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LAWYERS

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Editorial

The federal Government's amended *Workplace Relations Act 1996* has now been in operation for a few months. Employers have had to start applying the amended legislation to their operations and circumstances. It is really only once legislation is applied that the complexities and, in some cases, ambiguities inherent in the legislation become apparent.

This edition of the *IR Bulletin* focuses on the Australian Fair Pay and Conditions Standard. The Standard is a central feature of the legislation. It reflects the Federal Government's aim to establish a national industrial relations system with common minimum conditions of employment for all employees. Future editions of the *IR Bulletin* will cover other aspects of the amended legislation. We also look in this edition at two recent decisions of the Federal Court of Australia which signal a warning to employers to honour promises they make to employees and prospective employees.

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Australian Fair Pay and Conditions Standard

Q. What is the Australian Fair Pay and Conditions Standard?

The Australian Fair Pay and Conditions Standard sets minimum entitlements for employees in the following areas:

Wages

Australian Pay and Classification Scales are established and contain a minimum hourly rate of pay applicable to different classes of work.

These are largely derived from federal and State awards operative as at the reform commencement (27 May 2006). Over time, they will be supplemented and adjusted by rulings of the Australian Fair Pay Commission. Employees in respect of whom there is no Australian Pay and Classification Scale will have the benefit of the Federal Minimum Wage, initially $12.75 per hour.

Maximum hours of work

The maximum weekly hours of work are set at 38 hours plus reasonable additional hours.

Annual leave

Four weeks leave per annum is provided and is to be paid at not less than the basic periodic rate of pay. A shift worker who is required to work shifts spanning seven days per week and 24 hours per day is entitled to an additional week's annual leave.

Personal leave

Ten days paid sick and carer's leave is provided per annum. There are additional entitlements to a further two days of unpaid carer's leave in particular circumstances and to two days of paid compassionate leave for each occasion where a family or household member dies or faces a life threatening illness or injury.

Parental leave

This may be maternity, paternity or adoption leave. It is unpaid leave. In the case of maternity leave, it is up to 12 months. Paternity leave may be either short leave of one week, or long leave of up to 12 months for a primary care-giver. In the case of adoption leave, short leave will be up to 3 weeks and long leave (for a primary care-giver) up to 12 months.

Q. Who does the Australian Fair Pay and Conditions Standard apply to?

- **Employees who are not bound by any formal industrial instrument**

  The Standard applies to these employees. The Standard prevails over the applicable contract of employment to the extent to which, in a particular respect, the Standard provides a more favourable outcome for the employee.

- **Employees who are bound by a post-reform workplace agreement**

  The Standard applies to these employees. The Standard prevails over the workplace agreement to the extent to which, in a particular respect, the Standard provides a more favourable outcome for the employee.

- **Employees who are bound by a pre-reform federal award, but not by a federal pre-reform certified agreement or Australian workplace agreement (AWA)**

  The Standard applies to these employees except where a more generous award provision deals with the same subject matter.

- **Employees who are bound by a notional agreement preserving a State award (NAPSA), but no other federal or State certified agreement or enterprise agreement**

  The Standard applies to these employees except where a more generous State award provision deals with the same subject matter.

- **Employees who are currently bound by a pre-reform federal certified agreement or AWA, or by a preserved State agreement**

  The Standard does not apply to these employees.

Q. What has happened to awards and how do they fit in?

Awards no longer set the minimum terms and conditions for employees; minimum entitlements are now contained in the Standard. The Government is seeking to reduce both the number of awards in existence and the types of matters which are able to be included as terms of awards. The Australian Industrial Relations Commission will only be able to create awards as part of the rationalisation process and can only vary awards in limited circumstances.

Under the amended *Workplace Relations Act*, awards only operate to the extent that they contain the following:

- **Allowable award matters**

  There are 15 allowable award matters (including ordinary time hours of work, annual leave loadings and penalty rates). *Non*-allowable award matters, which may inform the meaning of allowable award matters, are also listed in the Act. Wages and classifications are no longer allowable award matters. Existing provisions about wages and classifications may continue to operate as part of an Australian Pay and Classification Scale.

- **Preserved award terms**

  There are seven preserved award terms listed in the Act, including annual leave and personal/carer's leave. These will apply where the entitlement in the preserved award term is *more generous* than the entitlement under the Standard or is not provided for by the Standard.

- **Facilitative provisions**

  These are terms which allow agreement between employers and employees about how an allowable award matter or preserved award term is to operate. Such provisions operate to the extent that they do not require the agreement of a majority of employees, and must permit agreement between an individual employee and employer.

- **Incidental and machinery terms**

  Incidental provisions are those which are incidental to an allowable award matter and are essential to making a particular term operate in a practical way. Machinery provisions are those which cover matters that are necessary for the operation of the award, such as the commencement and term of the award.

- **A model anti-discrimination clause**

  These are provisions which say that the award provisions are intended to operate in a manner which does not involve unlawful discrimination.

- **Terms relating to a board of reference**

  Terms which appoint and assign specific functions to a board of reference, for the purposes of the award, continue to apply.

Once a post-reform workplace agreement is entered into, an award has no effect.

Q. How do you work out whether a preserved federal or State award term is more generous than the Standard?

The Standard is excluded if a preserved federal or State award term is more generous. The Workplace Relations Regulations provide guidance on whether a preserved award term relating to annual leave, personal/carer's leave or parental leave is more generous than the Standard. The entitlements under the preserved award term and the Standard must be compared on the basis of their effect on an individual employee, rather than on employees generally. A preserved award term is taken to be more generous if it provides for a greater quantum of leave than the Standard. Where this is the case, the preserved award term applies and the Standard (including any associated administrative rules under the Standard) is completely excluded in relation to that matter.

For preserved award terms which deal with matters other than annual leave, personal/carer's leave or parental leave, the ordinary meaning of more generous should be used when comparing the preserved award entitlement with the entitlement under the Standard.

Q. How do you work out whether the Standard is more favourable in a particular respect than a provision in a workplace agreement or employment contract?

The Standard prevails over an applicable post-reform workplace agreement or employment contract to the extent that, in a particular respect, the Standard provides a more favourable outcome for the employee.

The Workplace Relations Regulations explain what matters constitute a particular respect for these purposes, and include within this category certain matters relating to wages, leave and statutory declarations.

The Regulations also specify when the Standard provides (or does not provide) a more favourable outcome for the employee in each particular respect identified. In each case, a line-by-line comparison (and not a global comparison) of the entitlement under the Standard and the workplace agreement or contract is required, with the applicable entitlement representing the high tide mark of the entitlements under the Standard and the workplace agreement or contract.

Working out which provision is more favourable requires consideration of each element of the provision from the perspective of an individual employee, rather than employees generally.

Q. How do employers and employees ascertain the minimum pay applicable to a particular kind of work?

The Australian Fair Pay Commission is responsible for setting and adjusting the Australian Pay and Classification Scales (APCSs), which prescribe wages for applicable employees.

There are preserved APCSs which are derived from existing award conditions. These exist now. There will be in the future new APCSs determined by the Australian Fair Pay Commission.

The starting point is to work out whether the type of work in question is covered by an APCS, as stated in the coverage provisions of the APCS. If there is an applicable APCS, the employee is entitled to receive payment which is at least equal to that which is payable under the APCS. If there is no applicable APCS, the employee is entitled to the Federal Minimum Wage or a special Federal Minimum Wage (in the case of juniors, employees with disabilities and employees to whom a training arrangement applies).

Q. Does the Standard require that employees are paid for every hour that they work?

Employees must be paid for each of the employee's guaranteed hours.

If an employee is employed to work a specified number of hours per week, the guaranteed hours for the employee for each week are the specified hours, plus any additional hours not counted towards the specified hours, less:

- any hours in the week when the employee is absent from work on deductible authorised leave (as defined in the Act);
- any hours in the week in relation to which the employer is prohibited by section 507 of the Act from making a payment to the employee – ie, where the employee engages in industrial action;
- any other hours of unauthorised absence from work by the employee during the week.

If a full-time employee's terms and conditions of employment do not determine the number of hours to be worked by a full-time employee, the employee is taken to be employed to work 38 hours per week.

Where an employee's hours of work are not specified, the guaranteed hours for the employee are the hours that the employee is required or requested to work, and does work for the employer, less any period in relation to which the employer is prohibited by section 507 from making a payment to the employee.

The answer is, then, that the Standard does require that an employee is paid for every hour he or she works where these hours are within an employee's guaranteed hours.

Q. Do all employees have to be paid fortnightly in arrears?

If there is an applicable Australian Pay and Classification Scale, workplace agreement or contract of employment dealing with frequency of payment, then it must be complied with.

If there are no applicable frequency of payment provisions, then the employer must pay the employee on the basis of fortnightly payments in arrears.

Q. What does the Standard provide about hours of work?

The Standard provides that employees must not be required or requested to work more than 38 hours plus reasonable additional hours per week.

Employers and employees can agree in writing to average out an employee's hours over a period that is no longer than 12 months.

This averaging mechanism will be particularly useful for seasonal employers.

Q. Do contracts of employment have to specify ordinary hours as 38 hours per week?

No. Contracts of employment do not have to specify 38 hours as the ordinary hours per week. A contract of employment could specify the applicable ordinary hours of work as being something in excess of, or less than, 38 hours per week provided that the hours of work per week over 38 hours are reasonable additional hours in all circumstances.

A contract of employment could also be silent as to the precise number of required hours of work and simply provide that employees must work the hours required to perform his or her job. The hours of work required must nevertheless be not more than 38 hours plus reasonable additional hours.

Q. What are "reasonable" additional hours?

Hours of work under the Standard are set at a maximum of 38 hours per week, plus reasonable additional hours. There is no strict definition of "reasonable additional hours" under the Standard. All relevant factors must be taken into account in determining whether additional hours that an employee is required to work are reasonable, and these may include:

- any risk to the employee's health and safety which may reasonably be expected to arise if he or she works the additional hours;
- the employee's personal circumstances (including family responsibilities);
- the operational requirements of the workplace, or enterprise, in relation to which the employee is required or requested to work the additional hours;
- any notice given by the employer of the requirement or request that the employee work the additional hours;
- any notice given by the employee of his or her intention to refuse to work the additional hours;
- whether any of the additional hours are on a public holiday; and
- the employee's hours of work over the four weeks prior to being required or requested to work the additional hours.

The application of these, and other, factors means that the additional hours which will be deemed *reasonable* will vary depending on the particular circumstances of each case.

Q. Must meal breaks be allowed/enforced?

Employees cannot be required to work for more than five hours continuously without an unpaid meal break of at least 30 minutes. However, these statutory provisions do not apply where the employee's employment is covered by:

- an award;
- a workplace agreement; or
- a pre-reform industrial instrument specified in the Regulations. These include a pre-reform federal certified agreement or AWA, a preserved State agreement and a notional agreement preserving a State award.

Q. What do employers have to record in relation to hours of work?

The *Workplace Relations Regulations 2006* require that employers keep records relating to the hours worked by their employees as follows:

- for employees earning *less than* $55,000 per year (indexed) who are entitled to be paid overtime under an applicable industrial instrument or employment contract, employers must keep a record of the start and finishing times and total weekly hours worked by the employees;
- for employees earning *less than* $55,000 per year (indexed) who are *not* entitled to be paid overtime, employers must keep a record of the total weekly hours worked by the employees;
- for employees earning *more than* $55,000 per year (indexed) who are entitled to be paid overtime under an applicable industrial instrument or employment contract, employers must keep a record of the start and finishing times of the employees; and
- for employees earning *more than* $55,000 per year (indexed) who are *not* entitled to be paid overtime, employers are not required to keep any records in relation to hours of work.

Q. What annual leave can be cashed out? Can employees cash out two weeks now?

Under the Standard, an employee is entitled to cash out annual leave which *has been credited to him or her*, if the following four conditions are satisfied:

- the employee is subject to a workplace agreement which specifically entitles the employee to cash out an amount of annual leave;
- the employee makes a written request to the employer to cash out that annual leave;
- the applicable workplace agreement entitles the employee to receive payment in lieu of the amount of leave at a rate which is not less than the employee's basic periodic rate of pay; and
- the employer authorises the employee to cash out that leave.

A maximum of 1/26 of the nominal hours worked by an employee during each 12 month period may be cashed out, which amounts to 2 weeks of annual leave per year for employees working a standard 38 hour week.

Leave is cashed out by an employee making a written request to the employer to cash out a specified amount of his or her annual leave, and the employer authorising the leave to be cashed out.

The employer must not require an employee to cash out annual leave, or exert undue influence or pressure in relation to the cashing out of annual leave.

The cashing out provisions appear to apply only in relation to annual leave accrued in accordance with the Standard.

Q. Can employers direct employees to take annual leave?

Under the Standard, an employer is entitled to direct an employee to take an amount of accrued annual leave in the following specific circumstances:

- where the employer shuts down the business or any part of the business in which the employee works;
- where the employee has a particular amount of annual leave accrued being, in the case of an employee who works 38 hours per week, 8 weeks accrued annual leave. In these circumstances, the employer can only direct the employee to take an amount of annual leave less than or equal to one quarter of the employee's accrued annual leave.

Q. Do casual employees have any entitlements to leave under the Standard?

Casual employees do not have any entitlements to annual leave or personal/carer's leave under the Standard.

Casual employees who are *eligible casual employees* do have entitlements to parental leave under the Standard. Other casual employees do not have parental leave entitlements under the Standard.

An *eligible casual employee* is a casual employee who has been engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months and who, but for the expected birth or placement of a child, would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.

Keep your promises: Federal Court warning to employers

Two recent decisions of the Federal Court signal a warning for employers to honour promises they make to employees and prospective employees. In both cases, the employer was held to be bound by the promises it made, even though the promises were not expressly included in the employment contract. In both cases, the employers were held liable to pay substantial damages.

Nikolich v Goldman Sachs J B Were Services Pty Ltd
[2006] FCA 784 (23 June 2006)

Facts

Peter Nikolich, a former investment adviser from Goldman Sachs J B Were (the Company), brought a claim against his former employer following a long-running dispute which led to Mr Nikolich developing depression and, ultimately, to his employment being terminated by the Company.

Pursuant to a Company initiative, Mr Nikolich and two of his colleagues formed a partnership of advisors, under which they worked together in managing the investment portfolios of a shared client base. After one member of this partnership resigned, a dispute arose over the allocation of the partnership's shared clients to financial advisers. Ultimately, a number of the clients were re-allocated to advisers outside the partnership, and the partnership lost a significant number of its former clients.

Mr Nikolich complained to the Company's HR department about the re-allocation. During the prolonged investigation of his complaint, Mr Nikolich became highly stressed and developed a depressive disorder. He went on two separate periods of sick leave as a result of his illness, the second of which ended with the termination of his employment by the Company on the basis of his inability or unwillingness to return to work.

Mr Nikolich applied to the Federal Court of Australia for compensation claiming, amongst other things, that the Company had breached his employment contract by failing to abide by certain provisions contained in its *Working With Us* (WWU) which policy, it had provided to Mr Nikolich when he joined the Company.

Decision

Justice Wilcox accepted that the Company had breached Mr Nikolich's employment contract by failing to comply with a number of provisions of the WWU policy which were to be treated, he considered, as *express terms* of the employment contract.

In reaching this decision, Justice Wilcox followed the decision of a Full Court of the Federal Court in *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193, and considered the following facts as relevant:

- Mr Nikolich's employment contract required him to comply with present and future "office memoranda and instructions", being secondary documents to his contract;
- a copy of the WWU policy was sent to Mr Nikolich when he joined the Company, and he was required to familiarise himself with its terms. The same applied for all new employees of the Company;
- the WWU policy purported to impose obligations on the Company, some of which were obligations usually found in an employment contract and which were otherwise absent from Mr Nikolich's contract; and
- the Company insisted that all its employees comply with the behavioural standards set out in the WWU policy, and was entitled to discipline its employees for breaching the policy.

Justice Wilcox noted that the Company retained some discretion in deciding how it applied the policy in the case of a management problem. Despite this, the Company would be liable for breach of contract if its conduct *ignored* the WWU policy.

His Honour found that the Company had breached its contract with Mr Nikolich by failing to abide by WWU policies to:

- provide a healthy and safe workplace;
- prevent Mr Nikolich being bullied or harassed; and
- follow specified grievance procedures in the case of a complaint.

Justice Wilcox rejected the Company's argument that the psychological illness Mr Nikolich suffered was too remote to justify an award of damages. Rather, the "very object" of the relevant WWU provisions was to provide peace of mind to employees. It was therefore foreseeable that a breach of these provisions might cause distress to an employee.

His Honour ordered damages of over $515,000 to Mr Nikolich, including amounts for past and future loss of earnings, and general damages for the psychological harm suffered. The order included the unusual condition that, if the Company did not appeal this decision, the amount of damages would be reduced by $50,000, as further delay to Mr Nikolich's return to the workforce would thereby be avoided.

Walker v Citigroup Global Markets Australia Pty Ltd
[2006] FCAFC 101 (23 June 2006)

Facts

In early 1998, senior stockbroker David Walker left a lucrative position with ABN-AMRO for a promised job with County Natwest Securities Australia Ltd (now Citigroup Global Markets Australia Pty Ltd).

In the months leading up to his departure from ABN-AMRO, Mr Walker had a number of discussions with senior NatWest employees about the terms and conditions of his proposed employment as Resource Analyst at NatWest. During this time, three draft letters of offer were issued by NatWest to Mr Walker, the third of which he signed in January 1998. Further oral agreements about his proposed terms and conditions were made between Mr Walker and NatWest around this time.

On 22 February 1998, NatWest withdrew its offer of employment by a letter in writing, apparently due to poor feedback received about Mr Walker and his inability to commit to a starting date with NatWest. At this time, NatWest employees told Mr Walker that NatWest would probably offer him a position in the Corporate Finance area instead of the position which was originally proposed. In May 1998, Mr Walker was informed that NatWest would not offer him any position.

Mr Walker applied to the Federal Court for damages, claiming that by withdrawing its offer of employment, NatWest had:

- breached its contract with him; and
- engaged in misleading and deceptive conduct contrary to sections 52 and 53B of the *Trade Practices Act 1974*.

Justice Kenny found that the Company was liable to pay damages in respect of both claims made by Mr Walker, and awarded him a total of around $1.3 million in damages. Both sides appealed to the Full Court of the Federal Court.

Decision

The Full Court of the Federal Court accepted Mr Walker's argument that the proper assessment of damages for his lost earnings should have been based on:

- 10 months' salary based on the amount agreed between Mr Walker and NatWest. Justice Kenny had limited the amount of damages for future income loss to one month's salary, on the basis that the Company was entitled under the contract to terminate Mr Walker's employment with one month's notice. The Full Court disagreed, finding that the provision permitting termination on one month's notice was a standard provision which, in the circumstances, was subject to the specific contractual promise that Mr Walker would be employed at least until the end of 1998 (a period of 10 months); plus
- a bonus of $250,000 promised to Mr Walker by NatWest; plus
- an amount reflecting a 75% probability that he would have remained in the proposed job until June 2003 (a further two and a half years). The Full Court believed it was unlikely that NatWest would have terminated Mr Walker's employment, as a skilled and competent employee holding a high profile position, on notice.

On this basis, the Full Court awarded Mr Walker more than $2.3 million for lost earnings in respect of NatWest's breach of contract.

In addition, the Court increased Mr Walker's award for general and consequential damages from $5,000 to $100,000, on the basis of the considerable dislocation of his personal life and loss of business reputation, which resulted from the withdrawal of the NatWest job offer.

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Lessons for employers

- **Employers may be bound by obligations or promises contained in general company policies as either express or implied terms of an employment contract.**
- **Although an employer may have some discretion as to how it applies company policies, it may be liable for breach of contract if it *ignores* the policies.**
- **Damages for breach of contract are often limited to the amount the employer would have to pay the employee during the notice period provided in the contract. However, if it is unlikely that the employer would have terminated an employment contract on notice, damages may be assessed over a much longer period.**
- **Although damages for hurt and distress following breach of contract are usually regarded as too remote to be recoverable, a court may award such damages if avoidance of hurt and distress was the very object of the provision breached (as can be the case with company policies designed to ensure fair treatment, etc), or if the hurt and distress manifests as a personal injury such as psychiatric illness.**

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