



**Australian Government**



**AUSTRALIAN INDUSTRY GROUP**

# FAIR WORK

**Education and Information Program**



# Seminar Program & Overview

- Overview of the *Fair Work Act* & related legislation
- Fair Work Institutions
- The New Safety Net – NES and Modern Awards
- Enterprise Agreements & Bargaining
- Industrial Action
- Union Right of Entry
- Termination of Employment
- General Protections
- Transfer of Business
- Compliance



# The Fair Work Act 2009 – an overview

## Key features:

- Establishes Fair Work Australia to oversee the new system
- Effective 1 July 2009 (except for NES and modern awards which commence 1 January 2010)
- Complete safety net of minimum employment conditions
- System based on enterprise bargaining
- Protections from unfair dismissal for all employees
- Protection for the low-paid
- Balance between work and family life
- Right to be represented in the workplace

# Who will the new system apply to?

- Trading, financial & foreign corporations; Cth agencies
- All Victorian employers (referral of powers effective 1/7/09)
- Total of approx 85% of workforce
- Other State Govts are considering whether to refer their powers re: other private sector employers – if so, will be effective from 1/1/10

# Fair Work Institutions



# Fair Work Australia (FWA)

- New body to replace AIRC, Australian Fair Pay Commission & Workplace Authority
- FWA functions from 1 July 2009
  - Making & varying Awards; reviewing minimum wages
  - Approving enterprise agreements, facilitating bargaining & issuing industrial action orders
  - Dispute settlement
  - Handling termination of employment and general protection claims
  - Deal with applications under the transfer of business provisions
  - Deal with matters arising under right of entry provisions;
  - Deal with the extension of NES entitlements.

# Fair Work Ombudsman

- Office of the Fair Work Ombudsman will replace the Workplace Ombudsman
- Functions from 1 July 2009
  - Investigating breaches of awards & industrial laws; initiating enforcement proceedings
  - Education, information & assistance
- From 31/1/10, a specialist building & construction division will replace the ABCC

# Fair Work Australia Structure

**Fair Work  
Australia**

**Office of the  
Fair Work  
Ombudsman**

**Fair Work Divisions  
Of the Federal  
Court and the  
Federal Magistrates  
Court**

**State and Territory  
Courts**



# The New Safety Net: National Employment Standards Modern Awards



# What do the NES cover?



1. Maximum weekly hours
2. Requests for flexible working arrangements
3. Parental leave and related entitlements
4. Annual leave
5. Personal/carer's leave & compassionate leave
6. Community service leave
7. Long service leave
8. Public holidays
9. Notice of termination and redundancy pay
10. Fair Work Information Statement

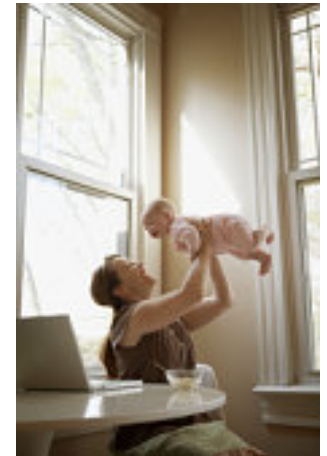
# 1. Maximum Weekly Hours

- 38 hours per week for full-time employees.
- For employees who are not full-time (e.g. part-time or casual), weekly hours must not exceed the lesser of the employee's ordinary hours or 38 hours.
- An employee can be required or requested to work reasonable additional hours. Employee may refuse to work the additional hours if they are not reasonable.
- Employer may agree with Award/ agreement free employees to average over period  $\leq 26$  weeks.



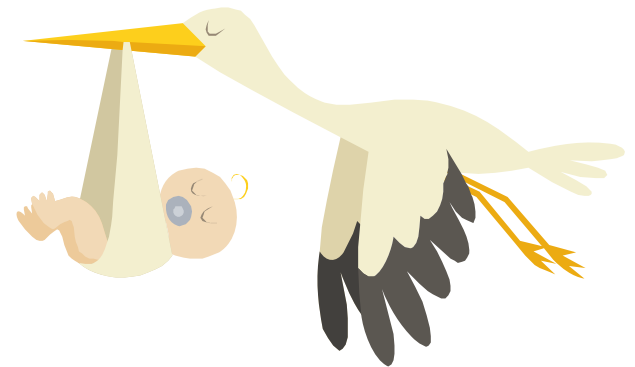
## 2. Requests for Flexible Working Arrangements

The NES gives 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.



# 3. Parental Leave and Related Entitlements

- 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 service before qualifying for this entitlement.



## 3. Parental Leave and Related Entitlements (cont)

- 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 of up to another 12 months.
- The 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.

## 4. Annual Leave



- 4 weeks paid annual leave for each year of service.
- A shift worker (as defined) is entitled to five weeks' annual leave.
- Cashing out of A/L may be provided for both award/agreement covered and non award employees subject to a remaining entitlement balance of 4 weeks.

# 5. Personal/Carer's & Compassionate Leave

- Employees, except casuals, are entitled to 10 days paid personal/ carer's leave
- All employees are entitled to 2 days of unpaid carer's leave per occasion
- Employees are also entitled to two days of paid compassionate leave per occasion





# 5. Personal/Carer's & Compassionate Leave

- Modern awards and enterprise agreements may allow for cashing out of personal leave, if the employee retains 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
- Employees may be required to provide evidence they were absent for a legitimate reason
- Modern awards and enterprise agreements may include further rules relating to evidence requirements

## 6. Community Service Leave

- The NES 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 for jury service.



# 7. Long Service Leave

- The Government will work with the States and Territories to develop a long service leave standard.
- NES provides transitional arrangements while the new national standard is being developed.
- Existing agreement entitlements continue to apply on commencement.

## 8. Public Holidays

- NES allows employees to be absent from work on specified public holidays and to be paid for the hours they would normally work.
- If a State or Territory substitutes another day or declares an additional day, the employee is entitled to be absent on that day.

# 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.
- Payment in lieu at “**full rate of pay**” for hours employee would have worked (incl overtime rates, allowances, loadings etc).
- An employee made redundant is entitled to a payment based on years of continuous service with an employer.
- Businesses with fewer than 15 employees are exempt.



# 10. Fair Work Information Statements

- The NES requires employers to give each new employee a copy of the Fair Work Information Statement containing information on key elements of the new system e.g. roles of FWA, FW Ombudsman, NES, modern awards etc.



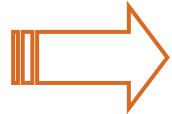
# Modern Awards



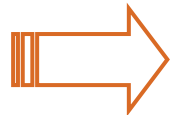
- **Modern awards build on the NES** and may include an additional 10 minimum conditions of employment, tailored to the needs of the particular industry or occupation.
- Like the NES, Modern Awards commence on **1 Jan. 2010**.
- Will operate on an industry or occupation basis.
- Will not cover employees or employers covered by an enterprise award or a Notional Agreement Preserving a State Award (NAPSA) derived from a State enterprise award).
- Remains under the auspices of the AIRC until Modern Awards commence

# Award Modernisation

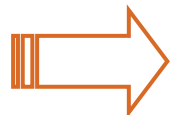
**4000+  
Federal  
Awards  
&  
NAPSA  
s**



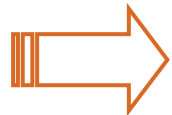
Stage 1: Priority industries / occupations



Stage 2: Awards made 3 April '09



Stage 3: Awards to be made by 4 September '09



Stage 4: Awards to be made by 4 December '09



**Limited  
number of  
Modern  
Awards  
Operative  
1/1/2010  
Reviewed  
4 yearly**





# What is in a Modern Award?

- 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,
- Representation and dispute settlement.

# Modern Awards

FWA must ensure modern awards and the NES provide a fair safety net for employees, taking into account:

- the relative living standards and needs of the low paid
- to encourage collective bargaining
- to promote social inclusion via increased workforce participation
- the need to promote flexible modern work practices and the efficient and productive performance of work

# Modern Awards

- the principle of equal remuneration for work of equal value
- the likely impact of any exercise of modern award powers on business
- the need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap
- the likely impact of any exercise of modern award powers in employment growth, inflation and the sustainability, performance and competitiveness of the economy.



# Modern Awards – Flexibility clauses

- The AIRC will include a **flexibility clause** in each modern award allowing employers and employees to negotiate arrangements to meet their individual needs.
- Protections will ensure employee is better off overall under the flexibility arrangement

# Creation of Modern Awards

- The AIRC will create modern awards to cover all employees who perform work that has historically been regulated by awards.
- The AIRC must complete the award modernisation process by 31 December 2009.
- Modern awards will not **apply** to employees with guaranteed earnings of more than \$108,300 p.a. Written undertaking to be agreed by employer and employee.
- These employees and employers can agree on terms to supplement the NES without reference to an award and may still be covered by an enterprise agreement.

# Modern Awards

- In limited circumstances, FWA will have the power to vary, make or revoke modern awards outside the system of four yearly reviews (e.g. 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)
- FWA will review minimum wages annually but will be able to vary award wages outside these reviews, in limited circumstances e.g. where FWA is satisfied that there are work value reasons that justify the variation
- FWA will balance public interest, social and economic factors when considering if and how to vary the content of modern awards.

# Transitional Arrangements

- FWA will be able to make orders where existing employees' take home pay is reduced due to award modernisation
- FWA will review modern awards 2 years
- Those under enterprise awards (or enterprise NAPSAs) will be able to apply to FWA to have their enterprise award modernised
- AFPC entitlements plus minimum entitlements relating to meal breaks, public hols and parental leave continue to operate until NES commences.
- FWA can vary transitional instruments to address difficulties arising from the application of the NES to transitional instruments.
- FWA can also make orders phasing in increases in wages where necessary to ensure the viability of an enterprise.

# People not covered by an award

- The 10 NES will apply to all employees - whether they are covered by an award or not.
- The Minimum Wage Panel will make a national minimum wage order for employees who are not covered by a modern award.



# Enterprise Agreements and Bargaining



# Collective Bargaining Framework

What is collective bargaining?

- The process where employers, employees and bargaining representatives (including employee organisations) bargain for an **enterprise agreement**.
- Several different types of enterprise agreements: single-enterprise, multi-enterprise, and greenfields agreements.
- The *Fair Work Act 2009* requires employers, employees, and their bargaining representatives to **bargain in good faith** when negotiating an enterprise agreement

# Bargaining over a wider range of matters

- The concept of “prohibited content” under the old Act has been removed.
- Instead, the contents of agreements will now be much broader and limited only by the requirement that they be about “permitted matters”.

## **Permitted matters** are:

- Matters pertaining to the relationship between an employer or employers and employees e.g. wages, annual leave; and
- Matters pertaining to the relationship between an employer or employers and an employee organisation or employee organisations e.g. trade union training leave, delegates’ rights

# Mandatory & Required Terms

- **Mandatory Terms** (deemed if agreement silent):
  - *Flexibility term* – allows employer & individual employee to agree to arrangements varying the effect of the agreement to meet their genuine needs. The employee must be better off overall.
  - *Consultation term* – requires employer to consult with employees on major workplace change
- **Required Terms** – Maximum 4 year term, dispute settlement procedure, special provisions for certain employees

# Unlawful Terms

- If an enterprise agreement contains unlawful terms FWA must refuse to approve the enterprise agreement.
- Examples of unlawful terms include:
  - Discriminatory terms e.g. race, sexual preference etc.
  - Objectionable terms e.g. provisions for bargaining fees etc.

# Single enterprise agreements

Apply to either:

- A single employer, or
- Two or more “single interest employers”:
  - Joint venture or common enterprise; or
  - Related bodies corporate; or
  - Specified in a “single interest employer authorisation”

# Multi-enterprise agreements

- Apply to 2 or more employers who are not “single interest employers”
- Majority support determinations & scope orders n/a
- Bargaining orders n/a (except where “low-paid authorisation”)
- Industrial action n/a
- FWA may only deal with a bargaining dispute &/or arbitrate if all employers agree (except where “low paid authorisation”)
- The employers must not have been coerced to enter the agreement

# Multi-enterprise agreements for low paid employees

- Any union entitled to represent the employees can apply to FWA for a “low-paid authorisation”
- Community services, cleaning and childcare sectors referred to in Explanatory Memorandum
- FWA must take into account certain factors, eg. history of bargaining, bargaining strength of employer & employees
- Can arbitrate if no reasonable prospect of agreement being reached & none of the employers have had a previous enterprise agreement



# Greenfields agreements

- Greenfields agreements can only be made in relation to a “genuine new enterprise” (defined to include a genuine new business, activity, project or undertaking) before the employer has engaged any employees.
- Agreements are made between the employer(s) and employee organisation(s) that are entitled to represent a majority of employees to be covered.
- A genuine new enterprise does not include an existing enterprise that an employer acquires which has been previously carried out by another employer.

# Good Faith Bargaining Requirements

- Attending and participating in meetings at reasonable times
- Disclosing relevant information (except confidential or commercially sensitive) in a timely manner
- Responding to proposals 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

# Good Faith Bargaining

- The employers must not have been coerced to enter the agreement
- 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.
- 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.

# Majority support determinations

- A determination that a majority of the employees who will be covered by the agreement want to bargain with the employer
- FWA must be satisfied that:
  - a majority of the e'ees who will be covered by the agreement want to bargain (using any method FWA considers appropriate);
  - if the agreement will not cover all the e'ees & the group of e'ees is not geographically, operationally or organisationally distinct – the group was fairly chosen; and
  - it is reasonable to make the determination

# Scope orders

- FWA may issue an order once bargaining has commenced which specifies the group of employees who the proposed agreement will cover
- If the agreement will not cover all the employees the group of employees is not geographically, operationally or organisationally distinct, FWA must be satisfied the group was fairly chosen

# The approval requirements are:

- The agreement contains a **flexibility term**, and a **consultation term**,
- Approving the agreement would not undermine good faith bargaining if a **scope order** is in operation in relation to the agreement
- Agreement was **genuinely agreed** to by a majority of the employees covered by the agreement
- For multi-enterprise agreements, each employer genuinely agreed to the agreement and that no person coerced, or threatened to coerce, any of the employers to make the agreement
- Terms of agreement do not contravene the **NES**
- Agreement passes the **better off overall test**

# Variation and Termination of enterprise agreements

- The process for varying an enterprise agreement is similar to the process for making an agreement.
- 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.

# Transitional Arrangements

- The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* provides that certain provisions of the *Workplace Relations Act 1996*, including the rules about agreement content, continue to apply to collective agreements and ITEAs made prior to the commencement of the new system.
- From 1 July 2009, collective agreements continue to operate as transitional instruments, even after their nominal expiry date. These transitional instruments will cease to operate when terminated or replaced by a new enterprise agreement.



# Transitional Arrangements

- The transitional provisions provide that an employee covered by an AWA or ITEA not passed its nominal expiry date can agree with their employer to terminate the AWA or ITEA on a conditional basis while negotiations are underway for an enterprise agreement under the new system.
- This allows the employee to fully participate in the bargaining process. Where an employee and employer have made a conditional termination, the AWA or ITEA will terminate when the new enterprise agreement comes into operation.

# Transitional Arrangements

- Employees on individual statutory agreements that have passed their nominal expiry date are able to fully participate in the bargaining process. After an individual statutory agreement has passed its nominal expiry date, it can be terminated unilaterally by either the employee or employer.
- Once an individual statutory agreement has been terminated, an enterprise agreement that covers the employer and employees would then apply. If there is no applicable agreement then any applicable award (and the NES) will apply to that employee.

# Transitional Arrangements

- The NES and minimum safety net wages will apply to all employees from 1 January 2010, and will prevail over a transitional instrument where the instrument is detrimental in comparison.
- Current rules about the operation, content and interaction of these transitional instruments will be retained.

# Transitional Arrangements

- From 1 January 2010, enterprise agreements will be assessed under the new 'better off overall test' (BOOT)
- Instruments made under the *WRA* and earlier systems (including collective agreements and *AWAs*) will be preserved under the transitional and consequential legislation.
- From 1 Jan. 2010, the NES will apply to transitional instruments on a no-detriment basis. In addition, employees will be entitled to the relevant safety net minimum wage if the base rate of pay in their agreement-based transitional instrument is less than the safety net.



# Industrial Action



# Protected Industrial action

- The *Fair Work Act 2009* provides rules for industrial action. Protected industrial action remains available only while bargaining for an enterprise agreement and is authorised by a secret ballot.
- Types of protected industrial action:
  - Employee Claim Action
  - Employee Response Action
  - Employer Response Action

# Types of Protected Industrial Action

- **Employee Claim Action-** is industrial action taken during the bargaining process to support or advance claims that are only about permitted matters or are reasonably believed to be about permitted matters
- **Employee Response Action-** is action taken in response to employer industrial action whether the industrial action is protected or unprotected.
- **Employer Response Action-** is limited to lockouts and it is only protected where the lockouts are in response to industrial action taken by employees.

# What steps are involved in undertaking a protected action ballot?

- A bargaining representative, may apply to FWA for a protected action ballot order
- The application must specify the group(s) of employees to be balloted and the question(s) to be put to the employees
- An application must not be made earlier than 30 days prior to the nominal expiry date
- FWA must make a protected action ballot order if the application has been correctly made and is satisfied that each applicant has been and is genuinely trying to reach agreement with the employer



# When can protected action be suspended or terminated?

- Where protected action is causing or is threatening to cause significant damage to the Australian economy, or endangers the safety, health or welfare of the population or part of it, FWA will order the parties to stop taking industrial action. If further conciliation does not lead to an agreement, FWA may determine a settlement.
- FWA will have regard for:
  - The merits of the case
  - The interests of the parties and the public interest
  - How productivity may be improved in the business
  - The conduct of the bargaining representatives
  - Any incentives to continue to bargain

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



- **Protected Action** -where there is a complete withdrawal of labour,
- **Protected partial work bans or restrictions**- an employer may elect to accept the partial performance or issue a notice stating that the employer refuses to accept any work and payments will be withheld for the duration of the ban
- **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

# Strike Pay – when is an employer required to withhold pay (cont)?

- **Unprotected action-**

- > 4 hours employer will be required to withhold payment for the duration of the action.
- $\leq$  4 hours employer must withhold 4 hours pay

# Action which is not protected

Includes action taken:

- in support of pattern bargaining
- in support of unlawful matters
- before the nominal expiry date of the enterprise agreement in place
- relating to a greenfields or multi-enterprise agreement.

# 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



# Right of Entry



# Right of Entry

- The right of entry provisions in the *Fair Work Act 2009* allow union officials with valid entry permits to enter employers' businesses for certain purposes.
- FWA will issue entry permits to officials who are 'fit and proper' persons.
- Federal right of entry permits differ from right of entry permits issued from State and Territory laws.

# Right of Entry

Under the *Fair Work Act 2009*, permit holders may enter premises to:

- to investigate a suspected breach of the *Fair Work Act 2009*, term of a fair work instrument, or designated outworker term
- 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 OHS law



# Right of Entry

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

# Right of Entry-Suspected Breach

The permit holder must:

- give the occupier and the employer a minimum 24 hours written notice of their intention to enter.
- show their entry permit and entry notice on request and before inspecting or copying records or documents
- enter during working hours and only to parts of the premises used mainly for business purposes
- comply with reasonable requests by an employer to adhere to OHS requirements or to meet in a certain area

# Right of Entry – 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.
- 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 a permit holder from disclosing information obtained during a right of entry for purposes other than rectifying the alleged breach

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

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.
- Show his or her entry permit and entry notice on request
- Comply with reasonable requests by an employer to adhere to OHS requirements or to meet in a certain room.
- 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.

# 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.



# 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.
- This includes situations such a permit holder hindering or obstructing an employer or using an entitlement to represent certain employees that does not exist.
- FWA 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

# Unfair Dismissal and Redundancy



# What's Changed?

## WR ACT

- Employees excluded from making an claim if at the time of dismissal they were employed by a business with <100 employees.
- Qualifying period 6 months, or a shorter or longer period agreed in writing between the parties before employment commenced.
- An unfair dismissal claim could not be made if the dismissal was for genuine operational reasons.

## FW ACT

- No exclusions for unfair dismissal provisions based on business size.
- An employee must have served a minimum employment period of 12 months if they are employed in a business with <15 employees, or 6 months in businesses with  $\geq 15$  employees before they can make an unfair dismissal claim.
- Operational reasons are not a feature of the *FW Act*. However, a dismissal will not be unfair if FWA is satisfied it was a genuine redundancy.



# What's Changed?

## WR ACT

- 21 days to make an unfair dismissal application.
- AIRC would attempt to conciliate an unfair dismissal claim, if unsuccessful the case would then move to arbitration and a binding order would be made.
- The AIRC could grant appeals in an unfair dismissal case, except for certain matters.

## FW ACT

- 14 days to make an unfair dismissal application.
- FWA will hold a conference or a hearing in an unfair dismissal case that involves contested facts.
- FWA cannot grant appeals from a decision made in an unfair dismissal case unless it is in the public interest to do so. An appeal on a question of fact can only be made on the ground that the decision involved a significant error of fact.

# Unfair Dismissal

A person has **not** been dismissed if:

- they were employed under a contract of employment which operated for a specified period of time or the duration of a specified task
- the employment was for a specified period of time under a training arrangement
- the person was demoted without involving a significant reduction in pay or duties and they remained with the same employer

# What is unfair dismissal?



A person has been **unfairly dismissed** when FWA is satisfied that:

- the person has been dismissed
- the dismissal was harsh, unjust or unreasonable
- the dismissal was not a case of genuine redundancy
- the dismissal was not consistent with the Small Business Fair Dismissal Code

Unfair Dismissal is different from General Protections for people being dismissed on grounds of discrimination etc.

# What is genuine redundancy?

- Replaces “genuine operational reasons” exemption
- Employer must establish:
  - Job is no longer required due to operational requirements
  - Compliance with award / EA consultation reqts
  - Redeployment within the enterprise (incl of an associated entity) was not reasonable

# What constitutes harsh, unjust or unreasonable?

- If there was not a valid reason or reasons
- Whether the person was notified of the reason
- Whether the person was given any opportunity to respond
- Any unreasonable refusal to allow the person to have a support person present to assist at any discussions relating to the dismissal
- If the dismissal related to unsatisfactory performance – whether the person had been warned before the dismissal

# What constitutes harsh, unjust or unreasonable (cont)?

- Whether the size of the enterprise would be likely to impact on the procedures followed in the dismissal
- Whether a lack of dedicated HR specialists or expertise in the employer's enterprise would be likely to impact on the procedures followed in the dismissal
- Any other matters that FWA considers relevant

# Who can make an unfair dismissal claim?



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

- completed the **minimum employment period**
- are **covered** by a modern award or enterprise agreement
- For award/agreement free employees the sum of their annual rate of earnings and any other amount in accordance with the Fair Work Act 2009 Regulations is less than the high income threshold set out in the Regulations (\$108,300 effective 01/07/09)

# New Unfair Dismissal Claim Process

- Claim must be made within 14 days unless exceptional circumstances
- Procedure to be “quick, flexible & informal” whilst providing a “fair go all round
- FWA may gather information via telephone calls or other informal means
- Conferences – informal, private, at FWA or employer’s premises



# What is the procedure through FWA?

FWA must decide 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, if relevant
- whether the dismissal was a genuine redundancy

# Remedies

FWA can make:

- An order for **reinstatement** to the employee's former position or appointment to another position that has terms and conditions no less favourable than the position they held previously.
- **Any other order** that it considers appropriate to maintain the person's continuity of employment and the period of continuous service with the employer
- An order for **remuneration lost** or likely to have been lost because of the dismissal
- An order for payment in lieu of reinstatement if it is satisfied that reinstatement is inappropriate and **compensation** is appropriate (Max 26 weeks)

# Can a decision of FWA be appealed?

- FWA cannot grant appeals from a decision made in an unfair dismissal case unless it is in 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.
- Appeals will be decided by hearing unless the parties agree to the appeal being conducted without hearing
- The Minister can apply to FWA for a review of unfair dismissal decisions (other than full bench decisions) if the Minister believes the decision is contrary to the public interest.

# Small Business Fair Dismissal Code

- The Code is available to small business employers i.e. with fewer than 15 employees who are considering dismissing an employee.
- **It is not a compulsory Code** – the employer does not have to follow the Code, but if the dismissal was consistent with the Code, FWA cannot find the person was unfairly dismissed.
- If the code is not followed, the claim will be treated the same as any other unfair dismissal claim.

# General Protections



# General Protections

- The freedom of association, unlawful termination and other miscellaneous protection provisions in the *WR Act* have been combined into a new set of expanded general protections in the *FW Act*
- The new protections relate to **workplace rights** and participation or non-participation in certain industrial activities.
- The new protections relate to **workplace rights** and participation or non-participation in certain industrial activities.

# What is a workplace right?

‘**Workplace rights**’ can be broadly described as employment entitlements and the freedom to exercise and enforce those entitlements e.g.

- 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
- the making of complaints or inquiries
- 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**”

# General Protections

- **Adverse action** depends on the nature of the relationship between the relevant persons e.g. adverse action by an employer against an employee includes dismissal, discrimination, refusing to employ a person, or prejudicially altering the position of the person.
- Definition covers certain conduct of employers, employees, industrial associations, independent contractors and principals. It also serves to protect prospective employees.



# 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 e.g. refusal to take part in industrial action
- Protections prevent adverse action being taken against a person in connection with these industrial activities.

# Coercion, misrepresentation and undue influence or pressure

- Coercion and misrepresentation in relation to workplace rights and industrial activities is also prohibited.
- Employees are also protected from undue influence or pressure being exerted by their employer in certain circumstances

# Discrimination and other miscellaneous 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 in the *WR Act*, which was limited to protection from dismissal.

# What happens if these protections are allegedly breached?

Where a person alleges a contravention of the general protections, FWA 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 FWA conference is voluntary and a person can elect to proceed directly to court instead.

# What happens if a party thinks these protections are breached?

- Where a person is dismissed from employment, a FWA application to hold a conference must generally be made within 60 days. If the matter cannot be resolved at the conference, the person can 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.

# Transfer of Business



# Transfer of Business

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

- the employment of an employee of the old employer has terminated
- within 3 months after the termination, the employee becomes employed by the new employer
- the transferring employee performs the same, or substantially the same, work for the new employer
- there is at least one of four connections between the old employer and the new employer i.e. an asset transfer; an outsourcing; an insourcing; or that the new and old employers are associated entities.

# Transfer of Business

- New and Old employers are associated entities
- 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 same benefit of their existing workplace instrument
- There also rules for non transferring employees which allows new employees who are not transferring and to whom no other instrument applies to be covered by the same instrument as the transferring employees.



# Transfer of Business – Role of FWA

- FWA will have powers to make orders on application, in relation to transfers of business. For example, FWA may order that a transferable instrument cover existing or new employees of the new employer, not just transferring employees. FWA may also order that the transferable instrument not cover the new employer and the transferring employees.
- In deciding whether to make such orders, FWA 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 and the financial position of the new employer.

# Transfer of Business

## Protections for transferring employees

- The transfer of employment provisions in the *FW Act* 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 NES entitlements

# Transfer of Business

## Protections for transferring employees

- 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.

# Compliance



# Record Keeping

- Requirements set out in the Regulations
- Substantially the same as under the previous Act i.e. the records you are keeping now.
- New requirements are to make and keep records in regard to:
  - Individual flexibility arrangements
  - Guarantees of annual earnings as permitted under the Fair Work Act. 2009

# Compliance with the FW Act

## Checklist for 1 July 2009:

- FW Australia and the FW Ombudsman commence operation.
- Ensure you are aware of and understand the general protection provisions of the *Fair Work Act 2009*
- Ensure you meet your record keeping obligations.
- Meet new requirements for agreements.
- New strike pay provisions will commence.
- New stand-down provisions will commence.
- New unfair dismissal provisions of the *Fair Work Act 2009* commence.

## Checklist for 1 January 2010:

- The new safety net comprising modern awards and 10 National Employment Standards commence.

# Questions?

