Australian Government

Overview – *Fair Work Act 2009*

The *Fair Work Act 2009* – an overview

The national workplace relations system changed from 1 July 2009.

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

- ☑ a system based on bargaining at the enterprise level
- ☑ protections from unfair dismissal for employees
- ☑ protection for the low-paid
- ☑ a balance between work and family life, and
- ☑ the right to be represented in the workplace.

The Fair Work Act 2009 *promotes national economic prosperity and social inclusion by providing a balanced framework designed to encourage cooperative and productive workplace relations* [Division 2, Section 3].

Commencement and Coverage

When will the *Fair Work Act 2009* commence?

The new workplace relations system, including the new collective bargaining and unfair dismissal frameworks, commenced on **1 July 2009**.

Parts of the *Fair Work Act 2009* concerning agreement making, industrial action, compliance, general protections and right of entry are necessarily connected with these frameworks and also commenced at this time.

Fair Work Australia and the **Fair Work Ombudsman** will manage the new system from 1 July 2009. The Australian Industrial Relations Commission will continue to complete the process of award modernisation for a limited time.

Safety net provisions of the *Fair Work Act 2009* will commence on **1 January 2010**. These provisions include the National Employment Standards, modern awards and national minimum wage orders for award/agreement free employees. Appropriate transitional arrangements will ensure that existing employee entitlements are protected between 1 July 2009 and 31 December 2009.

Does the *Fair Work Act 2009* apply to me?

From 1 July 2009, most of the Australian workforce will be covered by the national workplace relations system.

The *Fair Work Act 2009* generally applies in Australia to **'national system' employers** and their **employees**:

An employer is a **national system employer** (see Section 14) if they are:

- ☑ a **constitutional corporation**; or
- ☑ the Commonwealth; or
- ☑ a Commonwealth authority; or
- ☑ a person who employs a flight crew officer, maritime employee or waterside worker in connection with interstate or overseas trade or commerce; or
- ☑ a body corporate incorporated in a Territory; or
- ☑ a person who employs an employee in connection with a commercial, governmental or other activity undertaken by that person in a Territory.

A **national system employee** is an individual who is employed by a national system employer and is not on a vocational placement (Section 13).

Entitlements to parental leave, notice of termination and unlawful termination extend to all employees in Australia.

What is a constitutional corporation?

A constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution of Australia applies – that is, a trading or financial corporation formed in Australia, or a foreign corporation.

The approach of the High Court of Australia is that a corporation is a trading or financial corporation if its trading or financial activities are a substantial or significant part (rather than a peripheral or insignificant part) of its overall activities.

Generally, a trading activity is a business activity carried on with a view to earning revenue. Revenue is not necessarily profit, so a trading activity may be not-for-profit. An incorporated body that carries on commercial activities with a view to earning revenue will usually be a trading corporation.

Similarly, a financial corporation is generally identified by its predominant or substantial financial dealings for commercial purposes (e.g. money lending, providing insurance or other financial services). In practice, many financial corporations will also be trading corporations.

Employees of businesses that use trust structures may be covered by the *Fair Work Act 2009* if their employer is a corporate trustee (in a trust relationship, the trustee may be an employer but the trust itself cannot be an employer as it is not a separate legal entity). Whether an incorporated trustee (or another person) is the employer of a person will depend on who the parties to the employment contract are.

As at 1 July 2009, the *Fair Work Act 2009* applies to all private sector employers and their employees in Victoria. The *Fair Work Act 2009* also applies to Victorian public sector employees, subject to certain exceptions (e.g. in relation to law enforcement officers) set out in Victoria's *Fair Work (Commonwealth Powers) Act 2009*.

The *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* enables States to refer power to the Commonwealth to support a single national workplace relations system for all employees and employers (including those that are not constitutional corporations) in the private sector. This Act also enables States to refer matters relating to their public sector workforces (if they choose to do this).

NB: The *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* makes transitional and consequential amendments to 67 other Commonwealth Acts that refer to parts of the *Workplace Relations Act 1996* have now been repealed.

How does the *Fair Work Act 2009* interact with State and Territory laws?

The *Fair Work Act 2009* excludes State and Territory industrial laws that would otherwise apply to national system employers and employees. This includes the industrial relations Acts of the States, as well as other State and Territory laws that apply to employment generally and regulate key aspects of the employment relationship.

A number of State and Territory laws are preserved and will continue to apply to national system employers and their employees. These include laws dealing with occupational health and safety, workers compensation and discrimination (for the full list of preserved laws, see Section 27). Modern awards and enterprise agreements are subject to these preserved State and Territory laws, but prevail over other State and Territory laws (such as industry-specific employment laws) where inconsistent with those laws.

State or Territory laws dealing with flexible working arrangements and community service leave are preserved if they provide a more beneficial entitlement to employees.

How will the transition to the new workplace relations legislation be managed?

The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* repeals the *Workplace Relations Act 1996* (other than Schedules 1 and 10) and renames it the *Fair Work (Registered Organisations) Act 2009* to reflect its remaining content. This Act makes transitional provisions to move employers, employees and organisations from the old *Workplace Relations Act 1996* system to the new system. Additionally, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* makes consequential amendments to Commonwealth legislation that are essential to the operation of the *Fair Work Act 2009* for example the creation of the Fair Work Divisions of the Federal Court and the Federal Magistrates Court.

What is the bridging period?

The period of 1 July 2009 to 31 December 2009 is known as the **bridging period**. During this period, pay scales and other minimum conditions such as public holidays, continue to apply, pending commencement of the National Employment Standards and Modern Awards. The bridging period is significant because during this period a number of transitional changes will take place including:

☑ existing *Workplace Relations Act 1996* instruments (such as an award; a notional agreement preserving State awards (NAPSA); a workplace agreement; a workplace determination; a preserved State agreement; an Australian Workplace Agreement (AWA); a pre-reform certified agreement; a pre-reform AWA; an old IR agreement; a Section 170MX award) become 'transitional instruments' and some parts of the *Workplace Relations Act 1996* will continue as 'saved provisions' allowing, for example, Individual Transitional Employment Agreements (ITEAs) to continue to be made until 31 December 2009,

☑ transitional instruments will become subject to the rules set out in the transitional legislation regarding their operation, content, interaction, termination and other matters, and

☑ existing institutions and agencies are provided with dates that allow them to continue in a limited way for a transitional period, such as completing matters commenced prior to 1 July 2009 in the case of the Australian Industrial Relations Commission (AIRC) or assessing agreements in the case of the Workplace Authority.

NB: During the bridging period pay scales and other minimum conditions (including the Australian Fair Pay and Conditions Standard) will continue to apply, pending commencement of the National Employment Standards and modern awards on 1 January 2010.

Exclusive Economic Zone

The *Fair Work Act 2009* also applies in the Australian exclusive economic zone (EEZ) and over the continental shelf in relation to Australian-registered and Australian-operated ships, and to fixed platforms that are within Australia's jurisdiction. The *Fair Work Act 2009* applies outside Australia to ships that are registered in Australia or operated from an Australian base by an Australian employer.

The Fair Work Regulations will extend the *Fair Work Act 2009*:

- in relation to the Australian exclusive economic zone and the continental shelf – from 1 January 2010 to licensed ships and permits ships engaged in the coasting trade (i.e. transporting cargo between Australian ports), and ships operated from Australia on which the majority of the crew are Australian
- beyond the Australian exclusive economic zone and the continental shelf – to Australian employers and Australian-based employees working overseas.

From 1 January 2010, an Australian employer will include the employer of crew members who work on ships operated from Australia on which the majority of the crew are Australian.

Key Points

- The *Fair Work Act 2009* commenced on 1 July 2009.
- The *Fair Work Act 2009* generally applies to 'national system' employers and their employees in Australia, and to certain ships and fixed platforms outside Australia.
- The *Fair Work Act 2009* 'covers the field' and operates to the exclusion of State and Territory industrial laws, although some State and Territory laws are preserved**.**
- Fair Work Australia and the Fair Work Ombudsman will administer the new system from 1 July 2009.
- The new safety net, comprising of the National Employment Standards, modern awards and national minimum wage orders for award/agreement free employees will commence on 1 January 2010.
- The period of 1 July 2009 to 31 December 2009 is known as the **bridging period**. During this period, pay scales and other minimum conditions such as public holidays, continue to apply, pending commencement of the National Employment Standards and Modern Awards.

The National Employment Standards

Overview of 10 National Employment Standards

The National Employment Standards are ten legislated minimum standards. The National Employment Standards replace the Australian Fair Pay and Conditions Standard.

When will the National Employment Standards come into effect?

The National Employment Standards will come into effect on 1 January 2010.

The following provisions will continue operation during the bridging period:

☑ The Australian Fair Pay and Conditions Standard for leave and work hours;

☑ Provisions from the *Workplace Relations Act 1996* (the WR Act) related to meal breaks, public holidays and parental leave;

☑ Notice of termination provisions from the WR Act; and

☑ Pay scales and wages are preserved during the bridging period. Pay scales may continue beyond the bridging period for parties covered by an enterprise agreement, if the pay scale is not replaced by a modern award.

What are the 10 National Employment Standards?

1. Maximum Weekly Hours

- The National Employment Standards provide maximum working hours of 38 hours per week for full-time employees. For employees who are not full-time employees (e.g. part-time or casual employees), weekly hours must not exceed the lesser of the employee's ordinary hours or 38 hours.
- Calculating an employee's ordinary hours of work will depend on whether a modern award or an enterprise agreement applies to that employee:

    1. Where a modern award or an enterprise agreement applies to an employee the ordinary hours of work for that employee will be those hours set out in the modern award or enterprise agreement.

2. Where a modern award or an enterprise agreement does not apply to an employee the ordinary hours of work for an award/agreement free employee are the hours agreed to between the employee and his or her employer.

3. If no such agreement is reached, ordinary hours of work will be the employee's usual weekly hours of work. Regulations may be made to specify the usual weekly hours of work for an award/agreement free employee who is not a full-time employee and who does not have usual weekly hours of work.

- An employee can be required or requested to work reasonable additional hours. There are a number of factors that must be considered in determining whether additional hours are reasonable, including:
  - any risk to employee health and safety from working the additional hours;
  - the employee's personal circumstances, including family responsibilities;
  - the needs of the workplace or enterprise in which the employee is employed;
  - notice given by the employer of any request or requirement to work the additional hours;
  - notice given by employee of his or her intention to refuse to work additional hours;
  - whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working additional hours;
  - patterns of work in the industry; and
  - nature of employee's role and level of responsibility.
- An employee may refuse to work the additional hours if they are not reasonable.
- The National Employment Standards allow modern awards and enterprise agreements to provide for the averaging of hours. This does not undercut the weekly hours guarantee, but is relevant in considering if additional hours are reasonable. Employers and award/agreement free employees may also agree on the averaging of hours over a maximum period of 26 weeks (Sections 62-64).

Illustrative example

The modern award regulating Alex's employment includes averaging arrangements in relation to hours of work so that full-time employees would ordinarily work 152 hours over four weeks (an average of 38 hours per week). Over a four week period, Alex's work pattern was as follows:

Week 1 – worked 21 hours

Week 2 – worked 60 hours

Week 3 – worked 38 hours

Week 4 – worked 33 hours

The averaging arrangement is relevant in determining if it were reasonable for Alex to work the additional 22 hours in week 2. Other factors relevant in the decision include Alex's family responsibilities, health and safety and the notice given to work the additional hours.

Key changes

- The National Employment Standards provide maximum working hours protection for employees who do not work full time.
- Under the National Employment Standards, a modern award or enterprise agreement may provide for averaging of hours of work. An employee not covered by a modern award or an enterprise agreement may agree in writing to average hours over 6 months or less. Where there is an averaging arrangement, the weekly hours guarantee (and the requirement that

additional hours be reasonable) still applies in respect of each week – but the fact that there is an averaging arrangement is relevant to whether additional hours are reasonable.

2. Requests for Flexible Working Arrangements

☑ The National Employment Standards give employees the right to request a change to working arrangements if they have 12 months continuous service and are parents of, or have responsibility for the care of, a child under school age, or a disabled child under 18.

☑ The request must be in writing and detail the change sought and reasons for the change. A written response must be received from the employer within 21 days and state whether the employer grants or refuses the request.

☑ A request may only be refused on reasonable business grounds. Fair Work Australia will be able to provide information on what constitutes reasonable business grounds. The National Employment Standards does not provide a definition as to what constitutes 'reasonable business grounds', but factors that may be relevant could include:

- the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;
- the inability to organise work among existing staff; and
- the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.

☑ These provisions are not intended to displace State and Territory laws that provide employee entitlements in relation to flexible work arrangements if they are more beneficial to employees (Sections 65-66).

Illustrative example

Michael would like to start work at 10am, four days a week, to allow him to take his three year old son to pre-school. He submits a written request to his employer detailing the reasons for requesting the change in hours. His employer considers the request but is unable to agree as the changes would mean that Michael misses an important nationwide teleconference each morning.

Instead of simply refusing the request, Michael's employer discusses the situation with him. They agree to an arrangement where Michael starts work at 10am four days a week and participates in the teleconference by phone hook-up before he leaves home, while attending the most important weekly agenda-setting meeting in person.

Michael's employer gives Michael a written response, detailing the reasons for the refusal of the initial request and a statement of the revised arrangements they have agreed.

Key changes

- The National Employment Standards provides a legislated entitlement to request flexible working arrangements.

3. Parental Leave and Related Entitlements

☑ The National Employment Standards provide access to up to 24 months unpaid leave in relation to the birth of a child or the placement for adoption of a child under 16. This entitlement extends to same sex couples.

☑ The employee taking leave must have completed 12 months of continuous service before qualifying for this entitlement.

- ☑ Each member of an employee couple may each take up to 12 months leave. An employee who has taken 12 months of unpaid parental leave may request an extension for a further period of up to 12 months. The available extension period will be reduced by any parental leave or special maternity leave taken by the employee's partner. A request for extension may only be refused on reasonable business grounds.
- ☑ Leave cannot be taken concurrently; other than a period of up to 3 weeks around the time of birth or adoption (Sections 67-79).
- ☑ A casual employed on a regular and systematic basis over at least a 12-month period prior to the expected date of birth who has a reasonable expectation of continuing regular employment is also entitled to unpaid parental leave.

Illustrative example

Rosa is a pregnant employee entitled to unpaid parental leave. She has taken 2 weeks of unpaid special maternity leave due to a pregnancy-related illness. Rosa intends to take 4 weeks paid annual leave from the proposed start date of her period of unpaid parental leave.

Rosa also intends to request extending her unpaid parental leave entitlement so she can care for the child up to their second birthday.

Rosa's spouse Jim is also entitled to unpaid parental leave, but only intends to take one week of concurrent leave around the time of the child's birth. Rosa and Jim are treated as an employee couple for purposes of this entitlement.

An employee's maximum entitlement to unpaid parental leave is 12 months (Rosa and Jim are entitled to a maximum of 12 months unpaid parental leave each).

Rosa's entitlement to unpaid parental leave is reduced by the amount of unpaid special maternity leave she has taken (2 weeks).

Rosa may take any period of paid annual leave at the same time she is taking unpaid parental leave. Any period of paid annual leave taken by Rosa does not extend her overall entitlement to parental leave.

The maximum extension to a period of unpaid parental leave is 12 months, but this is reduced by the amount of unpaid parental leave and related entitlements that the other member of the employee couple may have taken. Extensions are only available to an employee if the employee takes their available initial parental leave period (in this case, the available parental leave period would be the initial 12 month period of leave less the two weeks of unpaid special maternity leave).

Rosa meets this requirement and is entitled to request (in writing and subject to certain notice requirements) a further period of leave of up to 12 months less one week (the amount of unpaid parental leave taken by Jim).

Rosa's employer may only refuse this request in writing on reasonable business grounds.

If Rosa's employer agrees to the extension, Jim's entitlement to unpaid parental leave would be effectively reduced by a corresponding amount. Because Rosa will be extending her period of unpaid parental leave by a further 12 months (less one week's leave taken by Jim), Jim could not take any further unpaid parental leave in relation to this child.

Key changes

- The National Employment Standards provide for maternity, paternity and adoption leave. It also provides both parents with the right to separate periods of up to 12 months unpaid parental leave.

- Alternatively, one parent will have the right to request an additional 12 months of leave that employers can only refuse on reasonable business grounds. If extended leave is taken it reduces the maximum leave available to the other member of an employee couple (including same-sex couples).

4. Annual Leave

☑ The National Employment Standards provide 4 weeks paid annual leave for each year of service. A shift worker (as defined by a modern award or enterprise agreement or, in the case of an award/agreement free employee, the *Fair Work Act 2009*) is entitled to 5 weeks annual leave.

☑ Modern awards and enterprise agreements may include provisions dealing with cashing out of annual leave. Employers and award/agreement free employees may also agree to cash out. An agreement to cash out annual leave must be in writing and the payment must be for the full amount that the employee would have been paid if the employee had taken the leave. The employee must retain a balance of 4 weeks annual leave after the cash out.

☑ Awards and agreements can also include provisions about taking or directing the taking of annual leave (Sections 86-94).

Key changes

- Operational details are largely left to awards and agreements – rather than complex legislative provisions.
- Under the National Employment Standards paid annual leave will accrue and then be taken on the basis of an employee's ordinary hours of work (set out in the relevant award/agreement). Awards and agreements may also include provisions about the taking and directing of annual leave.
- The National Employment Standards will enable modern awards/agreements to supplement the National Employment Standards if the effect of those terms is not detrimental.
- The cashing out of annual leave may be provided in modern awards and by enterprise agreements, subject to a remaining entitlement balance of 4 weeks leave.
- Equivalent provisions are included for award/agreement free employees.

5. Personal/ Carer's Leave and Compassionate Leave

☑ Under the National Employment Standards, employees (other than casual employees) are entitled to 10 days paid personal/ carer's leave.

☑ All employees are entitled to 2 days of unpaid carer's leave per occasion (this entitlement applies to casual employees and other employees who have exhausted their paid leave entitlement).

☑ Employees are also entitled to 2 days of paid compassionate leave per occasion (for casual employees, this is an unpaid entitlement).

☑ Carer's leave and compassionate leave entitlements may be taken in relation to a member of the employee's household or 'immediate family' (this includes extended and blended families, de facto partners, step-relationships and adoptive relationships).

☑ When taking personal/carer's leave and compassionate leave, employees must:

- provide notice to their employer as soon as is reasonably practicable (which may be a time after the leave has started);

- state the period, or expected period, of the absence if required by the employer—provide evidence that would satisfy a reasonable person of their entitlement to take the relevant kind of leave. Modern awards and enterprise agreements may include further rules relating to evidence requirements, such as the provision of medical certificates.

☑ Modern awards and enterprise agreements may allow for the cashing out of personal leave, provided certain conditions are met to ensure employees are protected (that is, the employee must retain a balance of 15 days paid leave after the cash out). An award/agreement free employee is not able to cash out personal/carer's leave
(Section 95-106).

Key changes

- The National Employment Standards will not change the quantum of the entitlement to personal/carer's leave and compassionate leave but will extend unpaid compassionate leave to casual employees.
- In addition, the number of days that can be used as carer's leave is no longer capped at 10 days per year. The National Employment Standards will also replace the rules about the accrual and crediting of paid personal/carer's leave with a single rule that consolidates notice and evidence rules for taking leave.

6. Community Service Leave

☑ The National Employment Standards provides a paid entitlement for employees required to attend jury service and unpaid leave for those who engage in a voluntary emergency management activity.

☑ An employee is entitled to be paid by their employer for a period of up to 10 days while they are absent from work during a period of jury service. An employer may require the employee to obtain payments to which they are eligible from the applicable State/Territory or Commonwealth body; these payments will reduce the amount payable to the employee.

☑ These provisions are not intended to displace State and Territory laws that provide employee entitlements in relation to engaging in eligible community service activities, if they are more beneficial to employees (Sections 108-112).

Key changes

- Employees currently rely on an employer's discretion and provisions in awards and agreements for community leave arrangements. The National Employment Standards will enable employees to take leave for employees who engage in a voluntary emergency management activity.
- The National Employment Standards contain provisions requiring employers to provide make up payments for full and part time employees undertaking jury duty for a period of up to 10 days (at the base rate of pay for ordinary hours of work). This supplements provisions in State and Territory legislation.

7. Long Service Leave

☑ The Government will work with the States and Territories to develop a uniform minimum long service leave standard. The National Employment Standards provide transitional arrangements while the new national standard is being developed.

☑ Existing agreement entitlements continue to apply on commencement.

☑ If an agreement is terminated, the National Employment Standards entitlement to Long Service Leave (the entitlement in the relevant pre-modernised award or, in some cases, pre-

commencement multi-State agreement) or State/Territory legislation will apply in any future agreement.

☑ There is limited scope to discount Long Service Leave where a pre-commencement agreement specifically excluded Long Service Leave (Section 113).

Key changes

- Initially, the National Employment Standards will provide transitional arrangements while a new national long service leave standard is being developed.

8. Public Holidays

☑ The public holidays National Employment Standard allows employees to be absent from work on specified public holidays and to be paid for the hours they would normally work.

☑ The following days are public holidays for the purposes of the National Employment Standard:

- 1 January (New Year's Day)
- 26 January (Australia Day)
- Good Friday
- Easter Monday
- 25 April (Anzac Day)
- Queen's birthday holiday
- 25 December (Christmas Day)
- 26 December (Boxing Day)

☑ If a State or Territory substitutes another day or declares an additional day, the employee is entitled to be absent on that day.

☑ Public holidays may be substituted by agreement between an employer and an award/agreement free employee or if permitted under the terms in a modern award/enterprise agreement.

☑ An employer may request an employee to work on a public holiday if the request is reasonable. The request may be refused if it is unreasonable or the employee's refusal is reasonable. The National Employment Standard provides a non-exhaustive list of factors to be taken into account when determining the reasonableness of a request or refusal (Sections 114-116).

Key changes

- The National Employment Standards provide an entitlement for an employee to be absent on prescribed public holidays.
- If an employee is absent on a public holiday the National Employment Standards provide for minimum rate of payment at base rate of pay for ordinary hours.
- Under the National Employment Standards, an employer may make a reasonable request for an employee to work on a public holiday. However, an employee may refuse to work if they have reasonable grounds.

9. Notice of Termination and Redundancy Pay

☑ An employer must provide an employee with written notice of the day of termination of employment.

☑ An employer must provide notice of termination or payment in lieu of that notice. The required period of notice is set out in a table in the National Employment Standards.

☑ An employee whose position is made redundant (as defined in the National Employment Standards) is entitled to a payment based on years of continuous service with an employer. Businesses with less than 15 employees are exempt from this National Employment Standard.

☑ Exclusions apply including:

- an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
- an employee whose employment is terminated because of serious misconduct;
- a casual employee;
- an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement; (Section 119-123).

Key changes

- The National Employment Standards will provide for written notice of termination and redundancy pay. The key change under the National Employment Standards is for the employer's notice to be in writing.
- The National Employment Standards provide a new entitlement to redundancy pay, depending on the level of continuous service by an employee.

10. Fair Work Information Statement

☑ The National Employment Standards require employers to give each new employee a copy of the Fair Work Information Statement containing information on key elements of the new system. Key elements include the roles of Fair Work Australia and the Fair Work Ombudsman, the National Employment Standards, modern awards, agreement making and freedom of association. The Fair Work Information Statement must also contain information on individual flexibility arrangements, employee records and privacy and termination of employment.

☑ An employer must give each new employee a copy of the Fair Work Information Statement (to be published and available from the Fair Work Ombudsman) prior to or as soon as practicable after commencement of employment (Section 124-125).

Key changes

- From 1 January 2010 an employer will be required to give the Fair Work Australia Information Statement to all new employees.
- There will not be a statutory requirement to give the statement to existing employees.

Further Information:

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 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 4 weeks leave after the cash out
- allowing agreement about when and how paid annual leave may be taken between an employer and employee
- allowing employers to give reasonable directions about the taking of paid annual leave by an employee
- allowing the substitution of public holidays by agreement.

Other protections:

As part of its award modernisation process, the Australian Industrial Relations Commission will create a general modern award. This award will 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.

Key Points

- **The National Employment Standards will commence operation on 1 January 2010**
- The National Employment Standards are 10 legislated minimum standards. The minimum standards relate to the following matters:

- maximum weekly hours);
- requests for 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;
- Fair Work Information Statement.

Modern Awards

What is a modern award?

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;
- ☑ procedures for consultation; and
- ☑ representation and dispute settlement.

Modern awards will be created by the Australian Industrial Relations Commission and will be industry or occupation-based (Section 139).

The Commission will include a **flexibility clause** in each modern award allowing 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 (Section 144).

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. Under a formal request from the Minister for Employment and Workplace Relations, the Commission is required to complete award modernisation by 31 December 2009.

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

An award does not apply to an employee 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. A guarantee does not apply to employees to whom an enterprise agreement applies.

The employer and employee must reach agreement about the undertaking before it commences operation. A guarantee may be given as a condition of accepting employment but an employer must not apply pressure to an employee in connection with the offer or acceptance of a guarantee of annual earnings. A guarantee can be given in respect of prospective employees.

When will modern awards commence?

Modern awards and the National Employment Standards will commence on **1 January 2010**.

Modern awards will operate on an industry or occupation basis. They will not cover employees or employers covered by an enterprise award (or a Notional Agreement Preserving a State Award (NAPSA) derived from a State enterprise awards). A separate process for modernising these awards is contained in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

How often will modern awards be reviewed?

Fair Work Australia will review modern awards **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.

The first regular review will take place in 2014, four years after modern awards commence on 1 January 2010. Fair Work Australia may vary, make or revoke modern awards during this process. Each award must be reviewed (Section 156).

An additional review of modern awards will take place in 2012, two years after modern awards commence. This review will examine whether modern awards:

- ☑ achieve the modern awards objective, and
- ☑ are operating effectively, without anomalies or technical problems arising from the award modernisation process.

When will the first National Minimum Wage Order occur?

Fair Work Australia's first annual wage review will be conducted and completed from 1 January 2010 to 30 June 2010.

In its first annual wage review, Fair Work Australia does not have to set a full range of special national minimum wages covering all the classes of employees referred to in paragraph 294(1)(b) of the *Fair Work Act 2009* (i.e. junior employees; employees to whom training arrangements apply; and employees with a disability).

Further Information:

In limited circumstances, Fair Work Australia will have the power to vary, make or revoke modern awards outside the system of four yearly reviews (for example, if it is satisfied that to do so is necessary to achieve the objectives of modern awards or to remove ambiguity, uncertainty or discriminatory terms) (Section 157).

The main power to vary modern award minimum wages is in annual wage reviews. Otherwise, Fair Work Australia may only vary modern award minimum wages in a four yearly review or outside a four year review where the variation is necessary to achieve the modern awards objective if the variation is justified for work value reasons (Sections 156-157).

Fair Work Australia must ensure modern awards and the National Employment Standards provide a fair and relevant minimum safety set of terms and conditions for employees, taking into account the following social and economic factors:

- the relative living standards and needs of the low paid;
- the need to encourage collective bargaining;
- the need to promote social inclusion through increased workforce participation;
- the need to promote flexible modern work practices and the efficient and productive performance of work;
- the principle of equal remuneration for work of equal or comparable value;
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- the likely impact of any exercise of modern award powers in employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

How will awards and enterprise awards transition to the new system?

Fair Work Australia will have the power to terminate any award-based transitional instruments that it considers are completely replaced by a modern award. Fair Work Australia can vary the coverage of these types of instruments if the modern award will only partially replace the instrument. These provisions enable transitional instruments to be terminated once they are no longer relevant.

Enterprise awards and Notional Agreements Preserving State Awards (NAPSAs) that were derived from a state enterprise award are not subject to the award modernisation process. Those awards will be integrated into the new workplace relations system via a different mechanism (see below).

What is the process for making a modern enterprise award?

An application can be made to Fair Work Australia for a modern enterprise award. An application can be made between 1 July 2009 and 31 December 2013. After this time period no new modern enterprise awards can be made. If an application to modernise an enterprise award is not received by Fair Work Australia by 31 December 2013 that instrument will cease to operate and the applicable modern award will then apply.

Prior to a decision being made to modernise an enterprise award and before 31 December 2013, existing enterprise awards will continue to cover employees and employees will maintain their existing entitlements.

What does Fair Work Australia consider when making an enterprise award?

Fair Work Australia will take a number of factors into consideration when deciding whether to modernise an enterprise award including:

- ☑ The circumstances that led to the making of an enterprise award;
- ☑ Whether there is a modern award that could cover the group of employees;
- ☑ The terms and conditions of employment applying in the industry that the employees work within, and the extent to which those terms and conditions are covered in the enterprise award;
- ☑ The extent to which the enterprise award contains enterprise specific terms; and
- ☑ The views of the persons covered by the enterprise award.

Fair Work Australia will take into account the same social and economic factors in making modern enterprise awards as making other modern awards. These factors include, for example, the impact on business including competitiveness and viability. The objective of modern enterprise awards is to recognise that they may provide tailored terms and conditions that reflect arrangements in specific enterprises. An enterprise may have developed employment arrangements over a period of time that meet the particular needs of that enterprise and reflect the way the enterprise operates. Fair Work Australia will take this into consideration when deciding whether to make a modern enterprise award.

Fair Work Australia is able to inform itself as it sees fit in conducting the modernisation process. This enables Fair Work Australia to seek and consider submissions not only from those with a direct interest in the award, but also other interested parties (e.g., other employers in the relevant industry).

These criteria are broad and require Fair Work Australia to consider and balance all relevant matters in deciding whether to make a modern enterprise award. For example, the criteria require Fair Work Australia to consider the circumstances that led to the making of the enterprise instrument and the extent to which the instrument provides enterprise specific terms and conditions of employment.

However, Fair Work Australia is required to assess these matters in light of the content of any relevant modern award that would otherwise apply (which would allow consideration of whether the relevant modern award provides terms and conditions that should be included in the modern enterprise award as an appropriate safety net), and the views of the persons covered by the enterprise instrument.

Illustrative example

Wrenview Island Resort operates a remote island resort. The Wrenview Island Resort Enterprise Award includes a number of enterprise-specific arrangements that suit the needs of the business.

For example, under the Wrenview Island Resort Enterprise Award, a maximum of 10 ordinary hours may be worked per day within a spread of 16 hours per day from starting time, inclusive of meal breaks. The rates of pay for all employees covered by the enterprise award have been annualised to incorporate compensation for employees working 15

weekends and six public holidays per year.

Wrenview and its employees are keen for these working arrangements to remain in the new system and are able to make submissions to FWA that the enterprise award be modernised, taking into account these longstanding enterprise-specific arrangements.

Where a modern industry or occupation based award is made, the terms and conditions of employment under a transitional enterprise award will still apply.

An enterprise award can be terminated by application to Fair Work Australia between 1 January 2010 and 31 December 2013. When Fair Work Australia receives an application, they can choose whether or not to terminate the enterprise award and decide whether the instrument should be made into a modern enterprise award.

What are take-home pay orders?

[Part 3, Section 9, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*]

An employee or outworker's take-home pay is defined as the pay that the employee or outworker actually receives (including not only wages and incentive-based payments, but other payments such as penalty rates and allowances). The effect of any deduction from wages (such as might occur under a salary sacrifice arrangement) is disregarded when assessing take-home pay. Fair Work Australia will be able to make take-home pay orders where one or more employees' take-home pay is reduced as a result of award modernisation.

The award modernisation process is not intended to result in a reduction of the take-home pay of an employee or outworker. A take-home pay order can only be made if:

☑ There is an actual reduction in take-home pay (for example, if an award rate decreases however the employee's pay does not, an order cannot be made); and

☑ Award modernisation is the reason for the reduction in pay.

Who can apply for a take-home pay order?

Applications for a take-home pay order can be made by an employee or outworker, a union that covers that employee or outworker or someone acting of behalf of the employee or outworker. An application for an order can be made in respect of an individual employee or outworker or a group of employees or outworkers.

The order can be sought in respect of a modernisation-related reduction in take-home pay.

An employee suffers such a reduction if, and only if:

☑ the modern award starts to apply to the employee when it commences operation - that is, the orders are only available in respect of current award covered employees;

☑ the employee is employed in the same position (or a position that is comparable to) the position they were employed in immediately before the modern award came into operation. This makes clear that the provision is designed purely to ensure a fair transition from the old award to the new - it is not intended that this provision apply where employees change jobs, or where working arrangements change;

☑ the employee's take-home pay for working particular hours (including a particular shift pattern or spread of hours) or for a particular quantity of work is less than it would have been immediately before the modern award came into operation; and

☑ the reduction is attributable to the modernisation process - the intention is that orders can only be made where modernisation is the operative or immediate reason for a reduction in take-home pay.

Equivalent provisions are made in relation to non-employee outworkers.

NB: It is not intended that the take-home pay orders should prevent an employer from taking action, for example reorganising roster arrangements, which would otherwise be lawful.

Additionally, Fair Work Australia must not make a take-home pay order in relation to an individual or a class where the reduction in take-home pay is minor or insignificant, or where the affected employees or outworkers have been adequately compensated for the reduction in other ways.

Key Points

- Modern awards and the National Employment Standards comprise the new minimum safety net to replace existing awards and statutory minimum standards, including the Australian Fair Pay and Conditions Standard.
- Modern awards will be reviewed by Fair Work Australia every four years following commencement, with a one-off interim review to occur in 2012.
- There is limited scope to vary awards outside the regular cycle of reviews.
- Modern awards will operate on an industry or occupation basis. They will not cover employees or employers covered by an enterprise award (or a NAPSA derived from a State enterprise awards). A separate process for modernising these awards is contained in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.*

What about people 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. Modern awards will apply to most, but not all employees.

The Minimum Wage Panel will 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 safety net casual loading for casual employees who are not covered by either an award or an agreement.

Unfair Dismissal and Fair Dismissal Code for Small Business

[For more detail on unfair dismissal laws refer to the Unfair Dismissal module]

What is a dismissal?

A **dismissal** is where an employer terminates the employment of his or her employee.

Dismissal can also be at the employee's initiative, known as **Constructive Dismissal**. Constructive dismissal occurs where an employee has been forced to resign from employment because of conduct engaged in by the employer, such as harassment.

A person has **not** been dismissed for the purposes of the unfair dismissal protections if:

☑ They were employed under a contract of employment which operated for a specified period of time, for a specified task, or for the duration of a specified season and employment was terminated at the end of the period, task or season;

☑ A training arrangement applied to the employee, their employment was for a specified period of time or limited to the duration of the training arrangement and their employment was terminated at the end of the training arrangement; or

☑ the person was demoted without involving a significant reduction in pay or duties and they remained with the same employer (Section 386).

What is unfair dismissal?

A person has been **unfairly dismissed** when Fair Work Australia is satisfied that:

- ☑ the person has been dismissed;
- ☑ the dismissal was harsh, unjust or unreasonable;
- ☑ the dismissal was not a case of genuine redundancy; and
- ☑ the dismissal was not consistent with the Small Business Fair Dismissal Code (only where the employer is a small business employer) (Section 385).

What constitutes harsh, unjust or unreasonable?

Fair Work Australia will look at all the following factors when considering whether a dismissal was harsh, unjust or unreasonable:

- ☑ whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees);
- ☑ whether the person was notified of that reason;
- ☑ whether the person was given any opportunity to respond to that reason;
- ☑ any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal;
- ☑ if the dismissal was related to unsatisfactory performance by the person – whether the person had been warned about the unsatisfactory performance before the dismissal;
- ☑ whether the size of the employer's enterprise would be likely to impact on the procedures followed in process of the dismissal;
- ☑ whether a lack of dedicated human resource management specialists or expertise in the employer's enterprise would be likely to impact on the procedures followed in the dismissal; and
- ☑ any other matters that Fair Work Australia considers relevant (Section 387).

General Protections

There are prohibitions against dismissing someone on discriminatory grounds or for other reasons such as engaging in industrial activity or being temporarily absent from work because of illness or injury. This is not the same as unfair dismissal and is dealt with under the General Protections part of the *Fair Work Act 2009* (Part 3-1).

What is genuine redundancy?

Genuine redundancy is where an employee's job is **no longer required to be performed by anyone** because of changes in the **operational requirements** of the business.

Possible examples of changes in the **operational requirements** of an enterprise include:

- ☑ a machine is now available to do the job performed by the employee;
- ☑ the employer's business is experiencing a downturn, for example, the employer only needs three people to do a particular task or duty instead of five; or
- ☑ the employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists.

It is not a case of genuine redundancy if the person dismissed could have been employed in another position within the business or associated entity and it would have been reasonable in all the circumstances to redeploy them (Section 389).

In any selection process for determining which employees are made redundant, the employer must ensure that the process is in accordance with any provision of any applicable modern award, enterprise agreement or transitional instrument and is not discriminatory.

General Protections

The provisions concerning genuine redundancy do not cover the process for selecting individual employees for redundancy. If the reason a person is selected for redundancy is discriminatory (for example, on the basis of race, sex or religion amongst others), then the person will be able to bring an action for an alleged contravention of the General Protections in Part 3-1 of the *Fair Work Act 2009*).

Who can make an unfair dismissal claim?

A person can make an unfair dismissal claim if they have:

☑ completed the **minimum employment period**; and

☑ are covered by a modern award (or award-based transitional instrument) or

☑ an enterprise agreement (or agreement-based transitional instrument) applies to the person.

In some situations, high earning employees will be excluded from unfair dismissal protections. All employees who are covered by an award (or award-based transitional instrument) or who have an enterprise agreement (or agreement-based transitional instrument) applying to their employment will have access to unfair dismissal remedies. However, if neither of these criteria applies, a person will only be able to bring an unfair dismissal claim if the sum of their annual rate of earnings and any other amounts worked out in accordance with the regulations is less than the high income threshold (which from 1 July 2009 is $108,300, indexed annually).

What are the minimum employment periods?

Employees must have served a **minimum employment period** before they can make an unfair dismissal claim. The minimum employment periods are:

☑ one year for employees of a small businesses (from 1 July 2009 until 31 December 2010 a small business employer is a business with less than 15 full-time equivalent employees. From 1 January 2011, the method of calculation will change to less than 15 employees based on a head count of total employees, not full-time equivalent employees); or

☑ six months if the employer is not a small business (Section 383).

Full-time equivalent test and the head count test

Full-time equivalent test (applies to dismissals that occur prior to 1 January 2011)

The number of full-time equivalent employees is to be calculated by adding up the ordinary hours of all employees in the 4 week period before dismissal or notice of dismissal (whichever is the earliest) and dividing those hours by 152 (being 4 x 38 hours). The ordinary hours of employees include periods of authorised leave (whether paid or unpaid) other than parental leave that has lasted for 4 weeks or more. One employee cannot count as more than one full-time equivalent. The legislation outlines the process for this calculation.

Head count test (applies to dismissals that occur on or after 1 January 2011)

The head count involves counting all employees employed by the employer at the time of dismissal or notice of dismissal (whichever is the earliest). Casual employees are not to be included in the count unless they have been employed by the employer on a regular and systematic basis.

In both tests employees of associated entities are also counted.

How is a period of employment defined?

An employee's period of employment is based on the employee's **continuous service** with the employer.

Service as a **casual** employee can count towards the period of employment as long as it was on a regular and systematic basis and the employee had a reasonable expectation of continuing work on a regular and systematic basis (Section 384).

Any unauthorised absences and most periods of unpaid leave do not count as service; however these do not break an employee's continuity of service (Section 22).

Example of how continuity of service is calculated where there are periods of unpaid leave:

John worked for 6 months as a full-time permanent employee. He then took leave without pay for 2 months and returned to work for a further 6 months. John's total period of continuous service is 12 months, which is the total period worked before and after the period of leave without pay.

How is the minimum employment period assessed?

Whether an employee has served the minimum employment period is assessed either when the person is given notice of dismissal, or when the dismissal actually takes effect, whichever happens first (Section 383).

What happens to the period of employment when the business is transferred to a new owner?

In a transfer of business, a new employer can choose not to recognise the employee's service under the old employer for the purposes of the unfair dismissal provisions. However, they must inform the employee in writing before the new employment starts. If the new employer and the old employer are associated entities, the employee's service with the old employer must be recognised.

How do I make an Application for unfair dismissal?

A person who believes they have been unfairly dismissed can make an application to Fair Work Australia.

What are the lodgement timeframes?

An application must be made within 14 days of a dismissal taking effect. However, Fair Work Australia has discretion to extend the timeframe for making an unfair dismissal application if there are exceptional circumstances, taking into account:

- ☑ the reason for the delay;
- ☑ whether the person first became aware of the dismissal after it had taken effect;
- ☑ any action taken by the person to dispute the dismissal;
- ☑ any possible disadvantage to the employer;
- ☑ the merits of the application; and
- ☑ fairness as between the person and other persons in a similar position (Section 394).

What fees can I expect to pay?

Unfair dismissal applicants are required to pay fees prescribed by regulation. The Regulations prescribe an application fee (which from 1 July 2009 will be $59.50), the method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded (Section 395).

What is the procedure through Fair Work Australia?

Fair Work Australia is required to decide certain matters before considering the merits of the application:

- ☑ whether the application was made within the 14 day time limit;
- ☑ whether the person is protected from unfair dismissal;

- ☑ whether the dismissal was consistent with the Small Business Fair Dismissal Code (only relevant where the employer is a small business employer); and
- ☑ whether the dismissal was a genuine redundancy (Section 396).

Fair Work Australia must hold a **conference or hearing** in relation to a matter that involves **contested facts** (Section 397).

Can I have someone representing me?

Yes. A person may be represented by a member, officer or employee (whether legally qualified or not) of an organisation, employer association or peak council representing the person.

In addition, a person may also be represented by a lawyer or paid agent. "Paid agent" is relevantly defined in Section 12 to mean an agent who charges or receives a fee to represent a person in a matter. However, in both cases, a person may only be represented where Fair Work Australia grants permission. Fair Work Australia will only grant permission if:

- ☑ it enables the matter to be dealt with more efficiently, having regard to the complexity of the matter;
- ☑ it would be unfair not to allow the person to be represented because of the inability of the person to represent themselves effectively; and
- ☑ it would be unfair not to allow the person to be represented taking into account fairness between the parties.

Can I appeal a decision of Fair Work Australia?

Fair Work Australia cannot grant appeals from a decision made in an unfair dismissal case unless it is in the public interest to do so.

The Minister for Employment and Workplace Relations can apply to Fair Work Australia for a review of unfair dismissal decisions (other than those made by the full bench) if the Minister believes the decision is contrary to the public interest.

To the extent that an appeal is based on an error of fact, it will only be allowed where that error is a significant error of fact (Section 400).

Fair Work Australia has a discretion to deal with appeals as it considers appropriate, including deciding whether to hold a hearing or decide a matter on the papers. However, the presumption is that appeals will be determined by a hearing.

Small Business Fair Dismissal Code (Section 388)

The Small Business Fair Dismissal Code is available to small business employers (those with fewer than 15 employees) who are considering dismissing an employee. Until 31 December 2010, the threshold used to define a small business for the purpose of applying the unfair dismissal arrangements will be fewer than 15 full-time equivalent employees.

From 1 January 2011, the threshold will be based on a simple headcount of employees.

It is not a compulsory Code – the employer does not have to follow the Small Business Fair Dismissal Code, but if the dismissal was consistent with the Code, then the dismissal will be considered fair and the other factors relating to unfair dismissal do not need to be considered (see Section 396). If the Small Business Fair Dismissal Code is not followed, the claim will be treated the same as any other unfair dismissal claim and may be found to be fair or unfair depending on the circumstances.

How does the Small Business Fair Dismissal Code work?

The Small Business Fair Dismissal Code allows for a dismissal without notice or warning in cases of **serious misconduct** such as theft, fraud or violence.

For **underperformance**, the Small Business Fair Dismissal Code requires that the employee be given a valid reason why they are at risk of being dismissed and a reasonable opportunity to rectify the problem.

Voluntary Checklist

A checklist to assist with complying with the Small Business Fair Dismissal Code has been developed for small business employers to complete at the time of dismissal and to keep in case an unfair dismissal claim is made. However, it is **not** a requirement for compliance with the Small Business Fair Dismissal Code that the checklist be completed.

The checklist covers off information such as if:

- the employee was stealing money or goods from the business
- the employee committed a serious breach of occupational health and safety procedures
- the employee was clearly warned (either verbally or in writing) that the employee was not doing their job properly and would have to improve his or her conduct or performance, or otherwise be dismissed
- the employee was provided with any training or opportunity to develop their skills
- the employee voluntarily resigned or abandoned his or her employment.

Key Points

- The introduction of the Small Business Fair Dismissal Code.
- There are a range of factors that Fair Work Australia will consider in determining if a dismissal is harsh, unjust or unreasonable.
- An application can be dismissed in the case of "genuine redundancy", which can include if the person's job is no longer required to be performed by anyone because of changes in the operational requirements of the employer's business.
- Under the previous workplace relations system only certain employees in businesses with more than 100 staff and who met a six month qualifying period of employment could make an unfair dismissal claim.
- Under the *Fair Work Act 2009*, an employee can make an unfair dismissal claim regardless of the business size, as long as they have completed the minimum employment periods and subject to certain other requirements.

Collective Bargaining Framework

[For more detail refer to Collective Bargaining Framework module]

What is collective bargaining?

☑ Under the *Fair Work Act 2009*, "collective bargaining" is a term which describes the process where employers, employees and bargaining representatives (including employee organisations) bargain for an **enterprise agreement**.

☑ There are several different types of enterprise agreements. These are single-enterprise agreements, multi-enterprise agreements and greenfields agreements. Greenfields agreements (which are made between an employer and an employee organisation before the employer has engaged any employees who will be covered by the agreement), can be either single-enterprise or multi-enterprise agreements.

☑ The *Fair Work Act 2009* entitles employers and employees to appoint any person as their bargaining representative for a proposed enterprise agreement. An employer is always a

bargaining representative for a proposed enterprise agreement that will cover it. Bargaining representatives are required to **bargain in good faith** when negotiating an enterprise agreement (other than a greenfields agreement).

What is an Enterprise Agreement?

- ☑ For the purposes of the *Fair Work Act 2009*, an "enterprise" is a business, activity, project or undertaking.
- ☑ An **enterprise agreement** is a collective agreement made at the enterprise level between employer(s) and employees.
- ☑ An enterprise agreement provides the terms and conditions of employment for those employees to whom it applies. It also sets out the rights and obligations of the employer(s) and any employee organisation(s) that it covers.

Who is a Bargaining Representative?

- Employers are bargaining representatives for a proposed enterprise agreement but may also appoint in writing another person as their representative.
- Employees are entitled to appoint any person in writing as their **bargaining representative**.
- An employee organisation is taken to be the bargaining representative for its members, unless the employee has appointed another person as their representative or has revoked in writing the organisation's status as their representative. The notice of revocation must be given to their employer.
- Employers are required to take all reasonable steps to notify each employee of their right to be represented during bargaining by providing them with a notice of employee representational rights.
- Bargaining representatives must meet the good faith bargaining requirements.
- A bargaining representative for an employee must be free from improper influence or control by the employer or another bargaining representative.

Content Rules

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

The concept of prohibited content is not part of the *Fair Work Act 2009*.

Permitted matters

Enterprise agreements must be about permitted matters. Permitted matters are:

- matters pertaining to the relationship between an employer or employers and employees;
- matters pertaining to the relationship between an employer or employers and an employee organisation or organisations;
- deductions from wages authorised by an employee; and
- how the agreement will operate.

The intention of the *Fair Work Act 2009* is that terms about trade union training leave are able to be included in agreements.

Whether an agreement is about permitted matters is important because employee claim action will only be protected industrial action if it is taken in support of such matters, or matters that are reasonably believed to be permitted matters.

What is good faith bargaining?

The good faith bargaining provisions of the *Fair Work Act 2009* require bargaining representatives to meet certain requirements when bargaining for a proposed enterprise agreement (other than a greenfields agreement).

These requirements are:

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

Refraining from capricious or unfair conduct covers a broad range of conduct. Examples of conduct that may be capricious or unfair include, but are not limited to:

- ☑ an employee organisation deliberately excluding an employee who is a bargaining representative from discussions relating to the terms of the proposed agreement and not notifying them of meetings;
- ☑ an employer dismissing or engaging in detrimental conduct towards an employee because the employee is a bargaining representative or is participating in bargaining; and
- ☑ an employer preventing an employee from appointing his or her own representative.

The good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining for the agreement or to enter into an agreement if they do not agree to its terms.

Role of Fair Work Australia in good faith bargaining?

Fair Work Australia has a role in facilitating bargaining in occasions where bargaining breaks down. For example if bargaining representatives are not meeting good faith bargaining requirements, Fair Work Australia can make a bargaining order on the application of another representative.

The bargaining order will specify actions required for bargaining representatives to meet good faith bargaining requirements. If non-compliance with a bargaining order is serious and sustained, a bargaining representative may apply for a serious breach declaration. The consequence of such a declaration is that if the representatives do not settle all the matters at issue within 21 days from the date of the declaration, Fair Work Australia must make a workplace determination.

If an employer does not agree to bargain with its employees, a bargaining representative can also apply to Fair Work Australia for a majority support determination. If Fair Work Australia determines the majority of employees support bargaining for an enterprise agreement, the employer must meet the good faith bargaining requirements.

A bargaining representative may apply to Fair Work Australia for a scope order to determine which group of employees are to be covered by the agreement, as well as seek Fair Work Australia's assistance in dealing with bargaining disputes.

Role of Fair Work Australia in approving agreements

An enterprise agreement does not have any legal effect until it is approved by Fair Work Australia.

What steps are required to seek approval by Fair Work Australia?

- ☑ A bargaining representative (including an employer, employee or employee organisation) for the agreement must apply to Fair Work Australia for approval **within 14 days after the agreement is made**.
- ☑ The application must be accompanied by a **signed copy of the agreement** and any **declarations** that are required by Fair Work Australia's procedural rules to accompany the application.

When will Fair Work Australia approve an agreement?

Once an application for approval has been made, Fair Work Australia must approve an agreement if it is satisfied that all **approval requirements** have been met.

The **approval requirements** are:

- ☑ the agreement was **genuinely agreed** to by the employees covered by the agreement;
- ☑ in the case of a multi-enterprise agreement, that each employer genuinely agreed to the agreement and that no person coerced, or threatened to coerce, any of the employers to make the agreement;
- ☑ the terms of the agreement do not contravene the **National Employment Standards**;
- ☑ the agreement passes the **better off overall test** from 1 January 2010. (Between 1 July 2009 and 31 December 2009 enterprise agreements will be assessed under the no-disadvantage test);
- ☑ the group (or **scope**) of employees covered by the agreement was fairly chosen;
- ☑ the agreement does not contain **unlawful terms**;
- ☑ the agreement contains a **nominal expiry date** of not more than 4 years from the day on which Fair Work Australia approves the agreement;
- ☑ the agreement contains a **dispute settlement term**, as described above;
- ☑ the agreement contains a **flexibility term**, as described above;
- ☑ the agreement contains a **consultation term**, as described above;
- ☑ approving the agreement would not undermine good faith bargaining if a **scope order** is in operation in relation to the agreement;
- ☑ if a **multi-enterprise agreement** was not approved by the employees of all the employers who asked their employees to vote on the agreement, that the agreement has been varied to cover only the employers (and their employees) whose employees approved the agreement; and
- ☑ the agreement meets the **approval requirements** dealing with shiftworkers, pieceworkers, outworkers, or school-based apprentices and school-based trainees (these requirements ensure that the agreement is not detrimental to those vulnerable employees).

Variation and Termination of enterprise agreements

Variation of enterprise agreements

The process for varying an enterprise agreement is similar to the process for making an agreement. This means that the employer(s) and their employees must jointly make a variation. The variation is made when it is approved by a majority of the employees who vote for the variation. Once a

variation has been made, a person covered by the agreement must apply to Fair Work Australia to have it approved.

Fair Work Australia approval process:

- ☑ An employer, employee or employee organisation covered by the agreement must apply to Fair Work Australia for approval of the variation within 14 days after the variation is made.
- ☑ The application must be accompanied by a signed copy of the variation and a copy of the agreement consolidated to include the variation and any declarations that are required by Fair Work Australia's procedural rules to accompany the application.
- ☑ A variation is subject to the same approval requirements as new agreements and must pass the better off overall test and not contravene the National Employment Standards.
- ☑ A variation to an agreement has no effect unless approved by Fair Work Australia.
- ☑ If Fair Work Australia is satisfied that the approval requirements have been met, it must approve the variation unless there are serious public interest grounds for not approving it.

Fair Work Australia may deal with a dispute about a proposed variation to an agreement that is already in operation if the matter is unable to be resolved by the employer and employees. However, Fair Work Australia cannot arbitrate such a dispute.

Termination of enterprise agreements

Employers and employees who are covered by an enterprise agreement may agree to terminate an enterprise agreement at any time while the agreement is in operation.

For an enterprise agreement to be terminated, the employees must vote in favour of the termination, followed by approval from Fair Work Australia.

A termination of an agreement has no effect unless it is approved by Fair Work Australia.

If an agreement has passed its nominal expiry date, an employer, employee or employee organisation covered by the agreement may apply to Fair Work Australia for the termination of the agreement.

If a party has made such an application, Fair Work Australia must terminate the agreement if it is satisfied that it is not contrary to the public interest to do so and if it considers it is appropriate to do so, taking into account the views of the employees, each employer, and each employee organisation covered by the agreement, as well as their circumstances and the likely effect the termination will have on each of them.

Key Points

Types of Agreements

- Under the previous workplace relations system there were multiple streams of agreement making, the new system has a single stream of collective enterprise agreements that are made between an employer or employers and their employees. Under the new system there is no distinction between union and non-union agreements.

Content of Agreements

- The previous system had extensive content rules for workplace agreements. Enterprise agreements under the new framework must be about 'permitted matters.'

Approval, variation and termination processes for agreements

- The new system requires enterprise agreements to be approved by Fair Work Australia before they commence operation. Fair Work Australia will apply a Better off Overall Test (BOOT) to agreements from 1 January 2010. Until then, Fair Work Australia will continue to apply the no-disadvantage test to enterprise agreements made during the bridging period.
- Employers and employees may agree to vary or terminate existing enterprise agreements.

- Variations and terminations by agreement must be approved by a majority of employees who are covered by that agreement.
- Variations and terminations are subject to approval by Fair Work Australia.

Good faith bargaining

- Fair Work Australia has a role in facilitating bargaining in occasions where bargaining breaks down. For example if bargaining representatives are not meeting good faith bargaining requirements, Fair Work Australia can make a bargaining order on the application of another representative.
- Bargaining orders will specify actions required for bargaining representatives to meet good faith bargaining requirements.
- If an employer does not agree to bargain with its employees, a bargaining representative can also apply to Fair Work Australia for a majority support determination.
- If Fair Work Australia determines the majority of employees support bargaining for an enterprise agreement, the employer must meet the good faith bargaining requirements and an employee bargaining representative may seek a bargaining order to ensure the employer bargains in good faith.
- A bargaining representative may apply to Fair Work Australia for a scope order to determine which group of employees are to be covered by the agreement, as well as seek Fair Work Australia's assistance in dealing with bargaining disputes.

Transitional Arrangements

What are transitional instruments?

Transitional instruments are instruments that were made under the *Workplace Relations Act 1996* that continue to operate after 1 July 2009. Transitional instruments are classified as **award-based transitional instruments** and **agreement-based transitional instruments.**

Award-based transitional instruments are awards and notional agreements preserving State awards (NAPSAs).

Agreement-based instruments include both collective and individual agreement-based instruments. The following agreement-based transitional instruments are **collective agreement-based transitional instruments**:

☑ collective agreements;

☑ workplace determinations;

☑ preserved collective State agreements;

☑ pre-reform certified agreements;

☑ old IR agreements; and

☑ Section 170MX awards.

The following agreement-based transitional instruments are **individual agreement-based transitional instruments**:

☑ ITEAs (Individual Transitional Employment Agreements);

☑ preserved individual State agreements; and

☑ AWAs (Australian Workplace Agreements).

Transitional instruments will continue to operate in relation to those employers, employees and employee organisations that were bound by the instrument immediately before 1 July 2009. Award

and collective agreement based transitional instruments will also apply to employees engaged by those employers after 1 July 2009. However, from 1 July 2009, an award-based transitional instrument will not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) when the employee is classified as a high income employee as per Section 329 of the *Fair Work Act 2009.*

How will employee service transition in relation to the National Employment Provisions?

As a general rule, employee's service with an employer before the commencement of the National Employment Standards will count as service for determining entitlements under the National Employment Standards. However the period of service will not be counted again, if the employee has already had the benefit of that entitlement. This is to prevent an employee "double dipping".

Illustrative example

Kaye is a fashion designer employed in Victoria by That Suits You Pty Ltd. After 10 years of continuous service, in mid-2008 Kaye took her accrued entitlement to long service leave under the *Victorian Long Service Leave Act 1992*. The effect of sub item 5(3) is that Kaye's 10 years of continuous service will count in determining her initial entitlement to long service leave in the first place, but will not be counted in calculating her further entitlement to long service leave under the Victorian Act (so that she will not be entitled to access again the amount of long service leave that she took in mid-2008).

How will the introduction of the National Employment Standards affect employee entitlements?

Redundancy

- Entitlement to redundancy pay under the National Employment Standards applies to terminations of employment due to an employee's position being made redundant that occur on or after the commencement of the National Employment Standards, even if notice of termination was given before that date. This means that even where an employee is given notice of termination under the WR Act prior to commencement of the National Employment Standards, an employer will still be liable to pay redundancy pay (to an eligible employee) if the date of termination falls after the National Employment Standards commencement date.

Annual Leave and Paid Personal/Carers Leave

- An employee who is in the middle of accessing leave during the commencement of the National Employment Standards will be entitled to take the rest of the leave under the entitlements of the National Employment Standards. If the provisions of that employee's terms and conditions of employment had been more generous, then these will prevail for the period of the leave. The amount, time and arrangements for that leave may be adjusted as necessary in accordance with the provisions of the National Employment Standards.
- If an employee accumulates leave (annual or paid personal/carers leave) before the commencement of the National Employment Standard, the provisions of the National Employment Standard will apply to that leave. The leave will be treated as if it was accrued under the National Employment Standard.
- Community service leave provisions under the National Employment Standards will apply to an employee who is absent from work on or after the commencement of the National Employment Standards, even if the period of absence began before commencement.

Illustrative example

Jarrod is employed full-time as a waiter at a café in Melbourne. He is summonsed to appear and is required to attend for jury service from 29 December 2009. The trial he is serving on ends on 20 January 2010.

From 1 January 2010 (the intended NES commencement date), Jarrod is taken to be on community

service leave under the provisions in Division 8 of the NES. This means he is entitled to payment from his employer under Section 111 of the *Fair Work Act 2009*. Under subsection 111(2), Jarrod's employer is required to pay him at his base rate of pay for ordinary hours of work in the period (up to a period of 10 days), less any amount of jury service pay he has received.

Jarrod is entitled to payment from his employer for the period from 4 to 15 January 2010 (10 working days). He is not entitled to any payment under the NES for the days of absence before this time, as they occurred prior to commencement of the NES (sub item 8(2)).

Termination

- Termination provisions under the National Employment Standards will only come into effect for terminations occurring after the commencement of the National Employment Standards. If the notice of termination occurs before the commencement of the National Employment Standards (even if the actual termination occurs afterwards), the WR Act termination provisions apply.

Information Statements

- There is no obligation for an employer to hand out Fair Work Information Statements to employees who were employed before the commencement of the National Employment Standards. An employer is only obliged to give out Fair Work Information statements to new employees after the commencement of the National Employment Standards.

NB: the Fair Work Information Statement will be prepared by the Fair Work Ombudsman and include information covering, the National Employment Standards; modern awards; agreement-making under the FW Act; the right to freedom of association; the role of Fair Work Australia and the Fair Work Ombudsman; termination of employment; individual flexibility arrangements; right of entry (including the protection of personal information by privacy laws).

Content and interaction of transitional instruments

Do the content rules in the Workplace Relations Act 1996 continue to apply to transitional instruments?

Transitional instruments continue to be subject to the content rules that applied, or would have applied, before 1 July 2009. For certain agreement-based transitional instruments, this includes rules concerning prohibited content. For award-based transitional instruments, this means that the rules in relation to allowable and non-allowable award matters are preserved.

Will there be new interaction rules in relation to transitional instruments?

Transitional instruments continue to be subject to the interaction rules for different types of transitional instruments that are contained in the *Workplace Relations Act 1996*. These rules preserve, for example, the ability for one type of transitional instrument to operate again when another transitional instrument is terminated (see paragraphs 5(2)(a)(ii) and (b)(ii) of the Act). For example, the following provisions of the WR Act will continue to operate:

☑ Section 349, which deals with the effect of an award while a workplace agreement in operation;

☑ clause 38A of Schedule 8, which deals with the operation of NAPSAs; and

☑ clause 2 of Schedule 7, which preserves Section 170LY of the pre-WorkChoices Workplace Relations Act and provides that a pre-reform certified agreement prevails over an award to the extent of any inconsistency.

Different rules apply to the interaction between a transitional instrument and an instrument made under the *Fair Work Act 2009*.

NB: as of 1 January 2010, modern award wages, pay scales and the National Employment Standards apply to transitional instrument covered parties

Variation and termination of transitional instruments

[**Part 3,** *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*]

NB: Transitional instruments can only be varied or terminated in limited circumstances.

Variation of transitional instruments

In what circumstances can a transitional instrument be varied?

Fair Work Australia may make a determination varying a transitional instrument in limited circumstances. Transitional instruments can be varied to:

- ☑ resolve ambiguity or uncertainty in the instrument;
- ☑ resolve an uncertainty or difficulty relating to the interaction between the instrument and a modern award (e.g., a pre-reform certified agreement will interact with a modern award where a modern award replaces an unmodernised award);
- ☑ remove or vary provisions that are inconsistent with the general protections framework in Part 3-1 of the *Fair Work Act 2009*;
- ☑ resolve an uncertainty or difficulty relating to the interaction between the instrument and the National Employment Standards.

Variations of transitional instruments will operate from a day specified in the determination made by Fair Work Australia, and variations may be back dated.

Fair Work Australia may also vary a transitional instrument if the instrument is referred to it by the Human Rights and Equal Opportunity Commission, and Fair Work Australia considers that the instrument requires a person to do an act that would be unlawful under Part II of the *Sex Discrimination Act 1984* (but for the fact it was done in direct compliance with the transitional instrument).

In addition to rules about variation and termination that apply to all transitional instruments, an award can also be:

- ☑ varied to maintain minimum safety net entitlements;
- ☑ varied to bind additional employers, employees or organisations; or
- ☑ revoked where it is obsolete or no longer capable of operating.

However, an award cannot be varied or revoked under this item after the end of the bridging period, except:

- ☑ to maintain minimum safety net entitlements; or
- ☑ as a result of Fair Work Australia finalising a matter on foot before the end of the bridging period.

NB: a transitional award cannot be varied to bind new parties after the bridging period

During the bridging period, pre-reform certified agreements and preserved collective State agreements can also be varied or extended by Fair Work Australia under the relevant provisions of the *Workplace Relations Act 1996* which are preserved by the *Fair Work Act 2009*. Applications cannot be made after the end of the bridging period.

Termination of transitional instruments

Transitional instruments continue to operate until they are terminated or replaced by an enterprise agreement.

In what circumstances can collective agreement-based transitional instruments be terminated?

A collective agreement-based transitional instrument can be terminated in accordance with the provisions of Part 2-4 of the *Fair Work Act 2009* as if the instrument were an enterprise agreement. This means that the parties covered by a collective agreement-based transitional instrument can jointly agree to terminate the instrument at any time. It also means that once the instrument has passed its nominal expiry date, an employer, employee or employee organisation covered by the instrument may apply to Fair Work Australia for the termination of the instrument. Fair Work Australia must terminate the instrument if it is satisfied that it is not contrary to the public interest to do so and that it is appropriate to terminate the agreement taking into account all the circumstances.

In what circumstances can individual agreement-based transitional instruments be terminated?

The *Fair Work Act 2009* provides uniform rules for the termination of all individual agreement-based transitional instruments, whereas previously under the Workplace Relations Act, different termination rules applied to Individual Transitional Enterprise Agreements, preserved individual State agreements, Australian Workplace Agreements (AWAs) and pre-reform AWAs.

An individual agreement-based transitional instrument can be terminated at any time by written agreement between the employer and employee covered by the instrument. Before it can operate, a termination would need to be approved by Fair Work Australia.

As soon as an individual agreement-based transitional instrument has passed its nominal expiry date, either the employer or employee covered by the instrument may unilaterally terminate the agreement by giving 90 days notice.

In addition to these termination provisions, conditional termination of an individual agreement-based instrument is available. Conditional terminations are intended to facilitate the orderly transition of employees covered by individual agreement-based transitional instruments to an enterprise agreement by terminating the individual agreement as soon as the proposed new enterprise agreement comes into operation. An employee who is covered by a conditional termination can fully participate in bargaining for an enterprise agreement whether or not the transitional instrument to which the conditional termination relates has passed its nominal expiry date.

Where the transitional instrument has not passed its nominal expiry date, a conditional termination must be signed by both the employer and employee. However, where the transitional instrument has passed its nominal expiry date, either the employer or the employee can unilaterally make a conditional termination.

When an enterprise agreement is made that covers an employee who is also covered by a conditional termination, the conditional termination must accompany any application to Fair Work Australia for approval of the enterprise agreement. Provided the formal requirements relating to the conditional termination have been met, the transitional instrument then terminates when the enterprise agreement comes into operation.

What is the process for terminating individual agreement-based transitional instruments?

The employer or employee wishing to terminate the agreement must:

- ☑ make a written declaration identifying the instrument and stating that the employer or employee wishes to terminate it;
- ☑ at least 14 days before applying to Fair Work Australia for the approval of the termination, provide a notice to the other person setting out certain matters; and

☑ having provided the notice as required, apply to Fair Work Australia for approval of the termination.

What are the sunsetting rules?

NAPSAs (other than a notional agreement that is an enterprise instrument) will terminate on the 4th anniversary of the Fair Work (safety net provisions) commencement day or on a later date prescribed by the regulations.

Enterprise awards will expire on 31 December 2013, if there has been no application for a modern enterprise award, or revocation of award is made by then.

Award based transitional instruments will become obsolete when they are replaced by a modern award.

The following kinds of transitional instruments that apply to non-national system employers will terminate on the earlier of 26 March 2011 or the circumstances provided for in the relevant sub items occurring:

☑ Division 3 pre-reform certified agreements;

☑ old IR agreements;

☑ Section 170MX awards; and

☑ WR Act Schedule 6 transitional awards.

General Protections

The *Workplace Relations Act 1996* contained a range of protection provisions that were scattered throughout the legislation and in some cases duplicated. The *Fair Work Act 2009* has consolidated and streamlined related protections into one part of the *Fair Work Act 2009*. The general protections provisions maintain existing protections in the *Workplace Relations Act 1996*. However, consolidating the specific protections into broad generally applicable protections means that a number of the protections have been expanded.

What is a workplace right?

'**Workplace rights**' can be broadly described as employment entitlements and the freedom to exercise and enforce those entitlements. The *Fair Work Act 2009* sets out the following categories of workplace rights:

☑ entitlements, roles and responsibilities under a workplace law, workplace instrument or order of an industrial body;

☑ participation in processes or proceedings under workplace laws or instruments; and

☑ the making of complaints or inquiries (subject to certain pre-conditions being satisfied) (Section 341).

The workplace rights protections prohibit taking '**adverse action**' against a person because they have a workplace right or because they do (or do not) exercise their workplace right.

What is adverse action?

The general protections provisions protect people from '**adverse action**'. This is a key definition that intersects with a number of the protections.

What constitutes adverse action in a particular case depends on the nature of the relationship between the relevant persons. For example, adverse action taken by an employer against an employee includes dismissal, discrimination, refusing to employ a person, or prejudicially altering the position of the person.

The definition covers certain conduct of employers, employees, industrial associations, independent contractors and principals. It also extends to protect prospective employees from adverse action in certain circumstances (Section 342).

What are industrial activities?

The **industrial activities** protections encompass a person's freedom to be or not be a member or officer of an industrial association and participation or non-participation in certain industrial activities (for example, refusal to take part in industrial action). The protections prevent adverse action being taken against a person in connection with these industrial activities. The protections also prohibit incentives in relation to a decision to become or not become a member of an industrial association (Section 350).

Coercion, misrepresentation and undue influence or pressure

Coercion and misrepresentation in relation to workplace rights and industrial activities is also prohibited. For example:

- ☑ industrial associations are prohibited from organising industrial action against an employer because the employer refuses to comply with an unlawful request made by the industrial association; and
- ☑ employees are protected from undue influence or pressure being exerted by their employer in relation to a decision by the employee to agree to or terminate an individual flexibility arrangement (Section 344, 348-349).

Protections

Employees and prospective employees are also protected from workplace discrimination on the grounds of race, colour, sex, sexual preference, age, disability, marital status, pregnancy, family or carer's responsibilities, religion, political opinion, national extraction or social origin. The general protections prohibit all adverse action (victimisation, refusing to employ, etc.) not just dismissal, on discriminatory grounds. This is a broadening of the protection that applied under the *Workplace Relations Act 1996*, which was limited to protection from dismissal.

The unlawful termination protections for discriminatory reasons (e.g. race, colour sex) have been retained for non-national system employers, however the protection is limited to protection from dismissal.

The general protections also prohibit a person from discriminating against an employer for reasons including, that employees of the employer are covered, or are not covered, by a particular type of workplace instrument (for example, coverage by a modern award instead of an enterprise agreement).

In addition, there are also protections to prohibit coercion of a person to make or not make certain employment or management decisions (for example, to allocate particular duties to a particular employee).

There is also a specific prohibition on an industrial association demanding payment of a bargaining services fee (Section 353).

Sham contracting

There continue to be protections against sham contracting. These are based on the sham arrangement provisions in the *Workplace Relations Act 1996*, and relate to circumstances where employers try to disguise genuine employment arrangements as independent contracting arrangements (Section 357-359).

What happens if I believe these protections are breached?

Where a person alleges a contravention of the general protections, Fair Work Australia is able to hold a conference to attempt to resolve the matter. In cases involving dismissal, the conference is mandatory. In all other cases, participation in a Fair Work Australia conference is voluntary and a person can elect to proceed directly to court instead.

Where a person is dismissed from employment, a Fair Work Australia application to hold a conference must generally be made within 60 days of the dismissal. If the matter cannot be resolved at the conference, the person is able to apply to the Fair Work Division of the Federal Court or Federal Magistrates Court for a remedy.

Available remedies include monetary penalties, injunctions, compensation, and reinstatement in the case of dismissal. Costs will only be awarded if the proceedings were instituted vexatiously, the costs were incurred due an unreasonable act by the other party, or one party unreasonably refused to participate in the Fair Work Australia proceedings.

Key Points

- The *Fair Work Act 2009* has consolidated a range of protections into one part of the *Fair Work Act 2009.*
- The general protections provisions preserve existing protections in the *Fair Work Act 2009*, whilst consolidating the specific protections into broad generally applicable protections. This means that a number of the protections have been expanded.
- The *Fair Work Act 2009* introduces the notion of 'workplace rights' which can be broadly described as employment entitlements and the freedom to exercise and enforce those entitlements.
- The *Fair Work Act 2009* prohibits the taking of 'adverse action' against a person because they choose to (or choose not to) exercise their workplace right.
- Industrial activity protections encompass a person's freedom to be or not be a member or officer of an industrial association and participation or non-participation in certain industrial activities (for example, refusal to take part in industrial action). The protections prevent adverse action being taken against a person in connection with these industrial activities.
- Coercion and misrepresentation in relation to workplace rights and industrial activities are also prohibited.
- Employees and prospective employees are also protected from workplace discrimination on the grounds of race, colour, sex, sexual preference, age, disability, marital status, pregnancy, family or carer's responsibilities, religion, political opinion, national extraction or social origin.
- The *Fair Work Act 2009* maintains the protections in the *Workplace Relations Act 1996* against sham contracting.
- When there is an alleged contravention of the general protections, Fair Work Australia is able to hold a conference to attempt to resolve the matter.

Transitional arrangements for general protections

- The general protections framework applies from 1 July 2009.
- However, where conduct giving rise to an alleged contravention of the freedom of association, unlawful termination or sham contracting provisions of the *Workplace Relations Act 1996* occurred before 1 July 2009, the *Workplace Relations Act 1996* framework applies.
- Where a person was dismissed prior to 1 July 2009 in alleged contravention of the unlawful termination protections in the WR Act, but no application is made till after 1 July 2009, the application should be made to Fair Work Australia, rather than the AIRC.
- Where conduct giving rise to a contravention of the freedom of association or sham contracting provision occurs prior to 1 July 2009, any application in relation to that alleged contravention will continue to be made to the Federal Court or Federal Magistrates Court.

Industrial action

The *Fair Work Act 2009* provides rules for industrial action including options for employers and employees taking and responding to industrial action. Protected industrial action remains available only while bargaining for an enterprise agreement and the other requirements in the *Fair Work Act 2009* are met. If action is initiated by or on behalf of employees, this includes that the industrial action be authorised by a protected action ballot.

Fair Work Australia is empowered under the *Fair Work Act 2009* to make orders to stop industrial action that is unprotected and suspend or terminate protected action in specific circumstances. The *Fair Work Act 2009* also sets out restrictions on payment to employees during periods of industrial action.

What is industrial action?

Employee industrial action includes:

- ☑ the performance of work in a manner that is different from the manner in which work is customarily performed or adopting a practice in relation to work that results in a restriction or limitation on or delay in the performance of work;
- ☑ a ban, limitation or restriction on the performance of work or on the acceptance of or offering for work; or
- ☑ a failure or refusal to attend for work or a failure or refusal to perform any work at all by the employees who attend for work.

Employer industrial action is limited to a 'lock out' of employees. This occurs if an employer prevents the employees from performing work under their contracts of employment without terminating those contracts.

What does protected industrial action mean?

Protected industrial action means industrial action that is permitted under the *Fair Work Act 2009* in relation to a proposed enterprise agreement.

Can industrial action be taken at any time during bargaining?

No. Industrial action must not be taken before the nominal expiry date of an enterprise agreement. Further, there are common requirements that an employer, employee or their bargaining representatives must meet for industrial action to be protected. These common requirements are set out in Section 413 and include, for example:

- ☑ the bargaining representatives must be genuinely trying to reach agreement;
- ☑ the bargaining representatives must not have contravened any orders in relation to the industrial action or bargaining;
- ☑ the bargaining representatives must have given proper notice of the industrial action;
- ☑ the bargaining representatives must not have organised or engaged in industrial action before the nominal expiry date of the enterprise agreement; and
- ☑ there must be no suspension or termination order of the industrial action or serious breach declaration in operation (Sections 413-414).

These common requirements are in addition to any other requirements that are specific to the type of the industrial action, namely whether the action is employee claim action, employee response action or employer response action.

Employee protected industrial action

Protected industrial action by employees may be either '**employee claim action**' or '**employee response action**'.

Employee claim action is industrial action taken or organised by employees or their bargaining representatives during the bargaining process to support or advance claims that are only about permitted matters or are reasonably believed to only be about permitted matters.

To be protected, employee claim action:

- ☑ must be authorised by a majority of eligible employees via a protected action ballot;
- ☑ must be taken within 30 days of the declaration of the protected action ballot results, or if Fair Work Australia extends that period, within a further period of up to 30 days;
- ☑ must have given the employer at least three days' notice of the action (unless Fair Work Australia has specified a longer period of notice in the protected action ballot order); and
- ☑ must not be in support of pattern bargaining or unlawful matters.

Employee response action is action taken in response to employer industrial action whether the employer industrial action is protected or unprotected. A protected action ballot is not required for employee response action, however, the bargaining representative of the employees must still notify the employer in writing of the intention to take action (although there is not the same 3 day notice requirement as applies for employee claim action) (Section 410).

Industrial action must not relate to a demarcation dispute

The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an Fair Work Australia order that relates to a significant extent to a demarcation dispute (Section 410).

Employer protected industrial action

Employer response action is limited to lockouts and it is only protected where the lockouts are in response to industrial action taken by employees. This action must also meet the common requirements described above, including giving written notice of the action to each employee bargaining representative and taking all reasonable steps to notify the employees.

OHS Exception to Industrial Action

If an employee refuses to perform work because of a reasonable concern for their immediate health or safety it is not defined as industrial action. However the employee must not unreasonably fail to comply with a direction of their employer to perform other available work, whether at the same or another workplace that was safe and appropriate for the employee to perform.

What steps are involved in undertaking a protected action ballot?

- ☑ A bargaining representative of an employee covered by a proposed enterprise agreement or two or more such bargaining representatives (acting jointly), may apply to Fair Work Australia for a protected action ballot order requiring a protected action ballot be conducted to decide if employees would like to engage in particular protected industrial action for the agreement.
- ☑ The application must specify the group or groups of employees who are to be balloted and the questions or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.
- ☑ An application must not be made earlier than 30 days prior to the nominal expiry date of an enterprise agreement/s that cover the employees who are to be covered by the proposed enterprise agreement.
- ☑ Fair Work Australia must make a protected action ballot order if the application meets the requirements of the *Fair Work Act 2009* and it is satisfied that each applicant has been and is genuinely trying to reach agreement with the employer of the employees who are to be balloted (Sections 437-448).

Strike Pay – when is an employer required to withhold pay?

Under the *Fair Work Act 2009* it will continue to be unlawful for an employer to pay or an employee to request pay for periods of industrial action, except in relation to partial work bans.

For **protected action** where there is a complete withdrawal of labour, such as a stoppage or a strike, employers will be required to withhold pay for the actual period of industrial action taken (Section 470).

For **protected partial work bans or restrictions** (other than an overtime ban), an employer may elect to accept the partial performance and pay full wages, issue a partial work notice and reduce employees' pay by the proportion specified in the notice or issue a notice stating that the employer refuses to accept any work and payments will be withheld altogether for the duration of the partial work ban (Section 471).

For **overtime bans**, a deduction may only be made in relation to the period of overtime the employee is required or requested to work but refuses to work (and the refusal is a contravention of their obligations) and no deduction may be made from the employee's ordinary time payments (Section 470).

Where **unprotected industrial action** takes place, employers must withhold at least 4 hours of pay for action of 4 hours duration or less, or the total duration of the action if the action is greater than 4 hours. This rule applies regardless of the nature of the action (e.g. complete withdrawal of labour, partial work ban or overtime).

When can protected industrial action be suspended or terminated?

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 must suspend or terminate the protected action. If Fair Work Australia terminates the action and further conciliation does not lead to an agreement, Fair Work Australia may determine a settlement.

Fair Work Australia may act similarly 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 employees and/or employer and the dispute will not be resolved in the foreseeable future (Section 423-430).

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.

What is the hard cut off for protected industrial action?

In most circumstances, protected Industrial action taking place under the *Workplace Relations Act 1996* will not be able to continue under the *Fair Work Act 2009* and the bargaining representatives will need to start the industrial action processes afresh. However, the *Fair Work (Transitional Amendments and Consequential Amendments) Act 2009* includes provision that allows for the limited preservation of the *Workplace Relations Act 1996* protected action ballot authorisations after 1 July 2009 provided certain conditions are met. Even if these conditions are met, a fresh notice of intention to take industrial action is required after 1 July 2009.

Consistent with the prohibition against industrial action before the nominal expiry date of a collective agreement or enterprise agreement, industrial action cannot be taken before the nominal expiry date of an agreement-based transitional instrument.

Key Points

- Protected industrial action will continue to be available only after the nominal expiry date of the existing enterprise agreement without the concept of a bargaining period.
- A pre-condition for taking protected action will be that the participants are genuinely trying to reach agreement and are complying with any good faith bargaining orders.
- The requirement to hold a protected action ballot authorising industrial action is retained.
- It will continue to be unlawful for an employer to pay, or an employee to demand or to accept strike pay for any period of protected or unprotected action. However, strike pay provisions will differ according to whether the industrial action is protected or unprotected and whether the action is a complete stoppage of work, partial work ban or overtime ban.

Right of Entry

What is right of entry?

The right of entry provisions in the *Fair Work Act 2009* allow union officials who hold valid entry permits to enter employers' businesses for certain purposes. Union officials can apply to Fair Work Australia for a right of entry permit. Fair Work Australia will issue entry permits to officials who are 'fit and proper' persons. It will also deal with breaches of right of entry provisions by both permit holders and employers and resolve disputes that arise under the provisions. Federal right of entry permits differ from right of entry permits issued under State and Territory laws.

The right of entry provisions in the *Fair Work Act 2009* largely replicate the provisions in the *Workplace Relations Act 1996*. However, some changes have been made as a result of the new modern award framework. The main difference is that right of entry is now linked to a union's entitlement to represent the industrial interests of the employee, rather than a requirement that the union be bound to a particular instrument that covers employees at the workplace.

When can a permit holder enter a workplace?

Under the *Fair Work Act 2009*, permit holders may enter premises for 2 specified purposes. These are:

1. to investigate a suspected breach of the *Fair Work Act 2009*, term of a fair work instrument, or designated outworker term, or
2. to hold discussions with employees.

The *Fair Work Act 2009* also imposes additional conditions on a permit holder when entering premises under a State or Territory occupational health and safety (OHS) law.

When can a permit holder enter to investigate a suspected breach?

A permit holder can only enter premises to investigate a suspected breach where:

☑ the permit holder reasonably suspects a breach of the *Fair Work Act 2009* or a fair work instrument, such as a modern award or enterprise agreement, has occurred or is occurring;

☑ the suspected breach relates to or affects a member of the permit holder's union who is working on the premises; and

☑ the permit holder's union is entitled to represent that member.

A reasonable suspicion might include a suspicion based on complaints by members to the union that suggest contraventions of the *Fair Work Act 2009* or fair work instrument. The provisions do not allow unions to engage in investigations where there is nothing to suggest that a breach has occurred.

When seeking to enter premises on these grounds, the permit holder must:

- ☑ give the occupier of the premises and any affected employer at least 24 hours notice of their intention to enter. The notice must include details of the alleged breach, a statement that the union is entitled to represent employees affected by the breach and a reference to the provision of the union's rules that confers that right;
- ☑ show his or her entry permit and entry notice on request and before inspecting or copying records or documents;
- ☑ enter only during working hours and only to parts of the premises used mainly for business purposes; and
- ☑ comply with reasonable requests by an employer to adhere to occupational health and safety requirements or to meet in a certain part of the premises (Sections 481-483).

Access to records

When investigating a suspected breach, a permit holder may look at and copy records or documents that are directly relevant to the suspected breach. However, a permit holder cannot access records that relate to employees who are not members of the permit holder's union unless the record also substantially relates to a member, the non-member consents or the permit holder obtains an order from Fair Work Australia that this is necessary to properly investigate the breach.

An employer is also not required to provide documents if doing so would otherwise breach a state or federal law.

A new civil penalty provision prohibits the disclosure of information obtained during a right of entry for purposes other than rectifying the alleged breach (these penalties apply to permit holders and non-permit holders).

Outworker Entry

The *Fair Work Act 2009* includes specific provisions allowing entry with respect to Textile, Clothing and Footwear (TCF) outworkers. These provisions allow entry to investigate a suspected breach relating to a TCF outworker where the permit holder is entitled to represent the industrial interests of TCF outworkers. It is not necessary to have a union member at the premises. In addition, 24 hours notice of entry is not required and entry is allowed to premises where documents relating to the suspected breach are kept (Sections 483A-483E).

When can a permit holder enter to 'hold discussions'?

A permit holder may enter premises for the purpose of holding discussions with employees (including Textile, Clothing and Footwear outworkers) that the permit holder's union is entitled to represent. Entry can only occur during business hours and discussions can only be held during mealtimes or other break periods. Discussions can only be held with people who wish to participate. The general protections provisions of the *Fair Work Act 2009* mean that no employee can be discriminated against for participating, or declining to participate, in such discussions (Section 484).

When seeking to enter premises on these grounds, the permit holder must:

- ☑ Give the occupier of the premises at least 24 hours notice of their intention to enter. The notice must include a statement that the union is entitled to represent employees who work at the premises and a reference to the provision of the union's rules that give that right;
- ☑ Show his or her entry permit and entry notice on request; and
- ☑ Comply with reasonable requests by an employer to adhere to occupational health and safety requirements or to meet in a certain room of the premises.

Location of meetings

The new right of entry clarify what may amount to a reasonable request by providing guidance about what does not constitute a reasonable location for holding discussions. Employers will still be able to request that a permit holder meet employees in a specific room or area of the premises, but

the area will need to be 'fit for purpose' and the request may not be made with the intention of intimidating, discouraging or making it difficult for people to participate in discussions.

Fair Work Australia will have the power to deal with disputes on the appropriateness of a particular meeting location.

Entry to exercise a State or Territory OHS right

The *Fair Work Act 2009* also imposes additional conditions on a permit holder when entering premises under a State or Territory OHS law.

An official of an organisation must not exercise a State or Territory OHS right on defined premises unless that official is a permit holder. When seeking to enter premises on these grounds, it is not necessary that the permit holder provide advance notice of entry. A permit holder must, however, provide at least 24 hours notice before exercising a State or Territory OHS right to inspect or access an employee record. Like the other forms of entry, a State or Territory OHS right may only be exercised during working hours and a permit holder must comply with any reasonable request by an employer to comply with an occupational health and safety requirement that applies to the premises (Sections 494-499).

What conduct is prohibited under the right of entry provisions?

There are penalties for anyone who misuses his or her entry rights or provides misleading information about his or her eligibility to enter premises. Additionally, there are civil penalties when a permit holder hinders or obstructs an employer or uses an entitlement to represent certain employees that do not exist.

Further, new protections against the misuse of information obtained by a permit holder in the course of investigating suspected breaches will apply. A person will be prohibited from disclosing information obtained during entry for a purpose other than rectifying the alleged breach or in specific and limited circumstances where there is a public interest in the information being disclosed (e.g. to report a potential threat to public health or safety). Information obtained under the right of entry provisions is also protected by the *Privacy Act 1988*.

Fines of up to $6,600 for individuals and $33,000 for unions will apply to any person who breaches these prohibitions. A permit holder who is fined must also have their entry permit either revoked or suspended by Fair Work Australia.

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 (Sections 500-504).

Key Points

- The *Fair Work Act 2009* provides for two grounds for right of entry – entry to investigate a suspected breach of the *Fair Work Act 2009*, a fair work instrument or a designated outworker term, and entry to hold discussions with employees (including Textile, Clothing and Footwear outworkers).
- The *Fair Work Act 2009* includes specific provisions allowing entry to investigate suspected breaches that affect Textile, Clothing and Footwear outworkers.
- At least 24 hours notice of intention to enter premises is required (except for entry to investigate a breach relating to Textile, Clothing and Footwear outworkers).
- When investigating a suspected breach, a permit holder cannot access records that relate to employees who are not members of the permit holder's union unless the record substantially relates to a member, the non-member consents or the permit holder obtains an order from Fair Work Australia that this is necessary to properly investigate the breach (except for suspected breaches relating to Textile, Clothing and Footwear outworkers).

- Information obtained under the right of entry provisions is also protected by the *Privacy Act 1988*.
- The *Fair Work Act 2009* provides guidance on when an employer's request that a union meet employees (including Textile, Clothing and Footwear outworkers) in a particular location will be unreasonable.
- The *Fair Work Act 2009* also imposes additional conditions on a permit holder when entering premises under a State or Territory occupational health and safety (OHS) law. An official of an organisation exercising an entry right must be a permit holder. When they seek to enter premises on OHS grounds, it is not necessary to provide advance notice of entry. However, they must provide at least 24 hours notice before exercising a State or Territory OHS right to inspect or access an employee record.
- Fines of up to $6,600 for individuals and $33,000 for unions will apply to any person who misuses his or her entry rights or provides misleading information about his or her eligibility to enter premises.

Transitional arrangements for right of entry permits

- An entry permit issued under the *Workplace Relations Act 1996* will continue to have effect under the *Fair Work Act 2009*. The permit will still be subject to any terms and conditions imposed upon it under the *Workplace Relations Act 1996* (including the expiry date).
- An entry notice given under the *Workplace Relations Act 1996* will be valid for entry under the *Fair Work Act 2009*.
- A notice to produce records given under the *Workplace Relations Act 1996* will be valid under the *Fair Work Act 2009*.

Transfer of Business

What constitutes a transfer of business?

Part 2-8 of the *Fair Work Act 2009* provides for the circumstances in which a transfer of business can occur.

There will be a transfer of business from an old employer to a new employer if:

(i) the employment of an employee of the old employer has terminated;

(ii) within 3 months after the termination, the employee becomes employed by the new employer;

(iii) the transferring employee performs the same, or substantially the same, work for the new employer as he or she performed for the old employer;

(iv) there is at least one of four connections between the old employer and the new employer. The four connections are: an asset transfer; an outsourcing; an insourcing; or that the new and old employers are associated entities.

The 'connections'

Asset transfers

This connection requires that, in addition to the matters in (i) to (iii) above being satisfied:

☑ there is an 'arrangement' between the old and new employers (or their associated entities)

☑ under the arrangement, the new employer owns or has the beneficial use of some or all of the assets that the old employer used in relation to (or in connection with) the transferring work.

Illustrative example

A is a recruitment company. It leases its office space and office equipment (for example computers, phones, chairs, desks). A's assets are the goodwill in its company name, their client lists and the knowledge and client connections of their employees.

A is subsequently sold to Z. Z does not take on the lease of A's office space or equipment as it intends to integrate A's business with its own and operate out of its existing premises. Z does, however, make a payment for goodwill in the business.

If Z employs some or all of A's employees then there is likely to be a transfer of business because there is a 'connection'. That is, there was an 'arrangement' (evidenced by a business sale agreement) for Z to own some of the assets A used to provide the transferring work.

However, if none of A's employees are employed by Z there will not be a transfer of business.

Outsourcing

This connection requires that in addition to the matters in (i) to (iii) above being satisfied, the old employer outsources work to the new employer. This will cover a situation, for example, where A (the old employer) outsources some of its work to B (the new employer) and B engages some of A's employees to continue performing the work. This connection will apply irrespective of whether there is a transfer of assets between the old employer and the new employer. This connection is only intended to apply to the initial outsourcing of work and not the situation where work that has already been outsourced is retendered. In other words, it could apply when A initially tendered the work to B but would not apply if A retenders the work and awards the new contract to C rather than B (Section 311).

Insourcing

The intention of this connection is that a transfer of business occurs where a new employer decides to in-source the work previously done by the transferring employee of the old employer (Section 311).

Illustrative example

Kambo & Partners (a human resources firm) decides that it no longer wishes to outsource security work at its premises and wishes again to engage employees itself to perform this work. Kambo terminates the outsourcing contract that it made with Elvis Security and offers employment to the security guards employed by Elvis Security. They accept the offers and perform substantially the same work as employees of Kambo as they previously performed as employees of Elvis Security, namely, providing security services at Kambo's premises. This would be a transfer of business.

New and old employers are associated entities

This connection requires that the new employer is an associated entity of the old employer. The definition of 'associated entity' is the same as that used in the Corporations Act 2001. This connection is intended to cover some corporate restructures (for example where a company transfers some of its employees from one part of the company to another) (Section 311).

The general transfer of business rules

The transfer of business provisions in Part 2-8 set out the default rules that apply to the coverage of transferable instruments (for example an enterprise agreement that has been approved by Fair Work Australia, a workplace determination or a named employer award) when a transfer of business occurs.

Rules for transferring employees and new employers

The default rules provide that a transferable instrument that covered the old employer and a transferring employee immediately before the employee's employment was terminated covers the new employer and the transferring employee. The intention of this rule is that a transferring employee should continue to have the benefit of their existing workplace instrument.

This means, for example, that an enterprise agreement or named employer award that already covered the new employer would not cover a transferring employee who is covered by a transferable instrument (Section 313).

Rules for new non-transferring employees of new employer

These rules have the effect that a transferable instrument covers a non-transferring employee of the new employer in certain circumstances. It allows new employees who are not transferring employees and to whom no other instrument applies to be covered by the same workplace instrument as the transferring employees (Section 314).

Role of Fair Work Australia

Fair Work Australia will have powers to make orders on application, in relation to transfers of business. For example, Fair Work Australia may order that a transferable instrument cover existing or new employees of the new employer, not just transferring employees. Fair Work Australia may also order that the transferable instrument not cover the new employer and the transferring employees.

In deciding whether to make such orders, Fair Work Australia must take into account a range of matters including the views of the new employer and the relevant employees, whether any employees would be disadvantaged by making the order, and the financial position of the new employer (Sections 317-320).

Protections for transferring employees

The transfer of employment provisions in the *Fair Work Act 2009* protect employee entitlements in a broader range of corporate restructuring, including outsourcing/in-sourcing arrangements.

On a transfer of employment a new employer will be required to recognise employees' service with the old employer when calculating certain National Employment Standard entitlements (for example personal/carers leave, parental leave and the right to request flexible work arrangements).

If the new employer and the old employer are not associated entities the new employer has a choice whether to recognise an employee's prior service and their associated annual leave and redundancy pay. If the new employer does not agree to recognise service, the old employer must pay out these entitlements.

The new employer must inform transferring employees of any change to entitlements, including the requirement for a new minimum employment period for unfair dismissal. If the employer fails to inform the transferring employees in writing, previous service for the minimum employment period is recognised and the employees will not be required to serve out a new minimum employment period.

Where an employee is transferred to an employer that is an associated entity of the previous employer, the employee's service with the previous employer will be deemed to be continuous for the purposes of service-related National Employment Standard entitlements and the unfair dismissal minimum employment period.

Further terms and conditions that are derived from an instrument may also transfer in a transfer of employment. Transferable instruments include enterprise agreements (whether or not in operation) that have been approved by Fair Work Australia, workplace determinations and named employer awards. An employer or an employee will be covered by a modern award if they are included in the specified class, so there is no need to include provisions providing for the transfer of modern awards that operate on an industry basis.

Key Points

- The *Fair Work Act 2009* provides new transfer of business rules.
- The rules will apply to a range of commercial transactions, such as some asset transfers, outsourcings, insourcings and where the old and new employers are associated entities.
- These new rules will also only apply where a new employer agrees to employ some or all of the old employer's employees. The rules do not force a new employer to employ employees of an old employer.
- The rules include default provisions that where there is a transfer of business, a transferring employee continues to be covered by their existing workplace instrument (that is, the instrument that covered them with the old employer continues to cover them) after the transfer occurs.
- Fair Work Australia will have powers to make orders in relation to transfers of business. For example, Fair Work Australia may order that a transferable instrument (that is, an old employer's instrument) cover existing or new employees of the new employer, not just transferring employees. New employers will also be able to apply to Fair Work Australia to 'switch off' the transferable (old employer's) workplace instrument.

Transitional arrangements for transmission of business

- The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* preserves the transmission of business rules in the *Workplace Relations Act 1996* with some modification, in relation to a transaction that is a transmission of business that occurs before 1 July 2009. The transitional provisions also retain the 12 month transmission period for transmitted instruments, preserve the rules governing the transfer of entitlements under the Standard and allow for applications to the Australian Industrial Relations Commission for an order modifying the operation of the transferred instrument (provided the application is made before a cut off date).
- The new rules in the *Fair Work Act 2009* will apply to transfers of business that occur on or after 1 July 2009. The transfer of business provisions are extended to cover employers and employees covered by transitional instruments (for example instruments made before 1 July 2009). This means that transitional instruments can 'transfer' to cover a new employer in the same way as instruments made under the *Fair Work Act 2009* and Fair Work Australia's powers as appropriately modified will apply to these instruments.