




Workplace Law Update

January 2010

Workplace Law Queensland is a division of 

Background



- A recent Australian Retailers Association snap poll found that only 17% of 150 respondents were fully compliant with the new laws. Almost 72% of those surveyed did not fully understand their obligations under the Fair Work Act.
- The National Employment Standards ("NES") and the new Modern Awards came in on 01/01/2010.
- The Fair Work Act ("FWA") has melded several thousand state and federal awards into around 150 "Modern Awards".
- All IR matters, including the review of awards, are now conducted through Fair Work Australia.
- A new Modern Award must not exclude the NES from application to any employee; however, they may include provisions which are ancillary or incidental to the NES.

Modern Awards

Banking, Finance and Insurance Award 2010



Award was first made on 3 April 2009 [PR986360] with variations made on 11 September 2009 [PR988363]; 21 September 2009 [PR989301]; 16 November 2009 [PR990706]; 24 December 2009 [PR992144]

- 2.2 The monetary obligations imposed on employers by this award may be absorbed into overaward payments. Nothing in this award requires an employer to maintain or increase any overaward payment.
- 2.3 This award contains transitional arrangements which specify when particular parts of the award come into effect.... minimum wages & piecework rates, casual or part-time loadings Saturday, Sunday, public holiday, penalties, shift allowances.
- 2.4 Neither the making of this award nor the operation of any transitional arrangements is intended to result in a reduction in the take-home pay of employees covered by the award.

Banking, Finance and Insurance Award 2010



4. Coverage – “vertical” or “horizontal”

- 7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:
 - (a) arrangements for when work is performed;
 - (b) overtime rates;
 - (c) penalty rates;
 - (d) allowances; and
 - (e) leave loading.
- No coercion or duress (7.2); agreement must be confined to above items & result in employee being better off overall (7.3); must be in writing, state aspect being varied, detail how to be varied, detail how employee is better off & commencement date (7.4)

**Banking, Finance and Insurance
Award 2010**



8. Consultation regarding major workplace change
9. Dispute resolution (parties or FWA involved, work continues)
10. Types of Employment (full time, part time, casual)
11. Termination of Employment
12. Redundancy
13. Classifications and minimum pay rates
14. Annualised Salaries
15. School-based Apprentices
16. Supported wage system
17. Allowances

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18. Accident pay
 19. Payment of wages
 20. Superannuation
 21. Ordinary hours of work
 22. Overtime and penalty rates
 23. Annual leave
 24. Personal/carer's leave and compassionate leave
 25. Community service leave
 26. Public holidays
- Schedule A—Transitional Provisions**
Schedule B—Classification Structure
Schedule C—School-based Apprentices
Schedule D—Supported Wage System

NES - Definitions



- **Base rate of pay v Full rate of pay**
- **Service** (with a number of exclusions) - the period the employee is employed by the employer. This does not include any "excepted period" (any period of unauthorised absence, any period of unpaid leave etc.).
- Also note that an "excepted period" does not break an employee's continuous service (although it is not counted towards length of continuous service).

NES Entitlements & Hours of Work



- An employee is not entitled to take or accrue any leave during a period when an employee is absent from work due to a personal illness or personal injury for which they are receiving statutory workers compensation.
- The maximum standard hours per week for a full-time employee is 38 hrs.
- For an employee other than full-time, maximum standard hours are <38 hrs or the ordinary hours normally worked by the employee (for casuals).
- An employer may request or require an employee to work reasonable additional hours (which the employee may refuse if the requirement is unreasonable) to be determined based on a number of considerations.

Considerations for Working Extra Hours



- Any risk to the employee's health & safety from working the additional hours;
- The employee's personal circumstances, including family responsibilities;
- The needs of the workplace;
- Whether the employee's terms and conditions reflect an expectation of working additional hours (overtime, penalty rates or other compensation);
- The amount of notice given by the employer;
- The amount of notice the employee gives of refusal;
- The usual patterns of work in the industry;
- The nature of the employee's role and level of responsibility;
- Whether the additional hours are in accordance with averaging provisions included in the relevant Modern Award; and
- In calculating hours "worked", any hours of authorised leave (paid or unpaid) are included.

Flexible Working Arrangements



- An employee who is a parent, or has a responsibility for the care of a child under school age, may request a change in working arrangements for the purpose of assisting in the care for the child .
- The employee must complete at least 12 months continuous service if a permanent employee; or has been engaged on a regular and systematic basis for at least 12 months prior and has a reasonable expectation of continuing engagement if a casual employee.
- The request must be in writing and set out details and the reasons for the requested change.
- Upon receipt of the written request, the employer **must** give the employee a written response within 21 days stating whether the employer grants or refuses the request.
- Refusal can only be on reasonable business grounds.
- The written refusal response must include the reasons for the refusal.

Fair Work Information Statement



- The NES provides for Fair Work Australia publishing a "Fair Work Information Statement" containing information about the NES, Modern Awards, agreement making under the legislation, the right to freedom of association and the role of Fair Work Australia.
- As of 01/01/2010 an employer must give each employee a copy of the Fair Work information Statement before or as soon as practicable after the employee commences employment.

Recent FWA Prosecutions



- Prigge v Manheim Fowles Pty Ltd
- BUPA Care Services, ANF & HSU Enterprise Agreement 2009
- Maxim Electronics Pty Ltd v CEEEEEIPPA Services Union
- AWU & Anor v United Group Resources Pty Ltd
- Harley v Aristocrat Technologies Australia Pty Ltd
- Upsall v Dentay Pty Ltd
- Fair Work Ombudsman Blitz – Hair & Beauty Salons

Adverse Action Claims



- Allow varying entities (mainly employees) a claim against another based on infringement of “workplace rights”.
- What constitutes a “workplace right” is very wide, and as far as employees are concerned includes a simple entitlement to complain in relation to their employment.
- Adverse action can include dismissal, alteration of the employers position which prejudices the employee or discriminates between the employee and other employees.

Can occur between:

- Employer and employee
- Employer and prospective employee
- Principal and Contractor (or prospective independent contractor).

Adverse Action Claims



- There are penalties against a party coercing or threatening another party in relation to the exercise of a workplace right or exerting undue influence or pressure in certain respects.
- 60-day time limit for lodgement of an adverse action claim.
- A claim made in respect of adverse action allows, where the applicant is the employee, to seek compensation up to \$6,600 however where Fair Work is actioning the matter independently, fines of up to \$33,000 can apply for a corporation.

Recent OH&S Developments



Alerts have been released by Workplace Health and Safety QLD in the following areas:

- Safe Forklift Operation;
 - Air-conditioner Installation;
 - Insulation;
 - Lifting inserts for tilt-up and pre-cast concrete construction; and
 - New Risk Management Code of Practice.
- For more information on the following, please indicate on the feedback form in your packs.

Recent Prosecutions



- Amcor Packaging
- AD Edwards Solid Plastering
- Austcast Pty Ltd
- Blue Recruit Pty Ltd
- CEK Enterprises Pty Ltd
- Bradken Resource Pty Ltd
- Queensland Rail

OH&S Update



- As of December, the draft OH&S provisions to become an agreed Model National Act.
- The model legislation consists of a principal OHS Act supported by model regulations and Codes of Practice.
- Under the new laws all Australian workers will have the right to stop unsafe work and have the right to elect Health and Safety Representatives to represent them in health and safety matters.
- All trained health and safety representatives will have the power issue provisional improvement notices to their employers and direct other workers to cease unsafe work.
- Safe Work Australia was established as an independent body to progress national OHS laws.

OH&S Compliance



- Workplace Health & Safety Compliance and Enforcement Policy 2009.
- the "Construction Induction Card will replace the blue card.
- Amended Codes of Practice.

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