




# Fair Work Ready

– your act and  
assist booklet

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The Fair Work Act, operative from 1 July 2009, implements a new federal workplace relations system, resulting in significant changes to the laws regarding unfair dismissal, enterprise bargaining and agreement-making, union right of entry and transfer of business. A new body - Fair Work Australia (FWA)- has been established to replace the Australian Industrial Relations Commission, the Australian Fair Pay Commission and the Workplace Authority. From 1 January 2010, a new Modern Award system and 10 National Employment Standards will also commence operation.

Ai Group understands the legislation and its potential impact on business better than anyone else. That is not surprising given our extensive involvement in the process. In listening to the needs, and representing the interests, of over 10,000 employers – Ai Group led the way in discussions with the Government and other stakeholders and played an integral part in the shaping of the legislation including securing many improvements for employers. We are therefore best placed to explain the practical implications of the reforms for your business and help you to implement all of the new requirements.

This booklet has been designed as a reference and outlines – for each of the areas mentioned above – the key changes, what action employers should take and what assistance Ai Group can provide to ensure that your business is Fair Work Ready!

Ai Group provides practical and comprehensive information, advice and assistance as part of our membership service including regular BiZassistUpdates and BiZassistBriefings on important developments. Members also have access to the comprehensive desk top reference, BiZassistManual, and the telephone advisory service, BiZassistInfoline. Ai Group is also continuing to devote substantial resources to protecting Members' interests during the Award modernisation process. This booklet outlines the additional services available to assist you to become Fair Work Ready.

# Unfair dismissal

## What are the key changes?

- Employers with 100 or fewer employees will no longer be exempt from the unfair dismissal laws
- Replacement of the broad “genuine operational reasons” exemption with a more limited genuine redundancy exemption
- A minimum employment period of 12 months for “small business” (less than 15 employees)
- New Small Business ‘Fair Dismissal Code’
- New calculation for exclusion of award/agreement-free “high income earners”
- Regular casual employees now able to make unfair dismissal claims after 6 months (12 months if employed by a small business)
- Limited exemptions for fixed term / task and seasonal employees, trainees and apprentices
- New processes for dealing with unfair dismissal claims
- Further changes regarding notice of termination and redundancy payments to take effect from 1 January 2010 under the National Employment Standards
- New General Protections provisions covering termination or proposed termination of employment (refer to later section in this booklet)

## What action should employers take?

- Determine whether you are a “small business” employer
- Determine whether your employees will have access to unfair dismissal and, if so, which employees
- Review any new risks versus benefits of various methods of engagement of workers for your business- fixed term, specified task, casual and seasonal
- Review and amend where necessary employment contracts including probationary/qualifying period clauses
- Review impact of new “annual rate of earnings” definition for “high income earners”
- Review and amend where necessary your disciplinary and termination procedures – will they meet the “Fair go all round test” or “Fair Dismissal Code”?
- Educate managers and supervisory staff on the risks of unfair dismissal claims, as well as your disciplinary and termination procedures

## How can Ai Group assist you to become Fair Work Ready?

- Advising you on the impact of the changes on your business and the steps you need to take to minimise your legal risk
- Assessing which of your employees will be caught in the unfair dismissal net
- Conducting training courses on the new unfair dismissal laws and best practice performance management for your managers and supervisors including a detailed workbook and tools for future reference
- Drafting, reviewing and/or amending your disciplinary, termination and redundancy policies / procedures
- Drafting, reviewing and/or amending your letters of offer / employment contracts
- Guiding you through a particular disciplinary / misconduct situation including advising you of the potential risks of proceeding with termination
- Providing practical up-to-date information, guidance and tools through our Termination of Employment and Redundancy Management handbooks

If your business is faced with an unfair dismissal claim, our experienced advisers with legal and other relevant qualifications can represent you in Fair Work Australia.

# Enterprise agreements, Bargaining and Industrial action

## What are the key changes?

### Types of Agreements

- Enterprise agreements are no longer separated into union and non-union agreements
- Only new collective agreements are permitted (individual enterprise agreements are only available in some circumstances until 31 December 2009 and greenfields agreements without a union party are not available from 1 July 2009)
- New concepts of single and multi-enterprise agreements apply

### Content of Agreements

- 'Prohibited content' restrictions have been removed and replaced with a new concept of 'permitted matters', resulting in a wider range of matters that can be included in enterprise agreements and be the subject of protected industrial action
- Agreements must include a "flexibility term" (enabling arrangements to be made with individual employees to vary agreement terms in certain circumstances), a term requiring consultation with employees about major workplace changes, and some other specified terms

### Bargaining process

- Employers must advise employees upon commencement of bargaining that they may appoint a bargaining representative and unions are deemed to be the bargaining representatives of their members unless the employee specifies otherwise
- The concept of a "bargaining period" no longer applies
- Employers, unions and other bargaining representatives must comply with new "good faith bargaining requirements"
- FWA may issue various orders and determinations to facilitate bargaining, including bargaining orders, majority support determinations, scope orders and orders requiring employers in a new 'low-paid bargaining' stream to bargain
- FWA has the power to arbitrate and determine an outcome where no agreement has been reached in some circumstances

### Approval of Agreements

- New process and requirements for lodgement of agreements with, and approval by, FWA
- The National Employment Standards will apply to all existing and new agreements from 1 January 2010
- From 1 January 2010 new agreements must pass a new approval test (BOOT) – each employee must be 'better off overall' under the agreement compared with the relevant modern award
- After an agreement is made, a union that was a bargaining representative can become covered by the agreement by giving written notice to FWA prior to approval



## Industrial Action

- Expansion of matters over which protected industrial action may be taken during bargaining
- Protected industrial action may be taken before the nominal expiry date of 'conditionally terminated' AWAs/ ITEAs
- Protected industrial action may be suspended or terminated if it is causing or threatening to cause significant economic harm to the parties
- Changes to rules regarding payment to employees during periods of industrial action
- Lock out action now only available to employers in response to employee protected industrial action

## What action should employers take?

- Pre-WorkChoices certified agreements – consider variation / extension before 31 December 2009
- WorkChoices collective agreements – new laws apply to re-negotiations from 1 July 2009:
  - re-negotiate before nominal expiry date if possible to avoid threat of protected industrial action
  - consider impact of new bargaining laws on types of agreements available, good faith bargaining obligations, BOOT, new content requirements, union involvement and strategy
  - develop strategy re: wage outcomes, duration and other terms
- AWAs/ ITEAs:
  - consider options for allowing agreements to continue beyond nominal expiry date
  - determine strategy if employees/union/s seek to negotiate a collective agreement
  - consider replacement with a collective agreement under new laws and most effective timing
- No current agreement – compare pros/cons of negotiating a collective agreement versus continuing to apply the award and common law conditions (considering impact of new modern awards from 1 January 2010)
- Industrial action:
  - Assess risk and undertake contingency planning for both protected and unprotected industrial action
  - Avoid agreeing to conditionally terminate AWAs / ITEAs due to exposure to protected industrial action

## How can Ai Group assist you to become Fair Work Ready?

- Advice on agreement-making options and strategic planning for your individual workplace including whether you should bargain now or wait and whether you can be forced to negotiate a formal agreement
- Information on current union claims and strategies and bargaining outcomes
- Enterprise agreement negotiation, drafting and lodgement by our experienced team of workplace advisers and advocates
- Training on Fair Work Enterprise Bargaining and Skills for Negotiating Committees
- Representation in FWA and advice concerning good faith bargaining orders, majority support determinations, scope orders and low paid bargaining orders
- Advice on your legal rights and obligations regarding industrial action and assistance with your contingency planning
- Assistance in responding to industrial action including strategic advice, representation in secret ballot applications and applications for orders from FWA and/or Federal Court to stop or suspend industrial action.

# Union right of entry

## What are the key changes?

- Union officials (with a valid permit) have the right to enter your workplace to hold discussions with employees whose industrial interests the union is entitled to represent and/or to investigate suspected breaches of the Act, an award or enterprise agreement, even if that union is not a party to the applicable award or enterprise agreement in your workplace
- When investigating a suspected breach, union officials have a new right to access certain employment records of employees who do not belong to their union (where the union has the employee's written consent or a FWA order)

## What action should employers take?

- Identify which union/s have the right to enter your workplace so you are prepared for any unexpected visits and potential demarcation disputes
- Review your business' current union right of entry practices and procedures – are they compliant/ adequate?
- If you currently don't have any site protocols, consider developing them now
- Educate all relevant personnel (including managers, supervisors, security and reception) on your procedures and their rights / obligations
- Communicate your protocols and behavioural expectations to your workforce and the union officials you normally deal with

## How can Ai Group assist you to become Fair Work Ready?

- Interpretation of union eligibility rules to identify the rights of particular unions to enter your workplace
- Advice on your specific rights and obligations regarding union right of entry
- Drafting or reviewing your right of entry procedures
- Provision of training for managers and supervisors

If a dispute arises at your workplace regarding union right of entry, our experienced advisers with legal and other relevant qualifications can give you urgent advice and assist you to resolve the dispute, including through FWA.

# Modern awards

## What are the key changes?

- New modern awards will operate from 1 January 2010, replacing existing federal awards and NAPSAs
- A significantly reduced number of awards, affecting terms and conditions in some industries / sectors
- Transitional provisions as part of the implementation of modern awards
- Common rule application of modern awards means that certain employees may become award-covered for the first time
- Ability to exclude / override award terms through enterprise bargaining will be more limited
- New award obligation to consult with employees/unions on workplace change
- Enterprise awards are to be modernised over the next 4 ½ years; otherwise they automatically terminate
- Individual flexibility provisions to meet employee/employer needs on certain award matters

## What action should employers take?

- Identify which modern award/s will apply to your business and how their terms and conditions differ from those in the current applicable award/s
- Assess the financial and operational impacts of any changes in terms and conditions under the modern award/s
- Consider if any employees will become award-covered for the first time
- For non-agreement covered employees – review existing awards, policies and employment contracts, amend where necessary and provide ‘written guarantee of annual earnings’ as appropriate
- For agreement covered employees – consider the impact of modern award/s in applying the ‘better off overall test’
- If an enterprise award applies, review the impact of the award modernisation process
- Consider preserving existing award terms and conditions through enterprise bargaining before 1 January 2010
- Understand the award flexibility provisions

## How can Ai Group assist you to become Fair Work Ready?

- Modern Award Clinics which examine the impact of the new awards and key changes in terms and conditions plus specific industry sector clinics, including a detailed workbook for future reference
- Audit Service to ensure you are currently applying the correct award conditions and are prepared for the new modern award/s
- Representation of your industry sector’s interests in proceedings before the Australian Industrial Relations Commission which is responsible for making all new modern awards by 31 December 2009
- Award looseleaf subscription service – from 1 January 2010 an annotated looseleaf updating service for modern awards
- Assessment of award coverage and obligations in your workplace
- Drafting, reviewing and/or amending letters of offer / employment contracts
- Advice for enterprise award-covered employers and representation in applications to modernise enterprise awards

# National Employment Standards

## What are the key changes?

- 10 National Employment Standards (NES) will apply as legislated minimum conditions to all employees in the federal system from 1 January 2010, replacing the Australian Fair Pay & Conditions Standard (AFPCS)
- The NES include maximum hours of work; annual, personal/carer's, compassionate and parental leave; flexible work arrangements; community services leave; public holidays; long service leave; notice of termination and redundancy pay and fair work information statements
- NES conditions cannot be excluded or reduced by awards or enterprise agreements
- The NES include some important changes to current AFPCS entitlements and some new entitlements including:
  - New rights of parents to request additional unpaid parental leave and flexible working arrangements
  - New rules re: cashing out of leave
  - Notice of termination must be given in writing
  - New calculation of payment in lieu of notice
  - Entitlement to severance pay for all employees including, for the first time, for all award-free employees, subject to certain exclusions
  - Partial preservation of existing award and agreement long service leave provisions
  - Provision of a Fair Work Information Statement by employers to all new employees

## What action should employers take?

- Assess whether the new minimum employment conditions will impose new obligations on your business
- Review and amend where necessary your policies and letters of offer / employment contracts
- Review existing workplace agreements to assess the likely impact of NES
- Obtain Fair Work Information Statement and ensure distribution as required

## How can Ai Group assist you to become Fair Work Ready?

- Drafting, reviewing and/or amending your HR policies and letters of offer / employment contracts
- Audit Service to ensure you are currently applying the correct minimum conditions and are prepared for the new NES
- Training courses covering modern awards and the Minimum Employment Standards including detailed workbook for future reference
- Assessment of award coverage and obligations in your workplace

# General protections provisions

## What are the key changes?

- New “General Protections” provisions dealing with:
  - The protection of “workplace rights” such as the benefit of an industrial instrument, the right to initiate proceedings under an industrial law and the right to make a complaint or inquiry. Essentially it is unlawful for a person to take “adverse action” against another person because the other person has a workplace right, has exercised a workplace right, or proposes to exercise a workplace right;
  - Protection against discrimination;
  - Freedom of association;
  - The right to be involved in lawful industrial activities;
  - Outlawing union claims for bargaining agent’s fees;
  - Unlawful coercion;
  - Misrepresentations; and
  - Sham contracting arrangements.
- Businesses are exposed to injunctions, financial penalties and compensation orders for breaches
- Claims alleging discriminatory or wrongful treatment under these provisions can be made not only following termination of employment but also as a challenge to demotions and decisions to refuse to employ or promote individuals

## What action should employers take?

- Review your recruitment, equal employment opportunity (EEO), disciplinary and termination procedures – do they guard against ‘discriminatory’ or ‘wrongful’ treatment? Amend where necessary
- Educate managers and supervisory staff on the risks of general protections claims plus your relevant procedures

## How can Ai Group assist you to become Fair Work Ready?

- Advising you on the detail and implications of these new provisions for your business and the steps you need to take to minimise your legal risk
- Provision of training for managers and supervisors
- Drafting, reviewing and/or amending your recruitment, EEO, disciplinary, and termination procedures
- Guiding you through particular situations that may give rise to a general protections claim to minimise your risks

If your business is faced with a General Protections claim, our experienced advisers with legal and other relevant qualifications can represent you in FWA and/or Federal Court proceedings.

# Transfer of business

## What are the key changes?

- New test for determining whether there has been a 'transfer of business', replacing 'transmission of business' provisions based on the nature of the work performed by the transferring employee, not the character of the business
- Industrial instruments (eg awards, collective agreements and AWAs/ ITEAs) of the old employer may apply to the new employer in a much broader range of situations, including where:
  - the employees continue to perform substantially the same work even if the businesses of the old and new employer are quite different
  - work is outsourced or insourced
  - employees move between companies in the same corporate group
- Transmitted instruments no longer automatically terminate after 12 months but will continue to apply until terminated by FWA or replaced by a new registered enterprise agreement
- Changes to rules regarding recognition of prior service for accrued entitlements

## What action should employers take?

- Examine the likely impact and risks of the new provisions if you are considering:
  - purchasing or selling a business (or part of a business);
  - outsourcing or insourcing any functions within your business eg IT, maintenance;
  - operating as an outsource provider, including a labour hire firm; or
  - restructuring within your corporate group involving a transfer of employees from one entity to another
- Explore options available to avoid or minimise the impact of transfer of instruments
- Ensure your business will be / is compliant with instruments that will / do apply through transfer of business

## How can Ai Group assist you to become Fair Work Ready?

- Advise you on the details and implications of the provisions as they apply to your particular business and situation
- Conduct due diligence on behalf of vendors or purchasers
- For outgoing employers, advise on your potential redundancy and other obligations which may arise from a transfer of business and solutions to avoid or minimise your exposure
- For incoming employers, advise you on potential solutions to avoid or minimise the impact of undesirable instruments, including:
  - applying to FWA for non-transfer orders where available
  - applying to have a transmitted agreement terminated
  - negotiation of a new collective agreement to replace a transmitted instrument(s)
  - use of award enterprise flexibility provisions
- Preparation of requisite notification to employees and letters of offer / employment contracts
- Compliance Audit Service to ensure you are compliant with any industrial instruments which do apply to your business as a result of a transfer of business

# Ai Group – Assisting your business to be Fair Work ready

## Membership Services

Employers are encouraged to access the full range of information services available to them as part of their Ai Group membership including:

- **BIZassistInfoline** Tel: 1300 78 38 44
- **BIZassistManual** Section 3: Managing Your Employees
- **BIZassistBriefings** Conducted three times per year in metropolitan and regional locations
- **BIZassistUpdates** General workplace relations and award updates
- **BIZassistNetworks** Various HR networks
- Member-only sections of our website [www.aigroup.com.au](http://www.aigroup.com.au)

## Consulting Services

With our vast industry experience gained from working for businesses of all sizes in a wide variety of sectors, proven capability in HR and workplace relations, and employment law expertise - Ai Group's Workplace Relations Advisers are the best placed to assist with all your people issues. Our consulting services include:

- Tailored, on-site strategy sessions covering the Fair Work Act and changes to awards through the award modernisation process
- Review and drafting of employment policies
- Negotiation, review and approval of enterprise agreements
- Representation in proceedings for unfair dismissal, workplace discrimination or harassment, dispute resolution or other workplace relations and equal opportunity matters
- Advice on performance management and disciplinary matters, the management of ill and injured workers and recruitment selection
- Assistance with termination of employment, including redundancy and transfer of business issues
- Incident investigations (e.g. responding to complaints of harassment or bullying)
- Major project assistance, including project specific industrial relations management
- Development and implementation of workplace relations strategies, including restructuring job redesign, redundancy, outsourcing/off-shoring, transfer of business and outplacement
- Advising in relation to workplace relations compliance investigations
- Conducting compliance and management audits
- Provision of onsite HR/IR resources

**To find out more, contact: David Hargraves 02 9466 5533, Simone Caylock 03 9867 0179, Peter Nolan 03 9867 0175, David Miller 07 3244 1733 or or Clive Starr 08 8300 0141**

## Legal Services - Ai Group Legal

Ai Group Legal Pty Ltd, a separate incorporated legal practice wholly owned by Ai Group, offers specialist workplace relations legal services, including:

- Drafting employment contracts
- Advice and representation regarding employment contract disputes and common law claims
- Breach of restraint of trade and confidentiality provisions in employment contracts
- Urgent court hearings in response to strikes and industrial misconduct

**To find out how Ai Group Legal can assist, call 1300 554 581, visit [www.aigrouplegal.com.au](http://www.aigrouplegal.com.au) or contact Craig Taylor 03 9867 0242, Ron Baragry 02 9466 5532 or David Miller 07 3244 1733**

## Training & Seminars

Ai Group offers a Fair Work Essentials suite of training programs in addition to our popular employment, workplace relations and equal employment opportunity programs and our new 'HR strategies' training series. All programs can be tailored to suit your particular needs and can be run on-site during or outside normal working hours.

**For further information, visit [www.aigroup.com.au/portal/site/aig/training](http://www.aigroup.com.au/portal/site/aig/training) or contact Fiona Green 03 9867 0276, Courtney Girdwood 02 9466 5546, Heather Bownds 07 3244 1725 or Lorraine Burrows / Andrea Haren 08 8300 0137**

## Publications

Ai Group provides a range of employment publications and handbooks which offer user-friendly and practical information on how to successfully manage your employment relationships. For an annual subscription, updates will be sent to you when new information is available and when legislative changes or case law developments occur, keeping you up-to-date on the latest issues.

**Visit [www.aigroup.com.au/manuals](http://www.aigroup.com.au/manuals) to order online**



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