

QLS NEWSFLASH:

EMPLOYMENT LAW UPDATE SEMINAR 30 JUNE 2009

Rachel Drew, Partner
30 June 2009

macrossanslawyers

www.macrossans.com.au

T 07 3292 9777

WHEN DOES THE NEW LAW START?

The *Fair Work Act 2009* repeals the *Workplace Relations Act 1996* (with the exception of Schedules 1 and 10 which relate to registered organisations – those schedules will now be known as *Fair Work (Registered Organisations) Act 2009*). The *Fair Work Act* establishes the new system of industrial relations for "national system employers" in Australia.

The majority of the Act commences on 1 July 2009. The national employment standards, modern awards and the new minimum wage provisions will commence on 1 January 2010.

WHAT HAPPENS TO EXISTING INDUSTRIAL INSTRUMENTS?

- Existing instruments (such as awards and collective agreements) will become "transitional instruments" from 1 July 2009 and will continue in force as if the *Workplace Relations Act* had not been repealed.

A member of the **hunt&hunt** legal group

- Existing agreements (including AWAs) will continue to operate past their nominal expiry dates until they are terminated or replaced (they will not cease under the new regime).
- Existing collective agreements will prevail over the terms of modern awards. However, all employees (even those covered by transitional instruments) must receive at least the minimum rate of pay contained in a relevant modern award.
- The NES will apply as minimum standards for all employees (even those covered by transitional instruments).
- Notional Agreements Preserving State Awards (NAPSAs) (former State Awards) will expire on 1 January 2014 (unless new regulations prescribe otherwise).
- If a modern award comes into operation and covers an employee, any applicable unmodernised award or NAPSA will cease to cover that employee.
- If a collective agreement is made before 1 July 2009, it can be lodged before or after 1 July 2009 provided it is lodged within 14 days of it being made. The agreement will then be assessed against the no-disadvantage test in accordance with the existing rules under the WR Act.

WHO WILL BE AFFECTED BY THE CHANGES?

The *Fair Work Act* invokes the corporations power in its definition of "employee" in section 13 and "employer" in section 14. It defines an "employer" for the purposes of the Act as:

- A constitutional corporation, being a corporation to which section 51(xx) of the Constitution applies: that is, foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
- Commonwealth government employees; and
- Employees and corporations in the Territories.

The legislation will not apply to partnerships or sole traders, or State Government employees. The Act may apply to not-for-profit associations if they are incorporated under the *Associations Incorporation Act* and earn a substantial proportion of their income from trading activities.

If an employer was covered by the "Work Choices" changes, the employer will be covered by the *Fair Work Act*.

All Victorian employees are also covered as a result of the Victorian government referring its power to make laws in relation to industrial relations to the Commonwealth. Tasmania and South Australia have committed to doing the same. Queensland is presently considering its position. It is unlikely state government employees will ever be covered by the Federal system, but most other employees are likely to be transferred into the Federal system.

WHAT WILL BE THE PROCESS FOR RESOLVING DISPUTES?

The *Fair Work Act* creates a new statutory body, Fair Work Australia. Fair Work Australia is described as "a one-stop shop for information, advice and assistance on workplace issues". Fair Work Australia will incorporate the work currently done by seven existing agencies:

- Australian Industrial Relations Commission
- Australian Industrial Registry
- Australian Fair Pay Commission
- Australian Fair Pay Commission Secretariat
- Work Place Authority
- Work Place Ombudsman
- Work Place Building and Construction Commission

The Act maintains the distinction between Fair Work Australia and the industrial jurisdiction of the Federal Court and Federal Magistrates Court.

Fair Work Australia will come into existence on 1 July 2009, but there will be a progressive rollover of duties from the seven existing agencies into Fair Work Australia between 1 July 2009 and 31 January 2010.

For example, the Workplace Ombudsman will roll into the Fair Work Ombudsman division of Fair Work Australia immediately on 1 July 2009, while the Workplace Authority will continue to operate until 31 January 2010. Its extended operation will allow it to assess collective agreements that are made until 30 June 2009 and ITEAs (the transitional agreements) made up to 31 December 2009 (after 31 December 2009 individual statutory agreements are no longer available). The Australian Fair Pay Commission will complete one final minimum wage review before it ceases on 31 July 2009. The AIRC will continue until 31 December 2009.

FWA can:

- Make and vary awards;
- Make minimum wage orders;
- Approve agreements;

- Determine unfair dismissal claims;
- Make orders on good faith bargaining and industrial action;
- Offer mediation, conciliation, make recommendations or express opinions in relation to industrial disputes;
- Arbitrate industrial disputes, in some circumstances.

Fair Work Australia is encouraged to resolve disputes in a way which "is fair, just, quick and informal and avoids unnecessary technicalities".

The clear mandate is for FWA to be less formal than the AIRC.

The new system is to be non-legalistic. Legal practitioners will only be allowed in exceptional circumstances:

- Where to do so would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter;
- It would be unfair not to allow the person to be represented because the person is unable to represent themselves effectively; or
- It would be unfair not to allow the person to be represented taking into account fairness between the person and other parties.

It is not clear, and won't be until FWA is asked to determine issues of legal representation, how restrictive this will be in practice.

FWA will decide unfair dismissal applications but will not have power to arbitrate the outcome of an industrial dispute, apart from specific circumstances where public interest concerns warrant intervention. This represents the philosophical shift to forcing the parties to achieve a resolution by negotiation, rather than having a third party determining the outcome.

Fair Work Division – Federal Court and Federal Magistrates Court

Because FWA does not have the power to arbitrate the outcome of an industrial dispute, jurisdiction to hear most matters arising under the legislation goes to the Federal Court and Federal Magistrates Court predominantly. Fair Work divisions will be created within the Federal Court with those divisions being given extremely broad powers to resolve disputes with any order considered appropriate to remedy a breach as well as injunctions to restrain breaches.

Parties are encouraged to use FWA before taking the matter directly to Court and the Court can take into account whether a party genuinely participated in an FWA dispute resolution process when deciding whether to make a costs order.

DETAILS OF THE NATIONAL EMPLOYMENT STANDARDS

The NES and minimum safety net wages and modern awards will apply to all employees from 1 January 2010 and will prevail over any existing instrument where the new standards provide a more favourable benefit.

National Employment Standards

The NES will apply to all employees in the federal system from 1 January 2010. It comprises 10 minimum standards (new or substantially changed entitlements in bold):

1. Maximum weekly hours - 38 hours per week plus reasonable additional hours. The Act sets out 10 criteria for determining the reasonableness of the additional hours.
2. **Parental leave - Up to one year of unpaid leave for each parent, plus the right for one parent to request an additional one year of unpaid leave. Employers can refuse the request on reasonable business grounds.**

The pregnant employee has the right to request a transfer to a safe job, or be paid "no safe job" leave.

The NES also contains a "Return to work guarantee" requiring the employer to return the employee to the same position as prior to the parental leave.

3. **Flexible work for parents - A right for parents to request flexible work arrangements until their child reaches school age. Employers can refuse the request on reasonable business grounds.**
4. Annual leave - Four weeks' paid per year.
5. **Personal/carer's leave and compassionate leave - 10 days paid personal/carer's leave per year, two days' unpaid carer's leave per permissible occasion (injury or illness of immediate family or member of household) and two days' paid compassionate leave per permissible occasion (injury or illness causing serious threat to life of immediate family or member of household, or a death of immediate family or member of household).**

The employee must provide evidence of the need for the leave. The standard of evidence is that which would "satisfy a reasonable person".

6. **Community service leave - Entitlement to unpaid leave from work to participate in voluntary emergency management activities and payment for time off for jury service.**
7. Public holidays - Entitlement to base rate of pay. Employers can request staff to work on a public holiday, however, they can refuse to do so, if their refusal is reasonable.
8. Information in the workplace - Employers to provide new staff with a Fair Work Information Statement, explaining their workplace rights.
9. **Notice of termination and redundancy pay - Up to 16 weeks' pay in accordance with the 2004 Redundancy Test Case standard.**

Redundancy pay does not apply to small business employers and employees with less than 12 months service. Small business employer means an employer with less than 15 employees on a head count, including regular casuals and the dismissed employee.

10. Long service leave - Provisions in state legislation, awards and enterprise agreements continue to apply until uniform national entitlements are established.

Modern awards will be allowed to add to the NES and may also deal with an additional 10 items.

Employers will not be able to contract out of the NES.

Minimum Wage

The final minimum wage determination by the Australian Fair Pay Commission will be completed by 31 July 2009.

Minimum wages set out in modern awards will then be reviewed annually by the Minimum Wage Panel within Fair Work Australia. The Minimum Wage Panel will also set the annual national minimum wage for the benefit of all national system employees. The minimum wages in modern awards will override any lower rates in an enterprise agreement made under the Act.

HOW WILL UNFAIR DISMISSAL WORK AND HOW WILL IT BE APPLIED?

Chapter 3, Part 3 of the Act sets out the amended provisions that apply to claims for unfair dismissal. The underlying test for determining whether a dismissal is unfair is whether the employee has been given a "fair go all round".

For an employee to commence a claim:

1. The employee must have completed the minimum employment period of 12 months for a small business employer (fewer than 15 employees), and otherwise 6 months.
2. Additional jurisdictional criteria are that one or more of the following must apply:
 - a modern award covers the person; or
 - an enterprise agreement applies; or
 - the sum of the person's annual earnings does not exceed the high income threshold (expected to be \$100,000.00).

An employee will not have access to unfair dismissal if:

- The employee is employed for a specific period, or for a specified task or season;
- The employee is under a trainee arrangement with a fixed period;
- The employee has been demoted but the demotion does not involve significant reduction in remuneration or duties and the employee remains employed with the employer.

The definition of unfair dismissal is subject to four criteria.

- The person is dismissed; and
- The termination was harsh, unjust or unreasonable; and
- The dismissal was not consistent with the Small Business Fair Dismissal Code; and
- The dismissal was not a case of genuine redundancy.

The Small Business Fair Dismissal Code will only apply to small business as defined within the legislation. The content of the Code will be set by regulation.

The criteria for considering whether a dismissal was unjust or unreasonable include:

- Whether there was a valid reason for dismissal relating to person's capacity or conduct;
- Whether the person was notified of that reason;
- Whether the person was given any opportunity to respond to the reason;
- Any unreasonable refusal by the employer to allow the presence of a support person to assist in any discussions relating to the dismissal;
- If the dismissal was in relation to unsatisfactory performance, whether the person was warned prior to the dismissal.

Employees whose positions are genuinely redundant will not be entitled to make an unfair dismissal claim.

The definition of genuine redundancy is:

1. If the employer no longer requires the job to be performed because of changes in its operational requirements;
2. The employer has complied with obligations in any modern award or enterprise agreement concerning consultation of other parties; and
3. A redundancy does not occur where it would have been reasonable for the employee to be redeployed within the enterprise or an associated entity.

An associated entity is:

- An entity that is a related body corporate of the employer;
- If the employer controls the entity;
- The entity has an investment in the employer which is material to the entity and the entity has significant influence over the employer;
- The employer has an investment in the entity which is material to the employer and the employer has a significant influence over the entity;
- If a third entity controls both the employer and the entity and the operations, resources, or affairs of the employer and the entity are both material to the third entity.

The principal remedy for an unfair dismissal continues to be reinstatement. Only if reinstatement is inappropriate will compensation be awarded. Any compensation awarded can be reduced if the dismissal was because of employee misconduct and compensation cannot include any amount to compensate for distress because of the manner of dismissal. The maximum amount of compensation is 26 weeks' wages or half of the high income threshold (whichever is less).

The application for unfair dismissal is made to Fair Work Australia and must be made within 14 days after the dismissal took effect. It is possible to apply for an extension of time but there must be exceptional circumstances.

Definition of "small business employer"

Under the FW Act, a "small business employer" is defined as an employer that employs fewer than 15 employees. When calculating an employer's headcount, the following rules apply:

- all employees are to be counted (including casual employees, if employed on a regular systematic basis);
- employees of any "associated entities" of the employer are to be counted; and
- the dismissed employee and any other employees who are being dismissed are to be counted.

The definition of a small business employer was the subject of considerable parliamentary debate, with some senators suggesting that the 15-employee threshold should be increased to 20. Ultimately, the controversy was resolved following a deal being struck between the government and Family First Senator Steve Fielding, under which a slightly broader definition will be adopted for a limited time.

Under the agreement, for an 18-month transitional period, small business employers will be defined as employers with fewer than 15 "full-time equivalent" employees, rather than 15 employees in total as provided under the Act. 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 four-week period immediately prior to the employee's dismissal and dividing that by 38, being ordinary weekly hours.

However, on 1 January 2011, this transitional definition will cease to apply and the FW Act definition (which will capture fewer employers) will apply.

Importantly, this transitional provision will only apply in the unfair dismissal context. It will not apply to the NES provisions excluding small businesses from an obligation to provide redundancy pay.

Unlawful Dismissal - "General Protection Court Application"

Chapter 3 Part 3.1 deals with a new concept of workplace rights and provides within Division 8 a mechanism by which an employee can contest a termination of employment if the employee can establish that the person was dismissed for a prohibited reason. This new unlawful dismissal application is called a "General Protection Court Application" and must be made within 60 days after the dismissal took effect (or within such further period as Fair Work Australia allows).

Similar procedural rules apply to a general protection Court application but there are fewer jurisdictional criteria. Broadly speaking, applications can be brought for dismissals which have occurred because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion or political opinion.

An application will be successful if just one of the reasons for the dismissal is one of these prohibited criteria. The onus of proof is on the employer to establish that the employer did not hold that intention in making the dismissal decision. The penalty can be a fine of up to \$33,000.

HOW WILL TRANSFER OF BUSINESS BE AFFECTED?

Under the Fair Work Act a transmission of business is now referred to as a "transfer of business". Under the Act, there is a transfer of business if:

- the employment of an employee with the old employer terminates;

- the employee joins the new employer within three months of termination;
- the employee performs the same, or substantially the same, work for the new employer as for the old employer; and
- there is a connection between the old employer and the new employer.

There is a connection if:

- there has been a transfer of assets from the old to the new employer;
- the old employer outsources work to the new employer;
- the new employer ceases to outsource to the old employer; or
- the new employer is an associated entity of the old employer.

If there has been a transfer of business, the industrial instruments which covered employees of the old employer continue to cover those employees if they are offered and accept employment with the new employer.

An employer may apply to Fair Work Australia to stop or vary the effect of an award or agreement that becomes applicable as a result of a transfer of business. When deciding whether to make an order stopping the application of industrial instruments to new employers of transferring employees, the FWA must take into account:

- whether the transferable instrument would have a negative impact on the productivity of the employer's workplace;
- whether the new employer would incur significant economic disadvantage; and
- the degree of business synergy between the transferable instrument and any workplace instrument already covering the new employer.

Rachel Drew

Partner

Macrossans Lawyers

Level 23, AMP Place

10 Eagle Street

Brisbane Qld 4000

GPO Box 2763, Brisbane Qld 4001

T 07 3292 9777

E rdrew@macrossans.com.au

www.macrossans.com.au
