

## National Employment Standards

On 16 June 2008 Prime Minister Kevin Rudd and Workplace Relations Minister Julia Gillard released their final version of the “National Employment Standards” (“the Standards”), which the Government intends to introduce alongside its proposed modernised awards with effect from 1 January 2010.

### Division 2 – Maximum Weekly Hours

Division 2 of the Standards is designed to ensure that 38 hours per week remains the standard maximum weekly hours for full-time employees. This division also recognises that, due to business requirements, employees may be required to work in excess of the standard 38 hours per week. It is provided therefore that an employee may be required to work “reasonable additional hours” in excess of 38 hours per week, but cannot be required to work “unreasonable additional hours”.

The factors that must be considered in determining whether additional hours are reasonable are:

- Any risk to an employee’s health and safety from working the additional hours;
- The employee’s personal circumstances, including family responsibilities;
- Needs of the workplace or enterprise in which the employee is employed;
- Whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working the additional hours;
- The notice (if any) given by the employer of any request or requirements to work the additional hours;
- The notice (if any) given by the employee of his or her intention to refuse to work the additional hours.

Division 2 provides that modern awards may provide for averaging of hours of work, but there is no similar provision for averaging of hours of work for employees not covered by a modern award.

### Division 3 – Request for Flexible Working Arrangements

A full-time employee who has completed at least 12 months continuous service with the employer and who is a parent, or has

responsibility for the care of a child under school age, may request the employer for a change in working arrangements for the purpose of assisting the employee to care for the child. It is a requirement that the employee make the request in writing and set out details of the change sought and the reasons for the change.

The employer must then give the employee a written response to the request within 21 days, stating whether the employee grants or refuses the request. It is a requirement that the employer may refuse the request only on “reasonable business grounds” (which is not defined). In the event that the employer refuses the request the written response by the employer must include the reasons for the refusal.

### Division 4 – Parental Leave and Related Entitlements

In order to be eligible for parental leave under Division 4 of the Standards, an employee must have completed at least 12 months continuous service with his or her employer immediately before the date of birth or expected date of birth of the child or date of placement or expected date of placement of an adopted child. A casual employee has no entitlement under this division of the Standards, unless he or she has a sequence of periods of employment of at least 12 months.

This division will enhance parental leave entitlements to provide each parent with a separate entitlement of up to 12 months unpaid parental leave. This means for example, that the mother of the child could take 12 months leave at the time of the birth of the child then return to work, at which point the father could then commence 12 months leave.

This division also entitles an employee returning from parental leave to return to the

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position held prior to commencing leave. In the case that the employee's position no longer exists, the employee will be entitled to return to a position comparable in status and pay with that former position.

In order to access parental leave an employee will be required to:

- Provide 10 weeks notice of intention to take the leave (unless this is not reasonably practicable); and
- Provide reasonable evidence of eligibility to take the leave on the employer's request.

This division also provides the following related entitlements:

- Special maternity leave;
- Pre-adoption leave;
- Transfer to a safe job and associated leave; and
- Consultation about workplace change.

### Division 5 – Annual Leave

Division 5 of the Standards applies only to employees other than casual employees. Division 5 is consistent with the current provisions of the *Workplace Relations Act 1996* (Cth) (the "WPR Act") in that it will provide for each year of service completed by an employee:

- An entitlement to 4 weeks paid annual leave; and
- An employee classified as a "shift worker" under a modern award for the purposes of this Division is entitled to an additional week of leave.

Unlike the current section 233 of the WPR Act whereby an employee who is subject to a workplace agreement can forego and cash out up to 2 weeks of annual leave in any 12 month period, this division does not include any entitlement to cash out annual leave. This division does however provide that a modern award can provide rules for cashing out and taking paid annual leave, but is silent on the arrangement for employees not covered by a modern award.

### Division 6 – Personal/Carer's Leave and Compassionate Leave

Division 6 of the Standards provides an employee, other than a casual employee, with an entitlement to:

- 10 days paid personal/carers leave for each year of service;
- 2 days paid compassionate leave "per occasion" (eg on the death or serious illness of a family member or household member); and
- 2 days unpaid carer's leave "per occasion" for genuine caring purposes or family emergencies, if paid carer's leave is exhausted.

Casual employees on the other hand will have an entitlement to:

- 2 days unpaid compassionate leave "per occasion"; and
- 2 days unpaid carer's leave "per occasion".

Paid personal/carers leave will accrue progressively under this Division of the Standards. This is slightly varied from the current method of accrual, pursuant to section 246 of the WPR Act, which is for each completed 4 week period of continuous service with an employer.

An employee may take paid personal/carers leave if the leave taken is:

- (a) Because the employee is unfit for work because of a personal illness, or personal injury affecting the employee; or
- (b) To provide care or support to a member of an employee's immediate family or a member of the employee's household, who requires care or support because of:
  - (i) A personal illness or personal injury effecting the member; or
  - (ii) An unexpected emergency effecting the member.

It is important to note that the amount of accrued paid carer's leave that can be taken each year is not capped. The employee must use any paid personal/carers leave entitlement before accessing unpaid carer's leave.

### Division 7 - Community Service Leave

Division 7 of the Standards provides employees with an entitlement to be absent from employment in order to engage in an "eligible community service activity", which is defined to include jury service, carrying out a "voluntary emergency management activity" (which is defined in section 659 of the WPR Act to mean an activity that involves dealing with an emergency or natural disaster which is carried out by the employee on a voluntary basis where the employee is a member of a recognised emergency management body and is requested by the body to carry out the activity), or an activity prescribed in the Regulations to be an activity that is of a community service nature. An employee who engages in an eligible community service activity is entitled to be absent from his or her employment for a period if the period consists of time when the employee engages in the activity, reasonable travelling time associated with the activity and reasonable rest time immediately following the activity, provided the employee's absence is reasonable in all the circumstances.

To be entitled to community service leave, an employee must comply with the notice and evidence requirements set out in the Standards.

With respect to employees (other than casual employees) who are absent from their employment because of jury service, the Standards impose an obligation on the employer to pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period. However, this amount is to be reduced by any amount of "jury service pay" that is paid to the employee (evidence of which must be

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provided by the employee to the employer). Furthermore, if an employee is absent because of jury service for a period of more than 10 days in total, the employer is only required to pay the employee for the first 10 days of absence.

The entitlement to community service leave is a new entitlement that is not currently provided for in the WPR Act. What is clear from the current version of the Standards is that other than for jury service, community service leave will be unpaid.

### Division 8 – Long Service Leave

The Government has indicated its intention to move to develop a uniform national minimum long service leave entitlement in an attempt to resolve the existing discrepancies which exist in State and Territory legislation. Until such time as a uniform long service leave entitlement is developed, the Standards provide that long service leave entitlements in pre-reform AWAs, pre-modernised awards, NAPSAs or State or Territory laws will be preserved.

When an existing workplace agreement, AWA or workplace determination ceases to operate, employees will be entitled to the long service leave entitlements in a pre-modernised award or NAPSA. If no underlying award or NAPSA applies, the employee will be entitled to long service leave under an applicable State or Territory law. The provisions of existing agreements or AWAs will not be altered as they relate to long service leave.

### Division 9 – Public Holidays

The Standards provide that an employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes. The days that are public holidays are specified in the Standards. An employer is entitled to request an employee to work on a public holiday if the request is reasonable, however an employee may refuse an employer's request if the request is not reasonable or the refusal is reasonable. In determining whether a request, or a refusal of a request, to work on public holiday is reasonable, the Standards prescribe a number of factors that must be considered, including (without limitation) the nature of the employee's workplace, the nature of the work performed by the employee, the employee's personal circumstances and whether the employee is entitled to receive overtime payments, penalty rates or other compensation for work on the public holiday.

If an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day, or part-day. Similarly, if the employee does not ordinarily work on the specified public holiday, the employee is not entitled to payment (which addresses casual employees who are not rostered on for a public holiday, or part-time employees whose part-time hours do not include the day of the week on which the public holiday occurs).

### Division 10 – Notice of Termination and Redundancy Pay

The notice of termination and payment in lieu provisions of the Standards essentially reflect the current provisions in section 661 of the WPR Act, although have been expressed in marginally different terms. An employer is now required to give written notice which specifies the day of the termination. Furthermore, if an employer elects to make payment in lieu of notice, the payment must be based on the employee's "full rate of pay", which is defined as the rate of pay payable to the employee which includes incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identified amounts.

The Standards include a new provision confirming that, for the purposes of determining an employee's notice of termination entitlement, a transferring employee's period of continuous service in a transmission of business context includes each period of continuous service of the employee with an old employer in the business being transferred, except if that employee had previously received notice of termination or payment in lieu of such notice in respect of that service. The Standards also provide that a modern award may include provisions specifying the period of notice an employee must give in order to terminate his or her employment.

In a significant change, all employees with more than 12 months' continuous service who are made redundant and who are employed in workplaces with 15 or more employees will be entitled to redundancy pay in accordance with the scale determined by the Australian Industrial Relations Commission in the 2004 Redundancy Test Case. The Standards provide that an employee is entitled to be paid redundancy pay by the employer if either:

- (i) the employee's employment is terminated at the employer's initiative, because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour, or
- (ii) because of the insolvency or bankruptcy of the employer.

Redundancy pay will be based on the employee's "base rate of pay", which is defined to mean the rate of pay payable to the employee for his or her ordinary hours of work, which excludes the additional entitlements included in the definition of "full rate of pay".

The notice of termination and redundancy provisions of the Standards will not apply to the following employees:

- employees employed for a specified period of time or for a specified task;
- employees serving a period of probation, or a qualifying period of employment, that is determined in advance;

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- employees whose employment is terminated because of serious misconduct;
- casual employees;
- seasonal employees; or
- trainees (other than apprentices) to whom a training arrangement applies.

The redundancy pay provisions also will not apply to:

- an employee who is an apprentice; or
- an employee covered by a modern award that includes an industry-specific redundancy scheme.

The Standards also include a provision which is commonplace in most industrial awards that excludes transferring employees from receiving a redundancy payment from their old employer if their new employer recognises the employee's service with the old employer in the business being transferred. An employee will also not be entitled to receive a redundancy payment if he or she rejects an offer of employment with the new employer:

- on terms and conditions substantially similar to, and considered on an overall basis, no less favourable than, the employee's terms and conditions of employment with the old employer immediately before the termination of that employment;

- recognising the employee's service with an old employer in the business.

There is a provision included in the Standards entitling Fair Work Australia to make a determination reducing the amount of redundancy pay an employer is obliged to pay an employee if the employer obtains other acceptable employment for the employee or cannot pay the redundancy payments.

### Division 11 – Fair Work Information Statement

A "Fair Work Information Statement" will be published by Fair Work Australia and contain information about:

- The National Employment Standards;
- Modern awards;
- Agreement – making under the WPR Act;
- The right to freedom of association; and
- The role of Fair Work Australia.

Employers must give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee commences employment.

## Case Notes:

### Qualifying Periods and Transmission of Business

A recent decision of the Full Bench of the Australian Industrial Relations Commission ("AIRC") has confirmed that employees who are transmitted to a new employer following the purchase of a business will be subject to a 6 month qualifying period unless the new employment contract expressly excludes the requirement. In *Aged Care Services Australia Group Pty Ltd v Ziday & Ors* [2008] AIRCFB 367 (27 May 2007), the Court held that five employees whose employment was terminated four months after the business was transmitted were unable to bring unfair dismissal proceedings because of the operation of the 6 months qualifying period in the Workplace Relations Act 1996 (Cth) ("the Act"). The Full Bench held that the transmission of business rules in the Act which afford certain statutory protections to transferring employees have no bearing on the operation of the 6 month qualifying period for the purposes of unfair dismissal proceedings. This decision is of greater significance for employees because it clarifies the fact that following the transmission of a business, the qualifying period in the Act will operate unless specifically excluded in any new employment agreement.

### Employer Drug Testing Policies

It is increasingly common for employers to implement drug and alcohol policies which permit the random testing of employees. However, a recent decision of the AIRC highlights the importance of ensuring that employees are made aware of and provided with training in respect of such policies. In *Kidd v Linfox Australia Pty Ltd* [2008] AIRC 398 the employer terminated the employment on the basis of the employee's alleged refusal to submit to a random drug test at the Sydney transport depot. The AIRC reinstated the employee and found that the employee had not been specifically trained in the drug and alcohol policy. It was also unclear from the evidence whether the employer had actually directed the employee to submit to the test. Importantly, the employer's policy in respect of random tests only applied to shift workers and testing was limited to one annual random drug and alcohol test. The employee was not a shift worker therefore he was not required to submit to the random test. Moreover, the employee had previously been tested in the same calendar year therefore the requirement to submit to a further test was in breach of the employer's policy. The case demonstrates the importance of

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bringing such policies to the attention of employees, providing appropriate training and ensuring the policy is enforced in accordance with its terms.

### National OH&S System

Following a recent agreement between the Council of Australian Governments ("COAG"), Australia appears to be moving towards a unified occupational health and safety system. The proposed system will be based on a model principal OHS Act supported by regulations and national codes of practice with a unified compliance and regulatory regime. Whilst States and Territories will retain jurisdiction, they will be required to enact legislation which is consistent with the model principal Act whilst retaining the right to enact additional provisions provided these do not "materially" affect the operation of the model legislation. It remains to be seen whether the proposed legislation will mirror the onerous OH&S regime in New South Wales or whether New South Wales will agree to adopt less stringent occupational health and safety laws. It is intended that the model OH&S system will be implemented no later than 2011.

# Unfair Dismissal Threshold Increase

As from 1 July 2008, the remuneration threshold for bringing unfair dismissal proceedings under the *Workplace Relations Act 1996* (Cth) will increase to \$106,400 (indexed from \$101,300). The limit applies to employees who are not employed under award-derived conditions.

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MEMBER OF THE KENNEDY STRANG LEGAL GROUP

LEVEL 16, 55 HUNTER STREET SYDNEY NSW 2000 PO BOX 475 SYDNEY NSW 2001 DX 605 SYDNEY  
P. +61 2 9225 2500 F. +61 2 9225 2599

[www.kempstrang.com.au](http://www.kempstrang.com.au)

Contact Details:  
Human Resources/  
Employment Law Group

Stephen Godding, Partner  
Email: [goddings@kempstrang.com.au](mailto:goddings@kempstrang.com.au)  
Tel: +61 2 9225 2512

Lisa Berton, Partner  
Email: [bertonl@kempstrang.com.au](mailto:bertonl@kempstrang.com.au)  
Tel: +61 2 9225 2502