying period was also introduced and claims could not be brought where employment had been terminated because of operational reasons (e.g. redundancy).

Dismissed workers without access to the unfair dismissal jurisdiction of the AIRC could, in certain circumstances, seek a remedy in the federal courts for unlawful termination (with the AIRC limited to a conciliation role) if they were terminated because of:

- temporary absence from work because of illness or injury;
- membership or non-membership of a trade union;
- participation in trade union activities;
- seeking office or having acted as a representative of employees;



- filing a complaint or participation in proceedings against an employer;
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- refusing to negotiate, make, sign, extend, vary or terminate an AWA;
- absence from work during maternity leave or other parental leave; or
- temporary absence from work because of carrying out of a voluntary emergency management activity.

Employees could otherwise attempt to take action for breach of contract, breach of trade practices legislation or discrimination.

11. Effects of Work Choices

The most important changes brought about by Work Choices were the:

- creation of a national industrial relations system for the first time;
- lessening of involvement of outside parties (i.e. unions and the AIRC) in the workplace bargaining process;
- removal of the industrial award as the default basis of employment terms and conditions (at least initially);
- exclusion of unfair dismissal claims for employers with less than 101 employees; and
- introduction of universal core standards applicable to all employees.

Significant criticism (and a highly successful public relations campaign by the ACTU) was levelled at Work Choices, primarily on the bases of the potential loss of award protections and that it was undoubtedly more difficult for many dismissed employees to take action to seek reinstatement and/or compensation. Labor State governments of the day expressed the view that the Work Choices changes would:

- take away the right of up to 4 million Australian workers to seek a remedy if they felt that they had been unfairly dismissed;
- allow workers to be employed under agreements that provided for just five minimum conditions and that workers would lose award provisions for overtime, rest breaks, redundancy pay, shift allowances, penalty rates and public holiday pay;
- take away the wage-fixing powers of the AIRC and give them to the new Australian Fair Pay Commission with an implied mandate to award lower minimum wage increases; and
- move many employers and employees currently operating under state systems of industrial relations into the federal system with no choice in the matter.



D. INTRODUCTION TO FORWARD WITH FAIRNESS

1. Transitional changes

The Rudd Government legislated shortly after its election in December 2008 to phase out AWAs and lay the groundwork for its new system. The transitional Act included the following main changes:

- a. no new AWAs were to be made but existing ones were to remain in force;
- b. Individual Transitional Employment Agreements (“ITEAs”) were introduced on a limited basis;
- c. a new test similar to the old no disadvantage test was introduced for benchmarking proposed collective agreements;
- d. the award modernisation process was commenced; and
- e. the existence of transitional state awards (“NAPSAs”) was continued until 31 December 2009 to coincide with the introduction of modern federal awards.

Existing AWAs are allowed to run their course under the transitional legislation. ITEAs can be offered to employees until the end of 2009 although the agreement may continue to operate after that expiry date until it is terminated. However, this is subject to the requirement that the employer, as at 1 December 2007, employed at least 1 employee on an AWA or a preserved individual State agreement.

Under the new test, the Workplace Authority must be satisfied that the agreement would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees when compared to a reference instrument (generally an otherwise applicable award).

2. Timetable for introduction of Forward with Fairness

The following are the relevant dates to be aware of:

Date Step

27 March 2008 Transition Act commenced

19 December 2008 Priority modern awards issued (commencing on 1 January 2010)

Early to mid 2009 Substantive legislation passed

April to December 2009 Remainder of modern awards issued (commencing on 1 January 2010)

1 July 2009 Unfair dismissal provisions commence

Workplace bargaining provisions commence

31 December 2009 Nominal expiry date for ITEAs



1 January 2010 Commencement of:

- Fair Work Australia
- National Employment Standards
- Modern awards

3. Main features of Forward with Fairness

In summary, the government's intentions are to make the following changes in the workplace relations area:

- replace the existing government agencies, i.e. Workplace Ombudsman, Workplace Authority, Australian Industrial Relations Commission, Australian Fair Pay Commission and Australian Building and Construction Commission ("ABCC") with a new authority called Fair Work Australia ("**FWA**");
- replace the current Australian Fair Pay and Conditions Standard with 10 National Employment Standards guaranteeing basic conditions, applying to all employees covered by Commonwealth law;
- further simplify and rationalise industrial awards;
- take employees earning over \$100,000 per year out of the award system;
- phase out Australian Workplace Agreements (AWAs) and rely on awards, collective agreements and common law agreements;
- remove the small business (100 employees or less) exemption for unfair dismissal claims but extend the qualifying period during which an unfair dismissal claim cannot be brought against a small business employer (which will be changed to less than 15 employees) to 12 months;
- draft a Fair Dismissal Code for small business which, if complied with, will be a complete defence to an unfair dismissal claim;
- overhaul the unfair dismissal hearing process so that Fair Work Australia (not the AIRC) will review unfair dismissal applications, call the parties together at the workplace or its local offices for a conference and reach a conclusion about whether the dismissal was unfair; and
- allow pattern bargaining by unions and employer associations.

There are several aspects to note about the new system:

- there will be a renewed emphasis on awards and the AIRC has been placed on a tight timetable to modernise awards to comply with the 1 January 2010 commencement date;
- from 1 January 2010 a new safety net of minimum standards will come into force, complementing the modernised awards. There will be 10 national standards which are largely similar to the current Fair Pay Standard Requirements. Probably the main change of relevance is the proposal to create a minimum standard of severance/redundancy pay for terminated



employees where the workplace has more than 15 employees. The proposal is for compulsory redundancy pay of up to 16 weeks. At the moment, there is no statutory requirement for severance/redundancy pay where there is no award or contract requirement;

- there will be a greater emphasis on collective bargaining;
- there will be changes to the current unfair dismissal restrictions (namely the exclusions for employees dismissed within a 6 month qualifying period or working for employers with less than 100 employees):
 - a. a 12 month qualifying period for employees of small businesses (less than 15 employees);
 - b. a 6 month qualifying period for all other employees;
 - c. non award employees earning over \$101,300 per annum will be unable to bring unfair dismissal claims in the AIRC; and
 - d. there will be a Fair Dismissal Code which small business will be able to rely on as a complete defence to an unfair dismissal claim.

E. FAIR WORK AUSTRALIA¹

The government's original proposal, when in opposition, was to create a "one stop shop" for workplace relations matters. Whilst there has been amalgamation of the current AIRC with the Workplace Authority and other institutions in the Fair Work Bill, it is likely that there will be significant similarities with the current system.

The Bill provides for the existing Australian Industrial Relations Commission, Australian Fair Pay Commission and Workplace Authority to be replaced by a new body called Fair Work Australia. It will consist of a President, Deputy Presidents and Commissioners and Minimum Wage Panel Members and will be given power to:

- a. vary awards;
- b. make orders for minimum wages;
- c. approve agreements;
- d. determine claims for unfair dismissal;
- e. make orders in relation to good faith bargaining and industrial action; and
- f. help parties resolve workplace disputes.

Wages will be reviewed annually by the Minimum Wages Panel presided over by the President. The current members of the AIRC will be offered positions on FWA.

The current Workplace Ombudsman will be replaced with the Office of the Fair Work Ombudsman.

¹ Chapter 5 Fair Work Bill



There will also be specialist divisions of the Federal Court and Federal Magistrates Court to hear workplace relations matters and the Federal Magistrates Court will have power to deal with small claims up to \$20,000.

F. NATIONAL EMPLOYMENT STANDARDS²

The National Employment Standards (“NES”) replace the old AFPCS and constitute the safety net of minimum standards for all workers which cannot be contracted out of or excluded by award or enterprise agreement. The NES regulate 4 of the 5 matters covered by the existing AFPCS namely:

- maximum working hours;
- annual leave;
- personal leave; and
- parental leave.

The other AFPCS standard, minimum wage rates, are to be primarily dealt with through the award system.

There are 10 standards in the NES relating to:

- a. maximum weekly hours;
- b. requests for flexible working arrangements for parents with children under school age;
- c. parental leave and related entitlements;
- d. annual leave;
- e. personal/carer’s leave and compassionate leave;
- f. community service leave;
- g. long service leave;
- h. public holidays;
- i. notice of termination and redundancy pay; and
- j. the Fair Work Information statement.

The NES will apply to all employees but modern awards (in conjunction with the NES) will only apply to employees earning less than \$100,000 per annum (indexed). Employers contravening the NES are subject to a maximum penalty of \$6,000 for individuals and \$33,000 for companies and any other order the Court considers appropriate including an injunction and reinstatement.

² Chapter2, Part 2.2 Fair Work Bill



1. Maximum weekly hours³

As with the AFPCS, maximum ordinary hours continue to be 38 standard hours per week for full time employees, unless additional hours are reasonable. There is a slight change in emphasis in the wording of the standard which discourages additional hours.

Employees may refuse to work additional hours if they are unreasonable, taking into account:

- a. any risk to employee health and safety from working the additional hours;
- b. the employee's personal circumstances, including family responsibilities;
- c. the needs of the workplace or enterprise in which the employee is employed;
- d. whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;
- e. any notice given by the employer of any request or requirement to work the additional hours;
- f. any notice given by the employee of his or her intention to refuse to work the additional hours;
- g. the usual patterns of work in the industry, or the part of an industry, in which the employee works;
- h. the nature of the employee's role, and the employee's level of responsibility;
- i. whether the additional hours are in accordance with averaging terms included in a modern award or enterprise agreement or an averaging arrangement between the employer and employee under the Act; and
- j. any other relevant matter.

Modern awards and agreements can provide for averaging of hours over a specified period, with the average hours not to exceed 38 for a full time employee.⁴ Where there is no modern award or enterprise agreement with application, an employer and employee can agree in writing to an averaging arrangement over a maximum of 26 weeks.⁵

2. Requests for flexible working arrangements⁶

An employee can request a change in working arrangements to assist them to care for a child under school age of which they are a parent or for whom they have responsibility for care.⁷ Whilst not in the Bill, this may yet be extended to include employees caring for a child with a disability and carers of adults in need of care. NOTE: When passed, the Fair Work Act included a provision extending this provision to employees caring for a child under 18 years with a disability.

³ Chapter 2, Part 2-2, Division 3 Fair Work Bill

⁴ Clause 63 Fair Work Bill

⁵ Clause 64 Fair Work Bill

⁶ Chapter 2, Part 2-2, Division 4 Fair Work Bill

⁷ Clause 65 Fair Work Bill



Possible types of flexible working arrangements may include a reduction in hours, non-standard start or finish times, working from home, working split shifts or job sharing arrangements.

Full time and part time employees are not entitled to make the request unless they have completed at least 12 months continuous service with the employer. For casual employees to be entitled, they must be a long term casual employee (i.e. with at least 12 months service) and have a reasonable expectation of continuing systematic and regular employment.⁸

Requests must be in writing and set out the details of the change sought and the reasons.

The employer must give a written response within 21 days with their decision on the request and if it is a refusal, must state the reasonable business grounds relied on.⁹

However, there is no avenue of challenge by an aggrieved employee to a refusal. No court order can be made against an employer for an alleged failure to specify reasonable grounds.¹⁰ Further, dispute resolution mechanisms in an award or enterprise agreement cannot provide for this issue to be dealt with by Fair Work Australia or another person.¹¹ NOTE: This position changed between the introduction of the Bill and the passage of the Fair Work Act. Fair Work Australia has been given the power to resolve disputes over these matters but only where the employer consents, whether it be in a collective agreement, an employment contract or in a specific case.

3. Parental leave¹²

Basic entitlements to unpaid parental leave remain the same although the provisions now apply to same sex couples. Full time and part time employees must have completed at least 12 months continuous service to be entitled to parental leave. Casual employees must be long term casuals and have a reasonable expectation of systematic and regular continuing employment.¹³

Parental leave can be taken for birth related leave or adoption related leave. Another difference is that spouses or partners will be able to take up to a year of leave at separate times. This contrasts with the current provision which allows for up to a year on a combined basis.

To be eligible for adoption related leave, the child must be under 16 and not have lived continuously with the employee for 6 months or more as at the date of placement.¹⁴

Parents and spouses (including adoptive parents) are entitled to up to 12 months unpaid parental leave if they will have a responsibility for the care of the child.¹⁵ Other requirements are that:

- leave must be taken in 1 period;
- birth related leave may be taken up to 6 weeks before the expected date of birth;
- adoption leave must start on the day of placement;

⁸ Clause 65(2) Fair Work Bill

⁹ Clause 25(6) Fair Work Bill

¹⁰ Clause 44(2) Fair Work Bill

¹¹ Clauses 739(2), 740(2) Fair Work Bill

¹² Chapter 2, Part 2-2, Division 5 Fair Work Bill

¹³ Clause 67 Fair Work Bill

¹⁴ Clause 68 Fair Work Bill

¹⁵ Clause 70 Fair Work Bill



- leave may be taken at any time within 12 months after birth or placement;
- concurrent leave must be for 3 weeks or less.¹⁶

There are detailed notice requirements.

An employee can request their employer to agree to an extension of unpaid parental leave of up to a further period of 12 months.¹⁷ A response must be given within 21 days after the request is made and the employer can only refuse such a request on reasonable business grounds. As with the provisions in relation to flexible working arrangements, the employer's refusal cannot be challenged. *NOTE: Under the Fair Work Act, Fair Work Australia has the power to resolve disputes about parental leave but only where the employer consents, whether in a collective agreement, an employment contract or in a specific case.*

Where a pregnant employee continues working during the six weeks before the expected birth, the employer can require the employee to produce a medical certificate to evidence her fitness for work. If this is not supplied, and no safe alternative job is available, the employee can be forced to start their leave early.¹⁸

A female employee is entitled to unpaid special maternity leave if she has a pregnancy-related illness or loses the child within 28 weeks of the expected date of birth.¹⁹ A pregnant employee is entitled to transfer to a safe job in certain circumstances.²⁰

The employer must consult with an employee absent on parental leave if the employer makes a decision that will have a significant effect on the status, pay or location of the employee's employment.²¹

An employee is entitled to return to their pre parental leave position or, if it no longer exists, an available position for which the employee is qualified and suited nearest the status and pay to the previous position.²²

An employee can take up to 2 days of unpaid pre adoption leave to attend any interviews or examinations required in order to obtain approval for the adoption.²³

Paid parental leave

Whilst not a part of the Bill, it is worthwhile to make note of the current proposals for paid parental leave at this point. The Productivity Commission released its draft report and recommendations on paid parental leave on 29 September 2008 and is shortly to deliver its final report. As expected, the Commission has proposed a taxpayer funded paid parental leave scheme with the main features being:

- 18 weeks taxpayer funded postnatal leave to be shared by eligible parents, with an extra 2 weeks of paternity leave for the father (or same sex partner);
- leave to be paid at the adult minimum wage rate (currently \$543.78 per week, subject to tax);

¹⁶ Clauses 71/72 Fair Work Bill

¹⁷ Clause 76 Fair Work Bill

¹⁸ Clause 73 Fair Work Bill

¹⁹ Clause 80 Fair Work Bill

²⁰ Clause 81 Fair Work Bill

²¹ Clause 83 Fair Work Bill

²² Clause 84 Fair Work Bill

²³ Clause 85 Fair Work Bill



- c. all workers would be eligible including casual employees, contractors and the self employed;
- d. a broad range of family types will be eligible including conventional couples, lone parents, adoptive parents and same sex couples;
- e. business will be responsible for paying the leave from their own pockets subject to government reimbursement; and
- f. employees on paid parental leave will be entitled to continuing superannuation contributions by their employers subject to a cap.

The Commission estimates its proposal will cost around \$530 million annually (with taxpayers contributing around \$450 million and the balance by business). Reduction or abolition of existing payments such as the "baby bonus" will help fund the scheme.

The 20 weeks total leave proposed by the Commission is greater than the 3 months submitted by the primary union and employer organisations although several stakeholders are still arguing the leave should extend for up to 6 months and be calculated on average wage rates rather than the minimum wage. There is also clearly a concern for small business in being expected to pay parental leave "up front" with later reimbursement.

The government has left its options open saying it is looking forward to a "fantastic" debate but it is clearly a case of "when" and not "if" a paid scheme will be introduced. Further submissions and public hearings have taken place with the Commission due to release a final report for consideration by the government at the end of February 2009. It was considered likely that the scheme would be in place by the end of 2009. However, the current economic circumstances have made this look less likely.

4. Annual leave²⁴

Full time and part time employees are entitled to 4 weeks paid annual leave for each year of service (or 5 weeks if they are a shift worker).²⁵ The entitlement accrues progressively during each year and is cumulative.

Service is defined as all periods of employment other than:

- unpaid leave (e.g. leave without pay or unpaid parental leave);
- unpaid absence (other than community service leave); or
- unauthorised absence (e.g. unprotected industrial action).

Annual leave may be taken as agreed between the employee and employer but the employer must not unreasonably refuse a request by the employee.²⁶ The employer can impose a reasonable requirement for an employee to take paid annual leave if there is provision in an applicable modern award or enterprise agreement or the employee is award/agreement free. Public holidays are not included in annual leave nor sick leave taken during a period of annual leave.²⁷

There is no leave loading under the standard and the pay rate for the annual leave period is the employee's base rate of pay for their ordinary hours.²⁸

²⁴ Chapter 2, Part 2-2, Division 6 Fair Work Bill

²⁵ Clause 87 Fair Work Bill

²⁶ Clause 88 Fair Work Bill

²⁷ Clause 89 Fair Work Bill

²⁸ Clause 90 Fair Work Bill



A modern award or enterprise agreement can contain terms about the cashing out of annual leave and award or agreement free employees can also agree with their employer in writing about this. However:

- the employee must keep a balance of accrued annual leave of 4 weeks; and
- each cashing out must be subject to a separate written agreement.²⁹

5. Personal/carer's leave and
compassionate leave³⁰

Full time and part time employees are entitled to 10 days per year of paid personal/carer's leave. The entitlement accrues progressively during a year and is cumulative.³¹ The old cap of employees only being able to take up to 10 days carer's leave per annum has been removed.

The leave may be taken:

- if the employee is not fit for work because of personal illness or injury; or
- to provide care or support to a member of the employee's immediate family or household who requires care or support because of personal injury or illness or an unexpected emergency.³²

A modern award or enterprise agreement can provide for cashing out of paid personal/carer's leave but only by separate written agreement on each occasion and only as long as the employee's paid personal/carer's leave balance does not fall below 15 days.³³

In addition to the requirements for paid personal/carer's leave, all employees are entitled to 2 days of unpaid carer's leave for each occasion that a member of the employee's immediate family or household requires care or support because of personal illness or injury affecting that person or an unexpected emergency affecting that person.³⁴

Employees are entitled to 2 days of compassionate leave for each occasion when a member of their immediate family or household:

- contracts or develops a personal illness that poses a serious threat to their life;
- sustains a personal injury that poses a serious threat to their life; or
- dies.³⁵

This leave can be taken to spend time with the family member or after the death of the member. Full time and part time employees are entitled to payment for compassionate leave. The division also contains requirements in relation to the notice mechanisms for this leave.³⁶

²⁹ Clause 94 Fair Work Bill

³⁰ Chapter 2, Part 2-2, Division 7 Fair Work Bill

³¹ Clause 96 Fair Work Bill

³² Clause 97 Fair Work Bill

³³ Clause 101 Fair Work Bill

³⁴ Clause 102 Fair Work Bill

³⁵ Clause 104 Fair Work Bill

³⁶ Clause 107 Fair Work Bill



6. Community service leave

Employees are entitled to this leave if taking part in an eligible community service activity, which is defined as:

- jury service;
- a voluntary emergency management activity (which is further defined); or
- otherwise as prescribed by regulation.³⁷

The leave covers not only the time engaged in the activity but also reasonable travelling and rest time following the activity (excluding jury service) which is reasonable in all the circumstances.³⁸

Employees absent on voluntary emergency management activities do not have to be paid by the employer. However, non casual employees absent on jury duty do have to be paid the difference between their base pay and the amount received for jury duty for the first 10 days of absence.³⁹

7. Long service leave

Long service leave remains under the coverage of state law although the intention is to work towards a national scheme. Under the *Industrial Relations Act 1999 (Qld)*, full time employees become entitled to 8.6667 weeks of long service leave after 10 years of service. Part time and long term casual employees are also entitled to accrue a proportional long service leave entitlement, calculated on their actual hours of service.

If an employee's employment is terminated after at least seven years service but before reaching 10 years service, they may be entitled to a pro rata long service leave payment if:

- the employee's service is terminated by their death;
- the employee terminates their service because of their illness or incapacity or because of a domestic or other pressing necessity;
- the employer dismissed the employee for a reason other than the employee's conduct, capacity or performance; or
- the employer unfairly dismisses the employee.

8. Public holidays⁴⁰

An employee is entitled to paid absence from work on public holidays. Public holidays are listed as:

- 1 January (New Year's Day);
- 26 January (Australia Day);
- Good Friday;

³⁷ Clause 109 Fair Work Bill

³⁸ Clause 108 Fair Work Bill

³⁹ Clause 111 Fair Work Bill

⁴⁰ Chapter 2, Part 2-2, Division 10 Fair Work Bill



- Easter Monday;
- 25 April (Anzac Day);
- Queen's Birthday holiday;
- 25 December (Christmas Day);
- 26 December (Boxing Day);
- state public holidays.⁴¹

An employer can make a reasonable request for the employee to work on the public holiday which the employee can refuse on reasonable grounds. The legislation sets out certain factors to take into account in deciding what is reasonable:

- the nature of the employer's workplace (including its operational requirements) and the nature of the employee's work;
- the employee's personal circumstances including family responsibilities;
- whether the employee could reasonably expect that the employer might request work on a public holiday;
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of work on the public holiday;
- whether the employee is full time, part time or casual or is a shift worker;
- the amount of advance notice given by the employer.⁴²

9. Notice of termination and redundancy pay⁴³

The standard requires that notice of termination must be given in writing. The standard provides for the provision by employers of minimum periods of notice or payment in lieu of notice on termination of employment which are:

<i>Period of employee's service</i>	<i>Required period of notice</i>
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 weeks
More than 3 years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

An employee who is over 45 years of age and has worked for the same employer for at least two years is entitled to an extra weeks notice. This is the same as in the WR Act. It is important to note that these are minimum entitlements only and an employee may be entitled to a greater period of notice according to the circumstances of the case.

⁴¹ Clause 115 Fair Work Bill

⁴² Clause 114 Fair Work Bill

⁴³ Chapter 2, Part 2-2, Division 11 Fair Work Bill



The bill introduces a new requirement for compulsory redundancy or severance pay. Redundancy occurs where an employer no longer requires the person's job to be done by anyone or where the employer becomes insolvent.⁴⁴ The scale of redundancy pay reflects the scale adopted by the AIRC in 2004 and is as follows:

<i>Period of employee's service</i>	<i>Redundancy pay period</i>
1 – 2 years	4 weeks
2 – 3 years	6 weeks
3 – 4 years	7 weeks
4 – 5 years	8 weeks
5 – 6 years	10 weeks
6 – 7 years	11 weeks
7 – 8 years	13 weeks
8 – 9 years	14 weeks
9 – 10 years	16 weeks
More than 10 years	12 weeks

If the employer obtains other acceptable employment for the redundant employee or cannot pay the required redundancy pay, the employer can make application to Fair Work Australia to vary the required amount.⁴⁵

The requirement to pay redundancy does not apply if the employee has less than 12 months continuous service or is a "small business employer".⁴⁶ This means an employer with less than 15 employees.

The requirement applies to permanent full time and part time employees whose employment is not terminated for serious misconduct.⁴⁷

Where a business is sold and the employee's service transfers to the new employer, redundancy entitlements do not have to be recognised by the new employer as long as they are paid out on transfer by the old employer.⁴⁸

10. Fair work information statement⁴⁹

Employers will be required to provide to every new employee a document called a Fair Work Information Statement.⁵⁰ It will contain details of the NES, awards, agreement-making, the right to freedom of association and the role of Fair Work Australia and the Fair Work Ombudsman.

⁴⁴ Clause 119 Fair Work Bill

⁴⁵ Clause 120 Fair Work Bill

⁴⁶ Clause 121 Fair Work Bill

⁴⁷ Clause 123 Fair Work Bill

⁴⁸ Explanatory memorandum p. 79

⁴⁹ Chapter 2, Part 2-2, Division 12 Fair Work Bill

⁵⁰ Clause 125 Fair Work Bill



G. MODERN AWARDS⁵¹

The aim is for "modern" awards to complement the new National Employment Standards and contain provisions tailored to the needs of particular industries and occupations. These may affect minimum wages, types of employment, arrangements for when work is performed, overtime and penalty rates, allowances, leave related matters, superannuation and procedures for dispute settlement.

The Government's request to the AIRC to undertake award modernisation expressed the government's intention that:

- there should be many fewer awards than at present (there are currently about 6,000);
- modern awards should generally operate by way of common rule;
- a general award is to be created to plug any gaps in award coverage;
- award coverage is not to be extended to managerial or other classes of employees who have historically been award free;
- state based differences in award terms are to be eliminated or phased out;
- awards are to contain flexibility provisions between employers and individual employees.

Whilst there will be a smaller number of awards and those awards will be simpler than current ones, they will also have much broader application than is currently the case. The modern awards will apply primarily on an industry basis but there will also be awards dealing with occupations not caught by the industry awards. There is likely to be award coverage whether or not an organisation is currently:

- covered by a transitional state award (NAPSA); or
- a specific respondent to a federal award.

Awards are being modernised in four stages. Stage One of the award modernisation process has been completed and exposure drafts of Stage Two awards have been published and are to be finalised by 3 April 2009.

The priority industries in Stage One included:

- catering, liquor, accommodation and restaurants;
- clothing and textiles
- mining and higher education;
- vehicle, metal, glue and rubber production;
- private sector clerical;
- racing, rail and retail and security.

⁵¹ Chapter 2, Part 2-3 Fair Work Bill



Stage Two of the process covered the following industries:

- agriculture, building and civil construction;
- cleaning and financial services;
- health and welfare services;
- information and communications technology;
- manufacturing, private transport and quarrying.

Stage 3 is the largest stage with some 39 industries and occupations to be dealt with. The new awards are due to commence operation on 1 January 2010.

Modern awards can contain terms about the following:

- a. minimum wages, skill based classifications and career structures and incentive based payments, piece rates and bonuses;
- b. types of employment and the facilitation of flexible working arrangements;
- c. arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks;
- d. overtime rates;
- e. penalty rates;
- f. annualised wage arrangements that:
 - i. have regard to the patterns of work in an occupation, industry or enterprise; and
 - ii. provide an alternative to the separate payment of wages and other monetary entitlements; and
 - iii. include appropriate safeguards to ensure that individual employees are not disadvantaged;
- g. allowances;
- h. leave, leave loadings and leave arrangements;
- i. superannuation;
- j. procedures for consultation, representation and dispute settlement;⁵²
- k. in certain circumstances, industry specific redundancy schemes.

Modern awards must include:

- a. coverage provisions;

⁵² Chapter 2, Part 2-3, Division 3 Fair Work Bill



- b. a flexibility term enabling an employee and their employer to agree on an arrangement varying the effect of the award. The flexibility term must:
 - i. identify the award terms being varied;
 - ii. require that the parties genuinely agree to the individual flexibility arrangement;
 - iii. require the employer to ensure that the individual flexibility arrangement results in the employee being better off overall;
 - iv. contain a termination mechanism; and
 - v. be in writing and signed by the parties;
- c. a procedure for settling disputes about any matters arising under the modern award and in relation to the National Employment Standards;
- d. terms for determination of the ordinary hours of work for each classification covered by the award.

Modern awards must not include:

- a. objectionable terms (as defined);
- b. terms about payments and deductions for the benefit of the employer;
- c. terms about right of entry;
- d. terms that are discriminatory;
- e. terms that contain state –based differences;
- f. terms dealing with long service leave.

An employment relationship must commence before any flexibility arrangement can be agreed, so an individual flexibility arrangement can not be made with a prospective employee. The AIRC has also restricted the model flexibility award term to the operation of award terms concerning the time at which work is performed, overtime or penalty rates, allowances or leave loadings.

Modern awards will not apply to high income employees. This is intended to be \$100,000 for full time employees (pro rata for part timers). However, it is necessary for employers to guarantee that the employee will receive the high income amount for the exclusion to operate and a contractual entitlement will not be enough to satisfy the requirement. Modern awards are to be reviewed every 4 years to keep them up to date.

H. ENTERPRISE AGREEMENTS⁵³

The current system of collective and individual agreements is to be replaced by a new system of enterprise agreements. AWAs have been abolished and after 1 January 2010 there will be no provision for statutory individual agreements.

⁵³ Chapter 2, Part 2-4 Fair Work Bill



The Bill allows for greater industry, sectoral and regional bargaining and there will no longer be a requirement to obtain a public interest authorisation for such agreements. Collective agreements can be made as either single-enterprise agreements, multi-enterprise agreements or greenfield agreements if the agreement relates to a genuine new enterprise. Union and employee collective agreements remain but the old employee Greenfield agreements where an employer could impose an agreement on new employees for a new project have been abolished.

Agreements will have a maximum term of 4 years.

Enterprise agreements must include:

- a. a nominal expiry date;
- b. a dispute settlement procedure;
- c. a term dealing with individual flexibility arrangements;
- d. a consultation term which requires the employer to consult employees about major workplace changes that are likely to have a significant effect on employees and allows employees to be represented in the consultation process.

An enterprise agreement will only be able to deal with “*permitted matters*”, namely:

- matters pertaining to the relations between each employer that will be covered by the agreement and its employees;
- matters pertaining to the relations between each employer and any unions that are covered by the agreement;
- deductions from wages for any purpose authorised by an employee covered by the agreement; and
- matters relating to how the agreement will operate.⁵⁴

The old prohibited content rules have been repealed although there are still several illegal content matters. Whilst it will still be necessary to refer to case law concerning a “matter pertaining”, a number of matters that were previously part of prohibited content will now be able to be covered such as deduction of union dues and time off for union training or meetings. Agreements may also cover the terms on which contractors or labour hire workers are engaged. The inclusion of a “*non-permitted*” but not unlawful term in an agreement will not generally prevent the agreement from being registered.

Enterprise agreements will be able to override awards subject to a general “*better off*” test which requires each award covered employee to be better off overall under the agreement than they would be under the relevant award. Agreements will need to meet or exceed the National Employment Standards.

An employer will be required to notify all relevant employees of their right to be represented by a bargaining representative of their choice. Unions are generally treated as the default representative of their members, subject to a contrary written election by any employee.

If a majority of employees want to bargain collectively, the employer will have an obligation to bargain “*in good faith*”. If the employer refuses to do so, Fair Work Australia will be required

⁵⁴ Clause 172 Fair Work Bill



to determine whether there is majority support and, if so, issue a Good Faith Bargaining Order.

Good faith bargaining obligations include requirements to:

- a. attend and participate in meetings at reasonable times;
- b. respond to proposals made by parties in a timely fashion;
- c. disclose relevant information in a timely manner, subject to appropriate protection for commercial in confidence information;
- d. give genuine consideration to the needs of the other parties and provide reasons for their responses;
- e. refrain from capricious or unfair conduct or conduct that undermines freedom of association or collective bargaining (such as failing to recognise an employee bargaining representative or allow them to attend meetings).

Fair Work Australia can issue a “*low paid authorisation*” in relation to a proposed multi-enterprise agreement to assist low paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level. Examples are the areas of community services, hospitality, retail, childcare and cleaning.

Fair Work Australia will also have to power to arbitrate if industrial action is threatening harm to the economy or the parties. It has a much broader range of powers than does the AIRC under the WR Act.

The new bargaining laws are to take effect from 1 July 2009.

I. TERMINATION OF EMPLOYMENT⁵⁵

The Bill restores the rights of many employees who would otherwise have been excluded from the unfair dismissal jurisdiction under the WR Act. Perhaps most importantly, the 100 or less employee exemption has been removed. The Government estimates that the changes will cover an additional approximately 100,000 employers and 3 million employees.

A person will be unfairly dismissed if Fair Work Australia is satisfied that:

- a. the person has been dismissed;
- b. the dismissal was harsh, unjust or unreasonable;
- c. the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- d. the dismissal was not a genuine redundancy.

An employee will be able to utilise the unfair dismissal jurisdiction if they:

- a. have completed the minimum employment period (6 months or 12 months if employed by a small business employer); and

⁵⁵ Chapter 3, Part 3-2 Fair Work Bill



- b. earn less than the high income threshold if award free (\$101,300 subject to indexation).

Casual employees of non small business employers will now be able to bring action after 6 months, subject to their employment being regular and systematic and their having a reasonable expectation of continuing employment. There is also no longer a general exclusion for fixed term or task or seasonal employees, if dismissed during their term of employment.

To rely on the redundancy exemption, employers will have to show that they met the consultation obligations in an applicable award or enterprise agreement and that there was no reasonable opportunity for the employee to be redeployed.⁵⁶ However, it is still not possible for an employee to challenge their termination on the basis that they were unfairly selected for termination. The old exclusion for terminations for “operational reasons” has been deleted.

An unfair dismissal application must be made to FWA within 7 days after the dismissal took effect, subject to a power of extension (although it is possible this may be extended to 14 days as a result of the Senate inquiry into the Bill). NOTE: A time limit of 14 days to file an unfair dismissal application was contained in the Fair Work Act when passed.

A private conference of the parties must be held by FWA. FWA can decide at any time (including before, during or after conducting a conference) to hold a hearing in the matter.

The general rule about legal representation under the Bill will apply which requires FWA to determine whether representation by a lawyer or paid agent (which excludes union advocates) would enable the matter to be dealt with more efficiently or whether it would be unfair to deny representation.⁵⁷

If FWA has granted permission for a person to be represented by a lawyer or paid agent, FWA may make an order for costs against the lawyer or agent if it is satisfied that the lawyer or agent has caused costs to be incurred by the other party to the matter because the lawyer or agent encouraged their client to start or continue a matter and it should have been reasonably apparent that the person had no reasonable prospect of success or because of an unreasonable act or omission on the part of the lawyer or agent.⁵⁸

There will also be significant changes to the way in which these claims are dealt with. Claims will be made to FWA rather than the AIRC which will adopt a faster and less formal approach to these matters. It is intended that legal representation will only be allowed in exceptional circumstances (with the possible exception of Community Legal Centre solicitors). The Bill does not provide further specification about how the new unfair dismissal system will operate in practice. It appears that FWA will be able to respond to claims in a flexible and informal manner including through initial inquisitorial inquiries, informal conferences and hearings. It is intended that FWA will be able to make binding decisions following a conference without the need for a formal, public hearing. Conferences will be able to be held at alternative venues such as the employer’s place of business which will minimise the cost in time and lost earnings of an employer in defending a claim.

The new unfair dismissal laws will commence from 1 July 2009, six months before much of the Bill takes effect.

Small employers will have a complete defence to an unfair dismissal claim if they can demonstrate they have complied with the *Fair Dismissal Code for Small Business*. The code is simple and provides that:

⁵⁶ Clause 389 Fair Work Bill

⁵⁷ Clause 596 Fair Work Bill

⁵⁸ Clause 401 Fair Work Bill



- a. a dismissal will be deemed fair where the employer has reasonable grounds to believe that the employee was guilty of serious misconduct, such as theft, fraud, violence or serious breaches of occupational health and safety requirements. It is sufficient but not essential that a report be made to the police about the matter;
- b. in instances other than serious misconduct, an employee must be warned clearly that they are not doing their job properly and will have to improve or be dismissed. There is no requirement for multiple warnings but the employee must have had a reasonable amount of time to improve and have failed to do so.

Employees are entitled to have another person present to assist them in these circumstances as long as it is not a lawyer acting in a professional capacity.

Compensation for unfair dismissal remains capped at 6 months wages with reinstatement the primary remedy.

The Work Choices provisions allowing for unfair dismissal applications to be dismissed “on the papers” on jurisdictional grounds have been deleted although there is provision for FWA to vet matters.⁵⁹ In practice, it was rare for the AIRC to determine matters without a preliminary hearing.

The unlawful termination provisions have been separated from the unfair dismissal provisions and it is possible that their practical application will be superceded by the more general provisions referred to below.⁶⁰

J. OTHER MATTERS

1. General protections

There is a broader set of general protections in the Bill which includes the old freedom of association and unlawful termination provisions. The prohibitions include:

- a. the taking of adverse action against a person or coercing them because of a “workplace right” they have or the non-exercise of such a right;
- b. an employer exerting undue influence or pressure on an employee to make various agreements or arrangements;
- c. knowingly or recklessly making a false or misleading representation about another’s workplace rights, or their exercise;
- d. taking adverse action against a person because of their membership or non membership of an association, or their engagement or non-engagement in various industrial activities;
- e. an employer discriminating against an employee or prospective employee because of their race, sex, age, disability etc;
- f. dismissing an employee because of temporary absence from work through illness or injury;

⁵⁹ Clause 396 Fair Work Bill

⁶⁰ Chapter 6, Part 6-4, Division 2 Fair Work Bill



- g. demanding payment of a bargaining services fee;
- h. various conduct relating to “sham” contracting arrangements.⁶¹

Each of these prohibitions is a civil remedy provision which can be enforced in court. FWA can be asked to convene a conference to deal with a dispute over a prohibited conduct which is effectively compulsory when dismissal occurs. This must generally be done within 60 days of dismissal. This must occur before any court action can be taken.

2. Industrial action

The rules about the taking of industrial action are similar to the WR Act rules. However, it is no longer necessary to instigate a formal “bargaining period” to take protected industrial action and employers can no longer take protected action, except in response to action taken by employees.⁶² Accordingly, pro active lockouts are not permitted.

3. Disputes⁶³

There has been no formal revival of the old generalised dispute notification power. Dispute settlement procedures can only be utilised if included in an award or enterprise agreement or if they relate to the NES. However, given the broader coverage of the award system, there may be greater scope for raising disputes than is currently the case.

4. Right of entry

The most significant change is to the right to enter for discussion purposes, which is no longer limited to discussions with someone who is covered by an award or agreement binding on the union.⁶⁴

5. Transmission of business⁶⁵

These provisions are of broader application than under the WR Act. For a transfer of business to exist, it is enough that:

- a. an employee has become employed by a new employer within 3 months of having left an old employer;
- b. the work they are performing for the new employer is substantially the same; and
- c. one of the following connections exists between the two employers:
 - i. an arrangement between the old and new employer to transfer assets that relate to the work in question;
 - ii. the outsourcing of the work from the old employer to the new employer;
 - iii. the insourcing of work previously outsourced from the new employer to the old employer; or
 - iv. the new and old employers being associated entities.

⁶¹ Chapter 3, Part 3-1, Division 6 Fair Work Bill

⁶² Clause 411 Fair Work Bill

⁶³ Chapter 6, Part 6-2 Fair Work Bill

⁶⁴ Clause 484 Fair Work Bill

⁶⁵ Chapter 2, Part 2-8 Fair Work Bill



The most significant aspect is that a transfer of business will be taken to occur where businesses enter into outsourcing arrangements which would not be treated as a transmission of business under the WR Act.

The effect is that any enterprise agreement or modern award that previously covered the employee whilst employed by the old employer will transmit to the new employer and not just on a 12 month basis as under the WR Act. The transmitting instrument may also apply to any new employees hired to perform the same type of work if there is no other applicable award/agreement.

K. ISSUES FOR BUSINESS

1. General comments

A number of general observations can be made about the legislation:

- a. a national system of workplace relations now seems to be entrenched and it should only be a matter of time before states refer their residual jurisdictions to the Commonwealth;
- b. minimum terms and conditions are now entrenched in legislation rather than being an award or state issue. This could prove to be a two edged sword if they are perceived to operate unfairly by any sector, given that the government must take responsibility for their presence in legislation;
- c. as noted previously, it is likely that there will be increased emphasis on collective bargaining and a greater possibility of industry wide bargaining;
- d. there will be greater emphasis on the procedural aspects of good faith bargaining which may or may not affect substantive issues;
- e. whilst there is no compulsory independent conciliation and arbitration of industrial disputes under the Bill, there may be a de facto revival through award dispute resolution mechanisms and the system of workplace determinations;
- f. the renewed relevance of the common law, particularly for employees earning over the high income threshold, is likely to continue and with it, the renewed importance on proper drafting of common law agreements, at least for employees earning over \$100,000 per annum (guaranteed), will continue;
- g. a greater number of unfair dismissal claims are likely but they are also likely to be dealt with more quickly and economically, if not more justly. In particular, employers will need to be aware of the requirement to show that an employee could not have been redeployed if relying on the redundancy exemption and will need to comply with the consultation requirements of applicable awards;
- h. the new unfair dismissal process is likely to be quite different in practice from the current process and it will be interesting to see how the Unfair Dismissal Code for small business will be applied;
- i. awards will assume a much more important role with complete award coverage at a federal level, at least in a simplified way. This is likely to lead



to more employers looking at individual flexibility arrangements or collective agreements as a way of overcoming generalised award provisions;

- j. AWAs and ITEAs will peter out over time;
- k. there are some important changes of relevance to the transfer of business rules which are more generous to transferring employees. Transferring employees will be covered by the old employer's industrial instruments indefinitely. Also, a transfer of business will now include outsourcing and restructures;
- l. there will be a greater role for unions, particularly by being the default bargaining representative for union members. It will be interesting to see how much more active unions become in workplaces where they have not had a presence or the presence has only been minor;
- m. there will be a lesser number of government bodies to deal with although the extent to which FWA is a "one stop shop" remains to be seen;
- n. there is some inherent flexibility in the NES for things such as averaging of hours, the cashing out of some annual leave and clarification of the power of employers to give directions to take annual leave (for instance over Christmas).

2. Issues for business to address arising out of the changes

Employers should start giving consideration to changes they will have to make to adjust to the new system. As basic matters, it will be important for employers to:

- revisit the issue of whether they are covered by state or federal law. This can be particularly problematic for non profit associations and charitable organisations;
- adjust their policies to ensure that they reflect the new NES requirements when they come into force and also note that existing collective agreements and individual statutory agreements will be subject to the NES;
- familiarise themselves with applicable modernised awards. Despite the decrease in the number of awards as a result of the award modernisation process, an employer may still face the prospect of having several different awards operating in their workplace.

In addition, employers should:

- a. if the workplace is covered by a collective agreement, consider how the new bargaining environment will impact on future bargaining and industrial strategies;
- b. if a collective agreement is due for renegotiation, consider whether it can be updated before 1 July 2009;
- c. be aware of:
 - i. the greater need to consider consultation and redeployment in unfair dismissal situations;
 - ii. the new compulsory redundancy pay requirements;



- iii. the renewed necessity to give all new employees a Fair Work Information Statement;
 - iv. the 21 day deadline for providing a written response with reasons to an employee request for flexible work arrangements; and
 - v. the 21 day deadline for providing a written response with reasons to an employee request for an extension of unpaid parental leave;
 - vi. the requirement to consult with employees on unpaid parental leave about changes that will have a significant effect on the status, pay or location of the employee's pre-parental leave position;
 - vii. an employee's entitlement to request make up pay for up to 10 days while the employee is on jury duty;
 - viii. new unfair dismissal arrangements;
 - ix. broader unlawful termination provisions;
 - x. the ability for employees to cash out a certain amount of annual leave.
- d. review employment contracts and policies in light of the NES and in particular ask the following questions:
- How do we currently employ our staff?
 - Do we have up to date written employment contracts or letters of appointment that reflect the realities of an employee's position?
 - What awards and agreements apply to our staff? What modern award/s are likely to apply to our workplace and what are their requirements?
 - How do we deal with hours of work and are there staff who work more than 38 hours per week?

L. CONCLUSIONS

If it was the government's intention to "rip up" Work Choices, then that certainly is not reflected in the Fair Work Bill. The Bill reflects more an intention to rein in some of the more "extreme" aspects of Work Choices whilst at the same time putting the government's own Labor mark on the industrial relations landscape. In this sense, it is perhaps inaccurate to describe the Fair Work Bill as "Work Choices Lite" and more appropriate to describe it as "mid strength". There is some irony in the fact that a conservative government implemented the largest federal centralisation of power in Australian industrial law since federation and it can be maintained that the Forward with Fairness changes are not of the same scale as Work Choices.

The most obvious aspects are the winding back of unfair dismissal exclusions whilst attempting to make the process more expeditious and the broader application of workplace bargaining along with a greater role for unions. Not so obvious but potentially important are the complete coverage of awards at a federal level for the first time and the dispute resolution mechanism under those awards.



There was a perception that Work Choices swung the pendulum in favour of employers. If that was the case, then the pendulum is now swinging back towards the employee side. It is difficult to say that the changes will be better for business in a strict sense. It is beneficial that the national system remains and that the commonwealth and states are working towards a national approach in other areas such as workplace health and safety and long service leave. It is also likely that the more family friendly aspects of the legislation will have long term benefits for both employers and employees. The unfair dismissal changes take away on the one hand (the broad small business exemption) and give on the other hand (in the form of a more expeditious and hopefully cost effective process). The bargaining changes will rely on a realistic practical approach by all parties (in which FWA may play a significant part) but are certainly a move away from the individual freedom of bargaining enjoyed by employers under Work Choices.

The real unknown is the effect the legislation will have on an increasingly fragile economy and it is possible that economic times may have overtaken the legislation to some extent with it being fashioned for a more expansive economic climate. However, it can equally be said that the more inequitable aspects of Work Choices would have only truly revealed themselves in an economic downturn.

Several commentators have expressed the hope that the Bill will herald a return to a more settled industrial landscape and a framework with a set of accepted rules which everyone can abide by and work with after what seems like an extended period of change and uncertainty. If the legislation can achieve that goal and all parties can utilise its framework in a practical way that achieves national economic prosperity, social inclusion and individual business success without disadvantaging employees, then it truly will be a case of Forward with Fairness.

