



Australia's Fair Work system

The *Fair Work Act 2009*—an overview

On 1 July 2009, Australia's workplace relations system changed. There is now a new workplace relations system in place, called Fair Work, which has been designed to balance the needs of employees, the unions and employers.

The Fair Work system takes full effect from 1 January 2010 as a new safety net of legislated National Employment Standards and modern awards are put into place.

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

Fair Work is designed to deliver a balance that will allow Australia to become more competitive and prosperous without taking away workplace rights and guaranteed minimum standards.

This fact sheet provides an overview of the key elements of Fair Work.

Fair Work Australia

The Australian Government has established an independent umpire, Fair Work Australia, to oversee Fair Work.

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.

The Fair Work Ombudsman provides employers and employees with a one-stop information and advice service on all aspects of workplace relations, which can be accessed by visiting fairwork.gov.au or by calling the Fair Work Infoline on 13 13 94.

A fair and comprehensive safety net of minimum employment conditions

Fair Work provides 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 applies to all employees in the federal system from 1 January 2010.

Fair Work Australia, the new industrial umpire, also sets 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 has created new simple modern industry and occupation-based awards, streamlining and simplifying thousands of awards down to just 122.

Special provision has been 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 Fair Work 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 Fair Work 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 Fair Work 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

Fair Work 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 Fair Work system is a special low-paid bargaining stream.

This 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 facilitates the making of agreements and plays 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 Fair Work 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 Fair Work 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 Fair Work Act.

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

- It is unlawful under the Fair Work 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 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 Fair Work Act largely replicate the provisions in the *Workplace Relations Act 1996*. The key difference is that right of entry is now 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 can 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 Fair Work 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 Fair Work Act includes new right of entry provisions that apply specifically to outworkers in the Textile, Clothing and Footwear (TCF) industry. These 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 Fair Work, 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.

Fair Work 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 Fair Work Act that are designed to promote a balance between work and family life.

Modern awards and enterprise agreements must include provision for the making of individual flexibility arrangements, allowing 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 Fair Work 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 Fair Work system, employees remain free to choose to be, or not to be, a union member. They 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 Fair Work 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.

National Workplace Relations System for the Private Sector

1 January 2010 marks a major milestone in the evolution of Australia's workplace relations arrangements with the commencement of the Government's single workplace relations system for the private sector.

As of 1 January 2010, private sector employers and employees in New South Wales, Queensland, South Australia and Tasmania, who were covered by a State workplace relations system, are now covered by the Fair Work system.

These employers and employees are covered by special arrangements to ensure a smooth transition to the new national system and join their private sector counterparts in Victoria and the Territories in the Government's Fair Work system.

Australia now has a workplace relations system that provides approximately 96 per cent of all private sector employers and employees with access to the same workplace laws, tribunals, minimum conditions, rights and entitlements as their counterparts doing the same work or operating a similar business, regardless of whether they are within the same state or across a border; and regardless of whether they are trading as a corporation, a sole trader or a partnership.

More information

Further fact sheets on the following policy topics are available from 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

For information and advice about entitlements or obligations under the Fair Work system, visit fairwork.gov.au or call the Fair Work Infoline on **13 13 94**.