

Special Edition: October 2008

Where are we going? Forward with Fairness and Fair Work Australia

Contents

| <i>Page</i> | |
|-------------|--|
| 3 | 1.1 Introduction |
| 3 | 1.2 Fair Work Australia |
| | 1.2.1 The new law |
| | 1.2.2 Compliance – courts and inspectorate |
| | 1.2.3 Minimum wages |
| | 1.2.4 Awards |
| | 1.2.5 Unfair dismissals |
| 5 | 1.3 First layer of Forward with Fairness – Labor’s ‘safety net’ |
| | 1.3.1 National employment standards |
| | 1.3.2 Modern awards |
| | 1.3.3 No increased costs for employers in modern awards? |
| 6 | 1.4 Second layer of Forward with Fairness – Collective bargaining |
| | 1.4.1 Content of agreements |
| | 1.4.2 Bargaining |
| | 1.4.3 Multi employer bargaining (MEB) in lower paying industries |
| | 1.4.4 Industrial action |
| | 1.4.5 Agreements |
| 8 | 1.5 Conclusion |

Published by **Employers First**[™], 313 Sussex St, Sydney NSW 1235, PO Box A233, Sydney South NSW 1235. Opinions expressed by contributors in articles and reproduced articles are the individual opinions of such contributors or the authors of such reproduced articles (as the case may be) and not necessarily those of **Employers First**. This publication is copyright. Apart from any fair dealing as permitted under the Copyright Act, no part may be reproduced by any process without the written permission of **Employers First**. The opinions, advice and information contained herein have not been sought by any member or any other person but are offered solely in pursuance of **Employers First's** and the author's intentions to provide an information service. **Employers First** and the authors are not aware that any person intends to act or rely upon any of the opinions, advice or information contained herein or of the manner in which it might be possible to do so. **Employers First** and the authors issue no invitation to any member or other person to act or rely upon such opinions, advice or information or any of them. They intend this to exclude liability for any such opinions, advice or information.

Telephone: 02 9264 2000

Fax: 02 9264 1968

Email: empfirst@ef.org.au

Where are we going?

Forward with Fairness and Fair Work Australia

1.1 Introduction

This special edition of the Adviser is dedicated to changes to federal workplace law which we expect to be released in Parliament by December. The new system is scheduled to be fully operational from 1 January 2010.

When these changes come into effect and become law, they will significantly change the employment and workplace relations landscape for both small and large employers. In addition, these changes are now occurring in a period of global economic uncertainty.

This article provides an overview of what is likely to lie ahead for members.

1.2 Fair Work Australia

The substantive legislation for Fair Work Australia is planned for introduction to Federal Parliament by December 2008. Prior to releasing the proposed legislation, the federal government has been releasing information about its intended content, in particular, through a series of fact sheets released by Minister for Employment and Workplace Relations, Julia Gillard.

1.2.1 The new law

The centrepiece of the new industrial system is to be a monolith called Fair Work Australia (FWA), a one-stop-shop replacing the:

- Australian Industrial Relations Commission (AIRC)
- Australian Fair Pay Commission (AFPC)
- Workplace Authority
- Workplace Ombudsman
- Australian Building & Construction Commission.

FWA will:

- vary awards
- make minimum wage orders
- approve agreements
- determine unfair dismissal claims
- make orders on such things as good faith bargaining and strikes
- resolve workplace disputes
- enforce compliance—workplace inspectors.

The plan is to make FWA 'accessible' — a bit like the corner store — for employees to call in for information and assistance. So the suggestion has been that there are to be FWA offices scattered around the country in shopping centres, akin to neighbourhood drop-in centres.

Minister Gillard has emphasised that FWA is fair, simple and accessible — a practical outfit for the ordinary working Australian that will quickly and simply provide information, resolve disputes and set wages and minimum wages and conditions. A lot of airplay has been given to the 'non adversarial' approach of FWA, our 'new independent umpire'. However, this image contrasts with the reality of a large

bureaucracy underpinned by an extensive legislative framework.

Minister Gillard has been keen to promote the new legislative framework as simpler and fairer, with a minimised role for lawyers and litigation. However, as much of WorkChoices still remains in place, the latest amendments will be grafted onto it. Complex legal questions are sure to arise in every section of the new law.

1.2.2 Compliance — courts and inspectorate

There will be a FWA Inspectorate with the power to bring court proceedings in the Specialist Fair Work Divisions which are to be created in the Federal Court of Australia and the Federal Magistrates Court of Australia.

Inspectors may be able to investigate and enforce common law entitlements that relate to the NES or modern awards. This is a significant development, as inspectors have never had jurisdiction to enforce common law contractual provisions.

The powers are to be wide and the court can:

- make 'any orders considered appropriate to remedy a contravention, including injunctions, rather than just imposing a penalty';
- enforce entitlements in a common law contract that relate to NES or modern awards to 'make it easier to enforce related entitlements at the same time';
- hear small claims matters with an increase in the monetary limit from \$10,000 to \$20,000;
- 'act in an informal manner, will not be bound by formal rules of evidence, and may act without regard to legal form and technicality'.

While a less legalistic approach may be an attractive proposition, we should hear warning bells whenever a government promises dispute setting mechanisms which will not be bound by rules of evidence and without regard to legal form and technicality.

1.2.3 Minimum wages

FWA will take over minimum wage and award reviews. Instead of employers and unions presenting their positions and a decision made based on those arguments, a Minimum Wage Panel within FWA will have an annual review with submissions from any interested party, which may, or may not, be taken into account.

It is most likely that the social justice role adopted by the (to be disbanded) Australian Fair Pay Commission will be strengthened in the FWA wage reviews, which will mean a continuation of high minimum wage rates in Australia. It will also mean that instead of approaching wage fixing from an economic and labour market perspective, the emphasis will be on providing a social security blanket for the lower paid.

We have not yet seen the final criteria the Minimum Wage Panel is to take into account, but three of the four considerations outlined in the Minister's fact sheet concern social inclusion, 'relative' living standards and a 'comprehensive' range of fair minimum wages for juniors and trainees.

So we expect to see a continuation of the AFPC approach to raise the level of minimum wages on social justice grounds, rather than employer capacity to pay and the creation of work.

Minimum wage adjustments are to take effect from 1 July each year.

1.2.4 Awards

Award reviews will undergo a similar process of review every four years. We don't yet know the detail of who will participate in this process and how or if their views will be taken into account. We expect it will resemble the process which has characterised the award modernisation process — present your submission to FWA if you are an interested party and FWA will make the decision based on its view of what should be done.

Once the modern awards are made by January 2010, their next review is planned for 2014. The intention is that awards are not to be altered during their four-year term.

Apart from this four yearly review, FWA can vary awards under:

'limited circumstances (where it is convinced there is a strong need to vary the award outside of the four-yearly process)' or to remove ambiguity, uncertainty and discriminatory terms.

1.2.5 Unfair dismissals

FWA will also handle unfair dismissals.

Unfair dismissal is a dismissal that is harsh, unjust or unreasonable.

Casual employees who have completed the relevant minimum qualifying period (12 months regular and systematic employment in a small business or 6 months in a larger one) will be able to make an unfair dismissal claim. Employment which ends at the completion of a fixed term or specified task are also excluded.

From July 2009, the unfair dismissal protection for employers with fewer than 100 employees will go. In its place will be a Fair Dismissal Code (the Code) for employers with fewer than 15 employees, including part time and casual staff, if they dismiss an employee with more than 12 months service.

The Code requires employers to give the employee reasons why their job is at risk and an opportunity to improve. Only one warning must be given.

The Code comes with a checklist for employers to see if the dismissal is fair. They must check:

- the employee has been warned;
- given a valid reason for the dismissal;
- given an opportunity to improve — through training for example.

Small business will be relieved to know that they can instantly dismiss an employee for stealing, fraud, violence or a serious breach of occupational health and safety laws (OHS). However, the employee is not prevented from claiming unfair dismissal. As is the case for larger employers, the employer will have to defend their position.

We know that this can be difficult — theft can take on a different meaning to the plain English definition, or be found to be an exceptional circumstance. Consider also the myriad cases on what constitutes a serious OHS breach. Even where the breach is judged to be serious, invariably mitigating circumstances are found which enable the employee to be reinstated or compensated.

While the Code has been presented as making the dismissal process easier and more certain for small business, the reality is they are now saddled with an entire new set of obligations — the fair dismissal obligations already applying to larger employers.

Whether you are a large or small employer, any employee who thinks their dismissal is unfair can go to FWA to resolve the matter — no lawyers to be involved — and can be reinstated or have compensation capped at six months salary. Further, dismissal based on operational reasons — as allowed by WorkChoices — is to go.

The management of unfair dismissal claims by FWA has something of the flavour of an earlier Labor experiment with judicial registrars.

What is emerging is that while the Government has stuck to its pre-election policy announcements — while there have been few surprises so far in the big picture — as always the 'devil is in the detail' now emerging.

It is also interesting that while the original policy statement provided a timetable for the

commencement of FWA reforms as January 2010, the Government has bought forward the operative dates for the new bargaining framework, unfair dismissals and associated protections will now come into force six months earlier on 1 July 2009.

What we are seeing is a layering of additional obligations and costs for employers.

1.3 First layer of Forward with Fairness — Labor's 'safety net'

The first layer of Forward with Fairness comprises national employment standards (NES) and modern awards.

1.3.1 National employment standards

The NES will apply to all employees with default rules to apply where employees are not covered by an award or enterprise agreement.

The NES largely adopt the provisions already in place for hours, leave, public holidays, termination and redundancy and keep the small business exemption from redundancy pay.

However the NES also:

- creates a right for employees to request flexible working arrangements if they care for a child under school age;
- requires employers to pay for jury service;
- requires employers to re-credit annual leave when an employee is ill or required to care during a period of annual leave;
- requires small business to provide redundancy payments through modern awards.

1.3.2 Modern awards

Modern awards will not apply to employees guaranteed annual earnings of more than \$100,000 (indexed annually, pro-rated for part timers). This exemption only applies if annual earnings are guaranteed in writing by employer and agreed with employee in advance.

The content of modern awards is now clearer — though by no means certain — with the AIRC 12 September Decision on the 14 Priority Awards. It shows another layer of potential wage cost increases for employers.

What we have seen so far does not show a consistent or predictable rationale for the re-organisation of awards. Some awards have been grouped into various industry awards, on the basis of employer industry — hospitality and retail. Others are a conglomeration of separate industries, representing sectors rather than an industry. The Manufacturing award covers industries as diverse as metal and engineering to glue and gelatine industry with occupations ranging from mechanics to farriers and space trackers.

1.3.3 No increased costs for employers in modern awards?

The creation of modern awards is 'not intended' to increase costs for employers.

How will this be achieved with the differences in:

- terms and conditions currently in awards and NAPSAs;
- the rates and conditions in different states;
- different parts of an industry and even between different groups of employers within the same part of the industry.

The exposure draft awards released on 12 September contain provisions which have the potential for substantial cost increases for employers. The AIRC has:

- chosen provisions from current awards and NAPSAs which will have the effect of raising wages and allowances, and imposing restrictions on work arrangements in certain awards. For example, in the draft Clerks Award rates have been increased by \$6 pw to \$47 pw, depending on the grade, and work after midday Saturday, currently ordinary hours, becomes overtime;
- introduced new standard entitlements — standard clauses — into modern awards, including the payment of an across the board 25% casual loading;
- revisited its pre WorkChoices redundancy decision and provided that small business should pay for redundant employees, but as a concession, payments are at a lower rate than in the NES and won't operate until January 2010.

The Standard Clauses introduced by the AIRC cover:

Consultation

Obligations on employers to notify employees and their representatives of significant workplace change and to discuss the change.

Dispute resolution

A process by which parties can go to the AIRC (later FWA).

Types of employment

Part time and casual, casual conversion after 12 months and 25% loading.

Termination of employment

Adds to the NES — provides a job search entitlement.

Redundancy

Provision for employees to be transferred and an entitlement to lower paid duties. Specifically, the new clause includes severance pay for employees of small employers — defined as less than 15 employees. The provision is designed to operate prospectively and would therefore not apply to periods of service prior to 1 January 2010.

Allowances

All allowances, including those that relate to the reimbursement of expenses, to be

expressed as a percentage of the key classification rate.

Superannuation

Nominates a default fund or funds should an employee fail to exercise his or her right to nominate the fund to which employer contributions should be made, and includes payments while absent from work on workers compensation.

So we have the:

- 10 national employment standards;
- 10 conditions in modern awards;
- plus six standard clauses which impose additional obligations.

This adds up to 26 minimum provisions — plus wages. These combine to be the minimum conditions employers must provide. They are the floor from which any bargaining is to start.

1.4 Second layer of Forward with Fairness — Collective bargaining

The second layer of Forward with Fairness promotes collective bargaining, and much of the content of the substantive legislation will concern bargaining, union rights and industrial action.

1.4.1 Content of agreements

The current 'prohibited content' provisions introduced by the previous federal government will be removed. Employers will have to bargain over a broader range of matters, 'pertaining to the employment relationship' — as decided by case law over the years. This remains a wide and litigious area but will certainly include payroll deductions of union dues and will extend to issues such as childcare, health insurance and climate change impacts in the workplace.

The wider range of matters which can be included in agreements will also allow protected industrial action to be taken while they are being negotiated.

Not only will employment matters be able to be included in agreements, but also representative or collective matters. So agreements can include matters that pertain to the relationship between:

- an employer and the employees;
- an employer and any union to be covered by the agreement.

1.4.2 Bargaining

Under the new system employers and employees will be required to bargain in 'good faith'.

The good faith bargaining obligations will be:

- attend and participate in meetings at reasonable times;
- disclose relevant information in a timely manner, subject to appropriate protection for commercial in-confidence information;
- respond to proposals made by a party in a timely fashion;
- give genuine consideration to the proposals of the other parties and providing reasons for their responses;
- refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.

Fair Work Australia is the new 'independent industrial umpire'. It can make good faith bargaining orders that can direct parties to:

- meet;
- disclose relevant information;
- consider proposals and respond to them;
- refrain from unfair or capricious conduct.

Such orders will be enforceable by the court (Fair Work Divisions of the Federal Court or the Federal Magistrates Court). It is not yet clear what the scope of these orders will be.

Where an employer refuses to bargain employees or their representatives can ask Fair Work Australia to determine if there is majority employee support for negotiating an enterprise agreement. FWA will determine majority

support by 'whatever method it considers appropriate'.

If Fair Work Australia determines there is majority employee support for an enterprise agreement, the employer will be required to bargain, and to notify employees of their right to be represented in bargaining. This can be a union, accountant, consultant or a colleague.

There is to be no need for a formal notice of the intention to bargain, so it is as yet unclear what triggers the bargaining process, and when an employer and unions/employees can be said to be engaged in bargaining.

While the Minister has made it clear that compulsory arbitration will not be a feature of good faith bargaining she has said that:

'Arbitration will be limited to exceptional circumstances only – where industrial action is causing a threat to safety or health, a threat to the economy, or significant harm to the parties'.

1.4.3 Multi employer bargaining (MEB) in lower paying industries

This proposal will be of particular interest to employers in childcare, aged care community services, security and cleaning.

There is to be a new form of regulation, or 'agreement' available for unions to put in place with multiple employers in lower paying industries. Here unions will be able to negotiate with the assistance of FWA, terms and conditions in excess of industry awards with multiple employers for a particular agreement. This will need to be closely monitored as it has clear risks for employers including pattern bargaining and questions as to what constitutes a 'low pay industry'.

Once in the MEB system, FWA can order compulsory conferences, which can also include a 'third party' head contractor 'who actually determines the terms and conditions that apply'.

Outcomes of MEB can include:

- a single agreement applying to a number of named employers, which may be identical in terms or have variations;
- a number of agreements with different terms applying to different employers;
- or a combination of the two.

While the Minister has made statements about prohibiting pattern bargaining, it is stated in Forward to Fairness that:

'where more than one employer and their employees or unions with coverage in the workplaces voluntarily agree to collectively bargain together for a single agreement, they will be free to do so'.

We have been told that industrial action in pursuit of industry-wide agreements will be proscribed, but however there is the possibility of some employers being roped into these new industry-wide deals against their will.

MEB (alias pattern bargaining) took us down the path of wages growth unmatched by productivity growth in the past. This would not be a welcome development in the highly uncertain economic times ahead.

1.4.4 Industrial action

The new laws will distinguish between **unprotected industrial action** taken outside of bargaining and **protected industrial action** which may occur during the bargaining.

Unprotected industrial action

Industrial action will not be protected where it is taken before the nominal expiry date of an enterprise agreement or the 'parties are not bargaining in good faith'.

Protected industrial action

Will be allowed in the course of bargaining, will require a secret ballot of employees and three days notice of intention to take the action.

If an employee stops work and the action is protected, their pay must be deducted, but only for the **actual** period of time the employee stopped work.

In the case of partial work bans, employers are to be given the option to tolerate the bans, stand down or lock out employees, or issue a 'partial work notice' and make deductions proportional to any work not performed. Fair Work Australia will be able to review whether the amount deducted is proportional if required.

If employees take unprotected action there is to be a mandatory minimum deduction of four hours pay for any incident of unprotected industrial action.

FWA will be able to suspend protected industrial action, where it is 'protracted and causing significant harm to the relevant employer and employees' and determine a settlement based on the 'merits of the case, the interests of the negotiating parties and the public interest, and the improved productivity of the business'.

1.4.5 Agreements

All agreements are to be approved by Fair Work Australia before they commence operation.

Fair Work Australia must be satisfied that:

- the employer and employees genuinely agree to the agreement;
- employees are better off overall by entering into the agreement;
- the terms of the agreement do not contravene the national employment standards;
- the agreement does not contain unlawful content.

Fair Work Australia will apply the Better Off Overall Test to ensure that each employee covered by the agreement is better off overall in comparison to the relevant modern award.

To be approved agreements will also be required to contain clauses that provide for:

- individual flexibility arrangements to be made between the employer and individual employees;
- dispute resolution;
- consultation on major workplace change;
- representation of employees in dispute resolution and consultation processes.

Parties will be able to negotiate these clauses to meet their particular circumstances.

Where an agreement does not contain these clauses, the terms of a model clause to be based on the AIRC general award clause will be deemed to be incorporated.

Certain matters will be classed as unlawful content.

These include terms that:

- breach unlawful termination and freedom of association laws;
- require the payment of a bargaining services fee to a union;
- are discriminatory;
- provide remedies for unfair dismissal to persons who have not served the applicable qualifying period (i.e. 6 or 12 months);
- purport to authorise industrial action during the life of the agreement.

1.5 Conclusion

What happens next?

The proposed legislation is yet to be announced in its final detail.

The bill is expected to go before the Parliament in the second or last sitting week this year – the last sitting date of both Houses is 4 December 2008.

FWA will not be established until 1 January 2010, although some of its components have now been brought forward to 1 July 2009. Assuming the proposed legislation is passed by the Parliament, the new unfair dismissal laws and good faith bargaining requirements will come into operation on 1 July 2009.

We will keep you informed of legislative developments as they emerge.

