



## Recent Changes to Fair Work Act and Other

Effects on your Business  
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MEMBERSHIP LAWYERS

## Fair Work Act



### Unfair Dismissals

#### Small Business Fair Dismissal Code

- Small Business Employees cannot make a claim for unfair dismissal in the first 12 months of employment.
- After 12 months, a dismissal that follows the SBFDC will be deemed to be fair.
- Previously "small business" determined by reference to hours worked by all employees and dividing by 38 to get full time equivalent workers.
- Complicated and open to confusion

## Fair Work Act



### “Small Business”

NOW - determined by a simple headcount of the number of employees in the business, regardless of how many hours worked. Includes:-

- Casuals employed, on a regular and systemic basis and
- employees of associated entities

What is:

- An Employee?
- A Regular and Systemic basis?
- An associated entity?

## Fair Work Act



### “Employees”

the indicia of an employment relationship;

- (a) degree of control;
- (b) mode of remuneration;
- (c) provision and maintenance of equipment or resources;
- (d) obligation to work;
- (e) delegation of work by contractor or exclusivity of performance;
- (f) hours of work and entitlements to leave;
- (g) provision for holidays;
- (h) deduction of income tax; and
- (i) characterisation of relationship for purposes of regulatory provisions such as superannuation and workers compensation.

## Fair Work Act



### "Regular and Systemic"

*Mr Cori Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic*

- whether an employee can establish they have a continuing relationship with their employer.
- the fact an employee has variable starting and finishing times cannot itself be conclusive of irregular, occasional or non-systematic employment.
- where there is no clear pattern or roster of hours and days worked, or a clear agreed arrangement, evidence of regular and systematic employment can be established where:
  - the employer regularly offers work when suitable work is available, at times when the employer knows the employee has generally made themselves available; and
  - work is offered and accepted sufficiently often that it could no longer be regarded as simply occasional or irregular.

## Fair Work Act



### "Associated Entities"

SECT 50AAA of the *Corporations Act 2001* (Cth) **Associated entities**

- Control
- Significant influence
- Qualifying investment in the assets of the other

See also *Adams v Condamine Catchment Natural Resource Management Corporation T/A Condamine Alliance*

Funding relationship, dependent on available government funds

No control established

No significant influence-independent operations

No "qualifying investment" in Landcare.

Contractual relationship only

Respondent's auditor confirm that the Respondent held no shares, debentures, options or interests

## Redundancy Payments



S117 FWA -Must be minimum notice or payment in lieu for a redundancy-enhanced by any relevant modernised award or by any contract of employment

S119 provides a sliding Scale of minimum severance pay based on years of service

From January 2011 - all employees whose roles are made redundant will accrue one years service under the NES redundancy entitlement and this means a payment of not less than 4 weeks severance pay.

## Redundancy Payments



### GEERS

- General Employee Entitlements and Redundancy Scheme
- Provides a payment scheme where employees unable to recover entitlements because business in liquidation or bankrupt
- From Jan 2011 the previous cap of 16 weeks unpaid redundancy replaced with a maximum of 4 weeks for every year of employment
- BUT based on entitlement under any relevant legal instrument-ie legislation, award, statutory entitlement or contract of employment

## Child Employment



### *Child Employment Act 2006 Qld*

- aim to protect children from being required to perform work that may be harmful to their health and safety, or physical, mental, moral and social welfare.
- designed to ensure that work does not interfere with a child's education, particularly for the period when the child is required to be at school.
- the bulk of the Act relates to school-aged children.
- In recognition of the unique requirements of work in the entertainment industry, this industry is exempt from some of the general provisions that apply to children working in other industries. Instead, conditions specific to the entertainment industry form part of the legislation.
- See Qld Government Child Employment Guide.

## Recent cases



### **TERMINATION OF EMPLOYMENT**

- Small Business Fair Dismissal Code
- misconduct
- fraud
- ss388, 394 Fair Work Act 2009
- respondent covered by Small Business Code
- immediate dismissal justified if employer believes on reasonable grounds employee's conduct was sufficiently serious
- applicant admitted to falsifying respondent's financial records
- applicant's actions put respondent's business in parlous state
- applicant's behaviour constituted serious misconduct
- summary dismissal warranted.

Forman v Archers Smash Repairs Gold Coast P/L

## Recent cases



### TERMINATION OF EMPLOYMENT

- misconduct
- Small Business Fair Dismissal Code
- s394 Fair Work Act 2009
- applicant terminated for falsifying timesheets and failure to attend work while conducting private business
- termination not due to applicant taking a day off sick
- reasonable grounds for respondent to believe applicant defrauding company by falsifying timesheets
- Small Business Fair dismissal Code complied with
- applicant not unfairly dismissed
- application dismissed.

Knecht v Renaissance Parquet

## Case Studies



### TERMINATION OF EMPLOYMENT

- contract for specified term
- subjective understanding of contract irrelevant
- s394 Fair Work Act 2009
- satisfied applicant employed on contract for specified term
- applicant's contrary assertions regarding nature of employment rejected
- In the absence of fraud, mistake, misrepresentation, a parties' *subjective* understanding of a signed contract irrelevant
- What meaning would an objective outsider would attribute to the contract in the circumstances?
- Employment ceased due to effluxion of time
- no termination at initiative of employer
- no jurisdiction
- application dismissed.

Andrews v Cooperative Research Centre for Advanced Composite Structures Ltd

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