

WORKPLACE LAW UPDATE

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Welcome to our second edition of "Workplace Law Update". In our last update, we previewed the major provisions of the new [Fair Work Act 2009](#) ("FW Act"). Most parts of the [FW Act](#) commence this week. In this edition of Workplace Law Update, we provide a summary of the key provisions of the Fair Work transitional legislation, which passed through Parliament on 17 June 2009 and will lay the foundations for change to the new fair work reforms from 1 July 2009. These changes are significant and we have endeavoured to summarise those parts of the legislation which may have short term impacts on your business. Please contact us to discuss any other aspect of the new legislation.

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PRACTICAL EFFECT OF TRANSITIONAL ARRANGEMENTS

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Transition to the new fair work system: The bulk of the [FW Act](#) commences on 1 July 2009, excluding the National Employment Standards ("NES") and modern awards which will not take effect until 1 January 2010. The *Fair Work (Transitional Provisions & Consequential Amendments Bill 2009* ("TPCA Act") passed the Senate on 17 June 2009 and puts in place important arrangements for movement into the new fair work system. The [TPCA Act](#) provides for the following matters during the "bridging period" (1 July 2009 to 31 December 2009):

- definition of a "small business employer" for unfair dismissal purposes
- continued operation of existing industrial instruments made under the *Workplace Relations Act 1996* ("WRA"), such as awards, agreements, AWAs and ITEAs, including rules on how these interact with the new system
- arrangements to allow enterprise bargaining to commence under the new system;
- arrangements for the transfer of existing WRA institutions to Fair Work Australia and the Fair Work Ombudsman and
- the creation of Fair Work Divisions of the Federal Court of Australia and the Federal Magistrates Court of Australia.

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Effect of the new system on existing awards and registered agreements: The [TPCA Act](#) provides for the continued operation of registered agreements made under the WRA (including after their nominal expiry date has passed) until they are terminated or replaced with a new enterprise agreement. The content and interaction rules that applied under the WRA will also continue to apply. Some other existing instruments, such as award-based instruments (eg. un-modernised awards, Notional Agreements Preserving State Awards and pay scales) will cease to operate once they are replaced by modern awards. Employers will need to carefully consider the effect the [TPCA Act](#) will have on existing awards and agreements applicable to their business.

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About CCI Lawyers

CCI Lawyers is a boutique workplace relations practice.

CCI Lawyers operates as an independently managed legal practice, providing legal services that are charged at competitive rates to employers across Australia.

CCI Lawyers is associated with the Victorian Employers' Chamber of Commerce and Industry ([VECCI](#)). Your business does not need to be a VECCI member to engage our services.

Smart Company Articles

Peter Vitale is a regular contributor to www.smartcompany.com.au. Feel free to browse the site and view his articles.

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Agreement making during the “bridging” period: The new enterprise bargaining framework under the [FW Act](#) will operate from 1 July 2009. Significantly, the [FW Act](#) places an emphasis on bargaining “in good faith”. This was not formerly a requirement under the WRA. Employees on AWAs and ITEAs will not be covered by a new enterprise agreement unless a conditional termination instrument is made. If a conditional termination instrument is made, the individual agreement will terminate once the enterprise agreement is made. All enterprise agreements made during the bridging period (1 July 2009 – 1 January 2010) will continue to be tested against the current “no-disadvantage test”. Following the introduction of the NES and modern awards in 2010, the relevant test will be whether the employee is “better off overall”. Employers will need to consider strategies for effective enterprise bargaining in the workplace taking into account the types of transitional instruments in operation and the need to comply with good faith bargaining requirements.

SMALL BUSINESS EMPLOYERS

Meaning of “Small Business Employer”: A key provision of the [TPCA Act](#) relates to the definition of a small business employer for the purposes of determining whether an employee may commence an unfair dismissal claim. The [TPCA Act](#) provides that from 1 July 2009 to 31 December 2010, a “small business employer” will mean a business with fewer than 15 employees on a “full time equivalent basis”. From 1 January 2011, the definition will revert to the meaning in the [FW Act](#), being a business with fewer than 15 employees by individual head count. Small business employers must ensure they comply with the Small Business Fair Dismissal Code from 1 July 2009. The code was officially [declared](#) on 24 June 2009, and is available in the Federal Government’s [fact sheets](#).

Small business exemption from redundancy pay obligations: There is an exclusion from the obligation to provide redundancy pay to employees under the NES if, immediately before the time of the termination, or at the time when the employee was given notice of the termination, the employer was a “small business employer”. Employers should note that the calculation for this purpose will be determined on a simple headcount and employees of associated entities will also be taken into account. The NES commences on 1 January 2010.

AWARD MODERNISATION

New Awards apply from 1 January 2010: The government has tasked the Australian Industrial Relations Commission (‘AIRC’) with a process of “award modernisation”, which involves reducing the number of awards in the federal award system into industry related categories and simplifying their operation. Each modern award will operate in conjunction with the NES, which will take effect from 1 January 2010. Completion of the modernisation process is due by 31 December 2009. Employers should be clear on which modern awards will apply to them before 1 January 2010 as various terms of the modern award may be different from the awards currently applicable or may cover employees not previously covered by an award. Details about the modernisation process are available on the AIRC [website](#).

FAIR WORK REGULATIONS

Employer record keeping obligations from 1 July 2009: On 19 June 2009, the *Fair Work Regulations 2009* ([FW Regulations](#)) were released by the federal government. The FW Regulations set out important record-keeping obligations with which employers must comply. Employers must ensure records are kept for each employee and maintained for a period of 7 years in relation to the following matters:

- basic employment details
- nature of employment (e.g. part-time, full-time, permanent, temporary or casual)
- payment of wages;
- overtime hours worked
- arrangements for averaging hours
- leave entitlements
- superannuation contributions
- termination of employment (where applicable) and
- individual flexibility arrangements and guarantees of annual earnings for high income earners.

Employers must ensure they comply with the new rules from 1 July 2009. Failure to comply may lead to investigation by the Fair Work Ombudsman and the issuing of civil penalties.

NEW WEBSITES OF INTEREST

Fair work online: Websites have been released providing information about the new fair work system. They include [Fair Work Online](#), [Fair Work Australia](#) and [Fair Work Ombudsman](#).
