



# 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](http://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](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

For information and advice about entitlements or obligations under the Fair Work system, visit [fairwork.gov.au](http://fairwork.gov.au) or call the Fair Work Infoline on **13 13 94**.



# Australia's Fair Work system

## 1. The Fair Work 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, called Fair Work, to ensure fair workplaces around Australia. Fair Work balances the needs of employees, the unions and employers. It delivers a balance designed to allow Australia to become more competitive and prosperous without taking away workplace rights and guaranteed minimum standards.

The Fair Work system takes full effect from 1 January 2010 as a new safety net of minimum employment conditions and modern awards are put into place.

### **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. The Government remains committed to the abolition of the Office of the Australian Building and Construction Commissioner and to replacing it with the Fair Work—Building Industry Inspectorate, and will continue to work towards this objective when Parliament resumes in 2010.



# Australia's Fair Work system

## 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 is to be a modern accessible body. It is independent of unions, business and government and focused on providing fast and effective assistance for employers and employees.

Fair Work Australia replaces 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 [fairwork.gov.au](http://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 work under the Fair Work Ombudsman to assist 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 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 are 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 have been created in the Federal Court and Federal Magistrates Court. The Fair Work Divisions hears matters that arise under the Fair Work laws.

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

State and Territory courts retain their existing jurisdiction and powers.

### ***Enforcement of basic safety net entitlements***

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



# Australia's Fair Work system

## 3. A strong and simple safety net

The Australian Government has delivered a strong, simple and fair safety net as part of the Fair Work 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 Fair Work system all employees have the benefit of clear, comprehensive and enforceable minimum protections that cannot be stripped away. Both employees and employers have the benefit of a safety net that is simple and flexible—easy to understand and easy to apply.

The safety net comprises two parts—the National Employment Standards and new modern awards. It applies 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 details 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 are industry or occupation-based and have streamlined and simplified thousands of awards.

Special provision has been 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 has included a flexibility clause in each modern award which will enable employers and employees to negotiate arrangements to meet their individual needs. Protections are designed to 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 is covered by modern awards?***

The Commission has created modern awards to cover all employees who perform work that has historically been regulated by awards. Modern awards do 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 do 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 applies on commencement is \$108,300. This figure will be adjusted on 1 July 2010.

These employees and their employers are 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.



# Australia's Fair Work system

## 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 specify the minimum wages for all award covered employees.

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

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

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

Fair Work Australia may 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 may also 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, 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 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 allowances of which FWA considers are of the kind that should be varied inline with wage rates, 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 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 may 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.



# Australia's Fair Work system

## 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 Fair Work 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 is 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 Standards.

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.



# Australia's Fair Work system

## 6. Bargaining in good faith

It is a new requirement under the *Fair Work Act 2009* 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 Fair Work*, 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 does not require parties to make concessions or sign up to an agreement where they do not agree to the terms. Good faith bargaining orders are therefore be about the process and conduct of negotiations and do 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 is 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 is 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 is not 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.



# Australia's Fair Work system

## 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 can 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 is also 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 2009* 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.



# Australia's Fair Work system

## 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.

Fair Work 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 Fair Work 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 is required to 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 is 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 means 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 are 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.



# Australia's Fair Work system

## 9. A simple, fair dismissal system for small business

A new, fair dismissal system has been introduced as part of the Fair Work 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. Employers should pay careful attention to the procedural matters under the Code. Meeting these obligations is an important factor in complying with the Code.

### ***A simple checklist to aid employers***

A simple Small Business Fair Dismissal Code Checklist (the Checklist) has been developed to help small business employers to comply with the Code. It is a tool to help small business employers follow the Code's procedural elements when dismissing an employee and understand when the Code applies. It should be noted that completing the Checklist does not mean that the Code has been complied with, nor is it a requirement of the Code that the Checklist be completed. The Checklist should be read in conjunction 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. Under Commonwealth workplace relations law, a termination is a genuine redundancy if:

- the operational requirements of the business have changed and you no longer need the person's job to be done by anyone; and
- you have followed any requirements in an applicable modern award, enterprise agreement or other industrial instrument to consult (e.g. with employees and/or their representatives) about the redundancy.

It is not a genuine redundancy if it would have been reasonable in all the circumstances for the employee to be redeployed.

The requirements for determining whether a redundancy is genuine are set out in section 389 of the Fair Work Act.

When employment for a fixed period or to complete a particular task, or seasonal employment comes to an end, the end of that employment is not considered to be a dismissal.

### ***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 2010 is \$113,800 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.

### ***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 or held over the telephone, 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 Fair Work 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 Fair Work, 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 came 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 requirements for determining whether a dismissal was a genuine redundancy are contained in section 389 of the Fair Work Act. The Small Business Fair Dismissal Code Checklist attached to this document can assist in determining whether a redundancy is a genuine redundancy.

Further information on the application of the Code, genuine redundancy and unfair dismissal is available at [www.fairwork.gov.au](http://www.fairwork.gov.au) or by contacting the Fair Work Infoline on 13 13 94.

## **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

The Checklist is a tool to help small business employers comply with the Small Business Fair Dismissal Code. Completing the Checklist does not mean that the Code has been complied with, nor is it a requirement of the Code that the Checklist be completed. However, completing the Checklist will help small business employers assess and record their reasons for dismissing an employee. 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.

Employers should read the Code before completing the Checklist, ensuring they understand their procedural obligations under the Code. Meeting these obligations is an important factor in complying with the Code.

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 it was a genuine redundancy? In other words, was the dismissal because you didn't require the person's job to be done by anyone because of changes in the operational requirements of your business?

- Yes
- No

4. If Yes,	YES	NO
a. Did you comply with any requirements in a modern award, enterprise agreement or other industrial instrument that applied to the employment, to consult (eg with employees and/or their representatives) about the redundancy?	<input type="checkbox"/>	<input type="checkbox"/>
b. Did you consider if the employee could have been redeployed?	<input type="checkbox"/>	<input type="checkbox"/>

5. 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"/>

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

Yes

No

If Yes, what was the reason?

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If you answered Yes to any question in parts 3, 4 or 5 or 6 you are not required to answer the following questions.

7. In any discussion with the employee where dismissal was possible, did the employee request to have a support person present, who was not a lawyer acting in a professional capacity?

Yes

No

8. If Yes, did you agree to that request?

Yes

No

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

Yes

No

10. 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?	<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"/>

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

Yes

No

If Yes, what was the reason?

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

Yes

No

If Yes, what was the reason?

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**DECLARATION**

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

Signature \_\_\_\_\_ Date \_\_\_\_\_



Australian Government

# Australia's Fair Work system

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

Yes

No

If Yes, please provide details

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**DECLARATION**

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

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Signature

Date

## 10. Clear, tough rules for industrial action

In the Australian Government's new workplace relations system, industrial action is governed by clear tough rules. These rules took effect on 1 July 2009.

### ***Protected industrial action***

Employees may take protected industrial action to support or advance claims during collective bargaining. Action initiated by or on behalf of employees will only be protected if it has been authorised by a mandatory secret ballot and it is in accordance with all other requirements specified in the Act. Bargaining representatives are required to provide the employer with at least three working days written notice of their intention to take the protected industrial action.

Bargaining representatives may apply to Fair Work Australia for a protected action ballot order. While the Australian Electoral Commission will conduct secret ballots by default, ballot applicants can nominate a ballot agent that is not the AEC. Fair Work Australia may decide the nominated agent can conduct the ballot if it is satisfied that the agent meets certain requirements.

Where protected industrial action has been authorised by a secret ballot under the *Workplace Relations Act 1996*, Fair Work Australia will, in very limited circumstances, be able to make orders preserving the authorisation after 1 July 2009.

Employers may also take protected industrial action by locking out employees who have taken industrial action.

A ballot is not required if the employees intend to take protected industrial action in response to industrial action taken by their employer.

### ***Suspending or terminating protected industrial action***

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 is required to order the parties to stop taking industrial action. If further conciliation does not lead to an agreement, Fair Work Australia may determine a settlement.

Fair Work Australia may similarly act to end the industrial action and determine a settlement for the bargaining participants where protected industrial action is protracted, is causing or threatening to cause imminent significant economic harm to the bargaining participants and the dispute will not be resolved in the foreseeable future.

The criteria Fair Work Australia will use to determine a settlement will include matters such as:

- the merits of the case
- the interests of the negotiating parties and the public interest
- how productivity might be improved in the business or part of the business concerned
- the conduct of the bargaining representatives during bargaining and the extent to which they have complied with good faith bargaining requirements, and
- any incentives to continue to bargain.

### ***Unprotected industrial action***

Industrial action will not be protected where, for example, it is taken before the nominal expiry date of an enterprise agreement, where the bargaining representatives are engaging in pattern bargaining, where the parties taking industrial action are not genuinely trying to reach agreement, or where there is a serious breach declaration in place.

Fair Work Australia may issue orders to prevent or stop any unprotected industrial action. If Fair Work Australia is unable to determine whether the action is unprotected within 2 days they are required to issue interim orders to



# Australia's Fair Work system

stop industrial action, unless such an order would be contrary to the public interest.

## **Strike Pay**

Under the Government's new workplace relations system it is unlawful for an employer to pay or an employee to demand or request strike pay. The new system will provide effective dispute resolution processes. Unprotected action such as snap strikes, taken outside of bargaining, is not an acceptable means of resolving workplace issues.

Under Work Choices, there was a requirement to withhold a mandatory four hours pay irrespective of the type of industrial action taken. In the new system, the four hour rule only applies to unprotected industrial action. Employers are required to withhold four hours pay for any incident of unprotected industrial action of up to four hours duration. For incidents of unprotected action of more than four hours, employers are required to withhold payment for the duration of the action.

Unprotected action, such as a snap strike, is unlawful. Because employers often have no opportunity to prepare for the impact of such action, it can cause significant damage to an employer's business. The four hour rule is designed to provide serious consequences for employees and to discourage the taking of unprotected action.

Industrial action that is protected action will be treated differently.

Where protected industrial action is taken that results in the complete withdrawal of labour (in the form of a strike), an employer must withhold payment for the actual period of industrial action. This will ensure that employees only lose pay for the actual period of action taken. This is a fairer and more proportional response than the former arrangements.

The Fair Work Act also clarifies the issue of payment for overtime bans. If an employee refuses an employer's request or requirement to work overtime and the refusal is a contravention of the employee's obligations under a modern award, enterprise agreement or contract of employment, and the refusal is protected industrial action, payment will be withheld for the period when the employee would otherwise have been working overtime. There will be no further deduction of pay. If the overtime ban is unprotected action, then the 'four hour' rule will apply.

There was confusion and uncertainty about how the Work Choices' strike pay rules applied when employees were at work but took protected action by performing only part of their duties (partial work bans). The Fair Work Act includes provisions to provide both clarity and flexibility for employers to respond proportionally to the bans.

This new process permits the employer to choose to either pay full pay or (after notifying the employee) dock part of the employee's wages, proportional to the duties the employee has refused to perform. An employer may also withhold payments altogether, provided they give the employee notice of non-payment. The Fair Work Regulations prescribe a formula for calculating the proportion of the reduction of employees' payments in relation to partial work bans. If an employer chooses to withhold all payment for partial work bans, employees can decide to return to work as directed. If employees continue the bans and the employer withholds all payment, an employee who subsequently withdraws their labour by not attending the workplace will be deemed to be taking protected action.

### ***Case Study***

Nurses are very committed to patient care and are therefore very reluctant to take industrial action that would affect their patients' safety. Where they legitimately wish to take action in pursuit of better pay and conditions through bargaining for a new enterprise agreement some may prefer to institute limited work bans such as not making beds, rather than going on strike. Under Work Choices, employers were legally required to dock their pay for a mandatory four hours for limited work bans. The Fair Work Act allows employers more discretion in dealing with these bans.

Information regarding rules for industrial action is available at [www.fairwork.gov.au/Industrial-action](http://www.fairwork.gov.au/Industrial-action)



# Australia's Fair Work system

## 11. Transfer of business

The transfer of business provisions under the Fair Work system are designed to be simple and fair.

The Work Choices provisions for transmission of business required a legalistic focus on what the 'business' of the old employer was, and whether the new employer had in some way taken over that 'business'. This meant that some of these arrangements between the old employer and the new employer were not regarded as transmissions of business. As a result, employees sometimes lost the benefit of their industrial instruments even though they were performing the same work for the new employer.

These new laws feature a definition of a transfer of business that is simple and easy to understand and which delivers broader protection for employees' terms, conditions and entitlements.

These laws took effect on 1 July 2009.

### ***Definition of 'transfer of business'***

Under Fair Work, the definition of a 'transfer of business' focuses on whether the work performed by employees for each employer is substantially the same and also specifies a required connection between the employers.

There is a transfer of business from an employer to a new employer if:

- the employment of an employee of the old employer has terminated
- within three months, the employee is employed by the new employer
- the transferring employee performs the same, or substantially the same, work for the new employer as for the old employer, and
- there is a connection between the old employer and the new employer.

The new provisions protect employees' terms, conditions and entitlements in a broader range of corporate restructuring activities, including movements to associated entities and some outsourcing and insourcing arrangements.

### ***Terms and conditions of employment***

The Government recognises the importance of balancing employee protections with the need to encourage businesses to take on employees of the old employer and operate in an efficient and productive manner.

Certain workplace instruments that covered employees of an old employer continue to cover those employees if they are offered and accept employment with a new employer within three months of a transfer of business. These include enterprise agreements that have been approved by Fair Work Australia (whether or not in operation), workplace determinations and named employer awards.

Fair Work Australia has broad power to change the coverage of transferred instruments and a new employer's existing instruments to ensure the rules work in a practicable and fair way for employees and employers. On application from the new employer, in addition to being able to order that an instrument will not transfer at all, Fair Work Australia also has flexibility to order that a transferring instrument be modified so that it better fits with the operation of the new enterprise.

In deciding whether to make an order, Fair Work Australia is required to consider matters such as whether employees would be disadvantaged in relation to their terms and conditions of employment.

Fair Work Australia must also have regard to the new employer's situation when considering whether to vary the application of a transferring employment instrument. For example, it must consider factors such as whether the employer will suffer significant economic disadvantage as a result of failing to modify the application of the instrument, and also the degree of alignment between any employment instruments of the old employer and arrangements that already exist in the new employer's enterprise agreement.

### ***National Employment Standards Entitlements***

On a transfer of business, a new employer is bound to recognise employees' service with the old employer when calculating certain National Employment Standards entitlements. These are personal/carer's leave, parental leave and the right to request flexible work arrangements.

In the case of annual leave and redundancy pay, the new employer has a choice whether to recognise service. If the new employer does not agree to recognise service, the old employer must pay out these entitlements. In addition, the National Employment Standards will allow for an employer's redundancy obligations to be waived on a transfer of business should an offer of employment be made by the new employer on substantially similar terms and conditions.

If an employee is transferred to an employer that is an associated entity of the previous employer, service with the previous employer will be deemed to be continuous for the purposes of all service-related National Employment Standards entitlements including annual leave and redundancy pay.

### ***Minimum employment period for unfair dismissal protection***

On a transfer of business, transferring employees' previous service for the purposes of the minimum employment period for unfair dismissal will be recognised unless the new employer expressly informs transferring employees in writing of a requirement for a new minimum employment period.

Where an employee takes up new employment within a three-month period with an employer that is an associated entity of the previous employer, the employee's service with the previous employer will be taken to be continuous for the purposes of the unfair dismissal minimum employment period.



# Australia's Fair Work system

## 12. Union right of entry

The Government promised in *Forward with Fairness* that it would ensure right of entry laws would strike a balance between the right of employees to be represented by unions, and the right of employers to run their businesses without interference.

The Government also promised to maintain 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 2009* (the Fair Work Act) largely replicate the provisions in the *Workplace Relations Act 1996* (WR Act).

Some adjustments have been necessary as a consequence of the new modern award framework which has streamlined and simplified thousands of awards (see fact sheet 3, "A strong and simple safety net" for more information on modernised awards).

The key difference from the previous WR Act is that right of entry is now linked to the right of the union 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 regarding the eligibility of a union to represent their employees.

### ***Right of entry comes with strict obligations***

Whether entering for discussion purposes or to investigate a possible breach of the Fair Work Act or a fair work instrument, unions must comply with strict conditions of entry:

- A union official must hold a valid right of entry permit, issued by Fair Work Australia. Permits can only be issued to a "fit and proper person".
- The permit holder must give at least 24 hours notice before entering and entry can only occur during working hours.
- The permit holder must set out the basis on which he or she has entry rights, including by referring to the relevant parts of the union's rules that gives the union the right to represent the employees.
- A permit holder must comply with any reasonable request from an employer that discussions or interviews take place in a particular part of the premises and that they take a particular route to reach that location. Similarly, he or she must comply with any reasonable occupational health or safety request.

Members (and potential members) of a union are able to meet with the union eligible to represent their interests at the workplace during meal times or other breaks for the purpose of holding discussions. In such discussions, employees and the union might canvass workplace issues as diverse as superannuation, workplace training and development, information on new laws, forthcoming bargaining, union services or health and safety issues.

There are strong penalties for anyone who misuses these entry rights or provides misleading information about their eligibility to enter a worksite. Fair Work Australia can resolve disputes about right of entry issues and will have the power to revoke or suspend the entry permits of officials who abuse their rights or who are no longer a fit and proper person to hold a permit.

## ***Access to employee records only in specific circumstances and with strong penalties for misuse***

Compliance with legal obligations is an important component of the Fair Work system. Unions have a very longstanding role in helping to ensure compliance with workplace laws. Unions can look at and copy the employment records of employees only where those records are relevant to the suspected breach of the law being investigated. This is the position that existed immediately before Work Choices and for many years before that.

Non-member records cannot be inspected or copied by a permit holder unless the non-member gives written consent or if Fair Work Australia agrees that access to the records is necessary to investigate the breach. Furthermore, an employer is not required to provide documents if doing so would otherwise breach a state or federal law.

There are strong protections against misuse of information obtained by a union in the course of investigating suspected breaches. In particular, a person cannot disclose information obtained under the right of 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 potential serious threat to public health or safety).

Controls on the use of information contained in the *Privacy Act 1988* also apply to any personal information collected during investigations. A fine of up to \$6,600 for individuals and \$33,000 for unions will apply where information is misused, and any permit holder found to have breached these provisions must have their permit revoked or suspended.

The Fair Work 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, under the provisions 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.



# Australia's Fair Work system

## 13. Enterprise Agreements

Collective bargaining at the enterprise level is at the heart of the Australian Government's Fair Work system.

New laws governing enterprise agreements took effect on 1 July 2009.

### ***Types of Enterprise Agreements***

The Fair Work system enables enterprise agreements to be made between a single employer, or single interest employers, and their employees (a single-enterprise agreement) or between more than one employer and their employees (a multi-enterprise agreement). Once approved, all enterprise agreements operate according to a common set of rules; however there are different rules for the bargaining, approval, variation and termination of multi-enterprise agreements.

There is now no distinction between union and non-union agreements. This removes the capacity for disputes over which type of agreement parties should enter into. Unions may elect to be covered by an enterprise agreement if they are a bargaining representative for the agreement.

A greenfields agreement can still be made for a genuine new enterprise (which includes a genuine new business, activity, project or undertaking) where the employer or employers have not yet engaged any employees who will be covered by the agreement. A greenfields agreement must be bargained with one or more relevant unions that are eligible (taken as a group) entitled to represent the majority of employees to be covered by the agreement — an employer cannot unilaterally set out a list of terms and conditions and have it approved as an enterprise agreement.

There is no capacity to make an individual statutory agreement (like an Australian Workplace Agreement) under the Fair Work system.

### ***Single-enterprise agreements***

In most cases an enterprise agreement will be made between an employer and some or all of their employees. This is the most common form of enterprise bargaining and there is no requirement to seek authorisation or notify Fair Work Australia when an employer and their employees wish to bargain for an enterprise agreement.

### ***Single-interest employers***

The Fair Work system introduces the concept of single-interest employers for enterprise agreements. Single-interest employers are employers who operate in a related way or share such a common interest that they may bargain together for a single-enterprise agreement.

If two or more employers are engaged in a joint venture or common enterprise or the employers are related bodies corporate, they will be able to bargain for a single-enterprise agreement and will not need authorisation to do so.

In addition, some employers can bargain as single-interest employers where Fair Work Australia authorises them to do so. Single-interest employer authorisations will be available for franchisees and certain employers that have been specified in a Ministerial declaration.

Employers that are not franchisees but who wish to be authorised as single-interest employers must first apply to the Minister for a declaration to allow them to bargain together for an enterprise agreement. A Ministerial declaration could potentially be made in respect of employers such as schools in a common education system and public entities providing health services. There are threshold criteria for a Ministerial declaration, which will prevent the stream being used more widely.

If these employers wish to bargain together they must obtain a single-interest employer authorisation. Fair Work Australia will only make a single-interest employer authorisation if it is satisfied that the employers who would be covered by the agreement have agreed to bargain together without coercion.

### **Multi-enterprise agreements**

Multiple employers who are not single-interest employers may voluntarily choose to bargain together for a multi-enterprise agreement. There is no public interest test for voluntary multi-enterprise bargaining and employers do not need to seek authorisation from Fair Work Australia to bargain together.

Bargaining orders and protected industrial action are not available to parties when bargaining for a multi-enterprise agreement because bargaining will be voluntary. This will also prevent industrial action in support of pattern bargaining. When approving a multi-enterprise agreement, Fair Work Australia must be satisfied that all employers genuinely agreed to make the agreement and were not coerced.

### **Low-paid bargaining stream**

There is a special bargaining stream for low-paid employees who have not had access to the benefits of collective bargaining. Fair Work Australia can facilitate bargaining for a multi-enterprise agreement to cover these employees.

Further details of the low-paid bargaining stream are set out in the fact sheet *"Assisting low-paid employees and those without access to collective bargaining"*.

### **Access to bargaining orders and protected industrial action**

Protected industrial action and bargaining-related orders from Fair Work Australia are not available in all circumstances. This is aimed at preventing pattern bargaining and to ensure that bargaining involving multiple employers happens on a truly voluntary basis.

The following table outlines the access to bargaining-related orders and protected industrial action in different bargaining situations:

<b>Type of enterprise agreement and bargaining situation</b>	<b>Protected industrial action</b>	<b>Bargaining orders/ Serious breach declaration</b>	<b>Majority support determination</b>	<b>Scope orders</b>
Single-enterprise agreement with a single employer or two or more employers that are related bodies corporate, or engaged in a joint venture or common enterprise	✓	✓	✓	✓
Single-enterprise agreement with two or more employers that are specified in a single-interest employer authorisation	✓	✓	✓	✗
Multi-enterprise agreement with two or more employers that are <b>not</b> specified in a low-paid authorisation	✗	✗	✗	✗
Multi-enterprise agreement with two or more employers specified in a low-paid authorisation	✗	✓	✗	✗

# 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*.