



## Forward with fairness... Status of the Federal Government's proposed Fair Work Bill

### Brief summary

- When the Federal Government (the Government) released the Fair Work Bill, 2008 (FWB) on 25 November 2008 we reported on the proposed amendments to the Workplace Relations Act, 1996 (Cth) (WRA). On 4 December 2008 the FWB was passed by the House of Representatives. The FWB then proceeded to a Senate Inquiry.
- On 27 February 2009 the Senate released its 219 page report on the FWB. Labor senators suggested technical amendments to the FWB. By contrast Coalition senators suggested more significant concerns with the proposed Fair Work framework.
- Although undergoing a Senate inquiry, no transitional legislation or regulations have yet been released in relation to the FWB. Both are critical aspects of the Fair Work framework. As a result, it is anticipated that the FWB will be enacted in June 2009 with the transitional legislation being released around the same time - just before aspects of the FWB come into force on 1 July 2009 with the remainder on 1 January 2010.

### A new Workplace Relations framework

- If enacted, the FWB will replace the WRA and provide for a new workplace relations system which will take effect on 1 January 2010. Legal scholars estimate that the new legislation will cover approximately 85 percent of Australian employees.
- Also constitutionally significant is that the FWB proposes to facilitate the referral of powers from the States to the Commonwealth to eventually enable the creation of a national workplace relations system.
- As we noted in our previous **Newsflash** it is proposed that the Australian Industrial Relations Commission (AIRC), the Workplace Authority, the Workplace Ombudsman and the Australian Building and Construction Commission will all be replaced with one body called Fair Work Australia (FWA).

## A two-tiered safety net

### (a) National employment standards (NES)

The FWB contains ten legislated minimum standards of employment:

1. Hours of work - a standard 38 hour week for full time employees plus additional hours where those hours are not reasonable.
2. Annual leave - four weeks paid annual leave for full time employees (pro rated for part time employees) and five weeks paid annual leave for shift workers.
3. Personal, carers and compassionate leave - ten days paid personal/carers leave per annum for full time employees (pro rated for part time employees), two days per year of paid compassionate leave and two days unpaid personal leave for genuine caring purposes and family emergencies.
4. Long service leave - current arrangements will remain governed by State or Federal laws until a national standard is established.
5. Parent leave - a right to separate periods of 12 months unpaid parent leave for each parent with the ability for one parent to request an additional 12 months leave. The refusal of such request will only be justified on "reasonable business grounds".
6. Flexible work for parents - parents will have the right to request flexible work arrangements until their child reaches school age. Employers may only refuse such a request on "reasonable business grounds".
7. Community service leave - paid leave for prescribed community service activities such as jury service and emergency services duties.
8. Public holidays - both national and state holidays will be recognised. There will be a minimum of eight guaranteed national public holidays plus state and local public holidays with the right to be paid appropriate penalty rates or other compensation when an employee is required to work on a public holiday.
9. Information in the workplace - a fair work information statement must be provided to all new employees. The statement will contain prescribed information about an employee's workplace rights and entitlements.
10. Termination of employment and redundancy - up to four weeks notice of termination of employment for all employees based on a sliding scale

according to years of service and a statutory entitlement to redundancy pay for employees in workplaces with 15 or more employees based on the AIRC's 2004 redundancy test case decision.

### **(b) New modern awards**

In addition to the ten minimum legislative standards applying to all employees, the Government has commenced a process to reduce the number of existing Industrial Awards from approximately 3000 to 250. The Awards will contain another layer of minimum employment standards relating to:

- minimum wages including skill based classifications, career structures, incentive based payments, bonuses, wages and apprentices and training arrangements
- type of work performed including permanent, casual, flexible work arrangements or job sharing
- arrangements for when work is performed including hours of work, rostering, rest periods and meal breaks
- overtime rates
- penalty rates for employees working unsocial, irregular or unpredictable hours or on weekends, public holidays and as shift workers
- annualised wage or salary arrangements which have regard to the patterns of works

in an occupation, industry or enterprise as an alternative to the payment of penalty rates

- allowances including reimbursement of expenses, hire duties and disability payments
- leave and leave loading
- superannuation
- consultation including representation and dispute settling processes.

It is anticipated that Awards will not be extended to cover employees who are traditionally award free, such as managers. However, Awards will be reviewed every four years to ensure that they remain relevant to those covered by their terms. A number of draft Awards have been prepared and are undergoing a consultation process.

A controversial issue that arises out of the FWB framework is whether the legislature or FWA should determine and set minimum employment entitlements. Although the Howard Government was moving towards the abolition of the Award system, the Rudd Government has re-established the system thus creating a two-tiered structure of minimum employment standards. It is currently unclear how the overarching powers of the legislature and the powers of the FWA will interact to

establish minimum standards of employment for Australian workers.

### Collective bargaining

It is evident that the Rudd Government is committed to enterprise level collective bargaining. The key goal of enterprise collective bargaining is to encourage employers and employees to negotiate and agree to terms and conditions of employment above the minimum "safety net".

In our last newsflash we outlined the key elements of the duty to bargain in good faith which has been re-introduced as part of the collective bargaining framework. In addition, the FWB has introduced a low paid bargaining stream to assist employees working in low paid sectors such as the service sector. If the parties in the low paid bargaining stream cannot agree to the terms and conditions of a collective agreement, binding arbitration will impose terms and conditions on the parties. However, the FWB is unclear on how this will be achieved. Further, binding arbitration in this sector will effectively act as a third mechanism by which terms and conditions of employment are imposed in addition to the NES and new award system.

### Unfair dismissal

As we have previously noted, there will be a significant change to the unfair dismissal jurisdiction effective 1 July 2009:

- The 100 employee "small business" exemption threshold will be abolished and employees of a business with less than 15 employees will not be able to make a claim before completing 12 months service or if the employer employs 15 or more employees, in the first six months of service.
- A claim must be made within seven days of dismissal.
- A proposed "Fair Dismissal Code" has been drafted for the use of small businesses. The intention is that, where a small business complies with the one page checklist forming the code, a terminated employee is then unable to bring an unfair dismissal claim.
- FWA will have the ability to elect whether a matter should proceed to a hearing or a conference. If the latter is elected, it will not necessarily be conducted as a conciliation. Rather, FWA will have the ability to ask questions and then make a binding determination.

- It is suggested that conferences will be the primary mechanism to deal with disputes. As a general rule legal representation will not be permitted. A further issue is whether an aggrieved party could lodge a claim in the Federal Court arguing a denial of natural justice given a decision would be rendered without a hearing and the ability to cross examine.

### Implications for Employers

FWA will create a new workplace relations system that will consist of

- increased statutory minimum standards of employment
- an increased emphasis on collective bargaining for workplace agreements
- a new industrial award system
- increased access to the unfair dismissal regime.

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on proposed legislative  
amendments to the current  
Work Choices legislation.**