

# ***Employment Law and the Fair Work Act 2009***

**The *Fair Work Act 2009 (Cth)* was introduced by the Rudd Labor Government (implemented by Deputy Prime Minister Julia Gillard) to replace the *Workplace Relations Act 1996*, and in particular “Work Choices”. The *Fair Work Act 2009 (Cth)* aims to consolidate state legislation on employment law, including the areas of dismissal, award schemes and minimum employment conditions. Fair Work Australia is the independent body set up by the Federal Government to oversee the implementation of the *Fair Work Act 2009 (Cth)* .**

As of 1 January 2010, the Fair Work system came into full effect, pursuant to the *Fair Work Act 2009 (Cth)* (“Fair Work Act”).

Private sector employers and employees in New South Wales, Queensland, South Australia and Tasmania who were covered by State workplace relations systems, will now be covered by the Fair Work system.

## **1. National Employment Standards (“NES”)**

The previous “Work Choices” system provided five basic entitlements for employees, being annual leave, personal / carers leave, parental leave, maximum ordinary hours of work and basic rates of pay and casual loadings. The new Fair Work system intends to create a “safety net” for employees in two ways, the first through the introduction of National Employment Standards, and the second by way of consolidation of various award schemes.

The National Employment Standards (“NES”) consist of 10 minimum standards of employment. In summary, they are as follows:

- Annual Leave (remains at four weeks, with leave accrued as and when ordinary hours are worked)
- Community service leave (entitlement to be paid for up to 10 days for jury service / duty, and unpaid leave for voluntary emergency services)
- Long service leave (continue to be regulated by State legislation, pending the development of a uniform national long service leave standard)
- Maximum weekly hours of work (38 hours for fulltime employees, additional hours can be requested by employer if reasonable)
- Notice of termination and redundancy pay (up to five weeks notice of termination and 16 weeks severance pay on redundancy, but generally not applicable to small businesses and for those employed less than one year)
- Parental leave and related entitlements (12 months unpaid leave per employee, plus a right to request an additional 12 months unpaid leave - this will also apply to same sex de facto partners)
- Personal / carers leave and compassionate leave (10 days paid personal / carers leave per year, able to be accrued)
- Provision of Fair Work Information Statement (must be provided to all new employees)
- Public holidays (eight working days per year to be paid to the employee)
- Requests for flexible working arrangements (parents or carers of children under school age can request in writing a change in working arrangements if they have worked with the one employer for at least a period of one year)

The NES apply to all employees (except casual employees in some circumstances) under the national workplace relations system.

## **2. Modern Awards**

The second aspect of the “safety net” for employees which the Fair Work system has implemented is known as “Modern Awards”. Existing awards have been consolidated by the Australian Industrial Relations Commission (AIRC) into industry or occupation based awards. Modern awards will apply to employees and employers under the national workplace relations system. Managers or high income earners [employees with guaranteed annual earning of more than \$100,000.00 (pro rata for part-time employees)] need not be covered by a modern award. High income earners are free to negotiate terms with their employer to supplement the NES without reference to an award.

A review of each award will be undertaken by Fair Work Australia every four years, with the first review set to take place in 2014.

Modern Awards would include terms and conditions on minimum wages, rest breaks, overtime and penalty rates, leave and allowances.

The introduction of Modern Awards means that many people's minimum entitlements have been changed. For more information on modern awards, visit: [www.airc.gov.au/awardmod/about.htm](http://www.airc.gov.au/awardmod/about.htm).

### 3. Termination of Employment

The Fair Work system has also established new laws in relation to the unfair dismissal of employees.

Unfair dismissal will occur if Fair Work Australia is satisfied that a person has been dismissed harshly, unjustly or unreasonably, provided that the dismissal was not a case of genuine redundancy.

Employees can make an unfair dismissal application if they are covered by the national workplace relations system. If not, remedies may be sought under State legislation.

Casual employees will be unable to make an unfair dismissal claim, unless they are engaged regularly and systematically by the employer, and hold a reasonable expectation that their employment would be ongoing.

Unfair dismissal claims should generally be lodged with Fair Work Australia within 14 days of the dismissal.

### 4. Small Business and Unfair Dismissal

Currently, "small business" is defined as businesses with fewer than 15 fulltime employees. From 1 January 2011, a small business will be defined as a business employing fewer than 15 employees using a headcount (not based on fulltime status).

Employees will only be able to make an unfair dismissal claim if they have been employed for a minimum period of 12 months by a small business owner (as opposed to only 6 months for larger businesses).

For small businesses, unfair dismissal can occur if the dismissal is not consistent with the Small Business Fair Dismissal Code ("the Code"). The Code sets out circumstances in which a dismissal without notice is allowed (in cases of theft, fraud and violence). The Code also sets out the actions that should be taken by a small business owner when dismissing underperforming employees. Reasons of why the employee is at risk of being dismissed must be provided, followed by giving the employee a reasonable chance to rectify their underperformance. The warning does not

necessarily have to be made in writing but it would be preferable. Multiple warnings are not necessary.

### 5. Unlawful Termination

Unlawful termination occurs when an employee is dismissed for reasons including: race, colour, sex, sexual preference, age, marital status, religion and political opinion. It is also unlawful for an employer to terminate employment of an employee owing to temporary absence from work because of illness or injury.

An employee who believes they have been unlawfully terminated needs to apply to Fair Work Australia within 60 days of the termination.

### 6. Transition towards the Fair Work system

During the transition period of the implementation of the new Fair Work system, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)* seeks to address the following issues:

- NES apply to all national system employees from 1 January 2010 (including those covered by Work Choices);
- All employees will receive the minimum rate of pay (eg. in an applicable award) from 1 January 2010;
- Agreements made lawfully under previous legislation can continue to operate unless terminated or replaced; and
- Industrial arrangements (eg. un-modernized awards) to cease to operate once they are replaced by modern awards.

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*Comasters can help clients, who are either employers or employees, in employment issues including the drafting of employment contracts and solving disputes.*

**Important:** This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

## Comasters Law Firm and Notary Public

Suite 101, Level 1, Capitol Terrace  
743-755 George Street  
Sydney NSW 2000, Australia  
Phone: (612) 9288 0300 Fax: (612) 9288 0399  
Email: [comasters@comasters.com.au](mailto:comasters@comasters.com.au)  
Website: [www.comasters.com.au](http://www.comasters.com.au)