Employment Update

2 December 2008

The Rudd government's long-awaited substantive reforms to WorkChoices were finally introduced into Parliament on 25 November 2008, in the Fair Work Bill 2008. This *update* addresses some of these significant features of the reforms.

Fair Work Australia

by Martin Dunne, Special Counsel, Sydney

Fair Work Australia (**"FWA"**) will be created as the body which will administer the ALP's workplace reforms.

Together with the Fair Work Ombudsman, FWA will replace the Australian Industrial Relations Commission, Australian Fair Pay Commission, Workplace Authority and Workplace Ombudsman.

FWA may only deal with disputes expressly authorised by the *Fair Work Australia Act*, by mediation, conciliation or recommendation.

In limited circumstances FWA will arbitrate a dispute if authorised by the Act.

In addition to disputes, other matters FWA may deal with include national employment standards, workplace and enterprise agreements minimum wages, unfair and unlawful dismissal, industrial action, right of entry and modern awards.

FWA decisions may be appealed, with permission or leave, to the Full Bench of FWA. Questions of law may be referred to the Federal Court.

A person must bear their own costs in matters before the FWA except in circumstances where applications have been brought vexatiously without reasonable cause or had no reasonable prospect of success.

Members of the AIRC will be transferred to Fair Work Australia.

The Fair Work Ombudsman (**"FWO"**) will investigate and prosecute breaches under the Act. Fair Work inspectors will monitor compliance with the Act and instruments, enquire and investigate, commence court proceedings and represent employees in circumstances the FWO considers will promote compliance with the Act or instruments.

The Federal Magistrates Court and Federal Court will have Fair Work Divisions to exercise judicial functions arising from the Act.

Many of the functions of FWA are similar to functions exercised by the Australian Industrial Relations Commission as most of the functions of the FWO will mirror those of the Workplace Authority Ombudsman.

Unfair dismissal

by Belinda Weir, Senior Associate, Brisbane

Some significant changes will be made to the Act to enhance access to remedies for unfair dismissal for employees, but there are also major changes that will benefit employers.

The time limit within which to commence a claim for unfair dismissal has been reduced from 21 days to 7 days, meaning that employees will have to commence proceedings quickly or risk being barred from proceeding. Time limits can be extended, but there must be "exceptional circumstances".

Additionally, for "small business employers" (defined generally as an employer with fewer than 15 employees), a dismissal will be considered to be "fair" if it complies with the Small Business Fair Dismissal Code. The content of the Code is not yet known and will ultimately be the subject of regulation. Best practice will demand that all small businesses look to adopting the terms of this document once it is released.

Significantly, the "100 employee" rule of Work Choices that restricted many unfair dismissal claims has been removed. All employees are entitled to commence such a claim provided they have more than 6 months service (12 months for small businesses of 15 employees or fewer), are governed by an award or agreement or alternatively, earn less than $100,000 per annum (which will be indexed).

Compliance and enforcement

by Greg Geason, Special Counsel, Hobart

Chapter 4 of The Fair Work Bill deals with compliance and enforcement.

Through Fair Work Australia, compliance with workplace laws, awards and agreements will be enforced.

Fair Work Australia replaces the Australian Industrial Relations Commission, the Australian Fair Pay Commission and the Workplace Authority.

The Workplace Ombudsman enjoyed a significant and prominent role in the Workplace Relations regime. The new regime continues that role albeit with a rebadging as the Fair Work Ombudsman.

The Fair Work Ombudsman will have an investigatory and prosecutorial function, which will be carried out by workplace inspectors, now called Fair Work Inspectors.

Within the Federal Court there will be a Fair Work Division and similarly within the Federal Magistrates Court a Fair Work Division.

The Act broadens the powers available to the courts to give so called flexible remedies, including a power to issue injunctions for breaches of an award or workplace agreement.

Of most interest perhaps, the Bill proposes a system for the enforcement of individual contractual entitlements. These are entitlements created under a contract between the employer and the employee in relation to matters which are dealt with in the National Employment Standards (**"NES"**) or a modern award. If one of these entitlements is breached, the employer or employee can apply to the Federal Court/Federal Magistrates Court to enforce the entitlement. A Fair Work Inspector may also bring this action on behalf of the employee or as an adjunct to an action for a breach of an NES, modern award, enterprise agreement or other industrial instrument

Penalties for breaching awards or enterprise agreements are set at a maximum of 60 penalty units. This equates to $6,600.00 for an individual or $33,000.00 for a company. The Federal Court and the Federal Magistrates Court may make such orders as they consider appropriate including the making of injunctions in relation to alleged breaches of civil remedy provisions.

The Federal Magistrates Court will now offer a small claims mechanism. A small claims procedure is presently available in state Magistrates Courts under the *Workplace Relations Act*. The new Act extends the small claims procedure to the Fair Work Division of the Federal Magistrates Court. The monetary limit will be increased to $20,000.00 (it is currently $10,000.00).

Collective bargaining and enterprise agreements

by David Thompson, Partner, Melbourne

The Fair Work Bill aims to promote the following in its objects:

(a) a single flexible framework to enable collective bargaining in good faith; and

(b) the facilitation of good faith bargaining and the making of enterprise agreements by Fair Work Australia (FWA).

The most notable features are:

- **Content** – The old prohibited content rules disappear. Agreements may include content about "permitted matters". This includes matters pertaining to the relationship between the employer and union (as well as between employer and employees). This will see the reintroduction of many old prohibited content items. Deductions of union dues from wages are specifically allowed. "Unlawful terms" cannot be included. This includes terms dealing with right of entry.
- **Joint Venture/Common Enterprise Agreements** – The Act encourages the use of joint venture agreements by 2 or more employers that are "single interest employers".
- **Greenfields Agreements** – Greenfields agreements will continue but in a far more restricted capacity, as they can only be entered into with a union.
- **Approval** – Application must be made to FWA to approve agreements. Agreements must pass a new "better off overall" test, that replaces the no disadvantage test. The test requires each employee and prospective employee to be better off overall than if the relevant modern award applies.
- **Flexibility and Consultation re workplace changes clauses** – Each agreement must include an individual flexibility arrangement, in order to meet the genuine needs of an employee and the employer plus a term requiring employers to consult about major workplace changes likely to have a significant effect on employees. If no such terms are included, model terms are deemed to be included.
- **Good faith bargaining** – An employer must not refuse to bargain with another bargaining representative. This is aimed at preventing employers from refusing to bargain with a union. FWA is given a comprehensive role in facilitating bargaining, according to good faith bargaining requirements. These include requirements relating to attendance and participation at meetings; disclosing relevant non-confidential information; genuinely considering proposals; timely responses to proposals; and refraining from capricious and unfair conduct. FWA may make a wide variety of orders to ensure that the parties meet good faith bargaining requirements.

Modern awards

by Costa Brehas, Senior Associate, Melbourne

In March 2008, after the Transition to Forward with Fairness legislation came into effect, the Minister for Employment and Workplace Relations requested the Australian Industrial Relations Commission ("AIRC") to modernise awards.

The object of award modernisation is to simplify and streamline thousands of state and federal awards throughout Australia and to make them easy to apply.

Modern Awards together with the National Employment Standards and National Minimum Wage Orders make up the guaranteed safety net of enforceable minimum terms and conditions which the Fair Work Bill seeks to establish.

Modern Awards will come into effect on 1 January 2010 from which time they will be administered by a new body, namely Fair Work Australia (**"FWA"**).

Contents of Modern Awards

Modern Awards are intended to build on the 10 National Employment Standards (**"NES"**). They:

a) may include:

- 10 additional conditions of employment including: minimum wages, types of employment, overtime, allowances and penalty rates;
- industry specific redundancy schemes;
- terms dealing with cashing out of annual leave and personal leave and averaging of hours of work.

b) must include:

- a flexibility clause that will enable an employer and an individual employee to negotiate an individual flexibility arrangement which can vary aspects of the award (e.g. overtime rates, penalty rates and allowances). However, the employee must not be disadvantaged as a result of entering into this arrangement;
- coverage terms setting out the employers, employees, organisations and outworker entities that are covered by the relevant award. However, Modern Awards will not apply to high income employees (with guaranteed annual earnings of more than $100,000.00 p/a or pro-rata for part-time employees indexed each year);
- a term providing a procedure for settling disputes about any matter arising under the award and in relation to the NES;
- terms regarding the ordinary hours of work for each classification and each type of employment in the award;
- where FWA considers it appropriate, terms providing for the automatic variation of allowances when wage rates in the award are varied.

c) must not include terms that are:

- "objectionable" in that they deal with payment of a bargaining services fee or permit a breach of the general protections in the FW Bill (regarding the rights and responsibilities of employers, employees, organisations etc.)
- about payments and deductions for the benefit of the employer;
- about rights of entry;
- discriminatory; or
- deal with long service leave or contain certain state based differences.

National employment standards

by Rachel Drew, Partner, Brisbane

The Bill creates 10 National Employment Standards, intended to be a "safety net" of minimum conditions. The Standards cannot be overridden by an individual contract or by an award or agreement.

The 10 minimum conditions include:

- The right to a 38 hour week with reasonable additional hours
- The right to request flexible working hours or conditions
- Up to 24 months unpaid parental leave and guaranteed return to work
- 4 weeks annual leave
- 10 days paid personal/carer's leave
- The right to unpaid leave for community service work, such as volunteer work for a State Emergency Service
- Preservation of long service leave entitlements
- Public holidays, with a limited right to request employees work on a public holiday
- Set periods for notice of termination and redundancy pay
- Distribution of Fair Work Information Statements

The standards apply to all employees of "constitutional corporations", that is trading or financial corporations, regardless of their industry or occupation and will operate in addition to any existing award provisions.

The Bill also preserves a national minimum wage. Minimum wages set out in awards will now be reviewed every year by a specialist Minimum Wage Panel within Fair Work Australia. The minimum wages in modern awards will override any lower rates in an enterprise agreement made under the Bill. The Bill also requires Fair Work Australia to make a national minimum wage order to provide minimum wages for all award free employees.

Industrial action and right of entry

by Justine Matthews, Partner, Newcastle

Protected and unprotected industrial action

In keeping with the Forward with Fairness Policy, the Bill retains a distinction between protected and unprotected industrial action.

Unprotected action

Unprotected action is an industrial action taken during the nominal term of an existing enterprise agreement. Under the Bill, if unprotected industrial action is taken, Fair Work Australia will be able to issue orders that it cease. Fair Work Australia will operate as the AIRC has operated under WorkChoices, namely, that it has no discretion whether or not to issue such orders. If the unprotected industrial action is occurring, the orders must be issued. If the orders are issued and ignored, the Federal Court (or Federal Magistrates Court) can enforce the orders by way of injunction.

Like WorkChoices, an employer can proceed directly to Court to obtain an injunction against unprotected industrial action.

Protected action

The rules and regulations surrounding protected industrial action are also very similar to WorkChoices. If employees want to take industrial action they must make an application to Fair Work Australia for a secret ballot order. Fair Work Australia can grant an order if employees are seeking to reach agreement. A ballot will be conducted by the Australian Electoral Commission. 50% of the employees voting must be in favour of taking industrial action. At least 50% of those eligible to vote must vote. The industrial action is only to be taken in support of claims for enterprise bargaining or in response to a lock-out. Protected industrial action can be terminated by Fair Work Australia where:

- industrial action is causing, or threatening to cause, imminent significant economic harm to any of the employees and, in the case of employee claim action, the employer as well;
- where industrial action is threatening life, personal safety, health or welfare of the population, or a part of it, or threatening significant damage to the economy.

Payment for industrial action

If employees take unprotected industrial action, the employer is prohibited from making any payment to an employee for a minimum of 4 hours. This is in line with WorkChoices.

A different approach however is taken if the industrial action is protected. Under the Bill there is no 4 hour minimum non-payment for protected industrial action.

Where partial work bans are imposed, employers have the option of giving notice to:

(a) reduce wages by a specified proportion; or

(b) make no payment at all.

Right of Entry

The Bill allows union officials to enter premises to investigate suspected contraventions of employee terms & conditions of employment. Like WorkChoices this extends to investigating OH& S breaches or to have discussions with employees who are union members.

Union officials also have extremely broad powers to compel employers to produce a document on 14 days notice. This is not limited to wage records, and it is not limited to records of union members. It extends to records considered relevant to a contravention of the Act.

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