

Chapter 2

Fair work

Australia's Fair Work system

2.1 The Fair Work system is Australia's national framework of workplace laws which sets out enforceable minimum terms and conditions of employment, industrial relations rights and responsibilities. The system was created by the Labor Government with the enactment of the *Fair Work Act 2009* (FWA), which took effect on 1 July 2009.

2.2 One of the FWA's core objectives is to promote collective bargaining, whereby employers, employees and bargaining representatives, including unions, negotiate enterprise agreements.¹ Bargaining can be straightforward, or it can be complicated and protracted, but it is the process of bargaining which ensures an outcome that serves the interests of employers and employees.

2.3 Any act or process which impinges on the parties' opportunity to bargain can be said to be contrary to the spirit and purpose of the FWA.

Coverage of the system

2.4 The Fair Work system applies to all employees and employers in the Australian Capital Territory and Northern Territory, and most workplaces elsewhere in Australia, with the following exceptions:

New South Wales—State public sector and local government employees are not covered by the national system and remain under the state system. Some state public sector and local government employers have registered agreements in the national system. Employees covered by those registered agreements are within the national system.

Victoria—State government employees working in sectors that provide essential services of core government functions aren't covered by the national system... Some state government employers have registered agreements in the national system. Employees covered by those registered agreements are within the national system. All other employees in Victoria are covered by the national system.

South Australia—State public sector and local government employees are not covered by the national system and remain under the state system. Some state public sector and local government employers have registered agreements in the national system. Employees covered by those registered agreements are within the national system.

1 *Fair Work Act 2009*, s. 3(f).

Queensland—State public sector and local government employees are not covered by the national system and remain under the state system. Some state public sector and local government employers have registered agreements in the national system. Employees covered by those registered agreements are within the national system.

Western Australia—The following types of businesses are not covered by the national system:

- sole traders
- partnerships
- other unincorporated entities
- non-trading corporations.

These types of businesses and their employees are covered by the state system. State public sector and local government employees are also covered by the state system. Sometimes businesses operating as sole traders, partnerships, other unincorporated entities, non-trading corporations, and state public sector or local government employers have registered agreements in the national system. Employees covered by those agreements are within the national system.

Tasmania—State public sector employees remain under the state system. Local government employees are covered by the national system. Some state public sector employers have registered agreements in the national system. Employees covered by those registered agreements are within the national system.²

Key features of the Fair Work system

2.5 There are four key features of the Fair Work system:

- Minimum National Employment Standards;
- Nationally-applicable awards for specific occupations and industries;
- The national minimum wage; and
- Protection from unfair dismissal.³

National Employment Standards

2.6 The National Employment Standards (NES) define the minimum entitlements employees in Australia can expect. All employees in the national workplace relations system are covered by the NES. Casual employees have limited access to NES entitlements.⁴

2 See www.fairwork.gov.au/about-us/legislation/the-fair-work-system (accessed 4 July 2017).

3 See www.fairwork.gov.au/about-us/legislation/the-fair-work-system (accessed 4 July 2017).

4 See www.fairwork.gov.au/employee-entitlements/national-employment-standards (accessed 4 July 2017).

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- 2.7 The 10 minimum entitlements provided by the NES are:
1. Maximum of 38 weekly hours of work, plus reasonable additional hours.
 2. In certain circumstances employees can request a change in their working arrangements, for example flexible working arrangements.
 3. Parental leave and related entitlements. Up to 12 months' unpaid leave for each employee, plus a right to request an additional 12 months' unpaid leave, plus other forms of maternity, paternity and adoption-related leave.
 4. Annual leave
 - four weeks' paid leave per year
 - plus an additional week for certain shift workers.
 5. Personal/carer's leave (includes sick leave) and compassionate leave
 - 10 days' paid personal/carer's leave (includes sick leave)
 - two days' unpaid carer's leave as required
 - two days' compassionate leave (unpaid for casuals) as required.
 6. Community service leave – unpaid leave for voluntary emergency activities and up to 10 days of paid leave for jury service (after 10 days is unpaid).
 7. Long service leave – a transitional entitlement for employees as outlined in an applicable pre-modernised award, pending the development of a uniform national long service leave standard.
 8. Public holidays – a paid day off on each public holiday, except where reasonably requested to work.
 9. Notice of termination and redundancy pay
 - up to four weeks' notice of termination (plus an extra week for employees over 45 years of age who have been in the job for at least two years)
 - up to 16 weeks' severance pay on redundancy, both based on length of service.
 10. The Fair Work Information Statement. This is available from the Fair Work Ombudsman (FWO) and must be given by employers to all new employees. It contains information about:
 - the NES
 - modern awards
 - agreement making
 - freedom of association and workplace rights
 - termination of employment
 - individual flexibility arrangements

- right of entry
- transfer of business
- the role of the [Fair Work Commission (FWC)]
- the role of the FWO.⁵

2.8 Enterprise agreements, any other registered agreements or awards cannot, in any circumstances, set out conditions which are lower than the NES or exclude the NES.⁶

Enterprise agreements

2.9 Enterprise agreements are agreements between employers, employees and employee representative organisations—unions—which set out mutually accepted terms and conditions of employment.

2.10 Most enterprise agreements set out:

- wage rates
- employment conditions (e.g. hours of work, meal breaks, overtime)
- a consultation process
- dispute resolution procedures
- deductions from wages for any purpose authorised by an employee.⁷

2.11 To be approved by the FWC, enterprise agreements must pass the 'better off overall' test (BOOT). An agreement passes the test if each award-covered employee, and each prospective award-covered employee, would be better off overall under the agreement than under the relevant modern award.⁸

Modern awards

2.12 With the NES, awards are intended to provide a guaranteed minimum safety net in terms of conditions of employment. Awards set out pay rates and conditions of employment, for example leave entitlements and overtime. In most cases, workers who are not covered by an enterprise agreement will have their minimum wages and conditions set by a modern award. Modern awards deal with:

- minimum wage rates

5 See 'National Employment Standards', Fair Work Commission, available at: www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/national-employment-standards (accessed 14 July 2017).

6 See www.fwc.gov.au/awards-and-agreements (accessed 16 July 2017).

7 See www.fwc.gov.au/awards-and-agreements (accessed 16 July 2017).

8 *Fair Work Act 2009*, ss. 193(1).

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- annual leave, and annual leave loading
 - other types of leave
 - hours of work
 - penalty rates, overtime and casual rates
 - allowances
 - consultation, and
 - many other minimum conditions.⁹

2.13 The majority of awards pertain to specific industries or occupations, with 122 modern awards currently being in place.¹⁰

The Fair Work Commission

2.14 The FWC is Australia's national, independent workplace relations tribunal. The commission reports that it performs a range of functions, including:

- providing a safety net of minimum conditions, including minimum wages in awards
- facilitating good faith bargaining and making enterprise agreements
- dealing with applications in relation to unfair dismissal
- regulating how industrial action is taken
- resolving a range of collective and individual workplace disputes through conciliation, mediation and in some cases public tribunal hearings
- functions in connection with workplace determinations, equal remuneration, transfer of business, general workplace protections, right of entry and stand down.¹¹

2.15 Most of the above functions are initiated when a person lodges an application with the FWC. Other functions, such as those pertaining to annual wage and modern award reviews, are initiated by the FWC.¹²

2.16 The FWC has a range of options available to it when applications are lodged, including:

9 See www.fwc.gov.au/awards-and-agreements (accessed 14 July 2017).

10 For a list of modern awards, see the Fair Work Commission website at: www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list (accessed 4 July 2017).

11 See www.fwc.gov.au/disputes-at-work/how-the-commission-works (accessed 14 July 2017).

12 See www.fwc.gov.au/disputes-at-work/how-the-commission-works (accessed 14 July 2017).

- referring an application to a staff conciliator to help resolve the dispute informally
- issuing directions about how an application is to be dealt with
- requiring people involved in an application to appear before the Commission
- inviting submissions (verbal or in writing)
- taking evidence
- conducting conferences
- holding hearings, and
- making decisions and orders.¹³

2.17 When the FWC holds a hearing, all parties are given the opportunity to put forward their case and be heard impartially.¹⁴

2.18 The FWC's role in settling disputes is limited by the reality that under the Act, the Commission's power to arbitrate intractable disputes is highly constrained and in large part limited to a consensus acceptance of this function by the parties to the dispute. Where a dispute settlement procedure doesn't include arbitration powers for the FWC, reported practice is that a party to a dispute who is in a position of power will seldom, if ever, consent to arbitration. It follows that the party with the most power gets their way in the disputed matter regardless of what might be fair and reasonable in the circumstances. Given the imbalanced nature of the employer/employee relationship under our current laws, the party with the most power is almost always the employer.

The Fair Work Ombudsman

2.19 The Office of the Fair Work Ombudsman (FWO) is an independent statutory agency. The FWA subparagraph 682(1)(a)(i) provides that the FWO's role is to promote harmonious and productive workplace relations. The FWO contributes to this by:

- helping people identify correct pay rates, and helping employers work out what they should be paying employees;
- helping employees find out what their entitlements are for leave, overtime and allowances;
- educating employers and employees about fair work practices, rights and obligations;
- investigating complaints or suspected contraventions of workplace laws, awards and agreements;

13 See www.fwc.gov.au/disputes-at-work/how-the-commission-works (accessed 14 July 2017).

14 See www.fwc.gov.au/disputes-at-work/how-the-commission-works (accessed 14 July 2017).

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- acting to enforce workplace laws;
 - working with industry, unions and other stakeholders; and
 - helping employers manage business transfers, shutdowns and closures.¹⁵

2.20 The Fair Work Ombudsman also has a significant role under subparagraph 682(1)(a)(ii) to "promote compliance with this Act and fair work instruments".

2.21 In deciding the approach to take when misconduct is alleged, the FWO considers the seriousness of the alleged conduct and circumstances of each case, including whether the case involves:

- public interest;
- a party facing significant barriers to resolving the matter themselves, for example, low levels of literacy or comprehension;
- a small business owner, who has limited access to a human resources expert;
- a party who has had previous issues with compliance;
- an alleged breach appears to be deliberate;
- sufficient information to support an argument that a breach has occurred;
- confidentiality;
- the parties having made any attempts to resolve the matter;
- breaches of monetary entitlements where the amount is significant;
- minimum entitlements as opposed to above award conditions;
- an employment relationship that has ended, including how long ago the employment ended.¹⁶

2.22 Given these guidelines it is apparent that the FWO exercises significant discretion in determining which allegations of non-compliance will be the subject of enforcement proceedings. A substantial body of the evidence provided to the committee strongly supports the view that those businesses which choose not to comply with obligations under the Act do so with a high degree of practical immunity. Chapter 6 details disturbing examples that indicate that non-compliance with minimum standards is a business model operating in a significant number of industries. From an economic perspective it seems to be a low risk/high return proposition, especially where the workers involved are in insecure work, are not union members, are young workers, or reflect or a combination of each of these characteristics.

15 See www.fwc.gov.au/about-us/national-workplace-relations-system (accessed 14 July 2017).

16 Fair Work Ombudsman, *Compliance and enforcement policy*, July 2017, p. 10.

2.23 The FWO endeavours to resolve most cases through mediation. Investigations are conducted in the most serious circumstances, where evidence suggests there is:

- exploitation of vulnerable workers (e.g. aged, young, overseas)
- significant public interest or concern (e.g. pregnancy and age discrimination)
- blatant disregard for the law, or a court or commission order
- deliberate distortion of a level playing field to gain a commercial advantage (e.g. large scale non-compliance that distorts the labour market), or
- an opportunity to provide an educative or deterrent effect.¹⁷

2.24 This gives rise to serious questions about how user friendly the compliance processes of the FWO are for workers who have been denied their rightful entitlements. Compliance proceedings in the court system for a worker who is award reliant are daunting, time consuming and expensive. The high cost of filing and court fees, ranging from \$615 upfront filing fees to daily court fees of \$2050¹⁸, make alternative dispute resolution options important, but the committee remains concerned that the combination of high cost legal proceedings, drawn out mediation and the very limited prospects of the FWO choosing to investigate a particular worker's complaint because it doesn't rank as serious enough under current policy guidelines makes compliance measures undertaken by the FWO very limited and in fact unlikely.

Is the Fair Work system fit for purpose?

2.25 There is an orthodox view that one of the principal objectives of the industrial relations system is to protect workers.¹⁹ This view is inherently linked to the question at the core of the committee's inquiry: is the Fair Work system fit for purpose?

2.26 The committee has looked at ways in which some employers are able to avoid their obligations under the FWA—by exploiting loopholes in the legislation, engaging in employment practices which undermine the industrial system, and at times breaching the law outright.

2.27 The following chapters examine the evidence.

17 Fair Work Ombudsman, *Compliance and enforcement policy*, July 2017, p. 13.

18 www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/home (accessed 30 August 2017).

19 Australian Council of Trade Unions, *Submission 182*, p. 4.