FAIR WORK ACT 2009

The following is a summary of the Fair Work Act with particular reference to the second reading speech to the House of Representatives by the Minister for Industrial Relations, Julia Gillard.

The Act was passed by Parliament on 20 March 2009 and most of it will come into effect on 1 July 2009 but parts will be phased in over time. The National Employment Standards and modern awards will commence on 1 January 2010.
Unfair dismissal laws will be phased in and until 1 Jan 2011 will only apply where there are 15 or more full time employees. Thereafter the less than 15 employee exemption will be calculated on a headcount of all employees.
The Act is expressed to be based on the principle of **fairness**.
The Act provides:

- a safety net of minimum employment conditions that cannot be removed;
- a system of good faith at the enterprise level;
- protections from unfair dismissal for **all** employees;
- protection for the low-paid;
- a balance between work and family life; and
- the right to be represented in the workplace.

These rights are overseen by a new industrial umpire, Fair Work Australia.

TERMS AND CONDITIONS OF EMPLOYMENT

The safety net

This will come into effect on **1 January 2010**.

The Act provides for a comprehensive safety net of minimum wages and employment conditions that cannot be stripped away. The safety net is in two parts:

The **National Employment Standards** comprise ten legislated employment conditions covering essential conditions which, briefly summarised, are as follows:

- maximum weekly hours of work to be 38 hours plus reasonable additional hours;
- annual leave : 4 weeks minimum;
- annual personal leave, (10 days paid), carers (2 days paid) and compassionate leave (2 days unpaid);
- public holidays;
- paternity leave: 12 months unpaid leave and right to return to former position;
- community service leave: e.g. jury duty;
- long service leave: State legislation deals with LSL;
- notice of termination and redundancy pay: minimum requirements as per the period set out in the Standard;
- employees with less than 6 months service are not entitled to minimum notice;
- employees of Small Business Employers (ie who employ less than 15 people) must have worked for at least 12 months to qualify;
- severance pay is also payable to employees made redundant except for those employed by Small Business Employers;
- the right request flexible working arrangements for parents.

Modern awards are currently being developed by the Australian Industrial Relations Commission. Modern awards will build on the National Employment Standards and will cover a further ten subject areas, including: minimum wages, arrangements for when work is performed, overtime and penalty rates, allowances, leave and leave loadings, superannuation and procedures for consultation, dispute resolution and the representation of employees.

Individual flexibility arrangements
The Act provides that each modern award must include a flexibility term to enable employers and employees to negotiate an individual flexibility arrangement to meet their needs that may vary the application of specified award terms. The Act provides strict protections to ensure that any such individual agreement is entirely voluntary and that an employee cannot be disadvantaged.

Modern awards and employees on high incomes
Under the Act, an employer and an employee who is guaranteed to earn more than $100,000 indexed may enter a written guarantee that results in a modern award not applying. The Act includes a number of important protections to ensure employees enter such an arrangement voluntarily.

Reviewing modern awards
The Act requires Fair Work Australia to undertake **four-yearly reviews** of modern awards to ensure that they maintain a relevant and fair minimum safety net and continue to be relevant to the needs and expectations of the community.

The Act allows adjustments to modern awards between the four-yearly reviews in limited circumstances, such as to deal with changes in the work value of classifications or to deal with pressing new circumstances affecting a particular award.

Minimum wages
The Act provides for minimum wages in modern awards to be reviewed every year by a specialist Minimum Wage Panel within Fair Work Australia. The minimum wages in modern awards will override any lower rates in an enterprise agreement made under the Act.

The Act also requires Fair Work Australia to make a national minimum wage order to provide minimum wages for all award free employees.

Special provisions for outworkers
The Act ensures that awards may include special provisions dealing with outworkers.

Equal remuneration
The Act has provisions to include the principle of equal remuneration for work of comparable value.

Transfer of business
The Act provides for a scheme to deal with the transfer of employment rights and obligations if there is a ‘transfer of business' and a new employer takes on employees of the old employer.

UNFAIR DISMISSAL
Under Work Choices, employees in businesses with up to 100 workers could be dismissed for any reason without rights to challenge the dismissal. This has been removed. Now, all employees will be entitled to relief against unfair dismissal except employees of a small business (less than 15 employees) will not be able to claim for unfair dismissal until after they have served a qualifying period of twelve months, while for larger businesses, the qualifying period is six months. Employees earning more than $100,000 are excluded.

‘Operational reasons' will no longer be a defence to a claim of unfair dismissal. However, a dismissal is not unfair if it is for reasons of genuine redundancy.

The Act recognises that small businesses do not have the human resources support that larger businesses enjoy. The Act provides for the publication of a simple Small Business Fair Dismissal Code which, if followed, will ensure a dismissal is not found to be unfair. The Code requires the giving of a warning, based on a reason that validly relates to the employee's performance or capacity to do the job, and a reasonable opportunity for the employee to improve his or her performance. The Code makes it clear the employer has the right to dismiss without notice an employee for serious misconduct.

COLLECTIVE BARGAINING AND ENTERPRISE AGREEMENTS

The Act provides a new framework for enterprise and collective bargaining which does not use any concept of union or non-union agreements. Instead, an agreement is made when approved by a valid majority of the employees to whom it will apply. A union that acted as a bargaining representative during the negotiations may apply to be covered by the agreement.

This new framework is premised on good faith bargaining. The Act empowers Fair Work Australia to make orders to ensure compliance with the good faith bargaining requirements.

Bargaining for single interest employers

The principle category of bargaining is for single interest employers at the level of the enterprise. Single interest employers include joint ventures, common enterprises, related bodies corporate and employers specified in a single interest employer authorisation or declaration. A single interest employer authorisation or declaration can be made to bring certain very limited types of employers with a strong commonality of interest (such as franchisees of the same franchisor, or employers who receive substantial public funding) into this stream, but only where those employers seek to be allowed to bargain together.

In the single interest bargaining stream, employees have the right to take protected industrial action. Employees may only take protected industrial action where they are genuinely trying to make agreements at the enterprise level. Pattern bargaining is not permitted.

Fair Work Australia is empowered to make certain kinds of orders as part of its oversight of the bargaining process.

Majority Support Orders

Where an employer refuses to bargain with its employees, an employee bargaining representative can ask Fair Work Australia to determine if there is majority employee support for negotiating an enterprise agreement. If so, the employer will be required to bargain collectively with its employees in good faith.

Scope orders

Secondly, the Act provides that Fair Work Australia may make a scope order if it is satisfied that bargaining for a proposed enterprise agreement is not proceeding efficiently or fairly because the group of employees to whom a proposed agreement will apply has not been fairly chosen.

Good faith bargaining orders

Thirdly, the Act sets out good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet, including: attending, and participating in, meetings at reasonable times; disclosing relevant information; responding to proposals; giving genuine consideration to the proposals of others and giving reasons for responses to those proposals; and refraining from capricious or unfair conduct that undermines freedom of

association or collective bargaining.

The Act specifies that the good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining or to reach agreement on the terms that are to be included in the agreement. Parties are entitled to take a tough stance in negotiations.

Where a negotiating party ignores good faith bargaining orders, the other party may apply to Fair Work Australia to intervene and to make a workplace determination. This will ensure there is no advantage to be gained by flouting the law.

Multi – Employer bargaining
The Act provides that where employees and employers genuinely wish to bargain on a multi-employer basis they will be free to do so. Protected industrial action and good faith bargaining orders are not available in these circumstances.

The Act provides it is unlawful to coerce an employer to make a multi-employer agreement or to discriminate against the employer if they have not made a multiemployer agreement.

Bargaining for the low paid
The Act provides a new scheme of bargaining for low paid employees.

Representation in bargaining
The Act provides that employees are entitled to have their union represent them in bargaining or appoint another person, such as a colleague. Employers may also appoint a bargaining representative.

The Act also requires employers to give written notice to all employees of their right to be represented in the bargaining when the employer initiates bargaining or if a majority support determination, low paid authorisation or a scope order is made.

Agreement content
The Act provides that all matters pertaining to the relationship between the employer and its employees, as well as to the relationship between the employer and a union representing those employees will be the subject of bargaining.

Required agreement content
The Act provides that in order to be approved by Fair Work Australia, an enterprise agreement must contain:

- a flexibility term that allows individual flexibility arrangements, subject to specified protections;
- a dispute settlement process that must involve either Fair Work Australia or another person or body independent of the parties and that provides for the representation of employees in the process; and
- a term providing for consultation with employees about major workplace changes and that provides for the representation of employees in that process.

Approval of Agreements
The Act provides that Fair Work Australia must not approve an agreement that includes terms that are inconsistent with unfair dismissal, right of entry, National Employment Standards and the general protection provisions of the Act. Fair Work Australia must also be satisfied that:

- the employer and a valid majority of the employees to whom the agreement will apply genuinely agree to the agreement; and
- employee would be better off overall under the agreement in comparison to the relevant modern award.

Workplace determinations
Where, despite their best efforts, parties cannot reach agreement the Act enables Fair Work Australia to exercise broad conciliation powers at the request of one of the parties.

Provided the parties have bargained in good faith, the Act provides that they will be able to walk away without having a settlement imposed on them.

Where the parties agree, the Act provides that Fair Work Australia may also make a binding determination on matters in dispute.

In those limited circumstances where protected industrial action is occurring in a bargaining context that has a particularly negative or dangerous impact, the Act provides scope for Fair Work Australia to resolve the dispute by making a workplace determination.

Firstly, the Act incorporates the long standing capacity for a workplace determination to be made where industrial action in threatening (or would threaten) to endanger the life, personal safety or health or welfare of the population or part of it or to cause significant damage to the economy.

Secondly, a new ground in the Act for the making of a workplace determination is where protracted industrial action is causing significant economic harm to the bargaining participants, or such harm is imminent. This provision is intended to apply only to the very small number of disputes where industrial action continues for an extended period, where the employees and the employer suffer greatly and yet the parties are so entrenched in their positions that there is no prospect of a breakthrough in negotiations.

RIGHTS AND RESPONSIBILITIES

General protections
The Act's general protections ensure that employees remain free to choose to be represented by a union, provide more comprehensive protections for those participating in collective activities (such as representing other employees or bargaining). The Act provides sanctions where a person takes adverse action because someone exercises one of those rights.

The Act will protect individuals who are subject to adverse treatment because they have or seek to exercise a ‘workplace right' such as being entitled to the benefit of an award or agreement or making a complaint or inquiry.

Employees with carer's responsibilities will also now be protected from discriminatory treatment.

Industrial action, secret ballots and strike pay
The Act provides rules to govern industrial action. The Act distinguishes between protected industrial action which may legitimately occur during bargaining and unprotected industrial action taken outside of bargaining.

The Act requires employees to approve industrial action through a secret ballot, while streamlining the ballot process.

When protected industrial action occurs, employers must deduct pay for the actual period of time the employee stopped work. If partial work bans are implemented, employers will be able to issue a notice and deduct a proportion of pay, with any disputes resolved by Fair Work Australia. The Act provides that pre-emptive lockouts – taken by the employer where the employees have not taken any industrial action – will no longer be protected action.

For unprotected industrial action, such as industrial action during the life of an agreement, the Act provides that employees will face a mandatory minimum deduction of four hours' pay.

Right of entry
The Act provides a right for members of a union that is eligible to represent their industrial interests (and potential members of that union) to meet with their union at the workplace during non-working hours for the purpose of holding discussions. No employee can be discriminated against for participating in, or declining to participate in, such discussions.

The Act provides that the right to enter premises to hold discussions comes with strict obligations, including the holding of a valid right of entry permit, the giving of 24 hours' notice to enter and requirements for conduct while on site.

Unions will continue to be able to investigate alleged breaches of workplace obligations that affect a member or members of the union. The right is subject to strict requirements. Unions will be able to look at and copy employment records of all employees but only where those records are relevant to the suspected breach being investigated.

The Act includes new protections against misuse of information obtained by the union investigating suspected breaches.

COMPLIANCE AND ENFORCEMENT
The Act establishes an integrated framework to oversee the new workplace relations system.

Fair Work Australia
The Act establishes Fair Work Australia to act as a one-stop shop for information, advice and assistance on workplace issues, by merging the functions currently performed across seven government agencies.

Fair Work Australia will be independent and will be focused on providing fast and effective assistance for employers and employees.

Fair Work Divisions of the courts
Fair Work Divisions will be created in the Federal Court and the Federal Magistrate's Court to hear matters which arise under the new workplace relations laws.

A new user-friendly small claims jurisdiction will be provided where the Court will not be bound by the rules of evidence and may act in an informal manner.

Fair Work Ombudsman
The Act establishes the Office of Fair Work Ombudsman, with functions including promoting harmonious and cooperative workplace relations and compliance by providing education, assistance and advice.

NATIONAL SYSTEM FOR THE PRIVATE SECTOR
The Act will apply to 'national system' employers and their employees, relying principally on the corporations' power of the Constitution.

The Government is working with States and Territories to achieve a national workplace relations system for the private sector.

The Act will exclude State and Territory industrial laws but not in areas such as discrimination, workers' compensation and occupational health and safety.

If you have any queries in relation to this please contact Tony McMinn on 9252.9531 or email Tony at amcminn@live.com.au.