

## FAIR WORK NATIONAL WORKPLACE SYSTEM - UP AND RUNNING ON 1 JULY 2009

The new national system of workplace relations under the Fair Work Act 2009 will commence operation on 1 July 2009 and two important areas of the law will change on that day. A new 'fair dismissal' system and new rules for making enterprise agreements. Every employer will need to understand their obligations.

### A new 'fair dismissal system'

On 1 July the new *Fair Dismissal System* opens up the system to all employees, although an employer of less than fifteen *effective full-time* employees will be classified as a small business and required to comply with a different set of rules – the Small Business Fair Dismissal Code.

The system will once again provide a sympathetic avenue for a dismissed employee to seek redress against their former employer. Many of the barriers to access the system under Work Choices have been dismantled and the criteria to determine whether a dismissal has been harsh unjust or unreasonable adjusted.

The consideration of whether or not a dismissal has been harsh, unjust or unreasonable will include:

- The validity of the reason for dismissal based on the conduct or capacity of the person;
- Whether the person was warned about the performance or conduct;
- The opportunity to respond to the allegations
- The impact of the size of the employer's business and their access to expertise in human resource management; and
- The participation of a support person or representative for the dismissed employee.

*Genuine operational reasons* for a dismissal, i.e. reasons of an economic, technological, structural or similar nature related to the employer's business, are no longer acceptable grounds to quash an application of unfair dismissal.

### Genuine redundancy

In the past an employee that was dismissed for reasons of the redundancy of their job were not considered to be unfairly dismissed. The basic principle has been retained but there is a potential '*sting in the tail*.' Redundancy will not be considered unfair dismissal unless the employee could reasonably have been re-deployed within the organisation or a related entity. The employer will also have to demonstrate that they have complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy

### Qualifying periods

Employees of a small business must have been employed at least 12 months before qualifying to make an application of unfair dismissal. All other employees must have been employed at least six months. The other exclusions currently under the law will continue to apply.

A dismissal of an employee of a small business will not be unfair if was *consistent* with the Small Business Fair Dismissal Code. The Code has not yet formally been declared by the Minister. However, according to information published on <http://www.workplace.gov.au/> in the circumstance of an underperforming employee, the Small Business Fair Dismissal Code will require the employer to give the employee a:

- valid reason, based on the employee's conduct or capacity to do the job,
- warning that the employee is at risk of being dismissed and
- reasonable chance to rectify the problem.

Multiple warnings are not required. It is desirable, but not necessary, for a warning to be in writing. The Code also sets out the circumstances in which a summary dismissal (a dismissal without notice or warning) is warranted, including cases of theft, fraud and violence.

### Remedies

Reinstatement is the primary remedy unless Fair Work Australia believes that reinstatement is not appropriate. In such circumstances Fair Work

Australia may award compensation in lieu of reinstatement.

## Enterprise bargaining

New rules regulating the negotiation and making of enterprise agreements will also commence on 1 July 2009. *Good faith bargaining*, a concept new to Australian employment law, may force many reluctant employers to the bargaining table. Fair Work Australia will have power to order ballots of employees to assess their interest in collective bargaining and it may issue orders requiring an employer to meet confer and disclose information relevant to making an enterprise agreement.

The employer and employee collective agreement option will no longer exist. Unions will be the default bargaining representative in all negotiations for an enterprise agreement.

Agreements may include a wider range of subject matter than allowed under current laws. For example, payroll deduction of union fees and trade union training leave.

Agreements will not be approved unless they pass either the 'No disadvantage test' or from 1 January 2010, the 'Better off overall test'.

If you have commenced but not completed by 30 June 2009, a process to make a workplace agreement under the old law then you will have to start afresh. There are no transitional arrangements in place to allow parties to 'carry over' for example, the results of a ballot on a proposed agreement if the application for approval occurs after 30 June 2009.

In Tip of the Month, we explain the new process for making an enterprise agreement. Further information and resources on the new system are available to subscribers to [Employee relations online for Employment services](#). Clients of Maguire Consulting may also access information by contacting [Paul Maguire](#).

## Fair Work (Transitional provisions and consequential amendments) Act 2009 passes through Parliament

The Fair Work (Transitional provisions and consequential amendments) Act 2009 has been passed by the Australian Parliament. The Act deals with the transition from the current set of employment laws to the full implementation of the Fair Work Act on 1 January 2010 and beyond. In particular, the Bill proposes that Australian Workplace Agreements, certified agreements and

collective agreements made under Work choices will continue in force until replaced by an enterprise agreement or otherwise terminated by the parties. However, the national employment standards will apply to all employees including those under such agreements. The Bill also establishes the interim arrangements for approval of agreements prior to the commencement of the national employment standards, modern awards and the definition of a small business for the next two years.

Employers who intend to continue to apply collective agreements certified by the Australian Industrial Relations Commission and workplace agreements made since 27 March 2006, that do not cover all of the matters covered by the National Employment Standards (NES) will automatically be bound by the NES from 1 January 2010.

## Fair Work Australia

The new agencies to manage all aspects of the administration of the new national system of workplace relations are Fair Work Australia, Fair Work Ombudsman and the Fair Work Divisions of the Federal Court and Magistrates Court.

Fair Work Australia is the new independent tribunal on national workplace laws. It has powers to carry out a range of functions relating to workplace disputes and industrial action, the minimum wages and employment conditions safety net, enterprise bargaining and more. Go to: [www.fwa.gov.au](http://www.fwa.gov.au) or phone 1300 799 675.

The Fair Work Ombudsman provides advice on national workplace laws and education to employees, employers and organisations. Fair Work Inspectors can help employers, employees and organisations comply with the new national workplace relations laws and, where necessary, take steps to enforce the laws through the court system. Go to: [www.fwo.gov.au](http://www.fwo.gov.au) or phone: 13 13 94.

Specialist Fair Work Divisions have been created in the Federal Court and Federal Magistrates Court. These Divisions will hear matters related to the new national workplace relations laws. The Courts will be able to generally make any orders they consider appropriate to fix a contravention of workplace relations laws, rather than just impose a penalty.

## Super not payable on parental, defence service and community service leave

Federal regulations (the Superannuation Guarantee (Administration) Regulations 1993) have been made to clarify that employers are not required to

provide superannuation guarantee contributions in respect of paid parental leave and other leave payments including defence force reserve service and community service defined under the Fair Work Act 2009.

[\[More\]](#)

## One in ten workers are independent contractors

In November 2008, one in ten employed people worked as independent contractors in either their main or second job, according to figures released today by the Australian Bureau of Statistics (ABS).

There were 967,100 people who worked as independent contractors in their main job, and an additional 134,100 people who worked as independent contractors in their second job. Men were more likely to be independent contractors, with 12% of employed men (727,000) working as independent contractors in their main job, compared with 5% of employed women (240,100).

[\[More\]](#)

## TIP OF THE MONTH: Making an enterprise agreement

### Introduction

The Fair Work Act 2009 introduced significant changes to the national system of enterprise bargaining and the making of legally enforceable agreements between employers and employees. This is a summary of the rules regulating the procedure to make and approve agreements made under the new national system. It should be read in conjunction with other material published on the matter with advice related to specific circumstances of your business.

### Initiating the bargaining process

There is not any particular requirement to initiate bargaining for an enterprise agreement. An employer may initiate bargaining directly with their employees. The employees or a union representing employees may also initiate bargaining. Enterprise bargaining also commences where Fair Work Australia has issued a *majority support determination*<sup>1</sup>.

### The first step - notice to employees

Where Fair Work Australia determines there is majority employee support for enterprise bargaining or where an employer and employees agree to

bargain, the employer must notify employees within 14 days of their right to be represented in bargaining.

The notice must specify that the employee may appoint a bargaining representative to represent the employee in bargaining for the agreement. The notice must also contain particular information as to who may be appointed as a bargaining representative, the default representative if an employee does not appoint a bargaining representative, the requirement to provide a copy of an instrument of appointment to the employer, and any other matter prescribed by the regulations. The form of the notice is prescribed in the Fair Work Regulations 2009.

### Next step - appointing bargaining representatives

When employees appoint a bargaining representative to represent their interests it must be done in writing. A bargaining representative may be a colleague i.e. another employee, a union or another person (such as a consultant, lawyer or accountant). An employee may appoint themselves as their bargaining representative. A union will be the default representative of an employee that is a union member unless they appoint their own bargaining representative.

Employers will automatically be a bargaining representative but may appoint in writing another person as their bargaining representative. For example, Maguire Consulting may be appointed as a bargaining representative for an employer.

Copies of the written instrument appointing bargaining representatives must be provided to the employer and to other bargaining representatives appointed by the employer and employees on request.

### Negotiation of the enterprise agreement

Subject to the obligation to bargain in good faith, the bargaining process may proceed in any manner that the bargaining representatives determine amongst themselves. The bargaining representatives may conduct the negotiations in a manner agreed between them.

### Obtaining employee approval – the access period

Before an employer requests that employees approve a proposed enterprise agreement by voting for the agreement the employer must comply with the following requirements:

## Providing access to the proposed agreement

The employer must take all reasonable steps to ensure that during the access period for the agreement, the employees employed at the time who will be covered by the agreement are given access to or a copy of the following materials:

- The written text of the agreement;
- Any other material incorporated by reference in the agreement.

## Notice of time and place for vote

The employer must take all reasonable steps to notify the relevant employees of the following by the start of the *access period* for the agreement:

- The time and place at which the vote will occur;
- The voting method that will be used.

The *access period* for a proposed enterprise agreement is seven (7) days ending immediately before the start of the voting process.

## Explaining the terms of the proposed agreement

The employer must take all reasonable steps to ensure that:

1. The terms of the agreement, and the effect of those terms, are explained to the relevant employees; and
2. The explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.

The following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that point 2:

- Employees from culturally and linguistically diverse backgrounds;
- Young employees;
- Employees who did not have a bargaining representative for the agreement.

## Obtaining employee approval – the vote

The employer may request employees to approve an enterprise agreement by voting for it. However, it may not do so until 21 days has elapsed from the last notice informing employees of the right to be represented in bargaining.

The employer may request that the employees vote by any means including a ballot or by an electronic method.

## When is an enterprise agreement made?

### Single-enterprise agreement

If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement have been asked to approve the agreement the agreement is made when a majority of those employees who cast a valid vote approve the agreement.

### Multi-enterprise agreement

If a proposed enterprise agreement is a multi-enterprise agreement; and the employees of each of the employers that will be covered by the agreement have been asked to approve the agreement and a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement; the agreement is made immediately after the end of the voting process.

### Greenfields agreement

A greenfields agreement is made when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover (which need not be all of the relevant employee organisations for the agreement).

## Approval of enterprise agreements

A bargaining representative to an enterprise agreement may apply to Fair Work Australia to approve the agreement once it has been made. Fair Work Australia must be satisfied that (if the agreement is not a greenfields agreement) the agreement has been *genuinely agreed* to by the employees covered by the agreement.

If the agreement is a multi-enterprise agreement Fair Work Australia must be satisfied that it has been genuinely agreed to by each employer covered by the agreement; and no person coerced, or threatened to coerce, any of the employers to make the agreement.

### Better off overall test

Fair Work Australia must also be satisfied that the terms of the agreement do not contravene the National Employment Standards; and the agreement passes the *better off overall* test.<sup>2</sup>

Commencing on 1 January 2010 it will no longer be sufficient to make an agreement that on balance does not disadvantage employees who will be covered by the agreement in comparison to an applicable award. The agreement must place employees and prospective employees better off than they would be under the applicable modern award. The Act describes the test as follows:

*“An enterprise agreement ... passes the better off overall test under this section if Fair Work Australia is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.” (Section 193)*

The ‘test time’ means the time the application for approval of the agreement is made to Fair Work Australia. ‘Prospective award covered employees’ are employees that would be covered by the agreement ‘if’ they were employed by the employer. This suggests for example, that an agreement that prescribes terms and conditions for junior employees but none are employed at the test time, must nevertheless, ensure that the terms and conditions related to ‘future’ junior employees would be better off overall than if they were employed under the relevant modern award.

Note that until the National employment Standards and modern awards commence on 1 January 2010 the No-disadvantage test will continue to apply in relation to enterprise agreements made during the ‘Bridging period’ of 1 July -31 December 2009. See the No disadvantage and the Fair Work Act factsheet for further information on the application of the test.

### **The group of employees must be fairly chosen**

Fair Work Australia must be satisfied that the group of employees covered by the agreement was fairly chosen. If the agreement does not cover all of the employees of the employer or employers covered by the agreement, Fair Work Australia must take into account whether the group is geographically, operationally or organisationally distinct.

### **No unlawful terms**

Fair Work Australia must be satisfied that the agreement does not include any unlawful terms i.e. terms that are:

- Discriminatory
- Breach unlawful termination and freedom of association laws

- Require the payment of a bargaining services fee to a union
- Provide remedies for unfair dismissal to persons who have not served the applicable minimum employment period (i.e. six or 12 months), or exclude or modify unfair dismissal protections to the detriment of a person
- Provide for right of entry to an employer's premises in a way that is inconsistent with the right of entry laws, or
- Purport to authorise industrial action during the life of the agreement.

### **No designated outworker terms**

Fair Work Australia must be satisfied that the agreement does not include any designated outworker terms i.e. terms related to an employee employed in the in the textile, clothing or footwear industry.

### **Nominal expiry date**

Fair Work Australia must be satisfied that the agreement specifies a date as its nominal expiry date that is not more than 4 years after the day on which Fair Work Australia approves the agreement.

### **A term about settling disputes**

Fair Work Australia must be satisfied that the agreement includes a term that provides a procedure that requires or allows Fair Work Australia, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes about any matters arising under the agreement or the National Employment Standards, and that allows for the representation of employees covered by the agreement for the purposes of that procedure.

### **Other requirements**

At the time of lodging the agreement for assessment by Fair Work Australia, parties will be required to submit a statutory declaration setting out details of the agreement. The agreement will be signed by the employer and the bargaining representatives acting on behalf of employees.

### **Approval with undertakings**

If Fair Work Australia has a concern that the requirements for approval may not be satisfied it may still approve the agreement with written undertakings from the employer in relation to the concern. However, it may only accept a written undertaking from employers covered by the agreement if it is satisfied that the effect of accepting

the undertaking is not likely to cause financial detriment to any employee covered by the agreement; or result in substantial changes to the agreement.

Fair Work Australia must not accept an undertaking unless it has sought the views of each person who Fair Work Australia knows is a bargaining representative for the agreement.

## When does the agreement commence?

An agreement will come into operation seven days after Fair Work Australia approves it or a later date if one is specified in the agreement.

## What happens if it is not approved?

The terms and conditions of employment that previously applied to the employees will continue to apply.

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

### New South Wales

#### Workplace guide to managing influenza pandemic

The New South Wales Office of Industrial Relations has published a guide and fact sheet to help employers and employees to plan ahead and be better equipped to respond in the event of an influenza pandemic.

[\[More\]](#)

#### Shop trading regulations amended

On 22 May 2009, the Shop Trading Regulation 2009 took effect. The regulation identifies that from the 22 May, for the purposes of section 11 of the Shop Trading Act 2008, there is no longer a \$100 application fee when making an application for an exemption.

[\[More\]](#)

### Victoria

#### Public service agreement

The Victorian public service agreement has been varied and extended for a further three years.

[\[More\]](#)

### Queensland

#### State wage case 2009

The Queensland state wage case is underway. On 10 June 2009 and 16 June 2009 respectively, the Queensland Council of Unions (application B/2009/41) and The Australian Workers' Union of Employees, Queensland filed with the Industrial Registrar applications seeking increases to the rates of all Queensland awards.

[\[More\]](#)

### Western Australia

#### Free employer advice service

There is a new *one stop shop* providing free employment advice at the Small Business Development Corporation. The new service is a joint initiative by Department of Commerce Labour Relations Division and the corporation to ensure small business has easy access in a single location to a wide range of information, including professional advice on labour laws.

[\[More\]](#)

### Tasmania

#### Pandemic influenza

Read the latest information on the management of the pandemic influenza H1N1.

[\[More\]](#)

### South Australia

#### Resolving apprenticeships disputes

SafeWork SA has published information to assist employers manage the risk of 'swine flu' occurring in the workplace

[\[More\]](#)

1 A majority support determination is an order of Fair Work Australia forcing an employer to commence bargaining where a majority of the employees wish to commence bargaining for an enterprise agreement. See the fact sheet Bargaining in Good Faith for further information.

2 During the bridging period i.e. 1 July -31 December 2009 the No-disadvantage test will apply rather than the better off overall test. See the fact sheet 'The No-disadvantage test and the Fair Work Act.'