Thomson Playford Cutlers

Workplace Relations Alert
November 2008

The *Fair Work Bill 2008:* what does it mean for you?

The focus of this Alert is (briefly) to describe the proposed system, to highlight unexpected changes in the Bill, and to identify strategic choices you might need to make and issues that you might need to address well before the new law comes into effect.

Things to do now:

- be aware of (and perhaps get involved with) the award modernisation process
- consider whether it will be helpful to make an enterprise agreement during 2009, and if so whether it would be better to do so before the new bargaining provisions come into effect on 1 July 2009
- in preparing for mergers, acquisitions, outsourcing and insourcing, identify awards and agreements that might 'transfer' to your business with incoming staff, and consider how to accommodate this
- consider whether you need to adjust:
  - plans for restructuring, and/or
  - internal processes for termination of employees

  before the new unfair dismissal laws come into effect on 1 July 2009

Things to do during 2009:

- review employment contracts and agreements being negotiated now, to ensure they can accommodate the National Employment Standards
- consider whether large annual leave entitlements accrued by award or lower income employees need to be reduced before the system changes
- educate your managers and staff about the changes that are coming, to ensure as smooth a transition as possible

If you would like to discuss these or any other issues arising from the Bill, or would like our assistance with any of these preparatory tasks, please contact us.

Thomson Playford Cutlers

Introduction

As you will be aware, the Federal Government's *Fair Work Bill 2008* was introduced into Parliament on 25 November. The Bill seeks to replace the *Workplace Relations Act 1996* (**WR Act**) entirely, setting up a new industrial relations system that retains some features of Work Choices but also basically fulfils Labor's Forward With Fairness election policy.

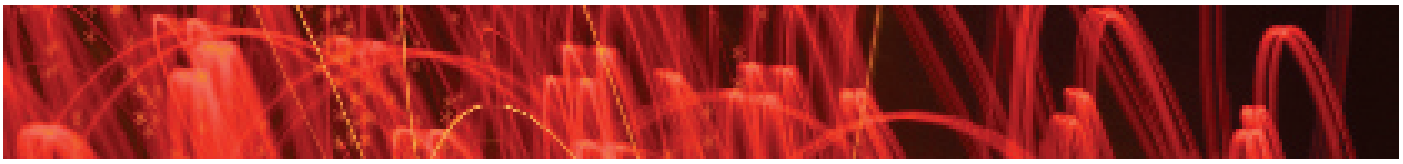
In short, the new system will involve:

- a **safety net** of:
  - national minimum wage orders that apply to all employees, and
  - 10 National Employment Standards that apply to most employees, combined with
  - a greatly reduced number of modernised awards that apply to employees earning less than $100,000, and
  - for those workplaces that choose this, a system of enterprise agreements which are made under a new system of 'good faith bargaining' rules, and
  - continuity of awards and agreements when businesses are 'transferred'
- a number of '**general protections**' for employees, including freedom of association provisions, a broad right to complain of discrimination in employment, and a prohibition on 'sham' contractor arrangements
- **unfair dismissal remedies** available to most employees earning under $100,000
- a **new institutional framework**:
  - Fair Work Australia (**FWA**) – which will replace the AIRC, Workplace Authority and Fair Pay Commission – overseeing the making of agreements, making and reviewing awards, and determining national wage increases
  - the Fair Work Ombudsman, who will educate and advise the public, and also manage the inspectors who investigate safety net breaches and run prosecutions, and
  - the Federal Court, Federal Magistrates' Court and (in some cases) State Supreme Courts – which will have broad powers to enforce the safety net, including the power to make injunctions for breach of an award or agreement, and to hear claims for breach of employment contracts
- increased **right of entry powers** for unions, and
- a limited right to take **protected industrial action**.

The Bill is significantly shorter (though still 575 pages) and more clearly drafted than the WR Act.

The Bill does not explain how the transition between old and new systems will be managed. This is to be explained in a separate Bill, to be introduced early in the new year. This means that at this point there is a great deal of uncertainty about how employers should manage through the next few years.

The Government hopes that the Bill will be passed by March 2009 – and this seems likely now, since the Opposition announced that it will not block it. However, the parliamentary process is likely to result in at least some amendment. Some provisions of the new law will commence on 1 July 2009, but most will commence on 1 January 2010.



National Employment Standards

The ten National Employment Standards (**NES**) proposed in the Bill will come into operation in January 2010 and will apply to all employees covered by the federal system. The NES cannot be excluded by modern awards or enterprise agreements.

The NES are largely as foreshadowed in Forward With Fairness, though we comment below on some surprises. The NES are:

1 **maximum weekly hours of work -** 38, with averaging only in accordance with awards, or for high income employees over periods of up to six months

2 **a right to request flexible working arrangements -** An employee will be able to seek a remedy for breach of this Standard if the employer fails to consider a request, but not a substantive review of reasons for refusing a request

3 **parental leave -** including a right to request a second period of 12 months to be a primary caregiver. Parental leave entitlements will be extended to same sex couples. The employer will have a new obligation to consult with an employee who is on parental leave about any decision that will have a significant effect on the employee's position

4 **annual leave -** with simpler accrual, and entitlements based on 'service' and the employee's ordinary hours of work. Leave will be able to be cashed out in accordance with an award or enterprise agreement, or by high income employees, always keeping a balance of at least four weeks' leave. Employers will not be able to direct award employees to take leave, unless authorised by an award; but will be able to (reasonably) direct award/agreement free employees to take leave

5 **personal/carer's and compassionate leave.** Unpaid compassionate leave will be extended to casuals. The evidence required for sick/carer's leave will be evidence that would satisfy a 'reasonable person'; the explanatory memorandum suggests familiar concepts such as medical certificates and statutory declarations

6 **community service leave -** including jury service and emergency service leave

7 **long service leave -** which, in the short term, refers back to relevant state legislation

8 **public holidays**

9 **notice of termination and redundancy pay.** While notice entitlements will be largely as under Work Choices, employees who have not served either 12 months (for employees of 'small businesses' – less than 15 employees) or six months (for larger employers) will not be entitled to notice at all. The provisions for redundancy pay will reflect those in existing federal awards (maximum of 16 weeks' pay dropping to 12 weeks); but redundancy pay will not be available to employees of small businesses. It is unclear whether a clause granting redundancy pay to employees of small businesses could be included in an award, or whether this would be a contravention of the NES, and

10 the provision of a '**Fair Work Information Statement**' (information about workplace rights) to all new employees.

Thomson Playford Cutlers

Awards

As at 1 January 2010, there will be in place a new framework of (probably several hundred) modernised awards, replacing (several thousand) existing federal and State awards. While the transitional arrangements are of course not yet clear, the idea is to start with a clean slate. Significantly, modernisation may result in previously award-free employees being award covered.

After that, FWA will have limited but significant powers to vary awards:

- in annual minimum wage reviews and four yearly reviews
- for work value reasons, and
- for removal of discrimination, uncertainty or ambiguity.

FWA will only have a very limited power to make new awards, if this is necessary to meet the objectives of the Act.

Modern awards may include terms about: minimum wages; types of employment; arrangements for when work is performed; overtime rates/penalty rates/ allowances; annualised wage arrangements; leave/leave loading arrangements; superannuation; provisions for consultation, representation and dispute settlement; and industry specific redundancy schemes.

Modern awards must include: coverage terms – setting out the parties to whom the award applies; flexibility terms; and automatic allowance variation.

Modern awards must not include: objectionable terms; terms about rights of entry; discriminatory terms; or terms that contain State based differences.

Modern awards will not apply to high income employees (the threshold is to be set by regulation, but the Government has stated $100,000 as the initial threshold). To provide some protection for high income employees, it will be an offence if an employer fails to pay the high income promised to the employee.

Enterprise agreements and the bargaining framework

Less regulation of the content of agreements

There will no longer be a concept of 'prohibited content' for enterprise agreements. Agreements will be able to include any 'matters pertaining' to the employment relationship between employer and employee, and also the relationship between employer and the employee organisation covered by the agreement, as well as salary deductions and how the agreement is intended to operate. This has the effect of permitting provisions: dealing with labour hire and casuals; union consultation clauses; leave to attend trade union training; and payroll deductions for salary sacrifice and union fees.

However, FWA will not be able to approve agreements that contain 'unlawful content' such as provisions that would undermine the NES, freedom of association or unfair dismissal provisions.

Agreements must include: a dispute settlement clause; a nominal expiry date of up to four years from date of approval; a consultation clause; and a flexibility clause.

Good faith bargaining

Bargaining towards enterprise agreements will be subject to 'good faith bargaining' rules, which it appears will come into effect in July 2009.

Bargaining can occur at any time, but if an existing agreement is in operation, good faith bargaining principles will only apply in the last 90 days of the existing agreement. A union can only be an employee's bargaining agent if it is entitled to represent the employee. Unless an employee elects otherwise, a union in that position will be – by default – his or her bargaining representative. Agreements with no union involvement are therefore much less likely than under the WR Act.

Employers will not be entitled to refuse to bargain with a bargaining representative of an employee. This could create interesting negotiations; theoretically, every employee is entitled to appoint his or her own bargaining agent, which could result in a large number of bargaining agents being involved.

Good faith bargaining will require representatives to: attend and participate in meetings at reasonable times; disclose relevant information in a timely manner; respond to proposals from others in a timely manner; give genuine consideration to proposals and reasons for responses to those proposals; and refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.

Thomson Playford Cutlers

Workplace determinations and facilitated bargaining for low paid

If an employer or employee representative does not comply with good faith bargaining requirements, FWA will have power to make 'bargaining orders' - generally limited to procedural matters such as making an order for a meeting. If there are serious breaches of a bargaining order, FWA may be able to make a workplace determination – an arbitrated solution to the negotiations. A workplace determination will operate in a similar way to an enterprise agreement and will be binding on the parties until it is terminated or replaced with an enterprise agreement or another workplace determination.

FWA will be able to assist low paid workers with minimal bargaining power to make agreements with employers. This will be done with multiple employers, through compulsory conferences and good faith bargaining orders. If agreement cannot be reached, FWA will be able to make a workplace determination.

Better off overall test

Agreements will be subject to the 'better off overall test' (yes, the **BOOT**). FWA will need to be satisfied that an award covered employee will be better off overall if the agreement applies to the employee rather than the relevant award.

Transfer of business

As compared with the old 'transmission of business' rules, the Bill's 'transfer of business' provisions are very broad. They will provide employees with greater certainty, and employers with less flexibility.

A transfer will occur if:

- an employee moves from employment with one employer to another, with no more than a three month gap, to perform substantially the same work, and
- the two employers are connected by a transfer of assets, an outsourcing arrangement or ceasing of outsourcing, or are 'associated entities'.

Any award or enterprise agreement applicable to the employment with the old employer will transfer to the new employer – and (subject to an order by FWA) can also apply to new employees employed to do the same work by the new employer after the transfer.

Unlike the 12 month limitation under Work Choices, transferred instruments will apply until they are terminated or replaced.

The new employer will have to recognise service with the old employer for some NES entitlements, but not necessarily annual leave or redundancy, which can be paid out on transfer.

General protections

Under this heading, employees have the right to bring claims for:

- breach of freedom of association provisions, which are largely the same as those in the WR Act
- termination for temporary absence due to illness or injury, which is again very familiar
- discrimination at work. This is an extremely broad and unprecedented set of provisions, based on the concepts in a relevant ILO Convention, and will give employees significant choice between this and specialist discrimination laws as an avenue for complaint, and
- sham 'contractor' arrangements, where employees are wrongly described and treated as independent contractors, similar to the protection introduced by Work Choices.

Unfair dismissals

The Bill aims to ensure a 'quick, flexible and informal' approach to unfair dismissal, with an overarching policy of a 'fair go all round'. All employees earning under $100,000, or who are covered by an enterprise agreement, will potentially have access to the claim.

The key changes from the current system are:

- employees working in small businesses (less than 15 employees) will be able to make a claim, but only after they have 12 months' continuous service. Employees of larger employers will have access after six months
- casual employees will not be considered when assessing business size, unless they have been employed 'on a regular and systematic basis' for 12 months
- employees who have been made 'genuinely redundant' will not be able to claim; but this test will not be met if the employer did not consult in accordance with an award or enterprise agreement, or if the employee could have been redeployed either with the employer or with a related corporate entity

Thomson Playford Cutlers

- it will be a complete defence to a claim against a small business that the dismissal complied with the Fair Dismissal Code. We foresee the Code's potential as best practice shorthand for all employers in future

- claims will need to be lodged with FWA within seven days from dismissal

- FWA has broad discretion as to how to conduct its inquiry – including holding private, informal mediation conferences between the parties at the workplace. Cases will need to be sufficiently complex for FWA to grant lawyers or paid agents leave to appear on behalf of their clients. FWA has the power to order penalty costs against a lawyer or paid agent who encourages parties to bring speculative claims. In other words, the procedure may be very different from the existing procedure, or may be very similar – it will depend on FWA's discretion in each case. FWA can decide to hold a hearing at any time – about all or part of a matter

- matters that FWA must take into account when deciding an unfair dismissal claim include the size of the business, and whether the absence of any human resources expertise impacted on the manner of the dismissal, and

- appeal rights will be limited.

The institutional framework

FWA will consist of the President, Deputy Presidents, Commissioners and specialist Minimum Wages Panel members. Matters will no longer necessarily be dealt with through adversarial hearings; FWA members will have broad powers to conduct matters, including in an informal manner (for example, 'on the papers'). Decisions of FWA members may be appealed with the permission of a Full Bench of FWA; permission must be granted if the appeal would be in the public interest.

Powers of Fair Work Inspectors will be significantly broadened. Inspectors will be able to:

- enter premises if they 'reasonably believe' that the Act or a fair work instrument (eg NES or modern award) applies to work done on the premises. Currently inspectors must have 'reasonable cause' to believe such circumstances exist – a higher threshold test

- investigate non-compliance with employment contract terms on matters covered by the NES and modern awards. For example, if an employee's employment contract provides for entitlements over and above NES entitlements, such as six weeks' annual leave, an inspector may investigate whether the employer has provided the employee with six weeks' leave.

A small claims procedure will be established in the Federal Magistrates' Court for monetary claims up to $20,000. The current limit is $10,000. In small claims proceedings, the Court is not bound by rules of evidence and procedure, with the focus being on resolving these matters in an efficient and informal manner.

While in many cases employees will have the right to choose whether they seek a remedy under the Bill or under other legislation (such as discrimination legislation), there are no 'double dipping' provisions.

Fair Work Australia	Office of Fair Work Ombudsman	Fair Work Divisions of Federal Court and Federal Magistrates Court
Minimum wage setting (Minimum Wages Panel) Award variation Enforcing good faith bargaining Facilitating multi-employer bargaining for the low paid Dealing with industrial action Approval of agreements Resolution of disputes and unfair dismissal matters	Promoting compliance with the Act, including through education, information and assistance Appointing Fair Work Inspectors to enter premises to investigate compliance with the Act (including NES, modern awards) Commencing court proceedings to enforce breaches	Exercising judicial functions under the Act, including: • unlawful termination claims • NES and modern award breach claims • contractual entitlements over matters included in the NES or a modern award

Thomson Playford Cutlers

Right of entry

Forward With Fairness stated that it would not make any substantial changes to the right of entry provisions. However, the Bill significantly expands union right of entry:

- the right to:
  - enter premises to investigate a suspected breach will be linked to union membership, and
  - hold discussions with employees will be linked to whether the union is entitled to represent the industrial interests of the employees (ie whether the work performed at the premises fits within the union's eligibility rules).

  Currently, entry is only permitted if the relevant union is bound by an award or collective agreement which covers the work being performed at the premises, and
- unions will be entitled to inspect non-members' pay and employment records.

Industrial action

Forward With Fairness indicated that Work Choices provisions relating to industrial action would broadly continue. However, some significant changes appear in the Bill.

The concept of protected industrial action will be retained; but the Bill abolishes the concept of a bargaining period. Instead, at any stage during negotiations for an agreement, employees or a union may apply for a protected action ballot to engage in industrial action.

Employers may only take protected action (lockouts) in response to employee industrial action.

The requirements that must be met in order for industrial action to be protected will be:

- the nominal expiry date of any applicable enterprise agreement or workplace determination must have passed
- the proposed enterprise agreement to which the action relates cannot be a greenfields or multi-enterprise agreement
- where the action is being organised by a bargaining representative or an employee, the bargaining representative or employee must be genuinely trying to reach an agreement and must not be in breach of any orders made in relation to industrial action, the agreement or matters that have arisen during bargaining
- appropriate notice of the action must have been given
- the action must not be in support of claims to include unlawful terms in the agreement, and
- the action must not relate to a demarcation dispute.

A secret ballot will still be required to approve protected action, but new mechanisms have been instituted to accelerate the process. Employees will now be able to apply for a secret ballot order 30 days before the nominal expiry date of an agreement.

The prohibitions on strike pay from Work Choices will remain. However, subject to giving notice, employers will now have discretion as to what payment to make (full, partial or none) to employees engaging in protected industrial action in the form of a partial work ban.

If FWA terminates protected action (for example because the action is causing or threatening significant economic harm, or risking health), it will be able to make a workplace determination – again, an arbitration of the issues in dispute in the bargaining process.

Thomson Playford Cutlers

For more information on this topic please contact:

Jacquie Seemann
Partner
+61 2 9020 5757
jacquie.seemann@thomsonplayfordcutlers.com.au

David Brand
Special Counsel
+61 2 8248 5833
david.brand@thomsonplayfordcutlers.com.au

Lincoln Smith
Senior Associate
+61 8 8236 1139
lincoln.smith@thomsonplayfordcutlers.com.au