

SECRETARIAT

PO Box 2062
Port Adelaide DC, SA, 5015
Email: irssa@adam.com.au
Internet: www.irssa.asn.au
Phone: 1300 918 207
Fax: 08 8125 5631

COMMITTEE OF MANAGEMENT

President

Craig Stevens

Vice President

Kaye Smith

Immediate Past President

Sandra Dann

Secretary

Rodger Prince

Treasurer

Glen Seidel

Committee Members

Kylie Dunn
Trevor Evans
Commissioner Peter Hampton
Justin Ward
Sharaze Pentland
David Johns
Darryl Anthony

Note: The views of the contributors are not necessarily those of IRSSA

Patron:

**Hon Trevor Olsson, LL.B, AO MBE,
GCSJ, RFD, ED**

Print Post Approved: PP535216/00024

PRESIDENT'S MESSAGE

Dear Members

A sub-committee of the Committee of Management has been busy reviewing the Rules of the Industrial Relations Society of South Australia. The language in the Rules requires some modernisation and amendment is also required to ensure compliance with the *Associations Incorporation Act 1985*. The Committee will present proposed Rule changes to Members at either a Special General Meeting or the next Annual General Meeting where Members can also decide upon the possible name change of the Society to the Australian Labour and Employee Relations Society SA, or, as a possible alternative, the Society trade under that name with no substantive change to its existing name. I look forward to seeing you at one of the Society's events in the near future.

Best wishes,

Craig Stevens
IRSSA President

Possible Future Changes to the Workplace Relations Framework

By Kylie Dunn, IRSSA Committee Member and Jason Leonardis, Lawyer, DMAW Lawyers

Last year the Australian Government requested the Productivity Commission (the Commission) to undertake a wide ranging inquiry into Australia's workplace relations framework to recommend improvements to maximise outcomes for employers, employees and the economy generally.

DID YOU KNOW?????

The South Australian Law Society has confirmed that all IRSSA seminars are recognised as CPD activities for the purposes of Practising Certificate requirements in South Australia. Legal practitioners in South Australia can claim 1 CPD unit for an active hour at an IRSSA seminar.



IRSSA is now calling for articles for its quarterly newsletter. Articles can be on any topical industrial relations matter and typically should be approximately 400 -500 words. If you are interested in submitting an article for the June newsletter please contact Justin Ward, IRSSA Newsletter Editor. Justin's email is justin.ward@sa.gov.au.

In a lengthy report, the Commission has made a number of recommendations that may bring about further future changes to the Australian workplace law landscape.

A summary of the Commission's key recommendations follows.

Sunday Penalty Rates

Sunday penalty rates that are not part of overtime or shift work may be altered to reflect Saturday rates for certain industries, primarily the hospitality, entertainment, retail, restaurant and cafe industries which typically experience busy Sunday trading periods.

National Employment Standards

The Commission recommended inserting into all modern awards a provision that the National Employment Standards (**NES**) permit employers and employees to agree to substitute a public holiday for an alternative day. Currently this is only available if it is a term of an award or enterprise agreement.

The Commission also recommended that long service leave remain a state-based entitlement rather than be incorporated into a unified national scheme.

The Commission identified that there was industry support for two new workplace entitlements, one relating to support for employees experiencing family/domestic violence, and another to facilitate breastfeeding in the workplace.

Unfair Dismissal

The Commission recommended the introduction of a two-stage test for unfair dismissal: the first stage being to determine whether there was a valid reason for the dismissal, and the second stage to determine whether any of the factors listed in section 387(b) – (h) of the *Fair Work Act 2009* have occurred.

In terms of remedy, the Commission recommended that the primary remedy be compensation rather than reinstatement as is currently the case.

The Commission also recommended that the Small Business Fair Dismissal Code no longer play a role in unfair dismissal matters.

Continues over...

General Protections

The vagueness of what constitutes a “workplace right” was a concern raised by several stakeholders during the inquiry. The Commission recommended that section 341 of the *Fair Work Act 2009* (Cth) be amended to more precisely define the meaning and application of workplace rights.

Enterprise Agreements

The Commission recommended that:

- the nominal expiry date for enterprise agreements be extended from 4 to 5 years, with a view to minimising business costs associated with negotiating agreements and providing greater certainty to employees in relation to conditions of employment.
- the existing ‘better off overall test’ for approval of enterprise agreements be replaced with a new ‘no-disadvantage test’ involving an assessment of whether a class of employees is no worse off overall under the agreement.

New Enterprise Contracts

The Commission recommended the introduction of a new employment instrument, the enterprise contract, to allow businesses greater flexibility to negotiate individual arrangements with classes of employments to vary the operation of an award in order to suit business operations, subject to employees not being disadvantaged.

IMPORTANT ISSUES FOR EMPLOYERS WHEN AN EMPLOYEE DOES NOT SUCCEED ON PROBATION

By Holly Gardner, Principal, Grace Solicitors

It is often thought that an employee can be terminated during the probation period without notice if the employee is found to be unsuitable. However this is not always the case and a process should be followed.

During the probation period employers need to highlight issues for the employees to address

During the probationary period, the employer should always attempt to address issues. Performance and conduct issues often arise because an employee does not understand what is required of them. The employer should always:

- make sure the employee clearly understands their role, their expected level of output or performance, and the expected conduct at work; and
- provide the employee with regular performance feedback during the probation period and inform them of any changes needed to their work or conduct.

Meeting with the employee to explain why probation will not continue

Towards the end of the probation period, it is important for the employer to meet face to face with the employee to explain the employment will not continue. At the meeting the employer should:

- provide feedback to the employee about their performance or conduct;
- give the employee an opportunity to respond to comments;

-
- explain why the probation period was unsuccessful; and
 - provide a termination letter with the pay entitlements of the employee (including the relevant notice required) and reasons for termination.

Notes: If the employee has been employed for six months or more (even if they are on probation) there are additional steps the employer may need to take before employment is terminated. Also the situation is different if the employee is employed by a small business with less than 15 employees and this should be further investigated.

Letter provided to the employee

A letter confirming that probation has been unsuccessful and that the employment will not continue should be provided to the employee. When drafting the letter, the employer should:

- review the letter of engagement/relevant industrial award/enterprise agreement to check the duration of the probation period;
- check whether the relevant industrial instrument (e.g. an award or enterprise agreement) contains any compulsory rules about probationary employment;
- consider the reasons why the employment is being terminated i.e. performance based and/or not a cultural 'fit';
- provide an employee notice to end his or her employment. The employer should check the relevant engagement/relevant industrial award/industrial agreement to check the amount of notice and this notice period should be specified in the letter; and
- confirm the date the employment will end.

Note: Notice is not required in the case of serious misconduct.

IMPORTANT NOTE: The content contained in this article is information only and not legal advice. No reliance should be placed on the content and the writer and/or Grace Solicitors does not accept responsibility for any reliance placed on the content.
