

PART I

BACKGROUND TO FORWARD  
WITH FAIRNESS

1 Introduction

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# INTRODUCTION

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“Almost three months ago the Australian people voted for change. They voted for a change of Government. And in doing so, they voted for a change to our workplace relations laws.”

The Hon Julia Gillard MP, Minister for Employment and Workplace Relations  
*Second Reading Speech on the Bill for the FWF Transition Act, 13 February 2008*

## Introduction

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[1.05] This book is intended to provide readers with a useful introductory guide to the Rudd Government’s “Forward with Fairness” workplace reform agenda.

The industrial relations policy which the then Labor Opposition took to the 24 November 2007 federal election consisted of two documents: “Forward with Fairness: Labor’s Plan for fairer and more productive Australian workplaces” (FWF Plan) released in April 2007; and “Forward with Fairness: Policy Implementation Plan” (FWF Implementation Plan) released in August 2007 (collectively, these documents are referred to in this book as the FWF Policy).

Labor was elected to Government at the November 2007 election, and very soon afterwards commenced work on implementing the FWF Policy – in which it had outlined its proposals for reversing some (but by no means all) of the former Coalition Government’s “Work Choices” legislation.

The FWF Policy indicated that its implementation would occur in two stages: first, through a “transition Bill” in early 2008: the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) (FWF Transition Act) – see Part II of this book for summary and analysis; and secondly, through a more substantive piece of reform legislation to be developed with extensive consultation in 2008-2009, which would be fully operational by 1 January 2010 – examined in Part III of this book.

Further information about the contents of Parts II and III of the book is provided at [1.65] below. However, it is first necessary to consider the key aspects of the Work Choices system. This will assist readers in understanding the context for the changes proposed in the FWF Policy.

## Key aspects of Work Choices

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**[1.10]** The former Coalition Government introduced a series of legislative reforms to Australia’s workplace relations system over the period it held office (1996-2007), commencing with the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (WROLA Act). The WROLA Act substantially amended the *Industrial Relations Act 1988* (Cth), re-naming it the *Workplace Relations Act 1996* (Cth) (WR Act).

The Coalition’s reform agenda involved a significant departure from Australia’s traditional system of industrial regulation through conciliation and arbitration by an industrial tribunal with strong powers; centralised determination of wages and employment conditions through awards (although with the overlay of enterprise bargaining since the early 1990s); and a central role for trade unions and employer organisations. Although often described as a process of labour market deregulation, the Coalition’s reforms in fact involved the use of an array of complex and detailed regulatory instruments to achieve its desired policy objectives (see further [1.60] below).

The high-water mark of the former Coalition Government’s movement away from the traditional industrial relations system took the form of the *Workplace Relations Amendment (Work Choices)*

*Act 2005 (Cth)* (Work Choices Act), which was passed by Federal Parliament on 7 December 2005 (see further *Australian Journal of Labour Law* 2006). Most of the Work Choices Act's provisions commenced operation on 27 March 2006. Many aspects of the Work Choices Act were given effect through regulations that were released on 19 March 2006, and also commenced operation on 27 March 2006 (*Workplace Relations Regulations 2006 (Cth)* (WR Regulations)).

The key changes introduced by the Work Choices Act, which substantially amended the WR Act, were as follows.

## National workplace relations system

**[1.15]** Under the Work Choices Act, a national workplace relations system commenced operation on 27 March 2006 (this system is referred to in this book as “Work Choices”). However, Work Choices is not a truly “national” system of regulation. It was estimated by the former Government to cover approximately 85% of the Australian workforce (and other estimates suggest that the level of coverage may be even lower than that).

The Rudd Government's FWF Transition Act has made some important changes to Work Choices, but leaves certain of its key features largely intact for the time being (therefore, in the following discussion, the present tense is used in relation to those elements of Work Choices that remain in place, while the past tense is used to describe those aspects that have been changed since Work Choices first came into effect).

## Employers and employees covered by Work Choices

**[1.20]** Work Choices is based primarily on the corporations power in the Australian Constitution, whereas traditionally, federal industrial legislation had been based on the constitutional labour (or conciliation and arbitration) power. As a result, Work Choices primarily covers employers that are trading, financial or foreign corporations, and their employees. Also falling within Work Choices are all employers in Victoria, the Australian Capital Territory and the Northern Territory (including those that are not incorporated); all federal public service departments and agencies; and waterside, maritime and flight crew employers. Some unincorporated State and local government bodies, and non-profit organisations, may also be

covered by Work Choices (if they engage in a sufficient level of trading or financial activity).

The Work Choices Act's reliance on the corporations power for its constitutional validity was upheld by a 5:2 majority of the High Court of Australia in *New South Wales v Commonwealth* (2006) 229 CLR 1. This case involved a challenge brought by the Labor State Governments of New South Wales, Western Australia, South Australia, Queensland and Victoria, as well as the Australian Workers Union and Unions NSW.

## Exclusion of State laws

**[1.25]** Work Choices operates, in respect of those employers and employees that it covers, to the exclusion of most State industrial and employment laws. This federal override of State laws has had the effect of bringing many employers (and their employees) that had traditionally been covered by State industrial relations systems into the national system. However, State laws dealing with certain specified matters (including equal opportunity, workers' compensation, occupational health and safety (OHS), and long service leave) continue to apply to employers and employees covered by Work Choices. That said, some of these State laws can be excluded, or the entitlements that they make provision for can be reduced, by a federal award or agreement.

## Australian Fair Pay and Conditions Standard

**[1.30]** Work Choices introduced, for the first time under federal law, a set of minimum employment conditions applicable to all employees covered by the national workplace relations system. The Australian Fair Pay and Conditions Standard (AFPCS) is made up of the following elements:

- minimum basic rates of pay, based on an applicable Australian Pay and Classification Scale (APCS) derived from a federal award or a notional agreement preserving State awards (NAPSA); or (for award-free employees) the Federal Minimum Wage (FMW), as adjusted by the Australian Fair Pay Commission (AFPC) – and casual loadings;
- a maximum 38 hour working week, subject to “averaging” arrangements over a period of up to 12 months, and employees being required to work “reasonable additional hours”;

- four weeks' paid annual leave;
- 10 days' paid personal/carer's leave per year, and two days' paid compassionate leave (for each occasion when it is required); and
- 52 weeks' unpaid parental leave in respect of the birth or adoption of a child.

The AFPCS prevails over terms of workplace agreements and employment contracts that are less favourable to employees than those provided for under the AFPCS. Employees are also entitled to the “more generous” provision, as between the AFPCS and award terms relating to annual leave, personal/carer's leave, parental leave, and hours of work. Under Labor's proposed substantive reform legislation, the AFPCS will be replaced by an expanded set of minimum employment standards (see further [1.65]-[1.70] below, and Chapter 7).

## Workplace agreements and the “fairness test”

**[1.35]** Work Choices enabled employers and employees to enter into various types of statutory workplace agreements: individual “Australian Workplace Agreements” (AWAs); employee or union collective agreements; employer or union “greenfields” agreements; and multiple-business agreements. AWAs have now been abolished by the FWF Transition Act, which also provides for the phasing-out of existing AWAs (see further [1.65]-[1.70] below and Chapter 2).

As originally enacted, the Work Choices Act allowed workplace agreements to remove or modify award conditions such as penalty rates and overtime or shift loadings, without any offsetting benefits being provided to employees. This was because Work Choices removed the “no disadvantage test” that had previously been applied as part of the approval process for statutory individual and collective agreements. Introduced as part of the transition to enterprise bargaining in the early 1990s, the no disadvantage test was intended to ensure that an agreement did not leave an employee worse off (in an overall sense) when compared to the award “safety net” and applicable legislation. Although the no disadvantage test was removed, the AFPCS prevails over inferior employment conditions in statutory agreements and employment contracts (see [1.30] above).

In the first 12 months of operation of Work Choices, evidence emerging from various sources indicated that many employees

were losing out on award entitlements through agreements made under Work Choices, especially AWAs (see for example Peetz 2007). Whether or not motivated by this evidence, the Coalition Government introduced a new “fairness test” for workplace agreements through the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) (Stronger Safety Net Act) (see further Chapters 2 and 5; and Sutherland 2007). The fairness test applied to workplace agreements lodged with the Workplace Authority Director (WAD) on or after 7 May 2007. However, it did not apply to AWAs covering employees with a base annual full-time equivalent salary of \$75,000 or more. The fairness test has now been replaced by a new no disadvantage test (NDT) under the FWF Transition Act (see further [1.70] and Chapter 5 below).

Under Work Choices, certain matters are designated as “prohibited content” in workplace agreements (see further Chapters 2, 3, 4 and 9). These include provisions that relate to deduction of union fees, trade union training leave, union “right of entry”, restrictions on the use of independent contractors or labour hire workers, restrictions on the offering of AWAs, and rights/remedies in respect of harsh, unjust or unreasonable dismissal. Agreement provisions that constitute prohibited content are unenforceable. Civil penalties may apply to parties that seek to include prohibited content in agreements, or lodge agreements containing prohibited content.

## Awards

**[1.40]** Work Choices introduced several measures aimed at reducing the importance of awards in the workplace relations system. First, and most importantly, entering into a workplace agreement had the effect of permanently displacing an otherwise applicable award. Second, the content of awards is restricted to “allowable award matters” (for example, hours of work, incentive/bonus payments, overtime/shift loadings, penalty rates), with certain other issues specified as “not allowable award matters” (for example, restrictions on or prohibitions of the use of certain types of employment, or on the use of contractors or labour hire workers). Third, there is very little scope for new awards to be made, or for variations to be made to the terms of existing awards.

Work Choices also provided for a process of “award rationalisation” which (if completed) would have made awards almost completely irrelevant. An Award Review Taskforce (ART) was established to make recommendations to the former Government on the rationalisation of federal awards, and the rationalisation of wage and classification structures in federal awards and NAPSAs (although, under Work Choices, awards do not include wage rates, the classifications and rates specified in pre-Work Choices awards were the basis for minimum pay entitlements under the AFPCS; see [1.30] above). However, neither of these aspects of the award rationalisation process made any significant progress prior to the Coalition losing office in November 2007.

The amendments to the WR Act made by the FWF Transition Act provide for a process of “award modernisation” to be conducted by the Australian Industrial Relations Commission (AIRC). They also contain new provisions regulating the content of the “modern awards” that are to be made as part of the award modernisation process (see further [1.65]-[1.70] below and Chapter 6).

## Dispute resolution

**[1.45]** Work Choices significantly diminished the role and standing of the AIRC in the workplace relations system. Most of the AIRC’s compulsory dispute-settlement powers were removed, and the century-old process of conciliation and arbitration of industrial disputes was abandoned. The AIRC’s minimum wage-setting function was transferred to the AFPC, and its role in approving workplace agreements was handed over to the Office of the Employment Advocate (OEA), which became the Workplace Authority (WA) in 2007.

Work Choices provided for a system of “voluntary” dispute resolution, which enables employers and employees to choose between the AIRC and private alternative dispute resolution (ADR) providers. Where both parties agree, they can refer the following types of workplace disputes for resolution in the AIRC:

- disputes arising under the model dispute resolution process (Model DRP) in the WR Act (this includes, for example, disputes about entitlements under the AFPCS);

- disputes in negotiations for a new collective agreement; and
- disputes arising under the terms of a workplace agreement, where the dispute resolution procedure in the agreement provides a role for the AIRC.

There are strict limits on the AIRC's powers when it is performing any of these dispute-settlement functions. For example, the AIRC cannot arbitrate or make enforceable orders (unless an agreement dispute resolution clause empowers it to do so; and, in some circumstances, not even if the parties wish it to do so).

There is very little in the way of regulation of the private ADR stream for workplace dispute resolution opened up by Work Choices (essentially, this leaves the regulation of private ADR to private contract law, and possibly State commercial arbitration legislation). However, evidence indicates that there has been very little "take-up" of the private ADR option, with most parties still choosing the AIRC as the preferred avenue for resolving disputes. That said, Work Choices has led to a massive reduction in the AIRC's workload (see Forsyth 2007a). Under Labor's proposed substantive reform legislation, the AIRC (and several other agencies) are to be replaced by a single federal regulatory body (see further [1.65]-[1.70] below and Chapter 9).

## Industrial action and union right of entry

**[1.50]** Work Choices introduced a range of new constraints on the taking and organisation of "protected" industrial action by employees and trade unions (and, indeed, by employers). While protected action remains permissible in support of claims made during a bargaining period for the negotiation of a new collective agreement, industrial action will not be protected if (for example):

- the action is taken in support of an agreement containing prohibited content (see [1.35] above);
- a negotiating party is engaging in "pattern bargaining";
- the action is taken by a union, or employees, without first obtaining the requisite approval of the relevant employees in a secret ballot.

New grounds were made available for employers and affected third parties to curtail protected industrial action through the suspension or termination of bargaining periods (for example,

in order to provide for a “cooling off” period, or where industrial action is causing significant harm to a third party). Further, employers and third parties were given easier access to remedies to address unprotected industrial action, including “section 496 orders” from the AIRC, and injunctions under s 497 of the WR Act to stop industrial action in support of pattern bargaining.

Work Choices also imposed significant new limits on the rights of union officials to enter workplaces for enforcement and recruitment purposes. Further, union right of entry to investigate OHS breaches under State OHS legislation became subject to the federal right of entry regime.

In addition, substantial new constraints on union activity and industrial action in the building and construction industry were introduced by the *Building and Construction Industry Improvement Act 2005* (Cth), and through the Commonwealth’s National Code of Practice for the Building and Construction Industry administrative scheme (see Forsyth et al 2007).

## Unfair dismissal

**[1.55]** Work Choices introduced several major exclusions from the federal unfair dismissal jurisdiction. As a result, employees can no longer bring claims in respect of dismissals:

- by an employer that has 100 employees or fewer;
- based on “genuine operational reasons” (or reasons that include such reasons);
- occurring during a six-month qualifying period (or such shorter, or longer reasonable period, that is agreed) following the commencement of employment.

Research undertaken for the Victorian Government in August 2007 showed that the operational reasons exclusion has been interpreted very broadly by the AIRC, substantially reducing traditional protections of job security (see Forsyth 2007b) (as to Labor’s proposed changes to unfair dismissal regulation, see [1.65]-[1.70] below and Chapter 9).

## Complexity

**[1.60]** The reforms introduced by the Work Choices amendments to the WR Act – in particular the establishment of a

national workplace relations system based on the corporations power and consequent takeover of State workplace relations arrangements – combined with the Coalition’s distrust of the traditional industrial relations institutions (especially the AIRC), has resulted in a body of federal workplace relations regulation that is extraordinarily prescriptive, complex and voluminous.

For workplace relations lawyers, employer organisations and unions, the task of explaining to their clients and members the new arrangements and the many “patches” applied to them, may have provided some relief from the realisation of their much-reduced roles in the new system.

From a technical perspective, the regulation introduced by the Work Choices Act is in some respects audacious and is remarkable in its detail (most questions arising from the WR Act have answers in the legislation, its schedules or regulations, or in the associated transitional provisions, if only they can be found). However, the legislation as presently drafted patently fails in what should be one of its principal purposes: to provide clear and accessible guidance to those it regulates – employers, employees, unions and other stakeholders – as to their rights and obligations.

## From Work Choices to Forward with Fairness

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**[1.65]** The then Labor Opposition strongly opposed the introduction of the Work Choices Act, and maintained its opposition to Work Choices through to the federal election campaign in late 2007. Due largely to the highly effective anti-Work Choices publicity campaign run by the Australian Council of Trade Unions (ACTU), industrial relations issues were more prominent in the 2007 election than they had been for some time. However, as the year unfolded (and as the election came nearer) the strength of Labor’s commitment to “rip up Work Choices” was diluted to some extent.

One of the core components of the FWF Plan, which was released at the National Conference of the Australian Labor Party (ALP) in April 2007, was its pledge to abolish AWAs. This maintained a policy stance that the ALP had held since the introduction of AWAs in 1996. However, Labor’s opposition to any form of statutory recognition for individualised bargaining,

while popular with the unions, was the subject of strident criticism from key business groups. Complaints from employers in the booming resources sector, in particular, placed significant pressure on Labor to reverse its position or to create some special arrangements for the mining industry (see further Chapter 2).

After extensive consultations with business representatives, in August 2007 the ALP released the FWF Implementation Plan. This document outlined a number of qualifications to the proposed abolition of AWAs:

- existing AWAs could continue in operation for their full term (up to five years);
- the employment of employees with “guaranteed earnings” over \$100,000 per year would not be regulated by awards (thus offering employers greater flexibility in the use of common law agreements for high-income employees); and
- employers and employees could enter into new individual agreements, as a transitional arrangement during the period leading up to the introduction of Labor’s substantive legislative reforms on 1 January 2010.

This softening of the ALP’s position, together with other policy commitments (most of which were outlined in the FWF Implementation Plan) suggested that Labor’s proposed “rollback” of Work Choices would not be comprehensive. For example, there would be no changes to the strict limits on industrial action and union right of entry. The prohibition on union “bargaining fees” in workplace agreements would remain. The Australian Building and Construction Commission (ABCC) would stay in place until 2010. There would also continue to be a stream of non-union collective agreements, without union involvement in the agreement-making process.

However, other aspects of the FWF Policy evinced an intention to re-shape the federal workplace relations system significantly. The main proposals outlined by Labor in the FWF Policy were as follows:

- a federal Labor Government would work cooperatively with the State and Territory Governments to extend the coverage of the national workplace relations system to all private sector employers (leaving State public sector and local government employers/employees covered by the State industrial relations jurisdictions);

- Labor would introduce a collective bargaining system providing for the voluntary negotiation of union and non-union agreements, subject to two key principles: (1) if a majority of employees supported collective bargaining, their employer would be required to negotiate collectively with them; and (2) all negotiating parties would be subject to a framework of “good faith bargaining” (GFB) rights and obligations;
- the five minimum standards contained in the AFPCS would be expanded into a scheme of 10 legislated “National Employment Standards” (NES), with the addition of: a right for parents to request flexible working arrangements; community service leave; public holidays; rights to notice of termination, and redundancy pay; long service leave; and a “Fair Work Information Statement”;
- “modern industry awards” would extend the NES “safety net” for award-covered employees, with awards permitted to contain a further 10 minimum employment standards (including wages, hours of work, overtime and penalty rates, allowances, leave and leave loadings);
- the AIRC would be asked to undertake an “award modernisation” process, which would involve simplifying the content of awards as well as some aspects of the award rationalisation process that was commenced (but not completed) under Work Choices;
- in addition to the \$100,000 award exclusion arrangement, there would be provision for the making of individual “flexibility” arrangements under awards and collective agreements;
- Labor would establish a new “one-stop-shop” federal agency, to be called Fair Work Australia (FWA), which would replace and absorb the functions of the AIRC, AFPC, ABCC, WA and Workplace Ombudsman (WO) – among other functions, FWA would resolve disputes, set and adjust minimum wages and award conditions, oversee GFB and approve workplace agreements, handle unfair dismissal claims, ensure compliance with awards, agreements and legislation, and it would also have a “judicial arm”;
- a simpler unfair dismissal system would be introduced, with claims to be resolved by FWA through a quick, non-legalistic process – employees in larger businesses would be eligible to bring an unfair dismissal claim after the first six months of employment, while employees of businesses with fewer than 15 employees would have to complete a 12-month qualifying period.

## Outline of the book

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**[1.70]** As indicated in [1.05] above, following Labor’s victory in the 2007 election, the Rudd Government commenced a two-stage process of implementing the FWF Policy.

Part II of this book examines the first stage of that implementation through the FWF Transition Act, which was passed into law on 19 March 2008 and was proclaimed to take effect on 28 March 2008. The FWF Transition Act made further amendments to the WR Act. References to the WR Act in this book are to that legislation as at the present time (amended by the Work Choices Act, the Stronger Safety Net Act, and the FWF Transition Act). The WR Act as it was prior to Work Choices is referred to as the “pre-Work Choices WR Act” or “pre-reform WR Act”; and the WR Act as it was immediately prior to the FWF Transition Act is referred to as the “pre-transition WR Act”.

Chapter 2 of this book considers the provisions of the FWF Transition Act that implement the abolition of AWAs, and the transitional arrangements through which AWAs entered into prior to 28 March 2008 (and lodged before, or within 14 days after, that date) are continued in operation. Also covered in Chapter 2 are the changes to the operation of AWAs under the WR Act, which generally continues to apply the pre-transition WR Act to AWAs but with changes relating to (for example) the employment conditions that apply following unilateral termination of an AWA by either party; and the rights of employees to participate in collective agreement-making processes following expiry of an AWA. An assessment is also provided of the likely impact of the removal of AWAs as an agreement option in the federal workplace relations system. This includes discussion of the extent of AWA usage under Work Choices, and the steps taken by some employers to “lock in” new AWAs prior to their abolition.

Chapter 3 explores a new form of agreement introduced by the FWF Transition Act: individual transitional employment agreements (ITEAs). These are the statutory individual agreements, available for use only in limited circumstances and for a limited period, that Labor agreed to implement in order to ameliorate employer concerns about the abolition of AWAs. Chapter 3 explains the rules dealing with who may enter into ITEAs, the processes for making ITEAs and having them

approved by the WAD, when ITEAs take effect, and the duration of ITEAs. The extent to which employers are likely to utilise ITEAs is also discussed.

Chapter 4 examines changes made by the FWF Transition Act to the regulation of collective agreements. The significant re-configuration of the collective bargaining process proposed in the FWF Policy will not take effect until the Government's substantive reform legislation is developed and implemented (see Chapter 9). In the meantime, the Government has made a number of amendments to the pre-transition WR Act provisions regarding collective agreement-making. These include new rules as to when collective agreements take effect, doing away with the concept of "protected award conditions", removing the capacity of parties to terminate collective agreements unilaterally, and allowing collective agreements to incorporate (by reference) a wide range of other industrial instruments. In addition, the operation of pre-Work Choices certified agreements (referred to in this book as "pre-reform certified agreements") may be extended for up to three years. Chapter 4 also covers the transitional arrangements for "pre-transition collective agreements" (that is, collective agreements entered into under the pre-transition WR Act prior to 28 March 2008 and lodged before, or within 14 days after, that date).

Chapter 5 deals with the NDT that, under the FWF Transition Act, has replaced the fairness test introduced by the former Government in May 2007 (see [1.35] above). All workplace agreements made on and from 28 March 2008 must pass the NDT. The basic concept of the NDT is the same for both collective agreements and ITEAs – an agreement must not result, on balance, in any reduction in an employee's overall terms and conditions of employment under a "reference instrument" (which may include, for example, a federal award, NAPSA, pre-transition collective agreement, or pre-reform certified agreement). In this respect, the NDT is similar to the no disadvantage test that applied prior to Work Choices. However, different reference instruments apply for purposes of the NDT as applied to collective agreements and ITEAs. Chapter 5 also considers the NDT as applied to variations to pre-reform certified agreements.

Chapter 6 covers the award modernisation process that the FWF Transition Act requires the AIRC to undertake. This includes an analysis of the provisions of new Pt 10A of the WR

Act, and the Award Modernisation Request from the Minister for Employment and Workplace Relations to the AIRC that triggered the process. The consultation process, the proposed roles of parties to awards, and the timeline for award modernisation are also discussed, along with the permissible (and impermissible) content of modern awards, the parties bound by them, and their relationship with other instruments. Finally, an assessment is made of the AIRC's prospects of completing the award modernisation process by the 31 December 2009 deadline, and of the role that modernised awards will play in the workplace relations system into the future.

Part III of the book examines the second stage of the workplace reform process that is being undertaken by the Rudd Government. Chapter 7 looks at the process for developing the NES, and the likely content of the NES, as outlined in the Government's *Discussion Paper: National Employment Standards Exposure Draft* released on 14 February 2008. Chapter 8 discusses various other steps that the Government has taken to implement the FWF Policy, and other workplace relations arrangements consistent with the FWF Policy.

Finally, Chapter 9 looks ahead to the likely shape of the Government's substantive reform legislation. Key aspects of the proposed legislation covered in this chapter include:

- the federal/State dimension – that is, the Government's plans for a national workplace relations system covering all private sector employers and employees;
- the proposed mechanisms to enable employers and employees to obtain “flexibility” under awards, collective agreements and common law contracts;
- collective bargaining and GFB;
- the role of FWA; and
- the unfair dismissal changes.

Chapter 9 also examines some of the key issues, or potential difficulties, that the Government may need to resolve in the process of finalising its substantive reform legislation. The chapter concludes with an assessment of the new workplace relations system that the Government intends to be fully operational by 1 January 2010, including its implications for employers, employees, unions and other stakeholders.

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### [1.75]

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