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Legal Solutions newsletter

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- WORKFORCE LEGAL SOLUTIONS
- NEWS

Workforce Legal solutions

Many thanks to all our clients for your patronage during our first year of business in 2008.

Wishing you all a very Merry Christmas and a Happy and Safe New Year for 2009.

News

The *Fair Work Bill 2008* passed through the House of Representatives on 4 December 2008 and will be subject to a Senate inquiry into the Bill over the next few weeks.

The key features of the Bill are as follows:

1. NES & Award Modernisation

From 1 January 2010 the safety net will comprise of 10 National Employment Standards (released by the Government in June 2008) and modern awards.

National Employment Standards

- Maximum weekly hours—38 hours plus reasonable additional hours;
- Flexible working arrangements—parent or carer for child under school age may request for change in working arrangements;
- Parental leave;
- Annual leave;
- Personal/carer's and compassionate leave;
- Community service leave—includes jury service or carrying out a voluntary emergency management activity;
- Long service leave—award or agreement provisions;
- Public holidays;
- Notice of termination (by employer) and redundancy pay—test case standard;
- Provision of Fair Work information statement.

Modern Awards

Will be based on ten NES and may include ten minimum conditions of employment tailored for the particular industry.

Includes minimum wages, types of employment arrangements for when work is performed, overtime and penalty rates, annualized salary, allowances, leave related matters, superannuation, and procedures for consultation, representation and dispute settlement.

Employees who have guaranteed earnings of more than $100,000 pa pro rata will not be covered by modern awards, but can still be covered by collective agreements. Earnings must be guaranteed in writing and agreed by employee in advance. Earnings not guaranteed in advance such as performance bonuses will not be included in guaranteed earnings. Non-

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monetary benefits such as a car and lap-top can be included where value can be calculated.

After 1 January 2010, modern awards will be reviewed four times per year for each award by Fair Work Australia. Outside of this there will be limited review of awards.

2. Unfair Dismissal

The changes to unfair dismissal are scheduled to take effect as of 1 July 2009.

Businesses with more than 15 employees: employees must serve a six month qualifying period before can make unfair dismissal claim which includes casuals who have regular and systematic employment.

Businesses with less than 15 employees: employees must serve a 12 month qualifying period before can make unfair dismissal claim. Employers must follow the Fair Dismissal Code to ensure dismissal is not unfair which includes one warning to be given to the employee.

- Application for unfair dismissal must be made within seven days;
- Informal approach is taken where Fair Work Australia will ascertain the facts, making inquiries and having discussions with employers/employees; holding conferences in attempt of mediated resolution;
- Full public hearings where complex issues are involved;
- Remedy will be reinstatement unless it is not in the interests of the parties or compensation capped at 6 months.

3. Bargaining in Good Faith

The new bargaining system will commence on 1 July 2009.

Implications of the new system:

- Where an employer refuses to bargain, employees or their representatives can ask Fair Work Australia to determine if there is a majority employee support for negotiating an agreement, which can be done whatever appropriate method including ballot or petition.
- Both parties can appoint a bargaining agent to represent them.
- Orders can be made by Fair Work Australia if parties are not bargaining in good faith.

4. Collective Agreements

Fair Work Australia will approve collective agreements under the proposed legislation.

For agreements to be approved, it must be satisfied that:

- Employer and employees genuinely agree to the agreement;
- Employees are **better off overall** by entering into the agreement in comparison to the modern award;
- Terms of the agreement do not contravene the NES.

The agreement does not contain unlawful content.

An agreement will come into operation seven days after Fair Work Australia approves it or at a later date if provided by the agreement.

Agreements will be able to include matters pertaining to the relationship between employer and employee and between the employer and any union covered by the agreement so deduction for union dues could be included for instance.

5. Protected industrial action

Protected industrial action will only be available during collective bargaining if it has been approved by a majority of employees in a mandatory secret ballot.

Employees and/or their bargaining agents must provide the employer three days' written notice of intention to take protected industrial action.

Where protected industrial action threatens health, safety or welfare of the community or part of it, Fair Work Australia will be required to order the parties to stop taking action, and make a determination if conciliation does not lead to an agreement.

Industrial action will not be protected if taken before nominal expiry date of an agreement or where parties are not bargaining in good faith.

With unprotected action, employers will be required to withhold four hours' pay for up to four hours' duration of action, and unprotected action of more than four hours, will require employers to withhold payment for the duration of

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the action.

With protected action, which results in complete withdrawal of labour, employer must withhold payment for actual period of protected action. Where there is partial work bans, employers have discretion to decide to either provide full payment or dock part of the employee's wages proportional to duties not being performed after notification to the employee.

Federal Magistrates' Court finds that pre-employment negotiations are part of the contract of employment

In the case of *McRae v Watson Wyatt Australia Pty Ltd [2008] FMCA 1658,* the Federal Magistrates Court found as of 1 December, 2008 that a redundancy provision that was discussed in pre-employment negotiations formed part of the employee's contract.

The employee was a superannuation consultant and was made redundant in 2007 by Watson Wyatt Australia Pty Ltd. The employer offered her one month's severance payment.

The employee rejected this as she asserted that in discussions with the managing director, before she commenced employment, it was agreed that she would be paid three weeks per year of service if made redundant but it was the company's policy not to include redundancy clauses in contracts. The employee had worked with the employer for seven years.

The employee had a hand-written note on the back of an envelope as to what the managing director had said during the negotiations.

The employer contended that a subsequent contract made in 2004 following a promotion of the employee excluded any pre-negotiations agreements as the contract provided that *"this letter sets out the entire agreement with you regarding the terms and conditions of your employment with the employer."*

Federal Magistrate Raphael rejected this on the basis that the HR Manager had indicated that the new contract was to improve the bonus arrangements for the employee and not alter any other term and two other entitlements were provided to the employee, including mobile phone and Qantas lounge membership which weren't detailed in written contract.

The employee won over $106,000 in damages for breach of contract and costs.

Employer wins damages over failure of recruitment company to check references

In the matter of *Driver Recruitment Pty ltd (trading as Authorised Solutions) v Wedeco AVP Pty Ltd [2008] NSWCA 290,* the NSW Court of Appeal found that it is an implied term of the contract between an employer and a recruitment company that the recruiter will conduct a thorough reference and background check of candidates that they put forward to the employer.

The employer engaged the recruiter to find a regional sales manager for South East Asia.

A candidate was successful and stayed in the position for 18 months when the employer discovered that the claimed qualifications of the employee were false; the employee had been bankrupt and was an undischarged bankrupt; and he had defrauded the company of more than $120,000.

The candidate had indicated on his cv that he had been employed as area manager with Tyco for the past two years. The recruiter spoke to two Tyco employees who indicated that candidate hadn't worked there for some five months and that the recruiter could contact the previous supervisor of the candidate as they couldn't comment on his work performance.

The recruiter failed to contact the previous supervisor and at first instance, the Judge found that the recruiter breached its contract and duty of care by failing to speak to the supervisor or tell the employer that they had not spoken to the previous supervisor and ordered $164,224 in damages to the employer.

On appeal, the recruiter argued that they would not have contacted the previous supervisor without the candidate's permission. However, the court dismissed the appeal with costs made by the recruiter and said that if the candidate did not give permission to speak to the supervision, then that information should have been provided to the employer.

The court also found that the recruiter had specifically told the employer's HR Manager that *"she had checked out the candidate's references and everything stacks up."*

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