

# Fair Work Act 2009 - impact on associations and charities

David Wilkinson



The Federal Government's *Fair Work Act 2009* (the Act) has significantly changed the industrial relations landscape in Australia. These changes affect all associations, charities and other not-for-profit organisations which are deemed to be national system employers that include incorporated (generally Companies Limited by Guarantee and under the Associations Incorporation Acts), and unincorporated entities (except unincorporated entities in WA) (generally sole traders & partnerships).

## Fair Work Australia

Fair Work Australia (FWA) and the Fair Work Ombudsman (FWO) have been responsible for administering and regulating the national Fair Work industrial relations system from 1 of July 2009 replacing existing industrial bodies e.g. Workplace Authority, Australian Industrial Relations Commission and Workplace Ombudsman.

## Unfair Dismissal Laws

Unfair Dismissal Laws have been expanded and the exemptions for incorporated businesses with fewer than 100 employees are no longer valid. Associations and charities with less than 15 employees (under the head count test) can use the "Small Business Dismissal Code and Checklist" when terminating employees. Under the new laws, an employee of an association or charity employing 15 or more staff needs to serve a 6 month qualifying period and employees of a business with less than 15 employees need to serve a 12 month qualifying period before they can access unfair dismissal, also an employee of an association or charity dismissed due to 'genuine redundancy' are exempt from making unfair dismissal claims.

Part of the new Unfair Dismissal laws are General Protections laws, these are the prohibitions against taking adverse action or dismissing an employee on discriminatory grounds or for other reasons such as engaging in industrial activity, freedom of association, sham contracting arrangements or being temporarily absent from work because of illness or injury. Associations and charities should be aware that General Protections impact their obligations not only in the case of termination but also during recruitment and throughout the employment relationship.

## National Employment Standards

From 1 January 2010, the National Employment Standards (NES) were introduced. This means that, as a minimum, all associations must provide employees with the following minimum conditions of employment:

- 1. Notice of Termination and Redundancy pay:** up to five weeks notice of termination and up to 16 weeks' severance (redundancy) pay on redundancy, both based on length of service. The minimum conditions for severance pay represent a significant development as it applies to all staff. In other words, it is not confined to employees under awards or agreements, but also applies to award free staff.
- 2. Requests for flexible working arrangements:** An employee who is a parent, or has a responsibility for the care of a child under school age or of a child under 18 with a disability is entitled to request a change in working arrangements to assist the employee in caring for the child. An association or charity may only refuse the request on reasonable business grounds.

...2

- 3. Parental leave and related entitlements:** An employee with at least 12 months' continuous service is entitled to 12 months unpaid parental leave associated with the birth or adoption of a child for whom the employee has primary care responsibilities. An employee, or the employee's spouse or de facto partner, may request to extend the period of parental leave up to a further 12 months - this entitlement is extended to long term (regular and systematic) casual employees of the employer immediately before making the request. An association or charity may only refuse the request on reasonable business grounds. As with flexible working arrangements, the Act does not explain the grounds on which it is reasonable to refuse the request but such grounds may include:
- > The effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity, and customer service;
  - > The inability to organise work among existing staff; or
  - > The inability to recruit a replacement for the employee, or the practicality or otherwise of the arrangements which may need to be put in place to accommodate the employee's request.
- 4. Annual leave:** The *Fair Work Act 2009* provides a minimum entitlement to annual leave. An employee (other than a casual employee) is entitled to 4 weeks of paid annual leave per year of service. Annual leave will accrue progressively throughout the year. Some shift workers are entitled to additional leave under the proposed modern awards which took effect on 1 January 2010.
- 5. Personal/carer's leave and compassionate leave:** The new legislative provision is for the most part consistent with the previous legislation. Ten days paid personal/carer's leave, two days unpaid carer's leave as required, and two days compassionate leave (unpaid for casuals) as required.
- 6. Community service leave:** Unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service.
- 7. Hours of work:** A employee's ordinary hours of work must not exceed 38 hours in any week. Additionally, an association may require an employee to work reasonable additional hours. Modern awards and enterprise agreements may provide for averaging over a longer period. For employees who are not covered by an award or an enterprise agreement, the hours of work may be averaged over a maximum of 6 months by mutual agreement.
- 8. Public holidays:** An employee is entitled to be absent from work on a public holiday unless the Association requests the employee to work on the public holiday. If so, the request must be reasonable. The nature of the workplace, the employee's personal circumstances and the payment received by the employee for working on the public holiday are relevant considerations in assessing the reasonableness of the request.
- Employees who are absent from work on a public holiday are entitled to receive payment for any ordinary hours that the employee would have worked at the employee's base rate of pay.
- 9. Long service leave:** Employees continue to be entitled to long service leave in accordance with their current state legislation entitlements.
- 10. Information statements:** From 1/1/10, associations are required to provide all new employees with the Fair Work Information Statement as soon as practicable after the employee commences employment. The Fair Work Information Statement contains information about the NES, modern awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, union rights of entry, transfer of business, and the respective roles of Fair Work Australia and the Fair Work Ombudsman.

## Increased Union Rights

Unions can access workplaces to speak with staff-but this can only occur during specified breaks during work hours. Authorised union delegates are able to review staff records and ask for copies of records. **If the records belong** to a non union member, that employee must give written consent for the union to view their records

## Employment Contracts

It is recommended that the terms and conditions of an employee's employment should be in writing.

## Agreement Making

The Act provides a framework for collective bargaining in good faith, particularly at the enterprise level. Agreements can be formalised through single and multi-enterprise agreements. Enterprise agreements can be made about 'permitted matters' and must not contain unlawful terms, which include discriminatory terms and objectionable terms.

## Paid Parental Leave

The Australian Government has approved a comprehensive Paid Parental Leave (PPL) Scheme through the Family Assistance Office (FAO) for new parents who are the primary carers of a child born or adopted after 1 January 2011. Associations will be responsible for providing PPL to eligible employees who give birth or adopt a child on or after 1 July 2011 where the employee:

- > has worked in the business for 12 months or more and;
- > is expecting to receive eight weeks or more of Paid Parental Leave

Employees must lodge their claim for PPL up to three months prior to the birth or adoption of the child with FAO or Centrelink. The FAO will transfer PPL to the associations nominated bank account on either a fortnightly basis or in three six-weekly instalments. Associations will then provide PPL pay to eligible employee's as part of the usual pay cycle from this deposit.

## Conclusion

The introduction of the *Fair Work Act 2009* introduced significant expansion in associations' obligations towards employees. This legislation needs to be taken into account by associations when negotiating agreements, performance managing staff, and hiring and terminating staff. In other words, at all stages of the employment cycle.

Because of this, it is imperative that associations ensure that their policies are compliant and up to date; that their contracts comply with minimum requirements and that they have suitably trained and qualified people conducting the performance management of staff. Failure to do so has the potential to cause significant loss to employers from a financial perspective through potential unfair dismissal and discrimination claims and in terms of the employer's ability to attract and retain staff.



*David Wilkinson is General Manager, Industrial Relations at Wentworth Advantage.  
For more information please email David at [dwilkinson@myadvantage.com.au](mailto:dwilkinson@myadvantage.com.au)  
or call 02 8448 3200*

*This article first appeared in associations forum news in June 2009 – Edition 21.*

*It was updated in August 2011 to reflect the current legislation.*