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Chapter 1

The Contemporary Evolution of Federal Industrial Relations Laws

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Introduction

In terms of industrial relations legislation we certainly live in interesting times. It has been in a period of seemingly perennial transition. The following discussion is a useful inclusion in an edited book of this type as a means of providing the reader with a brief overview of how Australian industrial relations legislation has changed over the period of the past two Federal Governments. To this end the paper begins by setting out the key features of the *Workplace Relations Act 1996*. It then moves to detail the core features of the Howard Government's *Work Place Relations Amendment (Work Choices) Act 2005*, noting the significant areas of amendment that were introduced with a considerable degree of controversy. It then looks at the key features of the *Transition to Forward with Fairness Act 2008*, the legislation introduced by the subsequent Rudd Government as a transitional measure to preface its industrial relations legislative reform agenda. This discussion then provides a more detailed exposition of the key features of the *Fair Work Act 2009*. It should be noted how the evolution of the legislation has at times been quite radical, with the introduction of entirely new themes and regulations, and at times has been quite conservative, with ideas and provisions contained in earlier legislation being revived, qualified or carried forward.

The Workplace Relations Act 1996

For much of the last century Australian industrial relations was governed under a centralised award system with very occasional tinkering of the legislation. In recent times the pace and scope of such legislation has quickened and expanded, in part a reflection of the changing political complexion of the Federal Government, but also to accommodate the rapid changes and contingencies that have been emerging out of an increasingly globalised and dynamic business world.

The legislative system that dominated Australian industrial relations for much of last century was still very apparent in *Workplace Relations Act 1996*. Awards still provided minimum standards and conditions for large numbers of workers, the Australian Industrial Relations Commission (AIRC) still drew on the conciliation and arbitration powers of the Constitution to settle disputes between the two sides of industry, and agreements struck under these processes were more or less applied nationally across industries and occupations.

The 1996 Act nonetheless introduced new instruments in the way workplace relations were governed. It aimed at entrenching decentralising bargaining at the level of the enterprise, a process that had already been underway as a result of earlier legislative tinkering in 1993. To this end the legislation came to rely on the 'constitutional corporations' powers of the Australian Constitution to reinforce and expand the scope of certified agreements (or what were more commonly known as enterprise bargaining agreements). Individual firms could, for the first time, strike collective agreements with their employees regardless of whether or not they were union members. A system of enterprise bargaining consequently grew up alongside the pre-existing centralised award system, with both being governed by the AIRC. The 1996 Act also introduced a new and more radical system of individual bargaining in the form of Australian workplace agreements (AWAs), as well as a new institution to govern its operation in the form of the Employment Advocate.

Both certified agreements and AWAs served the purpose of decentralising bargaining and allowing outcomes to be more responsive to the needs of individual enterprises and those they directly employed. However the application of the 'no disadvantage test' meant that such agreements had to equal or better the standards and conditions contained in comparable awards, meaning that there were certain limits placed on their content. This proved particularly problematic for the settlement of individually bargained agreements in the form of AWA, and so relatively few were concluded over the operation of the Act. The thinking of most firms could not get past the following question: 'Why offer workers individual AWAs when their content had to offer the same or more than an award, and where it is easier and more cost effective to simply reach an agreement with them collectively in the form of a certified agreement or award.'

The Work Choices Act 2005

The Federal Coalition Government sought to overcome this problem by advancing the processes of decentralised bargaining and make it easier for employers to conclude individual bargaining contracts with their employees. The opportunity to do so availed itself when it won a majority in both houses of the Federal Parliament in the 2004 election. It implemented the *Work Choices Act 2005*,

which drew exclusively on the ‘constitutional corporations’ powers of the Constitution to introduce radical changes in the way industrial relations were governed. In particular, it sought to reduce the power of third party players in the governance and conduct of industrial relations. To this end it implemented new legislated standards in the form of the Australian Fair Pay and Conditions Standards, and new institutions in the form of the Australian Fair Pay Commission. The new *Act* also contained other provisions which overrode the legislative jurisdictions of State and Territory industrial relations laws, placed new restrictions on the ability of trade unions to organise workers and conduct industrial campaign, reduced the scope and power of the AIRC to arbitrate industrial disputes, and limited the application of unfair dismissal laws. It furthermore sought to make AWAs more appealing by doing away with the ‘no disadvantage test’ and applying only four statutory minimums, making it easier for employers to discriminate between award minimums and the type of content AWAs could legally contain. The take-up rate of AWAs accordingly soared, with most conferring inferior wages and workplace conditions on the employees concerned. Pre-existing awards underwent a process of rationalisation to accord with the more limited content that could be legally included.

Although certainly not the only reason, the election of the Rudd Labor Government in November 2007 was no doubt significantly aided by widespread community discontent towards the changes brought in by the *Work Choices Act 2005*. Trade unions went on a series of very public protests over its perceived attack on the rights of workers and the limitations placed on their activities. State Labor Governments opposed the legislation, seeing it as usurping their jurisdictional and Constitutional rights, going so far as to mount a High Court challenge which ultimately proved unsuccessful. Many workers subject to the changes brought in by the *Act* saw their work conditions deteriorate, whilst others still employed under pre-existing awards and certified agreements were fearful of following the same path once these expired. Many employers, also, saw the operation of the *Act* as being overly complex and lacking in clarity and consistency. In short, the *Work Choices Act 2005* was supposed to deliver a simplified industrial relations system that was more responsive to employees’ aspirations and more accommodating to the needs of business. In practice, it was unable to live up to these expectations.

The Transition to Forward with Fairness Act 2008

Soon after its election, and in accordance with its election commitments, the Rudd Labor Government flagged its intention to introduce a new system of industrial relations. The intended legislative reform was designed to simplify the processes by which Australian industrial relations were governed, at the same time strike a balance between interests of employers and the demands of trade

unions. To this end the Rudd Government introduced two pieces of legislation: the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (hereafter simply referred to as the *Transition Act 2008*) and *Fair Work Act 2009*. The *Transition Act 2008* became operable on 27 March 2008, and sought to ensure pre-existing workplace agreements continued to operate until they were either replaced or terminated. Its broad aim was to provide both sides of industry with time to work through the transition to the new system without major disruption or confusion. This particular Act's key provisions to achieve this end were as follows:

- i. The Act prevented the making of new AWAs, with those made prior to the implementation of the legislation remaining in force until they expired.
- ii. The Act created new Individual Transitional Employment Agreements (ITEAs). This type of agreement was made available to users of AWAs for limited use over the period of transition to the new industrial relations system. They had a nominal expiry date of no later than 31 December 2009 and their content was aimed so as not to disadvantage an employee against an applicable collective agreement, or, where there was no collective agreement, an applicable award or the Australian Fair Pay and Conditions. In this regard another change related to when individual agreements of this type were deemed to be operable. Under the *Work Choices Act 2005*, AWAs were held to operate once they were lodged with the Employment Advocate. Under the *Transition Act 2008*, ITEAs were deemed to commence only once the Workplace Authority Director has approved them on the basis that they have passed a 'no-disadvantage test'.
- iii. The Act put in place a new 'no-disadvantage test' for collective agreements, in addition to those applied to ITEAs. Thus, to pass the new no-disadvantage test, collective agreements must not disadvantage employees in comparison with an applicable award. This overturned the so-called 'fairness test', which was a legislative amendment introduced by the Howard Government to off-set growing criticism of the *Work Choices Act 2005* in the months leading up to the 2007 Federal election. Because of its highly qualified provisions, the application and coverage of the fairness test was far more limited than the new 'no disadvantage test' set out in the *Transition Act 2008*.
- iv. The Act disallowed the unilateral termination of collective agreements. Collective agreements could only be terminated when the parties both agree or on application to the then AIRC, which had to be satisfied that termination would not be contrary to the public interest. When an agreement is terminated, the employees concerned were entitled to terms and conditions of employment set out in whatever award or workplace agreement would have applied to them except for the termination. Thus, by way of example, if an AWA was terminated, then the employee would be

- covered by a relevant collective agreement in the workplace concerned, or else an appropriate or designated award.
- v. The Act enabled pre-reform certified agreements to be extended or varied on application to the AIRC. The parties to such agreements had to have genuinely agreed to the extension or variation, and they must also not have engaged in industrial action or applied to the AIRC for a protected action ballot in relation to the agreement. The Act also allowed these types of agreements to be varied for a maximum of three years on application to the AIRC.
 - vi. The Act enabled the AIRC to undertake a process of modernising industrial awards. As part of this process all awards were expected to contain a flexibility clause enabling arrangements to meet the genuine individual needs of employers and employees. They were also expected to include a new safety-net of ten National Employment Standards (Note: These Standards were only signalled in this legislation, with their legislative recognition forming part of the later *Fair Work Act 2008* – see below). Employees earning above \$100,000 per annum were also granted the right to agree on their own pay and conditions without reference to awards. The aim here was to provide greater flexibility for agreements which had previously been required to comply with award provisions, no matter how highly paid the employee.

The Fair Work Act 2009

The *Fair Work Act 2009* is now the primary legislation governing Australian industrial relations. It was introduced into the Federal Parliament in November 2008 and replaced the *Workplace Relations Act 1996* and its amending instrument in the *Work Choices Act 2005*. It is an entirely new Act that incorporates certain provisions contained in the earlier Acts, omitting others and introducing still others for the first time. The Act applies a 'national system' of legal governance of Australian industrial relations, and to this end it carries on a legacy from the previous *Work Choices Act 2005* in relying on the 'Constitutional Corporations' powers of the Constitution.

The Act was implemented in two stages. Some provisions came into operation on 1 July 2009, the remainder commenced on 1 January 2010. The Act's key provisions are set out in the following.

National Employment Standards

The *Fair Work Act 2009* introduced ten National Employment Standards (NES) (Part 2-2., Division 2). This advanced on the four minimum Standards contained in the *Work Choices Act 2005* (hereafter referred to as the Work Choices Standards – WCS). The NES became operable on 1 January 2010, and was aimed at providing a

new safety net of conditions for employees. An 'Explanatory Memorandum' to the *Fair Work Act 2008* (Commonwealth Government, 2008) circulated by the Minister for Employment and Workplace Relations, Julia Gillard, lists the ten minimum NES as follows:

- i. *Hours of work:* The NES provides for the same quantum of maximum ordinary hours of work (38 hours for full time employees) as was provided under the WCS while making additional provisions of maximum ordinary hours for part-time employees. The WCS allowed for the averaging of hours, provided there was agreement in writing and the averaging period was no longer than 12 months. Under the WCS, hours worked in excess of 38 hours in a week were not considered additional (or subject to the reasonableness factor) if these hours were worked in accordance with an averaging agreement. Under the NES, a modern award or enterprise agreement may provide for averaging of hours of work. An employee not covered by an award or an agreement may agree in writing to average hours over 6 months or less. A key change was that where additional hours worked is based on an averaging arrangement, they are subject to reasonableness factors. The averaging provision/arrangement are to be taken into account when considering whether additional hours are reasonable (Part 2-2, Division 3).
- ii. *Requests for Flexible working arrangements:* The WCS did not provide an entitlement to request flexible working arrangements. The NES provides a new legislated entitlement for parents of, or having responsibility for the care of, a child under school age to request a change in working arrangements to assist with the care of the child. An employer is only able to refuse this request on reasonable grounds and the employer's decision is not be subject to review (Part 2-2, Division 4).
- iii. *Parental leave and related entitlements:* Both the WCS and the NES provide for maternity, paternity and adoption leave. The NES provides both parents with the right to separate periods of up to 12 months unpaid parental leave. Alternatively, one parent has the right to request an additional 12 months of leave, which employers are only able to refuse on reasonable business grounds. This builds on the previous entitlement under the WCS of 12 months unpaid leave, shared between parents (Part 2-2, Division 5).
- iv. *Annual leave:* Both the WCS and the NES provide the same coverage and quantum of annual leave entitlement. A key change under the NES is a simpler manner of accrual and the concept of 'service' for calculating the entitlement. Paid annual leave accrues and is then taken on the basis of an employee's ordinary hours of work. The NES enables modern awards to supplement the NES if the effect of those terms is not detrimental. This can include provisions that, for example, allow an employee to take twice the annual leave required by the NES but at half the rate of pay. The cashing

out of annual leave may be provided in modern awards and by enterprise agreements, subject to a remaining entitlement balance of 4 weeks leave. Award and agreement-free employees may also cash out their annual leave, as long as 4 weeks leave remains (Part 2-2, Division 6).

- v. *Personal/carer's leave and compassionate leave:* The NES does not change the quantum of the entitlement to personal/carer's leave and compassionate leave but extends unpaid compassionate leave to casual employees. In addition, the number of paid carer's leave days which can be used is no longer capped at 10 days per year. The NES also replaces the rules about the accrual and crediting of paid personal/carer's leave with a single, simple rule that consolidates notice and evidence rules for taking leave. The NES enables modern awards to make provision for the cashing out of personal/carer's leave as long as 15 days' leave balance remains. Employees not covered by an award or agreement will not be able to agree to cash out personal/carer's leave (Part 2-2, Division 7).
- vi. *Community service leave:* Under the *Work Choices Act 2005* there was no entitlement to any kind of community services leave, although it was unlawful to terminate an employee's employment if they were temporarily absent due to a voluntary emergency management activity. The NES enables employees to take unpaid leave to undertake an eligible community service activity, such as jury service or voluntary emergency management. The NES contains provisions for employers to provide make up payments for full and part time employees undertaking jury duty for a period of up to ten days (at the base rate of pay for ordinary hours of work). This is different to the previous situation, where employees relied on provisions in state and territory legislation, awards and agreements for jury make-up pay (Part 2-2, Division 8).
- vii. *Long service leave:* An entitlement to long service leave is currently provided by state and territory legislation, awards and agreements. The NES currently draws on current state and territory arrangements for long service leave in providing this entitlement, though. Government is presently working with state and territory governments to develop nationally consistent long service leave entitlements (Part 2-2, Division 9).
- viii. *Public holidays:* The NES and the WCS both provide an entitlement for an employee to be absent on prescribed public holidays. The NES provides for payment at their base rate of pay for ordinary hours if absent on a public holiday. Under the NES, the Queen's Birthday holiday is prescribed, which is in addition to what was prescribed under the WCS. Under the NES, also, an employer may make a reasonable request for an employee to work on a public holiday. However, an employee may refuse to work if they have reasonable grounds (Part 2.2, Division 10).

- ix. *Notice of termination and redundancy pay:* The NES provides for written notice of termination and redundancy pay. The previous provision for notice of termination was provided under the *Workplace Relations Act 1996*, provisions that were separate to the WCS. The substantive change under the present reforms is for the employer's notice be given in writing. The NES also provides 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 (i.e., firms employing 15 or less full time employees). Modern awards may include industry specific redundancy entitlements. These entitlements provide more comprehensive protection for employees (Part 2-2, Division 11).
- x. *Fair Work Information Statement:* An employer is required to give the *Fair Work Australia Information Statement* to all new employees. However, unlike the *Workplace Relations Fact Sheet* required of the previous legislation, there is no longer a statutory requirement to give the statement to existing employees (Part 2-2, Division 12).

The *Act* does not set out what may or may not comprise 'reasonable business grounds' if a request under the NES is refused. Instead, the reasonableness of the grounds is to be assessed in the circumstances that apply to an enterprise when the request is made. Such grounds may include, for instance, the effect on the workplace and the employer's business of approving the request; for example, the financial impact of granting the request, as well as the impact on efficiency, productivity and customer service. It may also include the inability to organise work among existing staff if the request is approved, or the inability to recruit replacement employees, or the practicality of arrangements that may need to be made to accommodate the request. More generally, Fair Work Australia, the new agency established under the *Act* (see below), is expected to provide guidance on what is and what is not 'reasonable' (Commonwealth Government, 2008).

Fair Work Australia, the Office of Fair Work Ombudsman and Court Divisions

The *Fair Work Act 2009* also established a new institution called Fair Work Australia, which is designed to be a 'one stop shop' for the regulation of Australian industrial relations. This new body commenced operations on 1 January 2010, and its roles and prerogatives replaced a range of institutions established under previous *Acts* – i.e., the AIRC, Australian Fair Pay Commissions, Australian Industrial Registry and the Workplace Authority. Fair Work Australia has the power to vary awards and approve new so-called 'modern awards' (see below). It also has the power to approve enterprise agreements, determine minimum wage rates, decide unfair dismissal claims and make orders in relation to good faith bargaining. Fair Work Divisions have also been established in the

Federal Court and Federal Magistrate's Court to hear matters which arise under the terms of the proposed *Act*. Apart from issuing penalties the courts are also able to order injunctions to prevent breaches of the *Act*. And finally, an Office of Fair Work Ombudsman has been established, which has the function of promoting harmonious and cooperative workplace relations, as well as compliance through the provision of education, assistance and advice (Part 5-1).

The powers and prerogatives of Fair Work Australia to settle industrial disputes and settled agreements are not as pervasive as those of the AIRC under the *Workplace Relations Act 1996*, nor are they as emasculated as they were under the *Work Choices Act 2005*. Fair Work Australia is empowered to make 'majority support orders' when there is majority employee support for negotiating an enterprise agreement and an employer refuses to bargain with employees or their bargaining representatives (e.g., trade union officials). It is also empowered to make a 'scope order' if it is satisfied that bargaining for a proposed enterprise agreement is not proceeding efficiently or fairly. And it can make 'good faith bargaining orders' if one of the negotiating parties is deemed to not be bargaining genuinely. In this regard good faith bargaining is defined as attending and participating in meetings at reasonable times; disclosing relevant information; responding to proposals; giving genuine consideration to the proposals and giving reasons for responses to such proposals; and refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining. Where a negotiating party ignores such orders, the other party may apply to Fair Work Australia to make a workplace determination, the aim being to ensure no advantage is gained by the party flouting the law (Part 2-4).

Enterprise bargaining

The *Fair Work Act 2009* places an emphasis on enterprise-level collective bargaining, and in doing so differs markedly to the focus placed on individual, non-union bargaining under the previous *Work Choices Act 2005*. Indeed the *Act* applies a new understanding of enterprise bargaining by not relying on the concept of union or non-union agreements. An agreement is simply made when approved by a valid majority of employees to whom it will apply. This new framework is premised on 'good faith bargaining' and where this is absent Fair Work Australia is empowered to make orders to ensure compliance with the good faith bargaining requirements mentioned earlier.

Enterprise agreements can be made between a single employer and its employees (referred to as a 'single enterprise agreement') or between more than one employer and their employees (referred to as a 'multi-enterprise agreement'). The latter types of agreement were greatly restricted under the *Work Choices Act 2005*, but will be allowable under the new *Act* if Fair Work Australia deems the workers to be covered are employed in low paid industries or

industries that limit their ability to access the benefits of collective bargaining (e.g., aged care, childcare, community services, security and cleaning). Multi-enterprise agreements are also available if jointly agreed by the parties and there has been no coercion. In short, pattern bargaining involving coercion in the form of industrial action is not permitted (Part 2-4).

Under the terms of the *Act* an enterprise agreement can include terms 'ancillary or supplementary' to the NES mentioned earlier. Thus, the limited 'allowable matters' that could be included in enterprise agreements under the *Work Choices Act 2005* has been greatly expanded. Indeed, enterprise agreements under the new *Act* will include 'any matters pertaining to the employment relationship'. In order to be approved by Fair Work Australia, an enterprise agreement must not include terms that are inconsistent with unfair dismissal, rights of entry, the NES and 'general protection' provisions (see below) of the *Act*. The agreement must furthermore contain terms that allow for individual flexibility arrangements; provide a dispute settlement process that involves either Fair Work Australia or other independent person or body; set out a nominal expiry date of up to four years, and provide for consultation with employees about major workplace changes. The employer and a valid majority of employees to whom the agreement will apply must also have genuinely agreed to the agreement. And, in the opinion of Fair Work Australia, each employee must be 'better off overall' under the terms of the agreement when compared to those working under a relevant award (Part 2-4).

The provisions of the *Act* also allow a trade union to be a party to an enterprise agreement if it represents at least one employee in the workplace. They furthermore provide trade unions with bargaining rights in a workplace even if the majority of employees approving the agreement are non-members. For their part employees are entitled to have their union represent them in bargaining or they can appoint another person to bargain on their behalf. Employers may also appoint a bargaining representative. Employers are furthermore required to give written notice to all employees of their right to be represented in the bargaining when initiating bargaining, or if a majority support determination, low-paid authorisation or a scope order is made by Fair Work Australia (Part 2-4).

Modern Awards

'Modern awards' are those concluded under the terms of the *Act* and are aimed at building on the legislated minimum standards represented in the NES (see above). In addition to incorporating the ten provisions set out in the NES, trade unions have the possibility of covering a further ten subject areas subject to negotiations between the parties to the agreement (Part 2-3). These subject areas include the following:

- i. *Minimum wages*: Refers to skill based classifications, pay within career structures, incentive based payments, bonuses, wages in general, and pay arrangements for apprentices and trainees.
- ii. *Types of work performed*: Refers to permanent and casual work arrangements, along with flexible work arrangements such as flexitime and job sharing.
- iii. *Arrangements for when work is performed*: Refers to hours of work, ordinary hours of work, rostering, shift work, rest breaks and meal breaks.
- iv. *Overtime rates for long hours*: Refers to rates of pay for hours worked in excess of ordinary hours of work, and, in the case of casuals, rates of pay for long hours of work.
- v. *Penalty rates*: Refers to employees working unsocial, irregular or unpredictable hours or on weekends, public holidays and as shift workers.
- vi. *Annualised wage or salary arrangements*: Refers to the patterns of work in an occupation, industry or enterprise as an alternative to the payment of penalty rates.
- vii. *Allowances*: Refers to the reimbursement of expenses, allowances for higher duties, disability payments, and allowances for special circumstances (e.g., dirt and dust, working in distant locations).
- viii. *Leave and leave loading*: Refers to alternative arrangements in excess or equivalent to the National Employment Standard and the rate of payment for leave.
- ix. *Superannuation*: Refers to alternative arrangements in excess or equivalent to legislated superannuation contributions.
- x. *Consultation*: Refers to rights of representation and dispute settling processes.

Modern awards are also expected to include flexibility provisions which enable employers and employees to negotiate individual flexibility arrangements. These may vary the application of specified award terms, but there are strict protections to ensure any agreements along these lines are entirely voluntary and the employees concerned are not disadvantaged. Modern awards are furthermore expected to set out their coverage including outworkers, specify what ordinary hours of work means for each classification of employees, what rates apply to piece workers, and include a procedure for settling disputes. In common with provision contained in the *Work Choices Act 2005*, a modern award is not be able to include terms about the right of entry, terms that are discriminatory, terms that contain State-based differences, or terms dealing with long service leave (Part 2-3).

An employee who earns more than \$100,000 may also enter a written arrangement with an employer that results in a modern award not applying.

Again, there are strict protections to ensure employees enter into such arrangements voluntarily. The new *Act* furthermore provides for minimum wages in modern awards to be reviewed every year by a specialist minimum wages panel within Fair Work Australia (Part 2-6). The minimum wages in modern awards override any lower rates in an enterprise agreement. The *Act* also requires Fair Work Australia to make adjustments in the national minimum wage to provide a minimum floor of wages for award-free employees.

Industrial action, secret ballots and strike pay

The *Fair Work Act 2009* also sets out a range of rules to govern industrial action. It draws a distinction between protected industrial action which may legitimately occur during a bargaining period, and unprotected industrial action taken outside this period. It requires employees to approve industrial action through a secret ballot, and in this regard it carries over many of the related provisions contained in the *Work Choices Act 2005*. When protected industrial action occurs, employers are only be able to deduct pay for the actual period of time the employees stopped work. Under the *Work Choices Act 2005*, pay was compulsorily docked in four hour lots regardless of the time employees stopped work (Part 3-3).

If partial work bans are implemented, employers are able to issue a notice and deduct a proportion of pay, with any disputes over this matter being resolved by Fair Work Australia. Pre-emptive lockouts taken by the employer when their employees have not taken any industrial action are no longer protected as they were under the *Work Choices Act 2005*.

For unprotected industrial action, for example, industrial action taken outside the bargaining period or during the life of an agreement, employees face a mandatory minimum deduction of four hours pay (Part 3-3).

Union Rights of Entry

The *Act* re-established many former trade union rights of entry, even if they are not party to an applicable enterprise agreement. Union officials can enter a workplace to investigate suspected breaches of industrial legislation provided they have a member who works within the enterprise. They also have the right to review and copy the employment records of employees where those records are relevant to a suspected breach of industrial law. In this connection the *Act* also includes protections against the misuse of information obtained by the union investigating suspected breaches. Union officials furthermore have the right to enter premises to hold discussions with workers whose interests they are entitled to represent. The *Act* also provides a right for members of a union that is eligible to represent their industrial interests (and potential members of that union) to meet with their union at the workplace during non-working hours for the purpose of holding discussions, and no employee can be discriminated against for

participating, or declining to participate, in such discussions. The right to enter premises to hold discussions comes with strict obligations. These include holding of a valid right of entry permit and the giving of 24 hours notice to enter. There are also requirements for conduct on the part of the union while on site (Part 3-4).

Workplace determinations

The *Fair Work Act 2009* empowers Fair Work Australia to exercise broad conciliation powers at the request of either of the parties. If the parties have bargained in 'good faith' (see above), Fair Work Australia will not impose a compulsory settlement. Where the parties agree, Fair Work Australia will make a binding determination on any matters in dispute, but only under certain conditions. It can do so if an industrial dispute is threatening to endanger life, personal safety or health, or the welfare of the population, or if the dispute is causing significant damage to the economy or the economic welfare of the bargaining participants. In such cases Fair Work Australia has the power to enforce a workplace determination to resolve the dispute. In short, the powers of Fair Work Australia to impose settlements over disputing parties is close to the type of arbitration power exercised by the AIRC under the *Workplace Relations Act 1996* (Part 2-5).

Unfair dismissal

Under the *Work Choices Act 2005*, businesses employing up to 100 employees could dismiss workers for any reason and not be challenge for the dismissal. The *Fair Work Act 2009* reduced this number to 15 employees. The provisions in this regard aim to protect good employees from being dismissed unfairly, at the same time allow employers to manage underperforming employees. Employees of small enterprises are not be able to claim for unfair dismissal until after they have served a qualifying period of 12 months. For larger businesses the qualifying period is six months. 'Operational reasons' as a defence against a claim for unfair dismissal no longer applies, as it did under the *Work Choices Act 2005*, although dismissing an employee for reasons of 'genuine redundancy' is still not be deemed to be unfair. Fair Work Australia is the body charged with overseeing the operation of unfair dismissal provisions contained in the *Act* (Part 3-2).

To help streamline and simplify the process for smaller enterprises, the *Act* provides for the publication of a Small Business Fair Dismissal Code. This Code, if followed, is aimed at ensuring a dismissal will not be found to be unfair. It requires the employer to give a warning to the employee based on a reason that validly relates to his or her work performance or capacity to do the job. It also requires the employer to give reasonable opportunity for the employee to improve their work performance. The Code allows the employer to dismiss

without notice an employee for serious misconduct (e.g., vandalism, theft or violence) (Part 3-2).

Transfer of business

The *Fair Work Act 2009* contains a number of provisions which have a significant impact on employers involved in the transfer of employees, and in particular in outsourcing situations. The 'transfer of business' (i.e., the transferring of 'industrial instruments' from one employer to another) is defined as circumstances where the work being transferred is substantially the same after the transfer has taken place, the work transferred is related to the transfer of assets, the transfer of employees between related companies, as well as incidences of outsourcing or in-sourcing. Under the terms of the *Act*, transmitted industrial instruments will apply in the new workplace until they are replaced and accordingly bind new employees to the organisation. Or to put it another way, if a business employs somebody within three months of them leaving their former employer and if there is some connection between their employment and movement of assets between two companies, or if the movement of the employee involves some form of out-sourcing, then the industrial award or enterprise agreement that applied to that person's employment with the original employer becomes binding on the second employer (Part 2-8).

General protections

The *Act* incorporates provisions relating to freedom of association and unlawful termination as set out in the *Work Choices Act 2005*. But it also includes a range of miscellaneous items referred to as 'General Protections'. These types of protections grant a range of additional rights to employees. These include the right to be represented by a union; the right to participate in collective activities such as bargaining or representing other employees (e.g., to act in the role of a shop steward); the right to the benefits of an award or enterprise agreement; and the right to make a complaint or inquiry in relation to the operation of an award or enterprise agreement; and the right to non-discrimination in employment for taking on carer's responsibilities. Sanctions will be applied where a person takes adverse action because someone has chosen to exercise one or more of these rights (Part 3-1).

Conclusion

The *Transition to Forward with Fairness Act 2008* and the *Fair Work Act 2009* have rolled back many of the anti-union, anti-collective bargaining provisions contained in the *Work Choices Act 2005*. AWAs are presently in a process of being abolished by a new version of the award system has been established, and a modified versions of the 'no disadvantage test' has been resurrected. Former union rights of access have been re-instituted in qualified terms, as has the former unfair dismissal

provisions and compulsory bargaining. And Fair Work Australia has revived the powers and prerogatives of the AIRC it replaced. Other elements contained in the *Work Choices Act 2005* have been carried forward in the form of secret ballots, the cashing out of annual leave, the averaging of ordinary hours of work, and the legislation of minimum employment standards. Still others have been introduced for the first time in the form of protections offered to employees involved in the transfer of businesses, 'good faith bargaining', limiting access to the award system to employees earning less than \$100,000, and requests for flexible working arrangements. There are also a range of new qualifications attached to many other provisions contained in the former *Work Choices Act 2005*.

Such developments are evidence of Australia's industrial relations laws being in a state of flux. In a relatively short time three significant legislative changes have taken place in almost as many years, and as a consequence there exists a range of labour contracts concluded under different legislative regimes. All of this makes it extremely difficult to gain a concrete understanding of how the governance of industrial relations is being played out in the workplace. Implementing the provisions contained in the *Fair Work Act 2009* is presently testing practitioners charged with the responsibility of managing labour. The problems associated with the practical implementation of the Act's provisions will no doubt become clearer as arguments over their legal standing and interpretation are tested in the courts.

Many employers who acted on the opportunities offered by the *Work Choices Act 2005* hold some lament towards the new changes, others who continued to operate under union negotiated collective agreements chug along as before. Trade unions have generally welcomed the re-establishment of their rights and the rights of workers more generally; others have argued that the changes don't go far enough. Clearly there will be a range of interesting debate and introspection as to how the changed legislative conditions will impact on the operation and governance of the Australian industrial relations system over the coming while.

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