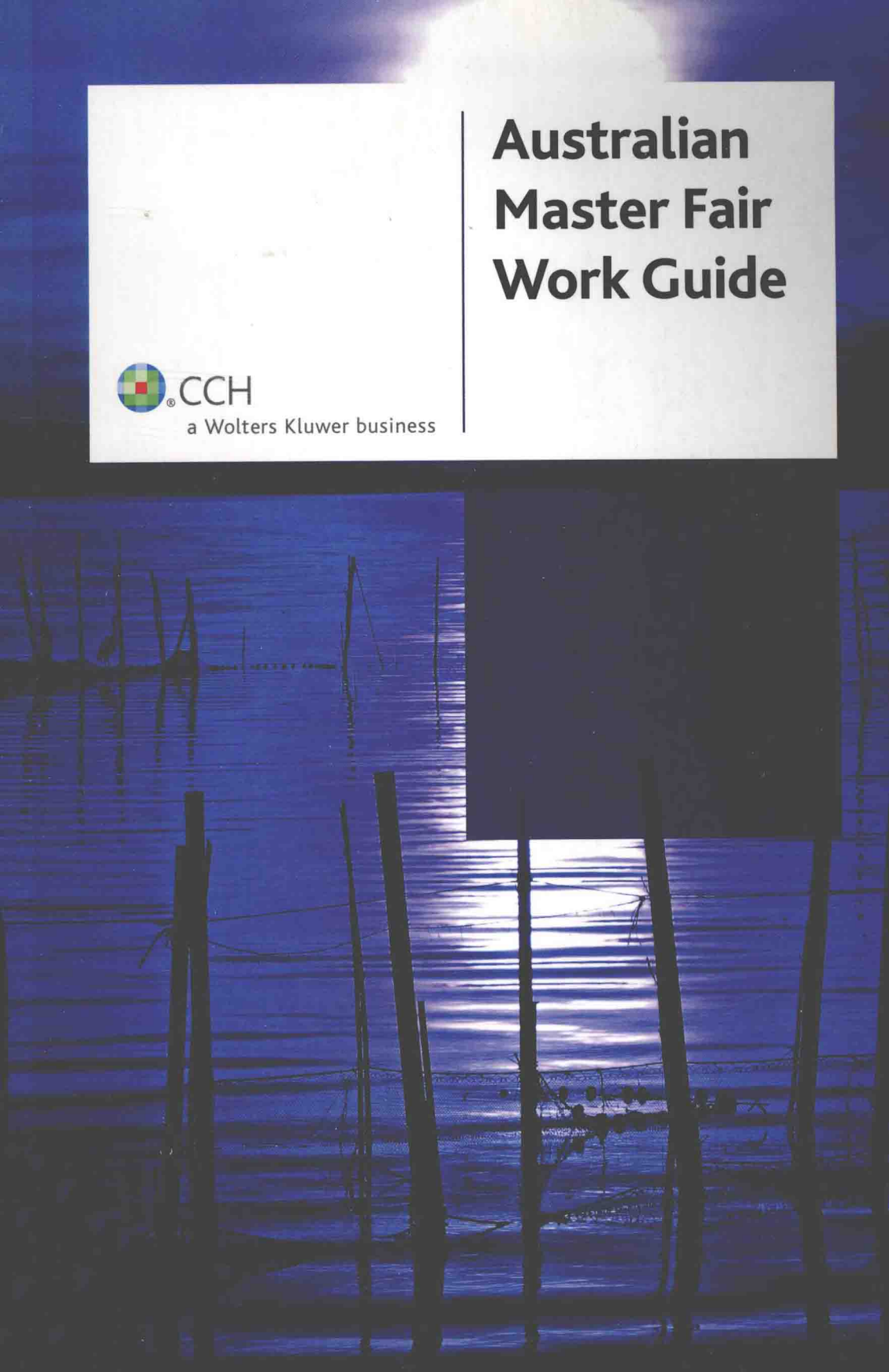
Australian Master Fair Work Guide



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Preface

While this is the first edition of the *Australian Master Fair Work Guide*, it can properly be considered the fifth book in a series of books that have tracked the changes to Australian industrial relations from the first *Australia Master Workplace Relations Guide*. Given this Guide is primarily about the Fair Work system and its operation, this title change is to clarify the contents.

At the time of publication of this Guide, Australia is preparing for the upcoming federal election to be held on the 21st August 2010. No doubt the next year or so will bring further, or new, legislative changes, and will throw up problems and issues perhaps not clearly identifiable at the moment.

This Guide covers the many aspects of the current legislative regime, as well as highlighting key differences between "Work Choices" and the Fair Work Act.

The Fair Work Act has seen the introduction of some notably important changes including:

- the establishment of Labor's "one-stop shop" IR agency called Fair Work Australia which replaced the AIRC and other separate government agencies set up under Work Choices
- collective bargaining under the banner of "bargaining in good faith"
- abolishment of Australian Workplace Agreements (individual agreements)
- restored access to unfair dismissal for the majority of employees
- inclusion of redundancy provisions and long service leave as minimum employment standards
- new rules for transfer of business arrangements.

Included in this edition are substantially updated chapters regarding the coverage of federal, state and territory laws and their institutions and processes. Also of note are the chapters on Awards and Agreements, which include new case examples, as well as the chapter on Minimum National Employment Standards, containing commentary surrounding the new parental leave scheme.

This Guide provides the reader (whether academic, practitioner or student) a solid and highly informative base from which to navigate through Australia's industrial relations system.

As with the previous editions of this work, CCH has gathered together a team of excellent practitioners and academics to put together the commentary on this most important legislative package.

On behalf of CCH and myself, I thank all the contributors for their efforts and commitment to what is a very substantial task.

John Stafford

Editor-in-Chief

CCH Australia

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Piper Alderman is a full-service, commercial law firm with offices in Sydney, Melbourne, Brisbane and Adelaide. It has 55 partners, over 160 lawyers and more than 325 staff in total. The firm is committed to continual excellence in the practice of law, having been leading advisers to commercial interests across Australia for over 160 years. It is a single, united partnership committed to performing as a team and working together with its clients to achieve their business goals. Its success has seen it consistently ranked as one of Australia's leading law firms and independently recognised as an outstanding legal provider. Piper Alderman's Employment Relations Team is led by Partner David Ey. It has an outstanding reputation for working in partnership with clients, responding to their needs and creating practical legal solutions. The team represents many well-known public corporations, private companies, partnerships and not-for-profit organisations across a wide range of industries and across the country.

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Contents

CHAPTER 1

OVERVIEW

Peter Punch
Partner, Carroll & O'Dea Lawyers and CCH's principal IR consultant

¶1-010 Key points

- The Howard Government's "Work Choices" legislation fundamentally and permanently altered the structure and regulation of industrial relations in Australia.
- The Labor Government's "Fair Work" legislative package does not so much eradicate "Work Choices" as remove its "harder edges" while retaining and building on a number of its elements, such as use of the "corporations" power to facilitate a truly national workplace relations system, and the legislating of certain "National Employment Standards" (NES).
- The Fair Work legislative package does, however, bring into play a number of important new concepts in workplace relations law and practice, including modern awards, an expanded set of national minimum standards for all employees and "good faith bargaining" in relation to enterprise agreements.
- The new unfair dismissal regime is intended to redress the balance of employer/employee rights, which swung heavily to favour employers under Work Choices. Only time will tell whether the new system strikes the right balance or returns us to the problems that emerged under the pre-Work Choices system.

- The new regulator, Fair Work Australia, is given a jurisdictional scope which may allow it to exercise great influence over industrial relations at both the national and individual workplace levels, but its influence will not be as great as that of the Australian Industrial Relations Commission (AIRC) under the pre-Work Choices system.
- The *Fair Work Act 2009* (FW Act) gives trade unions some additional tools to assist them in increasing their influence in the workplace and generally, but the new system does not restore all of their previous advantages and, in some respects retain many of the Work Choices restrictions.
- It will take further time to undertake a proper assessment of the full impact of the new system.

¶1-020 Introduction — five years of workplace relations regulation reform

It is now a little over five years since the then Prime Minister, John Howard, stood up in the federal parliament and made a short statement advising Australia that, now that his government had a majority in both houses of the parliament, there would be fundamental changes to federal workplace law.

Since that day in late May 2005, Australia has experienced what can be fairly, if a little theatrically, described as a catharsis in its system of workplace relations regulation. First, there was the hugely controversial amending legislation to the *Workplace Relations Act 1996* (Cth) (WR Act), forevermore known as "Work Choices", commencing on 27 March 2006. Second, was the High Court's decision in May 2007 confirming by a 5–2 majority that Work Choices was constitutionally valid (probably the most important decision of the court since the *Mabo* decision in 1992, and certainly the most important industrial relations decision of the court since the *Engineers* case in 1920). Third there was the attempt by the then federal government to bolster its political position by introducing a "fairness test" for agreement making (also in May 2007), which only caused more confusion and uncertainty. Fourth, there was the defeat of the Howard Government in November 2007 (no doubt partly due to the Work Choices controversy). Fifth, there was the transitional legislation by the Labor Government in March 2008, preventing any more Australian Workplace Agreements (AWAs) being made and starting the award modernisation process. Sixth, there was the FW Act (and its associated transitional legislation and regulations) commencing in three "tranches", on 1 July 2009, 1 January 2010, and finally, 1 July 2010. And, of course, there was much public controversy and debate throughout this whole saga.

The Labor Government's policy messages in workplace relations were to eradicate the blight of "Work Choices" and to restore fairness and balance to workplace relations regulation.

Does the FW Act achieve these aims? It was impossible to answer this question comprehensively as the position is not entirely clear yet. The course of events since the last edition does, however, allow some general observations to be made.

¶1-025 Permanent changes to the industrial regulation "landscape"

It is important to always remember just how fundamentally industrial relations regulation in this country has changed in just a few short years.

In what is really only a very short period — May 2005 to January 2010 — we have seen a seismic shift in the entire structure of industrial relations in Australia. While there are, no doubt, a range of views as to the merits or otherwise of the Work Choices "revolution", it has brought about three fundamental and permanent changes to the structure and regulation of industrial relations in this country:

(1) The legislative landscape for the regulation of collective and individual employment relationships has been altered from one that (putting aside public sector employment) involved a combination of state and federal industrial laws and tribunals (with the state systems being particularly relevant in New South Wales, Queensland and Western Australia) to a landscape where, from 1 January 2010, the entire private sector workforce in Australia (apart from a small pocket of unincorporated employers in Western Australia) now falls under federal legislative regulation (apart from certain specific areas such as workers compensation, occupational health and safety and anti-discrimination).

(2) Australia's 100-year-old cultural attachment to compulsory independent third party conciliation and arbitration of collective labour disputes has been severely and permanently curtailed, and will never return to the "glory days" it enjoyed between the 1920s and the late 1970s.

(3) Direct legislative prescription of certain minimum terms and conditions of employment is now the norm whereas, previously such matters were covered by a motley combination of award provisions and specific subject legislation (usually at the state level).

While the election of the Labor Government on 24 November 2007 was, no doubt, in some part attributable to an electoral backlash against what was seen by many as the imbalances and inefficiencies of the Work Choices package, the new government's industrial relations policies recognise these three fundamentals and, if anything, build on rather than seek to dismantle them.

¶1-030 Major developments since the last edition

Since the last (4th) edition of the *Master Workplace Relations Guide*, published in July 2009, there have been three major developments at the national level on the subject of industrial relations:

1) The establishment of a truly national system of industrial relations (as a matter of substance) through complementary federal and state legislation commencing

on 1 January 2010 (a quite extraordinary breakthrough when one considers that this subject was not seriously on the table until May 2005 and had been thought of as impossible as recently as 2004);

2) The replacement of over 1,500 state and federal awards with 122 "modern awards" by the federal government's deadline of 31 December 2009 (another objective which was thought of as almost impossible), and

3) The first National Minimum Wage decision under the FW Act delivered on 3 June 2010 resulting in a $26.00 per week increase in minimum wage rates contained in modern award and the national minimum wage from 1 July 2010.

¶1-050 A truly national system?

The Howard Government's Work Choices legislation was, in the context and history of Australia's federal system of government, a truly radical initiative — by the use of the "corporations power" (s 51(xx) of the Constitution), the federal parliament sought to cover the vast majority of employers in Australia under the one (national) system of workplace relations regulation (with the aim being to make it untenable for the states to continue with their own industrial relations systems).

This initiative was, of course, upheld by the High Court in May 2007. To use a hackneyed expression, "the die was cast" — there will be no return to the old "divided" federal and state system under either a Labor or Coalition Government at the national level.

The policy of the Labor Government was to establish a truly national workplace relations system through co-operation and negotiation with the state governments, covering all private sector employees in Australia (presumably leaving state and local government employees to remain under state regulation).

This objective was in substance achieved.

In late 2009, all state and territory governments, apart from Western Australia, entered into an intergovernmental agreement for the referral of employment-related matters not otherwise within the jurisdiction of the federal parliament to that parliament, subject to certain conditions that give the states power to withdraw a referral in certain circumstances and the power to veto amendments to the FW Act where a two-thirds majority exists.

The *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth) inserted into Pt 1-3 of the FW Act a new Div 2A, which allows a state parliament to refer to the federal parliament a wide range of workplace relations matters dealt with in the FW Act to the extent that the federal parliament does not already have power over such matters. The main effect of this arrangement is that a state parliament may refer to the federal parliament and bring under the reach of the FW Act those categories of employers that cannot be regulated under the FW Act without such a referral — particularly private sector employers who are sole traders or partnerships. Consistent with the government's election policy, however, a referral of power by a state does not include public sector employers.

Victoria took up the opportunity for full referral presented by Div 2A, so that the repeal of the WR Act and its special provisions for Victoria do not create any practical difficulties for employers and employees in that state. It is intended that they move "seamlessly" from the system under the WR Act to the new FW Act system subject to any necessary transitional matters being dealt with.

The states of New South Wales, Queensland, South Australia and Tasmania have all referred their industrial relations powers through their own complementary legislation.

Western Australia alone has chosen to stand outside the intergovernmental agreement and the national framework, but that resistance is more symbolic — most private sector employers in that state are "constitutional corporations" and thus, embraced by the national system under the FW Act.

The irony of the current situation should not be lost on us. For many years, various commentators and politicians (particularly on the Labor side of the divide) have advocated for a unified national system of industrial relations for Australia, but the "breakthrough" has come from the actions of a federal government from the conservative side of politics. If not for the controversial "Work Choices" experiment, what has now been achieved by the Labor Government would have been politically and practically impossible.

¶1-060 Fair Work Australia

A central component of the current government's industrial relations policy was the establishment of a "mega agency" called "Fair Work Australia" (FWA), which is intended to operate as a "one stop shop" for all aspects of workplace relations matters, including:

(a) minimum wage fixing

(b) award making

(c) agreement scrutiny and approval

(d) unfair dismissal claims

(e) enforcement mechanisms, and

(f) judicial functions such as interpretation and enforcement of rights and obligations.

In the Overview to the 4th edition of this Guide, the writer made the following remarks about the potential influence and power of FWA:

> With the commencement of the FW Act, FWA commenced its life on 1 July 2009. It commenced with all of the above-mentioned functions, apart from the judicial functions (which was always going to be the exception due to well-known constitutional constraints) together with a range of other functions (including some arbitral powers in certain areas) that suggest its influence on the conduct and shape of workplace relations in this country will be considerably greater than many might have expected from simply reading the Labor Party's policy manifesto. Clearly FWA will not rival the enormous

role that the AIRC (and its predecessors) had in the economic and industrial life of this country prior to Work Choices but there is no doubt considerable potential for FWA to be a very significant player. One can see that potential from its remit (and broad procedural discretions) over the following matters:

- the fixing of the minimum wage by its Minimum Wage Panel each year
- the oversight and review of modern awards (which are being made this year by the AIRC of course, as its last "hurrah" before exiting on 31 December 2009)
- approval of collective agreements
- supervision of "good faith bargaining"
- arbitration of disputes as agreed arbitrator under agreements
- conciliation functions in areas such as unfair dismissal, unlawful termination and workplace rights
- making of workplace determinations both in relation to situations where parties cannot reach agreement and industrial action is causing harm to a party, and for "the low paid sector", and
- (of course) hearing and determination of unfair dismissal claims, which from 1 July 2009 will be available for a much larger number of employees than was the case under Work Choices.

Time will tell just how prominent FWA becomes in this country's fabric of workplace relations, but it is certain that its prominence will be considerably greater than that of the AIRC under Work Choices.

FWA has now been in operation for one year, although only with its full range of powers and functions since 1 January 2010. With that limited window of experience of FWA "in action", it is not possible to be too emphatic about the validity of the above quoted prediction.

However, there can be no denying that FWA has played a prominent role already in resolving uncertainties created by the FW Act. For example:

- FWA has delivered a number of important decisions on the process of enterprise bargaining and the contents of enterprise agreements, including the *Woolworth's* case (see ¶9-390) establishing that an enterprise agreement did not need to include a provision for compulsory arbitration of disputes arising under the agreement (as long as there was a clause prescribing a process for dispute resolution). FWA has also decided on a number of occasions that the process for notification of representation rights and obtaining the agreement of employees to make an agreement must be strictly followed (see for example *Re Falls Creek Resort Management* [2010] FWA 2847). It has also adopted a rigorous approach for ensuring compliance with the "Better of Overall test" (for example the *Bupa* case: see ¶9-210).
- The Minimum Wage Panel of FWA has delivered its first Annual Wage Review decision for the period 2009–2010, providing for a $26.00 increase in modern award rates and in the national minimum wage from 1 July 2010.

