

WALSH HALLIGAN DOUGLAS

LAWYERS



“FAIR WORK” – NATIONAL WORKPLACE REFORM

“The Australian Government’s Fair Work Bill 2008, introduced into the parliament this afternoon, is an extensive re-write of Australian employment law and the industrial relations system with far reaching implications for employers and the management of relationships and work practices in Australian workplaces. ... Although changes to current laws have been expected and some change is warranted, the combination of new employee and union rights and the new regulatory and compliance obligations will carry significant risks to employers, small business and jobs, especially in a period of slowing economic growth.”

Statement by Mr P. Anderson, Chief Executive of ACCI, on 25 November 2008.

INTRODUCTION

On 25 November 2008, the Fair Work Bill (“FW”) was introduced to the House of Representatives by the Federal Government. The opposition has conceded it will not oppose the reforms but has reserved the right to seek some amendments in the Senate following a Senate Committee review process in February 2009.

The legislation is planned to take effect partially from 1 July 2009, with the balance of the reforms to take effect from 1 January 2010.

Walsh Halligan Douglas specialises in providing advisory services to small and medium sized enterprises (“SME”). This overview of the national workplace reforms is focussed on outlining the specific implications for SMEs.

The most important changes for employers are those which will significantly expand on the individual rights of employees, notably:

- National employment standards (statutory terms and conditions);
- Modern awards (industry specific entitlements);
- Unfair dismissal (greater access);
- Transfer of business rules (increased protection of ‘travelling’ entitlements);
- ‘Low paid’ collective bargaining rules.

COVERAGE

FW only applies to ‘national system employees’ and is essentially limited to the regulation of employment by private sector incorporated employers. FW does **not** regulate employment by sole traders and partnerships or independent contractors, apart from some limited provisions.

In Queensland, private sector employees of sole traders and partnerships and also public sector employees will continue to be governed by the *Industrial Relations Act 1999 (Qld)*. The federal government is presently negotiating with the states for a referral of constitutional powers to create a truly national system regulating all private sector employment.

NATIONAL EMPLOYMENT STANDARDS (“NES”)

The NES are ten statutory minimum employment terms and conditions which expand upon the five standards in the present legislation.

The NES cannot be overridden and deals with the following:

1. Maximum working hours (38 hours plus reasonable additional hours);
2. Requests for flexible working arrangements;
3. Parental leave;
4. Annual leave;
5. Personal leave;

6. Community service leave;
7. Public holidays (guaranteed);
8. Fair Work Information Statement (to be provided to new employees);
9. Notice of termination and redundancy pay;
10. Long service leave.

One of the notable new standards introduces a general right to redundancy pay (previously only award governed employees were usually guaranteed severance pay in the absence of an express contractual right).

The redundancy benefits range from a minimum of 4 weeks pay (for employees of greater than one year's service but less than 2 years), up to 12 weeks pay (for employees of over 10 year's service), in accordance with a sliding scale. Small businesses of less than 15 employees may be exempt from making redundancy payments.

The new standards also expand on the rights of parents of young children. First, in addition to the present entitlement to 12 months unpaid parental leave, an employee will have a right to request an additional 12 months unpaid leave, to which an employer must agree unless it has 'reasonable business grounds for refusing'. The extended parental leave provisions apply to all employees, including employees of sole traders and partnerships. Secondly, employees of under school age children are now entitled to request flexible work arrangements. An employer is only entitled to refuse a request on 'reasonable business grounds'.

It is unclear what sanctions, if any, will apply in the case of an unreasonable refusal by an employer to either type of request.

MODERN AWARDS

Modern awards and the NES will form a new 'safety net' of minimum employment terms and conditions which will take effect from 1 January 2010.

The modern awards are essentially limited to addressing ten additional matters to those terms and conditions prescribed in the NES. Wage and classification provisions will be included in the awards and reviewed annually by Fair Work Australia.

The modern awards will also contain a 'flexibility term' which will allow an employer and an employee to make a written 'individual flexibility arrangement' varying the terms and conditions in the award. The employee must be 'better off overall' and the flexibility arrangement can only vary those award terms and conditions of existing employees relating to:

- Arrangements for when work is performed;
- Overtime rates;
- Penalty rates;
- Allowances;
- Leave loading.

Draft exposure awards have already been issued for the mining, hospitality, manufacturing, retail, security services and clerical sectors.

Importantly, a 'high income employee' (\$100,000 gross per annum exclusive of paid superannuation benefits) may agree to opt out of award coverage, in lieu of a common law contract regulating those terms and conditions not already addressed in the NES. The employer will need to complete a written undertaking called a 'guarantee of annual earnings'. The guarantee will be binding on a new employer in the event of a transfer of business (see below).

UNFAIR DISMISSAL

FW restores many of the unfair dismissal rights taken away by WorkChoices. The reforms attempt to strike a balance by requiring employees to serve a minimum qualification period before being entitled to bring a claim, being at least twelve months for a 'small business' (employing less than 15 employees), and six months for all other employers.

The reforms also include an extra protection for a 'small business' by precluding a claim against an employer who dismisses an employee in a manner consistent with the terms of the 'Small Business Fair Dismissal Code'.

The Code sets out the circumstances in which a summary dismissal (a dismissal without notice or warning) is warranted, including cases of theft, fraud and violence. For under-performing employees, the Code simply requires the employer to give the employee a valid reason based on the employee's conduct or capacity to do the job, why the employee is at risk of being dismissed, and a reasonable chance to rectify the problem. Multiple warnings are not required. It is highly advisable, but not mandatory, for the warning to be given or confirmed in writing.

A dismissal will no longer be justified simply because of the existence of 'genuine operational reasons'. Under the reforms, an employer can dismiss because of changes in operational requirements, but only in the case of a 'genuine redundancy'. A redundancy will not be genuine where the employee could have been redeployed in the company or an associated entity.

BUSINESS TRANSFERS

FW will introduce significant changes to the rules dealing with business transfers, 'travelling' of employee entitlements, and continuity of employment service. The law previously was notoriously technical and uncertain.

When acquiring an existing business, any due diligence by the purchaser should take into account the operation of these new rules. Workplace instruments, such as an enterprise bargaining agreement or 'guarantee of annual earnings', will continue to indefinitely regulate the employment of any re-employed employees, rather than for just the present period of 12 months.

Outsourcing of labour is no longer exempt and will constitute a 'transfer', which will be a significant disincentive for this practice.

LOW PAID BARGAINING STREAM

The proposed collective bargaining rules, whilst important, are unlikely to have a dramatic impact on the workplaces of SMEs. The possible exception will be those employers affected by the new low paid bargaining stream rules.

The Liquor Hospitality & Miscellaneous Union has suggested up to 20% of the workforce may as a result of the low paid bargaining rules be able to access compulsory arbitrated workplace determinations by the new industrial umpire, Fair Work Australia. Many employers are concerned the rules may result in 'pattern bargaining' by unions at an industry level, rather than foster collective bargaining at the enterprise level which is the stated aim of the reforms.

The proposed legislation does not yet clarify the definition of "low paid employees", although more should be known after the completion of the Senate Committee review process.

RECOMMENDATIONS

If you are considering your current staffing levels in the present economic climate, then it would be advisable to take action soon under the WorkChoices' unfair dismissal regime, which ceases to operate from 1 July 2009, and also avoid the need to make a redundancy payment under the NES, which applies after 1 January 2010.

FW will allow considerable scope for individual flexible employment arrangements under modern awards for all award governed employees, and common law contracts for 'high income' employees, however these must be properly documented to be of benefit. The modern award system and the NES will necessitate that all employers should comprehensively review their employment arrangements over the next 12 months to ensure their compliance with the new laws.

If you would like to discuss the potential impacts on your business, and obtain a complimentary copy of the Small Business Unfair Dismissal Code, the National Employment Standards, or one of the draft modern awards, please contact Damon King.

This summary is not intended to be a comprehensive analysis or legal advice. There are very many changes made to the current Workplace Relations Act and each employer will need to consider these in light of their existing employment arrangements and obtain specific legal advice.

Damon King | Senior Associate

Direct Line: 07 3232 5717
Fax: 07 3232 5777
Level 12, 145 Eagle Street
Brisbane QLD 4000
Email: damonk@whd.com.au