

THE FAIR WORK ACT 2009

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Fair Work Act 2009

- **The *Fair Work Act 2009*** (Cth) replaces the *Workplace Relations Act 1996* (Cth) [575 pages]

many parts commenced operation on 1 July 2009, remaining parts commence 1 January 2010

The following complementary legislation also has commenced

- Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 [293 pages]
- Fair Work (Registered Organisations) Act 2009 [329 pages]
- Fair Work Regulations 2009 [142 pages]
- The National Employment Standards [50 pages]
- Small Business Fair Dismissal Code [3 pages]

= 1347 pages so far (August 2009)

Several Former Government agencies have been merged to form FWA (Fair Work Australia)

Fair Work Australia

commenced 1 July 2009 replacing the bodies below, some of which are finalising matters currently in progress.

Australian Industrial Relations Commission (AIRC)

Australian Industrial Registry

Australian Fair Pay Commission (AFPC)

Australian Fair Pay Commission Secretariat

Workplace Authority

Office of the Fair Work Ombudsman — commenced 1 July 2009 replacing the Workplace Ombudsman

Office of the Fair Work Ombudsman Building Industry Inspectorate — commences 1 February 2010, replacing The Australian Building and Construction Commission (ABCC)

FWA:

- Intended to be a 'one stop shop' on workplace relations issues - with functions of:
 - Approving enterprise agreements (role of former Workplace Authority)
 - Overseeing the new enterprise bargaining arrangements
 - Hearing applications for relief from the transfer of business rules
 - Resolving disputes, hearing applications to prevent industrial action and issuing orders
 - Setting and adjusting minimum wages (role of former AFPC) and employment conditions
 - Determining unfair dismissal claims
- Promoted as being less formal, more accessible and less adversarial in the resolution of disputes than the former system - in practice may be more complex.
- The "one-stop shop" will be truly 'National' if States refer their IR powers to the Australian Government and then will cover **almost all** Australian employers.
- FWA members transferred from the AIRC are used to working as a tribunal with strong procedural fairness and engagement principles, including a right to appear to "have a say"; they will need to decide whether to go back to the pre-WorkChoices AIRC system of hearings, or operate like the Workplace Authority "on the papers" submitted.
- The work previously carried out by the Workplace Ombudsman now is conducted by a division of FWA called the **Fair Work Ombudsman** which has an Inspectorate, able to investigate and enforce:
 - Breaches of awards and the NES
 - Breaches of employment contracts

The aim of creating one national system that applies to all employees including non-corporate employees (other than public service) depends upon the States referring powers. So far:

- **Victoria –yes** for private sector and public sector except some public sector State rights
- **SA –yes** for private sector
- **Tasmania –yes** for private sector and local Government
- **Queensland –in-principle yes** "subject to a number of issues being resolved" including local government and appropriate compliance arrangements (Unions are seeking to review the system after one year and before effective referral)
- **NSW – maybe** - productive discussions continuing, but NSW will not determine its position until the remaining elements of the Fair Work reforms are enacted. No publicity to this matter recently.
- **WA** (review of WA IR system to occur to report in October)

Minimum entitlements (1 January 2010)

The Government's safety net comprises two planks:

National Employment Standards (NES): which comprise 10 legislated minimum conditions:

These apply to **all** employees of **corporations** (proprietary limited [Pty Ltd] companies and employees of partnerships and sole traders in any State that refers powers/enacts mirror legislation)

Modern awards

- Apply as a “common rule” across occupations and industries
- Will not apply to employees whose guaranteed earnings exceed approx \$106,000 per annum (
- Contain a flexibility clause permitting an employer and employee to agree to vary parts of the award (on overtime, penalty rates, allowances, leave loading and times of work) - the change must be better for the employee!

Transitional questions

- Will NES apply to employees who are covered by “within-term” and “time-expired” collective agreements/AWAs? **Yes, from 1 January 2010.** Means if your agreement has provisions that do not equal NES, the NES will apply.
- Will modern awards apply to employees who are covered by “within term” and “expired” collective agreements? **Only base rates of pay, not the rest of the award.**

National Employment Standards

- 1. Maximum weekly hours of work (plus reasonable additional)**
- 2. Requests for flexible working arrangements**
- 3. Parental leave and related entitlements**
- 4. Annual leave**
- 5. Personal/carer's leave and compassionate leave**
- 6. Community service leave**
- 7. Long service leave**
- 8. Public holidays**
- 9. Notice of termination and redundancy pay (Note service from 1 Jan 2010 unless pre-existing redundancy entitlement)**
- 10. Fair Work Information Statement**

Award Modernisation

All federal awards and all Notional Agreements preserving State Awards are being reviewed, consolidated and rewritten as Australia wide awards called '**modern awards**'.

The total number of awards will be dramatically reduced and no State differences are permitted.

Generally, matters covered by the National Employment Standards are not repeated in awards, unless it is to improve the benefits or make provisions for special circumstances.

The review separated awards into 5 groups. After hearing initial submissions (there were hundreds) the AIRC which will complete the award modernisation task before it is abolished, proceeded to prepare and then issue '**exposure drafts**' of each modern award. After taking written submissions, there have been brief hearings (at which no new material is admitted) and then the AIRC issues the final modern award. **All modern awards commence operating on 1/1/10**

The reviews of **Priority Stage** and **Stage 2 Modern Awards** have been finalised and awards which commence on 1/1/10 have been issued.

Exposure drafts of **Stage 3 Modern Awards** have been issued, comments have been taken and the final awards are due for issue on 4 September 2009 including the **Entertainment** group of awards, which includes recreation activities.

Exposure drafts for **Stage 4 Modern Awards** are due 25 September 2009, with final awards due on 4 December 2009

Ministerial Reference Changes: The Minister, Julia Gillard, has the power to issue 'references' about how modernisation should take place. Her references include:

- Clerical award not to exclude employees earning >\$45,000.
 - Issued in response to Union concern: Employees who are not high income earners should only be exempt from awards where this has occurred in a **wide range** of pre-reform agreements and awards in an industry.
- FWA to create a modern award for the restaurant/catering separate from licensed clubs and hospitality.
 - Issued in response to Employer concern about significant cost increases if Hospitality Industry (General) Award 2010 is applied to restaurants, cafes and catering services
 - Restaurants, etc, are to have a "penalty rate and overtime regime" that takes into account the industry's **low** 3.8% average **profit margin** (compared to 12.7% for all industries) and that the industries peak operating times on weekends and evenings - Unions are furious; Other employers lobbying for similar clauses.

Exclusion of coverage

- Employees who earn over approx. **\$106,000** annually (\$100,000 as indexed from 27 August 2007 and then annually from 1 July) will **not** have a Modern Award apply to them

- Items **included** in \$106,000:

- Wages; amounts applied as the employee directs; agreed value of non-monetary benefits

- Items **not included** in \$106,000:

- Amounts which cannot be determined in advance; eg, incentives, commissions and bonuses, and, reimbursements of expenses; compulsory contributions to superannuation

Superannuation

- Modern Awards name:

- a default (industry) fund or funds

- any (complying) superannuation fund to which the employer was making superannuation contributions before 12 September 2008.

- Employer must select a default fund for employee choice from these funds, unless the employer enters an enterprise agreement that names a fund/s

Modern Awards – Individual Flexibility Agreements

Flexibility permitted on:

- ◆ When work is performed
- ◆ Overtime and penalty rates
- ◆ Allowances
- ◆ Leave loading
- ◆ Could trade some conditions, eg, regular over award payment in lieu overtime

Disadvantages:

- ◆ Cannot be a condition of employment
- ◆ Employee must be better off
- ◆ 28 day termination by either party
- ◆ **Could be used by unions to obtain legally enforceable extras**

Transfer of Business – operative for transfers of business from 1 July 2009

- Significant changes to rules for the transfer of industrial instruments on transfer of business
- Critical issues:
 - whether a “transfer of business” has occurred
 - whether (and for how long) enterprise agreements and named employer awards apply to the new employer
- **Changes:**
 - the **test** for whether a transfer of business has occurred
 - the removal of the 12-month “transmission period” replacement by an **unlimited period**
 - concept of “**transferring work**” in the new business which attracts coverage by transferred enterprise agreements and named employer awards.
- Will be more complex for the purchaser of a business to run the business the way it wants.
- New employer will need to take steps, to negotiate and enter new enterprise agreement or, transferring employees will be covered for an indefinite period by patchwork of agreements
- Employees of the old employer who become employed by the new employer **within 3 months after** their termination by the old employer have been transferred, if
 - ✓ Work is substantially the same (even if minor differences)
 - ✓ There is a connection between the old employer and the new employer, established by:
 - Transfer of assets, Outsourcing, Insourcing, Related corporations
- Applications to the FWA may be made by the new employer for an order that the old employer’s enterprise agreements (or certain terms) do not cover the new employer. Tests applied by FWA will include:
 - Comparability of terms, Views of employees, Negative impact on business for agreements to transfer
- FWA may vary enterprise agreements to remove terms that are not capable of meaningful operation – eg:
 - participation in the old employee’s share plan
 - defined benefits superannuation fund

Unfair dismissal

Who can bring an unfair dismissal claim?

- A person is protected by unfair dismissal if the person is:
 - Employed by a minimum period of service
- 12 months (small business) - 6 months others
- Covered by a modern award, enterprise agreement or earning less than the \$ threshold
- Small business = 15 full time equivalent employees – From 1 January 2011 15 employees

What is an 'unfair dismissal':

- Was there a termination of employment at the initiative of the employer
 - Constructive dismissal
 - No dismissal where fixed term employees, project employees, seasonal employees and some casuals
- Was the dismissal harsh, unjust or unreasonable
- Is the dismissal consistent with the Small Business Code
- Is the dismissal a case of genuine redundancy

Small Business Fair Dismissal Code:

Summary Dismissal

- The employee can be dismissed for serious misconduct e.g.:
 - stealing money or goods, or fraud, or violence, etc
 - Serious OHS breach

Other dismissal

- For unsatisfactory performance,
 - Clearly warn the employee of the problem, preferably in writing, and that dismissal is possible.
 - Give the employee an opportunity to rectify the problem
 - Offer to provide training or opportunity to develop
 - Before termination, tell the employee the reasons for the termination
 - Allow the employee to have another person present (not a lawyer)

Redundancy tax changes

- Definition:
 - from 'bona fide' to 'genuine' redundancy
 - a payment "received by an employee who is dismissed from employment because the...position is genuinely redundant"
- Necessary components for 'genuine':
 1. The payment must be received **in consequence of** the termination.
 2. The employee must have been **dismissed from employment**.
 3. That dismissal must be **caused by the** redundancy of the employee's **position**.
 4. The redundancy payment must be made **genuinely** because of the redundancy.

NOTE - It is a very technical area of law, if in doubt get specialist advice

Unfair dismissal

Process

- Hearing or conference is a matter for FWA
- Remedy can be decided and order made whether the matter is heard as a conference or a hearing
- FWA able to take on a more inquisitorial role
 - Will gather information before determining whether a conference or hearing will occur
 - Conferences informal, private
 - Determinations can be made in conferences and hearings
 - Hearing can occur before, during or after conducting a conference
 - FWA can require parties to attend conferences
 - FWA can require documents

Strategy

- Check compliance with act before termination of employment
- Caution with documents – effectively discoverable
- More detailed preparation before conference needed under new regime:
 - Witnesses
 - Documents
- Consider representation issues:
 - Briefing before conference
 - Assistance with scripts and arguments

Workplace Rights

General protections in the workplace:

- The Act prevents “adverse action” being taken:
 - against persons, in relation to “workplace rights”
 - against persons, in relation to “industrial activities”
 - against employees, or prospective employees because of discriminatory reasons
- Concept is that the employee who is entitled to a benefit under a workplace law or instrument, is entitled to initiate proceedings or otherwise inquire under a workplace law or instrument, without incurring adverse action.
- Also, in relation to employees, if the employee is able to make a complaint or inquiry in relation to his or her employment, no adverse action can be taken. There is no limitation on the type of complaint or inquiry other than it must be related to their employment

Adverse action

- Generally refers to circumstances in which the first person (employer, prospective employer, principal, employee, independent contractor) alters the position of the second person in the arrangement (employee, prospective employee, independent contractor, employer, or principal) to their prejudice
- Dismissal, refusal to employ, injury or alteration to employment, refusal to supply goods or services.

Prospective employees

- A prospective employee is taken to have the workplace rights he or she would have if he or she was employed in the prospective employment by the prospective employer

Exceptions

- Offer of employment conditional on accepting a guarantee of annual earnings
- Refusal to employ a prospective employee because of transfer of business provisions

Industrial activities

- Prohibits adverse action against another person because of:
 - being, or not being an officer or member of a union
 - engages or proposes to engage in certain “industrial activities”or
 - does not engage, or proposes not to engage, in certain other “industrial activities”
- Expanded definition of ‘industrial activities’

Discrimination

- Prohibition against employees or prospective employees being discriminated against because of:
 - Race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin

Discrimination – Exclusions

- Any action that is not unlawful under any anti-discrimination law in the place where the action is taken
- Action taken because of the inherent requirements of the particular position
- Relating to “institution” (not defined) relating to religion

Other matters which may be 'adverse action'

- Coercion
 - Workplace rights
 - Industrial activities
 - Employ, engage or allocate particular duties
 - Misrepresentations
 - Workplace rights
 - Industrial activities
 - Sham contractor arrangements
-
- Undue influence or undue pressure: s.344: An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:
 - make, or not make, an agreement or arrangement under the NES;or
 - make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2); or
 - agree to, or terminate, an individual flexibility arrangement; or
 - accept a guarantee of annual earnings; or
 - agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

Examples

- Overlooking an employee for promotion because the employee has made an internal complaint against another employee?
- Not rostering an employee to work overtime, because the employee has not agreed to an individual flexibility agreement?

Relevant rules

- Fair Work Ombudsman powers
- Multiple reasons for action
- Reason for action to be presumed unless proved otherwise (reversal of onus of proof)
- Six year time limit

Standing and stakes

- The following persons may apply to the Federal Court (Fair Work Division) for orders relating to the contravention:
 - a person affected by the contravention
 - a union
 - an inspector
- Remedies
 - Maximum civil penalties: \$6,600 for individuals; \$33,000 for companies
 - Any order the court considers appropriate

Some major differences from Workplace Relations Act:

- Goes beyond complaints under industrial laws and protects employees in relation to grievances at work
- At first glance, dispenses with concepts of “indirect discrimination” and “direct discrimination” BUT adverse action includes “discrimination” against employees and prospective employees
- Attributes do not include “persons associated”
- Onus of proof
- Time limit
- Civil penalties

ACTU reaction:

- The provisions are “new and exciting”
- Calls for unions to “bring these law to life”
- “Some hurdles...but a lot of springboards as well”

Implications for employers:

- Important to keep records of decisions
- Supervisor training
- Policies and procedures

• Permit holder has a right of entry:

- To hold discussions
- To investigate a possible breach of the Fair Work Act 2009 or a Fair Work instrument
- For OHS purposes under relevant legislation

• Permit holder must:

- comply with reasonable request that discussions or interviews take place in a particular part of the premises; that they take a particular route to reach that location; comply with any reasonable occupational health or safety request

• Records:

- Unions can look at and copy the employment records of employees only where those records are relevant to the suspected breach
- Non-member records will not be able to be inspected or copied by a permit holder unless the non-member gives written consent or if Fair Work Australia agrees
- An employer is not required to provide documents if doing so would otherwise breach a state or federal law

• Misrepresentation

- tougher laws

Fair Work Act and the “negotiating” process

- New obligations on employers including obligation to advise employees of “representational” rights (s. 173)
- Employee entitled to appoint **Bargaining Representative (BR)** – (s. 176, Fair Work Bill) – but employee organisation (union) will be BR by default

Representational Issues

- BRs will include any union that has members and represents employees who undertake work that is covered by agreement - or persons nominated by employees (ss 176(1)(b) and (3))
- If employer refuses to bargain BR may apply for **majority support declaration** (s.236)
- Majority support declaration can trigger a **bargaining order** (s. 230(2)(b))

Good Faith Bargaining Requirements

All bargaining representatives subject to good faith bargaining “requirements” (s. 228) – but no requirement to reach agreement or make concessions! Obligations include

- Attending and participating in meetings at reasonable times;
- Disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- Responding to proposals made by other bargaining representatives in a timely manner;
- Giving genuine consideration to proposals of other bargaining representatives (and giving reasons for the response to those proposals); and
- Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

A failure to comply with Good Faith Bargaining Requirements

- Bargaining representatives may seek **bargaining order** (s.230(3)(a))
- FWA must be satisfied of failure to comply with GFB requirements
- Order must specify action required to comply with the requirements (s.231(1)(a) – ©))
- Failure to comply with bargaining order is “civil remedy provision” – may be factor in application to terminate or suspend protected industrial action (s. 423)

Availability of Scope Orders

- BR may seek scope order – means that FWA has power to determine who should be covered by agreement (s. 238)
- Application can be made if BR concerned that negotiations not proceeding fairly or efficiently - or believes that agreement will not cover appropriate employees
- FWA may make order if satisfied that it will promote fair and efficient conduct of negotiations

“Last Resort” Arbitration

- Not part of ALP policy proposals – not consistent with legislative statement that no “requirement” to reach agreement
- First step is for FWA to make “**serious breach declaration**” – where breach of GFB requirements “serious and sustained” and has “significantly undermined bargaining” (s. 235)
- This results in 21 day “post-declaration negotiating period”
- If no agreement after 21 days FWA (sitting as Full Bench) must make **bargaining-related workplace determination** “as quickly as possible” (s. 269(1))
- Workplace determination to contain range of “agreed terms”, core and mandatory terms, and FWA’s determination about matters still in dispute (ss. 272 – 274)

Other powers of FWA to resolve bargaining disputes

- BR may apply to FWA to seek resolution of bargaining dispute (s. 240)
- This similar to powers of AIRC under pre-reform WR Act (but different from Work Choices!)
- Parties may agree for FWA to “arbitrate”

Industrial Action

- Not much different to Work Choices
- Based on scheme that has been in Act since 1994 – availability of “protected action”
- But concept of *bargaining periods* has gone
- Act differentiates between ‘employee claim action’; ‘employee response action’; and ‘employer response action’
- Has not removed requirement of protected action ballot
- Changes in rules concerning payment for periods of industrial action.

Employee Claim Action

Must:

- Be about or be reasonably believed to be about “permitted matters”
- Be authorised in protected action ballot (s. 409)
- Not be part of pattern bargaining
- Not relate in significant way to demarcation dispute
- Comply with various notice requirements (ss. 413, 414)

Some Other changes to “Employee Action”

- All employees may initiate protected action even where union negotiating agreement (ie not just union members) - s. 409
- Involvement of “non-protected” persons in action will not automatically deny protected status to participants

Employer Response Action

- Action taken in response to action by BR of employees (or employees) – (s. 411(a))
- Must not affect continuity of employees’ employment (s. 411(a) – (d))
- Work Choices limited employer action to “lockout” (Fair Work Act provides a wider definition)
- BUT employer response action must be taken in response to action by employees (differs from Work Choices)

Common Requirements for Protected Industrial Action

- Cannot relate to greenfields agreement or multi-enterprise agreement
- BR must be “genuinely trying to reach agreement” (s.413(3)) – replicates s. 170MP of pre-reform WR Act.
- Notice requirements to be met – 3 working days for employee claim action
- BR and/or employees must have complied with any orders concerning industrial action that may be in place
- No action before NED (s. 413(6) and 417)

Protected Action Ballots

- FWA must make order for protected action ballot if satisfied that applicant “genuinely trying to reach agreement”
- New provision is that BR can make application for ballot within 30 days before NED (s. 438) – ie do not have to wait for agreement to expire.
- Where AEC is ballot agent, C’tth liable for all costs – and if alternative ballot agent the applicant must pay

Jurisdiction to Prevent Industrial Action

- FWA has power to make orders that action cease for “stop period” (s. 418) (New version of s.496 of WR Act) – still mandatory prohibition as in Work Choices
- Where appears to FWA that **unprotected** industrial action is happening, threatened or probable, or being organised

- Some changes concerning requirements for “protected action” (eg removal of provision that action not protected if “unprotected” workers took part; and no necessity for action to be authorised by union committee of management)
- Application must be determined within 2 days (so far as practicable) – otherwise interim orders
- New provision in s. 418(4) – allows for action to continue after “stop period” without new ballot in certain cases eg where failure to give necessary notice.
- Application required to be determined within 2 days (so far as practicable) – otherwise interim orders

Circumstances where FWA may make order terminating or suspending industrial action

Section 423 - (**Discretion** to terminate industrial action) (formerly s. 431 – termination of Bargaining Period)

- Circumstances where the industrial action is causing or threatening to cause **significant economic harm** to the *direct parties* to the proposed agreement
- In case of threatened harm – FWA must be satisfied that harm is “imminent”
- Matters for FWA to consider – nature and degree of harm, capacity of party to bear harm, whether parties genuinely unable to reach agreement, and have met GFB requirements

Circumstances where FWA must make order terminating or suspending industrial action

Section 424 (where *obliged* to terminate action)

- Must make order where satisfied that action is threatening to endanger life, safety or health etc, or to cause significant damage to **Australian economy** or important part of it.
- s. 424 deals with serious cases of industrial action extending to section of community
- Application must be determined within 2 days (or else interim order made)
- Application may be initiated by FWA, a BR, or the Minister

Effect of Order terminating Industrial Action

- If order made under ss 423 or 424 (or Ministerial Direction made) this results in 21 day **post-industrial action negotiating period** (s.266(3))
- And if parties do not reach agreement on all issues after 21 days – FWA (constituted as Full Bench) must make **industrial action workplace determination** (s.266(1))
- Again, case of “last resort arbitration” (with the result that s.423/424 orders are unlikely to be pursued by employers)

Payments for Periods of Industrial Action

- Distinction between “protected and “unprotected” action – 4 hour minimum deduction only applies in case of unprotected action (ss. 470 and 474)
- Changes with respect to overtime bans and “partial work bans”
- In case of overtime bans – employees not paid for period of bans but ordinary hours not affected
- In case of partial work bans employer has *a choice*.

Payment for Period of Partial Work Bans

Employer can choose to:

- Accept partial performance and continue to pay full salary
- Lockout employees
- Refuse to accept partial performance and stand down employees (where this permissible) until they are willing to perform duties
- Issue a “partial work notice” and apportion pay in accordance with work performed FWA has power to resolve disputes in such matters

Agreement-making

How will agreement-making change under the Fair Work Act?

Enterprise agreements (name changed back from 'Collective Agreements')

- The new agreement-making provisions will become operative on **1 July 2009**.
- The Act establishes a process for making 'enterprise agreements' with significant changes to:
 - the existing process for collective agreements; and
 - the content that may be included in enterprise agreements

What Changes?

- The Act provides for 3 kinds of enterprise agreements:
 - Single enterprise (1 employer and multiple employees)
 - Multiple enterprise (two or more employers); and
 - Greenfields
- The concept of union or non-union agreements has been removed
- Agreements must be approved by Fair Work Australia and will come into operation on approval

What can be included in agreements?

An agreement may now only contain **permitted matters**. These include:

- matters pertaining to the relationship between an employer and the employees who will be covered by the agreement;
- matters pertaining to the relationship between the employer(s) and employee organisations covered by the agreement;
- deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
- how the agreement will operate.

This is a clear extension to the old concept of "matters pertaining to the employment relationship" - it will allow unions to negotiate over matters such as deduction of union fees.

What must be included in agreements?

The following terms must be included in all enterprise agreements:

- a **nominal expiry date** for a maximum of 4 years;
- a **dispute settlement term** that allows an independent external body to settle disputes;
- a **flexibility term** that enables employees and employers to agree to vary the effect of the agreement in relation to a particular employee;
- a **consultation term** that requires employers to consult employees about major workplace change;
- **rates of pay** in the agreement cannot provide for less than the base rate payable under the modern award or the national minimum wage order.

An agreement must not contain certain terms

- Discriminatory terms
- Terms that breach freedom of association provisions
- Bargaining service fees to unions
- Alternative unfair dismissal remedies
- Right of entry provisions which are inconsistent with the Act
- Terms that purport to authorise industrial action during the life of the Agreement

No disadvantage test kicked out!

- FWA will apply the Better Off Overall Test, the **BOOT**:

“for the purposes of determining whether an enterprise agreement passed the BOOT, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class then if the relevant modern award applied to that class, FWA is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.”

Treatment of existing industrial instruments

(1) Continuation of instruments

- All existing WR Act instruments will continue as “**transitional instruments**” until they are terminated or replaced by a Fair Work Act instrument

(2) Rules governing variation and termination of old agreements

- The circumstances in which transitional instruments can be varied will be limited.
- The clear exception being pre-reform certified agreements that can continue to be varied and extended until 31 December 2009.

How the new safety net will impact all agreements (from 1 January 2010)?

- The NES will apply to all employees – no matter what instrument they are covered by.
- When calculating NES entitlements:
 - generally service prior to 1 January 2010 will count as service for the purpose of calculating NES entitlements
 - with redundancy, pre 1 January 2010, service will only count where the employee had a right to redundancy pay immediately prior to 1 January 2010.
- All employees covered by any agreement, must pay their employees at least the minimum rate of pay specified in a modern award for each hour worked.

What are the key dates to know?

- Pre-reform agreements and ITEAs can still be made until **31 December 2009**.
- **Prohibited content rules** will continue to be set by the Act under which they were made, for example, prohibited content rules under the WR Act will continue to apply to agreements between 27 March 2006 and 30 June 2009.
- **From 1 July 2009** the FW Act will require you to start bargaining under the new Fair Work system.
- Because the NES and modern awards will not be operational **between 1 July 2009 and 1 January 2010** – any agreements made during this time will be assessed against the No Disadvantage Test (rather than the BOOT test).