

# EVALUATING THE FAIR WORK ACT

Putting a regulator in between employers and employees is a backward step, writes **Judith Sloan**

The *Fair Work Act 2009* has been fully operational since the beginning of 2010. Compared with the statute it replaced—the *Workplace Relations (WorkChoices) Amendment Act 2005*—there has been surprisingly little analysis of its impact, both current and prospective.<sup>1</sup> This article is an attempt to redress this by focusing on those features of the *FWA* that differ significantly from *WorkChoices* and the issue of modern awards, which were also a provision in *WorkChoices*.<sup>2</sup>

So far, the impact of the *FWA* has been muted. Many of the agreements made under *WorkChoices* are yet to expire, and labour market conditions have been relatively benign since the *FWA* came into operation. The real test will come as new agreements are negotiated under the changed rules contained in *FWA*. Should the labour market falter down the track, a further test of *FWA* will be the extent to which employers can adjust employment costs, their workforces, or working hours to suit subdued demand.

Employers in some sectors are already concerned, particularly in relation to modern awards and unfair dismissals. Moreover, the adjustments to the federal minimum wage and other award pay scales in mid-2010, as well as the foreshadowed approach to future adjustments, are of current relevance to employers in industries with a high degree of award reliance, including retail trade and accommodation and food services.

## Background

The *FWA* is an extremely lengthy and complex document. It runs to over 600 pages. The table of contents takes 34 pages. In this sense, the *FWA* is similar to *WorkChoices*, another long and complicated statute. Another feature that the *FWA* shares with *WorkChoices* is its national coverage, save for a small number of state government employees and unincorporated enterprises in Western Australia, which has not referred its industrial relations powers to the federal government.

The key parts of the *FWA* are:

- National employment standards
- Modern awards
- Enterprise agreements
- Low-paid bargaining
- Minimum wages
- Unfair dismissal
- Industrial action
- Office of the Fair Work Ombudsman

The aim here is not describe the *FWA* fully but rather to concentrate on issues that bear on the flexibility with which employers and

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employees can arrange their workplace relations, including the terms and conditions of employment. Broadly, the *FWA* contains the mechanics of a deeply interventionist approach to industrial relations compared with the counter-factual of a light-handed regulatory approach based on the principle of freedom of contract. This approach stems from the (untested) assumption of unequal bargaining power between employer and worker; the promotion of trade union representation as a means of redressing this imbalance; and the role of a third party (Fair Work Australia) in approving agreements, solving industrial disputes, and setting minimum wages and conditions. Overall, the *FWA* retreats to the arrangements that existed before 1996 when the *Workplace Relations Act* was introduced by the Howard government.

### Modern awards

The idea behind modern awards is relatively straightforward: Rather than continue with some 4,000 federal and state awards, often written in obscure and complex language, a small number of industry awards should be created

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‘to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.’<sup>3</sup> The original intention of modernising awards may have held some popular appeal but, in practice, the process has proved to be extremely complicated and damaging.

Complication arose from the commitment by Julia Gillard, the then Minister for Employment and Workplace Relations, that no employee would be made worse off because of modern awards. (She also pledged that employers would not face additional costs.) When combining various state awards into one award, as well as awards that covered workers in a number of industries, the most generous provisions within all of these instruments were generally

set down. If this were not bad enough, there were some combination of industries in modern awards—hotels and cafés, for instance—that had long-standing but very different patterns of shift allowances and weekend penalties. For example, hotel employees are paid much higher weekend penalty rates than café workers. Were these different industries to be covered by the same new award, the consequences for some of the affected enterprises would be dire.

To deal with these complications, Fair Work Australia created more awards than originally envisaged. Initially, there were to be only a handful but the final figure is more than 100. Fair Work Australia also granted long transition periods in a number of cases lest some employers face much higher employment costs all at once.

Notwithstanding the supposed advantage of modern awards in providing simple and clear directions for employers, in practice, many employers have found it very difficult even to determine which award should apply to their workers.<sup>4</sup> In one celebrated case, Melbourne firm Pop Art had made repeated inquiries about the appropriate rates of pay for its workers but was still issued with a notice from the Fair Work Ombudsman for back pay amounting to \$700,000. This notice was subsequently withdrawn after ‘consideration of additional evidence provided by the employer allowed greater clarity about the nature of the Pop Art business and the diverse range of products it manufactures.’<sup>5</sup> The Ombudsman’s office said three possible industrial instruments could apply to the company!

A further example of the consequences of modern awards relates to the employment of students after school. The Terang Cooperative had employed a number of school students for two hours per day, which was all the time available to students before closing time. The new modern award covering retailing, however, specifies a minimum engagement period of three hours. The business had no option but to let the students go after being harassed by the Fair Work Ombudsman and ordered to pay the students the money ‘owed’ to them for the hours they had not worked.

The case was taken up by a number of employer associations seeking to vary the modern award. In rejecting the application, Graeme Watson, Vice President of Fair Work Australia, said:

I acknowledge the particular impact on some individuals in Victoria. I also acknowledge the strength of arguments that it is desirable to provide youth with employment opportunities. It follows that award provisions which limit opportunities for youth employment should be avoided if possible. However the interest of *fairness* (italics added) to employees generally must be considered and balanced against other objectives.<sup>6</sup>

This case highlights the quite deliberate one-size-fits-all feature of modern awards—and its negative consequences.

### Enterprise agreements

The provisions governing the making and approval of enterprise agreements are both bureaucratic and complex in terms of process and content. Statutory individual contracts are not provided for and while, in theory, agreements can be made without trade unions as party, this option is unlikely to be used often. If any employee is a member of an employee organisation (trade union), the organisation will be the bargaining representative of the employee by default unless another bargaining agent is explicitly notified to the employer. In practice, the majority of enterprise agreements will be negotiated with trade unions, irrespective of the proportion of the workforce who are actually members.

To be approved, agreements must meet the ‘better off overall’ test, which states:

Each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.<sup>7</sup>

This is a strict test. There cannot be winners and losers; every worker now and in the future must be deemed to be better off. Moreover, the comparison is with the modern award, which in turn incorporates the National Employment Standards, a list of 10 minimum employment conditions in the *FWA*, or even more generous conditions.

Enterprise agreements are required to contain individual flexibility arrangements. *Prima facie*, these arrangements might appear to provide for a form of individual contracting, but experience under the *Workplace Relations Act* leaves little doubt that the trade unions, who by and large are party to the agreements, will thwart the potential effectiveness of these arrangements.

A key development in the *FWA* is the introduction of the concept of ‘good faith’ bargaining, a highly interventionist form of regulation that allows Fair Work Australia to overrule a ‘take-it-or-leave-it’ approach by employers. The components that make up ‘good faith’ bargaining include attending meetings at reasonable times; disclosing information; responding to proposals; giving genuine consideration to proposals; and

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refraining from being capricious or unfair in a way that undermines freedom of association and enterprise bargaining. Again, the device of enforced ‘good faith’ bargaining is favoured by the trade unions, with enforcement guaranteed by a third party.

### Unfair dismissals

A central feature of WorkChoices was the exemption of all employers with fewer than 100 employees from the unfair dismissal provisions of that statute. It is not generally known that remedies for unfair dismissal have been a feature of federal industrial relations regulation only since 1993. There is little doubt that the unfair dismissal provisions are among the most contentious from the employer’s point of view.

The *FWA* restored unfair dismissal provisions for all employees irrespective of the number of employees in the organisation, although some provisions cover small business, including a minimum employment period to qualify for unfair dismissal and the Small Business Fair Dismissal Code, covering employers with fewer than 15 employees.<sup>8</sup>

In brief, this code sets out two instances in which dismissal can be justified: summary dismissal and other dismissal. In the first instance, employers may dismiss an employee without notice—for theft or fraud, for instance. In the second instance, the code sets out a series of steps that employers should follow. Ostensibly designed to minimise the burden on small employers, the code states that the evidence required includes a completed checklist, copies of written warning(s), a statement of termination and a signed witness statement.

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Not surprisingly, the number of claims for unfair dismissal has soared since the *FWA* became law. In 2009–10, there were nearly 12,000 applications for unfair dismissal, an increase of nearly 50% on the previous year. According to the Annual Report of Fair Work Australia, the figure for 2009–10 was still lower than for 1995–96, ‘which arguably was the last full year in which a national termination of employment jurisdiction existed.’<sup>9</sup> This comparison seems a strange one to make. In all likelihood, the number of unfair dismissal claims will rise even further as employees become more familiar with the new provisions of the *FWA* and the Small Business Fair Dismissal Code proves to be a less effective defence than anticipated by the government.

In addition to the increasing numbers of claims for unfair dismissal, the decisions made by Fair Work Australia show some interesting interpretations of the *FWA*. For example, a long-standing factory worker

in Albury-Wodonga repeatedly refused to wear his safety glasses at work. As this was a violation of occupational and safety laws, the employer dismissed the worker. In ordering his reinstatement, Fair Work Australia noted that this man had a wife and family and would find it difficult to obtain another job! The stories of workers demanding ‘walk away’ money to satisfy their claim for unfair dismissal continue to accumulate. Of the cases conciliated in 2009–10, three-quarters required a cash payout to the employee.<sup>10</sup>

### Minimum wages

The Australian Fair Pay Commission, which undertook the role of adjusting minimum wages under the WorkChoices legislation, was abolished in mid-2009, not long after its decision to award no increase to the federal minimum wage and related pay scales, an increase that would otherwise have applied from October 2009. Under the *FWA*, the role of setting minimum wages was assigned to a panel within Fair Work Australia made up of members of the tribunal and outside appointees.

The panel reached its first decision in June 2010, increasing the federal minimum wage by \$26 per week, only one dollar less per week than the claim of the Australian Council of Trade Unions (ACTU). By any measure, this was a large rise, adding to the rise of employment costs associated with a number of modern awards. This was despite the panel conceding that:

We accept that for some employers, particularly in award-reliant industries, there will be costs increases arising from the application of modern award wages and conditions. And this is clearly a relevant consideration for us.<sup>11</sup>

The criteria that guide the panel in the setting of minimum wages include a curious rag-bag of various considerations, some potentially conflicting with one another. There is reference to the ‘performance and competitiveness of the national economy,’ ‘promoting social inclusion through increased

workforce participation,’ and ‘relative living standards and the needs of the low paid.’ The decision provides an interesting insight into the thinking of the panel. Social inclusion is understood to cover not only having a job but the quality of the job. The ‘low paid’ are defined as those earning less than two-thirds of the median wage. While it is acknowledged that there may be a negative relationship between minimum wages and employment, the strength of the relationship is interpreted as being weak.

What this first minimum wage decision suggests is that generous increases are likely to be awarded every year, and there is even a prospect of a percentage increase rather than a flat amount. Unless Australia’s economic performance were to deteriorate markedly, employers will need to factor in these increases in addition to the ones that will flow through modern awards as the transition period progresses.

### Compliance

The compulsory arbitration and centralised wage fixation system that existed up to 1993 substantially reduced the flexibility of individual employers and employees to set employment conditions that suited their circumstances, but there was always some give in the system because of the poor compliance regime. Relying on the trade unions to ensure award compliance meant that small businesses, in particular, were able to operate under the radar. Informal variations could be made to pay and conditions—variations that were often mutually satisfactory—without fear of detection or prosecution.

Ironically, this state of affairs began to change noticeably with the passing of WorkChoices and the establishment of the Workplace Ombudsman. In 2007, the budget of this office was \$46 million and by 2008, it had risen to \$70 million. Now called the Fair Work Ombudsman, it has a budget of \$134 million in 2009–10. Needless to say, the staffing of the office has exploded.

Armed with substantial powers of investigation, the Fair Work Ombudsman seeks to examine complaints, recover underpayment

of wages, and impose penalties that are both substantial and cumulative, applying to each day of the breach and to each worker. It also undertakes audits of particular industry segments, including retail and security. Early in 2010, for instance, the Fair Work Ombudsman wrote to almost 50,000 retailers to check whether they were paying the correct wages, penalty rates, loadings, and allowances. According to the Ombudsman, ‘we are mindful that this is an industry which employs large numbers of young people and low-paid workers who may be vulnerable if they are not fully aware of their workplace rights.’<sup>12</sup>

The irony is that while modern awards were designed to make life simpler for employers than the previous arrangements, in practice the reverse has been the case. Gary Black, Executive Director of the National Retail Association, complained, ‘For the Ombudsman to be embarking on this sort of campaign,

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given the immense complications around the transitional provisions in the modern award, is indefensible.’ Employer associations have noticed a marked increase in the number of inquiries from employers seeking information about the appropriate rates of pay for their workers.

### Conclusion

This article has selected some key features of the Labor government’s *Fair Work Act* to illustrate the extent of its re-regulation of the labour market. The coverage has not been comprehensive. Some other very worrying aspects of the new law not mentioned; for instance, low-paid bargaining which provides scope for multi-employer bargaining and end-point arbitration. Instead of continuing to allow employers and employees to agree on wages and working conditions that suit their situations, this act turns the clock back by reimposing a third party (Fair Work Australia) to interfere

with this relationship, as well as provide a form of protection to the trade union movement.

Given the trade unions' reaction to WorkChoices and their role in the election of the Labor government in 2007, these developments were to be expected. What is surprising is the complexity of the new system and the mismanagement of the award modernisation process that has left so many employers bamboozled and facing additional expenses, both direct and in the form of more compliance. Given that modern awards were intended to be simple and easy to understand, it is hard to see why this outcome would be welcomed by the government.

There are early signs of cause for concern in the area of unfair dismissals, mirroring the pattern of prior experience when employers were forced to pay 'walk away' money to undeserving ex-employees. Fear of an unfair dismissal complaint will make employers more cautious both in terms of taking on additional staff and whom they take on.

The full impact of the new law cannot be measured at this stage, however. Agreements made under WorkChoices have been allowed to run their course and so the true test will only come when these agreements are renegotiated. There are early indications that previous non-union agreements—covering Telstra and Commonwealth Bank employees, for example—will be replaced by union agreements. There are also rumblings in some mining districts, in the Pilbara for instance, where unions had lost their dominant bargaining positions but are keen to secure them again.

In all likelihood, we are heading towards a less flexible system with an energetic and well-resourced 'cop on the beat' to ensure employers comply with the letter of the law. Generous increases in minimum wages can be anticipated, which will be in addition to the transitional increases in the modern awards. From a macroeconomic point of view, there is a distinct possibility that wages will begin to rise too rapidly. Enterprise bargaining will continue but with the unions making full use of their new box of tricks, in particular, the 'good faith' bargaining rules.

### Endnotes

- 1 Anthony Forsyth and Andrew Stewart (eds.), *Fair Work: the New Workplace Laws and the Work Choices Legacy* (Sydney: Federation Press, 2009).
- 2 The award rationalisation process leading to modern awards under the WorkChoices legislation was not operationalised.
- 3 Section 134(1)(g), *Fair Work Act 2009*.
- 4 *The Australian Financial Review* (24 October 2010).
- 5 *The Australian* (4 October 2010).
- 6 Appeal by *National Retail Association Ltd and Master Grocers Association Limited* [2010] FWAFB 7838 (8 October 2010).
- 7 Section 193(1), *Fair Work Act 2009*.
- 8 Anna Chapman, 'Protections in Relation to Dismissal: From the Workplace Relations Act to the Fair Work Act,' *University of New South Wales Law Journal* (2009), 746–771.
- 9 Fair Work Australia, *Annual Report 2009–10* (2010), 10.
- 10 *The Sydney Morning Herald* (21 October 2010).
- 11 Fair Work Australia (2010b), Decision—Annual Wage Review, 2009–10.
- 12 *The Australian* (1 April 2010).