



Australian Government

The Fair Work Act 2009 – an overview

On 1 July 2009, Australia's workplace relations system changed. There are now new workplace relations laws in place, which have been designed to balance the needs of employees, the unions and employers.

The new system will deliver a balance that will allow Australia to become more competitive and prosperous without taking away workplace rights and guaranteed minimum standards.

The *Fair Work Act 2009* (the Act) creates a new legislative framework for workplace relations.

This fact sheet provides an overview of key elements of the new system.

Fair Work Australia

The Australian Government has established an independent umpire, Fair Work Australia, to oversee the new workplace relations system.

Fair Work Australia is a modern accessible body. Its focus is on providing fast and effective assistance for employers and employees.

Fair Work Australia has the power to vary awards, make minimum wage orders, approve agreements, determine unfair dismissal claims and make orders on such matters as good faith bargaining and industrial action, to help employees and employers resolve disputes at the workplace.

There is also an inspectorate headed by the Fair Work Ombudsman. Specialist Fair Work Divisions are being created in the Federal Court and Federal Magistrates Court to hear matters which arise under the new workplace relations laws.

A fair and comprehensive safety net of minimum employment conditions

The new workplace relations system will provide a strong safety net for employees that cannot be stripped away. The safety net comprises two parts—the 10 National Employment Standards and new modern awards. The safety net will apply to all employees in the federal system from 1 January 2010. Fair Work Australia, the new industrial umpire, will also set minimum wages for award and agreement-free employees through a national minimum wage order.

The National Employment Standards comprise 10 legislated employment conditions covering essential conditions such as maximum weekly hours of work, leave, public holidays, notice of termination and redundancy pay and the right to request flexible working arrangements.

Award modernisation will create new simple modern industry or occupation-based awards that will streamline and simplify thousands of awards.

Special provision is made to modernise enterprise awards on a case by case basis and integrate them into the new system.

Fair Work Australia will review each modern award every four years to maintain a relevant and fair minimum safety net and to make sure it continues to meet the needs of the community. Minimum wages in awards will be reviewed annually.

An interim review of modern awards will take place in 2012, two years after modern awards commence.

This review will examine whether modern awards are achieving the modern awards objective and operating effectively, without anomalies or technical problems arising from the award modernisation process.

Good faith collective bargaining at the enterprise level

Collective bargaining at the enterprise level is at the heart of the Government's new workplace relations system.

Generally, an enterprise agreement will be made between an employer and some or all of their employees. There is no need for formal notification to commence bargaining—in most cases parties can simply agree to negotiations and successfully bargain with one another to create an enterprise agreement.

Where an employer refuses to bargain and there is either no existing agreement in place, or it is within 90 days of the nominal expiry date of an existing agreement, an employee bargaining representative can ask Fair Work Australia to determine if there is majority employee support for negotiating an enterprise agreement. If Fair Work Australia determines there is majority support, the employer must bargain collectively with the relevant employees in good faith.

There is no distinction between union and non union agreements under the new system. Employees can nominate who will represent them in bargaining and their employer must respect their choice. Employers are required to notify their employees of their right to representation. Employees who are union members will automatically be represented by their union, unless they elect to appoint another person as their representative or revoke the union's status as their representative.

Bargaining representatives must meet the good faith bargaining requirements prescribed in the Act when bargaining for a proposed enterprise agreement. These include that a bargaining representative must recognise and bargain with all other bargaining representatives. However, these requirements do not mean that either employers or employees have to make concessions or reach agreement on terms that are to be included in the agreement.

When bargaining is not occurring in good faith, Fair Work Australia has the power to make orders to ensure compliance with the requirements.

In the event of serious and sustained breaches of bargaining orders which significantly undermine bargaining, a bargaining representative can apply to Fair Work Australia for a serious breach declaration. If Fair Work Australia makes a declaration, and bargaining representatives have not reached agreement within 21 days, Fair Work Australia can make a workplace determination to resolve the matters that are still at issue. There is a high threshold for accessing workplace determinations in these circumstances.

Greenfields agreements

The new workplace relations system includes provisions for making greenfields agreements. However, before a greenfields agreement is approved, Fair Work Australia must be satisfied that the employee organisation(s) that will be covered by the agreement are entitled to represent the industrial interests of a majority of the prospective employees for that agreement. Fair Work Australia must also be satisfied that it is in the public interest that the agreement be approved.

Bargaining assistance for the low-paid

A new feature of the workplace relations system is a special low-paid bargaining stream.

This new stream is intended to help workers who have missed out on the benefits of bargaining in the past. These include workers in areas like child care, aged care, community services, security and cleaning, who are often paid the basic award rate.

In the special low-paid stream, Fair Work Australia will facilitate the making of agreements and will play a hands-on role to get the parties bargaining.

In order to encourage agreement making, Fair Work Australia also has powers (in limited circumstances) to make a binding special low-paid workplace determination to settle matters at issue during bargaining where, despite the best endeavours of Fair Work Australia and the parties, the bargaining fails.

Clear tough rules on industrial action

An important feature of the new workplace relations system is clear tough rules for industrial action.

Employees can take protected industrial action to support or advance claims during collective bargaining. Industrial action initiated by or on behalf of employees will only be 'protected' if it has been authorised by a mandatory secret ballot and meets all other requirements contained in the Act.

Industrial action by employers or employees in response to industrial action by the other party is also protected, provided it is taken in accordance with the requirements of the Act.

The Act establishes proportional and sensible options for responding to industrial action.

- It is unlawful under the Act for an employer to pay strike pay, or for an employee to demand or request it.
- Where unprotected industrial action is taken it is mandatory for an employer to withhold at least four hours pay.
- Where protected industrial action is taken, pay will be withheld for the duration of the period of industrial action only.
- In the event of protected partial work bans, an employer will have the option of issuing a 'partial work notice' and deducting an employee's wages, proportional to the duties the employee has refused to perform.

Where unprotected industrial action takes place or is being organised, Fair Work Australia is required to issue an order for it to stop, not occur or not be organised. In addition, the Federal Court or Federal Magistrates Court may grant an injunction to ensure a person does not contravene a 'stop order' or to prevent industrial action being taken if it is in support of pattern bargaining.

Where protected action is causing or is threatening to cause significant harm to the Australian economy or part of it, or endangers the safety, health or welfare of the population or part of it, Fair Work Australia will be required to order the parties to stop taking industrial action. Fair Work Australia may also order parties to stop taking industrial action if the action is causing (or threatening to cause) significant economic harm to both bargaining participants. If further negotiation does not lead to an agreement, Fair Work Australia may determine a settlement in these circumstances.

Right of entry

The Government has also maintained existing right of entry rules which ensure that only fit and proper persons are permitted to enter workplaces on behalf of unions, and that permit holders understand that their rights come with significant responsibilities. The Government has kept these commitments.

The right of entry provisions in the Act largely replicate the provisions in the Workplace Relations Act. The key difference is that right of entry will now be linked to a union's right to represent the industrial interests of the relevant employees, rather than coverage by an instrument such as an award or enterprise agreement. Fair Work Australia will be able to advise employers as to the eligibility of a union to represent their employees.

Unions must comply with very strict conditions of entry: they must hold a valid permit; give at least 24 hours' notice; and comply with strict requirements for conduct on site. Sanctions will apply to a permit holder who misuses entry rights or acts inappropriately.

There are strong protections against misuse of information obtained in the course of investigating suspected breaches of the Act or an instrument made under the Act. In particular, a person cannot disclose information obtained during an authorised entry for a purpose other than rectifying the alleged breach, or in specific limited circumstances where there is a public interest in the information being disclosed (e.g. to report a serious potential threat to public health or safety).

Where a union exercises entry for discussion purposes, it can only hold discussions with workers who want to participate.

The Act includes new right of entry provisions that apply specifically to outworkers in the Textile, Clothing and Footwear (TCF) industry. These new provisions are tailored to the unique nature of this industry. For example, a permit holder can enter premises to inspect relevant documents even if the TCF outworkers do not work at the premises. In addition, advance notice of entry is not required when permit holders enter any premises to investigate suspected breaches relating to TCF outworkers.

Protections from unfair dismissal for all employees

Under the new workplace relations system there are new laws regarding unfair dismissal that are fair to small business owners and their employees.

Employees of a small business are not able to make a claim for unfair dismissal until after they have served a minimum employment period of 12 months, while for larger businesses, the minimum employment period is six months.

'Operational reasons' are no longer a defence to a claim of unfair dismissal. However, a dismissal is not unfair if it is because of genuine redundancy.

The new system also provides for the declaration of a simple Small Business Fair Dismissal Code which will make it easier for small business employers to follow and comply with unfair dismissal laws.

There is a specialist information and assistance unit which has been established within the Office of the Fair Work Ombudsman for small and medium sized employers to get assistance and advice when considering dismissal.

Fair Work Australia will conduct a thorough and transparent review of the first three years operations of the new unfair dismissal arrangements, and will particularly take into account the experience of employers of small and medium sized businesses.

A balance between work and family life

There are a number of provisions within the Act that will assist to promote a balance between work and family life.

Modern awards and enterprise agreements must include provision for the making of individual flexibility arrangements, which will allow for genuine flexibility (e.g. family friendly working hours) for employees and employers, while ensuring strong protections for employees.

The National Employment Standards increase the amount of unpaid parental leave available to parents and provide a new right to request an extension of unpaid parental leave. The extension may be for a period of up to 12 months (subject to any leave taken by the parent's partner). A request may only be refused on reasonable business grounds. The Standards also provide the right to request flexible working arrangements, which an employer can only refuse on reasonable business grounds.

There are also additional protections in the Act to ensure protection from all aspects of workplace discrimination, including new protections for employees who are also carers.

The right to be represented in the workplace

Under the new workplace relations system, employees will remain free to choose to be, or not to be, a union member. They will also have the choice of whether or not they wish to participate in collective activities such as bargaining for an enterprise agreement or taking protected industrial action.

The Act protects employees' freedom to choose whether to be represented by a legitimate workplace representative or union delegate.

It is now unlawful for a person to be dismissed or discriminated against because they were representing employees in the workplace in the negotiation of an enterprise agreement.

More information

Further fact sheets on the following topics are available from
<http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Pages/FactSheets.aspx>:

- The new workplace relations system
- Fair Work Australia institutions
- A strong and simple safety net for all Australian workers
- Minimum wages
- General protections for freedom of association and other workplace rights
- Bargaining in good faith
- Assisting low paid employees and those without access to collective bargaining
- Approval and content of enterprise agreements
- A simple, fair dismissal system for small business
- Clear, tough rules for industrial action
- Transfer of business
- Union right of entry
- Enterprise Agreements
- A smooth transition to the new workplace relations system



Australian Government

1. The new workplace relations system

The Australian Government has delivered its election promises set out in the policy, *Forward with Fairness*. The new workplace relations system embodies the Australian value of 'the fair go' and is based on the belief that economic prosperity and a decent standard of living for all can go hand in hand.

From 1 July 2009, the workplace relations system changed. The Australian Government has implemented a new workplace relations system to ensure fair workplaces around Australia. The new workplace relations system balances the needs of employees, the unions and employers. It delivers a balance that will allow Australia to become more competitive and prosperous without taking away workplace rights and guaranteed minimum standards.

Key elements

The new workplace relations system provides a stronger safety net that workers can rely on, in good and uncertain economic times.

Some of the key features of the new workplace relations system are:

- a fair and comprehensive safety net of minimum employment conditions
- a system that has at its heart bargaining in good faith at the enterprise level
- protections from unfair dismissal for all employees
- protection for the low-paid
- a balance between work and family life, and
- protection of the freedom to choose to be represented in the workplace.

Consultation

In *Forward with Fairness*, the Government committed to taking a measured and consultative approach to developing its substantive workplace relations legislation.

Extensive consultation to develop both the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (passed by Parliament on 19 March 2008) and the *Fair Work Act 2009* (passed by Parliament on 20 March 2009) was undertaken with a range of groups. To ensure the best possible final product peak union and employer bodies and state and territory workplace relations ministers were given unprecedented access to the draft legislation. This ensured these parties had the opportunity to thoroughly examine the legislation and to make suggestions for its improvement.

This consultation continued during the development of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009*. This legislation ensures a smooth, simple transition to the new system.

Next steps

On 17 June 2009 the Government introduced separate legislation into the Australian Parliament to provide a balanced framework for cooperative and productive workplace relations in the building and construction industry. The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 provides compliance arrangements for the building and construction industry. This Bill is now the subject of a Senate Committee Inquiry which will hand down its report on 10 September 2009.

The Modern Awards and National Employment Standards will commence on 1 January 2010.

Updated 1 July 2009



Australian Government

2. Fair Work Australia institutions

Under Work Choices employers and employees had to navigate seven agencies.

The new workplace relations system has a new independent umpire to make sure the system is fair and simple to understand for working Australians. This new umpire is Fair Work Australia.

Fair Work Australia will be a modern accessible body. It will be independent of unions, business and government and focused on providing fast and effective assistance for employers and employees.

Fair Work Australia will replace the following Australian Government agencies:

- Australian Industrial Relations Commission
- Australian Industrial Registry
- Australian Fair Pay Commission
- Australian Fair Pay Commission Secretariat
- Workplace Authority.

Fair Work Australia oversees the new, fair, simple and modern workplace relations system. It is based around a user-friendly culture that moves away from the adversarial and often legalistic processes of the past in favour of less formal processes. The focus is on providing fairness and efficiency, and excellent levels of service to users of the system.

Fair Work Australia consists of the President, Deputy Presidents, Commissioners and Minimum Wage Panel members. Fair Work Australia has the power to vary awards, make minimum wage orders, approve agreements, determine unfair dismissal claims and make orders on such things as good faith bargaining and industrial action. Fair Work Australia is also able to vary or modify the application of transferring employment instruments in a transfer of business on application from a new employer, and assist employees and employers to resolve disputes at the workplace.

Fair Work Australia has a General Manager and administrative staff. Administrative staff may exercise certain powers and functions under the supervision of Fair Work Australia members. They also provide advice and assistance to employers and employees on the role, functions and processes of Fair Work Australia under the workplace relations laws.

Office of the Fair Work Ombudsman

There is also an inspectorate headed by the Fair Work Ombudsman. The Office of the Fair Work Ombudsman replaces the Workplace Ombudsman.

The Office of the Fair Work Ombudsman also absorbs the education and general advisory functions of the Workplace Authority. Information and advice on all aspects of the new workplace relations system can be obtained by contacting the Fair Work infoline on 13 13 94 or by visiting www.fairwork.gov.au.

While the Office of the Fair Work Ombudsman has separate governance arrangements, its day-to-day operations are practically integrated with Fair Work Australia. Fair Work Australia Inspectors will work under the Fair Work Ombudsman assisting employers, employees and organisations to comply with the new workplace relations laws and, where necessary, take steps to enforce the laws through the court system.

Fair Work Inspectors will have strong and effective investigative powers, including the power to inspect and copy documents and records on an employer's premises. For the first time, inspectors will be able to investigate and enforce breaches of 'safety net contractual entitlements' where they are investigating or seeking compliance with the National Employment Standards, a modern award, enterprise agreement, workplace determination, equal remuneration order or minimum wages order in relation to that employee. 'Safety net contractual entitlements' are terms of contracts that deal with subject matters covered by the National Employment Standards (eg, annual leave; parental leave) or modern awards (eg, minimum wages, penalty rates).

Fair Work Divisions of the Court

Specialist Fair Work Divisions are being created in the Federal Court and Federal Magistrates Court. The Fair Work Divisions will hear matters that arise under the new workplace relations laws.

The Fair Work Divisions will have flexible remedies. The Courts will be able to make any orders considered appropriate to remedy a contravention, including injunctions, rather than just imposing a penalty.

State and Territory courts will retain their existing jurisdiction and powers.

Enforcement of basic safety net entitlements

The legislation also allows entitlements under a common law contract of employment that relate to subject matters described in the National Employment Standards (e.g. leave and notice of termination and redundancy) or modern awards (e.g. wages, penalty rates and allowances) to be enforced by the Federal Court and the Federal Magistrates Court. This will make it easier for employers and employees to enforce related entitlements at the same time. State and Territory courts can also hear claims about these matters.

Small claims

The existing small claims mechanism has been extended to the Fair Work Division of the Federal Magistrates Court and the monetary limitation of the small claims mechanism has been increased from \$10,000 to \$20,000 (including in relevant state and territory courts). This will allow employees to elect to have claims about entitlements (e.g. underpayment of wages) dealt with under a simple and quick mechanism.

When dealing with a matter under the small claims procedure the Fair Work Division may act in an informal manner, are not bound by formal rules of evidence, and may act without regard to legal form and technicality. The Court will have discretion to allow a person to be represented by a lawyer but in most cases this will not be necessary.

Fair Work Australia		Office of the Fair Work Ombudsman	Fair Work Divisions of the Federal Court and Federal Magistrates Court
President of FWA <ul style="list-style-type: none"> Statutory office holder with tenure to age 65 		Fair Work Ombudsman <ul style="list-style-type: none"> Statutory office holder Promotes compliance with legislation, including through education, information and assistance Appoints Fair Work Inspectors 	<ul style="list-style-type: none"> New specialist Fair Work Divisions created in Federal Court and Federal Magistrates Court Deal with all matters arising under new workplace legislation Deal with entitlements under a contract of employment about matters in the National Employment Standards (e.g. leave) or modern awards (e.g. wages) Small claims procedure extended to the Federal Magistrates Court
<i>Tribunal functions</i>	<i>Non-Tribunal functions</i>		
FWA Members <ul style="list-style-type: none"> FWA Deputy Presidents and Commissioners Statutory office holders with tenure to age 65 Functions/powers, include: <ul style="list-style-type: none"> approval of enterprise agreements awards review and variation good faith bargaining orders unfair dismissal industrial action orders mediation and dispute resolution FWA has have broad powers to conduct matters and inform itself as it considers appropriate in an informal and non-adversarial way (e.g. compulsory conferences) 	General Manager <ul style="list-style-type: none"> Statutory office holder Provides assistance to President and FWA members Exercises powers under delegation of President Manages FWA staff, who will assist FWA members to discharge functions (e.g. provide registry functions, gather information for matters before FWA) Provides information about role and functions of FWA Reviews developments in enterprise agreements Conducts research on matters including the use of individual flexibility arrangements and operation of the National Employment Standards relating to requests for flexible working arrangements 	Fair Work Inspectors <ul style="list-style-type: none"> Powers include: <ul style="list-style-type: none"> Entry to premises to monitor compliance with legislation or instruments made under legislation (e.g. National Employment Standards, awards, agreements) Bring court proceedings to enforce rights and obligations Investigate and enforce common law entitlements that relate to the National Employment Standards or modern awards 	<div style="background-color: black; color: white; text-align: center; padding: 5px;">State and Territory Courts</div> <ul style="list-style-type: none"> State and territory courts retain their existing jurisdiction and powers
Minimum wages panel (MWP) <ul style="list-style-type: none"> Sets and adjusts wages in its annual wage review Headed by President 			



Australian Government

3. A strong and simple safety net

The Australian Government has delivered a strong, simple and fair safety net as part of its new workplace relations system.

Work Choices provided only five very basic minimum entitlements for employees—annual leave, personal/carer's leave, parental leave, maximum ordinary hours of work and basic rates of pay and casual loadings. Some vital award conditions could be removed or modified by a workplace agreement without compensation including redundancy payments and penalty rates. The number and types of matters that could be provided in awards were restricted and certain matters were completely prohibited.

In the Government's new workplace relations system all employees have the benefit of clear, comprehensive and enforceable minimum protections that cannot be stripped away. Both employees and employers will have the benefit of a safety net that is simple and flexible—easy to understand and easy to apply.

The safety net will comprise two parts—the National Employment Standards and new modern awards. It will apply to all employees in the federal system from 1 January 2010.

The National Employment Standards

- Maximum weekly hours of work
- The right to request flexible working arrangements
- Parental leave and related entitlements
- Annual leave
- Personal/Carer's leave and compassionate leave
- Community service leave
- Long service leave
- Public holidays
- Notice of termination and redundancy pay
- Provision of a Fair Work Information Statement, which will detail the rights and entitlements of employees under the new system and how to seek advice and assistance.

Modern Awards

The second element of the safety net is the creation of modern awards by the Australian Industrial Relations Commission. Modern awards will be industry or occupation-based and will streamline and simplify thousands of awards.

Special provision is made to modernise enterprise awards on a case by case basis and integrate them into the new system. In deciding whether to make a modern enterprise award, both enterprise specific and broader industry factors are relevant.

Modern awards build on the National Employment Standards and may include an additional 10 minimum conditions of employment, tailored to the needs of the particular industry or occupation. These include minimum wages, types of employment, arrangements for when work is performed, overtime and penalty rates, annualised wage or salary arrangements, allowances, leave related matters, superannuation and procedures for consultation, representation and dispute settlement.

The Commission will include a flexibility clause in each modern award which will enable employers and employees to negotiate arrangements to meet their individual needs. Protections will make sure that an employee is better off overall under the flexibility arrangement.

Case Study

Sally works in a small retail business in the city. Her daughter's school has asked her to coach a school softball team each Wednesday afternoon. This will require Sally to leave work two hours earlier than usual. Sally writes to her employer asking if she can come to work an hour earlier on Monday and Tuesday mornings and have Wednesday afternoons off. Her employer agrees to trial this for three months. Both Sally and her employer set out the arrangement in writing on the basis that Sally is better off overall because of the change.

Who will be covered by modern awards?

The Commission will create modern awards to cover all employees who perform work that has historically been regulated by awards. Modern awards will not cover those classes of employees who, because of the nature or seniority of their role have not traditionally been covered by awards.

Modern awards will not apply to employees with guaranteed annual earnings of more than \$100,000 (pro rata for part-time employees). The high income threshold will be indexed annually from 27 August 2007 and adjusted in July each year in line with annual growth in average weekly ordinary time earnings for full-time adult employees. The figure that will apply on commencement is \$108,300. This figure will be adjusted on 1 July 2010.

These employees and their employers will be free to agree on terms to supplement the National Employment Standards without reference to an award.

This exemption from the award applies if an employer provides a written undertaking to pay an employee annual earnings at or above the high income threshold over a period of 12 months or more.

A guarantee for a shorter period may apply in the case of a short-term, fixed-term contract or a particular type of work on a short-term basis.

The employer and employee must reach agreement about the undertaking before it commences operation. A guarantee can be entered into before employment commences.

How often will modern awards be reviewed?

Fair Work Australia will undertake four yearly reviews of each modern award to maintain a relevant and fair minimum safety net and to make sure it continues to meet the needs of the community. The first such review is set to take place in 2014, four years after modern awards commence on 1 January 2010.

An interim review of modern awards will take place in 2012, two years after modern awards commence. This review will examine whether modern awards are achieving the modern awards objective and operating effectively, without anomalies or technical problems arising from the award modernisation process.

Awards may also be varied in other limited circumstances (for example where the variation is necessary to achieve the modern awards' objective of a fair and relevant safety net).

Fair Work Australia will undertake annual reviews of minimum wages but will be able to vary award wages outside these reviews, in limited circumstances. These include where Fair Work Australia is satisfied that:

- there are work value reasons that justify the variation where the variation is occurring as part of a four yearly review of a modern award, or
- if the variation is outside the four yearly review and annual wage review processes, there are work value reasons that justify the variation and it is necessary in order to achieve the modern awards' objective of a fair and relevant safety net.

Fair Work Australia will balance public interest, social and economic factors when considering whether and how to vary the content of modern awards.

What about people who are not covered by awards?

The Australian Government is committed to providing protections for employees who are not covered by an award. The 10 National Employment Standards will apply to all employees—whether they are covered by an award or not.

There will be a national minimum wage order for all employees not covered by a modern award.

Other protections for employees

As part of its award modernisation process, the Government has asked the Australian Industrial Relations Commission to create a modern award to provide minimum entitlements for employees who are not covered by another (industry or occupation-based) modern award, and who are performing work of a similar nature to that which has historically been regulated by awards. This award is not to apply to those classes of employees who, because of the nature or seniority of their role have not traditionally been covered by awards.

Default rules for employees not covered by awards or enterprise agreements

To ensure that the National Employment Standards operate effectively, simple and flexible 'default rules' will apply consistently to all employees not covered by an award or enterprise agreement.

The default rules will set out how the National Employment Standards will apply to such employees, by:

- defining which shift workers are entitled to an extra week of annual leave under the Standards
- providing a mechanism to set the employee's 'ordinary hours of work' to underpin the calculation of leave accrual and payment under the Standards, if these are not agreed between the employer and employee
- allowing the averaging of working hours, by written agreement, over a maximum period of 26 weeks
- allowing the cashing out of annual leave by agreement subject to protections, including a requirement that the employee retains at least four weeks leave after the cash out
- allowing agreement between an employer and employee about when and how paid annual leave may be taken
- allowing employers to give reasonable directions about the taking of paid annual leave by an employee, and
- allowing the substitution of public holidays by agreement.



4. Minimum wages

Guaranteed fair minimum wages are a key part of the Australian Government's commitment to establish a safety net for employees. The Government is also committed to providing complete and accessible information for both employers and employees about minimum wages.

Modern awards will specify the minimum wages for all award covered employees.

Under the new workplace relations system, minimum wages and casual loadings will be set and adjusted by a specialist Minimum Wage Panel within Fair Work Australia. The Minimum Wage Panel will comprise seven Fair Work Australia Members, including the President and at least three Minimum Wage Panel Members. Members will be appropriately qualified and have a mix of specialist and generalist expertise. Minimum Wage Panel Member appointments will be part-time and appointees will have expertise in one or more of the following fields:

- workplace relations;
- economics;
- social policy;
- business, industry or commerce.

This mix will ensure that proper consideration is given to the wage-setting parameters, such as the macro-economic impact of the Panel's decisions.

Fair Work Australia will be able to commission research and conduct inquiries into wage-related issues.

How often will minimum wages be revised?

Fair Work Australia will undertake annual reviews of minimum wages but will be able to vary award wages outside of these reviews, in limited circumstances. These include where Fair Work Australia is satisfied that:

- there are work value reasons that justify the variation where the variation is occurring as part of a four yearly review of modern awards, or
- if the variation is outside the four yearly review and annual wage review processes, that there are work value reasons that justify the variation and it is necessary in order to achieve the modern awards' objective of a fair and relevant safety net.

The Minimum Wage Panel will conduct its annual wage reviews through a non-adversarial process, and will do so openly and transparently. Individuals and organisations can make submissions.

Updated wage rates in modern awards take effect from the first pay period on or after 1 July each year and are enforceable by law. This timing will assist businesses by aligning any wage adjustments for employees with the financial year. Changes in modern award wage rates that are made in an annual review will only be able to be deferred in exceptional circumstances. Any deferral must be limited to the particular situation to which the exceptional circumstances relate. Modern awards will include a formula that will ensure that appropriate allowances are automatically varied in accordance with the annual wage review decision.

What about people who are not covered by awards?

The Minimum Wage Panel will also make a national minimum wage order for employees who are not covered by a modern award. The order will include a national minimum wage and special national minimum wages for junior employees, employees to whom training arrangements apply and employees with a disability. It will also include a safety net casual loading for casual employees who are not covered by either an award or an agreement.

How will minimum wages be determined?

When setting and adjusting minimum wages, the Minimum Wage Panel will take the following into account:

- the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth
- promoting social inclusion through increased workforce participation
- relative living standards and the needs of the low-paid
- the principle of equal remuneration for work of equal or comparable value and
- providing a comprehensive range of fair minimum wages for junior employees, employees to whom training arrangements apply and employees with a disability.



Australian Government

5. General protections for freedom of association and other workplace rights

The Australian Government believes that the choice of whether or not people belong to a union is a basic democratic right. That is why, under the new workplace relations system, all Australian employees remain free to choose to be or not to be a union member along with the choice of whether or not they wish to participate in collective activities such as bargaining for an enterprise agreement or taking protected industrial action.

It will be unlawful to try to stop an employee exercising this free choice, for example by threats, pressure, discrimination, victimisation or dismissal.

Combined protections

The *Fair Work Act 2009* streamlines a range of related protections into one part of the legislation, making them simpler to follow. The freedom of association, unlawful termination and other miscellaneous protection provisions (such as an employee's right to reasonably refuse to work on a public holiday) in the *Workplace Relations Act 1996* have been combined into a new set of general protections, effective on 1 July 2009.

Under these combined protections, it is unlawful for a person to take adverse action because another person has, or exercises, a workplace right. Adverse action includes dismissal, discrimination, refusing to employ a person, or prejudicially altering the position of a person. Workplace rights include an entitlement under an award or agreement, or a workplace law.

For example, it is unlawful to discriminate against an employee because they have taken parental leave in accordance with their entitlement under the National Employment Standard.

It is also unlawful to discriminate against a person because they are, or aren't, a member of a trade union.

What else is covered?

The general protections also cover industrial action, sham contracting arrangements, discrimination on a number of grounds including race, sex, sexual preference, age, disability, pregnancy, among others, and absence from work because of illness or injury.

The new general protections provide more comprehensive protections for workers in some situations than was the case under the *Workplace Relations Act 1996*.

For example, under the *Workplace Relations Act 1996* it was unlawful for an employer to dismiss an employee for certain reasons such as because of their sex, race or family responsibilities. Under the new laws, a range of additional adverse actions, falling short of dismissal, are unlawful, for example, placing an employee in a position that pays less, or refusing to employ them, for one of the prohibited reasons.

There are protections to ensure parties are not coerced into making a particular type of enterprise agreement or discriminated against because of the type of agreement that covers them. For example, it is unlawful to coerce an employer to make a multi-employer agreement. Fair Work Australia may only approve such an agreement if it is satisfied that all employers genuinely agreed to make the agreement and were not coerced. It is also unlawful to discriminate against an employer because they have a particular type of agreement or an agreement that covers or does not cover a union or a particular union. There is a new protection to prevent a person being coerced to employ or engage a particular person or appoint them to a particular role.

Case Study 1

Sally works for a finance company. Under her enterprise agreement, she is entitled to a performance bonus if she meets certain personal performance targets. She is assessed by her supervisor as having met the criteria. She then tells her manager that she is pregnant and will be taking maternity leave in four months time.

Sally's manager advises her that she won't be paid the performance bonus because the bonus is paid to "keep good people in the business" and "she won't be around".

Sally could seek a remedy under the new laws because she believes that she was denied the performance bonus because she is pregnant.

Case Study 2

Stephen has been asking his employer to explain his overtime entitlements to him. His employer says he is too busy to discuss it, so after some months Stephen says he will phone the Fair Work Infoline to get the information. Stephen's employer changes the roster that Stephen has been working for the last year, and puts him on night shift, and says to Stephen, "what do you expect if you're a trouble maker?"

Stephen can seek assistance from the Fair Work Infoline and, if the issue is not resolved, Stephen (or a Fair Work Inspector on his behalf) can seek an urgent remedy from the Fair Work Division of the Federal Court.



6. Bargaining in good faith

It is a new requirement under the Act that bargaining representatives for a proposed enterprise agreement must meet the good faith bargaining requirements. Good faith bargaining encourages parties to communicate openly and to focus their negotiations on key issues.

Under the new system, the good faith bargaining requirements are:

- attending and participating in meetings at reasonable times
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- responding to proposals made by other bargaining representatives for the agreement in a timely manner
- giving genuine consideration to the proposals of other bargaining representatives and providing reasons for responses to those proposals, and
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining, and
- recognising and bargaining with the other bargaining representatives for the agreement.

Good faith bargaining will not require parties to make concessions or sign up to an agreement where they do not agree to the terms. Good faith bargaining orders will therefore be about the process and conduct of negotiations and will not require parties to make or accept particular offers.

Majority support

There is no need for formal notification to commence bargaining—in most cases employees and employers can simply agree to start negotiations. Where an employer refuses to bargain, however, employees or their representatives can ask Fair Work Australia to determine if there is majority employee support for negotiating an enterprise agreement.

Fair Work Australia can determine whether there is majority employee support by whatever method it considers appropriate, such as a ballot or a petition.

If Fair Work Australia determines that there is majority employee support for pursuing an enterprise agreement, the employer will be required to bargain collectively with the relevant employees.

The right to be represented

Where Fair Work Australia determines that there is majority employee support for enterprise bargaining or where an employer agrees to or initiates bargaining, or a scope order comes into operation, the employer will be required to notify employees within 14 days of their right to be represented in bargaining.

Employees can appoint a bargaining representative to represent their interests. This may be themselves, a colleague, a union or another person (such as a consultant or accountant). The only requirement for a bargaining representative appointed by an employee is that they must be sufficiently independent of influence from the employer. For union members, their bargaining representative will be taken to be their union (if the union is entitled to represent them) unless they appoint someone else or revoke the union's status as their representative. Employers are also able to appoint their own bargaining representative.

When bargaining is not occurring in good faith

The bargaining framework recognises that most employers and employees will voluntarily and successfully bargain collectively in good faith.

However, in the unusual situation where a bargaining representative is not bargaining in good faith, or the bargaining is not proceeding efficiently or fairly, Fair Work Australia can make orders to ensure the integrity and fairness of the bargaining process. Any orders made by Fair Work Australia can be enforced in the courts.

Examples of conduct where Fair Work Australia could potentially make bargaining orders include:

- a refusal by the employees to respond to a proposal from the employer about new work methods to increase productivity
- pursuing a claim that could not be included in an agreement approved by Fair Work Australia—for example, that does not comply with the National Employment Standards or would not pass the Better Off Overall Test, or which is unlawful
- unfair conduct towards a bargaining representative, such as unreasonably preventing the person consulting with employees to be covered by the agreement
- an employer refusing to meet with the employees' bargaining representative or to respond to the representative's correspondence or telephone calls, or
- unfairly selecting the group of people to whom the agreement would apply and who would get to vote on the agreement.

On very rare occasions there may be parties who ignore orders to bargain in good faith if they believe this will advantage them in bargaining.

If a bargaining representative has breached one or more bargaining orders and the breach is serious and sustained and has significantly undermined the bargaining for the agreement, Fair Work Australia may arbitrate by making a workplace determination.

There is a high threshold for access to workplace determinations in these circumstances, meaning their use is likely to be rare. The provision is aimed at conduct where a union or an employer is prepared to flout the law. Fair Work Australia is required to take account of the views of all other bargaining representatives. Fair Work Australia must also be satisfied that all other reasonable alternatives for reaching agreement have been exhausted and there is no prospect that the agreement will be reached in the foreseeable future.

Agreement variations

The *Fair Work Act 2009* allows agreements to be varied before their expiry date, but only by consent. Access to good faith bargaining orders will not be available when bargaining for variations, although Fair Work Australia can deal with a dispute if requested by an employee or employer association or an affected employee. Fair Work Australia cannot arbitrate such a dispute, unless all the bargaining representatives have agreed.



7. Assisting low-paid employees and those without access to collective bargaining

Work Choices had no provisions to assist the low-paid beyond the five minimum entitlements of the Fair Pay and Conditions Standard and an annual minimum wage review.

Under the new system Fair Work Australia can facilitate multiple-employer bargaining for certain kinds of employees, being the low-paid who have not had access to the benefits of, or who face substantial difficulty undertaking, enterprise-level collective bargaining. This will help employees working in areas like child care, aged care, community services, security and cleaning, who are often paid the basic award rate.

The need for multi-employer bargaining options

Enterprise level bargaining has been a central feature of workplace relations since the early 1990s.

However, over that time not all employers and employees have enjoyed the benefits of enterprise bargaining.

This may have occurred because employees in low-paid sectors generally lack the skills and bargaining power to bargain for improved wages and conditions at the single enterprise level. Similarly, some individual employers in low-paid sectors may lack the time, skills and resources to bargain collectively with their employees.

Some of these employees are unable to negotiate above minimum award rates and conditions because the conditions are effectively set by a third-party (such as a head-contractor), not their direct employer.

To provide employees and employers with another option in these circumstances, the new system provides access to a separate multi-employer bargaining stream for the low-paid.

How will parties enter the low-paid bargaining stream?

A bargaining representative or an organisation of employees with relevant coverage may apply to Fair Work Australia for entry into the low-paid stream to bargain with a specified list of employers.

Fair Work Australia will then consider a range of factors to determine if the proposed multi-employer bargaining is in the public interest. Issues to be considered will include whether multi-enterprise bargaining would assist particular low-paid employees and the history of bargaining in the industry in which the employees work. Fair Work Australia will also be required to consider the extent to which the applicant is prepared to respond to the needs of individual employers.

Individual employers can seek exemption from the process if they feel they should not be included. Decisions by Fair Work Australia that allow multi-employer bargaining in the low-paid stream are subject to appeal.

How will the low-paid bargaining stream operate?

Once in the low-paid stream, parties will benefit from having access to Fair Work Australia to help them negotiate the making of a multi-employer agreement. The types of assistance available include:

- *Compulsory conferences*: Fair Work Australia will remain impartial, but have the power to bring the parties together if this will assist in settling an agreement and to take a more hands-on role in facilitating the negotiations. Fair Work Australia can require a third-party to attend a conference in certain circumstances, if this is necessary to advance the negotiations. This might include a head contractor who actually determines the terms and conditions that apply to the employees.

- *Good faith bargaining orders*: Parties in this bargaining stream can apply to Fair Work Australia for orders to ensure that bargaining processes are being conducted in good faith (see fact sheet number six on bargaining in good faith).
- *Dispute resolution*: Fair Work Australia has broad powers to mediate or conciliate and to make recommendations. At any time, some or all of the parties can agree to Fair Work Australia resolving the issues in dispute by making a consent low-paid workplace determination.

In order to encourage agreement making, Fair Work Australia also has limited powers to make a binding special low-paid workplace determination to settle matters in dispute during bargaining if, despite the best endeavours of Fair Work Australia and the parties, the bargaining fails.

There are strict criteria for access to such a workplace determination. Access will only be available as a last resort. It will only be available for those employers and their employees who are bargaining for the first time under the Fair Work Act and where the relevant employees are substantially reliant on the safety net and there is no collective agreement currently in operation at the workplace. Fair Work Australia must be satisfied that making such a workplace determination will promote workplace productivity and efficiency. In deciding the outcome of the determination, Fair Work Australia must take into account the need to maintain the competitiveness of the employer.

Parties who bargain in the low-paid bargaining stream are not able to take protected industrial action in support of their bargaining claims. Protected action is available only in support of single-employer bargaining.

Outcomes of bargaining in the low-paid stream could include:

- A single agreement that applies to the enterprises of a number of named employers, which may have identical terms for each employer or some variations within it for different employers
- A number of agreements with different terms applying to different enterprises, or
- A combination of these.

Case Study

The Child Care Union has been surveying its members and many of them have expressed frustration with their inability to negotiate flexible working arrangements and pay increases. These workers feel they are being left behind when it comes to being able to negotiate better pay and conditions.

The union has found it difficult to negotiate with employers as some of them lack the resources and skills to bargain collectively.

The union asks Fair Work Australia to consider assisting it to negotiate a multi-employer agreement with six child care operators. Fair Work Australia considers whether the request to bargain in this stream is in the public interest, having regard to a number of criteria including the interests of the child care workers and whether and how child care employers have previously negotiated pay and conditions for workers.

Fair Work Australia decides that the union may negotiate on a multi-employer basis with five of the six employers. One employer is exempted as it already has a common law above-award arrangement in place that was developed with staff input.

Fair Work Australia works with the union and the other five employers on negotiating an agreement. With Fair Work Australia's assistance, the union successfully negotiates a separate agreement with one employer and a multi-employer agreement with four employers, which provides for flexibility for employees around rosters and annual pay rises tied to productivity improvements.



8. Approval and content of enterprise agreements

Work Choices prohibited certain content in enterprise agreements including payroll deductions for union membership and leave for occupational health and safety training where it is conducted by a union.

The new workplace relations system enables employers and employees to bargain over a wide range of matters. These provisions balance the legitimate interests of an employer and employees during the bargaining process. They ensure the focus of an agreement is on the direct employment relationship between the employer and employees and, where relevant, the union.

The concept of prohibited content no longer exists in the new workplace relations system.

Approval of agreements

All agreements need to be approved by Fair Work Australia before they commence operation.

When applying for approval of an agreement by Fair Work Australia, a bargaining representative must submit a signed copy of the agreement and any declarations required by Fair Work Australia.

Before approving agreements Fair Work Australia must be satisfied that:

- the employees genuinely agree to the agreement and approval would not be inconsistent with the good faith bargaining requirements
- the group of employees covered by the agreement was fairly chosen and requirements relating to specific categories of employees, such as outworkers, have been met
- each award-covered employee and prospective award-covered employee will be better off overall by entering into the agreement
- the terms of the agreement do not contravene the National Employment Standards
- the agreement does not contain unlawful content and the required terms (i.e. nominal expiry date and a term about settling disputes) are included, and
- if the agreement is a multi-enterprise agreement, all employers have genuinely agreed to make the agreement, and no person coerced, or threatened to coerce, any of the employers to make the agreement.

An agreement will come into operation seven days after Fair Work Australia approves it, or a later date if one is specified in the agreement.

The Better Off Overall Test

Fair Work Australia will apply the Better Off Overall Test to ensure that each award-covered employee and each prospective award-covered employee who will be covered by the agreement will be better off overall in comparison to the relevant modern award.

Fair Work Australia may examine classes of employees in applying the Better Off Overall Test. Fair Work Australia will assume, in the absence of evidence to the contrary, that an employee will be better off overall if their class of employees will be better off overall in comparison to the relevant modern award.

The Test will be applied as a point in time test. Minimum wage provisions in awards or the national minimum wage order will override less generous minimum wage provisions in an enterprise agreement, to ensure that agreements are not made with the intention of bypassing the safety net. This will mean that where minimum award rates increase during the life of an agreement to above the agreement rates, employers will have to pay the higher rate.

Content of agreements

Agreements are able to contain permitted matters, which include matters pertaining to the relationship between:

- a. the employer and the employees, and
- b. the employer and any union to be covered by the agreement.

Deductions from wages for any purpose authorised by an employee such as salary sacrifice or deduction of union dues may also be included, as will terms dealing with the operation of the agreement.

Terms that are not about permitted matters cannot be the subject of protected industrial action. If terms in agreements do not meet these criteria, they will be void and unenforceable.

If a term in an agreement is not about a permitted matter, it will have no effect.

The expression 'matters pertaining to the relationship' has been used for over 100 years and brings with it established legal principles.

Courts in the past have found certain kinds of claims do not pertain to the employment relationship, such as clauses requiring an employer to make a donation to a third party, requiring an employer to only use certain suppliers or that outright prohibit the engagement of contractors.

To be approved, agreements are also required to contain terms that provide for:

- a nominal expiry date, and
- a procedure that requires Fair Work Australia or another independent person to settle disputes about any matters arising under the agreement and in relation to the National Employment Standards. The term must also allow for the representation of employees in the dispute settlement procedure.

Agreements must also contain terms about:

- individual flexibility arrangements that can be made between the employer and individual employees, and
- consultation on major workplace change.

Parties are able to negotiate such terms to meet their particular circumstances. Where an agreement is silent on these two matters, the model terms set out in regulations will be deemed to be incorporated.

Terms about certain matters will be classed as unlawful content and cannot be included in agreements. These include terms that:

- are discriminatory
- breach the general protections
- require the payment of a bargaining services fee to a union
- provide remedies for unfair dismissal to persons who have not served the applicable minimum employment period (i.e. six or 12 months), or exclude or modify unfair dismissal protections to the detriment of a person
- provide for right of entry to an employer's premises in a way that is inconsistent with certain right of entry laws, or
- purport to authorise industrial action during the life of the agreement.

Fair Work Australia will not approve agreements that contain unlawful content.



9. A simple, fair dismissal system for small business

A new, fair dismissal system has been introduced as part of the new workplace relations system. New dismissal laws took effect on 1 July 2009.

Under Work Choices, employees in businesses with up to 100 workers could be dismissed for any reason without any right to challenge the dismissal as being harsh, unjust or unreasonable. For other employees, the employer had only to demonstrate the dismissal was for 'operational reasons' and there would be no right of challenge or redress.

The removal of these rights resulted in clear hardship for many, and in real feelings of insecurity when workers realised they could be dismissed at any time for no reason.

A new fair dismissal system

The Government has established new laws regarding unfair dismissal that are fair to small business owners and their employees.

The objective of these laws is to ensure good employees are protected from being dismissed unfairly, while enabling employers to manage under-performing employees with fairness and with confidence.

Special arrangements for small businesses

Within the overall unfair dismissal system, special arrangements apply for small businesses with fewer than 15 full-time equivalent employees until 1 January 2011. From 1 January 2011, the special arrangements will apply to small businesses with fewer than 15 employees based on a simple headcount (rather than using a full-time equivalent calculation).

These arrangements recognise the special circumstances of small business owners. They do not have human resource management departments, they cannot afford to lose time and they cannot readily redeploy employees into other positions or workplaces.

Compared with larger businesses, small business owners benefit from:

- 1 A doubling of the minimum employment period from six to 12 months, during which time employees cannot take a claim for unfair dismissal, and
- 2 A short and simple Fair Dismissal Code which, if followed by the small business owner, will ensure a dismissal is not unfair.

In addition, there is a specialist information and assistance unit established within the Office of the Fair Work Ombudsman to give small and medium sized employers assistance and advice if they are considering dismissal.

A Fair Dismissal Code for small businesses

The Code sets out the circumstances in which a summary dismissal (a dismissal without notice or warning) is warranted, including cases of theft, fraud and violence.

For under-performing employees, the Code simply requires the employer to give the employee a valid reason, based on the employee's conduct or capacity to do the job, why the employee is at risk of being dismissed and a reasonable chance to rectify the problem.

Multiple warnings are not required. It is desirable, but not necessary, for a warning to be in writing.

The Code sets out a process for dismissal which recognises that employees need a fair go. It contains basic principles that any reasonable person would regard as fair. If an employee is not performing satisfactorily it is only right that they should be warned and have the opportunity to improve their performance. At the same time, employers should have the right to immediately dismiss an employee whose conduct is seriously affecting the business, for example, stealing from the employer.

A simple checklist to aid employers

A simple checklist has been developed to help small business employers to comply with the Code.

What is 'unfair dismissal'?

Unfair dismissal is a dismissal that is harsh, unjust or unreasonable.

If an employee is made redundant, and the redundancy is genuine, the dismissal will not be unfair.

Exclusions from making an unfair dismissal claim

Employees who have not met the minimum employment period (12 months employment in a small business and six months employment in a larger one) are not eligible to make a claim for unfair dismissal.

Employees whose remuneration is more than the high income threshold (unless a modern award or enterprise agreement covers or applies to their employment) are also excluded from making an unfair dismissal claim. The high income threshold from 1 July 2009 is \$108,300 and is indexed annually.

Casual employees employed on an irregular basis are also not eligible to make a claim for unfair dismissal. Only those casual employees who have been engaged on a regular and systematic basis and who have a reasonable expectation that their employment would continue, on that basis, can make an unfair dismissal claim.

Other exclusions from unfair dismissal remedies include seasonal employment and specified-task employment at the end of which an employee's work is no longer required. The ending of employment that was for a fixed period or task is not considered to be a dismissal.

Simple, non-legalistic processes

Where a claim of unfair dismissal is made, a simple, streamlined process applies for both small and larger businesses.

Unfair dismissal claims must normally be lodged with Fair Work Australia within 14 days. Fair Work Australia may take a flexible approach in gathering information. Fair Work Australia may make initial inquiries and discuss the issues with employers and employees, including in informal conferences at mutually agreed locations, with a view to achieving a mediated resolution.

Where there are contested facts, Fair Work Australia may decide the outcome in either a conference or by holding a formal hearing.

The new system is designed to be non-legalistic, the aim being to keep lawyers and contingency fee agents out of the process as far as possible. Under the new system, legal representation may be permitted, but only with Fair Work Australia's permission.

Decisions may be made in a conference setting. Fair Work Australia will act consistently with the principles of natural justice, including by ensuring that both parties get to have their say and are able to respond to allegations put against them.

Full public hearings will only occur where, after considering the views of the parties, Fair Work Australia decides this would be the most effective and efficient way to resolve the matter.

A remedy of reinstatement or capped compensation

Reinstatement will be the remedy unless it is not in the interests of either of the parties. Where reinstatement is not feasible, compensation may be ordered but a cap on compensation will apply. The maximum compensation will be six months' pay, but normally compensation will be well beneath the cap. Employers will no longer need to pay 'go away' money, since the process will be quick, simple and informal.

Fair Work Australia review

Fair Work Australia will conduct a thorough and transparent review of the first three years of operation of the new unfair dismissal arrangements in 2012, and will particularly take into account the experience of employers of small and medium sized businesses.

Small Business Fair Dismissal Code

Commencement

The Small Business Fair Dismissal Code comes into operation on 1 July 2009.

Application

The Fair Dismissal Code applies to small business employers with fewer than 15 full-time equivalent employees.

Small business employees cannot make a claim for unfair dismissal in the first 12 months following their engagement. If an employee is dismissed after this period and the employer has followed the Code then the dismissal will be deemed to be fair.

Employees who have been dismissed because of a business downturn or their position is no longer needed cannot bring a claim for unfair dismissal. However, the redundancy needs to be genuine. Re-filling the position with a new employee is not a genuine redundancy.

The Code

Summary Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

Small Business Fair Dismissal Code Checklist

It is in the interests of the employer to complete this checklist at the time of dismissal and to keep it in case of a future unfair dismissal claim. However, it is not a requirement of the Fair Dismissal Code that the checklist be completed.

1. How many full-time equivalent employees are employed in the business? (Include the dismissed employee and any other employee dismissed at the same time).
- Under 15 full-time equivalent employees
 - 15 full-time equivalent employees or more
- [If under 15 full-time equivalent employees, the Fair Dismissal Code applies.]

2. Has the employee been employed in this business as a full-time, part-time or regular casual employee for 12 months or more?
- Yes
 - No
- [If No, the employee cannot make an unfair dismissal claim.]

3. Did you dismiss the employee because of a genuine redundancy?
- Yes
 - No
- If Yes, explain the reason for the redundancy (for example, economic downturn, introduction of new technology therefore requiring less staff, or another such reason) and whether redeployment was considered.
-
-
-

4. Do any of the following statements apply?
- | I dismissed the employee because I believed on reasonable grounds that: | YES | NO |
|---|--------------------------|--------------------------|
| a. The employee was stealing money or goods from the business. | <input type="checkbox"/> | <input type="checkbox"/> |
| b. The employee defrauded the business. | <input type="checkbox"/> | <input type="checkbox"/> |
| c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace. | <input type="checkbox"/> | <input type="checkbox"/> |
| d. The employee committed a serious breach of occupational health and safety procedures. | <input type="checkbox"/> | <input type="checkbox"/> |

5. Did you dismiss the employee for some other form of serious misconduct?

Yes

No

If Yes, what was the reason?

If you answered Yes to any question in parts 3, 4 or 5, you are not required to answer the following questions.

6. Did you dismiss the employee because of the employee's unsatisfactory conduct, performance or capacity to do the job?

Yes

No

If Yes

	YES	NO
a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed?	<input type="checkbox"/>	<input type="checkbox"/>
b. Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct? If yes, how much time was given? <hr/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?	<input type="checkbox"/>	<input type="checkbox"/>
d. Did the employee subsequently improve his or her performance or conduct?	<input type="checkbox"/>	<input type="checkbox"/>
e. Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him or her an opportunity to respond?	<input type="checkbox"/>	<input type="checkbox"/>
f. Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct or performance could be improved? Please attach any supporting documentation.	<input type="checkbox"/>	<input type="checkbox"/>

7. Did you dismiss the employee for some other reason?

Yes

No

If Yes, what was the reason?

8. Did the employee voluntarily resign or abandon his or her employment?

Yes

No

If Yes, please provide details

DECLARATION

I declare that I believe every statement or response in this checklist to be true.

Signature _____ Date _____