The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

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Employment

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[22.10] Introduction

This chapter deals with federal and state industrial laws as well as laws about discrimination and health and safety that apply to workplaces in NSW. There is also discussion of the common law relating to contracts of employment.

The vast majority of employees and employers are now covered by federal laws. Employees employed by the NSW Government and local councils are mostly covered by NSW laws.

The current system under the *Fair Work Act 2009* (Cth) became fully operational in 2010.

The concept of employment

[22.20] The employment relationship and contracts

Before considering the federal and state workplace relations systems, it is important to understand the nature of the employment relationship and contracts of employment.

Employment is based on a contractual relationship between an employer and an employee where there is an agreement to work in return for wages or salary. Over time employment has come to be regulated by a large body of legislation.

Much of this legislation establishes minimum wages and entitlements. A contractual term which purports to be an agreement to provide less than the legal minimum is of no effect. Despite the regulated nature of employment, the contract of employment remains at the heart of the employment relationship.

A contract of employment may be written, oral (ie, a spoken agreement), or partly written and partly oral. A letter of appointment may also constitute an employment contract. A written contract of employment seldom (if ever) contains exhaustive provisions about every aspect of the employment relationship. Terms may be incorporated into the contract through documents such as workplace codes of conduct and company policies. In addition to the express terms, employment contracts include implied terms which have been developed by courts over many years. Implied terms need not be expressed (written or spoken) to be part of the employment contract. Implied terms in employment contracts are often referred to as "duties". Typical examples of implied terms include:

- the employee's duty to obey the lawful and reasonable directions of the employer that are consistent with the contract and within the scope of employment;
- the employer's duty to take reasonable care to protect an employee against forseeable injury arising from the employment.

Three relevant High Court of Australia decisions about contract of employment are:

- *Byrne v Australian Airlines Ltd* [1995] HCA 24;
- *Visscher v Giudice* [2009] HCA 34;
- *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

[22.30] Independent contractors

The employment relationship is one in which an employee serves the employer. This is to be contrasted with a "contract for services" provided by an independent contractor. The rights and obligations that attach to the employment relationship do not usually apply when an independent contractor is providing their services. Although discrimination, health and safety and the *Fair Work Act* general protections provisions do apply to independent contractors. Consequently, there are often legal disputes as to whether a person is an employee or a contractor.

The following table contrasts the characteristics of employees from independent contractors.

Characteristic	*Employee*	*Contractor*
The worker arranges their own insurance.		Likely
The worker is controlled in the way they work.	Likely	
The worker is able to be disciplined at work.	Likely	
The worker is required to wear a specific uniform.	Likely	
The worker supplies their own tools and materials.		Likely
The worker is paid for each task completed.		Likely
The worker is paid a wage calculated on time worked.	Likely	
The worker is paid when on annual leave or if absent on sick leave.	Likely	
Income tax is withheld from payments to the worker.	Likely	
The worker uses an ABN and renders invoices for payment.		Likely
The worker runs their own business, earning a profit and building "good will" with a customer base.		Likely
The worker is able to work with any number of customers or clients.		Likely
The worker can delegate their work to employees or subcontractors of the worker.		Likely

It is usually the case that no single characteristic determines the nature of the work relationship. The right to control the person in regard to key aspects of the work is an important consideration. All of the characteristics must be taken into account. Employees are sometimes required to work as independent contractors yet really are employees. Such situations are often referred to as "sham arrangements". Division 6 of Pt 3-1 of the *Fair Work Act* makes sham arrangements unlawful.

A relevant High Court decision distinguishing between independent contractors and employees is *Hollis v Vabu Pty Ltd* [2001] HCA 44.

The *Independent Contractors Act 2006* (Cth) gives the Federal Court of Australia and the Federal Circuit Court of Australia jurisdiction to provide a remedy to independent contractors in circumstances where the services contract is unfair, harsh, unconscionable, unjust, against the public interest or designed to avoid the provisions of the *Fair Work Act*.

Increasing numbers of people are working in what has been called the "gig economy". Typically, such workers use a digital platform to find jobs. Examples include Uber drivers and workers making food deliveries. The law in Australia remains unclear as to whether such workers are employers or independent contractors. The Fair Work Commission in *Michail Kaseris v Raiser Pacific V.O.F* [2017] FWC 6610 found that an Uber driver was not an employee and that Uber was instead providing a technology service to drivers to help them find customers. In *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, the Fair Work Commission found that a Foodora driver was an employee and awarded him compensation for unfair dismissal.

[22.40] Volunteers

Volunteering is not employment, even though work may be performed. Volunteers are not usually paid for work at all. There is a clear understanding by everyone concerned – the organisation and the person doing the work – that the work is performed as a gift to the organisation. Sometimes, organisations might pay the costs of some incidental expenses incurred by the volunteer (eg, transport costs), but this will not mean that the volunteer is an employee.

The rights and obligations that attach to the employment relationship do not usually apply to volunteers, although some discrimination, health and safety laws and the anti-bullying provisions in Pt 6-4B of the *Fair Work Act* do apply.

[22.45] Unpaid work experience, internships and vocational placements

Unpaid work experience, internships and vocational placements can be lawful, provided that they are not in fact employment relationships.

Whether unpaid work was actually performed under an employment relationship depends on the circumstances of the case. For example, a person who is called an intern, but is performing work for a long period of time and where the main benefit is going to the employer is likely to be an employee. By contrast, someone who is working for a shorter period of time and is gaining the main benefit from the work, such as learning, training or skill development, will probably not be an employee.

The *Fair Work Act* provides that people on a "vocational placement" are not employees. Vocational placements are undertaken as a requirement of an education or training course and are defined in more detail in s 12 of the Act.

Unpaid trials are only lawful if they do not extend beyond what is reasonably required to demonstrate the skills for the job. This could be one hour or one shift, depending on the complexity of the work. Some element of direct supervision would also be required if the job seeker were truly demonstrating their skills.

If you are doing unpaid work and are not sure whether or not you are an employee, you should get legal advice.

[22.50] Types of employment

Employment may be permanent full-time, permanent part-time or casual. Employment may also take place pursuant to a fixed-term contract.

Permanent full-time

An employee who works full time is usually contracted to work 38 hours a week or more on an ongoing (open ended) contract. Full-time employees receive:

- paid leave (personal carer's leave, holiday pay, sick leave and so on);
- minimum notice requirements if employment is terminated;
- redundancy pay in the case of redundancy if the employer has 15 employees or more and there has been service for one year or more.

Permanent part-time

Part-time employees usually work less than 38 hours a week on an ongoing (open ended) contract. The work hours of a part-time employee are usually regular, with little change from week to week. Part-time employees receive all of the entitlements of a full-time employee, such as parental leave, annual leave and notice, but on a pro-rata basis.

Casual employment

Casual employees are hired to work irregularly. That means that there is no expectation or certainty of ongoing work, fixed shifts or hours. Casual employees are usually only employed from the start of their work day or shift, to the end of their work day or shift, with each separate hiring a new contract of employment. Casual employees are not entitled to:

- paid leave (personal carer's leave, holiday pay, sick leave and so on);
- minimum notice requirements, if employment is terminated, or redundancy pay.

Casual employees are generally paid at a higher hourly rate than comparable part-time or full-time employees. This is referred to as a casual loading and under most awards it is a 25% uplift on the applicable hourly rate.

Many employers and employees misunderstand the nature of casual employment. There is no definition of casual employment in the *Fair Work Act*. In *Skene v WorkPac Pty Ltd* [2018] FCAFC 131 (*Skene*), the full court of the Federal Court of Australia found that an employee who was referred to as a casual employee in the contract of employment and paid a casual loading was actually a permanent employee. The court found that the absence of a firm advance commitment as to the duration of the employee's employment or the days or hours the employee will work is the essence of casualness.

In response to the decision in *Skene*, the Federal Government introduced new regulations which came into effect on 18 December 2018. The result was that if an employer paid a casual loading that was clearly identified as being an amount to compensate for National Employment Standards

(NES) entitlements such as annual leave, personal leave or notice, then the employer is able to off-set the casual loading paid against any claim the employee makes under such entitlements. See reg 2.03A of the *Fair Work Regulations 2009* (Cth) for more detail. The NES are discussed at [22.90].

If you are unsure of your employment status, you should speak to your union or a lawyer.

On 1 October 2018, a model casual conversion clause was inserted into most awards, which allows regular casual employees to request that they be made permanent. A regular casual employee is defined as a casual employee who has worked a pattern of hours on an ongoing basis in last 12 months, which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the award.

The request must be made in writing, and the employer can only refuse on reasonable business grounds and after consultation with the employee. Disputes about the request can be referred to the Fair Work Commission.

Fixed-term contracts of employment

Employers and employees may agree upon a contract for a fixed period of time or for a specific project, in which case the contract will stipulate the length of the employment and/or the end date. Employment will come to an end at the expiry of the fixed term without the need for the employer or the employee to give notice of termination. Employment under a fixed-term contract can be full-time or part-time. As well as having an end date, a fixed-term contract may contain provisions for early termination (before the end date) by either party giving notice of termination.

Labour hire arrangements and recruitment agencies

A labour hire arrangement involves a firm ("A") that employs workers. "A" then dispatches the workers to undertake work for a client organisation ("B"), sometimes called the "host". "B" pays fees to "A" for this service. The workers remain employees of "A", who is responsible for the payment of wages to the workers and the provision of most other employee entitlements to the workers. The workers may be permanent or casual employees of "A". The employees of "A" are often referred to as "agency" or "labour hire workers".

The advantages for "B" in the labour hire arrangement are that it is able to access labour and services only when needed and may avoid some of the costs and liability associated with outright employment of workers.

Courts may be prepared to look behind these arrangements where it is a sham arrangement or there is evidence of a contract or control between the labour hire workers and the host.

Labour hire workers have the same protections under the *Fair Work Act* as other employees, but those protections can normally only be enforced against the labour hire company "A". This can lead to practical difficulties for employees, particularly in relation to the unfair dismissal remedy in Pt 3-2 of the *Fair Work Act*. The host employer "B" normally makes the decision that it no longer wants the employee to work anymore, but it is the labour hire company "A" that is the employer. So, the employee has no unfair dismissal remedy against "B". "A" still has to treat its employees fairly, even though the decision in relation to the placement was taken by company "B". However, it can often be difficult for labour hire employees to work out whether they have been dismissed, particularly if they are casual employees of company "A" and company "A" is actively trying to find them other work.

If you are labour hire employee and your placement has been terminated, you should get legal advice about your situation.

Labour hire arrangements are to be distinguished from recruitment services. A recruitment agent (sometimes referred to as a "head hunter") finds and introduces workers as prospective employees to a client organisation, with the intention that a worker will eventually take up employment with the client organisation. When this occurs, the agent receives a fee from the client organisation. At no time does the agent employ the worker.

Section 324(1A) of the *Fair Work Act* makes it unlawful for an employer to directly or indirectly require a prospective employee to pay money in order to obtain employment. It is also illegal in NSW under s 49 of the *Fair Trading Act 1987* (NSW) for a person to demand or receive a fee from a worker seeking employment. In other words, a recruitment agent or a labour hire organisation must not charge a worker a fee for placing the worker in employment.

The regulation of workplace relations

[22.60] National and NSW systems

Most employers and employees in NSW are now under the national system, including partnerships, sole traders and associations. However, public sector and local government employers (and their employees) are regulated by the NSW system though there are some exceptions.

[22.70] Overview of national workplace relations system

Relevant legislation

The *Fair Work Act* regulates most employment arrangements in Australia. The Act has many functions including: setting out the National Employment Standards (NES); providing remedies for unfair dismissal, general protections and bullying claims; creation of the Fair Work Ombudsman and the Fair Work Commission, the small claims process, civil penalty regime and enforcement generally and providing resolution for industrial disputes; and passage of industrial instruments such as modern awards, minimum wage orders and enterprise agreements and the *Fair Work Regulations* – these Regulations accompany the *Fair Work Act*. Importantly, the Regulations provide the mechanism for setting the high income threshold, describe the form and content of employee records, and provide a non-exhaustive definition of serious misconduct.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) (and its *Regulations*) deals with the transition from *Workplace Relations Act 1996* (Cth) to the *Fair Work Act*. This Act can be important for the transitional arrangements between the old State and Modern Awards.

Work Health and Safety Act 2011 (Cth) – this Act provides a national framework for worker and workplace health and safety.

Work Health and Safety Act 2011 (NSW) – adopts the Commonwealth legislation in NSW.

Fair Work (State Declarations – employer not to be national system employer) Endorsement 2014 (No. 1) – lists certain employers declared by a state law not to be a national system employer.

Fair Work Commission Rules 2013 (Cth) – these Rules set out the practice and procedure to be followed by the Fair Work Commission, the national workplace relations tribunal.

Independent Contractors Act 2006 (Cth) – this Act removes many independent contracting arrangements from the control of state and territory employment laws and places them under the regulation of the Commonwealth. This Act allows the court to review or vary unjust or unfair service contracts.

Though most employment arrangements are now regulated by Commonwealth law, some NSW laws endure. Section 27 of the *Fair Work Act* sets out NSW legislation that is not excluded by the *Fair Work Act*. Some examples include:

- *Anti-Discrimination Act 1977* (NSW);
- workers' compensation laws;
- work, health and safety;
- long service leave (for most employees);
- workplace surveillance.

Three bodies involved in the national system

Three bodies are pivotal to the national system: The Fair Work Commission (FWC); the courts, which now have special Fair Work divisions and small claims procedures; and the Fair Work Ombudsman (FWO).

The Fair Work Commission

The Fair Work Commission (FWC) is the national workplace relations tribunal. It is an independent statutory body. Applicants can apply to the FWC to deal with certain matters such as an unfair dismissal application, general protections application or bullying complaint. An employer may also use the FWC. For example, to reduce the amount of redundancy pay owing to an employee. The FWC exercises a range of functions, such as dealing with:

- unfair dismissal applications, including conducting conciliations and arbitrations;
- general protections termination of employment applications, including conducting conciliations (and arbitrating where there is agreement between the parties for an arbitration);
- bullying complaints;

- the making and amending of modern awards;
- disputes about a matter in a modern award or in an enterprise agreement;
- conducting annual wage reviews and setting national minimum wages;
- industrial action (such as strikes by employees and lock outs by employers) and authorising, suspending or terminating industrial action;
- right of entry disputes;
- equal remuneration orders;
- making determinations, such as workplace determinations where parties are unable to come to agreement; and
- registering enterprise agreements.

Fair Work Ombudsman

The Fair Work Ombudsman (FWO) is an agency also created under the *Fair Work Act* that provides a free service assisting employees, employers and contractors by:

- providing information and education about wages and entitlements and workplace rights and responsibilities;
- investigating complaints, generally in response to a request by an employee or employer; and
- enforcing compliance with workplace laws by, among other methods, commencing legal proceedings on a party's behalf.

The FWO is separate from the FWC and makes decisions independently of the government and any other person.

Federal Court of Australia and Federal Circuit Court of Australia: Fair Work Division

There are specialist Fair Work divisions in the Federal Court of Australia and the Federal Circuit Court of Australia.

In some circumstances, applicants must go through the FWC before taking their complaint to court. For example, an employee with a general protections complaint involving a dismissal. These applications must be commenced in the FWC and if not resolved at conciliation, the FWC must issue a certificate stating that attempts to resolve the dispute have failed, for the court to accept the application. In other circumstances, the applicant goes directly to court. For example, where an employee sues to recover wages and/or entitlements from the employer.

The courts can order a variety of remedies, such as compensation, reinstatement of employees, payment of fines, and injunctions to stop or prevent a person from contravening a law such as the *Fair Work Act* or the *Fair Work Regulations*. For example, the courts can impose a civil penalty where certain provisions of the *Fair Work Act* have been breached.

A small claims option is available for underpayment claims in the Federal Circuit Court. The amount claimed must not be more than $20,000. Small claims proceedings are fairly informal and fast, and lawyers are typically not present. The small claims procedure uses a simplified Court application form. Section 548 of the *Fair Work Act* sets out the small claims procedures. Civil penalties are not available in the small claims jurisdiction.

Employment claims can be heard in NSW courts. The Chief Industrial Magistrates Court (CIM) is a specialist employment jurisdiction within the Local Court of NSW. The CIM can deal with wage and entitlement claims under the *Fair Work Act*, including the small claims process for amounts less than $20,000.

Minimum standards and the "safety net"

[22.80] The purpose of legislation

Federal legislation and, where applicable, state legislation is capable of overruling all other terms of the employment contract. For example, regardless of what the parties agree, an employee must be paid at least the minimum wage outlined in the relevant award or agreement, or if here is no relevant award or agreement, the national minimum wage.

National system legislation (mostly the *Fair Work Act* and *Fair Work Regulations*) sets out minimum terms and conditions of employment in a so-called "safety net" for employees. The safety net comprises:

- the national minimum wage;
- the National Employment Standards (NES);

- modern awards; and
- national minimum wage orders.

The national minimum wage for national system employees is reviewed and set annually (along with modern award wages) by the Minimum Wage Panel of the FWC. There are lower minimum rates for juniors, trainees and employees with a disability. Employers cannot pay less than the national minimum wage, but they can pay more. As at 1 July 2019, the national minimum wage is $19.49 per hour or $740.80 per week for a 38-hour week.

The NES apply to all national system employees and cannot be overridden by any award or agreement, although terms and conditions supplementary to the NES are permissible. For example, a contract can provide an employee with more annual leave days than required in the NES, but the contract cannot restrict the employee's annual leave to less days per year than required in the NES.

In addition to the NES, various legally binding industrial instruments may govern the employment relationship such as a modern award, an enterprise agreement or a workplace determination.

[22.90] The National Employment Standards

The NES are 10 minimum terms and conditions of employment that apply to all National System employees in Australia (although not all entitlements apply to casual employees).

The NES can be summarised as follows:

- maximum weekly hours of work – 38 hours for a full-time employee. The employee may refuse to work unreasonable additional hours;
- written requests for flexible working arrangements. An employee can request a flexible work arrangement if they have at least 12 months continuous service and are:
  - a parent or carer of a child who is school aged or younger;
  - a carer under the *Carers (Recognition) Act 2010* (Cth);
  - an employee with a disability;
  - 55 years or older; or
  - experiencing domestic violence (or caring for/supporting an immediate family member, or household member, who is experiencing domestic violence).

The employer may only refuse the request on reasonable business grounds. Reasonable business grounds goes to the issues of cost, workplace re-arrangements, efficiency, productivity and customer service as set out in the *Fair Work Act*. If the employer rejects the request, the employer must provide the employee with a written response within 21 days of the written request setting out reasons and where required evidence for the refusal:

- parental leave and related entitlements – up to 12 months unpaid leave for the parent and her or his spouse or de facto partner (which is also available where a child under 16 is adopted). The employee must have completed at least 12 months of continuous service whether permanent or casual. There are strict notice and evidence requirements. There is also a right to request an additional 12 months unpaid leave. Additional rights include transfer to a safe job in appropriate cases or to take no safe job leave, keeping in touch days, consultation requirements, and a return to work guarantee, at the employee's pre-parental leave position or if that position no longer exists, an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position. Employees who have taken leave don't have to wait another 12 months before they can take another period of leave with the same employer;
- annual leave – four weeks paid leave per year, five weeks of paid leave for certain shift working employees. Annual leave is cumulative;
- personal/carer's leave and compassionate leave – 10 days paid personal/carer's leave (which is available on a pro-rata basis for part-time employees), two days unpaid carer's leave, and two days paid compassionate leave. Personal leave is cumulative;
- unpaid family and domestic violence leave – as of 12 December 2018 all employees are entitled to five days unpaid family and domestic violence leave each year;
- community service leave – unpaid leave for matters such as voluntary emergency service and jury service (the employee is entitled to be paid the shortfall of any jury service pay for up to 10 days of jury service);
- long service leave – employees with certain existing arrangements are entitled to long service leave on that basis. A national long service leave standard is to be developed. In

NSW, the *Long Service Leave Act 1955* (NSW) still applies to most employees, pending federal legislation of a national standard;
- public holidays – a paid day off, unless reasonably requested to work. Public holidays may be substituted for another day in a modern award or an enterprise agreement;
- notice of termination and redundancy pay – up to five weeks minimum notice of termination and up to 16 weeks redundancy pay. Redundancy provisions do not apply where there are less than 15 employees employed at the time of the redundancy or if an employee has completed less than 12 months service (notice and redundancy pay is discussed in more detail at [22.190]);
- Fair Work Information Statement – this document is prepared and published by the FWO and must be provided by employers to all new employees before or as soon as practicable after the employee has commenced employment.

For the full text of the NES, see Pt 2-2 of the *Fair Work Act* or for detailed fact sheets on each NES provision, go to the FWO website www.fairwork.gov.au.

Contraventions of an NES provision is a civil penalty that can be enforced by the individual in a court, which operates on a no costs basis.

[22.100] Modern awards

Minimum employment standards in Australian workplaces have traditionally been included in awards. Awards are enforceable documents containing the minimum terms and conditions applicable to employees who are covered by the awards. Since 2010, "modern awards" have replaced "pre-modern awards" and now cover most workplaces. Modern awards are industry or occupation-based, rather than relating to a particular employer or organisation, as the goal is one minimum standard for employers and employees in the same industry or occupation across Australia.

Modern awards must be reviewed, and where necessary varied, every four years by the FWC, and they may only deal with the following 10 subject matters:
- minimum wages and skill-based classifications and career structures and incentive-based payments;
- type of employment, for example, full-time, casual etc;
- arrangements for when work is performed, including rostering etc;
- overtime rates;
- penalty rates;
- annualised wage arrangements;
- allowances;
- leave;
- superannuation; and
- procedures for consultation, representation and dispute settlement.

How to find which modern award applies

The Fair Work Ombudsman website provides information and tools to search for modern awards www.fairwork.gov.au/awards-and-agreements/awards.

Many high-income employees and people employed as senior managers and professionals are not covered by Awards.

Safety net contractual entitlements

Where an employer contracts to pay wages and provide entitlements that are above the minimum standards set out in the relevant modern award and the National Employment Standards, the payment and provision of the higher contracted wages and entitlements are enforceable under the *Fair Work Act*. For example, the relevant modern award may establish an employee's minimum hourly rate at $20. However, the employer may enter into a contract with the employee for an hourly rate of $25 per hour. If the employer subsequently fails to pay the employee $25 per hour, then the employer will have contravened the *Fair Work Act*. The employer will not be able to assert that it was only ever obliged to pay $20 per hour. The statutory protection of these contractual rights is set out in ss 541–543 of the *Fair Work Act*.

[22.110] Enterprise agreements

What is an enterprise agreement and what are the benefits?

Modern awards are part of the "safety net" for employees. The intention is to set a minimum standard in order to protect those who may not be in a position to bargain for better pay rates and conditions. When employers and employees

wish to agree on better conditions, or exchange an increase in one benefit for the relinquishing of another, they may make an enterprise agreement, which is an enforceable document that will prevail over a modern award. In order to be enforceable, enterprise agreements must be approved by the FWC and pass the "better off overall test" (BOOT) to ensure that employees are not worse off than they would be under the modern award. An enterprise agreement must not contravene the NES but may include terms supplementary to the NES. Enterprise agreements are made at the enterprise level, that is, they apply to employees of a particular business (or businesses).

Once a draft agreement is finalised, an application is made to the FWC for approval of the agreement. In granting approval, the FWC must consider certain requirements, such as that genuine agreement is present, and that the "better off overall test" is satisfied.

Different procedures are in place depending on the type of enterprise agreement. The three types are:

- single-enterprise agreements (a single employer or a situation such as a joint enterprise);
- multi-enterprise agreements (two or more employers that are not single interest employers);
- "greenfields" agreements (where one or more employers are proposing to establish an enterprise and have not yet engaged employees). Greenfields agreements are agreed between employers and the relevant union.

How to find an enterprise agreement

Registered enterprise agreements, variations and terminations of enterprise agreements can be found on the FWC website www.fwc.gov.au/awards-and-agreements/agreements/find-agreement.

[22.120] Workplace determinations

A workplace determination is an industrial instrument that functions similarly to an enterprise agreement, that is, it will prevail over the relevant modern award. In contrast to an enterprise agreement, it is created by a determination made by the FWC in a situation where parties are unable to reach agreement.

Remuneration

[22.130] Payment of wages and salary

Employees are entitled to be paid remuneration for their work in money, rather than goods or services.

Employees should check their modern award or enterprise agreement to find out their rate of pay based on the relevant classification and also if they are entitled to other amounts, such as overtime; penalty rates (eg, for working on weekends); casual or part-time loadings (an extra percentage paid to compensate for the casual employee's lack of entitlements such as annual leave); or allowances (eg, where the employee works with dangerous chemicals, or uses their car for work purposes).

How to calculate pay

The Fair Work Ombudsman website provides various pay tools, to assist in finding the applicable pay rates for employees, or to calculate an employee's weekly pay. See www.fairwork.gov.au/pay.

All work must be paid work

Employees should be paid in full for work performed. There must be at least a monthly payment.

Generally speaking, a trial or probation period in a new workplace takes place within the employment relationship and therefore all wages and entitlements should be paid [see 22.45]. An employee should also be paid for the time spent in meetings and travelling (except where the travel is from home to work and home again). An employee should also be paid for time spent in training on premises and off premises where the employer has organised or required the employee to attend training.

Generally, a full-time or part-time apprentice or trainee should be paid for time spent attending any training or assessment related to their traineeship.

Deductions from employee's pay

An employer is only permitted to make deductions from an employee's pay in certain limited circumstances. Generally, the deduction must be authorised in writing by the employee, for the employee's benefit and must be reasonable (see *Fair Work Act*, s 324).

For example, it would be unlawful for an employer to deduct money from an employee's wages where there have been breakages or where a customer has left without paying their bill. Employees should check their modern award or enterprise agreement, and any other written agreement, for any mention of deductions.

Pay slips, cash and records

Employers must issue pay slips to each employee within one working day of pay day. The Fair Work Ombudsman has made available online pay slip templates to assist employers in providing pay slips that contain all the necessary legal requirements. The obligation to provide a pay slip is a strict legal obligation, which means there is no legitimate excuse for an employer not to provide pay slips. An employer that does not provide pay slips is in breach of the *Fair Work Act* and *Regulation* and a court could impose penalties for those breaches. The obligation to provide a pay slip is set out in s 536 of the *Fair Work Act*.

A pay slip must include the following information:

- name of the employee;
- name of employer and ABN;
- the period to which the pay slip relates;
- an hourly rate of pay for ordinary hours worked (if there is one), the amount, the number of hours worked, the amount of the payment;
- an annual rate (if there is one) at the latest date to which the payment relates;
- the date on which payment was made, for the period on the pay slip;
- the net and gross amount of the payment;
- any amount that is a bonus, loading, allowance, penalty rate, incentive payment or other separate entitlement;
- any deductions made;
- superannuation contributions – the amount paid or the amount the employer is liable to make in relation to the period to which the pay slip relates;
- name and number of the superannuation fund.

It is not illegal for an employee to be paid cash in hand – but the employee must be given a pay slip, and tax must be withheld (deducted) from gross wages and remitted to the Australian Taxation Office (ATO) by the employer. If an employee receives cash without a pay slip, there is a real risk that the employer may not be complying with relevant laws and obligations. For example, the employer may not be remitting tax to the ATO or contributing superannuation.

If a dispute arises between an employer and an employee and there are no pay slips, it may be difficult for the employer or employee to provide evidence of relevant events, or evidence that an employment relationship existed. With effect from September 2017, the *Fair Work Act* was amended so that an employer who fails to keep records or provide pay slips in accordance with the Act, bears the burden of disproving any allegation the employee makes in relation to a contravention of the Act, a modern award or enterprise agreement. For example if an employee alleges that they worked 42 hours per week, but were only paid for 34, the employer who did not provide pay slips has to prove that the employee only worked 34 hours per week and did not work 42 hours as alleged.

The employer must keep accurate employee records for seven years. The records that an employer must keep are:

- the employee's personal details and certain information about their employment;
- gross pay and deductions;
- bonuses, loadings, penalty rate payments and other allowances;
- overtime records;
- records regarding an agreement about averaging work hours;
- leave records;
- records of superannuation contributions.

Where a business is transferred to a new employer, the old employer must transfer the employee records to the new employer.

Section 535 of the *Fair Work Act* and reg 3.42 of the *Fair Work Regulations* give employees or ex-employees the right to inspect and copy their employee records. An employer must provide the documents within 14 days from the request. An employer who refuses to make the records available or does not provide them within the specified time without a reasonable explanation may be penalised by a court.

[22.140] Superannuation

Workers who earn $450 or more per month (before tax) are entitled to superannuation contributions, provided they are aged 18 or over. If they are under 18 and working more than 30 hours per week, they are also entitled to superannuation. Independent contractors who mainly provide their intellectual or physical labour are entitled to superannuation contributions. Also, overseas students and workers on any other type of visa are entitled to superannuation and can apply for these funds when they exit Australia.

The employer (or principal in the case of a contractor) must contribute 9.50% of wages/salary to a superannuation fund. The employer is required to forward the superannuation contributions to a superannuation fund that complies with the relevant legislation. Some Awards have default industry super funds where an employee has not elected a fund.

The Australian Taxation Office (ATO) administers the statutory superannuation scheme whereby employers make contributions for employees. In the event that superannuation is not contributed on behalf of the employee, the Australian Taxation Office will impose a "charge" on the employer and in effect collect the unpaid superannuation contributions for the employee. Employees should regularly check their superannuation statements to ensure that superannuation contributions are being made. Most superannuation funds facilitate member access to statements online through the fund's website.

More information about superannuation can be obtained on the website of the ATO. Complaints about a failure by an employer to make superannuation contributions should be made to the ATO (see www.ato.gov.au/super).

[22.150] Suspension and stand down

Generally, an employer cannot "stand down" or "suspend" an employee without pay. There are some exceptions to this rule. An employee can be suspended or stood down without pay where there is:

- industrial action (eg, a strike or a lock-out);
- a breakdown of equipment – if the employer cannot be reasonably held responsible for the breakdown;
- a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

A contract of employment or an enterprise agreement may also contain stand down provisions.

In practice, the situations in which an employer may lawfully stand down employees without pay are quite limited, for example, during a natural disaster. Employees cannot be stood down just because there is not enough work or because of a decline in the employer's business. If the employer no longer wishes to pay the employee, then the appropriate course may be to terminate the employment of the employee. Employees cannot be stood down while on leave.

An employee cannot be suspended without pay for misconduct or wrongdoing, although they may be suspended with pay and be directed not to attend the workplace and to await further instructions from the employer. It is relatively common for employees to be suspended on pay while an investigation takes place into misconduct alleged against the employee.

Section 70 of the *Government Sector Employment Act 2013* (NSW) entitles a NSW government sector agency to suspend an employee in specific circumstance and on specific terms. Similar provisions exist for Australian public sector employers.

[22.160] Insolvency or bankruptcy of an employer

The law of corporate insolvency and personal bankruptcy is technically complex in the way it deals with amounts owed to employees of the insolvent corporation or bankrupt person.

The liquidation or bankruptcy of the employer will often result in the dismissal of employees on the basis of redundancy. Consequently, employees will become entitled to notice and if eligible, redundancy payments in addition to any wages, leave, superannuation and other amounts already owing. Generally, the relevant legislation gives some priority to the payment of employee creditors from the available remaining assets of the employer (if any).

The Fair Entitlements Guarantee (FEG) is an Australian Government safety net scheme established to pay out some employee entitlements where they were not paid because of liquidation or bankruptcy.

To obtain assistance from FEG, there must be a liquidation event (ie, the employer has entered liquidation or bankruptcy). In order to access the FEG scheme, the FEG claim must be made no later than 12 months after the termination of employment, or the date of the insolvency event (whichever is later).

FEG applies to five categories of employee entitlements:

- unpaid wages;
- annual leave;
- long service leave;
- notice, up to five weeks pay; and
- redundancy pay up to a maximum of four weeks per completed year of service (and pro rata for less than a full years service).

In calculating all entitlements under FEG, a maximum rate wage is used. If the employee earns more than this rate, FEG assistance will be calculated as if the employee earned only the maximum wage. The maximum wage is indexed every financial year. As at the time of publication, the maximum wage is $2,451 per week.

A person will not be eligible for FEG assistance if they are an "excluded employee" (including company directors and their relatives), a contractor, or are owed money that is not an eligible employee entitlement.

The FEG only applies to Australian citizens, permanent residents of Australia and the holders of special category visas (for citizens of New Zealand only). If you are a temporary resident of Australia, for example on a sponsored work visa, and your employer goes into liquidation or is made bankrupt, you do not get the benefit of FEG.

More information is available on the FEG website www.employment.gov.au/fair-entitlements-guarantee-feg.

Third parties

[22.170] Liability to third parties

Under the *Employees' Liability Act 1991* (NSW), employees are entitled to be indemnified by their employer for torts committed by the employee in the course of their employment. Also, the employee is not liable to indemnify the employer. For example, an employee who is negligent and causes a car accident while on duty may seek indemnity from their employer if the employee is sued for compensation by the other driver. The employer cannot require the employee to pay for the damage. However, this rule does not apply where the conduct of the employee was:

- serious and wilful misconduct; or
- did not occur in the course of, and did not arise out of the employment of the employee.

Mere negligence is not serious and wilful misconduct.

At common law, an employer is usually vicariously liable for the conduct of employees. Again, for such liability to arise the conduct must have occurred in the course of employment. The *Law Reform (Vicarious Liability Act) 1983* (NSW) enshrines this principle by making an employer liable where the employee commits a tort:

- in the course of the service of the employee;
- incidental to the service of the employee;
- incidental to the carrying on of the business of the employer.

Where a NSW public servant has engaged or is alleged to have engaged in tortious conduct, s 5 of the *Crown Proceedings Act 1988* (NSW) nominates the State of New South Wales as the defendant to claims against the Crown.

[22.180] Liability of third parties

A third party such as a director, manager or an advisor may be liable for the employer's contraventions of the *Fair Work Act* in circumstances where the person (including a corporation) was "involved with" the contravention. Section 550 of the *Fair Work Act* sets out the basis of this potential liability of third parties.

On the basis of s 550, an employee may claim the underpayment of the wages and entitlements from the third person as well as from the employer. The employee may also seek the imposition of a penalty on the third person as well as the employer.

Where an employer is insolvent or bankrupt, this option may allow the employee to recover money from the third person directly.

With effect from September 2017, the *Fair Work Act* was amended to make it easier for franchisors to be held responsible for contraventions of the Act, awards or enterprise agreements by their franchisees. These provisions are found in Div 4A of Pt 4-1 of the *Fair Work Act* and extend franchisors' responsibility for contraventions to situations where they:

- knew, or could reasonably be expected to have known, that a relevant contravention would happen, or a contravention of the same or similar kind was likely to happen; and
- haven't taken reasonable steps to prevent the contravention.

Termination

[22.190] Types of termination of employment

Employment can be terminated by either the employer or the employee, or may come to an end at the completion of a task or the expiry of a fixed contractual period. The reason for the termination of employment is critical in determining the obligations and entitlements of employers and employees.

It may be difficult for the parties in an employment relationship to say exactly how the employment relationship was terminated. This can be even more challenging for a court or tribunal to determine. Section 117 of the *Fair Work Act* requires the employer to give an employee written notice of the day of termination prior to termination.

Where an employee resigns, there may be issues of constructive dismissal (ie, the employee was forced to resign). Where an employer makes an employee redundant, there may be a question as to whether the redundancy was genuine. If it was not, the employee may challenge the decision, usually through unfair dismissal proceedings.

An employer intending to dismiss an employee is well advised to follow certain procedures, but is justified in dismissing an employee without notice (summary dismissal) in certain circumstances. Where a dismissal at the initiative of the employer is not in accordance with the law, the employee may have a claim under the unfair dismissal, general protections, or unlawful termination provisions of the *Fair Work Act*, or a claim under anti-discrimination or workers' compensation legislation.

There may be circumstances where either party may have repudiated the contract, such as where an employer fails to pay wages, or an employee fails to turn up for work. In such cases, it is important to determine which party repudiated first. This situation highlights the importance of the timing of events surrounding termination, and of keeping records of the events as they unfold. The date of termination is also crucial for working out time limits for making a claim, whether a minimum employment period (a necessary element for making an unfair dismissal claim) has been satisfied, and amounts of money payable as final pay.

An important High Court decision on the repudiation of the contract of employment is *Visscher v Giudice* [2009] HCA 34.

[22.200] Termination by the employer

Notice and payment in lieu of notice

In most instances, employers are required to give permanent employees notice that their employment will be terminated in advance, or pay the employee in lieu of providing actual notice. Payment in lieu of notice is at the full rate of pay for the hours the employee would have worked had their employment continued to the end of the notice period. Notice must be given in writing and state the day of termination.

Section 117 of the *Fair Work Act* sets out the minimum periods of notice as follows:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	*Period*
1	Not more than one year	One week
2	More than one year but not more than three years	Two weeks
3	More than three years but not more than five years	Three weeks
4	More than five years	Four weeks

The notice period is increased by one week if the employee is over 45 years old and has completed at least two years of continuous service with the employer at the end of the day the notice is given.

An employee may be entitled to a longer notice period under an award, enterprise agreement or contract.

Under the NES, certain employees are not required to be given notice of termination, such as employees employed for a specified time or task and casual employees.

Where notice is not required

The only situation where a permanent employee is not entitled to notice (or payment in lieu) is, where the employee's serious misconduct entitled the employer to instantly or summarily dismiss the employee.

Summary dismissal

Summary dismissal is the instant dismissal of an employee without notice or payment in lieu of notice – typically the employee is told to leave the workplace immediately, sometimes without even the opportunity to collect their personal possessions. The usual reason is an allegation of serious misconduct. The *Fair Work Act* and *Regulations* contain a definition of serious misconduct (see *Fair Work Act*, s 12; *Fair Work Act*, reg 1.07). Employers should take care to ensure their reasons for, and conduct surrounding, summary dismissal are justifiable, particularly in light of unfair dismissal rights of employees.

Summary dismissal can also affect an employee's entitlement to long service leave. An employee with between five and 10 years of service who is dismissed for any reason other than serious and wilful misconduct is entitled to pro rata long service leave. An employee who is dismissed after 10 years of service is entitled to any accrued long service leave regardless of the reason for their dismissal.

Inadequate notice from the employer

An employee who is dismissed without proper notice (or pay in lieu of notice) may take legal action in the Federal Circuit Court or the Federal Court to recover money owed by the employer. This usually amounts to the wages that would otherwise have been earned during the notice period. There is a six-year time limit to commence proceedings in court.

Redundancy

Where an employee is terminated by an employer because the employee's job is no longer required to be done by anyone (except where this is due to the ordinary and customary turnover of labour) or there has been a restructure of the workforce, or because the employer has become insolvent or bankrupt, the employee is generally entitled to redundancy pay. The ordinary and customary turnover of labour exception will apply where it is common and usual for a particular role to be brought to an end, rather than being ongoing.

Employees are entitled to redundancy pay at the scale set out in the NES in s 119 of the *Fair Work Act* as follows:

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	*Redundancy pay period*
1	At least one year but less than two years	Four weeks
2	At least two years but less than three years	Six weeks
3	At least three years but less than four years	Seven weeks
4	At least four years but less than five years	Eight weeks
5	At least five years but less than six years	10 weeks
6	At least six years but less than seven years	11 weeks
7	At least seven years but less than eight years	13 weeks
8	At least eight years but less than nine years	14 weeks
9	At least nine years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

Redundancy pay is at the base rate of pay for the employee's ordinary hours of work. The entitlement of an employee to redundancy pay is in addition to the requirement for notice in s 117 of the *Fair Work Act*.

An employee may be entitled to a higher redundancy payment under an award, enterprise agreement or contract. Certain employees are not entitled to redundancy pay, such as casual employees, apprentices, or those employed by a small business employer. A small business employer is defined in s 23 of the *Fair Work Act* as an employer who employs less than 15 employees, including the employees of any associated entities. A simple head count is applied in which all permanent employees and casuals employed on a regular and systematic basis are included. An employer may apply under s 120 of the *Fair Work Act* to the FWC to reduce the amount of redundancy pay owing to an employee where the employer has found other acceptable employment for the employee (even if the employee declined to accept it) or cannot pay the amount.

Genuine redundancies are excluded from the unfair dismissal provisions of the *Fair Work Act* (see [22.240]).

Common law claim for wrongful termination

If an employee is dismissed prior to the end of a fixed-term contract, or is dismissed where there is an ongoing contract, there may be a claim for damages based on the notice specified in the contract, or "reasonable notice" where there is no reference to notice in the contract. This applies whether or not the contract is in writing. The question of what is reasonable will depend on numerous circumstances such as length of service, age, seniority and salary.

The damages claim is limited to the salary the employee would have earned had notice been given, taking into account whether the employee had earned wages after the dismissal. It remains unclear whether s 117 of the *Fair Work Act* overrides a contractual entitlement to reasonable notice or provides only a minimum period of notice.

A common law contract can be terminated without notice by an employer where there is serious misconduct.

[22.210] Termination by the employee

An employee can resign from employment with notice in accordance with their modern award, enterprise agreement or employment contract. They may also resign without notice where there are sufficient grounds. Such grounds include where an employer has, by their conduct, repudiated the contract, such as where an employer has failed to pay wages or where a worker is directed to carry out dangerous work without the necessary safety procedures and equipment.

Where an employee is forced to resign due to the employer's conduct, this is known as "constructive dismissal" and it can give rise to the right to make a claim against the employer in the same way as other wrongful or unfair dismissals. Employees should be aware that some conduct of the employer will not be sufficient to repudiate the contract, and if the employee mistakenly assumes that the contract has been repudiated and acts upon this, then the employee will be taken to have repudiated the contract, not the employer.

Inadequate notice from the employee

If an employee leaves without giving proper notice, the employer may be permitted by a modern award or enterprise agreement to deduct from the employee's termination pay an amount equivalent to the wages that would have been earned in the notice period. Absent such a term in a relevant instrument, no deduction will be permitted.

The employee must be paid the full balance of any other money owed.

Must employees give reasons?

An employee is not obliged to give reasons for resignation. However, to be entitled to a pro rata long service payment on termination (under the *Long Service Leave Act 1955* (NSW)), an employee with five to 10 years' service must give a reason (and usually some supporting evidence) establishing that it was necessary for them to resign because of ill-health, or some pressing domestic or other necessity.

[22.220] Other termination payments

Termination pay should include wages owing, but also other payments such as untaken annual leave, loadings and long service leave.

The actual amount owed may be in dispute, because entitlements can depend on the reason for the termination.

Employees are legally entitled to a written notice of termination and a proper written breakdown of their termination pay.

An employee or a person acting on the employee's behalf can require the employer to make employee records available during employment or following termination of employment (see *Fair Work Act*, s 535; *Fair Work Regulations*, reg 3.42).

[22.230] References and separation certificates

Employers do not have to give work references. However, it is common practice for employers to voluntarily provide at least a documentary statement certifying that the employee was employed between certain dates and indicating the employee's job title.

If employment is terminated, an employment separation certificate (in the form provided by Centrelink) must usually be obtained if the employee wishes to claim social security benefits. The employer must provide this on request from the employee. If the employer refuses to provide a separation certificate, the former employee should inform Centrelink.

Unfair dismissal

[22.240] Employment legislation throughout Australia has long contained provisions protecting workers against harsh and unfair dismissal. Accompanying the legislative provisions is a large body of case law that aids in the interpretation of such provisions. The *Fair Work Act* contains protections against unfair dismissal in Pt 3-2 that are consistent with the historical development of unfair dismissal laws in Australia. Section 381(2) encapsulates the ethos of the unfair dismissal provisions, namely: "a fair go all round" for employees and employers. This expression was used by Justice Sheldon in *Re Loty and Holloway v AWU* [1971] AR (NSW) 95.

[22.250] Protections from unfair dismissal

Who can make an unfair dismissal claim?

To be eligible to make an unfair dismissal claim, an employee must meet all of the following criteria:

- the employee was dismissed (in some instances a forced resignation or a demotion is considered a dismissal, see below);
- the employee has completed the minimum employment period of:
  - six months if employer is not a small business (see definition in *Fair Work Act*, s 23); or
  - 12 months if employer is a small business;
- if the employee was a casual he/she must have been engaged on a regular and systematic basis for the minimum employment period and have a reasonable expectation of ongoing work;
- the employee earned less than the High Income Threshold ($148,700 from 1 July 2019, indexed annually), or the employee is covered by an award or enterprise agreement.

Meaning of "dismissed"

An employee has been dismissed if their employment has been terminated at the employer's initiative or if the employee was forced to resign because of the conduct or course of conduct engaged in by the employer.

The following events are not considered to be a dismissal:

- the end of a fixed-term contract (although there may be an exception where the employee has been employed on a series of successive outer limit contracts);
- the end of a task based contract where the task is completed;
- the end of a seasonal contract when the season finishes;
- the end of the training arrangement, where employment was to be for the duration of the training period;
- demotion without a significant reduction in remuneration or duties.

Lodging the claim and time limits

Applications must be filed with the Fair Work Commission (FWC).

Applications must be filed within 21 days of the dismissal taking effect. The FWC has discretion to grant extensions of time for late applications, although it strictly enforces the time limit and in order to grant an extension, must be satisfied exceptional circumstances exist (see *Fair Work Act*, s 394(3)).

Application forms are available from the FWC Registries or on the FWC website. The application must be filed by ordinary mail, online, email, fax or in person in the Registry.

Great care must be taken in deciding whether to make an unfair dismissal or a general protections claim, as the FWC will usually not entertain an application to amend unless the employee in substance intended to make the other application, and has simply used the wrong form. In other circumstances, where an employee wishes to change the type of application after the 21-day time limit, they will need to apply for an extension of time (General protections claims are discussed at [22.280]).

Fees

In the FWC, there is a $73.20 filing fee (as at 1 July 2019), which must be paid except if the fee has been waived in cases of serious financial hardship. The FWC has a standard fee waiver application.

What is an unfair dismissal?

A person has been unfairly dismissed if the FWC 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 (in the case of a small business employer); and
- the dismissal was not a case of genuine redundancy.

Harsh, unreasonable or unjust dismissal

A dismissal is unfair if it is harsh, unreasonable or unjust.

In determining claims for unfair dismissal, the FWC must consider whether:

- there was a valid reason for dismissal, related to the employee's capacity or conduct;
- the employee was notified of that reason;
- the employee was given an opportunity to respond to any reason related to their work performance or conduct, that is, afforded procedural fairness;
- the employer unreasonably refused to allow the employee to have a support person to assist at discussions relating to dismissal;
- the employee was given a warning of unsatisfactory performance before termination;
- the size of business or a lack of dedicated human resource management would be likely

to impact the procedures followed in effecting the dismissal.

The FWC must also take into account any other matters it considers relevant. Other relevant matters frequently considered include the impacts of the dismissal on the employee personally, a long period of service with a satisfactory record, differential treatment of employees, contrition, summary dismissal (where disproportionate to conduct) and the gravity of the conduct.

Before an unfair dismissal hearing the parties should prepare to file evidence and make submissions to the FWC on each of the above matters.

Small Business Fair Dismissal Code

A Small Business Fair Dismissal Code applies under s 388 of the *Fair Work Act*. The code applies to all small business employers (see [22.200]).

The Fair Work Ombudsman (FWO) has created a checklist to make it easier for small business employers to comply with the Small Business Fair Dismissal Code.

If a small business employer has dismissed an employee without notice – that is, with immediate effect – on the ground that the employee has committed serious misconduct that falls within the definition in reg 1.07 of the *Fair Work Regulations*, then it is necessary for the FWC to consider whether the dismissal was consistent with the "Summary dismissal" section of the Code. All other types of dismissals by small business employers are to be considered under the "Other dismissal" section of the Code.

In assessing whether the "Summary dismissal" section of the Code was complied with, it is necessary to determine first whether the employer genuinely held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal, and second whether the employer's belief was, objectively speaking, based on reasonable grounds. Whether the employer has carried out a reasonable investigation into the matter will be relevant to the second element. It is not necessary for the FWC to determine whether the conduct actually occurred.

The relevant case is *Ryman v Thrash Pty Ltd* [2015] FWCFB 5264 at [41].

The Code states that if an employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal for serious misconduct such as theft, fraud, violence and serious breaches of occupational health and safety, summary dismissal may be justified without the employee being given an opportunity to respond to the allegation. If there is other conduct that is not serious misconduct, the employer must give the employee a reason why she or he is at risk of being dismissed and an opportunity to respond to and rectify the problem.

Genuine redundancy

The dismissal is a case of genuine redundancy if:

- the employer no longer requires the person's job to be performed by anyone because of operational requirements of the employer's enterprise; and
- the employer has complied with any obligation in an award or enterprise agreement about consultation; and
- it was not reasonable in all the circumstances for the employee to be redeployed within the employer's or an associated entity's enterprise.

Conciliation

Most applications proceed firstly to telephone conciliation with a staff member of the FWC.

Settlement of the claim

Reinstatement is the primary remedy, but it is often the case the employee does not seek it or the employer resists it. The most common form of settlement is financial compensation. Other outcomes include:

- reinstatement or re-employment with or without back-pay;
- retrospective resignation (where the employee is allowed to resign rather than be dismissed);
- a reference or a statement of service.

Settlements are invariably made without admissions of liability, and usually contain confidentiality provisions and non-disparagement obligations.

Parties usually execute "terms of settlement" or a "deed of release" on settlement of an employee's claim.

Settlement agreements usually (although not always) prevent the employee from continuing or commencing further legal proceedings against the employer in relation to matters arising out of their employment, except for workers' compensation personal injury claims and claims under superannuation legislation. An employee who may

have a claim for underpayment against their former employer should be especially mindful of this.

Jurisdictional issues

If jurisdictional arguments are raised that the employee is not eligible to make a claim, the FWC can deal with the argument by way of arbitration before or after conducting a conciliation, or as part of the substantive arbitration.

Hearing

If the matter is not settled by conciliation and is not discontinued, it is allocated to a member of the FWC to be listed for hearing.

During the hearing, the FWC hears evidence from both parties, and submissions on the law. The FWC is not bound by formal rules of evidence.

If a party fails to attend a scheduled listing, the matter may be decided in their absence (an ex parte hearing).

The civil standard of proof applies; that is, proof on the balance of probabilities.

Remedies

If the applicant establishes a case of harsh, unreasonable or unjust dismissal, the FWC may order:

- reinstatement to the person's former position;
- re-employment in another position;
- compensation up to a maximum of the lesser of $74,350 (as at 1 July 2019) and 26 weeks' pay.

Orders for reinstatement and re-employment can be made together with orders for lost wages and continuity of service. The majority of cases where the applicant is successful result in an order for compensation.

In assessing compensation, the Commission must consider whether the employee has made reasonable attempts to find another job, and what they would have earned if they had done so. If an employee's conduct contributed to the dismissal, the FWC will reduce the amount of compensation awarded.

Representation

A person may be represented by a legal practitioner only with the permission of the FWC (see *Fair Work Act*, s 596).

Costs

Parties usually pay their own legal costs (if any). Orders for costs are available only if the application or response is vexatious, without reasonable cause or without reasonable prospects of success; or either party acts unreasonably.

Costs can be ordered against lawyers or paid agents where there were no prospects of success and they encouraged the person to start, respond to, or continue the proceedings or if the lawyer or paid agent took an unreasonable act or omission and costs were incurred as a result.

It is unusual for the FWC to order costs.

Appeals

If either party is dissatisfied with the decision of the FWC, they may appeal the decision with the permission of a Full Bench of the FWC. There is a 21-day time limit to lodge an appeal, unless an extension is granted. The FWC may only grant permission to appeal if it is satisfied that it is in the public interest to do so. Grounds for appeal are error of law or significant error of fact.

More information

The FWC website at www.fwc.gov.au has a number of documents that provide information about unfair dismissal proceedings, including guides, fact sheets, practice notes and an Unfair Dismissals Bench Book. The LawAccess NSW website at www.lawaccess.nsw.gov.au also provides information and step by step guides.

Claims for underpayment

Where there are underpayments, it is common for there to be a settlement of the underpayment claim as well as the unfair dismissal. However, the FWC cannot determine an underpayments claim. The Federal Circuit Court, Federal Court or Chief Industrial Magistrates Court can determine claims of underpayments. There is a six-year time limit. Section 548 of the *Fair Work Act* provides for a simple small claims procedure for employee entitlements in the Federal Circuit Court, where up to $20,000 can be claimed. Information about making a small claim is available at the website of the Fair Work Ombudsman (www.fairwork.gov.au).

Protection of employees

[22.260] "General protections" in the Fair Work Act

The "general protections" are provisions of the *Fair Work Act* that deal with a range of related protections for most employees and employers. They also protect prospective employees and employers, independent contractors and those they contract with, and unions. Even third persons are protected where action has been taken against a third person because of the conduct of another.

The general protections protect:

- workplace rights (eg, protection against being adversely treated for asking for pay slips, inquiring about pay and entitlements or making a workplace complaint);
- temporary absence due to illness or injury;
- the right to engage or not engage in industrial activities (eg, by ensuring that employees are free to join or refuse to join a union);
- against workplace discrimination (eg, where an employee is dismissed, demoted or denied training opportunities because of, eg, being pregnant, having a disability or being a particular age); and
- against sham arrangements (where an employer hires a person as an independent contractor when it is actually an employment relationship).

Three of the key protections are considered in more detail below.

The general protections protect against "adverse action" being taken against a person.

Adverse action includes:

- dismissing an employee;
- injuring the employee in her or his employment;
- altering the position of an employee to the employee's prejudice;
- discriminating between the employee and other employees;
- discriminating against a prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee;
- refusing to employ a person;
- terminating an independent contractor's contract;
- altering the position of an independent contractor to her or his prejudice;
- refusing to engage an independent contractor; and
- taking unauthorised industrial action against an employer.

Threatening and organising adverse action are also covered by the protections.

"Injury in employment" is narrower than "altering the position" and refers to legally compensable injury. Prejudicial alteration refers to advantages enjoyed by the employee and may include disciplinary conduct, restructure, change in policy, procedure or an undertaking as long as the detriment is real or substantial.

Workplace rights

Section 340 of the *Fair Work Act* prohibits a person (eg, an employer) taking adverse action against another person (eg, an employee) because that person (the employee) has a workplace right.

The term "workplace right" includes many employment rights, such as a right under a modern award or other industrial instrument, the right to participate in industrial action or a hearing held by the FWC, and even the right to make a complaint or inquiry in relation to one's employment (such as the right to complain to an employer or to the FWO about under payment of wages). Accordingly, where, for example, an employer cuts an employee's hours because the employee called the FWO and complained about underpayment of wages, the employee would have a claim under the general protections.

Protection from workplace discrimination

This protection prohibits an employer taking adverse action against a person who is an employee, or prospective employee, because of the person's:

- race;
- colour;
- sex;
- sexual orientation;
- age;
- physical or mental disability;
- marital status;
- family or carer's responsibilities;
- pregnancy.

There are certain exceptions to this protection, such as where the employer's action was taken because of the inherent requirements of the job.

Due to the operation of s 351(2)(a) of the *Fair Work Act*, NSW employees who claim to have been terminated because of their religion, political opinion or social origin must bring their claim as an "unlawful termination" under s 772 rather than s 351 (see *McIntyre v Special Broadcasting Services Corporation* [2015] FWC 6768).

Temporary absence due to illness or injury

This protection prohibits an employer dismissing an employee because the employee is temporarily absent from work due to illness or injury, where the employee has provided a medical certificate and has not had more than three months of unpaid sick leave in the last year.

This protection does not prohibit an employer from dismissing a person who is temporarily absent due to illness or injury – it merely prohibits an employer from dismissing a person *because of* those circumstances.

Onus

Once the employee proves the facts which provide the basis for the employer's alleged adverse action, the onus in general protections matters is on the employer to prove that the adverse action they took was not because of any of the prohibited reasons discussed above.

[22.270] Unlawful termination

Where based on the relevant facts a claim can be made both under the general protections provisions and the unlawful termination provisions, the person *must* apply under the general protections provisions (see *Fair Work Act*, s 723). The unlawful termination provisions in the *Fair Work Act* should be considered where the employer is a non-national system employer. As NSW has referred its powers to the Commonwealth, non-national system employers are generally unincorporated entities and State and Local Governments. Many of the provisions restate the general protections.

Onus

Once the employee proves the facts which provide the basis for the employer's alleged adverse action misconduct, the onus in general protections matters is on the employer to prove that the adverse action they took was not because of any of the prohibited reasons discussed above.

[22.280] Enforcement of the general protections and unlawful termination provisions

A person alleging a contravention of the general protections that has led to a termination of employment, or an unlawful termination, must apply to the FWC within 21 days of the dismissal taking effect, unless the person seeks an injunction. In the case of an injunction, an application can be made directly to the Federal Court or the Federal Circuit Court.

Great care must be taken in deciding whether to make a general protections claim (in the case of a dismissal) or an unfair dismissal claim, as the FWC will usually not entertain an application to amend where it is made after 21 days from the dismissal.

Application forms are available from the FWC Registries or on the FWC website. The application must be filed by ordinary mail, email, fax or in person in the Registry.

Where a contravention of general protections does not result in dismissal, a person has six years from the date of the contravention to make a claim to a Federal Court or Federal Circuit Court. The limitation period is found in s 544 of the *Fair Work Act* (it is still possible to firstly make an application to the FWC before making a claim in the courts).

An allegation of a contravention of the general protections, or unlawful termination, is usually dealt with by the FWC through a conference. If the matter is not resolved at a conference, the FWC will issue a certificate in matters involving a dismissal. The applicant then has 14 days to make an application to the Federal Court or Federal Circuit Court. The Federal Court and the Federal Circuit Court have identical jurisdictions in regards to enforcing the general protections. The Federal Court can hear appeals from the Federal Circuit Court.

If the parties agree, a dismissal general protections application can be dealt with by the FWC in a consent arbitration hearing. This may lead to a quicker and cheaper remedy, however the FWC has no power to award penalties. It is limited to granting reinstatement and/or compensation.

The remedies available from the Federal Court and the Federal Circuit Court are:

- compensation for loss suffered because of the contravention including economic and non-economic loss;
- reinstatement;
- an injunction to stop or remedy the effects of the contravention or threatened contravention;
- penalties – a maximum $63,000 for a body corporate and $12,600 for an individual.

More information

The FWC website at www.fwc.gov.au has a number of documents that provide in depth information about general protections proceedings, including fact sheets, practice notes and a General Protections Benchbook.

Discrimination laws

[22.290] Unlawful discrimination

This part deals very briefly with discrimination laws other than the general protections found in the *Fair Work Act* (see Chapter 17, Discrimination for more information). Discrimination at work occurs when factors unrelated to a person's ability to do the job are used to treat that person unfairly in determining whether, for example, they should be hired, promoted or dismissed.

Anti-discrimination laws apply to employees and employers. They extend to a wide range of employment-related situations, including discrimination by private employment agencies, trade unions and qualifying bodies such as licensing boards.

Federal anti-discrimination law

Federal legislation prohibits discrimination in employment on grounds including race, sex, pregnancy, sexual orientation, gender identity, intersex status, marital or relationship status, disability, family responsibilities, age, religion, political opinion, trade union activity and criminal record. Federal discrimination law also prohibits offensive behaviour based on race, colour or national or ethnic origin and sexual harassment.

Complaints about breaches of federal discrimination laws are made to the Australian Human Rights Commission. Generally complaints must be made within six months from when the discriminatory conduct took place. The Federal jurisdiction attracts costs as opposed to the NSW laws, which is a no costs system.

NSW anti-discrimination law

NSW legislation prohibits discrimination in employment on grounds including race, sex (including pregnancy), transgender status, marital or domestic status, disability, carer's responsibilities, homosexuality and age. NSW discrimination law also prohibits vilification on the grounds of race, transgender status, homosexuality, HIV/AIDS status and sexual harassment. Complaints about breaches of State discrimination laws are made to the Anti-Discrimination Board of NSW. Generally complaints must be made within 12 months from when the discriminatory conduct took place.

State and federal anti-discrimination legislation is discussed in detail in Chapter 17, Discrimination.

Choosing a jurisdiction

Because there are overlapping federal and state discrimination laws, employees need good advice about the most appropriate agency with which to lodge a discrimination claim. This is very important, because it may not be possible to transfer a complaint from one agency to another. Also, it is usually not possible to make multiple discrimination claims arising from the same event.

The choice of jurisdiction will depend on the circumstances of the case and the remedy the person is seeking.

Information about commencing proceedings is available from the Australian Human Rights Commission, the NSW Anti-Discrimination Board, unions, LawAccess NSW, Legal Aid NSW and Community Legal Centres.

Registered industrial organisations

[22.300] The *Fair Work (Registered Organisations) Act 2009* (Cth) regulates the operation of registered organisations representing the interests of employees and employers. The Registered Organisations Commission, established in 2017, and the FWC regulate different aspects of registered organisations. Generally unions represent member workers and employer associations represent member employers.

[22.310] Unions

Unions are legally registered organisations representing the interests of employees working in the same or related industries or occupations.

In NSW, there is a union for most occupations. Someone who is unsure of what union they can join should contact Unions NSW (www.unionsnsw.org.au).

All employees in Australia are entitled to be union members unless excluded through union rules. No person can be forced to become, or remain, a union member.

Industrial rights and contraventions

The general protections in the *Fair Work Act* protect certain union related industrial activities. It is also a contravention of the *Fair Work Act* general protections to take adverse action against an employee or prospective employee because the person:

- is or was a union official, or some other elected representative of employees;
- is or is not a union member.

The Federal Court and the Federal Circuit Court can make a wide range of orders to enforce the provisions concerning victimisation on these grounds.

It is also a contravention for a union to seek bargaining service fees.

Union structure

The structures and policy-making procedures of most unions follow similar patterns:

- the elected executive generally manages the union's activities and implements policy;
- the general secretary or president has overall responsibility for the union's affairs;
- organisers and industrial officers are responsible for recruitment of members and general industrial matters;
- members elect their own local representatives (workplace delegates).

Union rules

Unions are subject to their own internal rules dealing with such matters as:

- eligibility;
- conditions of membership;
- resignation;
- expulsion.

Fees

Employees may arrange for union fees to be automatically deducted from their wages. However, unions recommend that employees pay their union fees by direct debit. In this way, employees may keep their union membership confidential from their employer if the employee chooses. Union fees are tax deductible.

Dealing with workplace problems

A member of a union who has a problem in the workplace should either contact their workplace union delegate or contact the union office directly.

Membership rights

Unions are democratic organisations. Members have rights to participate and be involved in the work of their union in numerous ways such as voting and seeking election for office. A member of a union is also entitled to be provided with the financial statements of the union. Officers of unions can inspect union books (see *Fair Work (Registered Organisations) Act 2009*, s 280). Union rules (as varied from time to time) can be found on the FWC's website.

A union member who makes certain disclosures may be protected by Pt 4A of the *Fair Work (Registered Organisations) Act 2009* ("Protection for whistleblowers") which also contains an entitlement not to be victimised and provision for compensation.

Safety and bullying

[22.320] Health and safety at work

Many NSW statutes, regulations and codes of conduct deal with health and safety requirements at work. In July 2008, an agreement was made between the Commonwealth and all states and territories (except Western Australia) to implement harmonised work health and safety laws. The *Work Health and Safety Act 2011* (Cth) came into effect on 1 January 2012 and replaced the occupational health and safety laws in NSW.

More detailed information about work health and safety laws is available from SafeWork NSW.

Employers' responsibilities

Generally, employers must ensure the health, safety and welfare of their employees by:

- providing and maintaining a safe workplace, facilities, plant and work systems;
- ensuring the safe use, handling, storage and transport of equipment or substances;
- providing proper information, instruction, training and supervision.

Employees' responsibilities

Employees also have responsibilities to take reasonable care for the health and safety of people at the workplace, and must cooperate with initiatives designed to ensure safety at work. Failure to do so may be a breach of legislation.

If an injury or illness occurs

An employee who suffers a work-related injury or illness should, as soon as possible:

- notify the employer (or former employer);
- see a doctor and get a SafeWork NSW medical certificate; and
- complete an employee's compensation claim form and submit it with the SafeWork NSW medical certificate to either the employer or the employer's compensation insurer.

Victimisation

It is illegal to victimise or dismiss an employee for:

- raising a health and safety complaint;
- being on a health and safety committee.

See Pt 6 of the *Work Health and Safety Act* which deals with discriminatory, coercive and misleading conduct.

It will also be a breach of the *Fair Work Act* general protections to take adverse action against an employee for making a safety-related notification or complaint, or for making a workers' compensation claim.

Ceasing work

A worker has a right to cease or refuse to undertake work if they have a reasonable concern that doing the work would expose them to a serious risk to their health and safety, or if directed to cease unsafe work by a health and safety representative. If work is stopped because of a health and safety issue, employees should be prepared to, for example, move to a safe place and perform other suitable work if required.

[22.330] Bullying and harassment

On 1 January 2014, a "bullying" jurisdiction commenced in the FWC. The laws allow an employee or a group of employees who have been bullied at work to apply to the FWC for an order to stop the bullying. A bullying complaint can be made even where an employee has made or proposes to make other complaints such as a workers' compensation, discrimination or general protections claim.

The anti-bullying laws are set out in Pt 6.4B of the *Fair Work Act*. The laws only apply to bullying conduct that occurred at work after 1 January 2014.

Who is covered?

The bullying conduct must occur at work. Employees employed by a corporation or the Commonwealth Government as well as some maritime employees are covered by the laws. Employees employed by non-constitutional corporations, NSW public sector and local government employees are not covered.

The definition of "worker" for the purposes of the anti-bullying laws is broad and mirrors

that contained in the *Work Health and Safety Act*. Worker includes an individual who does work in any capacity such as employees, contractors, subcontractors, volunteers (though not those volunteering in groups comprised wholly of volunteers) or students on placement. A worker may also include someone who performs work voluntarily in a program where they are a client and the work is performed for their benefit. There are notable exceptions such as defence force personnel.

What is bullying?

Bullying is defined in s 789FD of the *Fair Work Act* as "repeated", "unreasonable" conduct on the part of an individual or group towards an employee or a group of employees, which creates a risk to health and safety. Examples of bullying behaviour are aggressive or intimidating conduct, belittling, mocking or humiliating comments, malicious gossip or the spreading of rumours, practical jokes, initiation rites, victimisation, exclusion from work events, the making of vexatious allegations, conducting an investigation in a grossly unfair manner and unreasonable work expectations. For conduct to be "repeated", there must be more than one occurrence, although it is not necessary that precisely the same behaviour is repeated. The test for "unreasonable" is an objective test. That is, would a reasonable person think it unreasonable in the circumstances? The individual carrying out the bullying need not be a fellow worker (they could, for example, be a customer of the workplace in which the worker works). Nor is there a requirement that the person doing the bullying be at work at the time they engage in the behaviour (eg, bullying behaviour may include text messages sent to a worker while they are at work, but the sender is not). Also, there need not be evidence of actual harm to the worker as a result of bullying, rather there must be evidence of a "real" risk to health and safety. However, there must be a causal link between the conduct and the risk.

For these laws to apply, the bullying behaviour must happen at work. The term "at work" is not defined in the bullying laws but it has been given a broad meaning in the *Work Health and Safety Act*. The concept is not limited to the physical workplace, but rather encompasses the performance of work at any time or location. A worker will be "at work" when they are engaged in some other activity which is permitted by their employer (or, in the case of a contractor, their principal). This may include conduct that occurs during meal breaks or travel time. Importantly, "reasonable management action" that is carried out in a "reasonable" manner is not bullying (see *Fair Work Act*, s 789FD(2)). The term "management action" is wider than managerial decisions and includes conduct or behaviour which impacts an employee. Examples of management action are performance appraisal and performance management, misconduct investigations and counselling for misconduct, and denying a worker a benefit. Again, what is "reasonable" will be an objective test determined by the facts that apply before, during and after the management action. The FWC is not required to make its own judgement about any conduct that is the subject of management action (such as poor performance and subsequent performance management) and substitute its own view for that of the relevant managers or supervisors. Instead, an applicant must show the management action lacked any evident and intelligible justification such as to render it unreasonable in all the circumstances. Given this low threshold, management action that is less than best practice may still be found to be "reasonable".

Applications and the role of the Fair Work Commission

Applications for "an order to stop bullying" are made using Form F72 on the FWC website. An applicant must individually name each person against whom they seek orders.

The FWC will start to process an application to for an order stop bullying within 14 days of filing. No time limit applies to making an application to the FWC. However, where an applicant is no longer "at work" (in the case of a resignation or dismissal, for example) there can be no future risk of bullying at work, and the FWC will therefore have no power to issue an order. An application made in such circumstances may be dismissed on the basis it has no reasonable prospects of success.

The FWC will notify the employer and any individual who may be identified by the applicant as a "bully" in the application. The employer is required to file a response within seven days, while an individual named as a "bully" may do so if they wish. The FWC has the power to dismiss an application for a range of reasons such as want of jurisdiction or because the application is defective or vexatious.

The application fee is $73.20 (as at 1 July 2019). The filing fee can be waived in circumstances of financial hardship – the form for fee waiver is also available on the FWC website.

The FWC will deal with a stop bullying claim by either a conference or by way of hearing through receiving the evidence of witnesses, documentary evidence, submissions, research etc. The rules of evidence do not apply. In most cases, the FWC will hold an initial conference in order to explore potential resolution before listing the matter for hearing.

The FWC has powers to make orders about confidentiality, de-identify parties, and prohibit publication of reasons for the decision etc. Given the sensitive nature of some of these bullying applications, initial conferences may provide an effective and appropriate forum for an employee to have their bullying complaint dealt with externally.

Remedy

If the FWC finds that an employee or group of employees have been bullied and that there is a risk that the bullying will continue, then the Commission has broad powers to make orders for the bullying to stop. If orders are to be made, the FWC must have regard to any other investigation or process and the outcome of that process. Examples of orders made by the FWC relating to individual parties include that parties not make contact with each other, not attend certain premises, and refrain from making abusive or offensive statements. Examples of orders the FWC has made in relation to employers include orders to provide anti-bullying training to all staff, to create up to date anti-bullying policies, and to ensure a SafeWork inspector attends meetings with the parties.

The FWC cannot make orders for compensation, payment of a pecuniary amount or for reinstatement (in response to this type of application). However the FWC however is not prevented from making an order that requires monetary expenditure on the part of an employer, such as the provision of training. Orders can only be made against the applicant, the applicant's employer or other individual identified in the bullying stop application.

NSW public sector and local government employees who experience bullying at work can avail themselves of the protections within the *Work Health and Safety Act*.

All employees can complain to SafeWork NSW about bullying and harassment and SafeWork NSW may investigate the complaint. However, SafeWork NSW does not have powers to make orders in the way the FWC does.

Children

[22.340] Employment of children

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) and the *Children and Young Persons (Care and Protection) (Child Employment) Regulation 2015* (NSW) regulate the employment of children under 16 years of age for all types of modelling, and children under 15 years of age for entertainment, exhibition, still photography or door-to-door sales work. The *Industrial Relations (Child Employment) Act 2006* (NSW) may also be relevant in NSW to the extent that it deals with times at which (or periods during which) a child may be employed.

For further information on the regulation of child employment, contact the Children's Guardian or visit its website at www.kidsguardian.nsw.gov.au.

Working with Children Check Clearances

People who work or volunteer in child related work require a Working with Children Check Clearance (WWCC). A WWCC is issued by the Office of the Children's Guardian (Children's Guardian). The Children's Guardian administers the *Child Protection (Working with Children) Act 2012* (NSW) (the *Act*). The purpose of the *Act* is to identify persons who pose a risk to children. Section 4 of the *Act* identifies that the paramount consideration when making a decision under the *Act* is "the safety, welfare and well-being of children and, in particular, protecting them from child abuse".

Once the Children's Guardian receives an application, a criminal record and database check is completed to identify whether the applicant has been charged or convicted of either a Sch 1 or Sch 2 offence under the *Act*. Findings of misconduct by

a reporting body and notifications made by the NSW Ombudsman are also considered.

The Children's Guardian may conduct a risk assessment for any reason.

If a Sch 1 trigger is identified, then the Children's Guardian must perform a risk assessment to determine if the applicant poses a risk to the safety of children. The applicant may be asked to provide further information during this process and should consider obtaining legal advice before doing so. If an unacceptable risk is identified by the Children's Guardian, then the applicant will be disqualified from working with children and a bar imposed.

In conducting a risk assessment, the Children's Guardian may consider a range of factors including: the seriousness of the matters that caused the assessment, the period of time since the conduct occurred and the applicant's conduct since the matters that caused the assessment, the age of the applicant at the time that the matters occurred, the applicants present age and the age of the victim. The Children's Guardian must not determine that an applicant does not pose a risk to the safety of children unless satisfied that: a reasonable person would allow his or her child to have direct unsupervised contact with the applicant while the applicant was engaged in child related work and it is in the public interest to grant the clearance.

If a Sch 2 offence is identified, then the person will be automatically disqualified from working with children and a bar imposed.

The Children's Guardian may also impose an interim bar, which prevents the applicant from working with children while it is making its final determination. If an interim bar is still in place after six months, an appeal can be made to the NSW Civil and Administrative Tribunal (NCAT) to lift the interim bar. Both a clearance and a bar last five years.

If an applicant is refused a WWCC clearance or a clearance is cancelled, they may generally appeal that decision to NCAT within 28 days. NCAT may overturn the Children's Guardian decision by making an enabling order if it forms the view that the applicant is not a risk to children, which allows the applicant to obtain a WWCC clearance. Under s 26, people with certain convictions are not entitled to appeal. For more information, see www.kidsguardian.nsw.gov.au/working-with-children/working-with-children-check.

State and local government employment

[22.350] Federal government employees are generally covered by the *Public Service Act 1999* (Cth) and the *Fair Work Act*.

State and local government sector employees are generally covered by:

- the *Government Sector Employment Act 2013* (NSW) and the *Industrial Relations Act 1996* (NSW) – in the case of public servants employed by the NSW Government;
- Ch 11 of the *Local Government Act 1993* (NSW) and the *Industrial Relations Act 1996* (NSW) – in the case of local government employees in NSW.

In addition to the above legislation, numerous other statutes, regulations, statutory instruments and industrial instruments apply. For example, in the case of NSW public servants, there are a number of key awards made by the Industrial Relations Commission of NSW, which include the:

- *Crown Employees (Public Service Conditions of Employment) Award 2009*;
- *Crown Employees (Public Sector – Salaries 2008) Award*.

The Industrial Relations Commission of NSW has power to hear disputes involving NSW public sector and local government employees. This includes jurisdiction to hear unfair dismissal claims and victimisation claims, both of which have a 21-day time limit.

Public sector employees may have additional options that are not outlined here, and should seek legal advice about their particular circumstances.

Contact points

[22.360] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Anti-Discrimination Board of NSW
www.antidiscrimination.justice.nsw.gov.au
ph: 1800 670 812 or 9268 5544
Parramatta
ph: 9268 5555
Newcastle
ph: 4903 5300
Wollongong
ph: 4267 6200

Australian Council of Trade Unions
www.actu.org.au
ph: 1300 362 223 or (03) 9664 7333

Australian Human Rights Commission
www.humanrights.gov.au
ph: 9284 9600
Complaints
www.humanrights.gov.au/complaints/make-complaint
ph: 1300 656 419

Australian Public Service Commission (APSC)
www.apsc.gov.au
ph: 8239 5330

Australian Unions
www.australianunions.org.au
ph: 1300 486 466

Children's Guardian, Office of
www.kidsguardian.nsw.gov.au
ph: 8219 3600

Comcare
www.comcare.gov.au
ph: 1300 366 979

Community Legal Centres NSW
For a list of Community Legal Centres, see www.clcnsw.org.au

Fair Work Commission
ph: 1300 799 675

Fair Work Ombudsman
www.fairwork.gov.au
ph: 13 1394

Federal Court of Australia
www.fedcourt.gov.au
Registry ph: 9230 8567

Federal Circuit Court
www.federalcircuitcourt.gov.au
ph: 9230 8567

Industrial Relations Commission (NSW)
(including Industrial Registry)
www.irc.justice.nsw.gov.au
ph: 8688 3516

LawAccess NSW
www.lawaccess.nsw.gov.au
ph: 1300 888 529

Legal Aid NSW
www.legalaid.nsw.gov.au
ph: 1300 888 529

NSW Industrial Relations
www.industrialrelations.nsw.gov.au
ph: 131 628

Public Service Commission
www.psc.nsw.gov.au
ph: 9272 6000

SafeWork NSW
www.safework.nsw.gov.au
ph: 13 10 50

State Insurance Regulatory Authority (SIRA)
www.sira.nsw.gov.au

Unions NSW
www.unionsnsw.org.au
ph: 9881 5999

Workers Compensation Commission
www.wcc.nsw.gov.au
ph: 1300 368 040