



# Australia's Fair Work system

## 14. A smooth transition to the Fair Work system

The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (T&C Act) and the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (R&C Act) were both passed by the Parliament on 17 June 2009.

The *Fair Work Amendment (State Referrals and Other Measures) Act 2009* (Cth), which gives effect to State referrals from 1 January 2010, was passed by the Commonwealth Parliament on 2 December 2009 and received Royal Assent on 9 December 2009.

The R&C Act deals with consequential amendments to other Commonwealth legislation resulting from the *Fair Work Act 2009* (the Fair Work Act) and additional amendments consequential to any state referrals of workplace relations powers.

The transitional and consequential acts operate together with the Fair Work Act to set out the arrangements for a smooth transition to the new workplace relations system.

The T&C Act repeals the current *Workplace Relations Act 1996* (WR Act) with the exception of Schedule 1 (which deals with registered organisations) and Schedule 10 (which deals with transitionally registered associations). Schedules 1 and 10 are renamed as the *Fair Work (Registered Organisations) Act 2009*. The repeal of the WR Act was one of the last steps required to remove Work Choices.

The T&C Act also includes sensible and practical arrangements for movement into the new system, and covers issues including:

- the continued operation of existing WR Act industrial instruments and setting out how these interact with the Fair Work system, including the National Employment Standards and modern awards
- arrangements to allow bargaining under the new system to commence in an orderly way
- arrangements for the transfer of assets, functions and proceedings from the institutions under the WR Act to Fair Work Australia and the Office of the Fair Work Ombudsman, and
- consequential amendments to other Commonwealth legislation considered essential to the operation of the Fair Work Act (for example, the creation of the Fair Work Divisions of the Federal Court of Australia and the Federal Magistrates Court of Australia).

### ***Key elements of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009***

#### **Commencement of the new system**

In *Forward with Fairness* the Australian Government committed to the new workplace relations system being fully operational by 1 January 2010.

The majority of the Fair Work Act commenced on 1 July 2009. Consistent with the Government's election policy commitments, the new safety net of the 10 National Employment Standards and modern awards commence from 1 January 2010.

## **National Employment Standards and minimum wages**

The T&C Act ensures that the National Employment Standards and minimum wages apply to all national system employees from 1 January 2010, including employees covered by instruments made before the commencement of the new system.

This means that all employees, including employees who made Australian Workplace Agreements under Work Choices, receive the benefit of the 10 minimum National Employment Standards and minimum 'safety net' wages.

The T&C Act also ensures that all employees receive at least the minimum rate of pay (e.g. in an applicable award) from 1 January 2010.

Where this results in an increase for employees to whom a transitional instrument applies, Fair Work Australia will make orders to 'phase in' the increase where it is satisfied that this is necessary to ensure the ongoing viability of a business.

In a case where one or more employees' take home pay is reduced as a direct result of award modernisation, Fair Work Australia is also able to make 'take home pay orders' requiring payment of an amount of money.

## **Transitional instruments**

The T&C Act reflects the Government's commitment that agreements made lawfully under the WR Act can continue to operate, including past their nominal expiry date, until they are terminated or replaced. As a general rule, the content and interaction rules that applied under the WR Act will continue. This will provide certainty for employers and employees.

For example an individual statutory agreement can be unilaterally terminated by either party after the nominal expiry date, by the giving of 90 days' notice to the other party. These agreements can also be terminated at any time where the parties agree.

The T&C Act also outlines how other existing industrial instruments are to be treated under the Fair Work system. This provides for:

- award-based instruments (such as un-modernised awards, notional agreements preserving State awards) and pay scales to cease to operate once they are replaced by modern awards
- a process to allow parties to enterprise awards, and notional agreements preserving State awards (NAPSAs) derived from State enterprise awards, to apply to Fair Work Australia to have their enterprise award modernised and integrated into the modern award system.

## ***Transitional bargaining and agreement-making***

The T&C Act also includes a number of bargaining and agreement-making rules which mean that:

- employees on individual statutory agreements are able to agree with their employer to enter into a conditional termination. This allows them to participate in collective bargaining processes, including voting on a new agreement while retaining existing entitlements under the individual agreement. Once the new enterprise agreement comes into operation, the individual agreement will terminate and the enterprise agreement will apply to the employee.
- the new bargaining framework under the Fair Work Act (including the good faith bargaining requirements) commenced operation on 1 July 2009. Bargaining under the WR Act does not carry over to the new system. However, Fair Work Australia is able to take account of the conduct engaged in by representatives in relation to the negotiations for a collective agreement under the WR Act when considering certain matters under the Fair Work Act.
- protected industrial action does not carry over to the new system either. However, Fair Work Australia will, in very limited circumstances, be able to make orders preserving protected action ballot authorisations made under the WR Act, after 1 July 2009.
- prior to the National Employment Standards and modern awards becoming operational on 1 January 2010, testing of new enterprise agreements against the no-disadvantage test has been undertaken using an appropriate reference instrument (for example, an un-modernised award)
- individual transitional employment agreements (ITEAs) could be made until 31 December 2009.

## ***Institutions***

The T&C Act abolished the Workplace Ombudsman and its functions have been taken over by the Office of the Fair Work Ombudsman. It also provided for the Workplace Authority, the Australian Industrial Relations Commission (AIRC), the Australian Industrial Registry and the Australian Fair Pay Commission (AFPC), and the AFPC Secretariat to continue to operate alongside Fair Work Australia for a limited time to finalise existing matters with different cessation dates.

The T&C Act has also provided for the creation of the specialist Fair Work Divisions in the Federal Court and the Federal Magistrates Court.

## ***Right of entry and representation***

The T&C Act includes transitional rules to deal with right of entry which include effectively deeming permits issued or notices of entry given under the WR Act to also be permits or notices under the new system. It also includes arrangements to enable state-registered unions to participate in the federal workplace relations system and to broaden the scope for Fair Work Australia to make representation orders where there is a disagreement about which union has coverage in a workplace.

## ***Key Elements of the Fair Work (State Referral and Consequential and Other Amendments) Act 2009 and the Fair Work Amendment (State Referrals and Other Measures) Act 2009***

### **State referrals of workplace relations powers**

The R&C Act amended the Fair Work Act enabling States to refer power to the Commonwealth to support a national system for employers and employees in the private sector.

The R&C Act makes arrangements to transition Victorian employers and employees from the system in place under the *Workplace Relations Act 1996* (as extended by Victoria's previous reference) to the new system.

The *Fair Work Commonwealth Powers Act 2009* (Vic), which refers legislative power to the Commonwealth, was passed by the Victorian Parliament, and has commenced. This enabled the Fair Work system to apply in Victoria from 1 July 2009 with no interruption in coverage for Victorian employers and employees.

Legislation to enable referrals has been passed by South Australia, Queensland, Tasmania and New South Wales. The *Fair Work Amendment (State Referrals and Other Measures) Act 2009* (Cth), which gives effect to these State referrals from 1 January 2010, was passed by the Commonwealth Parliament on 2 December 2009 and received Royal Assent on 9 December 2009.

### **Amendments to other Commonwealth legislation resulting from the Fair Work Act**

The R&C Act makes transitional and consequential amendments to 67 Commonwealth Acts that refer to parts of the WR Act or to instruments under that Act which will be repealed by the T&C Act.

These amendments replace references to concepts, institutions and instruments in the WR Act with corresponding concepts, institutions and instruments in the Fair Work Act. For example, references have changed from the Australian Industrial Relations Commission and the Australian Fair Pay Commission to Fair Work Australia.

The R&C Act also makes amendments to other Commonwealth legislation, clarifying the operation of legislation in the new workplace relations system. These include amendments to the *Human Rights and Equal Opportunity Commission Act 1986* to enable the Human Rights and Equal Opportunity Commission to refer to Fair Work Australia industrial instruments alleged to breach the *Age Discrimination Act 2004* and the *Disability Discrimination Act 1992*.