

# E – BRIEF



NSW Parliamentary Library Research Service

January 2010 E-Brief 2/10

---

## Industrial relations update: The referral of powers and the *Fair Work Act 2009*

by Lenny Roth

### 1. Introduction

A new national industrial relations system commenced on 1 January 2010 following a referral of powers to the Commonwealth by all states except Western Australia. Federal industrial laws enacted in 2009 (the *Fair Work Act*) already applied to most employees in NSW but the referral of powers results in about 500,000 more employees moving from the NSW system to the national system. This paper outlines the terms of the referral of powers and it presents a brief summary of the *Fair Work Act*.

### 2. Background to the referrals

A 2009 [briefing paper](#) discussed the constitutional provision for referral of powers and it outlined the history to the industrial relations referrals.<sup>1</sup> A brief summary of the history follows.

For more than a century, a federal industrial relations system has operated concurrently with state systems. This is because the Australian Constitution gave the states the primary responsibility for regulating industrial relations but also gave the Federal Parliament a limited law-making power in this area.

In 1996, Victoria became the first state to refer its powers over industrial relations to the Commonwealth. This was done to overcome the criticism that the coexistence of federal and

state industrial relations systems “causes unnecessary complexity for business and duplicated regulatory systems provided by the taxpayer”.<sup>2</sup>

In 2005, the Howard Government’s *Work Choices* reform package contained a proposal to create a national system through a referral of powers by the states. However, the states disapproved of the proposed reforms and they rejected this offer. The Howard Government then relied on the corporations power in the Australian Constitution to greatly extend the coverage of federal industrial laws to the exclusion of state industrial laws. The new *Work Choices* laws, in force in 2006, applied to all trading and financial corporations and their employees. This covered about 78 per cent of private sector (non-managerial) workers in Australia.<sup>3</sup>

In 2008, the new Rudd Government began implementing its 2007 election policy, *Forward with Fairness*. On the agenda was the creation of a simpler and, it was argued, fairer industrial relations system, including repealing some elements of *Work Choices*, and working with the states to achieve a national industrial relations system for the private sector. Prospects of success were enhanced by the fact that the Labor Party was in government in all states and federally.

In April 2009 the *Fair Work Act* was enacted. Most of the new provisions commenced on 1 July 2009. At this time an agreement had not been reached with the states on the referral of powers and the coverage of the *Fair Work Act* was the same as the *Work Choices* laws it replaced (i.e. it covered all trading and financial corporations and their employees).

### 3. The referrals of power

On 25 September 2009, at a meeting of the Workplace Relations Ministerial Council (WRMC), several jurisdictions signed an agreement to refer their powers to the Commonwealth for the purpose of creating a national system: Victoria, South Australia, Tasmania, the Northern Territory and the ACT. In December, NSW and Queensland also signed up to this agreement. In Western Australia, the Liberal Party formed government after the September 2008 elections and has stated that it will not refer its powers.

The [intergovernmental agreement](#) and legislation enacted by all participating jurisdictions sets out the framework for the referrals: NSW enacted the [Industrial Relations \(Commonwealth Powers\) Act 2009](#).<sup>4</sup> The referrals enable the Federal Parliament to:

- (1) Extend the coverage of the *Fair Work Act 2009* (as of 1 January 2010) so that employees are covered by the Act even if they are not employed by a trading or financial corporation. As noted previously, this results in about 500,000 more employees in NSW being covered by the Act. This is known as the **initial reference**.
- (2) Make amendments to the *Fair Work Act*, from time to time in the future, that will apply uniformly in all of the referring states. This is

known as the **amendment reference**.

The **initial reference** can, at any time and for any reason, be revoked by State Governor proclamation (6 months notice is required).<sup>5</sup> If this occurs, the *Fair Work Act* would cease to apply to employers and employees who came into the national system as a result of the referral. The Act would continue to apply to employers and employees that were covered by the Act prior to the referral (i.e. employers that are trading and financial corporations and their employees).

The **amendment reference** is subject to the condition that the Federal Government must consult with the states on proposed amendments. If an amendment is considered by any of the states to undermine one of the fundamental workplace relations principles (FWR principles) set out in the Act, it is to be referred to the WRMC. If a two-thirds majority of the WRMC does not endorse the amendment, it will not proceed.<sup>6</sup>

The **amendment reference** can also, at any time, be revoked by State Governor proclamation without affecting the operation of the **initial reference**.<sup>7</sup> This will be the case if the proclamation provides 3 months notice and it declares that the *Fair Work Act* is being, or has been, amended in a manner that is inconsistent with the FWR principles. The amendment reference can also be revoked without affecting the initial reference if the proclamation provides 6 months notice and the amendment references of all states terminate on the same day.

If an **amendment reference** were revoked in either of these two situations what effect would this have?

- It would not affect those employers and employees who were already covered by the national system prior to the initial referral (i.e. employers that are financial or trading corporations and their employees). The *Fair Work Act* and all amendments to the Act would continue to apply to these employers and employees.
- It would affect employers and employees who came into the national system as a result of the initial referral. *All* amendments to the *Fair Work Act* after the date of revocation would not apply to these employers and employees but the *Fair Work Act* (as it existed before the revocation) would continue to apply to these employers and employees.<sup>8</sup>

Explaining the NSW referral legislation, Attorney General, Hon John Hatzistergos MLC stated:

If the [NSW] Government is of the view that an amendment or proposed amendment...undermines the [FWR principles] a proclamation may be made declaring that that particular amendment will have no effect in [NSW].

But this partial termination of the reference of powers will not affect the overall reference—that is, the rest of the national system as it operates in this State will not be affected by such a proclamation.

This mechanism permits the State to precisely identify and quarantine any objectionable amendments to the Fair Work Act.<sup>9</sup>

However, note that the legislation does not appear to allow for the **amendment reference** to be revoked *only in respect of a particular amendment*. If it is revoked, it seems

that *all* later amendments to the *Fair Work Act 2009* would not apply to NSW employers and employees who came into the national system as a result of the initial referral. The explanatory notes to the NSW bill do not clarify this issue but the notes to the Queensland bill explain that if an amendment reference is revoked:

...until the Queensland Parliament re-enacts the amendment reference, any subsequent amendments the Commonwealth Parliament makes to the *Fair Work Act 2009* (Cwth) will not take effect in Queensland's referred jurisdiction.<sup>10</sup>

Some complexity would arise if a state revoked an **amendment reference** because it would create a situation whereby subsequent amendments to the *Fair Work Act* would apply to some employers and employees in that state but not to others (trading or financial corporations and their employees would be covered by the amendments but others would not be covered).

#### 4. State public sectors excluded

In NSW the national system does *not* apply to public sector employees or the local government sector.<sup>11</sup> A public sector employee includes members of the NSW public service, or any other service of the Crown in right of the State (including an employee of a NSW government agency).<sup>12</sup> It also includes employees of a body established for a public purpose that is subject to the control or direction by a Minister of the State or in which the state has a controlling interest. However, it does not include employees of a state owned corporation or subsidiary (who are therefore in the national system).

#### 5. Some state laws still apply

Certain state industrial laws still apply to employers and employees covered

by the national system. This includes, for example, laws concerning:

- Anti-discrimination;
- Occupational health and safety;
- Workplace surveillance;
- Children's employment;
- Outworkers; and
- Long service leave.<sup>13</sup>

## 6. The Fair Work Act 2009

The following is a very brief summary of the main elements of the *Fair Work Act* and some differences between it and the former *Work Choices Act*.<sup>14</sup>

### ***New industrial institutions***

Fair Work Australia (FWA) has been established as the new industrial relations tribunal. It replaces the Australian Industrial Relations Commission (AIRC) and the Australian Fair Pay Commission. A Fair Work Ombudsman (FWO) has also been created to provide an information and advice service and to investigate complaints or suspected breaches of industrial relations laws. The Federal Government has agreed with the NSW Government to appoint members of the NSW Industrial Relations Commission (IRC) to FWA.<sup>15</sup> It has also agreed that the FWO and the NSW IRC will work together for a period of three and a half years.

### ***National Employment Standards***

The NES are ten minimum standards for national system employees. There are some similar standards to those under *Work Choices* (maximum working hours, annual leave, personal leave and parental leave) as well as standards on long service leave, community service leave, redundancy pay and requests by certain carers for flexible working arrangements. Awards and enterprise agreements must be consistent with the NES.

### ***A modern award system***

Awards set additional minimum standards for a specific industry or occupation. This includes minimum wages and conditions such as overtime and penalty rates, types of employment, leave and leave loading.

The AIRC has created new "modern" awards. As part of this, around 1,700 federal and state awards have been replaced by 122 modern awards.

Modern awards allow for 'flexibility arrangements' between employers and individual employees in relation to certain award conditions (eg the time at which work is performed) to meet the genuine needs of the employee and employer. Variations must result in the employee being better off overall.

Note that if an employee's take-home pay has been reduced as a result of award modernisation, the employee can apply to FWA for a pay order.

### ***Minimum wage setting***

Modern awards specify minimum wages for all employees covered by awards. FWA will also make a national minimum wage order for employees who are not covered by an award. The FWA will conduct annual reviews of minimum wages, taking account of a number of specified matters.

### ***Enterprise agreements***

Collective agreements (now known as enterprise agreements) remain a key part of the industrial relations system. Enterprise agreements may be made between a single employer and their employees (single enterprise agreement) or between more than one employer and their employees (multi-enterprise agreement). There is no longer a distinction between union and non-union enterprise agreements.

All agreements need to be approved by FWA before they commence. Before approving agreements, FWA must be satisfied of a number of matters including that the agreement passes the new 'better off overall test'. FWA must be satisfied that each award-covered employee and each prospective award-covered employee who will be covered by the agreement will be better off overall in comparison to the relevant modern award. This replaces the no-disadvantage test that was reintroduced in 2008 in place of the *Work Choices* 'fairness test'.

Individual statutory agreements (AWAs) no longer exist. However, note that (as with modern awards) enterprise agreements must contain terms about flexibility arrangements between employers and individual employees to meet their genuine needs. Arrangements must result in employees being better off.

### ***Bargaining for new agreements***

Employers and employees can commence bargaining for a new enterprise agreement without formal notification. Where an employer refuses to bargain, employees can ask FWA to determine if there is majority employee support for negotiating a new enterprise agreement. If there is, the employer is required to bargain.

When negotiating a new agreement, employees can appoint whoever they wish (including themselves) as a bargaining representative. Employers are considered to be bargaining representatives but they may appoint someone else to act in this role.

Each representative must comply with the new good faith bargaining requirements. Some of these are:

- attending and participating in meetings at reasonable times;
- disclosing relevant information in a timely manner;
- giving genuine consideration to proposals; and
- responding to proposals in a timely manner.

When bargaining is not occurring in good faith, a representative can apply to FWA to make a bargaining order (not available in the case of bargaining for multi-enterprise agreements).

### ***Resolution of bargaining disputes***

Representatives may refer a dispute about a proposed enterprise agreement to FWA. FWA cannot arbitrate the dispute unless all representatives agree but it may use its general powers to conduct compulsory conciliation or mediation or to make recommendations to the parties. There are also four limited situations in which FWA may resolve a bargaining dispute by making a binding workplace determination (eg if there are serious and sustained breaches of bargaining orders).

### ***Bargaining help for low paid***

FWA can facilitate multiple-enterprise bargaining for low paid employees who have not been able to access the benefits of enterprise bargaining in the past (e.g. for workers in community services, cleaning, security and child care). As well as powers to make bargaining orders (which would not otherwise be available in the case of multi-enterprise bargaining) and to conduct conciliation and mediation, FWA has the power, only to be used as a last resort, to make a binding determination (this is one of the four limited situations noted above).

### **Rules on industrial action**

The rules on industrial action are similar to those that existed under *Work Choices*. Employees and their representatives may take lawful industrial action in support of a new enterprise agreement but only after a previous agreement has expired, the action has been approved in a secret ballot, and three days notice has been given. Employers can now only take lawful industrial action in response to action already taken by employees. In certain situations FWA can suspend or terminate lawful industrial action.

### **Protections from unfair dismissal**

Unfair dismissal rights taken away by *Work Choices* have been largely restored. There is no longer a general exemption from unfair dismissal provisions for employers with 100 or fewer employees. Employees will be protected from unfair dismissal if they have completed the minimum period of employment. This is 6 months except in the case of small businesses (less than 15 employees) where it is 12 months. A dismissal by a small business employer will not be unfair if it has complied with a new Small Business Fair Dismissal Code. A dismissal by an employer of any size will also not be unfair if it is a case of genuine redundancy.

### **Rules on union right of entry**

The right of entry restrictions on unions are similar to those under *Work Choices*. Union officials need to obtain a permit, they must give 24 hours notice, and they must comply with reasonable employer requests about where they can be on the premises. One change is that the right of entry for discussion purposes is no longer limited to discussions with an employee who is covered by an award or agreement binding on the union.

- <sup>1</sup> See also Rosemary Owens, 'Unfinished Constitutional Business: Building a National System to Regulate Work', (2009) 22(3) *Australian Journal of Labour Law* 258
- <sup>2</sup> See S Kollmorgen, 'Recent legislation: Towards a Unitary System of Industrial Relations' (1997) 10(1) *Australian Journal of Labour Law* 158.
- <sup>3</sup> House of Representatives, *Fair Work Amendment (State Referrals and Other Measures) Bill 2009: Explanatory Memorandum*, 2009, p iv-v.
- <sup>4</sup> The Commonwealth enacted the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009*
- <sup>5</sup> *Industrial Relations (Commonwealth Powers) Act 2009* (NSW), ss7, 9
- <sup>6</sup> Intergovernmental agreement, cl 2.11-2.19
- <sup>7</sup> *Industrial Relations (Commonwealth Powers) Act 2009* (NSW), s 7, 8; and *Fair Work Act 2009* (Cth), s30L(7), (8)
- <sup>8</sup> *Industrial Relations (Commonwealth Powers) Act 2009* (NSW), s 8; and *Fair Work Act 2009* (Cth), s30L(7), (8)
- <sup>9</sup> John Hatzistergos MLC, [NSWPD](#), 1/12/09.
- <sup>10</sup> Queensland Parliament, [Fair Work \(Commonwealth Powers\) and Other Provisions Bill 2009: Explanatory Notes](#), 2009, p10.
- <sup>11</sup> *Industrial Relations (Commonwealth Powers) Act 2009* (NSW), s 6. The same situation exists in Queensland and South Australia. In Tasmania, the national system covers public sector employees but does not cover local government employees, while in Victoria, the ACT, and the Northern Territory the national system covers both public sector and local government employees.
- <sup>12</sup> *Industrial Relations (Commonwealth Powers) Act 2009* (NSW), s 3.
- <sup>13</sup> See definition of "excluded subject matter" in *Industrial Relations (Commonwealth Powers) Act 2009* (NSW), s 3.
- <sup>14</sup> This summary is primarily based on fact sheets on the [website](#) of the Department of Education, Employment and Workplace Relations; and Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22(1) *Australian Journal of Labour Law* 3.
- <sup>15</sup> Hon John Hatzistergos MLC, 'NSW Moves to a National Industrial Relations System', *Media Release*, 19 November 2009.

Information about Research Publications can be found on the Internet at the:

[NSW Parliament's Website](#)

Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

© 2010

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent from the Librarian, New South Wales Parliamentary Library, other than by Members of the New South Wales Parliament in the course of their official duties.