



THE FOUNDATIONS OF THE NEW WORKPLACE RELATIONS SYSTEM

The *Fair Work Act 2009* (Cth) (FW Act) has produced a major overhaul of the workplace relations system in Australia. The Act:

- establishes the National Employment Standards which, together with modern awards, set the minimum wages and conditions for employees;
- places an emphasis on collective bargaining and enterprise agreements;
- provides greater protection for employees against unfair dismissal and against adverse action for having or exercising a workplace right; and
- establishes a single body, Fair Work Australia, to oversee the new workplace relations system. There will also be an inspectorate headed by the Fair Work Ombudsman.

Most of the FW Act commenced on 1 July 2009. The National Employment Standards and modern awards commence on 1 January 2010.

Employers and employees covered by the FW Act

As with the *Workplace Relations Act 2006* (Cth), the FW Act sets up a national system, based predominantly on the corporations power in the federal constitution.

An employer is covered by the FW Act if they are:

- A constitutional corporation;
- The Commonwealth or a Commonwealth authority;
- A person who employs a flight crew officer, maritime employee or waterside worker in connection with interstate or overseas trade or commerce;
- Employers in the Australian Capital Territory and the Northern Territory; or
- Employers in States that have agreed to refer their workplace relations powers to the Commonwealth

As at 1 July 2009, the FW Act applies to all private sector employers and their employees in Victoria. Tasmania and South Australia have announced their intention to refer their workplace relations powers to the Commonwealth from 1 January 2010; this means that the FW Act will apply to all private sector employers and their employees in those States from that date.

What is a constitutional corporation?

A constitutional corporation is:

- An entity incorporated under the *Corporations Act 2001* (Cth) that engages in substantial trading or financial activities;
- An entity that is established as a body corporate under other legislation that is engaged in substantial trading or financial activities; or
- A foreign corporation.

The approach of the High Court of Australia is that a corporation is a trading or financial corporation if its trading or financial activities are a substantial or significant part (rather than a peripheral or insignificant part) of its overall activities.



Generally a trading activity is a business activity carried on with a view to earning revenue. Revenue is not necessarily profit, so a trading activity may be not-for-profit. An incorporated body that carries on commercial activities with a view to earning revenue will usually be a trading corporation.

Similarly, a financial corporation is generally identified by its predominant or substantial financial dealings for commercial purposes (eg money lending, providing insurance or other financial services).

It is likely that a building industry company will be treated as a constitutional corporation. However, if you are in any doubt you should seek professional advice.

This definition does not include partnerships, unincorporated associations and sole traders.

For those operating under a partnership or sole trade arrangement, there are many advantages to incorporation which should be considered. These include the following:

- Limited liability^{*};
- Ability to access the workplace relations system;
- Enhanced ability to show independent contractor status eg under workers' compensation legislation; and
- Many provisions of state and territory industrial laws will no longer apply to constitutional corporations.

The National Employment Standards (NES)

The NES commence on 1 January 2010 and will replace the Australian Fair Pay and Conditions Standard. The ten minimum employment standards covered by the NES are:

- (a) maximum weekly hours;
- (b) requests for flexible working arrangements;
- (c) parental leave and related entitlements;
- (d) annual leave;
- (e) personal/carer's leave and compassionate leave;
- (f) community service leave;
- (g) long service leave;
- (h) public holidays;
- (i) notice of termination and redundancy pay; and
- (j) Fair Work Information Statement.

The NES apply to all employees of national system employers and prevail over employee entitlements specified in State and Territory laws, except where those laws provide more beneficial entitlements for employees.

A modern award, agreement or common law agreement cannot be detrimental to an employee in any respect when compared to the NES, except where this is expressly allowed by the NES. Areas in which the NES expressly allows a modern award to include provisions which would otherwise be contrary to the NES include the cashing out of paid annual leave and paid personal/carer's leave, redundancy pay, the kind of evidence that must be provided to access paid personal/carer's leave, substitution of a public holiday and the period of notice for termination of employment.

* 'Limited liability' means that creditors have no right of action against the members of a company except to the extent of the nominal value of their shares or guarantees.



Detailed information about the NES is provided in Master Builders Fact Sheet 7.

The role of modern awards under the FW Act

Under the FW Act, modern awards, together with the NES, establish a minimum safety net for wages and conditions of employment. There have been significant changes to the matters that may be included in modern awards. The new arrangements also specify matters that must be included in modern awards.

Modern awards do not apply to employees with guaranteed annual earnings of more than \$108,300, indexed annually on 1 July. Modern awards also do not cover employees or employers covered by an enterprise award or a Notional Agreement Preserving a State Award derived from a State enterprise award. Separate arrangements apply to the modernisation of these awards.

The *Building and Construction General On-Site Award 2010* (the Building Award) has been made by the Australian Industrial Relations Commission and will commence on 1 January 2010.[†] It is an industry award that covers employers throughout Australia in the on-site building, engineering and civil construction industry and their employees in classifications specified in the award.

Fair Work Australia will review modern awards every four years.

Allowable matters

Modern awards build on the NES and may include an additional 10 minimum conditions of employment, specific to the particular industry or occupation. Modern awards may also include an industry-specific redundancy scheme and incidental and machinery terms, as is the case with the Building Award. The additional 10 conditions are:

- Minimum wages;
- Types of employment (such as full-time employment, casual employment, regular part-time employment and shift work and the facilitation of flexible working arrangements);
- Arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
- Overtime rates;
- Penalty rates;
- Annualised wage or salary arrangements;
- Allowances;
- Leave, leave loadings and arrangements for taking leave;
- Superannuation;
- Procedures for consultation, representation and dispute settlement.

Collective bargaining framework

The FW Act substantially changes the process and nature of agreement making and emphasises collective agreement making. Key changes that have been made by the FW Act include:

- There is a single stream of collective enterprise agreements that are made between an employer or employers and their employees. There is no distinction between union and non-union agreements.

[†] Note that the award may be subject to variation.



- The scope of matters that an agreement can cover has been expanded.
- Enterprise agreements must be approved by Fair Work Australia before they come into effect. Fair Work Australia will apply a Better off Overall Test to agreements from 1 January 2010. Until then, Fair Work Australia will continue to apply the no-disadvantage test to agreements made between 1 July 2009 and 31 December 2009.
- Enterprise agreements may be varied or terminated where approved by a majority of employees who are covered by that agreement. Variations and terminations are subject to approval by Fair Work Australia.
- Bargaining is subject to various 'good faith bargaining' requirements. Fair Work Australia has a role in facilitating bargaining where bargaining breaks down.

More detailed information about agreement making is provided in Master Builders Fact Sheet 3.

Unfair dismissal provisions and general protections

Unfair dismissal

The FW Act increases the protection for employees who have been unfairly dismissed. Master Builders Fact Sheet 9 provides more detailed information about termination of employment and unfair dismissal.

General protections

The FW Act contains a range of protections, including freedom of association, unlawful termination, and other miscellaneous protection provisions, known as 'general protections'. The general protections provide more comprehensive protection for employees than under the previous workplace relations laws.

The general protections use the concept of 'adverse action'. Adverse action is broader than dismissal – it includes discrimination between the employee and other employees for a prohibited reason; injuring a person in his or her employment; refusing to employ a person; or prejudicially altering the position of a person (such as demoting the person) for a prohibited reason. Adverse action includes threatening to take action and organising action.

The general protections make it unlawful for a person to take adverse action against another person in the following circumstances:

- The person has, or exercises, a workplace right;
- The person is, or is not, a member of a trade union;
- The person engages in, or chooses not to engage in, industrial action; or
- On the grounds of race, colour, sex, sexual preference, age, disability, marital status, pregnancy, family or carer's responsibilities, religion, political opinion, national extraction or social origin.

The FW Act also extends the scope of these provisions to cover independent contractors and employers. Adverse action against an independent contractor could include terminating the contract for a prohibited reason, for example that the contractor has a particular political opinion. Adverse action against an employer may occur where an employee ceases work or engages in industrial action against the employer for a prohibited reason.

'Workplace rights', in broad terms, are employment entitlements and the freedom to exercise and enforce those entitlements. They are:



- Entitlements, roles and responsibilities under a workplace law, workplace instrument or order of an industrial body (for example, an employee's right to have an enterprise agreement apply to the employee only if it satisfies the better off overall test);
- Participation in processes or proceedings under workplace laws or instruments (for example, taking protected industrial action or appointing a bargaining agent); and
- The making of complaints or inquiries (for example if an employee makes a complaint to a union or the Fair Work Ombudsman about wages that they believe are not being paid correctly).

Coercion and misrepresentation in relation to workplace rights and industrial activities is also prohibited by the FW Act. These protections are designed to ensure that persons are not coerced into making an enterprise agreement or joining a union. Employers must not exert undue influence or pressure on an employee to make, or not make, certain agreements or arrangements (such as an individual flexibility arrangement).

These provisions are complex and individual advice on their application should always be sought.

Fair Work Australia and the Fair Work Ombudsman

Fair Work Australia is the national workplace relations tribunal. It commenced operation on 1 July 2009. Fair Work Australia's powers are broader than the powers of the Australian Industrial Relations Commission and include the power to:

- Vary awards;
- Make minimum wage orders;
- Assess enterprise agreements using the better off overall test from 1 January 2010;
- Approve, vary or terminate enterprise agreements;
- Determine unfair dismissal claims;
- Make orders on such things as good faith bargaining and industrial action;
- Vary or modify the application of transferring employment instruments in a transfer of business;
- Assist employers and employees to resolve disputes at the workplace;
- Deal with matters arising under right of entry provisions, such as issuing entry permits, to allow a permit holder to access non-member records or deal with a right of entry dispute;
- Deal with issues arising under general protections and unlawful termination provisions; and
- Deal with the extension of the National Employment Standards entitlements.

The Fair Work Ombudsman commenced operation on 1 July 2009. The Fair Work Ombudsman replaces the Workplace Ombudsman and the general advisory functions, including the Workplace Info Line, from the Workplace Authority. The functions of the Fair Work Ombudsman are to:

- Promote harmonious, productive and cooperative workplace relations;
- Promote and monitor compliance with the FW Act;
- Provide education and assistance to employers and employees (for example through targeted education campaigns);
- Inquire into, investigate and if required take action in relation to contraventions of the FW Act, a Fair Work Workplace Instrument or safety net entitlements; and
- Represent employees or outworkers who are involved in a matter before Fair Work Australia that the Fair Work Ombudsman considers need representation.



FOR FURTHER INFORMATION

Master Builders Australia

Level 1, 16 Bentham Street Yarralumla ACT 2600
PO Box 7170 Yarralumla ACT 2600
Telephone: (02) 6202 8888, Fax: (02) 6202 8877
Email: enquiries@masterbuilders.com.au
Website: www.masterbuilders.com.au

**Master Builders Association -
Australian Capital Territory**

1 Iron Knob Street, Fyshwick ACT 2609
PO Box 1211, Fyshwick ACT 2609
Telephone: (02) 6247 2099, Fax: (02) 6249 8374
Email: canberra@mba.org.au
Website: www.mba.org.au

Master Builders Association - Newcastle

Level 1, 165 Lambton Road
Broadmeadow NSW 2292
PO Box 266 Hunter Regional Mail Centre NSW 2310
Telephone: 02 4953 9400, Fax: 02 4953 9433
Email: enquiries@newcastle-mba.com.au
Website: www.newcastle-mba.com.au

Master Builders Association - New South Wales

52 Parramatta Road Forest Lodge NSW 2037
Private Bag 9 Broadway NSW 2007
Telephone: (02) 8586 3555, Fax: (02) 9660 3700
Email: enquiries@mbansw.asn.au
Website: www.mbansw.asn.au

**Territory Construction Association -
Northern Territory**

Cnr Winnellie Road and Hickman St Winnellie NT 0820
PO Box 37121 Winnellie NT 0821
Telephone: (08) 8922 9666, Fax: (08) 8922 9600
Email: info@tcant.com.au, Website: www.tcant.com.au

Master Builders Association - Queensland

417-419 Wickham Terrace Brisbane QLD 4000
Telephone: (07) 3225 6444, Fax: ((07) 3225 6545
Email: ask@masterbuilders.asn.au
Website: www.masterbuilders.asn.au

Master Builders Association - South Australia

47 South Terrace Adelaide SA 5000
PO Box 10014 Adelaide SA 5000
Telephone: (08) 8211 7466, Fax: (08) 8231 5240
Email: buildsa@mbasa.com.au
Website: www.mbasa.com.au

Master Builders Association - Tasmania

34 Patrick Street Hobart TAS 7000
GPO Box 992K Hobart TAS 7001
Telephone: (03) 6234 3810, Fax: (03) 6234 3860
Website: www.mbatas.org.au

Master Builders Association - Victoria

332 Albert Street East Melbourne VIC 3002
GPO Box 544 Melbourne VIC 3001
Telephone: (03) 9411 4555, Fax: (03) 9411 4591
Email: mbassist@mbav.com.au
Website: www.mbav.com.au

**Master Builders Association - Western
Australia**

35-37 Havelock Street West Perth WA 6005
PO Box 167 West Perth WA 6872
Telephone: (08) 9476 9800, Fax: (08) 9476 9801
Email: mba@mbawa.com
Website: www.mbawa.com

Disclaimer: This information is provided as general advice on the workplace relations system. It does not constitute legal advice and it is always advisable to seek further information regarding specific workplace relations issues.