

The Law of Work

A new chapter

Rosemary Owens and Joellen Riley

(Up to date to 30 June 2008.)

This supplement is the first of a number prepared primarily to assist teachers and students who are using *The Law of Work* as a textbook in courses during the second half of 2008. It provides a general outline of legislative changes introduced and proposed by the newly elected ALP federal government, followed by a chapter-by-chapter discussion of how these changes, and other significant legal developments, can be expected to influence the regulation of working relationships in Australia. Although the change of government promises the interment of many of the most unpopular aspects of the *WorkChoices* laws, rather few changes have yet been made, and the government has promised a long consultation period before introducing others. The authors and publishers are planning a second, completely revised edition to coincide with the enactment of the full 'Forward with Fairness' package of reforms at the beginning of 2010. Until then, we are committed to keeping users of *The Law of Work* up-to-date by way of on-line supplements produced ahead of each teaching semester. This general supplement will be followed shortly by a paper analysing the recently released National Employment Standards and Award Modernisation decision.

Foreshadowing change . . .

Since publication of *The Law of Work* at the very end of 2006, one enormously significant event has occurred, which is likely to bring major changes to the regulation of labour relations in Australia. The election of the Rudd ALP federal government on 24 November 2007 guarantees at least some winding back of the *WorkChoices* laws¹ that proved to be the undoing of the Coalition government, and possibly caused the former Prime Minister, John Howard, to lose his own seat of Bennelong.

¹ *Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (WorkChoices)*

According to Roy Morgan polls conducted ahead of the election, the *WorkChoices* laws were the most significant factor in voters' support of a change of government.² The 2007 election was only the second time an Australian Prime Minister lost his own seat in a federal election. The first was Stanley Bruce in 1929, and that also followed unpopular industrial law proposals.

This supplement to *The Law of Work* (prepared ahead of a proposed second edition to coincide with enactment of the complete ALP 'Forward with Fairness reforms'³) explains the (relatively few) changes that have already been introduced by the new government, and those which have been proposed in government policy papers. The supplement covers the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) (Transition Act), which was passed on the second anniversary of the *WorkChoices* legislation (27 March 2008), and proclaimed to take effect from 28 March 2008. This Act prohibits the making of new Australian Workplace Agreements (AWAs) but allows certain employers already using AWAs to use a transitional instrument called an Individual Transitional Employment Agreement (ITEA). The Transition Act also reintroduces a no-disadvantage test, to apply when any kind of workplace agreement is made. These changes are explained in the notes below to **Chapter 11: Bargaining**.

The Transition Act also repeals the provisions in the *WorkChoices* legislation for rationalisation and simplification of awards, and replaces them with a new award modernisation process. This is explained in the notes below to **Chapter 7: Standard Setting**.

The Transition Act is just the first plank in a whole raft of changes proposed in the Forward with Fairness policy papers. Perhaps eager to learn from the mistakes of its predecessors (who notoriously pushed through the *WorkChoices* laws with little time for Parliamentary debate, let alone broad community consultation), the new ALP government has been engaging in considerable consultation with various stakeholder groups before releasing bills to deal with many of its proposals. These include some newly-formed committees of representatives of employer associations, such as the Business Advisory Group and Small Business Advisory Group, as well as the more traditional unions and lobby groups. This means that those sections of *The Law of*

² See 'IR Reforms Still Driving Labour Support: Liberal Voters Afraid of Union Dominance', June 18, 2007, at <http://www.roymorgan.com/news/polls/2007/4179> last checked 14 May 2008.

³ See K Rudd and J Gillard *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces*, Canberra, April 2007; and *Forward with Fairness: Policy Implementation Plan*, Canberra, August 2007.

Work which focus on Australian statutory law, still provide a largely accurate picture of current Australian workplace laws. The government's announcements have indicated that the whole program of new laws will not be enacted and operational until the commencement of 2010. Nevertheless, where clear policy proposals have been articulated, this supplement provides a digest of those proposals. In **Chapter 7: Work Standards**, we explain the proposals for a new set of ten National Employment Standards (NES). (A more detailed supplement on the NES will be made available shortly.) In **Chapter 9: Security at Work**, we outline what is presently known about plans to amend the federal unfair dismissal laws.

Although many of these proposals represent significant reforms, it is important to remember that many of the changes introduced by *WorkChoices* will leave an abiding legacy on Australian labour law. The most fundamental elements of the former Coalition government's ten year program which transformed 'industrial relations law' into 'workplace law' are not likely to be wound back under the Rudd government proposals. The notes below to **Chapter 3: Australian Law of Work in Transition** reiterate the abiding significance of the *WorkChoices* laws.

A number of other legal developments are also noted in this supplement. The *Independent Contractors Act 2006* (Cth), which was still only a Bill when our book was published, is noted in **Chapter 4: The Subject of the Law of Work**. Some State developments, using an opportunity created by the *WorkChoices* exemptions of State laws regulating 'child labour', are noted in **Chapter 7: Work Standards**.

Developments in the common law of employment contracts - notably concerning the formulation of a duty of good faith and fair dealing, and clarification of the employer's common law duty to provide a safe workplace - are noted in **Chapter 6: Rights and Responsibilities under Contract**. In the following chapter-by-chapter notes, references in square brackets are to pages in *The Law of Work*.

Name changes

When the former Howard government introduced the *Workplace Relations Amendment (A Stronger Safety Net Act) 2007* (Cth) in the lead up to the 2007 federal election, it 'rebadged'⁴ the principal institutions dealing with individual employment rights and their enforcement. The Office of the Employment Advocate (OEA) was renamed the

⁴ See C Sutherland, 'All Stitched Up? The 2007 Amendments to the Safety net' (2007) 20(3) *Australian Journal of Labour Law* 245 at 246.

Workplace Authority, and the Employment Advocate took on the new title 'Workplace Authority Director'. The Office of Workplace Services (OWS), housing the workplace inspectorate, became the Workplace Ombudsman. This terminology is still in place, but is likely to be replaced by new designations from the beginning of 2010, when the Rudd government's full 'Forward with Fairness' program is enacted. This program promises a new 'one stop' body called 'Fair Work Australia', and it is likely the 'Fair Work' terminology will be adopted by the various essential limbs of any new body charged with management of standard setting, supervising bargaining, and handling various kinds of disputes. The precise anatomy of Fair Work Australia is yet to be revealed.

Chapter 3: Australian Law of Work in Transition

Reforms in context

On 24 November 2008, Australians elected a new ALP federal government, committed to undoing many of the more unpopular measures introduced by the Howard government's *WorkChoices* laws. Before explaining the principal elements of the Rudd 'Forward with Fairness' proposals, it is useful to reflect on where both *WorkChoices* and 'Forward with Fairness' are located, in the general trajectory of labour law reform over the past few decades in Australia.

Until the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (which took effect from 1 January 1997), the dominant discourse about the law of work in Australia was that it was largely about balancing the interests of labour (generally, organised labour) and capital. Successive enactments at federal and State levels established and maintained systems for the determination of wages and working conditions, generally on an industry-wide basis, by conciliation and arbitration of industrial disputes.

This system derived from the thinking of the 1890s, when social and economic stability in Australia (and in parts of Europe) had been threatened by industrial conflict. At the time, a system for conciliation and arbitration of industrial disputes to enable the peaceful settlement of claims over wage rates and working conditions, was considered to be the best means of fostering industrial harmony. Independent tribunals were established to arbitrate claims brought by registered trade unions and employer bodies. Parties were able to

make their case, and were encouraged to reach compromise solutions. If the parties failed to agree, the tribunals had the power to arbitrate and impose binding 'awards'. The industrial statutes contained provisions establishing and empowering the tribunals, providing processes for the registration and conduct of industrial associations (unions and employer associations), and processes for the making, maintaining and enforcement of awards, and the prevention and settlement of industrial disputes.

Many economic and social changes in Australia throughout the 1970s and 1980s led to a significant change in industrial relations policy. Decisions were made (first by the Hawke/Keating ALP government) to move away from industry-wide determination of wages and working conditions and adopt enterprise-based bargaining for wages and conditions above an award-based safety net.⁵ This change to an enterprise bargaining based system (similar to the United States' model) was cemented by the Howard government's *Workplace Relations* reforms in 1996.

The replacement of the term 'industrial relations' by 'workplace relations' symbolised the new focus of federal law: it was concerned not with 'industrial disputes' and relations between capital and labour on a broad scale, but with the regulation of wages, working conditions, productivity and efficiency at the individual workplace level. Industry wide awards were cut back to a very basic safety net, and single business enterprise bargaining was the means for determining wages and conditions above the safety net. This trajectory of Australian labour law - away from industry-level regulation towards a bargaining-based system - is very unlikely to be diverted to any significant extent by the Rudd ALP Government's proposed reforms.

There will, however, be one significant point of departure from the former path, and this is a clear rejection of *individual* workplace bargaining that undermines collectively bargained standards, at least for workers on low to moderate incomes. The Rudd government's *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) has already outlawed the making of new Australian Workplace Agreements (AWAs). (The main elements of this Act are explained in the notes to **Chapter 11: Bargaining**.)

AWAs, which were first introduced in 1996, allowed an employer and an individual worker to escape the

⁵ For contemporary reflections on these earlier reforms, by the reformers who instigated them, see K Hancock "The Future of Industrial Relations in Australia" (2008) 18 (2) *Economic and Labour Relations Review* 7-14; and J Niland "The NSW Green Paper Twenty Years On: A Reflection on the Future" (2008) 18(2) *Economic and Labour Relations Review* 15-22.

prescriptions of an otherwise binding award or certified collective agreement, so long as the AWA passed a 'no-disadvantage test', meaning that the worker was not worse off overall under the AWA than they would be under a relevant award. The *WorkChoices* laws abandoned the no-disadvantage test, so that AWAs could be made which undercut award and enterprise bargain conditions. Within a very short time, research began to emerge that suggested that many low income earners, and especially disadvantaged groups, were suffering substantial reductions in take-home pay and benefits as a consequence of abandoning the no-disadvantage test. For example, figures released by the Office of the Employment Advocate (OEA) (which is now renamed the Workplace Authority) in May 2006 showed that from a sample of 250 AWAs, every one removed at least one 'protected award condition' and 16 per cent removed all such conditions.⁶ In April 2007, the *Sydney Morning Herald* newspaper published data allegedly leaked from the OEA, which revealed that 44 per cent of a sample of 998 AWAs removed all protected award conditions; 76 per cent removed shift loadings, 70 per cent removed incentive payments and bonuses and 59 per cent removed annual leave loading.⁷ These revelations made a nonsense of the Howard government's claims that 'no worker would be worse off' as a consequence of the enactment of *WorkChoices*.

The prospect of severe electoral damage prompted the Howard government to enact the *Workplace Relations Amendment (A Stronger Safety Net Act) 2007* (Cth), which reintroduced a very limited form of fairness test, to ensure that any worker trading off 'protected award conditions' in an AWA would be paid some kind of compensation in exchange.⁸ This legislation was much-criticised for its complexity and imprecision, and in the end, the fairness test was the first casualty of the new government's reforms.

A number of other Howard government changes to the traditional Australian industrial relations framework were foreshadowed in the original Workplace Relations and Other Legislation Amendment Bill 1996, however at the time, the government did not have control of the Senate and so was constrained by Senate objections to amend its

⁶ See P McIlwain Evidence to Estimates Hearing, Senate Committee on Employment, Workplace Relations and Education, Parliament of Australia, Canberra, 29 May 2006.

⁷ See M Davis 'Revealed: How AWAs Strip Work Rights', *Sydney Morning Herald*, 17 April 2007; M Davis, and M Schubert, 'Workers' Rights Lost with AWAs', *The Age*, 17 April 2007, noted in C Sutherland and J Riley 'Industrial Legislation in 2007' (2008) 50(3) *Journal of Industrial Relations* forthcoming.

⁸ For a thorough account of this Act and its operation, see C Sutherland "All Stitched Up? The 2007 Amendments to the Safety Net" (2008) 20(3) *Australian Journal of Labour Law* 245-271.

legislation. Many of these changes were ultimately enacted with *WorkChoices*. These reforms included:

- nationalising the industrial relations system, so that private sector employers would all be governed by federal law only, and would not be influenced by state industrial laws;
- abolition of the system of creating and revising industry wide awards by an independent conciliation and arbitration tribunal, i.e. the Australian Industrial Relations Commission (AIRC) - this also meant removing the role of the Australian Council of Trade Unions in bringing forward national wage cases;
- instituting a legislated set of minimum conditions of work, applicable to all federal employers;
- providing a 'small business' exemption from unfair dismissal laws;
- creating tougher controls on industrial action by unions.

Many of these changes are unlikely to be wound back by the ALP government, if its early policy documents are a fair indication of its plans. Even a small business exemption (of sorts) may remain for unfair dismissal laws - although 'small' is likely to be defined as a business with less than 15 employees, not 101 as is the case under the present iteration of the *Workplace Relations Act*, s 643(10)-(11). A number of elements of *WorkChoices* are likely to remain as permanent features of federal labour regulation in Australia.

Work Choices' legacy

1. A national system

Perhaps the most significant legacy of the *WorkChoices* reforms is that corporate private sector employers in Australia are now all governed by federal workplace relations laws. State laws still have effect in some important spheres - notably occupational health and safety, workers' compensation, discrimination, child labour (see [122-123]) - but on the whole, matters to do with setting wages and conditions of work, and dealing with conflict of an industrial nature, are all within federal law.

At the time *The Law of Work* went to press, the High Court decision in *New South Wales v Commonwealth* (the

WorkChoices Case)⁹ had not been handed down. The result of that case was as we predicted: the High Court of Australia, by majority, held that the legislation was constitutionally valid.¹⁰ In particular, the majority held that the legislation was validly underpinned by the corporations power in s 51(xx) of the *Constitution* in so far as the legislation purported to apply to 'trading and financial corporations'. Reliance on this power does, however, mean that only incorporated employers, operating in the private sector, are bound by federal laws. State public sector employees, and employees of partnerships and unincorporated businesses, are still governed by State industrial laws. For some time, there has been confusion about the status of local government authorities, especially where they engage in commercial (hence 'trading') activities.

The Rudd government has signalled that it will continue to rely on the corporations power in the Constitution to support its laws, however it is also contemplating plans to seek the cooperation of the States to establish a genuinely national system. See the proposals discussed in the Williams Inquiry (commissioned by the New South Wales government) (see <http://industrialrelations.nsw.gov.au/rsources/final+reportword.doc>). Whatever the outcome of these plans, it seems clear that the States are unlikely to reassert control over private sector workplace relations in the foreseeable future. If the federal government is not able to secure the States participation in a cooperative federal scheme, it is likely that federal laws will continue to be underpinned by a complex mix of constitutional powers: see [107-110].

2. Legislated minimum standards

It is also clear that the new government intends to retain a set of legislated minimum conditions. In the days when it was believed that the federal Parliament had no power to directly legislate to set wages and working conditions (it could work only through independent arbitral tribunals) there could be no 'common rules' for federal employees. States could legislate for basic conditions (such as annual leave entitlements), but federal law could not. So the way that minimum wages and other basic conditions of employment were set at federal level was through the award system. The ACTU would

⁹ (2006) 156 IR 1; 81 ALJR 34; [2006] HCA 52.

¹⁰ For detailed commentary on the case see A Stewart and G Williams *Work Choices: What the High Court Said*, Federation Press, Sydney 2007; and Thomson (with commentary by Evans et al), *WorkChoices: The High Court Challenge*, Thomson, Sydney, 2007.

initiate a paper dispute, and this would be resolved by a National Wage Case hearing by the AIRC. Governments would be parties to these cases and make submissions, but could not ultimately determine the outcome.

Now that we understand that the federal government is able to use the corporations power to make laws imposing on corporations obligations in respect of their employees, we have federal laws directly imposing minimum working standards. Under *WorkChoices*, minimum conditions of work were fixed in legislated standards, called the Australian Fair Pay and Conditions Standards, dealing with maximum hours, personal/carers' leave, annual leave and parental leave. The Rudd government has signalled that it will maintain minimum standards in legislation, but will expand the list to 10.¹¹ The new standards proposed are outlined in **Chapter 7: Work Standards**, below, and a more detailed supplement on these standards is to be published shortly.

3. Controls on the exercise of union power and industrial action

WorkChoices introduced several restrictions on trade union activity, notably restrictions on rights of entry to workplaces, and requirements for trade unions planning industrial action to undertake a secret ballot of their members before going ahead with any action: see [541].. These rules are likely to remain. The Rudd government's policy document 'Forward with Fairness: Policy Implementation Plan' has asserted a commitment to strong controls on disruptive industrial action, including retention of the rights of entry rules enacted with *Work Choices*.

ALP Reforms

1. First move: the Transition Act

On 28 March 2008, the *Workplace Relations Amendment (Transition to Forward with Fairness Act 2008 (Cth)* commenced. The main features of this Act were the abolition of the old form of AWAs (with institution of a transitional instrument to allow called an Individual

¹¹ See the Discussion Paper: National Employment Standards Exposure Draft released by the Department of Education, Employment and Workplace Relations in February 2008; and the National Employment Standards, released in June 2008, and available at <http://www.workplace.gov.au/workplace/Publications/News/NewNationalEmploymentStandards.htm> (last checked 4 July 2008).

Transitional Employment Agreement or ITEA), the institution of a new no-disadvantage test for all agreement-making, and the establishment of a new award modernisation process.

AWAs

The Transition Act abolished the provisions in the *Workplace Relations Act* allowing employers to make new AWAs. AWAs already in force prior to 1 December 2007 have been allowed to remain on foot until they expire, and until the parties themselves bring them to an end, but no new AWAs may be made. Those employers who were using AWAs at 1 December 2007, and have not been relying on awards or any form of collective agreement-making, will be permitted to use a new individual instrument to engage new and existing staff. These Individual Transitional Employment Agreements (ITEAs) may be made between employers and individual employees, subject to a new no-disadvantage test which measures the ITEA provisions not only against a relevant award, but also against any collective agreement that would otherwise apply to the employee. ITEAs are a transitional instrument only. They can survive only until 31 December 2009, and will disappear when the new Fair Work legislation is passed and the full package of Forward with Fairness measures is implemented.

No-disadvantage test

The *Transition Act* has revived a 'no disadvantage test' similar to that which applied prior to the *WorkChoices* changes: see [520-522]. The new test set out in *Workplace Relations Act* s 346D(2) provides that a collective agreement will pass the test if the Workplace Authority Director is satisfied that the agreement 'does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees', measured against any relevant 'reference agreement', which includes any kind of award (including a Notional Agreement Preserving a State Award or NAPSA: see [126-127]). No new AWAs can be made. ITEAs can be made only by employers who were using AWAs prior to 1 December 2007, and only until 31 December 2009, by which time the new laws are expected to be enacted. In the meantime, any ITEA will be required to pass a no-disadvantage test which benchmarks against any relevant collective agreement, as well as any relevant award: see s 346E(2). Employers will no longer be able to unilaterally terminate collective agreements after their nominal expiry date under former s 393 (introduced

by *WorkChoices* and now repealed). This means that collective agreements, once made, will survive as benchmarks for any ITEAs made during the Transition Act's transition period.

Award modernisation

The Transition Act also inserted a new Part 10A into the *Workplace Relations Act* to establish a new award modernisation process to be conducted by the AIRC. These provisions instruct the AIRC to identify a list of industries or occupations to undergo an award modernisation process, so that industry awards contribute to an appropriate safety net to underpin collective bargaining in the future. The first decision, identifying a list of priority awards, and providing a template for a 'model award flexibility clause', was published in June 2008.¹² A new s 576J lists ten matters that will be able to be dealt with by modern awards.

These include:

- Minimum wages
- Type of employment
- When work is performed
- Overtime
- Penalty rates
- Annualised pay arrangements
- Allowances
- Leave loadings
- Superannuation
- Consultation, representation and dispute resolution.

Effectively, this is a step towards a system which has three (possibly four) layers of regulation for working conditions. At the bottom - the floor of the system - will be a safety net of 10 national employment standards. The next level will be modern awards, designed to regulate wages and working conditions for an industry or occupation sector. These are basic safety net standards, and they should contain a model flexibility clause to accommodate employees' genuine individual needs. The third level would be enterprise based collective bargaining, between employers and employee groups (generally trade unions), to make workplace agreements to replace the award. These would be made only where employers and employees collectively consented to the agreement, and they would be subject (after 2010) to a new 'better off overall' test. They will continue to

¹² See Award Modernisation decision [2008] AIRCFB 550, PR062008, handed down on 20 June 2008.

provide the opportunity for above-award rewards for productivity in enterprises.

After 2010, there is to be no option for statutory individual workplace agreements (such as AWAs or ITEAs), however employees on incomes above \$100,000 could agree to be exempt from awards, and their employment relationships could be governed by the common law of contract. (This would be the possible fourth level of regulation.)

2. Future plans: Reinstatement of unfair dismissal protection

One of the more contentious *WorkChoices* changes was removing the rights of employees of 'small businesses' to bring claims for reinstatement or compensation for unfair dismissal. Corporate employers with 100 or fewer employees were exempt from any claims by dismissed employees that the dismissal was 'harsh, unjust or unreasonable'. Claims for 'unlawful' dismissal, however, were still allowed. A dismissal is 'unlawful' if it is for discriminatory reasons (based on sex, race, disability, sexual preference, and a number of other characteristics: see [401-405]); or because of an employee's choice as to union membership; or for temporary absence from work for illness. All employees were still able to bring claims based on these complaints. But only large employers were subject to applications that a dismissal was 'unfair'. This meant that many employees were deprived of an inexpensive and accessible means of challenging a dismissal.

The Rudd Government has announced plans to reinstate unfair dismissal rights for all employees by removing this 'small business' bar. Its announcements indicate that this change will be introduced later in 2008. However employers in very small businesses (with fewer than 15 employees) will face some different rules. First, an employee in a business with fewer than 15 employees will need to have served a minimum of 12 months before being entitled to bring a claim for unfair dismissal. The government also proposes to introduce a Fair Dismissal Code to guide small business employers, and this code will be formulated in consultation with a Small Business Working Group. These proposals had not been enacted, nor even released in draft, at the time of writing.

3. New watchdog: Fair Work Australia

The remainder of the Forward with Fairness agenda - and the establishment of Fair Work Australia as a new

umbrella authority to manage the various aspects of implementing industrial relations law and policy - is to be finalised following consultation with stakeholder groups. Legislation is expected to be introduced to have effect from 1 January 2010.

4. Time for lobbying?

The relatively long period allowed by the government for consultation before implementation of policies has created space for many voices.

One such voice (or group of voices) has emerged from a newly formed Australian Institute of Employment Rights (AIER), under the patronage of the Hon R J Hawke, and led by a number of legal and industrial relations practitioners and scholars. The AIER has published a Charter of Employment Rights, with accompanying commentary. This Charter maps a vision for a system of workplace law in Australia based firmly on international standards. It is a 'human rights' based model. The book (Bromberg M and Irving M (eds) *Australian Charter of Australian Employment Rights*, Hardie Grant Books, Melbourne, 2007) provides a thematic approach to thinking through workplace law issues. The ten Charter principles (explained in brief chapters) are

- Good faith performance
- Work with Dignity
- Freedom from Discrimination and Harassment
- A Safe and Health Workplace
- Workplace Democracy
- Union membership and representation
- Protection from unfair dismissal
- Fair Minimum Standards
- Fairness and balance in industrial bargaining
- Effective dispute resolution.

For discussion of the adoption of a human rights based approach to the regulation of work relationships, see J Fudge 'The New Discourse of Labor Rights: From Social to Fundamental Rights' (2007) 27(1) *Comparative Labor Law & Policy Journal* 29.

A special edition of the *Economic and Labour Relations Review* published in June 2008 has focused on the remaking of Australian industrial relations laws, in the light of past reviews. Papers in this volume by Professors Keith Hancock, John Niland, Ron McCallum and Margaret Gardner, provide perspectives on the current reform process and its desired outcomes, in the light of reviews these experts made of Australian industrial

relations laws in the past. Hancock was author of a review of the federal system prior to the making of the Industrial Relations Act 1988; Niland reviewed the NSW system under the Greiner government ahead of the Industrial Relations Act 1991 (NSW) and McCallum reviewed this legislation for the Carr government ahead of the 1996 Act; and Gardner reviewed the Queensland legislation in 1998 for the Beattie government. These perspectives, and commentary provided by a number of labour law scholars, make interesting reading for students watching developments in this field.

Chapter 4: The subject of the law of work

The main development affecting this chapter of *The Law of Work* has been the enactment of the *Independent Contractors Act 2006* (Cth). This Act of the former Howard government has not been targeted for repeal by the Rudd government. Likewise, the provisions enacted in an accompanying Act amending the *Workplace Relations Act 1996* (Cth) to insert a new Part 22 prohibiting and punishing 'sham' employment arrangements (see ss 900-904) have also escaped attention in the Forward with Fairness policy provisions. This fact has been noted by Andrew Stewart in 'WorkChoices and Independent Contractors: The Revolution that Never Happened',¹³ as one of the weaknesses in the Forward with Fairness plans. No attention appears to have been given to the problem of defining and policing the boundary between employees protected by workplace laws, and other kinds of dependent workers. The 'disguised employment' problem (see [175]) has not yet been solved.

The main effect of the *Independent Contractors Act 2006* (Cth) - which remains in force - is to override the State laws that dealt with the disguised employment problem by 'deeming' some kinds of dependent contractors to be employees for the purposes of state industrial legislation.¹⁴ Another incident of this legislation was to provide federal unfair contracts review provisions for independent contracting arrangements, overriding State provisions in New South Wales and Queensland. These provisions extend the coverage of federal unfair

¹³ (2008) 18(2) *Economic and Labour Relations Review* 51.

¹⁴ For a more detailed discussion of the legislation, see J Riley 'A Fair Deal for the entrepreneurial worker? Self-employment and independent contracting post *Work Choices*' (2006) 19(3) *Australian Labour Law Journal* 246.

contracts review to arrangements involving incorporated independent contractors. The former law (in WR Act ss 832-834, or ss 127A-C of the pre-Work Choices Act) covered only those contractors who were natural persons, so any contractors who had cloned themselves into a single shareholder, sole director company to take the benefit of limited liability,¹⁵ would not be entitled to use the provisions.

The new Act does little more, and by no means solves all problems in this field. The common law is still relied on to determine the appropriate boundary between genuine commercial contracts and employment.

Chapter 6: Rights and Responsibilities under Contract.

A number of important cases have been decided since publication of *The Law of Work*, which affect our understanding of the rights and responsibilities of employers under the employment contract. One of these is the decision of the full bench of the federal court in *Goldman Sachs JB Were Services Pty Ltd v Nikolich*¹⁶ (see [224] and [264] for references to the first instance decision).¹⁷ Here we deal with some important case law developments, as they relate to the discussion in original chapter.

Construction and interpretation of employment contracts [221-227]

The Full bench decision in *Goldman Sachs JBWere Services Pty Limited v Nikolich* confirmed that a human resources policy document can cause terms to be incorporated into an employment contract, at least to the extent that statements in the policy document are promissory in nature. The court unanimously held that a term promising to 'provide and maintain, as far as practicable, a working environment that is safe and without risk to health' made in a 'Working with Us' policy manual that the employer had issued to staff, created a contractually binding commitment for the employer. A majority of the

¹⁵ See *Corporations Act 2001* (Cth) s 114 which allows incorporation of a company with only one member.

¹⁶ [2007] FCAFC 120 (7 August 2007).

¹⁷ For a note on this case, see L Keats 'Workplace Policy as Contract: the Full Federal Court Hands Down its Decision in the Nikolich Appeal' (2008) 21 (1) *Australian Journal of Labour Law* 43-58.

court (Jessup J dissenting from the majority's view of the facts) held that the employer had breached this term by failing to properly investigate and deal with an employee's grievance, where that grievance was causing the employee considerable mental suffering.

Nevertheless, not all statements in policy documents will be contractually binding. Only those that a reasonable person would believe to form part of an enforceable contract will give rise to potential damages claims. Statements that merely represent the employing firm's aspirations, or describe its customary processes, will not generally meet that test.

Some guidance can be drawn from the language used in the document. Expressions such as 'the employer will' or 'shall' undertake some 'duty' or 'obligation' suggest a serious intention to be bound, however words which indicate nothing more than imprecise 'aims' to achieve certain standards will not.

In the course of this judgment, Justice Marshall dealt with two contentious issues: how important is it that an employee has been asked to sign a policy document, and does it matter that the employer has reserved a discretion to vary policies from time to time? Justice Marshall held that there was no magic in signatures. The fact that the employee was required to sign off on some, but not all, provisions in the manual did not indicate that only the signed provisions were terms of the contract. Likewise, the employer's option to vary a policy does not mean that the policy can never be a contract terms. So long as the policy commitment is promissory in nature, any agreed variation to its terms may operate as a term of the contract.¹⁸

Another case that has important ramifications for the way in which employment contracts are construed is the full bench decision of the Federal Court in *Walker v Citigroup Global Markets Australia Pty Limited (formerly known as Salomon Smith Barney Australia Securities Pty Limited)*.¹⁹ This case concerned a financial services advisor who was offered and accepted a job, but never actually commenced duties. Between the time of his acceptance and the time he was due to start, the new employers changed their minds. At first instance, the matter was resolved as a *Trade Practices Act* claim. Mr Walker obtained substantial compensation from the employer because it had caused him loss by misleading and deceiving him - a breach of s 52 of the *Trade Practices*

¹⁸ *Nikolich* [2007] FCAFC 120 at [124].

¹⁹ [2006] FCAFC 101 (23 June 2006). The first case in this series, in which the primary judge determined liability, was *Walker v Salomon Smith Barney Australia Securities Pty Ltd* [2003] FCA 1099. Damages were assessed in *Walker v Citigroup Global markets Pty Ltd* [2005] FCA 1678.

Act 1974 (Cth). The trial judge awarded only one month's salary in respect of Walker's breach of contract claim, on the basis that the employment contract document issued to him allowed the employer to terminate the contract on only one month's notice in any event. His s 52 claim was assessed on the basis of the harm he had suffered as a consequence of giving up the benefits of his former employment: see *The Law of Work* [204].

On appeal, however, a full bench took an entirely different view of Mr Walker's employment contract. When Mr Walker was being recruited, those negotiating the deal had assured him that he would be employed until at least the end of 1998 - a period of close to 12 months from his initially proposed starting date. This assurance was apparent in a promise that he would be guaranteed a certain minimum bonus for the 1998 year, and would be given an elevation in status at the end of that time. The one month termination clause was a written term in a standard form 'Conditions of Employment' document which was attached to his offer of employment. Although Kenny J at first instance held that the termination clause in the standard Conditions applied, the full bench found that on its true construction, and taking into account the negotiations concluded prior to issuing the standard term contract, the proposed employment contract was mutually intended to continue until at least 31 December 1998.

The full bench resolved the conflict between the more informally negotiated terms and the subsequently issued standard conditions document by applying the principle that '[w]here there are clauses of a contract specially framed with the individual circumstances in mind, together with standard form clauses, it will normally be appropriate to give greater weight to the specially negotiated clauses'.²⁰ So the termination clause was construed to take effect 'only after the completion of the 1998 calendar year'.²¹

The circumstances of the recruitment assisted the court to this solution. The court held that the 'purpose and object of the transaction, namely the recruiting of a high level and high profile employee then in other employment' made it a 'practical absurdity' that the parties would have agreed to a clause allowing termination on only one month's notice, and a consequent avoidance of any obligation to pay the promised guaranteed bonus.²²

²⁰ [2006] FCAFC 101 at [77].

²¹ At [77].

²² At [76].

In this case the court was able to determine the negotiated deal terms from letters exchanged between the parties. Employees relying on nothing more than verbal assurances may continue to have difficulty in holding a reneging employer to orally agreed terms, in the face of a contradictory written contract. Nevertheless, the court's reasoning in *Walker* - drawing on the 'purpose and object' of the transaction, and considerations of what 'business people active in the financial world'²³ would have agreed - offers some prospect that future courts will not hold that contradictory clauses in a standard form contract necessarily trump negotiated oral terms of an employment contract. This marks a considerable advance in the law concerning the construction of employment contracts - at least as far as that law has been developed in the Federal Court of Australia.

The employee's duty to obey and conduct outside working hours [231]

The highly salacious case of *Telstra Corporation Ltd v Streeter*²⁴ provides another example of the difficulties that arise when employer's object to employees' behaviour outside of work. In that case, Ms Streeter's conduct in a hotel room, after working hours, became the subject of a complaint of sexual harassment by another employee. Ms Streeter was subsequently dismissed, but was successful in obtaining a re-employment order from Hamberger C in an unfair dismissal claim before the AIRC. Telstra appealed and won. The full bench agreed that Telstra was justified in dismissing Ms Streeter, not because of the conduct in the hotel room, but because she had been dishonest in answering questions about the incident afterwards. The case raises difficult questions about the boundary between the employment and private life, and the potential for employers to carry conflicting burdens: on the one hand, an obligation not to dismiss unfairly; on the other, the obligation to ensure that employees are not subjected to sexual harassment in connection with their work.

The employer's duty of 'mutual trust and confidence' [254-260]

The scope for the development of the employer's duty 'not to destroy mutual trust and confidence in the employment

²³ At [76].

²⁴ [2008] AIRCFB 15. For a note on the case see A Kennedy "'More Sinned Against than Sinning'? *Telstra Corporation Ltd v Streeter*" (2008) 21(1) *Australian Labour Law Journal* 59-69.

relationship' to develop into a broader 'good faith' obligation has been contentious in Australia for some time. At first instance in *Walker*, Kenny J stated categorically that 'the Court should not imply a duty of good faith' into the employment contract between an employer and an upper-level employee.²⁵ The full bench in *Walker* resolved the questions on appeal without needing to consider at all whether any implied obligation of good faith constrained the employer to exercise its power to terminate the contract only 'reasonably and in good faith'. Nevertheless, the approach taken by the full bench arguably applied an assumption that parties to employment contracts are obliged to act in good faith, by cooperating to give effect to the mutually determined expectations of the relationship.

Subsequent to the *Walker* litigation, Rothman J in the New South Wales Supreme Court has held (in *Russell v Trustees of the Roman Catholic Church*²⁶) that there is a duty to act in good faith, and that it imports an obligation to exercise 'prudence, caution and diligence' so as to 'avoid or minimise adverse consequences to the other party'.²⁷ This is still a first instance decision. No appellate level case has confirmed this principle.

The general reluctance of Australian courts to imply good faith obligations in employment contracts appears to stem from a fear that an implied duty of good faith may permit courts to interfere in the commercial decisions of the parties themselves by rewriting contracts to make them more fair and reasonable. This misconstrues the notion of good faith as it operates in commercial law. Good faith performance requires only that parties to a contract cooperate in performing the contract according to its agreed terms, so that both parties are able to enjoy the mutually intended benefits of the relationship.²⁸ The good faith obligation precludes opportunistic conduct, such as taking advantage of a one month's notice of termination clause in some standard conditions tacked to a letter of appointment, even though one had clearly negotiated a long term engagement. The approach to construction taken by the full bench in *Walker* was consistent with an obligation upon parties to cooperate in good faith to perform the terms of their real agreement.

The employer's duty of care [260-261]

²⁵ [2005] FCA 1678 at [205].

²⁶ [2007] NSWSC 104.

²⁷ *Ibid* at [117].

²⁸ For fuller argument of this position, see J Riley, *Employee Protection at Common Law*, Federation Press, Sydney, 2005, Chapter 3

The scope of the employer's duty of care, and whether it arises as an implied term of the employment contract, or as a tortious duty, has been discussed in a number of cases since publication of *The Law of Work*. The majority in the full bench decision in *Nikolich* held that a commitment expressed in a human resources policy manual to take 'every practicable step to provide a safe and healthy working environment' was a term in the employee's contract of employment, however it appears that it would not have been necessary for that obligation to be expressly undertaken by the employer, to be binding. After upholding Wilcox J's finding that the term derived from the 'Working With Us' document was an express contract term of, Black CJ opined that this term 'does not greatly extend the obligation that would exist by implication at common law'.²⁹ Justice Jessup also stated, in a thorough analysis of the relationship between the duty of care in both contract and tort, that it is well-established that employers are under an obligation 'imposed by law, to take reasonable care for the safety of employees'.³⁰

This suggests that the duty breached in *Nikolich* was no more onerous than a duty that would be implied as a matter of law into every employment contract, regardless of the existence of any HR policy manuals. If this is so, those employers who rushed to repeal their HR policy documents following the initial *Nikolich* decision by Wilcox J have not limited their liabilities. They will still be held to owe an implied duty to take reasonable care to provide a safe and healthy work environment. They may be held to breach that duty if they fail to deal sensitively, and in a timely fashion, with a workplace conflict that has clearly induced stress-related illness in an employee.

Remedies for wrongful termination [262-265]

Loss of chance damages

While employees remain entitled to nothing more than remuneration for a period of reasonable notice, damages for wrongful termination of an employment contract will be limited. However, the *Walker* case has raised the prospect that employees may also claim an entitlement to 'loss of chance' damages. That is, they may (in appropriate cases) be able to claim an amount of damages

²⁹ [2007] FCAFC 120 at [31].

³⁰ *Ibid* at [324].

in respect of their lost opportunity to remain in employment for a period in excess of the notice period.

This claim kind of claim is based on *Commonwealth of Australia v Amann Aviation Pty Ltd (Amann)*,³¹ a case in which the High Court of Australia held that an assessment of damages could take account of the value of a loss of the chance to renew a contract, even where there was no legal right of renewal.

In *Amann*, Brennan J said that 'in evaluating a plaintiff's benefits under a contract, the court does not look solely at the express terms of the contract but evaluates the plaintiff's rights to benefits of any kind whether those benefits are expressed by the terms of the contract or are ascertainable by reference to circumstances extrinsic to those terms.'³² He cited cases from the employment law field as justification for the award of damages taking into account the loss of benefits for which the employer had given no express promise. These included *Manubens v Leon*,³³ a case about a hairdresser who was able to recover the loss of tips as well as wages after a wrongful dismissal, and *Herbert Clayton & Jack Waller Ltd v Oliver*,³⁴ and *White v Australia and New Zealand Theatres Ltd*,³⁵ both cases concerning the lost opportunity to gain reputation and fame when theatrical engagements were cancelled.

This argument was used in *Walker's* case. It was rejected at first instance, on the basis that the employer had exercised a clear contractual right to terminate on one month's notice by deciding it did not want to continue with plans to engage Mr Walker at all. According to Kenny J, the facts of the case left no room to speculate on what might have eventuated if there had been no breach of contract. However the appeal bench found that the contract was intended to run until at least the end of December 1998 and could not be terminated before then. They went on to hold Mr Walker, having already held a position of considerable prominence in the firm for a year, and most probably performing his duties well, would be very unlikely to have been terminated. The court held: 'That NatWest would have sacked a skilled and competent employee holding a high profile position within the company without cause is not a natural inference to be drawn without direct evidence.'³⁶ NatWest brought no such evidence, so the court awarded damages on the basis that Mr Walker had a

³¹ (1991) 174 CLR 64.

³² *Ibid* at 102.

³³ [1919] 1 KB 208.

³⁴ [1930] AC 209.

³⁵ (1943) 67 CLR 226.

³⁶ At [83].

75 per cent chance of remaining employed until at least 30 June 2003. The figure awarded for loss of chance (after taking into account a deduction for actual earnings from other sources during that period) was \$1,867,386. Added to the \$479,167 awarded for the ten months salary owed until the end of 1998, Mr Walker received \$2,346,553 in respect of lost earnings.

The fact that the court was prepared to award considerable damages based on the loss of a chance to remain employed opens up the scope for very considerable damages in executive contract cases, at least when they are brought in the Federal Court's jurisdiction. A decision of the New South Wales Court of Appeal has taken a different view in *Murray Irrigation Ltd v Balsdon*.³⁷

This case was an appeal from the decision of Ashford J in the District Court of New South Wales in *Balsdon v Murray Irrigation Ltd*.³⁸ Ashford J had awarded damages of \$553,804 to a manager who was dismissed from his employment in breach of the employer's obligation (held to be incorporated into his contract) that it would not to dismiss on 'harsh, unjust or unreasonable' grounds. Of the sum awarded by Ashford J, \$107,687 represented payment of a period up to April 2003, when the employee's fixed term employment contract ended, and \$319,677 represented an assessment of the present value of his potential income stream over the years from 2003 to 2012 when he would be 65 and of retirement age. This aspect of Ashford J's judgment was overturned by the Court of Appeal on the basis that the employer had no legal obligation to renew Mr Balsdon's fixed term contract, so it could not be held liable to pay damages for failing to do so. This was so, even though Mr Balsdon had been employed in the job for more than 30 years. In this case, the Court of Appeal rejected an argument based on *Amann*.

Damages for distress and humiliation [263]

The extent to which employees may claim damages in contract for mental suffering resulting from a breach of the employment contract remains contentious. The majority in the full bench decision in *Nikolich* held that breach of a policy commitment to 'take every practicable step to provide a safe and healthy working environment' could, and in this case did, give rise to an award of damages for psychiatric harm suffered as a result of the breach. Justice Jessup dissented, but on the grounds that the

³⁷ [2006] NSWCA 253.

³⁸ Unreported. DC159/2004, 19 September 2006.

facts in this case did not warrant a finding that the employer had breached the obligation.

At first instance, Wilcox J had based an argument in favour of an award of damages for breach of a promise to provide an harassment free workplace on *Baltic Shipping Company v Dillon*.³⁹ (This was the High Court of Australia decision that allowed a claim for disappointment and distress by a woman whose holiday cruise was spoiled by the sinking of the ship, on the basis that a promise of enjoyment was part of the contract.) In the *Nikolich* appeal, Black CJ held that the argument of counsel for the employer that *Addis v Gramophone Co Ltd*⁴⁰ stood in the path of the claim was 'misplaced'.⁴¹ This was not a claim for the kind of distress or disappointment which was at issue in *Baltic Shipping Company v Dillon*. Nor was it a claim based on any injury arising from the fact or manner of the employee's dismissal, so cases such as *Johnson v Unisys*⁴² and *State of New South Wales v Paige*⁴³ were also irrelevant in this case. Here, the trial judge, after hearing expert testimony from many medical professionals, had determined that the employee suffered psychological injury as the foreseeable consequence of a breach of his employment contract while he remained employed. So the tantalising question of whether a breach of an employment contract may ever give rise to a claim for the kind of damage claimed in *Baltic Shipping v Dillon* remains unanswered.

Chapter 7: Work Standards

A new safety net of legislated standards

The new ALP government has released the proposed new National Employment Standards (NES), which would replace the Australian Fair Pay and Conditions Standards. The final version of the NES were released in June 2008. A full explanation of the standards will be published in due course. Briefly, the 10 NES are:

³⁹ (1993) 176 CLR 344.

⁴⁰ [1909] AC 488.

⁴¹ [2007] FCAFC 120 at [71].

⁴² [2003] 1 AC 518.

⁴³ (2002) 60 NSWLR 371.

- Maximum weekly hours of 38 (plus 'reasonable' additional hours) - this proposal appears to be much the same as the present AFPCS for hours, except that the notion of allowing 'averaging' of hours over a period of time is to be left to determination in awards. *WorkChoices* allowed averaging over 12 months.
- Requests of flexible working arrangements - parents of under school aged children would have an entitlement to make a written request for flexible working arrangements, and the employer would be obliged to consider and not unreasonably refuse the request. (This provision would adopt an approach from the United Kingdom.)
- Parental leave and related entitlements - 12 months unpaid leave upon the birth or adoption of a child for either parent (the same as current AFPCS) but with a right to request an additional 12 months unpaid leave.
- Annual leave - four weeks annual leave for a full time worker (pro rata for part-time) with additional allowance for shift workers to be determined by awards.
- Personal/carers' leave and compassionate leave - 10 days paid leave for personal (sick) or carers' leave, plus 2 days paid compassionate leave, and an entitlement to take 2 days unpaid leave 'per occasion' for family emergencies if other leave is exhausted.
- Community service leave - unpaid leave for community service and jury service (with 'make-up' pay for jury service leave).
- Long service leave - ultimate adoption of a national standard, with preservation of state entitlements in the meantime.
- Public holidays - a right not to work on public holidays, without loss of pay; and a right to reasonably refuse to work on a public holiday if requested to do so.
- Notice of termination and redundancy pay - minimum notice ranging from 1 to 5 weeks for termination

and

s

employed by employers with more than 15 employees.

- Fair Work Information Statement - all employees must receive from their employer a Fair Work Information Statement advising them of their rights and entitlements, including information about access to services for dispute resolution.

The Productivity Commission is conducting an Enquiry into Paid Maternity Leave: see

<http://www.pc.gov.au/inquiry/parentalsupport> for information on the enquiry and access to submissions.

Role of modernised awards

The award modernisation program, set in train in the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*, is intended to ensure that the new national employment standards are supplemented by basic working conditions appropriate to specific industries and occupational groups. Modern awards will be able to cover the following matters:

- Minimum wages
- Type of employment
- When work is performed
- Overtime
- Penalty rates
- Annualised pay arrangements
- Allowances
- Leave loadings
- Superannuation
- Consultation, representation and dispute resolution.

The process of award modernisation is supposed to be completed by 31 December 2009, in time for the new modern awards to contribute to a safety net more carefully calibrated to serve the needs of workers in particular occupational groups, on the implementation of the entire Fair Work scheme.

It is important to note, however, that the *Transitional Act* did not create any mechanism for the making of brand new awards by the former process of conciliation and arbitration. Unions will not be able to instigate the creation of new standards by generating an industrial dispute, according to the old, pre-*WorkChoices* model. The 'modernisation' process is more akin to the

'simplification and rationalisation' process introduced by *WorkChoices*, and is driven by requests from the Minister to a full bench of the AIRC. A second supplement (to be published shortly) will consider the early decision of the AIRC dealing with the priorities for the award modernisation process.

Child labour laws

The *WorkChoices* takeover of State industrial laws excluded a number of important areas. One of these was 'child labour'. This allowed the State governments room to move to protect under 18-year old workers from the worst effects of *WorkChoices* on vulnerable young workers. The *Industrial Relations (Child Employment) Act 2006* (NSW), was enacted to prevent under 18 year old workers in NSW from being employed on AWAs which undercut relevant state awards. Employers of children in NSW must provide those children with wages and working conditions which are either the same as they would be entitled to under a relevant state award, or, if different, which do not, on balance, result in a 'net detriment' to the child. What constitutes a 'net detriment' has been established by a full bench of the NSW Industrial Relations Commission in the *Child Employment Principles Case 2007*.⁴⁴ This case provides illuminating reading about the treatment of many young workers in NSW, especially those working casually in the food service industry.

This Act also makes NSW employers subject to NSW unfair dismissal laws in respect of child workers, even if the employer is otherwise a federal employer. Employers must publish clearly the relevant state award at the work premises, and an inspectorate of state industrial inspectors monitors compliance with the Act and can issue compliance notices. Civil penalties of up to \$10,000 can be levied for breach of the legislation.

Queensland has amended the *Child Employment Act 2006* (Qld) by enacting the *Industrial Relations Act and Other Legislation Amendment Act 2007* (Qld) (which received assent on 28 May 2007) to insert ss 15A - 15P. Like the NSW legislation, these provisions prohibit the imposition of working conditions, which disadvantage young workers when compared with a relevant State award. Western Australia has also moved to enact similar protections for young workers by amending the *Children and Community Services Act 2004* (WA) (CCS Act). The *Industrial Relations and Related Amendment Bill 2007* proposes to

⁴⁴ (2007) 163 IR 41.

insert a new Part 7 into the CCS Act, aimed to ensure that federal system employers are not able to impose working conditions on minors in WA which are less favourable than the minimum conditions under a relevant State award.

Chapter 9: Security at Work

Federal regime for protection against dismissal [418-437]

The Forward with Fairness policy proposals include removal of the exemption for 'small businesses' with 100 or fewer employees from the unfair dismissal laws: see [426-427]. In its place, the government has flagged the introduction of a 'Fair Dismissal Code' to guide genuinely small businesses (i.e. those with 15 or fewer employees) in their dealings with underperforming or redundant staff. It is also proposed to remove the two-stage enquiry conducted when an employer (even a large employer) claims that a dismissal was for 'operational reasons': see [424-426]. Legislation to make these changes is likely to be tabled in 2008, however the government has committed to postpone the operation of any changes until the commencement of the full Fair Work regime in 2010. This effectively means that the *WorkChoices* unfair dismissal laws will have operated for more than four years before their removal.

The new National Employment Standards would also introduce a general entitlement to redundancy pay, which would apply to businesses employing more than 15 employees.

Chapter 11: Bargaining

Individual enterprise bargaining [526-530]

The most significant change to the system of enterprise bargaining since publication of *The Law of Work* has been the abolition of new Australian Workplace Agreements (AWAs). The *Workplace Relations Amendment (Transition to Forward with Fairness Act 2008)* (Cth) repealed the provisions which allow the making of AWAs. As a concession to those employers who had already moved to use AWAs across their workforces, a transitional instrument has been created, which may be used when those employers engage new and existing staff. Only employers who were using AWAs before 1 December 2007 may use these

instruments, Individual Transitional Employment Agreements or ITEAs. They can survive only until 31 December 2009, and will disappear when the new Fair Work legislation is passed and the full package of Forward with Fairness measures is implemented.

These ITEAs are subject to a no-disadvantage test, to ensure that employees are not required to accept terms and conditions that would disadvantage them. The test is administered by the Workplace Authority (the new name for the Office of the Employment Advocate) and the ITEA cannot operate until after approval. The no-disadvantage test is a 'global' assessment, balancing trade-offs to assess whether the employee is better off overall, and it is measured against a 'reference instrument' which includes a relevant award or a collective agreement if one exists. This is a major difference between the old, pre-*Work Choices* no-disadvantage test, and the transitional test. Before, only awards could be used as the benchmark for the no-disadvantage test.

Employers will no longer be able to unilaterally terminate collective agreements after their nominal expiry date under former s 393 (introduced by *WorkChoices* and now repealed). This means that collective agreements, once made, will survive as benchmarks for any ITEAs made during the Transition Act's transition period.

The ITEAs are also underpinned by the Australian Fair Pay and Conditions Standard. No workplace agreements of any kind are valid to the extent that they undercut these standards.

Existing AWAs

AWAs already in force prior to 1 December 2007 have been allowed to remain on foot until they expire, and the parties themselves bring them to an end, but no new AWAs may be made. Those employers who were using AWAs at 1 December 2007, and have not been relying on awards or any form of collective agreement-making, will be permitted to use ITEAs.

Common law individual agreements

The award modernisation provisions in the Transition Act require the AIRC to develop a model 'flexibility clause' which can be used to allow employers and employees to come to special individualised arrangements over matters such as rostering and flexible hours. Until this clause is available, it is difficult to anticipate how this kind of flexibility may compare with the kind of flexibility claimed to be available through AWAs and ITEAs.

The Forward with Fairness policy implementation plan also anticipates that high income earners (earning above a threshold anticipated to be set at \$100,000 per annum) will be entitled to opt-out of award coverage.

Collective agreements

In the new, post-Fair Work world, all statutory bargaining will be collective bargaining. It is anticipated that collective bargains made between employers and employees without the intervention of unions will still be possible. All collective bargains will be subject to a revived 'no disadvantage test' (introduced already in the Transition Act) which is similar to that which applied prior to the *WorkChoices* changes: see [520-522]. The new test in the *Workplace Relations Act* s 346D(2) provides that a collective agreement will pass the test if the Workplace Authority Director is satisfied that the agreement 'does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees', measured against any relevant 'reference agreement', which includes any kind of award (including a Notional Agreement Preserving a State Award or NAPSA: see [126-127]).

Bargaining processes

New agreement making processes will be part of the Fair Work legislation, and details are yet to be tabled. However it is expected that the requirement for unions to hold secret ballots before taking industrial action will remain, as will the prohibitions on pattern bargaining, and strike pay.