



# Law at Work Alert

Devine Law at Work

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## NEW FEDERAL WORKPLACE RELATIONS SYSTEM OFF AND RUNNING — WHAT IT MEANS FOR YOUR BUSINESS

The majority of the *Fair Work Act 2009* (FWA) commenced on 1 July 2009, replacing the *Workplace Relations Act 1996*. The FWA now regulates the workplace relations of Australian companies and their employees. The effect of the commencement of the FWA is that many key aspects of federal workplace regulation are in a state of transition, in some cases only until the end of the year and in other cases for several years.



A **snapshot** of the status of key workplace matters is outlined in this issue of the *Law at Work Alert*

### Current Awards

On 1 July 2009, Federal Awards applying to Companies will become **award based transitional instruments** and will continue to apply until they are replaced by a Modern Award. Modern Awards are set to take effect on 1 January 2010 and are discussed in more detail on the following pages. ***continued page 2***

## UNFAIR DISMISSAL: REMUNERATION THRESHOLD INCREASES



The remuneration threshold for non-award employees who *may* be eligible to make unfair dismissal claims has increased to **\$108,400**. This threshold applies to unfair dismissal claims brought under either federal or state legislation and only to those employees who are dismissed on or after **1 July 2009**.

Employers should note that this remuneration eligibility threshold does *not* have application to any person who was employed under an industrial instrument (whether an award or workplace agreement) at the time of the dismissal. In practice however there will be very few people employed under an industrial instrument who earn more than the threshold. Further, employers should note that there are multiple exclusions under both federal and state industrial legislation. Therefore the mere fact that an employee's remuneration is less than the threshold does not mean that s/he will be eligible to make an unfair dismissal application.



## New Federal Workplace Relations System Off and Running—What it means for your business

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### Notional Agreements Preserving a State Award

Following the Work Choices amendments to the WRA which took effect on 27 March 2006, all State Awards which applied to the employment of Company employees were drawn into the Federal workplace relations and assumed the status of a Notional Agreement Preserving a State Award (NAPSA).

On 1 July 2009, all NAPSA's become **award based transitional instruments** and will continue to apply until replaced by a Modern Award or until 1 January 2014, whichever occurs first.

### Modern Awards

Following legislative changes which took effect in March 2008, the Australian Industrial Relations Commission (AIRC) instituted an award modernisation process, resulting in the review of all Federal Awards and NAPSA's. This modernisation process is being conducted in four stages and must be completed by 31 December 2009. To date the AIRC has issued a number of Modern Awards and these can be accessed online at [www.airc.gov.au](http://www.airc.gov.au)

Modern awards will:

- take effect on **1 January 2010** and will include only 10 key items, making them much simpler than traditional awards;
- *not* apply to employees who earn more than \$100,000 (indexed);
- be reviewed every 4 years, with limited opportunity to propose and make changes during this period.

### Current Workplace Agreements

On 1 July 2009, collective and individual workplace agreements applying to Companies which were made and approved prior to 1 July 2009 will become **agreement based transitional agreements** and will continue to have effect until they are terminated and/or replaced. They will prevail over Modern Awards and the National Employment Standards to the extent of any inconsistency.

### Future Workplace Agreements

Since March 2008 it has been possible for Companies to enter into an Individual Transitional Enterprise Agreement (ITEA). These can continue to be made during the

bridging period from 1 July 2009 to 31 December 2009; however they must expire on **31 December 2009**.

The FWA has new arrangements with respect to enterprise agreements made from 1 July 2009 onwards.. The key changes to enterprise agreements introduced by the FWA apply to content and the approval process, as well as a new requirement for bargaining representatives to meet good faith bargaining requirements.

Under the FWA the following **permitted matters** may be included in any enterprise agreement a Company chooses to make with its employees or a union after 1 July 2009:

- matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;
- matters pertaining to the relationship between the employer or employers and the employee organisation or organisations that will be covered by the agreement;
- deductions from wages for *any* purpose authorised by an employee who will be covered by the agreement;
- how the agreement will operate.

Under the FWA the **approval process** will be conducted by the Workplace Authority. In order to be approved, the Workplace Authority must be satisfied that:

- if the agreement is not a Greenfields agreement, that the agreement has genuinely been agreed to by the employees covered by it;
- if the agreement is a multiple-enterprise agreement, that the agreement has genuinely been agreed to by the employees covered by it and that no person coerced or threatened to coerce any of the employers to make the agreement;
- the terms of the agreement do not exclude a NES; and



- the agreement passes the **better off overall test** – this test replaced the current no-disadvantage test on 1 January 2010 and means that the Workplace Authority must be satisfied, at the test time, that each award employee would be better off overall if the agreement applied to the employee than if the relevant modern award applied;
- the employees covered by the agreement were fairly chosen;
- the agreement does not include any **unlawful terms**;
- the agreement does not include any designated out worker terms;
- the agreement specifies a date as a **nominal expiry date** and this date is not more than four years after the day on which the agreement is approved;
- the agreement contains a **dispute resolution procedure** that allows the Workplace Authority or another party independent of the employers, employees and employee associations, to settle disputes about any matters arising under the agreement, and in relation to National Employment Standards and that allows for representation of employees covered by the agreement for the purposes of that procedure;
- approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives.
- arising under the agreement, and in relation to National Employment Standards and that allows for representation of employees covered by the agreement for the purposes of that procedure;
- approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives.

The FWA has introduced a requirement for all bargaining representatives to meet the following **good faith bargaining** requirements:

- attending and participating in meetings at reasonable times;
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;



- responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- giving genuine consideration to the proposals of other bargaining representatives for the agreement and giving reasons for the bargaining representatives responses to those proposals;
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
- recognising and bargaining with the other bargaining representatives for the agreement.

A bargaining representative can seek the assistance of the Fair Work Authority to facilitate in the process of negotiating a proposed enterprise agreement.

### Unfair Dismissal

In March 2006, unfair dismissal laws which had applied to all employees (under either Federal or State legislation) were changed. However, as the major consequence of these changes was to limit the eligibility of claimants to people employed by employers of 100 or more employees (among others), these changes did not impact directly on larger Companies.

On 1 July 2009, with the commencement of the FWA, unfair dismissal laws changed again. These changes will impact on Companies in the following ways:

- claims will have to be lodged by applicants within **14 days** of the dismissal (previously 21 days) or within such further period as the Fair Work Authority allows (having regard to matters including the reason for the delay, when the person first became aware of the dismissal, any action taken by the person to dispute the dismissal, the merits of the application and fairness between the person and other persons in similar circumstances);



- claims will be made to a new entity, Fair Work Australia;
- claims will essentially be determined 'on the papers', however there will be scope for informal conferences;
- legal representation will only be permitted in exceptional circumstances, although legal representatives internal to Companies would be permitted as a Company representative;
- decisions made by the Fair Work Authority will usually not involve a public hearing; however such a hearing may be required where the case involves "particularly complex issues" and in such circumstances legal representation may be permitted.

Under the FWA a dismissal of a Company employee will be held to be unfair if the Fair Work Authority is satisfied that: the person has been dismissed; and, the dismissal was harsh, unjust or unreasonable; and, the dismissal was *not* a case of **genuine redundancy**.

Under the *Workplace Relations Act 1996* (WRA) a termination of employment (also known as a dismissal) has been defined as "termination of employment at the initiative of the employer". This definition has been retained under the FWA, however an additional provision defines what is *not* a dismissal to include where a person is **demoted** and the demotion: does not involve a significant reduction in his/her remuneration or duties; and he/she remains employed by the employer who effected the demotion.

The FWA introduces a definition of what is a "genuine redundancy". Previously this was not defined. Instead, dismissal on the ground of "genuine operational requirements" was one of the exemptions to the unfair dismissal laws. The dismissal of a Company employee will be a case of genuine redundancy if:

- the Company no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- the Company has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

Key aspects of the unfair dismissal provisions in the WRA will remain *unchanged* under the FWA:

- reinstatement will remain the primary remedy;
- the maximum compensation which can be awarded will remain six months pay – the information produced by the Federal Government to date stresses that compensation will normally "be well beneath the cap";
- an employee dismissed for operational reasons (i.e. genuine redundancy) will remain ineligible to make an unfair dismissal claim;
- eligibility to make an unfair dismissal claim will remain subject to an income threshold (currently \$108,300 and indexed each 1 July).

### Transfer of Business and Transfer of Employment

The commencement of the FWA will have particular impact in respect of transfer of business. Under the FWA there will be a transfer of business from an employer (old employer) to another employer (new employer) *if* the following requirements are satisfied:

- the employment of an employee of the old employer has been terminated;
- within **three months** (previously two months under the WRA) after the termination, the employee becomes employed by the new employer;
- the work (transferring work) the employer performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
- there is a **connection** between the old employer and the new employer - this includes situations in which: the new employer/associated entity has the beneficial use of all of the assets that the old employer/associated entity had use of in relation to the transferring work; the transferring work has been outsourced by the old employer to the new employer/associated entity; and, when the new and old employers are associated entities;

If there is a transfer of business, certain industrial instruments will transfer across to the new employment and will **continue to have effect in relation to the transferring work** (including both transferring and new



employees performing that work) on a **permanent basis** unless and until an order to the contrary is sought from and issued by the Workplace Authority. Previously, transferring instruments had effect for only 12 months.

Further, under the FWA, whether or not there is an actual transfer of business there can be a **transfer of employment**. This will apply where either: the employee becomes employed by the second employer not more than three months of the termination of his/her employment by the first employer and the first and second employers are associated entities when the employee becomes employed by the second employer; or, where the employee is a transferring employee and the first and second employers are not associated entities when the employee becomes employed by the second employer.

The effect of a transfer of employment will be that **any period of service with the old employer will count as service with the new employer**:

- where the new and old employers are associated entities, the new employer will be required to recognise the prior service of the employee with the old employer in relation to all service related National Employment Standards: annual leave; personal leave; parental leave; the right to request flexible work arrangements; and, redundancy pay;
- where the new and old employers are *not* associated entities, the new employer will be required to recognise the employee's service with the old employer for the purpose of personal leave, parental leave and the right to request flexible work arrangements, however they will have a choice about whether to recognise service with the old employer for the purpose of annual leave and redundancy pay - if the new employer chooses not to recognise the previous service, the old employer must pay out those entitlements.

As a consequence of these changes, prospective purchasers of a business will need to be more thorough than ever when conducting due diligence, particularly with respect to understanding the direct implications of applicable industrial instruments and the contingent liability arising from accrued employee entitlements.

### Comment

If there is one thing which is certain about Australian employment law it is that it always seems to be changing. The commencement of the FWA means that the constant change which has been a feature of federal workplace regulation in the past three years will remain so for many years to come.

As the price of non-compliance is usually very high, it is critically important that employers ensure that they are up to date with the changes and that their systems and practices and what they tell their employers are consistent with the new system of regulation. At a minimum this should involve: a review and updating of employment contracts, Company policies and procedures; education of line managers and internal advisers; and clear information to employees.



*As a consequence of these changes, prospective purchasers of a business will need to be more thorough than ever when conducting due diligence, particularly with respect to understanding the direct implications of applicable industrial instruments and the contingent liability arising from accrued employee entitlements.*

### DO YOU NEED HELP?

If you are unsure of what you need to do to comply with the *Fair Work Act 2009* just give Elizabeth a call on 02 8985 7312 or send an email to [elizabeth@devinelaw.com.au](mailto:elizabeth@devinelaw.com.au)



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Devine Law at Work is in the business of *helping people work together for better results*. We are a law firm and consultancy which specialises in Australian employment law and workplace relations.

We are a multi-disciplinary practice which integrates skills and expertise in: workplace law; legal education; communication (including negotiation, conflict resolution and facilitation); workplace systems and business development.

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