Smart Guide No. 2

HR / IR Survival Guide for Business

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

Surviving the current business environment in Australia is a complex combination of having a sound business with a sustainable place in the market and the staff and structures which maximise profits and minimise costs.

What is often lost in this equation is the value of employee involvement and outcomes and how best to maximise this to make the most of the workforce in general.

This guide will provide advice and tips on how to use some of the more recent human resources and industrial relations strategies and structures to give you that competitive edge required to stay profitable and flexible in today's business environment.

Too often HR/IR issues are dealt with as a last resort and often following a critical incident or as part of formal agreement making negotiations. This can mean employers are often caught on the back foot and trying to recover a position or rectify a dispute.

While there is always the propensity for grievances and accidents to occur in the workplace, having a well-constructed and proactive approach to these issues can deliver a workforce that is productive and efficient and more importantly, able to deal with change by adapting quickly to situations which can greatly affect the profitability and viability of the business.

Large Businesses and Multi-National Corporations

Workplace Based Productivity and Efficiency Bargaining

Many large corporations have multi-site, multi business streams, and often overseas headquarters or operations. This structure provides the potential for communication and leadership to be centralised and heavily reliant on industry-based negotiations. Although this structure provides a level of consistency and stability, quite often it can limit real workplace changes at the coalface.

The trade union movement is well versed and skilled in promoting and leading specific industry-based negotiations such as in the oil, transport and metal industries with common claims and wage targets.

Despite the legislative impediments to pattern bargaining and the requirements for all parties to 'bargain in good faith' the reality is that the unions are too thin on the ground to negotiate workplace specific Enterprise Agreements adequately and professionally across so many worksites and industries. To accommodate for this, they seek to set negotiated precedents with key industry employers and/or employer organisations and then flow on these outcomes as widely as possible.

There have been a number of recent decisions made by the Fair Work Commission in relation to good faith bargaining and the rights of parties involved.

In a 2010 decision in the case of *CPSU vs. Red Bee media Australia Pty Ltd (FWA 9253),* it was the employer's position that the good faith bargaining period had ceased when their employees decided to undertake industrial action. Unfortunately, this position was rejected, leaving the employer to wear significant financial and time implications.

This makes it even more important to ensure that the communication process is being utilised to its maximum advantage. Negotiations and industrial disputes are rarely settled by legislation because the overall outcomes are improved when they are settled by agreement between the parties.

Participation in enterprise bargaining as supported under the Fair Work Act 2009 remains a voluntary process and if you are involved in negotiations where it becomes apparent that you are being subjected to pattern bargaining, under section 422 of the Act, it is possible to obtain injunctive relief.

For many employers, this system works well, as the negotiations which are quite often complex are performed by third parties such as industry associations and unions. By using this method, the outcomes are generally implemented by all parties in their industry sector and/or industrial award.

Some downsides of this outcome include the inability to deliver change quickly if business circumstances alter through the onset of technology, marketplace changes or global issues (such as the global financial crisis) and in larger corporate structures the workforce is generally more highly unionised and regulated which is often a disincentive to seek and achieve change at the workplace.

Unions are not the same in each industry nor quite often in each state, so each business needs to evaluate the type and depth of union involvement in their workforce and create strategies to work with the union to enhance their business. If this is not possible, employers must consider how to achieve the required results by gaining the trust and support of employees who will support change in exchange for improved working conditions.

The current legislation requires that:

- Employees are able to be covered by collective agreements which operate to the exclusion of awards and can apply at either a single enterprise or at a number of enterprises
- The parties involved in negotiating an enterprise agreement must bargain in good faith, and The Fair Work Commission has the legislative powers to arbitrate in these negotiations where no resolution can be found by the parties

- Before agreements can be approved by the FWC, they must be approved by the majority of employees who would be covered by the agreement
- All enterprise agreements must pass the 'Better Off Overall' (BOOT) test which measures the terms and conditions of the agreement against the award safety net and National Employment Standards

The key to this process is that no matter whether there is union opposition, if the employees are onside and the agreement will genuinely improve their conditions of employment while also providing productivity and efficiency benefits for the employer, as long as the agreement meets the technical tests, the employees can vote to accept the agreement.

If the employees would like to accept the agreement it is difficult for the union to derail the negotiations, as the final decision ultimately rests with the majority vote of employees. This places the emphasis on larger businesses and corporations to closely examine the goals and objectives they wish to achieve from the enterprise bargaining process and what is realistically achievable in their current marketplace and industrial environment. This means working across all levels of the business to find productivity bottlenecks or industrial impediments to improved financial and operational efficiency.

Once a wish list is compiled, these items should be properly costed and evaluated by performing a cost benefit analysis to calculate the real benefits and costs individually. This can be a complex matter in large corporations, but it can deliver real benefits with demonstrable improvements to the business outcomes and overall financial performance.

If increased profits or cost savings are identified, it is good policy to contribute some of the identified savings into the benefits/payments to employees through the enterprise agreement. By using this method in the negotiation process you will not only engage employees but also earn their support. A simple method used by many organisations is the calculation of real benefit to be divided equally into three parts:

1. One third to the employees who achieve the change and meet clearly defined targets
2. One third to the business unit or direct employer
3. One third to the corporation who owns the business

One example of this method was negotiated in an agreement with a national union and group of employees in a location where annual equipment damage and subsequent lost time due to repairs and insurance claims was consistently measured at around $300,000 per annum. Although the business was in a high-risk environment the annual damage costs were excessive and were able to be substantially reduced. Disciplinary actions and training were having little impact on the outcomes so as part of the enterprise agreement a formula was negotiated to dramatically reduce

these costs with a third of all savings paid to the employees through a bonus system based on agreed targets and cost reductions. The long-term outcome was highly successful, and the employees received cash bonus payments, the employer drastically reduced costs and improved productivity.

While this type of agreement does not suit all circumstances, the method of costing productivity and efficiency improvements and building a shared component of any savings into the enterprise agreement can be highly beneficial.

Employees generally are seeking job security and reasonable wages and conditions so any ability to earn additional money or benefits is generally well accepted.

Key areas where negotiations can fail is lack of preparation in the following:

- What is being negotiated at industry level
- The available scope for deviation from the industry settlement
- How the organisation identifies, costs, and evaluates their productivity and efficiency issues and how these will be progressed
- The timing of the process (for large corporations with multi-site, multi-business operations these preparations should be at least six months to a year prior to the expiry of existing agreements or industry negotiations)
- Who is the organisation represented by at the negotiations and industry meetings and at what stages?
- What is the bottom line acceptable and non-acceptable outcomes to be achieved from the negotiations and what strategies are to be utilised in both scenarios?

The key point in this advice is that the same level of careful planning and strategic attention is required in determining the outcomes and deliverables associated with workplace specific enterprise agreement bargaining as with any other major corporate workplace initiative. Although there is a lot of work to be done to get it right, the benefits can be the difference in the marketplace between you and your competitor and profit or loss.

Managing Employee Performance and Productivity

Many large businesses have locations interstate and overseas which can create significant obstacles to employee communication and performance management. After employee wages and conditions, performance management is generally the most important tool that employers have to be able to maximise their business potential.

There are many complex and detailed tools available to measure and gauge employee satisfaction and performance. These include but are certainly not limited to:

- Psychological assessment tools
- 360-degree feedback tools
- Six Sigma type organisational strategies
- Performance appraisal systems

All these systems have their individual strengths and weaknesses, but they all supply a common thread of contact and communication with employees and an alignment to business goals and objectives. Without some form of system, tool, or process to constantly evaluate employee feedback and performance, the productivity and efficiency of a business can be adversely affected.

One of the best outcomes and least used strategies (especially in large organisations) is the tool of 'Management by Walking Around'. This process requires a culture of senior management taking time out to walk around offices or facilities and talk with employees about the business in general. It is important to seek genuine feedback from employees at all levels as to their view of the company and its management. A common complaint from employees is often that they are too far removed from the decision makers and only see the senior management when something major occurs. 'Management by Walking Around' (MBWA) is adopted as a formal strategy by many large corporations.

Another good strategy is to reward the workers who are the ‘working bees’ of the organisation that turn up every day and do their job well rather than only those who stand out and are the highest achievers. These people are often ignored when accolades or rewards are being given but in many large organisations, they are the real strength of the business.

Six monthly or annual employee performance appraisal processes are generally in place across large organisations and can be a valuable tool to assess and deal with employee performance. If this method of employee evaluation is used the following questions may be considered to get the best possible results from the process:

- Are the managers delivering the appraisal process trained and proficient in delivering performance appraisals or are they merely going through the motions?
- When was the process last reviewed to ensure that the outcomes justify the input and resources required?
- Do the current goals and objectives match the contemporary business environment?
- Have you done an employee corporate health survey and if so, how were the results managed through the performance appraisal process?
- What is the employees’ view of the process and its outcomes?

To ensure that the performance appraisal process is successful it is necessary to regularly review the process and tools and combine other strategies such as climate surveys and management reviews in achieving and improving employee performance. Employees generally want to come to work and be well rewarded for their efforts in a workplace free of discrimination and poor behaviour. Employers want employees to work diligently and efficiently in order to achieve their goals and objectives. Both parties can meet their objectives, but it takes work to construct and implement a management culture and work ethic that is supported by contemporary systems and support mechanisms to ensure that these goals can be met.

One simple method of ascertaining what staff do and why is to ask selected staff to document their daily tasks for a day or week and then compare this information with the business requirements. You can then make any necessary changes to maximise the productivity of staff.

The amount of time spent making telephone calls and time spent on the internet is becoming a major issue and needs constant vigilance and support through specific IT and Internet Usage polices. Employers need to know that this time is being best utilised for work purposes and not for social media, personal business, or unacceptable behaviour through accessing pornography online.

Although some investment in time and money is required, the use of operating manuals and flowcharts that document processes and procedures can increase efficiency and reduce error and rework.

One large multinational company recently conducted training for all staff worldwide on the use of their local facsimile and photocopying machines (short, brief sessions conducted by local managers and supervisors) with a view to reducing the costs associated with printing mistakes, reducing the amount of coloured printing and general wastage. Quite often these small initiatives can pay large dividends on a wider scale.

In recent years, there has been a demonstrable shift away from paper- based performance appraisal systems and moves towards more flexible and user-friendly Human Resources systems that incorporate a wider range of tools and assessment method that are available as online products.

Most large successful companies have a high degree of employee involvement and engagement combined with professional in-house HR/IR advisors. They recognise that the management of staff and resources is one of the main components to remaining competitive and profitable.

Medium Sized Businesses

Businesses in this category are often placed in the middle of the enterprise bargaining negotiations framework where their size does not allow them a seat at the negotiating table, and they must rely on industry outcomes in relation to general wage and productivity issues. This suits many businesses, but it can limit the ability to deal with change quickly and effectively especially in times of crisis.

Many medium sized businesses belong to industry and/or employer associations and they rely on these organisations to represent their interest and provide information on movements in wages and conditions, legislative and regulatory changes. Quite often there is no dedicated HR/IR department or professional engaged as a full-time employee. This lack of in-house on the ground advice and services can mean that the business misses out on possible options that are available in order to improve productivity and efficiency in the workplace.

Union membership in medium size businesses varies depending upon their industry, location, and size but it is generally less intense than for the larger corporations. The rules that apply in relation to workplace specific bargaining and workplace agreements are the same but there are generally less resources available to carry out the tasks and to plan the process. As a result of this, many businesses adopt past practice and industry practices as the norm while missing out on the gains in productivity and efficiency that some of the larger businesses are able to achieve. This can weaken their market position and competitive advantage. Some basic tips to assist the evaluation and negotiation process for medium sized businesses include:

- Having a good business plan which is frequently assessed, reviewed, and revised to suit your business goals and objectives
- Setting clear objectives for management and staff on how they are to perform in order to achieve those objectives and link these to a performance management system
- Having policies and procedures in place which are not only compliant with legislative and regulatory requirements but support innovation and flexibility
- Identifying what you and your business is good at and what it is not so good at and why
- Identifying what your competitors do and what is best practice in your market segment
- Compiling a working list of the things that you would like to change and seek a cross sectional input of the workforce to ascertain the efficacy of these items

Before jumping into a complex agreement negotiating process the first place to start is to analyse what you currently have in place. This means reviewing all of the existing contracts, agreements

and industrial instruments that cover your workforce and ensuring that they are technically correct and meet all legislative and regulatory requirements.

Introduced by the Rudd, Gillard labour government, The Fair Work Act 2009 redefined a lot of the industrial relations landscape and made significant changes to the way awards and agreements operate in Australia. One significant change was the scrapping of State Awards and the replacement of many old awards with the new Modern Award system. All employers must ensure that they are paying the correct rates under this award system and that their existing workplace agreements do not fall below the minimum required standard.

The Modern Awards contain a specific Flexibility clause, and it is a requirement that all workplace agreements also contain them. Following the 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.

The FWC Model Flexibility clause is as follows:

Model flexibility term

Schedule 2.2

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.

Some basic principles to assist in preparing an IFA and calculating whether your proposed IFA will pass the BOOT are as follows:

- If the employer wishes to enter into an IFA with an employee, they must put the request in writing
- It is suggested that at this stage a draft of the proposed IFA be given to the employee (TP1).
- An IFA can also only be made after an employee has commenced employment and they are entitled to the minimum award conditions contained in the relevant modern award. This means an employer cannot ask a prospective employee to agree to an IFA as a condition of employment.

IFA's can only vary the following award terms:

- Arrangements for when work is performed such as working hours
- Overtime rates
- Penalty rates
- Allowances and
- Leave loading

In addition, the clause must detail how the employee is Better Off Overall as a result of the variation to each award term.

What is the Better Off Overall Test?

The Better Off Overall Test compares the agreement with the relevant award. The agreement will pass the Better Off Overall Test if on balance the employee is better off than they would have been if no agreement had been entered into and they remained subject to the award. In most cases this will amount to a comparison of the financial rewards the employee receives before and after the enterprise agreement is entered into.

The information which follows is a step-by-step process which can be used to evaluate if the agreement passes the Better Off Overall Test.

Better Off Overall Test Calculator

1. Calculate the minimum amount due under the award

- Assess the total hours needed to be worked over a given period (say 4 weeks if using an Award which provides for 152 hours over a 4-week period before any overtime is payable).
- Work out the total rate of pay for this period of time taking into account any overtime and penalty rates which will be payable.
- Multiply by 12 months if hours of work will be regular over that time. If hours will not be regular break the calculation down into the various periods when hours will be regular.
- Add in the value to the employee of double time pay for any public holidays which are usually worked.
- Add in the value of annual leave loadings if you wish to remove these.
- This will give you the minimum annual amount you will need to pay employees in each classification to meet the Better Off Overall Test.

2. Consider other entitlements which can be used to offset the minimum and give these entitlements a realistic monetary value.

For example:

- Incentive based payments and bonuses
- Accommodation
- Fuel and use of vehicle
- Bonus payments.

3. **Add or subtract these amounts from the minimum rate you calculated in number 1 above.**

4. **Divide the total amount by the total number of hours to be worked over the year.**

5. **The final amount is the hourly rate you will enter into the agreement for that employee.**

An employee or employer must not be forced to enter into an IFA and a person must not be treated adversely or discriminated against for refusing to agree to an IFA.

Employers should be careful not to make false or misleading statements about the effect of the IFA or penalties could apply. Statements made carelessly may also attract penalties if the employee is misled, even if this was not intended. It is the employer's responsibility to ensure that an employee has genuinely agreed to an IFA. This means that the employer must take steps to ensure the employee fully understands the effect of the agreement as compared to the award entitlements. It is a good idea to have a copy of the award available for the employee to review and compare.

When making an IFA, an employer should keep in mind any language or cultural differences that might affect the employee's understanding of the terms or their choice to agree to the IFA. If any employees have limited literacy, employers will need to be especially careful to make sure they understand the effect on them of each clause of the proposed agreement.

Unlike enterprise agreements, IFA's do not need to be approved by the Fair Work Commission. It is the employer's responsibility to ensure that the IFA is made correctly and meets all the requirements of the Fair Work Act. An IFA must be in writing and signed by the employer and employee. If the employee is under 18 years of age, it must also be signed by the employee's parent or guardian.

Once an IFA is made, it is the employer's responsibility to ensure that a copy of the IFA is given to the employee. The employer must also keep a copy with the employee's employment records. This provides for a very flexible and time critical industrial instrument where issues such as employee start and finish times, overtime and penalty rate payments and hours of work can be negotiated to meet workplace needs. Implementation of an IFA ensures the rights of both parties are protected and there is minimal interference from outside agencies.

There are some technical issues associated with the negotiating and drafting of Individual Flexibility Agreements and it would assist any business contemplating the use of these agreements to receive some professional advice.

Another stream of bargaining introduced in the Fair Work Act that may be applicable to your operations allows for low paid employees and their employers to negotiate an enterprise

agreement which suits their particular circumstances. This process allows improvements in productivity and service delivery while recognising the difficulties that apply to employees and employers who qualify under these provisions to conduct enterprise bargaining negotiations at the enterprise level under normal circumstances.

Employees who elect to bargain under the low-paid bargaining provisions are not able to take industrial action during the bargaining process. These provisions are contained in Section 241 of the Act and an example of the application of this provision was the decision of the Full Bench of the FWC where they awarded an order to proceed with a low paid authorisation (section 242 (1)) in the case of *United Voice vs. The Australian Workers' Union of Employees Queensland* 2011, FWAFB 2633. This particular case was in the aged care sector.

Managing Employee Performance and Productivity

Much of the advice contained in the previous section in relation to employee performance management also applies to medium sized businesses and can readily be applied to this sector.

The key components remain communication with employees and the application of processes and procedures which allow the identification and implementation of productivity enhancing initiatives to improve the bottom line of the business using the full range of new flexible workplace negotiating and agreement options available.

Small Business

The small business sector remains one of the worst hit sections of the business community with increasing costs and charges, increased competition, increased legislative and regulatory requirements and decreasing consumer confidence and spending. While this apparent litany of negative issues affects all areas of the economy, the effects are amplified in the small business area where the majority of the focus is on day-to-day business and remaining profitable in order to survive.

However, there is still a vast majority of small businesses who are able to adapt and thrive in the ever-changing environment through their ability to meet the requirement of their marketplace in a timely and cost-efficient manner.

With the introduction of the Fair Work Act 2009, the Workplace Health and Safety Harmonisation Act and various changes to anti-discrimination and anti-bullying laws and the Vulnerable Persons Amendment to the Fair Work Act introduced in 2017, to name a few, there is an increased pressure on business owners to ensure that they have adequate policies and procedures in place to meet their legislative and regulatory requirements.

This is particularly evident when terminating an employee or employees in a business with fewer than 15 employees. In order to have the dismissal deemed fair, employers must follow the Small Business Fair Dismissal Code (the Small Business Fair Dismissal Code and Checklist are both available on the Fair Work Ombudsman website) for dismissals and terminations due to a business downturn or their position no longer being required.

If a dismissal is contested and an employee lodges an unfair dismissal claim, the small business employer must provide evidence of compliance with the Code and supporting evidence to demonstrate that the proper processes were applied. The penalties for non-compliance have significantly increased and the onus of responsibility has shifted greatly to the employer. This is especially evident in the matter of wages and conditions and the application of the National Employment Standards (NES) which apply to all employees in parallel with the new Modernised Award System.

The NES are set out in the *Fair Work Act 2009* and comprise 10 minimum standards of employment. In summary, the NES involve the following minimum entitlements:

- Maximum weekly hours of work – 38 hours per week, plus reasonable additional hours
- Requests for flexible working arrangements – an entitlement allowing employees to request a change in working arrangements if they are parents or carers of a child under school age, of a child under 18 with a disability, have a disability, are 55 or older, are experiencing family or domestic violence or supporting an immediate family member or household member because of domestic violence.
- Parental leave and related entitlements – up to 12 months unpaid leave per employee, plus a right to request an additional 12 months unpaid leave, concurrent parental leave plus other forms of maternity, paternity, and adoption related leave
- Annual leave – four weeks paid leave per year, plus an additional week for certain shift workers
- Personal/carer's leave and compassionate leave – 10 days paid personal/carer's leave, two days unpaid carer's leave as required, and two days compassionate leave (unpaid for casuals) as required
- Community service leave – unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service
- Long service leave – a transitional entitlement for employees as outlined in an applicable pre‑modernised award, pending the development of a uniform national long service leave standard

- Public holidays – a paid day off on a public holiday, except where reasonably requested to work
- Notice of termination and redundancy pay – up to five weeks' notice of termination and up to 16 weeks' severance pay on redundancy, both based on length of service
- Provision of a Fair Work Information Statement – must be provided by employers to all new employees, and contains information about the NES, modern awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, union rights of entry, transfer of business, and the respective roles of Fair Work Australia and the Fair Work Ombudsman (TP1).

An enterprise agreement must not exclude or buy out any of the NES provisions.

Case Study

The FWC full bench handed down a decision in the case involving *The Australian Institute of Marine and Power Engineers v Inco Ships Pty Ltd* where they refused to certify an agreement between the parties because the terms of the agreement attempted to replace long service leave and redundancy payments with increases in salary.

The smaller the business the less access there usually is to professional HR/IR advice, however the FWO website (www.fwo.gov.au) has plenty of information and advice for business owners and as a taxpayer funded resource can be very useful for small business. The website also includes a payroll calculator which will calculate the required award wage under the modernised award system and factor in the 5-year transitional rates calculations if applicable.

One of the most prevalent causes for concern in the small business sector is the use and abuse of casual and contract employees. The lines between what constitutes an employee, and a contractor are complex and often disputed, however generally if a contractor is engaged purely to carry out a contract for service and is doing work which could be done by an employee then their status as an independent contractor may be challenged.

Some of the basic definitions of a contractor are:

- Has their own business and has the opportunity to make a profit or loss on the job?
- Is paid to achieve a specific result
- Provides skilled services
- Generally, controls how the services are provided
- Is free to subcontract work to others
- May supply tools, material, or special knowledge

- Is responsible for risk and repairs
- Is able to advertise their services to the broader community
- Has no right to employee benefits
- Generally, has an Australian Business Number
- Carries out the work under a business name, partnership, or company

If an employer uses a contract or contractor to disguise an employment relationship to avoid paying employee entitlements such as superannuation, employee leave entitlements, and payroll and other taxes the arrangement may be found to be a sham contract.

It is crucial that any contractual arrangement is documented with a well drafted contract that clearly sets out the nature of the working relationship and all the terms of remuneration and tasks required to be performed.

The use of casual labour is an essential tool for businesses of all sizes to enable them to meet their workplace demands by increasing or decreasing their workforce accordingly.

Casual employees are generally hourly hire and can work up to 38 hours per week without penalty and in return for their casual status are paid a casual loading which compensates for their lack of employee benefits such as annual leave, paid personal/carer's leave, notice of termination, redundancy benefits and other entitlements of full time or part time employment which is usually between 23-25% of their base rate of pay.

Often complications arise with the use of casuals and contractors where they have been engaged in a workplace for an extended period of time and a dispute arises over their termination and or conditions or benefits. For example, a long-term casual is entitled to unpaid parental leave (i.e., maternity, paternity adoption leave), unpaid bereavement leave and unpaid carer's leave. They may also be entitled to accrue a proportionate long service leave entitlement calculated on their actual hours of service, as well as superannuation payments and Work Cover.

Conversion to full-time or part-time employment

Some awards like the Hospitality Industry (General) Award 2010 contain the following conversion clause:

This clause only applies to a regular casual employee.

A regular casual employee means a casual employee who is employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months.

A regular casual employee who has been engaged by a particular employer for at least 12 months may elect (subject to the provisions of this clause) to have their contract of employment converted to full-time or part-time employment.

An employee who has worked at the rate of an average of 38 or more hours a week in the period of 12 months casual employment may elect to have their employment converted to full-time employment.

An employee who has worked at the rate of an average of less than 38 hours a week in the period of 12 months casual employment may elect to have their employment converted to part-time employment.

Where a casual employee seeks to convert to full-time or part-time employment, the employer may consent to or refuse the election, but only on reasonable grounds. In considering a request, the employer may have regard to any of the following factors:

- *the size and needs of the workplace or enterprise*
- *the nature of the work the employee has been doing*
- *the qualifications, skills, and training of the employee*
- *the trading patterns of the workplace or enterprise (including cyclical and seasonal trading demand factors)*
- *the employee's personal circumstances, including any family responsibilities; and*
- *any other relevant matter.*

Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and agree upon:

- *the form of employment to which the employee will convert—that is, full-time or part-time employment; and*
- *if it is agreed that the employee will become a part-time employee, the matters referred to in clause 12 - Part time employment apply*

The date from which the conversion will take effect is the commencement of the next pay cycle following such agreement being reached unless otherwise agreed.

Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

An employee must not be engaged and/or re-engaged (which includes a refusal to re-engage) to avoid any obligation under this award.

Nothing in this clause obliges a casual employee to convert to full-time or part-time employment, nor permits an employer to require a casual employee to so convert.

Nothing in this clause requires the employer to convert the employment of a regular casual employee to full-time or part-time employment if the employee has not worked for 12 months or more in a particular establishment or in a particular classification stream.

Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

Terminating long term casual employees also needs careful consideration as casuals may be entitled to bring an unfair dismissal claim if they have completed the minimum employment period and worked on a regular and systematic basis during this period of employment.

When calculating the mix of employees, part time employees, casuals, and contractors, it is important to accurately assess the business needs and requirements of the business by calculating:

- When is the work is to be performed? e.g., after normal working hours, on weekends and public holidays
- Could the work be performed by a permanent part time employee or contractor?
- What is the net return for work done outside normal working hours?
- How can labour costs be reduced?

Once this assessment has been determined, the allocation of labour and the most cost-effective structure can be implemented.

The workplace bargaining options available to the small business sector are the same as for all employers however depending upon the size of the business, collective agreements or enterprise bargaining agreements may be too complex and costly to implement in small workplaces.

The remaining options of the Modernised Award Flexibility Clause and Individual Flexibility Agreements as detailed in the previous section of this document can provide real gains in productivity and efficiency at the workplace especially for small business.

Summary

To maximise productivity and efficiency at the workplace no matter what size or business sector you belong to, the same principles apply to HR/IR issues as would other parts of business. In order to achieve the best results, careful consideration of inputs, outputs business goals and objectives, structures and costs is required.

Finally, the most pertinent advice relating to employees is to keep your workforce in the best shape it can be is to deal with diminished performance and disciplinary matters promptly and professionally, have proper policies and procedures in place to support your actions and seek professional assistance if and when required.

Workplace structures and staffing requirements are a continually moving target and business plans and operations need to be constantly assessed against labour costs to ensure that the best and most flexible staffing options are in place.

Fair Work Act Changes

1. The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Amendment Act) has amended the FW Act by providing:

    - a definition of casual employee
    - a pathway for casual employees to convert to full-time or part-time employment; and
    - an obligation to provide casual employees with a Casual Employment Information Statement (the CEIS).

2. These changes came into effect on Saturday 27 March 2021, and apply to all former, existing and new casual employees, including those who commenced employment before 27 March 2021, provided their initial employment offer meets the new definition of casual employment.[1]

On the Horizon

National Wage Increase

The decision by the FWC of June 15, 2021, awarded lower paid workers a $18.62 a week rise with the new minimum wage now $772.60. This is a 2.5% increase with the hourly rate rising to $20.33 per hour and becomes effective 1 July 2021.

Victorian Long Service Leave Changes November 2018

Changes have been made to Victorian Long Service Leave employee entitlements following the passing of the Long Service Leave Act 2018 (Vic) which is operative from 1 November 2018.

These changes allow Victorian employees to be able to request to take Long Service Leave (LSL) after they have successfully completed seven years of service on a pro-rata basis.

This LSL provision was previously only allowable after completing 10 years' service which remains at this stage in all other States.

However, the new Victorian legislation applies to all full-time, part- time and casual employees who are entitled to LSL and applies to employees who are employed by companies who may be based outside Victoria, but have staff employed in the State of Victoria.

Employers are unable to refuse a legitimate request from an employee requesting to take LSL unless they have "reasonable grounds" relating to the employee concerned and the impact that the employee taking the leave may have on a client or business outcome.

Breaches of the new Act incur penalties which have been increased to 12 penalty units for an individual which is currently $1,934.28 and 60 penalty units amounting to $9,671.40 for a company.

In calculating LSL under the new act continuous service now covers authorised absences on both paid and unpaid leave.

This includes parental leave of periods of up to 52 weeks but does not include parental leave in excess of 52 weeks, although periods of this length will not break continuity of employment.

The amount of LSL that may be taken has been changed and now employees will be able to take LSL in periods as small as one day at a time.

Previous legislation required employees to have an agreement with their employer to take LSL in shorter periods, but under the new legislation employees have greater access to the LSL accrual and can be taken as required if approved by the employer.

Other provisions of the new Act stipulate that LSL must be calculated on an employee's normal weekly hours and ordinary time rate of pay on the day that the LSL commences, it is also an offence to make payments in lieu of LSL entitlements.

The only time LSL accruals can be paid out is at the termination of employment.

While at this stage the new legislation applies only to Victorian employees, other States will review the new Act and consider its merits.

What you can do now is ensure that your payroll systems, policies, and procedures are compliant with the new Victorian LSL Act if you operate in that State.

2020 ANNUALISED SALARY CHANGES – MODERN AWARD PAYROLL UPDATE

What do the annual salary changes mean for Australian businesses from 1 March 2020 onwards?

Implementing these changes could prove time-consuming and frustrating for employers and employees alike, but failure to follow the 2020 annualised salary changes is a direct breach of the Fair Work Act. As an employer, you could be fined and could even be sentenced to jail time.

Over 1 mil. Australian businesses have staff employed under at least 1 of these awards, putting thousands of business owners at risk. The chances of these changes affecting you are pretty much certain. And, with a wage theft bill, failure to follow procedure could result in company directors facing jail time.

With penalties up to $63,000 and possible jail time, is this a risk you want to take?

What are the 2020 annualised salary changes?

The Fair Work Commission have taken a decision which changed annualised salary provisions under 22 modern awards from 1 March 2020 onwards. If an applicable award covers your employee(s), your obligations for paying employee salaries are going to change.

"Under the Fair Work Act, Employers have always been obligated to pay salaried employees under all Awards at least the same gross amount that they would have received under their respective awards (including overtime, allowances and travel). Most entitlements should already be accounted for, but as salaried employees do not typically record their time and attendance, it has been almost impossible for employers to calculate any entitlements."

With the recent changes to the annualised salary provisions, you need to start tracking full-time employee hours, even if they are salaried. It means employers can be penalised under the award act, even if their employees are salaried.

Why are the annual salary changes happening?

2018-19 has seen countless Australian businesses called out by Fair Work for failing to comply with their employment obligations.

Fair Work is continuing (and will continue) to name and shame Australian businesses. The upcoming changes to the annualised salary agreement are part of their strategy to close loopholes and ensure Australian businesses are paying employees fairly. With businesses already handling costly settlements, the proposed wage theft bill will make payroll scandals an executive-level nightmare.

Banking, Finance, and Insurance Award 2020 Broadcasting and Recorded Entertainment Award 2020	Oil Refining and Manufacturing Award 2020
Clerks - Private Sector Award 2020 Contract Call Centres Award 2020	Pastoral Award 2020 Pharmacy Industry Award 2020
Horticulture Award 2020 Hospitality Industry (General) Award Hydrocarbons Industry (Upstream) Award 2020	Rail Industry Award 2020 Restaurant Industry Award 2020
Legal Services Award 2020 Local Government Industry Award 2020	Salt Industry Award 2020
Manufacturing and Associated Industries and Occupations Award 2020 Marine Towage Award 2020 Mining Industry Award 2020	Telecommunications Services Award 2020 Water Industry Award 2020 Wool Storage, Sampling and Testing Award 2020

What to do next …

Meet with your payroll or HR team and create a strategy to do the following:

- Ensure all full-time employees who fall under one of the relevant awards tracks and submit all hours worked each week, either in writing or electronically.
- Have in place written documentation which records which provisions of the award are intended to be included within the annual salary.

- Where an employee works hours, which exceed those ‘outer limits’ in a pay period/roster cycle, pay the employee for those hours worked (at the relevant overtime or penalty rate) within the relevant pay cycle.
- Run a report at least once a year comparing employees’ salaries with the employees’ full entitlements under the Award for all the hours they have worked in the relevant period.
- Run reports each time an employee is terminated to ensure they have been paid the minimum amount under the Award for the hours they have worked since 1 March 2020, or since the last annual report.
- Immediately top up an employee’s salary for any underpayments identified in comparison with their Modern Award entitlements.

We know from information provided by the Fair Work Ombudsmen that there have been many cases of wage underpayments and investigations. In the following we outline what happens if the Ombudsmen becomes involved.

So, what happens during a workplace investigation?

Fair Work Inspectors (FWI) conduct workplace investigations. Inspectors are government officials who promote and monitor compliance with Australian workplace laws.

Collecting evidence

During an investigation, they collect evidence such as time and wages records, employment contracts and other documents depending on what is being investigated.

Often, they will request that parties provide evidence. FWIs have the power to require people to give them records or documents relating to the investigation. This is called giving someone a ‘notice to produce’. They also have the power to enter premises, such as a workplace, in order to investigate and gather evidence.

FWIs may offer witnesses (including the employer and employees) the opportunity to participate in a recorded interview. The recording will be considered as part of the evidence.

They expect that people who provide information, records or documents in an investigation give accurate and complete information and material or tell them if it is not.

What happens if someone does not comply with a requirement to provide information or records

Penalties of up to $13 320 (for an individual) or $66 600 (for a company) can apply for:

- not providing documents or records by the due date in a notice to produce
- giving information or producing documents or records knowing they are false or misleading
- intentionally hindering or obstructing officials from performing duties or exercising powers.

This includes making it difficult for an inspector, an assistant, or a senior officer to gather evidence.

Outcomes

The FWI decides the most appropriate outcomes to follow an investigation. The outcomes will depend on matters including:

- the evidence available
- the contraventions identified (if any)
- the seriousness and extent of the contraventions
- the co-operation of the people involved.

Outcomes of an investigation can include:

No further action - for example, if:

- there is not enough evidence to prove that someone has broken a law
- the business has closed down
- the employer cannot be found.

Contravention letter - telling the person who has broken the law which law/s they have broken and how they can fix the issue.

Letter of caution - giving the person who has broken the law a formal warning, which FW might rely on in the future if they break the law again.

Failure to fix an error

If the evidence shows that a workplace law has been broken, where possible they will request that the error is fixed. This often means asking an employer to pay back wages that are owed.

If the person or company that has broken the law refuses to fix the problem, the case may be referred to court for further action, or the employee or employer can take their own legal action in a small claims court.

Where to get help during an investigation

If you have any questions or concerns during a workplace investigation, you should contact the FWI assigned to your case.

- FWIs are neutral - they do not represent employers or employees; they simply enforce workplace laws.
  They can:
  - tell employers and employees what will happen during the workplace investigation
  - give employers and employees information about workplace laws.

- Explore bO2 online resources to get more information about workplace regulations. Also, Employer organisations, unions or other legal professionals may also be able to give advice on workplace rights and obligations.

So, now's the time to be proactive and undertake your own review to ensure your business is compliant and is not likely to be subject to criminal charges in the months and years to come.

Preventing an investigation from the FWO

Five steps to audit your payments to employees

1. Review and update all employee information on your staff database to be in alignment with the updates to the National Employment Standards, modern awards or enterprise agreements, their contracts of employment and any recent case law.
2. Audit all staff pay records to ensure they are compliant with the entitlements owed to an employee when the payments were processed.
3. Identify any discrepancies that arise from the historical audit and notify the employee.
4. Back-pay all owed entitlements that historically were underpaid.
5. Audit compliance process to reduce risk of future and repeat underpayment of wages and benefits.

Note: The essential thing here is to be proactive. By demonstrating that you have chosen to explore, investigate, and (when necessary) remedy any underpayment of wages issues, you will show a commitment to doing the right thing by your staff.

What should you do if you uncover a case of underpayment of wages in your business?

The Fair Work Ombudsmen suggests the following steps in rectifying underpayments:

Step 1: Work out how long the employee has been underpaid
Step 2: Work out how much the employee was actually paid
Step 3: Work out how much the employee should have been paid
Step 4: Calculate how much the employee has been underpaid
Step 5: Backpay the employee
Step 6: Keep up to date with future wage increases

So, what is the risk of getting it wrong?

- Financial Implications for the business
- Reputation of the business
- Prosecution from the Fair Work Ombudsmen

It is simply not a risk worth taking.

Getting it wrong if you are an Accountant, Business Advisor or HR Advisor

Under section 550 of the FW Act, a person is involved in a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled, or procured the contravention.
(b) has induced the contravention, whether by threats or promises or otherwise.
(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
(d) has conspired with others to effect the contravention.

In *Fair Work Ombudsman v South Jin Proprietary Limited* [2015] FCA 1456, White J explained the following in relation to determining liability under section 550 of the FW Act:
In order to be knowingly concerned in, or party to, a contravention, a person must have engaged in some conduct which "implicates or involves" him or her in the contravention, so that there is a "practical connection" between the person and the contravention.

How can you put the correct systems and processes in place within your business?

In order to reduce the risk of non-compliance, these six steps are critical:

1. Ensure the right people in your business have a clear understanding of employee entitlements and use external expertise where necessary.
2. Provide payroll staff with the tools and required training to understand employee entitlements and how to find changes as they arise.
3. Appoint a manager or team leader who is up to date with this knowledge.
4. Make sure you listen to employees immediately if they raise concerns as they have six years in which to make a claim.
5. Sign up for your relevant award changes as they are published by the Fair Work Commission and Fair Work Ombudsman.
6. Ensure your employee records are kept for a minimum of seven years.

Table of Amendments

PAGE NO	AMENDMENT	NEW VERSION	DATE AMENDED
12	Replace Fair Work Australia with The Fair Work Commission	1.1	12/03/2014
19	On the horizon	1.1	12/03/2014
19	On the horizon –changes to Modern Award transitional terms and conditions	1.2	30/04/2015
19	Addition of Recent Changes, changes to On the Horizon	1.3	01/11/2015
All	General updates and overhaul of content	1.4	01/08/2016
19	On the horizon – Accident Make-up Pay & changes to Penalty Rates	1.5	20/03/2017
19	On the horizon – Changes to Penalty Rates, National Wage Increase & Casual Conversion	1.6	01/07/2017
19	On the horizon – Update to include changes to the Fair Work Act etc, including minimum wage on page 20	1.7	01/07/2018
21	On the horizon – Update to include Victorian Long Service Leave changes	1.8	01/11/2018
21	On the horizon – Update national minimum wage increase	1.9	01/07/2019
22	On the horizon – 2020 Annualised Salary Changes – Modern Award Payroll Update	2.0	22/05/2020
All	General updates and overhaul of content	2.0	22/05/2020
All	General updates and overhaul of content	2.1	06/10/2021