



20 Months On – 20 Things You Should Know About The Fair Work Act

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About Us

- Part of The EI Group
- An experienced team of workplace lawyers dedicated to providing workplace relations advice and legal representation in employment law and industrial law matters
- “OneStopHR” as a cost-effective and efficient way of getting the workplace relations legal support that you need
- Our legal services include:
 - Industrial Relations
 - Enterprise Agreement Making
 - Contracts, Policies
 - Terminations (including general protections claims)
 - Compliance
 - Legal Representation
 - Training

Facts & Figures

- In 2009-2010:
 - The Fair Work Ombudsman (“FWO”) recouped \$26.1m in underpayments
 - The FWO fielded 1.1 million enquiry calls
 - The FWO was described by Vice President Watson (Fair Work Australia) as *“the most energetic and possibly the best resourced Award enforcement agency that we’ve ever had”*
- Rise in claims

	2009-2010	1st half of 2010-2011
General Protections	1176	976
Unfair Dismissal	9369	6279

Topics Covered

1. Modern Awards
2. National Employment Standards
3. Claims (including unfair dismissal and general protections)

1. Coverage vs Application of Modern Awards

- 122 industry and occupational Modern Awards commenced operation on 1 January 2010 for companies
- Modern Awards will not “apply” to:
 - Employees covered by enterprise award or enterprise agreement
 - High Income Employees with guarantee of annual earnings
- Award “covered” employees can bring unfair dismissal claims
- Where Modern Award “applies”, employer must abide by full terms and conditions (subject to flexibilities discussed in next section)

Coverage of “Managers” under Modern Awards

- Do not be distracted by labels or job titles but analyse the nature of the work that the employee performs
- “Major and substantial function, purpose or object of the engagement” is more critical than the major and substantial portion of an employee’s time being spent on those duties
 - *Southern Automobiles v Ransom (2000) 47 AILR 4*

2. Guarantee of Annual Earnings

- A Modern Award will not apply to high income employee with a “guarantee of annual earnings”
- Written document must guarantee that an employee’s:
 - Wages
 - Non monetary benefits with an agreed value (eg. car, laptop)
 - Amounts paid on behalf of employee or upon their direction,
will exceed the high income threshold (currently set at \$113,800) for a specified period
- Should be audited (updated as necessary) on an annual basis

3. Transitioning

- Incremental phasing-in of the following (in 5 equal installments of 20%) until 2014:
 - Minimum wages
 - Piecework rates
 - Industry allowances
 - Casual/Part-time loadings
 - Saturday/Sunday/Public Holiday penalties
 - Evening and other penalties
 - Shift allowances

Transitioning Example

- Can only use published Modern Award wages, loading or penalty where pre-Modern Award equivalent entitlement was lower
 - **Example 1:** *Clerks – Private Sector Award 2010 contains casual loading of 25%. Transitional casual loading for post 2006 employer (from Clerical & Administrative Employees (NSW) Award) is 21%. **Could jump straight to the Modern Award casual loading because its higher than the transitional casual loading.***
 - **Example 2:** *Clerks – Private Sector Award 2010 contains casual loading of 25%. Transitional casual loading for employer incorporated pre 2006 (from Clerical & Administrative Employees (NSW) Award) is 29%. **Could not drop straight to the Modern Award casual loading because its lower than the transitional casual loading.***

What flexibilities can be utilised in respect to Modern Awards?

- Individual Flexibility Agreement
- Enterprise Agreement
- Offsetting
- Salaries

4. Individual Flexibility Agreement (IFA)

- Allows employer and an employee to vary certain Modern Award terms to “meet the genuine needs of employer and employee”
- Model flexibility term permits variation of:
 - Arrangements for when work is performed
 - Overtime rates
 - Penalty rates
 - Allowances
 - Leave loading
- Employee must be “Better off” (not assessed by FWA)

IFA Procedural Requirements

- Procedural Requirements
 - Must be recorded in writing (setting out which terms will be varied and how employee “better off”)
 - Must be signed by employer and employee (and parent or guardian if employee aged under 18)
 - Copy of IFA must be given to employee
 - Do not need to be registered
- Written IFA must be kept as time and wages record
- Terminable by either employer or employee on four weeks notice or at any time by written agreement

5. Enterprise Agreements

- Long term approach to adjusting Modern Award terms and conditions to suit needs of your enterprise (or part thereof)
- Nominal term of up to 4 years
- Procedural and bargaining obligations under *Fair Work Act 2009* (Cth)
- Must be approved by 50% of those who vote and then assessed by Fair Work Australia against the Better Off Overall Test (“BOOT”)

6. Set Off

- Set off is where a entitlement under a contract of employment (such as a higher rate of pay) can be used to set off any applicable monetary entitlements under the Modern Award or other industrial instrument
- Careful drafting and analysis required to ensure underpayment claims do not arise

7. Salaries

- Some Awards include salary provisions to absorb certain Modern Award entitlements
 - Example:
 - Clerks – Private Sector Award 2010* states at clause 17.1:
"An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:
clause 16 - Minimum weekly wages;
clause 19 - Allowances;
clauses 27 and 28 - Overtime and penalty rates; and
clause 29.3 - Annual leave loading.
Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary".

Salaries (continued)

- Most Modern Awards with salary provisions also contain requirement that an annual salary must be at least equal to wages employee would have received under Modern Award
 - *"The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked)"* (Clause 17.2 of Clerks Private Sector Award 2010)
- Need to audit salaries each year to ensure ongoing compliance

Questions?



NES

- Apply to all employees (cannot be excluded/modified to detriment of employee)
- Came into operation on 1 January 2010
- 10 minimum standards:
 - Maximum Weekly Hours of Work
 - Requests for Flexible Working Arrangements
 - Parental Leave
 - Annual Leave
 - Personal/Carer's and Compassionate Leave
 - Community Service Leave
 - Long Service Leave
 - Public Holidays
 - Notice of Termination and Redundancy Pay
 - Fair Work Information Statement

8. Maximum Weekly Hours of Work

- 38 hour working week for full time employees + “reasonable additional hours”
- Averaging hours provision
 - 26 weeks (Award/Agreement free employees)
 - 4 weeks (generally maximum for Modern Award)
 - Enterprise agreement averaging will depend on wording of agreement

9. Request for Flexible Working Arrangements

- Parent (or person with responsibility for care) of child under school age, or child under 18 with disability, may request changes to working arrangements
 - Example: change in hours of work, patterns of work and location of work)
- Procedural requirements:
 - Requests must be made in writing, set out details of change/s requested and reasons
 - Employer must respond within 21 days as to whether will grant request
 - Refusal only on “reasonable business grounds”, which must be detailed to employee



Request for Flexible Working Arrangements

FLEXIBLE WORK ARRANGEMENT RECORD

To be retained on the employee's file as a record of the agreed flexible work arrangement.

Employee:

- I confirm that I have entered into this Agreement with my Employer.
- In making this election I confirm I am making a free and informed decision and no undue influence or undue pressure has been exerted upon me.

Family Name _____

Given Name _____

Employee ID/Position _____

Identify the details of flexibility arrangement: _____

What arrangements have been agreed to meet the irregular or unforeseen work circumstances: _____

Identify reason(s) for the request for flexibility arrangement: _____

Commitment to attend meetings, training etc _____

Proposed commencement date of flexible work arrangement: _____

Proposed date of review _____

Employee Signature: _____	Employer Signature: _____
Print Name: _____	Print Name: _____
Date: _____	Title: _____
	Date: _____

Flexible Working Policy

23/02/2011



Flexible Working Policy

[Company Name]'s flexible working policy recognises the importance of aiming to achieve a fair balance between work and family responsibilities. Different flexible working arrangements can be considered depending on the degree of flexibility necessary to best accommodate employees' family commitments, without compromising the achievement of the company's business objectives. The benefits of reviewing and implementing flexible working arrangements can include improved productivity, retention of skilled staff and improved employee satisfaction.

Entitlement

As of 1 January 2010 the National Employment Standards set out that certain national system employees are entitled to make a written request for flexible working. Eligible employees may request to change their working arrangements, such as working part-time, compressed hours, flexible hours, job sharing, term-time working, working from home, split-shifts and work redesign. The company will consider an eligible employee's request for flexible working and respond in writing to inform the employee whether their request is granted, partially granted or refused.

Eligibility: Permanent Employees and Casual Employees

Permanent employees must fulfill the following requirements before they are eligible to make a flexible working request:

- Been in the company's continuous employment for the past 12 months; and
- Are the parent of, or responsible for the care of, a child under school age (i.e. the age at which the child is required by the applicable State or Territory law to start attending school); or
- Are the parent of, or responsible for the care of a child who is disabled and under the age of 18.

Casual employees must fulfill the following requirements before they are eligible to make a flexible working request:

- Been in the company's continuous employment for the past 12 months; and
- There must be a reasonable expectation that the employee will continue their employment on a regular and systematic basis; and
- Are the parent of, or responsible for the care of a child under school age; or
- Are the parent of, or responsible for the care of a child who is disabled and under the age of 18.

Documentation Requirements

An employee who believes they are eligible to make a request for flexible working and considers that a change to their working arrangements would have a positive impact upon their ability to balance their work and family responsibilities should set out their request in writing to [manager/HR/name of person]. In order for the company to properly consider the employee's request, it will be helpful if as much detail as possible is included in the employee's request. For example, the employee's request should include the following:

23/02/2011



- the type of flexible working arrangement that is requested, or different options of flexible working that could benefit the employee;
- how a new working arrangement would benefit the employee in their day to day life;
- a proposed start date and if relevant, an end date;
- suggestions as to how the employee's proposed flexible working arrangement could impact their fellow employees and how this could be overcome;
- if it may be unclear to the company why the employee is eligible to apply, then provide details as to why the employee believes they meet the eligibility requirements;
- any other relevant information.

Procedure

Once the company receives the employee's written request to change their working arrangements it will carefully consider the request, taking into account the employee's proposals and their impact upon the company's ability to continue to meet its business objectives. A written response will be provided to the employee within 21 days of the company receiving the request. The response will set out whether the employee's request is granted, partially granted or refused. In making its decision, the company will take into consideration some or all of the following objectives; its staffing requirements, technical operations, output and productivity, occupational health & safety and the specific circumstances of the employee.

Agreement or Refusal

If the employee's request for flexible working is agreed in full, then the start date of the new arrangement will need to be agreed, a review date decided and the relevant change to the employee's terms and conditions will be documented in a Flexible Working Arrangement Record.

If the employee's request for flexible working is partially agreed, further discussion will then take place between the employee and the company to come to a mutually convenient arrangement.

If the employee's request is refused, the company will explain in its response letter the reasonable business grounds that lead to the company's decision to refuse the employee's request. Reasonable business grounds may include:

- (a) the effect on the workplace and the company's business of approving the request, including the financial impact and the impact on efficiency, productivity and customer service;
- (b) the inability to organise work among existing employees;
- (c) the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request;
- (d) the effect the arrangements will have on the company's other employees;
- (e) The arrangements that will be required to enable the employee to fulfill their parental or carer responsibilities;
- (f) The timing of the request. For example, how quickly do the new arrangements need to begin and how long do they need to stay in place for;
- (g) What effect of not having the flexible work arrangement may have on the employee;
- (h) Whether other legal obligations will be breached by modifying the work arrangements, for example, occupational health & safety laws.

23/02/2011



Interaction with State Entitlements

Any State or Territory laws [delete one as appropriate] that provide employee entitlements in relation to flexible working arrangements, such as carer's provisions under anti-discrimination laws, continue to apply to the extent that they are more beneficial to employees.

If you require a Flexible Working Policy that is customised to suit your business, please contact one of our workplace lawyers or workplace consultants for assistance on 1300 261 180

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10. Parental Leave and Related Entitlements

- Applies to married, same sex and de facto couples
- Entitled to 12 months unpaid maternity leave after 12 months of service
- Request for extra 12 months will be reduced by amount of parental leave taken by other partner and employer may refuse on “reasonable business grounds”
- 3 weeks to be able to be taken concurrently



11. Annual Leave

- Annual leave will accrue from the day an employee commences, on a day to day basis
- Modern Awards (very few), EAs or written agreements (for Award/Agreement-free employees) may allow for cashing out of annual leave, provided that employee has at least 4 weeks annual leave remaining after cashing out
- Must be recorded by separate agreement in writing on each occasion

Personal Leave

- Personal Leave will accrue from the day an employee commences, on a day to day basis
- Modern Awards (very few) or EAs may allow for cashing out of personal leave, provided that employee has 15 days personal leave remaining after cashing out
- No cap of 10 days on carer's leave

12. Community Service Leave

- New entitlement
- Allows for leave to participate in eligible community services activities (unpaid) and jury service (top up pay for maximum 10 days)
- Leave period may include reasonable travel time and rest time

13. Notice of Termination and Redundancy Pay

- Written notice of termination
- Statutory scale of redundancy pay for all businesses with more than 15 employees (including regular and systematic casuals with expectation of ongoing employment)

Permanent Employee's period of continuous service with the Employer	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

Redundancy Pay – Employees Excluded

- The following employees are not entitled to redundancy pay:
 - Employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
 - Employee whose employment is terminated because of serious misconduct;
 - Casual employee;
 - Trainee or apprentice;
 - Employee to whom an industry-specific redundancy scheme in a Modern Award applies; or
 - Employee to whom a redundancy scheme in an enterprise agreement applies if:
 - (i) the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a Modern Award that is in operation; and
 - (ii) the employee is covered by the industry-specific redundancy scheme in the Modern Award.

Redundancy - Traps

- Beware of transitional arrangements
 - Where employees have more generous entitlement under pre-Modern Award than NES, they are entitled to that until 31 December 2014 (may include small businesses with less than 15 employees)
 - Service only counted from 1 Jan 2010 for employees who did not have entitlement at 31 December 2009

14. Fair Work Information Statement

- A copy of the Fair Work Information Statement must be provided to all employees before, or as soon as practicable after, the employee starts employment (but in any event no more than once in any 12 month period if the employer employs them more than once)

Questions?



15. Probation Period vs Minimum Employment Period

- Probationary employee must be provided with one weeks notice of termination
- If the employee is not suitable for the position for some reason or another, then an employer really has until the expiry of the “minimum employment period” before they risk an unfair dismissal claim
- Minimum employment period
 - Small business = 12 months
 - Other = 6 months

16. Unfair Dismissal

- Substantive AND Procedural Fairness
- 7 steps:
 1. Invite employee to meeting set up with adequate advance notice
 2. Inform the employee of the purpose of the meeting
 3. Inform the employee of who will be in attendance at the meeting
 4. Advise the employee that they are welcome to bring a support person of their choosing to the meeting, if they wish
 5. Put the allegations/issues to the employee and allow the employee an opportunity to respond
 6. Consider any responses made by the employee after the meeting
 7. Advise the employee in writing of the company's decision - based on the seriousness of the conduct (for example, a warning, improvement plan or termination)

17. General Protections

- Adverse action must be causally linked to “workplace right”
- Employees who exercised workplace right before commencement of Fair Work Act and then became victim of adverse action after 1 July 2009 are entitled to pursue general protections claim (*Australian Licensed Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd [2011] FCA 333*)
- Onus on employer to prove adverse action was not taken against employee because of their workplace right
- Can be compensated for hurt and humiliation ((*Australian Licensed Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd [2011] FCA 333*))

Recent General Protections Case Examples:

- *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education [2011] FCAFC 14* - Very difficult for employers to argue adverse action taken against union delegate or member was not motivated by union activity
- *Bayford v Maxxia Pty Ltd [2011] FMCA 202* – Adverse action provisions don't preclude an employer from taking reasonable disciplinary action against employees

18. Serious Misconduct

- Summary Dismissal (ie: without notice)
 - Breach of poorly drafted “no back biting policy” did not warrant summary dismissal and termination was “harsh, unjust and unreasonable” - compensation ordered (*Tara Davies v Hip Hop Pty Ltd Trading as Hippity Hop Child Care [2011] FWA 776*)
 - Truck driver putting safety of general public at risk by talking on mobile phone after repeated warnings was guilty of “gross and wilful misconduct” and was not unfairly dismissed (*Ben Starkey v Cootes Transport Group Pty Ltd [2011] FWA 228*)
 - Nurse who altered medical certificate after being told by medical centre receptionist that it was “ok” to do so, was unfairly dismissed on alleged grounds of fraud and corruption and breach of company policy. Company should have investigated facts from the doctor and accepted plausible and explicable explanation of the employee – reinstatement ordered (*Diane Hammond v Australian Red Cross Blood Service [2011] FWA 1346*)

19. Permitted Deductions

- The deduction must be authorised:
 - In writing by the employee and be principally for the employee's benefit; or
 - In accordance with an enterprise agreement; or
 - By or under a modern award or an FWA order; or
 - By or under a law of the Commonwealth, a State or a Territory, or an order of a court; or
 - In accordance with a salary sacrifice or other arrangement, under which an employee chooses to forgo an amount payable to the employee in relation to the performance of work, but receive some other form of benefit or remuneration.
- Where deduction/payment for employer's benefit, it must be "reasonable" and signed by parent/guardian if employee is aged under 18

20. Record Keeping

- Employers must keep records of:
 - Name of employee
 - Name and ABN of employer
 - Status of employment (permanent full-time, part-time or casual etc)
 - Commencement date
 - Remuneration paid (gross and net)
 - Deductions made
 - Hours of work (for part-time and casual employees whose rate of pay is determined by period of time worked)
 - Incentive based payments, bonuses, loadings, penalty rates or other monetary allowances
 - Overtime hours (for employees entitled to be paid overtime)
 - Leave records (leave taken, balance of leave, cashing out agreements)
 - Superannuation details
 - Termination details
 - NB: specific requirements for payslips

Record Keeping (continued)

- Employee records must be kept by employer for a period of 6 years from the date of termination of employment
- Employee records must be transferred in transfer of business situation
- Employee records must be made available to employee (or their representative):
 - By post within 14 days of receiving request
 - Within 3 days if employer making records available for copying at their premises

What should I do?



Take-aways

- Modern Awards - understand, compare, comply
- Consider flexibilities contained in Modern Awards
- Ensure careful drafting of set-off provisions in any contract of employment
- Audit salary arrangements against Modern Award at least annually
- Enter into high income guarantees with “high income employees” as a way of avoiding application of Modern Awards
- Update policies and procedures for NES and Fair Work Act compliance
- Ensure Managers & HR practitioners are adequately trained

Questions?

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