

Employment Alert

Recent amendments to the Fair Work Act

WHAT YOU NEED TO KNOW

- Following last year's review of the *Fair Work Act 2009* (Cth) (the "Act"), a number of changes have been made to the Act by the *Fair Work Amendment Act 2012* (Cth). These changes took effect on 1 January 2013.
- Fair Work Australia is now the Fair Work Commission (the "FWC").
- Other key changes include:
 - Changes to the time periods for filing unfair dismissal and general protections dismissal claims;
 - New powers for the FWC to dismiss unfair dismissal applications and make costs orders against parties and representatives; and
 - Certain changes to the enterprise bargaining provisions of the Act, including the provisions relating to protected action ballot applications.

WHAT YOU NEED TO DO

- Employers should consider the changes when developing their strategy for responding to and managing proceedings before the FWC.
- The Minister for Employment and Workplace Relations, Financial Services and Superannuation has foreshadowed a further round of changes and further amendments to the Act during the course of 2013. In the meantime, employers should ensure that their practices and procedures reflect the changes to the Act.

Changes to unfair dismissal and general protections dismissal claims

The time limit for lodging an **unfair dismissal application** has increased from 14 days to **21 days**. However, employees who were dismissed *prior to 1 January 2013* will still only have 14 days from the date of dismissal to lodge an application.

The FWC now has express power to dismiss an unfair dismissal application based on unreasonable behaviour by the applicant where the applicant:

- Fails to attend a conference or hearing;
- Fails to comply with a direction or order of the FWC; or
- Fails to discontinue the application once a settlement is reached.

The FWC also now has power to make a costs order against a party in an unfair dismissal matter where that party has caused the other party to incur costs

because of their unreasonable act or omission in connection with the conduct or continuation of the matter:

- This power operates in addition to the FWC's existing power to make costs orders when it is satisfied that an application is made or responded to vexatiously or without reasonable cause or that it should have been reasonably apparent that a person's application or response had no reasonable prospect of success; and
- Accordingly, this new power lowers the hurdle for seeking and obtaining cost orders in connection with unfair dismissal proceedings.

The amendments to the Act also remove the requirement that the FWC must have first made an order granting leave for a party to be represented before it can make costs orders against lawyers or paid agents. Accordingly, even when the FWC has not granted leave for a party to be represented, the FWC can make orders against lawyers or paid agents when:

- They have encouraged a person to start, continue or respond to the matter when it is apparent that the person had no reasonable prospects of success; or
- There has been an unreasonable act or omission by the representative in connection with the conduct or continuation of the matter.

The time limit for lodging a **general protections dismissal** application has been reduced from 60 days to **21 days**. However, employees dismissed *prior to 1 January 2013* still have 60 days from the date of dismissal to lodge a general protections dismissal application.

Enterprise agreements

The amendments to the Act have imposed additional requirements for making enterprise agreements:

- Enterprise agreements now cannot be made with a single employee;
- An employee organisation or a union official of an employee organisation (importantly, whether acting in that capacity or otherwise) cannot act as bargaining representative for an employee *unless* the union has coverage to represent that employee in relation to work to be performed under the agreement;
- Opt out clauses in an enterprise agreement are now prohibited;
- A bargaining representative applying for a scope order now need only take "all reasonable steps" to give notice to other bargaining representatives; and
- Employers now cannot modify the notice of employee representational rights prescribed by the regulations.

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Modern awards

In relation to modern awards, key changes include:

- The introduction of new requirements for modern awards to provide for a default superannuation fund and the mechanism for how FWC is to review the default superannuation fund every four years;
- The amendments to the Act have clarified that applications to vary an award in order to remove an ambiguity or uncertainty or to correct an error may be brought by an employer organisation or union that is entitled to represent the industrial interests of the employers or employees covered by the award; and
- The FWC can now strike out an award variation application if it is not made in accordance with the legislation, is frivolous or vexatious or has no reasonable prospects of success.

Protected action ballots

The key amendments to the protected action ballot provisions of the Act are:

- Protected action ballots may now be conducted by electronic voting;
- The protected action ballot must now specify a date that will enable the protected action ballot to be conducted as expeditiously as practicable; and
- The following persons may now vote in a protected action ballot:
 - An employee who will be covered by the enterprise agreement;
 - An employee who is represented by a bargaining representative who is an applicant for the protected action ballot order; or
 - An employee who is *representing themselves in bargaining* if they are a *member of a union that applied* for the protected action ballot order.



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