



i n s i g h t

Reference Number: *in sight* 02/09

Date: 22 April 2009

To: Recipients as addressed

Re: **Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009**

The new “Forward with Fairness” workplace relations system is to be fully operational from 1 January 2010, but under transitional arrangements many aspects of the system may commence on 1 July 2009.

The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (“the TPCA Bill”) was introduced into the House of Representatives on 19 March and was referred to a Senate Committee that same day. The Senate Committee is to report by 7 May. The fourth and final “Forward with Fairness” Bill will be introduced in the week commencing 25 May, with the Bills expected to be passed by the Parliament no later than 25 June (the last sitting day in June) and become law shortly thereafter.

The TPCA Bill repeals most of the *Workplace Relations Act 1996* (“the WR Act”) and provides for transitional and consequential arrangements for the implementation of the Government’s Forward with Fairness election policy contained in the earlier *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (see [in sight 03/08](#) and [in sight 07/08](#)) and the *Fair Work Act 2009* (see [in sight 16/08](#)). The final forthcoming Bill will deal with minor amendments to other legislation (such as references to the *Fair Work Act 2009*) and arrangements for the transfer of state industrial relations powers to the Commonwealth (negotiations for which are continuing with the states).

Most of the provisions of the *Fair Work Act 2009* will commence on a single day by proclamation, the Government’s plan is that this date will be 1 July 2009 (the “WR Act repeal day”). There will be a “bridging period” between that date and 1 January 2010, the date of full implementation of the new system. Transitional arrangements under the TPCA Bill will apply during that bridging period (and, in some cases – such as the preservation of existing agreements – after).

Universal application of the safety net

The National Employment Standards (see [in sight 10/08](#)) and minimum safety net wages will apply to all employees from 1 January 2010, and will prevail over a transitional instrument (e.g. enterprise agreement, AWA, ITEA) where the instrument is detrimental in comparison.

Transitional Instruments

Existing industrial agreements (enterprise agreements, AWAs and ITEAs) and “unmodernised awards” will become transitional instruments from the WR Act repeal day. Transitional instruments will continue to apply to employers, employees and organisations (where relevant) and will also apply to new employees.

Individual employees and their employer may agree to a conditional termination of an AWA or ITEA (even one not yet past the Nominal Expiry Date) to enable the employee to participate in collective bargaining for a new enterprise agreement which would ultimately apply to the employee. Such a conditional termination will even allow the employee to engage in protected industrial action. If an enterprise agreement is ultimately agreed to, it will replace the conditionally terminated AWA or ITEA.

Parties to an enterprise award (which are currently excluded from the Award Modernisation process) will be able to apply to Fair Work Australia (FWA) by the end of 2013 to have the award modernised.

Collective Bargaining, Agreement-making and Industrial Action

From the WR Act repeal day, collective bargaining for enterprise agreements must take place under the new system. During the bridging period, FWA will apply the existing no-disadvantage test (NDT) to enterprise agreements, using the unmodernised award as the comparator (and any applicable state legislation, e.g. re long service leave). The Australian Fair Pay and Conditions Standard (AFPCS), including the minimum wages provisions, will also continue to apply and be relevant to the NDT.

Bargaining or protected industrial action under the WR Act (such as that approved by ballot at Victoria University and the University of Sydney) will **not** carry over into the new system. Parties will either have to finalise an enterprise agreement before the WR Act repeal day or recommence bargaining under the new system after that date. However, in dealing with applications about bargaining and industrial action under the new system, FWA will be able to take into account the history of the bargaining participants, e.g. in relation to bargaining meetings that have been held.

Dispute Resolution

FWA will deal with disputes about matters arising under a transitional instrument, and will exercise the same powers that the AIRC could have exercised under the WR Act in relation to the dispute. Also, during the bridging period, FWA will deal with any disputes about the AFPCS and minimum entitlements under the WR Act, such as notice of termination and public holidays.

This is likely to make little practical difference, as all current members of the AIRC will be appointed to FWA, and will hold concurrent appointments during the bridging period.

General Protections, Unfair Dismissal, Right of Entry and Stand Down

The new system general protections, unfair dismissal, right of entry and stand down frameworks will commence on the WR Act repeal day. Where provisions of modern awards and/or new system enterprise agreements would otherwise be relevant, the current terms of transitional instruments will apply. During the bridging period, the general protection provisions will include the AFPCS and other minimum entitlements under the WR Act.

Existing right of entry permits and other right of entry instruments issued under the WR Act will automatically transfer to the new system.

Institutions

On the WR Act repeal day, Fair Work Australia will come into operation, with all current AIRC members being appointed to FWA, while also retaining their AIRC appointment during the bridging period. The Fair Work Ombudsman will replace the Workplace Ombudsman, and also take over the general advisory function currently performed by the Workplace Authority (WA).

The Government then plans to progressively abolish all the other WR institutions as follows, although the actual date is subject to Ministerial declaration.

The Australian Fair Pay Commission (AFPC) will cease to exist on 31 July 2009, having completed the 2009 wage review. The AIRC and the Australian Industrial Registry will cease to exist on 31 December 2009, after finalising the modern awards and any unfair dismissal matters commenced before the WR Act repeal day. The Workplace Authority will cease to exist on 31 January 2010, after assessing collective agreements made before the WR Act repeal day and any ITEAs made before 31 December 2009.

Registered Organisations

The remnants of the *Workplace Relations Act 1996*, which are those parts relating to the registration and accountability of organisations (both unions and employer associations) will become the *Fair Work (Registered Organisations) Act 2009*, effectively creating a fifth Act in the process.

Existing registrations will continue, and FWA will be empowered to make representation orders to settle union demarcation disputes, even if such disputes have not yet disrupted or harmed a business. There is currently some public dispute between Professor Andrew Stewart and DEEWR about whether the actual words in the TPCA Bill have the desired effect, but this is sure to be settled by the Parliament during debate on the TPCA Bill.

Further Information

The full text of the documents, the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, the Explanatory Memorandum and Ms Gillard's Second Reading Speech are available on the [AHEIA website](#).

The Parliamentary consideration of the TPCA Bill and the fourth Bill will take place in late May and June. After the legislation is finalised, AHEIA will provide further information and advice for Members. Also, AHEIA will be providing information sessions for appropriate staff about the new system, with a supplementary session for those staff who need a more comprehensive understanding of the legislation.



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