

Getting ready for life under Fair Work

The remaining elements of the Australian government's '*Forward with fairness*' workplace relations policy will commence on 1 January 2010. The changes constitute the final act to dismantle *Workchoices* and herald the beginning of a new era in Australian employment regulation. The task for employers is to understand the new laws and adjust their employee management systems accordingly.

The National Employment Standards

The National Employment Standards and modern awards prescribed under the Fair Work Act commence on 1 January 2010. All employees will be entitled to the benefits of the ten National Employment Standards and most employers will be required to apply the terms of one or more modern awards.

The ten National Employment Standards (NES) are:

Maximum weekly hours

An employer must not require an employee to work more than an average of thirty eight hours per week unless the additional hours are reasonable. The Fair Work Act prescribes a list of grounds that must be taken into account to determine whether the additional hours would be reasonable including: risks to health and safety, overtime and penalty rates, family responsibilities and industry standards.

The 38 hours may only be averaged over a period longer than a week in accordance with the terms of the applicable modern award or if the employee is not covered by an award, over 26 weeks.

Request for flexible working arrangements

The introduction of a '*flexible work arrangement*' standard means that any employee with pre-school age children will have the right to request changes to their working conditions to assist them to care for the child. The right to request is subject to a qualifying period of employment of twelve months and the employer may only refuse on '*reasonable business grounds*' and the reasons must be provided to the employee in writing.

If there are more beneficial State laws enabling flexible work arrangements they will also apply.

Parental leave and related entitlements

Parental leave remains at 52 weeks unpaid but may be extended to 104 weeks by agreement with the employer. An employee returning to work after a period of parental leave is entitled to return to the job that they performed prior to the leave or if that no longer exists, an available job that the employee is qualified and suitable for nearest in status and pay

An employee must have completed at least twelve months continuous service with the employer immediately before the expected date of birth or placement in the case of an adoption.

Casual employees are not entitled to unpaid parental leave unless they have been employed on a regular and systematic basis for at least twelve months, and would have a reasonable expectation of continuing employment.

Annual leave

Four weeks per year for full and part time employees and five weeks for shift workers.

Accrued annual leave in excess of 4 weeks may be '*cashed out*' if it is allowed under a modern award or enterprise agreement (for employees covered by such instruments) or under a written agreement with an award free employee.

Employees may be directed to take annual leave if it is reasonable to do so.

Personal/carers leave and compassionate leave

An employee is entitled to 10 days paid personal/carers leave in the event that person is ill and unfit for work or where they are required to care and support an immediate family member who is ill.

The employee will also be entitled to 2 days unpaid carers leave for each occasion a member of the employee's immediate family requires care or support because of personal illness or unexpected emergency affecting the family member.

An employee is entitled to 2 days paid compassionate leave upon the death or serious illness of immediate family members.

A modern award or enterprise agreement may allow cashing out of accrued personal/carers leave in excess of a balance of 15 days paid leave. Award free employees may not cash out personal/carers leave.

Community service leave

An employee that engages in an eligible community service activity is entitled to be absent for an unspecified period (unless it is jury service) including travelling time to undertake the activity and rest afterwards as long as the absence is reasonable in all the circumstances.

Eligible community service includes voluntary emergency management e.g. SES, jury service, or a service prescribed by regulations.

All employers will be required to pay employees a maximum of 10 days at their base rate of pay when they perform jury duty.

Long service leave

All employees are entitled to long service leave in accordance with pre-modern awards, agreements or State legislation.

Public holidays

Employees are entitled to be absent from work on a public holiday. However, an employer may request that an employee work on a public holiday and the employee may only refuse to do so if the request was unreasonable or the refusal is reasonable. The Fair Work Act prescribes a list of matters that must be taken into account to determine whether the request or refusal is reasonable.

The following are public holidays

- New years day
- Australia day
- Good Friday
- Easter Monday
- ANZAC day
- Queen's Birthday
- Christmas day
- Boxing day

Any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is

excluded by the regulations from counting as a public holiday.

Employees that are absent from work on a public holiday are entitled to be paid their base rate of pay for their ordinary hours of work. Modern awards and enterprise agreements may prescribe penalty rates applicable for work on a public holiday

Notice of termination and redundancy pay

An employer must not terminate an employee's employment unless they provide the employee with written notice. The period of notice must be no less than the period prescribed by the Fair Work Act.

Period of continuous service	Notice period
Not more than 1 year	1 week
More than 1 but less than 3 years	2 weeks
More than 3 by less than 5 years	3 weeks
More than 5 years	4 weeks

Add one week if the employee is over the age of 45 years and has completed at least 2 years of continuous service.

The notice period does not apply to an employee that has been employed for specified period of time, or has been dismissed for serious misconduct, or a casual employee, or trainee.

Redundancy of up to 16 weeks pay will be introduced for all employers except small businesses that employ less than fifteen employees.

The scale is identical to the current award based redundancy pay, as are the exclusions such as employees employed for a specified period, casuals, trainees and apprentices, and an employee dismissed for serious misconduct.

Fair Work Information Statement

A 'Fair Work Information Statement' published by the Fair Work Ombudsman must be provided to new employees before or as soon as practicable after, the employee starts employment.

The Statement will contain information on the NES, modern awards, agreement making, the right to freedom of association and the role of Fair Work Australia and the Fair Work Ombudsman.

The Statement had not been published at the time Employee Relations MONTHLY was published. We will circulate it to readers when it is available.

Interaction between NES and modern awards and enterprise agreements

The NES prevails over the terms of a modern award or enterprise agreement.

A modern award or enterprise agreement must not exclude the NES. A modern award may contain terms that are ancillary or incidental to the operation of an NES entitlement or supplement it. In such circumstances, for example, in the application of annual leave, the modern award and NES must be read together.

An enterprise agreement may provide terms that have the same effect as an NES entitlement and in such circumstance they operate in parallel i.e. the NES provides a minimum entitlement. The employee is not entitled to both the NES and enterprise agreement entitlement.

A modern award does not apply to an employee when an enterprise agreement applies to them in their particular employment.

What about pre-Fair Work agreements and awards?

Under the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 ("the Transitional Act") if a collective agreement, pre-reform certified agreement, AWA, ITEA, or Preserved State Agreement is operating on 30 June 2009 (or has been made by this date and is due to begin operating), it continues to apply after 1 July 2009 as an "*agreement-based transitional instrument*". They will continue in force until terminated or replaced by a new Fair Work Act employment instrument.

Commencing 1 January 2010, a term of an agreement-based transitional instrument has no effect to the extent that it is detrimental to an employee when compared to an entitlement of the employee under the NES. The interaction is quite complex and it will be necessary to seek advice on each and every particular agreement based transitional instrument to assess whether there is detriment or not.

Employees employed under an agreement-based transitional instrument will also be entitled to the minimum rate prescribed under an applicable modern award.

Award-based transitional instruments will (except in limited circumstances) expire on 31 December 2009 and modern awards will apply after that date.

Modern awards

The terms of modern awards are currently taking shape but there are now sufficient [modern awards](#) that have been published to understand how they are going to impact on employers.

A national system

Firstly, employers that operate across interstate boundaries will benefit from a reduction in '*State-based*' occupational or industry awards that may apply to their business. For example, there will only be one national award applicable to employees engaged in clerical work. Similarly, nurses working in private medical clinics. Social and community services employers in particular, will benefit from the change. The retail, metals and construction industries will also see signal national awards.

Coverage

Secondly, most employees will be covered by a modern award. However, if your employees are currently not covered by an award then they may continue to be '*award-free*' unless a national award applicable to employees performing work of a similar nature has been made by the Industrial Relations Commission. Employers that incorporated their business or commenced operation after 26th March 2006, in particular, may find themselves covered by a modern award.

Transitional arrangements

The transition from the current set of awards to the modern awards necessarily will result in differences in wages and other entitlements. Consequently, where there is a difference (either higher or lower) in minimum wages, casual and part-time loadings, evening, weekend and public holiday penalties, industry and shift allowances then those elements affecting pay (and only those elements) will be phased in over five (5) years commencing **1 July 2010**.

Employers may continue to pay the current minimum wages, loadings, etc under award based transitional instruments until **1 July 2010**.

Award flexibility agreements

Modern awards will contain a model '*Award flexibility*' clause that allows individual employers and employees to agree on different arrangements to meet the genuine needs of the employer and an individual employee.

The award terms which may be varied in a flexibility clause are limited to:

- Arrangements for when work is performed;

- Overtime rates;
- Penalty rates;
- Allowances; and
- Annual leave loading.

The flexibility clause was supposed to operate in parallel to the modern award clause that allowed the annualisation of wages, allowances and penalty rates. However, the Commission has chosen not to include annualisation of salaries in modern awards unless the industry has a history of such.

An agreement made pursuant to a flexibility clause may only be made after employment has commenced. A contract containing a flexibility clause may not be offered as a condition of employment i.e. the offer of employment cannot be made contingent upon the acceptance of a flexibility agreement.

What is the relationship between modern awards and transitional agreements?

If you have an AWA, ITEA, certified agreement, collective employment agreement or other pre-Fair Work Act agreement in place then the Transitional Act prescribes the arrangements for interaction between modern awards and agreement-based transitional instruments. There are two sets of rules as follows:

1. If a collective agreement, a PSA or an AWA applies to an employee, a modern award will not apply. This preserves the existing interaction rules between these types of instruments and unmodernised awards.
2. If a pre-reform certified agreement applies to an employee, the relevant modern award will also apply. However, the pre-reform certified agreement will prevail over the modern award to the extent of any inconsistency.

Despite both of these rules, the rates of pay in agreement-based transitional instruments must not fall below the relevant modern award rate. If the modern award provides a higher rate of pay, the employee will be entitled to that higher amount. If this threatens a business' viability, it can apply to Fair Work Australia to phase in the increase.

Transfers and the NES

When a transfer of business occurs after 1 January 2010, a new employer will be bound to recognise employees' service with the old employer when calculating certain NES entitlements. These are:

- Personal/carer's leave,
- Parental leave and

- The right to request flexible work arrangements.

What about annual leave and redundancy payments?

In the case of annual leave and redundancy pay, the new employer has a choice whether to recognise service. If the new employer does not agree to recognise service, the old employer must pay out these entitlements. In addition, the NES will allow for an employer's redundancy obligations to be waived on a transfer of business should an offer of employment be made by the new employer on substantially similar terms and conditions.

If an employee is transferred to an employer that is an associated entity of the previous employer, service with the previous employer will be deemed to be continuous for the purposes of all service-related NES entitlements including annual leave and redundancy pay.

Are transferring employees required to undergo a qualifying period?

A six month qualifying period may be imposed on a transferring employee (and therefore restricting their right to claim unfair dismissal) only where the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised.

Getting ready

The changes implemented so far and commencing 1 January 2010 place an enormous burden on employers to adjust the way they manage employment relationships. There is insufficient space to explain every action that employers should undertake prior to 1 January 2010. However, the following are a good start:

- Read the NES thoroughly. It will underpin every employment relationship.
- Identify the modern award(s) that will apply to your employees. These, together with the NES are the key statutory instruments regulating minimum employment conditions.
- Review all of your employment letters, contracts, policies and procedures to assess where they need to be amended to comply with the General Protections, Fair dismissal system, modern award or NES (See the July and August editions of Employee Relations MONTHLY for information on the General Protections and the Fair dismissal system). Create new policies if you don't have any in place e.g. Award flexibility.

- Quantify the impact of the modern award minimum rates on your business. Remember the current rates continue to apply until July 2010.
- Inform employees of the new policies and procedures, the NES and the application of the modern award or awards.
- Get assistance from Maguire Consulting wherever you are unsure or would prefer us to guide you.

Further information and resources on the new system are available to subscribers to [Employee relations online for Employment services](#).

States to refer their workplace relations powers to the Commonwealth

A national industrial relations system is a step closer with the introduction of legislation to enable States to refer workplace power to the Commonwealth.

The Bill extends the Fair Work Act to include unincorporated employers and their employees and outworkers in referring states.

Victoria has enacted referral legislation. South Australia and Tasmania have introduced legislation to refer the workplace relations power.

Queensland has agreed in principle to refer private sector workplace relations powers. New South Wales Government has not made a formal commitment. The Western Australian Government has stated it will not join the national industrial relations scheme.

[Fair Work Amendment \(State Referrals and Other Measures\) Bill 2009](#)

[Explanatory memo](#)

Spike in unfair dismissal claims

Unfair dismissal applications have spiked dramatically in the first few weeks of the Fair Work Act on 1 July 2009 according to media reports.

Commenting on an article published in the Financial Review, Opposition ministers said that in the first 10 weeks following the commencement of Fair Work, there were 2339 applications, compared to 1268 made in the same period last year. Acting Shadow Workplace Relations Minister Andrew Southcott said the figures signalled a return to the bad old days where businesses were forced to pay "go away" money to employees.

Shadow Small Business Minister Steven Ciobo said the new Small Business Fair Dismissal Code put the onus on small businesses to prove their case. *"It's basically like holding a gun to the head of small business, making any recovery much harder and longer,"* he said.

Fair Work Australia does not publish monthly figures on the number of applications made and therefore the report is not easily verifiable. However, a sharp increase would be expected as employees of small and medium enterprises are now eligible to seek compensation if they are dismissed.

AROUND THE STATES - What's making news in state jurisdictions?

New South Wales

Taking Care: Mature age workers with elder care responsibilities

Workers' elder care responsibilities are likely to increase significantly over the next few years, bringing new challenges for governments, employers and workplace policy. New research Taking Care: Mature age workers with elder care responsibilities conducted by the Women and Work Research Group at the University of Sydney and commissioned by NSW Industrial Relations, explores the available research on working mature-aged carers and identifies common challenges faced by these workers.

[\[More\]](#)

Victoria

Work Safe week

Work Safe Week is being held from 26-30 October and the Victorian Workcover Authority is conducting various activities to provide employers with the latest information on health and safety in the workplace.

[\[More\]](#)

Queensland

State wage case 2009

The Full Bench of the Queensland Industrial Relations Commission has decided to grant the following:

- \$16.20 wage increase for State award employees;

- 2.5% allowance increase for award employees;
- \$16.20 increase to the Queensland Minimum Wage.

The operative date for increases is 1 September 2009.

[\[More\]](#)

Western Australia

State wage decision 2009

On Thursday 11 June 2009 the Western Australian Industrial Relations Commission handed down the 2009 State Wage decision, ordering a \$12.30 per week increase to the State minimum wage and adult award rates of pay. This will increase the State minimum wage to \$569.70 per week effective on and from the commencement of the first pay period on or after 1 October 2009.

[\[More\]](#)

Tasmania

State wage decision 2009

The weekly rates of pay in all public and private sector awards increased by \$12.00 from 1 August 2009. All work related allowances increased by 1.9%. Meal allowances in the relevant awards will be increased to \$15.40 per meal. The minimum wage for Tasmania is now \$558.10 per week. The minimum amount payable under the Supported Wage System increased to \$71 per week

[\[More\]](#)

South Australia

2009 General Review of award wages

The South Australian Industrial Relations Commission has decided to increase the minimum award rates pay as follows:

- The adult award rate of pay will be increased by \$14.00 per week.
- The new State Minimum Award Wage will be \$560.65 per week.
- The minimum rate for a full-time adult will be established at \$560.65 per week.
- The minimum supported wage will increase from \$69.00 per week to \$71.00 per week.

All awards and the MSR will be increased with effect from the first pay period on or after 1 October 2009.

[\[More\]](#)

Getting ready for Fair Work – Briefing Session Melbourne

The next and most important change to employment regulation in Australia will commence on **1 January 2010**. The new law affects how we employ staff, our relationship with them during the course of their employment and how we end the employment relationship. Employers must be ready.

I will be conducting a seminar exclusively for clients in Melbourne on **Wednesday 11 November 2009** to ensure you understand the new obligations and are able to comply including:

- The National Employment Standards
- Modern awards
- Flexibility agreements
- The Fair Dismissal system
- General protections
- Good faith bargaining

When? 9am – 11am, Wednesday
11 November 2009

Where? Bureaux, Level 1, 530 Lonsdale
St Melbourne

How much? \$44 (GST inclusive)

This will be the most important seminar that you attend this year as an employer.

Secure your place and contact [Paul Maguire](#).