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FAIR WORK ACT 2009: IMPLICATIONS FOR AGED CARE PROVIDERS



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INTRODUCTION

- *Fair Work Act 2009* (Cth) (“**FW Act**”) replaced the *Workplace Relations Act 1996* (Cth) (“**WR Act**”) on 1 July 2009, some provisions will not commence until 1 January 2010.
- The FW Act covers four key areas:
 1. Minimum standards for employees including wages, hours, leave, entitlements, protections, agreements, unfair and unlawful dismissals
 2. Operation of unions, including collective bargaining
 3. Specialist commission that helps resolve disputes and sets standards
 4. Industrial action



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OUTLINE

- Objectives of FW Act
- Transitional provisions
- Compliance and enforcement
- Rights and Responsibilities
 - Protection from Dismissal and Adverse Action
 - Small Business Fair Dismissal Code
 - Freedom of Association
 - Right of Entry
 - Industrial Action



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OUTLINE

- Safety Net of Minimum Entitlements
 - National Employment Standards (“NES”)
 - Modern Awards
 - Coverage of Modern Awards
 - Take Home Pay Orders
 - High Income exclusion
 - Enterprise Agreements
 - Nature and content of agreements
 - Role of Unions
 - Bargaining Process
 - Approval Process



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OBJECTIVES OF FW ACT



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FW ACT OBJECTIVES

- The objectives of the FW Act include:
 - Ensuring the creation of a safety net of fair, relevant and enforceable minimum terms and conditions (.e.g. NES, modern awards, enterprise agreements)
 - Encouraging collective bargaining
 - Assisting employees balance work and family responsibilities
 - Ensuring Freedom of Association



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FW ACT TOP 10

1. Create Fair Work Australia (“**FWA**”)
2. Changes to unfair dismissal laws and introduction of the “Small Business Fair Dismissal Code”
3. Changes to unfair dismissal law during redundancies
4. Establish new remedies against discrimination
5. Consolidate existing minimum standards into National Employment Standards and national Modern Awards
6. Shift from individual to collective agreement making
7. Create individual flexibility agreements
8. Good faith bargaining with bargaining representatives
9. Arbitration during disputes
10. Create new rules for transfer of business



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TRANSITIONAL PROVISIONS



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FAIR WORK (TRANSITIONAL PROVISION AND CONSEQUENTIAL AMENDMENTS) ACT 2009

- From 1 July 2009 to 31 December 2009 there is a bridging period between the WR Act and the FW Act
- During this period, the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (**“Transitional Act”**) will apply to certain matters
- Collective and Individual Transitional agreements made under the WR Act continue to operate unless replaced or terminated



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NO DETRIMENT TEST

- Instruments made (or extended or varied) during the bridging period, and transitional instruments will be subject to the no detriment test from 1 January 2010
- To the extent that a term of a transitional instrument is detrimental to an employee, in any respect, when compared to an entitlement of the employee under the NES, the term of the transitional instrument is of no effect
- This is a line by line test which will assess industrial instruments against the NES to ensure that the employee does not suffer a detriment



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COMPLIANCE AND ENFORCEMENT



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COMPLIANCE AND ENFORCEMENT

- The FW Act creates new bodies such as:
 - Fair Work Australia (“**FWA**”)
 - Fair Work Divisions created within Federal Court and Federal Magistrates’ Court
 - Fair Work Ombudsman (“**FWO**”)



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FWA - FUNCTIONS

- Settlement of disputes
- Modern Awards
- Enterprise Agreements
- Unfair and unlawful dismissal
- Workplace determinations
- Minimum wages
- Equal remuneration
- Transfer of business
- Industrial Action
- Other rights and responsibilities



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FWO - FUNCTIONS

- Undertakes inspections and inquiries into allegations of breaches of the FW Act, modern awards, enterprise agreements, determinations and other employment benefits.
- Has an educational function for employers and employees.
- Prosecutions for breaches of the FW Act and any other legislation which confers prosecutorial powers on the FWO.



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RIGHTS AND RESPONSIBILITIES



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RIGHTS AND RESPONSIBILITIES

- The FW Act provides the following protections:
 - New unfair dismissal provisions
 - Freedom of association
 - Freedom from adverse action
 - New right of entry rules
 - Industrial action
 - Secret ballots and strike pay



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PROTECTION FROM UNFAIR AND UNLAWFUL DISMISSAL



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WR ACT EXCLUSIONS FROM UNFAIR DISMISSAL CLAIMS

1. Fixed term/task
2. Probationary period
3. Qualifying period (6 months)
4. Casuals engaged <12 months
5. Trainees
6. Earning >\$101,300 & not covered by award or prescribed industrial instrument
7. Seasonal employees
8. Employed by an employer > 100 employees
9. Genuine operational reasons



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FW ACT EXCLUSIONS FROM UNFAIR DISMISSAL CLAIMS

1. Terminated within “**minimum employment period**”
2. Earning **>\$108,300** and not covered by **modern award** or collective agreement
3. Casuals – unless they have a regular and systematic basis of employment during the ‘period’ & reasonable expectation of continuing employment on that basis



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UNFAIR DISMISSAL - FW ACT PROTECTION

- A person has been unfairly dismissed if FWA is satisfied that:
 - the person has been dismissed; and
 - the dismissal was harsh, unjust or unreasonable; and
 - the dismissal was not consistent with the Small Business Fair Dismissal Code (provided the employer is a small business); and
 - the dismissal was not a case of genuine redundancy.



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UNFAIR DISMISSAL – FW ACT PROTECTION

- A person is protected from unfair dismissal if:
 - The person is an employee who has completed a qualifying period (either 6 months or 12 months for small business employers) and:
 - A modern award covers the person; or
 - An enterprise agreement applies to the person in relation to the employment; or
 - Annual rate of earnings is less than the high income threshold (\$108,300); and
 - The dismissal was not because of a genuine redundancy
 - Unfair dismissal claims must be filed within 14 days of the dismissal coming into effect



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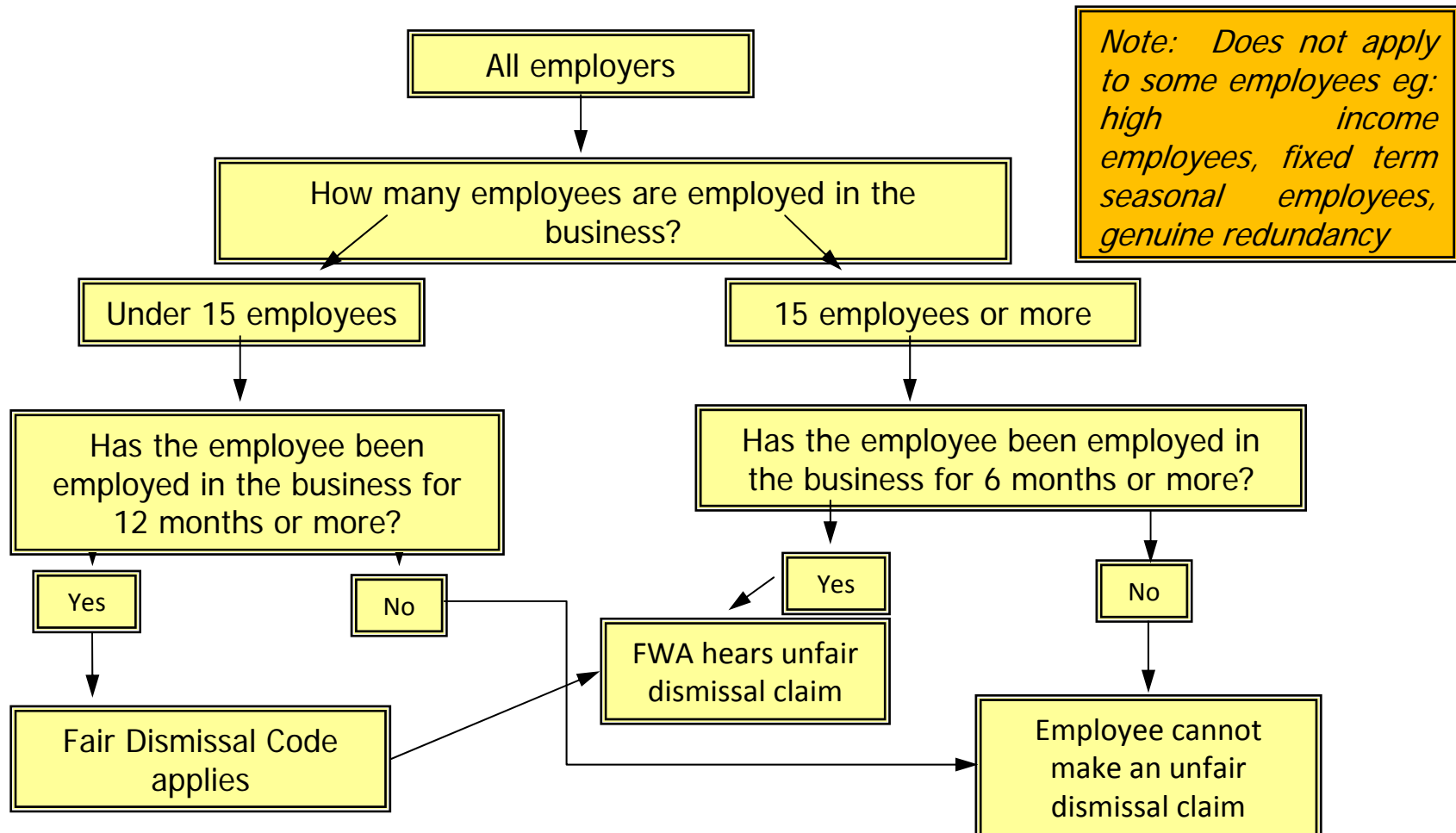
UNFAIR DISMISSAL – GENUINE REDUNDANCY

- To claim that a redundancy is genuine, an employer must demonstrate:
 - They no longer required the person's job to be performed by anyone because of changes in the operational requirements of their enterprise.
 - They have complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
 - They could not redeploy the employee to another position within the business or associated entity and/or it would not have been reasonable in all the circumstances to redeploy them.



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UNFAIR DISMISSAL SUMMARY





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REMEDIES FOR UNFAIR DISMISSAL

- Remedies FWA may consider include:
 - Reinstatement
 - Order for continuity of service
 - Order to restore lost pay
 - Compensation



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UNLAWFUL TERMINATION – FW ACT PROTECTION

- The protections against dismissing an employee for a prohibited reason are set out in the FW Act and are very similar to those contained in the WR Act
- A prohibited reason may be used to terminate someone's employment if the reason is based on the inherent requirements of the particular position concerned
- An application to FWA must be made within 60 days of the dismissal coming into effect



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UNLAWFUL TERMINATION – FW ACT PROTECTION

- Prohibited reasons include:
 - Temporary absence from work due to illness or injury
 - Trade union membership or non-membership
 - Seeking office or acting as an employee representative
 - Filing a complaint or participating in a complaint against an employer for a breach of laws or regulations to a competent administrative authority
 - 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
 - Absence during maternity or other parental leave
 - Temporary absence due to voluntary emergency management activity



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UNLAWFUL TERMINATION – PROCESS

- Conciliation is conducted between the parties
- If the matter cannot resolve at conciliation, FWA must issue a certificate terminating the matter
- If FWA considers that there is no reasonable prospect of success of the matter at trial, FWA must advise the parties of this opinion
- The Applicant can commence proceedings at the Federal Court or Federal Magistrates' Court once the notice of termination has been received from FWA.



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FREEDOM OF ASSOCIATION



FREEDOM OF ASSOCIATION

- Protections for freedom of association incorporated into new prohibition on adverse action
- Adverse action creates remedies for discrimination
- Engaging in adverse action may give rise to penalties and compensation



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ADVERSE ACTION



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ADVERSE ACTION – NEW PROTECTIONS UNDER FW ACT

- A person must not take adverse action because the other person:
 - has a workplace right; or
 - has, or has not, exercised a workplace right; or
 - proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
 - to prevent the exercise of a workplace right by the other person;
 - is or is not a member of an industrial association; or
 - engages or does not engage in industrial action; or
 - because of the person's 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.



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ADVERSE ACTION – NEW PROTECTIONS UNDER FW ACT

- Adverse action includes:
 - Dismissing a person or terminating a contract with a contractor.
 - Refusing to hire a person or to engage as a contractor.
 - Injuring a person in their employment or in their contract.
 - Discriminates against a person.
 - Alters a persons employment conditions.
 - Organises industrial action or takes part in industrial action.
 - Refusing to supply services under a contract.



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EXAMPLES OF ADVERSE ACTION

- **Hypothetical 1**

Jennifer is a part time employee and raises a concern with her employer about whether she is receiving the correct shift loading for her weekend shifts. After her query, her employer cuts her shifts in half.

- **Hypothetical 2**

Robert has a concern about a safety issue in his workplace which he raises with employer. Robert advises the employer that he is thinking about bringing the matter to the attention of his union. Robert is demoted by his employer after raising the safety concern.



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RIGHT OF ENTRY



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RIGHT OF ENTRY

- A Union can enter a workplace in relation to:
 - Suspected breach of the FW Act
 - Hold discussions
 - OHS matters
- Most of the same restrictions continue to apply, including:
 - 24 hours notice required
 - Enter during working hours, discussions during meal breaks
 - Location and route specified by employer
 - Comply with OHS directions of the employer
- Exemption notice
 - Allows Union to enter premises to access documents in relation to a contravention without giving notice of entry



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INDUSTRIAL ACTION



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INDUSTRIAL ACTION

- Restrictions on when employers and employees can take industrial action.
- Pay restrictions apply during a period of industrial action
- Current arrangements for obtaining orders to stop or prevent unprotected action will continue to apply.
- Access to the courts for breaches of common law torts will continue to be available.



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PROTECTED ACTION BALLOT ORDER

- A bargaining representative may apply to FWA for a protected action ballot order during the bargaining period for an enterprise agreement which, if granted, asks employees to vote to approve the taking of industrial action on a matter
- A bargaining representative must demonstrate they have been genuinely trying to reach an agreement during the bargaining period
- If the order is granted by FWA, a vote of employees will take place (run by the AEC or other approved entity)
- If the vote passes, industrial action can take place with no less than 3 working days notice, and must occur within 30 days of the announcement of the result of the votes (unless FWA extends the period by another 30 days)



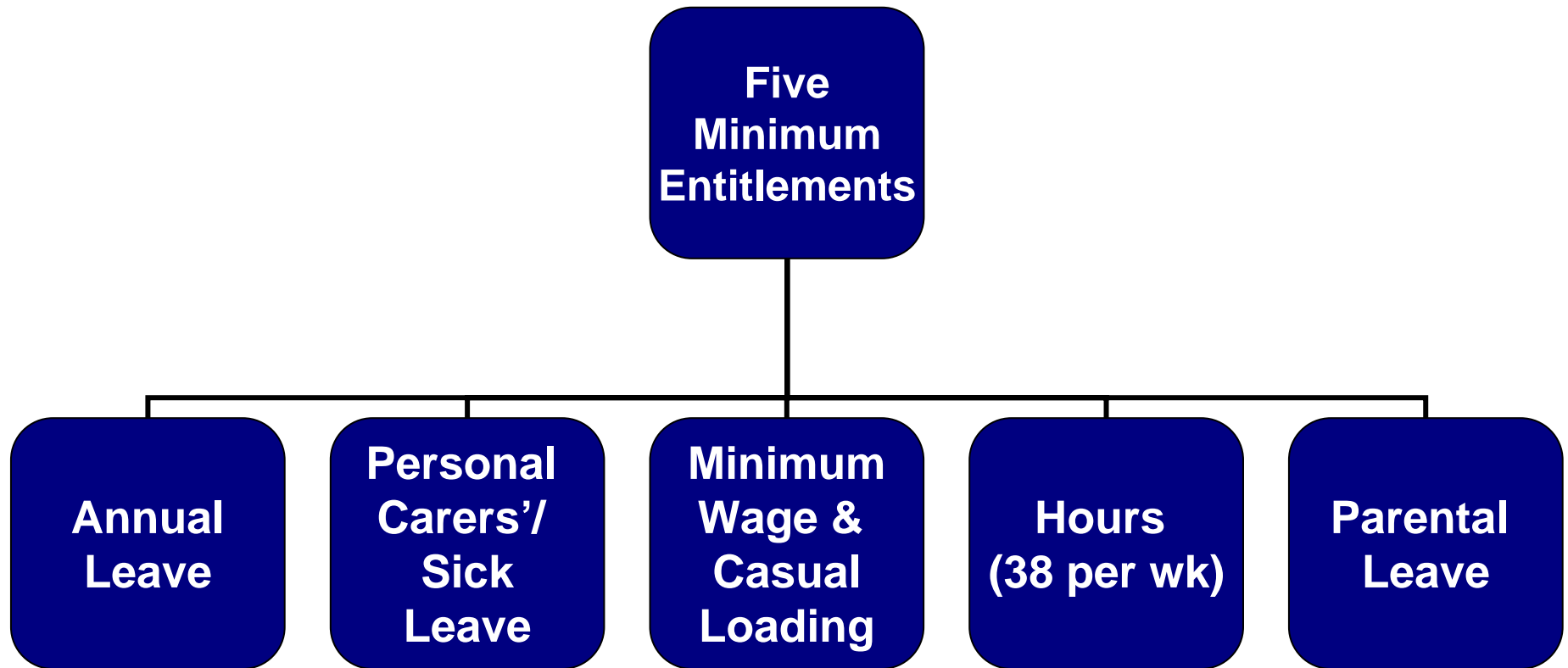
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SAFETY NET OF MINIMUM ENTITLEMENTS



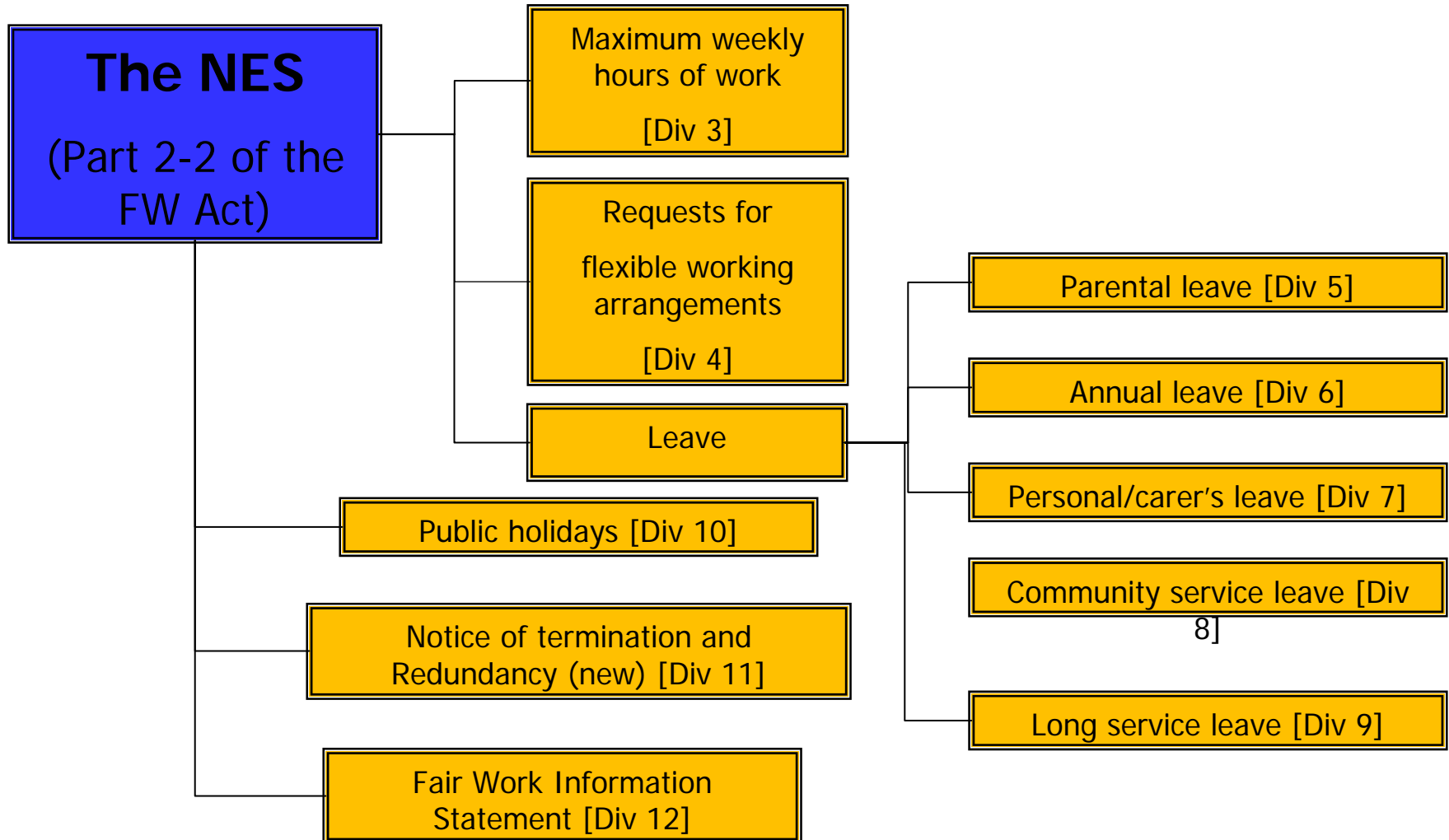
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THE OLD AFPCS STANDARD UNDER THE WR ACT





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NATIONAL EMPLOYMENT STANDARDS (NES)



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NATIONAL EMPLOYMENT STANDARDS

- Hours of work
 - Maximum of 38 hours per week for full-time employees
- Annual Leave
 - 4 weeks paid annual leave per year of service
 - 5 weeks paid annual leave for shiftworkers
 - May cash out leave entitlements
- Personal, Carers and Compassionate Leave
 - 10 days personal leave per annum
 - All accrued personal leave can be used for carers leave (WR Act capped this use at 10 days per annum)



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NATIONAL EMPLOYMENT STANDARDS

- Parental leave
 - 52 weeks unpaid leave (total between both parents/carers)
 - Right to request an additional 52 weeks leave
- Flexible work for Parents
 - Right to request a change to working arrangements if the employee has care or responsibility of child of school age
- Community Service Leave
 - Entitlement to receive paid leave (less jury fees) during jury service
 - Entitlement to unpaid leave to engage in voluntary emergency management activity



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NATIONAL EMPLOYMENT STANDARDS

- Public Holidays
 - Entitlement to be absent from work on declared public holidays
- Information in the Workplace
 - Information Statement to be provided to all new employees
- Notice of Termination and Redundancy
 - Notice of Termination 1 to 4 weeks (plus an additional week if over 45 years of age with required period of service)
 - All employees (except for small business employees) have entitlement to redundancy payments
- Long Service Leave
 - Refers to State and Territory legislation on long service leave



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AWARD MODERNISATION



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AWARD MODERNISATION

- Current awards are now being reviewed by the AIRC
- The aim of this process is to create a comprehensive set of modern awards and to reduce the number of existing awards
- The AIRC published a priority industry list and three subsequent industry lists, all of which are to be reviewed and completed by 31 December 2009
- Pre-drafting submissions have now closed for stage 4
- Exposure drafts are expected soon for stage 4 industries



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MATTERS WHICH MUST BE INCLUDED IN MODERN AWARDS

- Coverage
- Employees
- Employers
- Organisations
- Flexibility terms
- Settlement of disputes
- Ordinary hours of work
- Variation of allowances



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MATTERS WHICH MAY BE INCLUDED IN MODERN AWARDS

- Minimum wages
- Types of employment
- Hours
- Overtime rates, penalty rates and allowances
- Leave
- Superannuation
- Procedures for consultation, representation and dispute settlement
- Industry specific redundancy schemes



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MATTERS WHICH MUST NOT BE INCLUDED IN MODERN AWARDS

- Objectionable provisions
- Deductions for the benefit of employers
- Terms about right of entry
- Discriminatory terms
- Terms dealing with Long Service Leave
- State based differences



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AWARD FLEXIBILITY – MODEL CLAUSE

“Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

- *arrangements for when work is performed;*
- *overtime rates;*
- *penalty rates;*
- *allowances; and*
- *leave loading”.*



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MODERN AWARDS FOR THE AGED CARE INDUSTRY



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APPLICABLE MODERN AWARDS

- It is anticipated that at least three modern awards will apply to the Aged Care industry:
 - Aged Care Award 2010 (“ACA”); and
 - Nurses Award 2010 (“NA”); and possibly
 - Home and Community Care Award 2010



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AGED CARE AWARD 2010

- The ACA covers:
 - Employers throughout Australia in the aged care industry and their employees in the classifications listed in the Award, to the exclusion of any other modern award.
- Aged Care Industry defined as:
 - “the provision of accommodation and care services for aged persons in a hostel, nursing home, aged care independent living units, aged care serviced apartments, garden settlement, retirement village or any other residential accommodation facility including in the **home**”



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NURSES AWARD 2010

- The NA covers:
 - Employers throughout Australia in the health industry and their employees in the classifications listed in the Award, to the exclusion of any other modern award.
- Health Industry defined as:
 - “employers in the business and/or activity of providing health and medical services and who employ nurses and persons who directly assist nurses in the provision of nursing care and nursing services”



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CONDITIONS – MODERN AWARDS

- Annual Leave:
 - Standard entitlement: 5 weeks NA & 4 weeks ACA
 - 1 week extra for shiftworkers
- Definition of shiftworkers
 - NA: Full time employee, working 7 day roster, regularly working weekends
 - ACA: Any employee who works more than 4 hours on over 10 weekends or is regularly rostered to work ordinary hours outside 6am to 6pm, Monday to Friday
- Ordinary Hours
 - 6 am to 6 pm for NA and 6 am to 6 pm for ACA



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CONDITIONS – MODERN AWARDS

AC

- Shiftwork loadings (Full time employees)
 - Afternoon shift commencing at 10.00 am and before 1.00 pm = 10%
 - Afternoon shift commencing at 1.00 pm and before 4.00 pm = 12.5%
 - Night shift commencing at 4.00 pm and before 4.00 am = 15%
 - Night shift commencing at 4.00 am and before 6.00 am = 10%
- Shiftwork loadings (Part time employees)
 - Entitled to loading where their shift commences before 6.00 am or finishes after 6.00 pm



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CONDITIONS – MODERN AWARDS

NA

- Shiftwork loadings (Full time employees)
 - Afternoon shift commencing not earlier than 12.00 pm and finishing after 6.00 pm = 12.5 %
 - Night shift commencing at 6.00 pm and finishing before 7.30 am = 15%
- These loadings do not apply to RN4 and RN5
- Shifts worked on public holidays are to be paid at double time
- Shifts worked from midnight Friday to midnight Saturday are to be paid at 50% loading of ordinary rate of pay
- Shifts worked from midnight Saturday to midnight Sunday are to be paid at 75% loading of ordinary rate of pay



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CONDITIONS – MODERN AWARDS

- Maximum Length of Shifts - 10 hours both
- Break between shifts - 10 hours ACA (can be reduced to 8 hours by mutual agreement), 8 hours NA
- Break after overtime shifts - 10 hours both
- Broken Shifts:
 - Removed from NA;
 - 4 weeks limitation under the ACA;
 - No Broken Shift Allowances;
- Casual Loading - 25% both



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CONDITIONS – MODERN AWARDS

- Overtime - AC
 - F/T Employees:
 - All authorised overtime from Monday to Friday, time and a half for first two hours, double time thereafter
 - All authorised overtime on Saturday or Sunday, double time for all time
 - All authorised overtime on a public holiday, double time and a half for all time
 - P/T Employees:
 - All time worked in excess of 38 hours per week paid at time and a half for first two hours and double time thereafter, except that Sundays receive double time, and public holidays receive double time and a half for all hours worked



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CONDITIONS – MODERN AWARDS

- Overtime – NA
 - Hours worked in excess of the ordinary hours on any day or shift (or in excess of 38 hours for P/T employee)
 - Monday to Saturday = time and a half for first two hours, double time thereafter
 - Sunday = double time for all time
 - Public holiday = double time and a half for all time
 - These loadings do not apply to RN4 and RN5



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CONDITIONS – MODERN AWARDS

- Ceremonial Leave - Employee required by Aboriginal tradition to attend ceremony - up to 10 days unpaid leave per annum – both AC and NA
- Meal Break - where required to remain available or on duty during a meal break (5 hrs) will be paid overtime until a meal break is provided



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CONDITIONS – MODERN AWARDS

- Individual Flexibility Arrangements - with individuals, must be in writing and not disadvantage the employee
 - Arrangements for when work is performed
 - Overtime rates
 - Penalty rates
 - Allowances
 - Leave Loading



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CONDITIONS – MODERN AWARDS

- Public Holidays - AC
 - Full time day workers who work on a public holiday receive 150% loading, or they can have the same number of hours that they worked added to their annual leave
 - Part time employees will only be entitled to payment for public holidays for those public holidays which fall on the day that they are rostered to work. If they work on a public holiday, they are entitled to 150% loading, or to have the same number of hours that they worked added to their annual leave
 - Casual employees are entitled to 250% loading for working on a public holiday
 - These loadings are intended to replace any other shift loading



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CONDITIONS – MODERN AWARDS

- Public Holidays – NA
 - All work done by an employee during their ordinary shifts on a public holiday, including a substituted day, will be paid at double time of their ordinary rate of pay
 - An employer and the employees may, by agreement, substitute another day for a public holiday



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MODERN AWARDS – PROTECTION AND EXEMPTION



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TAKE HOME PAY ORDERS

- An employee, or a representative acting on their behalf, may make an application for a take home pay order if they have suffered a **reduction** in take home pay because of the award modernisation process
- An order will only be made where:
 - the employee's take-home pay for working particular hours (including a particular shift pattern or spread of hours) or for a particular quantity of work is less than it would have been immediately before the modern award came into operation; and
 - The reduction is attributable to the modern award



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HIGH INCOME EMPLOYEES

- Modern Awards will not apply to an employee who is a High Income Employee
- A High Income Employee is an employee who, at a particular time, earns over \$108,300 (for a full time employee, or a pro rata amount if part time) and who at that time is employed under a guarantee of annual earnings
- High Income Employees remain entitled to the protection of the National Employment Standards



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GUARANTEE OF ANNUAL EARNINGS

A guarantee of annual earnings will be made where:

- an employer gives an undertaking to an employee in writing to pay the employee an amount of earnings during a period of 12 months or more; and
- the employee agrees to accept the undertaking; and
- The undertaking and the employee's agreement occur before the start of the period referred to, and within 14 days of the employee commencing work for the employer, or a day on which the parties agree to vary the terms and conditions of the employee's employment; and
- An enterprise agreement does not apply to the employee's employment at the start of the period



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ENTERPRISE AGREEMENTS



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ENTERPRISE AGREEMENTS

The FW Act provides for:

- Single interest employers
- Multi-employer bargaining
- Bargaining for the low paid

Types of enterprise agreements include:

- single-enterprise agreements
- multi-enterprise agreements
- greenfields agreements



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CONTENT OF ENTERPRISE AGREEMENTS

- Enterprise agreements must be about permitted matters. Permitted matters include:
 - matters pertaining to the relationship between the employer (or employers) and employees covered by the agreement
 - matters pertaining to the relationship between the employer (or employers) and employee organisation (or employee organisations) covered by the agreement
 - deductions from wages for any purpose authorised by an employee covered by the agreement; and
 - how the agreement will operate
- The FW Act does not refer to prohibited content, unlike the WR Act



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ROLE OF UNIONS IN ENTERPRISE AGREEMENTS



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GREATER SCOPE FOR UNION INVOLVEMENT

Representatives by default

- Employees are entitled to appoint in writing a person of their choice (including themselves) as their bargaining representative for a proposed enterprise agreement..
- An employee organisation which represents employees who will be covered by the proposed enterprise agreement (e.g.. Union members) will be the representative by default in the bargaining process, unless employees nominate another representative in writing, and revoke the status of the employee organisation.



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ENTERPRISE AGREEMENT BARGAINING



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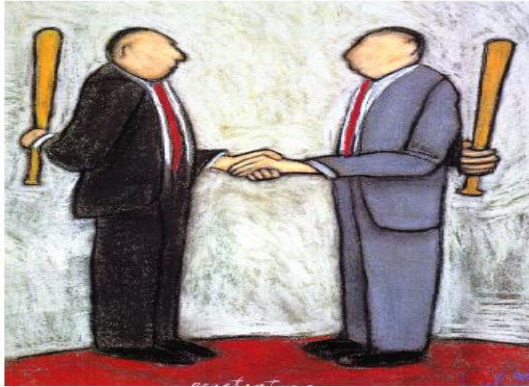
MAJORITY SUPPORT DETERMINATION AND SCOPE ORDERS

- Employer cannot refuse to bargain
- Majority Support Determination
 - If an employer does not agree to bargain with its employees, a bargaining representative can also apply to FWA for a majority support determination. If FWA determines the majority of employees support bargaining for an enterprise agreement, the employer must meet the good faith bargaining requirements.
- Scope Orders
 - A bargaining representative may apply to FWA for a scope order to determine which group of employees are to be covered by the agreement, as well as seek FWA's assistance in dealing with bargaining disputes.



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GOOD FAITH BARGAINING



What does *bargaining in good faith* involve?

FWA can make orders to enforce good faith bargaining

Does not require concessions or agreement on terms to be included in an enterprise agreement



- ✓ **Attend and participate in meetings at reasonable times**
- ✓ **Disclose relevant (not confidential) information in a timely manner**
- ✓ **Respond to proposals in a timely manner**
- ✓ **Genuine consideration of the other parties' proposals and providing reasons for responses**
- ✓ **Refrain from capricious or unfair conduct that undermines collective bargaining and freedom of association**
- ✓ **Court can enforce contraventions and issue penalties**



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GOOD FAITH BARGAINING ORDERS

- If a party to bargaining considers that another party to the bargaining process is not behaving in accordance with good faith bargaining requirements, that party may apply to FWA for a good faith bargaining order which may specify actions which the parties must take to comply with their good faith bargaining obligations.
- The timing of such an application depends upon the existing coverage of the employees to whom a proposed enterprise agreement applies



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LOW PAID BARGAINING

- Goals
 - Assist low paid workers to make enterprise agreements that suit their needs;
 - Assist in identifying improvements to productivity and service delivery;
 - Address constraints on the ability of low paid workers and their employers to bargain at the enterprise level;
 - Enable FWA to provide assistance to low paid workers and their employers to facilitate bargaining for enterprise agreements.
- Where agreement cannot be reached, FWA can make a low paid determination



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BARGAINING ORDERS

- Bargaining orders may be made with respect to low-paid employees, good faith bargaining obligations, majority support determinations and scope determinations
- A bargaining order or determination may address the following points:
 - Agreement and minimum required content
 - Representation in the bargaining process



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BREACH OF BARGAINING ORDERS

- Serious breach declarations
 - If a party is subject to a bargaining order of FWA and engages in serious and sustained breaches of that order, the other party/ies to the bargaining may apply to FWA for a serious breach declaration. This has the effect of requiring the parties to settle all matters in issue within 21 days of the declaration or face a workplace determination made by FWA
- Penalty provisions apply to breaches of bargaining orders
 - 300 penalty units for a body corporate (approximately \$33,000)



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Summary of Agreement Making Changes

WR ACT

FW ACT

Union Collective Agreement

Employee Collective Agreement

Union Greenfields Agreement

Employer Greenfields Agreement

Multi-employer agreement only permitted if approved by Workplace Authority

No obligation to bargain

Enterprise Agreements (single enterprise or multi-enterprise, latter voluntary or via low pay authorisation)

Union Greenfields Agreements

If genuine bargaining

Compulsory GFB



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Agreement making changes (continued)

WR ACT

FW ACT

Approval by majority vote



Same, but very different tests

No obligation to bargain in good faith



5 obligations to bargain in good faith

Maximum 5 year term



4 years

**Union appointed as bargaining agent or
Union collective agreement**



Union becomes default bargaining rep

**Apply to FWA to be covered
by agreement**



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ENTERPRISE AGREEMENT APPROVAL PROCESS BY EMPLOYEES



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APPROVAL BY EMPLOYEES

- Notice requirements:
 - Employer must notify employees of their right to be represented during bargaining within 14 days of deciding to commence bargaining (section 173 notice)
 - Employees must be told that in the absence of appointing someone else, the employee organisation will be entitled to represent their interests in the bargaining process
- Appointing a representative
 - An employee can revoke the appointment of the employee organisation and can appoint any other person, including themselves, to act as their own bargaining representative



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PRE-APPROVAL REQUIREMENTS

- 21 days after giving the section 173 notice, an employer can request employees to approve the enterprise agreement
- Employees must be given a copy of the proposed enterprise agreement at least 7 days prior to the date of voting
- Only employees who are to be covered by the enterprise agreement may vote



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WHO CAN VOTE?

- Employees who are covered by an individual agreement based transitional instrument (such as an ITEA or AWA) may only vote if they have lodged a conditional termination notice.
- A conditional termination notice provides for the termination of individual agreement based transitional instrument subject to the passing of the enterprise agreement
- If the employee does not lodge this notice prior to the date on which the vote takes place, then they are not permitted to vote on the enterprise agreement



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WHEN IS AN ENTERPRISE AGREEMENT MADE AND APPROVED BY FWA?



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WHEN IS AN ENTERPRISE AGREEMENT MADE?

- A single enterprise agreement is made when a majority of those employees who cast a valid vote approve the agreement
- In the case of multi-employer agreements or greenfields agreements, the agreement will be made when:
 - a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement; or
 - when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover (which need not be all of the relevant employee organisations for the agreement)



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APPROVAL PROCESS FOR FWA

- A bargaining representative for the agreement must apply to FWA for approval within 14 days of the agreement being made
- The application must be accompanied by a signed copy of the agreement and any declarations that are required by FWA



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WHEN WILL AN AGREEMENT BE APPROVED?

- Employees genuinely agreed to the agreement
- For multi-enterprise agreements, each employer genuinely agreed and no person coerced, or threatened to coerce, any of the employers to make the agreement
- There is no breach of the National Employment Standards
- The agreement passes the better off overall test from 1 January 2010 (or the no-disadvantage test before this date)
- The group of employees to be covered is fairly chosen



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WHEN WILL AN AGREEMENT BE APPROVED?

- The agreement does not contain unlawful terms
- The nominal expiry date is no more than 4 years from the day on which FWA approves the agreement
- The agreement contains a dispute settlement term, a flexibility term and a consultation term
- Approving the agreement would not undermine good faith bargaining if a scope order is in operation in relation to the agreement



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WHEN WILL AN AGREEMENT BE APPROVED?

- If a multi-enterprise agreement was not approved by the employees of all the employers, the agreement has been varied to cover only the employers (and their employees) whose employees approved the agreement
- The agreement meets the approval requirements dealing with shiftworkers, pieceworkers, outworkers, or school based apprentices and school based trainees (these requirements ensure that the agreement is not detrimental to those vulnerable employees)
- An agreement commences operation once it has been approved by FWA



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BETTER OFF OVERALL TEST (“BOOT”)

An agreement passes the better off overall test if FWA is satisfied that each award covered employee, and each prospective award covered employee, would be better off overall if they were employed under the agreement rather than under the relevant modern award.



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WHAT HAPPENS IF FWA DOES NOT APPROVE AN AGREEMENT?

- FWA may accept an undertaking from an employer (or employers) to address any concerns about the agreement not meeting approval requirements. If accepted, the undertaking is taken to be a term of the agreement
- FWA may only accept a written undertaking from an employer where it is satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement, or result in substantial change to the agreement
- Prior to accepting an undertaking, FWA must seek the views of each person who is a bargaining representative to the agreement



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TRANSFER OF BUSINESS



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TRANSFER OF BUSINESS

- There will be a transfer of business from an old employer to a new employer if:
 - the employment of an employee of the old employer has terminated
 - within 3 months after the termination, the employee becomes employed by the new employer
 - the transferring employee performs the same, or substantially the same, work for the new employer as he or she performed for the old employer; or
 - there is at least one of four connections between the old employer and the new employer, including (an asset transfer; an outsourcing; an insourcing; or that the new and old employers are associated entities)



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TRANSFER OF BUSINESS

- Subject to an order of FWA, transferring employees and the new employer are covered by the transferring instrument, which can include:
 - An enterprise agreement;
 - A workplace determination;
 - A named employer award.
- No time limit on the application of the transferred instrument
- Broader focus on similarity of work performed
- Includes traditional sale of business and insourcing and outsourcing



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PROTECTION OF EMPLOYEES

- A new employer is required to recognise a transferring employee's service for the purpose of calculating certain entitlements under the National Employment Standard
- If the new employer and old employer are not related entities, the new employer has a choice as to whether it recognises an employee's prior service and their associated annual leave and redundancy pay
- A new employer must inform transferring employees of any change to their entitlements, including the imposition of a new minimum employment period for unfair dismissal



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CONCLUSION



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CONCLUSION

- Transitional provisions apply until 31 December 2009
- Compliance and enforcement through FWA and FWO
- Rights and Responsibilities
- Protection from Dismissal and Adverse Action
- Small Business Fair Dismissal Code
- Freedom of Association
- Right of Entry
- Industrial Action



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CONCLUSION

- Safety Net of Minimum Entitlements
 - NES
 - Modern Awards
 - Enterprise Agreements
- Transfer of Business



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CONCLUSION

- Employers should:
 - Familiarise themselves with the applicable modern awards and any changes to terms and conditions, particularly loadings and penalty rates
 - Review existing employment agreements (whether individual or collective) to ensure compliance with minimum standards and the NES
 - Review existing policies and contracts to ensure compliance with the NES
 - Be aware of changes to unfair dismissal provisions
 - Be aware of new claims which may be made against them under adverse action provisions



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CONCLUSION

- Be aware of right of entry requirements
- Be aware of restrictions on industrial action
- Be aware of obligations during bargaining periods
- Consider whether changes in business structure resulting in redundancies may require redeployment or consultation
- Be aware of business arrangements which may give rise to transfer of business obligations



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MORE INFORMATION

ACSA and ACAA have developed a series of Fact Sheets covering many of the topics discussed today.

These can be downloaded from our websites.

www.agedservices.asn.au

www.acaansw.com.au

More detailed information and advice on all aspects of the new workplace relations system can be obtained by contacting the Fair Work infoline on 13 13 94 or by visiting

www.fairwork.gov.au