



## **FAIR WORK FUNDAMENTALS:**

**What you (and your clients) need to know about the  
Fair Work Act 2009 and related employment law**

*A presentation to the Inner West Law Society on 29 April 2010*

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## **YOUR PRESENTER**

Elizabeth Devine is the founder and Principal of Devine Law at Work, a law firm and consultancy which specialises in workplace law and workplace relations and which is in the business of *helping people work together for better results*.

Elizabeth graduated in Arts and Law from Macquarie University in 1988 and 1990 respectively. Elizabeth has been practicing law as a Solicitor for close to 20 years and has specialised in all aspects of Australian workplace law and workplace relations for 14 years. Her experience includes work in respected city law firms and a peak employer body.

Elizabeth founded Devine Law at Work in 2002 to realise an ambition to practice workplace law in a holistic manner; bringing together skills and expertise in the law, adult education, communication (including negotiation, conflict resolution and facilitation) and business development.

Elizabeth is passionate about enhancing the knowledge of others about workplace law and regularly presents to a broad range of corporations and business, professional and industry groups. A professional speaker and enthusiastic educator, Elizabeth is well known for her engaging, easily understood and approachable style.

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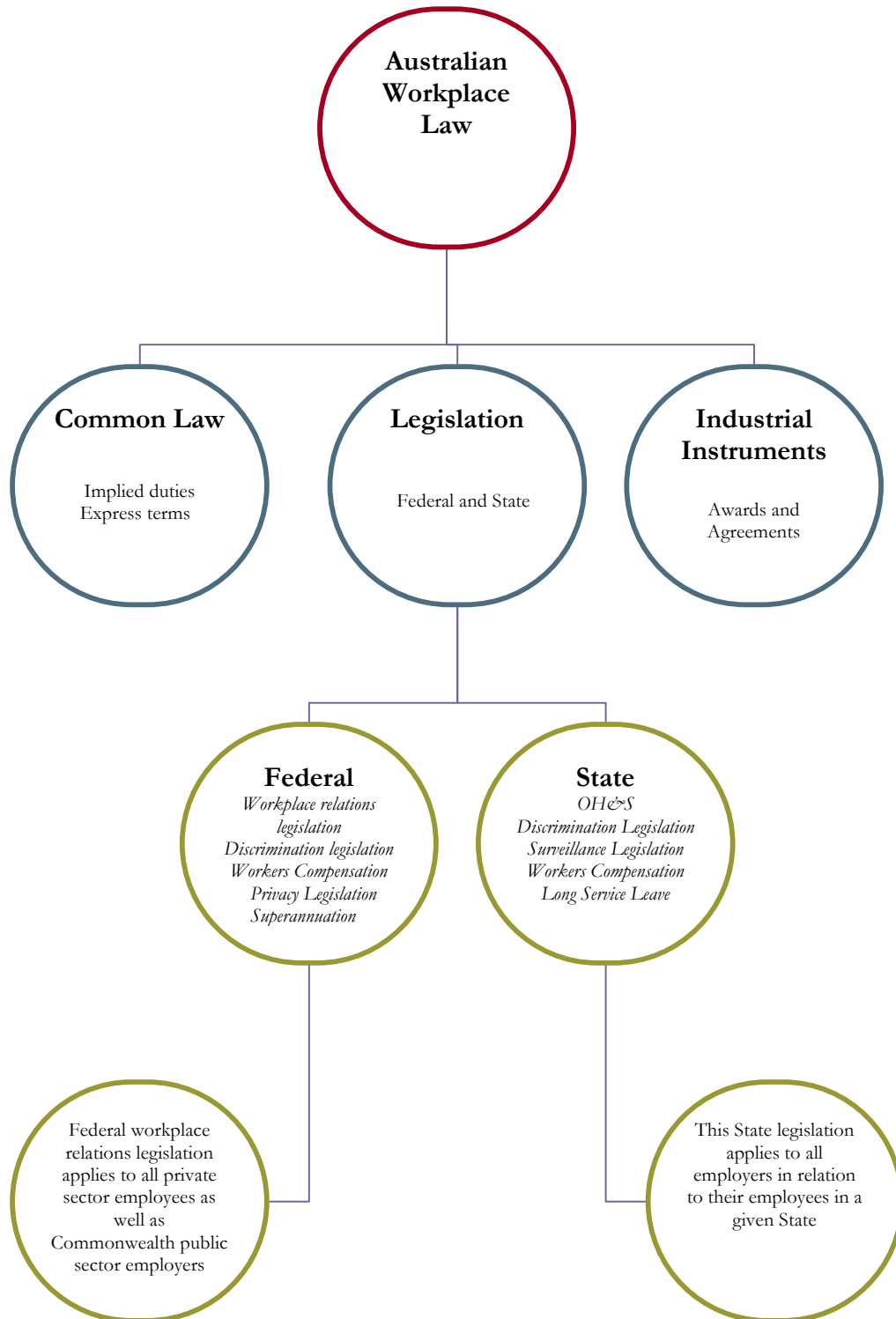


## KEY POINTS

- Workplace law is a rich mix of the common law of contract, industrial instruments (awards and enterprise agreements) and legislation.
- Awards provide a safety net of minimum terms and conditions of employment for those employees they are applicable to.
- A broad range and large number of federal *and* state legislation impact the employment relationship, including: workplace relations legislation; anti-discrimination legislation; occupational health and safety legislation; and, privacy legislation.
- Multiple systems of law apply to the Australian workplace. Employers who operate in more than one state or territory are required to be knowledgeable of and compliant with these multiple systems.
- Workplace law is ever changing, so staying up to date with it is an ongoing necessity.
- As of **1 January 2010** all private sector employers (including sole traders, partnerships and corporations) are subject to **federal** workplace regulation, most notably the *Fair Work Act 2009* and *Fair Work Regulations 2009*. Prior to this, only corporations were subject to federal workplace regulation.
- As of **1 January 2010** all private sector employees are entitled to 10 minimum terms and conditions of employment known as the National Employment Standards.
- As of **1 January 2010** a new system of Modern Awards commenced. These awards are set of 10 minimum terms and conditions of employment and apply to all employees who are included in the coverage and classification provisions of the award.
- Despite the commencement of Modern Awards and referral of industrial relations powers by the States to the Federal Parliament, State Awards will continue to apply until 31 December 2010 to employers who operate through an entity which is a sole trader or partnership. From 1 January 2011 the applicable Modern Award will apply to these employers.



## SOURCES OF AUSTRALIAN WORKPLACE LAW





## 1. INTRODUCTION

Australian employment law consists of three key components:

- the common law of contract;
- legislation; and
- industrial instruments (awards and enterprise agreements).

All three components of Australian employment law work together to form what is the employment contract between an employer and employee and each must be borne in mind not only when an employer enters into an employment contract but also in the course of the employment relationship and when that relationship is brought to an end.

Terms and conditions of employment which form the common law employment contract must comply with the minimum terms and conditions of employment sourced from legislation and industrial instruments. Whichever source of the employment contract is the most generous will override the others. For example, if common law employment contract contains a provision which is more generous than the minimum provision in legislation or an Award, the contractual provision will apply. However if a legislative provision is more generous, for example with respect to notice of termination, than an express contractual provision the legislative provision will prevail over the contractual provision.

## 2. THE IMPORTANCE OF THE EMPLOYMENT CONTRACT

At the centre of the employment relationship is the **employment contract**. This consists of the terms and conditions upon which employees perform work and upon which employers pay remuneration. The centre piece of the employment contract is what is known as the “wages/work bargain”.

The employment contract does not merely consist of a formal written document labelled as a contract or agreement. It can also consist of the content of:

- any position description;
- any advertisement;
- any information package;
- discussion at interview;
- company policies and procedures, manuals and handbooks;
- a letter of offer/appointment;
- documents created during the life of the employment contract which introduce new terms or vary original terms;
- terms included in any industrial instrument (e.g. Award or Enterprise Agreement);



- terms implied under the common law;
- rights and obligations created by legislation.

An employment contract consists of both **express terms and implied terms**. Express terms are those which are expressly stated, either orally or in written form. Implied terms are those which are implied as a consequence either of a rule of law (implication of law) or from the particular circumstances of an employment contract (implication of fact).

As with any contract, for an employment contract to be binding: both parties must **intend** to create a legal relationship; there must be an **offer** by one party and an **acceptance** by the other party; it needs to be made by parties who are **legally capable** of entering into a contract; the parties must **genuinely consent** to the terms of the contract; the terms of the contract must not be contrary to law or public interest.

### 3. WHAT TYPE OF WORKER?

There are two key types of workers in Australia: **employees** and **independent contractors**.

The distinction between an employee and an independent contractor can often be unclear. Some workers will often be called a contractor by the parties to the arrangement; however under the law the person may in fact be an employee. From a legal perspective, the process of determining whether a worker is an employee or a contractor involves weighing all of the relevant indicia.

The question of whether a particular relationship between parties to a contract is commercial or employment in nature can only be answered on a **case by case basis**. Getting to this answer is not necessarily a straightforward matter and seeking the advice of an employment law specialist is strongly recommended.

Employers ordinarily have a greater number of legal obligations towards employees than a principal contractor will have towards sub-contractors. The additional obligations of an employer include:

- subject to the terms of any applicable award, the obligation to pay overtime, penalty rates and allowances;
- the obligation to comply with the National Employment Standards (NES), a set of minimum employee entitlements, including the minimum wage, maximum ordinary hours of work and annual, personal and parental leave;
- the obligation to ensure the health, safety and welfare of its employees;
- the obligation to ensure that an employee's employment is not terminated in a way is unfair or unlawful;



- the obligation to withhold tax under the pay-as-you-go (“PAYG”) provisions of applicable tax law.

Each of these obligations is discussed in greater detail below.

Under certain legislation, however, an independent contractor may be deemed to be an employee for the purposes of that legislation. This includes workers compensation.

#### 4. WHAT TYPE OF EMPLOYEE?

There are two broad categories of employee in Australia: permanent and casual. Within the category of permanent employee, there are a further two categories: full-time (38 hours per week) and part-time (less than 38 hours per week).

There are some common entitlements of all employees. However, there are differences as well. This includes the entitlement of most casual employees to an additional loading. There are other entitlements which permanent employees have which casual employees do not have. A comparison between the entitlements of each of these categories of employees is outlined in **Attachment A\*** to this Paper.

Part-time employees receive the same entitlements as full time employees on a pro rata basis.

A common Australian hybrid workplace category is what is known as the “permanent casual”. This category is not recognised at law. Employers who engage “permanent casuals” are at risk of their employees being found at law to truly be permanent employees. The key consequence of this can be that the employer can end up paying twice, both the casual loading and other permanent employee entitlements.

All employees may be further categorised as either **award employees** or **award free employees**. Award employees are those whose employment is covered under an award. Award free employees are those whose employment is not covered under an award.

Employees may also be further categorised as being subject to an **open-ended contract** or a **fixed term** contract.

#### 5. COMMON LAW

Under the common law, the employment relationship between an employer and an employee is essentially a set of obligations. Some of these obligations are joint, some are those only of the employer and some are those only of the employee. These obligations apply throughout each stage of the employment relationship, from the seeking of the relationship through to the ending of the relationship.



The joint duties owed by an employer and employee are:

- the **wages/work bargain** – no work, no pay; and
- personal service** – the relationship is between the two parties and cannot be transferred by one to third party without the permission of the other party.

The key legal duties of the employer are to:

- to pay remuneration** (e.g. wages, salary, commission) so long as the employee has earned it by first providing service (as directed) or being ready and willing to do so;
- to provide work** if failure to do so can lead to loss of reputation or publicity;
- to provide work if failure to do so can lead to a reduction in the employee's actual or potential earnings;
- to take reasonable care to ensure the safety** of employees;
- comply with all relevant laws** (including awards).

Employers will be obliged to provide work if there is an express term in the contract to that effect. An employer will not be obliged to pay remuneration if there is an express term to that effect (e.g. not to pay if there is no work).

Employers are obliged under common law to take reasonable care to ensure the safety of employees. This duty falls into three categories: the duty to provide competent fellow employees; the duty to provide safe plant and equipment; and the duty to provide a safe system of work. As the duty is a personal one between the employer and each and every employee, the standard of "reasonable care" will vary between each employee. For example, a higher standard of care may be reasonable when the employee is very young or otherwise inexperienced. This common law duty sits alongside the statutory obligation to ensure the health, safety and welfare of employees under occupational health and safety legislation.

The employee's key legal duties are to:

- obey their employer's orders** – so long as these are reasonable and lawful;
- exercise reasonable care** and attend to the work with **skill and competence**;
- look after the employer's property** (which can include the duty to inform the employer of the apparent misuse of property by another employee);



- provide faithful service;**
- hand over inventions** – intellectual property usually resides with the employer;
- maintain confidentiality** – this obligation continues after the termination of the employment contract;
- comply with all relevant laws.**

The duty to obey an employer's directions, provided they are lawful and reasonable, is considered **fundamental to the employment contract**. Any failure by an employee to obey a lawful and reasonable direction entitles the employer to take disciplinary action and may entitle it to dismiss the employee. Using directions and warnings is one of the most effective ways of responding to performance and conduct issues, as they provide the employee with an opportunity to improve and also provide an employer with an excellent defence to legal action arising from a dismissal.

The reasonable care required of each employee will vary. The employee is obliged to ensure they have the skills and competence to perform the job required. If they do not have those skills or competence, or if they do and they fail to exercise them, then they are in breach of the contract. If the employer is aware that the prospective employee lacks the necessary skills and competence but still offers the position to them, for some other reason, then the employee's work needs to be assessed in light of the new and lower standard inferred by the making of the offer.

The duty to provide faithful service is also considered fundamental to the employment relationship. Breach of this duty by an employee will amount to breach of the employment contract and, subject to the specific facts of the case, may permit the employer to consider the employment contract to be at an end.

The duty of an employee to maintain the confidentiality of his/her employer's confidential information applies both during the employment relationship and after its termination. At common law, this duty can only be breached if it is in the public interest to disclose an employer's confidential information (i.e. whistle blowing). A good example of where this might be justified is if the employee learns that their employer is engaged in some form of criminal activity (e.g. fraud) and the disclosure is made to the proper authority (e.g. the police and not the media).

## 6. INDUSTRIAL INSTRUMENTS

The Australian industrial system has been characterised by the presence of what are known as Awards for over one hundred years. These legal documents consist of key terms and conditions of employment which apply to a certain group of employees. They are made by the relevant Industrial Relations Commission, whether State or Federal. Usual parties to an Award are employer organisations and employee organisations (unions). Awards have the same legal status as legislation and are therefore enforceable and can override the terms of a common law contract.



The employment of the majority of Australian employees is the subject of an Award.

Another form of industrial instrument, which is relatively common in Australian workplaces, is an enterprise agreement. When properly made and approved, these agreements override Awards to the extent of any inconsistency on common subject matter. You may wish to give consideration to developing such a document, either now or in due course. Please let us know if you would like advice regarding this option.

Following the introduction of the Work Choices amendments to the *Workplace Relations Act 1996* (WRA), the then key piece of legislation regulating Company employers, in March 2006, all State Awards were drawn into the Federal system of workplace regulation and became known as Notional Agreements Preserving a State Award (NAPSA). NAPSA's and Federal Awards were all replaced by a new system of Modern Awards on and from **1 January 2010**.

Please note that a copy of the Award must be displayed in the workplace or otherwise be easily accessed by the employee; for example, online.

## 7. LEGISLATION

### 7.1 Overview

Both Federal and State legislation impacts on the employment relationship. This includes:

- workplace/industrial relations legislation** – the Federal legislation, the *Fair Work Act 2009* (FWA), applies to national system employers (which as of 1 January 2010 includes sole traders and partnerships operating in NSW and other States and Territories which have referred their industrial powers as well as constitutional corporations which have been subject to Federal regulation since March 2006);
- occupational health and safety legislation** – State legislation;
- workers compensation legislation** – State legislation;
- anti-discrimination legislation** – employees are protected under both Federal and State legislation;
- long service leave (LSL) legislation** – State legislation;
- workplace surveillance legislation** – this applies to employers in NSW;
- privacy legislation** – many employers are subject to the *Privacy Act 1988* (Cth)

For the purpose of this paper, my focus will be on the *Fair Work Act 2009* (FWA).



## 7.2 Fair Work Act 2009

Prior to the commencement of the FWA on 1 July 2009, the key legislation regulating the Federal system of workplace regulation was the *Workplace Relations Act 1996*. From 1 January 2010 significant provisions of the FWA commenced, providing for National Employment Standards (NES) and Modern Awards.

Since March 2006 and until 1 January 2010 the federal system of workplace regulation only had application to constitutional corporations. In December 2009 the NSW Parliament passed legislation which had the effect of referring its industrial relations powers to the Federal Parliament. As a consequence, since 1 January 2010 all private sector employers, including sole traders, partnerships and corporations, are now regulated by the FWA.

In broad terms, the FWA makes provision for:

- minimum wages** – the current minimum wage that an employee should be paid is \$14.31 per hour/ \$543.78 per week, subject to the minimum wage in any applicable Award or Enterprise Agreement;
- other minimum terms and conditions of employment** for *all* employees, regardless of whether they are award or award free employees – including annual leave, personal leave, maximum hours of work, the right to request flexible work arrangements and notice on termination;
- specific protections for employees** – including workplace rights, protection from unfair dismissal and protection from unlawful termination;
- the making of **industrial instruments** – awards and enterprise agreements;
- the limited circumstances in which **industrial action** may be taken, either by employers, employees or unions;
- record keeping requirements** – all employers are obliged to keep records in relation to all employees;
- the rules applying to **transfer of business**;
- right of entry to workplaces by unions.

For the purposes of this Paper, further detail is provided on the following pages in relation to the NES.

***National Employment Standards***

The NES took effect on **1 January 2010**. A summary of their content appears below and on the following pages. All national system employers, including your firm, need to ensure that they are compliant with the NES in the terms and conditions of employment offered to employees.

NES	
<b>Maximum ordinary hours</b>	This NES provides that the maximum hours which an employer can require an employee to work per week are 38 plus any “reasonable additional hours” – which is defined by reference to a number of relevant factors.
<b>Right to request flexible work arrangements</b>	<p>This NES provides that an employee who has provided 12 months service (including casual employees who have been engaged on a regular and systematic basis for at least 12 months and who have a reasonable expectation of ongoing work) and who is a parent or a person with a caring responsibility for either a child who is aged under school age or a child under 18 years with a disability has the right to request a change in working arrangements to assist the employee in caring for the child. This can include a change to hours worked, patterns of work and location.</p> <p>The request must be made in writing and the employer must respond within <b>21 days</b>.</p> <p>The employer may only refuse a request on “reasonable business grounds”.</p>
<b>Notice of Termination and Redundancy Pay</b>	<p>This NES provides that a minimum amount of notice must be provided by the employer when it dismisses an employer and by the employee when s/he resigns. In the case of the employer, there is a right to make a payment in lieu of notice.</p> <p>This NES also provides that any employee whose employment is made redundant is entitled to receive a minimum amount of redundancy pay – calculated by reference to base rate of pay and length of service.</p> <p>These entitlements to minimum notice and redundancy pay do <i>not</i> apply to: employees who have provided less than 12 months service; employees employed for a specified period of time, for a specified task, or for the duration of a specified season; employees dismissed for serious misconduct; casual employees; and, employees (other than apprentices) who are the subject of a training arrangement.</p> <p>The entitlement to redundancy pay does not apply in the event of a transfer of employment from one employer to another if the employee rejects an offer of employment from the proposed new employer which is on terms substantially similar to and, on an overall basis, no less favourable than the employee’s terms of employment with the outgoing employer.</p> <p>The minimum amounts of notice and severance pay are outlined in <b>Attachment B*</b> to this Paper.</p>



<b>NES</b>	
<b>Parental Leave</b>	<p>This NES provides that an employee who has provided at least 12 months continuous service is entitled to take up to 12 months unpaid parental leave. Both members of an “employee couple” are permitted to take up to three weeks concurrent leave.</p> <p>An employee wanting to take parental leave has to provide 10 weeks written notice to his/her employer. S/he may be required by the employer to provide supporting evidence, such as a medical certificate. Under this NES the employee is no longer required to provide a statutory declaration.</p> <p>Under this NES an employee who takes parental leave is entitled to return to work in the same position as s/he held prior to taking the leave, except where that position no longer exists, in which case s/he is entitled to an equivalent position.</p> <p>This NES also provides that an employee is entitled to request a 12 month extension of unpaid parental leave, which the employer can refuse only on “reasonable business grounds”.</p>
<b>Annual Leave</b>	<p>This NES provides that a permanent employee is entitled to 4 weeks annual leave each year (5 weeks for shift workers). The entitlement accrues throughout the year and accrues from year to year.</p> <p>If a public holiday falls during a period of leave, that day is treated as a public holiday not as a day of leave. The same approach applies if the employee falls ill during the period of leave, provided the employee satisfies the notification and documentation requirements.</p> <p>A portion of the entitlement may be cashed out in accordance with either the terms of an applicable Modern Award, or an enterprise agreement or an agreement between an employer and an award/agreement free employee. The portion remaining after any cashing out is not less than 4 weeks.</p>
<b>Personal/Carer’s Leave and Compassionate Leave</b>	<p>This NES provides that each permanent employee is entitled to 10 days personal carer’s leave each year – which can be taken as either sick leave or carer’s leave. To be eligible, the employee must satisfy notification and documentation requirements.</p> <p>The entitlement accrues throughout the year and accrues from year to year.</p> <p>If a public holiday falls during a period of leave, that day is treated as a public holiday not as a day of leave.</p> <p>A portion of the entitlement may be cashed out to an extent if the employee is the subject of a Modern Award or an enterprise agreement which contains a cashing out provision. The portion remaining after any cashing out is not less than 15 days.</p> <p>Permanent employees are entitled to 2 days unpaid carer’s leave and two days compassionate leave, subject to satisfaction of eligibility requirements.</p>



<b>NES</b>	
<b>Community Services Leave</b>	This NES permits absence from work by an employee who is engaged in eligible community service (e.g. jury service, emergency management activity) for the period of time engaged in the activity, reasonable travelling time and reasonable resting time immediately after the activity. Employers are required to pay the employee his/her base rate of pay during any period of jury service for up to 10 days.
<b>Long Service Leave</b>	This NES provides that the entitlement to long service leave will continue to derive from State legislation.
<b>Public Holidays</b>	Under this NES, employers are entitled to ask any employee to work on a prescribed public holiday and the employee will be entitled to refuse that request if either the request is unreasonable or the refusal is reasonable. Contextual factors will determine whether the request/refusal is reasonable.
<b>Fair Work Information Sheet</b>	Developed by Fair Work Australia, employers are required to provide this Information Sheet to each new employee as soon as reasonably practicable after the commencement of his/her employment. A copy can be obtained from Fair Work Australia's website <a href="http://www.fwa.gov.au">www.fwa.gov.au</a>

## 8. MODERN AWARDS

### 8.1 Overview

Awards have long been a feature of the Federal system of workplace regulation. Following an extensive period of award modernisation, a new system of Federal Awards commenced on **1 January 2010**. These awards are known as Modern Awards.

Modern awards contain 10 key matters only, plus incidental and ancillary items:

1. **Minimum wages**, skill based classifications and career structures and incentive based payments, piece rates and bonuses.
2. **Type of employment**—full time, part time or casual, shift work—and the **facilitation of flexible working arrangements**, particularly for employees with family responsibilities.
3. Arrangements for **when work is performed**, including hours of work, rostering, notice periods, rest breaks and variations to working hours.
4. **Overtime rates**.
5. **Penalty rates**, including those for employees working unsocial, irregular or unpredictable hours and for employees working on weekends or public holidays and for shift workers.



6. **Annualised wage or salary** arrangements.
7. **Allowances**, including for the following:
  - expenses incurred in the course of employment;
  - responsibilities or skills that are not taken into account in rates of pay;
  - disabilities associated with the performance of particular tasks or work in particular conditions or locations.
8. **Leave, leave loadings and arrangements for taking leave.**
9. **Superannuation**; and
10. Procedures for **consultation, representation and dispute settlement.**

Modern awards work together with National Employment Standards (NES) to provide a minimum safety net of terms and conditions of employment to employees the subject of the Federal system of workplace regulation. However, while the NES will have application to all employees, Modern Awards only have application to those specifically covered by them.

Provided that an employer provides an employee with a guarantee of annual earnings (as defined in the *Fair Work Act 2009*), Modern awards do *not* apply to employees who earn more than the **high income threshold** (currently \$108,300).

## 8.2 Awards applying to the legal services industry

Despite the commencement of Modern Awards and the referral of State industrial powers to the Federal system of workplace regulation there will, until **31 December 2010**, be different awards applying to your firm depending on what type of entity it is.

- if the entity employing the staff in your firm is a **sole trader or partnership**, the State Awards referred to below will apply until 31 December 2010 and the Modern Award referred to below will *not* have effect until 1 January 2011;
- if the entity employing the staff in your firm is a **constitutional corporation**, the Modern Award referred to below took effect on 1 January 2010.

For **sole traders and partnerships**, the following State Awards (now known as State reference awards) will apply to your clerical employees and law graduates until 31 December 2010:

- Clerical and Administrative Employees in Legal Industry (State) Award*;
- Graduate-at-Law Award*.



These State reference awards can be accessed online at [www.industrialrelations.nsw.gov.au](http://www.industrialrelations.nsw.gov.au)

For **constitutional corporations**, the *Legal Services Industry Award 2010* has application to your clerical employees (including law clerks) and law graduates. This Modern Award took effect on 1 January 2010.

Modern Awards can be accessed online at [www.fairwork.gov.au](http://www.fairwork.gov.au)

If you would like a **summary** of the key provisions of any of the abovementioned awards, please email me on [elizabeth@devinelaw.com.au](mailto:elizabeth@devinelaw.com.au)

### **Transitional provisions**

Please note that, as with many Modern Awards, the *Legal Services Industry Award 2010* contains transitional provisions which mean that certain provisions do not take effect until **1 July 2010**. These are the provisions concerning:

- minimum wages** (including junior wages, employees the subject of training arrangements and employees with a disability); and
- casual and part-time loadings**; and
- Saturday, Sunday, public holiday, evening and other penalties and shift allowances**.

All other provisions in the Modern Awards took effect on **1 January 2010**.

The effect of the transitional provisions are that:

- the abovementioned provisions will not commence until 1 July 2010; and
- the commencement of increases/decreases to rates of pay will be **phased-in in five equal instalments over four years** (each 1 July until 1 July 2014);
- the monetary obligations contained in the Modern Award may be absorbed into over award payments.

The phasing-in arrangement referred to above will only apply to the difference between the minimum wage provision in each Modern Award and what is paid to the employee by your firm at any given time. From 2010 onwards, Fair Work Australia will review the minimum wage for each Modern Award each July. In the event of a higher wage or other rate being determined by Fair Work Australia each July, the difference for the purposes of ensuring compliance with the phasing-in arrangement will be between any new minimum wage/other rate determined by Fair Work Australia and what is being paid by the employer *not* the difference between the rate being paid prior to 1 January 2010 and the original rate(s) in the Modern Award.



Please note that, when amending the Modern Awards to add the transitional provisions, the Australian Industrial Relations Commission expressly stated that a reduction in take home pay is *not* intended (by either the Modern Award or the transitional arrangement) and where there is such a reduction the employee may apply to Fair Work Australia for an order to remedy the situation.

### 8.3 Steps you need to take

If you are a **sole trader or partnership** you need to, at a minimum, ensure that:

- a copy of the applicable State reference award is available to the employees in your firm which are the subject of that award;
- all employees the subject of the State reference award are classified correctly under it;
- you are familiar with the terms of the applicable State reference award and compliant with its content;
- you review your existing terms and conditions of employment having regard to the content of the State reference award and ensure they are compliant with the terms of the award – if they are not, take immediate steps to amend any terms or practices which are not compliant.

Ahead of the commencement of the application of the Modern Award on 1 January 2011, you should also take the steps referred to immediately below.

If you are a **constitutional corporation** Modern Awards on 1 January 2010 you need to, at a minimum:

- ensure that all of your employees have access to the applicable Modern Award – for example, staff be informed on the staff noticeboard of how they can access the Modern Award applicable to them online at [www.fwa.gov.au](http://www.fwa.gov.au);
- ensure that senior management familiarise themselves closely with the content of the applicable Modern Award;
- ensure that all staff the subject of a Modern Award are **classified** under each applicable Modern Award – to do this you need to first have a clear understanding of the duties of each employee;
- having classified each staff member the subject of an applicable Modern Award, then **inform each employee in writing of their classification** under the applicable Award;



- conduct a comparison of all of your current key terms and conditions of employment with the minimum terms provided for under the Modern Award to determine any point of difference and if they are compliant with the Modern Award;
- have regard to the opportunity to make the most of **award flexibility** with respect to certain key provisions in each Modern Award (e.g. when work is performed, overtime rates, penalty rates, allowances and leave loading);
- educate Payroll staff about the changes to rates of pay and when these commence;
- ensure that Payroll staff keep a close eye on wage increases each July, while closely calculating the required increase/decrease in rates to be made each July to ensure compliance with the phasing in clause.

## 9. **WOULD YOU LIKE MORE INFORMATION?**

If you have any queries or would like to discuss any aspect of employment law, please do not hesitate to get in touch with me. I also invite you to find out more about employment law and Devine Law at Work at [www.devinelaw.com.au](http://www.devinelaw.com.au)

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**ATTACHMENT A**

**Comparison of Legal Entitlements of Different Types of Workers  
under Federal Workplace Relations and Related Legislation**

<b>Entitlement</b>	<b>Employees</b> <i>Full time</i>	<b>Employees</b> <i>Part time</i>	<b>Employees</b> <i>Casual</i>	<b>Contractors</b>
Allowances, penalty rates, loadings and overtime	Yes – subject to terms of any applicable award.	Yes – subject to terms of any applicable award.	Yes – subject to terms of any applicable award.	No
Annual leave	Yes	Yes	No	No
Award provisions	Yes – subject to incidence criteria.	Yes – subject to incidence criteria.	Yes – subject to incidence criteria.	No
Carer’s leave – paid	Yes	Yes	No	No
Carer’s leave – unpaid	Yes	Yes	Yes	No
Compassionate leave	Yes	Yes	No	No
Health, safety and welfare protection	Yes	Yes	Yes	No – unless the contractor visits the workplace.
Long service leave	Yes under State Long Service Leave legislation	Yes under State Long Service Leave legislation	Yes under State Long Service Leave legislation	No
National Employment Standards	Yes	Yes	Some but not all	No
Notice upon termination	Yes	Yes	If a true casual then the employment automatically terminates at the end of the engagement.	Yes



Entitlement	Employees	Employees	Employees	Contractors
	<i>Full time</i>	<i>Part time</i>	<i>Casual</i>	
Parental leave	Yes, subject to the provision of a minimum 12 months continuous service	Yes, subject to the provision of a minimum 12 months continuous service	Yes – under the Federal system the employee must be an “eligible casual employee” (a person who has been engaged on a regular and systematic basis for a sequence of periods during a period of at least 12 months and who but for the birth/placement of a child would have a reasonable expectation of continued engagement on a regular and systematic basis)	No
Protection against discrimination	Yes	Yes	Yes	Yes
Record keeping requirements	Yes	Yes	Yes	No
Redundancy/Severance payments	Yes	Yes	Subject to the nature and length of service – severance payments usually payable when there is more than 1 year of service	No
Superannuation	Yes – provided the employee earns more than \$450 per month	Yes – provided the employee earns more than \$450 per month	Yes – provided the employee earns more than \$450 per month	No
Sick leave – paid and unpaid	Yes	Yes	No	No



<b>Entitlement</b>	<b>Employees <i>Full time</i></b>	<b>Employees <i>Part time</i></b>	<b>Employees <i>Casual</i></b>	<b>Contractors</b>
Unfair dismissal claims	Yes – subject to other eligibility criteria	Yes – subject to other eligibility criteria	Yes – subject to other eligibility criteria and only if they have worked on a regular and systematic basis for a period of 12 months or more and, but for the dismissal, they would have had a reasonable expectation of ongoing work	No
Unfair contract claims	No	No	No	Yes
Workers Compensation	Yes	Yes	Yes	Subject to deeming provisions of relevant State industrial laws

**ATTACHMENT B****Minimum notice periods – *Fair Work Act 2009***

Period of Continuous Service	Period of Notice	Additional notice if employee is over 45 years old and has completed at least 2 years continuous service
Not more than 1 year	At least 1 week	+ 1 week
More than 1 year but not more than 3 years	At least 2 weeks	+ 1 week
More than 3 years but not more than 5 years	At least 3 weeks	+ 1 week
More than 5 years	At least 4 weeks	+ 1 week

**Minimum redundancy pay\* – *Fair Work Act 2009***

*\* please note that some employees are excluded from eligibility for redundancy pay, including employees who have been employed for less than 12 months and employees of a small business employer (< 15 employees)*

Years of service	Federal award minimum
<1	0
1 < 2	4
2 < 3	6
3 < 4	7
4 < 5	8
5 < 6	10
6 < 7	11
7 < 8	13
8 < 9	14
9 < 10	16
10 years +	12