

# IMPENDING LEGISLATIVE CHANGE

The *Federal Workplace Relations Act 1996* (the WRA) will be repealed on 30 June 2009 and will from 1 July 2009 be replaced by the *Fair Work Act 2009* (the FWA).

The FWA is the industrial platform of the Rudd Labor Government and will introduce a significant range of changes to general employment regulation in Australia, including in respect to:

- Statutory minimum conditions of employment
- Agreement making with employees
- Modern awards
- The role of unions

As with the WRA, the FWA applies to employees of constitutional corporations (i.e. trading, financial and foreign corporations). It does not apply to partnerships or sole traders. Set out below are certain particular employment conditions and issues which will arise under the FWA.

## Minimum conditions of employment

### STATUTORY CONDITIONS - NATIONAL EMPLOYMENT STANDARD

The WRA currently provides that minimum conditions of employment are derived from the Australian Fair Pay and Conditions Standard, and other provisions of the WRA. From 1 January 2010 the statutory minimum conditions for all employees will be known as the National Employment Standard (NES) and will comprise:

#### MAXIMUM ORDINARY HOURS OF WORK

The maximum ordinary hours of work are 38, or an average of 38 over an averaging period. However, an employee may be required to work reasonable additional hours. What is reasonable will depend on a number of factors, including the employee's personal circumstances and the operational requirements of the business.

#### LEAVE ENTITLEMENTS

For permanent full-time employees the following forms of leave may apply with pro rata equivalents for part time employees:

- Annual leave - four weeks per year of service, accrued at the completion of each four week period of continuous service.
- Personal/Carer's leave - Ten days per year of service. Subject to evidentiary and notice requirements, personal/carer's leave may be used for personal illness/injury or to provide care or support to a member of an employee's household who requires support due to illness/injury or an unexpected emergency. Where an employee has no paid leave available, an employee is also entitled to two days unpaid carer's leave on each

occasion a need arises to care for a defined person.

- Compassionate leave - subject to evidentiary and notice requirements, an employee is entitled to two days paid leave for each occasion it is necessary to spend time with a member of the employee's immediate family or household who is suffering a personal illness/injury posing a serious threat to life, or after the death of such a person.
- Parental leave - subject to evidentiary and notice requirements, this is unpaid leave of up to 52 weeks, and includes maternity, paternity and adoption leave. There is a qualification period of one year's continuous service.
- Long Service leave will form part of the Federal minimum standards, although initially where state law has previously applied the FWA will refer back to that state law.
- Community service leave will be provided for things such as jury service, and voluntary emergency management activities such as fire fighting.

#### PUBLIC HOLIDAYS WILL BE SPECIFIED IN THE NES

This includes New Years Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Queen's Birthday, Christmas Day and Boxing Day, together with applicable State approved days.

#### NOTICE OF TERMINATION OF EMPLOYMENT AND REDUNDANCY

For full-time and part-time employees, the WRA specifies the following minimum periods of notice of termination of employment:

PERIOD OF CONTINUOUS SERVICE	NOTICE
Not more than one (1) year	At least one (1) week
More than one (1) year, but not more than three (3) years	At least two (2) weeks
More than three (3) years but not more than five (5) years	At least three (3) weeks
More than five (5) years	At least four (4) weeks

An extra week of notice will be payable where an employee is over 45 years of age and has completed at least two years of continuous service.

A minimum redundancy provision will also apply for full time and part-time employees, which provides a follows:

REDUNDANCY PAY PERIOD	
EMPLOYEE'S PERIOD OF CONTINUOUS SERVICE WITH THE EMPLOYER ON TERMINATION	REDUNDANCY PAY PERIOD
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

This scale will not apply to employers with less than 15 employees.

### FLEXIBLE WORK

Employees will be able to request flexible working arrangements for children under school age.

### INFORMATION STATEMENT

The employer will be required to provide new employees with a Fair Work Information Statement. The statement will identify various rights of employees, including the NES, modern awards, freedom of association, termination of employment and the role of Fair Work Australia.

### MODERN AWARDS

From 1 January 2010 a system of modern awards will form part of the minimum standards of employment. Modern awards will cover employees in designated industry or occupational groups. The coverage of these awards will be broad. There will

be few areas of work where a modern award will not have some application, including for employees in the clerical, call centre, retail, hospitality, transport and warehousing areas.

Modern awards may specify a range of employment conditions (e.g. minimum rates of pay, hours of work, consultation, dispute resolution, redundancy and leave). Where a modern award provides a benefit in excess of the NES, the modern award will prevail.

Modern awards will provide for an employer to agree with individual employees to vary certain terms of awards. Typically this will relate to hours of work and payment issues such as penalty rates, allowances, and start and finish times etc.

An employer and employee may agree that a modern award will not cover an employee who has been given a guarantee of annual earnings in excess of the high income threshold (initially \$100,000 p.a.). Earnings will include wages and the agreed value of non-monetary benefits. It will not include superannuation.

## Enterprise agreements

As a minimum, from 1 January 2010, an employer will need to apply the relevant statutory minimum conditions referred to above, together with the terms of any applicable modern award.

It is however, possible to negotiate a collective enterprise agreement in accordance with the legislation,

to provide for enterprise specific arrangements. Such agreements might typically provide for matters such as wage rates and their variation over a period of time, hours of work arrangements, work practice issues and procedures for resolving workplace disputes.

The statutory scheme of enterprise agreements will

change with the introduction of the FWA from 1 July 2009.

Enterprise Agreements under the FWA can be made from 1 July 2009. The FWA provides for collective agreements to be made with all employees or distinct groups of employees. Where an employee is a member of a trade union, that union will have the right to act as a bargaining agent for the negotiation of the agreement. The requirements for an agreement under the FWA are that they:

- Must be approved by Fair Work Australia
- Can be for a nominal term of up to 4 years
- Must satisfy the "no disadvantage test" (up to 31 December 2009) and thereafter the "better off overall test" - i.e. each employee is better off overall under the agreement than if the relevant modern award applied.

The requirements for making an agreement under the FWA are quite extensive.

## Contracts of employment

As indicated above, as a minimum from 1 January 2010, an employer must employ persons in compliance with the relevant minimum statutory conditions, together with any applicable modern award.

An employer may however elect to employ persons recognising the applicable minimum statutory conditions, but dealing with additional work related matters or providing enhanced provisions by means of a common law contract. Such a contract may be written or oral, although it will usually be preferable for there to be a written contract.

Common law contracts will continue to be valid

provided they do not breach any applicable minimum statutory standard or applicable modern award.

Common law contracts will also continue to be the typical means of engagement of more senior employees (e.g. managers), or employees not covered by the award system.

Common law contracts are often used to confirm employee obligations in respect to things such as confidential information, or to restrain certain classes of employees from working for competitors after the termination of employment.

## Dispute resolution

With the commencement of the FWA, the Australian Industrial Relations Commission (AIRC) will be replaced by Fair Work Australia. Fair Work Australia will have broader powers than currently available to the AIRC to resolve workplace issues. Separate

statutory processes to deal with termination of employment and industrial action will continue, and will now be serviced by Fair Work Australia. Fair Work Australia will also be responsible for the making and variation of modern awards.

## Industrial action

Industrial action is unlawful during the nominal term of an enterprise agreement made under the FWA. There are strong remedies available where this is breached. However, during the bargaining period for an enterprise agreement it is possible, subject

to certain procedural steps, for employees to take "protected industrial action", during which time they in most circumstances have immunity from legal redress.

## Termination of employment

Where the need arises to dismiss an employee it is necessary to have a valid reason for the dismissal, and that "procedural fairness" be afforded to the employee in the implementation of the decision. This means the employee will need to be advised of the reason for the dismissal prior to the termination of employment, and have an opportunity to be heard in relation to those reasons. For performance or behavioural issues, not justifying summary dismissal, there is an expectation the employee will have been previously warned of concerns about their performance and/or behaviour, and afforded time and the opportunity to address those concerns.

Employees who have been dismissed, may be able to bring claims alleging that the dismissal is either unfair and/or unlawful.

### UNFAIR DISMISSAL

The FWA enables certain classes of employee whose employment is terminated to bring an action in

respect to the termination on the ground that it is "harsh, unjust or unreasonable".

An employee will relevantly be able to bring a claim where they are covered by a Modern Award, Enterprise Agreement or where the employee earns less than \$100,000 p.a.

There are some important exclusions of classes of employees who cannot bring such claims. Such claims are not available for fixed term employees, employees in a probation period or with less than 6 months service, or casual employees employed for short periods of time (i.e. effectively less than 12 months).

There will be a separate code for small business i.e. those with less than 15 employees. This will include a qualification period of at least 12 months service to be able to bring a claim. The calculation of number of employees will, however, continue to consider overseas related entities. In determining the number

of employees, the FWA will take into account employees of relevant entities in both Australia and overseas.

An employer can be ordered to reinstate an employee with back pay, or if reinstatement is not appropriate, pay compensation of up to 6 months remuneration to the employee.

**UNLAWFUL TERMINATION**

Under the FWA, an employee may bring an action against an employer if their dismissal was for a prohibited reason, including temporary absence because of illness or injury, trade union membership or non membership, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion or political opinion. A failure by an employer to provide the minimum amount of notice (or payment

in lieu of notice) may also constitute an unlawful termination.

An employer can be ordered to reinstate the employee, pay compensation of up to 6 months remuneration and/or pay a penalty of up to \$10,000 if it is found to have unlawfully terminated an employee's employment.

**OTHER REMEDIES**

Employees who are ineligible to bring an unfair dismissal and/or unlawful termination claim will continue to be able to access certain other remedies in relation to the termination of their employment. Such actions are typically taken by more senior employees (e.g. managers), and will usually involve claims that the circumstances of their employment should justify a longer period of notice.

**Independent contractors**

Regulation in relation to the engagement of contractors essentially continues as it currently stands, including:

- Under the FWA it will continue to be an offence to engage someone as an independent contractor when the arrangement is truly one of employment.
- The Independent Contractors Act 2006 (Cth) will continue to apply to many independent contracting arrangements, and can allow for a contractor to

make claim that a contract is unfair. A key consideration in such matters is what the contractor might have earned had they been an employee working under any applicable award.

- The Industrial Relations Act 1996 (NSW) which regulates the engagement of certain types of contract carriers (owner drivers) in NSW, in many ways not dissimilar to the regulation of employment.

If you need advice in regard to the impending legislative changes, please contact us.

DUNCAN COTTERILL IS A FULL SERVICE LAW FIRM WITH SPECIALIST AREAS IN:

EMPLOYMENT

TAXATION

PROPERTY PROJECTS

TRANS-TASMAN

ENVIRONMENTAL/RM

FINANCE & BANKING

COMMERCIAL

INTELLECTUAL PROPERTY

LITIGATION & DISPUTE

RESOLUTION



**Ken Brotherson**

Partner

DDI: +61 2 8267 3810

k.brotherson@DuncanCotterill.com



**Aaron Dearden**

Partner

DDI: +61 2 8267 3805

a.dearden@DuncanCotterill.com



**Paul McKaysmith**

Solicitor

DDI: +61 2 8267 3818

p.mckaysmith@DuncanCotterill.com