

PENDLEBURY WORKPLACE LAW UPDATE

Developments in HR & IR Law in Australia
July 2009

Inside this Issue:
The Fair Work Act 2009 Commences



Hello to all friends & colleagues of Pendlebury Workplace Law. This Update will consider the most relevant changes commencing 1 July 2009 as a result of the implementation of the Fair Work Act 2009.

THE FAIR WORK ACT

- The Australian Industrial Relations Commission will continue to deal with award modernisation and current matters as Fair Work Australia transitions into operation. Initially the members of Fair Work Australia will be the current members of the AIRC.

OVERVIEW - 1 JULY 2009

- New Unfair Dismissal regime starts 1 July 2009.
- Registered Agreements / AWAs / ITEAs in existence will continue to operate as 'transitional instruments' unless the parties agree to replace them with a new Enterprise Agreement.
- Modern Awards will commence on 1 January 2010 and replace federal awards and state awards (NAPSAs).
- National Employment Standards (NES) will commence on 1 January 2010.

UNFAIR DISMISSAL

- From 1 July 2009 an employee can seek redress from Unfair Dismissal by lodging an application with Fair Work Australia.
- There is no longer an exemption for employers with less than 100 employees with respect to unfair dismissal claims.
- An employee has 14 days (not 21 days) to lodge an application, although Fair Work Australia may extend that limit if there are special circumstances (illness, misadventure etc.).



- A union may lodge an unfair dismissal application for an employee.
- Once lodged, the claim is initially assessed by Fair Work Australia to determine whether the employee is prevented from running a claim for being a casual, or has not worked the "minimum employment period" (6 months for most employers, 12 months for small business employers, i.e. those with less than 15 employees), or is a high income earner (i.e. over \$100,000 p.a. for a 38 hour week). Note that the "qualifying period" no longer exists and is replaced by the "minimum employment period".
- If an employee alleges that the reason for the termination of his/her employment was that they were attempting to exercise a "workplace right" then the employee has 60 days in which to lodge an application. The employer then has the onus to disprove the allegation.
- Fair Work Australia will initially list the unfair dismissal claim for a conciliation conference. It is understood that Fair Work Australia may conduct this conciliation hearing at the employer's worksite.

- If the matter cannot be resolved at the conciliation conference, then Fair Work Australia makes a decision as to whether the matter proceeds to a formal hearing.
- Fair Work Australia can reinstate/re-employ or order monetary compensation of up to 6 months.
- A *prospective* employee can make a claim to Fair Work Australia if he/she is not selected for a job and alleges that they were not selected because he/she was asserting a "workplace right". This is a provision which is designed to protect employees who were enthusiastic advocates of workplace rights at their previous place of employment and perhaps ran previous unfair dismissal claims.
- To successfully terminate the employment of an employee, an employer must still afford procedural fairness, including communication, an opportunity to respond, counselling, warnings etc.

AWARDS AND AGREEMENTS

- Federal awards and state awards (NAPSAs) will be replaced by new modern awards on 1 January 2010.
- New collective agreements will be called 'Enterprise Agreements' and have a maximum term of up to 4 years.
- Pre-reform certified agreements, collective agreements, AWA's and ITEAs continue to operate as "transitional instruments".
- No new statutory individual agreements may be entered into.



- For Enterprise Agreements made prior to 1 January 2010, the No Disadvantage Test will be the relevant test. Post 1 January 2010, the Better Off Overall Test will be the relevant test.
- There is no longer prohibited content with respect to Enterprise Agreements. The "matters pertaining rule" will apply, and no unlawful content will be permitted.
- The modern awards will not apply to employees earning > \$100,000 pa (indexed yearly).

UNION RIGHT OF ENTRY

- A union may obtain access to the workplace if they have the relevant permit and can demonstrate the right to enrol the employees as members of that union. Agreement / award coverage is not relevant.
- The union official need only allege a breach or reasonably suspect a breach of the employer's obligations to gain access, or to hold "discussions" with the employees whether they are union members or potential members.

- The union official can access employee records if there is an alleged breach of employer obligations. The union may make copies and take the copies away provided the employee in question agrees.
- In essence a union official can get on site for any reason as long as they give 24 hours written notice.

DISPUTE RESOLUTION

- Fair Work Australia can hear disputes but cannot impose an arbitrated wage decision on the parties unless the parties agree to accept the outcome. Arbitrations on non-wage outcomes are within the Fair Work Australia power.
- Fair Work Australia can hear disputes as they arise. It does not matter whether an award or agreement is in force or has expired.
- Fair Work Australia can only accrue the right to arbitrate for new Enterprise Agreements made post 1 July 2009. For agreements made before that date, arbitration can only occur by agreement of the parties.
- What about dispute referrals to state tribunals through Referral Agreements? These may continue but have to be specifically agreed as part of an Enterprise Agreement otherwise Fair Work Australia will be responsible for the resolution of disputes.

TRANSITION TO THE FAIR WORK ACT 2009

Here are some interesting matters to know amidst the vast array of detailed regulations under the new *Fair Work Act 2009*.

- Fair Work Australia (the successor to the AIRC) is locked in as the mediator/conciliator/arbitrator of disputes where the parties are covered by an Enterprise Agreement. The only way that the parties can avoid going through Fair Work Australia is if the parties *specifically* agree on an alternative e.g. a state tribunal, via a Referral Agreement and the Enterprise Agreement.
- Averaging of working hours arrangements is limited to a four (4)-week averaging period (as opposed to twelve months previously) for employees *not* covered by an award or agreement.
- Specific forms have been created for unions to notify employers that they are representing workers in Enterprise Agreement discussions and for Bargaining Representatives generally.
- Bargaining Representatives for the purposes of negotiating Enterprise Agreements must be free from "control or influence" by the employer.
- The NSW Industrial Relations Commission has a role in adjudicating *compliance/ enforcement* of the new laws. Compliance/ enforcement can also be carried out by the Federal Court and the new "Fair Work Ombudsman".

- The Minister has a degree of power to get involved in the content of Enterprise Agreements and disputes.



If you would like more information regarding the impact of the Fair Work Act 2009 on your business and employment arrangements, please do not hesitate to contact the Principal Solicitor, Brooke Pendlebury on:

P: 9231 0250, M: 0403 818 912, E: info@pendlebury.com.au.

Please have a look at the website at www.pendlebury.com.au.

If you would prefer not to receive further Updates I will remove you from the mailing list. This publication is intended only as a general overview of legal issues. It is not intended as legal advice and should only be used for information purposes only.