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DEAL DONE— LABOR'S FAIR WORK BILL 2009 BECOMES LAW

After a contentious debate in the Senate, the *Fair Work Bill 2009* was passed both of the Federal Houses of Parliament on **20 March 2009**. The content of most of the new legislation will take effect on 1 July 2009 and will comprehensively replace the key federal workplace relations legislation which has been in place for 13 years, the *Workplace Relations Act 1996*. The balance will take effect on 1 January 2010.

Contrary to reports that "*Work Choices is dead!*", the new legislation retains many key reforms introduced by the Work Choices amendments to the *Workplace Relations Act 1996*, while restoring some pre-Work Choices provisions and creating some new provisions.

Overall, the *Fair Work Act 2009* (FWA) will represent a clearer and simpler approach to workplace regulation for the majority of Australian employers and employees. After the tumultuous years which followed the controversial Work Choices reform and in the current challenging economic environment, this will come as a relief to many.

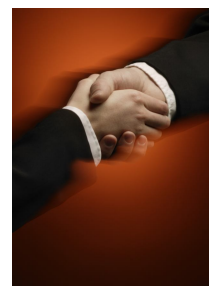
A summary of the key changes which will take effect when the various parts of the FWA take effect appears in this issue of the Law at Work Alert. If you would like more information or if you have any queries, please contact us.

Background

In March 2006, significant changes were made to the WRA. These amendments were known as the Work Choices amendments. Among other things, the Work Choices amendments endeavoured to create a national system of workplace regulation. Work Choices was successful in drawing in the majority of Australian employees (around 85%) into the federal system by drawing all Australian company employers into the system. Other key Work Choices amendments included:

- a simpler process of making individual workplace agreements, known as Australian Workplace Agreements (AWA's);
- the introduction of a set of five guaranteed employee entitlements, known as the Australian Fair Pay and Conditions Standard (AFPCS) which apply to *all* employees covered by the federal workplace relations system (not merely award employees) - minimum wage; maximum ordinary hours of work per week; annual leave; personal leave (including sick leave, carer's leave and compassionate leave); and, parental leave;

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- limiting eligibility criteria for unfair dismissal claims - in particular to employees employed by employers with fewer than 100 employees and employees whose employment had not been terminated for an 'operational reason';
- the creation of a new wage fixing body, the Fair Pay Commission - replacing the Australian Industrial Relations Commission in this function.

In May 2007 further amendments were made to the WRA, reintroducing a test for the making of workplace agreements (including AWA's), known as the Fairness Test.

Since its election in November 2007, the Rudd Labor Government has had a very clear workplace law reform agenda. In March 2008, the WRA was amended for the following purposes: abolishing the making of new AWA's; permitting the making of Individual Transitional Employee Agreements (ITEA's) for a limited period; abolishing the Fairness Test; reintroducing the pre-Work Choices no-disadvantage test for the making of workplace agreements; and, establishing an award modernisation process.

In November 2008, the Rudd Labor Government introduced the *Fair Work Bill 2008* (the Bill) into Federal Parliament. It was passed by the House of Representatives in early December and then referred to the Senate Standing Committee on Education, Employment and Workplace for a full inquiry. The Senate Standing Committee issued its report on 27 February 2009.

The Bill was debated in the Senate and an amended version of the Bill was passed by the Senate on 19 March 2009. While most of the amendments were accepted by the Government, the proposed amendment to the unfair dismissal provision was rejected. This provision was amended again and ultimately a further amended version of the Bill was passed by both Houses of the Federal Parliament on 20 March 2009.

Most provisions of the FWA will take effect on **1 July 2009**, while others will take effect on **1 January 2010**. The FWA will comprehensively replace the WRA. That said, it will retain many key features of the Work Choices amendments, restore some pre-Work Choices content and create new provisions as well. The key areas impacted by the reforms are: Modern Awards; National Employment Standards; Unfair Dismissals; Workplace Bargaining; and, the establishment of Fair Work Australia institutions. Each of these areas is discussed below and on the following pages.

MODERN AWARDS

- Modern Awards will take effect on **1 January 2010**.
- All Federal awards and Notional Agreements Preserving a State Awards (NAPSA) are being reviewed by the Australian Industrial Relations Commission - a process which commenced in March 2008 and will be completed by 31 December 2009.
- Modern awards will contain only **10 key matters** only, plus incidental and ancillary items: minimum wages, skilled based classifications and structures and incentive based piece rates and bonuses; types of employment; arrangements for when work is performed (including hours of work, rostering, notice periods, rest breaks and variations to working hours); overtime rates; penalty rates; annualised wage or salary arrangements; allowances; leave, leave loadings and arrangements for taking leave; superannuation; and, procedures for consultation, representation and dispute settlement.
- Modern awards will work with National Employment Standards to provide a minimum safety net of terms and conditions of employment to employees the subject of the Federal workplace relations system (e.g. Company employees).



- Modern awards will *not* apply to employees who earn more than \$100,000 (indexed annually).
- Modern awards will be reviewed every 4 years and within this period there will be limited opportunity to propose and make changes.
- The award modernisation process is in four stages. The first stage was completed in December 2008 and the next stage will be completed in April 2009. The modern awards which have been issued so far are available online at www.airc.gov.au

NATIONAL EMPLOYMENT STANDARDS

- The WRA has for many years included provisions for minimum entitlements of employees. In 2006, when the Work Choices amendments to the WRA commenced, a further five minimum employment standards were introduced into the WRA. These standards are known collectively as the Australian Fair Pay and Conditions Standard (AFPCS). The 10 National Employment Standards (NES) which will take effect on **1 January 2010** are essentially a collection of the previously existing minimum entitlements (including the AFPCS) with a few additional entitlements.
- In the case of award employees, the NES will work together with the 10 provisions of each modern award to provide a safety net of minimum terms and conditions.
- The 10 NES are:
 - 1. Maximum ordinary hours** - 38 hours per week plus "reasonable additional hours".
 - 2. Request for flexible working arrangements** - employees who having caring responsibilities for a child who is under school age or for a person who is aged under 18 years with a disability will be entitled to **request** a change in working arrangements to assist the employee in caring for the child/young person.
 - 3. Notice of Termination and Redundancy Pay** - employees will be entitled to receive a minimum amount of notice in the event of termination by an employer on any ground. Any employees who is terminated on the ground of a genuine redundancy will, subject to satisfying other eligibility criteria, be entitled to receive a minimum amount of redundancy/severance pay.

TIMELINE FOR CHANGE

27 March 2008

New AWA's abolished.

Award modernisation process commences.

25 November 2008

Fair Work Bill introduced into Federal Parliament.

4 December 2008

Fair Work Bill is passed by the House of Representatives.

27 February 2009

Senate Standing Committee issues report following inquiry into the *Fair Work Bill 2008*.

20 March 2009

Fair Work Bill 2009 passed by both Houses of Parliament.

1 July 2009

Fair Work Act 2009 commences, including new unfair dismissal provisions and good faith bargaining provisions.

January 2010

Modern awards commence.

Fair Work Australia (new regulator) commences.

National Employment Standards commence.

Fair Work Information Statement requirement commences.



4. **Parental Leave and Related Entitlements** - any employee who has provided at least 12 months continuous service will be entitled to 12 months unpaid parental/adoption leave in the event of the birth/adoption of a child. Both members of an "employee couple" will be permitted to take a maximum of three weeks concurrent unpaid leave. Employees who qualify for and take 12 months unpaid parental leave will be entitled to request an extension of a further 12 months unpaid parental leave.
5. **Annual Leave** - employees will have an entitlement to 4 weeks annual leave for each year of service (shift workers will be entitled to 5 weeks for each year of service). When a public holiday falls within a period of annual leave, the day on which the public holiday falls must be treated as a public holiday and not as an annual leave day. The same rule applies when other forms of leave are taken during a period of annual leave (e.g. sick leave). A portion of annual leave may be cashed out provided this is done in accordance with a provision in a modern award, an enterprise agreement or an agreement between an employer and award free employee.
6. **Personal/Carer's Leave and Compassionate Leave** - employees will continue to be entitled to 10 days paid personal leave (including sick leave and carer's leave) and two days paid compassionate leave provided relevant eligibility requirements are satisfied. When a public holiday falls within a period of sick leave, the day on which the public holiday falls must be treated as a public holiday and not as a sick leave day. A portion of annual leave may be cashed out provided this is done in accordance with a provision in a modern award, an enterprise agreement or an agreement between an employer and award free employee.
7. **Community Services Leave** - employees who engage in an eligible community services activity (jury service, a voluntary emergency management activity, or an activity prescribed in the regulations) for a period consisting of time engaged in the activity, reasonable travelling time and a reasonable resting time immediately after the activity. Employers will be obliged to pay an employee engaged in jury service his/her base rate of pay for up to 10 days.
8. **Long Service Leave** - employees will continue to have an entitlement to long service leave sourced from relevant State or Territory legislation, subject to satisfying relevant eligibility requirements.
9. **Public Holidays** - employers will continue to be entitled to request an employee to work on a prescribed public holiday and employees will remain entitled to refuse the request if it is not reasonable. Employees who are not required to work on a public holiday will continue to be entitled to receive the base rate of pay for that day.
10. **Fair Work Information Statement** - a document to be prepared by Fair Work Australia, will have to be provided by employers to new employees as soon as reasonably practicable after the commencement of employment.

UNFAIR DISMISSAL

What will change

The changes to federal unfair dismissal law are proposed will take effect on **1 July 2009**. The key changes will be:

- a 'small business employer' will be redefined as an entity with fewer than 15 employees (previously fewer than 100 under Work Choices) - each full time, part time and long term casual (more than 12 months) will count as one employee;



- small business employers will be able to make use of a Fair Dismissal Code to determine whether the proposed dismissal will be considered fair (see the box on the next page for details);
- the probationary/qualifying period applying to employees of **small** business employers will be capable of extension from the current 6 months up to 12 months—this means that a small employer which dismisses an employee who has provided less than 12 months service will not be at risk of an unfair dismissal claim;
- claims will have to be lodged within 7 days of the dismissal (previously 21 days) - although the FWA will be able to exercise its discretion to accept late claims in 'exceptional circumstances';
- claims will be made to a new entity, Fair Work Australia (claims were previously considered, conciliated and then heard by the Australian Industrial Relations Commission which will cease to exist on 1 January 2010);
- claims will essentially be determined 'on the papers', however if there are contested facts between the parties the FWA will be obliged to hold a conference or a hearing—conferences may be held either at FWA premises or the employer's workplace;
- legal representation will only be permitted in exceptional circumstances (currently it is permitted only with leave, although this is usually granted);
- decisions will usually not involve a public hearing, however such a hearing may be required where the case involves "particularly complex issues" and in such circumstances legal representation may be permitted.



What will *not* change

Key aspects of the unfair dismissal provisions in the current Act will remain unchanged:

- reinstatement will remain the primary remedy;
- the maximum compensation which can be awarded will remain six months pay - the information produced by the Federal Government to date stresses that compensation will normally "be well beneath the cap";
- an employee dismissed for operational reasons (e.g. genuine redundancy) will remain ineligible to make an unfair dismissal claim;
- eligibility to make an unfair dismissal claim will remain subject to an income threshold.

WORKPLACE BARGAINING

In March 2008, the making of new Australian Workplace Agreements (AWA's) was abolished. This ended the option for individual bargaining for enterprise relevant terms and conditions of employment of award employees that had been a feature of federal workplace regulation since 1996. The FWA reflects a clear and unapologetic return to a focus on collective bargaining of enterprise agreements, whether these are made with unions or employees.



Under the FWA the following **permitted matters** may be included in an enterprise agreement: matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement; matters pertaining to the relationship between the employer or employers and the employee organisation or organisations that will be covered by the agreement; deductions from wages for any purpose authorised by an employee who will be covered by the agreement; and, how the agreement will operate.

Under the FWA the **approval process** will be conducted by Fair Work Australia (currently the Workplace Authority). In order to be approved, Fair Work Australia must be satisfied that: if the agreement is not a Greenfields agreement, that the agreement has genuinely been agreed to by the employees covered by it; if the agreement is a multiple-enterprise agreement, that the agreement has genuinely been agreed to by the employees covered by it and that no person coerced or threatened to coerce any of the employers to make the agreement; the terms of the agreement do not exclude a National Employment Standard; the agreement passes the **better off overall test**; the employees covered by the agreement are fairly chosen; the agreement does not include any **unlawful terms**; the agreement does not include any designated outworker terms; and, the agreement specifies a date as a **nominal expiry date** and this date is not more than four years after the day on which the agreement is approved; the agreement contains a **dispute resolution procedure** that allows Fair Work Australia or another party independent of the employers, employees and employee associations, to settle disputes about any matters arising under the agreement, and in relation to National Employment Standards and that allows for representation of employees covered by the agreement for the purposes of that procedure; and, approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives.

The **better off overall test** will replace the current no-disadvantage test in due course, most likely from 1 January 2010. To pass this test, Fair Work Australia must be satisfied at the test time that each award covered employee would be better off overall if the agreement applied to the employee than if the relevant modern award applied: *section 193(1)*.

The FWA will introduce a requirement for all bargaining representatives to meet the following **good faith bargaining** requirements: attending and participating in meetings at reasonable times; disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner; responding to proposals made by other bargaining representatives for the agreement in a timely manner; giving genuine consideration to the proposals of other bargaining representatives for the agreement and giving reasons for the bargaining representatives responses to those proposals; refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; recognising and bargaining with the other bargaining representatives for the agreement.

A bargaining representative can seek the assistance of Fair Work Australia to facilitate in the process of negotiating a proposed enterprise agreement.

INDUSTRIAL ACTION

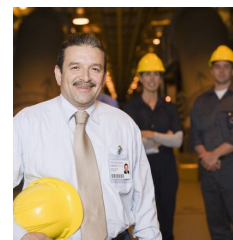
Under the WRA there has been a very limited right to strike. This will remain the case under the FWA, with protected industrial action limited to the following circumstances:

- **employee claim action** - which is action organised or engaged in for the purpose of supporting or advancing claims in relation to a workplace agreement that are about or are reasonably believed to be about permitted matters; and is organised or engaged in against an employer that will be covered by the agreement by a bargaining representative or an employee included in a group of employees specified in the protected action ballot order; and meets the common requirements for industrial action to be protected industrial action; and other requirements; or
- **employee response action** - which is action organised or engaged in as a response to industrial action taken by an employer; and is organised or engaged in against an employer that will be covered by the agreement by a



bargaining representative or an employee included in a group of employees specified in the protected action ballot order; and meets the common requirements for industrial action to be protected industrial action; and other requirements; or

- **employer response action** - which is action organised or engaged in as response to industrial action by a bargaining representative of an employer who will be covered by the agreement or an employee covered by the agreement; and is organised or engaged in by an employer that will be covered by the agreement; and meets the common requirements of industrial action in order to be protected industrial action; and other requirements.



The **common requirements** for industrial action to be protected action are: the action must not related to a proposed enterprise agreement that is a Greenfields agreement or multi-enterprise agreement; if the person organising or engaging in the industrial action is either the bargaining representative or the employee, then the bargaining representative must be genuinely trying to reach agreement; notice requirements must be satisfied - at least **three days written notice** (currently seven days) must be provided; employees and bargaining representatives the subject of relevant orders must not contravene these orders; the action must not be taken prior to an existing agreement passing its **nominal expiry date**; and neither an order suspending or terminating the industrial action nor a Ministerial declaration terminating the industrial action must be operation.

The **other requirements** for industrial action to be protected action are: that the action was authorised by a protected action ballot; that the action must not be in support of or to advance claims to include unlawful terms in the agreement; and, that the bargaining representative of an employee who will be covered by the agreement must not be engaging in **pattern bargaining**; and, the action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene a Fair Work Australia order that relates to a significant extent to a demarcation dispute.

If industrial action is taken which is *not* protected industrial action Fair Work Australia may: order an **injunction** to stop the industrial action; and/or impose **penalties** - the maximum penalty which may be imposed on a body corporate is 300 penalty units (\$33,000) for a body corporate and 60 penalty units (\$6600) in any other case.

Under the WRA, during a period of industrial action (whether or not protected) an employer must not make a payment to an employee who engaged in the action for four hours, if the duration of the action was less than four hours, or otherwise for the total duration of the action. Further, an employee must not accept payment for a period of industrial action.. In either case, a breach can result in the imposition of a maximum penalty of 300 penalty units (\$33,000) on a body corporate and 60 penalty units (\$6600) in any other case. Under the FWA, an employer must not make a payment in relation to the total duration of protected industrial action unless the action is a **partial work ban**. A partial work ban is industrial action which is *not* a failure or refusal of an employee to attend for work or a failure or refusal by an employee who attends for work to perform any work at all or an overtime ban. In the case of action which does amount to a partial work ban, an employer may still reduce the payment made to the employee provided the required procedure is followed.

Under the FWA, if an employee engages in industrial action which is not protected, the employer must not pay him/her for four hours, if the duration of the action was less than four hours, or

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otherwise for the total duration of the action. As under the WRA, an employee must not accept payment for a period of industrial action.

FAIR WORK AUSTRALIA

There has long been a range of different government and related agencies involved in the workplace regulation and enforcement. Currently this includes: the Australian Industrial Relations Commission, the Australian Industrial Registry; the Australian Fair Pay Commission and Secretariat, the Workplace Authority; the Workplace Ombudsman; and the Australian Building and Construction Commission. Under the Federal Government's workplace reforms, each of these is to be abolished and will cease to operate on 31 December 2009, with the exception of the Australian Building and Construction Commission which will cease to operate on 31 January 2010.

In the place of these various agencies, a new 'Fair Work' institutional framework will be established and take effect on 1 January 2010. This will consist of the following: Fair Work Australia (wages, awards, agreements, good faith bargaining orders, unfair dismissal); the Office of the Fair Work Ombudsman (compliance and enforcement); and, Fair Work Divisions in the Federal Court and Federal Magistrate's Court (enforcement, including matters arising under a common law contract which relate to matters in the NES and in modern awards) and small claim procedure).

The creation of Fair Work Divisions in the Federal Court and Federal Magistrate's Court will see these Courts assume a higher profile in workplace law. Under the FWA both Courts will have considerable discretion in making orders to remedy a contravention of the legislation. This will include the ability to issue injunctions in addition to penalties.

DO YOU HAVE ANY QUERIES OR WOULD LIKE TO KNOW MORE? Getting your questions answered and finding out more is just a phone call or email away. Please see our contact details above and below.