

## FAIR WORK ACT 2009

This is the first of a series of articles prepared by John Trew QC, Special Counsel to the Firm regarding the new Fair Work Act 2009 (Cth). The articles deal with the following areas:-

- (1) *Overview (this article);*
- (2) Who is covered by the Fair Work Act;
- (3) Employment Conditions under the Fair Work Act;
- (4) Employment Protection; and
- (5) Compliance and Enforcement and other matters.

### Overview

- The *Fair Work Act 2009*, subject to two exceptions, commenced substantially on 1 July 2009. Two other statutes commenced on the same day. They are the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the *Transitional Provisions Act*) and the *Fair Work (State Referred and Consequential and Other Amendments) Act 2009* (the *State Referral Act*). Those three Acts give effect to the *Fair Work* system that replaces the *WorkChoices* system.
- Two parts of the *Fair Work Act* did not commence on 1 July 2009. They concern modern awards, presently being made by the AIRC, and the 10 National Employment Standards often referred to as NES. Modern awards and NES are to commence on 1 January 2010. In addition, sections 3-40, 573-718 and Schedule 1 commenced, on 26 May 2009. They established the necessary institutional framework required for the new system when it commenced operation on 1 July 2009.
- The postponed commencement of the modern awards and NES is to allow the AIRC to complete the program set by the earlier *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*. It inserted Pt 10A (sections 576A-576ZB) into the *Workplace Relations Act 1996*. Modern awards are to replace the many thousands of awards made by the AIRC and state industrial relations tribunals to the extent that they affect employers within the reach of the Commonwealth legislative powers under the *Constitution*.
- Many issues that will need to be dealt with in the transition from the *WorkChoices* system contained in the *Workplace Relations Act 1996* are provided for in the *Transitional Provisions Act*. They are not dealt with in this note.

- That *Act* has repealed the *Workplace Relations Act* other than Schedule 1 (which deals with registered organisations) and Schedule 10 (which deals with transitional registered state organisations). That *Act* keeps those schedules in operation as part of a renamed *Fair Work (Registered Organisations) Act 2009*. It also makes consequential amendments to Commonwealth legislation that are essential to the operation of the *Fair Work Act*, for example, the creating of the Fair Work Divisions of the Federal Court and the Federal Magistrates Court.
- As well as making transitional and consequential amendments to other Commonwealth legislation as a result of a *Fair Work Act* and the *Transitional Provisions Act* to which further reference here is not necessary, the *State Referral Act* specifies the terms upon which States may refer workplace relations matters to the Commonwealth in reliance upon the reference power (section 51(xxxvi)) in the *Constitution*. Although that *Act* has been described by the minister in the second reading speech as enabling states to refer matters to the Commonwealth so that a uniform national workplace relations system in the private sector employment can be established, its initial purpose is to provide a framework for Victoria to refer its workplace relations powers to the Commonwealth. The *Fair Work (Commonwealth Powers) Act 2009* has been enacted by the Victorian parliament and took effect on 1 July 2009. Although each of South Australia and Tasmania has announced its intention to transfer workplace relations powers to the Commonwealth, no legislation has yet been introduced into their parliaments to give effect to their announcements.
- Sometimes political slogans are a part of the name of legislation. The *Fair Work Act* is an example. Its name also draws attention to an important shift in emphasis in Commonwealth workplace relations legislation. The *Conciliation and Arbitration Act 1904* and its successor the *Industrial Relations Act 1988* were mainly concerned with mechanisms for determining collective rights by the prevention and settlement of interstate industrial disputes, in reliance upon the conciliation and arbitration power (section 51(xxxv)) in the *Constitution*. The making of awards usually occurred as the result of a process of conciliation and arbitration by the AIRC and its predecessors regulating terms and conditions of employment of persons affected by industrial disputes. The *Fair Work Act* confirms the shift of emphasis in the WorkChoices system to the creation and enforcement of individual statutory employment rights. About half of the new *Act's* provisions deal with terms and conditions of employment of individuals. That has been facilitated by the legislation's substantial reliance upon the corporations power (section 51(xx)) in the *Constitution*. The registration and internal regulation of trade unions (described in the federal legislation as organisations) is not even dealt with in the *Fair Work Act*. The government has proposed that they should be regulated by the renamed *Fair Work (Registered Organisations) Act*. Collective bargaining rights are included in the *Fair Work Act* but do not have the prominence they once enjoyed.

- Although the *Fair Work Act* has not fully codified minimum terms and conditions of employment throughout Australia, it has gone a long way in that direction, virtually supplanting the former state and territory regulation of those matters. In many respects, it is a charter of employment rights and obligations. For example, formerly employers, employees and their respective advisers looked primarily to state and territory legislation for their annual holiday and other leave entitlements etc. Now these rights will be found primarily in the *Fair Work Act*, particularly the NES and the modern awards.
- This note gives a bird's eye view of the principal features of the new legislation. There is a very useful and more detailed analysis of the legislative changes and the policy considerations that have led to them by A Stewart in "A question of balance: Labor's new vision for Workplace Regulation" (2009) 22 AJLL 3 to which the reader usefully may make further reference. That article and its analysis of the legislation have been influential in the preparation of this note and parts of it have been adapted for inclusion here. Although, the emphasis of this note is upon individual rights and obligations of employers and employees affected by the *Fair Work Act*, reference is also made to other aspects of the legislation.

### **The Fair Work Act 2009**

- The *Fair Work Act* is divided into six chapters designed to meet the criticisms previously made about the complicated structure of the *Workplace Relations Act* it replaces. Even so, it is a lengthy piece of legislation. In summary:
  - Chapter 1 (Sections 1-40) includes a statement of the object of the *Act*, definitions, identification of the employers and employees covered by the legislation and relations between the *Fair Work Act* and state and territory laws. The *State Referral Act* mentioned above inserted new provisions extending the *Fair Work Act* to employment in a state referring its workplace relations powers to the Commonwealth. Those amendments commenced on 1 July 2009.
  - Chapter 2 (Sections 41-333A), the largest in the *Act*, deals with employment conditions of employees to whom the *Act* extends. It deals with NES, modern awards, enterprise agreements, workplace determinations, minimum wages and the transfer of businesses.
  - Chapter 3 (Sections 334-536) deals with general protections against discriminatory or wrongful treatment, unfair dismissals, the regulation of industrial action and right of entry to an employer's work premises.
  - Chapter 4 (Sections 537-572) deals with the enforcement of the civil remedy provisions that appear throughout the *Act* and it also confers relevant jurisdiction upon the Federal Court and the Federal Magistrates Court. Recently announced

plans by the Commonwealth government to incorporate the relevant part of the Federal Magistrates Court's jurisdiction into the Federal Court will require amendments to chapter 4. No legislation yet has been proposed.

- Chapter 5 (sections 573-718) establishes an independent statutory body to oversee the new system. Fair Work Australia replaces the AIRC, the Australian Industrial Registry, the Australian Fair Pay Commission, the AFPC secretariat and the Workplace Authority. The Office of the Fair Work Ombudsman replaces the Workplace Ombudsman.
- Chapter 6 (Sections 719-800) is the last part of the *Act* apart from Schedule 1 that follows it. It deals with a miscellany of subjects, including situations where there is more than one remedy available for the same conduct or in the same circumstances (section 719-734), additional provisions for the resolution of disputes (sections 735-740), extension of NES entitlements to employees generally in reliance upon the external affairs power (section 51(xxix)) in the *Constitution* (sections 741-768), extension of termination of employment benefits to employees generally in reliance upon the external affairs power (sections 769-789) and finally a miscellaneous group of provisions dealing with delegation of the minister's functions or powers (section 792) liability of, and signature, on behalf of a body corporate (793-794), public sector employment (section 795) and various regulation-making powers: sections 796-800.
- The Schedule (Sch 1) contains provisions affecting the transition from the present agencies responsible for the administration of the *Workplace Relations Act* to the new agencies created by the *Fair Work Act*.

The *Fair Work Act* does not affect the continued operation of the *Independent Contractors Act 2006*.

The operation of the *Fair Work Act* is described in the other articles on this website.

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