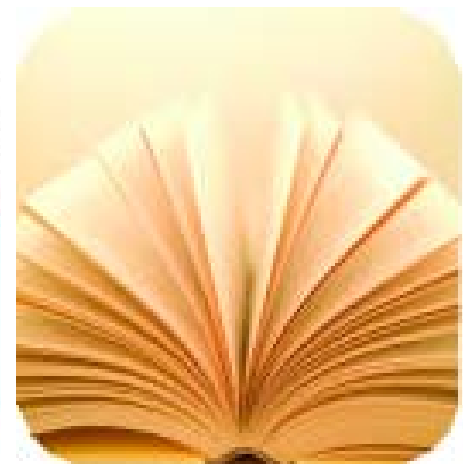




**everything  
commercial**

# Fair Work Legislation – Scope & Key Changes

Presentation to Casey Dandenong General  
Practice Association  
Rob Jackson, Principal  
*2 September 2009*



# Introduction

OLD SYSTEM	NEW SYSTEM
<i>Workplace Relations Act 1996</i>	<i>Fair Work Act 2009 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 Fair Work (Registered Organisations) Act 2009</i>
<i>Building and Construction Industry Improvement Act 2005</i>	<i>Fair Work (Building Industry) Act 2009?</i>
Australian Industrial Relations Commission Australian Fair Pay Commission	Fair Work Australia
Workplace Ombudsman	Fair Work Ombudsman
Australian Building and Construction Commission	Fair Work Building Industry Inspectorate?
Australian Fair Pay and Conditions Standard	National Employment Standards
Certified agreements Workplace agreements · Collective agreements · AWAs/ITEAs	Enterprise agreements (flexibility agreements?)

# Timetable

	<b>1 JULY TO 31 DECEMBER 2009</b>	<b>FROM 1 JANUARY 2010</b>
<b>Dismissal claims</b>	<i>Fair Work Act</i>	<i>Fair Work Act</i>
<b>Agreement making</b>	<i>Fair Work Act</i>	<i>Fair Work Act</i>
<b>Agreement approval</b>	No-disadvantage test	Better off overall test
<b>Minimum entitlements</b>	Australian Fair Pay and Conditions Standard “old” awards	National Employment Standards Modern awards
<b>Minimum wages set by</b>	Australian Fair Pay Commission	Fair Work Australia

## Fair Work Australia (FWA)

FWA has the power to

- ◆ Vary awards
- ◆ Make minimum wage orders
- ◆ Approve agreements
- ◆ Determine unfair dismissal claims
- ◆ Make orders on good faith bargaining and industrial action
- ◆ Assist in resolving disputes at the workplace

## Office of the Fair Work Ombudsman

- ◆ Power to:
  - Enforce NES and modern awards
  - Enforce NES related terms of contracts
- ◆ Fair Work Information Statement

## Unfair Dismissal

- ◆ Minimum employment period
  - One year for small business employer
  - Six months for other employers
- ◆ Small business employer less than 15 employees
  - 31 December 2010 FTE then head count
- ◆ 14 days to make application to FWA
- ◆ FWA may conduct a conference or a hearing
- ◆ Must hold hearing if facts in dispute
- ◆ Permission of FWA required to have representation
- ◆ Costs orders against representatives

- ◆ What is unfair?
  - Not consistent with Small Business Fair Dismissal Code
  - Not genuine redundancies
- ◆ Remedies
  - Reinstatement
  - Compensation (6 months max)
- ◆ FWA must not order compensation unless reinstatement is inappropriate

## Unlawful termination / Workplace rights

- ◆ Grounds
  - Unlawful termination
  - Freedom of association
  - Discrimination
- ◆ Application must be within 60 days
- ◆ No minimum employment period – includes job seekers
- ◆ FWA must conduct a conference
- ◆ Certificate if dispute not resolved
- ◆ Application to Court within 14 days of certificate
- ◆ Presumed unlawful reason – onus on employer to prove otherwise
- ◆ Increased penalties
- ◆ No cap on amount Court can award

# Agreements

- ◆ Enterprise Agreements
  - Types of agreement
  - What can enterprise agreements be about?
  - Enterprise agreement must contain:
    - flexibility term
      - hours and shift penalty
    - consultation term

## Agreements (cont')

- ◆ Approval of agreements
- ◆ FWA must be satisfied about
  - Coverage
  - NES
  - Better off overall test
  - Good faith bargaining
- ◆ Enterprise agreement must not
  - Reduce unfair dismissal rights
  - Deal with right of entry differently to the Act
- ◆ Union can apply to be covered by enterprise agreement

## Agreements (cont')

### ◆ Bargaining representatives

- Notice to employees/unions
- Employer should not refuse to recognise or bargain with bargaining representative

### ◆ Good faith bargaining

### ◆ Bargaining orders

- Can only apply if good faith bargaining requirements not met
- After giving written notice to the other party
- If majority support determination or scope order in place
- Must specify actions to be taken or not taken

## Transmission of business / restructures

- ◆ Transfer of instruments
  - Instrument follows the work if
    - outsourcing OR
    - insourcing OR
    - related bodies corporate OR
    - connection between parties AND
    - at least 1 employee transfers within 3 months
  - Applies to new employees
  - FWA can order that transferring instrument not apply
  - Transmission notices no longer required
- ◆ New employer can elect not to recognise service – consequences?

# National Employment Standards (NES)

## 1. Maximum weekly hours

- ◆ 38 hour week for full time employees
- ◆ Employers may request reasonable additional hours

## 2. Requests for flexible working arrangements

- ◆ Flexible work arrangements until employee's child reaches school age/18 if the child is disabled  
(c/f family responsibilities under *Equal Opportunity Act 1995* (Vic))
- ◆ Only refuse on reasonable business grounds

## National Employment Standards (NES)

### 3. Parental leave

- ◆ Up to 2 years unpaid parental leave

### 4. Annual leave

- ◆ 4 weeks paid annual leave
- ◆ 5 weeks for shift workers

### 5. Personal/Carer's leave

- ◆ 10 days per year

# National Employment Standards (NES)

## 6. Community Service Leave

- ◆ Voluntary emergency management activities
- ◆ Jury service

## 7. Long Service Leave

- ◆ Preservation of existing award based entitlements

## 8. Public Holidays

## 9. Fair Work Information Statement

- ◆ To be given to new employees

# National Employment Standards (NES)

## 10. Notice of Termination & redundancy pay

### ◆ Notice

Employee's Period of Continual Service With The Employer	Period of Notice
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
* If employee is over 45 years of age and has at least 2 years continuous service, entitled to 1 additional week of notice.	

## National Employment Standards (NES)

- ◆ Redundancy pay
  - Small businesses with fewer than 15 employees excluded
- ◆ FWA can reduce redundancy pay if employer obtains suitable alternative employment for the employee or the employer is unable to meet the redundancy pay obligations due to genuine financial difficulties

## National Employment Standards (NES)

Employee's period of continuous service with the employer on termination	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
At least 10 years	12 weeks

## Modern awards

- ◆ Minimum wages
- ◆ Types of employment (F/T, P/T, casual), flexible working arrangements
- ◆ Arrangements for when work is performed
- ◆ Overtime and penalty rates
- ◆ Annualised wage arrangements
- ◆ Allowances
- ◆ Leave, leave loading (cashing out leave?)
- ◆ Superannuation
- ◆ Consultation, representation and dispute settlement
- ◆ Outworker terms
- ◆ Industry specific redundancy schemes

## Terms that must not be included in Awards

- ◆ Unreasonable deductions
- ◆ Right of entry
- ◆ Discriminatory terms
- ◆ Terms that contain State based differences
- ◆ Long service leave



**Disclaimer:** whilst all reasonable efforts have been made to substantiate the information contained in this presentation, it is of a general nature only. Comments do not represent specific advice therefore you should not try to act on this information. If you require specific advice you should contact Macpherson+Kelley. No responsibility can be accepted if the information is incorrect or inaccurate.



m+k

macpherson+kelley lawyers