



YOUR RIGHTS UNDER THE FAIR WORK ACT

FSU FACT SHEETS

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FOREWORD

After four years of campaigning and months of debate in Federal Parliament, Australian workers have won the right to new, fairer industrial relations laws.

The Fair Work Act is the new national Workplace Relations Act which replaced WorkChoices on 1st July 2009.

The new laws provide many exciting new provisions for finance workers -

- a legislated right to bargain collectively for improved working conditions
- the right to be represented by your union in the workplace
- increased protection from unfair dismissal


In order to help you understand the implications of the new workplace laws, the FSU with support from the Federal Government and ACTU, has prepared the following fact sheets.

1. The Fair Work Act: An Overview
2. Types of Industrial Instruments
3. The Safety Net: National Employment Standards and Modern Awards
4. Collective Bargaining Arrangements
5. Unfair Dismissal
6. General Protections
7. Settling Disputes

I trust that you will find this information useful – use these fact sheets regularly in conjunction with your Award, Enterprise Agreement or employment contract to check your rights and entitlements.

If you need any further information, advice or support, you can call the FSU Member Rights Centre on 1300 366 378 or visit us at www.fsunion.org.au

In unity,



Leon Carter

FSU National Secretary



FAIR WORK ACT 2009: BETTER RIGHTS FOR WORKING AUSTRALIANS

From 1 July, 2009, Australian workers will be covered by new laws at work. The Fair Work Act replaces the Workplace Relations Act and restores many of the rights taken away under WorkChoices. Workers can now look forward to greater protection at work.

There are 6 key areas where employees will see a difference:

1. Protection from unfair dismissal

Approximately three million Australian workers will get back protection from unfair dismissal that they did not have under WorkChoices. The exemption from unfair dismissal for 'operational reasons' will be removed.

2. A strong safety net

The new safety net of National Employment Standards and modern awards will come into force from 1 January 2010 and will safeguard entitlements like: maximum weekly hours of work, penalty rates, public holidays, redundancy pay and leave entitlements.

3. Collective bargaining rights

Collective bargaining will be at the centerpiece of the new IR system and will build upon the minimum conditions set out in the NES and relevant modern award. If a majority of workers support bargaining for a new collective agreement, the employer will be obliged to sit down and bargain in good faith. Your union will also have a guaranteed right to represent you.

4. An independent umpire

The role of the independent umpire is vital to making sure that the system works properly. It needs to be

easy to use, affordable, timely and have the power to be able to do the job properly. Fair Work Australia will be able to conciliate, mediate, call compulsory conferences and make recommendations.

5. No new AWAs – individual contracts

No new AWAs can be made after March 2008. The new laws allow workers on expired AWAs to access collective bargaining. Existing AWAs can be terminated by agreement at any time, or after the nominal expiry date on application to Fair Work Australia.

6. The right to be represented in the workplace

The right to be represented by a union will be enshrined in the new laws. It will be unlawful to take action against someone simply because they exercise a workplace right, join a union or act collectively through a union. There will be new obligations for employers to consult when major workplace change occurs, with a guaranteed right to union representation in those situations, as well as in dispute settlement processes.



FACT SHEET 1

THE FAIR WORK ACT: AN OVERVIEW

What's it all about?

The national workplace relations system changed from 1 July 2009 with the introduction of the Fair Work Act 2009.

Some of the key features of the new workplace laws are:

- a system based at bargaining at the enterprise level
- protections from unfair dismissal for employees
- protection for the low paid
- the right to be represented in the workplace

Does the Fair Work Act apply to me?

Most of the Australian workforce will be covered by the new workplace laws.

The Act will generally apply to 'national system' employers and their employees. The national system includes employers like constitutional corporations, the Commonwealth or a Commonwealth authority, as well as employers in the Territories and almost all employees in Victoria (including non-trading corporations).

However, some parts of the Act will apply to all employees

- Notice of termination
- Unlawful termination
- The National Employment Standard for parental leave

Introducing Fair Work Australia

The Fair Work Act introduces a new "one stop shop" called Fair Work Australia.

Fair Work Australia will take over the responsibilities of the:

- Australian Industrial Relations Commission
- Australian Fair Pay Commission
- Workplace Authority
- Workplace Ombudsman

Fair Work Australia will:

- set and adjust award wages
- make minimum wage orders
- review and vary awards every 4 years
- make bargaining orders where necessary
- make workplace determinations to settle bargaining disputes
- supervise the taking of industrial action
- approve agreements
- conciliate (and in limited cases) arbitrate disputes
- deal with disputes concerning union right of entry
- determine whether an industrial instrument applies in a transfer of business
- determine unfair dismissal claims
- have the power to convene compulsory conferences aimed at settling disputes



FACT SHEET 2

TYPES OF INDUSTRIAL INSTRUMENTS

Where do your rights at work come from?

Worker's rights are derived from:

- Legislation made by State and Federal parliaments relating to employment (eg Fair Work Act 2009), anti-discrimination, occupational health and safety, worker's compensation, superannuation laws etc
- Common Law which is made by the courts and judges, where judgements made have created precedents that will be applied in future cases
- Common Law contract is the contract that exists between an employer and employee that is enforceable by law. It will contain the terms and conditions that an employee agrees to work under. A letter of offer is an example of a common law contract. Common law contracts after 1 January 2010 must provide the National Employment Standards (see Fact Sheet 3) as minimum conditions of employment. Even if the contract is silent on an NES provision, the employee will still have the corresponding NES provision as a legislated minimum entitlement.

Workers may also be covered by collective industrial instruments such as an Award or Enterprise Agreement or they may be covered by an individual agreement (AWA or ITEA). Your letter of offer will specify which industrial instrument applies to you.

Awards

An award is a legally binding document prescribing the minimum terms and conditions of employment for those employees covered by the application clause of the award. Awards may relate to employees in an entire industry (eg Banking and Finance Industry Award) or a particular enterprise (eg Westpac Employees Award).

As part of the requirements of the Fair Work Act, all existing industry awards must go through a modernisation and consolidation process. The new modern awards will commence on 1st January 2010 and may contain 10 conditions relating to wage rates, types of employment, hours of work, overtime and penalty rates, annualised wages, allowances, leave, superannuation and procedures for consultation, representation and dispute resolution.

Enterprise awards will continue to operate but must be modernised by the end of 2013 and no new enterprise awards will be made.

An enterprise award can be terminated by application to Fair Work Australia between 1st January 2010 and 31st December 2013.

A modern award will not apply to an employee who is covered by an enterprise award or an enterprise agreement.

Enterprise Agreements

An enterprise agreement is a collective employment agreement that sets out wages and working conditions for a particular group of employees (eg NAB Enterprise Agreement 2006) and is also enforceable by law.

An enterprise agreement will build upon the basic conditions that are contained in the National Employment Standards and the relevant modern award.

All new enterprise agreements from 1st January 2010 must pass the Better Off Overall Test (BOOT), which means that employees must be better off under the enterprise agreement than they would have been under the relevant modern award.

Australian Workplace Agreement (AWA)

An AWA is a written individual agreement between an employer and an employee that sets out terms and conditions of employment. New AWAs could not be made after 28 March 2008, however AWAs made before 28 March 2008 continue to operate until terminated or replaced.

Once an AWA began to operate, it replaced any award or workplace agreement that would otherwise apply to the employee.

AWAs had to contain the 5 minimum conditions in the Australian Fair Pay and Conditions Standard.

For further details visit www.fairwork.gov.au

Individual Transitional Employment Agreement (ITEA)

Like an AWA, an ITEA is a written individual agreement between an employer and an employee that sets out terms and conditions of employment and is subject to a No Disadvantage Test (NDT). The NDT compares a proposed ITEA to an applicable collective agreement or award to ensure employees are not disadvantaged by the terms and conditions of the proposed ITEA.

ITEAs are transitional agreements and all must have a nominal expiry date of 31 December 2009, or earlier. Once the nominal expiry date has passed, the ITEA may be terminated.



FACT SHEET 3

THE SAFETY NET: NES AND MODERN AWARDS

With the introduction of the Fair Work Act 2009, a new safety net will come into effect on 1 January 2010. It will consist of ten legislated “safety net” entitlements called National Employment Standards (NES) and modern awards.

The NES will apply to all national system employees.

The National Employment Standards are:

1. A standard 38 hour working week for full time employees and the right to refuse unreasonable overtime
2. Up to 24 months unpaid parental leave
3. A right for parents to request flexible working arrangements
4. 4 weeks paid annual leave each year, plus an additional week for shift workers
5. 10 days paid personal / carer's leave each year, 2 days paid compassionate leave and 2 days unpaid emergency leave
6. Unpaid community service leave and up to 10 days paid jury duty leave
7. All national and state public holidays
8. Long service leave
9. Notice of termination and, if employed in a business with 15 or more employees, redundancy pay
10. A requirement that all employers provide new employees with information about their rights (a Fair Work Information Statement)

The NES is a minimum standard. Awards and enterprise agreements cannot contain terms that go below the NES, but can contain terms that go above NES.

Modern Awards

The second part of the safety net is modern industry or occupational awards. The Australian Industrial Relations Commission has modernised and consolidated all awards. The new modern awards commenced on 1st January 2010.

Modern awards build on the NES and may contain an additional 10 conditions, such as wage rates, types of employment, hours of work, overtime and penalty rates, allowances, annualised wages, leave, superannuation and procedures for consultation, representation and dispute resolution.

All modern awards must contain

- terms on ordinary hours of work
- a flexibility clause – allowing agreement on an individual arrangement that varies the effect of the award in relation to the employee. Agreement must be in writing and can be terminated with 4 weeks notice
- dispute settlement procedure

Modern awards must be reviewed at least every four years to ensure that they are kept relevant and up to date.

Who is covered by a modern award?

Employees are covered by an award if they fall within the scope of a modern award.

Employees will not be covered by a modern award if:

- they are covered by an enterprise award or enterprise agreement
- they are a high income employee*

Enterprise awards must be modernised by the end of 2013 and no new enterprise awards will be made. An enterprise award can be terminated by application to Fair Work Australia between 1st January 2010 and 31st December 2013.

*Who is a high income employee?

High income employees must have a written guarantee from their employer that their annual earnings will exceed the high income threshold (indexed annually and is currently \$113 800, as at July 2010). The employee must be told the consequences of the guarantee (that the award will not apply) and must agree to it. An employee who has an enterprise agreement applying to them cannot sign a high income guarantee.



FACT SHEET 4

COLLECTIVE BARGAINING ARRANGEMENTS

For the first time in Australian history, there is now a legislated right for workers to bargain collectively. If the majority of employees wish to collectively bargain, the employer must negotiate in good faith.

If the employer does not agree to bargain then a union can apply to Fair Work Australia for a majority support determination. This determination is issued when FWA is satisfied that a majority of employees within the scope of the agreement want to bargain with their employer. The employer is then obliged to begin bargaining.

Unions will represent their members in bargaining (act as bargaining reps) unless the member indicates otherwise.

The employer is required to notify all employees of their right to appoint a bargaining rep at the beginning of the bargaining process. Employers and employees may appoint any person as their bargaining representative for a proposed enterprise agreement.

If there is disagreement over who will be covered by the proposed agreement Fair Work Australia can issue a scope order which will specify the employer and employees who will be covered by the agreement.

The Act requires all parties to negotiate in good faith. All parties must:

- ▶ attend and participate in meetings at reasonable times
- ▶ disclose relevant information in a timely manner
- ▶ respond to proposals in a timely fashion
- ▶ give genuine consideration to the proposals of the other party and provide reasons for responses, and
- ▶ refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining

If one party is not meeting the above requirements, FWA may issue a bargaining order. A bargaining order may specify the actions that a party is required to take or it may provide for a party to refrain from engaging in a particular action that would breach good faith bargaining requirements.

If either party refuses to comply with a good faith bargaining order, they will be subject to civil penalties.

If a party consistently breaches good faith bargaining orders in a serious and sustained way, Fair Work Australia may issue a serious breach declaration. When a serious breach declaration has been issued, the parties have 21 days to reach agreement, otherwise FWA may make a bargaining related workplace determination (ie. arbitrate).

When negotiations for a new agreement have concluded, the proposed agreement must go to a ballot of staff. The agreement is approved if more than 50% of votes cast are in favour.

The employees who will be covered by the new agreement must have access to the proposed agreement for at least 7 days prior to the ballot.

The agreement must pass the Better Off Overall Test, which means that employees must be better off under the new agreement than they would be under the relevant modern award. Fair Work Australia may approve an agreement that doesn't pass the BOOT in exceptional circumstances, such as short term business

Every agreement must include:

- a flexibility clause – an agreement made in writing between an employee and their employer, which can be terminated with 4 weeks written notice.
- a consultation clause – allowing for consultation and representation of employees in the event of major workplace change.
- a dispute settlement procedure – outlining a process for settling disputes under the agreement or National Employment Standards. The clause must provide for employee representation. Fair Work Australia will only be able to arbitrate disputes where the DSP in the agreement expressly provides for arbitration.
- A nominal expiry date (4 years or less).

Only one agreement can apply to an employee.

Industrial action: What is it?

Employee industrial action is defined to include not attending work, performing work in a different manner to which it is customarily performed (such as work bans).



FACT SHEET 4 cont

COLLECTIVE BARGAINING ARRANGEMENTS

If an employee refuses to perform work because of a reasonable concern for their immediate health and safety, it is not defined as industrial action. However, the employee must not unreasonably fail to comply with a direction to perform other available work, at the same or another workplace.

Employer industrial action is defined as locking workers out.

What is protected industrial action?

Protected industrial action means that during enterprise bargaining, union members may legally take action. It is against the law for your employer to threaten you, sack you, victimise you, or sue either yourself or the Union office for any loss the company incurs.

Industrial action will be protected where it is taken during bargaining (but after the expiry of the current agreement) and where the bargaining representatives:

- are genuinely trying to reach agreement
- are not engaged in pattern bargaining
- have obtained authorisation through a protected action ballot
- have given the employer 3 days notice

Protected action ballot order

A bargaining representative seeking to take protected industrial action must apply for a protected action ballot order and notify the employer that an application has been made. An application will be able to be made 30 days before the nominal expiry date of an agreement. Fair Work Australia will try to determine the application within 2 days. The applicant must be genuinely bargaining.

Industrial action will be authorised where at least 50% of the employees on the roll of voters vote and more than 50% of votes cast approve the action.

Only industrial action taken by employees who were balloted (and their unions) is protected. To be protected, the action must be taken within 30 days of the date the results of the protected action ballot were declared, unless an extension has been granted by FWA.

Pay during protected industrial action

An employer is prohibited from paying wages during industrial action, but only for the duration of the action. There is no longer a minimum 4 hours deduction of wages.

In the case of partial work bans, the employer has the option of paying wages, advising it won't pay wages or advising employees that it will pay a percentage of wages. Unless the employer gives notice of a reduction in pay or refusal to accept part-performance the employees will be entitled to full pay.

Fair Work Australia can determine if the proportionate reduction is appropriate.

Overtime bans

An overtime ban is not considered industrial action, unless:

- ▶ the employer requested or required the employee to work the period of overtime
- ▶ the employee refused to work the overtime;
- ▶ the refusal was a contravention of the employee's obligations under a modern award, enterprise agreement or a contract of employment

When can protected industrial action be stopped?

FWA must suspend or terminate action within 5 days where the action is threatening to endanger the life, personal safety or welfare of the population or part of it; or to cause significant damage to the Australian economy or an important part of it. FWA, a bargaining representative or the Minister can apply for this order.

FWA may suspend or terminate action where the action has been prolonged, it is causing, or imminently threatening to cause significant economic harm to the employer and employees covered by the agreement, and where the dispute will not be resolved in the foreseeable future. In the case of a lock out, FWA need only be satisfied the action is causing significant economic harm to the employees. FWA, a bargaining representative or the Minister can apply for this order.

If Fair Work Australia terminates industrial action under any of the above grounds, it must make an industrial action related workplace determination (ie arbitrate).

Stopping unprotected action (Stop orders)

Anyone who is affected by unprotected industrial action can apply to FWA to stop the action. FWA must issue a stop order within 2 days. Employees who take unprotected industrial action must have their pay docked for the period of the action, or a minimum of 4 hours.



FACT SHEET 5

UNFAIR DISMISSAL

What is unfair dismissal?

A person has been unfairly dismissed when Fair Work Australia is satisfied that the dismissal was harsh, unjust or unreasonable and it was not a case of genuine redundancy.

Dismissal can also be at the employee's initiative. This is known as Constructive Dismissal and occurs when an employee has been forced to resign from employment because of conduct engaged in by the employer, such as harassment.

The Fair Work Act restores protection from unfair dismissal for an additional 3 million workers who were excluded under the previous Work Choices legislation.

What constitutes harsh, unjust or unreasonable?

Fair Work Australia will consider:

- Whether there was a valid reason for the dismissal, related to the person's capacity or conduct.
- 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 in discussions relating to the dismissal
- If the dismissal was related to unsatisfactory performance – whether the person had been warned about the unsatisfactory performance before the dismissal, and
- Any other matters that Fair Work Australia considers relevant

An employer can no longer avoid an unfair dismissal claim by claiming the dismissal was due to 'operational reasons'. Genuine redundancy occurs when the employer no longer requires the work done by the employee to be performed by anyone. It is not a case of genuine redundancy if the person dismissed could have been employed in another position within the business or associated entity and it would have been reasonable to redeploy them.

Who can make an unfair dismissal claim?

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

- Completed the minimum employment period (qualifying period), and
- Are covered by a modern award, or
- An enterprise agreement applies to the person

In some situations, high income earning employees will be excluded from unfair dismissal protection. If a person is not covered by a modern award or enterprise agreement, they will only be able to bring an unfair dismissal claim if they earn less than the high income threshold (currently \$108 300, from 1 July 2009, indexed annually).

Regardless of the size of the business, workers can be protected from unfair dismissal provided that they have served a qualifying period.

The qualifying period for a small business is 12 months and for other businesses the qualifying period is 6 months.

A small business is now defined as having fewer than 15 FTE. After January 2011, a small business will be one with fewer than 15 full time, part time or regular and systematic casual employees.

The Fair Work Act provides for a Fair Dismissal Code. If a small business can prove to FWA that

it has complied with the code, FWA cannot find the dismissal was unfair.

Should Fair Work Australia find a dismissal unfair, it can order reinstatement or compensation (up to 6 months pay).

Making an unfair dismissal claim

Claims must be lodged within 14 days of the dismissal. The applicant must pay an application fee (as at 1 July 2009 the fee is \$59.50). Fair Work Australia will then decide whether it has jurisdiction to hear the claim and if it does, it will hold a private conference. If the matter remains unsettled, FWA may hold a formal hearing. Lawyers will only be allowed with FWA's permission, however this rule does not apply to union lawyers.

Appeals can only be made to the Full Bench if it is in the public interest to do so or where there has been a significant error of fact.

The Minister can apply to Fair Work Australia for a review of unfair dismissal decisions (other than those made by the Full Bench) if the Minister believes the decision is contrary to public interest.



FACT SHEET 6

GENERAL PROTECTIONS

The General Protections section of the Fair Work Act protects employees from discrimination and other forms of unfair treatment at work.

What is a workplace right?

A workplace right is an employment entitlement and the freedom to exercise and enforce those entitlements.

Workplace rights can also relate to performing a role or responsibility in the workplace, which is provided for by an industrial law or award/agreement (such as a Health and Safety Representative or a Workplace Union Representative).

Employees have the right to engage in industrial activity, including joining and being represented by a trade union and to participate in lawful industrial activities.

Employees also have the right to make an inquiry or complaint in relation to their employment or to participate in proceedings under workplace laws.

An employer must not take adverse action against an employee because they possess or exercise a workplace right.

Adverse action may include:

- refusing to employ a prospective employee
- dismissing an employee
- altering the position of an employee to the employee's prejudice, or
- discriminating against an employee

Adverse action also includes threatening to take any of the above actions.

Protections against discrimination

An employer is prohibited from taking adverse action against an employee or a prospective employee because of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion or political opinion.

Other protections

An employer cannot deliberately or recklessly make false or misleading representations about someone else's workplace rights: eg an employer cannot tell an employee that they do not have the right to be represented by a union during bargaining.

An employer must not represent an employment relationship as an independent contracting relationship or dismiss an employee in order to engage the person to perform the same work as an independent contractor.

Unions cannot charge bargaining fees, discriminate against employers because of their industrial arrangements, or coerce employers to hire or not hire a particular person or to engage or not engage a particular independent contractor.

The employer bears the onus of proving that it did not take adverse action against an employee for one of the unlawful reasons.

Enforcing workplace rights

An employee, union or Fair Work inspector can enforce a workplace right. Where a person alleges a contravention of the general protections, Fair Work Australia is able to hold a conference to help resolve the matter. If the case involves dismissal, the conference is mandatory. In all other cases, the FWA conference is voluntary and a person can elect to proceed directly to court.

Where a person is dismissed from employment, an application to Fair Work Australia to hold a conference must generally be made within 60 days of the dismissal. If the matter isn't resolved at the conference, the person can apply to the Fair Work Division of the Federal Court or Federal Magistrates Court for a remedy. Remedies include monies, injunctions, compensation and reinstatement.



FACT SHEET 7

SETTLING DISPUTES

A worker, union or Fair Work inspector can lodge a claim with the Fair Work Divisions within the Federal Court and the Federal Magistrates court if it believes that the Fair Work Act (including the National Employment Standards) or an award has been breached. Claims may also be taken to the State Magistrates Court.

There will be a small claims procedure within the court, for claims up to \$20 000. When dealing with a small claims matter, the court may act in an informal manner. Lawyers will only be allowed with the court's permission, however this rule does not apply to union lawyers.

The courts may refer parties to Fair Work Australia for mediation or conciliation. FWA will only be able to arbitrate where both parties consent.

The courts can make a range of orders, including penalties, reinstatement orders and injunctions. Injunctions can be used to prevent an employer from proceeding with a course of action (eg from implementing a major change when it has not followed the consultation procedure in the award). If the matter could have been resolved

at Fair Work Australia, but one party refuses to participate in conciliation, then the court may award costs against that party.

Disputes about the application of agreements will be dealt with in accordance with the disputes clause in the agreement. There is a model clause set out in the Regulations which allows Fair Work Australia to arbitrate disputes about the agreement. The parties can then build upon, or dilute the model clause, but every dispute clause must provide for a third party to deal with the dispute and for employees to be represented.





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