

# Fair Work | Fact Sheet

## Fair Work Act 2009 (Cth) – Overview and Transition from Work Choices

When the Fair Work Act 2009 (Cth) (FW Act) took effect on 1 July 2009, the Rudd Government implemented the ‘Forward with Fairness’ industrial relations policy, which it took to the 2007 federal Election. This policy promised to wind back the Howard Government’s 2006 Work Choices legislation and enhance employee rights and protections.

Prior to 1 July, the federal industrial relations system was regulated by the Workplace Relations Act (WR Act). This system covered about 85% of Australian employees, being those employed in Victoria or a territory or elsewhere by a ‘constitutional’ corporation (i.e. a trading, financial or foreign corporation). The remaining employees were covered by State industrial relations systems.

In the federal system, awards were maintained by the Australian Industrial Relations Commission. These contained minimum employment conditions for the employees. Minimum wages were set by a separate instrument known as the Australian Pay & Classification Scale (APCS). APCSs were maintained by the Australian Fair Pay Commission (AFPC).

Employees could make statutory workplace agreements under the WR Act, which replaced awards during their period of operation. At the time the Rudd Government took office, these agreements could be made with individual employees (i.e. Australian Workplace Agreements or AWAs) or made with unions or employees directly (i.e. collective agreements). At that point of time, in order for such agreements to take effect they were required to meet the Fairness Test, which meant they had to provide ‘fair’ compensation for any reduction in core entitlements arising under applicable awards.

Those employees in the federal system who were award and agreement free were entitled to a minimum wage specified in either an applicable APCS or the Federal Minimum Wage, which was set by the AFPC. In addition, award and agreement free employees were entitled to the minimum terms and conditions contained in the Australian Fair Pay and Conditions Standard (the Standard), which covered working hours and types of leave.

### Forward with Fairness

The first step taken by the Rudd Government in implementing its Forward with Fairness policy was to enact the Workplace Relations Amendment (Transition to Forward with Fairness) Act. This law took effect in March 2008 and phased out AWAs, replaced the Fairness Test with a tougher ‘no-disadvantage test’ and started a process of ‘award modernisation’.



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On 1 July 2009 the FW Act replaced the WR Act. The FW Act took the Forward with Fairness changes introduced in 2008 further, by:

- replacing the Standard with a more comprehensive ‘safety net’ of minimum terms and conditions regulated by legislation (in the form of the National Employment Standards (NES)) and the new ‘modern awards’ (although these will only come in to operation on 1 January 2009);
- establishing a new institutional framework for the administration of the federal industrial relations system, with Fair Work Australia (FWA) and the Fair Work Ombudsman replacing the ‘alphabet soup’ of tribunals, agencies and courts that currently have a role in making and enforcing employment terms and conditions;
- making key changes to the system of enterprise bargaining to provide for a greater role for unions in collective bargaining and for FWA in overseeing the bargaining process; and
- enhancing protections dealing with workplace and industrial rights (such as freedom of association) and unfair dismissal laws.

### Safety Net

The Standard will cease to apply after 31 December 2009. The NES will commence on 1 January 2010.

The NES will differ from the Standard in key areas, including the following:

- Working parents of a child under school age will be able to request a change in the working arrangements to assist with the care of the child. An employer will only be able to refuse this request on reasonable grounds. In addition, one parent will have the right to request an additional 12 months of unpaid parental leave.
- There will be a new entitlement to take unpaid leave to undertake eligible community service activities, such as jury service or voluntary emergency activity.
- Employers with 15 or more employees will have to make redundancy payments to retrenched workers.
- Employers will be required to issue new employees with what will be called a Fair Work Statement.

If an employee starts or applies for parental leave, annual leave, personal/carer’s leave under the WR Act rules before 1 January 2010, the NES rules will apply to that entitlement on and after that date.

Service prior to 1 January 2010 counts for all service-based NES entitlements unless the employee has already received the benefit of that entitlement. An exception is in the case of the NES redundancy pay entitlement. In that case if an employee’s terms and conditions of employment (whether common law or statutory) do not provide for redundancy pay entitlements, service before 1 January 2010 is not counted.



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Employers need only issue the Fair Work Statement to new employees who start employment after 1 January 2010.

Terms in federal awards, National Agreements Preserving State Awards (NAPSAs), pre Work Choices certified agreements, Individual Transitional Employment Agreements (ITEAs) and AWAs that undercut NES will have no effect on and after 1 January 2010.

2010 will also see the commencement of the modern awards, following an 18 month process undertaken by the AIRC to reduce, simplify and rationalise the 4,000 or more awards that currently regulate employment in Australia. Modern awards will regulate more employment conditions than are currently provided in awards. However, they will also enable employers to reach agreement with employees covered by awards to make the application of award conditions more flexible (or even in the case of high earning employees, contract out of the awards altogether).

From 1 January 2010, these awards will once again regulate minimum wages and the APCs will be abolished.

From 1 January 2010 modern awards will apply in place of federal awards and NAPSAs. NAPSAs will cease operation on 1 January 2014.

Modern awards will not apply to an employee covered by Work Choices collective agreements, AWAs and ITEAs. However, modern awards will apply to an employee covered by a pre Work Choices certified agreement. If the agreement is inconsistent with the modern award, the agreement will prevail to the extent of any inconsistency. The base rate of pay in the agreement must not be less than the relevant modern award rate.

A key change in the FW Act is the removal of the exemption from unfair dismissal laws of employers with 100 or less employees. It is claimed that this exemption prevented around 56% of the Australian workforce from accessing unfair dismissal laws. Approximately 100,000 additional previously exempt businesses, with around 3 million employees, will become part of the unfair dismissal system. Key changes include:

- Employers with fewer than 15 full-time employees who dismiss their employees during the first 12 months of service will not be exposed to an unfair dismissal claim.
- Small businesses that follow the new Fair Dismissal Code, which sets out the steps that need to be taken in order for dismissal to be fair, will have an automatic defence to any unfair dismissal claim.
- Retrenchments will only be exempt from unfair dismissal laws if the employer has followed consultation procedures in awards or workplace agreements and explored opportunities for the employee to move to other jobs in their own business or related businesses, before retrenching.

Unfair dismissal provisions in the WR Act continue to apply in relation to a dismissal that occurred before 1 July 2009.

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### Enterprise Bargaining and Industrial Action

The FW Act retains the bulk of the tough restrictions on the use of strikes as a means of putting pressure on employers to agree to union and employee demands. However, it makes it harder for employers to ignore unions in the making of enterprise agreements. In particular, the FW Act:

- will remove the current capacity of employers to use non-union agreements to bar unions from exercising rights to enter workplace to talk to members; and
- will give unions and employers rights to seek an order from FWA requiring that an employer bargain with them in good faith about a collective agreement.

Work Choices collective agreements made and lodged before 1 July 2009 will still be processed under the WR Act provisions.

Pre Work Choices certified agreements can still be varied by the AIRC up to 31 December 2009.

FW Act enterprise agreements will extinguish federal awards, NAPSAAs, pre Work Choices certified agreements, Work Choices collective agreements, AWAs and ITEAs.



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### Transition from Work Choices to FW Act

Change	When it will apply
Changes to agreement making	1 July 2009
Changes to industrial action	1 July 2009
Changes to unfair dismissal	1 July 2009
NES	1 January 2010
Modern awards	1 January 2010
All employers will be required to give the Fair Work Australia Information Statement to all new employees	1 January 2010
BOOT Test replaces No-Disadvantage Test	1 January 2010



Find out more at:  
[www.fairworkaustralia.ahri.com.au](http://www.fairworkaustralia.ahri.com.au)