

The Fair Work Act:

A handbook



Australian Business
Lawyers & Advisors

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Developments since 2nd edition

Since the release of the 2nd edition of this handbook in October 2009, there have been several significant developments in workplace law such as the referral of workplace law powers by New South Wales, Queensland, South Australia and Tasmania to the Commonwealth. Although the referring States have retained some of their workplace law powers, the retained laws are largely confined to State government and local government employment matters. Consequently, most non-government employers who were previously outside the Fair Work Act, have now been brought into the same national system that applies to the vast majority of private sector employers.

The National Employment Standards (NES) commenced 1 January 2010. The NES comprise minimum conditions of employment including annual leave, personal/carer's leave and the right to request flexible working arrangements. With few exceptions, these minimum conditions are enforceable. The key conditions of the NES are summarised at chapters 9 to 19 of this handbook and the full text of the NES is reproduced in the appendix. The process of award modernisation culminated in just over 120 new modern awards taking effect 1 January 2010. Chapter 20 has been updated to take this into account. In June 2010, the Federal Parliament passed the Paid Parental Leave Act 2010 thereby establishing a government funded paid parental scheme from January 2011. Chapter 13 'Parental Leave' summarises both the conditions for parental under the NES and key aspects of the Paid Parental Leave Act 2010. On 3 June 2010, the new industrial relations tribunal, Fair Work Australia, delivered the first Annual Wage Review under the Fair Work Act. The minimum weekly adult wage was increased by \$26 to \$569.90 per week effective 1 July 2010 and wage rates in modern awards were also increased. The high income threshold for the purposes of the unfair dismissal jurisdiction increased to \$113,800 per annum effective 1 July 2010. Key aspects of the unfair dismissal provisions are summarised at chapter 1 of the handbook.

Our objective

As with previous editions, the purpose of this handbook is to provide information about key aspects of the Fair Work Act. These are explained in a practical context with many illustrative examples. Of course this handbook should not be seen as a substitute for professional advice and if you require advice, please do not hesitate to contact us.

Making business life simpler

Our mission is to make business simpler by using everyday scenarios to explain the workplace law issues which frequently confront business. Our team has a wealth of experience in all areas of workplace law. We use the intellectual property from our strategic practice to provide tangible and practical solutions. By promoting how workplace law is understood, we promote compliance.

Experts make things simple

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1. Dismissal

1.1 The Fair Work Act:

- Provides for remedies for unfair dismissal and unlawful termination (e.g. compensation, reinstatement);
- Sets out when a person is protected from unfair dismissal and from unlawful termination;
- Sets out the elements that make up an unfair dismissal;
- Sets out various prohibited reasons which, if relied upon by an employer, will lead to a termination being unlawful;
- Provides for procedures for obtaining remedies for unfair dismissal and procedures for obtaining remedies and penalties for unlawful termination.

1.2 The unfair dismissal laws under the Fair Work Act apply to all businesses within the federal workplace jurisdiction, e.g. trading or financial corporations, foreign corporations, employers in Victoria, ACT or Northern Territory.

Meaning of dismissed

1.3 A person is **'dismissed'** if the person's employment is terminated at the employer's initiative or if the person resigned from their employment but was forced to do so because of conduct engaged in by the employer.

Inclusions and exclusions

1.4 Employees who earn more than the **'high income threshold'** and who are not covered by an award or enterprise agreement are ineligible to make a claim for unfair dismissal (but see also paragraph 20.9 of this handbook). Effective 1 July 2010 the high income threshold is \$113,800 per annum. This will remain the threshold until 30 June 2011. The threshold is indexed annually and so any increase is effective on 1 July each year. The government has passed regulations to prevent the threshold from decreasing.

1.5 The Fair Work Act requires an employee to serve a **'minimum employment period'** before the employee can bring an unfair dismissal claim. If the employer is not a small business employer, the period is **6 months** ending at the earlier of the following times:

- (a) The time when the person is given notice of the dismissal;
- (b) Immediately before the dismissal.

1.6 If the employer is a small business employer the period is **12 months**.

1.7 A person who is employed under a contract of employment for a specified period of time or for a specified task or for the duration of a specific season is not able to access the unfair dismissal jurisdiction if the employment terminates at the end of that period, on completion of the task or at the end of that season.

1.8 Trainees are also excluded. However, the exclusion only applies where the trainee was engaged under a formal training arrangement and the employment was for a specified period of time or limited to the duration of that training arrangement and the employment terminates at the end of the training arrangement.

Casuals

- 1.9 An employee dismissed from their casual employment is able to gain access to the unfair dismissal jurisdiction if the employee can show that they were employed on a regular and systematic basis over the relevant period (12 months in the case of a small business, 6 months in other cases) and during the period of service as a casual the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis.
- 1.10 A person demoted in their employment is unable to access the unfair dismissal jurisdiction as long as:
- (a) the demotion does not involve a significant reduction in remuneration or duties; and
 - (b) the employee remains employed with the employer.

Special provisions for small business

- 1.11 Two aspects of the unfair dismissal laws see small business treated differently from other businesses. First, employees within businesses with fewer than the equivalent of 15 full time employees (a small business under the Act) are unable to take unfair dismissal proceedings if dismissed within the first 12 months of employment. If dismissed from a business with 15 or more employees at the time of dismissal, the dismissed employee is unable to bring a claim if the dismissal occurs within the first 6 months of employment. Second, a dismissal in a small business will be deemed fair if the employer follows the **‘Small Business Fair Dismissal Code’**.
- 1.12 There is no comparable statutory code for businesses with 15 or more employees.

Redundancy

- 1.13 Under the Fair Work Act, a genuine redundancy is not an unfair dismissal. A dismissal is a genuine redundancy if the employee’s job is no longer required to be performed by anyone because of changes in the operational requirements of the employer’s enterprise. However, a dismissal for redundancy could be found to be unfair if it would have been reasonable to re-deploy the employee within the employer’s enterprise rather than terminating the employment.
- 1.14 This means that it is important for employers to give careful consideration to whether re-deployment is available as an alternative to termination for redundancy. The term ‘employer’s enterprise’ includes the enterprise of an entity associated with the employer such as a body corporate related to the employer for the purposes of the Corporations Act 2001.
- 1.15 Employers should take care to follow any consultation obligations in awards and enterprise agreements because a failure to do so could expose the employer to the prospect that the dismissal will not be considered a genuine redundancy.

Notifying Centrelink

- 1.16 The Fair Work Act requires an employer to notify Centrelink in writing if the employer has decided to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons. The notice must be given as soon as practicable after the decision is made and before the employees are dismissed. There is a prescribed form for the notice accessible at www.fwa.gov.au.



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