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April 2009 Newsletter

Special Employment Edition

Changes to the terms of employment contracts, sale of business and unfair dismissal law

This newsletter deals with some of the key issues arising from the changes to Australia's national employment laws following the proclamation by the Federal Government on 7 April 2009 of its "Forward with Fairness" legislation.

As with WorkChoices, the new laws will apply to all incorporated employers in Australia and will, generally, not apply to employers who are not incorporated such as an individual sole trader or a partnership of individuals.

Timetable:

- now: all employment contracts entered into that have effect after 1 January 2010;
- 1 July 2009:
 - Fair Work Australia commences;
 - transmission of business changes commence;
 - unfair dismissal provisions commence;
- 1 January 2010: National Employment Standards and new award and enterprise agreement systems commence.

EMPLOYMENT CONTRACTS AND SALE OF BUSINESS

1. What terms will govern the employment relationship?

As before, an employer and an employee are bound by their employment contract. The contract (even if entered into before 1 January 2010) will be interpreted subject to the following:

- from 1 January 2010, subject to the National Employment Standards;
- from 1 January 2010, subject to a minimum wage set by a Minimum Wage Panel (reviewed on 1 July each year);

- from 1 January 2010, for most employees earning less than \$100,000 per annum (to be indexed), the protection of a new award;
- there will be the option for employers and employees to make collective enterprise agreements in place of the relevant new award, provided that each employee is "better off overall". There is no longer a mechanism for individual agreements replacing awards; and
- there are provisions dealing with matters such as union rights of entry, representation and industrial action.

2. National Employment Standards (NES)

From 1 January 2010, the NES replaces the Australian Fair Pay Conditions Standard. The NES deals with the following:

- maximum weekly hours of work – 38 hours plus reasonable additional hours. If an employment agreement requires more than 38 hours, it would be prudent for that agreement to indicate why additional hours may be necessary;
- employees who are the parents of a child under school age (or those having responsibility for the care of such child) will be able to ask for a change in working arrangements to assist with the care of the child. An employer will only be able to refuse the request on reasonable business grounds;
- parental leave and related entitlements;
- annual leave;
- personal/carer's leave and compassionate leave;
- community service leave;

- long service leave;
- public holidays; and
- notice of termination and redundancy pay.

3. New Award System

From 1 January 2010, the “New Awards System” is intended to provide a “fair and relevant safety net for employees”. They are required to be simple to understand, easier to apply and to reduce the regulatory burden on business. They are to be read with the NES and form an important part of the benchmark for enterprise agreements.

“Modern Awards” may deal with the following matters:

- minimum wages and classification;
- types of employment;
- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- annualised wage or salary arrangements;
- allowances;
- leave related matters;
- superannuation;
- procedures for consultation, representation and dispute settlements.

In each case, the award may only include terms about these matters to the extent that the terms provide a “fair minimum safety net”. The new awards are not expected to duplicate the NES, but will amplify the NES and (where permitted by the NES) vary the NES (e.g. cashing out some leave).

For employees not covered by an award, there will be default rules setting out how the NES will apply. For example, they will:

- define which shift workers are entitled to an extra week of annual leave;
- provide a mechanism to set ordinary hours of work, to underpin the calculation of leave accrual;
- allow averaging of working hours by written agreement over a period of 26 weeks;
- allow cashing out of annual leave by agreements, subject to protections including that the employee retains at least 4 weeks leave after the cash out;

- allow agreement about when and how annual leave may be taken;
- allow the substitution of public holidays by agreement.

The new awards are not meant to materially change current award entitlements, but as some Federal awards are more favourable to employees than State awards, there may in fact be increases in entitlements.

4. Enterprise Agreements

From 1 January 2010, the only basis for covered employees contracting out of the applicable “modern award” requirements will be an enterprise agreement. Such an agreement must be approved by “Fair Work Australia” (see below) and the agreement must pass the “better off overall test” in respect of each employee covered by the agreement.

Enterprise agreements will not allow contracting out of the NES. It is anticipated that they will allow flexibility in relation to matters such as shifts, overtime, penalty rates and allowances.

A union will be entitled to be a party to an enterprise agreement only where it was a bargaining representative and has notified “Fair Work Australia”, that it wants to be covered. Note that a union can be appointed as a bargaining agent even at the request of a single employee.

It will become compulsory for employers to engage in collective bargaining in some situations, if the majority of their employees request it. Fair Work Australia will also have the power to issue procedural orders requiring the parties in some circumstances to bargain in good faith. Those requirements include attending and participating in meetings at reasonable times, disclosing relevant information (other than commercially sensitive information), and responding to proposals in a timely manner. Good faith bargaining would also include giving due considerations to the other parties’ proposals, and refraining from capricious or unfair conduct that takes away from freedom of association or collective bargaining.

The changes significantly strengthen the power of unions compared to the regime under WorkChoices.

5. Transfer of business

Changes from 1 July 2009 extend the transfer of business requirements to cover some purchasers who previously would not have been bound by the vendor's employment arrangements. Purchasers bound by the transfer of business entitlements may also be bound by enterprise agreements and certain workplace determinations and employer awards.

On a transfer of a business, the purchaser will be bound to recognise an employee's service with the old employer when calculating certain NES entitlements. These are personal/carers leave, parental leave and the right to request flexible work arrangements.

In the case of annual leave and redundancy pay, from 1 July 2009 the purchaser has a choice whether to recognise service.

If the purchaser does not agree to recognise service, the vendor has to pay out those entitlements. In addition, a vendor's redundancy obligations can be waived on a transfer of a business if an offer of employment is made by the purchaser on substantially similar terms and conditions.

These changes will change the drafting of provisions in sale agreements dealing with employees. From the purchaser's point of view, it raises the issue as to whether the purchaser should require an adjustment to the purchase price for accrued personal/carer's leave, parental leave, and redundancy entitlements in addition to traditional adjustments for accrued entitlements such as annual leave and long service leave.

6. What to do

- It is recommended that employers should review and start using new employment agreements and familiarise themselves with the employment terms and options which will apply from 1 January 2010; and
- If negotiating a sale of business, vendors and purchasers should be cognisant of the employee entitlements that need to be taken into account.

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UNFAIR DISMISSAL

ITS BACK FOR THE MASSES

The *Fair Work Act 2009* and *Fair Work Regulations 2009* apply to unfair dismissals from **1 July 2009**. The new regime removes the current minimum threshold 100+ employees and the right to dismiss an employee for operational reasons.

An employee will not be unfairly dismissed where a genuine redundancy occurs: however, this only applies where:

- there is no replacement employment;
- it was not reasonable to redeploy the employee including within any associated entity; and
- the employer has complied with the consultative process requirements.

To be eligible to make an unfair dismissal claim, an employee must:

- be covered by a modern award or enterprise agreement; or
- earn less than the high income threshold (currently \$100,000 for full time employees - indexed annually); and
- have complied with a qualifying period of service (6 months service (small business) and otherwise 12 months service).

An application for unfair dismissal must be lodged within 14 days of any such dismissal or such other period as allowed by Fair Work Australia.

A claim cannot be made by the employee if:

- the employee is employed for a specific task or term and is dismissed on completion of that task or term;
- the employment is pursuant to a training arrangement;
- the employee is demoted but otherwise still employed by the employer.

A claim cannot be made against a 'small business' that has complied with the Small Business Fair Dismissal Code. A small business is defined as an entity having fewer than 15 full time equivalent employees (including the dismissed employee/s, casual employees and any associated entity). The number of full time equivalent employees is to be calculated on the basis of 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. This will increase after a transitional period ending on 1 January 2011 and will thereafter be based on a simple head count.

The Small Business Fair Dismissal Code allows employers to summarily dismiss an employee where the employee's conduct is sufficiently serious i.e. theft, fraud or violence. It is sufficient if the matter has been reported to police; however, the employer's report must be based on reasonable grounds and the quality of such evidence must have been assessed by the employer. Alternatively, a serious occupational health and safety breach will also be grounds for summary termination.

The parties to an employment contract will **not** be able to contract out of an employee's right to make a claim for unfair dismissal.

Dismissal will be unfair if it is 'harsh, unjust or unconscionable'. Dismissal will include both termination of employment by the employer and where the employer's conduct is such that the employee feels they have no choice but to resign from the employment (constructive dismissal). The criteria to determine whether a dismissal is unfair includes:

- whether the employer had a valid reason relating to conduct or capacity;
- whether the employee was notified of the risk of termination and any reason for proposed termination;
- whether the employee was given any opportunity to respond;
- whether there was any refusal to have a support person present during any relevant discussion;
- whether the employee was warned about unsatisfactory conduct or performance;
- the degree of absence of any human resources expertise within the employer entity; and
- any other matter.

It is not known whether the 'support person' will have a purely observatory role or will be entitled to act as an advocate for the employee.

From a procedural fairness viewpoint, it is made clearer that there is not an automatic obligation to give more than one warning.

Any claim will be administered by Fair Work Australia. There will be an informal conference convened to discuss the claim in an endeavour to assist the parties to resolve the dispute. If the claim cannot be resolved, a determination will generally take place on the documents presented. Fair Work Australia will operate on an informal basis with broad discretion to inform itself as it sees fit. The rules of evidence do **not** apply. This gives rise to risks such as mere assertions being put forward as evidence in an unattested format and significant questions about the structure of a company and its ability to be able to deploy the employee elsewhere within its organisation or an associated entity.

A hearing will only occur if there are facts in dispute or taking into account the views of the parties. Lawyers and paid agents will only be able to represent the parties if granted leave to do so by Fair Work Australia. Consent will only be granted if:

- it is more efficient;
- a person can't represent themselves;
- it is required to bring fairness between the parties.

An HR employee or in-house solicitor will be able to represent the employer without leave. A trade union official will be able to represent the employee as an unpaid agent.

The remedies available are:

- reinstatement (this is intended to be the prime remedy);
- an order for lost pay; and/or
- compensation - being up to the lesser of 50% of the high income threshold (i.e. currently \$50,000) or up to 26 weeks income prior to dismissal.

There are limited appeal rights from any decision made by Fair Work Australia.

Some employers (who are not currently subject to the unfair dismissal law) are taking steps to ensure that dismissal of employment occurs before 30 June 2009 in order to reduce the risk of potential claims. All affected employers should ensure that they are well prepared for any proposed dismissal that is to take place after 1 July 2009 and ensure that they comply with all relevant requirements. Employers should also educate their managers about the upcoming changes concerning unfair dismissal.

The Act does not take away other potential remedies for employees, including other laws relating to unlawful dismissal (e.g. on discriminatory grounds or on the grounds of union membership), misrepresentation claims, and the developing area of common law claims based on implied terms.

To enable the Fair Work Act to take effect the following will occur:

- the Fair Work Divisions of the Federal Court and Federal Magistrates Court will come into effect;

- Fair Work Australia will be established. Matters will be transferred from the Australian Industrial Relations Commission to Fair Work Australia;
- the Fair Work Ombudsman will take over from the Workplace Ombudsman. Any investigations or proceedings on foot will become the domain of the Fair Work Ombudsman. The Fair Work Ombudsman is to establish a specialist information and assistance unit for small and medium enterprises;
- transitional unfair dismissal small business provisions come into effect.

Note that some of these changes raise constitutional issues (e.g. is the proposed Fair Work Australia going to be investigator, prosecutor and judge on disputes?), and an early constitutional challenge is likely.

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