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Fair Work Bill 2008: Fairer for Who?

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Introduction

The *Fair Work Act 2008* (**FW Act**) was introduced into the Commonwealth Parliament on 25 November 2008 after almost a year of consultation between the Commonwealth and all stakeholders with an interest in workplace relations and employment law reform including the states, employer and business organisations and unions. It was passed by Parliament on 19 March 2009 is now awaiting royal assent.

The Act's provisions will implement changes that address policy objectives of the Rudd Government that had been enunciated by Mr Rudd prior to the 2007 Federal Election.[2]

1 A new institution known as Fair Work Australia (**FWA**) will create a 'one stop' shop on workplace relations issues and will replace the current Australian Industrial Relations Commission (**AIRC**), Australian Fair Pay Commission, The Workplace Authority, The Workplace Ombudsman and the Australian Building and Construction Commission (**ABCC**) from February 2010.

2 Legislated minimum employment standards prescribing 10 employment standards that will comprise the National Employment Standards (**NES**).

3 Modern Awards are to operate from 1 January 2010. The process of developing Modern Awards was substantially progressed by the AIRC during 2008 and this continues.[3]

4 A new bargaining framework that introduces 'good faith bargaining' obligations, fewer restrictions on the content of agreements, introduction of single stream of collective 'Enterprise Agreement',[4] an enhanced role for union officials as bargaining representatives, parties to agreements and participants in dispute resolution arising from agreements and a role for FWA to arbitrate (in a far wider range of circumstances than the AIRC) especially with respect to the 'low paid'.

5 Opening up access to remedies against harsh, unjust or unreasonable termination of employment to employees of small businesses.

6 An overriding policy objective of enhancing and enlivening the representative role of union officials in workplaces is also apparent from the Bill. For example, this policy objective is evinced by enhanced rights of access to workplaces for union officials based on union eligibility for membership rules.[5]

This paper will review these provisions and analyse how they might benefit employees, the unemployed, unions and businesses.

Fair Work Australia

A central plank of the Government's reform is the creation of a new institutional framework with Fair Work Australia (**FWA**) at the centre. FWA will be a 'one-stop shop' for information, advice and assistance on workplace issues, replacing seven existing Commonwealth agencies:

- The Australian Industrial Relations Commission (**AIRC**);
- The Australian Industrial Registry;
- The Australian Fair pay Commission;
- The Australian Fair pay Commission Secretariat;
- The Workplace Authority;
- The Workplace Ombudsman;
- The Australian Building and Construction Commission.

Conciliation and Arbitration Function

1997 - 2006

Whilst the role of the AIRC in industrial relations at the workplace level through compulsory arbitration was diminished by the legislative changes introduced by the Howard Government in 1996 it retained a significant arbitral role.[6] For example, the AIRC could still settle industrial disputes through arbitrating an award containing *allowable matters*.[7]

However, the main emphasis of the *Workplace Relations Act 1996* (**WR Act**) was agreement making at the workplace level whether individual or collective.[8] In the realm of bargaining the AIRC had the power to intervene in disputes only in the most exceptional circumstances[9]to terminate the bargaining process and arbitrate an award in settlement.[10].

As well as being encouraged to bargain at the workplace (collectively or individually) parties to agreements were also encouraged to resolve disputes at the

workplace level by use of dispute settling procedures in agreements.[11] Under such procedures the AIRC could be empowered to act as a private arbitrator of disputes over the application of the agreement.[12] When performing its private arbitration role the AIRC was determining rights and obligations of the parties to an agreement.

As this form of arbitral determination of rights was with the consent of the parties, the terms of which was set out in the agreement disputes procedure, the High Court took the view that this was not akin to the exercise of a Chapter III judicial function and was therefore valid.[13] In exercising this power under s170LW, however, the AIRC was held not to be confined to the powers conferred on it by the agreement but could also draw upon is ordinary statutory powers if doing so would not be contrary to the terms of the agreement.[14] These powers principally found in WR Act s111(1) were considered facilitative rather than substantive. [15]

2006-2009

Whilst retaining the power for the AIRC to terminate a bargaining period in extreme circumstances[16]and arbitrate *workplace determinations*,[17]under the Work Choices[18] reforms, the AIRC arbitral role in ordinary workplace dispute settlement was further diminished so that it could not settle workplace disputes through arbitration of an award. The AIRC was left with a private arbitration role when provided for in a workplace agreement which could only be exercised in accordance with the terms of the agreements including with respect to procedure.[19]

2009 and Forward (with Fairness)[20]

It is proposed that FWA will replace the AIRC on 1 January 2010 as the workplace relations administrative tribunal and the new home for managing workplace issues, handling industrial disputes, bargaining rules and unfair dismissal.[21] FWA will be able to exercise conciliation and mediation powers to settle disputes as it considers appropriate and arbitration functions are expressly provided by the Fair Work Act (**FW Act**).[22] FWA's functions are expressly provided for in relation to fifteen subject matters.[23]

FWA is given powers of compulsory arbitration in relation to a number of the fifteen subject matters that are additional and are not currently powers available to the AIRC. These additional powers include jurisdiction to:

- Make, vary and revoke *Modern Awards*;[24]
- Setting and varying minimum wages;[25]
- Make orders varying a *transferable instrument* to enable it to operate in a way that is better aligned to the working arrangements of the new employer;[26]

- With regard to collective bargaining make *bargaining orders*,[27]make a *serious breach declaration*,[28]make a *majority support determination*,[29] make a *scope order*,[30] make and vary a *low-paid authorisation*,[31]make and vary a *single interest employer authorisation*,[32]make a *special low-paid workplace determination*,[33]make an *industrial action related workplace determination*,[34]make a *bargaining related workplace determination*,[35]order the termination of protected industrial action on grounds of significant economic harm to employer or employees;[36]
- Determine disputes about contravention of *General Protections*;[37]
- Determine disputes about stand downs where stand down is not provided for in an *Enterprise Agreement*;[38]
- Make orders regarding failure to notify a decision to dismiss 15 or more employees to a union of which any of the affected employees is a member.[39]

A small number of functions of FWA that may involve the exercise of arbitral powers are common with the functions of the AIRC under the current provisions of the WR Act including jurisdiction to arbitrate in relation to unfair dismissal,[40]the making of orders for cessation of unprotected industrial action[41]and the making of orders for the purpose of settling disputes over the operation of the right of entry provisions. [42]

The new collective bargaining regime and the related powers of FWA are likely to bring profound change to workplace relations at the enterprise level and in some industries at the industry level.[43] This is due to the combined effects of the prominent role unions as bargaining representatives are likely to play and the high degree of regulation and potential for intervention by FWA in the bargaining process.

Minimum Wage Setting

Since the Work Choices reforms[44]that established the Australian Fair Pay Commission (**AFPC**), the approach to minimum wage setting has fundamentally changed. Under WR Act the AFPC has been charged with the setting of minimum wages with its main considerations being economic competitiveness and employment and the capacity of the low paid and unemployed to obtain and remain in employment.[45]

Previously minimum wages had been set by the AIRC and its predecessors as the outcome of adversarial arbitration proceedings resulting in the making or variation of awards. National Wage Cases,[46]and Safety Net Reviews[47]conducted by the AIRC and its predecessor the Australian Conciliation and Arbitration Commission had become something of a ritual during the two decades preceding Work Choices.

In these adversarial proceedings employer groups often adduced economic evidence that linked minimum wage levels to employment. However, notwithstanding consistent attempts by the AIRC to link wage increases to improvement in productivity and efficiency, decisions in effect reflected an arbitrated settlement between the claims put by the Australian Council of Trade Unions and the counter arguments led by the Australian Chamber of Commerce and Industry and its predecessors, other employer groups and the State and Commonwealth Governments.

Decisions invariably gave primacy to what was a fair living wage for employees rather than what level of minimum wage would provide and maintain employment particularly for the low paid and unemployed. In reality this reasoning had probably not changed much since the notion of a "*fair and reasonable*" living wage was preferred over the "*higgling of the market*" by Justice Higgins in the *Harvester* judgment in 1907.[48]

Minimum Wage Setting By FWA

The AFPC has been presided over by economist Professor Ian Harper in its three general Federal Minimum Wage (**FMW**) Wage-Setting decisions.[49] It seems there has been general satisfaction both with how the AFPC has operated and its decisions. Basing its decisions in setting the FMW on economic research as to the likely effects on the labour market has to some extent been adopted by the Government in the minimum wage review function of FWA.

FWA will be required to conduct on annual minimum wage review to set *modern award* minimum wages and make a national minimum wage order.[50] Annual minimum wage reviews must be conducted by the *Minimum Wage Panel* of FWA which will consist of the President and seven FWA members.[51] As part of the review the President may direct that a report be prepared for consideration in an annual wage review[52] and in conducting the review FWA has a discretion to inform itself as it considers appropriate, including by commissioning research provided such research is published.[53]

In conducting the annual minimum wage review all persons and bodies interested must be given a reasonable opportunity to make written submissions to FWA and to make comments to FWA on those submissions.[54] It is not envisaged that the *Minimum Wage Panel* of FWA would conduct an adversarial proceeding but a review closer to how the AFPC has operated rather than the previous approach of the AIRC in National Wage and Safety Net Review cases.

National Employment Standards

National Employment Standards (**NES**)[55]will replace the Australian Fair pay and Conditions Standard (**AFPCS**)[56]and consists of 10 minimum standards that will apply to all national system employees as follows:

1. Maximum weekly hours (38 plus reasonable additional hours and an ability to average hours through modern awards, an enterprise agreement or written agreement);[57]

2. Requests for flexible working arrangements to assist an employee to care for a child;[58]

3. Parental leave of 12 months that can be extended for a further 12 months[59]and related entitlements;

4. Annual leave of four weeks or five weeks for shift workers with accrual based on ordinary hours;[60]

5. Personal/carer's leave (10 days paid plus two days unpaid per year)[61] and compassionate leave (days per *permissible occasion)*;[62]

6. Community service leave including entitlement to be absent from employment during period of voluntary community or emergency service (e.g. fire fighting)[63]and entitlement to be absent from employment for jury service and (make-up) payment for the first 10 days of such absence;[64]

7. Long service leave based on *award-derived long service leave terms* when a workplace agreement was not in operation (State and Territory long service leave laws continue to apply where this does not apply);[65]

8. Public holidays - entitlement to be absent from work (where the employee is based for work) and payment for the absence subject to a reasonable request by an employer to work on the day;[66]

9. Notice of termination of up to five weeks[67]and redundancy pay of up to 16 weeks;[68]

10 Fair Work Information Statement determined by FWA must be given to a new employee containing information about the NES, modern awards, agreement making, right to freedom of association and role of FWA and Fair Work Ombudsman.[69]

Under the proposed transitional provisions where an existing workplace agreement (*transitional instrument*) is detrimental to an employee when compared to the NES, the term of the agreement is of no effect.[70] For example, if a collective workplace agreement or AWA was still in operation and it provided for a redundancy benefit that was less than the NES redundancy payment scale the agreement provision would be of no effect and the NES scale would apply.

Terms of modern awards and enterprise agreements must not exclude any provision of the NES.[71]

Modern Awards

The AIRC was given the mandate to conduct an award modernisation process and make modern awards by amendments to the WR Act that came into operation on 27 March 2008.[72] Award modernisation is expected to be concluded by the AIRC in time for modern awards to commence operation on 1 January 2010 and the terms of number of modern awards for major industry sector were issued by the AIRC in December 2008.[73] Through award modernisation the size, complexity and number of awards will be drastically reduced. Modern awards will replace the state awards that had been brought into the national system by Work Choices.[74]

All modern awards must have a clause that facilitates individual flexibility arrangements between an employer and an employee varying the effect of the award in order the "*meet the genuine needs of the employee and employer*."[75]

Modern awards will not apply to *high income employees* which is an employee with guaranteed annual earnings excluding compulsory employer superannuation contributions that exceeds the *high income threshold* prescribed by regulation (expected initially to be $100,000).[76] In practical terms this will mean that a *high income employee* can be engaged on an employment contract without the need to comply with a modern award. However, the terms of the contract would still have to comply with the NES.

Bargaining

The FW Act has established a system of collective bargaining with the involvement of unions as bargaining representatives and *good faith bargaining* obligations imposed on the parties and with FWA enforcing the rules.

Enterprise Agreements

Two types of agreement are provided for, single enterprise agreements (**SEA**) and multi-enterprise agreements (**MEA**), and both types of agreement can be a *greenfields agreement*.[77]

Notification Requirements

When an employer:

- agrees to bargain; or
- initiates bargaining; or
- a *majority support determination*[78] or a *scope order*[79] comes into operation in relation to the proposed agreement; or

- a l*ow paid authorisation*[80]that specifies the employer comes into operation;

the employer is required to notify employees who will be covered by the agreement of their representational rights.[81]

This notice must specify that the employee can appoint a bargaining representative in bargaining for the agreement and in related proceedings before FWA. The notice must also explain that if the employee is a member of a union that is entitled to represent the industrial interests of the employee in relation to the work covered by the agreement and the employee does not appoint another bargaining representative, the union will be their default bargaining representative.[82]

When the employer agrees to bargain or initiates bargaining for a greenfields agreement, the employer is required to take all reasonable steps to notify each union that is entitled to represent the industrial interests of employees who will be covered by the agreement in relation to work covered by the agreement that it is a bargaining representative for the agreement. A copy of this notice must be given to FWA.[83]

Whilst this requirement does not prevent a greenfields agreement being made with some but not all relevant unions it makes it mandatory that each union be notified of the proposed agreement at least 14 days before the agreement is made. The practical effect of this requirement will be that unions who have not traditionally been involved in an industry will be made a bargaining representative for a greenfields agreement by default, and can then participate in the bargaining process.

Good Faith Bargaining

Good faith bargaining requirements must be met by *bargaining representatives*[84]for an agreement. Good faith bargaining requirements are:

1 Attending and participating in meetings held at reasonable times;

2 Disclosing relevant information in a timely manner;

3 Responding to proposals by other parties in a timely manner;

4 Giving genuine consideration to proposals from other parties and giving reasons for responses to proposals;

5 Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.[85]

A bargaining representative can apply to FWA for a *bargaining order* when another party is not meeting good faith bargaining requirements.[86] A bargaining order must

specify actions necessary to ensure good faith bargaining and actions to be taken to deal with the capricious or unfair conduct.[87] This provides FWA with a very broad power to intervene with respect to the conduct of bargaining participants.

A bargaining representative can apply for a *serious breach declaration* where there has been "*serious and sustained*" contravention of bargaining orders.[88] The effect of a serious breach declaration is that after the expiry of 21 days (*the post-declaration negotiating period*), FWA is required to make a bargaining related workplace determination.[89] In effect this requires FWA to arbitrate any outstanding matter still at issue.[90]

Majority Support Determinations

When an employer has not yet agreed to bargain, the bargaining representative of an employee (invariably a union) can apply to FWA for a *majority support determination*.[91] FWA must issue a majority support determination if satisfied that the majority of employees at the workplace who will be covered by the agreement want to bargain with the employer and the employer has not agreed to do so.[92] The employer is then required to bargain in good faith with the bargaining representatives.

Scope Orders

When a bargaining representative has concerns that bargaining is not progressing efficiently or fairly for the reason that the agreement will not cover appropriate employees, they can apply to FWA for a *scope order*.[93] FWA has the power in making a scope order to limit or expand the scope of an enterprise agreement that is being negotiated.[94]

Low-paid Bargaining

A bargaining representative or union can apply for a *low-paid authorisation* allowing bargaining for an MEA with a number of employers in an industry.[95] FWA is required to make a low-paid authorisation when satisfied it is in the public interest after taking into account a range of factors including whether there is and has been access to bargaining in the industry, the relative bargaining strength of the employees and the degree of commonality between the enterprises.[96]

A bargaining representative can also apply to FWA for a *special low-paid workplace determination*.[97] FWA must make the special low-paid workplace determination if satisfied that the bargaining representatives for the MEA are genuinely unable to reach agreement and there is no prospect of an agreement being reached, the terms and conditions of the employees are a minimum safety net based on a modern award and the NES, the determination would promote future bargaining and that making the determination would be in the public interest, [98]

Industrial Action Related Workplace Determination

Where FWA has ordered the termination of protected industrial action in support of bargaining on the grounds that it is causing significant economic harm to the employer or any employees that will be covered by the agreement,[99] it must make an industrial action-related workplace determination if an agreement is not reached by the time the "post-industrial action negotiating period" ends.[100] This allows FWA to arbitrate bargaining matters remaining in issue upon termination of industrial action on the basis of significant economic harm to the immediate employer and employees rather than the far higher threshold of endangerment to life or significant damage to the Australian economy.[101]

Bargaining Related Workplace Determination

When FWA has made a serious breach declaration (which is triggered by serious and sustained contravention of bargaining orders)[102] and the post-declaration negotiating period of 21 days has ended, it can arbitrate in the making of a bargaining related workplace determination.[103]

Right of Entry

The major change to the right of entry provisions is that when a union official (who is a permit holder) is seeking to exercise right of entry to investigate suspected contraventions[104] the union does not need to be bound by an award or agreement that applies to the workplace. Right of entry can now be exercised when the employer employs a member of the permit holder's union whose industrial interests the union is entitled to represent, the member performs work on the premises and the selected contravention relates the member.[105] Also subject to some restrictions on disclosure of employee records under the *Privacy Act 1988* and the Privacy Principles,[106] while on the premises investigating a contravention the permit holder can require the occupier or affected employer to allow inspection and copying of employee records.[107]

The threshold has also be substantially lowered so that when a union official seeks to exercise his or her right of entry for the purpose of holding discussions with employees there only needs to be one person on the premises performing work that the union is entitled to represent and who wishes to participate in those discussions.[108]

A further more subtle change should be noted in that whilst an enterprise agreement cannot include a term that excludes or modifies the operation the right of entry provisions in the FW Act,[109] it would appear not to be unlawful if an agreement provided for union rights outside of the scope of these provisions such as a term providing for union participation in a workplace grievance procedure.

Freedom of Association and Other Workplace Rights

Various remedies that are found throughout the WR Act have been brought together dealing with coercion, misrepresentation, freedom of association, unlawful termination and discrimination.[110] A new protection against adverse action being taken against a person because they have or have not exercised a *workplace right* has been included which expressly provides that a prospective employee is taken to have the workplace rights he or she would have had if employed in the prospective employment by a prospective employer.[111]

It seems likely that this remedy against adverse action for having or exercising a workplace right will be far more accessible to employees and unions than WR Act s792 and its predecessor s298K. These provisions have been the subject of much litigation and have often been used strategically by unions to thwart or slow down workplace change initiatives.[112]

Unfair Dismissal

A remedy against unfair dismissal will be available to all national system employees.[113] The exclusion from a remedy of employees who were terminated for an operational reason or for reasons that include a genuine operational reason[114] has been removed and replaced with an exclusion of dismissals that were a genuine redundancy.[115] A criterion for considering harshness has also been included that reintroduces procedural fairness as a predominant consideration for FWA in determining unfair dismissal claims.[116]

An employee of a small businesses (15 or fewer full time employees) will not have access to a remedy against a harsh, unjust or unreasonable dismissal unless the dismissal is inconsistent with the Small Business Fair Dismissal Code.[117]

Transfer of Business

Transfer of business provisions[118]have replaced the transmission of business provisions of the WR Act.[119] Under the new transfer of business provisions various *transferable instruments*[120]will transfer from an old employer to a new employer where the employment of an employee of an old employer has been terminated, within 3 months of the termination the employee becomes employed by the new employer, the employee performs work that is substantially the same as that performed for the old employer and there is a connection between the old employer and the new employer.[121] Connection between the old and new employer includes transfer of assets, where the new employer is an associated entity, where the old employer outsources work to the new employer and when the old employer ceases outsourcing work to a new employer.[122]

Further key differences are that the transferable instrument will apply both to employees who transfer from the old employer to the new employer[123]and non-

transferring employees of the new employer[124]and the transferable instrument will operate indefinitely until terminated or replaced by an enterprise agreement.[125]

FWA will, however, have the power to determine that the terms of a transferable instrument be varied to enable it to operate in a way that is better aligned to the working arrangements of the new employer.[126]

How will unions benefit?

The major beneficiary of the FW Act will undoubtedly be the union movement which has been granted what can only be described as privileged status in the enterprise bargaining system, greatly enhanced right of entry, access to a range of new arbitral functions of FWA and access to remedies concerning adverse action against a person because of existence of a workplace right.

How will employees benefit?

Employees have gained a range of rights including:

- Access to unfair dismissal remedies for all employees covered by the national system;
- Remedies against adverse action by an employer because of the existence of a workplace right; and
- Greater representational rights during bargaining.

However, it seems that if all of this combines to make many employers less inclined employ or to make changes to work practices needed to become more competitive for fear of intervention from unions and an all powerful workplace tribunal in FWA, this may have a detrimental effect on economic activity and employment.

How will the unemployed benefit?

These laws are likely to make the task of the unemployed in gaining employment more difficult. This move back to a high level of centralised regulation and control of the labour market will impose inflexibilities on employers considering employing an unemployed person.

Reintroduction of unfair dismissal laws for all national system employees may prove to be a disincentive to employ. Regrettably, the abolition of the AFPC and repeal of its legislative mandate to set minimum wages taking account of the effects on employment and unemployment may also mark a return to the 'Higgins approach' to minimum wage fixing based on a fair and reasonable living wage rather than the likely effects on the labour market. This might also act as a disincentive to employers to engage the unemployed.

How will businesses benefit?

Australian businesses must now operate in a highly regulated and centralised workplace relations system that encourages intervention by unions and FWA in important workplace matters. In some instances, businesses that already operate in a highly unionised environment may see the return of compulsory arbitration powers to the tribunal as a welcome circuit breaker when there are industrial disputes.

Award modernisation and the drastic reduction in the number and complexity of awards by the making of modern awards will be seen my many in business as a long overdue reform that will result in some much needed simplification of one aspect of employment regulation.

However, the return to legislatively enshrined external interference to business in the area of employment and workplace relations is likely to make business less flexible in responding to workplace productivity and efficiency (and therefore competitive) challenges. Business will also be prone to the transaction costs associated with this type of regulation and a likely increase in conflict and litigation over workplace issues and the associated costs that this will inevitably bring.

Conclusion

This legislation was developed from the Australian Labor Party (**ALP**) policy *Forward with fairness: Labor's plan for fairer and more productive workplaces* and the mandate the Rudd ALP Government received in the 2007 Federal Election to implement this policy. It has become increasingly obvious that this policy has been superficially justified and misrepresented by age old adages about fairness and a 'fair go for all round' for workers when, save for some welcome simplification of the award system through award modernisation, it seems likely that the FW Act will:

- Hand great privilege and advantage to unions particularly with respect to collective bargaining;
- Provide no significant benefits to workers;
- Damage the ability of the unemployed and the disadvantaged to access the labour market; and
- Damage the capacity of Australian businesses to be flexible, productive and competitive.

Endnotes:

[1] Special Counsel DLA Phillips Fox

[2] *Forward with fairness: Labor's plan for fairer and more productive workplaces;* <http://www.alp.org.au/download/now/forwardwithfairness.pdf>, 25 March 2009

[3] *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* s3 & Sch 2 Item 9.

[4] Provisions allowing for individual agreements (AWAs) were repealed by Note 3 s3 & Sch 1 item 1 with effect from 28 March 2008.

[5] For example see FW Act Pt 2-4 Div 3 & 8, Pt 2-5 Div 2, Pt 3-1, Pt 3-4

[6] *Workplace Relations and Other Legislation Amendment Act 1996.*

[7] WR Act s89A

[8] Note 7 Pt VIB - certified Agreements & Pt VID Australian Workplace Agreements

[9] Where threatening to endanger life, personal safety etc of the population or cause significant damage to the Australian economy (WR Act s170MW(3)).

[10] Note 7 ss170MW & 170MX

[11] Note 7 s170LT(8)

[12] Note 7 s170LW; *CFMEU v AIRC* (2001) 203 CLR 625 at [30]-[32]

[13] *CFMEU v AIRC* (2001) 203 CLR 625 at [30]-[32]

[14] WR Act s111(1) & (2); *CEPU v Telstra* (2003) 128 IR 385 at [25]-[27], [47],[51].

[15] *CEPU v Telstra* (2003) 128 IR 385 at [33].

[16] Note 7 s430

[17] Note 7 Pt 9 Div 8

[18] *Workplace Relations Amendment (Work Choices) Act 2005*

[19] Note 7 Pt 13 Div 4 & 5

[20] Note 2

[21] Note 3 Sch 18 Items 7 & 11.

[22] FW Act s595

[23] Note 22 s576

[24] Note 22 Pt2-3

[25] Note 22 Pt 2-6

[26] Note 22 s320

[27] Note 22 s230

[28] Note 22 s235

[29] Note 22 s237

[30] Note 22 s238

[31] Note 22 ss243-245

[32] Note 22 ss249 & 251

[33] Note 22 s262

[34] Note 22 266

[35] Note 22 s269

[36] Note 22 s423

[37] Note 22 Pt 3-1; ss365 & 372

[38] Note 22 s526

[39] Note 22 Pt 3-6, s531

[40] Note 7 ss652 &654; Note 22 s390 & 399

[41] Note 7 s496; FW Act s418

[42] Note 7 ss770-772; FW Act s505

[43] Note 7 ss243-245, 249 & 251

[44] Note 18 Pt 2

[45] Note 7 s23

[46] National Wage Case April 1985 [Print F8100] - 3/4/85; National Wage Case November 1985 [Print G0700] - 4/11/85; National Wage Case June 1986 [Print G3600] - 26/6/86; National Wage Case March 1987 [Print G6800] - 10/3/87; National Wage Case December 1987 [Print H0100] - 17/12/87; National Wage Case February 1988 [Print H0900] - 5/2/88; National Wage Case August 1988 [Print H4000] - 12/8/88; February 1989 Review (Wage Fixation Principles) [Print H8200] - 25/5/89; National Wage Case August 1989 [Print H9100] - 7/8/89; National Wage Case April 1991 [Print J7400] - 16/4/91; National Wage Case October 1991 [Print K0300] - 30/10/91.

[47] Safety Net Adjustments and Review September 1994 [Print L5300] - 29/9/94; Third Safety Net Adjustments and Section 150A Review October 1995 [Print M5600] - 10/10/95; Safety Net Review—Wages April 1997 [Print P1997] - 22/4/97; Safety Net Review—Wages April 1998 [Print Q1998] - 29/4/98; Safety Net Review—Wages April 1999 [Print R1999] - 29/4/99; Safety Net Review—Wages May 2000 [Print S5000] - 1/5/00; Safety Net Review—Wages May 2001 [PR002001] - 2/5/01; Safety Net Review—Wages May 2002 [PR002002] - 9/5/02; Safety Net Review—Wages May 2003 [PR002003] - 6/5/03; Safety Net Review—Wages May 2004 [PR002004] - 5/5/04; Safety Net Review—Wages June 2005 [PR002005] - 7/6/05.

[48] *Ex parte HV McKay* (1907) 2 CAR 1 per Higgins J at 3

[49] *Wage Setting Decision and Reasons for Decision October 2006; Wage Setting Decision Nos 2/2007, 3/2007, 4/2007and Reasons for Decision July 2007; Wage Setting Decision No 2/2008 and Reasons for Decision July 2008*, < http://www.fairpay.gov.au/fairpay/WageSettingDecisions/All/>, 23 March 2009.

[50] Note 22 ss285-287

[51] Note 22 620

[52] Note 22 ss290 & 582

[53] Note 22 ss288, 291 & 590

[54] Note 22 s289

[55] Note 22Pt 2-2

[56] Note 7 Pt 7

[57] Note 22 Pt 2-2 Div 3

[58] Note 22 s65

[59] Note 22 ss70 &76

[60] Note 22 s87

[61] Note 22 ss96 &102

[62] Note 22 s104; A member of employee's immediate family or household has life threatening illness or injury or dies.

[63] Note 22 ss108 & 109

[64] Note 22s111

[65] Note 22s113

[66] Note 22 ss114-116

[67] Note 22 s117; Extra 1 week if employee is over 45 and has completed at least 2 years service.

[68] Note 22 s119; FWA can order that an employer is excluded from the obligation to pay redundancy pay if they obtain acceptable employment for the employee or cannot pay the amount (s120).

[69] Note 22 ss124 & 125

[70] *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* Sch 3 Item 24

[71] FW Act s55

[72] Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008; WR Act Pt 10A.

[73] *Award Modernisation Decision* [2008] AIRCFB 1000

[74] Note 3 Sch 3 Item 29*;* Note 7 Sch 8 Pt 3

[75] Note 22 s144

[76] Note 22 ss47(2) & Pt 2-9 Div 3

[77] Note 22 s172

[78] Note 22 s237

[79] Note 22 s238

[80] Note 22 s243

[81] Note 22 s173(2)

[82] Note 22 s174(3)

[83] Note 22 s176

[84] Which includes the employer that will be covered by the agreement; Note 22 s176 & 177

[85] Note 22s228

[86] Note 22 s229

[87] Note 22 s231

[88] Note 22 ss234-235

[89] Note 22 s269

[90] Note 22 s270

[91] Note 22 236-237

[92] Note 22 s237

[93] Note 22 s238

[94] Note 22 s238(5)

[95] Note 22 s242

[96] Note 22 s243(2)

[97] Note 22 s 260(4)

[98] Note 22s262

[99] Note 22 s423

[100] Note 22 s266

[101] These grounds for terminating industrial action still remain; Note 22s424 formerly Note 7 s430.

[102] Note 22 ss234-235

[103] Note 22 s269

[104] Note 22 s481

[105] Note 22ss481-482

[106] Note 22 Note to s482 & s504

[107] Note 22 s482(2)

[108] Note 22 s484

[109] Note 22 s194

[110] Note 22 Pt 3-1

[111] Note 22 ss340-341

[112] *Patricks Stevedores Operations No 2 Proprietary Limited v Maritime Union of Australia* (1998) 195 CLR 1

[113] Note 22 Pt 3-2

[114] Note 7 s643(8) & (9)

[115] Note 22 s385

[116] Note 22 s387

[117] Note 22 s388; The Small Business Fair Dismissal Code will be declared by the Minister responsible for the FW Act. A draft was released in 2008. See DEEWR Fact Sheet; <http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Documents/WRfactsheet_09.pdf>, 25 March 2009.

[118] Note 22 Pt 2-8

[119] Note 22 Pt 11

[120] Enterprise agreements, workplace determinations and named employer awards; Note 22 s312

[121] Note 22 s311

[122] Note 22 s311(3)-(5)

[123] Note 22 s313

[124] Note 22 s314

[125] Note 22 ss313(3) & 314(3)

[126] Note 22 s320