

Fair Work Act 2009



Implications for National System Employers

1. Session outcomes

1. Appreciate the options for engaging workers: employees and independent contractors
2. Understand the National Employment Standards and the Modern award system
3. Appreciate when Enterprise Agreements or other flexibility options may be useful
4. Know the main employee General Protections under the Fair Work Act

2. Engagement

- Independent contracting
 - ▣ Conducting own business
- Employment
 - ▣ In the service of another:
 - Legislation
 - Industrial awards
 - The 'deal' between the employer and employee: common law contracting

2. Engagement (cont.)

□ Employment

- Authority to control
- Authority to suspend and dismiss
- Worker presented as part of 'employer's' business
- Worker paid according to time worked (wages)
- Provision for paid holidays, sick leave
- Income tax deducted

2. Engagement (cont.)

□ Independent contract

- Worker running own business: bears risk of profit/loss, self-insures, etc
- Worker paid for achieving a certain result
- Worker has own place of work and advertising
- Worker creates good will
- Worker provides and maintains own equipment
- Worker can delegate work
- Worker can work for others at same time
- Worker renders invoice for work performed

3. Key components of the *Fair Work Act*

- A. The National Employment Standards
- B. Modern Awards
- C. Agreement making
- D. Individual flexibility arrangements

3. Key components of the *Fair Work Act* (cont.)

- E. Freedom of association and workplace rights (general protections)
- F. Termination of employment
- G. The Fair Work Ombudsman and Fair Work Australia

A. The National Employment Standards (NES)

10 minimum workplace entitlements in the NES:

1. A maximum standard working week of 38 hours for full-time employees, plus “reasonable” additional hours
2. A right to request flexible working arrangements to care for a child under school age, or a child (under 18) with a disability
3. Parental and adoption leave of 12 months (unpaid), with a right to request an additional 12 months

A. The National Employment Standards (NES) (cont.)

10 minimum workplace entitlements in the NES:

4. Four weeks paid annual leave each year (pro rata)
5. Ten days paid personal/carer's leave each year (pro rata), two days paid compassionate leave for each permissible occasion, and two days unpaid carer's leave for each permissible occasion
6. Community service leave for jury service or activities dealing with certain emergencies or natural disasters, this leave is unpaid except for jury service

A. The National Employment Standards (NES) (cont.)

10 minimum workplace entitlements in the NES:

7. Long service leave
8. Public holidays and the entitlement to be paid for ordinary hours on those days
9. Notice of termination and redundancy pay
10. The obligation to provide new employees with a Fair Work Information Statement

B. Modern Awards

- Overview of the modern award process using the *Clerks—Private Sector Award 2010* as an example

CLASSIFICATIONS

- The rights and responsibilities of employees under an award is largely dependant on their classification
 - ▣ **For example, in the Clerks-Private Sector Award 2010, clerks are classified as follows:**
 - **Level One**
 - Initial recruits and those with limited experience
 - Basic clerical skills
 - Working within an established routine, with supervision from superiors
 - **Level Two**
 - Those with sufficient experience to carry out their duties under general direction
 - Moderate mastery of clerical skills

CLASSIFICATIONS (cont.)

➤ **Level Three**

- Employees are able to perform specialised or non-routine tasks with the scope to exercise limited initiative
- Able to train employees at levels 1 and 2
- Skills include ability to deal with finances, provide specialised advice on information regarding products

➤ **Level Four**

- Employees are able to give specific advice and information to their employer organisation and clients in relation to their specific area of responsibility
- Usually supervise a number of employees in lower levels
- High level of clerical and organisational skills

CLASSIFICATIONS (cont.)

➤ **Level Five**

- Employees have gained sufficient specialist knowledge and experience to provide advise on a range of fields for the development of the employing organisation
- Have control over staff performance, training and development
- Employees at this level often have secondary qualifications, but this is not necessary

TYPES OF EMPLOYMENT

- Full-time employment
 - 38 hour week (average)
- Part-time employment
- Casual employment
 - 3 hour minimum engagement
 - 25% loading

REMUNERATION

Minimum weekly wages

- Each award contains a minimum wage requirement for ‘ordinary hours of work’
 - ▣ For example, the minimum wages under the Clerks Award 2010 are:

■ Classification	Per week \$
■ Level 1—Year 1	580.00
■ Level 1—Year 2	610.00
■ Level 1—Year 3	630.00
■ Level 2—Year 1	637.60

REMUNERATION (cont.)

Classification	Per week \$
■ Level 2—Year 2	650.00
■ Level 3	675.00
■ Level 4	710.00
■ Level 5	740.00

REMUNERATION (cont.)

Allowances

- **Employees are entitled to various allowances. What allowances are available depends on the award. For example, employees under the Clerks Award 2010 are entitled to:**
 - ▣ Transport allowance
 - ▣ Clothing and footwear allowance (for uniforms, etc.)
 - ▣ Meal Allowance (when overtime is worked, etc.)
 - ▣ Vehicle allowance (if employment requires use of the employee's vehicle)
 - ▣ Living away from home allowance
 - ▣ Etc

REMUNERATION (cont.)

Superannuation

- Options for superannuation vary between awards
- As per Superannuation guarantee legislation
- Choice of fund
- Award outlines the default fund(s) (where choice is not exercised)
 - E.g. Clerks award: include CARE Super, AustralianSuper, SunSuper, HESTA, Statewide Superannuation, Tasplan, REI Super, Asset Limited, Westscheme Pty Ltd.

HOURS OF WORK

□ 'Ordinary' hours of work

▣ Clerks award:

- full time – average of 38 per week not exceeding 152 hours in 28 days or an average of 38 over the period of an agreed roster
- span of hours: 7.00 a.m. – 7.00 p.m. Monday to Friday, 7.00 a.m. – 12.30 p.m., Saturday

□ Overtime:

- ▣ Note that some awards expressly distinguish between the concepts of work performed by 'specific direction' or 'own initiative'. The Clerks Award does not

LEAVE AND PUBLIC HOLIDAYS

- Annual Leave
 - ▣ Annual leave loading – **Generally** 17.5%
 - Applicable from 31/12/14
- Personal/carer's and compassionate leave
- Community Service leave
- Public Holidays
- Long service leave

TERMINATION OF EMPLOYMENT

□ Notice of termination

▣ By employer

Employee's period of Continuous Service

Not more than 1 year

More than 1 year but not more than 3 years

More than 3 years but not more than 5 years

More than 5 years

Plus 1 week if the Employee:

(a) is over 45 years old; and

(b) has completed at least 2 years of continuous service.

Period of notice

At least 1 week

At least 2 weeks

At least 3 weeks

At least 4 weeks

Note: pay in lieu of notice is base rate of pay under minimum rate for classification

TERMINATION OF EMPLOYMENT (cont.)

▣ Resignation by employee:

- 1 week
- Modern awards generally provide that the employer can withhold pay for period of notice not given (the Clerks Award does so, for example)

TERMINATION OF EMPLOYMENT

(cont.)

- Redundancy pay
 - ▣ Continuous service is calculated from first day of service under the previous Award
 - ▣ If the employee's employment was not subject to an award before 1/1/10, the calculation commences on 1/1/10: Part III of Schedule 4 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

TERMINATION OF EMPLOYMENT

(cont.)

▣ Entitlement

Period of continuous service

At least 1 year but less than 2 years
At least 2 years but less than 3 years
At least 3 years but less than 4 years
At least 4 years but less than 5 years
At least 5 years but less than 6 years
At least 6 years but less than 7 years
At least 7 years but less than 8 years
At least 8 years but less than 9 years
At least 9 years but less than 10 years
At least 10 years

Redundancy pay period

4 weeks
6 weeks
7 weeks
8 weeks
10 weeks
11 weeks
13 weeks
14 weeks
16 weeks
12 weeks

Options in the face of the Modern Award system

- (1) Independently contract
- (2) Comply with NES/Award and supplement with common law contract and/or award-based 'individual flexibility agreement'
- (3) Enterprise Agreement

C. Agreement Making

Benefits of Enterprise Agreements

- Modern award does not apply to employees covered by an enterprise agreement
- Approval by a majority who cast a valid vote.
- The 'better off overall test'

C. Agreement Making (cont.)

Enterprise Agreements

- Replace award coverage
- Set terms of employment that reflect the business and employment imperatives of the specific employer rather than the industry Australia-wide
- Trade off award imposts with agreement enhancements

D. Individual Flexibility Arrangements

Award-based 'Flexibility Agreements'

- Vary award terms:
 - Arrangements for when work performed
 - Overtime rates
 - Penalty rates
 - Allowances and leave loading
- Must pass 'better off overall test'
- Prescriptive process and content
- Can be terminated upon 4 weeks' notice by either party

E. Other aspects of the *Fair Work Act*: General Protections

Workplace rights

- ‘Workplace right’ exists where a person:
 - is entitled to a benefit or has a role or responsibility under a workplace law, workplace instrument (such as an award or enterprise agreement) or an order made by an industrial body.
 - is able to initiate or participate in a process or proceedings under a workplace law or workplace instrument
 - has the capacity under a workplace law to make a complaint or inquiry:
 - to a person or body to seek compliance with that workplace law or workplace instrument
 - (if the person is an employee), in relation to their employment.

E. Other aspects of the *Fair Work Act*: General Protections

Adverse action

- Adverse action – includes doing, threatening, or organising any of the following:
 - ▣ dismissing an employee, injuring them, altering their position to their detriment, or discriminating between them and other employees
 - ▣ an employer refusing to employ a prospective employee or discriminating against them in the terms and conditions the employer offers
 - ▣ a principal terminating a contract with an independent contractor, injuring them or altering their position to their detriment, refusing to use their services or to supply goods and services to them, or discriminating against them in the terms and conditions the principal offers to engage them on
 - ▣ an employee or independent contractor taking industrial action against their employer or principal

E. Other aspects of the *Fair Work Act*: General Protections

Adverse action (cont.)

- Prohibition on taking adverse action against person because person:
 - ▣ has a workplace right
 - ▣ has or has not used a workplace right
 - ▣ proposes to, or proposes not to, use a workplace right
 - ▣ does or does not belong to a trade union
 - ▣ engages or does not engage in industrial activity (as set out previously)
- Remedies and penalties (onus on employer)
 - ▣ Injunction, compensation
 - ▣ Fines: up to \$6,600 for an individual, \$33,000 for a corporation

E. Discrimination under the FWA

- Prohibition on taking ‘adverse action’ against employee b/c of race, colour, sex, age, physical or mental disability, family or carer’s responsibilities (etc).
- Broader than anti discrimination law because:
 - ▣ no comparator of ‘less favourable’ treatment
 - ▣ need only be a reason for the action, not the reason
 - ▣ reverse onus of proof

E. Discrimination Under FWA

(cont.)

- 60 days to lodge application to FWA
- Conciliation conference
- General Protections Court Application

F: Termination of Employment - Unfair Dismissal

Termination of employment – unfair dismissal

- **Criteria:** Dismissal was harsh, unjust or unreasonable, and was not a case of genuine redundancy

(Not unfair dismissal if the employer is small business employer (employs less than 15 employees (up to 1 January 2011 - 15 full-time equivalent) and follows Small Business Fair Dismissal Code.)

F: Termination of Employment - Unfair Dismissal

Termination of employment – unfair dismissal (cont.)

- **Eligibility:**
 - Employed at least 6 months (12 months if small business employer)
 - Covered by a modern award or enterprise agreement
 - Earning less than \$108,300 a year

- **Remedies:**
 - Reinstatement (same position or position on no less favourable terms)
 - Compensation to a maximum of 6 months remuneration, payable by instalments
 - No compensation for shock, distress, reputation

G. The Fair Work Ombudsman and Fair Work Australia

□ Fair Work Ombudsman

- ▣ Provides advice about fair work practices, rights and obligations to employees, employers and outworkers.
- ▣ Monitors compliance with the *Fair Work Act* , and investigates possible contraventions
- ▣ Complaints
- ▣ Industry audits
- ▣ Taking court action on contraventions of the *Fair Work Act* (e.g. sham contracting)

G. The Fair Work Ombudsman and Fair Work Australia

□ Fair Work Australia

- ▣ National workplace relations tribunal
- ▣ The safety net of minimum wages and employment conditions
- ▣ Enterprise bargaining
- ▣ Industrial action
- ▣ Dispute resolution
- ▣ Termination of employment

Summary

1. You now appreciate the options for engaging employees:

- Independent contract or employment
- If employment:
 - ▣ NES/Industry Award (plus common law contract and/or award-based flexibility agreement)
 - ▣ Enterprise agreement

Summary

2. You now should understand the impact of the NES and the new Modern Award System

- Coverage
- Classifications
- Types of employment
- Minimum wages, allowances and other remuneration
- Hours of work
- Leave entitlements
- Termination and redundancy pay

Summary

3. Know the main employee General Protections:

- Workplace rights and prohibition on adverse action
- Discrimination under the FWA
- Unfair dismissal rights and remedies
- Functions of the Workplace Ombudsman and Fair Work Australia