Australian Government

The Fair Work Act 2009 – an overview

The workplace relations system will change from 1 July 2009, with new laws designed to balance the needs of employees, the unions and employers.

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

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

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

Fair Work Australia—a 'one-stop shop"

The Australian Government is establishing a new independent umpire, Fair Work Australia, to oversee the new workplace relations system.

Fair Work Australia will be a modern accessible body. It will focus on providing fast and effective assistance for employers and employees.

Fair Work Australia will have 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 will also be an inspectorate headed by the Fair Work Ombudsman. Specialist Fair Work Divisions will be created in the Federal Court and Federal Magistrates Court to hear matters which arise under the new workplace relations laws.

Fair Work Australia will be open for business from 1 July 2009 and will be fully operational as a one-stop-shop by 1 January 2010.

A fair and comprehensive safety net of minimum employment conditions

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

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

Modern awards may be industry or occupation-based and will streamline and simplify thousands of awards. 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 operating effectively as a result of the award modernisation process. Any anomalies or technical issues will be addressed by Fair Work Australia as part of this review.

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Good faith collective bargaining at the enterprise level

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

Generally, an enterprise agreement will be made between an employer and some or all of their employees. There will be no need for formal notification to commence bargaining—in most cases parties will 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.

There will be no distinction between union and non union agreements under the new system. Employees can nominate who will represent them in bargaining and their employer must respect their choice. Employers will also be 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.

The Act provides an exhaustive list of good faith bargaining requirements. A bargaining representative is required to bargain in good faith with all other bargaining representatives, however, these requirements do not mean that either side has to make concessions or to reach agreement on terms that are to be included in the agreement.

When bargaining is not occurring in good faith, Fair Work Australia will have 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 will be able to make a workplace determination to resolve the matters that are still at issue. There will be a high threshold for accessing workplace determinations in these circumstances.

Greenfields agreements

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

Bargaining assistance for the low-paid

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

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

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

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

Clear tough rules on industrial action

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

Employees will be able to take protected industrial action to support or advance claims during collective bargaining. Industrial action will only be 'protected' if it has been authorised by a mandatory secret ballot and all other requirements contained in the Act have been met.

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

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

- It will be unlawful under the Act for an employer to pay strike pay, or for an employee to demand or request it.
- Where unprotected industrial action is taken it will be 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, Fair Work Australia will be required to issue an order for it to stop. In addition, the Federal Court or Federal Magistrates Court may also directly grant an injunction to stop industrial action being taken 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 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 they understand that their rights come with significant responsibilities. The Government has kept these commitments.

The right of entry provisions in the Act largely replicate the provisions in the Workplace Relations Act. The key difference is that right of entry will now be linked to 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 will be able to advise employers as to the eligibility of a union to represent their employees.

Unions will have to comply with very strict conditions of entry: they must hold a permit; give 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. In particular, a person cannot disclose information obtained during a 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 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 new right of entry provisions include specific compliance measures which take into account the particular nature of the conditions of outworkers in the Textile Clothing and Footwear (TCF) industry sector. For example, a permit holder can enter premises to investigate a suspected breach relating to a TCF outworker where they are entitled to represent the industrial interests of TCF outworkers, but do not have a union member at the premises. In addition, the 24 hours' notice of entry is not required.

Protections from unfair dismissal for all employees

The new workplace relations system will establish new laws regarding unfair dismissal that are fair to small business owners and their employees.

Employees of a small business will not be able to 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' will no longer be a defence to a claim of unfair dismissal. However, a dismissal is not unfair if it is for reasons of genuine redundancy.

The new system also provides for the publication 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 will be a specialist information and assistance unit 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 new unfair dismissal arrangements, and will particularly take into account the experience of employers of small and medium sized businesses.

A balance between work and family life

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

Modern awards and enterprise agreements must include provision for the making of individual flexibility arrangements, which will allow for genuine flexibility (e.g. family friendly working hours) for employees and employers, while ensuring strict 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 beyond 12 months. The Standards also provide the right to request flexible working arrangements, which an employer can only refuse on reasonable business grounds.

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

The right to be represented in the workplace

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

The Act will enable representation at work by recognising the right of employees to be represented by a legitimate workplace representative or union delegate.

It will be 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.

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When will the new system commence?

The new workplace relations system will commence on 1 July 2009. Consistent with the Government's election policy commitment, the National Employment Standards and modern awards will commence from 1 January 2010.

Two separate pieces of legislation have been introduced into Parliament to set out transitional and consequential arrangements to ensure a smooth, simple transition to the new system.

The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 contains transitional provisions and consequential changes to Commonwealth legislation considered essential to the operation of the Act including institutional arrangements for Fair Work Australia. This was introduced to the Parliament on 19 March 2009, and was the subject of a Senate Inquiry that handed down its report on 7 May 2009.

The Fair Work (State Referral and Consequential and Other Amendments) Bill 2009 was introduced into Parliament on 27 May 2009. This Bill addresses the remaining consequential amendments to all other Commonwealth legislation and additional amendments consequential to any state referrals of workplace relations powers.

The Australian Government anticipates that the Victorian State Government's Bill to refer legislative power to this Parliament will be introduced into the Victorian Parliament shortly and passed in time to coincide with the commencement of the Act on 1 July 2009. This will ensure that there are no interruptions in coverage for, and provides certainty to Victorian employers and employees.

Australian Government

1. The new workplace relations system

The Australian Government is delivering its election promises set out in the policy, *Forward with Fairness*. The 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 will change. The Australian Government is implementing a new workplace relations system to ensure fair workplaces around Australia. The new workplace relations system balances the needs of employees, the unions and employers. It will deliver a balance that will allow Australia to become more competitive and prosperous without taking away workplace rights and guaranteed minimum standards.

Key elements

The new workplace relations system will provide 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
- the right 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) Bill, which was introduced to the Parliament on 19 March 2009 and the Fair Work (State Referral and Consequential and Other Amendments) Bill, which was introduced to the Parliament on 27 May 2009. This legislation will ensure a smooth, simple transition to the new system.

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Progress to Date

Date	Action
13 February 2008	Introduction of Transition to Forward with Fairness Bill into the House of Representatives
14 February 2008	Release of 10 National Employment Standards for public comment
19 March 2008	Transition legislation passed by the Parliament
28 March 2008	*Transition to Forward with Fairness Act* commences New Australian Workplace Agreements (AWA) can no longer be made and a new no disadvantage test ensures employees get the full benefit of the award safety net.
28 March 2008	Award Modernisation Request issued to the Australian Industrial Relations Commission (AIRC)
4 April 2008	Closing date for submissions on 10 National Employment Standards; 129 submissions received
16 June 2008	National Employment Standards provided to AIRC to assist with award modernisation
20 June 2008	AIRC publishes model individual flexibility agreement clause
12 September 2008	Exposure drafts of modern awards for priority areas published by the AIRC
7-17 October 2008	Expanded Committee on Industrial Legislation held to examine the draft legislation. Over 60 representatives from business organisations, unions and state and territory governments participated.
25 November 2008	The Australian Government introduces the Fair Work Bill into the Parliament. Senate refers the provisions of the Fair Work Bill to a Senate Committee Inquiry.
27 January 2009 – 19 February 2009	Senate Committee conducts public hearings on the provisions of the Fair Work Bill.
27 February 2009	Senate Committee delivers its report on the provisions of the Fair Work Bill.
19 March 2009	Introduction of the Fair Work (Transitional Provisions and Consequential Amendments) Bill into Parliament.
20 March 2009	Fair Work Bill is passed through Parliament.
7 April 2009	The Fair Work Bill receives royal assent.
26 May 2009	Swearing in of the Hon Justice Geoffrey Giudice as President of Fair Work Australia.
27 May 2009	Introduction of the Fair Work (State Referral and Consequential and Other Amendments) Bill into Parliament.

What's next?

Date	Action
1 July 2009	First operational day of Fair Work Australia and the Office of the Fair Work Ombudsman.
1 January 2010	Launch of the Modern Awards, the National Employment Standards, and minimum wages.
1 February 2010	Powers of the Australian Building and Construction Commission subsumed into the Office of the Fair Work Ombudsman.

2. Fair Work Australia institutions—A one stop shop

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

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

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

Fair Work Australia will be open for business from 1 July 2009 and fully operational as a one-stop-shop by 1 January 2010.

By 1 January 2010, Fair Work Australia will replace the following Australian Government agencies:

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

Fair Work Australia will oversee the new, fair, simple and modern workplace relations system. It will be 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 will be on providing fairness and efficiency, and excellent levels of service to users of the system.

Fair Work Australia will consist of the President, Deputy Presidents, Commissioners and Minimum Wage Panel members. Fair Work Australia will have 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 will also be 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 will have a General Manager and administrative staff. Administrative staff will exercise certain powers and functions under the supervision of Fair Work Australia members. They will 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 will be an inspectorate headed by the Fair Work Ombudsman. The Office of the Fair Work Ombudsman will replace the following Australian Government agencies:

- Workplace Ombudsman
- Australian Building and Construction Commission (from 1 February 2010)

The Office of the Fair Work Ombudsman will absorb the education functions of the Workplace Authority (i.e. Workplace Infoline).

While the Office of the Fair Work Ombudsman will have separate governance arrangements, its day-to-day operations will be practically integrated with Fair Work Australia. The Fair Work Ombudsman will appoint Fair Work Australia Inspectors who will 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 will have strong and effective investigative powers, including the power to inspect and copy documents and records on an employer's premises. For the first time, inspectors will be able to investigate and enforce breaches of terms of contracts of employment on behalf of an employee about matters in the National Employment Standards or modern awards where they are investigating or enforcing the National Employment Standards, a modern award, enterprise agreement, workplace determination or wages order in relation to that employee.

Fair Work Divisions of the Court

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

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

State and Territory courts will retain existing jurisdiction and powers.

Enforcement of basic safety net entitlements

The legislation will also allow 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 will also be able to hear claims about these matters.

Small claims

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

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

<table>
<tr><th colspan="2">Fair Work Australia</th><th>Office of the Fair Work Ombudsman</th><th>Fair Work Divisions of the Federal Court and Federal Magistrates Court</th></tr>
<tr><td colspan="2">President of FWA
• Statutory office holder with tenure to age 65</td><td rowspan="4">Fair Work Ombudsman
• Statutory office holder
• Will promote compliance with legislation, including through education, information and assistance
• Will appoint Fair Work Inspectors

Fair Work Inspectors
• Powers include:
– Entry to premises to monitor compliance with legislation or instruments made under legislation (e.g. National Employment Standards, awards, agreements)
– Bring court proceedings to enforce rights and obligations
– Investigate and enforce common law entitlements that relate to the National Employment Standards or modern awards</td><td rowspan="2">• New specialist Fair Work Divisions will be created in Federal Court and Federal Magistrates Court
• Will deal with all matters arising under new workplace legislation
• Will deal with entitlements under a contract of employment about matters in the National Employment Standards (e.g. leave) or modern awards (e.g. wages)
• Small claims procedure will be extended to the Federal Magistrates Court</td></tr>
<tr><td>Tribunal functions</td><td>Non-Tribunal functions</td></tr>
<tr><td>FWA Members
• FWA Deputy Presidents and Commissioners
• Statutory office holders with tenure to age 65
• Functions/powers, include:
– approval of enterprise agreements
– awards review and variation
– good faith bargaining orders
– unfair dismissal
– industrial action orders
– mediation and dispute resolution
• FWA will have broad powers to conduct matters and inform itself as it considers appropriate in an informal and non-adversarial way (e.g. compulsory conferences)</td><td rowspan="2">General Manager
• Statutory office holder
• Will provide assistance to President and FWA members
• Exercise powers under delegation of President
• Will manage FWA staff, who will assist FWA members to discharge functions (e.g. provide registry functions, gather information for matters before FWA)
• Provide information about role and functions of FWA
• Review developments in enterprise agreements
• Conduct research on matters including the use of individual flexibility arrangements and operation of the National Employment Standards relating to requests for flexible working arrangements</td><td rowspan="2">State and Territory Courts
• State and territory courts will retain existing jurisdiction and powers</td></tr>
<tr><td>Minimum wages panel (MWP)
• Will set and adjust wages in its annual
• wage review
• Headed by President</td></tr>
</table>

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Australian Government

3. A strong and simple safety net

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

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

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

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

The National Employment Standards

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

Modern Awards

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

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

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

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Case Study

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

Who will be covered by modern awards?

The Commission will create modern awards to cover all employees who perform work that has historically been regulated by awards.

Modern awards will not 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. These employees and their employers will be free to agree on terms to supplement the National Employment Standards without reference to an award and may still be covered by an enterprise agreement.

The exemption 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.

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 operating effectively as a result of the award modernisation process. Through this review, any anomalies or technical issues will be addressed by Fair Work Australia.

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.

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.

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.

4. Minimum wages

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

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

Under the new workplace relations system, minimum wages and casual loadings will be set and adjusted by a specialist Minimum Wage Panel within Fair Work Australia. The Minimum Wage Panel will comprise up to seven members of Fair Work Australia including the President. Members will be appropriately qualified, and have a mix of specialist and generalist expertise. Some appointments will be part-time and have expertise in economics, social policy, workplace relations and business, industry or commerce. This mix will ensure that proper consideration is given to the wage-setting parameters, such as the macro-economic impact of the Panel's decisions.

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

How often will minimum wages be revised?

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

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

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

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

What about people who are not covered by awards?

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

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How will minimum wages be determined?

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

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

Australian Government

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

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

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

Combined protections

The *Fair Work Act 2009* streamlines a range of related protections into one part of the legislation, making them simpler to follow. The current 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) will be combined into a new set of general protections, effective from 1 July 2009.

Under these combined protections, it will be 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 an industrial law.

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

It will also be 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 will 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 will provide more comprehensive protections for workers in some situations than is currently the case.

It is currently 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, will be unlawful, for example, placing an employee in a position that pays less, or refusing to employ them, for one of the prohibited reasons.

There will be protections to ensure parties are not coerced into making a particular type of agreement or discriminated against because of the type of agreement that applies to them. It will be unlawful to coerce someone to make a multi-employer agreement and 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 will also be unlawful to discriminate against an employer because they have a particular type of agreement or an agreement that does not cover a union or a particular union. There will be a new protection to prevent a person being coerced to employ or engage a particular person or appoint them to a particular role.

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

6. Bargaining in good faith

Bargaining in good faith helps agreement making, because it encourages parties to communicate openly and to focus their negotiations on key issues.

There was no requirement under Work Choices to bargain in good faith. Even where a majority of workers wished to have a collective agreement, the employer could ignore their wishes and not bargain with them.

Under the new system, the good faith bargaining obligations will be:

- recognising and bargaining with the other bargaining representatives
- 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 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.

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

Majority support

There will be no need for formal notification to commence bargaining—in most cases parties will 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 will be able to 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 there is majority employee support for pursuing an enterprise agreement, the employer will be required to bargain collectively with the relevant employees.

The right to be represented

Where Fair Work Australia determines there is majority employee support for enterprise bargaining or where an employer agrees to bargain, the employer will be required to notify employees within 14 days of their right to be represented in bargaining.

Employees can appoint a bargaining representative to represent their interests. This could be a colleague, a union or another person (such as a consultant or accountant). Union members will be entitled to have their union (which is the union eligible to cover them) be their bargaining representative. Employers will also be able to appoint their own bargaining representative.

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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, Fair Work Australia will be able to 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 legally 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 workplace bargaining representative, such as unreasonably preventing the person consulting with other employees
- 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 will be a high threshold for arbitration in these circumstances, meaning its use is likely to be rare. It is aimed at conduct where a union or an employer is prepared to flout the law. Fair Work Australia will be required to take account of the views of all other bargaining representatives. Fair Work Australia must also be satisfied that all other reasonable alternatives for reaching agreement have been exhausted and there is no prospect that the agreement will be reached in the foreseeable future.

Agreement variations

The *Fair Work Act 2009* allows agreements to be varied before their expiry date, but only by consent. Access to good faith bargaining orders will not be available in the context of variations, although Fair Work Australia will be able to deal with a dispute if requested by an employee or employer association or an affected employee. Fair Work Australia will not be able to arbitrate such a dispute.

Australian Government

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 from 1 July 2009, Fair Work Australia will be able to 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 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 a third-party (such as a head-contractor) effectively sets their pay and conditions, not their direct employer.

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

How will parties enter the low-paid bargaining stream?

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

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

Individual employers will be able to 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 will be subject to appeal.

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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 will be able to 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.
- *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 will have 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 will also have limited powers 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.

There will be 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 and only where the relevant employees are substantially reliant on the safety net. Fair Work Australia must be satisfied that making such a workplace determination will promote workplace productivity and efficiency and, in deciding the outcome, must take into account the need to maintain the competitiveness of the employer.

Parties who bargain in the low-paid bargaining stream will not be 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 or some variations within it for different employers
- A number of agreements in 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.

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8. Approval and content of enterprise agreements

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

The new workplace relations system will enable 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 under Work Choices will be removed, effective from 1 July 2009.

Approval of agreements

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

At the time of lodging the agreement for assessment by Fair Work Australia, parties will be required to submit a statutory declaration setting out details of the agreement. The agreement will be signed by the employer and the bargaining representatives acting on behalf of employees.

Before approving agreements Fair Work Australia must be satisfied that:

- the employer and employees genuinely agree to the agreement
- the group of employees covered by the agreement is fairly chosen
- each 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
- if the agreement is a multi-enterprise agreement, all employers have genuinely agreed to make the agreement, and no person coerced, or threatened to coerce, any of the employers to make the agreement.

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

The Better Off Overall Test

Fair Work Australia will apply the Better Off Overall Test to ensure that each award-covered employee to 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 award covered employee will be better off overall if their class of employees will be better off overall in comparison to the relevant modern award.

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

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Content of agreements

Agreements will be able to 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.

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

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

Matters that do not pertain to the employment relationship or the relationship with the employees' union as representative cannot be the subject of protected industrial action. If terms in agreements do not meet these criteria, they will be void and unenforceable.

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 will also be 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 clause 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 will be able to negotiate such terms to meet their particular circumstances. Where an agreement is silent on these two matters, a model term that will be set out in regulations will be deemed to be incorporated.

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

- are discriminatory
- breach unlawful termination and freedom of association laws
- 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 the 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.

Australian Government

9. A simple, fair dismissal system for small business

A new, fair dismissal system will be introduced as part of the new workplace relations system. New dismissal laws will come into effect from 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 unfair. 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

As set out in *Forward with Fairness* before the last election, the Rudd Labor Government will establish new laws regarding unfair dismissal that are fair to small business owners and their employees.

The objective 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 will 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 will 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 simple six-paragraph Fair Dismissal Code which, if followed by the small business owner, will ensure a dismissal is not unfair.

In addition, there will be a specialist information and assistance unit established within the Office of the Fair Work Ombudsman for small and medium sized employers to get assistance and advice when 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.

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

A simple checklist to aid employers

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

What is 'unfair dismissal'?

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

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

Exclusions from making an unfair dismissal claim

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

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, can make an unfair dismissal claim.

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

Simple, non-legalistic processes

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

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

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

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

Decisions will be able to 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 new unfair dismissal arrangements, and will particularly take into account the experience of employers of small and medium sized businesses.

Small Business Fair Dismissal Code

Application

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

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

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

The Code

Summary Dismissal

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

Other Dismissal

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

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

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

Procedural Matters

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

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

Small Business Fair Dismissal Code Checklist

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

1. How many full-time equivalent employees are employed in the business? (Include the dismissed employee and any other employee dismissed at the same time).

   ☐ Under 15 employees

   ☐ 15 employees or more

   [If under 15 employees, the Fair Dismissal Code applies.]

2. Has the employee been employed in this business as a full time, part-time or regular casual employee for 12 months or more?

   ☐ Yes

   ☐ No

   [If No, the employee cannot make an unfair dismissal claim.]

3. Did you dismiss the employee because of a genuine redundancy?

   ☐ Yes

   ☐ No

   If Yes, explain the reason for the redundancy (for example, economic downturn, introduction of new technology therefore requiring less staff, or another such reason) and whether redeployment was considered.

   _____

   _____

   _____

4. Do any of the following statements apply?

I dismissed the employee because I believed on reasonable grounds that:	YES	NO
a. The employee was stealing money or goods from the business.	☐	☐
b. The employee defrauded the business.	☐	☐
c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace.	☐	☐
d. The employee committed a serious breach of occupational health and safety procedures.	☐	☐

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

☐ Yes

☐ No

If Yes, what was the reason?

_____

_____

_____

_____

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

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

☐ Yes

☐ No

If Yes	YES	NO
a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed?	☐	☐
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? _____	☐	☐
c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?	☐	☐
d. Did the employee subsequently improve his or her performance or conduct?	☐	☐
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?	☐	☐
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..	☐	☐

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

☐ Yes

☐ No

If Yes, what was the reason?

_____

_____

_____

_____

_____

_____

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

☐ Yes

☐ No

If Yes, please provide details

_____

_____

_____

_____

_____

_____

DECLARATION

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

Signature _____ Date _____

Australian Government

10. Clear, tough rules for industrial action

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

Protected industrial action

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

Bargaining representatives will be able to apply to Fair Work Australia for a secret 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.

Employees will also be able to take protected industrial action in response to industrial action taken by their employer, without a secret ballot.

Employers will also be permitted to take protected industrial action, by locking out employees who have taken industrial action.

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 will be 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 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

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industrial action are not genuinely trying to reach agreement, or where there is a serious breach declaration in place.

Fair Work Australia will be able to issue orders to prevent or stop any unprotected industrial action. If Fair Work Australia is unable to determine whether the action is unprotected within 48 hours they will be required to issue interim orders to stop industrial action.

Strike Pay

Under the Government's new workplace relations system it will be unlawful for an employer to pay or an employee to demand or request strike pay.

The new workplace relations 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 will only apply to unprotected industrial action. Employers will be 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 will be 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 current arrangements under which an employee stopping work for a very short period, or imposing a minor work ban, must be docked a full four hours pay.

Payment for overtime bans is clarified in the new system. 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.

There is currently confusion and uncertainty about how the Work Choices' strike pay rules apply when employees are at work but take protected action by performing only part of their duties (partial work bans).
The *Fair Work Act 2009* includes provisions to provide both clarity and flexibility for employers to respond proportionally to the bans.

This new process will now permit 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. 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 are legally required to dock their pay for a mandatory four hours for limited work bans. The new workplace relations system allows employers more discretion in dealing with these bans.

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Australian Government

11. Transfer of business

The transfer of business provisions under the new workplace relations 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.

There will be a new definition of a transfer of business that is simple and easy to understand and which will result in broader protection for employees' terms, conditions and entitlements.

These laws will come into effect from 1 July 2009.

Definition of 'transfer of business'

Under the new workplace relations system, 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 will be 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 will 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 will have broad power though 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 will also have flexibility to order that a transferring instrument be modified so that it better fits with the operation of the new enterprise.

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In deciding whether to make an order, Fair Work Australia will be 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 will be 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.

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 they 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* largely replicate the provisions in the *Workplace Relations Act*.

Some adjustments have been necessary as a consequence of the new modern award framework which will streamline and simplify thousands of awards (see fact sheet three, "A strong and simple safety net" for more information on modernised awards). The key difference with the *Workplace Relations Act* is that right of entry will now be 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 will be able to 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 2009* 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 will be able to meet with the union eligible to represent their interests at the workplace during non-working hours 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 will be able to 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.

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

Effective compliance with legal obligations is an important component of the new workplace relations system. Unions have a very long-standing role in helping to ensure compliance with workplace laws. Unions will be able to 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 will not be able to be inspected or copied by a permit holder **unless the non-member gives written consent or if Fair Work Australia agrees**. 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 during a 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 threat to public health or safety). Controls on the use of information contained in the *Privacy Act 1988* will 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 new right of entry provisions include specific compliance measures which take into account the particular nature of the conditions of outworkers in the Textile Clothing and Footwear (TCF) industry sector. For example, a permit holder can enter premises to investigate a suspected breach relating to a TCF outworker where they are entitled to represent the industrial interests of TCF outworkers, but do not have a union member at the premises. In addition, 24 hours' notice of entry is not required.

Australian Government

13. Enterprise Agreements

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

New laws governing enterprise agreements will come into effect from 1 July 2009.

Types of Enterprise Agreements

The new workplace relations system will enable 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 will operate according to a common set of rules; however there will be different rules for the approval, variation and termination of multi-enterprise agreements.

There will be 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 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 will be no capacity to make an individual statutory agreement (like an Australian Workplace Agreement) under the new workplace relations 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 new workplace relations 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.

As is the case currently, 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 will be able to bargain as single-interest employers where Fair Work Australia authorises them to do so. The single-interest authorised stream has been designed to cover franchisees and certain institutions that operate within a common framework and which substantially rely on public funding. In particular, the stream is expected to cover schools in a common education system and public entities providing health services, such as some hospitals in Victoria.

If these employers wish to bargain together they must obtain a single-interest employer authorisation. Fair Work Australia will only make an employer authorisation if it is satisfied that the employers have the requisite common interest.

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Employers who are not franchisees but who wish to be authorised as single-interest employers must first apply to the Minister for a declaration that would allow them to bargain together for an enterprise agreement. There will be a high threshold for such Ministerial declarations, which will prevent the stream being used for pattern bargaining.

Multi-enterprise agreements

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

Because multiple-enterprise bargaining will be voluntary and to prevent pattern bargaining, bargaining orders and protected industrial action will not be available when bargaining for a multi enterprise agreement. When approving a multi-enterprise agreement, Fair Work Australia will need to be satisfied that all employers genuinely agreed to make the agreement and were not coerced.

Low-paid bargaining stream

There will be a special bargaining stream for low-paid employees who have not had access to the benefits of collective bargaining. Fair Work Australia will be able to 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 seven *"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 will not be 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:

Type of enterprise agreement and bargaining situation	Protected industrial action	Bargaining orders/ Serious breach declaration	Majority support determination	Scope orders
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 *not* specified in a low-paid authorisation	✗	✗	✗	✗
Multi enterprise agreement with two or more employers specified in a low-paid authorisation	✗	✓	✗	✗

Australian Government

14. A smooth transition to the new workplace relations system

The second of the two transitional and consequential Bills, the Fair Work (State Referral and Consequential and Other Amendments) Bill 2009 (the R&C Bill), was introduced into Parliament on 27 May 2009.

The R&C Bill 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 first Bill, the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the T&C Bill) was introduced on 19 March 2009.

Together, the two transitional and consequential Bills will operate with the Fair Work Act to set out the arrangements for a smooth transition to the new workplace relations system.

The T&C Bill was introduced into the Parliament in March 2009 and 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). The repeal of the WR Act is one of the last steps required to remove Work Choices.

The T&C Bill 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 new 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 Fair Work Ombudsman
- consequential amendments to other Commonwealth legislation considered essential to the operation of the Fair Work Act (e.g. 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) Bill 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 Fair Work Act will commence 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 will commence on 1 January 2010.

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National Employment Standards and minimum wages

The T&C Bill 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, will receive the benefit of the ten minimum National Employment Standards and minimum 'safety net' wages.

In the period before the National Employment Standards commence (from 1 July 2009 to 1 January 2010) entitlements under the Australian Fair Pay and Conditions Standard (e.g. annual leave, minimum entitlements relating to meal breaks, public holidays and parental leave) will continue to operate.

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

Fair Work Australia will be able to make orders to 'phase in' minimum wages in exceptional circumstances, for example where it is satisfied that measures are 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 will also be able to make 'take home pay orders' requiring payment of an amount of money.

Transitional instruments

The T&C Bill reflects the Government's commitment that agreements made lawfully under the *Workplace Relations Act 1996* (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 Australian Workplace Agreement can be terminated by agreement of the parties after the nominal expiry date, by the giving of 90 days' notice by either party.

The T&C Bill also outlines how other existing industrial instruments will be treated in the new workplace relations system. This will provide 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 Bill also includes a number of bargaining and agreement-making rules which will mean that:

- employees on individual statutory agreements will be able to agree with their employer to enter into a conditional termination agreement. This will allow 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 employee will be covered by the enterprise agreement
- the new bargaining framework under the Fair Work Act (including the good faith bargaining requirements) will operate from 1 July 2009. The T&C Bill does not carry over bargaining or protected industrial action under the WR Act to the new system. However, Fair Work Australia will be able to take account of the history of bargaining between the bargaining participants when exercising its functions and discretion under these rules

- until the National Employment Standards and modern awards are operational on 1 January 2010, testing of new enterprise agreements against the no-disadvantage test will be undertaken using an appropriate reference instrument (for example, an un-modernised award)
- individual transitional employment agreements (ITEAs) can be made until 31 December 2009.

Institutions

The T&C Bill will abolish the Workplace Ombudsman with its functions to be taken over by the Office of the Fair Work Ombudsman. It also provides for the Workplace Authority, the Australian Industrial Relations Commission (AIRC), the Australian Industrial Registry and the Australian Fair Pay Commission to continue to operate alongside Fair Work Australia for a limited time to finalise existing matters with different cessation dates.

The T&C Bill also provides 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 Bill includes transitional rules to deal with right of entry which include effectively deeming permits under the WR Act to also be permits 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.

Key Elements of the Fair Work (State Referral and Consequential and Other Amendments) Bill 2009

State referrals of workplace relations powers

The R&C Bill amends the Fair Work Act enabling States to refer matters to the Commonwealth with a view to establishing a uniform national system for employers and employees in the private sector.

The R&C Bill establishes a framework that is ready to be adapted to future Commonwealth legislation to accommodate anticipated future references from other States.

The R&C Bill also provides scope for referring States to choose the extent to which the Act covers their public sector workforces.

The Victorian State Government's Bill to refer legislative power to this Parliament is expected to be introduced into the Victorian Parliament shortly and passed in time to coincide with the commencement of the Fair Work Act on 1 July 2009. This will ensure that there are no interruptions in coverage, as well as providing certainty of coverage for Victorian employers and employees.

Amendments to other Commonwealth legislation resulting from the Fair Work Act

The R&C Bill 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 Bill.

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

The R&C Bill 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*.