

Fair Work Education and Information Program

Fair Work Act Information Session



Australian Government

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This presentation is intended provide an overview of the main elements of the *Fair Work Act 2009* and associated legislation and Regulations.

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Employment Relations Update

- Topic 1 - *Fair Work Act 2009*
- Topic 2 - Dismissals
- Topic 3 - Enterprise Bargaining
- Topic 4 - National Employment Standards
- Topic 5 - *Hospitality Industry (General) Award 2010*

FAIR WORK ACT 2009 - OBJECTS

The Fair Work Act 2009 aims to provide a balanced framework for cooperative and productive workplace relations with:

- Workplace relations laws that are fair to workers, flexible for business, and promote economic prosperity
- A guaranteed minimum safety net of employment terms and conditions
- Work and family balance, the prevention of discrimination, freedom of association and effective processes for resolving workplace disputes and grievances
- Minimum conditions in enterprise bargaining processes

FAIR WORK ACT 2009 - APPLICATION

- The Act represents a new industrial relations system that covers National System Employers and National System Employees
- The Act replaces the Workplace Relations Act 1996 excepting for areas provided to remain in operation during the Bridging Period of 1 July 2009 to 1 January 2010
- Areas of the Act that do not commence until 1 January 2010 are the National Employment Standards, the modern awards and the better off overall test

FAIR WORK ACT 2009 - FRAMEWORK

- Fair Work Australia (“FWA”) was established 1 July
 - Operates as the new industrial umpire: a new ‘one stop shop’
 - Combined a number of entities operating under the previous system and will absorb all functions of:
 - Australian Industrial Relations Commission, and Registry
 - Australian Fair Pay Commission, and Secretariat
 - Workplace Authority
 - Workplace Ombudsman
 - Australian Building and Construction Commission
- (refer: Fair Work Australia Fact Sheet)*

FAIR WORK ACT 2009 - FRAMEWORK

- FWA's role is to exercise its powers in a fair, informal manner:
 - Provide employers and employees (including young workers) with information about the new Fair Work system including Awards and family friendly work flexibilities
 - Assist employers and employees to resolve workplace grievances
 - Hear and attempt to resolve unfair dismissal and unlawful termination claims
 - Facilitate collective bargaining and enforce good faith bargaining principles
 - Review and approve Enterprise Agreements
 - Adjust minimum wages annually (applying from 1 July each year)
 - Conduct award reviews every 4 years
 - Monitor compliance with workplace laws, awards and agreements.
 - Assist employers to correctly apply the workplace laws
 - Regulate registered industrial organisations

FAIR WORK OMBUDSMAN

- FWO is operative 1 July 2009, with the objectives to:
 - Promote harmonious and cooperative workplace relations and compliance with the Act and fair work instruments
 - Provide education, assistance and advice to employees, employers and organisations
 - Monitor compliance with the Act and fair work instruments
 - Inquire into, and investigate, any act or practice that may be contrary to the Act, a fair work instrument or a safety net contractual entitlement
 - Commence proceedings in a court, or to FWA, to enforce this Act, fair work instruments and safety net contractual entitlements
 - Refer matters to relevant authorities
 - Represent employees who are / may become, a party to proceedings in a court, or a party to a matter before FWA (if the Fair Work Ombudsman considers that representation will promote compliance with the Act / fair work instrument)
 - Any other functions conferred on the Fair Work Ombudsman by any Act

UNFAIR DISMISSALS

- The new unfair dismissal arrangements commenced on 1 July 2009
- Process for resolving a claim has changed
- Timeframe for lodging a claim shortened to 14 days
- Test applied by FWA is the 'harsh, unjust or unreasonable' test
- Reinstatement is the primary remedy – compensation is only where reinstatement is inappropriate

UNFAIR DISMISSALS - EXCLUSIONS

1. Minimum Employment Period
 - Small Employer: an employee is not able to lodge a claim if terminated during the first 12 months of employment
 - Larger employer: an employee is not able to lodge a claim if terminated during the first 6 months of employment
 - Casuals: if they have completed the minimum employment period, they must have been engaged on a regular and systematic basis
2. Award / Agreement free employees earning over \$100,000 (as indexed)
3. Instances of a Genuine Redundancy

UNFAIR DISMISSALS

- FWA need to determine four criteria for a finding of unfair dismissal:
 - The employee was dismissed
 - The dismissal was harsh, unjust or unreasonable
 - The dismissal was not consistent with the Small Business Fair Dismissal Code (note: only applicable to small employers)
 - The dismissal was not for a genuine redundancy

UNFAIR DISMISSALS

- A person's dismissal was a case of **genuine redundancy** if:
 - the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
 - the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy
- A person's dismissal was not a case of **genuine redundancy** if it would have been reasonable in all the circumstances for the person to be redeployed within:
 - the employer's enterprise; or
 - the enterprise of an associated entity of the employer.

UNFAIR DISMISSALS

- A person has been dismissed where:
 - Employee was terminated at the initiative of the employer
 - Employee (was forced to) resigned due to the conduct, or a course of conduct, of the employer
- Where an employee has not been 'dismissed':
 - A fixed term contract has come to an end (including via a training arrangement)
 - Demotion did not result in significant reduction in remuneration or duties and they remain employed

FAIR DISMISSAL CODE

- Code for small businesses to use when terminating employment
- Checklist for small employers to follow to ensure fair process
- Where a small business follows it, it is a protection / defense where Unfair Dismissal is lodged
- Not for use by larger employers as expectations of them is higher – due to having better HR resources

UNFAIR DISMISSALS - PROCESS

- FWA will hold a Conciliation
- Informal, private and confidential process
- Conciliator's role to assist the parties to resolve the claim
- If not resolved, Conference or Hearing will be convened

ADVERSE ACTIONS – GENERAL PROTECTIONS

- General Protections are designed to ensure fairness and representation at the workplace by recognising the right to freedom of association and preventing discrimination and other unfair treatment
- This includes:
 - A right to freedom of association
 - Protection from workplace discrimination
 - Protection from sham contracting arrangements
 - The ability to exercise, or to not exercise Workplace Rights

ADVERSE ACTIONS - REMEDIES

- Right for either an employer or an employee to seek remedy where they have been subjected to Adverse Action under the General Protections provision
- Actions may be:
 - Where dismissal has occurred - General Protections Dismissal Application before FWA. Must be lodged in 60 days
 - Where dismissal has not occurred – General Protections Dispute Application before FWA
- If not resolved at FWA Conference, the applicant can apply to a federal court for a remedy
- Remedies include reinstatement, compensation or injunctions
- Court can also order penalty against the employer for breaching the Act (unlawful termination provisions)

AGREEMENT MAKING

- The following types of Enterprise Agreements (“EAs”) will be available from 1 July 2009:
 - Single Enterprise Agreements
 - Multi-enterprise Agreements
 - Greenfields Agreements
- Bargaining commences when:
 - The employer initiates bargaining, or
 - The employer agrees to bargain, or
 - FWA makes a determination that the majority of employees wish to bargain (available where employer does not agree to bargain), or
 - The employer has been named in a low-paid authorisation.

AGREEMENT MAKING - REPRESENTATION

- Employers must give employees notice, within 14 days of initiating bargaining, of their right to representation
- Unions are not automatically party to an Agreement however they are automatically a bargaining representative if they have one or more members at the workplace and the member does not appoint another bargaining representative
- Employers must bargain with an appointed bargaining representative – civil breach not to do so
- Unions must be a party to a Greenfields Agreement

AGREEMENT MAKING

An Agreement must contain:

- Nominal expiry date (up to 4 years)
- Dispute settlement clause allowing for an external party ie FWA to settle disputes
- Flexibility term to allow for variation on individual basis
- Consultation clause for consulting about major change with employees
- Pay rates – must be at least the rates in the relevant modern award or national minimum wage
- EA may contain other matters pertaining to the employment relationship including deductions from wages

AGREEMENT MAKING - APPROVAL

Arrangements for approvals include:

- That 7 days prior to vote to approve, the employer must make copies of the Agreement to available employees and ensure the Agreement is explained to them
- That 7 days prior to vote the employer notifies employees of the time and place of the vote and how the vote will be conducted
- The vote must occur at least 21 days after the employer gave notice to employees of the ability to appoint a bargaining representative
- The majority of employees must approve the Agreement

AGREEMENT MAKING – FWA APPROVAL

FWA Approval Process:

- Bargaining representative (which includes the employer) makes application to FWA for approval
- Prior to approval, a Union can make written notice that it wants to be covered by EA
- Documents to be lodged with FWA are:
 - Application
 - Signed copy of the EA
 - Declarations that may be required
- FWA then must be satisfied on a number of points before approving the EA

AGREEMENT MAKING

- FWA assessment:
 - The Agreement has been genuinely agreed to
 - Does not exclude or provide conditions that are less favourable than the NES
 - Passes the 'better off overall' test* (no disadvantage test until 1 January 2010)
- FWA must also be satisfied the EA does not undermine good faith bargaining
- Undertakings available where it does not pass in limited circumstances

BETTER OFF OVERALL TEST

- A point in time test
- Replaces current No Disadvantage Test
- The test requires each class of employee, including prospective employees, to be 'better off overall' than they would be if the relevant modern award was to apply

GOOD FAITH BARGAINING

...**good faith bargaining requirements** that a bargaining representative for a proposed enterprise agreement must meet are:

- Attending, and participating in, meetings at reasonable times
- Disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- Responding to proposals made by other bargaining representatives for the agreement in a timely manner
- Giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals
- Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining

GOOD FAITH BARGAINING

- Where a bargaining representative feels the other party is not meeting the good faith bargaining requirements, they may apply to FWA for a bargaining order
- Good faith bargaining orders do not apply to multi-enterprise agreements but do apply to low paid authorisations
- Bargaining order application, and a serious breach declaration, must meet certain documentary requirements
- FWA will assess the application on a number of criteria and make an order, if deemed necessary
- Failure to comply with an order is a civil offense

GOOD FAITH BARGAINING

An order can be to / for:

- Exclude a bargaining representative from bargaining
- Require some or all of the employees' bargaining representatives (who will be covered by the agreement) to meet and appoint one of the representatives to represent the representatives in bargaining;
- An employer not to terminate the employment of an employee if the termination would constitute, or relate to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in the Act
- To reinstate an employee whose employment has been terminated if the termination constitutes, or relates to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in the Act

NATIONAL EMPLOYMENT STANDARDS

- Represent 10 legislated minimum conditions that will be contained in the *Fair Work Act 2009*
- Will replace the current Australian Fair Pay and Conditions Standard (AFPCS) from 1 January 2010
- The NES will be referred to in Modern Awards and provide minimum conditions that awards will build on
- Represent minimum for all employees, even the Award free.
(refer: *NES Fact Sheet*)

NATIONAL EMPLOYMENT STANDARDS

They are:

- Hours of Work
- Flexible working arrangements
- Parental Leave
- Annual Leave
- Personal Carer's Leave
- Community Service Leave
- Long Service Leave
- Public Holidays
- Notice of Termination and Redundancy
- Fair Work Information Statement

MODERN HOSPITALITY AWARD

- Stage 1 of the Award Modernisation process involved the review of Awards and NAPSAs for a number of industries, including hospitality
- The process commenced in mid 2008 with consultations with key industry organisations and other interested parties
- AHA made written and verbal submissions during the consultation stages
- On 19 December 2008 the modern Hospitality Industry (General) Award 2010 was released by the Australian Industrial Relations Commission
- This Award will commence operation on 1 January 2010, and will replace currently used NAPSAs and Awards

APPLICATION: WHO IT APPLIES TO

- Apply throughout Australia to employers engaged in the hospitality industry and includes:
 - Hotels, Motor inns, Motels
 - Serviced apartments
 - Ski lodges, Holiday flats/units,
 - Wine saloons and Wine bars
 - Taverns
 - Resorts
 - Casinos
 - Function areas and Convention centers
- Coverage also extends to contract operators (ie cleaning, security) providing the contractor's primary business is in the hospitality sector
- In May the Minister requested a separate modern award be established for restaurant and catering

APPLICATION: WHO IT DOES NOT APPLY TO

- The Award does not cover registered or licensed clubs or restaurants and catering
- Modern Awards will not cover employees earning over \$100,000 (indexed) per annum – pro rata for part time (as these people are viewed as high income earners
- Amount stated is from 1 August 2007 – to be indexed from then
- High income earners will still be subject to the NES

MODERN AWARD CONTENT

- Reflects many existing conditions, particularly those from the current Federal Hospitality Award
- The NES is referred to throughout the Award, with the Award building on some of those conditions, for example, an extra week of annual leave for a shiftworker

CLASSIFICATION STRUCTURE

- The modern award has a 6 level classification structure plus an introductory rate and a minimum rate for managers
- The classification structure is reflective of the structure that currently applies in most Australian States and Territories
- Each stream is defined in terms of wage levels
- Each classification level has varying grades for the type of work performed – eg:
 - F&B grade 1 is at Award Level 1
 - Cook grade 1 is at Award Level 2

ALLOWANCES

- The Award allowances are:
 - Meal allowance – where working more than 2 hours of overtime
 - Clothing, equipment and tools
 - Laundry allowance
 - Vehicle allowance
 - Forklift allowance
 - First Aid allowance
 - Broken period allowance
 - Reimbursement for special clothing – when purchased by the employee
 - Protective clothing provided at no cost
 - Working late – provision of transport in certain circumstances
 - Working early – provision of transport in certain circumstances
 - Working away from usual place of work allowance (80kms+)

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