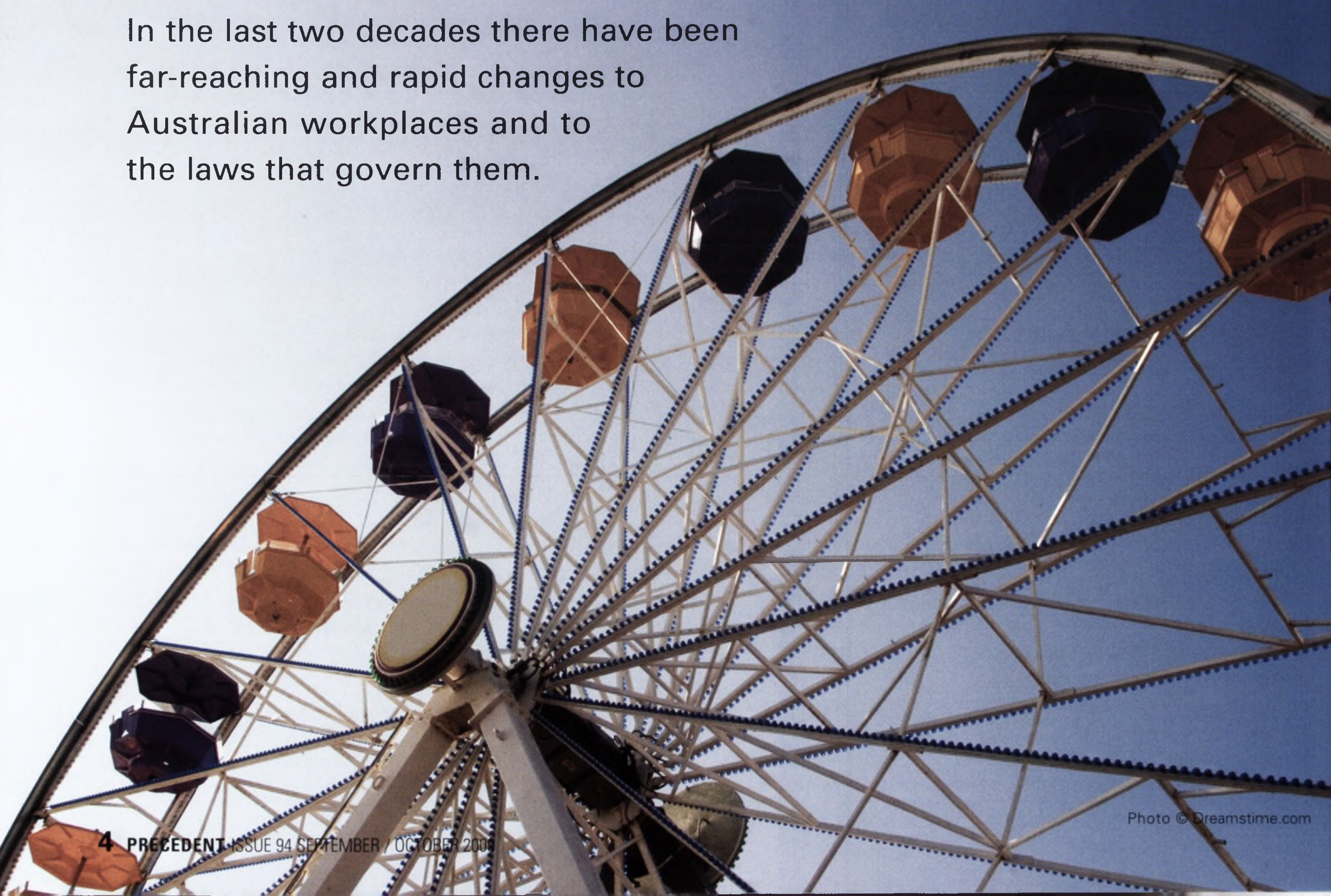
# An introduction to the *Fair Work Act*

By Ian Latham

In the last two decades there have been far-reaching and rapid changes to Australian workplaces and to the laws that govern them.



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Those years have seen a seemingly inexorable move to more decentralised bargaining processes and the increasing dominance of the Commonwealth in regulating the laws that apply to those workplaces. Shortly before the election, the then prime minister, John Howard, stated that:

> 'if we win on Saturday then the reforms that we have brought about will never be reversed by a future federal Labor government. They will become part of the furniture, they will become so embedded in our business and workplace culture, that no future Labor government will be able to reverse it.'[1]

Despite this, industrial issues figured prominently in the federal election campaign and its result. Following the election of the ALP, a series of Bills dealing with industrial relations came before the Parliament. In early 2008, legislation was passed as a first step to the rewriting of Work Choices. The *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* 2008 was described by the government as the start of meeting a key commitment it made to the Australian people at the last election – to bring fairness and balance to Australia's workplaces.[2] More recently, the *Fair Work Act* was passed. With some 800 sections (not including associated legislation, schedules and regulations) it may be some time before it is fully understood.

The Explanatory Memorandum has described the Bill in the following way:

> 'As the means for fulfilling pre-election commitments made by the Government in *Forward with Fairness*, released April 2007, and *Forward with Fairness – Policy Implementation Plan*, released August 2011, this Bill provides a much-needed opportunity to re-conceptualise the legislation from first principles and ensure that Australia's workplace relations legislation:
> – provides a clear and stable framework of rights and obligations;
> – is simple and straightforward to understand in terms of structure, organisation and expression; and
> – reduces the compliance burden on business (for example, by avoiding 'micro regulation' and overly prescriptive provisions and by conferring broad functions and appropriate discretion on Fair Work Australia).'

The President of the Australian Council of Trade Unions (ACTU), Sharan Burrow, echoed these sentiments, saying:

> 'The *Fair Work Act*… has turned the tide on a decade of workers' rights being undermined, which resulted in us working longer hours for little reward and feeling less secure about our jobs. The new laws will not only protect jobs in the economic downturn, but will provide a framework to improve our lives at work and outside… this week, we celebrate the fact that with the *Fair Work Act*, Australians again have proper rights at work.'

On the other hand, the legislation has been said to include the industrial relations version of a myocardial infarction – lifeblood to a tiny muscle is occluded, killing off muscle and leading to the weakening and eventual demise of the organ and entire system.[4]

Perhaps the truth is more prosaic. With some apprehension, this paper will attempt to summarise some of the major changes to the legislation and indicate some of the more interesting developments.

## THE EXTENSION OF STATUTORY EMPLOYMENT PROTECTIONS

One of the key features of Work Choices was to create a statutory safety net of minimum conditions. This trend has continued in the Fair Work legislation and is typified by the new National Employment Standards (NES), which provide for the following minimum terms and conditions:

- maximum hours of work;
- right to request flexible working arrangements;
- parental leave;
- annual leave;
- personal/carers' leave;
- community service leave;
- long-service leave;
- public holidays;
- notice of termination and redundancy pay; and
- fair work information statement.

While many of these conditions existed in Work Choices, there are some interesting developments in the provisions relating to hours of work, flexible work and redundancy.

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### Maximum weekly hours

Section 62 provides for maximum weekly hours of work stating that:

'(1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
  (a) for a full-time employee – 38 hours; or
  (b) for an employee who is not a full-time employee – the lesser of:
    (i) 38 hours; and
    (ii) the employee's ordinary hours of work in a week.
    *Employee may refuse to work unreasonable additional hours*
(2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.'

A broad range of factors is used to determine whether the additional hours are reasonable or unreasonable.

### Right to request flexible working arrangements

Section 65 sets out a process where employees may request change in working arrangements if they have children under school age or who have a disability.

### Redundancy pay

For the first time, there will be a statutory standard for redundancy pay in accordance with the following scale:

| Redundancy pay period<br>Employee's period of continuous service | | Redundancy pay period |
|---|---|---|
| 1. | At least 1 year but less than 2 years | 4 weeks |
| 2. | At least 2 years but less than 3 years | 6 weeks |
| 3. | At least 3 years but less than 4 years | 7 weeks |
| 4. | At least 4 years but less than 5 years | 8 weeks |
| 5. | At least 5 years but less than 6 years | 10 weeks |
| 6. | At least 6 years but less than 7 years | 11 weeks |
| 7. | At least 7 years but less than 8 years | 13 weeks |
| 8. | At least 8 years but less than 9 years | 14 weeks |
| 9. | At least 9 years but less than 10 years | 16 weeks |
| 10. | At least 10 years | 12 weeks |

Allied to these statutory minima will be the creation of so-called 'modern' awards. These awards will be relatively small in number and will replace the patchwork of state and federal awards governing workplaces. They will standardise the state-based differences in wages and conditions.

## TRANSFER OF BUSINESS

One of the more controversial aspects of Work Choices was the restriction upon the transfer of industrial instruments upon the sale of businesses. A series of Federal and High Court decisions[5] had cut back the commonly understood meaning of the legislation, with the effect that a number of employees had their conditions of employment reduced upon the sale of their employer's business. These effects were exacerbated by a number of Work Choices provisions that extinguished industrial instruments in certain circumstances.

The Act deals with this with the following formulation:

(1) There is a *transfer of business* from an employer (the *old employer*) to another employer (the *new employer*) if the following requirements are satisfied:
  (a) the employment of an employee of the old employer has terminated;
  (b) within 3 months after the termination, the employee becomes employed by the new employer;
  (c) the work (the *transferring work*) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
  (d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).

## CHANGES TO THE BARGAINING PROCESS

A clear trend over the last two decades has been the deregulation of bargaining processes. Parties were given a greater choice of industrial agreements to reach. By the time of Work Choices, parties were able to reach agreement without a bargaining party and were able to refuse to bargain at all with a bargaining party. This trend has been at least partially reversed by the introduction of good faith bargaining and low-wage bargaining processes.

### Good faith bargaining

Perhaps the most fascinating part of the new Act is the introduction of good faith bargaining (*see article by Joellen Riley in this issue – Ed.*). Section 228 sets out a number of good faith bargaining requirements to be met by a bargaining representative:

(1) The following are the *good faith bargaining requirements* that a bargaining representative for a proposed enterprise agreement must meet:
  (a) attending, and participating 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 for the agreement in a timely manner;
  (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
  (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.
(2) The good faith bargaining requirements do not require:
  (a) a bargaining representative to make concessions

during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

In one of the few decisions that has dealt with good faith bargaining in the local industrial context, it was suggested by one party that breaches of good faith bargaining were indicated by the existence of matters such as failures to communicate; failing to respond to reasonable requests for relevant information within a reasonable time; stalling, shifting position just as agreement seems in sight; adopting a rigid non-negotiable position; and unilateral conduct that harms the negotiating process, such as issuing inappropriate press releases.

The commission at least partially accepted this analysis, holding that parties were required:

> 'not [to] raise matters that have previously been raised and either resolved or not identified as an outstanding item unless there are good, if not compelling, reasons justifying the raising of those matters'.[6]

Despite the controversy surrounding this section, it should be noted that there is no requirement on a bargaining party to make concessions or reach agreement. This seems to follow overseas authority that distinguishes what is called 'hard' bargaining from 'good faith bargaining'. Hard bargaining is:

> 'a situation where one party insists on terms the other refuses to accept. A resulting impasse in bargaining will not be found to stem from a breach of the duty of good faith if it can be said that the proponent is merely using its economic position to negotiate terms which favour its legitimate interests. In effect, where the board finds the party's bargaining position to be a violation of the duty, it is not so much assessing the inherent reasonableness of the proposal as it is using the proposal, in the wider context, as an indicator of the party's unwillingness to conclude any agreement.'[7]

Breach of these requirements may lead to good faith bargaining orders being made.[8] In certain circumstances, breaches of these orders may lead to the arbitration of outstanding matters.

Some intriguing questions remain. What is meant by the duty to provide reasons? Must such reasons be reasonable? Can those reasons be tested? What does the giving of genuine consideration mean? Can these provisions be equally used against unions and bargaining agents? Is there capacity to bargain in sectors that have traditionally been beyond the reach of the industrial system such as middle and senior management?

## LOW-PAID ARBITRATION AND EQUAL PAY ARBITRATION

A somewhat obscure process has been created for what is called low-paid arbitration under s261:

> '*When FWA must make a consent low-paid workplace determination.*

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Perhaps the most **fascinating** part of the new *Act* is the introduction of **good faith bargaining.**

FWA must make a consent low-paid workplace determination if:
(a) an application for the determination has been made; and
(b) FWA is satisfied that the bargaining representatives who made the application have made all reasonable efforts to agree on the terms that should be included in the agreement; and
(c) there is no reasonable prospect of agreement being reached.
Note: FWA must be constituted by a Full Bench to make a consent low-paid workplace determination (see subsection 616(4)).'

Likewise, section 302 provides that the FWA may make an order requiring equal remuneration:

*'Power to make an equal remuneration order*
(1) FWA may make any order (an *equal remuneration order*) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.
*Meaning of equal remuneration for work of equal or comparable value*
(2) *Equal remuneration for work of equal or comparable value* means equal remuneration for men and women workers for work of equal or comparable value.'

## EXTENSION OF UNFAIR DISMISSAL RIGHTS

The legislation is also notable for limiting the exclusions for unfair dismissal rights. Employees in workplaces with fewer than 100 employees will be able to contest unfair dismissal rights, while the exclusions for dismissals based on 'operational reasons' will be tightened.

## INDEPENDENT CONTRACTORS

Lastly, it should be remembered that there is a capacity to set aside and vary contracts that apply to independent contractors. Section 12 of the *Independent Contractors Act* states that:

'12 Court may review services contract
(1) An application may be made to the Court to review a services contract on either or both of the following grounds:
(a) the contract is unfair;
(b) the contract is harsh.
Note: A proceeding pending in the Federal Magistrates Court may be transferred to the Federal Court of Australia: see Part 5 of the *Federal Magistrates Act* 1999.
(2) An application under subsection (1) may be made only by a party to the services contract.
(3) In reviewing a services contract, the Court must only have regard to:
(a) the terms of the contract when it was made; and
(b) to the extent that this Part allows the Court to consider other matters – other matters as existing at the time when the contract was made.'

The meaning of this legislation is somewhat obscure and the processes set out are potentially cumbersome, particularly in relation to the granting of relief.[9] Nevertheless, as its meaning becomes clearer, this Act may fundamentally affect the relationship of principal and contractor.

## CONCLUSION

If Work Choices is any example, it will take years before the new sections of this Act are properly analysed by the courts. Even longer-standing sections are only now are being explained. The risk in dealing with such legislation is manifest. In addition to these risks, litigation also bears its usual risks, perhaps most perfectly expressed in these words:

'the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change'.[10]

Despite these risks, however, there is much that can be said about the new Act. Perhaps most importantly, while making some fundamental changes to Work Choices, it continues many of its themes. It continues a national framework of workplace regulation. It is largely non-interventionist. It is long and complicated. It is, however, a statute that lawyers and litigants will need to get to grips with. Covering some 85 per cent of the nation's workplaces and representing a substantial, if fragile consensus, it will dominate the industrial landscape for many years to come. ■

**Notes: 1** *Sydney Morning Herald*, 20 November 2007. **2** Second Reading Speech, *Commonwealth Parliamentary Debates*, 13 February 2008, p185. **3** Sharan Burrow, 'Employees enter a new era of rights', *Sydney Morning Herald,* 1 July 2009. **4** G Collier, 'Smart bosses have nothing to fear from workplace laws', *The Australian*, 20 July 2009. **5** *PP Consultants Pty Ltd v Finance Sector Union of Australia* [2000] HCA 59; 201 CLR 648; 75 ALJR 191; 101 IR 103; 176 ALR 205, *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194; (2005) 214 ALR 24; (2005) 79 ALJR 679; (2005) 138 IR 252, *Urquhart v Automated Meter Reading Services (Aust) Pty Ltd* [2008] FCA 1447 (23 September 2008). **6** *Liquor, Hospitality and Miscellaneous Union – Western Australian Branch v CSBP Limited; CSBP Limited v Liquor, Hospitality and Miscellaneous Union* – [2007] AIRC 469 (15 June 2007) at [91]. **7** *Buhler-Versatile* [2001] MLRB no. 9. **8** For an early example, see *Australian Municipal, Administrative, Clerical and Services Union v Queensland Tertiary Admissions Centre Ltd* [2009] FWA 53. **9** See, in particular, *Keldote Pty Ltd v Riteway Transport Pty Ltd* [2009] FMCA 319. **10** *John v Rees* [1970] Ch 345.

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