



DEVINE LAW AT WORK

## **NEGOTIATING AND DRAFTING EMPLOYMENT CONTRACTS FOR LEGAL AND CLERICAL STAFF**

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### KEY POINTS

- At the centre of the employment relationship is the employment contract.
- The employment contract consists of the common law contract, legislation and industrial instruments (awards and workplace agreements).
- The common law employment contract has many parts – oral terms, written terms (including what appears in a letter of offer or appointment and in Employment Manuals and Company Policies) and implied terms.
- Thought should be put into what is included in a common law contract and “one size fits all” approach should be avoided or at least minimised. If a term is important to either or both parties to the contract it should be included and not left to chance.
- A common law employment contract can only be made and changed in accordance with the common law of contract.
- Neither party to a common law employment contract can make unilateral changes to it.
- A common law employment contract can only be terminated in accordance with the terms of the contract and the common law.
- Employers and employees alike are the subject of duties implied into the employment contract under the common law.
- One of the key duties of employees is the duty to obey – this is the basis upon which employers can exercise the right to issue directions, provided that the direction is issued on a lawful basis, and enforce what is required of employees.
- It is important to correctly categorise workers as different legal entitlements apply to each type.
- Clerical employees and law graduates are the subject of Awards, while employed solicitors and partners are not.
- If you are a sole trader or partnership, State Awards will continue to apply to your clerical employees and law graduates until 31 December 2010. a Modern Award will then apply to those same staff from 1 January 2011.
- If you are a constitutional corporation, a Modern Award has applied to your clerical employees and law graduates since 1 January 2010.



## 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 when an employer negotiates terms and conditions of employment with a prospective or existing employee.

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 centrepiece 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.

Please note the requirement for **genuine consent**. In the workplace, this means that:

- employees can only be required to comply with any requirements that they both know about and agree to be bound by – this means that if they do not know about X requirement (e.g. a company policy) then they cannot be bound by it;
- if an employee consents to a contractual term under duress or undue influence, then that term will not be binding on them or enforceable by their employer;
- a contract will not be enforceable if a party to it has been induced to enter it under a mistake (of fact or law) or a misrepresentation;
- any variations must be agreed to – unilateral changes are not legally binding or enforceable;
- any term which breaches the law will not be enforceable, for example if a person who is truly an employee is called an independent contractor.

### 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.



These indicia include:

- how the person is paid – is the person paid for his/her time or for the results s/he produces? is the person paid by the hour or by a fixed/invoiced rate?;
- what level of control there is over the worker and whether they can delegate the services (e.g. to their own employee or to another contractor);
- whether the worker has freedom in the way s/he performs the work required;
- whether the worker is free to accept or refuse work;
- whether the worker has to work at set times, is obliged to work and works exclusively for a company;
- whether PAYG income tax is deducted on behalf of the worker and whether provision is made for paid leave;
- whether provision is made for the payment of insurances, superannuation and workers compensation coverage;
- whether the worker is required to wear a uniform;
- whether the worker is required to provide his/her own tools and equipment to provide the services required;
- whether the worker takes any commercial risks and whether s/he can make a profit or loss from the work performed;
- whether the parties intended to enter an employment contract or an independent contracting arrangement.

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, our 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>	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. The request must be made in writing and the employer must respond within <b>21 days</b> . The employer may only refuse a request on “reasonable business grounds”.
<b>Notice of Termination and Redundancy Pay</b>	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. 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. 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.



<b>NES</b>	
<i>Notice of Termination and Redundancy Pay continued</i>	<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>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>



<b>NES</b>	
<b><i>Personal/Carer's Leave and Compassionate Leave continued</i></b>	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. Permanent employees are entitled to 2 days unpaid carer's leave and two days compassionate leave, subject to satisfaction of eligibility requirements.
<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 your firm operates as 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 your firm operates as 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* – a summary of this NAPSA/Award is outlined in **Attachment C\*** to this Paper;
- Graduate-at-Law Award* - – a summary of this NAPSA/Award is outlined in **Attachment D\*** to this Paper.

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 and a summary of its key provisions is outlined in **Attachment E\*** to this Paper.

Modern Awards can be accessed online at [www.fairwork.gov.au](http://www.fairwork.gov.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. THE BASICS OF RECRUITING STAFF

### 9.1 Overview

In my experience, most workplace issues have at their source both poor communication and disappointed expectations; in particular the disappointment of expectations which have either been poorly communicated or not at all (“*it’s commonsense*” or “*it should have been obvious*”). By investing in taking the time to think through the purpose of a role and what you seek from a person performing the role, as well as ensuring that not only your expectations as an employer but also the expectations of a prospective or existing employee are clear, you can not only get better results from the employee concerned, you can also go a long way towards preventing workplace issues and minimising the risk of legal action.

### 9.2 Basic steps in recruitment

The most important step in recruitment is the work you put in prior to advertising for a role. It is critically important that you commence the recruitment process have a clear understanding of:

- the purpose of the role in relation to the business/practice;



- what is required of the person in the role in order to ensure that the purpose of the role is achieved;
- what characteristics are needed in the person performing the role.

In relation to the last of these, consideration should be given to the following matters, at a minimum:

- what kind of work will the worker be performing?
- at what level will the worker be required to perform the worker? (e.g. entry level, mid-level, senior)
- where will the worker perform the work – does s/he need to be in the workplace?;
- how will the work be performed?
- does the nature of the work require the worker to be supervised and, if so, to what extent does s/he need to be supervised?
- how often and for what length of time will the worker be required to perform the work?
- does an award or other industrial instrument apply to the work/worker?
- if an award/workplace agreement does apply:
  - what is the worker's classification?;
  - what are the entitlements of this worker under this award/agreement?
  - what restrictions on this type of employment apply, if any? (e.g. minimum number of hours, minimum number of days)
- what are the other legal entitlements of this type of worker? (e.g. under legislation)
- what workplace rules apply to this worker? (e.g. performance standards, policies and procedures)
- what will you pay the worker for his/her/its services?;
- is the worker required to provide any/all of the tools and equipment s/he will use to perform the work required?



- what else will you give the worker for his/her/its services? (i.e. in addition to payment, the entity might promise other things – for example matters contained in policies and procedures).

### 9.3 What to watch out for

Having taken the time to ensure that you are clear about the purpose of the role and what you are looking for in a prospective employee, ensure that:

- the advertisement is consistent with the requirements of the role and does not breach anti-discrimination laws (unlawful discrimination on grounds including sex, race, disability and age) or trade practices legislation (e.g. misrepresentations, misleading and deceptive conduct);
- the advertisement or job specification it refers to clearly states essential requirements, including any qualifications or licences required;
- you require the applicant to direct their application to the specific requirements of the role – this makes it easier for you to cull applicants;
- you prepare for interview by preparing questions which address the specific requirements of the role;
- the questions you ask at interview do not breach anti-discrimination law (e.g. a question addressed to a young female applicant such as “*are you planning to have children?*” or “*do you have children?*” will breach the prohibition against sex discrimination, while a more open ended question will usually not);
- you make detailed notes, either at interview or as soon as possible afterwards, about the suitability of the applicant in terms of the role in question;
- avoid the temptation to employ the ‘best of a bad lot’ if none of the applicants are suitable;
- avoid the temptation to employ a person just because they performed well at interview without checking references;
- you offer the role to the ‘best person for the job’ having regard to objective criteria;
- where an employee is required to have certain qualifications (e.g. a law degree) or licences that you make any offer of employment **conditional** upon the applicant’s production of a certified copy of those qualifications;
- you document the offer of employment in clear and comprehensive terms – further detail on this is outlined below;



- you do not engage in any misleading or deceptive conduct, as this will not only expose you to the risk of breach of trade practices law, but also mean that the misled party will be able to avoid the contract and expose you to the risk of legal action by them and an order for damages;
- you take strong action in the event that you discover that an applicant or existing employee has made misrepresentations to you – subject to the nature and impact of the misrepresentation you may have a right to consider the contract at an end.

## **10. EMPLOYMENT SYSTEMS**

As lawyers, we all know the importance of documentation in the work we perform for clients. It is important we apply this knowledge to our own employment practices and ensure we have relevant, legally compliant and, above all, clear documentation of our expectations, our work rules and the terms and conditions of employment.

At a minimum, your employment systems should include:

- standard letters of offer/appointment or formal employment contracts which are consistent through the business/practice but also capable of being adapted to reflect the particular employee;
- key policies and procedures;
- position descriptions for each role.

For the purposes of this Paper, further detail is provided below in relation to employment contracts, as well as more general information in relation to policies and procedures.

## **11. THE EMPLOYMENT CONTRACT – WHAT YOU SHOULD INCLUDE**

### **11.1 Key principles**

The following principles should be borne in mind when preparing and reviewing employment contracts:

- before you begin, ensure you are clear about what *all* of the key requirements of the role are and ensure you document these in a job description/duty statement;
- take the time to think about what you expect from an employee and make sure you document these expectations and communicate them to the prospective/existing employee and check if they agree with those expectations;
- don't leave anything to chance – document the terms and conditions of employment;



- make sure you document your expectations and the terms of the offer of employment/ variation of the employment contract in plain English and in the clearest terms possible – it is often a good idea to check with a third party as to whether they understand what is meant;
- employment contracts are most effective when they fit into the commercial framework of your firm – that is, they reflect the business need for the role;
- ensure the content of the proposed contract is compliant with legislation and any applicable industrial instruments;
- get the assistance of an employment specialist – the time it will take you to stay up to date with this ever changing area of law and the cost of not taking the time to be sure you are compliant will be far more expensive than the cost of getting an expert in;
- have a system for reviewing employment contracts to ensure they remain relevant to the business needs of the firm and reflect current law.

## 11.2 Key terms

At a minimum the following clauses should be included in an employment contract for a full-time or part-time employee:

- Position – including reference to an attached Position Description (see further discussion of these documents in section \*\* of this Paper);
- Probationary Period – it is permissible to have up to six months by way of probation, a mechanism that permits both parties to ‘get out quick’ if things do not work out;
- Commencement Date;
- Employment Status – for example, full-time, part-time or casual;
- Hours of Work;
- Reporting;
- Location – allowing yourself the option of requiring the employee to work at other locations than your office;
- Remuneration – be as detailed as possible and bear in mind award provisions which may apply;
- Tax and Superannuation;
- Leave – annual, personal (including sick and carer’s leave) and compassionate;



- Public Holidays;
- Intellectual Property
- Company Property;
- Termination – the amount of notice required in circumstances other than summary dismissal should be expressly stated;
- Reminders of key obligations under the common law – for example, the duty to follow directions, the duty to keep confidential information confidential, the duty to provide faithful service;
- Specific protections for the business – for example, non-compete clauses;
- Special Conditions.

In my experience, it is best to develop a standard document with consistent terms and conditions of employment which refer to a schedule. The schedule can be used to adapt the particular terms and conditions of employment to each individual, avoiding interference with the body of the document. Special terms and conditions of employment for a particular employee can then be added to the document when appropriate.

### 11.3 Non-compete clauses

One of the most effective ways in which you can protect your business/practice from disclosure of confidential information and solicitation of clients, suppliers and employees, is to include a non-compete clause in the employment contract of an employee provided that:

- ensure that the non-complete clause is carefully drafted, preferably by a person with extensive expertise in this area – these clauses are notoriously difficult to enforce because they are commonly very poorly drafted;
- include in the non-compete clause the **specific business interest** you are seeking to protect;
- particularise the terms of the restraint – for example, time frame and geography;
- ensure that the terms of the restraint are reasonable, having regard to the need to balance the business interest against the employee’s right to ‘ply their trade’;
- avoid at all costs ‘cascading clauses’ which provide for a range of time frames and geographical locations and will apply subject to – they are still commonly used but are usually rejected by the Courts because they are too general in their terms.



Restraints which prevent an employee from working for a competitor to the employer should be only be used with a 'high value' employee, who is in a position to disclose confidential information s/he has obtained while employed by you and solicitor clients, suppliers and employees, as opposed to adopting a blanket approach and include this type of clause in all employment contracts. When developing this type of restraint, you should follow all the tips referred to above and also include a mechanism for compensating the employee for being prevented from working for a competitor – merely saying that the consideration for the restraint is the employee's normal remuneration (as opposed to an additional payment) will usually *not* be sufficient.

Non-compete clauses will only be as effective as the work culture in which they operate reinforces the key purpose of them – namely, that employees have an ongoing duty of confidentiality to their employer as well as a duty of faithful service. Throughout all stages of the employment relationship, from recruitment through to termination, this message needs to be reinforced through:

- effective induction of new staff;
- clear provisions in relation to the duty of confidentiality in employment contracts;
- awareness raising and refresher training for existing staff;
- other reminders in the workplace – e.g. discussions as meeting and notices,
- clear policies and procedures regarding information handling;
- having systems in place which ensure that 'high value' employees are not the only repository of important business information (e.g. client information) and not the only key party to important business relationships;
- having systems in place which ensure that when an employee resigns they handover all important business information and that other key relationship contacts within the business/practice make contact with all clients;
- having a standard letter provided to all resigning employees which reminds them of their ongoing duty to keep confidential information confidential and, if applicable, their ongoing duty to not compete with you for a period of time.

## 12. POSITION DESCRIPTIONS

Position/Job Descriptions are a very useful business tool when considered and prepared with care and then kept under regular review. Key benefits include an understanding of:

- the specific **requirements of the role**, which aids recruitment (including advertisement content), performance review/management (including during the probationary period) and any disciplinary process;



- the **selection criteria** for the person who is recruited into the role (e.g. qualifications, experience, knowledge), which aids recruitment and, in the event of any demonstrated absence of the required criteria, disciplinary action;
- where the role fits within the organisation and how it interrelates and supports other roles within the organisation;
- the reporting line(s) of the role.

Accordingly, the clearer the content of the Position Description, with jargon minimised, the clearer the understanding of each of these matters will be within the business.

In broad terms, position descriptions should be developed by reference to:

- the current and future needs of the business – the role and the tasks performed by it must serve direct needs of the business;
- the purpose of the role within the business;
- the organisational structure of the business, including the matrix of job roles;
- objective standards of performance/ key results that the person must deliver;
- the accountabilities/responsibilities of the role;
- the employment contract – position descriptions form part of the overall employment contract and therefore should be consistent with and actively support the other components of the employment contract.

A Position Description should include a clear statement of:

- the **job profile** – details of the position, such as title, department, employment type, reporting line;
- the **purpose** of the role;
- selection criteria**;
- key responsibilities/accountabilities** – we recommend that all Position Descriptions include, in addition to the particular responsibilities of the role, responsibilities in respect of legal compliance, including OHS and anti-discrimination laws;
- a date for **review** and the date on which it was last reviewed – annual business planning sessions as well as annual performance reviews are an excellent opportunity to review the Position Description in relation to the changing needs of the business and with the individual employee.



Jargon, as well as overly general and vague statements, should be actively avoided in Position Descriptions

Position descriptions should operate within a holistic framework of people management and legal compliance/risk management, by ensuring that there is a consistent link through each stage of the employment relationship – from recruitment, to entering into the contract, to review during the probationary period, through to ongoing performance/conduct review during the period of permanent employment and any consequent disciplinary action, including termination of employment.

As with all employment documents, position descriptions should never be static documents. They should be reviewed on a regular basis and feedback should be sought about the role from interested parties in the business.

### 13. POLICIES AND PROCEDURES

The purpose of policies is to ensure that there is a clear understanding on the part of the employer, employees and managerial/supervisory staff of the work rules of the employer and the obligations of each of the parties under relevant law. The purpose of procedures is to ensure that a consistent and legally compliant approach is adopted by all staff, including managerial/supervisory staff. They play an integral role in the functioning of the business of an employer, from both administrative and compliance perspectives.

For many years there has been a commonly held view that employer policies and procedures do not form part of the employment. Subject to the specific terms of a given set of policies and procedures, this view is not correct: see in particular the decisions in *Riverwood International Australia Pty Ltd v McCormick* (2000) FCA 889 and *Nikolich v Goldman Sachs J B Were Services Pty Limited* [2006] FCA 784. In essence, if an employer expects an employee to be bound by its policies and procedures, the employer needs to consider itself to also be bound; with any failure to comply resulting in a breach of contract.

Accordingly, it is very important to apply care when developing policies and procedures, to ensure that not only are they compliant with relevant laws but also that your business/practice is prepared to be bound by them and

As policies and procedures will only be useful to the extent that they reflect the needs and culture of your business/practice, it is vital that you, at a minimum:

- do not merely rely on an ‘off the shelf’ document and instead develop a document that reflects your business/practice specifically;
- do not merely ‘put them away’ and hope that employees will know about them, let alone comply with them, by osmosis;
- induct all new staff into your policies and procedures;
- ensure that managerial staff understand the policies and procedures and understand their key role in ensuring compliance with them by both the employer and other employees;



- implement new policies and procedures, including variations with clear and effective communication to staff – that is, do not try to ‘slip them through’;
- keep policies and procedures under review;
- measure their effectiveness.



DEVINE LAW AT WORK

## **Attachment A – Comparison of Legal Entitlements**



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

Entitlement	Employees	Employees	Employees	Contractors
	<i>Full time</i>	<i>Part time</i>	<i>Casual</i>	
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



DEVINE LAW AT WORK

## **Attachment B – Minimum notice and severance pay under the *Fair Work Act 2009***



## NATIONAL EMPLOYMENT STANDARD

### 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



DEVINE LAW AT WORK

## **Attachment C - Summary of the Clerical and Administrative Employees in Legal Industry (State) Award**



## SUMMARY OF KEY PROVISIONS - CLERICAL AND ADMINISTRATIVE EMPLOYEES LEGAL INDUSTRY (STATE) AWARD

**Note 1:** *The content of this document is a summary of the Award only. Not all provisions in the Award are included in the summary. Further, this summary is not a substitute for a detailed understanding of the specific provisions of the Award. We **recommend** you familiarise yourself with the content of the Award and, if uncertain of how any particular provision applies to you, to seek our advice to ensure your compliance with the Award.*

**Note 2:** *the reference to 'NES' in this document is a reference to the ten National Employment Standards provided for under the Fair Work Act 2009.*

PROVISION	CLAUSE	DETAILS
<b>Terms of engagement</b>	2	An employee is to be employed as a full-time, part-time or casual employee  The employer must inform the employee of the terms of his/her employment and in particular whether s/he is full-time, part-time or a casual employee
<b>Full-time employee</b>	1	An employee employed to work an average of 38 hours per week
<b>Part-time employee</b>	1 & 4	An employee employed to work an average of less than 38 hours per week when averaged over a 4 week period  Minimum daily engagement shall be 3 hours
<b>Casual employee</b>	1	An employee who is employed and paid as such  Casual employees paid ordinary hourly rate plus a <b>casual loading of 20%</b>
<b>Classifications</b>	3	5 levels of employee
<b>Hours</b>	4	Ordinary hours of work per week are 38 hours averaged over 4 weeks.  Normal span of hours – 6am to 6pm Monday to Friday, 7.30am to 12noon Saturday  Maximum hours worked in a day – 10 hours  Starting time not to be altered without 7 days notice



<b>PROVISION</b>	<b>CLAUSE</b>	<b>DETAILS</b>
<b>Meal breaks</b>	5	No employee shall be required to work for more than 5 hours without a break Employees shall be allowed a meal break of at least 30 mins between 12noon and 2pm – although the timing of the break may be changed by mutual agreement
<b>Overtime</b>	6	For all time worked outside normal span of hours and in excess of 38 hours per week, payable at overtime rates of time and one half for the first two hours, double time thereafter  All time worked after 12 noon on a Saturday payable at double time.  All time worked on a Sunday payable at double time, within minimum of 4 hours  All time worked on a public holiday payable at the rate of double time and one half, within a minimum of 4 hours
<b>Time off in lieu of overtime</b>	6	An employee may take time off in lieu of payment for overtime
<b>Wages</b>	Part B	<b>Adults</b> Grade 1 - \$602.50/wk (\$15.85/hr) Grade 2 - \$624.90/wk (\$16.44/hr) Grade 3 - \$660.90/wk (\$17.39/hr) Grade 4 - \$705.50/wk (\$18.56/hr) Grade 5 - \$770.30/wk (\$20.27/hr)  <b>Juniors rates – see Part B for details</b>
<b>Payment frequency</b>	10	Salaries are payable on a weekly basis  Overtime payments to be made within one week of the pay day
<b>Annual leave loading</b>	12	Annual leave loading of 17.5% payable when annual leave taken
<b>Termination</b>	14	Termination by 2 weeks notice by employer or employee or shorter period by mutual agreement  Employment of an employee subject to probationary period may be terminated on 1 weeks notice  Employer obliged to provide employee with Statement of Service if employment terminated who has provided more than two months' service



<b>PROVISION</b>	<b>CLAUSE</b>	<b>DETAILS</b>
<b>Higher duties</b>	15	An employee called to perform duties of a higher level in the absence of the employee who normally performs the duties or when called upon to perform the duties on a temporary basis, will be paid at the higher level rate when asked to perform the higher duties for more than 1 day
<b>Finishing at night</b>	16	When an employee working overtime finishes at a time when the usual means of transport is not available the employer shall make satisfactory arrangements for the transport home of the employee
<b>Travelling expenses</b>	19	An employee required to go any place away from his/her usual employment in the course of his/her work will be paid all reasonable expenses actually incurred.
<b>Redundancy</b>	22	Applies only where the employer has 15 or more employees  <b>Severance pay</b> Less than 1 year – Nil 1 year and less than 2 years – 5 weeks 2 years and less than 3 years – 8.75 weeks 3 years and less than 4 years – 12.5 weeks 4 years and less than 5 years – 15 weeks 5 years and less than 6 years – 17.5 weeks 6 years and over – 20 weeks

## **Attachment D – Summary of the Graduate-at-Law (State) Award**



## SUMMARY OF KEY PROVISIONS - GRADUATE-AT-LAW (STATE) AWARD

**Note 1:** *The content of this document is a summary of the Award only. Not all provisions in the Award are included in the summary. Further, this summary is not a substitute for a detailed understanding of the specific provisions of the Award. We **recommend** you familiarise yourself with the content of the Award and, if uncertain of how any particular provision applies to you, to seek our advice to ensure your compliance with the Award.*

**Note 2:** *This is a common rule award and applies to sole traders and partnerships within New South Wales until 31 December 2010*

PROVISION	CLAUSE	DETAILS
<b>Terms of engagement</b>	4	All graduates-at-law must be employed as weekly (38 hours) or part-time employees  The employer may employ a graduate-at-law for a specified period  The employer must inform each employee as to the terms of engagement, in particular whether s/he is a weekly or part time employee
<b>Ordinary hours</b>	5	Ordinary hours shall be an average of 38 per week, Monday to Friday, by arrangement between the employer or employee
<b>Study Leave</b>	6	An employee shall be entitled to a maximum of 3 hours study leave per week without loss of pay for the purpose of attending continuing practical training, with part-time employees entitled to a proportionate amount of this leave.
<b>Minimum wage</b>	Part B	\$30,418.90 per annum (full time rate) \$15.39 per hour



DEVINE LAW AT WORK

## **Attachment E – Summary of Legal Services Industry Award 2010**



## SUMMARY OF KEY PROVISIONS – LEGAL SERVICES INDUSTRY AWARD 2010

**Note 1:** *The content of this document is a summary of the Award only. Not all provisions in the Award are included in the summary. Further, this summary is not a substitute for a detailed understanding of the specific provisions of the Award. We **recommend** you familiarise yourself with the content of the Award and, if uncertain of how any particular provision applies to you, to seek our advice to ensure your compliance with the Award.*

**Note 2:** *the reference to 'NES' in this document is a reference to the ten National Employment Standards provided for under the Fair Work Act 2009.*

PROVISION	CLAUSE	DETAIL
<b>Coverage</b>	<b>4</b>	<p>This award covers employers throughout Australia in the legal services industry and their employees in the classifications in clause 14 (clerical and administrative employees, law clerks and law graduates).</p> <p>The legal services industry is defined as employers engaged in the business of providing legal and legal support services.</p> <p>The Award does <i>not</i> cover community legal centres, aboriginal legal services or an employer whose primary activity is not within the legal services industry.</p> <p>The award does not cover a person excluded from award coverage under the <i>Fair Work Act 2009</i>.</p>
<b>Employment status</b>	<b>10</b>	<p>Employees must be employed as either full-time, part-time or casual.</p>
<b>Full-time employee</b>	<b>10.3</b>	<p>Full-time hours are 38 per week</p>
<b>Part-time employees</b>	<b>10.4</b>	<p>A part-time employee is an employee who is engaged to perform less than 38 hours per week on a reasonably predictable basis.</p> <p>Part-time employees are paid an hourly rate which is 1/38<sup>th</sup> of the full-time weekly rate of pay.</p> <p>Part-time employees are entitled on a pro-rata basis to equivalent pay and conditions to full-time employees.</p>



PROVISION	CLAUSE	DETAIL
Casual employees	10.5	<p>A casual employee is an employee engaged and paid as such.</p> <p>Casual employees are paid an hourly rate which is 1/38<sup>th</sup> of the full-time weekly rate of pay <b>plus a loading of 25%</b>. The loading is paid instead of entitlements to leave and other matters from which casuals are excluded by the Award and NES.</p>
Classifications	Schedule 2	<p><b>Legal Clerical and Administrative Employees</b> – Levels 1 to 5. These are employees who are “in the clerical and administrative stream” in the legal services industry.</p> <p><b>Law Clerk</b> means a clerk engaged for the major part of their time in interviewing clients, preparing documents and general work assisting a barrister or solicitor in their practice, but not including account clerks, law graduates, titles office clerks, receptionists and employees principally engaged in word processing, computer use, filing, machine operation, switchboard, delivery of documents or duties of a routine nature.</p> <p><b>Law Graduate</b> means a lawyer not admitted to practice but who is undertaking a period of training within a law firm with the view to being admitted to practice.</p>
Normal span of hours	24.1(d)	<p>7am to 6.30pm Monday to Friday</p> <p>This span of ordinary hours may be altered by up to 1 hour at either end by agreement with the employee</p>
Hours of work	24.1(1) 26	<p>Ordinary hours for day workers are to be an average of 38 per week but not exceeding 152 hours in 28 days</p> <p>Ordinary hours may be worked on any day or all of the days of the week, Monday to Friday</p> <p>By agreement between an employer and the majority of employees concerned, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period exceeding 28 days provided it does not exceed 12 months</p>



PROVISION	CLAUSE	DETAIL
Make up time	29.1	An employee may elect, with the employer's consent, to take time off work during ordinary time and work those hours at a later time during the spread of ordinary hours.
Rosters	32	Where they apply, rosters are to be set for a fortnightly period
Wages – adults (21 yrs +)	14	<p>Level 1 Legal clerical &amp; admin - \$610/wk (\$16.05/hr)            Level 2 Legal clerical &amp; admin - \$637.60/wk(\$16.77/hr)            Level 3 Legal clerical &amp; admin - \$675/wk (\$17.76/hr)            Level 4 Legal clerical &amp; admin - \$710/wk (\$18.68/hr)            Level 5 Legal clerical &amp; admin - \$740/wk (\$19.47/hr)</p> <p>Law graduate - \$740/wk (\$19.47/hr)</p> <p>Law clerk - \$786/wk (\$20.68)</p>
Wages - juniors	15	<p>Junior employees are paid the following percentage of the appropriate adult wage rate:</p> <p>Under 16 years of age 45%            16 years of age 50%            17 years of age 60%            18 years of age 70%            19 years of age 80%            20 years of age 90%</p>
Annualised salaries	30	<p>The employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the Award:</p> <ul style="list-style-type: none"> <li>- minimum wages</li> <li>- allowances</li> <li>- penalty rates and overtime</li> <li>- annual leave loading</li> </ul> <p>The employer must <b>advise the employer in writing</b> that an annual salary is payable and which of the provisions of the award is satisfied by payment of the annual salary.</p> <p>The annualised salary must not be less than the amount the employee would have received under the Award.</p>
Higher duties	16	An employee asked to perform any duties set out in Levels 2 to 5 of Schedule B classifications either on a temporary basis or in the absence of a person who normally performs the duties and where the duration of the duties is more than 1 day, must be paid at the applicable rate for the duties as if they were performed on a permanent basis.



<b>PROVISION</b>	<b>CLAUSE</b>	<b>DETAIL</b>
<b>Payment frequency</b>	<b>22</b>	<p>Wages must be paid fortnightly unless the employer and employee agree otherwise.</p> <p>Payment to be made by cash, cheque or EFT</p>
<b>Shiftwork</b>	<b>31</b>	See clause 31 for details
<b>Breaks</b>	<b>33</b>	<p>All employees are entitled to a <b>meal break</b> of between 30 to 60 minutes. The meal break must be taken after 5 hours is worked. It is unpaid.</p> <p>An employee directed by an employer to work and not take a meal break after 5 hours must be paid at the rate of time and one half for the meal break and be permitted to have the break as soon as possible.</p> <p>All employees are entitled to two rest breaks during the day, with the first during the first period of work prior to the meal break and the second during the second period of work following the meal break and prior to ceasing work. Rest breaks are treated as time worked and are paid.</p>
<b>Overtime</b>	<b>34.1</b>	<p>Overtime is payable for all time worked outside ordinary hours on a day or in excess of 38 hours per week.</p> <p>Overtime is paid at a rate of time and one half for the first three hours and double time thereafter. For continuous shiftworkers the rate is double time at all times.</p> <p>Employees who work overtime also have an entitlement to a rest break – see sub-clause 34.4 for details.</p>
<b>Penalty rates</b>	<b>34.2</b>	An employee required to work overtime on a Saturday after 12noon and on a Sunday must be paid at double time for a minimum of three hours.
<b>Call back</b>	<b>34.7</b>	An employee called back to work is to be paid at a minimum of 4 hours work at a rate of time and one half for the first three hours and double time thereafter.
<b>Standing by</b>	<b>34.8</b>	Where an employee is regularly required to hold themselves in readiness to work after ordinary hours, the employee is to be paid standing by time and their ordinary hourly rate for the time they are standing by.



PROVISION	CLAUSE	DETAIL
<b>Allowances</b>	<b>19</b>	Meal allowance Uniform allowance Vehicle allowance Transport of employees Living away from home allowance Protective clothing Adjustment of expense related allowance
<b>Public holidays</b>	<b>34.3</b>	An employee required to work on a public holiday must be paid double time and one half with a minimum payment of three hours.
<b>Annual leave</b>	<b>35</b>	Entitlement as per NES  <b>Paid leave in advance</b> An employer may allow an employee to take leave in advance either wholly or partly before the leave has accrued. Where this happens and the employee either leaves or is dismissed before completing the required period of service, the employer is entitled to deduct the amount of leave still owing from the remuneration payable to the employee on termination of employment.
<b>Annual leave loading</b>	<b>35.3</b>	During a period of leave, the employee is entitled to receive a loading calculated on the wage rate prescribed in clause 14.  The loading for a day worker is 17.5%.  The loading for a shift worker is 17.5% or the relevant shift loading, whichever is the greater <i>but not both</i> .
<b>Personal leave and compassionate leave</b>	<b>36</b>	As per NES
<b>Special conditions of employment – Law Graduate</b>	<b>39</b>	A law graduate is entitled to leave of absence without pay: - for study and attendance at examinations, not exceeding four days in respect of each subject for which they present themselves for examination which is necessary to enable the employee to qualify for admission; - to attend lectures and organised classes at a university or other course of instruction which is required to enable the employee to qualify for admission.



<b>PROVISION</b>	<b>CLAUSE</b>	<b>DETAIL</b>
<b>Termination</b>	<b>14</b>	<p>Minimum notice as per NES.</p> <p>Where an employer has given notice of termination to an employee, the employee must be allowed up to 1 day's leave without loss of pay to seek other employment. Time off to be taken at times convenient to the employee after consultation with the employer.</p>
<b>Redundancy</b>	<b>12</b>	<p>Redundancy pay as per NES*.</p> <p>Where an employee is transferred to lower paid duties by reason of redundancy the same period of notice must be given as the employee would have been entitled to if the employment had been terminated.</p> <p>An employee who is given notice of termination due to redundancy:</p> <ul style="list-style-type: none"><li><input type="checkbox"/> may leave his/her employment during the period of notice and remains entitled to receive wages and other entitlements (including redundancy pay) calculated to the date s/he leaves, but is not entitled to be paid for the balance of the notice period;</li><li><input type="checkbox"/> is entitled to up to one day's time off without loss of pay for each week of the notice period for the purpose of seeing other employment – if the employee takes more than one day during the notice period the employer may require him/her to provide proof of attendance at an interview or s/he will not be entitled to payment for the absence (a statutory declaration is sufficient);</li></ul> <p>*If a redundant employee was employed by the employer as at 31/12/2009 and was the subject of a Notional Agreement Preserving a State Award (NAPSA) at that time which is <i>more</i> generous than the amount of redundancy pay required under the NES, the NAPSA will apply (with respect to redundancy pay only) until 31/12/2014.</p>



<b>PROVISION</b>	<b>CLAUSE</b>	<b>DETAIL</b>
<b>Award flexibility</b>	7	<p>An employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:</p> <ul style="list-style-type: none"><li>(a) arrangements for when work is performed;</li><li>(b) overtime rates;</li><li>(c) penalty rates;</li><li>(d) allowances; and</li><li>(e) leave loading.</li></ul> <p>The employer and employee must have genuinely made the agreement without coercion or duress.</p> <p>The agreement may be terminated with four weeks notice or otherwise by agreement.</p> <p>Procedural requirements must be satisfied for the agreement to be valid and enforceable– see sub-clauses 7.3 to 7.8 for details.</p>
<b>Consultation and Dispute Resolution</b>	8 & 9	<p>Employer must consult if there is to be major workplace change.</p> <p>The parties must follow the dispute resolution process outlined in the event of any dispute between them.</p>