

CLIENT ALERT - Employment and Industrial Relations

1 July 2009

Fair Work Laws Commence

The Fair Work Act ("FW Act") partially commences operation today, 1 July 2009, with the remaining provisions to commence on 1 January 2010. Although similar in some respects to the Workplace Relations Act 1996 ("WR Act"), the FW Act introduces a number of significant changes.

The Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 ("Transition Act") passed on 17 June 2009. The Transition Act sets out the way in which our industrial relations system will transfer from the WR Act into the new system from today. In addition, the Fair Work Regulations which operate in conjunction with the FW Act were published on 22 June 2009.

1 National Employment Standards

The National Employment Standards ("NES") are 10 minimum standards which all employees employed by a national system employer must receive. The NES will replace the Australian Fair Pay and Conditions Standard ("AFPCS") from 1 January 2010. Employers should now begin to review their existing arrangements under contracts, enterprise agreements, policies and payroll procedures to ensure they are prepared for the changes that will commence from 1 January 2010.

1.1 Maximum weekly hours

The NES provides for the same maximum weekly hours as the WR Act. Hours may be averaged in certain circumstances.

1.2 Request for flexible working arrangements

The NES allows parents of a child under school age to request a change in working arrangements to assist with the care of the child. An employer may only refuse such a request on reasonable grounds.

1.3 Parental Leave

An employee is entitled to 12 months' unpaid leave under the NES and may request an additional 12 months' unpaid leave. As with the request for flexible work arrangements an employer may refuse on reasonable business grounds.

1.4 Annual Leave

The quantum of annual leave remains the same, however the manner of accrual and definition of service has changed under the NES.

1.5 Personal/Carer's Leave

The quantum of personal leave remains the same, however the use of personal leave for carer's leave is now uncapped.

1.6 Community Service Leave

Employees will be entitled to take unpaid leave to undertake eligible community service activities. Employees on juries will be entitled to receive 10 days' paid leave at their base rate of pay, less any amount of jury service pay which they receive.

1.7 Long Service Leave

The FW Act relies on the provisions of applicable State and Territory legislation and award-derived long service leave terms. It provides that those existing entitlements form part of the NES. As all existing enterprise agreements must be judged against the NES, this means that existing enterprise agreement must be considered in the context of legislation and award-derived long service leave terms.

1.8 Public Holidays

Employees will be entitled to be absent from employment on a public holiday.

1.9 Notice of Termination and Redundancy Pay

An employer must not terminate an employee's employment unless the employer has given the employee written notice of the termination of their employment.

Employees (other than those employed by small businesses) will be entitled to receive up to 16 weeks' redundancy pay.

1.10 Fair Work Information Statement

An employer must provide each employee with the Fair Work Information Statement before, or as soon as practicable after the employee starts employment. Information Statements will be published by Fair Work Australia ("FWA") in due course.

The obligation for an employer to give an employee the Fair Work Information Statement will only apply to an employee who starts employment with the employer on or after the commencement of the FW Act.

1.11 Interaction with AFPCS and existing Agreements

As set out above, the NES will not commence until 1 January 2010. From today until the commencement of the NES, the AFPCS will continue to apply to all employees and to new enterprise agreements made under the FW Act.

From 1 January 2010 the NES will apply to new enterprise agreements and it will also apply as minimum standard for employees covered by a transitional instrument. Arrangements under transitional instruments which continue to operate under the FW Act will need to satisfy a "no detriment rule" which compares the terms of the old agreement with the NES.

1.12 Prior Service

As a general rule, an employee's service with an employer before the commencement of the new system will count as service of the employee with the employer for the purpose of determining the employee's entitlements under the NES. However, if the employee did not have an entitlement to redundancy pay prior to the commencement of the new system then prior service will not count for the purpose of calculating redundancy payments.

2 Award Modernisation

Award modernisation is currently underway and will be finalised by 31 December 2009, with all modern awards set to commence operation on 1 January 2010.

A modern award must include a number of provisions, including flexibility terms which will enable an employee and their employer to agree on an arrangement to vary the effect of the award in order to meet the genuine needs of the employee and employer.

Existing Awards such as Transitional Awards (old Federal Awards) and NAPSAs (old State Awards) will also continue to operate until such time as they have been replaced by a modern award and/or terminated by FWA.

Modern awards are likely to cover a range of employees not currently covered by awards. The FW Act provides that Modern Awards will not apply to High Income Employees, which are defined as employees with guaranteed annual earnings of \$108,300 (not including superannuation, reimbursements or any form of variable income).

3 Enterprise Agreements

3.1 Permitted matters

Enterprise Agreements may be entered into between employers and employees and/or employee organisations.

3.2 Greenfields agreements

Greenfields agreements may only be made in consultation with an employee organisation. FWA may determine which employee organisation is appropriate to bargain with the employer.

3.3 Bargaining

Employers must provide notice to employees of their representational rights and bargaining rights. An employer must not refuse to recognise or bargain with another bargaining representative to the agreement. Parties must bargain in "good faith".

The new good faith rules which apply to bargaining will commence operation from today. Enterprise agreements under the FW Act will be required to pass the "no-disadvantage test" between today and 31 December 2009, thereafter enterprise agreements will be required to pass the new "better off overall test" (BOOT test).

Employees who continue to be employed under individual arrangements such as AWAs and ITEAs after today may enter into a "conditional termination agreement" so that they can participate in the bargaining process for a new enterprise agreement under the Fair Work Act. Once the new enterprise agreement commences the old individual agreement will cease to apply.

3.4 Better Off Overall Test

An enterprise agreement (other than a greenfields agreement) must pass the BOOT. FWA must be satisfied that each award covered employee, and each prospective award covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

3.5 Flexibility terms

An enterprise agreement must include a flexibility term allowing the parties to enter into an arrangement which suits the particular workplace.

3.6 Consultation terms

An enterprise agreement must include a consultation provision which requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about major workplace changes that are likely to have a significant effect upon the employees.

3.7 Variation and Termination of Enterprise Agreements

An enterprise agreement may be jointly varied or terminated by the employer and employee/s.

3.8 Transition provisions

Existing agreements such as old State agreements, pre-reform collective and individual agreements and post-reform workplace agreements, including AWAs and ITEAs, will continue to operate under the new FW Act (referred to as “transitional instruments”). Transitional instruments will also continue to operate after their nominal expiry date until either terminated in accordance with the current rules or until replaced by a new enterprise agreement under the FW Act. Employees must, however, be paid the applicable minimum rate of pay set out in a modern award at all times.

Some agreements, such as pre-reform agreements, NAPSAAs and old IR agreements will, if still otherwise in operation, automatically cease to apply in the future due to sunset provisions set out in the Transition Act.

4 Transfer of business

Under the FW Act, transferring employees and the new employer are covered by the transferring instrument, which can include an enterprise agreement, a workplace determination, or a named employer award. There is no time limit on the application of the transferred instrument.

5 Rights and responsibilities of employees, employers and organisations

5.1 Workplace right

A person must not be prevented from exercising a workplace right by any other person.

5.2 Adverse action

An employer must not take “adverse action” against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction, industrial activities or social origin. Under the FW Act employees will be able to commence action for “adverse action” during the period of their employment as well as following the termination of their employment.

6 Remedies upon termination

The grounds for unfair and unlawful dismissal remain substantially the same. Eligible employees must lodge an unfair dismissal claim within 14 days, and 60 days for an unlawful dismissal claim.

6.1 Small Business Fair Dismissal Code

A dismissed employee of a small business will not be able to claim unfair dismissal if the employer has complied with the Small Business Fair Dismissal Code.

6.2 Genuine redundancy

FWA cannot hear claims for unfair dismissal where the dismissal occurred because of a genuine redundancy. The FW Act provides a guide to what will constitute a genuine redundancy. Employers must consider all obligations to consult and redeploy including redeployment with related bodies corporate before making employees redundant.

7 Protected Industrial Action

Protected industrial action includes employee claim action for an agreement, employee response action for an agreement, or employer response action for an agreement. Secret ballots are still required prior to employee action taking place.

8 Right of entry

8.1 Entry to investigate suspected contravention

A permit holder can enter premises to investigate suspected contravention of the Act, or a fair work instrument. The permit holder must reasonably suspect that the contravention has occurred or is occurring. Permit holders are limited to exercising certain rights while on the premises.

8.2 Entry to hold discussions

A permit holder may enter premises to hold discussions with employees.

8.3 When may rights be exercised?

Rights of entry may only be exercised during working hours, and discussions can only be held during mealtimes or other breaks. Notice of entry must be given at least 24 hours before exercising the right of entry.

9 Fair Work Australia

FWA will, broadly speaking, perform similar functions to those of the Australian Industrial Relations Commission.

10 Office of the Fair Work Ombudsman

The Office of the Fair Work Ombudsman will perform a similar role to the Workplace Ombudsman under the WR Act.

10.1 Fair Work Inspectors

Fair Work Inspectors will be appointed by the Fair Work Ombudsman. A Fair Work Inspector may issue a compliance notice if they believe that a person has contravened one or more of:

- a provision of the National Employment Standards;
- a term of a modern award;
- a term of an enterprise agreement;
- a term of a workplace determination;
- a term of a national minimum wage order;
- a term of an equal remuneration order.

11 Additional Matters

Despite the highly publicised last minute Senate amendments to the FW Act made on 20 March 2009, the number of employees that constitute a small business for the purpose of unfair dismissal laws will remain at the original 15 employees. However the 15 employee threshold will now be phased in so that:

- Until 1 January 2011 this will be calculated in terms of full-time equivalent employees;
- The number of full-time equivalent employees is to be calculated by averaging the ordinary hours worked by all employees in the business over the 4 week period immediately prior to the employee's termination, and dividing that by 38, being ordinary weekly hours;
- From 1 January 2011, the threshold will be based on a simple headcount of employees.

12 Practical Implications for Employers

The provisions of the FW Act and the Transition Act in relation to transferring transitional agreements, agreement making, the transfer of business and unfair dismissal commenced today. In that context, you should undertake the following steps now:

- Review existing employment contracts, policies and workplace agreements;
- Develop new strategies for agreement making;
- Obtain advice prior to any restructure or acquisition;
- Carefully consider new termination of employment obligations; and
- Provide training to employees regarding the changes.

The provisions of the FW Act and the Transition Act in relation to modern awards and the NES will commence on 1 January 2010. You should consider undertaking the following during the second half of 2009:

- Assess requirements of modern awards and how they will impact on your business;
- Assess requirements of National Employment Standards;
- Review and update employment contracts;
- Review and update policies; and
- Provide training to employees regarding these changes.

The Employment and Industrial Relations team at Russell Kennedy are able to provide advice in relation to all aspects of the new system including the FW Act and the Transition Act.

The Employment team will also be presenting a seminar on this topic titled – ***Moving to the Fair Work Act*** – on Wednesday 8 July. Further details, including how to register, can be found on our website www.rk.com.au

DISCLAIMER

The information contained in this alert is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on this topic, please contact Russell Kennedy's Employment and Industrial Relations team directly.