



An Introduction To Australian Workplace Law

Australian workplace law is a highly complex jigsaw puzzle of laws, including the common law, a range of state and federal legislation and an array of industrial instruments (awards and workplace agreements). Compliance with these laws, let alone comprehending the opportunities they offer, is an ongoing challenge for employers and employees alike.

Like the Australian workplace, Australian workplace law is never static and has been the subject of significant evolutionary change in recent years, with more to come. Just some of these changes include: the high profile Work Choices changes to the federal industrial system; significant changes in the way in which the common law is applied in the workplace; the rise of the non-traditional worker; and the increasing role of skilled migrants. The Rudd Labor Government introduced further change to workplace regulation earlier this year, with further changes to take effect by January 2010.

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An Introduction to Australian Workplace Law

Law in the workplace can be compared to the foundations of a building upon which the workplace is built. The systems and practices used by any employer in its relationship with its employees are the essential materials with which that building is constructed. If the materials are strong and are kept well maintained then the building will withstand any legal storm. However, if the materials are not sound and not checked on a regular basis then the building may well be damaged or even slip off its foundations.

Workplace law has three key sources in Australia: the common law (judge made law); legislation; and industrial instruments (awards and industrial instruments). Businesses and other organisations which engage workers must ensure that they comply with each of these sources of workplace law. Failure to do so can result in expensive and time consuming legal action.

At the centre of the employment relationship is the employment contract. This consists of the terms and conditions upon which employees perform work and upon which employers pay remuneration. The centrepiece of the employment contract is what is known as the “wages/work bargain”. An employment contract will consist of both express terms and implied terms. Express terms are those which are expressly stated, either orally or in written form. Implied terms are those which are implied as a consequence either of a rule of law (implication of law) or from the particular circumstances of an employment contract (implication of fact).

As with any contract, for an employment contract to be binding on the parties to it: both parties must **intend** to create a legal relationship; there must be an **offer** by one party and an **acceptance** by the other party; it needs to be made by parties who are **legally capable** of entering into a contract; the parties must **genuinely consent** to the terms of the contract; the terms of the contract must not be contrary to law or public interest.

OBLIGATIONS UNDER THE COMMON LAW

The key legal duties of the **employer** are to:

- ✓ pay remuneration (eg. wages, salary, commission) so long as the employee has earned it by first providing service (as directed) or being ready and willing to do so;
- ✓ provide work if failure to do so can lead to loss of reputation or publicity;
- ✓ provide work if failure to do so can lead to a reduction in the employee's actual or potential earnings;
- ✓ take reasonable care to ensure the safety of employees;
- ✓ comply with all relevant laws (including awards).

The key legal duties of an **employee** are to:

- ✓ obey their employer's orders – so long as these are reasonable and lawful;
- ✓ exercise reasonable care and attend to the work with skill and competence;
- ✓ look after the employer's property (which can include the duty to inform the employer of the apparent misuse of property by another employee);
- ✓ provide faithful service;
- ✓ hand over inventions – intellectual property usually resides with the employer;
- ✓ maintain confidentiality – this obligation continues after the termination of the employment contract;
- ✓ comply with all relevant laws.

The joint duties of both employers and employees are:

- ✓ trust and confidence;
- ✓ good faith;
- ✓ personal service— the relationship is between the two parties and one party cannot transfer to a third party without the other party's consent.



KEY TERMS IN WORKPLACE LAW

Award

An industrial instrument created by a state or federal industrial relations commission providing minimum terms and conditions of employment for the employees the subject of the award.

Award employee

An employee whose employment is the subject of an award.

Casual employee

An employee who is engaged on an irregular and short term basis. For award purposes, it refers to an employee engaged and paid as such. For specific legislative purposes, may also include employees who have worked on a regular and systematic basis for a short period (usually less than 12 months).

Constructive dismissal

Where an employee resigns or otherwise leaves his/her employment.

Contract

An agreement between two or more parties. The obligations of the parties under the contract may be implied or express or both. A contract may be oral, written or both.

Contractor

A person or entity which contracts with another party under a contract for service—this is a relationship which is commercial in nature.

Dismissal

Termination of the employment contract at the initiative of the employer. Some employees are eligible to make unfair dismissal claims in the event that they consider the dismissal to be unfair.

Employee

A person who is employed under a contract of service.

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OBLIGATIONS UNDER KEY WORKPLACE LEGISLATION

An overview of key workplace legislation appears below.

ANNUAL LEAVE	Under both Federal and State legislation all employees other than casual employees are entitled to annual leave. Under Federal legislation annual leave accrues on a monthly basis, as 1/13th of the nominal hours worked. Under State legislation, annual leave accrues on an annual basis and is an entitlement to a number of days. Under Federal legislation a proportion of annual leave may be cashed out provided that certain procedural requirements are met.
ANTI-DISCRIMINATION	There is both Federal and State anti-discrimination legislation. Discrimination refers to the act of making a distinction between two or more people or things. Unlawful discrimination refers to an act of making a distinction based on a particular characteristic a person has or is thought to have which leads to less favourable treatment of that person than in the same circumstances, or in circumstances which are not materially different, a person without that characteristic would receive. There are many grounds of unlawful discrimination: sex (including sexual harassment, pregnancy, family responsibilities and marital status); race (including colour, descent or national or ethnic origin); disability (including perceived and actual disability, physical and mental disability); carer's responsibility; age; sexual preference; transgender status.
INDUSTRIAL LAW	There are both Federal and State industrial laws. Federal industrial law applies to employers which are constitutional corporations. State industrial law applies to employers which are sole traders and partnerships. Industrial laws make provisions for (among other things): minimum conditions (e.g. under Federal industrial legislation there are a range of prescribed minimum conditions including the Australian Fair Pay and Conditions Standard); the making of awards; the making of workplace agreements; termination of employment provisions (including unfair dismissal); leave provisions; and industrial dispute provisions.
LONG SERVICE LEAVE	Under State legislation all employees are entitled to long service leave after 10 years continuous service. Under NSW long service leave legislation the entitlement is to two months paid leave. An employee <i>may</i> be entitled to a pro-rata payment of long service leave in the event that his/her employment is terminated by the employer for any reason other than the employee's serious and wilful misconduct, or by the employee on account of illness, incapacity or domestic or other pressing necessity or by reason of the employee's death.
OCCUPATIONAL HEALTH & SAFETY	All employers must comply with OH&S legislation. In general term this requires employers to ensure the health, safety and welfare of their employees and visitors to the workplace (which can include contractors). All employers must take active steps to identify workplace risks and then eliminate those risks or, where elimination is not possible, control the risks. Risk control involves taking measures to minimise the risk to the lowest level reasonably practicable. Having either eliminated or controlled the risk, the employer and their managers are then obliged to ensure that the measures used to eliminate or control risks are properly used or maintained. Employers are also obliged to ensure that they consult with their employees. Failure to comply with OH&S legislation can result in substantial penalties being imposed and, in the case of directors and managers, even imprisonment.
SUPERANNUATION	Under this legislation employers are obliged to make a superannuation contribution in respect of each eligible employee. Ordinarily all employees who earn more than \$450 in a given month will be entitled to superannuation. The current contribution is 9% of the employee's ordinary remuneration.
TRADE PRACTICES LAW	Under this legislation employers are obliged to ensure that do not, amongst other things, engage in unconscionable conduct or misleading or deceptive conduct in respect of their employees.
WORKERS COMPENSATION	All employers are obliged to have a workers compensation policy and, where applicable, cooperate with the return to work plan for an injured worker, including the provision of suitable employment. Employee are entitled to receive workers compensation in respect of any incapacity caused and/or treatment required for a work related injury.
WORKPLACE SURVEILLANCE	This NSW legislation regulates the conduct of employers in relation to covert and overt surveillance of employees while at work, including employee use of the employer's email and internet system.



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OBLIGATIONS UNDER AWARDS AND WORKPLACE AGREEMENTS

In addition to the common law and legislation, employers must also comply with the content of any relevant awards and workplace agreements.

Most workplaces will have employees whose employment is the subject of an award. Employers can obtain assistance in identifying whether an award or awards apply in their workplace from a range of sources, including government regulators, industry and employer associations and solicitors who specialise in workplace law. NSW awards can be searched for at www.industrialrelations.gov.au. Federal awards can be searched for at www.workchoices.gov.au and www.wagenet.gov.au.

If an award does apply to a particular category of employee, the employer needs to ensure that the terms and conditions upon which employment is offered and provided to that employee are compliant with the award. The award must also be displayed in the workplace.

Awards may be common rule in nature (i.e. apply across an industry) or respondent based (i.e. they will only apply if the employer or an association it belongs to is specifically named as a respondent). Many enterprises consider the one size fits all approach of awards to be difficult to reconcile with the particular needs of the enterprise. In such circumstances, employers may enter into workplace/enterprise agreements. Agreement may be made with individuals or groups of employees; although the opportunity to enter into individual agreements has been significantly curtailed following legislative changes to federal industrial law in March 2008. Under the NSW system, enterprise agreements may only be made with a group of employees. Under both the federal and state systems collective agreements can either be made with a union or the employees directly.

KEY PRINCIPLES

Employers and their managers often report feeling overwhelmed by the range and number of laws which apply in the workplace. The good news is that while there certainly are many different laws which apply, they are all essentially founded on relatively simple principles. Understanding these principles and adopting them in the daily life of the workplace can ensure that employers and their managers can not only comply with these laws but also maximise the benefits they obtain from them.

We consider the key principles of workplace law to be:

- employees and employers have both rights and obligations;
- both parties to the employment contract are entitled to be treated fairly;
- both parties to the contract must keep their promises;
- employees are entitled to be safe at work - from not only risks to physical and mental health but also from any form of unlawful discrimination;
- the best method of decision making is objective criteria and impartiality;
- employees are obliged to perform the work required of them and do nothing to harm the interests of the employer;
- employers are free to use their own prerogative in the workplace so long as they comply with the abovementioned principles.



KEY TERMS IN WORKPLACE LAW

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Non-award employee

Also known as a common law employee, this type of employee is not the subject of an award. This term usually applies to managerial and other senior and professional staff. As with award employees, the common law and all relevant workplace law apply to the employment of this category of worker.

Personal leave

Refers to sick leave and carer's leave.

Reasonable notice

Under the common law most open-ended contracts can only be terminated with the provision of notice. Where the amount of notice is not expressly stated in the contract, "reasonable notice" will have to be provided. What is reasonable will depend on all relevant circumstances of the particular employment relationship.

Redundancy

Where an employer identifies that it no longer requires a role to be performed by anyone. Usually arises as a consequence of organisational restructure and/or technological change.

Retrenchment

The ground upon which an employment contract is terminated as a consequence of the making redundant of the position held by the employee.

Sexual Harassment

A person is sexually harassed if another person makes an unwelcome sexual advance or an unwelcome request for sexual favours or another person engages in unwelcome conduct of a sexual nature in relation to the person harassed in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person would be offended, humiliated or intimidated.

Workplace Agreement

An industrial instrument which includes terms and conditions of employment applying to a particular employment relationship. Workplace agreements can override award provisions.

You can find a more detailed Glossary of Key Terms in Workplace Law at www.devinelaw.com.au.



Compliance Checklist— How to correctly categorise a worker

While some workers easily fall into a particular category of worker, many others can be difficult to correctly categorise. This is particularly the case when distinguishing casual employees from permanent part-time employees and when distinguishing employees from independent contractors. Correct categorisation of workers is a fundamental step in ensuring compliance with the relevant laws which apply to each type of worker and therefore the consequences of incorrect categorisation can be quite significant. What appears below is a basic checklist of what questions an engaging entity needs to ask itself when engaging either an employee (of any type) or a contractor to assist it in the process of correct categorisation. It is not intended to be exhaustive.



- ✓ what kind of work will the worker be performing?;
- ✓ at what level will the worker be required to perform the work? (e.g. entry level, mid-level, senior);
- ✓ where will the worker perform the work – does s/he need to be in the workplace?;
- ✓ how will the work be performed?;
- ✓ does the nature of the work require the worker to be supervised and, if so, to what extent does s/he need to be supervised?;
- ✓ how often and for what length of time will the worker be required to perform the work?;
- ✓ does an award or other industrial instrument apply to the work/worker?;
- ✓ if an award/workplace agreement does apply:
 - ✓ what is the worker's classification?;
 - ✓ what are the entitlements of this worker under this award/agreement?;
 - ✓ what restrictions on this type of employment apply, if any? (e.g. minimum number of hours, minimum number of days);
- ✓ what are the other legal entitlements of this type of worker?;
- ✓ what workplace rules apply to this worker? (e.g. performance standards, policies and procedures);
- ✓ what will the engaging entity pay the worker for his/her/its services?;
- ✓ is the worker required to provide any/all of the tools and equipment s/he will use to perform the work required?;
- ✓ what will the engaging entity give the worker for his/her/its services? (i.e. in addition to payment, the entity might promise other things, for example matters contained in policies and procedures).

The information obtained from this process will assist in the proper categorisation of the worker's employment status. In this process proper consideration should be given to the relative pros and cons of each category of worker. Having identified the answers to each of these and any other relevant questions, the engaging entity needs to ensure that at each stage of the engagement process (from advertisement through to interview through to offer and acceptance) the key features of the employment relationship are **documented**. Having documented these key features, they then need to be kept under review, with any variations first negotiated and then documented.

In circumstances where the status of the worker is changed from employee to contractor, the engaging entity needs to be very careful to ensure that it does not breach the prohibitions against sham arrangements and coercion contained within the *Workplace Relations Act 1996* (Cth). These prohibitions are discussed in the article entitled "The Non-Traditional Worker in the Australian Workplace" which appears on **pages 8 and 9** of this publication.



Contract Checklist

What appears below is a guide to the terms and conditions of employment which should be included in most employment contracts. This list is not exhaustive.

- ✓ name of employer;
- ✓ employment status (permanent/casual, employee/contractor, full-time/part-time, fixed period or project);
- ✓ probationary period;
- ✓ commencement date;
- ✓ term (if applicable, e.g. fixed term);
- ✓ duties;
- ✓ due care and diligence;
- ✓ faithful service (including no outside employment without express consent and other potential conflicts of interest);
- ✓ hours (not always appropriate when the employee is a non-award employee);
- ✓ remuneration (including wages/salary and non-monetary benefits);
- ✓ allowances (if applicable);
- ✓ bonus/incentive scheme (if applicable);
- ✓ share rights/options (if applicable);
- ✓ expenses;
- ✓ leave (annual, personal, long service, parental and other forms);
- ✓ superannuation;
- ✓ insurances and indemnities;
- ✓ intellectual property;
- ✓ training;
- ✓ confidential information;
- ✓ non-compete clause (if applicable);
- ✓ company policies;
- ✓ performance standards and performance review;
- ✓ termination;
- ✓ governing law.

Additional matters where an employee is the subject of a 457 visa

- ✓ health insurance for employee and accompanying family members;
- ✓ undertaking regarding compliance with terms of visa;
- ✓ coverage of return travel costs for employee and accompanying family members.

The content of any employment contract must be compliant with any industrial instrument and legislation. If any term of the contract is not legally compliant it will *not* be enforceable. A contract is not capable of overriding an award/agreement or any relevant legislation.

Any change to a term or terms contained in an employment will only be enforceable if the variation has been made with the consent of both parties to the contract. For example, an employer must seek the employee's consent to any proposed variation. This consent should be documented and the record kept.



Policies and Procedures

As a risk management strategy, policies and procedures can be an effective way in which employers can maximise the opportunity to comply with relevant laws and to communicate workplace rules to employees.

It is critical that the policies and procedures are relevant to the particular workplace and enterprise. To be effective, these must be kept under regular review—with feedback obtained both from within the workplace and externally (e.g. a lawyer who can ensure they reflect the current status of the law).

Key policies and procedures which are recommended are listed below. This list is not exhaustive.

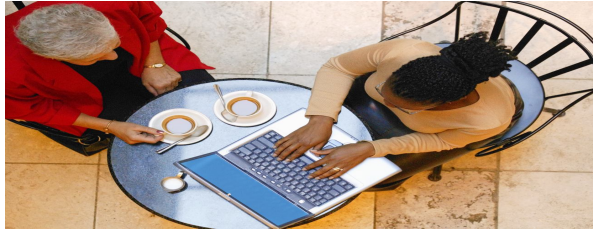
- Code of Conduct;
- Disciplinary Policy and Procedure;
- EEO and Anti-Discrimination Policy;
- Occupational Health and Safety Policy and Procedure;
- Redundancy and Retrenchment Policy and Procedure;
- Performance Appraisal Policy and Procedure;
- Grievance Procedure;
- Dispute Resolution Procedure;
- Internet and Email Policy;
- Privacy Policy;
- Information Handling Policy;
- Workplace Surveillance Policy;

These policies and procedures may be bundled together with any other workplace rules into an Employment Handbook.

Employers must keep in mind that they are legally obliged to keep the promises that they make and this includes the promises that they make in policies and procedures. Accordingly employers need to ensure that the content of these documents is consistent with what the employer is willing to comply with and that all employees, in particular managers, understand what they must do to ensure that the promises are kept.



The Non-Traditional Worker in the Australian Workplace



The Australian workplace is in constant evolution. From its convict and indenture origins, it has evolved from a strong rural and agricultural base to an urbanised and corporate focus.

When the Harvester decision (which established the notion of a fair and reasonable wage) was handed down in 1907 the typical worker was a male who was married to a woman who did not work outside the home and who had three children. "Harvester Man" would quite possibly not recognise the Australian workplace 100 years on.

Significant changes in the Australian workplace have arisen particularly in the past thirty years. Just two of those changes are the increased participation of women in the workplace and the increase of service industries. Accompanying these changes has been the rise of the **non-traditional worker**, a category of worker which includes: casual employees; part-time employees; fixed term contract employees; self-employed contractors and labour hire workers.

In research conducted in 2006, the Productivity Commission has identified that approximately one-third of the Australian workforce fits into the category of non-traditional worker - around 3.3 million of the 10 million strong workforce. The largest group within this category of worker is the casual employee (1.9 million), followed by the self-employed contractor (800,000).

THE ROLE OF THE NON-TRADITIONAL WORKER

The Productivity Commission found that there is a demand for non-traditional work by business for two key reasons: a need to have a flexible workforce in response to changing market conditions; and a need to minimise employment costs (including the costs and risks associated with recruitment, training, supervision and termination). Workers are available to meet this demand for three key reasons: preferences for greater autonomy and flexibility; financial incentives; and, for the unemployed, the use of non-traditional work as a stepping stone to ongoing employment. Workers are more likely to secure their preferred form of employment if their skills are in high demand.

REGULATION OF DIFFERENT TYPES OF EMPLOYMENT

Employment relationships are regulated by the common law of contract, a myriad of different state and federal laws and, where applicable, industrial instruments. In contrast to this

commercial relationships are primarily the subject of the common law of contract and trade practices law.

The true character of a particular employment relationship is determined by reference to all the facts and circumstances bearing on the nature of the engagement.

Difficulties with distinguishing different working relationships from each other have long been a feature of Australian workplaces and Australian workplace law. Two common examples are: distinguishing casual employment from permanent employment; and employment relationships from commercial relationships.

Casual or permanent employee?

The term casual employee does not have a settled legal meaning. It commonly refers to a worker who is engaged on an irregular and short term basis. From an award perspective, a casual employee is an employee who is engaged and paid as such. Under specific legislation a casual employee may be an employee who is employed on a regular and systematic basis for a short period (usually less than 12 months).

A third category of casual employee is what is colloquially known as the "permanent casual". This is a worker who has been working with an employer for an extended period (i.e. more than one year). Despite the firm belief of many employers, this is *not* a worker who is recognised at law as a casual. The employment status of the relationship will often be maintained as casual because of a combination of the appeal of the casual loading to the worker and the appeal of the perceived reduction in legal liability of the employer. In respect of the latter, many employers operate under a mistaken belief that if a person is employed and paid as a casual then that employee will not be eligible to make an unfair dismissal claim against the employer. As many have found to their chagrin, the "permanent casual" will, in the event of legal action, most probably be found to be a permanent employee at law.

Employee or Independent Contractor?

Some workers will often be called a contractor by the parties to the arrangement; however under the law the person may in fact be an employee. From a legal perspective, the process of determining whether a worker is an employee or a contractor involves weighing all of the relevant indicia, which can include: how the person is paid; what level of control there is over the worker and whether they can delegate the services; whether the worker is free to accept or refuse work; whether the worker has to work at set times; whether the worker works exclusively for a business/organisation; whether PAYG tax is deducted on



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behalf of the worker and whether provision is made for paid leave; whether provision is made for the payment of insurances, superannuation and workers compensation coverage; whether the worker is required to wear a uniform; and, whether the parties intended to enter an employment contract or an independent contracting arrangement.

Businesses and other organisations proposing to enter into independent contractor agreements need to be aware of the *Independent Contractor Act 2006* (Cth) and provisions in the *Workplace Relations Act 1996* (Cth), particularly with respect to the prohibitions contained in that legislation against: unfair contracts; misrepresenting a proposed or current employment relationship as an independent contracting arrangement; dismissing or threatening to dismiss an employee for the sole or dominant purpose of engaging the individual as an independent contractor; the making of false statements knowingly with the intent to persuade or influence an individual to perform the same or substantially the same work as an independent contractor.

Whether or not a worker is categorised as an employee or a contractor has significant implications for the worker and the party employing/engaging that person. While commercial relationships are not free of regulation, employment relationships are the subject of considerable regulation in Australia. An employer will ordinarily have a greater number of legal obligations towards employees than a principal contractor will have towards a self-employed contractor. A comparison of the legal entitlements of employees and contractors appears on the table to the right.

THE ROLE OF THE NON-CITIZEN EMPLOYEE

Of the roughly 800,000 temporary residents in Australia, close to half have some form of entitlement to work while in Australia. This represents a significant portion of the Australian workforce of around 10 million people.

When employing non-citizen employees, employers must ensure that they not only comply with Australian workplace law but also Australian immigration law. Failure to comply with either or both can lead to legal action and the imposition of significant penalties and other detriment.

THE FUTURE

The Australian workplace is markedly different from the one which existed even thirty years ago. With a workplace now notable for its diversity, the non-traditional worker (including non-citizens) now represent a significant portion of the Australian workforce and a more relevant approach to regulation of workplace relationships involving these workers is warranted. In the meantime, business and other organisations employing or engaging workers need to ensure that the contractual relationships they have with workers both meet the needs of the business/organisation and comply with the current state of the law.

Given the sometimes tricky nature of making a distinction between employees and contractors, the benefits of independent legal advice will often be considerable. In the case of employers of non-citizens, this advice will need to include advice concerning both workplace law and immigration law.



COMPARISON OF THE LEGAL ENTITLEMENTS OF EMPLOYEES AND CONTRACTORS

Entitlement	Employees	Contractors
	<i>Not all of these entitlements will apply to casual employees</i>	
Allowances	Yes	No
Annual leave	Yes	No
Australian Fair Pay & Conditions Standard	Yes	No
<i>This applies only where the worker is the subject of the Federal industrial system</i>		
Health, safety and welfare protection	Yes	No—unless the contractor visits the workplace.
Long Service Leave	Yes	No
Notice upon termination	Yes	Yes
Parental leave	Yes	No
Personal leave	Yes	No
Protection from unlawful discrimination	Yes	Yes
Severance payments	Yes	No
Superannuation	Yes	No
Trade practices protection	Yes	Yes
Unfair contract claims	Yes	Yes
Unfair dismissal claims	Yes	No
Unlawful termination claims	Yes	No
Workers compensation	Yes	Subject to the deeming provisions of relevant state laws.



Workplace Law Reform — What lies ahead

Having been the subject of significant change in the past two years, the federal system of Australian workplace law is set for further change in the near future following the election of the Rudd Labor Government late last year. This system applies to companies registered in Australia.

What appears in this Law at Work Report is a guide to what Labor is proposing in respect of each of the key components of federal workplace relations law. Given the ideological banter from both parties in the past two years, you may be surprised to find that many of the changes introduced by the then Howard Coalition Government, both in 1996 with the introduction of the *Workplace Relations Act 1996* (the Act) and then in 2006 with the *Work Choices* amendments, will either be retained by Labor or changed minimally. The most notable examples of what will *not* change include:

- the retention of a national industrial relations system;
- a simplified approach to making workplace agreements;
- the simplification of awards;
- restrictions on industrial action; and,
- standard conditions for all employees, with the five conditions introduced in 2006 retained and another five added to them.



The areas of most significant change will apply to:

- Australian Workplace Agreements (“AWA’s), first introduced in 1996, were abolished on 28 March 2008;
- unfair dismissal (not only in terms of eligibility but also in terms of how claims are determined); and
- the creation of a one-stop workplace relations shop, Fair Work Australia, with independent administrative and judicial functions—the election of the Rudd Labor Government appears to be the end of the line for the Australian Industrial Relations Commission, with the absorption of what remained of its functions after the Work Choices amendments into Fair Work Australia.

Each of the proposed changes are discussed below and on the following pages.

National System

The Work Choices changes of March 2006 saw the large majority of Australian employers (corporations) drawn into the federal system. Sole traders and partnerships were *not* included in the federal system. The Rudd Labor Government will seek to extend this to all private sectors Australian employers via cooperation with the State and Territory Labor governments, either in the form of referral of powers or through harmonisation of laws.

Australian Industrial Relations Commission

The Australian Industrial Relations Commission is likely to be rolled over into a new government authority, Fair WorkAustralia.

Awards

Following amendments to the Act which took effect on 28 March 2008, the Rudd Labor Government has instituted an award modernisation process by the Australian Industrial Relations Commission, which must be completed by **31 December 2009**. This process will result in ‘modern awards’ applying to award employees the subject of the federal industrial system. Modern awards will be limited to 10 key matters:

- **Minimum wages** – including classifications, career structures, incentive based payments, bonuses, wage rates, other arrangements for apprentices and trainees.
- **Employment status** (e.g. permanent, casual) **and facilitation of flexible work arrangements.**
- **Hours** – when work is performed, including hours, rostering, rest and meal breaks.
- **Overtime rates.**
- **Penalty rates** – for employees working “unsocial”, “irregular or unpredictable” hours, on weekends, public holidays or as shift workers.
- **Minimum annualised wage or salary arrangements** as an alternative to penalty rates, having regard to occupation, industry or enterprise patterns of work.
- **Allowances**, including reimbursement of expenses, higher duties and disability based payments.



- **Superannuation.**
- **Consultation, representation and dispute settling procedures.**

Government authorities and an independent umpire

The Fair Pay Commission (wages), the Workplace Authority (workplace agreements), the Workplace Ombudsman (regulator) and the Australian Industrial Relations Commission (judicial) will be rolled into one central agency, Fair Work Australia. The Rudd Labor Government is proposing that Fair Work Australia will have separate and independent administrative and judicial divisions.

Industrial Action

Protected industrial action, during a period of negotiation for a workplace agreement, subject to notification and other procedural requirements, will remain. The prohibition against industrial action other than in these circumstances will remain.

Fair Work Australia will be empowered to terminate any industrial action which is held to be causing or threatening to cause significant damage to the Australian economy.

Annual Leave

There will be no change to this entitlement to 4 weeks annual leave per year for a full-time employee and five weeks for a shiftworker.

Community Service Leave

Employees will be entitled to leave for prescribed community activities. For example, paid leave for jury leave and reasonable unpaid leave for emergency services duties.

Compassionate Leave

The entitlement to 2 days paid leave on each occasion that a family or household member is ill or the subject of an emergency will not change.

Long Service Leave

Historically an entitlement sourced from State and Territory legislation and a leave entitlement which was *not* drawn into the *Workplace Relations Act 1996* (Cth) when the Work Choices amendments of March 2006 took effect (unlike annual, personal and parental leave), Labor proposes to work with the State and Territory governments to develop nationally consistent long service leave entitlements.

Parental Leave

The entitlement to take up to 12 months unpaid parental leave will not change. However, under the Rudd Labor Government, each parent of a child will be entitled to a separate period of leave of 12 months, in place of the current entitlement to share up to 12 months. Where parents decide they would prefer one parent to have up to two years unpaid parental leave, that parent will have the right to request his/her employer to extent his/her entitlement from 12 months to two years. An employer will only be entitled to refuse such a request on reasonable business grounds.

The Rudd Labor Government will also introduce the entitlement to request flexible work arrangements until an employee's child reaches school age.

Personal Leave (Sick and Carer's)

A well established award entitlement which was drawn into the Act when the Work Choices amendments took effect in 2006, this entitlement will remain unchanged.

Maximum Ordinary Hours

The Work Choices amendments of March 2006 mandated 38 hours per week plus "reasonable additional hours". Under the Rudd Labor Government the standard working week will be 38 hours. While an employer will be permitted to require an employee to work additional hours, they will be prohibited from requiring an employee to work "unreasonable additional hours".

Public Holidays

The entitlement to have paid leave on a public holiday will not change. Employees who work on a public holiday will be entitled to a penalty rate or other compensation.



Standard Conditions

The Work Choices amendments of March 2006 introduced five standard conditions to apply to *all* employees. The Rudd Labor Government will make some changes to the current five standard conditions and extend the standard conditions to 10 in all. These 10 conditions will be the National Employment Standard (NES) and will apply to the following:

- hours of work;
- parental leave;
- flexible work for parents;
- annual leave;
- personal, carers and compassionate leave;
- community service leave;
- public holidays;
- information in the workplace;
- termination of employment and redundancy;
- long service leave.



Mandatory Employee Information

The Workplace Relations Fact Sheet introduced by the then Coalition Government in May 2007 will be replaced by a Fair Work Information Statement.

OH&S and Workers Compensation

The Rudd Labor Government will see to harmonise Federal and State OH&S legislation and workers compensation legislation; particularly with respect to definitions and procedural and reporting requirements. Unions are likely to resume a more significant role in consultation. It will also establish a new national body to oversee workplace safety.

There will be a moratorium on private sector employers seeking a licence to self-insure under federal workers compensation legislation and becoming subject to the federal OH&S legislation.

Redundancy/ Severance Pay

The original Termination, Change and Redundancy ("TCR") cases in 1989 established the entitlement of award employees to severance pay in the event of the termination of their employment following the making redundant of the position held by them, provided that they were employed by employers with 15 or more employees. In 2004, in the third TCR case, the AIRC extended the entitlement to severance pay to all award employees, regardless of the size of their employer. In March 2006 the Work Choices amendments saw the entitlement to severance pay wound back to award employees of employers with 15 or more employees.

The Rudd Labor Government will make no changes to this entitlement. The Work Choices 'correction' to the entitlement will remain intact.

Unfair Dismissal

The Work Choices changes of March 2006 reduced eligibility to employees of employers with fewer than 100 employees. Labor will restore the remedy to those excluded from it in March 2006.

Under the Rudd Labor Government, eligibility for this remedy will apply to:

- an employee of an employer who has 15 or more employees who has been employed for 6 or more months;
- an employee of an employer who has 15 or fewer employees who has been employed for 12 or more months;
- if the employee is not covered by an award, the employee must be earning less than the remuneration threshold applicable at the date of dismissal (currently \$106,400 per annum).

Unfair dismissal claims will be determined in the course of a conference conducted by Fair Work Australia.

There will be no formal submissions, no cross examination and no hearing.

Reinstatement will remain the primary remedy where it is held that a dismissal is unfair.



Unlawful Termination

This remedy, which prohibits termination of employment of an employee for a prohibited reason (e.g. race, sex, disability, age, trade union membership) will remain. However claims will be determined by Fair Work Australia and not the Federal Court or Federal Magistrate's Court.

Wages

Fair Work Australia will determine wages, replacing the Australian Fair Pay Commission. A wage decision shall be made each year. Fair Work Australia will publish updated wage rates for all awards by 1 July each year.

Workplace Agreements

Following amendments to the Act which took effect on 28 March 2008, no new AWA's (individual workplace agreements) can be made after that date. However workplaces which need a transitional period to move away from individual workplace agreements may be permitted to make Individual Transitional Employment Agreements (ITEA) provided that it expires on 31 December 2009 and other criteria are satisfied.

Collective agreements will continue, whether made with unions or employees. Where a majority of employees want a collective agreement an employer may be required by Fair Work Australia to negotiate same. The Fairness Test, which was introduced in May 2007 by the then Coalition Government, was replaced with the no disadvantage test on 28 March 2008 which determines the fairness of proposed agreement by reference to relevant award. To be approved, the conditions in the workplace agreement must result in the employees covered by it being better off overall.

In addition to the requirement that the employees be better off overall, the only other requirements for a collective agreement to be approved are: the terms are lawful; bargaining is conducted in good faith; and, the majority of employees vote in favour of the agreement.

Fair Work Australia will approve collective agreements within seven days and will make its decision 'on the papers'.

Pattern bargaining will remain prohibited. However there will be some scope for multiple-employer agreements to be entered into.

Conclusion

The process of further change in Australian workplace law has begun and is likely to continue for the next few years.

On the one hand, there will be a distinct change in focus away from individual workplace agreements, which have been in place since 1996, towards collective agreements and awards.. In this way Labor will be restoring the regulatory environment which existed immediately prior to introduction of the Act 12 years ago, at least with respect to industrial instruments.

On the other hand, while it may not openly admit to doing so, the Rudd Labor Government clearly has found some merit in the approach to industrial regulation which characterised the previous Federal Government. In particular, the Rudd Labor Government is adopting the Howard Government's priorities with respect to:

- a national system of industrial regulation;
- reducing the role of AIRC;
- reducing the influence of unions, in particular through the strict limits placed on industrial action;
- standard conditions for all permanent employees; and
- simplification of awards.

While AWA's will be a feature of the past in a few years, once all AWA's made prior to 28 March 2008 have been terminated, many other features of industrial regulation will remain relatively intact. Labor is continuing down the path of a streamlined and relatively straightforward system of workplace regulation and that can only be a good thing for employers and employees the subject of the federal industrial system.





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Devine Law at Work is in the business of *helping people work together for better results.*

We work with our clients to achieve better results through a combination of high level technical expertise and skills in workplace law and workplace relations, communication, negotiation, adult education, conflict resolution and management assistance.

We offer services in advice, advocacy, legal documents, negotiation and conflict resolution, systems development, legal education, legal health checks and workplace investigations.

USEFUL LINKS

ANNUAL LEAVE

Federal Government information
www.workchoices.com.au
www.workplace.gov.au

Office of Industrial Relations (NSW)
www.industrialrelations.nsw.gov.au

AWARDS

Workplace Info (Federal awards)
www.workplace.gov.au

Office of Industrial Relations (NSW awards)
www.industrialrelations.nsw.gov.au

COURTS, COMMISSIONS & TRIBUNALS

Administrative Decisions Tribunal (NSW)
www.lawlink.nsw.gov.au/adt

Anti-Discrimination Tribunal (NSW)
www.lawlink.nsw.gov.au/adb

Australian Industrial Relations Commission
www.airc.gov.au

Federal Court of Australia
www.fedcourt.nsw.gov.au

Human Rights and Equal Opportunity Commission
www.hreoc.gov.au

Local Court (NSW)
www.lawlink.nsw.gov.lc

NSW Industrial Relations Commission
www.lawlink.nsw.gov.au/irc

GOVERNMENT DEPARTMENTS – WORKPLACE/ INDUSTRIAL RELATIONS

Workplace Ombudsman (Federal)
www.wo.gov.au

Workplace Authority
www.workplaceauthority.gov.au

Office of Industrial Relations (NSW)
www.industrialrelations.nsw.gov.au

LONG SERVICE LEAVE

Office of Industrial Relations (NSW)
www.industrialrelations.nsw.gov.au

OCCUPATIONAL HEALTH AND SAFETY

Comcare (Federal)
www.comcare.gov.au

Workcover (NSW)
www.workcover.nsw.gov.au

WORKPLACE AGREEMENTS (Federal)

Workplace Authority
www.workplaceauthority.gov.au