

THE NEW WORKPLACE RELATIONS LAWS

Overview of the New Industrial Relations System

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Perth

Federal Magistrate Toni Lucev

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Fair Work Bill 2008 – The Six Key Areas – an overview

1. The *Fair Work Bill 2008*¹ encapsulates the Federal Government's workplace relations policy in proposed legislative form, apart from the abolition of workplace agreements, already achieved under previous legislation. One of the objects of the *FW Bill* is however to ensure that statutory individual employment agreements can never be part of a fair workplace relations system.
2. The *FW Bill* is centred on six key policy areas:
 - (a) new legislated minimum National Employment Standards;²
 - (b) modern awards;
 - (c) a new bargaining framework;
 - (d) expanded unfair dismissal arrangements;
 - (e) revised provisions concerning industrial action and right of entry; and
 - (f) a new institutional framework.
3. Apart from modern awards, aspects of each of these key areas is further considered below, together with the new provisions concerning transfer of business.

A new industrial regime – Fair Work Australia

4. Save for the constitutionally necessary isolation of judicial decision making,³ the *FW Bill* seeks to streamline the arbitral and administrative processes by the establishment

¹ "*FW Bill*".

² "NES".

³ See the *Boilermakers* cases: *Attorney-General v R* (1957) 95 CLR 529; *R v Kirby; ex parte Boilermakers Society of Australia* (1956) 94 CLR 254. The Privy Council and the High Court decided that the Commonwealth Court of Conciliation and Arbitration could not exercise both arbitral and judicial power, as it had traditionally done. This was because of the constitutional division between Parliament, executive and the judiciary. Put shortly – judges could not arbitrate because the resulting

of Fair Work Australia⁴. Although there will be a separate and independent statutory agency, the Office of the Fair Work Ombudsman, headed by a Fair Work Ombudsman,⁵ the Office of the FWO's day to day operations will be practically integrated with FWA. Fair Work inspectors will be appointed by the FWO.

5. The Government intends to create new Fair Work divisions of the Federal Court and the Federal Magistrates Court, but the establishment of those divisions is not the subject of the FW Bill, and will be subject to later amending legislation.

6. FWA will replace a number of industrial relations bodies, namely:

- (a) the Australian Industrial Relations Commission;⁶
- (b) the Australian Industrial Registry;
- (c) the Australian Fair Pay Commission;
- (d) the Workplace Authority;
- (e) the Workplace Ombudsman,

from 1 January 2010, and with effect from 1 February 2010 it will also replace the Australian Building and Construction Commission.⁷

7. The FWA will be three-tiered: consisting of a President, a number of Deputy Presidents and Commissioners (presently unspecified in number, but including the present Deputy Presidents and Commissioners of the AIRC) and a minimum of four and a maximum of six Minimum Wage Panel Members.

8. FWA's key functions will include:

- (a) minimum wage setting and adjustment by a specialist Minimum Wages Panel to be established within FWA;
- (b) award variation;
- (c) ensuring good faith bargaining;
- (d) facilitating multi-employer bargaining for the low paid;

form of an arbitrated award was a form of legislative instrument determining future rights, not a judgment enforcing past rights.

⁴ "FWA".

⁵ "FWO".

⁶ "AIRC".

⁷ The replacement of the Australian Building and Construction Commission is subject to a report being prepared by the Hon. M. Wilcox QC: see www.workplace.gov.au/wilcox.

- (e) dealing with industrial action and right of entry;
 - (f) approval of agreements; and
 - (g) resolution of disputes and unfair dismissal matters.
9. In performing its functions FWA will be required to take into account Australia's ILO obligations under ratified ILO Conventions.
 10. It is intended that the FWA deal with matters in a more informal way than is presently the case. It is envisaged that in most cases representation by a lawyer or paid agent will be unnecessary.
 11. If however a lawyer or paid agent is an employee of a party, bargaining representative or peak body representing a party, or is a bargaining representative, then FWA permission is not required to appear.
 12. FWA will have the ability to decide matters "on the papers", or in informal conference proceedings. It need not have a public hearing. Appeals against single member decisions of the FWA will be by leave, but only if the FWA considers it in the public interest for leave to be granted.
 13. The FWA has all of the normal powers in relation to the obtaining of information and giving of evidence to facilitate it undertaking inquiries and hearings. It will not be bound by the rules of evidence and procedure in relation to matters before it.
 14. Generally, appeals from FWA decisions (and certainly those of Deputy Presidents and Commissioners) will be to a Full Bench of FWA comprising three members with at least the President or a Deputy President on the Bench.
 15. Various other functions are specifically allocated to Full Benches of the FWA including:
 - (a) the making of a modern award;
 - (b) conducting four yearly reviews of modern awards;
 - (c) making a determination that varies or revokes a modern award in a four-yearly review; and
 - (d) making a workplace determination.
 16. Minimum Wage Panels must consist of seven FWA members of which one must be the President and at least three must be specialist Minimum Wage Panel Members.

17. Fair Work inspectors will investigate and enforce safety net entitlements and breaches of safety net entitlements, modern awards and enterprise agreements: functions not dissimilar to those of existing Workplace Inspectors. Entitlements will be enforceable before the Federal Court and the Federal Magistrates Court. There will be an extension of the existing small claims mechanism so as to allow the Fair Work division of the Federal Magistrates Court to deal with small claims which will include claims of up to \$20,000. In dealing with these claims the Federal Magistrates Court will be able to act informally, will not be bound by formal rules of evidence, and may act without regard to legal technicality and form. The Federal Magistrates Court will have discretion to allow a person to be represented by a lawyer, but the intention is that in most cases this will be unnecessary.

A New Agreement making regime

18. Significant changes are made to the collective bargaining framework on the premise that it will be simpler than the current system. The changes include:
 - (a) the introduction of good faith bargaining;
 - (b) regulation concerning agreement content;
 - (c) a single stream of agreement making;
 - (d) streamlined processes for agreement approval; and
 - (e) facilitated bargaining for the low paid.
19. The provisions with respect to enterprise bargaining reflect the fact that collective bargaining at an enterprise level is at the heart of the new workplace relations system.

Types of Agreement

20. There will be a single stream of collective enterprise agreements able to be made between an employer or employers and employees, with no distinction between union and non-union agreements.
21. A union entitled to represent an employee's industrial interests and which was a bargaining representative for a proposed agreement may give written notification to FWA that it wants to be covered by the agreement. This will give it additional entitlements, including the ability to enforce the agreement.
22. Collective agreements may be made as either single enterprise agreements, multi-enterprise agreements or greenfields agreements if the greenfields agreement relates

to a genuine new enterprise. The enterprise must be new and not an existing enterprise acquired as a going concern. Greenfields agreements must be made with one or more unions that would be eligible to represent employees employed in the enterprise.

Who may bargain – representatives

23. Employees may appoint a bargaining agent, and where no appointment is made and the employee is a member of a union, that union automatically becomes the bargaining agent. Unions who are eligible to have members employed under a greenfields agreement must be given notice of an employer's intention to make a greenfields agreement. An employer may appoint a person as a bargaining agent.
24. Bargaining representatives must be recognised by other bargaining representatives.

The content of agreements

25. Enterprise agreements can be made about any one or more of the following:
 - (a) matters pertaining to the relationship between an employer or employers and employees covered by the agreement;
 - (b) matters pertaining to the relationship between an employer or employers and an employee organisation or employee organisations covered by the agreement.
 - (c) deductions from salary for any purpose authorised by an employee covered by the agreement; and
 - (d) how the agreement will operate.
26. The intention appears to be that by use of the "matters pertaining" formulation matters that clearly fall within managerial prerogative, but are outside the employer's control or unrelated to employment arrangements, are not subject to bargaining (or industrial action). It is also clear that the formulation means to include (where agreed to) matters such as:
 - (a) union consultation clauses;
 - (b) leave to attend union training clauses; and
 - (c) payroll deductions, including deductions for union fees.
27. Whilst there will be no concept of prohibited content there will be unlawful content, the inclusion of which will preclude the approval of enterprise agreements by the FWA. Unlawful content will include provisions inconsistent with or which seek to override

legislative provisions related to freedom of association, unfair dismissal and industrial action. Hence, matters such as:

- (a) payment of union bargaining fees;
- (b) contracting out of unfair dismissal protection; and
- (c) provisions purporting to allow industrial action during the currency of an enterprise agreement,

will be unlawful content precluding approval of the agreement.

28. In addition, enterprise agreements must include:

- (a) individual flexibility arrangements;
- (b) consultation clauses in relation to major change; and
- (c) a procedure for the FWA or another independent person to settle disputes about matters arising under the agreement, and in relation to the NES.

Approval of agreements

29. Enterprise agreements must be lodged with FWA for approval prior to their commencing operation. Once an agreement has received employee approval the role of the FWA is to ensure that:

- (a) there is genuine agreement;
- (b) the group of employees covered by the agreement was fairly chosen;
- (c) the agreement passes the "Better Offer Overall Test";⁸
- (d) the agreement contains a nominal expiry date (no later than four years after the date of operation) and a dispute settlement clause;
- (e) there are no terms contravening the NES; and
- (f) there are no terms containing unlawful content.

30. BOOT is satisfied if each award-covered employee (and prospective award-covered employee) would be better off overall if the agreement applied than if the applicable modern award applied to the employee. The test time is the time the application for approval of an agreement is made.

31. Seven days after FWA approval the enterprise agreements come into effect.

⁸ "BOOT".

Good faith bargaining

32. Where there is a refusal by an employer to bargain collectively with employees the FWA will have power to issue bargaining orders requiring representatives to bargain in good faith.
33. FWA bargaining orders cannot be made in relation to the content of the agreement. Bargaining orders will relate to procedural matters only. These are specifically listed as:
 - (a) requiring attendance and participation in meetings at reasonable times;
 - (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
 - (c) responding to proposals made by other bargaining representatives in a timely manner;
 - (d) giving genuine consideration to the proposals of other bargaining representatives and providing reasons for responses to those proposals; and
 - (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.
34. These provisions are designed to improve communication, and therefore reduce the likelihood of industrial action and protracted disputes concerning enterprise bargaining.
35. Bargaining representatives who believe that other bargaining representatives are not negotiating in good faith must give notification to the alleged offender and give a reasonable time for a response. FWA will not be able to make bargaining orders unless this notification process has been complied with.
36. Where FWA considers there have been serious and sustained breaches of bargaining orders by a bargaining representative and those breaches have significantly undermined bargaining for the agreement FWA will be able to make a workplace determination, provided it is satisfied that all other reasonable alternatives to reach agreement have been exhausted and that no agreement would be able to be reached in the foreseeable future.
37. Where bargaining representatives cannot agree regarding agreement content the choices are:
 - (a) to jointly abandon the bargaining process;

- (b) to take protected industrial action; or
- (c) jointly seek FWA's assistance in determining a settlement, or assistance through mediation or conciliation.

Facilitated bargaining for the low paid

- 38. Multi-employer bargaining for low paid employees will be able to be facilitated by the FWA. This is an endeavour to overcome the lack of access to the benefits of collective bargaining for various groups of low paid employees.
- 39. The FWA will have the ability to:
 - (a) call compulsory conferences of parties;
 - (b) require third party attendance at conferences (including the attendance of head contractors who sometimes determine the terms and conditions of employment to apply).
- 40. Bargaining representatives may also apply on behalf of employers or employees for a low paid authorisation which will allow the FWA to facilitate bargaining for a specified list of employers.
- 41. In determining if the proposed bargaining is in the public interest the FWA will consider a range of factors including:
 - (a) the history of bargaining in the industry concerned;
 - (b) whether bargaining authorisation will assist in identifying improvements to productivity and service delivery;
 - (c) the view of employers and employees to be covered by the agreement; and
 - (d) the extent to which the applicant is prepared to respond reasonably to the needs of an individual employer.
- 42. The FWA will also be able to make good faith bargaining orders in low paid bargaining negotiations. Protected industrial action will not be available.
- 43. In the event that the parties are unable to reach agreement a workplace determination may be sought by the consent of employee representatives and one or more employers. The FWA will also have the capacity to make a workplace determination on the application of only one party. In such cases, the FWA will have to determine whether the arbitration should proceed by having regard to criteria including:

- (a) whether the parties have genuinely tried to reach agreement; and
 - (b) whether making a workplace determination will promote productivity and efficiency in the enterprises concerned.
44. The facilitated low pay bargaining provisions have been criticised as representing the re-introduction of compulsory arbitration, as well as constituting a layer of arbitrated employment conditions above the safety net and below enterprise agreements. Advocates of the provision say that they allow persons who would not otherwise be able to engage in enterprise bargaining to obtain access to a reasonable bargaining arrangement.

A fresh set of key employment standards

45. The NES are intended to provide a safety net of minimum employment standards to apply to all employees covered by the Federal workplace relations system with effect from 1 January 2010. Minimum wages are not included. It is intended that minimum wages will be provided for in modern awards.
46. There are ten NES. They are:
- (e) maximum weekly hours of work;
 - (f) requests for flexible working arrangements;
 - (g) parental leave and related entitlements;
 - (h) annual leave;
 - (i) personal/carer's leave and compassionate leave;
 - (j) community service leave;
 - (k) long service leave;
 - (l) public holidays;
 - (m) notice of termination and redundancy pay; and
 - (n) fair work information statement.

Maximum weekly hours of work

47. The maximum weekly hours of work remain the same for full-time employees: that is 38 ordinary hours of work. For employees under a modern award or enterprise agreement these hours may be averaged. An employee not covered by a modern award or enterprise agreement may agree in writing to average hours over six months or less.

48. The major change is where additional hours worked are averaged they will be subject to reasonableness factors, which will include the averaging provision or arrangement itself.

Requests for flexible working arrangements

49. This is a new legislated entitlement. Parents with, or having responsibility for the care of, a child under school age will be able to request a change in working arrangements to assist with the care of the child. The only basis on which an employer may refuse this request is on reasonable grounds, and the employer's decision is not subject to review.

Parental leave and related entitlements

50. The entitlements provided for are maternity, paternity and adoption leave. The existing standard provisions will be expanded by the NES providing for:
- (a) both parents being given the right to separate periods of up to 12 months unpaid parental leave;
 - (b) alternatively, one parent having the right to request an additional 12 months leave, with employers only able to refuse on reasonable business grounds.
51. There are two other significant changes:
- (a) the NES increases the amount of concurrent leave able to be taken by both parents from one to three weeks; and
 - (b) extends parental leave entitlements to same sex couples for the first time.

Annual leave

52. The coverage and quantum of annual leave entitlement does not change under the NES. The NES will however provide for modern awards to supplement the NES in a non-detrimental way. This may include allowing employees to take extended periods of annual leave on half pay, or the cashing out of annual leave, subject to a remaining entitlement balance of four weeks.
53. The NES also proposes a simplified system of accrual and credit for payment of annual leave, namely that paid annual leave accrues and is taken on the basis of an employee's ordinary hours of work.
54. Modern awards will be allowed by the NES to provide for additional leave for shift workers and for cashing out of annual leave with appropriate safeguards.

Personal/carer's leave and compassionate leave

55. There is no change to the quantum of entitlement to personal/carer's leave and compassionate leave under the NES.
56. The NES does however:
- (a) extend unpaid compassionate leave to casual employees;
 - (b) remove the cap of 10 days paid carer's leave per year; and
 - (c) allow employees (other than those not covered by modern awards or enterprise agreements) to cash out personal/carer's leave and compassionate leave, provided a balance of at least 15 days is maintained.
57. The NES also simplifies the rules for the provision of notice and giving of evidence for taking personal/carer's leave and compassionate leave.

Community service leave

58. There is no current minimum national standard entitlement to community service leave.
59. The NES will enable employees to take unpaid leave for community service such as jury service or voluntary emergency management.
60. For full and part-time employees undertaking jury service for a period of up to 10 days the NES contains provisions for employers to provide make-up payments at the base rate of pay for ordinary hours of work.
61. This is an area where currently payment for jury service is regulated by State or Territory legislation, or by Federal or State awards and agreements. However, only Victoria and Queensland currently require employers to pay a make-up payment to employees for jury service.

Long service leave

62. There will be no change to long service leave entitlements because under the NES long service leave entitlements will be determined by current State and Territory arrangements.
63. However, the Federal Government intends to work with State and Territory Governments to develop nationally consistent long service leave entitlements, presumably under the NES.

Public holidays

64. The NES continues the entitlement of an employee to be absent on prescribed public holidays. The NES prescribes an additional public holiday, namely the Queen's birthday holiday.
65. The NES provides for payment of public holiday absences at the base rate of pay for ordinary hours.
66. Under the NES an employer may make a reasonable request to an employee to work on a public holiday, but an employee may refuse to work if the employee has reasonable grounds.

Notice of termination and redundancy pay

67. Under the NES an employer must now provide written notice of termination and redundancy pay. There is also a new entitlement to redundancy pay, depending on the level of continuous service by an employee. This NES does not apply to employees of a small business (one employing less than 15 employees).
68. The entitlement to redundancy pay is on a sliding scale from a minimum of four weeks for an employee with at least one years service to a maximum of 12 weeks for at least 10 years service.
69. NES redundancy entitlements may be increased under the provisions of modern awards.

Fair work information statement

70. Employers will be required from 1 January 2010 to give all new employees the Fair Work Australia Information Statement.
71. The Statement must contain information about the following:
 - (a) the NES;
 - (b) modern awards;
 - (c) agreement making;
 - (d) the right to freedom of association; and
 - (e) the role of FWA and the FWO.

Reasonable business grounds

72. What constitutes “reasonable business grounds” for the refusal of a request under the NES? No definition or guideline is provided in the Bill. Reasonableness is left to the assessment of the employer in the circumstances of each case.
73. The explanatory memorandum does however provide some examples of what are said to be, or might comprise, “reasonable business grounds”. These are:
- *the effect on the workplace and the employer’s business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;*
 - *the inability to organise work amongst existing staff; or*
 - *the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee’s request.⁹*

Industrial action and right of entry

74. Protected industrial action will be available during negotiations for an enterprise agreement with the requirement to hold a mandatory secret ballot authorising the industrial action. There are pre-conditions to the taking of protected industrial action, namely that:
- (a) participants are genuinely trying to reach agreement; and
 - (b) participants are complying with any good faith bargaining orders in place.
75. There will still be an exception to industrial action for a refusal to work out of a reasonable concern for an employee’s health or safety. The reverse onus of proof, requiring the employee to first prove the existence of the reasonable concern for health and safety, has been removed, and the reasonableness of the concern will now be required to be established as a defence to any claim by an employer in relation to industrial action.
76. Applications for secret ballots in relation to protected industrial action will still require the applicants to be genuinely trying to reach an agreement. Protected action ballots can be conducted by either the Australian Electoral Commission or an alternative approved ballot agent. Protected action ballot orders will no longer be able to be stayed on application by an employer. This is designed to reduce delays in the

⁹ Explanatory Memorandum, page xii.

- protected action ballot process and prevent parties from having to re-apply for ballot orders that have expired during a challenge.
77. Industrial action is protected if taken within 30 days after the result of the ballot has been declared. The period may be extended by up to 30 days upon application to the FWA by the applicant.
 78. Protected action ballot orders will now be subject to civil penalties, not criminal proceedings, and may be enforced by a wider range of persons including FWA inspectors.
 79. Applications for protected action ballot orders can be made up to 30 days prior to the nominal expiry date of an enterprise agreement.
 80. Employer industrial action, defined as a lock out, will only be protected where the employer locks out employees in response to employee industrial action.
 81. The rules with respect to strike pay are altered.
 82. For unprotected industrial action employers will be required to withhold four hours pay for any incident of unprotected industrial action up to and including four hours duration. If the unprotected industrial action is longer than four hours, the withholding of pay will be required for the total duration of the action.
 83. Where there is protected industrial action and a complete withdrawal of labour employers will be required to withhold pay for the actual period of industrial action taken.
 84. Where protected industrial action involves partial work bans or restrictions employers will have a choice of actions with respect to strike pay. They include:
 - (a) accepting partial performance by employees and continuing to pay full salary;
or
 - (b) refusing to accept partial performance and (where the agreement or contract allows) standing the employees down until they are prepared to perform all of their duties; or
 - (c) issuing a "partial work notice" and apportioning pay according to work performed; or
 - (d) locking out employees.
 85. Where an employer decides to accept partial performance and issues a partial work notice the written notice to the employees accepting partial performance must specify

the proportion of the employee's wages to be deducted that are reasonably attributable to the work which is the subject of the ban. The deduction relates to the employee's portion of work not performed, not the damage suffered by the employer's business as a consequence of the non-performance of that work.

86. Disputes concerning the proportion of wages that should be deducted will be able to be settled by the FWA.
87. The FWA will also be required to order industrial action to end if it is causing or may cause significant harm to the Australian economy or to the safety or welfare of the community. The FWA will also have discretion to end industrial action and determine a settlement where industrial action is protracted and significant economic harm has been caused to, or is imminent for, the bargaining parties.
88. The Minister may terminate industrial action by order where the industrial action is in relation to essential services.

Right of entry

89. Union officials with a right of entry permit will be able to visit employees in workplaces.
90. Entry may take place to investigate suspected breaches of industrial laws and fair work instruments affecting union members on the premises sought to be entered.
91. In relation to entry to investigate suspected breaches a permit holder may:
 - (a) inspect work, processes or objects;
 - (b) interview people who agree to be interviewed;
 - (c) require the occupier or affected employer to allow the inspection and copying of any record or document relevant to the suspected breach, kept on, or accessible from the premises.
92. The inspection and copying of records or documents must be relevant to the suspected breach that the permit holder is investigating. Further, there is a new prohibition introduced which prohibits the use or disclosure of employee records obtained by permit holders for a purpose other than a primary purpose of their collection. This prohibition applies not only to the permit holder obtaining the record but any person who receives information as a result of the permit holder acquiring it (for example, a union organiser or industrial advocate). Breach of the prohibition incurs a maximum penalty of \$6,600 for an individual and \$33,000 for a union.

93. Permit holders may also enter a workplace to hold discussions with employees who are, or are eligible to be, members of their union. A union permit holder can therefore enter a workplace to hold those discussions provided there is one, or more, employees whose industrial interests the union is entitled to represent.
94. A permit holder may also enter premises to investigate breaches of State occupational health and safety laws.
95. The right of entry provisions apply to all employers and employees in the workplace. In this respect, these provisions are different to the majority of other provisions of the *FW Bill* which apply to employees of national system employers.
96. In order to obtain entry additional content requirements have been included for entry notices. Thus there must be a declaration in respect of a suspected breach that the permit holder's union is entitled to represent the industrial interests of an affected member. Where discussions are to be held there will have to be a declaration that the permit holder's union is entitled to represent the industrial interests of a person who performs work on the premises. The entry notice will have to refer to the relevant provision in the union rules. Advice on the interpretation of union rules, on both the employer and employee side, is likely to be a mini growth area for all workplace relations lawyers!
97. Many of the current requirements relating to entry permits for union officials have been maintained. Thus:
 - (a) entry permits must still be produced on entering premises;
 - (b) entry permits can only be issued to "fit and proper persons" by the FWA;
 - (c) at least 24 hours, but not more than 14 days, notice must be given to the occupier of premises before entry, which must be during working hours;
 - (d) conditions may be imposed on entry permits by the FWA;
 - (e) FWA may revoke and suspend entry permits, and issue bans for specified periods in relation to the issue of entry permits;
 - (f) civil penalties for contravention of provisions concerning right of entry remain the same; and
 - (g) entry will be unauthorised if the permit holder does not comply with reasonable requests of an occupier or affected employer to produce documents evidencing authority to enter, and to observe a specified route upon entry, if directed to do so.

Expanded unfair dismissal

98. New qualifying periods have been introduced which must be met before an unfair dismissal claim can be made. For employees of businesses with fewer than 15 employees the employee must have been employed for 12 months before an unfair dismissal claim can be made. For employees in businesses with 15 or more employees the employee must have been employed for 6 months before an unfair dismissal claim can be made.
99. Casual employees may also make unfair dismissal claims, but on the basis of the same qualifying period as permanent employees, provided they have been employed on a regular and systematic basis for the requisite period and had a reasonable expectation of continuing employment by the employer.
100. Certain employees will be excluded from making an unfair dismissal claim, namely:
 - (a) employees not covered by a modern award or employed under collective agreements whose remuneration exceeds the high income threshold of \$100,000 for a full-time employee, indexed from 27 August 2007, and adjusted in July each year in line with annual growth in average weekly ordinary time earnings for full-time adult employees;
 - (b) employees dismissed due to genuine redundancy;
 - (c) employees employed under a contract of employment for a specified period of time, for a specified task or for a specified season, where their employment depends on the completion of the specified period, task or season; and
 - (d) an employee to whom a training agreement applies and whose employment is limited to the duration of that training agreement where the employment ends on completion of the training agreement.
101. Applications alleging termination was harsh, unjust or unreasonable must be lodged with FWA within seven days of the termination, although FWA will have a discretion to accept late applications in exceptional circumstances.
102. For small businesses there will be a Small Business Fair Dismissal Code, compliance with which will render a dismissal fair.
103. The FWA will act in an informal and inquisitorial manner in determining issues such as whether the employee has completed the minimum qualifying period or whether the employer has complied with the Small Business Fair Dismissal Code. If there are

contested facts then the FWA will be required to either hold a conference or conduct a hearing. Conferences will be informal without necessarily requiring formal written submissions or cross-examination. The FWA will only have full public hearings where it is considered appropriate, and in determining whether it is appropriate will have regard to:

- (a) the views of the parties; and
 - (b) whether a hearing would be the most efficient and effective way to resolve the application.
104. Legal representation will only be allowed where the FWA deems it to be appropriate, otherwise parties will be able to be supported by a non-legal representative or agent.
105. The preferred remedy where a dismissal is unfair will be reinstatement. Pay lost may also be ordered to be repaid where the employee is reinstated. Compensation may be ordered in lieu of reinstatement where it is not in the interests of the employee or the employer's business to reinstate the employee. Compensation will be capped at the lesser of 6 months pay or half the high income threshold.
106. The factors for determining compensation are specified, as follows:
- (a) the effect of the order on the viability of the employer's enterprise;
 - (b) the length of the person's service with the employer;
 - (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed;
 - (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal;
 - (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation;
 - (f) the amount of an income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
 - (g) any other matter that FWA considers relevant.
107. The seven day time limit for applications is designed to promote quick resolution of claims and to increase the feasibility of reinstatement as an option. This is consistent with the intention that the new unfair dismissal scheme be simpler and easier for all

parties to use, and that the FWA be able to make binding decisions following conferences, without the need for a formal, public hearing.

108. Some unions and professional bodies have criticized the seven day limit upon the making of applications following dismissal, and suggested that it be increased to 21 days, particularly so as to allow employees to obtain advice. That criticism, with respect, misses the point: an employee will generally know whether or not they think they have been unfairly dismissed. They can lodge the application setting out their reasons, and obtain advice afterwards, if it is required. It also needs to be borne in mind, in any event, that under the pre *Work Choices* unfair dismissal provisions approximately four in 20 applications were withdrawn, 15 in 20 settled, and only one in 20 reached a full hearing.
109. If the new unfair dismissal provisions work as intended it will result in a scheme which is less adversarial and speedier in its resolution of claims.

New transmission of business rules

110. The circumstances in which a transfer of business occurs are now more broadly defined than under the existing transmission of business provisions.
111. The new test relates to a transfer of business, rather than a transmission of business.
112. The new test provides for industrial instruments to transfer to a new employer where an employee has been terminated by an old employer, and within three months is re-employed by the new employer, subject to there being a connection between the old and new employer, as defined. That connection might be established by a transfer of assets, outsourcing or a cessation of an outsourcing arrangement, or where the new employer is an associated entity of the old employer or there is a transfer between related companies. For there to be a transfer of business the transferring work performed by the employee must be the same, or substantially the same, at the new employer as the work the employee performed for the old employer.
113. The test focuses on similarity of work rather than transmission of business.
114. The *FW Bill* refers to “transferable instruments”, including enterprise agreements, workplace determinations and a named employer award, as being transferable instruments in relation to which a new employer is bound in relation to the transferring employee performing the transferring work. The transferable instrument displaces any other instruments applying to the new employer.

115. The FWA is given power to vary a transferable instrument to remove terms not capable of meaningful operation because of the transfer of business to the new employer.

Observations

116. The provisions of the *FW Bill* represent a further expansion of federal jurisdiction over workplace relations. Conceptually the constitutional and legislative basis for the *FW Bill* is the same as that underpinning the *Work Choices Act*. However, the thrust of the *FW Bill* is altogether different: moving the system from a focus on individual statutory employment contracts to collective bargaining and collective enterprise agreements. Moreover, the *FW Bill* establishes a minimum safety net of standards for all employees of national system employers, together with facilitated bargaining for the low paid who otherwise might not be able to avail themselves of enterprise bargaining. The *FW Bill* maintains many of the provisions introduced under *Work Choices* in relation to industrial action, and whilst it expands the circumstances under which right of entry may be obtained by union officials (and in that respect largely represents a return to the position pre *Work Choices*) it maintains many of the conditions imposed upon right of entry under *Work Choices*, and adds some new content requirements for entry notices.
117. The new provisions concerning transfer of business appear to simplify the old provisions related to transmission of business, but the new transfer of business provisions will no doubt be scrutinised closely by both workplace relations and commercial lawyers involved in the sale and purchase of businesses where labour costs are particularly significant.
118. The new institutional framework provides a simpler and more streamlined organisational model than that which presently exists. For many practitioners (both legal and lay) however, the real change in this area will occur in appearances before FWA. If the legislative intent is fulfilled the simpler, more informal and less adversarial process in FWA will result in the speedier resolution of disputes. In that regard, the case management skills and culture of FWA will go a long way towards determining whether parliamentary intention becomes practical reality.
119. Finally, note well that the *FW Bill* is just that: a Bill. Whether it becomes law, in whole or part, unamended or amended, will be a matter for the Federal Parliament in coming weeks and months.