The New National Employment Standards under the *Fair Work Act 2009*: Three aspects discussed

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(*Federal Magistrate, Perth. B Juris (Hons); BA; LLB; P Cert Arb. The views expressed in this paper are the views of Federal Magistrate Lucev. They are not, and do not purport to be, the views of the Federal Magistrates Court or any other Federal Magistrate.)

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Introduction

1. This paper discusses, in general terms, three of the new National Employment Standards under the *Fair Work Act 2009* (Cth),[1] namely:

   a) maximum weekly hours and averaging of hours of work;[2]

   b) requests for flexible working arrangements;[3] and

   c) notice of termination and redundancy pay.[4]

Maximum weekly hours and averaging of hours of work

2. The maximum weekly hours of work remain 38 hours for a full-time employee.[5]

3. For an employee who "is not a full-time employee" the maximum weekly hours are the lesser of:

   a) 38 hours; and

   b) the employee's ordinary hours of work in a week.[6]

4. Because the phrase "full-time employee" is not defined in the *FW Act* an employee who is "not a full-time employee" must logically include all of those employees who are not full-time employees, and, must therefore, include casual employees. Where casual employees who are so called long term casuals have been working a consistent number of ordinary hours per week those casual employees are arguably employees to whom the maximum weekly hours' provisions in s.62 of the *FW Act* apply.

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[1] *FW Act.* Discussion in specific terms will probably have to await judgments of the federal courts and determinations by Fair Work Australia ("FWA").
[2] *FW Act*, ss.62-65.
[3] *FW Act*, ss.65-66.
[4] *FW Act*, ss.117-123.
[5] *FW Act*, s.62(1)(a).
[6] *FW Act*, s.62(1)(b). Ordinary hours of work for award/agreement free employees are defined in *FW Act*, s.20.

5. An employee may refuse to work additional hours beyond the maximum weekly hours if the additional hours "are unreasonable".[7]

6. An employer "must not":

   a) "request"; or

   b) "require",

   an employee to work additional hours beyond their maximum weekly hours in a week "unless the additional hours are reasonable".[8]

7. Employees under a modern award or enterprise agreement may have their maximum weekly hours rostered over a "specified period".[9]

8. A number of question arise in this respect including:

   a) what conditions or constraints will govern the averaging process;

   b) over what period will the averaging take place;

   c) will the periods differ from industry to industry and from part of an industry to another part of an industry;

   d) what rationale will govern differences in the specified periods.

9. These types of questions will have to be determined, firstly, in the workplace, and, later, in the event of disputes, by FWA or, if legal issues arise, the federal courts.

10. Employee's who are award or agreement free may also have their maximum weekly hours rostered over a "specified period", but in the case of these employees the specified period must be "not more than 26 weeks".[10]

11. In determining whether additional hours are reasonable or unreasonable there are a number of mandatory factors to be taken into account. They are:

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[7] *FW Act*, s.62(2).
[8] *FW Act*, s.62(1).
[9] *FW Act*, s.63.
[10] *FW Act*, s.64.

a) any risk to employee health and safety from working the additional hours;

b) the employee's personal circumstances, including family responsibilities;

c) the needs of the workplace or enterprise in which the employee is employed;

d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

e) any notice given by the employer of any request or requirement to work the additional hours;

f) any notice given by the employee of his or her intention to refuse to work the additional hours;

g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

h) the nature of the employee's role, and the employee's level of responsibility;

i) whether the additional hours are in accordance with averaging terms included under section 63 of the *FW Act* in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64 of the *FW Act*; and

j) any other relevant matter.[11]

12. There is a mandatory prohibition on an employer making a request to an employee (a request might be "I would like you to work some additional hours") or requiring an employee to work additional hours (a requirement might be "You will work these additional hours"), unless those additional hours are reasonable.

[11] *FW Act*, s.62(3)(a)-(j).

13. In determining whether the hours are reasonable an employer, or an employee in determining that the requested additional hours are unreasonable, must take into account the mandatory factors set out above.

14. It follows therefore that both employer and employee must take these matters into account, and must have the requisite knowledge of these matters to be able to take them into account, and to prove that they have done so, particularly in the event of a challenge arising in civil penalty proceedings for contravention of the maximum working hours provisions.

The reasonableness/unreasonableness factors

Health and safety

15. Any risk to employee health and safety from working the additional hours must be taken into account in determining whether the hours are reasonable or unreasonable.

16. On the face of it, this factor requires an employer who wants an employee to work additional hours to undertake a health and safety risk assessment in relation to the working of those hours. The risk assessment relates to the health and safety of the employee required to work the hours, but when multiple employees are being requested to work additional hours as part of a group, such an assessment would require that a health and safety problem affecting a particular employee be considered for its effect on other employees. For example, an ore truck driver in a mine on 12 hour shifts who is susceptible to tiredness or fitting, would, if required to work additional hours, have to be factored in to the risk to health and safety of other employees on the shift in which the driver is working additional hours, in addition to a health and safety risk assessment of the risk to the driver personally from working the additional hours. Likewise, the health and safety risk to the particular employee as well as a group of employees working additional hours would need to be considered in a hospital surgical environment.

17. Where travel time is incorporated into working hours for employees required to travel after extended shifts and/or for long distances employers might also need to factor in health and safety considerations.

Employee's personal circumstances including family responsibilities

18. This factor seemingly will require employers to know about and be in a position to understand each employee's personal circumstances, including family details, relating to partners and parents and children. For example, in determining whether it is reasonable or unreasonable to work additional hours, an employer may have to consider:

    a) where there are children of the employee to be cared for and whether the employee working additional hours will prevent that employee from caring for the children in circumstances where the employee would normally do so, because the employee's partner is working, including situations where:

        i) in rural regions the partner's work back to back shifts; or

        ii) where the parents work in separate employment, but one parent works day shifts and the other night shifts;

    b) whether the employee's partner, or any of the employee's children, have a particular disability which requires the employee to assist in care outside of the employee's ordinary working hours;

    c) an employee's other employment responsibilities (for example where an employee has a second job) or income earning activities (for example, particularly in rural areas, where an employee may be a farmer owner or farm worker, and the farm is the primary source of income);

    d) sporting commitments for the employee, the employee's partner and the employee's children, in which the employee might be involved in an official capacity, or simply be desirous of attending (such as a child's sports grand final); and

    e) the employee's children's school activities in which the employee might be involved (for example, sports days, canteen, weekly or

monthly assemblies and prize giving and end of the year speech nights).

19. One significant danger which may arise in these issues, is a kind of reverse discrimination, where persons with partners and families are excluded from consideration of additional hours by an employer simply on the basis of their personal circumstances and family responsibilities. If that were to occur, the employer might then be liable under other provisions of the *FW Act* relating to the protection of workplace rights,[12] and discrimination.[13]

Needs of the workplace or enterprise

20. It is perhaps arguable that it is self-evident that the needs of the workplace or enterprise need to be taken into account, but this factor is made mandatory by the provisions of the *FW Act*. In short, it appears that there must be a justifiable reason which the employer must be able to demonstrate for the additional hours to be worked.

21. Justifiable reasons may be many, but might include:

a) the need to increase supply to meet demand (whether in the short or long term);

b) the need to increase supply to take advantage of increased prices and to thereby increase the profit of the enterprise; and

c) unforseen events giving rise to the need for employees to work longer hours, including, for example, the illness or non-arrival for work of another employee, an accident in the workplace requiring another employee to work, or requiring additional employees to work to deal with the consequence of the accident.

22. It needs to be noted that the *FW Act* does not ascribe any greater weighting to any one or more factors than any other factors, and it need not necessarily be the case that greater weight be given to the needs of the workplace or enterprise than the needs of the employee. Each case will have to be determined on its merits.

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[12] *FW Act*, ss.340-342.
[13] *FW Act*, s.351.

Entitlement to payment

23. This factor looks to whether or not the employee has a specific entitlement to overtime or the payment of a level of remuneration that reflects an expectation of the employee working additional hours.

24. On each occasion an employee is requested to work additional hours this is a factor which needs to be considered. Problems which might emerge include:

    a) single time overtime penalties being considered to be too low, thereby making additional hours unreasonable;

    b) penalty payments being insufficient remuneration for the requirement to work on particular special days, such as Christmas day or Easter Sunday or other religious or festival days (and this is a consideration which might also arise in the context of personal circumstances including family responsibilities); and

    c) a level of remuneration which purports to include payment for all hours worked, but which is not sufficiently high to effect an expectation of the working of additional hours.

Notice

25. A factor to be taken into account includes the notice given by an employer of any request or requirement to work additional hours and the notice given by an employee of an intention to refuse to work the additional hours.[14]

26. The giving of, or the failure to give, notice may be a balancing factor in terms of the other factors. For example, dependent upon the circumstances, the greater the notice given the less the weight which might be attributed to some other factors. And, the less notice that is given, the more weight which might be given to other factors.

27. For example, a retail shop assistant who is given several weeks' notice of the requirement to work additional hours on a shopping night preceding Christmas, and who says that personal circumstances,

[14] *FW Act*, s.62(3)(e) and (f).

namely, the employee's monthly book club meeting, precludes her from working the additional hours, is a circumstance which is likely to see greater weight being given to notice as a determinate of reasonableness. By contrast, even a significant amount of notice may be of no assistance where the employee's personal circumstances, including family responsibilities, mean that the employee is the only child of a parent who requires a live-in carer, and the normal paid live-in carer has a regular night off, including the night on which the employer seeks to have the employee work additional hours on the shopping night preceding Christmas.

28. As a practical matter, whether employer or employee, notice ought to be put in writing to prevent disputes about whether notice has been given or refused. If no response is received, the matter should be followed up in writing well before the time at which the employee is supposed to work the additional hours. The matter should not be left in abeyance.

Usual patterns of work in the industry

29. A factor to be taken into account is the usual patterns of work in the industry, or the part of an industry, in which the employee works.

30. This factor almost assumes that an employer knows what the usual pattern of work is an industry, or in the part of the industry, in which the employee works. It also assumes that there is a usual pattern of work in the industry, as opposed to there being a usual pattern of work within a particular workplace.

31. In any event, whether or not additional hours are reasonable depends upon a consideration of this factor. The factor therefore requires knowledge of the usual pattern of work in an industry (or the lack of one if that be the case), or to the part of the industry, in which the employee works. This may require employers to obtain information about their competitor's patterns of work, if they are able to do so. If they are not able to do so directly, then regard may need to be had to other sources of information concerning patterns of work in an industry, such as information held or made available by industry commercial groups and organisations (including unions), and

government organisations (such as the Productivity Commission, Australian Bureau of Statistics material and Commerce, Trade and Small Business departments of State governments) to see if the information, or some information, concerning those patterns is available.

32. The term "industry" has given rise to significant industrial relations litigation since the time of federation. Whether a particular employee, or group of employees, is in an industry, and whether particular unions have coverage of that industry, has been fertile ground for dispute. Issues of that type might arise in cases concerning these provisions of the *FW Act*: for example, what "industry" is an employee actually employed in? Further questions might arise as to what is meant by "part of an industry". For example, does it mean a geographical part of the industry? Thus, is coal mining in Western Australia, part of the "coal mining industry", when compared to the "coal mining industry" in New South Wales or Queensland, or are they a separate part of that industry to the industry in Western Australia? Or, is the industry to be divided along large occupational groupings, and are mining, production and transport (whether by road, rail or ship) separate parts of the iron ore industry? Difficult questions might arise in relation to the retail industry, where retail open and closing hours are heavily regulated, particularly in Western Australia. The State legislation affecting industry operating hours (for example in the retail industry and hospitality industry) might be relevant to the question of what constitutes usual patterns of work, and might also constitute any other relevant matter (the final catch all factor). Difficult issues might arise in respect of restaurant industry employees, whether their hours are averaged or not, in circumstances where the closing time of a restaurant is dictated not by the time on the clock but the patrons in the restaurant. What, for example, is the employer to do with employees who on their final shift (in a week) are faced with a large table of patrons who are staying two to three hours beyond normal closing time ordering more food, and wine so as to conduct a six year vertical tasting of a particularly expensive Western Australian cabernet sauvignon?!. What if the employees who remain have a child to be picked up from an under-age babysitter due to return home by midnight? What if the employees are due to work another shift at 8.00am or 10.00am the next morning? No doubt common sense and

workplace negotiation will resolve many of these types of issues, but equally it is inevitable that some will find their way to other places for determination or judgment.

33. It should be noted that it is the usual patterns of work in "the industry" that are the relevant factor, not the individual employee's usual patterns of work, or even, the usual patterns of work in the particular workplace, enterprise or employer.

Nature of employee's role and level of responsibility

34. The nature of an employee's role within an organisation, and the level of their responsibility, is not necessarily determined by their place in the hierarchy of an organisation or by the amount of money that they are paid. For example, a control room operator in a continuously operating process plant, who is one of only a very small number of such control room operators, may have a role the nature of which is so integral to the running of the process plant, that, depending upon the circumstances, that role will weigh heavily in favour of the employee being required to work additional hours, dependent upon those circumstances. By contrast, a large supermarket checkout operator would not be integral to the operation of the employer's business in quite the same manner. Thus, degrees of specialisation and whether the employee is essential to the operation of the employer's business, may have an impact when weighing this factor. An employee who can be readily replaced by someone from a labour hire firm or casual pool of employees, may have a greater claim to argue that additional hours of work are unreasonable, than the integrally essential control room operator.

35. In the case of senior management or executives the mere fact that they are senior managers or executives does not necessarily mean that they can be required to work additional hours. Again, the nature of the role will have an impact, and the senior manager or executive's level of responsibility will need to be balanced against other factors.

Averaging arrangements under modern awards or enterprise agreements and agreements between employer and employee

36. Averaging arrangements in a modern award, enterprise agreement or an employer-employee agreement are not themselves determinative of reasonableness for the purposes of requesting that additional hours be worked. They are again simply one factor in a series of factors which have to be considered anew in each instance where an employer wants an employee to work additional hours, or an employee wants to refuse to work those hours.

37. The averaging terms might be relevant if they impose a requirement to work a significant number of hours in one week, which happens to be the week in which the additional hours are requested to be worked, and therefore results in the employee having to work a very large number of hours in that week. By contrast, if the averaging arrangements meant that the employee did not have to work in a particular week or worked a small number of hours, that might be factor in favour of the employee working additional hours. However, where the employee was scheduled to work no hours, and had decided to go away with the family, or in the case of some FIFO employees, who live in another state or even country, that might constitute a personal circumstance which might then weigh back in favour of the employee not being required to work the additional hours.

Any other relevant matter

38. What constitutes any other relevant matter will ultimately be determined objectively, but also involve discretionary considerations dependent upon the particular circumstances of the case.

39. One relevant matter, in all cases, is likely to be the lawfulness of the request. Thus, if for example, the request to work additional hours were to be in breach of State trading hours legislation or State occupational health and safety legislation for working hours (for example for persons in the transport industry) that would be a relevant matter, and in the case of illegality, probably determinative of the result.

40. Other relevant matters might include the availability of transport if the employee works additional hours, or, in circumstances where the

employee has their own transport, the distance to be travelled following working of the additional hours. In some areas (such as those prone to cyclones or bushfires), considerations as to the weather might be relevant, if it is likely that the weather would prevent an employee from travelling home after completing work. Where an employee is working away from home, or is a FIFO employee, the availability of accommodation might be a relevant matter in determining whether additional hours might be worked.

41. The range of matters which might be sought to be raised as relevant matters will no doubt be very wide. Ultimately, as indicated above, the relevance of a matter to the working of additional hours is likely to be determined by an objective consideration of the matter raised.

Specified period for averaging hours of award and agreement free employees

42. An award or agreement free employee may agree in writing to an averaging arrangement under which the hours of work are averaged. However, this can only be done for a specified period (of not more than 26 weeks).

43. There are practical implications that arise from the 26 week maximum period. They include:

a) that the averaging arrangements for employees could change every 26 weeks, or sooner;

b) that each employee's averaging arrangements must be renegotiated every 26 weeks, or sooner;

c) an employer may therefore be required to be conducting ongoing individual renegotiations for the averaging of maximum hours of work for dozens or hundreds or thousands of employees, depending upon the extent of award or agreement coverage in a particular workplace, enterprise or employer.

Civil penalty proceedings

44. The requirement to consider the various factors when determining whether it is reasonable or unreasonable to work additional hours is no mere administrative nicety. Section 62 of the *FW Act* is a civil penalty provision,[15] which, if contravened, exposes individuals and corporations to penalties of up to $6,600 and $33,000 respectively for each contravention.[16]

Requests for flexible working arrangements

45. Section 65 of the *FW Act* provides for a request to be made for flexible working arrangements. The requests are not open-ended, and the conditions upon the making of the request are quite restrictive.

46. The requests may be made by an employee who is:

a) "a parent … of a child"; or

b) "has responsibility for the care, of a child".[17]

47. The *FW Act* does not define "parent", but it does define "child of a person" to include (note it is not therefore an exhaustive definition):

> *17(1) A child of a person includes:*
>
> *(a) someone who is a child of the person within the meaning of the Family Law Act 1975 ; and*
>
> *(b) an adopted child or step-child of the person.*
>
> *It does not matter whether the child is an adult.*[18]

48. Thus, the parent of a child includes at least the biological, adoptive and step-parents of a child.

49. Whether an employee "has responsibility for the care, of a child" will be a question of fact. It may therefore be necessary to investigate who has that responsibility, but there is no reason why in certain

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[15] *FW Act*, ss.44(1) and 539(2), Item 1.
[16] *FW Act*, s.546(1) and (2).
[17] *FW Act*, s.65(1).
[18] *FW Act*, s.17(1).

circumstances it might include the non-biological parent in a same sex couple; grandparents and other relatives. Other relatives might have responsibility for the care of a child in circumstances where the parents of a child are both working or are otherwise unavailable. Other relatives might also have the responsibility for the care of a child because of certain cultural practices and beliefs.

50. It may also be necessary to have regard to orders of the family law courts[19] to determine who has responsibility for the care of a child.

51. Although the division and the relevant section are both headed "Requests for flexible working arrangements" the words of s.65(1) of the *FW Act* provide that the request may be made "for a change in working arrangements". A note in the legislation gives examples of changes in working arrangements as including changes in:

a) hours of work;

b) patterns of work; and

c) location of work.

52. Those examples are non-exclusive, and do not preclude different or wider changes in working arrangements being requested by an employee.

53. The employee parent or responsible carer of a child can only request a change in working arrangements for one purpose, that is, "to assist the employee to care for the child". There is no "right" to apply for a change in working arrangements on any other basis under s.65 of the *FW Act*.[20] Thus, any request must demonstrate that it is in order to assist the employee to care for the child.

54. The child for the purposes of s.65(1) is not a child as defined in s.17 of the *FW Act*, but rather, under s.65(1) of the *FW Act*, the child in respect of which the request is made must be a child:

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[19] The Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court (but the latter only outside of Western Australia).

[20] But this does not seem to preclude requests being made by reason of an entitlement arising under other federal legislation, State legislation or a relevant modern award, enterprise agreement or an employee's contract of employment.

a) under school age; or

b) under 18 years of age with a "disability".

55. Thus, the child in respect of whom the request is made by the employee must be a child for the purposes of the definition in s.17 of the *FW Act*, but a child within the two specified categories of under school age or under 18 with a disability.

56. There is no definition of "disability" for these purposes in the *FW Act*. Thus, a disability might cover a wide range from a minor to a major disability, and include both permanent and temporary disability.

57. An employee is not entitled to make a request to change working arrangements unless:

a) the employee, who is not a casual employee, has completed at least 12 months of continuous service with the employer immediately before making the request;[21] or

b) for a casual employee, the employee is:

i) a long term casual employee immediately before making the request; and

ii) an employee with a regular expectation of continuing employment by the employer on a regular and systematic basis.[22]

58. An employee request for a change in working arrangements must:

a) be in writing;[23] and

b) set out the details of the change sought and the reasons for the change.[24]

59. The reasons for the change must relate back to the criteria requiring the change in working arrangements to be to enable the employer "to assist the employee to care for the child". Without:

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[21] *FW Act*, s.65(2)(a).
[22] *FW Act*, s.65(2)(b).
[23] *FW Act*, s.65(3)(a).
[24] *FW Act*, s.65(3)(b).

a) a child that needs to be cared for; or

b) a request related to assistance to such a child,

there can be no valid request.

60. Within 21 days an employer must give the employee a written response stating whether the employer grants or refuses the request for a change in working arrangements.[25]

61. An employer can only refuse a request "on reasonable business grounds".[26] Where an employer refuses a request the written response to the employee "must include details of the reasons for the refusal".[27]

62. The focus in terms of refusing a request is whether there are "reasonable business grounds". This is narrower than merely "reasonable grounds", and narrower than the reasonableness or unreasonableness criteria in s.62(3) relating to maximum weekly hours. However some of the criteria in s.62(3) might relate to matters which are "reasonable business grounds". For example,

a) the need to the workplace or enterprise; and

b) the nature of the employee's role and the employee's level of responsibility,

might both relate to "reasonable business grounds" on which a request for a change in working arrangements might be refused. In any event, the focus is on the "business" and not matters personal to the employee (unless those matters impinge upon matters integrally associated with the business).

63. If an employee has an entitlement which is more beneficial under the laws of a state or territory the provisions of s.65 do not apply to exclude the application of such a law.

64. The provisions under which a request for a change in working arrangements may be made are not civil penalty provisions.[28] There is

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[25] *FW Act*, s.65(4).
[26] *FW Act*, s.65(5).
[27] *FW Act*, s.62(6).
[28] *FW Act*, s.44(2).

therefore no penalty provision attaching to any contravention of the requirement to refuse a request for a change in working arrangements only on the basis of reasonable business grounds.

Notice of termination and redundancy pay

Notice of termination

65. An employer must provide written notice of termination to an employee.[29]

66. The *FW Act* does not specify how the "written notice of the day of termination" must be "given" to the employee. However, ss.28A and 29 of the *Acts Interpretation Act 1901* (Cth) provide that where written notice is required to be given to a person that notice may be given by:

    a) delivering it personally;

    b) leaving it at the person's last known address; or

    c) sending it by prepaid post to the person's last known address.

67. Each of the above would therefore be acceptable means of giving the employee written notice of termination.

68. It might be argued that written notice of termination could also be given by email or face book or other electronic means, where the relevant electronic account is one which is "owned" by the employee. This possibility is one which has not yet been considered in connection with the provisions of the *FW Act* requiring the giving of written notice to an employee.

69. There are means by which it is reasonably clear written notice will not be given to an employee. They include:

    a) advice to the relevant unions, whether written or otherwise concerning the employee's termination;[30]

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[29] *FW Act*, s.117(1).

[30] It should however be noted that notice to, and/or consultation with, a relevant union or unions might be required by other provisions of federal or state legislation or modern awards or enterprise agreements.

b) by putting a written notice to all employees (or even individual notices to each employee) on a noticeboard in the workplace.

70. The notice period is on a sliding scale of one to four weeks for employees for the period of continuous service of more than one year to more than five years, plus an extra week if the employee is over 45 years of age with more than two years of service.[31]

71. There is express provision for payment in lieu of notice "at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice."[32] The "full rate of pay" for a national system employee is defined to mean:

> *(1) The full rate of pay of a national system employee is the rate of pay payable to the employee, including all the following:*
>
> *(a) incentive-based payments and bonuses;*
>
> *(b) loadings;*
>
> *(c) monetary allowances;*
>
> *(d) overtime or penalty rates;*
>
> *(e) any other separately identifiable amounts.*[33]

72. There is a different definition of full rate of pay for an employee who is a pieceworker.[34]

73. There is nothing to prevent modern awards and enterprise agreements providing for greater periods of notice of termination to be given by an employer to employees.

74. The *FW Act* also provides that modern awards and enterprise agreements may provide for notice of termination by employees to be given in order to terminate employment.[35]

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[31] *FW Act*, s.117(2).
[32] *FW Act*, s.117(2)(b).
[33] *FW Act*, s.18(1).
[34] *FW Act*, s.18(2).
[35] *FW Act*, s.118.

Redundancy pay

75. Redundancy pay is a newly prescribed national standard, with the level of payment dependent upon the level of continuous service by an employee. The entitlement is on a sliding scale from a minimum of four weeks for an employee with at least one year's service to a maximum of 16 weeks for an employee with at least nine but not more than ten years service, and 12 weeks for an employee with at least 10 years service.[36] The reduction in the provision of redundancy payment at 10 years is apparently to account for the fact that employees terminated after 10 years service would generally be entitled to a lump sum of pro rata long service leave.

76. There is nothing to prevent redundancy entitlements being increased to levels above the NES standard under the provisions of modern awards or enterprise agreements.

77. The entitlement to redundancy pay arises if the employee's employment is terminated:

> *(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or*
>
> *(b) because of the insolvency or bankruptcy of the employer.*[37]

78. The entitlement to redundancy pay may be varied by an order of FWA by reducing it to a specified amount (which can be nil) if FWA considers it appropriate to do so.[38] FWA may only do so where the employee is entitled to an amount of redundancy pay and the employer:

> *(i) obtains other acceptable employment for the employee; or*
>
> *(ii) cannot pay the amount.*[39]

79. It should be noted that the employer may apply for the reduction if the employer obtains for the employee other "acceptable employment". This differs from the traditional "suitable alternative employment", and

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[36] *FW Act*, s.119(2).
[37] *FW Act*, s.119(1)(a) and (b).
[38] *FW Act*, s.120(2).
[39] *FW Act*, s.120(1)(b)(i) and (ii).

is different to "alternative employment" or simply "employment". Whether employment is "acceptable" is going to have to be objectively determined by FWA in each case, having regard to the facts, including the circumstances of each employee.

80. The obligation to pay redundancy pay does not apply to a "small business employer".[40] A small business employer is defined as:

> *23(1) A national system employer is a small business employer at a particular time if the employer employs fewer than 15 employees at that time.*
>
> *(2) For the purpose of calculating the number of employees employed by the employer at a particular time:*
>
> *(a) subject to paragraph (b), all employees employed by the*
>
> *employer at that time are to be counted; and*
>
> *(b) a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis.*
>
> *(3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.*
>
> *(4) To avoid doubt, in determining whether a national system employer is a small business employer at a particular time in relation to the dismissal of an employee, or termination of an employee's employment, the employees that are to be counted include (subject to paragraph (2)(b)):*
>
> *(a) the employee who is being dismissed or whose employment is being terminated; and*
>
> *(b) any other employee of the employer who is also being dismissed or whose employment is also being terminated.* [41]

81. Various groups are "specifically excluded" from:

a) both termination and redundancy, namely those employees:

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[40] *FW Act*, s.119(1)(b).

[41] *FW Act*, s.23. Particular note should be made of the reference to "associated entitles" in sub-s.(3). An "associated entity" is defined in s.50AAA of the *Corporations Act 2001* (Cth).

i) employed for a specified period of time, specific task or the duration of a specified season;

ii) terminated because of serious misconduct;

iii) who are casuals; and

iv) who are not apprentices to whom a training scheme applies and whose employment is for a specified period of time or limited to the duration of the training arrangement,

provided that they are not prevented from applying if a "substantial reason" for employing the employee as described was to avoid the application of the termination and redundancy provisions;[42]

b) notice of termination provisions, namely those employees who are:

i) daily hire employees in the building and construction industry; or

ii) daily hire employees in the meat industry employed in connection with the slaughter of livestock; or

iii) weekly hire employees working in connection with the meat industry whose termination of employment is determined solely by seasonal factors;[43] and

c) redundancy provisions, namely those employees who:

i) are apprentices; or

ii) to whom an industry-specific redundancy scheme in a modern award applies; or

iii) to whom an industry-specific redundancy scheme in an enterprises agreement applies, if:

[42] *FW Act*, s.123(1).
[43] *FW Act*, s.123(3).

(1) the scheme is an industry specific redundancy scheme incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation; and

(2) the employee is covered by the industry-specific redundancy scheme in the modern award.[44]

Transfer of employment situations that affect the obligation to pay redundancy pay

82. There is no entitlement to redundancy pay, unless otherwise determined by FWA, where service with the first/old employer is recognised by the second/new employer and where the employee rejects an offer of employment with the second/new employer on terms substantially similar and no less favourable overall to the employee.[45]

83. An employee who does not have a period of continuous service with an employer of 12 months or more immediately before the time of termination or at the time when given notice of termination is not entitled to redundancy pay.[46]

84. Modern awards may also include terms specifying other situations in which there is not an obligation to pay redundancy pay upon the termination of an employee's employment,[47] and such term may be incorporated by reference into an enterprise agreement and provide that it covers some or all of the employees who are covered by the award term.[48]

Civil penalty provisions

85. The notice of termination and redundancy pay provisions are civil penalty provisions contravention of which exposes the contravener to penalties of up to $6,600 and $33,000 for an individual and a company respectively.

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[44] *FW Act*, s.134(4).
[45] *FW Act*, s.122.
[46] *FW Act*, s.121(1).
[47] *FW Act*, s.121(2).
[48] *FW Act*, s.121(3).

Conclusion

86. The three new National Employment Standards discussed above provide for significant new entitlements for employees and obligations for employers. Many of the issues raised in the general observations made in this paper will be resolved in workplaces. Others might ultimately require more formal means of determination or adjudication. All however will need to be carefully considered, and observed as required by the *FW Act*.