Smart Guide No. 1

A Business Guide to the Fair Work Act

Supporting documentation and proforma letters may be found in Tool Packs No.1 and 2.

This will be indicated in the text by the following: (TP1) or (TP2).

All information contained in this guide is current at time of release.

Introduction

There have been some dramatic changes in the industrial relations legislation and compliance issues which have affected businesses in Australia since 2007. A brief history of these changes commenced in 2007 when the then Prime Minister John Howard introduced changes to the Workplace Relations Act 1996 (Cth) (WR Act). These amendments named 'Work Choices' came into effect on 27 March 2007 and the controversial changes were upheld as constitutionally valid by the High Court in May 2007.

There were some significant issues of philosophical disagreement between the union affiliated ALP and the Business orientated Liberal Party over the introduction of these workplace laws.

These differences were essentially centred on the fundamentals of two different philosophies with the Work Choices legislation aimed at deregulating industrial relations at the workplace level through the application of Australian Workplace Agreements (AWA's) and individual contracts and the Fair Work Act, aimed at refining and centralising labour relations while reducing the input and relevance of the trade union movement.

Negotiation of an AWA or individual contract did not mandate the representation of a trade union and was aimed more at deregulating the negotiation of wages and conditions particularly in relation to flexibility, productivity, and efficiency.

This obviously incensed the trade union movement as they could see their power base and future being eroded over time to the point that they would follow the path of some European countries where the union movement was almost inconsequential. In response they marshalled their forces and got behind the ALP political party and were successful in achieving a change of government.

Although the Howard Government introduced the "fairness test" to assist agreement making and protect employee entitlements, their government was defeated in November 2007. Following the successful election of the ALP, they quickly set about creating a new industrial landscape based more on their philosophies. The previous Work Choices legislation proved to be generally politically unpopular and polarised opinions on industrial relations. As soon as the Rudd government was elected, they set about deconstructing the previous government's IR framework.

In March 2008 legislation was passed preventing any new Australian Workplace Agreements (AWA's) and commencing the award modernisation process. In 2009 the then Rudd and Gilliard ALP government completely rewrote the industrial relations legislation

and introduced the Fair Work Act 2009 in July to replace the Liberal Party government Work Choices Act. The then Rudd government used the 'corporations' power' of the Australian Constitution to bring employee relations issues into a national framework and essentially gave the states no option but to devolve their IR powers and defer to the federal system.

The State Referral Act came into operation on 1 July 2009 and there has been a stream of legislation since to shore up and improve on the Fair Work Act and its philosophical objectives. The difficulty for business operators and particularly those small businesses without dedicated HR/IR roles is that there has been an immense change in the applicable labour law and legislative framework that applies to business, and this has increased the risk of non-compliance and uncertainty in dealing with workplace matters.

There is no doubt that there has been an increase in the responsibility of employers to ensure that they are paying correct wages and conditions and the penalties for non-compliance under the new legislation has considerably increased.

The Fair Work Act 2009 is currently approximately 1,700 pages long which includes the associated rules and regulations, and it would be impractical to go through each item in this guide. To assist you we have we have provided the brief history of the inception of the Fair Work Act 2009 and the events that led up to its implementation, and then focussed on some of the key points which are relevant to the business community who need to be aware of their roles and responsibilities.

National Employment Standards and Award Modernisation

One of the first tasks undertaken was to have a review completed by the Australian Industrial Relations Commission (AIRC) (which later became Fair Work Australia and is currently named the Fair Work Commission) of the over 3,000 awards which existed under previous industrial legislation into 121 Modern Awards.

The Fair Work Commission was set up to handle principally:

- The establishment and maintenance of minimum wages
- Award matters
- Agreement making approval and scrutiny
- Unfair dismissal claims
- Enforcement of the Fair Work Act

This process called 'Award Modernisation' was done in conjunction with the reorganisation of the structure of the AIRC which presided over a mixture of state and federal awards.

Effective from 31 December 2010, the state award system which in many cases mirrored the federal award provisions was abolished along with the state industrial systems. From this date all state awards (known as Division 2B State Awards) ceased to operate, and the employees affected were transitioned to coverage under the applicable new modern award. The old system of award related minimum conditions which relied on a complex mixture of state legislation and award provisions, test cases and disputes was replaced with the new order of legislative control over minimum wages and employee entitlements and a diminished role of third party (tribunal) influence. Effective from 1 January 2010 all state governments with the exception of Western Australia transferred their industrial relations powers to the federal government.

FWC's minimum wage panel determines the minimum wage each year and these decisions under the new legislative framework are passed on quickly and much more widely than under the old state and federal award system.

Because of the size and nature of the changes and the requirement for employers to implement the changes and remain compliant, FWC handed down an award modernisation decision which contained transitional provisions to be applied to modern awards. These provisions took into account the existing position of employers and employees and provided a clear and structured framework to transition to the new modern award system while minimising the financial impact that the consolidation of awards into the modern award system created.

The 121 new modern awards now cover the vast majority of workers in Australia and all enterprise agreements use the applicable modern award, industrial relations system and Fair Work Act 2009 as their base.

It is important to note that during the transition or phasing in period, safety net increases were to be taken into account when calculating an employee pay rates under the terms and conditions of a modern award.

The Fair Work Ombudsman website located at http://www.fairwork.gov.au is an excellent resource for calculating employee entitlements. This website contains a wage calculator to assist in the award transition process and ensuring that the correct wages and conditions are paid.

Section 134 the modern awards objective of the Fair Work Act outlines the role that FWC sees the modern award system playing in future employee relations and remuneration issues. This will include ensuring that there is a relevant and fair minimum safety net for employees which takes into account the following:

- Relative living standards and the needs of the low paid
- The need to encourage collective bargaining
- The need to promote social inclusion through increased worker participation
- The need to promote flexible modern work practices and the efficient and productive performance of work
- The principle of equal remuneration
- The likely impact of modern award powers on business including on productivity, employment costs and regulatory burden.

This simplification was not achieved without some dissent and although the system has been streamlined and consolidated, there are still issues associated with the implementation of these modern awards that are causing concern at the industry level. These concerns are loosely based on the way the awards are structured and the conditions and benefits that used to exist sporadically at industry level now being uniform and compulsory. The underlying concept of the new modern award system was to create a safety net for as many employees as possible.

Non-compliance with the Fair Work Act 2009 and the modern award system is more punitive than under previous legislation and some offences carry significant financial penalties if breached.

It is important that your business reviews your award coverage and award transition processes and payments to ensure that you are paying employees at the correct rates.

There have also been other award issues which employers need to be aware of. This includes:

- Casual conversion clauses (the election of a casual employee to request a permanent position) is included in all new modern awards
- The creation of a miscellaneous award (for employees not covered by a specific modern award)
- Penalty rates and overtime provisions that previously did not exist in some state awards have been introduced in the modern industry awards.

In an alignment with the Superannuation Legislation amendment, all modern awards are now required to include superannuation terms and a process to review these terms.

The exemption level for employees covered by an employment agreement is an indexed amount which is changed on the 1st July each year, for employees not covered by an award or enterprise agreement. However, although these employment agreements are made without application of the award minimum provisions, they must apply the National Employment Standards (NES).

National Employment Standards (NES)

The National Employment Standards (NES) were introduced in conjunction with the modern awards and the legislated national minimum wage orders as another element of the safety net.

The NES are standard minimum entitlements that cannot be altered to the detriment of an employee through negotiations on workplace instruments such as enterprise agreements, contracts, or awards.

The NES mandates the minimum standard and there are no impediments to employers offering conditions which are better than those contained in the NES.

The 10 National Employment Standards are:

- **Fair Work Information Statement** - employers must give the Fair Work Information Statement to all new employees (TP1).
- **Maximum weekly hours of work** - 38 hours per week, plus reasonable additional hours. Note: An agreement may be negotiated between employee and employer if additional hours are required (TP2).
- **Requests for flexible working arrangements** – employees can ask for a change in working arrangements if they:
    - Are a parent or carer for young children under school age or children under 18 with a disability?
    - Have a disability
    - Are 55 or older
    - Are experiencing family or domestic violence or
    - Are supporting an immediate family or household member who requires care or support because of family or domestic violence.

- **Parental leave and related entitlements** - up to 12 months unpaid leave, the right to ask for an extra 12 months unpaid leave, concurrent parental leave and other types of maternity, paternity, and adoption leave
- **Annual leave** - 4 weeks paid leave per year, plus an extra week for some shift workers
- **Personal / carer's leave and compassionate leave** - 10 days paid personal (sick) / carer's leave, 2 days unpaid carer's leave and 2 days compassionate leave (unpaid for casuals) as needed
- **Community service leave** - up to 10 days paid leave for jury service (after 10 days is unpaid) and unpaid leave for voluntary emergency work (Note: Employers may request in writing that certain staff members be exempt from jury duty. (TP2).
- **Long service leave** - entitlements are carried over from pre-modern awards or from state legislation. For details see the Long Service Leave and the National Employment Standards fact sheet.
- **Public holidays** - paid days off on public holidays unless it' is reasonable to ask the employee to work.
- **Notice of termination and redundancy pay** - up to 4 weeks' notice of termination (5 weeks if the employee is over 45 and has been in the job for at least 2 years) and up to 16 weeks redundancy pay.

These standards became effective from 1 January 2010, were amended in 2018 and they form the basic safety net that must be adhered to by employers.

Some of the most significant changes that were introduced with the NES include:

- The ability for employees to request flexible working hours
- Up to 12 months unpaid parental leave (available to each parent)
- Community service leave and make up pay
- The ability to cash out annual leave
- A broadening of the redundancy pay provisions

Awards and agreements may contain similar or supplementary terms to the NES, but they are not to be excluded or diminished and cannot be bought out or traded off.

Employers and employees also have the option to negotiate above award entitlements, but this must be agreed to in writing.

Case Study

In one recent case between the *Australian Institute of Marine and Power Engineers vs. Inco Ships Pty Ltd 2011 FWAFB (Full Bench)* the full bench refused an application to certify their enterprise bargaining agreement because the agreement attempted to substitute long service leave and redundancy provisions for additional remuneration.

Flexibility and Agreement Making

The modern award system with its minimum wages safety net and the NES with increased coverage and a national system organised around the 121 industry-based awards, has created a solid base from which employers can plan and manage their employees with less complications once all of the transitional provisions have ended.

Where an employer seeks to increase their productivity and efficiency using a predominantly award based workforce through workplace change, the best possible options are through workplace agreements.

The option of a workplace specific Enterprise Agreement remains the vehicle of choice for this process and a more detailed explanation of the bargaining process, and its application is contained in Workplace Guide no.2 - The HR/IR Survival Guide.

The actual process of commencing enterprise agreement negotiations with a group of employees is mandated by the Fair Work Act and the steps must be followed in order to ensure compliance and to allow the agreement to be approved and implemented.

Basic terms that may be included in an enterprise agreement are:

- Rates of pay
- Penalty rates and overtime
- Allowances
- Standard hours
- Personal and annual leave
- Employee authorised deductions from wages
- Matters pertaining to the employer and employee relationship

- How the agreement will operate

All agreements must contain:

- A dispute resolution clause that allows disputes under the agreement and/or the NES to be referred to the Fair Work Commission or an independent person and the right to representation
- A flexibility clause that allows individual employees and their employer to enter into an individual arrangement altering the terms of the enterprise agreement
- A consultation clause requiring the employer to consult with affected employees where there is major workplace change including a change to rosters or ordinary hours of work
- A nominal expiry date
- A coverage clause explaining who the agreement covers.

Terms not allowed

The following terms are not allowed to be included in an enterprise agreement:

- Discriminatory terms
- Terms that breach the general protections provisions in Part 3-1 of the Fair Work Act 2009
- Terms that require a bargaining service fee to be paid
- Terms inconsistent with the unfair dismissal provisions in the Fair Work Act
- Terms that modify the law relating to industrial action in Part 3-3 of the Fair Work Act
- Terms relating to right of entry which are not in accordance with Part 3-4 of the Fair Work Act
- A term that would enable an employee or employer to 'opt out' of coverage of the agreement.

The basic steps to commence the negotiation process are:

1. The employees must be provided with a copy of the Notice of Employee Representational rights as in Schedule 2.1 of the Fair Work Regulations 2009. The notice must be in the form prescribed and issued within 14 days of the decision to commence negotiations.

2. Where an employee or group of employees wish to either be their own bargaining representative, or they wish to appoint a bargaining representative to act on their behalf these elections must be in writing to the employer.

3. An employee who is a union member has that union as their default bargaining representative on the condition that the union is entitled to represent the industrial interests of the employee and the work performed.

4. The notice may be provided personally, mailed to the employee's address by pre-paid post, emailed, posted by notice on the employer's intranet with a link to the employee's email address or faxed to the employee.

5. There is no time limit on the employee to respond to the employer's intention to commence a bargaining period or process, however any reply must be in writing and must specify the person or persons appointed to be their bargaining agent and whether they wish to accept or reject the union representation.

6. Following the notice of representational rights being provided to employees the bargaining process can commence.

7. The parties involved in negotiating an enterprise agreement are required to bargain in good faith which involves attending and participating in meetings, relaying relevant information to employees, responding to bargaining proposals and providing responses, refraining from unfair conduct, and recognising and bargaining with the other bargaining representatives.

8. Good faith bargaining does not mean that concessions must be made, or an agreement reached unless the terms are acceptable.

9. During the negotiating phase the employees may have access to protected industrial action which can only be accessed during the bargaining period and only if specific steps are followed. These steps are contained in Chapter 3, Part 3-3 of the Fair Work Act 2009.

10. If the employees are covered by a modern award, the base rate in the enterprise agreement must not be less than the base rate in the applicable modern award. This also applies to employees who are not covered by an award but are covered by a minimum wage order.

11. When the parties have reached agreement, all employees who would be covered by the agreement must have the opportunity to vote on the agreement.
12. This vote may not take place until at least 21 days after the Notice of Employee Representational rights was provided.
13. The voting process is optional and can be by show of hands, ballot or electronically but to be successful must be accepted by the majority of the workers who would be covered by the agreement.
14. If the union is involved in the process, they must be advised of the voting timetable and process.
15. The draft agreement must be provided to employees at least 7 days prior to the vote and they must have access to the written document and any matters that may be negotiated in conjunction with the agreement.
16. The terms and conditions of the agreement must be explained to the employees and take into consideration language and cultural issues.
17. If the majority of employees accept the agreement, the employer and at least one employee representative must sign and date the new enterprise agreement.
18. Once the agreement is finalised it must be lodged with the Fair Work Commission for approval accompanied by Forms 16, 17 and 18 which can be accessed on the FWC website at www.fwc.gov.au under agreements.
19. The Commission with then apply the Better Off Overall Test (BOOT) and if the agreement passes this test (unless there are any technical or public interest issues) the agreement should be approved and may commence.

Enterprise Bargaining Agreements can be very useful especially for larger companies where major flexibility and productivity issues are able to be negotiated and achieved, usually with a suitable increase in wages or conditions for employees in return for these flexible work options.

EBA's may be varied from time to time by the parties, but any variations must be approved by the FWC. The parties to an EBA are also able terminate the agreement by making a terminal agreement using a similar negotiating process. Once an EBA has passed its nominal expiry date, the agreement continues to apply until it is terminated or replaced with another agreement.

As demonstrated from the steps outlined above the planning, negotiation and implementation of an enterprise agreement can be time consuming, complex, and costly.

For smaller businesses there are still options available under the Fair Work Act 2009 which can deliver workplace flexibility without some of the formality and process of an EBA.

One of the most common flexibility options is the Individual Flexibility Agreement (IFA) which allows an employer to enter into an individual agreement with an award-based employee on certain workplace conditions (TP1).

The Model Flexibility Clause below sets out the flexibility requirements for awards and agreements with all Modern Awards having a similar provision entitled Award Flexibility. Following the recent transitional review award flexibility decision additional wording has been included to ensure that an agreement can only be entered into after the employee has commenced employment.

Model flexibility term

Individual Flexibility Arrangements

The Company and employee covered by this Agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the Agreement if:

- **the Agreement deals with 1 or more of the following matters:**
    a) arrangements about when work is performed
    a) overtime rates
    b) penalty rates
    c) allowances
    d) leave loading; and
- **the arrangement meets the genuine needs of the Company and employee in relation to 1 or more of the matters mentioned in paragraph (a); and**
- **the arrangement is genuinely agreed to by the Company and employee.**

Terms of the Individual Flexibility Arrangements

The Company must ensure that the terms of the individual flexibility arrangement:

a) are about permitted matters under section 172 of the Fair Work Act 2009; and

b) are not unlawful terms under section 194 of the Fair Work Act 2009; and

c) result in the employee being better off overall than the employee would be if no arrangement was made.

The Company must ensure that the individual flexibility arrangement:

a) is in writing; and

b) includes the name of the Company and employee; and

c) is signed by the Company and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and

d) includes details of:

i) the terms of the enterprise agreement that will be varied by the arrangement; and

ii) how the arrangement will vary the effect of the terms; and

iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

e) states the day on which the arrangement commences.

The Company must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

Termination of the Individual Flexibility Arrangement

The Company or employee may terminate the individual flexibility arrangement:

a) by giving no more than 28 days written notice to the other party to the arrangement; or

b) if the Company and employee agree in writing — at any time.

These agreements are relatively easy to negotiate and as they apply to individual employees can be used effectively to make changes to suit individual work practices and operational requirements.

All IFA's must also pass the BOOT and copies must be kept by the parties and on file.

Further information on IFA's and the BOOT are contained in Workplace Guide 2 - The HR/IR Survival Guide.

Redundancy

Under the provisions of the Fair Work Act 2009 and the NES there has been a widening and consolidation of the application of redundancy pay and provisions for Australian workers.

The NES provides for up to 4 weeks' notice of termination (5 weeks if the employee is over 45 and has been in the job for at least 2 years) and up to 16 weeks redundancy pay. Some professional awards a 1 month's notice period.

However, as a general rule, unless there is a contract or agreement to the contrary, employers with less than 15 employees do not have to provide redundancy pay (notice periods do still apply) but they must follow the Small Business Dismissal Code when making an employee redundant.

Copies of the Small Business Dismissal Code can be found on the FWA website at: www.fwc.gov.au.

In order to avoid an unfair dismissal, claim when carrying out an employee redundancy, the following steps are advised:

1. The employer should ensure that the employee's position is no longer required and the job they were performing is no longer needed or to be done by any other employee or worker or where through no fault of the employee the duties of the role have changed to the point that the original role no longer exists
2. Once this has been established, employees can be selected for retrenchment by seniority, job performance potential or voluntary redundancy
3. The consultation process requires the employer to:
    - Notify the affected employee/s of the decision to introduce major change in the workplace which will have significant effects on their employment and provide in writing the details of the proposed change (TP2).
    - Discuss with the affected employee/s (and their union if applicable) the likely effects of the change and any measures to mitigate these effects
    - Give prompt consideration to any suggestions raised by the employee/s or their union, such as redeployment and retraining options
4. The employer has a responsibility to the employee and also to avoid unfair dismissal or adverse action claims, to consult with the affected employee as Section 389 (1) (b) of the Fair Work Act will only recognise a 'genuine redundancy' which is exempt from unfair dismissal protection where the consultation process has been followed
5. If there are more than 15 employees to be made redundant, Section 530 of the Fair Work Act requires that the employer notifies Centrelink in writing of the proposed redundancies. Section 531 of the FWA also requires that notice be provided to the

appropriate union and the consultation process to be followed under these circumstances

The redundancy pay provisions are as follows:

Redundancy pay period

At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
10 years and over	12 weeks

The reason that the redundancy pay provisions at 10 years or more are less than the amount for '9 years but less than 10 years' is that the government assumes that an employee is also entitled to long service leave pay at this point.

These provisions do not apply where an employee has had less than 12 months continuous service on termination.

6. Where the employer has fewer than 15 total employees at the earlier time that the employee was given notice or dismissed (this includes part-time and casuals who are regular casuals and any other business entities) they are generally not entitled to the redundancy, but the consultation process contained in the Small Business Dismissal Code should be adhered to.

7. Notice periods on termination apply to all employees and are as follows:

   Employee's period of continuous service with the employer at the end of the day the notice is given.

Termination Notice Periods

Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks

More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

Then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

8. If the new employer and the old employers are associated entities then under Section 22(5) Transfer of Employment of the FWA, the new employer must recognise the employee's service with the old employer

9. If the transfer of business is between two non-associated entities, under Section 122 of the FWA redundancy payments do not apply and any accrued entitlements are usually paid out as part of the business sale

Dismissal of an employee for disciplinary or inefficiency matters or where the employee is replaced by another employee carrying out the same duties is *not* considered a genuine redundancy.

Dismissals

Once the decision has been reached to terminate the employment of an employee for other than redundancy, the following steps should be observed:

1. A meeting should be held with the employee and at this meeting the employee should be provided with the opportunity to bring a support person. If possible, this should not be a lawyer and although it is permissible for a family member to fill this role they are generally emotionally involved and can be counterproductive

2. The support person is there to be a support person only, not an advocate or spokesperson for the employee

3. The employee must be provided with all accusations and reasons for the dismissal and be given the opportunity to respond

4. Depending upon the circumstances the employer, after hearing the employee's response to the allegations, may proceed with the termination or elect to investigate the responses and call a further meeting at a later date when a final decision will be made

5. If the dismissal is performance based the employer will need to demonstrate that the employee has been adequately warned about their conduct and been given

reasonable time and resources to improve their performance to the required standard

6. These warnings can be verbal or written but must be able to be produced if required to defend an unfair dismissal claim

7. There are no set rules for the mode of warning however it is essential to follow any policies and procedures which may exist in the workplace and file notes should be kept of all meetings

8. All the specific reasons for dismissal must be provided to the employee in writing at the end of the meeting if possible

9. In the case of serious misconduct or instant dismissal, the employer must ensure that the penalty suits the offence and the seriousness of the incident

10. The recognised types of conduct that may attract instant dismissal are:

    - Dishonesty, theft, and fraud
    - Abusive and/or threatening behaviour
    - Harassment and/or bullying
    - Absenteeism/abandonment of employment
    - Misuse of alcohol or other drugs
    - Unsafe practices or behaviour

Those employees who may be eligible to lodge an unfair dismissal claim if they believe that their dismissal was harsh, unjust, or unfair include employees who:

- Completed the minimum service requirement or employment period which is 1 year for small business and 6 months for those businesses within excess of 15 employees
- Are covered under the terms and conditions of a modernised award or enterprise agreement
- Earn less than the high-income threshold
- Are not covered by a specified term or limited tenure contract which stipulates a task to be performed and a termination date once the task is completed
- Are employed under a season which stipulates the end of the employment at the end of the season

- Are employed under a designated traineeship which states the end of employment at the end of the arrangement
- Have been demoted where there has not been a significant drop in remuneration or duties

Those employees who are exempt from access to the unfair dismissal process include:

- Employees who have been dismissed in accordance with the Small Business Fair Dismissal Code (less than 15 employees)
- Where a genuine redundancy applies
- Where an application for another remedy is in place

Although certain casual employees are exempt from unfair dismissal protection, when a casual employee is used in any situation where their work is continual and systematic, it is advisable to follow the normal performance, warning, and dismissal process to minimise the likelihood of a claim being lodged.

In all cases where an unfair dismissal claim is lodged, it is up to the employer to demonstrate that the reason for dismissal was valid and the FWC will evaluate whether:

- The reason for the dismissal was valid
- The employee was advised of the reason
- The employee was provided with the opportunity to respond to the valid reason
- The employee was advised of this right and provided with the opportunity to have a support person present when the issues were discussed
- Any performance related issues were raised with the employee and that they were warned about the issues before the dismissal
- The size of the employer's enterprise affected the dismissal processes
- The absence of dedicated human resources management specialists or other expertise may have had an effect on the dismissal process

The FWC also has the right to consider any other matter that they believe is relevant when assessing an unfair dismissal claim.

This reinforces the need to properly follow the procedures and processes and ensure that if required, a proper investigation or review is undertaken and that there are written records where possible to support the actions and outcomes.

There were over 16,558 unfair dismissal applications in 2020-2021 and although the majority of these cases were resolved prior to going to trial, they can be time consuming and costly. Statistics from the FWC in 2020 show that in 82% of the cases before the Fair Work Commission where monetary compensation was awarded by the FWC, these amounts were below $6,000.

Since the introduction of the legislation, there have been over 140,000 unfair dismissal claims lodged with the FWC.

These figures demonstrate that both employees and employers need to consider the potential costs and outcomes of proceeding to trial and closely consider the conciliation process to reach a settlement at the stage where it is possible.

Bullying, Harassment and Workplace Discrimination

By far the most difficult and growing area of complaints for employers to manage are in the area of bullying and harassment. These claims can be highly disruptive to the workforce and can often be accompanied by Work Cover claims for stress and related injuries. Examples of overt bullying behaviour include:

- Yelling
- Abusive language
- Public humiliation
- Unwanted teasing or practical jokes
- Constant criticism
- Unjustified threats of dismissal
- Examples of covert bullying behaviour include
- Sabotaging a colleague's work
- Withholding required information/resources from a colleague
- Constantly changing targets or work guidelines without explanation
- Overloading an employee with work and creating unrealistic deadlines
- Isolating or ignoring an employee on a consistent basis
- Sending offensive email messages
- Not giving credit where credit is due
- Malicious gossip

Currently claims of this nature are dealt with by the Anti-Discrimination Commission with offices in each state and territory or the Australian Human Rights Commission located in Sydney. However, since January 2014, a worker who 'reasonably' believes he/she has been bullied at work may apply directly to the Fair Work Commission to have the matter investigated within 14 days. The term 'worker' is very broad and can include contractors, trainees, and labour hire staff as well as employees. If the FWC uphold the complaint, they may order any actions considered appropriate to prevent the bullying including policy reviews, training or simply for the bullying to cease.

The process of claims management is similar to other workplace disputes where the claimant lodges a claim with the Anti-Discrimination Commission or associated body and the employer is then given the opportunity to respond. This is usually accompanied by a conciliation hearing where the parties are given the opportunity to air their grievances in a non-confrontational environment with a view to reaching a mutually agreed settlement.

If this is not achieved, the matter may proceed to a trial which can not only be costly but also has the potential to award large settlements if the accusations and outcomes are proven or, if the matter is heard in the FWC, orders to stop the bullying may be issued which if breached, carry significant financial penalties.

For more information about bullying and harassment or disputes refer to Workplace Guide no.3 - Grievances and Disputes, Investigations, Unions, and Industrial Action.

General Protections (Adverse Action)

Contained in Part 3-1 of the Fair Work Act 2009 are the general protections provisions which apply to workplace rights involving prospective employers, employers, principal contractors, and industrial associations.

The basic coverage of these provisions is to prohibit the taking of "adverse action" in connection with a party exercising a workplace right or engaging in a workplace activity.

Section 342(1) of the FW Act defines the parties able to take action under these provisions as:

- An employer against an employee
- A prospective employer against a prospective employee
- A principal against a contractor, or an employee of the contractor
- A prospective principal against a prospective contractor
- A contractor against a principal

- An employee against an employer
- An industrial association, or an officer or member of an industrial association, against a person

Some of the conduct which may give rise to an adverse action claim include workplace rights such as:

- Dismissal
- Injury
- Prejudice
- Discrimination
- Coercion
- Industrial activity
- Freedom of association
- Undue pressure or influence
- Misrepresentation:
    - Discrimination
    - Sham contract arrangements
- Temporary absence:
    - Must not dismiss an employee due to a temporary absence, illness, or injury

Case Study

Barclay V the Board of Bendigo Regional Institute of Technical and Further Education 2011.

In this decision the employer was found to have taken adverse action against their employee Mr. Barclay by suspending him from duty and removing his workplace internet access and preventing him from entering the workplace while requiring the employee to show cause why disciplinary action should not be taken against him. This action was taken by the employer after Mr. Barclay who was a Union sub-branch officer sent an email alleging that his colleagues were asked to produce fraudulent documents. In this case the court found that an employer should distinguish between when an employee is acting in their capacity as an employee and when an employee is acting in a union capacity and in their decision also stated that “adverse action will not be excused simply because its perpetrator held a benevolent intent”.

Decisions such as the above demonstrate the complexity of the Fair Work Act 2009 and the application that adverse action claims can have if they progress to the Court system.

This is particularly evident when it comes to the options available where an employee wishes to dispute action taken against them for whatever reason. It also highlights the necessity to follow all the correct steps when dealing with employee performance, disciplinary or termination.

Adverse action claims Section 361 of the FWA removes the onus of proof from the applicant and transfers it to the respondent to prove that an action that has been taken was not an action that would contravene the adverse action definitions as contained in the Division 3 – Workplace Rights section of the FWA and this is not in contravention of the principles of adverse action, although the applicant must establish that they have the relevant workplace right before this proof is required.

Adverse action claims can be technically complex and if they proceed to trial can be expensive and attract a wide range of outcomes including:

- Conciliation
- Penalties
- Injunctions
- Damages
- Other remedies such as reinstatement, hurt and humiliation compensation, lost wages, and compliance programs

Therefore, it is recommended that professional advice is sought if you are in receipt of an adverse action claim.

It is important to note that the FWC has additional powers to:

- Arbitrate (with the consent of all parties) rather than commence court proceedings
- Award costs against each party where it is believed there is unreasonable conduct. This may be awarded against the representative if they have entered the proceedings without reasonable prospects of success

Summary

Since its inception and despite the political noise that it has created, The Fair Work Act 2009 has some significant benefits for all parties. These include:

- A streamlined and uniform award system
- The establishment of a minimum wage which will continually be reviewed
- Removal of duplicated State Industrial Relations systems and structures
- General protections for employees and employers
- Standardises redundancy provisions
- Protection of the Better Off Overall Test for employees
- The implementation of National Employment Standards
- A consolidation of old and new IR legislation into one instrument with a reasonable transition period for parties to meet compliance requirements

Some of the negative aspects for business include:

- An increased level of complexity for employers
- An increased level of compliance and vigilance required to avoid breaches
- A more regulated and less flexible enterprise bargaining system
- More reliance on process than outcomes in matters of employee termination and redundancy

There are many options to improve workplace productivity and flexibility using the modern award system and the Fair Work Act, but care must be taken to follow the correct processes and procedures to avoid costly mistakes.

The Industrial Relations system and legislation continues to evolve to meet the requirements of the areas it covers.

The expiry of the Modern Award transitional period from July 2014 means that there is a more level playing field for employers in general, however all employers will need to ensure they have implemented the required workplace changes to applicable wages and conditions, or they may face significant back pay claims and/or penalties for breaches of the Act.

Some other changes that have been implemented as a result of the four yearly Modern Award Review process and legislative amendments include:

1. Cashing out of annual leave provisions
2. Penalty rates review in certain modern awards
3. Family and Domestic Violence leave entitlements
4. Workplace Flexibility options

One of the most significant additions to the IR legislation was instigated due to a large number of employers being found to have underpaid their staff significant amounts of wages. The Federal Government therefore introduced some additional legislation into the Fair Work Act 2009 to deter this type of practice by significantly increasing the penalties for non-compliance.

The ***Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*** successfully passed through the Senate on September 4, 2017, with some minor amendments in relation to the investigative powers of the Fair Work Ombudsman when gathering evidence.

The reasons provided by the Government for this legislation were that underpayment of wages remains a significant problem in Australia.

This assertion is based on a number of high-profile cases involving large organisations and franchise companies underpaying staff by deliberately ignoring award and penalty rates, misuse of contractors (sham contracting) and threats to cancel work visas and withhold wages and/or require the wages to be paid back to the employer.

The largest of these breaches was the 7-Eleven case which has discovered millions of dollars of underpaid wages to employees who were mainly immigrant or work visa employees in a vulnerable position and the government, while acknowledging that the majority of employers abide by the relevant wages and conditions prescribed in the modern award system, have found that some organisations, and particularly franchise companies, have deliberately flouted the laws.

The new laws will apply in conjunction with the existing Fair Work Act and the powers of the Fair Work Ombudsman but will provide significant new penalties for employers who breach the laws with penalties increased up to ten times the existing penalty framework.

This legislation was introduced on 15 September 2017 and is called the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017.

It makes the following changes to the Fair Work Act 2009:

- increase penalties for ‘serious contraventions’ of workplace laws

- make it clear that employers cannot ask for ‘cash-back’ from employees or prospective employees, or threaten to cancel visa arrangements or termination of employment
- increase penalties for breaches of record-keeping and pay slip obligations
- employers who do not meet record-keeping or pay slip obligations and cannot give a reasonable excuse will need to disprove wage claims made in a court (this is also referred to as a reverse onus of proof)
- strengthen our powers to collect evidence in investigations
- introduce new penalties for giving us false or misleading information or hindering or obstructing our investigations

From 27 October 2017, the changes also mean that certain franchisors and holding companies can be held responsible if their franchisees or subsidiaries do not follow workplace laws (if they knew or should have known and could have prevented it).

The penalties that apply to breaches of this particular piece of legislation where litigation is successful are Court imposed sanctions of:

- make a person pay an amount of money as a penalty for not doing what the law says (up to $12,600 per contravention for an individual, and $63,000 per contravention for companies)
- make a person pay a higher penalty for some ‘serious contraventions’ (up to $126,000 per contravention for an individual and $630,000 per contravention for companies)
- make an employer or other person pay an employee their outstanding entitlements (plus interest)
- require someone to do something (e.g., give an employee their job back) or undertake training or do an audit
- restrain someone from doing something (an injunction or interim injunction) for example, stop discriminating against an employee, or
- pay an employee compensation for loss suffered

The Office of the Fair Work Ombudsman is actively out in the community conducting investigations into claims of underpayment of wages and misuse of contractors and has been successful with some large penalties being applied to employers in the last 12-18 months.

This legislation will mean more investigations and scrutiny on employers and will possibly mean an increase in claims made by employees.

It is crucial that employers closely examine their wage structures, use of contractors and workplace agreements to ensure that they are compliant and correct.

Workplace Agreements and Employment Contracts

There have been the two recent decisions by the FWC which increase the basic wage and cut penalty rates in some specific awards.

It is important that if you have employment contracts, Individual Flexibility Agreements, or workplace enterprise bargaining agreements that you review these instruments to take account of these decisions to ensure that these instruments pass the Better Off Overall Test.

Australian Building and Construction Commission

The ABCC has been reinstated by the Federal Government after the passing of the Building and Construction Industry (Improving Productivity) Bill on November 30, 2016.

This means that the previous Office of the Fair Work Building Industry Inspectorate became the ABCC on December 1, 2016.

Main components of the new legislation:

- The ABCC's power to conduct compulsory witness examinations and undertake investigations and other enforcement action having regard to industry conditions for each category of building industry participant.
- The establishment of a working group to investigate Security of Payment for contractors.
- An expanded definition of 'building work' which covers transportation and the supply of goods to building sites and offshore resources platforms.
- Increases to penalties for unlawful industrial actions by individuals and corporate entities, including unions.
- The creation of a prohibition on unlawful industrial action, including picketing.
- An expansion of the existing offence of coercion.
- Greater powers for the Courts to order injunctions to stop unlawful action, including picketing; and

- The creation of the Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 ("Building Code"), which will apply to all enterprise agreements past November 29, 2018.

From March 2017 Government projects over $4,000,000 will have to comply with new procurement rules that take into account:

- Locally produced material content for the project.
- The contribution to local employment.
- The whole-of-life cost of the project.
- That materials will comply with Australian product standards; and
- How the company is growing local skills.

It is also a requirement on most Commonwealth building sites to have mandatory drug testing procedures in place.

There is also a new compliance process for Code compliance in relation to workplace agreements.

FWC Decision on Casual Conversion to Permanent Employees

In a decision handed down in 2020 as part of the four-year modern award review process, the FWC has determined to amend 121 Modern Awards to include provisions for casual workers to have the right to request conversion to part time or full-time employment after a period of 6 or 12 months where they have performed regular work.

Employers can refuse the request on reasonable grounds, including that it would require a significant adjustment to a casual employee's hours of work, or they could foresee their position would no longer exist in the next 12 months.

Family and Domestic Violence Leave

The following abbreviated summary follows the recent decision of the Fair Work Commission as part of the 4-year review of Modern Awards to insert a model domestic violence clause into the awards to allow employees to access 5 unpaid days where they can provide reasonable proof that they are experiencing family or domestic violence issues.

Summary of Decision 26 March 2018 – 4 yearly review of modern awards — Family and Domestic Violence AM2015/1 [2018] FWCFB 1691

This decision takes a cautious regulatory response to this issue with the following decision of the Full Bench of the Fair Work Commission.

> *"We have decided to provide five days' unpaid leave to employees experiencing family and domestic violence if the employee needs to do something to deal with the impact of that violence and it is impractical for them to do it outside their ordinary hours of work.*
>
> *We have decided to defer our consideration of whether employees should be able to access paid personal/carer's leave for the purpose of taking family and domestic violence leave.*
>
> *The extent to which the new entitlement to unpaid leave will be utilised is unknown, as is the impact of the new entitlement on business.*
>
> *We propose to revisit this issue in June 2021, after the model term has been in operation for three years.*
>
> *At that time, we will consider whether any changes are needed to the unpaid leave model term, and whether to allow access to personal/carer's leave.*
>
> *At that time, we will also revisit the question of whether provisions should be made for paid family and domestic violence leave."*

The Full Bench exempted from this general finding the Australian Government Industry Award 2016, the Road Transport and Distribution Award 2010 and the Road Transport (Long Distance Operations) Award 2010, which are to be the subject of separate consideration.

Flexible Working Arrangements

Also, as part of the 4 yearly review, the FWC considered the ACTU claims in relation to flexible working arrangements and, although some of the claims were rejected, the FWC has determined that there needs to be additional provisions inserted into the awards to meet the expectations of employees with family and carer responsibilities, and the abbreviated summary below sets out the basis of their decision and what to expect once the clause is finalised.

The Full Bench reached the provisional view that the modern award minimum safety net should be varied to incorporate a model term to facilitate flexible working arrangements for parents and carers.

The provisional model term proposed by the Full Bench is summarised below.

The provisional model term would supplement the NES in the following ways:

- The group of employees eligible to request a change in working arrangements relating to parental or caring responsibilities, will be expanded to include ongoing and casual employees with at least six months' service but less than 12 months' service.
- Before refusing an employee's request, the employer will be required to seek to confer with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances.
- If the employer refuses the request, the employer's written response to the request will be required to include a more comprehensive explanation of the reasons for the refusal.
- The written response will also be required to include the details of any change in working arrangements that was agreed when the employer and employee conferred, or, if no change was agreed, the details of any changes in working arrangements that the employer can offer to the employee.

A note will draw attention to the Commission's (limited) capacity to deal with disputes.

Table of Amendments

PAGE NO	AMENDMENT	NEW VERSION	DATE AMENDED
7,9,10,11	1 July 2014 – Nil	1.1	12/03/2014
12	1 July 2014 – Full	1.1	12/03/2014
15	Individual contracts – exemption level rate. Indexed July each year	1.1	12/03/2014
15	Modern award superannuation terms	1.1	12/03/2014
20	EBA consultation to include change to rosters / hours of work	1.1	12/03/2014
28	High income threshold amount update	1.1	12/03/2014
31	Employee may apply directly to the FWC	1.1	12/03/2014
34	FWC powers	1.1	12/03/2014
15	Individual contracts – exemption level rate. Indexed July each year	1.2	26/08/2014
28	High income threshold amount update	1.2	26/08/2014
15	Individual contracts – exemption level rate. Indexed July each year	1.3	01/07/2015
28	High income threshold amount update	1.3	01/07/2015
Various	General updates to statistics, grammar, punctuation etc	1.4	01/07/2016
15	Individual contracts – exemption level rate updated to $138,900. Indexed July each year.	1.4	01/07/2016
28	High income threshold amount updated to $138,900	1.4	01/07/2016
15	Individual contracts – exemption level rate updated to $142,000. Indexed July each year.	1.5	01/07/2017
28	High income threshold amount updated to $142,000	1.5	01/07/2017
15	Individual contracts – exemption level rate updated to $145,400. Indexed July each year.	1.6	01/07/2018
28	High income threshold amount updated to $145,400	1.6	01/07/2018
Various	General updates to statistics, grammar, punctuation, etc, plus additions to the Summary on page 34	1.6	01/07/2018
15	Individual contracts – exemption level rate updated to $148,700. Indexed July each year.	1.7	01/07/2019
28	High income threshold amount updated to $148,700	1.7	01/07/2019
Various	General updates and overhaul of content	1.8	22/05/2020
Various	General updates and overhaul of content	1.9	06/10/2021