



FAIR WORK ACT SUMMARY

What is the Fair Work Act and does it cover your workplace?

The Fair Work Act is effectively an overhaul of current Workplace Law and commenced on 1 July 2009 – with significant elements commencing to operate from 1 January 2010. The new legislation replaces the previous ‘Workchoices’ regime; retaining some elements and introducing completely new ones.

Like the previous Workchoices legislation, the Fair Work Act uses the ‘Corporations’ head of power of the constitution. As such all ‘Constitutional corporations’ are covered by the legislation. In brief, a constitutional corporation includes all ‘foreign corporations’ and all ‘trading’ and ‘financial’ corporations formed within Australia. If the entity is a Pty. Ltd it is most likely covered; however where trading activities are minimal it will be a question of degree in each circumstance.

Sole traders and partnerships in all States but for WA are now also covered by the Act due to the referral of IR powers by the States; which became effective on 1 January 2010.

What are the penalties for non-compliance?

The enforcement and compliance provisions of the proposed legislation are similar to those in the current Workplace Relations Act – however the remedies available for breach of industrial instruments (Awards and Agreements) has been expanded to include injunctions, compensation and other orders. Maximum penalties for civil penalty provisions remain at \$33,000 for employers who are corporations.

What are General/Workplace Protections?

The Act streamlines a range of workplace protections (‘employee workplace rights’) including in relation to misrepresentation, discrimination, coercion, freedom of association, industrial activity and individual flexibility agreements (which refer to the ability to contract out of specific award terms subject to the better off overall test) – but also significantly enhances employee rights. The Act introduces a ban on taking any ‘adverse action’ for a discriminatory reason or in because a person has a workplace right or proposes to exercise a workplace right. Caution will need to be used when taking action in respect to employees (or prospective employees) to prevent a breach of these rights. Employer Assist will provide further information on this issue in the upcoming seminars.

What are the rules around Unfair Dismissal for small business (<15 employees)

Under Workchoices an employee working for an employer of less than 100 employees had no jurisdiction to take an unfair dismissal claim. This exemption is gone. Under the new system an

employee of an employer of less than 15 employees can take an unfair dismissal claim after completing 12 months service. Additionally, such an employer need only comply with the 'small business fair dismissal code' in terminating an employee – if they do so they will not breach the unfair dismissal provisions. Determining compliance with the code, will however, not be a simple matter as the concept of reasonableness in the code remains open to interpretation.

What are the rules around Unfair Dismissal for medium sized business (>15 employees)

Employers employing in excess of 15 employees will have a six (rather than 12) month exemption period from unfair dismissal claims, however once an employee has 6 months service they have jurisdiction to make a claim. The small business fair dismissal code does not apply to these employers, who will be required to comply with the ordinary termination provisions of the Act. *(For further information see our 'Unfair Dismissals IR Fact Sheet').*

What are Modern Awards and how do employers comply?

Approximately 5000 State and Federal Awards have been replaced by around 120 'modern' awards. The Awards commenced to operate from 1 January 2010 for constitutional corporations; although for most Modern Awards the pay rate, penalty and allowance provisions commenced from 1 July 2010 on a transitional basis. Non-constitutional corporations covered by the Fair Work Act due to the referral of IR powers became covered from 1 January 2011; with rates commencing from 1 February 2011. Together with the National Employment Standards (discussed below) modern awards form the new safety net for employees. In certain circumstances, employees earning in excess of \$113,800 (indexed) per annum will be award free.

What are the National Employment Standards and how do employers comply?

The new Fair Work Act has introduced a set of 10 National Employment Standards (NES) which will apply from 1 January 2010 and, as indicated above, will act as a safety net for employees. The 10 NES are:

1. Maximum weekly hours of work (38 ordinary plus reasonable additional hours).
2. Requests for flexible working arrangements (for children under school age).
3. Parental leave (ie unpaid birth-related and adoption related leave).
4. Annual leave.
5. Personal/carer's leave and compassionate leave.
6. Community service leave (including jury service).
7. Long service leave.
8. Public holidays.
9. Notice of termination and redundancy pay.
10. The Fair Work Information Statement

Terms and conditions of existing AWA's, ITEA's, Workplace Agreements, common law contracts and future Awards and Enterprise Agreements must meet the new standard – regardless of the actual term within (for instance) a current agreement. This means all current agreements must be reviewed for compliance.

(For further information see our 'National Employment Standards IR Fact Sheet').

Is an Enterprise Agreement an option for your workplace?

Any company employing two or more employees has the option of implementing an Enterprise Agreement. The legislation ensures that individual agreements (AWA's) and their 'short-term replacement' (ITEA's) will no longer be available. The Act does away with the union/non-union distinction previously available under Workchoices – so while all agreements are between employers and their employees a union can seek to be a party where they are a bargaining agent for an employee. The No-Disadvantage test is replaced by the 'better off overall test' (BOOT). Advantages of Enterprise Agreements - such as their ability to operate for an extended period and cover all new employees for that period (4 years under new legislation, 5 years previously) and preventing unlawful industrial action during their life – remain.

Where do common law contracts stand under the new legislation?

Common law contracts are also subject to the requirements of the National Employment Standards and (where applicable) a Modern Award. Therefore, all such agreements must be reviewed and altered to ensure compliance. Of course, there are many other provisions available to employers to include in common law contracts of employment to ensure protection of liability and for reliance upon in the event of termination and/or dispute. There has never been a more important time to review all employment arrangements for compliance and business efficacy.

What happens to employees not covered by an Award (ie Managers)?

Modern awards are not intended to cover employees, such as managers who, because of the nature or seniority of their role have traditionally not been covered by awards.

Additionally, these Awards will not apply to employees with guaranteed annual earnings of more than \$113,800 (pro rata for part-time employees). The high income threshold will be indexed annually adjusted each year in line with annual growth in average weekly ordinary time earnings for full-time adult employees. This amount does not include compulsory superannuation.

These employees and their employers will be free to agree on terms to supplement the National Employment Standards (which continue to apply) without reference to an award. The exemption applies if an employer provides a *written undertaking* to pay an employee annual earnings at or above the high income threshold over a period of 12 months or more. A guarantee for a shorter period may apply in the case of a short-term, fixed-term contract or a particular type of work on a short-term basis. The employer and employee must reach agreement about the undertaking before it commences operation; however once commenced the award will not apply to such employees.



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If you have any questions regarding this fact sheet or would like assistance regarding IR/HR/OHS contact IR Assist for more information:

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