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The new federal workplace relations system

This *Express Law* provides an overview of the key changes that will be made by the *Fair Work Act 2009* (the FW Act) and the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the Transitional Bill).

On 7 April 2009, the FW Act received the Royal Assent. The majority of its provisions, including the new bargaining framework for enterprise agreement making, will commence operation on 1 July 2009 and the remainder, including provisions dealing with modern awards, minimum wages and the new National Employment Standards (the NES), will commence on 1 January 2010.

On 19 March 2009, the federal government introduced the Transitional Bill into parliament. The Transitional Bill sets out the rules for the transition from the current workplace relations system to the new Fair Work system.

The Transitional Bill will repeal the current *Workplace Relations Act 1996* (the WR Act) other than Schedules 1 and 10 of that Act, which deal with registered and transitionally registered organisations respectively. The Schedules will form a stand-alone Act, to be renamed the 'Fair Work (Registered Organisations) Act 2009'. The Transitional Bill has been referred to the Senate Education, Employment and Workplace Relations Committee. The committee's report is due on 7 May 2009.

A further consequential Bill (intended to amend more than 70 pieces of federal legislation and deal with any referral of powers from the States) will be introduced into parliament in the week beginning 25 May 2009. Regulations will also be made.

Key changes to the workplace relations system

The key changes made by the FW Act are:

- the creation of Fair Work Australia (FWA) and the Office of the Fair Work Ombudsman
- the introduction of a new safety net, including the NES and modern awards
- new rules for enterprise agreement making
- changes to the unfair dismissal regime
- the expansion of union rights of entry
- the introduction of general protections provisions (replacing the unlawful termination and freedom of association provisions).

Fair Work Australia and the Office of the Fair Work Ombudsman

From 1 July 2009 (or sometime earlier) the FW Act and Transitional Bill will establish a new institutional framework comprising FWA and the Office of the Fair Work Ombudsman.

FWA will be the new independent industrial umpire that will oversee the new national workplace relations system.

The Office of the Fair Work Ombudsman will take over the functions of the Workplace Ombudsman and the advice and education role of the Workplace Authority. The Office will also include a specialist information and assistance unit for small and medium sized business.

The FW Act and Transitional Bill will also create new Fair Work divisions of the Federal Court of Australia and the Federal Magistrates' Court.

From 1 July 2009, the functions of the Workplace Ombudsman and the advice and education role of the Workplace Authority will be transferred to the Office of the Fair Work Ombudsman.

The Australian Fair Pay Commission is expected to cease operating on 31 July 2009, after completion of its 2009 minimum wage review.

The Australian Industrial Relations Commission (including the Australian Industrial Registry) will continue to operate to complete the award modernisation process but is expected to cease operating on 31 December 2009.

The Workplace Authority is expected to cease operating on 31 July 2010.

The safety net

The new safety net, consisting of the NES, modern awards and national minimum wage orders, will not commence operation until 1 January 2010. Until that time, the Australian Fair Pay and Conditions Standard, including Australian Pay and Classification Scales, will continue to be the statutory minimum standards for federal system employees.

The NES will include entitlements to:

- annual, personal/carer’s and community service leave
- notice of termination
- for businesses with 15 or more employees, redundancy pay
- public holidays.

Once operational, the NES will apply to all national system employees, including those covered by pre-reform certified agreements and collective agreements.

There are also some new rules in relation to entitlements under the FW Act and Transitional Bill, for example:

- All accrued paid annual and personal/carer's leave, e.g. leave that accrued under the WR Act, will be administered in accordance with the NES.
- Previous service before the NES commences will count for the purposes of determining entitlements under the NES (except paid annual and personal/carer's leave).

— Previous service will be recognised for the redundancy pay entitlement unless the employee did not have a redundancy pay entitlement immediately before the commencement of the NES.

In addition, the FW Act and Transitional Bill will provide that employees must receive at least the minimum rate of pay contained in a modern award from 1 January 2010. FWA will also be able to make 'take-home pay orders' to ensure that the actual take-home pay of individuals or groups of employees is not detrimentally affected by their move to a modern award.

FWA will be able to make orders to vary a transitional instrument to resolve any uncertainty or difficulty relating to the interaction between the NES and that instrument, or to make that instrument operate effectively with the NES.

Awards

An employee will continue to be covered by an existing award if their modern award applies on 1 January 2010 (or, if the award for their industry has not been modernised, until their award has been modernised). An employer covered by an enterprise award, such as the Australian Public Service Award 1998, must apply to FWA to have the award modernised before 31 December 2013, otherwise it will cease to operate.

Any notional agreement preserving State awards or any existing award that applies to an employee will cease to apply if and when the employee becomes covered by a modern award.

As soon as practicable after 1 January 2012, FWA will conduct a two-year review of modern awards (except modern enterprise awards) to ensure that they are operating effectively and consistently with the modern awards objective. After that date, there will be a four-yearly review process, with the first review commencing in 2014.

Modern awards will not apply to employees with guaranteed annual earnings (as defined by the FW Act) of over $100,000 (as indexed).

Bargaining under the new system

The new bargaining system will commence on 1 July 2009. The effect is that, if a collective agreement has not been made before 1 July 2009, the new system will apply to any proposed negotiations or negotiations that are under way. Note that an employee collective agreement is made under the WR Act when it has been approved by a majority of employees. A union collective agreement is made when its terms are agreed by the union and the employer (it does not need to have been approved by a majority of employees in order to be made). However, as the Transitional Bill does not preserve the rules for approving a union collective agreement, in effect, a union collective agreement will need to be not only made but also approved by a majority of employees by 1 July 2009 in order to be lodged with the Workplace Authority.

If a collective agreement is made before 1 July 2009, it must be lodged with the Workplace Authority within a certain timeframe (generally 14 days from the time it is made) in order to operate as a collective agreement in the new system. The collective agreement will then become a transitional instrument under the new system, and the WR Act 'rules' will continue to apply to it.

There will also be a 'bridging period' for bargaining between 1 July 2009 and 31 December 2009: enterprise agreements made during that period will be assessed against the 'no-disadvantage

test'. From 1 January 2010, enterprise agreements will be assessed against the 'better off overall test'.

Under the new system, enterprise agreements will be made between employers and employees. However, a union that is a bargaining representative for a proposed enterprise agreement may choose to be covered by the agreement.

Good faith bargaining

From 1 July 2009, bargaining representatives must meet the good faith bargaining requirements, which include:

- attending and participating in meetings
- responding to proposals in a timely manner
- giving genuine consideration to proposals.

Negotiating parties will not be required to make concessions or reach agreement. However, in very limited circumstances, FWA will be able to arbitrate a dispute and make a workplace determination: for example, if negotiating parties seriously and persistently breach good faith bargaining orders.

Conditional termination of individual agreement-based transitional agreements

Prior to the nominal expiry date of an individual agreement-based transitional agreement, e.g. an Australian Workplace Agreement or an individual transitional employment agreement (the successor to Australian Workplace Agreements), the parties may make a 'conditional termination' agreement which will allow either party to unilaterally effect a conditional termination of the agreement once its nominal expiry date is reached.

A conditional termination agreement will allow the employee to participate in the bargaining process for an enterprise agreement, including in industrial action and voting. If an enterprise agreement comes into operation, the individual agreement will cease to apply automatically.

Existing industrial instruments

From 1 July 2009, existing industrial instruments will become 'transitional instruments' that will continue to operate as if the WR Act were still in operation. Generally, transitional instruments will continue to operate beyond their nominal expiry dates until they are terminated or replaced.

Transitional collective instruments will prevail over the terms of modern awards, but all employees must receive the minimum rate of pay in the relevant modern award or national minimum wage order.

Some transitional instruments will eventually be sunsetted (that is, they will automatically cease to operate after a given date unless further legislative action is taken to extend their operation). For example, notional agreements preserving State awards will be sunsetted on 1 January 2013 (or a later date set by regulation), and old industrial relations agreements, Division 3 agreements and section 170MX awards will be sunsetted at the latest on 27 March 2011.

Transfer of business

The new transfer of business rules will apply to transactions completed after 1 July 2009. The FW Act makes significant changes to the transmission of business rules by introducing, for the first time in federal workplace relations legislation, a test to determine whether a transmission has occurred. The test will focus on whether there is a similarity in the work performed by employees rather than in the business which has been transferred. Notably, outsourcing and insourcing arrangements may be captured by the test:

- Outsourcing or 'contracting out' generally refers to the situation where an employer engages a third party to perform part of its business. For example, an employer might outsource its cleaning arrangements by contracting with a cleaning company to provide cleaning services to the employer's business rather than directly employing cleaners itself.
- Insourcing or 'contracting in' refers to arrangements whereby an employer begins to perform activities or services that it has previously not performed itself. For example, an employer might establish a new part of its business to perform HR and payroll functions rather than contract with a payroll company for these services.

FWA will be able to make orders that an instrument will not transfer to a new employer in cases where otherwise it would transfer. FWA may also modify the operation of an instrument that does transfer by, for example, varying or amending its terms. A transferred instrument will no longer cease to operate after the period of 12 months lapses (a time limit that was introduced by the *Workplace Relations Amendment (Work Choices) Act 2005*).

Unfair dismissal

Under the FW Act and Transitional Bill, employees will be eligible to make an application for unfair dismissal unless they are:

- employed by a small business employer (an employer of 15 employees or fewer) for less than 12 months
- employed by an employer of 15 or more employees for less than 6 months
- award/agreement free and earn more than the high income threshold
- dismissed on the ground of genuine redundancy (although the exclusion is narrower than the current exemption under the WR Act).

Until 1 January 2011, '15 employees' will be calculated on the basis of full-time equivalent employees. From 1 January 2011, '15 employees' will be based on a simple head count of employees.

General protections

The FW Act and Transitional Bill introduce new general protections provisions which prohibit the taking of adverse action against a person because they have a workplace right (such as an entitlement under an industrial instrument) or engage in industrial activity (such as joining or not joining a union); or because they have or have not exercised a workplace right or engaged in an industrial activity, or propose to, or not to, exercise a workplace right or engage in an industrial activity.

The general protection provisions also protect employees and prospective employees from adverse action on grounds such as race and sex.

What does this mean for agencies?

The implementation of the FW Act and Transitional Bill will bring sweeping changes to the workplace relations system and have significant implications for all employers and employees in the federal system.

Agencies should be prepared for the commencement of the new system on 1 July 2009. In particular, agencies that wish to make a collective agreement under the existing WR Act framework should ensure that it is made before 1 July 2009 (including approved by the majority of employees). If they do not, the type of agreement they are making, the process for doing so and the rules relating to bargaining and representation will change on and from that date.

Agencies that make an agreement before 1 July 2009 should also ensure that they will be in a position to lodge that agreement within 14 days, otherwise the agreement will not be assessed by the Workplace Authority Director and will not come into operation.

AGS recommends that agencies include terms in new agreements that are consistent with the NES. This will help to ensure that the transition from the Australian Fair Pay and Conditions Standard to the NES is as seamless as possible.

Text of the FW Act will shortly be available at:
www.comlaw.gov.au

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