

10 THINGS YOU NEED TO KNOW ABOUT THE NEW EMPLOYMENT LAWS

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INTRODUCTION

1. THE NEW LEGISLATION: FAIR WORK ACT, 2009

The Work Choices amendments of the Howard Government were brought about by amending the pre-existing federal laws relating to employment, under the *Work Place Relations Act*, 1996.

The reforms of the Rudd Labor Government involving enacting entirely new legislation to replace the *Work Place Relations Act*. The new legislation is the *Fair Work Act*, 2009.

The *Fair Work Act*, 2009 (“the Act”) is coming into operation in two stages. The first stage commenced 1 July 2009 and all companies need to be taking urgent steps to ensure that they are aware of and compliant with these changes. Further changes will come into effect from 1 January 2010.

In short summary, the main changes which took effect from 1 July 2009 include new obligations with respect to union activities, the making of enterprise agreements and unfair dismissal laws. The most substantial changes to come into effect from 1 January 2010 relate to the imposition of new National Employment Standards which will include, for example, an additional twelve months unpaid parental leave, redundancy pay of up to twenty weeks and flexible working arrangements for parents with children under school age. Also from 1 January 2010, modern Awards will be introduced which will apply unless an employee earns over \$100,000.00 per annum.

Laws relating to occupational health and safety and rehabilitation (such as worker’s compensation legislation) will continue to be governed by State law. Accordingly, companies will need to adapt to the changes to the federal workplace laws under the Act, as well as continue to comply with the obligations which are well established under state law with respect to occupational health and safety and rehabilitation.

2. THE SOLE UMPIRE: FAIR WORK AUSTRALIA

The most fundamental structural change to the employment law regime in Australia brought about by the current Government is to create Fair Work Australia (“FWA”).

FWA commenced a large part of its operations from 1 July, 2009. Section 576 of the Act sets out the reach of its functions as follows:

- the National Employment Standards;

- modern awards;
- enterprise agreements;
- workplace determinations;
- minimum wages;
- equal remuneration;
- transfer of business;
- general protections;
- unfair dismissal;
- industrial action
- right of entry;
- stand down;
- other rights and responsibilities;
- the extension of the National Employment Standards entitlements;
- unlawful termination protections;
- dealing with disputes referred to it;
- providing assistance and advice about its functions and activities;
- providing administrative support;
- mediating any proceedings, part of proceedings or matter arising out of any proceedings that, under section 53A of the *Federal Court of Australia Act 1976* or section 34 of the *Federal Magistrates Act 1999*, have been referred by the Fair Work Division of the Federal Court or Federal Magistrates Court to FWA for mediation;
- any other function conferred on FWA by a law of the Commonwealth.

The Australian Industrial Relations Commission will cease to exist at the end of 2009. For the balance of 2009, it will be completing its award modernisation obligations. The Australian Industrial Relations Commission will also try to finish off as many Court matters which were filed with it before 30 June, 2009 by the end of the year.

Many of the staff of the current commission will be employed by Fair Work Australia.

Section 595 of the Act makes it clear that the focus of its activities will be to mediate and or conciliate matters. It may also deal with a dispute by making a recommendation or expressing an opinion as to what action the parties should take in relation to a dispute. In certain specified areas it will also arbitrate matters such that any decision it makes in that matter is binding.

The Fair Work Ombudsman will support compliance and enforcement of the new laws, and is the party which employees may contact at first instance to complain against non-complying employers.

3. CHANGES TO RIGHTS OF ENTRY FOR UNIONS

To understand the new laws there are several terms which need to be understood:

- * **fair work instrument** – means a modern award, an enterprise agreement, a workplace determination or an FWA order;
- * **a permit holder** is a person who holds an entry permit;
- * an **entry permit** is a permit issued by FWA on application by an official of a union organisation (to be issued with such an entry permit the specific official is to be a fit and proper person to hold the permit). Entry permits are issued to individuals for general use and are not ordinarily specific to a particular workplace.

There are two circumstances in which a permit holder may enter a work premises:

- (a) Where the permit holder **reasonably suspects a contravention** of the Act or a fair work instrument that relates to or affects a member of the permit holder's organisation whose industrial interests the organisation is entitled to represent and who performs work on the premises. That is, there must be at least one member of the organisation working at the site for an entry to take place.
- (b) A permit holder may enter the work site **to hold discussions** with employees who perform work on the premises, whose industrial interest the permit holder's organisation is entitled to represent, and who wished to participate in those discussions. This right of entry can be exercised without any employees being a current member of the permit holder's union.

There are procedures which must be followed for a permit holder to enter the work place. They cannot simply show up unannounced, except in circumstances where they have obtained special leave from FWA to do so.

Section 487 requires the service of an **entry notice** at least 24 hours before, but no more than 14 days before the proposed entry. The contents of the entry notice must comply with the requirements of the Act. If no entry notice has been served at least 24 hours before the attendance, then unless FWA has granted an exemption from serving such a notice, the employer is entitled to refuse entry to the permit holder.

In circumstances where the entry is for the purpose of investigating a suspected breach, the permit holder is only entitled to inspect the records of its union members. The permit holder must obtain an exemption order from FWA in order to be allowed to inspect the non-union member's records.

In most instances it is expected that the permit holder will wish to follow up on records which may not be made available on the spot, such as where further searches may be required offsite. Accordingly, the Act provides a mechanism where a notice can be served at the time of the entry or within five days after the entry requiring the production of the documents listed in the notice no earlier than 14 days after the notice is given.

In relation to the right of entry to meet with employees, the Act specifies that the employer can contain the impact of this by requiring the permit holder to meet with staff in a particular location specified by the employer. Further, such meetings should only take place during work breaks and not during ordinary working time. Permit holders can only enter the premises during ordinary working hours.

Issues for your attention:

- Each work site should have a responsible officer to deal with entry notices and access by permit holders. That person should have a clear understanding of the circumstances in which a permit holder has a right of entry.
- Employers should have a record of who is and who is not a member of an industrial organisation and the organisations that they are a part of so as to ensure that there is no disclosure of non-union member records in the event of an entry by a permit holder.
- Employers should have a clear understanding of how they will deal with the entry of permit holders including identifying a room that will be used to deal with any meetings which the union wishes to hold with the employees.
- In some industries there may be value in considering developing a relationship of trust with the applicable union(s).

4. UNFAIR DISMISSAL

From 1 July, 2009 new unfair dismissal laws came into force. The basic test for what constitutes an unfair dismissal remains the same – was the dismissal, harsh, unjust or unreasonable.

The most fundamental change under the *Fair Work Act* is to remove the protection previously existing under Work Choices to companies which employed up to 100 employees. From 1 July, 2009, all companies are exposed again to unfair dismissal claims.

Certain specific protections are available to small businesses. A small business is defined as a company which employs fewer than 15 employees at the time that an employee is terminated. The head count of 15 employees includes casual employees employed on a regular and systematic basis and employees working for an associated entity. For such small businesses, employees cannot bring an unfair dismissal claim during the first 12 months of their employment. For larger businesses, a claim cannot be brought during the first six months of employment.

For small businesses, the Act provides what is called the “Small Business Fair Dismissal Code”. The Code sets out a process for dismissal with a checklist for employers to follow. If the checklist is complied with, the employer is entitled to seek a finding that the employee has fairly dismissed and so head off an unfair dismissal claim at its commencement.

Another threshold issue is the level of earnings of the employee. If an employee earns more than \$100,000.00 per annum (to be indexed annually), they are not entitled to bring an unfair dismissal claim.

The process for dealing with unfair dismissal claims has changed fundamentally. Claims are now to be brought before FWA. The Act makes it very clear that the concern is to ensure that FWA deals with such disputes quickly, flexibly and informally. The emphasis will be on reinstatement rather than on monetary compensation. In many instances, FWA will be entitled to proceed to hear a matter on the spot if it cannot be successfully conciliated first.

Legal representation will not be encouraged in FWA and, indeed, may be refused. A lawyer can assist an employer in dealing with unfair dismissal matters, such as in advising in the process before a termination is effected and in helping the employer prepare for the conciliation, such as in helping with the preparation of witness statements and an outline of arguments. In some instances FWA will allow a lawyer to provide assistance in a conciliation process if they are satisfied that this will likely assist in achieving a resolution of the matter.

The Act continues an unlawful termination jurisdiction as existed under the *Work Place Relations Act*. So terminating an employee for reasons which are deemed unlawful under the Act will give rise to an entitlement by employees to bring an unlawful termination claim before FWA. The *Act* also expands to the

role of the Fair Work Ombudsman, so that he/she can now investigate an employer's business records and interview staff and further prosecute breaches of the *Act*. There are civil penalties of up to \$33,000 where discrimination is found to have occurred in the workplace.

An unfair dismissal claim must be brought within 14 days of termination. An unlawful termination claim must be brought within 60 days.

Issues for your attention:

- Employers should ensure that the process of disciplining and terminating employees is properly documented and that those documents are brought to FWA to respond to any unfair dismissal or unlawful dismissal claim brought.
- Even if the small business Fair Dismissal Code does not apply to you, have you addressed the assumption set out in question 6 of the Checklist as an answer to allegations of unfair dismissal?
- Employers should come along to FWA meetings with all of the relevant documentation in case the matter proceeds to a contested arbitration immediately.

5. ENTERPRISE AGREEMENT MAKING

The current system of entering into enterprise agreements changed with effect from 1 July 2009. Any enterprise agreements which were in the process of negotiation but which were not finalised by 30 June 2009 are of no effect and negotiations now have to recommence in full compliance with the obligations set out in the Act.

Existing workplace agreements will continue until their expiry date, but be subject to the National Employment Standards from 1 January, 2010.

The new law no longer makes provision for individual workplace agreements.

Section 172 of the Act sets out what may be included in an enterprise agreement and is very broad and general in its scope. An enterprise agreement cannot override the National Employment Standards.

Section 173 provides that an employer that wishes to be covered by a proposed Enterprise Agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who will be covered by the agreement and who is employed at the notification time for the agreement. Generally, the notification time for a proposed enterprise agreement is the time when an employer agrees to bargain or initiates bargaining for the agreement with the employees concerned.

The Act sets out clear rules for the appointment of bargaining representatives and how bargaining representatives are to conduct themselves.

Section 180 of the Act sets out certain obligations an employer must comply with before an approval by employees can be given. This includes providing employees with either a copy of, or at least access to, a written text of the agreement and any materials referred to in the agreement. The Employer must also take all reasonable steps to notify the relevant employees of the start of the access period for the agreement and the time and place at which a vote will occur and the voting method that will be used to approve the enterprise agreement. The access period is the seven days prior to the start of the voting process.

The Act mandates that the employer take all reasonable steps to ensure that the terms of the agreement and the effect of those terms are explained to the relevant employees in terms of appropriate to those employees. In particular, the Act emphasises the need to take into account when explaining the agreement the cultural and linguistic backgrounds of the employees, young employees, and employees who do not have a bargaining representative for the agreement.

Section 193 provides that the enterprise agreement satisfy a ***“better off overall test”***. The agreement must provide rights which overall are better than the rights which the employee would receive if the relevant modern award applied to the employee concerned.

There are certain terms which are mandatory in an enterprise agreement dealing with, for example, flexibility and consultation obligations. The Regulations provide Model Flexibility Terms and Model Consultation Terms which the parties can adopt in lieu of devising their own wording, if they wish.

Section 206 provides that the base rate of pay under a enterprise agreement must not be less than the modern award rate.

Bargaining representatives acting on behalf of workers must meet the “good faith bargaining requirements”. In certain circumstances FWA can be involved in the bargaining process and make orders regarding aspects of the bargaining process.

Issues for your attention:

- For companies which have existing Workplace Agreements in place prior to 30 June, 2009, careful comparison between those agreements and the National Employment Standards should be conducted before 1 January, 2010 to ensure that there is no inadvertent breach of the new Standards.

6. AWARD MODERNISATION

The Labor Government's amendments to employment law in Australia have been introduced in stages. Last year a transitional Act was introduced which appointed the Australian Industrial Commission to review and modernise Australian Awards.

The intent in modernising Awards is to try to bring some consistency and clarity to the Award situation in Australia given the historical differences from state to state and the confusion created by the NAPSA system which was part of the Work Choices regime. For those unfamiliar with the NAPSA system, when the Work Choices amendments came in, State Awards were frozen in time as far as their application to companies is concerned and redescribed as Notional Agreements Preserving State Awards (hence NAPSA). As such, State Awards were transformed overnight to have the status of a Federal Industrial Instrument. However, those NAPSA's continue to be state based in their application and in many instances have led to discrepancies between the rights of employees doing the same work in different states of Australia.

Since last year the Australia Industrial Relations Commission has been engaged in a very active process of reviewing and amending the Awards and creating a series of new Awards which will come into effect from 1 January, 2010, known as "Modern Awards". All previous Awards will cease to apply to Australian companies.

Section 139 of the *Fair Work Act* sets out specific terms which may be included in Modern Awards. They include such things as minimum wages, including rates for junior employees, etc, skill based classifications and career structures, incentive based payments, piece rates and bonuses, types of employment, such as full time, casual, regular part-time, shift work, etc., arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working breaks, overtime rates, penalty rates, annualised wage arrangements that have regards to patterns of work in an occupation, safe guards to ensure individual employees are not disadvantaged, allowances, leave, leave loading and arrangements for taking leave, superannuation and procedures for consultation, representation and dispute settlement. In certain circumstances, a Modern Award can also include industry specific redundancy schemes and non-controversial topics, such as flexibility terms.

Modern Awards must not include what are described under the Act as "objectionable terms". Objectionable terms include such things as terms about payments and deductions for the benefit of the employer, terms limiting rights of entry, terms that are discriminatory, terms that contain state based differences and terms dealing with long service leave.

The *Fair Work Act* provides that FWA must conduct a four yearly review of Modern Awards. Such review is to be conducted by a full bench of the FWA.

The Australian Industrial Relations Commission has published on line its determinations with respect to a range of Modern Awards. That is, many of them are already available on line, even though they do not come into force until 1 January, 2010. In some industries, the effect of the Award changes will be substantial and so companies should be taking steps well before the 1 January introduction of the new Awards to assess what the financial impacts of the new Awards may be on their wages bill.

It is understood that the intention is that there will be an Award which applies to every employee in Australia who earns less than \$100,000.00. That is, for those people not covered by an industry specific Modern Award, there will be a miscellaneous Award capturing all other employees.

Issues for your attention:

- Have you identified which Modern Award(s) will apply to your business from 1 January, 2010?
- Have you identified any financial or procedural impacts which the new Modern Awards may have on your business? How are you going to deal with those impacts?

7. TRANSFER OF BUSINESS ISSUES

Section 311 of the Act provides that there is a transfer of business from one employer to another if:

- (a) the employment of an employee of the old employer has terminated; and
- (b) within three months after the termination the employee becomes employed by the new employer; and
- (c) the work (the transferring work) the employee performs for the new employer is the same or substantially the same as the work the employee performed for the old employer; and
- (d) there is a connection between the old employer and the new employer.

What constitutes a connection between the old employer and the new employer is set out in detail in the Act. It includes circumstances where there has been a transfer of assets from the old employer to the new employer, or where the old employer outsources work to the new employer, or where the new employer is an associated entity of the old employer.

Section 312 provides that an enterprise agreement that has been approved by FWA, a work place determination or a named employer Award is a **transferrable instrument**. Section 313 goes on to say that if a transferrable instrument covered the old employer then the transferrable instrument will cover the new employer with respect to work done with the new employer, even where the new employer, already has at that time its own applicable industrial instrument.

Further, under section 314, if after the transfer the new employer employs a non-transferring employee and they do the kind of work done by the old employer, and the new employer does not have applicable to it at that time any other enterprise agreement or Award, then the new employee will be covered by the transferred instrument.

Fortunately, Division 3 of the Act (sections 317-320) grants the FWA powers to override these transfer provisions. Accordingly, if there is a concern on the part of an incoming owner of a business that they may be straddled unfairly with certain obligations from a transferring industrial instrument, they can approach the FWA for relief from the transferring instrument. No time frame is given for how long the transferring instrument continues to apply (this compares with a 12 months limit under Work Choices).

It is also important to be aware that on transmission of business, employee entitlements are presumed to have transferred across for each employee selected to continue working with the new employer. In most instances, the sale price will be reduced to take into account the accumulated liabilities inherited by the incoming owner with respect to employee entitlements. This is a complete reversal of the situation which previously existed.

Issues for your attention:

- If you are assessing the prospect of taking over another party's business or taking on directly the employment of labour previously provided through a labour hire company, you should look very carefully at what industrial instruments may come with transferred employees, and assess what steps may need to be taken to address that issue.
- Ensure the sale price takes into account any employee obligations inherited from the outgoing owner.

8. MATERNITY LEAVE CHANGES & FLEXIBLE WORKING ARRANGEMENTS

Parental leave entitlements are set out in the Act as part of the National Employment Standards. Accordingly, they come into effect from 1 January, 2010.

A number of aspects of parental leave have not changed. So, for example, the general rule remains the same that an employee must have completed at least 12 months service with the employer to qualify for parental leave. There are notice and evidence requirements also as per the previous legislation.

Section 70 provides that their leave remains unpaid leave at this stage (limited paid maternity leave provisions may come into effect in 2011).

There are special provisions now in circumstances where both the father and mother of the child work for the same employer (referred to in the Act as “an employee couple”). So, for example, the law allows both parents to take concurrent leave of up to three weeks and allows a mechanism whereby the employees may exchange their roles so that one of the parents takes the leave for a certain period of time and then swaps with the other parent.

There are provisions dealing with the employer’s entitlement to require the employee to take leave in the six week window before the due date in certain circumstances – there needs to be medical evidence to justify such a requirement.

The most controversial aspect to the new maternity leave provisions is the right of an employee to seek an extension of their unpaid parental leave beyond the first 12 months to another 12 months period. Section 76 provides that this request must be in writing and must be given to the employer at least four weeks before the end of the initial 12 months parental leave period. Section 76 provides that an employer must give to the employee a written response to the request no later than 21 days after the request has been made. The Act provides that “*the employer may refuse a request only on reasonable business grounds*”. In circumstances where there is a refusal, the written response must include details of the reasons for the refusal.

The Act is very clear that there is no scope for any extension beyond 24 months.

Section 81 provides that if there is proper medical evidence to support it, the employee is entitled to request a transfer to a safe job (ie, a job which does not cause undue risk with respect to the health of the mother or her child). In certain circumstances, where the employer is unable to provide safe work, the employee will be entitled to continue to receive payment of their wages without having to attend work. This is only at the end of the period of their pregnancy and is very unlikely to arise, for example, in an office environment.

The Standard still requires the employer to keep an employee’s position open

for their return after maternity leave.

Another aspect of the National Employment Standards beyond the scope of this paper is an entitlement under Section 65 that employees may request flexible working arrangements. Such a request can be made by an employee who is a parent or is responsible for the care of a child which is under school age or is under 18 and has a disability. Essentially the onus is placed on the employer to justify why the employer should not agree with an employee's request that the employee's working hours should be flexible to take into account the obligations to the dependent.

Issues for your attention:

- How will you respond to employee requests for an extension of their maternity leave beyond the first 12 months?
- How will you deal with requests for more flexible working arrangements from staff with children under school age?

9. NATIONALISED MANDATORY REDUNDANCY ENTITLEMENTS

Section 117 of the Act sets out similar provisions to previous laws with respect to mandatory minimum notice periods with respect to termination of employment, including in circumstances of redundancy. The minimum notice required is as set out in the table below.

Employee's Period of Continuous Service	Period of Notice Required
Not more than one year	1 week
More than one year but not more than three years	2 weeks
More than three years but not more than five years	3 weeks
More than five years	4 weeks

In circumstances where the employee is over 45 years of age and has completed at least two years continuous service with the employer, a further one week's notice is required.

What is new under the Act is that there is a further amount to be paid in circumstances of a redundancy. The mandatory minimum set out in section 120 of the Act is as follows:

Employee's Period of Continuous Service	Minimum Redundancy Pay Required
At least one year but less than two years	4 weeks
At least two years but less than three years	6 weeks
At least three years but less than four years	7 weeks
At least four years but less than five years	8 weeks
At least five years but less than six years	10 weeks
At least six years but less than seven years	11 weeks
At least seven years but less than eight years	13 weeks
At least eight years but less than nine years	14 weeks
At least nine years but less than ten years	16 weeks
At least 10 years	12 weeks (should be 20 weeks?)

Redundancy pay does not have to be made in circumstances where the employee's period of continuous service is less than 12 months or where the employer is a small business employer (meaning that it employs less than 15 staff at the time of the termination).

If the employee is offered a suitable job with another employer on terms and conditions substantially similar to or on an overall basis no less favourable than the employee's terms and conditions of employment with the first employer, and the new employer recognises their period of service with the first employer (which in most circumstances they must do), and the employee chooses not to accept the position, then they are not entitled to receive an amount for redundancy under the Act. In circumstances where such an offer is accepted, a redundancy payment is not required either.

Issues for your attention:

- If there is a serious prospect of having to make employees redundant in the near future, some decisions should be made well ahead of 1 January, 2010 because from that date on, such a decision may well become far more expensive for employers.
- If considering redundancies, as there is great reward in an employer seeking to find suitable alternative work for the employee, such as with an associated company, all such avenues should be carefully looked into.
- If an employer employs 15 or more staff, there may be some value in considering a staggered process of redundancy so that at least a second or third phase of redundancies are protected from the heavy payment schedule required under the Act.

10. STATE LAWS: STILL APPLY TO UNINCORPORATED ENTITIES

The federal legislation in employment law, both through the Howard Government's Work Choices legislation and the *Fair Work Act* and associated legislation of the Rudd Government, do not capture all employers and employees in Australia. The changes have been enacted relying primarily on the corporations power under the Commonwealth Constitution. This means, for example, that in New South Wales unincorporated entities, such as partnerships and sole traders are not captured by these workplace laws. Such entities continue to have their employment obligations and conditions governed by the state industrial relations laws and state Awards systems.

Several states of Australia have now ceded their industrial powers to the Commonwealth. It is only in those circumstances that unincorporated entities would be captured by the *Fair Work Act*. Therefore, important differences can arise between various states of Australia.

Some incorporated associations still operate under NSW employment laws. The critical question is whether the activity of the association is ultimately a profit-making venture (ie, "in trade and commerce"), or whether it serves a community building function. Only those incorporated associations which are profit-making ventures are subject to the *Fair Work Act*.

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