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Extending the Fair Work Act: The New National System

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Although the *Fair Work Act* 2009 (FW Act) has been in force since 1 July 2009, it had always been intended that two key elements would have a delayed commencement from 1 January 2010: the National Employment Standards (NES), which provide a safety net of minimum entitlements for all employees covered by the Act; and a new system of 'modern awards' that prescribe additional conditions on an industry or occupational basis.

2010 has also seen the extension of the FW Act to cover all private sector employers, regardless of whether they are corporations. This has been achieved by the passage of State laws which refer powers to the Commonwealth, and by equivalent amendments to the federal Act which scraped through just before the end of the 2009 parliamentary sitting.

The exception is in Western Australia, whose Liberal government has refused to co-operate in creating a national system, and where accordingly the coverage of the FW Act continues to be determined by whether an employer is a trading, financial or foreign corporation.

The Modern Award System

In March 2008, the AIRC was tasked with reviewing and modernising some 1560 federal and State multi-employer awards by the end of 2009. That mammoth job has more or less now been completed – and, to the surprise of many, on schedule.

The Initial Modern Awards

In December 2009, the Full Bench that had been overseeing the process finalised new awards for the fourth and last batch of industries and occupations: see *Award Modernisation* [2009] AIRCFB 945. As at the commencement of Part 2-3 of the FW Act on 1 January 2010, a total of 122 modern awards took effect. They can be accessed through Fair Work Online (www.fairwork.gov.au).

Among the new instruments is the Miscellaneous Award 2010, which sets out a 'basic' set of terms and conditions for employees who are not covered by any other modern award (for example, because they are in an 'emerging' industry), but who in principle ought to be.

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Clause 4 of the Miscellaneous Award states that it does not cover employees in any industry for which there *is* a modern award, but where that award has no classification for the relevant employees, or specifically exempts them from coverage. Nor does the Miscellaneous Award cover 'classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards'. Those classes are specified to include 'managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists'. Between them, these limitations ensure that the Award will have limited coverage, if any.

Transitional Arrangements for Wage-Related Provisions

In a separate decision in December 2009, the AIRC Full Bench opted for a slightly revised version of the model transitional arrangements it had earlier announced for wage-related provisions in modern awards: see *Award Modernisation* [2009] AIRCFB 943.

Some modern awards will take full effect from 1 January. But most will have a 'phasing schedule' that delays the commencement of certain monetary provisions (that is, wage rates, loadings, industry allowances and penalty rates), where there is a difference between the modern award entitlements and those in a relevant transitional instrument.

That transitional instrument may, depending on the context, be a pay scale, a Federal Minimum Wage, the old default casual loading of 20%, a pre-reform federal award, a transitional award or a NAPSA (notional agreement preserving State awards). It must be one that previously applied to the employer in question, or that would have applied but for the operation of a registered agreement. If the employer has only commenced business after 1 January 2010, it must comply with any transitional instrument that would have applied to it if it had been employing staff immediately prior to that date.

Where the phasing schedule applies, it requires an employer to continue to observe the wage rates, loadings, industry allowances and penalty rates (if any) specified in the relevant transitional instrument until 1 July 2010. After that date, the schedule provides for the phasing in of the modern award entitlements, over a period of up to four years. This will often mean complex calculations, since some rates may need to be phased up to a higher figure, at the same time as others are being phased down. For example, a modern award may stipulate a higher basic rate of pay than a transitional instrument, but a lower casual loading – or vice versa. There is also an overriding requirement that no existing employee should see their take-home pay fall because of the adjustments.

Transitional Arrangements and the BOOT

The inclusion of such phasing provisions in modern awards has necessitated a change to the way in which FWA applies the 'better off overall test' (BOOT) for enterprise agreements.

Section 193 of the FW Act provides that the comparison between award and agreement conditions required by the BOOT is to be made as at the date the relevant agreement is lodged for approval by FWA.

Under a new Schedule 2.1 to the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations* 2009 (TPCA Regs), however, FWA is required to adopt a different approach, at least during a 'transitional period' that finishes at the end of 2014. In applying the BOOT, it will still only assess an agreement once. But it must have regard not only to the conditions set by the award at the date the agreement is lodged, but the conditions that will subsequently apply under the award as at 31 July in each year that falls within both the transitional period and the nominal period of the agreement. A failure to offer better conditions for all affected employees at just one of those dates would mean the agreement failing the BOOT. But no account need be taken of any possible variations to an award that may be made in the future – for example as a result of FWA's annual wage reviews.

Where an agreement has conditions that are well above the award safety net, this is unlikely to prove a problem in practice. But for some employers, the new regulations will complicate the process of determining what conditions to offer over the life of an agreement.

Further Changes to Modern Awards

Although the last of the major award modernisation decisions have been issued, there will continue to be adjustments to the new instruments, as problems are identified and addressed.

Modern awards are now the responsibility of Fair Work Australia (FWA), which can vary them to resolve uncertainty or correct errors (FW Act s 160). FWA's Minimum Wage Panel will also be conducting its first annual wage review during the first half of 2010, under Division 3 of Part 2-6 of the FW Act.

The modernisation process to date has not affected enterprise awards (ie, those that apply to a single business). But applications can now be made to FWA to modernise these too, under Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (TPCA Act). This is something that will need to be done before the end of 2013, if those instruments are not to lapse.

Extending the Coverage of the Fair Work Act

The Commonwealth has the power under the Constitution to regulate all employers that are trading, financial or foreign corporations, or that operate in a Territory. It can also regulate its own agencies. These categories are reflected in the definition of 'national system employer' in s 14 of the FW Act.

That definition is now separately extended by ss 30D and 30N to cover all other employers (such as sole traders and partnerships) in a *referring State*, subject to any limitations imposed by that State.

There are two categories of referring State. Division 2A of Part 1-3 of the Act covers States that referred the necessary powers prior to 1 July 2009. It applies only in Victoria, where all employers (private *and* public sector) have been covered by federal law since 1997.

Both Division 2A, and the *Fair Work (Commonwealth Powers) Act* 2009 (Vic) that underpins it, have been amended to reflect a new model for the reference of State powers. That model is encapsulated in an Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector, which has been signed by the Commonwealth, the Territories and all States bar Western Australia.

The necessary amendments to the FW Act were made by the *Fair Work Amendment (State Referrals and Other Measures) Act* 2009. This was passed by the Senate on 2 December 2009, just ten minutes before rising for its summer break. It had been opposed by the Coalition, despite strong support from all major business groups, as well as the ACTU. Had the amendments not been enacted before the end of the year, the entire referral scheme would have collapsed.

As it is, the amending legislation has added Division 2B to Part 1-3 of the FW Act, creating a second category of referring State. This Division, which took effect on 1 January 2010, applies to any State referring its powers during the second half of 2009. That covers New South Wales, Queensland, South Australia and Tasmania, thanks to the passage of the following laws:

- *Industrial Relations (Commonwealth Powers) Act* 2009 (NSW)
- *Fair Work (Commonwealth Powers) and Other Provisions Act* 2009 (Qld)
- *Fair Work (Commonwealth Powers) Act* 2009 and *Statutes Amendment (National Industrial Relations System) Act* 2009 (SA), and
- *Industrial Relations (Commonwealth Powers) Act* 2009 (Tas).

The effect of these laws is that all private sector employers and employees will be covered by the FW Act from the beginning of 2010, subject to what is said below about transitional arrangements.

But unlike the position in Victoria, this will *not* be the case for government employees in these four States, who will remain subject to each State's industrial legislation.

Under the FW Act, bodies established by a State for a public purpose can be declared to be non-national system employers, with the federal Minister's consent (s 14(2)–(5)). In some cases, this means that statutory corporations that had previously operated under the federal system have now switched to State coverage. But no such declaration can be made in relation to a supplier or distributor of electricity, gas or water, an operator of a port or a rail service, or a university (s 14(6)–(7)).

As for local government employers, it is only in Western Australia that their status now depends on whether they can be regarded as trading corporations, an issue on which there has been conflicting case law. In Victoria and Tasmania they are subject to the FW Act. But in New South Wales, Queensland and South Australia, they are covered by State industrial laws.

A full list of the public sector and local government employers in New South Wales, Queensland and South Australia that are excluded from the FW Act, even if they are otherwise corporations, can be found in the *Fair Work (State Declarations – employers not to be national system employers) Endorsement* 2009, issued by the Minister for Workplace Relations on 17 December 2009.

Transitional Arrangements for Referred Employers

The effect of these changes is that a large number of (mostly small) employers in New South Wales, Queensland, South Australia and Tasmania have transferred into the federal system, as from 1 January 2010.

For the most part, the transition was instantaneous. As the legislation stands, these 'referred employers' are now required to comply with the NES and federal record-keeping requirements. The federal unfair dismissal laws and agreement-making provisions apply to them, as do the 'general protections' in the FW Act against discriminatory or wrongful treatment at work.

Effect of State Awards and Agreements

However, one important exception relates to award coverage. Under a new Schedule 3A to the TPCA Act, any State award applicable to a referred employer as at 31 December 2009 is deemed to have become a federal instrument known as a *Division 2B State award*.

Such an award will generally operate until the end of 2010 (Sch 3A cl 21). After that it will in most cases be replaced by a modern award, although FWA will be required during 2010 to consider varying modern awards to include transitional arrangements

for affected employers and employees (cl 29). If, as expected, these arrangements provide for any new wage rates to be phased in, this will in turn affect the operation of the BOOT where an enterprise agreement is made by such an employer: see TPCA Regs reg 3D.01.

If a State award formerly applicable to a referred employer is an enterprise award, it is treated as an 'enterprise instrument' for the purpose of Schedule 6 to the TPCA Act. As such it may operate for up to four years, unless and until modernised or terminated by FWA.

A Division 2B State award generally continues to operate according to its original terms, except that:

- it is overridden to the extent that it is detrimental to an employee by comparison with the NES (Sch 3A cl 37)
- any reference to a State industrial body is taken to refer to FWA instead (cl 13), and
- any dispute resolution clause is replaced by a model term (cl 7; and see TPCA Regs reg 3A.02).

Such an award can be varied by FWA to ensure its effective operation with the NES, to remove ambiguity or uncertainty, or to adjust minimum wage rates (TPCA Act Sch 3A cll 18–19, 40).

Where at the date of transition a referred employer was covered by an agreement registered under State law, this is also deemed to have become a federal instrument under Schedule 3A to the TPCA Act, known as a *Division 2B State employment agreement*. Unlike a State award, it has no 'drop dead date', but may continue until terminated or replaced. However, it may not have an expiry date any later than 31 December 2012 (Sch 3A cl 27). It may be terminated in essentially the same manner as other agreement-based transitional instruments under the TPCA Act (cll 22–26).

A Division 2B State employment agreement may be overridden by the NES, to the extent it is detrimental to employees (cl 37). But any dispute resolution provision it contains may continue to operate, even if it nominates a State industrial body. If such a body declines or is unable to settle a dispute, FWA may do so instead. The parties may also vary such a dispute resolution provision at any time (cl 8). All dispute resolution processes must be conducted in accordance with Part 6-2 of the FW Act, even where a State body remains involved (Sch 3A cl 9).

Division 2B State awards and employment agreements generally remain subject to the same content and interaction rules that applied under the State laws that governed them at the date of transition (cll 10–12). It is also provided that a collective Division 2B State employment agreement prevails over an otherwise applicable modern award, to the extent of any inconsistency (cl 41(1)). However,

such an agreement will be displaced by any enterprise agreement or workplace determination made under the FW Act (cl 44(1)).

Transitional Federal Awards

There are a number of referred employers who, at the time the Work Choices amendments took effect in March 2006, were covered by a federal award. Such awards have remained in effect since then as 'transitional awards', under Schedule 6 to the *Workplace Relations Act* 1996 (now continued in force by Schedule 20 to the TPCA Act). Many unincorporated farmers, for example, have been covered by such instruments. Transitional awards were originally scheduled to expire in March 2011 – and indeed this remains the case in Western Australia.

In relation to a referred employer, however, such an award is now classed as a 'Division 2B State reference transitional award'. In theory, it can have effect under Schedule 3 to the TPCA Act as an award-based transitional instrument. But in practice, unless it is an enterprise award it will have been displaced by any applicable modern award as from 1 January 2010 – not 2011, as is the case with State awards.

Other Transitional Provisions

Many other provisions have been added to the TPCA Act to deal with the transition of referred employers into the federal system.

For example, Division 2 of Part 3 of Schedule 4 deals with how to count prior service accrued by an employee for the purpose of NES entitlements, as well as with what happens if an employee was in the process of taking leave at the date of transition.

There are also provisions that seek to preserve (and even extend) the effect of certain pay equity orders made under State law (Sch 3 Pt 8, Sch 3A Pt 4 Div 1A). They were added in accordance with an agreement between the federal government and the Australian Services Union, which also contemplates the initiation of a test case under Part 2-7 of the FW Act. FWA will be asked to make an equal remuneration order for the social and community services sector, in order to extend the benefit of a case that had already been successfully run in the Queensland Industrial Relations Commission (see *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* [2009] QIRComm 33).

Employers Moving into the State Systems

As already explained, there are a few employers who are now subject to State industrial laws, where previously they may have been covered by the FW Act. This category includes various statutory boards and corporations, as well as the Brisbane City Council and a number of other local councils in South Australia.

Both the *Industrial Relations Act* 1999 (Qld) and the *Fair Work Act* 1994 (SA) have been amended to deal with these employers. Among other things, there are provisions that seek to validate any agreements made by them (whether under federal or State law) and to ensure that after the transition date those agreements have effect under the relevant State Act.

Future Amendments to the Fair Work Act

The referrals of power that allow the FW Act to apply to referred employers each involve a *text-based reference*. They authorise the Commonwealth Parliament to amend the FW Act to include Divisions 2A or 2B (as the case may be) in a particular form specified in the referring statute. This is known as the 'initial reference'. They also authorise the enactment of transitional arrangements (the 'transition reference').

In addition, the referral statutes confer power to make further changes in the future to the FW Act, as it applies to referred employers, provided the changes relate to a very broadly defined set of 'referred subject matters'.

Although this 'amendment reference' is couched in broad terms, the Intergovernmental Agreement contains a number of commitments by the Commonwealth to consult with the referring States (and also the Territories) before making any changes to the FW Act. Indeed any proposal that is considered to infringe certain 'fundamental workplace relations principles' must not proceed without the support of a two-thirds majority of the participating jurisdictions.

The principles in question are set out in both the referral statutes and ss 30B(9) and 30L(9) of the FW Act. They include an independent tribunal system, no provision for individual statutory agreements, protection from unfair dismissal, the right to choose whether to join a union or participate in collective activities, and a 'strong, simple and enforceable safety net of minimum employment standards'.

Termination of State Referrals

The referral statutes specify that a State Governor may issue a proclamation terminating a reference, though the termination must not ordinarily take effect for at least six months.

The legislation contemplates that a State may terminate its amendment reference alone, leaving its initial reference in operation. This may be done on only three months' notice, where a proposed or actual amendment to the FW Act is considered to be inconsistent with the 'fundamental' principles mentioned above. This possibility is specifically acknowledged in ss 30B(8) and 30L(8) of the FW Act.

In theory, this would allow a State to prevent 'objectionable' amendments, at least in relation to its referred employers. For example, a future Coalition government might amend the FW Act to preclude unfair dismissal claims. That would necessarily affect constitutional corporations, Commonwealth agencies and Territory employers. But if a referring State revoked its amendment reference in time, then the pre-amendment version of the Act would continue to apply to referred employers in that State.

In practice, it seems unlikely that this would ever happen. A federal government that had the numbers in the Senate to amend the FW Act in such a way, and which was prepared to ignore the (non-binding) Intergovernmental Agreement, could just as easily change the referral provisions to take away the option of terminating only the amendment reference.

That would in effect force any objecting State either to maintain its reference, or to revoke it entirely. The latter is indeed an option that a State can exercise at any time, without notice, merely by repealing its referral legislation. To do so, however, it would need to consider what to do about the employers that would once again fall within State coverage.

There is a clear expectation that, once the new national system commences, it is unlikely any State will seek to terminate its reference of powers – or at least, not without a compelling justification.