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Employment Law in Australia Overview



Level 12
60 Carrington Street
SYDNEY NSW 2000

DX 262 SYDNEY
Tel +61 2 8915 1000
Fax +61 2 8916 2000

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Authors: Martin O'Connor and Brandon Chakty

1. Introduction

- 1.1 In Australia, employment is primarily regulated by legislation at the Federal level. There are some areas, notably long service leave, which continue to be regulated at the State level.
- 1.2 The primary piece of federal legislation is the *Fair Work Act 2009* (Cth) (the **FW Act**). The FW Act applies to the majority of businesses operating in Australia.
- 1.3 The FW Act, among other things:
 - (a) sets out the National Employment Standards; and
 - (b) creates the framework for Modern Awards and enterprise agreements.

2. National Employment Standards

2.1 The National Employment Standards (the **NES**) are minimum employment entitlements that must be provided to all employees. Modern Awards, enterprise agreements and contracts of employment cannot stipulate conditions of employment that are less than the NES nor can they exclude the NES. The NES are set out in paragraphs 2.2 to 2.11 below.

2.2 **Hours of Work.** Full time employees must not be required to work more than 38 hours per week unless the additional hours are reasonable. All other employees must not be required to work more than the lesser of 38 hours per week or their ordinary hours of work per week, unless the additional hours are reasonable. An employee has a right to refuse to work additional hours if those hours are unreasonable. Some Modern Awards and enterprise agreements allow the averaging of weekly hours but a weekly average cannot exceed 38 ordinary hours of work.

2.3 **Flexible Working Arrangements.** Generally speaking, an employee who has completed at least twelve (12) months of continuous service with an employer and who:

- (a) is the parent of, or has responsibility for the care of, a child who is of school age or younger;
- (b) is a carer;
- (c) has a disability;
- (d) is 55 or older; or
- (e) is experiencing violence from a member of his/her immediate family, or cares or supports an immediate family member experiencing such violence;

may request flexible working arrangements with his/her employer. The request must be in writing and it must set out the reasons why a change in working arrangements is needed.

An employer must respond to the request in writing within 21 days and may only refuse the request on reasonable business grounds.

If the employee making the request is covered by a Modern Award, then before formally responding to the request, the employer is obligated to first discuss the request with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances.

2.4 **Parental Leave.** Generally speaking, employees who have completed at least twelve (12) months of continuous service with an employer are entitled to twelve (12) months of unpaid parental leave if:

- (a) that leave relates to the birth or adoption of a child; and
- (b) the employee will have responsibility for the care of the child.

An employee may request an extension of unpaid parental leave for up to a further twelve (12) months and this request may only be refused on reasonable business grounds.

There are special rules that apply where both parents of a child are employees (not necessarily of the same employer) and both intend to take unpaid parental leave. There are also special provisions relating to unpaid maternity leave and transfers to 'safe jobs' during pregnancy.

Immediately following a period of unpaid parental leave, an employee is entitled to return to his/her pre-parental leave position or, if that position no longer exists, a similar available position for which the employee is suitably qualified.

- 2.5 **Annual Leave.** Permanent employees are entitled to four (4) weeks (or five (5) weeks in the case of a shift worker) of paid annual leave for each year of employment. Annual leave accrues progressively during the year and accumulates from year to year. Paid annual leave must be taken as agreed between the employee and the employer, but an employer must not unreasonably refuse an employee's request to take paid annual leave. If an employee has accrued an entitlement to paid annual leave but has not used that entitlement, the entitlement generally must be paid out to the employee upon termination of his/her employment.
- 2.6 **Personal Leave.** Permanent employees are entitled to up to ten (10) days of paid personal/carer's leave for each year of employment. Personal leave accrues progressively during the year and accumulates from year to year. Personal/carer's leave can only be taken where an employee is not fit for work due to illness or injury or where an employee has to provide care to a member of his/her immediate family due to their illness, injury or an unexpected emergency affecting that family member. Unlike annual leave, accrued but unused entitlements to personal/carer's leave are generally not paid out on termination of employment.

An employee is entitled to two (2) days of unpaid personal/carer's leave on each occasion where the employee is ill or injured or where the employee has to provide care to a member of his/her immediate family due to their illness, injury or an unexpected emergency affecting that family member. An employee cannot take unpaid personal/carer's leave if the employee could take paid personal/carer's leave instead.

An employee is entitled to take two (2) days of compassionate leave on each occasion where a member of the employee's immediate family suffers a life-threatening illness, has a life-threatening injury or dies. Compassionate leave is paid leave for permanent employees and unpaid leave for casual employees.

All employees are entitled to five (5) days of unpaid family and domestic violence leave each year. Family and domestic violence leave does not accrue (i.e. it is available in full at the beginning of each year) and does not accumulate from year to year. Family and domestic violence means violent, threatening or other abusive behaviour by an employee's close relative that seeks to coerce or control the employee or causes the employee harm or fear. Employees can take this leave if they are experiencing family and domestic violence and they need to do something to deal with the impact of that violence, and it is impractical to do that thing outside their ordinary hours of work.

There are various notice and evidence requirements which apply when taking personal/carer's leave, compassionate leave or family and domestic violence leave. Notice must be given as soon as practical by the employee and the employer must be advised as to the period or expected period of leave. The employee must also provide the employer with evidence that would satisfy a reasonable person of his/her entitlement to take such leave.

- 2.7 **Community Service Leave.** The types of community services which are eligible for community service leave include jury service, voluntary emergency management activities and civil defence duties. An employee must give notice as soon as practicable of any absence and advise his/her employer of the period or expected period of absence. The employee must provide reasonable evidence that the absence is required.

Where the employee is a permanent employee and is absent on jury service, the employer must pay the difference between the jury service pay and the employee's wage but only for the first ten (10) days of jury service.

- 2.8 **Long Service Leave.** Long service leave is provided at the State level and State legislation is preserved by the FW Act. Employees' entitlement to long service leave varies slightly from State to State.

In New South Wales, the relevant legislation is the *Long Service Leave Act 1955* (NSW) (the **LSL Act**). A copy of the LSL Act is available [here](#). Under the LSL Act, an employee is entitled to two (2) months of paid long service leave after ten (10) years of continuous service with the same employer and one (1) month paid leave for each additional five (5) years of continuous service thereafter. In certain circumstances, an employee is entitled to a pro rata long service leave payment after only five (5) years of continuous service. Other States have different qualifying periods.

- 2.9 **Public Holidays.** An employee is entitled to be absent from work on public holidays (both State and Federal). However, an employer may reasonably request an employee to work on a public holiday. The FW Act sets out a number of factors which must be taken into account when determining whether a request is reasonable. These include the nature of the employer's workplace, the employee's personal circumstances (including any family responsibilities), whether the employee is entitled to overtime, penalty rates or other compensation for working on the public holiday, the type of employment of the employee, the amount of notice given by the employer to the employee and the amount of notice given by the employee if he/she refuses the request.

If a permanent employee is absent from work on a public holiday and the employee ordinarily works on that day, the employer must still pay the employee his/her base salary for the hours the employee would have ordinarily worked on that day.

- 2.10 **Notice of Termination and Redundancy.** Employers are generally required to give employees prior written notice of their dismissal. That notice must be delivered personally or left at the employee's last known address or sent to the employee by prepaid post.

The FW Act sets out the minimum period of notice that must be given to an employee depending on the employee's period of continuous service with his/her employer. The minimum periods are as follows:

Period of Continuous Service	Period of Notice
Less than 1 year	1 week
More than 1 year but less than 3 years	2 weeks
More than 3 years but less than 5 years	3 weeks
More than 5 years	4 weeks

Note: The relevant period of notice in the above table is increased by one (1) week if the employee is over 45 years of age and has completed at least two (2) years of continuous service with the employer.

Employers are generally permitted to provide employees with a payment in lieu of this notice period. If the employee is entitled to any statutory redundancy payment, payment in lieu of notice is in addition to such redundancy payment.

An employee is entitled to be paid redundancy pay if he/she is terminated because the employer no longer requires his/her job to be done by the employee or anyone else, or because the employer is insolvent or bankrupt.

The FW Act sets out the minimum amount of redundancy pay that must be paid to an employee depending on the employee's period of continuous service with his/her employer. The minimum amounts are as follows:

Period of Continuous Service	Redundancy Pay (No. of Weeks' Salary)
1 year but less than 2 years	4 weeks
2 years but less than 3 years	6 weeks
3 years but less than 4 years	7 weeks
4 years but less than 5 years	8 weeks
5 years but less than 6 years	10 weeks
6 years but less than 7 years	11 weeks
7 years but less than 8 years	13 weeks
8 years but less than 9 years	14 weeks
9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

An employer can apply to vary the amount of redundancy pay that is payable in circumstances where the employer finds other acceptable employment for the employee or where the employer cannot pay the minimum amount. This application needs to be brought by the employer to the Fair Work Commission.

An employer is not liable to pay redundancy to an employee if:

- (a) the employee has less than twelve (12) months of continuous service with the employer; or
- (b) the employer is a "small business employer".

A "small business employer" is an employer who employs fewer than 15 employees. A casual employee is not counted towards this number unless, at the relevant time, he/she has been employed by the employer on a regular and systematic basis. Associated entities (e.g. related companies or businesses) are taken to be one entity for the purposes of calculating the total number of employees.

Employers are also absolved of the obligation to pay redundancy pay in certain transfer of business situations.

- 2.11 **Fair Work Information Statement.** A Fair Work Information Statement must be given to each employee before or as soon as practical after the employee commences employment. A copy of this Information Statement is available [here](#).

3. Modern Awards

- 3.1 In addition to the minimum statutory entitlements provided by the NES, further conditions of employment may be provided for a particular category of employees in a document called a "Modern Award".
- 3.2 There are a range of Modern Awards, copies of which are available [here](#). An employee will normally be covered by the Modern Award that relates to the industry or occupation in which the employee works.

4. Enterprise Agreements

- 4.1 An enterprise agreement is an agreement between a particular employer and its employees as a group or groups.

- 4.2 Enterprise agreements also stipulate conditions of employment which are in addition to the minimum statutory entitlements provided by the NES.

5 High Income Employees

- 5.1 A high income employee is an employee who earns a salary above the high income threshold. This threshold is indexed and increases each year on 1 July. As from 1 July 2019, the high income threshold is \$148,700.
- 5.2 High income employees must be covered by a Modern Award or an enterprise agreement in order to be protected from unfair dismissal.

6. Paid Parental Leave

- 6.1 In 2010, the Federal Government introduced a paid parental leave scheme. The scheme provides government-funded Parental Leave Pay at the National Minimum Wage (as from 1 July 2019, the National Minimum Wage is \$740.80 per 38 hour week before tax) for a maximum period of 18 weeks. Parental Leave pay can be received before, after, or at the same time as existing entitlements such as annual leave, long service leave, and employer-funded paid parental leave.
- 6.2 To be eligible for Parental Leave Pay under this scheme, the employee must:
- (a) be the primary-carer of a new born or a recently adopted child;
 - (b) have earned an individual adjusted taxable income of \$150,000 or less;
 - (c) be an Australian resident or permanent citizen;
 - (d) have been in paid employment for 10 of the 13 months prior to the birth or adoption of the child; and
 - (e) have worked 330 hours in that 10 month period (which is just over 1 day a week), with no more than an 8 week gap between 2 consecutive working days.
- 6.3 Employers have a number of responsibilities under this scheme, including the obligation to:
- (a) provide Parental Leave Pay to the employee in accordance with their normal pay cycle;
 - (b) withhold tax from the Parental Leave Pay under the usual PAYG withholding arrangements;
 - (c) provide the employee with a record of their Parental Leave Pay and include Parental Leave Pay in the employee's payment summary;
 - (d) notify Centrelink if certain events occur (e.g. where the employee returns to work before or during their Paid Parental Leave period);
 - (e) return any unpaid Paid Parental Leave funds to Centrelink; and
 - (f) notify Centrelink, in advance if possible if the employer is ceasing to trade, selling its business, transferring ownership or merging with another business.

7. Superannuation

- 7.1 An employer is required to contribute the compulsory superannuation levy for all employees who are entitled to receive this levy. The levy is currently 9.5% of an employee's ordinary time earnings up to the maximum contribution base. This rate will remain at 9.5% until 30 June 2021 and will then increase by 0.5% each year until it reaches 12% on 1 July 2025.
- 7.2 The maximum contribution base increases each year on 1 July. For the period 1 July 2019 to 30 June 2020, the maximum superannuation base is \$55,270 per quarter. The portion of an employee's salary that is above this limit does not attract the levy (an employer may still pay superannuation above this amount if it wishes).

7.3 The superannuation levy is provided for by the *Superannuation Guarantee (Administration) Act 1992* (Cth). A copy of this Act is available [here](#).

8. Dismissal

8.1 An employer is generally not required to provide reasons for the termination of an employee.

8.2 **Unlawful dismissal.** It is unlawful to dismiss an employee on certain grounds and an employer that does so risks considerable consequences. Examples of unlawful grounds for termination include:

- (a) temporary absence from work due to illness or injury;
- (b) membership or non-membership with a trade union or participation in trade union activities;
- (c) the filing of a complaint against the employer or participation in proceedings against the employer (e.g. whistle blowers); and
- (d) discrimination on the grounds of race, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

8.3 **Unfair dismissal.** All unfair dismissal claims are handled by the Fair Work Commission. Generally, to be eligible to make a claim of unfair dismissal an employee must have been employed for six (6) months or more and must:

- (a) be covered by a Modern Award;
- (b) have an enterprise agreement apply to them in relation to their employment; and/or
- (c) earn less than the high income threshold.

A dismissal will be unfair if it is:

- (a) harsh, unjust or unreasonable;ⁱⁱ and
- (b) not a case of genuine redundancy.

Separate rules apply to small business employers. For example, where the employer is a small business employer, the employee must have been employed for at least twelve (12) months (not six (6) months) to be eligible to make an unfair dismissal claim.

Martin O'Connor, Partner

Telephone +61 2 8915 1027

Email martin.oconnor@addisonslawyers.com.au

Brandon Chakty, Graduate

Telephone +61 2 8915 0124

Email brandon.chakty@addisonslawyers.com.au

ⁱ This overview is current as at 4 July 2019.

ⁱⁱ There is no set definition for what will constitute harsh, unjust or unreasonable. Factors that will be considered by the Fair Work Commission include the reason for the dismissal, the notification and opportunity to respond provided to the employee, the ability for the employee to have a support person present, the nature of any unsatisfactory performance issues, any warnings provided to the employee, the size of the employer's business and any other relevant factors.