

Fair Work Act

The Federal Government's Fair Work Act 2009 (the Act) has now been passed by Parliament. Certain elements of the Act take effect from 1 July 2009 and the remainder of the Act takes effect from 1 January 2010. The following is a summary of the main provisions of the Act.

National Employment Standards (NES)

Ten minimum employee entitlements will apply to most employers from **1 January 2010**. Effectively, these will replace the five minimum standards that currently exist under the Australian Fair Pay and Conditions Standard. All contracts, policies and procedures will need to be reviewed to ensure compliance with these new minimums.

Modern Awards

The Act provides that Modern Awards, which the Australian Industrial Relations Commission is in the process of developing, under the award modernisation process will be subject to a full review every four years. All of the Modern Awards will contain a clause that allows an employer and an employee to enter into flexible work arrangements that effectively vary the Modern Award. In addition, Modern Awards will only cover the employment of employees earning less than \$100,000 per annum. Modern Awards will operate from **1 January 2010**.

Minimum rates of pay

Minimum rates of pay will be included in Modern Awards. This is contrary to the current position where rates of pay have been removed from Awards. A newly established body, Fair Work Australia (FWA), will review these minimum wages annually. Updated rates of pay will take effect on or before 1 July each year.

Termination of Employment – Unfair Dismissal

The Act has removed the exemption created under WorkChoices for unfair dismissal claims against employers who employ less than 100 employees. However, the new provisions require six months service from an employee before an unfair dismissal claim can be brought where the employer employs 15 or more employees and 12 months for smaller employers.

Employees will also only have 14 days to bring an unfair dismissal claim instead of the current 21 days. A Fair Dismissal Code will be introduced which sets out a checklist procedure that, if followed, will exempt small businesses from unfair dismissal claims. The new unfair dismissal laws operate from **1 July 2009**.

Creation of Fair Work Australia

FWA will replace the bodies that currently administer the Workplace Relations Act (WRA) as part of a 'one stop shop', including FWA having divisions in the Federal Court and Federal Magistrates Court. These divisions will exercise judicial power including in a new informal small claims jurisdiction for claims up to \$20 000. It will also adjudicate cases involving failures to comply with an award or NES obligation. These divisions will have the power to make "any order they consider appropriate" to remedy a breach and to issue injunctions to prevent breaches.

Collective Bargaining – Good Faith Bargaining

FWA will have the power to compel employers to bargain for industrial agreements in good faith. This means requiring parties to meet, disclose information, consider and respond to proposals and refrain from capricious conduct that undermines freedom of association or collective bargaining. FWA has no authority to require parties to make concessions or sign agreements. Fines can be imposed for a failure to bargain in good faith.

Employment Issues in an Economic Downturn

Throughout 2009 it is anticipated that many employers will be need to restructure positions, reduce contract workforces, reduce workforces, outsource functions or freeze recruitment.

What is a redundancy?

A *genuine redundancy* is about the job not the employee and is where *the job* the employee was performing *no longer exists* or is split up between other employees. There needs to be *genuine operational reasons* leading to the redundancy. An operational reason is where the business is restructured for reason of efficiency or productivity, the workforce is reduced due to a general downturn in business or loss of a contract or the business is sold or outsourced.

Can an employee who is made redundant bring an unfair dismissal claim?

Currently, under the *Workplace Relations Act 1996* an employee cannot bring an unfair dismissal claim where the termination is for *genuine operation reasons*. An employee can, however, still bring an unlawful termination claim if the redundancy selection included any discriminatory reasons. The Federal Court hears unlawful termination claims.

As an alternative to redundancies, can I reduce employee salaries or reduce hours of work?

An employer is not entitled to unilaterally change a contract of employment. This means to implement such a change an employer must have the consent of the employee before the change is made. It is common in tough economic times for employer to want to spread the burden by reducing hours of work or change duties. This may also give rise to a constructive dismissal claim if no agreement from the employee has been obtained. If an agreement has been reached a new contract of employment should be entered into to reflect the new arrangement.

As an alternative to redundancies, can I refuse to pay employee bonuses?

If an employee has a contractual right to a bonus payment, this must be paid to the employee. Some bonus plans may be based on company performance so this would be able to be taken into account when calculating the amount of the bonus. Bonus plans that are in contracts of employment cannot be unilaterally changed. Care should also be taken in relation to changing bonuses that are in a policy without prior consultation with employees.

Can I refuse to give pay increases?

As long as your remuneration meets any minimum wage requirements from the Pay Scale Summaries or the Federal Minimum Wage you do not need to provide pay increases. The exception would be where you have promised salary increases of set percentages in contracts of employment or enterprise agreements. You are not allowed to reduce an employee's salary without that employee's consent. Care should be taken to ensure that the employee is not coerced into providing consent.

Can I force employees to take accrued annual leave?

Subject to any provisions to the contrary in an Award, NAPSA or Workplace Agreement, you can direct an employee to take annual leave during a shutdown or a partial shutdown of the business in which the employee works. You can also direct an employee to take annual leave where the employee has accrued at least 8 weeks leave post 27 March 2006. You can direct the employee to take a quarter of the accrued leave.

This article has been prepared by Peta Nowacki a workplace relations lawyer and consultant. If you require any assistance with workplace relations needs, you can contact *Working Together* at peta@working-together.com.au or via www.working-together.com.au