FAIR Work Act

Gerard Nelson provides members with a summary of the new Federal legislation, the Fair Work Act 2009

Gerard Nelson

employers to exhibit fairness in dismissing employees

The key features for Australia's new workplace relations system, which has the Fair Work Act at its heart, are as follows:

- A safety net of minimum employment conditions
- Good faith bargaining at the enterprise level
- Unfair dismissal provisions, for all employees
- Balance between work and family life
- A right to be represented in the workplace.
- Protection for low-paid employees

A Safety Net of Minimum Employment Conditions

There are 10 National Employment Standards relating to:

1. Maximum weekly hours
2. Requests for flexible working arrangements
3. Parental leave and related entitlements
4. Annual leave
5. Personal/carers leave and compassionate leave
6. Community service leave
7. Public holidays
8. Notice of termination and redundancy pay
9. Fair work information statements
10. Long service leave

Workplace Agreements

Only employers and their employees are able to make enterprise agreement - that is, there can be no agreement made between employers and unions, however if a union has been a bargaining representative they are entitled to be named in the agreement. Employers and employees have a right to either represent themselves or else appoint in writing a bargaining representative of their choice, which can include a union to represent them. If a union has a member in the particular workplace, then the union becomes the default bargaining representative.

Enterprise bargaining negotiations can be initiated either by an employer or by a majority of the employees.

There is a requirement, which is enforceable by the Act for bargaining representatives to bargain in good faith, this means:

- Recognising and bargaining with bargaining representatives
- Attending and participating in meetings at reasonable times
- Disclosing relevant information in responding to proposals in a timely manner (this will be a major issue if the employer relies upon sensitive commercial information)
- Giving genuine consideration to proposals
- Providing valid reasons for responses
- Refraining from capricious or unfair conduct, which would undermine the bargaining process

Good faith bargaining does not require anyone to make concessions or to reach agreement on terms to be included. Nor does it mean that either party can be forced to enter into an enterprise agreement. Fair Work Australia can make bargaining orders to enforce good faith bargaining. There are financial penalties for failing to comply with bargaining orders.

Fair Work Australia can only approve an enterprise agreement if there is genuine agreement, employees have been advised of the representational rights within certain time frames, the terms of the agreement do not contravene the national employment standards requirements and the agreement passes the 'better off' overall test (BOOT), that is, the terms of the agreement must make each employee covered by the agreement, better off than they would have been if the relevant modern award had applied.

Modern Awards

The Australian Industrial Relations Commission has been given the task of developing a set of awards which covers all employees. This is an ongoing process, which is expected to be completed by December 2009. Modern awards will come into operation on 1 January 2010 and will have Australia-wide application. There are transitional arrangements, which will allow for a gradual implementation of the awards. It is likely that there will be little benefit to employers in attempting to use the transitional arrangements. An outcome of the modern award process is that generally employers in the same industry will pay the same rates of pay, regardless of the geographic location.

Union Right of Entry

Unions may now enter workplaces for the purposes of investigating alleged breaches of workplace legislation on behalf of one of their members, provided the union is entitled to represent that member and the member is an employee of the company.

When unions attempt to enter the workplace for these investigatory purposes, they must now comply with strict conditions of entry which are as follows:

- The union official must hold a valid right of entry permit issued by Fair Work Australia
- They must give the employer 24 hour's notice before entering the workplace
- They must enter only during working hours
- They must advise the employer of the basis of entry
- They must specify the particulars of the suspected breach in the entry notice that they are required to give

- They must comply with any reasonable request from an employer as to where discussions & interviews are to take place and must comply with reasonable occupational health and safety requests
- Meetings with employees for representation, discussions or recruitment purposes can only be held during working time, before or after work or during lunch breaks.

Unions are entitled to access any union members employee records that they consider may be in breach of the workplace relations legislation. They have no right to inspect non-union members records, unless the employee gives written consent or Fair Work Australia directs that they are to have the right to inspect.

Industrial Action

Protected industrial action, strikes, work-to-rules and the like will only be available in support of employee claims during enterprise bargaining if that industrial action has been approved by a majority of employees in a mandatory secret ballot after bargaining representatives have gained a secret ballot order.

The employer must be provided with three working days written notice of the intention to take protected industrial action. Employers still have the right to lock out employees who have taken industrial action. There are sanctions against unprotected industrial action and Fair Work Australia will be able to issue orders to prevent or stop unprotected industrial action. Employers are able to withhold pay from employees who strike during protected industrial action or for incidents of unprotected industrial action.

Balance Between Working and Family Life

S65 of the Act allows an employee who is either a permanent employee, with 12 months continuous service or a long-term casual employee to formally request changes in his working arrangements, if the employee is a parent, or has responsibility for the care of a child who is under school-age or is under 18 and has a disability. Changes in working arrangements can include changes in hours of work, changes in pattern of work and changes in location of work. The employer must respond within 21 days and can only refuse the request if there are reasonable business grounds for doing so.

Representation in the Workplace

Employees can decide to be or not to be a union member. They also have the choice as to whether or not, they participate in collective activities such as bargaining for an enterprise agreement, or for taking protected industrial action, through the majority of employees seeking an enterprise agreement or through secret ballot arrangements.

Employees can also be represented by a legitimate workplace representative or a union delegate. It is unlawful for a person to be dismissed or discriminated against because they were represented.

Unfair Dismissal

The Act requires employers to exhibit fairness in dismissing employees and allows employees who have been unfairly or unlawfully dismissed to seek relief with Fair Work Australia. When assessing if the dismissal is harsh, unjust or unreasonable, Fair Work Australia will consider the following:

- If there was a valid reason relating to the employee's performance or behaviour and whether the employee was notified of the situation
- Whether the employee was given an opportunity to explain or defend themselves before the dismissal occurred
- Whether the employee was warned about the performance or behaviour, and whether they had been given a chance to improve
- Whether or not the employee was allowed to have a person to support them in discussions related to their performance or behaviour

There are some exclusions to the right to take unfair dismissal action being:

- If the employee is in their first 12 months of employment in a small business
- If they are in their first six months of employment in a large business
- If the employee is a casual employed on any regular basis
- If the employee is a seasonal worker
- If the employee had been employed for a specific task or a fixed period
- If the dismissal was the result of a genuine redundancy

Employees are not excluded from making an unlawful dismissal claim. An unlawful dismissal claim can relate to the following:

- Temporary absence (up to three months in the year), because of illness or injury
- Union membership or participation in lawful union related activities
- Filing a complaint to an industrial, safety or other authority or a union
- Representing employees
- Discrimination on the grounds of race, colour, sex, sexual preference, marital status, age, disability, family carer responsibilities, religion, political opinion, national extraction or social origin
- Maternity or other parental leave.

In the above summary, I have only dealt with the major areas of change in outline so as to set the scene - its my intention to deal in detail with each of the topics raised in this column in the coming months. ■

Gerard Nelson of Parke Nelson Pty Ltd, HR & IR Consultants, Lvl 1, 370 St Kilda Rd, Melbourne 3004 - contact him at gerard.nelson@workplacestrategies.com.au