The New Unfair
Dismissal Regime

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Unfair dismissal was a key reason for the unpopularity of the ill-fated *WorkChoices* regime. By preventing employees from accessing state-based unfair dismissal remedies and exempting enterprises employing less than 100 employees from the federal unfair dismissal regime, *WorkChoices*[1] effectively left three million Australian employees with nowhere to go if they were unfairly dismissed[2].

From 1 July 2009, the Rudd Government's *Fair Work Act 2009 (Cth)*, ('the Act') removed the *WorkChoices* less-than-100-employee exemption from unfair dismissal. Although the Act continues to block access to state based unfair dismissal remedies, the majority of Australian employees now have access to the federal unfair dismissal regime.

The threshold issues practitioners will now need to be abreast of include:

- The concept of a 'national system employee'[3];
- The relevant qualifying periods of employment[4];
- The income thresholds of dismissed employees[5]; and
- The limitations applying to casual employees[6].

An understanding of what amounts to a dismissal may be required in situations of redundancies[7], forced resignations, demotions and for fixed term, fixed task and seasonal employees[8].

Assuming jurisdiction, Fair Work Australia ('FWA') (which replaces the Australian Industrial Relations Commission), will consider whether a dismissal was 'harsh, unjust or unreasonable' having regard to the usual factors[9], the objective being to achieve 'a fair go all round'[10]. The Act is silent as to who bears the onus of proof on these matters. As with *WorkChoices*, a mere breach of procedural fairness is not the only consideration when assessing the fairness of a dismissal.

In an effort to minimize the effects of the Act on Small Business Employers (as defined[11]), a six paragraph Fair Dismissal Code applies to those Employers[12]. The original idea was that compliance with the Code would in effect be a defence to an unfair dismissal claim. However, this is not what s. 385 of the Act says. Code compliance will merely be the starting point for the FWA's consideration of an unfair dismissal application.

A new quick, cheap, informal and lawyer-free process is claimed for the handling of applications. Applicants now have 14 days from the date of termination in which to lodge their application with FWA[13]. Whether what happens next is markedly different from the current conciliation/formal hearing model remains to be seen. Parties can minimize or avoid formal hearings, and still achieve a binding decision by FWA[14]. As to the lawyer-free claim, lawyers can appear with permission of the Tribunal, although they may have to justify their necessity[15].

The primary remedy remains reinstatement, with compensation in lieu thereof only if reinstatement is considered 'inappropriate'. Compensation remains capped at six months pay with no element for shock, distress or humiliation to be included in any award[16].

Parties will continue to bear their own costs of proceedings other than in exceptional circumstances [17]. We can expect a continuation of low compensation awards, meaning in practice that it may not be cost effective for a claimant or respondent to retain a solicitor.

Practitioners also need to be aware FWA may not be the best forum if reinstatement is not appropriate. If elements of discrimination are present in the dismissal, clients might be better advised to lodge a complaint with the Australian or Human Rights Commission. Of course, there still remains recourse to the courts for breach of implied terms of good faith and mutual trust and confidence. In those forums, dismissed employees may be able to recover damages for hurt, humiliation and distress that well exceed the economic loss element of the claim[18].

It is early days in the implementation of the Act and we eagerly await decisions by FWA for a more

thorough understanding of how the regime will operate in practice.

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Footnotes

1. *Workplace Relations Act 1996 (Cth) s 643 (10)*
2. *The Explanatory Memorandum to the Fair Work Bill 2009 estimates the number of employees employed in businesses containing 100 or fewer employees to be about 3 million.*
3. *For constitutional reasons all employees of ACT employers, and employees employed by companies outside of the ACT are 'national system employees'. This leaves employees of sole traders, unit trusts and partnerships outside of the ACT not covered by this Part of the Act.*
4. *Six months' continuous service or one year's service for those working for a Small Business Employer: s 383.*
5. *Employees earning over $108,300 and who are not covered by an industrial instrument: Reg 3.05*
6. *S 384*
7. *S 389*
8. *S 386*
9. *Eg. whether reasons were given, whether the dismissal was for a valid reason/s, whether the person was notified of that reason and given an opportunity to respond, whether performance warnings were given (etc).*
10. *S 381(2)*
11. *Less than 15 employees on a head count basis after 1 Jan 2011 (s 23), and on a full time equivalent basis until then: Fair Work (Transitional Provision and Consequential Amendments) Act 2009 Sch 12 A.*
12. *See the www.deewr.gov.au for copies of the Code, declared under s 388 of the Act.*
13. *Extensions available in 'exceptional circumstances'.*
14. *See Chapter 3 Part 3-2 Division 5 of the Act.*
15. *Section 596*
16. *S 392*
17. *S 611*
18. *See the June 2009 Ethos column.*

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