

CHANGING INDUSTRIAL RELATIONS LANDSCAPE

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Post 27 March 2006 to 30 June 2009

Between 27 March 2006 and 30 June 2009 (both dates inclusive) the industrial relations system was primarily regulated by the Workplace Relations Act 1996 (“WRA”).

WRA applied to incorporated employers and their employees by virtue of the corporation’s power in section 55 of the Australian Constitution. The High Court in *New South Wales v Commonwealth of Australia [2006] HCA 52* gave this power a broad interpretation.

That meant that an individual sole trader remained subject to the NSW Industrial Relations Act.

WRA enabled employers to enter into:

- individual workplace agreements;
- collective workplace agreements;
- multiple business collective agreements; or
- Greenfield collective agreements which established terms and conditions for businesses to be established.

No longer were workplace agreements subject to “no disadvantage” test when such agreements were compared to any underlying award or industrial prescription which regulated and industry or employer.

WRA introduces the Australian Fair Pay and Conditions Standard.

The Australian Fair Pay Commission was established to take away from the Australian Industrial Relations Commission the power to specify the minimum wage and other industry standards.

Individual workplace agreements prevailed over collective agreements even though their term may then not have expired.

Collective bargaining was blunted at the union level. Strike action required a secret ballot of more than 50% of members and a majority in favour.

Awards which had been made at the State level, pursuant to Schedule 8 of WRA, became a “notional instrument” known as Notional Agreement Preserving State Awards (“NAPSA”) or Preserved State Agreements (“PSA”) in relation to Preserved Individual Agreements or Preserved Collective State Agreements.

The High Court said that the corporation’s power enabled these awards to be adjusted as the State awards or enterprise agreements or individual agreements were transposed under the WRA system.

Rates of pay in a PSA were derived from the state award it replaced, however the Australian Fair Pay and Conditions applied to NAPSA’s.

Post 1 July 2009

From **1 July 2009**, the Fair Work Act 2009 (“FWA”) replaces the Workplace Relations Act 1996.

FWA effects significant *changes to the Federal workplace relations system*, including:

- increased access to unfair dismissal for employees;
- expanded union right of entry powers;
- emphasis on collective enterprise bargaining and requirement to bargain in good faith;
- Fair Work Australia will be the new governing body enforcing legislation and will replace a number of government agencies including the Workplace Authority and the Workplace Ombudsman;
- The introduction of 10 minimum conditions of employment, known as the National Employment Standards (NES); and
- Modern Awards will replace all Pre-Reform Federal Awards and NAPSAs (Notional Agreements Preserving State Awards), with the exception of those awards confined to a single enterprise.

Modern Awards and the NES do not commence until 1 January 2010.

FWA sets out its objectives in the following terms:

- providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through NES, Modern Awards and national minimum wage orders; and
- ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

Terms and conditions of employment are dealt with in Chapter 2 of FWA and provide for:

- Part 2-1 has the core provisions for the Chapter. It deals with compliance with, and interaction between, the sources of the main terms and conditions provided under this Act--the National Employment Standards, modern awards and enterprise agreements.
- Part 2-2 contains the National Employment Standards, which are minimum terms and conditions that apply to all national system employees.
- Part 2-3 is about modern awards. A modern award is made for a particular industry or occupation and provides additional minimum terms and conditions for those national system employees to whom it applies. A modern award can have terms that are ancillary or supplementary to the National Employment Standards.
- Part 2-4 is about enterprise agreements. An enterprise agreement is made at the enterprise level and provides terms and conditions for those national system employees to whom it applies. An enterprise agreement can have terms that are ancillary or supplementary to the National Employment Standards.
- Part 2-5 is about workplace determinations. A workplace determination provides terms and conditions for those national system employees to whom it applies. A workplace determination is made by FWA if certain conditions are met.
- Part 2-8 provides for the transfer of certain modern awards, enterprise agreements, workplace determinations and other instruments if there is a transfer of business from one national system employer to another national system employer.

A **national system employer** is:

- a constitutional corporation, so far as it employs, or usually employs, an individual; or
- the Commonwealth, so far as it employs, or usually employs, an individual; or
- a Commonwealth authority, so far as it employs, or usually employs, an individual; or
- a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
 - a flight crew officer; or
 - a maritime employee; or
 - a waterside worker; or
- a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
- a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

FWA excludes State or Territory industrial laws

FWA (section 26) is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.

An excluded **State or Territory industrial law** is:

- a general State industrial law; or
- an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:
 - regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action);
 - providing for the establishment or enforcement of terms and conditions of employment;
 - providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment;
 - prohibiting conduct relating to a person's membership or non-membership of an industrial association;
 - providing for rights and remedies connected with the termination of employment;
 - providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment; or
 - a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime); or
 - a law of a State or Territory providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal or comparable value; or
 - a law of a State or Territory providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair; or
 - a law of a State or Territory that entitles a representative of a trade union to enter premises; or
 - an instrument made under a law described in paragraph (a), (b), (c), (d), (e) or (f), so far as the instrument is of a legislative character; or
 - either of the following:
 - a. a law that is a law of a State or Territory;
 - b. an instrument of a legislative character made under such a law;
 - c. that is prescribed by the regulations.

Federal law prevalence under Section 26 ***does not apply*** to the following laws, which continue to have application:

- the *Anti-Discrimination Act 1977* of New South Wales;
- the law is described by the regulations as a law to which section 26 does not apply;
- the law deals with any non-excluded matters (for example superannuation, workers compensation and OH & S and long service leave, except in relation to an employee who is entitled under Division 9 of Part 2-2 to long service leave and attendance for service on a jury, or for emergency service duties and prescribed matters relating to essential services); and
- the law deals with rights or remedies incidental to b and c of this paragraph 20.

Section 29 of FWA provides that a modern award or enterprise agreement prevails over a law of a State or Territory, to the extent of any inconsistency unless the regulations provide that a modern award or enterprise agreement does not apply.

If there is no inconsistency then a modern award or enterprise agreement applies subject to any law of a State or Territory referred to above.

Section 57 provides that a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

Interaction between the National Employment Standards and a modern award or enterprise agreement

- A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards;
- A modern award or enterprise agreement may include terms allowed by the regulations and other terms referred to in section 55.
- Section 61 provides that NES cannot be displaced
- The minimum standards relate to the following matters:
 1. maximum weekly hours (Division 3);
 2. requests for flexible working arrangements (Division 4);
 3. parental leave and related entitlements (Division 5);
 4. annual leave (Division 6);
 5. personal/carer's leave and compassionate leave (Division 7);
 6. community service leave (Division 8);
 7. long service leave (Division 9);
 8. public holidays (Division 10);
 9. notice of termination and redundancy pay (Division 11);
 10. Fair Work Information Statement (Division 12).

Divisions 3 to 12 constitute the *National Employment Standards*

The Fair Work Information Statement (which is not a legislative instrument) will be prepared by the Fair Work Ombudsman and contain the matters referred to in section 124 of FWA including:

- the National Employment Standards;
- modern awards;
- agreement-making under this Act;
- the right to freedom of association;
- the role of FWA and the Fair Work Ombudsman;
- termination of employment;
- individual flexibility arrangements; and
- right of entry (including the protection of personal information by privacy laws).

Maximum weekly hours (Section 62)

An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:

- for a full-time employee--38 hours; or
- for an employee who is not a full-time employee--the lesser of:
 - a. 38 hours; and
 - b. the employee's ordinary hours of work in a week.

An employee may refuse to work unreasonable additional hours. The section guides an employer as to how to determine the issue of reasonableness.

Modern awards and enterprise agreements may provide for averaging of hours of work (see section 63)

An employee who is a parent, or has responsibility for the care, of a child may request the employer for a change in working arrangements to assist the employee to care for the child if the child provided the employee has completed at least 12 months employment (see section 65). The application must comply with the section.

FWA is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to flexible working arrangements, to the extent that those entitlements are more beneficial to employees than the entitlements under this Division (section 66).

Section 113 deals with long service. FWA does not exclude State and Territory laws that deal with long service leave, except in relation to employees who are entitled to long service leave under this Division (see paragraph 27(2)(g)), and except as provided in subsection 113A(3).

Redundancy pay:

Section 119 (1) provides as follows:

An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

- at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
- because of the insolvency or bankruptcy of the employer.

The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	Redundancy pay period
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

Section 121 qualifies the above section as follows:

Section 119 does not apply to the termination of an employee's employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):

- the employee's period of continuous service with the employer is less than 12 months; or
- the employer is a small business employer; or
- A modern award may include a term specifying other situations in which section 119 does not apply to the termination of an employee's employment.
- A national system employer is a small business employer at a particular time if the employer employs fewer than 15 employees at that time.
- When a person is protected from **unfair dismissal**:
A person is protected from unfair dismissal at a time if, at that time:

- the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- one or more of the following apply:
 - a modern award covers the person;
 - an enterprise agreement applies to the person in relation to the employment;
 - the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.
- The minimum employment period is:
 - if the employer is not a small business employer--6 months ending at the earlier of the following times:
 - the time when the person is given notice of the dismissal;
 - immediately before the dismissal; or
 - if the employer is a small business employer--one year ending at that time.
- A person has been unfairly dismissed if FWA is satisfied that:
 - the person has been dismissed; and
 - the dismissal was harsh, unjust or unreasonable; and
 - the dismissal was not consistent with the Small Business Fair Dismissal Code; and
 - the dismissal was not a case of genuine redundancy.
- A person has been ***dismissed*** if:
 - the person's employment with his or her employer has been terminated on the employer's initiative; or
 - the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.
- However, a person has ***not been dismissed*** if:
 - the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
 - the person was an employee:
 - a. to whom a training arrangement applied; and
 - b. whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

- i. and the employment has terminated at the end of the training arrangement; or
 2. the person was demoted in employment but:
 - a. the demotion does not involve a significant reduction in his or her remuneration or duties; and
 - b. he or she remains employed with the employer that effected the demotion.
- In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:
- whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
 - whether the person was notified of that reason; and
 - whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
 - any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
 - if the dismissal related to unsatisfactory performance by the person-- whether the person had been warned about that unsatisfactory performance before the dismissal; and
 - the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
 - the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
 - any other matters that FWA considers relevant.
- A person's dismissal was a case of **genuine redundancy** if:
- the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
 - the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
 - A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:
 - a. the employer's enterprise; or
 - b. the enterprise of an associated entity of the employer.

Remedy—reinstatement:

An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

- reappointing the person to the position in which the person was employed immediately before the dismissal; or
- appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

If:

1. the position in which the person was employed immediately before the dismissal is no longer a position with the person's [employer](#) at the time of the dismissal; and
2. that position, or an equivalent position, is a position with an [associated entity](#) of the [employer](#);
3. the order under subsection (1) may be an order to the [associated entity](#) to:
 - a. appoint the person to the position in which the person was employed immediately before the dismissal; or
 - b. appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

If FWA makes an order for reinstatement and considers it appropriate to do so, FWA may also make any order that FWA considers appropriate to maintain the following:

- the continuity of the person's employment;
- the period of the person's continuous service with the employer, or the associated entity as the case may be.

FWA may also make any order that FWA considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

Compensation

An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

In determining an amount for the purposes of an order under subsection (1), FWA must take into account all the circumstances of the case including:

- the effect of the order on the viability of the employer's enterprise; and
- the length of the person's service with the employer; and
- the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
 - the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

- the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- any other matter that FWA considers relevant.

If FWA is satisfied that misconduct of a person contributed to the [employer's](#) decision to dismiss the person, FWA must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

The amount ordered by FWA to be paid to a person must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

The amount ordered by FWA to be paid to a person must not exceed the lesser of:

The amount is the total of the following amounts:

- a. the total amount of remuneration:
 - received by the person; or
 - to which the person was entitled; (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
 - if the employee was on leave without pay or without full pay while so employed during any part of that period--the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations. the amount worked out under subsection (6) of section 392 of FWA; and
 - half the amount of the high income threshold immediately before the dismissal.

FWA may allow a further period for the application to be made by a person under subsection (1) if FWA is satisfied that there are exceptional circumstances, taking into account:

- the reason for the delay; and
- whether the person first became aware of the dismissal after it had taken effect; and
- any action taken by the person to dispute the dismissal; and
- prejudice to the employer (including prejudice caused by the delay); and
- the merits of the application; and
- fairness as between the person and other persons in a similar position.

FWA may issue entry permits:

FWA may, on application by an organisation, issue a permit (an *entry permit*) to an official of the organisation if FWA is satisfied that the official is a fit and proper person to hold the entry permit.

A permit holder may enter premises and exercise a right under section 482 or 483 for the purpose of investigating a suspected contravention of this Act, or a term of a fair work instrument, that relates to, or affects, a member of the permit holder's organisation:

- whose industrial interests the organisation is entitled to represent; and
- who performs work on the premises.
- Note 1: Particulars of the suspected contravention must be specified in an entry notice or exemption certificate (see subsections 518(2) and 519(2)).
- Note 2: FWA may issue an affected member certificate if it is satisfied that a member referred to in this subsection is on the premises (see subsection 520(1)).
- The fair work instrument must apply or have applied to the member.
- The permit holder must reasonably suspect that the contravention has occurred, or is occurring. The burden of proving that the suspicion is reasonable lies on the person asserting that fact.
- A permit holder who seeks to exercise rights under this Part without reasonably suspecting that a contravention has occurred, or is occurring, is liable to be penalised under subsection 503(1) (which deals with misrepresentations about things authorised by this Part).

Producing authority documents

If the permit holder has entered premises, the permit holder must produce his or her authority documents for inspection by the occupier of the premises, or an affected employer:

- on request; and
- before making a requirement under:
 - a. paragraph 482(1)(c) or 483B(1)(c), or subsection 483D(2); or
 - b. subsection 483(1), 483C(1) or 483E(1).

Paragraphs 482(1)(c) and 483B(1)(c) and subsection 483D(2) deal with access to records and documents while the permit holder is on the premises. Subsections 483(1), 483C(1) and 483E(1) deal with access to records and documents at later times.

If the permit holder has entered premises under Subdivision B, the permit holder must produce his or her authority documents for inspection by the occupier of the premises on request.

Authority documents, for an entry under Subdivision A, AA or B, means:

- the permit holder's entry permit; and
- either:
 - a. a copy of the entry notice for the entry; or
 - b. if FWA has issued an exemption certificate for the entry--the certificate.