



Australian Government

N.B: The first half of this module is designed for Employers. Material designed for Employees is provided from page 18 onwards

COMPLIANCE WITH THE FAIR WORK ACT - EMPLOYERS

Overview

Certain provisions of the *Fair Work Act 2009* came into effect on 1 July 2009 while other provisions will commence after 1 January 2010. Employers need to be aware of these provisions and the rights and responsibilities they present.

What is the 'bridging period' and why is it significant?

1 July 2009 to 31 December 2009 is known as the '**bridging period**'. It 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 Transition 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 agencies are provided with dates that allow them to continue with transitional work, 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.

I am an Employer. What do I need to know from 1 July 2009?

Fair Work Australia

- Fair Work Australia and the Fair Work Ombudsman commence operation.

If you are a member of an employer association, talk to them in the first instance about workplace relations advice. If you require further assistance, you can contact Fair Work Australia at www.fwa.gov.au or the national Fair Work Australia Help Line number is **1300 799 675**.

N.B: Further information on Fair Work Australia and the Fair Work Ombudsman are provided in the module titled '**Overview of Fair Work Australia and Fair Work Ombudsman**'.

Creation of Fair Work Divisions in Federal Courts

- There will be new Fair Work Divisions created in the Federal Courts.

What are the Fair Work Divisions in Federal Courts?

The Fair Work Divisions of the Federal Court and Federal Magistrates Court will specialise in workplace relations matters and complement the work of Fair Work Australia. The new Divisions commenced on 1 July 2009 in relation to matters arising under the *Fair Work Act 2009*, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (T&C Act) and the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (R&C Act).

Continuing work by Workplace Authority

- The Workplace Authority will have an ongoing role after 1 July 2009 until 31 January 2010.

What role will the Workplace Authority have after 1 July 2009?

- The Workplace Authority continues to operate to complete the processing of any workplace agreements made or varied before 1 July 2009, as well as any Individual Transitional Employment Agreements lodged during the bridging period.
- The advice and education functions moved to the Fair Work Ombudsman on 1 July 2009.
- The Workplace Authority will cease on 31 January 2010.

General Protections

- Ensure you are aware of and understand the general protection provisions of the *Fair Work Act 2009*

N.B: Further information on the **general protection** provisions of the *Fair Work Act 2009* are provided in the module titled '**Overview – Fair Work Act 2009**'.

What are general protections?

The freedom of association, unlawful termination and other miscellaneous protection provisions (such as an employee's right to reasonably refuse to work on a public holiday) that were contained in the *Workplace Relations Act 1996* have been combined into a new set of general protections, and came into effect on 1 July 2009.

Under these combined protections, it will be unlawful for a person to take adverse action because another person has, or exercises, a workplace right.

Adverse action by an employer against an employee includes dismissal, discrimination, refusing to employ a person, or prejudicially altering the position of a person. Workplace rights include an entitlement under an award or agreement, or a workplace law.

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

It will also be unlawful to discriminate against a person because they are, or aren't, a member of a trade union.

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.

What else is covered?

The general protections cover industrial action, sham contracting arrangements, discrimination on a number of grounds including race, sex, sexual preference, age, disability, pregnancy, among others, and dismissal from work due to temporary absence because of illness or injury.

The new general protections provide more comprehensive protections for employees in some situations than is currently the case.

Under the *Workplace Relations Act 1996*, it was unlawful for an employer to dismiss an employee for certain reasons such as because of their sex, race or family responsibilities.

Under the *Fair Work Act 2009*, a range of additional adverse actions, falling short of dismissal, are unlawful, for example, placing an employee in a position that pays less, or refusing to employ them, for one of the prohibited reasons.

There are also protections to ensure parties are not coerced into making a particular type of agreement or discriminated against because of the type of agreement that applies to them. It is unlawful to coerce someone to make a multi-employer agreement and Fair Work Australia may only approve such an agreement if it is satisfied that all employers genuinely agreed to make the agreement and were not coerced. It is also unlawful to discriminate against an employer because they have a particular type of agreement or an agreement that does not cover a union or a particular union.

There is also a protection to prevent a person being coerced to employ or engage a particular person or appoint them to a particular role.

Key Transitional Arrangements

- The general protections framework commenced 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 prior to 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 *Workplace Relations Act 1996*, but no application is made till after 1 July 2009, the application should be made to Fair Work Australia, rather than the Australian Industrial Relations Commission.
- Where conduct giving rise to a contravention of the freedom of association or sham contracting provision occurred 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.

Bargaining Framework and Agreements

Collective Agreements

What happens if I was involved in bargaining when the new legislation commenced?

The *Fair Work Act 2009* bargaining rules commenced on 1 July 2009. The *Fair Work Act 2009* does not carry over bargaining.

Bargaining participants would need to either have completed bargaining under the *Workplace Relations Act 1996* before 1 July 2009 or commence bargaining for a new enterprise agreement under the *Fair Work Act 2009* on or after 1 July 2009. The conduct of a bargaining representative before 1 July may be taken into account by Fair Work Australia when deciding whether to make a bargaining order or scope order.

What test will apply if I make a collective agreement during the bridging period?

Before 1 January 2010, enterprise agreements will be assessed by Fair Work Australia against the no-disadvantage test using an appropriate reference instrument. A reference instrument is defined as a relevant general instrument for one or more of the employees to be covered by the enterprise agreement or a designated award if there is no relevant general instrument.

What happens if I have made a collective agreement with my employees before 1 July 2009 but have not yet lodged it?

If a collective agreement has been 'made' under the provisions of Section 333 and Section 340 of the *Workplace Relations Act 1996* before 1 July 2009 then it must have been lodged with the Workplace Authority within 14 days of making (for greenfields agreements) or approving (for all other collective agreements) the agreement. These agreements will be approved by the Workplace Authority, subject to passing the no-disadvantage test.

Union collective agreements that have been made by an employer and union(s) but not approved by the relevant employees before 1 July 2009 may be lodged and assessed with the Workplace Authority provided the agreement:

- was made before 1 July 2009; and
- is approved by employees and lodged with the Workplace Authority within 3 months from 1 July 2009.

N.B: 'Approval' of union or employee collective agreements under the *Workplace Relations Act 1996* is defined in Section 340 of the *Workplace Relations Act 1996* and includes the approval of a valid majority voting for the agreement.

The Workplace Authority will continue to operate until 31 January 2010 to assess these agreements, including collective agreements made before 1 July 2009.

How will my existing collective agreement be treated under the new system?

A *Workplace Relations Act 1996* collective agreement will become a 'transitional instrument' from 1 July 2009. It will continue in force until it is either terminated or replaced.

From 1 January 2010 a provision of a transitional instrument will have no effect to the extent that it is detrimental to an employee, in any respect, when compared to an entitlement under the National Employment Standards (NES).

Transitional collective agreements will be subject to new termination rules set out in the transitional legislation. If an employer or employee wishes to terminate the agreement this will have to be done in the same way as new enterprise agreements made under the *Fair Work Act 2009*.

Will I be required to negotiate with all unions that represent (or are eligible to represent) my employees, when bargaining for a new agreement?

Employees can nominate who will represent them in bargaining and employers must respect their choice. Employers will be required to notify their employees of their right to representation. Employees who are union members will automatically be represented by their union, unless they elect to appoint another person as their representative.

What will I be able to do if there are two unions both wanting coverage of my employees?

Fair Work Australia will have powers to make a representation order when there is a dispute about whether an organisation is entitled to represent the industrial interests of a workplace group.

Where there is a dispute about union coverage an organisation or an employer will be able to make application to Fair Work Australia for an order about the right to represent the industrial interests of the employees in a particular workplace.

Individual Transitional Employment Agreements (ITEAs)

Can I offer my employees an Individual Transitional Employment Agreement after 1 July 2009? If so, what test will apply to my agreements made and lodged during the bridging period?

Individual Transitional Employment Agreements can be made through the bridging period however consideration should be given to the changes that take effect from 1 January 2010.

After 31 December 2009 Individual Transitional Employment Agreements may no longer be made. Existing Individual Transitional Employment Agreements will continue to apply as a transitional instrument until they are either terminated or replaced.

The National Employment Standards and minimum rates of pay (for example, minimum rates in a relevant modern award) will apply to any employee where any existing entitlement is detrimental by comparison. This includes any entitlement derived from a transitional instrument such as an Individual Transitional Employment Agreement.

The no-disadvantage test will continue to apply until 31 December 2009 to all agreements, including Individual Transitional Employment Agreements, made in the bridging period under saved provisions of the *Workplace Relations Act 1996*.

What happens if I've made an Individual Transitional Employment Agreement with an employee before 1 July 2009 but have not yet lodged it?

The Workplace Authority will continue to receive lodgements and assess Individual Transitional Employment Agreements made up until 31 December 2009 under provisions of the *Workplace Relations Act 1996*.

Will Individual Transitional Employment Agreements expire on 31 December 2009?

No. The 'nominal expiry date' of these agreements is 31 December 2009 at the latest, but they do not stop operating on that date. They will continue to operate until they are either terminated or replaced.

Are there new provisions for termination of transitional Individual Employment Agreements after 1 July 2009?

Yes. The transitional legislation provides for individual agreement-based transitional instruments, including Individual Transitional Employment Agreements, to be terminated by written agreement between the employer and employee. An employer and employee can also agree to conditionally terminate an Individual Transitional Employment Agreement if an enterprise agreement that covers the employer and employee starts operating.

The transitional legislation also provides that these agreements may be terminated by either the employer or employee if the agreement has passed its nominal expiry date.

Industrial Action

My employees have been involved in protected industrial action. Are they entitled to continue industrial action after 1 July 2009?

Upon application, Fair Work Australia may order under certain circumstances that industrial action that was authorised under the *Workplace Relations Act 1996* in relation to a proposed collective agreement may be continued after 1 July 2009. Otherwise, industrial action that was protected under the *Workplace Relations Act 1996* will not be protected under the *Fair Work Act 2009*.

For instance Fair Work Australia must be satisfied that on or after 1 March 2009, the person organised or engaged in industrial action, for the purpose of supporting or advancing claims in relation to the proposed collective agreement and the person is genuinely trying to reach agreement in relation to the proposed enterprise agreement (T&C Act, Sch 13, Item 14A(3)).

- Employees seeking to pursue industrial action in support of claims for a new collective agreement will be required to follow the rules under the *Fair Work Act 2009*.

Protected action ballots and strike pay

Are secret ballots under the *Workplace Relations Act 1996* valid after 1 July 2009?

No. Protected action ballot orders under the *Workplace Relations Act 1996* are of no effect after 1 July 2009. However, bargaining representatives may apply to Fair Work Australia for an order that industrial action that was authorised

under a secret ballot held under the *Workplace Relations Act 1996* continues after 1 July 2009 (T&C Act – Schedule 13, Part 4(13)).

Are employers required to provide a designated workspace for employees to conduct a protected action ballot?

- An employer must allow the protected action ballot agent access to the workplace for the purpose of notifying employees of the information about the protected action ballot.
- An employer must also allow the protected action ballot agent access to the workplace for the purpose of preparing for, or conducting the protected action ballot (Regulation 3.13(7) and (8)).

What costs relate to protected action ballots?

If the protected action ballot agent for a protected action ballot is the Australian Electoral Commission, the Commonwealth is liable for the full costs incurred by the Australian Electoral Commission in relation to the protected action ballot, whether or not the ballot is completed.

If the agent for a protected action ballot is not the Australian Electoral Commission, the applicant for the protected action ballot order is liable for the full costs of conducting the protected action ballot, whether or not the ballot is completed. If the application for the protected action ballot order was made by joint applicants, each applicant is jointly liable for the costs of conducting the protected action ballot, whether or not the ballot is completed.

What percentage of employees is required for a secret ballot to be valid, and what constitutes a majority in support of the industrial action prescribed in a secret ballot?

At least 50 per cent of the employees on the roll of voters for the ballot are required to vote in the ballot for it to be valid.

To approve industrial action, more than 50 per cent of the valid votes must vote to approve the action.

Stand Downs

Does the *Fair Work Act 2009* allow employers to stand down employees?

An employer is able to stand down an employee without pay if specified requirements are met. The *Fair Work Act 2009* allows an employer to stand down an employee, if the employee could not be usefully employed because of one of the circumstances:

- industrial action (other than industrial action organised or engaged in by the employer);
- a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown; or
- a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

If the employer is able to obtain some benefit or value for the work that could be performed by an employee then the employer would not be able to stand down an employee.

Is standing down an employee during industrial action allowed?

An employer can stand down an employee if the industrial action that results in a stand down is not engaged in by the employer.

Right of Entry

Will a Right of Entry Permit under the *Workplace Relations Act 1996* remain valid under the *Fair Work Act 2009*?

A permit that is in force immediately before 1 July 2009 under Part 15 of the *Workplace Relations Act 1996*, or that comes into force on or after that day under that Part, has effect (T&C Act – Schedule 14, Part 1).

Will an employee organisation that provided notification to enter an employers premise prior to 1 July 2009, for entry after 1 July 2009 be able to access that workplace?

An entry notice properly given before 1 July 2009 and for an entry that has not occurred before that day has effect after 1 July 2009 (T&C Act – Schedule 14, Part 2(1)).

Will existing exemption certificates still be valid after 1 July 2009?

An exemption certificate properly issued by a Registrar before 1 July 2009 for an entry that has not occurred before 1 July 2009 has effect after 1 July 2009 (T&C Act – Schedule 14, Part 2(2)).

Record Keeping

Will I be required to keep time and wage records for all employees?

An employer must keep a record in respect of each employee about:

- basic employment details such as the name of the employer and the employee and the nature of their employment (e.g. part-time, full-time, permanent, temporary or casual); and
- pay; and
- overtime hours; and
- averaging arrangements; and
- leave entitlements; and
- superannuation contributions; and
- termination of employment (where applicable); and
- individual flexibility arrangements and guarantees of annual earnings.

From 1 January 2010, employee records must specify the ABN (if any) of the employer.

Employers must continue to provide employees with access to their employment records and issue payslips.

Termination of Employment

Redundancy

If an employee can be redeployed, will a termination be considered a genuine redundancy?

A termination is not considered to be a genuine redundancy if the person dismissed could have been redeployed within the business or an associated entity and it would have been reasonable in all circumstances to redeploy them.

What provisions do employers have to comply with when selecting which employees will be made redundant?

- Employers need to comply with the General Protection provision of the *Fair Work Act 2009* when selecting employees to be made redundant.

If the reason a person is selected for redundancy is unlawful under the General Protections provisions (for example, on the basis of race, sex or religion amongst others) then the person will be able to bring an action under the *Fair Work Act 2009* (Part 3-1).

What notice periods do employers have to comply with when making an employee redundant?

- There are minimum notice periods contained in Section 177 of the *Fair Work Act 2009*.
- An employer also needs to comply with any notice periods and consultation requirements regarding redundancy in any modern awards (or award-based transitional instrument) or enterprise agreements (or agreement-based transitional instrument) which apply to that employee when making an employee redundant.

If an employer does not comply with these terms, the person dismissed may be able to make an unfair dismissal claim.

Unfair Dismissal

N.B: Further information on unfair dismissal is provided in the content module titled '**Unfair Dismissal**'.

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).

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).

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

Can a dismissal be considered unfair if an employee is hired for a specified task or for the duration of a season or training arrangement and their employment is terminated at the end of that specified task, season or training arrangement?

No. A person is not considered to be dismissed if they were employed under a contract of employment for a specified period of time, for a specified task or for a specified season or if the employee was hired under a training arrangement and their employment was limited to the duration of a training period.

However, they may be able to bring an unfair dismissal claim if their employment is terminated prior to the end of the task, season or training arrangement.

Can an employee make an unfair dismissal claim if they have been forced to resign?

Yes, provided they are eligible. 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. An employee may be able to make an unfair dismissal claim or make an application under the General Protections part of the *Fair Work Act 2009* in a constructive dismissal case.

Can a person seek more than one remedy for a dismissal?

A person is prevented from 'double-dipping' when they have multiple potential remedies relating to dismissal from employment. However, in certain circumstances the anti-double dipping provisions will not apply, for example where an application has been withdrawn or failed for want of jurisdiction.

Transfer of Business

A transfer of business occurring on or after 1 July 2009 will be subject to new transfer of business rules under the *Fair Work Act 2009*. These rules replace the transmission of business rules in the *Workplace Relations Act 1996*.

A new definition of 'transfer of business' is provided in the *Fair Work Act 2009* as well as changes to the instruments that transfer to the new employer.

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.

The rules provide that where there is a transfer of business 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).

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:

- 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 as he or she performed for the old employer;
- ☑ 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.

Only 'transferable instruments', as defined in the *Fair Work Act 2009*, transfer to the new employer. These are:

- ☑ an enterprise agreement that has been approved by Fair Work Australia
- ☑ a workplace determination
- ☑ a named employer award
- ☑ a transitional instrument 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, (other than a workplace agreement or workplace determination that is yet to come into operation).

From January 2010

Terms and Conditions of Employment

- ☑ The new safety net consisting of the 10 National Employment Standards (NES) and modern awards will commence on 1 January 2010.
- ☑ The National Employment Standards will apply to all employees covered by the federal system from 1 January 2010, including those that are covered by a transitional instrument (in effect, an instrument made before 1 July 2009, or Individual Transitional Employment Agreements made before 31 December 2009), and will prevail over a transitional instrument where the instrument is detrimental in comparison.

Modern Awards

Who will be covered by modern awards?

Modern awards are not intended to extend coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award-free. Modern awards will not apply to employees who earn over the high income threshold (a figure which is calculated every year using the formula in the Fair Work Regulations 2009). This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia.

Employers and employees must not contravene a term of a modern award. A person who contravenes a term of a modern award may be subject to a maximum civil penalty of 60 penalty units (i.e., \$6,600) in the case of an individual, and 300 penalty units (i.e., \$33,000) in the case of a body corporate, and may also be ordered to pay amounts to a person that should have been paid in accordance with the award.

Will a modern award prevail over my agreements?

No, a modern award does not apply where a workplace agreement (for example an Individual Transitional Employment Agreement or collective agreement), workplace determination, preserved state agreement, Australian Workplace Agreement (AWA) or pre-reform AWA applies. However, an agreement cannot pay a lower rate of pay than the rate in the relevant modern award.

If no modern award is made to cover my employees from 1 January 2010 what happens? Will they be award-free?

After 1 July 2009, award-based *Workplace Relations Act 1996* instruments (i.e. federal awards and notional agreements preserving State awards) continue to exist in the new system as

award-based transitional instruments.

Award-based transitional instruments will continue to cover employers, employees and organisations (where relevant) that would have been covered if the *Workplace Relations Act 1996* had not been repealed.

Award-based transitional instruments will continue to apply to existing and new employees. If no modern award is made to cover the relevant employees the award-based transitional instrument will continue to apply after 1 January 2010. It will only cease to apply when a modern award is made that replaces it.

Enterprise instruments will continue to operate between 1 July 2009 and 31 December 2013.

Enterprise instruments are:

- awards or notional agreements preserving State awards that regulate terms and conditions of employment in a single business or part of a single business or one or more enterprises, if the employers carry on similar business activities under the same franchise; and
- preserved collective State agreements where, on the day before the commencement of the Work Choices amendments (i.e. 27 March 2006) a State or Territory law had the effect of converting a State or Territory enterprise award into an enterprise agreement.

Between 1 July 2009 and 31 December 2013, either an employer or an employee covered by an enterprise instrument can apply to Fair Work Australia to have the enterprise instrument modernised. If an application to modernise an enterprise instrument has not been received by Fair Work Australia by 31 December 2013, the instrument will cease to operate and the employer and employees will become covered by any relevant modern award.

National Employment Standards

What will I have to do if any of the new National Employment Standards is better than an entitlement in a current agreement?

The National Employment Standards (NES) and minimum wages will apply from 1 January 2010. From that date a transitional instrument will have no effect to the extent that it is detrimental to an employee, in any respect, when compared to an entitlement under the National Employment Standards.

- Employers and employees therefore need to review their agreements against the National Employment Standards to determine which will apply. Where an agreement term is detrimental to the employee then the National Employment Standards will need to be given effect from 1 January 2010.

A person covered by a transitional instrument will be able to apply to Fair Work Australia to resolve any difficulties about the application of the rules about the interaction between transitional instruments and the National Employment Standards. Fair Work Australia will be able to vary the instrument to resolve uncertainty or difficulty or to make the instrument operate effectively with the National Employment Standards.

What are the new provisions for parents requesting flexible working arrangements?

Eligible employees who are parents or who have caring responsibilities for children who are under school age, or children under 18 who have a disability,

have the right to request flexible working arrangements, such as changes to their:

- hours of work
- patterns of work
- work location

A request for flexible working arrangements must be made in writing, setting out the details of the change(s) sought and the reason(s) for the request. Employers have 21 days to provide a written response to the requesting employee, including reasons for the decision. Requests can only be refused on reasonable business grounds.

Where a request is refused by an employer, Fair Work Australia or another authorised party can be asked to resolve the refusal, so long as an enterprise agreement, contract of employment or other agreement that is in place permits them to do so.

Compliance with the National Employment Standards

A person must not contravene a provision of the National Employment Standards. A person who contravenes a provision of the National Employment Standards may be subject to a maximum civil penalty of 60 penalty units (i.e., \$6,600) in the case of an individual, and 300 penalty units (i.e., \$33,000) in the case of a body corporate, and may also be ordered to pay amounts to a person that should have been paid in accordance with the National Employment Standards.

However, an employer's refusal of a request for flexible work arrangements or extended parental leave on reasonable business grounds will not be subject to such penalty and payment orders.

Minimum Wages

Minimum wages are a key part of the safety net for employees. Under the new workplace relations system, minimum wages will be set by Fair Work Australia in modern awards and in a national minimum wage order.

- Modern awards will specify minimum wages for all modern award-covered employees.
- For employees who are not covered by a modern award or enterprise agreement, minimum wages will be provided for in a national minimum wage order.

Employees to whom an enterprise agreement applies will receive the rates of pay specified in the agreement. However, these rates of pay must at least be equal to the base rate of pay that they would receive under the relevant modern award (where the employee is covered by a modern award) or the national minimum wage order (where the employee is not covered by a modern award and the national minimum wage order would determine their base rate of pay if the agreement did not apply). This rule guarantees base rates of pay, not other monetary payments such as casual loading or allowances.

How often will minimum wages be revised?

A specialist panel of Fair Work Australia – the Minimum Wage Panel – will conduct an annual wage review each financial year. In an annual wage review, the Minimum Wage Panel will review minimum wages in modern awards and may make changes to modern award minimum wages. The Minimum Wages Panel will also review the national minimum wage order and must make a new national minimum wage order for each financial year. The minimum wage order must set:

- a national minimum wage;
- special national minimum wages for juniors; employees to whom training arrangements apply and employees with a disability. The Minimum Wage Panel is not required to set special national minimum wages for employees to whom training arrangements apply or juniors until its second wage review; and
- a casual loading for award/agreement free employees.

How will minimum wages be determined?

When setting and adjusting minimum wages, Fair Work Australia will take the following factors into account:

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

What if my employees are not covered by a modern award?

A national minimum wage order will set minimum wages for employees who are not covered by a modern award or enterprise agreement. The national minimum wage order will include a national minimum wage, as well as special national minimum wages for award/agreement free employees who are junior employees, employees to whom training arrangements apply or employees with a disability. The order will also include a casual loading for casual employees who are not covered by either an award or an agreement.

Transitional arrangements for Minimum wages

Fair Work Australia is required to conduct and complete its first wage review within the period 1 January 2010 to 30 June 2010.

However, Fair Work Australia may, before 1 January 2010, exercise powers for the purpose of obtaining information to be taken into account in its first annual wage review. These powers include inviting persons or bodies to make written submissions and undertaking or commissioning research.

After 1 July 2009, the following will continue to apply as transitional minimum wage instruments:

- Australian Pay and Classification Scales (APCS), which continues as a transitional APCS;
- the rate of the standard federal minimum wage (FMW), which continues as the transitional standard FMW;
- a special federal minimum wage, which continues as a transitional special FMW; and
- the rate of the default casual loading, which continues as the transitional default casual loading.

The wage provisions of the *Workplace Relations Act 1996* generally continue to apply after 1 July 2009 as the continued Australian Fair Pay Commission wage provisions. However:

- provisions relating to federal minimum wages and casual loadings cease to apply after 1 January 2010 (instead on this date a national minimum wage order in the same terms is taken to have been made);
- provisions authorising Australian Fair Pay Commission action cease to have effect when the Australian Fair Pay Commission ceases to exist; and
- the frequency of payment guarantee is not preserved because the *Fair Work Act 2009* separately provides rules about payment of wages (see Part 2-9, Div 2).

I am an Employer. What do I need to know?

Checklist for 1 July 2009:

- Fair Work Australia and the Fair Work 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.
- All agreements negotiated after 1 July 2009 will be subject to good faith bargaining provisions.
- New strike pay provisions will commence.
- New stand-down provisions will commence.
- Only under certain circumstances will eligible employees be able to continue industrial action commenced prior to 1 July 2009.
- 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.

COMPLIANCE WITH THE FAIR WORK ACT – EMPLOYEES

Overview

Certain provisions of the *Fair Work Act 2009* came into effect on 1 July 2009 while other provisions will commence after 1 January 2010. Employees need to be aware of these provisions and the rights and responsibilities they present.

What is the 'bridging period' and why is it significant?

1 July 2009 to 31 December 2009 is known as the '**bridging period**'. It 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 Transition 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 agencies are provided with dates that allow them to continue with transitional work, such as completing matters commenced prior to 1 July 2009 in the case of the Australian Industrial Relations Commission or assessing agreements in the case of the Workplace Authority.

I am an Employee. What do I need to know from 1 July 2009?

Fair Work Australia

- Fair Work Australia and the Fair Work Ombudsman commence operation.

If you are a member of a union or employee association, talk to them in the first instance about workplace relations advice. If you require further assistance, you can contact Fair Work Australia at www.fwa.gov.au or the national Fair Work Australia Help Line number is **1300 799 675**..

N.B: Further information on Fair Work Australia and the Fair Work Ombudsman are provided in the module titled '**Overview of Fair Work Australia and Fair Work Ombudsman**'.

General Protections

- Ensure you are aware of and understand the general protection provisions of the *Fair Work Act 2009*.

N.B: Further information on the **general protection** provisions of the Fair Work Act 2009 are provided in the module titled '**Overview – Fair Work Act 2009**'.

What are general protections?

The freedom of association, unlawful termination and other miscellaneous protection provisions (such as an employee's right to reasonably refuse to work on a public holiday) that were contained in the *Workplace Relations Act 1996* have been combined into a new set of general protections, effective from 1 July 2009.

Under these combined protections, it will be unlawful for a person to take adverse action because another person has, or exercises, a workplace right.

Adverse action by an employer against an employee includes dismissal, discrimination, refusing to employ a person, or prejudicially altering the position of a person. Workplace rights include an entitlement under an award or agreement, or a workplace law.

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

It will also be unlawful to discriminate against a person because they are, or aren't, a member of a trade union.

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.

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 most 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.

Bargaining Framework and Agreements

Collective Agreements

What will happen if I am involved in bargaining when the new legislation takes effect?

The *Fair Work Act 2009* bargaining rules commenced on 1 July 2009. Bargaining participants would need to either have completed bargaining under the *Workplace Relations Act 1996* before 1 July 2009 or commence bargaining for a new enterprise agreement under the *Fair Work Act 2009* on or after 1 July 2009.

What test will apply to a collective agreement during the bridging period?

Before 1 January 2010, enterprise agreements will be assessed by Fair Work Australia against the no-disadvantage test using an appropriate reference instrument (e.g., an award).

How will my existing collective agreement be treated under the new system?

A *Workplace Relations Act 1996* collective agreement will become a 'transitional instrument' from 1 July 2009. It will continue in force until it is either terminated or replaced.

From 1 January 2010 a provision of a transitional instrument will have no effect to the extent that is detrimental to an employee, in any respect, when compared to an entitlement under the National Employment Standards.

Transitional collective agreements will be subject to new termination rules set out in the transitional legislation. If an employer or employees wishes to terminate the agreement this will have to be done in the same way as new enterprise agreements made under the *Fair Work Act 2009*.

I am a member of a trade union. Will my employer be required to bargain with my union?

Employees who are union members will automatically be represented by their union, unless they elect to appoint another person as their representative or revoke the union's appointment as their representative. Employees can nominate who will represent them in bargaining and their employer must respect their choice. Employers will also be required to notify their employees of their right to representation.

I am a member of a State-based trade union, what will happen to them under the Fair Work legislation?

The Fair Work legislation will allow for all State-registered industrial associations to be either permanently or transitionally recognised so they can participate in the federal workplace relations system. Fair Work Australia may grant recognition where the State registered industrial association has no federal counterpart.

Individual Transitional Employment Agreements (ITEAs)

Can my employer offer me an Individual Transitional Employment Agreement after 1 July 2009?

Yes. Individual Transitional Employment Agreements can be made through the bridging period, however, consideration should be given to the changes that take effect from 1 January 2010.

After 31 December 2009, Individual Transitional Employment Agreements may no longer be made. Existing Individual Transitional Employment Agreements will continue to apply until they are either terminated or replaced.

N.B: The National Employment Standards and minimum rates of pay (for example, minimum rates in a relevant modern award) will apply to an employee where any existing entitlement is detrimental by comparison.

The no-disadvantage test will continue to apply to all agreements, including Individual Transitional Employment Agreements, made before 31 December 2009 under saved provisions of the *Workplace Relations Act 1996*.

If I am covered by an Individual Transitional Employment Agreement, will it expire on 31 December 2009?

No. The 'nominal expiry date' of these agreements is 31 December 2009 at the latest, but they do not stop operating on that date. The Individual Transitional Employment Agreement will continue to operate until it is either terminated or replaced.

Are there new provisions for termination of Individual Transitional Employment Agreements after 1 July 2009?

Yes. The transitional legislation provides for individual agreement-based transitional instruments to be terminated by written agreement between the employer and employee. An employer and employee can also agree to conditionally terminate an Individual Transitional Employment Agreements in order to allow the employee to participate in bargaining for a proposed enterprise agreement.

The transitional legislation also provides that these agreements may be terminated by either the employer or employee if the agreement has passed its nominal expiry date.

Protected action ballots, industrial action and strike pay

I voted in a secret ballot prior to 1 July 2009. Is that ballot result still valid when the Fair Work Act commences?

The transitional legislation will allow bargaining participants to apply to Fair Work Australia for an order that recognises a ballot result that was declared before the commencement of the *Fair Work Act 2009*. Applications to Fair Work Australia must be made within 28 days after 1 July 2009 (T & C Act, Sch 13, Item 14A(1) and (2)). If no application is made, or if the application is not granted, then a ballot result from before 1 July 2009 will not be valid on or after 1 July 2009.

I have been involved in protected industrial action. Am I eligible to continue industrial action after 1 July 2009?

Upon application, Fair Work Australia may order under certain circumstances that industrial action that was authorised under the *Workplace Relations Act 1996* in relation to a proposed collective agreement may be continued after 1

July 2009. For instance Fair Work Australia must be satisfied that on or after 1 March 2009, the person organised or engaged in industrial action, for the purpose of supporting or advancing claims in relation to the proposed collective agreement and the person is genuinely trying to reach agreement in relation to the proposed enterprise agreement (T&C Act Sch 13, Item 14A(3)).

If no application is made, or if the application is not granted, then industrial action which was protected under the *Workplace Relations Act 1996* before 1 July 2009 will not be valid on or after 1 July 2009 under the *Fair Work Act 2009*.

I am involved in bargaining for a collective agreement that commenced after 1 July 2009. Can I pursue industrial action?

Employees will be able to take protected industrial action to support or advance claims during collective bargaining. Industrial action will only be protected if it has been authorised by a protected action ballot in accordance with the *Fair Work Act 2009*.

Is my employer required to provide a designated workspace to conduct a protected action ballot?

An employer must allow the protected action ballot agent access to the workplace for the purpose of notifying employees of the information about the protected action ballot. An employer must allow the protected action ballot agent access to the workplace for the purpose of preparing for, or conducting the protected action ballot (Regulation 3.13(7) and (8)).

What percentage of employees is required for a secret ballot to be valid, and what constitutes a majority in support of the industrial action prescribed in a secret ballot?

At least 50 per cent of the employees on the roll of voters for the ballot are required to vote in the ballot for it to be valid.

To approve industrial action, more than 50 per cent of the valid votes must vote to approve the action.

Will I lose pay if I participate in a work ban as part of industrial action?

It is unlawful for an employer to pay strike pay, or for an employee to demand or request it. Where unprotected industrial action is taken it will be mandatory for an employer to withhold at least 4 hours pay. Where protected industrial action is taken, pay will be withheld for the duration of the period of industrial action only. In the event of protected partial work bans, an employer will have the option of issuing a 'partial work notice' and deducting an employee's wages, proportional to the duties the employee has refused to perform. An employer may also give a notice of non-payment.

Will my employer be able to take industrial action?

Employer industrial action will only be protected where the employer takes action in response to action organised by or on behalf of employees and where the action taken by the employer meets the requirements in Section 411 and the common requirements in Section 413 of the *Fair Work Act 2009*.

Stand Downs

Does the *Fair Work Act 2009* allow an employer to stand down its employees?

An employer is able to stand down an employee without pay if specified requirements are met. The *Fair Work Act 2009* allows an employer to stand down an employee, if the employee could not be usefully employed because of one of the circumstances:

- industrial action (other than industrial action organised or engaged in by the employer);
- a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown; or
- a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

If the employer is able to obtain some benefit or value for the work that could be performed by an employee then the employer would not be able to stand down an employee.

Can an employer stand down employees during industrial action?

Yes. An employer can stand down an employee if the industrial action that results in a stand down is not engaged in by the employer.

Right of Entry

Will a Right of Entry Permit under the *Workplace Relations Act 1996* remain valid under the *Fair Work Act 2009*?

A permit that is in force immediately before 1 July 2009 under Part 15 of *Workplace Relations Act 1996*, or that comes into force on or after that day under that Part, has effect (T&C Act – Schedule 14, Part 1).

Will my union, which provided notification to enter my employers premises prior to 1 July 2009 (for entry after 1 July 2009) be able to access that workplace?

An entry notice properly given before 1 July 2009 and for an entry that has not occurred before that day has effect after 1 July 2009 (T&C Act – Schedule 14, Part 2(1)).

Will existing exemption certificates still be valid after 1 July 2009?

An exemption certificate properly issued by a Registrar before 1 July 2009 for an entry that has not occurred before 1 July 2009 has effect after 1 July 2009 (T&C Act – Schedule 14, Part 2(2)).

Record Keeping

Is my employer required to keep time and wage records for all employees?

An employer must keep a record in respect of each employee about:

- basic employment details such as the name of the employer and the employee and the nature of their employment (e.g. part-time, full-time, permanent, temporary or casual); and
- pay; and
- overtime hours; and

- ☑ averaging arrangements; and
- ☑ leave entitlements; and
- ☑ superannuation contributions; and
- ☑ termination of employment (where applicable); and
- ☑ individual flexibility arrangements and guarantees of annual earnings.

From 1 January 2010, employee records must specify the ABN (if any) of the employer.

Employers must continue to provide employees with access to their employment records and issue payslips.

Termination of Employment

Redundancy

If an employee can be redeployed will a termination be considered a genuine redundancy?

No. A termination is not considered to be a genuine redundancy if the person dismissed could have been redeployed within the business or an associated entity and it would have been reasonable in all circumstances to redeploy them.

What provisions do employers have to comply with when selecting which employees will be made redundant?

Employers need to comply with the general protection provisions of the *Fair Work Act 2009* when selecting employees to be made redundant. If the reason a person is selected for redundancy is unlawful under the general protections provisions (for example, on the basis of race, sex or religion amongst others) then the person will be able to bring action under the *Fair Work Act 2009* (Part 3-1).

What notice periods do employers have to comply with when making an employee redundant?

There are minimum notice periods contained in Section 177 of the *Fair Work Act 2009*.

An employer also needs to comply with any notice periods and consultation requirements regarding redundancy in any modern awards (or award-based transitional instrument) or enterprise agreements (or agreement-based transitional instrument) which apply to that employee when making an employee redundant. If an employee does not comply with these terms, the person dismissed may be able to make an unfair dismissal claim.

Unfair Dismissal

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 (see below).

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).

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).

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; or
- the employee voluntarily resigned or abandoned his or her employment.

Can a dismissal be considered unfair if an employee is hired for a specified task or for the duration of a season or training arrangement and their employment is terminated at the end of that specified task, season or training arrangement?

No. A person is not considered to be dismissed if they were employed under a contract of employment for a specified period of time, for a specified task or for a specified season or if the employee was hired under a training arrangement and their employment was limited to the duration of a training period.

However, they may be able to bring an unfair dismissal claim if their employment is terminated prior to the end of the task, season or training arrangement.

Can an employee make an unfair dismissal claim if they have been forced to resign?

Yes, provided they are otherwise eligible. 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. An employee may be able to make an unfair dismissal claim or make an

application under the General Protections part of the *Fair Work Act 2009* in a constructive dismissal case.

Can a person seek more than one remedy for a dismissal?

A person is prevented from 'double-dipping' when they have multiple potential remedies relating to dismissal from employment. However, in certain circumstances the anti-double dipping provisions will not apply e.g. where an application has been withdrawn or failed for want of jurisdiction.

Transfer of Business

What constitutes a transfer of business?

A transfer of business occurring on or after 1 July 2009 will be subject to new transfer of business rules under the *Fair Work Act 2009*. These rules replace the transmission of business rules in the *Workplace Relations Act 1996*.

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:

- 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 as he or she performed for the old employer; and
- 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.

What happens to my terms and conditions if I am a transferring employee?

A new definition of 'transfer of business' is provided in the *Fair Work Act 2009* as well as changes to the instruments that transfer to the new employer.

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.

The rules provide that where there is a transfer of business 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).

Only **transferable instruments**, as defined in the *Fair Work Act 2009*, transfer to the new employer. These are:

- ☑ an enterprise agreement that has been approved by Fair Work Australia
- ☑ a workplace determination
- ☑ a named employer award
- ☑ a transitional instrument 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 industrial relations agreement; a section 170MX award, (other than a workplace agreement or workplace determination that is yet to come into operation).

From January 2010

Terms and Conditions of Employment

- ☑ The new safety net consisting of the 10 National Employment Standards (NES) and modern awards will commence on 1 January 2009.
- ☑ The National Employment Standards will apply to all employees covered by the federal system from 1 January 2010, including those that are covered by a transitional instrument (in effect, an instrument made before 1 July 2009, or Individual Transitional Employment Agreements made before 31 December 2009), and will prevail over a transitional instrument where the instrument is detrimental in comparison.

Modern Awards

Who will be covered by modern awards?

Modern awards are not intended to extend coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award-free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia.

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 July 2009 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.

Will a modern award prevail over my agreements?

No, a modern award does not apply where a workplace agreement (for example an Individual Transitional Employment Agreement or collective agreement), workplace determination, preserved state agreement, Australian Workplace Agreement (AWA) or pre-reform AWA applies. However, an agreement cannot pay a lower rate of pay than the rate in the relevant modern award.

If I am not covered by a modern award from 1 January 2010 what happens? Will I be award-free?

After 1 July 2009, award-based *Workplace Relations Act 1996* instruments (i.e. federal awards and notional agreements preserving State awards) continue to exist in the new system as

award-based transitional instruments.

Award-based transitional instruments will continue to cover to employers, employees and organisations (where relevant) that would have been covered if the *Workplace Relations Act 1996* had not been repealed.

Award-based transitional instruments will continue to apply to existing and new employees. If no modern award is made to cover the relevant employees it will continue to apply after 1 January 2010. It will only cease to apply when a modern award is made that replaces it.

Enterprise instruments will continue to operate between 1 July 2009 and 31 December 2013.

Enterprise instruments are:

- awards or notional agreements preserving State awards that regulate terms and conditions of employment in a single business or part of a single business or one or more enterprises, if the employers carry on similar business activities under the same franchise; and
- preserved collective State agreements where, on the day before the commencement of the Work Choices amendments (i.e. 27 March 2006) a State or Territory law had the effect of converting a State or Territory enterprise award into an enterprise agreement.

Between 1 July 2009 and 31 December 2013, either an employer or an employee covered by an enterprise instrument can apply to Fair Work Australia to have the enterprise instrument modernised. If an application to modernise an enterprise instrument has not been received by Fair Work Australia by 31 December 2013, the instrument will cease to operate and the employer and employees will become covered by any relevant modern award.

National Employment Standards

General

What happens if any of the new National Employment Standards or a minimum rate of pay is better than an entitlement in my current workplace instrument?

The National Employment Standards (NES) and minimum wages will apply from 1 January 2010. The National Employment Standards and minimum rates of pay

(for example, minimum rates in a relevant modern award) will apply to an employee where any existing entitlement is detrimental by comparison.

N.B: Employers and employees will need to review their agreements against the National Employment Standards and minimum rates of pay to determine which will apply.

What assistance can Fair Work Australia provide in the transition to the National Employment Standards?

A person covered by a transitional instrument will be able to apply to Fair Work Australia to resolve any difficulties about the application of the rules about the interaction between transitional instruments and the National Employment Standards. Fair Work Australia will be able to vary the instrument to resolve uncertainty or difficulty or to make the instrument operate effectively with the National Employment Standards.

Entitlements

I am a parent. Can I request flexible working arrangements?

Eligible employees who are parents or who have caring responsibilities for children who are under school age, or children under 18 who have a disability, have the right to request flexible working arrangements, such as changes to their:

- hours of work
- patterns of work
- work location

A request for flexible working arrangements must be made in writing, setting out the details of the change(s) sought and the reason(s) for the request. Employers have 21 days to provide a written response to the requesting employee, including reasons for the decision. Requests can only be refused on reasonable business grounds.

Where a request is refused by an employer, Fair Work Australia or another authorised party can be asked to resolve the refusal, so long as an enterprise agreement, contract of employment or other agreement that is in place permits them to do so.

I am an Employee. What do I need to know?

Checklist for 1 July 2009:

- Fair Work Australia and the Fair Work Ombudsman commence operation.
- New general protection provisions of the *Fair Work Act 2009* will commence.
- New unfair dismissal provisions of the *Fair Work Act 2009* will commence.
- Only under certain circumstances will eligible employees be able to continue industrial action commenced prior to 1 July 2009.
- All agreements negotiated after 1 July 2009 will be subject to good faith bargaining provisions.
- New strike pay provisions will commence.

- New stand-down provisions will commence.

Checklist for 1 January 2010:

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