# Benchbook

## General Protections

## About this benchbook

This benchbook has been prepared by the Fair Work Commission (the Commission) to assist parties lodging or responding to general protections applications under the *Fair Work Act 2009* (Fair Work Act). Information is provided to parties to assist in the preparation of material for matters before the Commission.

# Disclaimer

The content of this resource should be used as a general guide only. The benchbook is not intended to be an authority to be used in support of a case at hearing.

Precautions have been taken to ensure the information is accurate, but the Commonwealth does not guarantee, and accepts no legal liability whatsoever arising from or connected to, the accuracy, reliability, currency or completeness of any material contained in this resource or on any linked site.

The information provided, including cases and commentary, are considered correct as of the date of publication. Any changes to legislation and case law will be reflected in updates to this benchbook.

Individual cases have been selected as examples to help users gain a better understanding of the issues covered. These cases should not be considered exhaustive.

This resource is not a substitute for independent professional advice and users should obtain any appropriate professional advice relevant to their particular circumstances.

In many areas of Indigenous Australia, it is considered offensive to publish photographs or names of Aboriginal and Torres Strait Islander people who have recently died. Users are warned that this resource may inadvertently contain such names.

## Links to external websites

Where this site provides links to external websites, these links are provided for the visitor's convenience and do not constitute endorsement of the material on those sites, or any associated organisation, product or service.

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# Copyright



## Version history

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# Part 1 – Overview of benchbook

This benchbook has been arranged to reflect the process users would follow when making an application under the general protections provisions. Issues that may arise at a certain point during the process will be addressed as they come up. As a result, this benchbook may not deal with these issues in the same order as the Fair Work Act.

**IMPORTANT: Division 6 – Sham arrangements (pages 125-132 of this benchbook) dealing with whether a worker is an independent contractor or employee are currently under review in light of the High Court decisions in Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 and ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2. Please refer to these cases for the current approach to be taken in determining whether a worker is an independent contractor or employee.**

## General protections process under the Fair Work Act

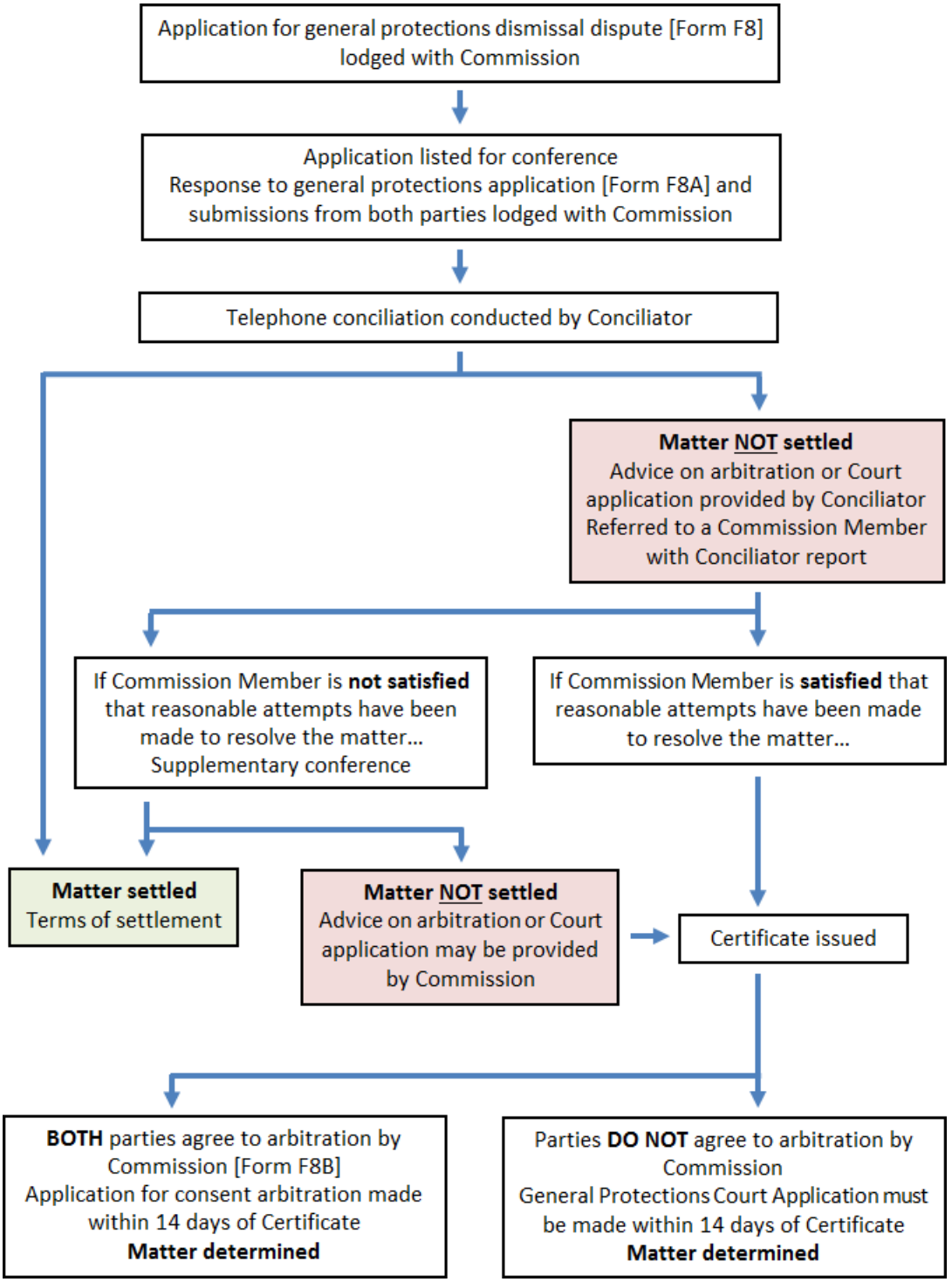
**Note:** Given the complexity of the general protections provisions and the wide variety of possible applications, the diagram below sets out the general process followed within the Commission for the most common type of application made, that being an application by an employee against their employer.

This flowchart only reflects the role of the Commission under the Fair Work Act, there are other options for addressing alleged breaches of the general protections provisions available through the courts.

**Related information**

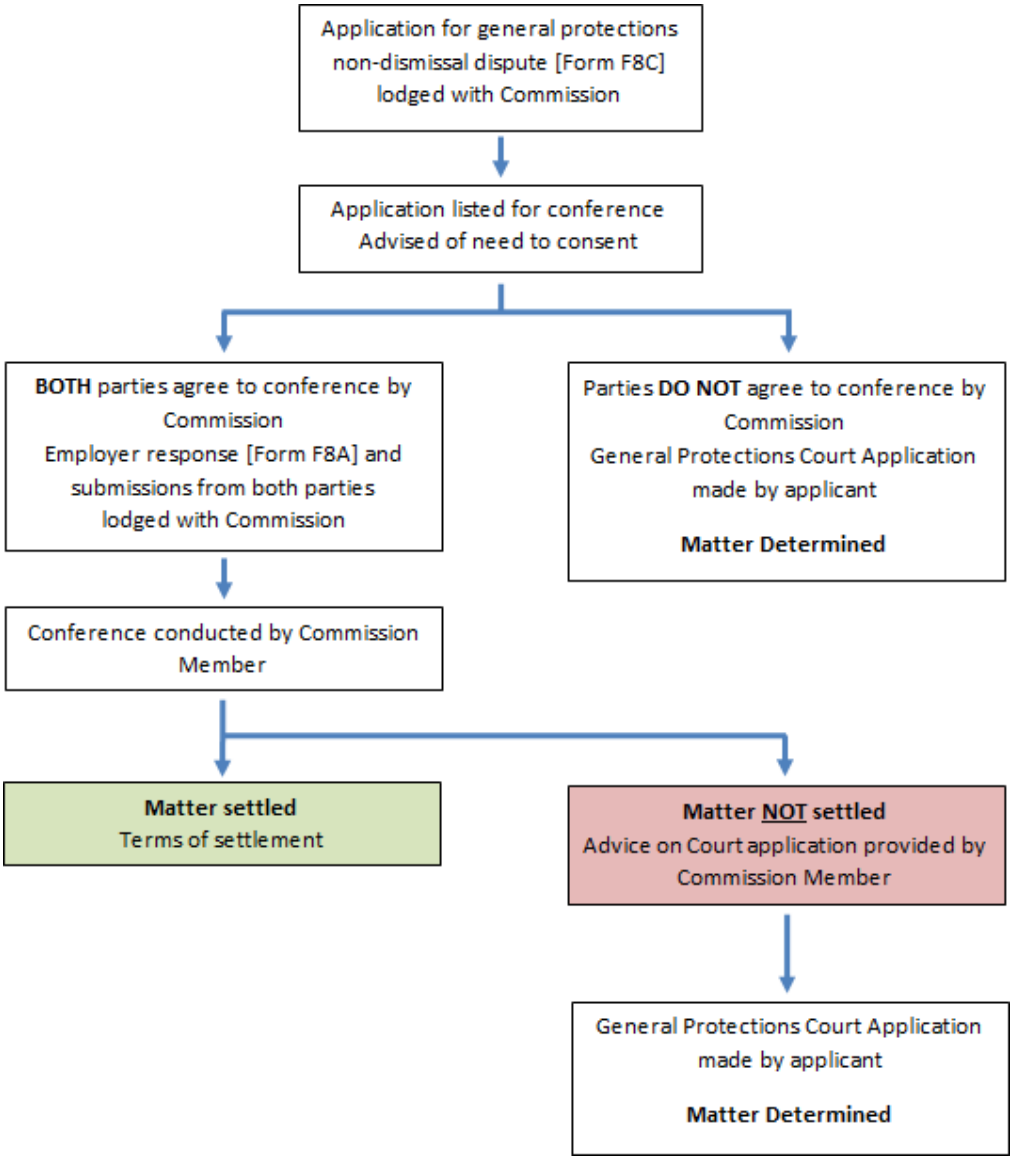
- Other types of applications

## Flowchart – Dismissal dispute process



## Flowchart – Non-dismissal dispute process

**Note:** An applicant in a non-dismissal dispute matter may make an application directly to the Court, an application does not need to be lodged with the Commission.




# When is a person covered by the general protections?

The general protections provisions provide protections for national system employers and national system employees, organisations and other associations of national system employers or employees. It also provides protections in some circumstances for other persons, including employers and employees in State industrial relations systems, independent contractors and the persons who engage them (principals), State registered industrial associations, and other associations of State employers or employees.[1]

[1] Explanatory Memorandum to Fair Work Bill 2008 [1334].

On the face of the provisions, the general protections regulate the conduct of all employers, employees, principals, independent contractors, industrial associations and, in some cases, all persons. However, the general protections only apply to the extent provided for below.[2]

The general protections provisions protect persons who are:

- employees (including prospective employees)
- employers (including prospective employers)
- independent contractors (including prospective independent contractors)
- a person (the principal) who has entered into a contract for services with an independent contractor (including a principal who proposes to enter into a contract), and
- an industrial association (including an officer or member of an industrial association);

in respect of the following action:

- action taken by **a constitutionally-covered entity**
- action that affects the activities, functions, relationships or business of a constitutionally-covered entity (or is capable of affecting or is taken with intent to affect)
- action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity to take, or not take, particular action in relation to another person (or threatening to do so)
- action taken in **a Territory or a Commonwealth place**
- action taken by:
  - a trade and commerce employer, or
  - a Territory employer

  that affects, is capable of affecting or is taken with intent to affect an employee of the employer, or
- action taken by an employee of:
  - a trade and commerce employer, or
  - a Territory employer

  that affects, is capable of affecting or is taken with intent to affect the employee's employer.[3]

The general protections provisions also have effect as if any reference to an employer or employee was a reference to a national system employer or employee.[4]

**Related information**
- Part 4 – Coverage

[2] Explanatory Memorandum to Fair Work Bill 2008 [1347].
[3] Fair Work Act s.338(1).
[4] Fair Work Act s.339.

# Part 2 – How to use this resource

This benchbook has been designed for electronic use and works best in this form. The electronic version has links to all of the cases referenced in the footnotes, as well as links to the legislation and other websites. To access the electronic version please visit:

www.fwc.gov.au/benchbook/general-protections-benchbook

## Symbols

**Further information on related topics.**

**Links to sections of legislation.**

**Contains issues that may form the basis of a jurisdictional objection.**

**Cases where the argument raised on this point was successful. Note: this does not indicate that the party that raised the point was successful overall.**

**Cases where the argument raised on this point was unsuccessful. Note: this does not indicate that the party that raised the point was unsuccessful overall.**

**Tips – helpful hints that may assist your understanding of the information.**

**Important information.**

**Item for comparison.**

# Naming conventions

## Employees, employers, applicants and respondents etc.

The parties to general protections matters have generally been referred to in this resource as 'employee' and 'employer'. These terms have been adopted for convenience even though the parties could be prospective employees, contractors, principals or even industrial associations. It is often the case that parties appearing at the Commission are former employees and former employers.

After an application under the general protections provisions is lodged the parties are referred to as:

- Applicant (usually the person who lodged the application – the employee), and
- Respondent (the employer).

In the case of an appeal the parties are referred to as:

- Appellant (the party who lodges the appeal), and
- Respondent (the party who is responding to the appeal).

## Fair Work Commission, Fair Work Australia, Australian Industrial Relations Commission etc.

As outlined in the table below, the name and form of the national workplace relations tribunal has changed a number of times since the Commonwealth started legislating on industrial relations. In this benchbook the tribunal is referred to as the 'Commission'.

| Name | Short title | Dates |
|---|---|---|
| **Fair Work Commission** | The Commission | 1 January 2013–ongoing |
| **Fair Work Australia** | FWA | 1 July 2009–31 December 2012 |
| **Australian Industrial Relations Commission** | AIRC, the Commission | 1989–2009 |
| **Australian Conciliation and Arbitration Commission** | The Commission | 1973–1989 |
| **Commonwealth Conciliation and Arbitration Commission** | The Commission | 1956–1973 |
| **Commonwealth Court of Conciliation and Arbitration** | | 1904–1956 |

# Workplace relations legislation, Regulations and Rules

Whilst specific general protections provisions were only introduced from 1 July 2009 there have been similar protections around unlawful termination, freedom of association and other specific protections in previous legislation.

The following table sets out legislation containing similar law and the dates that the legislation was in operation. The current legislation governing general protections, unlawful termination and freedom of association laws is the Fair Work Act.

| Name of legislation | Provisions | Operative date |
|---|---|---|
| ***Fair Work Act 2009*** **(Cth)** | General Protections<br>Unlawful termination* | 1 July 2009 and 1 January 2010 (Staged commencement) |
| ***Workplace Relations Act 1996*** **(Cth) (Incorporating the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth))** | Unlawful termination & Freedom of association<br>Sham arrangements in relation to independent contractors<br>Protection from coercion in relation to making a collective agreement | 27 March 2006 |
| ***Workplace Relations Act 1996*** **(Cth)** | Unlawful termination & Freedom of association<br>Unfair contracts with independent contractors<br>Protection from coercion in relation to making a certified agreement | 25 November 1996 |
| ***Industrial Relations Act 1988*** **(Cth)** | Unlawful termination & Freedom of association<br>Unfair contracts with independent contractors | 1 March 1989 |
| ***Fair Work Regulations 2009*** **(Cth)** | | 1 July 2009 and 1 January 2010 (Staged commencement) |
| **Fair Work Commission Rules 2013** | | 6 December 2013 |

* The unlawful termination protections remain in force under Part 6–4 of the Fair Work Act for persons not covered by the general protections provisions to give effect to the following International Labour Organization instruments that Australia is a signatory to:

- ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation, 1958
- ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981
- ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, 1982, and
- ILO Recommendation (No. 166) concerning Termination of Employment at the Initiative of the Employer, 1982.

# Case law

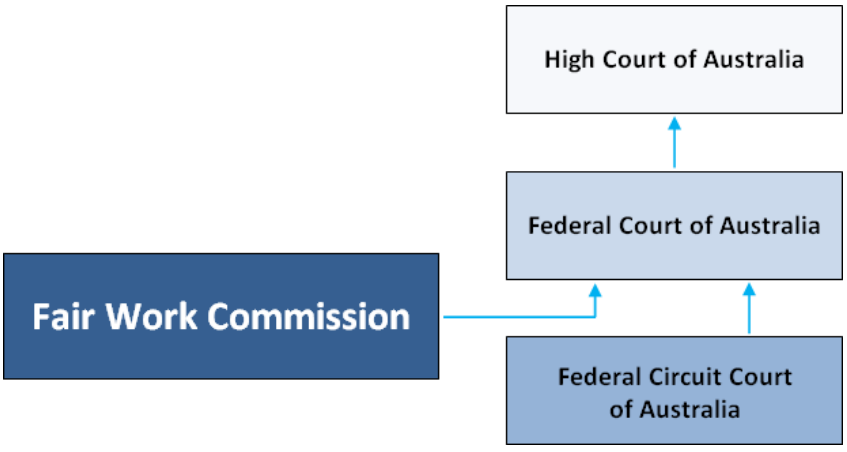
## What is case law?

Previous decisions made by courts and tribunals (or 'case law') help interpret the meaning of legislation and how it applies in a specific case. When a decision is made by a court or tribunal, that interpretation of the law may form a precedent. Decisions of the High Court of Australia are authoritative in all Australian courts and tribunals.

A **precedent** is a legal decision which provides guidance for future, similar cases.

An **authoritative** decision is one that must be followed on questions of law by lower courts and tribunals.

## Hierarchy of Courts and the Fair Work Commission



# Referencing

References in this resource use the following formats.

**Note:** In the electronic version of this benchbook the cases referenced in the footnotes are hyperlinked and can be accessed by clicking the links.

## Cases

> [41] *Elgammal v BlackRange Wealth Management Pty Ltd* [2011] FWAFB 4038 (unreported, Harrison SDP, Richards SDP, Williams C, 30 June 2007) [13].
> [42] *Visscher v Giudice* (2009) 239 CLR 361, 388 [81].
> [43] ibid.
> [44] *Searle v Moly Mines Limited* (2008) 174 IR 21 [22]; citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 427.

The name of the case will be in italics.

The link will be either to the journal the case has been reported in, or if the case is unreported, to the original reference. For example, some of the abbreviations used are:

- 'IR' for 'Industrial Reports'
- 'CLR' for 'Commonwealth Law Reports'
- 'FWAFB' for a 'Full Bench of Fair Work Australia'
- 'FWCFB' for a 'Full Bench of the Fair Work Commission'

Page or paragraph numbers are included at the end of the reference, to provide a pinpoint in the document where appropriate.

If a reference in a footnote is identical to the one immediately before, the term 'ibid.' is commonly used.

Where one case refers to another case, the term 'citing' is used.

| Item | Example |
|---|---|
| **Case names** | *Elgammal v BlackRange Wealth Management Pty Ltd*<br>*Visscher v Giudice* |
| **Link to case** | [2011] FWAFB 4038 (unreported, Harrison SDP, Richards SDP, Williams C, 30 June 2007)<br>(2009) 239 CLR 361 |
| **Page number** | (1995) 185 CLR 410, 427 |
| **Paragraph number** | (2008) 174 IR 21 [22] |
| **Identical reference** | [42] *Visscher v Giudice* (2009) 239 CLR 361, 388 [81].<br>[43] ibid. |
| **Reference to other case** | [44] *Searle v Moly Mines Limited* (2008) 174 IR 21 [22]; citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 427. |

## Legislation

[3] *Acts Interpretation Act 1901* (Cth) s.36(2).
[4] Fair Work Act s.381(2).
[5] Fair Work Regulations reg 6.08(3).
[6] *Police Administration Act* (NT) s.94.
[7] *Fair Work (Commonwealth Powers) Act 2009* (Vic).
[8] *Industrial Relations (Commonwealth Powers) Act 2009* (NSW).
[9] *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld).

The name of the legislation will be in italics unless a shortened version is being used.

The jurisdiction of the legislation is included in brackets if the full name is cited. For example, some of the abbreviations used are:

- '(Cth)' is a Commonwealth law
- '(ACT)' is an Australian Capital Territory law
- '(NSW)' is a New South Wales law
- '(NT)' is a Northern Territory law
- '(Qld)' is a Queensland law
- '(SA)' is a South Australian law
- '(Tas)' is a Tasmanian law
- '(Vic)' is a Victorian law
- '(WA)' is a Western Australian law

Section, regulation or rule numbers are included at the end of the reference to provide a pinpoint in the legislation where appropriate.

| Item | Example |
|---|---|
| **Legislation names** | *Acts Interpretation Act 1901*<br>Fair Work Act<br>Fair Work Regulations<br>*Industrial Relations (Commonwealth Powers) Act 2009* |
| **Jurisdiction** | *Acts Interpretation Act 1901* (Cth)<br>*Police Administration Act* (NT)<br>*Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) |
| **Section number** | *Acts Interpretation Act 1901* (Cth) s.36(2)<br>Fair Work Act s.381(2)<br>Fair Work Regulations reg 6.08(3) |

# What is a day?

Section 36(1) of the *Acts Interpretation Act 1901* (Cth)[5] deals with the manner in which time is to be calculated in interpreting the Fair Work Act. It reads:

> *(1) Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.*

This means that when calculating time you do not count the day on which the relevant act or event occurs or occurred.[6]

# Glossary of terms

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| **ABN (Australian Business Number)** | A unique, 11 digit number which allows easy identification and interaction between business and government, particularly the tax office. |
| **Adherent** | A person who is a supporter or a follower of particular religious beliefs. |
| **Adjournment** | To suspend or reschedule proceedings (such as a conciliation, conference or hearing) to another time or place, or indefinitely. |
| **Affidavit** | A sworn statement of fact which is made under oath before an authorised official.<br>An affidavit is used to give evidence in Commission (or court) proceedings. |
| **Appeal** | An application for a Full Bench of the Commission to review a decision of a single Member of the Commission and determine if the decision was correct.<br>A person must seek the permission of the Commission to appeal a decision. |
| **Allege** | To declare that something is true without providing proof. |
| **Altruism** | Having regard to the wellbeing or best interests of others. |
| **Applicant** | A person who makes an application with the Commission. |
| **Application** | The way of starting a case before the Commission. An application can only be made using a form prescribed by the *Fair Work Commission Rules 2013* (Cth). |

[5] This Act as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A).
[6] *Shop, Distributive and Allied Employees Association v White's Discounts Pty Ltd* (2003) 128 IR 68 [15]–[16].

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| **Arbitration** | The process by which a Member of the Commission will hear evidence, consider submissions and then make a decision in a matter.<br><br>Arbitration generally occurs in a formal hearing and generally involves the examination and cross-examination of witnesses. |
| **Balance of probabilities** | It is the comparison of disputed facts to determine what is more likely to have occurred.<br><br>A fact is proved to be true on the balance of probabilities if its existence is more probable than not. |
| **Civil remedy provision** | A provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction. |
| **Collateral purpose** | A proceeding is brought for a collateral purpose when its purpose is other than to seek an adjudication of the issues to which the application raises, such as to harass or embarrass the other party or to seek some other advantage. |
| **Compensation** | A requirement to pay money to an applicant as reimbursement for loss suffered as a consequence of an action.<br><br>Where a matter involves a dismissal the Commission will consider whether reinstatement is appropriate before considering if compensation should be ordered and, if so, how much. |
| **Commission Member** | See **Member** |
| **Conciliation** | An informal method of resolving a general protections dispute by helping the parties to reach a settlement.<br><br>An independent conciliator can help the parties explore options for a resolution without the need for a conference or hearing before a Member.<br><br>Conciliation is the first step taken in the resolution of a general protections dismissal dispute. |
| **Conference** | A generally private proceeding conducted by a Commission Member. |
| **Contemporaneous** | Something which belongs to the same time; or was existing or occurring at the same time. |
| **Court** | In this benchbook, a reference to 'Court' means the Federal Court or Federal Circuit and Family Court. |

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| **Decision** | A determination made by a single Member or Full Bench of the Commission which is legally enforceable.<br><br>A decision in relation to a matter before the Commission can include the names of the parties and will generally outline the basis for the application, comment on the evidence provided and include the judgment of the Commission in relation to the matter. |
| **Decision maker** | A person with the power or authority to make major decisions. |
| **Discontinue** | To formally end a matter before the Commission.<br><br>A discontinuance can be used during proceedings to stop those proceedings or after proceedings to help finalise a settlement. Once a matter has been discontinued it cannot be restarted. |
| **Discriminator** | A person who makes a distinction in favour of, or against, a person or thing. |
| **Employee organisation** | See **union** |
| **Enterprise agreement** | An enterprise agreement is an agreement made at the enterprise level and enforceable under legislation which sets out terms and conditions of employment of employees and their employer (or employers).<br><br>An enterprise agreement must meet a number of requirements under the Fair Work Act before it can be approved by the Commission. |
| **Error of law** | An error of law is a common ground for legal review. It occurs when a Member of the Commission has misunderstood or misapplied a principle of law; for example, by applying the wrong criteria, or asking the wrong question. |
| **Evidence** | Information which tends to prove or disprove the existence of a particular belief, fact or proposition.<br><br>Certain evidence may or may not be accepted by the Commission, however the Commission is not bound by the rules of evidence.<br><br>Evidence is usually set out in an affidavit or given orally by a witness in a hearing. |
| **Fair Work Act** | *Fair Work Act 2009* (Cth). |
| **First instance** | A decision (or action) which can be considered the first decision (or action) to be made in relation to a matter. |

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| **Fixed term contract** | An employment contract where the time of commencement and the time of completion are unambiguously identified by a term of the contract.<br><br>This can be achieved by stating definite dates, or by stating the time by which one or other end of the period of time is fixed, and by stating the duration of the contract of employment.<br><br>An employer does not terminate an employee's employment when the term of employment expires; rather, employment comes to an end by agreement or by the operation of law. |
| **Full Bench** | A Full Bench of the Commission comprises at least three Commission Members, one of whom must be a presidential member. Full Benches are convened to hear appeals, matters of significant national interest and various other matters specifically provided for in the *Fair Work Act 2009*.<br><br>A Full Bench can give a collective judgment if all of its Members agree, or independent judgments if the Members' opinions differ. |
| **Hearing** | A generally public proceeding or arbitration conducted before a Commission Member. |
| **Independent contractor** | A person working in their own business to provide services which might otherwise be performed by an employee.<br><br>An independent contractor is covered by the general protections provisions of the Fair Work Act. |
| **Industrial instrument** | A generic term for a legally binding industrial document which details the rights and obligations of the parties bound by the document, such as an enterprise agreement or award. |
| **Jurisdiction** | The scope of the Commission's power and what the Commission can and cannot do.<br><br>The power of the Commission to deal with matters is specified in legislation. The Commission can only deal with matters for which it has been given power by the Commonwealth Parliament. |
| **Labour hire worker** | Someone who enters into a work contract with a labour hire agency.<br><br>A labour hire worker is covered by the general protections provisions of the Fair Work Act. |
| **Lodge** | The act of delivering an application or other document to the Commission. |
| **Matter** | Cases at the Commission are referred to as matters. |
| **Member** | Someone appointed by the Governor-General as a Member of the Commission. A Member may be a Commissioner, a Deputy President, a Senior Deputy President, a Vice President or the President. |

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| **Notice of Listing** | A formal notification sent by the Commission setting out the time, date and location for a matter to be heard. A Notice of Listing can also include specific directions or requirements. |
| **Order** | A formal direction made by the Commission which gives effect to a decision and is legally enforceable. |
| **Outer limit contract** | An employment contract which has a fixed term, ending upon a given date or at the end of a defined period of time or upon the completion of a specified task, but which contains a broad and unqualified power to terminate the contract within its fixed term. |
| **Party (Parties)** | A person or organisation involved in a matter before the Commission. |
| **Pecuniary penalty** | An order to pay a sum of money which is made by a Court as a punishment. |
| **Person** | A separate legal entity, recognised by the law as having rights and obligations. |
| **Procedural fairness** | Procedural fairness requires that a person whose interests will be affected by a decision receives a fair and reasonable opportunity to be heard before the decision is made.<br>Procedural fairness is concerned with the decision making process followed or steps taken by a decision maker rather than the actual decision itself.<br>The terms 'procedural fairness' and 'natural justice' have similar meaning and can be used interchangeably. |
| **Proscribed** | Something which is prohibited. |
| **Quash** | To set aside or reject a decision or order, so that it has no legal effect. |
| **Reasonable person** | A person who possesses the faculty of reason and engages in conduct in accordance with community standards. |
| **Referred state** | States that have referred some (or all) of their workplace relations powers to the Commonwealth.<br>All states except Western Australia have referred these powers. |
| **Reinstatement** | To return an employee to the job they previously held before they were dismissed. If the original position is not available the employee should be returned to a position as close as possible in remuneration and status to the original position. |
| **Remedy** | The possible outcomes of a matter before the Commission.<br>This could include an order for reinstatement or compensation made by the Commission. |

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| **Representative** | A person who acts on a party's behalf. This could be a lawyer, a paid agent, an employee or employer organisation or someone else.<br><br>Generally a lawyer or paid agent can only represent a party before the Commission with permission of the Commission. |
| **Repudiation (Contract)** | To terminate or reject a contract as having no authority or binding effect. |
| **Respondent** | A party responding to an application made to the Commission. |
| **Serving documents** | See **service** |
| **Service (Serve)** | Service of a document means delivering the document to another party or their representative, usually within a specified period.<br><br>Documents can be served in a number of ways. The acceptable ways in which documents can be served are specified in Parts 7 and 8 of the *Fair Work Commission Rules 2013*.' |
| **Settlement** | An agreed resolution of a dispute. Generally, a negotiated outcome which both parties are satisfied with and by which they are bound. |
| **Sham contract** | When an employer deliberately disguises an employment relationship as an independent contracting arrangement, instead of engaging the worker as an employee.<br><br>It can also occur when employees are pressured to become independent contractors, where they are threatened with being dismissed, or are misled about the effect of changing their working arrangements. |
| **Statutory declaration** | A written statement in a prescribed form in which a person declares something to be true.<br><br>Such a statement is declared before, and witnessed by, an authorised official (such as a justice of the peace) but is not sworn on oath and therefore is not recognised as evidence. |
| **Union** | An organisation which represents the interests of employees which has been registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).<br><br>A union can also be referred to as an employee organisation. |
| **Untenable** | If something is untenable it cannot be defended; it is incapable of being maintained against argument. |
| **Volunteer** | Someone who enters into any service of their own free will, or who offers to perform a service or undertaking for no financial gain.<br><br>A volunteer is not covered by the general protections provisions of the Fair Work Act. |

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| **Waiver** | An applicant can request that the application fee for lodging a general protections dismissal dispute be waived due to serious financial hardship. A copy of the Application for Waiver of application fee form can be found on the Commission's website. |
| **Witness** | A person who gives evidence in relation to a situation that they had some involvement in or saw happening. A witness is required to take an oath or affirmation before giving evidence at a formal hearing. The witness will be examined by the party that called them and may be cross examined by the opposing party to test their evidence. |
| **Witness statement** | A written statement that is usually in the form of a sworn or affirmed affidavit or statutory declaration. The witness statement should detail the information that the witness will rely on during the hearing. |

# Part 3 – What are the general protections?

## About general protections

Historically protections from unlawful actions being taken in or in relation to the workplace have been scattered throughout legislation. The introduction of the Fair Work Act saw these provisions collected together in a single Part.

The principal protections have been divided into:

- protections relating to workplace rights (which can be broadly described as employment entitlements and the freedom to exercise and enforce those entitlements)
- engaging in industrial activities (which encompasses the freedom to be or not be a member or officer of an industrial association and to participate in lawful activities, including those of an industrial association)[7]
- other protections including protection from discrimination, and
- sham arrangements.

Certain persons, including employers, principals, employees and industrial associations; are prohibited from taking adverse action against certain other persons because the other person has, or exercises, a workplace right, or engages in industrial activity. Adverse action includes dismissal of an employee but also includes a range of other action such as prejudicing an employee or independent contractor and organising industrial action against another person. Coercion and misrepresentation in relation to workplace rights and industrial activities are also prohibited.[8]

### Civil remedy provisions

All of the general protections prohibitions are civil remedy provisions.[9]

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

#### *Involvement in contravention treated in same way as actual contravention*

A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.[10]

[7] Explanatory Memorandum to Fair Work Bill 2008 [1338].
[8] Explanatory Memorandum to Fair Work Bill 2008 [1339].
[9] Explanatory Memorandum to Fair Work Bill 2008 [1341].
[10] Fair Work Act s.550(1).

A person is **involved in** a contravention of a civil remedy provision if, and only if, the person:

- has aided, abetted, counselled or procured the contravention
- has induced the contravention, whether by threats or promises or otherwise
- has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention, or
- has conspired with others to effect the contravention.[11]

# Role of general protections

See Fair Work Act s.336

The general protections have been introduced to:

- protect workplace rights
- protect freedom of association
- provide protection from workplace discrimination, and
- provide effective relief for persons who have been discriminated against, victimised, or have experienced other unfair treatment.

# How do the general protections work?

## Adverse action taken 'because' of a proscribed reason

A number of the general protections provisions aim to protect employees from adverse action taken **because** of a particular proscribed reason. For example, s.340 says:

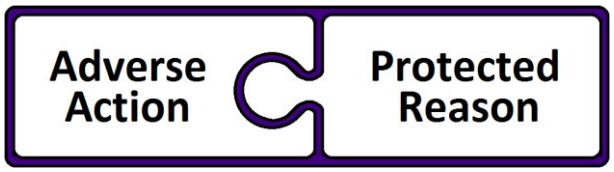
> ***340 Protection***
>
> *(1) A person must not take adverse action against another person:*
>
> *(a)* ***because*** *the other person:*
>
> *(i) has a workplace right; or*
>
> *(ii) has, or has not, exercised a workplace right; or*
>
> *(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or*
>
> *(b) to prevent the exercise of a workplace right by the other person.*
> [Emphasis added]

Thus a general protections dispute occurs when it is alleged that adverse action is taken – or when a threat to take adverse action occurs – **because** a person has one of these rights, exercises or does not exercise such a right, or proposes or does not propose to exercise such a right.

Other general protections provisions which use 'because' are:

[11] Fair Work Act s.550(2).

- s.346 (regarding industrial activities)
- s.351 (regarding discrimination)
- s.352 (regarding temporary absence in relation to illness or injury), and
- s.354 (regarding coverage by particular instruments, including provisions of the National Employment Standards).




## Why? – The reason for the adverse action

The use of the word 'because' in these provisions means that the central question in a general protections dispute, once it has been established that adverse action was taken, will be 'Why was the adverse action taken?'.[12]

This is a question of fact which must be answered in the light of all the facts established in the proceeding. It will involve a consideration of the reason or reasons of the person who made the decision to take the adverse action and surrounding circumstances including those of the employee at the time the action was taken.[13]

A **question of fact** is when the Commission must decide what the facts of the case are based on the evidence. Often a question of fact arises where there are two or more versions of events presented.

This means the Commission must determine which one, if either, of the circumstances is more likely to have occurred on the balance of probabilities.

Unless the adverse action was taken 'because' of a proscribed reason, then there will be no breach of the general protections provisions.

For example, if adverse action is taken against a person who is exercising a workplace right, there will only be a breach of the general protections provisions (s.340) if the exercise of the workplace right was the reason why (or a reason why) the adverse action was taken. The workplace right need only be a reason, not the only reason, for the action. If the action was taken solely for another reason – such as serious misconduct at work – then there will be no breach.

[12] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549 [44].
[13] ibid., [41] –[42], [45].

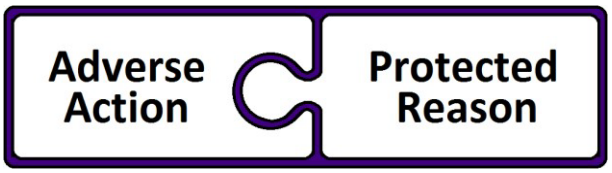
For instance, if adverse action is taken against a pregnant employee, there will be no breach of the general protections provisions (s.351) unless the employee's pregnancy was the **reason** (or a reason) for the taking of the adverse action. Pregnancy does not by itself establish an immunity from adverse action.[14]

In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*[15] (which concerned disciplinary action taken against a union representative who sent a communication to fellow employees) the High Court noted that the attribute or activity protected by Part 3-1 does not have to be completely disassociated with the adverse action. The question is whether those protected attributes or activities were an operative factor in the decision to take the action.[16]

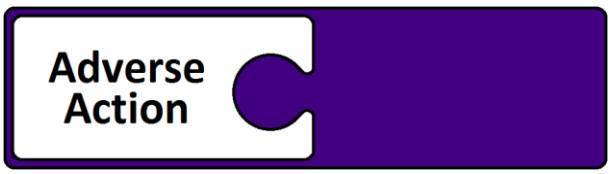
**Example**

1. If an employee is dismissed **because** he or she had taken temporary leave due to illness, then the employee may be covered by the general protections provisions.
2. If an employee was dismissed while on temporary leave due to illness, but that **was not** a reason for the dismissal, then the employee will not be covered by the general protections provisions.

In example 1 above, the employee has been dismissed (adverse action) because they had taken a period of temporary leave, which is a protected right (reason).




In example 2 above, the employee has been dismissed (adverse action) during a period of temporary leave, which is a protected right. However the decision to dismiss was not **because** the employee was on leave – so the (reason) is missing.




[14] *Lai v Symantec (Australia) Pty Ltd* [2013] FCCA 625.
[15] (2012) 248 CLR 549.
[16] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549 [62].

## Multiple reasons

***360 Multiple reasons for action***

*For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.*

Section 360 deals with the situation where there are multiple reasons for the taking of adverse action. If one of the reasons for taking adverse action was a proscribed reason, then there will be a breach of the applicable general protections provision (where the provision is a 'because' provision). The proscribed reason does not have to be the sole or dominant reason. However the reason must be a **substantial and operative reason**.[17]

## Case examples

| Protected reason substantive and operative reason for dismissal | Case reference |
|---|---|
| **Occupational health and safety**<br>The applicant was dismissed after an incident where he refused to sit a competency test without reasonable excuse. The employer alleged he was dismissed because he failed to achieve the level of competence required to fulfil the inherent requirements of his role.<br>The Court found that the substantive and operative reason for the employee's dismissal was because his health at that particular time prevented him from performing his duties. The respondent was requiring the applicant to undertake duties that they knew, or at least suspected, he would be unable to perform. The applicant was dismissed for exercising a workplace right (an OH&S right) to take reasonable care to protect his own health and safety at work, as well as the health and safety of other persons by not driving a train while being mentally or physically ill. Further, the applicant was dismissed for a mental or physical disability. | *Flavel v Railpro Services Pty Ltd* [2013] FCCA 1189. |

[17] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549 [102], [104] per Gummow and Hayne JJ.

| Protected reason NOT substantive and operative reason for adverse action | Case reference |
|---|---|
| **Maternity leave not reason for adverse action**<br><br>The applicant was made redundant whilst on maternity leave. The respondent gave evidence that the decision to terminate the applicant's employment was for cost-cutting reasons and had nothing to do with her maternity leave. This evidence was supported by contemporaneous documents and was consistent with other evidence in the case. The substantive and operative test was applied and the Court found that the applicant was not dismissed for a proscribed reason. | *Lai v Symantec (Australia) Pty Ltd* [2013] FCCA 625. |
| **Industrial activities not reason for adverse action**<br><br>The employee was warned and threatened with dismissal for taking unauthorised leave to attend the CFMEU's board of management meeting. Applications for unpaid leave were denied on several occasions due to the company's policy requiring that paid leave be exhausted before unpaid leave is available. The substantial and operative reason for the warning was not the employee's participation in industrial activities, but the taking of unauthorised leave. | *Construction, Forestry, Mining and Energy Union v Bengalla Mining Company Pty Limited* [2013] FCA 267. |
| **Union role not reason for adverse action**<br><br>The employee, who was his union's sub-branch president, sent an email to other employees containing serious allegations concerning the employer's conduct. The employee was suspended on full pay and requested to show cause why he should not be subject to disciplinary action. The employer's manager gave evidence that she decided to take the action against the employee because of her concern about the allegations in the email and their potential consequences, and not because of his union membership, office or activities. The manager's evidence was accepted. It was held that there had not been any contravention by the employer. | *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549. |

| Protected reason NOT substantive and operative reason for adverse action | Case reference |
|---|---|
| **Exercising a workplace right or mental disability not reason for adverse action**<br><br>The applicant was employed as an Ambulance Paramedic. The respondent had sought expressions of interest from officers to act in a higher duties position for nine weeks. The applicant was later involved in an altercation with the Acting Team Manager which resulted in the applicant submitting a Workcover claim asserting a psychological injury. The applicant was absent from work due to his acute stress reaction for approximately six weeks. An external investigator investigated the applicant's complaints around the altercation. The final report concluded that the applicant's complaints were unsubstantiated and described aspects of the applicant's behaviour as 'inappropriate', 'aggressive', 'bullying' and 'intimidating'. At a counselling meeting to discuss the findings the applicant was issued with a formal warning in relation to his behaviour. After a further complaint about the investigation and report, the applicant requested a transfer to another branch, providing a report from his treating psychologist in support. As a result the respondent formed the view that it was unsafe to permit the applicant to continue working as a Paramedic whilst he was suffering from an acute stress reaction and he was stood down on full pay pending a psychological assessment. After returning to work the applicant had a further altercation with the same manager after his request to postpone some annual leave was refused. The applicant was again stood down and fter an investigation the applicant was dismissed for serious and wilful misconduct.<br><br>The applicant alleged the respondent took adverse action against him in contravention of s.340 of the Fair Work Act by refusing to appoint him to perform higher duties; issuing him with a formal warning; standing him down from employment; and terminating his employment. The applicant alleged that the adverse action was taken because he had exercised a workplace right by making complaints or inquiries in relation to his employment. The applicant further alleged that the respondent took adverse action against him in contravention of s.351 by refusing to appoint him to perform higher duties because of his mental disability (within the meaning of s.351).<br><br>In the decision at first instance, after consideration of all of the issues the primary judge dismissed the application, finding that the respondent did not take adverse action against the applicant because he had exercised a workplace right or because he had a mental disability. The applicant appealed citing 11 grounds for appeal. The Full Court was not satisfied that the primary judge fell into error in respect of any of the appeal grounds alleged and dismissed the appeal. | *Short v Ambulance Victoria* [2015] FCAFC 55. |

| Protected reason NOT substantive and operative reason for adverse action | Case reference |
|---|---|
| **Making complaints not reason for adverse action**<br><br>The applicant was employed by the respondent as a Program Leader pursuant to a fixed term contract of employment. Disputes arose between the applicant and the respondent's Director of Education, who was the applicant's supervisor, relating to the performance of the applicant's duties. This dispute gave rise to allegations of misconduct. The applicant was informed that the respondent proposed to investigate the allegations and he was suspended on full pay pending the outcome of the investigation. After considering the investigator's findings and the applicant's responses, the applicant was advised that the respondent had elected not to renew his contract.<br><br>The respondent accepted that the suspension and failure to re-engage the applicant both constituted adverse action within the meaning of the Fair Work Act. It maintained, however, that the adverse action had not been taken 'because' of the making of the complaints but rather because of the conduct of the applicant.<br><br>The Court found that the operative and immediate reasons for the employer having taken adverse action against the applicant was not because the applicant exercised the workplace right to make a complaint in relation to his employment. | *Kweifio-Okai v Australian College of Natural Medicine (No 2)* [2014] FCA 1124. |

## Other provisions not based on 'because'

Other general protections provisions are not based on adverse action being taken 'because' of a particular proscribed reason. Some provisions contain a direct prohibition on certain types of action; for example s.344 prohibits employers from exerting undue influence or pressure on employees to do certain things. Some provisions depend upon the existence of a certain state of mind in the person who took the action; for example, s.345 prohibits the making of false and misleading representations about certain matters to certain persons 'knowingly or recklessly'. Other provisions prohibit certain actions taken with a particular intent, for example s.348 prohibits organising, taking, or threatening to organise or take any action against another person with 'intent' to coerce that person or a third person to do certain things.

### *Knowingly or recklessly*

Whether a person made a representation knowingly can be determined by an enquiry into what the person knew about the statement in question. A reckless representation is a representation made by someone who is careless or indifferent as to its truth.[18]

### *With intent*

Where a provision prohibits a person taking action with the intent of bringing about a certain result, a person's intent may be established by evidence of their knowledge of the circumstances which

[18] *Fenwick v World of Maths* [2012] FMCA 131 [51].

gives the act its character. If such knowledge is established, the person will have breached the provision even if the person believed that the act was lawful. Actual knowledge is necessary, but a person who deliberately refrains from making enquiries because that person knows the probable consequences of the enquiries may be found to have constructive knowledge of those consequences, which may be regarded as equivalent to actual knowledge of the consequences.[19]

**Related information**

- Section 344 – Undue influence or pressure
- Section 345 – Misrepresentations
- Section 348 – Coercion

# Rebuttable presumption as to reason or intent

## Section 361 – Reason for action to be presumed unless proved otherwise

*(1) If:*

*(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and*

*(b) taking that action for that reason or with that intent would constitute a contravention of this Part;*

*it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.*

*(2) Subsection (1) does not apply in relation to orders for an interim injunction.*

Under this section, where an application is made alleging that a person took action for a particular reason or with a particular intent, it is presumed that the person has taken the action for the alleged reason or with the alleged intent unless the person proves otherwise.

For example, if an application is made alleging that an employer dismissed an employee because the employee exercised a workplace right, once it is established that the dismissal took place and that the employee exercised a workplace right, it is presumed that the employer dismissed the employee because the employee exercised a workplace right unless the employer proves otherwise.

This section makes it easier than it otherwise would be to establish that a person took adverse action because the reason for taking adverse action usually lies entirely within the knowledge of the person who took the adverse action.

[19] *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378 [31]–[38].

### *How can the presumption be rebutted?*

The court must consider why the adverse action was taken. This involves consideration of the person or decision-maker's particular reason for taking the action and consideration of all the facts of the case at the time the decision was made, including those related to the adverse action.[20]

The person who is seeking to rebut the presumption will need to provide evidence about the reason for taking the adverse action and/or the intention at the time of taking the adverse action. In the case of an organisation or corporation, the reason or reasons motivating the person(s) in the organisation or corporation who effectively made the decision to take the adverse action will be significantly relevant. In that context, it is important to identify the effective decision-maker(s) and their motives.[21]

To **rebut** means to refute by evidence or argument, to oppose something by proving the opposite.

It will ordinarily be difficult to rebut the statutory presumption if no direct evidence by the person or decision-maker(s) who took the adverse action is given.[22]

Direct evidence of the decision maker's state of mind, intent or purpose will be considered, and the credibility of the decision-maker will be examined.[23] It will be up to the Court or Commission to consider whether the decision-maker's evidence as to the reasons for taking the action is accepted. It is open to the other party to call evidence to demonstrate that the decision-maker's real reason for taking the action was not what they said it was.

Direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer. However, direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker's evidence. [24]

**Related information**

- Evidence

Consideration is not to be given to a decision-maker's unconscious reasons. The decision-maker can only give evidence on reasons that they were conscious of. Unconscious reasons will not be considered because it would create an impossible burden to disprove.[25]

[20] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549.
[21] *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605.
[22] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549.
[23] *Fair Work Ombudsman v AJR Nominees Pty Ltd* [2013] FCA 467.
[24] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549 [45].
[25] ibid., [146].

## Case examples

| Presumption rebutted | Case reference |
|---|---|
| **Employer discharged presumption by giving direct evidence of decision-maker**<br>The decision-maker explained her reasons for taking adverse action against the employee. She provided convincing and credible explanations of why she took the steps that she did. She adhered to her explanation for calling on the employee to show cause why he should not be disciplined for circulating the email. She maintained her denials of having acted against the employee for any reason associated with his union membership, office or activities. The decision-maker's evidence was accepted and the Court was satisfied she did not act for any proscribed reason. | *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549. |
| **Employer evidence supported by facts**<br>An employee who was an office holder of the CFMEU was warned and threatened with dismissal for an unauthorised absence to attend the CFMEU's board of management meeting. The respondent gave detailed evidence from individuals who took part in the decision-making process. The evidence was supported by documents and was based on the company's leave policy. There was nothing to suggest any of the decision-makers had a problem with the employee attending the meeting, but were merely concerned that he was doing so without approved leave. No company witnesses were discredited and no objective facts contradicted their evidence. The onus was rebutted. | *Construction, Forestry, Mining and Energy Union v Bengalla Mining Company Pty Limited* [2013] FCA 267. |

| Presumption NOT rebutted | Case reference |
|---|---|
| **Credibility and truthfulness**<br>The employee contended that he was dismissed because he exercised his workplace right to paid leave for an absence due to serious illness. The Court did not accept the evidence of the decision-maker that he was unaware of the employee's illness. The Court found that the decision-maker had a motive to lie in order to avoid paying out a substantial amount of sick leave. | *Fair Work Ombudsman v AJR Nominees Pty Ltd* [2013] FCA 467. |
| **Respondent failed to call all relevant witnesses which contributed to failing to rebut onus**<br>The respondent company failed to call material witnesses that it asserted could prove many of the disputed allegations. It gave no satisfactory explanation for their absence. In this case the court relied on the *Jones v Dunkel* inference that their evidence would not have assisted the respondent's case. | *Fair Work Ombudsman v AJR Nominees Pty Ltd* [2013] FCA 467. |

| Presumption NOT rebutted | Case reference |
|---|---|
| **Board of directors were not called to give evidence about reasons and intention**<br><br>The Court found that the decision to dismiss the employee was made by the company's Melbourne-based directors, in consultation with South Australian staff. The employee alleged that he was dismissed because of his position with the union. During the hearing the company only provided evidence from the South Australian staff. The failure to provide evidence from the decision-makers meant that the company failed to rebut the presumption that they dismissed the employee because of his involvement with the union. | *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605. |

### *Multiple decision-makers*

Sometimes the decision to take adverse action is made by a collective group, such as the partners in a business, the board of a corporation, at a council meeting, or a number of managers and supervisors. In that circumstance, it may be necessary to call all members of the collective group to give evidence in order to rebut the presumption in s.361.

## Case examples

| Relevant person(s) gave evidence | Case reference |
|---|---|
| **All relevant decision-makers called by company seeking to rebut presumption**<br><br>The respondent did not call all board members to give evidence in relation to decision-making process. The applicant submitted the Court should draw the adverse inference that the evidence of other board members would not have supported the respondent's case. She alleged the respondent had not discharged the evidentiary onus of proof by failing to call all board members. The employer argued that the other board members had agreed with the course of action proposed and had little to do with the alleged adverse action. Their evidence was accepted and the presumption was successfully rebutted. | *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22. |

| Relevant person(s) did NOT give evidence | Case reference |
|---|---|
| **All relevant decision-makers not called**<br><br>The Court found that there were three decision-makers who adversely affected the applicant by dismissing him. Only two of the decision-makers gave evidence, the third did not. The Court considered that the third decision-maker was an important witness and expected that he would have been called. As a result of the failure to call the third decision-maker, the Court drew the adverse inference that his evidence would not have assisted the respondent's case. | *Flavel v Railpro Services Pty Ltd* [2013] FCCA 1189. |

# Part 4 – Coverage

## Who is covered?

 See Fair Work Act ss.338–339

The general protections provisions protect persons who are:

- employees (including prospective employees)
- employers (including prospective employers)
- independent contractors (including prospective independent contractors)
- a person (the principal) who has entered into a contract for services with an independent contractor (including a principal who proposes to enter into a contract), and
- an industrial association (including an officer or member of an industrial association)

in respect of the following action:

- action taken by **a constitutionally-covered entity**
- action that affects the activities, functions, relationships or business of a constitutionally-covered entity (or is capable of affecting or is taken with intent to affect)
- action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity to take, or not take, particular action in relation to another person (or threatening to do so)
- action taken in **a Territory or a Commonwealth place**
- action taken by:
    - **a trade and commerce employer**, or
    - **a Territory employer**

    that affects, is capable of affecting or is taken with intent to affect an employee of the employer, or
- action taken by an employee of:
    - a trade and commerce employer, or
    - a Territory employer

    that affects, is capable of affecting or is taken with intent to affect the employee's employer.[26]

The general protections provisions also have effect as if any reference to an employer or employee was a reference to a national system employer or employee.[27]

[26] Fair Work Act s.338(1).
[27] Fair Work Act s.339.

**Related information**

- What is a constitutionally-covered entity?
- What is a Territory or a Commonwealth place?
- What is a trade and commerce employer?
- What is a Territory employer?
- What is a national system employer?

## Meaning of person

The term person is used throughout the general protections provisions. A person can be defined as a separate legal entity, recognised by the law as having rights and obligations.

There are two categories of person:

- a natural person (a human being), and
- an artificial person (an entity to which the law attributes personality – such as a body corporate).[28]

## Employer and employee to have ordinary meaning

The terms employer and employee have their ordinary meaning for the purpose of general protections provisions. Other sections of the Fair Work Act give specific definitions to these terms ('national system employer' and 'national system employee') which are not applicable to the general protections provisions.[29]

An **employer** is a person who engages another to work under a contract of employment. An **employee** is a person who works under a contract of employment for an employer, rather than under some other kind of contract for work.

Officers and enlisted members of the Australian Defence Force (Army, Navy and RAAF) are not employees because no civil contract of any kind is created with the Crown or the Commonwealth as a result of the appointment of an officer or the enlistment of an enlisted member.[30]

## Prospective employees

Prospective means 'of or in the future' or 'potential; likely; expected'.[31] Prospective employees are not confined to persons who an employer has formed an intention to employ, and includes persons whose employment is being considered.[32]

However the expression prospective employee '… implies a substantial degree of proximity such as to exclude persons who might yet apply for employment or be invited to consider employment with a particular employer but at the relevant time were not yet negotiating in relation to such a possibility'.[33]

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[28] Butterworths Australian Legal Dictionary, 1997, 870.
[29] Explanatory Memorandum to Fair Work Bill 2008 [1346].
[30] *Defence (Personnel) Regulations 2002* (Cth) reg 117; see for example *C v Commonwealth of Australia* [2015] FCAFC 113.
[31] The Macquarie Dictionary Online.
[32] *Construction, Forestry, Mining and Energy Union v State of Victoria* [2013] FCA 445 [171].
[33] *Vij v Cordina Chicken Farms Pty Ltd* (2012) 222 IR 91 [67].

A person would not usually be regarded as a 'prospective employee' unless they have actually made an application for employment or are negotiating in relation to possible employment.

A prospective employee is protected from a prospective employer:

- refusing to employ them, or
- discriminating against them in the terms and conditions on which employment is offered.

A prospective employee is taken to have the workplace rights he or she would have if he or she were actually employed in the prospective employment by the prospective employer.[34]

**Example**

If a person was refused employment because they were a member of a union, or was offered a lower rate of pay because of their gender, then that person may seek a remedy under the general protections provisions of the Fair Work Act.

## Case example

|  **NOT a prospective employee** | **Case reference** |
|---|---|
| The applicant, a labour hire employee, argued that he was a prospective employee of the entity utilising the hired labour (the respondent) by virtue of the fact that the respondent had held out the potential for direct employment in circumstances where a person performed well.<br><br>The Federal Magistrate rejected this argument and found that the applicant was not a prospective employee of the respondent and therefore the adverse action claim (which related to discrimination) must fail. It was found that although the inducement of permanent employment might have been held out by the respondent to its contractors' employees, there was no evidence that the applicant had been offered such employment or even invited to apply for it. | *Vij v Cordina Chicken Farms Pty Ltd* (2012) 222 IR 91. |

[34] Fair Work Act s.341(3).

## Independent contractors

An independent contractor is covered by the general protections provisions of the Fair Work Act.

### *What is an independent contractor?*

An independent contractor undertakes to produce a given result, but is not, in the actual execution of the work, under the order or control of the person for whom it is done.[35] The fundamental characteristic of an independent contractor (as compared to an employee) is that the independent contractor provides a service to the principal while working in their own business.[36]

In the general protections provisions of the Act, the term 'independent contractor' is not confined to persons providing services in the form of labour which would otherwise be performed by an employee, and extends to any person (including large corporations) carrying on the business of a contractor that provides services, irrespective of scale, including where any number of persons are employed to carry on the business's functions.[37]

### *Prospective independent contractors*

The general protections provisions apply to a person (the principal) proposing to enter into a contract for services with an independent contractor who takes action against the independent contractor or a person employed or engaged by the independent contractor.[38] The provisions thereby protect prospective independent contractors and their employees and other persons engaged by them. They cover not just independent contractors who are proposed to be engaged, but also potential independent contractors whose engagement is under consideration or in prospect.[39]

## Labour hire workers

A labour hire worker, whether an employee or independent contractor, is covered by the general protections provisions of the Fair Work Act.

A labour hire worker is someone who enters into a work contract with a labour hire agency. The labour hire agency has a commercial contract to supply labour to a host firm. The worker performs work for the host firm. The host firm pays the labour hire agency, and the labour hire agency then pays the worker. An example of this is a temporary position working in an office during a particularly busy time for the host firm.

## Volunteers

Persons properly characterised as volunteers will not be covered by the general protections provisions of the Fair Work Act.

A volunteer is 'someone who enters into any service of their own free will, or who offers to perform a service or undertaking for no financial gain'.[40]

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[35] *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539, 545.
[36] *Hollis v Vabu* (2001) 207 CLR 21 [40].
[37] *Construction, Forestry, Mining and Energy Union v State of Victoria* [2013] FCA 445 [115]–[165].
[38] Fair Work Act s.342(1) item 4.
[39] *Construction, Forestry, Mining and Energy Union v State of Victoria* [2013] FCA 445 [171]–[172].
[40] The Macquarie Dictionary Online.

The Commission considers volunteerism as an arrangement generally motivated by altruism, rather than for remuneration or private gain. Therefore, the commitments shared between the parties are usually considered moral in nature, rather than legal.[41] Payment unrelated to hours of work or the actual performance of work does not of itself imply that a worker is an employee.[42] In these circumstances, the payment can more aptly be described as an 'honorarium' or gift.[43]

For example, a worker may receive board and lodgings[44] or reimbursements for expenses[45] and still be considered a volunteer.

# What is a constitutionally-covered entity?

Each of the following is a **constitutionally-covered entity**:

- a constitutional corporation
- the Commonwealth
- a Commonwealth authority
- a body corporate incorporated in a Territory, or
- an organisation.[46]

**Related information**

- What is a constitutional corporation?
- What is the Commonwealth?
- What is a Commonwealth authority?
- What is a body corporate incorporated in a Territory?
- What is an organisation?

## What is a constitutional corporation?

The Fair Work Act defines constitutional corporations as 'a corporation to which paragraph 51(xx) of the Constitution applies'.[47]

The Australian Constitution defines constitutional corporations as 'Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.[48]

[41] *Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club* [2011] FWA 1143 (unreported, Steel C, 21 February 2011) [42].
[42] See *Bergman v Broken Hill Musicians Club Ltd T/A Broken Hill Musicians Club* [2011] FWA 1143 (unreported, Steel C, 21 February 2011) [43].
[43] ibid.
[44] *Teen Ranch v Brown* (1995) 87 IR 308, 310–311.
[45] *Frattini v Mission Imports* [2000] SAIRComm 20 [40].
[46] Fair Work Act s.338(2).
[47] Fair Work Act s.12.
[48] *Australian Constitution* s.51(xx).

This definition has two limbs that are 'comprehensive alternatives'.[49] This means that constitutional corporations are either 'foreign corporations' or 'trading or financial corporations formed within the limits of the Commonwealth'. Therefore, a foreign corporation does not need to be formed within the limits of the Commonwealth or be a trading or financial corporation to be classified as a constitutional corporation.[50]

Many incorporated employers in the private sector who sell goods or provide services for a fee will easily satisfy the criteria of a trading or financial corporation.[51]

The issue of whether an employer is a constitutional corporation usually arises where the employer is a not-for-profit organisation in industries such as health, education, local government and community services.[52]

### *Foreign corporations*

A foreign corporation is a corporation that has been formed outside of Australia.[53]

A corporation which is formed outside of Australia, which employs an employee to work in its business in Australia, is likely to be a constitutional corporation and therefore fall within the jurisdiction of the Commission.[54]

## Case examples

|  **Foreign corporation is a constitutional corporation** | **Case reference** |
|---|---|
| **Employer company was formed in New Zealand but employee performed work in Australia**<br>The Fair Work Act applied to the dismissal, in Australia, of an employee who performed work in Australia under a contract of employment with a foreign corporation. | *Gardner v Milka-Ware International Ltd* [2010] FWA 1589 (unreported, Gooley C, 25 February 2010). |

[49] *The State of New South Wales v The Commonwealth of Australia* (1990) 169 CLR 482, 504 (Deane J).
[50] ibid.
[51] A Stewart, *Stewart's Guide to Employment Law* (4th ed, 2013) 36.
[52] ibid., 34.
[53] *The State of New South Wales v The Commonwealth of Australia* (1990) 169 CLR 482, 504 (Deane J).
[54] *Gardner v Milka-Ware International Ltd* [2010] FWA 1589 (unreported, Gooley C, 25 February 2010) [24].

| Foreign corporation is NOT a constitutional corporation | Case reference |
|---|---|
| **Company formed in Britain but does not employ persons within Australia**<br>QinetiQ Limited can only be a national system employer, to the extent that it employs persons within Australia. QinetiQ Limited does not employ any person in Australia. Accordingly, QinetiQ Limited is not a national system employer. | *Jones v QinetiQ Pty Ltd T/A QinetiQ Australia* [2013] FWC 3302 (unreported, Asbury DP, 14 June 2013). |

### *Trading or financial corporation formed within the limits of the Commonwealth*

Trading denotes the activity of providing goods or services for reward (such as payment).[55]

The Commission will consider the nature of a corporation with reference to its activities, rather than the purpose for which it was formed.[56]

A corporation will be a trading corporation if the trading engaged in is 'a sufficiently significant proportion of its overall activities'.[57]

It does not matter if trading activities are a corporation's 'dominant' activity or whether they are merely an 'incidental' activity, or entered into in the course of pursuing other activities.[58]

A corporation can be a trading corporation even if it was not originally formed to trade.[59]

One factor that may be considered is the commercial nature of the activity.[60] When considering the commercial nature of a corporation's activity, the Commission will look at a number of factors, including:

- whether it is involved in a commercial enterprise; that is, business activities carried on with a view to earning revenue
- what proportion of its income the corporation earns from its commercial enterprises
- whether the commercial enterprises are substantial or peripheral, and
- whether the activities of the corporation advance the trading interests of its members.[61]

A **financial corporation** is one 'which borrows and lends or otherwise deals in finance as its principal or characteristic activity...'[62]

[55] *Re Ku-Ring-Gai Co-operative Building Society (No.12) Ltd* (1978) 36 FLR 134, 139.
[56] *Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190, 208 (Mason J).
[57] ibid., 233.
[58] ibid., 239.
[59] *Garvey v Institute of General Practice Education Incorporated* (2007) 165 IR 62 [30].
[60] *University of Western Australia v National Tertiary Education Industry Union* (unreported, AIRC, O'Connor C, 20 June 1997) Print P1962 3; citing *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190, 209.
[61] *University of Western Australia v National Tertiary Education Industry Union* (unreported, AIRC, O'Connor C, 20 June 1997) Print P1962 3; citing *The Australian Beauty Trades Suppliers Ltd* (1991) 29 FCR 68, 72.
[62] *Re Ku-Ring-Gai Co-operative Building Society (No.12) Ltd* (1978) 36 FLR 134, 138.

The approach taken in deciding whether the activities of a corporation are such that the corporation should be considered to be a financial corporation is the same as the approach taken in deciding whether a corporation is a trading corporation.[63]

## Case examples

| Trading or financial corporation | Case reference |
|---|---|
| **Professional sporting organisation and club – trading corporation**<br>The High Court, by majority, held that a football club and the league to which it belonged in Western Australia were trading corporations. Their central activity was the organisation and presentation of football matches in which players were paid to play and spectators charged for admission, and television, advertising and other rights were sold in connection with such matches. This constituted trading activity. | *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190. |
| **Charitable organisation – trading corporation**<br>The RSPCA, a charitable organisation, was found to be a trading corporation on the basis that it earned substantial income from trading activities. It did not matter that this income was used for charitable purposes rather than to create a profit. | *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) Inc (No 2)* (2002) 120 FCR 191. |
| **Not-for-profit organisation and hospital – trading corporations**<br>The Australian Red Cross Society and the Royal Prince Alfred Hospital were held to be trading corporations, on the basis that they both generated substantial income from trading activities, even though that income was only a minority proportion of total income. The motive for which that trading income was earned was not relevant. | *E v Australian Red Cross* (1991) 27 FCR 310. |
| **Metropolitan Fire and Emergency Services Board – trading corporation**<br>The Court found that the trading activities of the Metropolitan Fire and Emergency Services Board (the Board) generated substantial income and were sufficient to constitute the Board as a trading corporation. The principal activity of the Board, established as a statutory corporation, was to respond to fire and other emergencies, an activity which it undertook without charge to the public. The Board's Fire Equipment Services activities, which involved the commercial servicing of fire equipment for commerce, industry and the domestic market generated 5.11% of the Board's revenue. | *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346. |

[63] *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 303.

| Trading or financial corporation | Case reference |
|---|---|
| **Building Society – financial corporations**<br>Two co-operative incorporated building societies were held to be financial corporations, on the basis that they lent money at interest and were therefore engaged in commercial dealing in finance. The fact that this activity was not for profit and involved the performance of an important social function was not determinative. | *Re Ku-Ring-Gai Co-operative Building Society (No. 12) Ltd and another* (1978) 36 FLR 134. |
| **Trustee of Superannuation fund – financial corporation**<br>A statutory corporation formed to provide superannuation benefits for state public servants was determined to be a financial corporation, on the basis that it engaged in financial activities on a very substantial scale. The fact that this activity was engaged in for the purpose of providing superannuation benefits to contributors was no obstacle to the conclusion that it was a financial corporation. | *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282. |

| NOT a trading or financial corporation | Case reference |
|---|---|
| **Partnership including Pty Ltd company**<br>The respondent was a partnership made up of two individuals and a Pty Ltd company. If the Pty Ltd company was a trading corporation then the partnership would take on the characteristic of a trading corporation and therefore be a national system employer.<br>The respondent submitted that the Pty Ltd company:<br>• did not have an ABN<br>• was not registered for GST<br>• did not have a bank account<br>• had not been involved in any form of trade, and<br>• had no income except that received as a partner pursuant to the partnership distribution arrangement.<br>The Commission found there was nothing in the tax returns to indicate that the Pty Ltd company was engaged in any buying or selling of goods or services or that it generated any revenue. The Commission was satisfied that the Pty Ltd company was not a trading corporation. | *Williams v Goldendays Pty Ltd & D Kolichev & L Kolichev T/A Stirling Aluminium and Glass* [2015] FWC 4200 (unreported, Bissett C, 24 June 2015). |

| NOT a trading or financial corporation | Case reference |
|---|---|
| **District or amateur sporting organisation**<br>Incorporated cricket clubs were found not to be trading corporations (although the Western Australian Cricket Association with which they were associated was found to be a trading corporation). The clubs were basically amateur bodies which did not charge for admission to matches and generally did not pay players. Although they engaged in some trading activities, this was not of sufficient significance to allow them to be characterised as trading corporations. | *Hughes v Western Australia Cricket Association (Inc)* (1986) 19 FCR 10. |
| **Charitable organisation**<br>The respondent was found not to be a trading corporation. The trading activities it did engage in were insubstantial and peripheral to the central activity of medical research. | *Hardeman v Children's Medical Research Institute* (2007) 166 IR 196. |

## What is the Commonwealth?

The **Commonwealth of Australia** – the official title of the Australian nation, established when the six states representing the six British colonies joined together at Federation in 1901.

A **Commonwealth employee** is a person who holds an office or appointment in the Australian Public Service, or holds an administrative office, or is employed by a public authority of the Commonwealth.[64]

## What is a Commonwealth authority?

A ***Commonwealth authority*** is a statutory authority, created by legislation, that is a separate legal entity from the Commonwealth and which has the power to hold money on its own account.

There are approximately 150 Commonwealth statutory authorities.

Examples of Commonwealth statutory authorities include:

- the Australian Tax Office (ATO)
- the Australian Postal Corporation (Australia Post)
- the Commonwealth Scientific and Industrial Research Organisation (CSIRO)
- the Australian Broadcasting Corporation (ABC)
- the Australian Competition and Consumer Commission (ACCC)

There is a Register of Australian Government Organisations on the Department of Finance website: www.finance.gov.au/resource-management/governance/agor/

[64] Butterworths Australian Legal Dictionary, 1997, 224.

## What is a body corporate incorporated in a Territory?

The term **body corporate** covers any artificial legal entity having a separate legal personality. These entities have perpetual succession; they also have the power to act, hold property, enter into legal contracts and sue and be sued in their own name.

**Perpetual succession** is the characteristic of a company which makes it a continuing entity in law with its own identity regardless of changes in its membership.[65]

The types of entities falling into these categories are broad, and include:

- trading and non-trading entities
- profit and non-profit making organisations
- government-controlled entities, or
- other entities with less or no government control or involvement.

Included in the definition of body corporate are entities created by:

- common law (such as a corporation sole and corporation aggregate)
- statute (such as the Australian Securities & Investments Commission), and
- registration pursuant to statute (such as a company, building society, credit union, trade union, and incorporated association).

If an entity is not established under an Act of Parliament, or under a statutory procedure of registration, such as the Corporations Law or an Incorporation Act, it is generally not a body corporate.

Each state and territory has legislation that allows various kinds of non-profit bodies to become bodies corporate. Bodies incorporated under these Acts are normally community, cultural, educational or charitable organisations. Bodies of this nature that are incorporated in the Northern Territory or the Australian Capital Territory are included in the general protections provisions even if they are not a trading corporation or a financial corporation.

**Related information**

- What is a Territory?

## What is an organisation?

An organisation is an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).[66] Registered organisations include unions and employer organisations.

[65] Butterworths Australian Legal Dictionary, 1997, 870.
[66] Fair Work Act s.12.

# What is a Territory or a Commonwealth place?

## What is a Territory?

Any land within Australia's national border that is not part of one of the states is called a territory.

### *Mainland*

The Northern Territory, the Australian Capital Territory and Jervis Bay Territory are mainland territories.

### *External*

Ashmore and Cartier Islands, Christmas Island, the Cocos (Keeling) Islands, the Coral Sea Islands, and Norfolk Island are external territories.

The Australian Antarctic Territory and the sub-Antarctic Territory of Heard Island and McDonald Islands are also external territories (however they are governed differently to the other external territories).

## What is a Commonwealth place?

**Commonwealth place** means a place acquired by the Commonwealth for public purposes, other than the seat of government (Canberra).[67]

Examples of Commonwealth places include airports, defence bases, and office blocks purchased by the Commonwealth to accommodate employees of Commonwealth Government Departments.

# What is a trade and commerce employer?

A trade and commerce employer is a person who, in connection with constitutional trade or commerce; employs, or usually employs, an individual as:

- a flight crew officer
- a maritime employee, or
- a waterside worker.[68]

**Constitutional trade or commerce** means trade or commerce:

- between Australia and a place outside Australia
- among the States
- between a State and a Territory
- between two Territories, or

[67] *Australian Constitution* s.52(i); Fair Work Act s.12.
[68] Fair Work Act ss.14(1)(d) and 338(3).

- within a Territory.[69]

# What is a Territory employer?

A Territory employer is a person (including a body corporate) who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as they employ, or usually employ, an individual in connection with that activity carried on in the Territory.[70]

# What do I do if I am not covered by the general protections?

Persons not covered by the general protections provisions of the Fair Work Act still have protections that they can rely on:

- through Australia's adherence to ILO conventions, these persons have protection from unlawful termination of employment, and
- there will be various anti-discrimination options available in all States and Territories.

You can contact the industrial relations body in your state:

- Industrial Relations Commission of New South Wales – www.irc.justice.nsw.gov.au
- Queensland Industrial Relations Commission – www.qirc.qld.gov.au
- South Australian Employment Tribunal – www.saet.sa.gov.au
- Western Australian Industrial Relations Commission – www.wairc.wa.gov.au
- Tasmanian Industrial Commission – www.tic.tas.gov.au

**Note:** Victoria, the Australian Capital Territory and the Northern Territory do not have their own industrial relations bodies because they are a part of the national workplace relations system.

**Related information**

- Other types of applications

**Legal advice**

If you would like free legal advice or other advisory services there are Community Legal Centres in each state and territory who may be able to assist.

The law institute or law society in your state or territory may be able to refer you to a private solicitor who specialises in workplace law.

Employee and employer organisations may also be able to provide advice and assistance.

[69] Fair Work Act s.12.
[70] Fair Work Act ss.14(1)(f) and 338(4).

# What is a national system employer?

 See Fair Work Act s.14

A **national system employer** is an employer covered and bound by the national workplace relations laws.

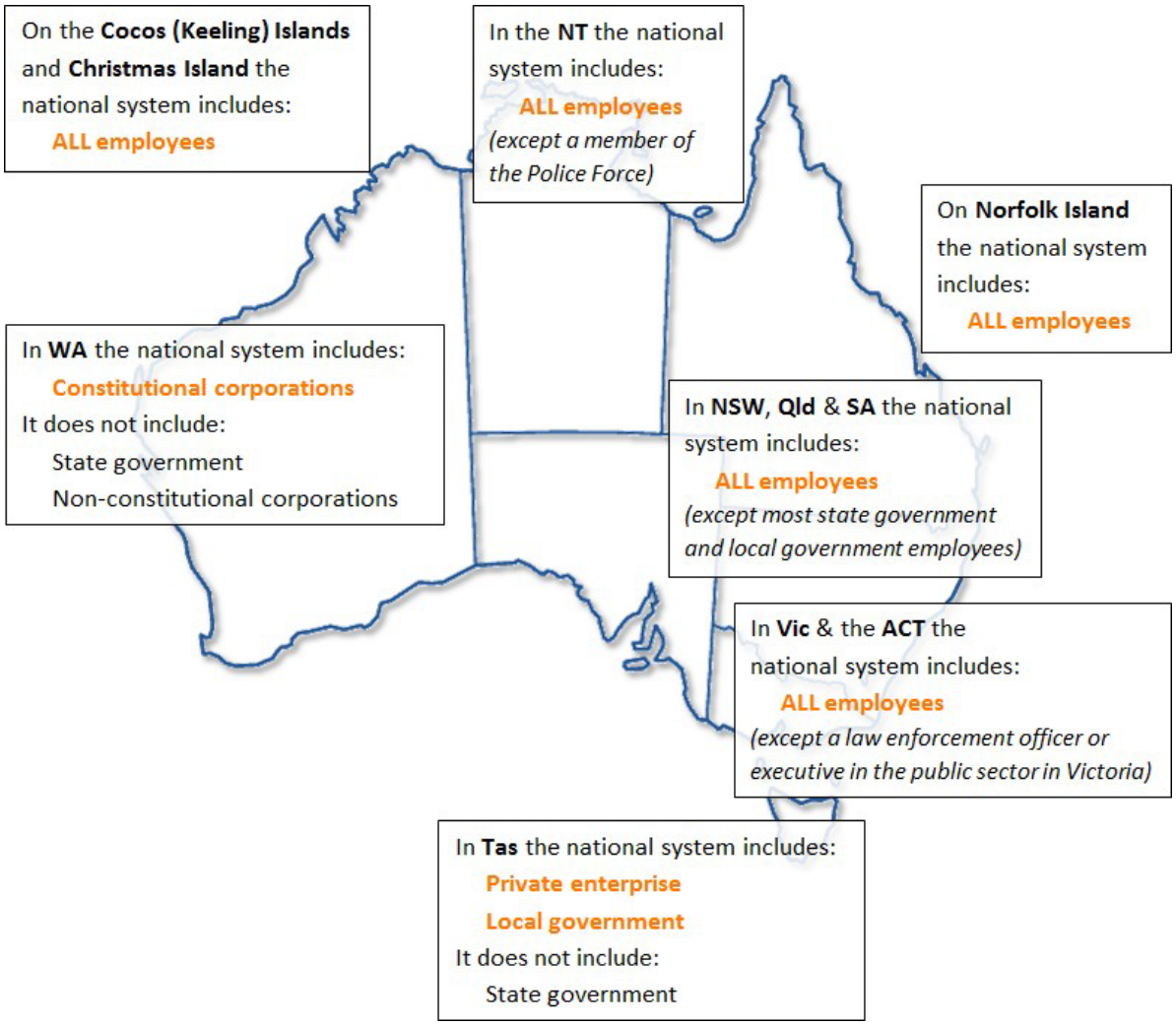
Whether an employer is a national system employer depends on the location of the employment relationship (state or territory) and, in some cases, the legal status and business of the employer.

## Who is covered by national workplace relations laws?

The national workplace relations system covers:

- all employees in Victoria (with limited exceptions in relation to State public sector employees), the Northern Territory and the Australian Capital Territory
- all employees on Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands
- those employed by private enterprise in New South Wales, Queensland, South Australia and Tasmania
- those employed by local government in Tasmania
- those employed by a constitutional corporation in Western Australia (including Pty Ltd companies) – this may include some local governments and authorities
- those employed by the Commonwealth or a Commonwealth authority
- waterside employees, maritime employees or flight crew officers in interstate or overseas trade or commerce.

## Map – what does the national system include?



# Part 5 – What is adverse action?

See Fair Work Act s.342

## Employer against an employee

**Adverse action** is taken by an employer against an employee if the employer threatens to, organises or takes action by:

- dismissing the employee
- injuring the employee in his or her employment
- altering the position of the employee to the employee's prejudice, or
- discriminating between the employee and other employees of the employer.

## Employee against an employer

**Adverse action** is taken by an employee against an employer if the employee threatens to or takes action by:

- ceasing work in the service of the employer, or
- taking industrial action against the employer.

## Prospective employer against a prospective employee

**Adverse action** is taken by a prospective employer against a prospective employee if the prospective employer threatens to or takes action by:

- refusing to employ the prospective employee, or
- discriminating against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.

## Principal against independent contractor

**Adverse action** is taken by the principal against an independent contractor if the principal threatens to or takes action by:

- terminating the contract
- injuring the independent contractor in relation to the terms and conditions of the contract
- altering the position of the independent contractor to the independent contractor's prejudice
- refusing to make use of, or agree to make use of, services offered by the independent contractor, or
- refusing to supply, or agree to supply, goods or services to the independent contractor.

# Principal proposing to enter into a contract for services with an independent contractor against the independent contractor

**Adverse action** is taken by the principal against an independent contractor if the principal threatens to or takes action by:

- refusing to engage the independent contractor
- discriminating against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor
- refusing to make use of, or agree to make use of, services offered by the independent contractor, or
- refusing to supply, or agree to supply, goods or services to the independent contractor.

# Independent contractor against a principal

**Adverse action** is taken by the independent contractor against a principal if the independent contractor threatens to or takes action by:

- ceasing work under the contract, or
- taking industrial action against the principal.

# Industrial association, or an officer or member of an industrial association, against a person

**Adverse action** is taken by the industrial association, or the officer or member of the industrial association against a person if the industrial association, or the officer or member of the industrial association threatens to or takes action by:

- organising or taking industrial action against the person
- taking action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment
- if the person is an independent contractor – taking action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services, or
- if the person is a member of the association – imposing a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).

## Actions of industrial associations

For the purposes of the general protections, each of the following is taken to be action of an industrial association:

- action taken by the committee of management
- action taken by an officer or agent, acting in that capacity

- action taken by a member or group of members, if the action is authorised by the rules, the committee of management or an officer or agent of the industrial association (unless the committee of management or an officer has taken all reasonable steps to prevent the action)
- action taken by a member who performs the function of dealing with an employer on behalf of the member and other members, acting in that capacity (unless the committee of management or an officer has taken all reasonable steps to prevent the action), and
- if the industrial association is unincorporated and does not have a committee of management – action taken by a member, or group of members.[71]

### *Unincorporated industrial associations*

For the purposes of the general protections, a reference to a person includes a reference to an unincorporated industrial association.

A contravention of the general protections committed by an unincorporated industrial association is taken to have been committed by each member, officer or agent of the unincorporated industrial association who took, or took part in, the relevant action; and did so with the relevant state of mind.[72]

### *Conduct of bodies corporate*

Any conduct engaged in by, or at the direction of, an official (who can be an officer, employee or agent) of a body corporate, within the scope of the official's actual or apparent authority, is considered to be conduct that the body has engaged in for the purposes of the Fair Work Act.[73]

## Advising, encouraging, inciting or coercing action

If for a particular reason a person (the first person), advises, encourages or incites, or takes any action with intent to coerce a second person to take action, and the action if taken by the second person for the first person's reason would contravene a general protections provision, then the first person is taken to have contravened the provision.[74]

[71] Fair Work Act s.363.
[72] Fair Work Act s.364.
[73] Fair Work Act s.793.
[74] Fair Work Act s.362.

# What is dismissal?

See Fair Work Act s.386

The term **dismissed** is defined in the Fair Work Act as a situation where:

- a person's employment has been terminated at the employer's initiative, or
- a person was forced to resign because of the conduct or course of conduct engaged in by the employer.

A dismissal does NOT include where:

- a person is demoted in his or her employment without a significant reduction in duties or remuneration and remains employed by the employer
- a person was employed under a contract for a specified period of time, specified task or for the duration of a specified season and the employment comes to an end at the end of that period, or
- a person had a training arrangement with their employer which:
  - specified that the employment was limited to the duration of the training arrangement, and
  - whose employment ends at the end of that training arrangement.

**Related information**
- When does a dismissal take effect?

## Terminated at the employer's initiative

Contains issues that may form the basis of a jurisdictional issue if the parties agree to have the Commission conduct an arbitration for a general protections dismissal dispute.

See Fair Work Act s.386(1)(a)

### *The action of the employer must cause the termination*

A termination is at the employer's initiative when:

- the employer's action 'directly and consequentially' results in the termination of employment, and
- had the employer not taken this action, the employee would have remained employed.[75]

There must be action by the employer that either intends to bring the relationship to an end or has that probable result.[76]

[75] *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200, 205.
[76] *Barkla v G4S Custodial Services Pty Ltd* (2011) 212 IR 248, 256; citing *O'Meara v Stanley Works Pty Ltd* (2006) 58 AILR 100 [23].

The question of whether the act of an employer results 'directly or consequentially' in the termination of employment is an important consideration but it is not the only consideration.[77] It is important to examine all of the circumstances including the conduct of the employer and the employee.[78]

### *Repudiation*

The test for repudiation by the employer is whether the conduct of the employer, when judged objectively, showed an intention to no longer be bound by a contract.[79] The employer's actual or subjective intention is not relevant.[80]

A repudiation of the contract does not bring the contract to an automatic end but gives the affected party the right to terminate the contract.[81] If the affected party accepts the repudiation the contract will end. [82]

Where an employer has repudiated the contract, and an employee accepts the repudiation and an employee exercises their right to terminate the contract, this will amount to a termination at the employer's initiative.

An employee may engage in conduct amounting to a repudiation by seriously breaching the contract of employment.

### *Employment contract may continue after employment relationship is terminated*

Termination at the employer's initiative requires the termination of the employment relationship, not the contract of employment.[83]

## Case examples

| Terminated at the employer's initiative | Case reference |
|---|---|
| **Employer claimed employee resigned her employment**<br>The applicant submitted a letter of resignation which effectively gave 7 months' notice. Her employer accepted the resignation but made it effective immediately. It was found that the termination of employment occurred at the employer's initiative. | *Nohra v Target Australia Pty Ltd* (2010) 204 IR 389. |

[77] *Pawel v Advanced Precast Pty Ltd* (unreported, AIRCFB, Polites SDP, Watson SDP and Gay C, 12 May 2000) Print S5904.
[78] *O'Meara v Stanley Works Pty Ltd* (2006) 58 AILR 100 [23]; citing *Pawel v Advanced Precast Pty Ltd* (unreported, AIRCFB, Polites SDP, Watson SDP and Gay C, 12 May 2000) Print S5904; *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200; *ABB Engineering Construction Pty Ltd v Doumit*, (unreported, AIRCFB, Munro J, Duncan DP, Merriman C, 9 December 1996) Print N6999.
[79] *Elgammal v BlackRange Wealth Management Pty Ltd* [2011] FWAFB 4038 (unreported, Harrison SDP, Richards SDP, Williams C, 30 June 2011) [13].
[80] ibid.
[81] *Visscher v Giudice* (2009) 239 CLR 361, 388 [81].
[82] ibid.; see also *Dover-Ray v Real Insurance Pty Ltd* (2010) 194 IR 22 [23].
[83] *Searle v Moly Mines Limited* (2008) 174 IR 21 [22]; citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 427.

| Terminated at the employer's initiative | Case reference |
|---|---|
| **Employer argued abandonment of employment**<br>An employee who had notified her employer that she would be unable to attend work due to medical reasons, and was then terminated, was found to have been terminated at the initiative of the employer. An argument that the employee had abandoned her employment by not attending for work as directed was rejected. It was held that the employer had terminated the employment. | *Sharpe v MCG Group Pty Ltd* [2010] FWA 2357 (unreported, Asbury C, 22 March 2010). |
| **Employer proposed changed working conditions to accommodate employee's pregnancy**<br>The employer and employee agreed that the employee would work in a less difficult role as the employee was pregnant. However, when the employer informed the employee that there would be a significant reduction in salary for the new role, the employee refused to agree, and regarded herself as having been dismissed. This was found to constitute a termination of employment at the initiative of the employer. | *Owens v Allied Express Transport Pty Ltd* [2011] FWA 1058 (unreported, Hampton C, 28 February 2011).<br>Permission to appeal refused (2011) 210 IR 17. |

| NOT terminated at the employer's initiative | Case reference |
|---|---|
| **Employee engaged on series of fixed-term contracts**<br>Non-renewal of employment at the expiry of the last of a series of fixed term contracts was held not to be a termination of employment at the initiative of the employer. | *Drummond v Canberra Institute of Technology* [2010] FWA 3534 (unreported, Deegan C, 4 May 2010).<br>Leave to appeal refused (2010) 197 IR 287. |
| **Series of 'outer limit contracts'**<br>The employer and employee had entered into a series of outer limit contracts. Even though there was a strong expectation that contracts would be renewed, it was not sufficient to displace the legal effect of the contract that the parties had entered into. The employment was terminated through the passing of time at the end of the final contract, and the employee was not terminated at the initiative of the employer. | *Department of Justice v Lunn* (2006) 158 IR 410. |

| NOT terminated at the employer's initiative | Case reference |
|---|---|
| **Apprenticeship contracts**<br>Apprentices were placed on apprenticeship contracts with a duration of four years but with an expectation that there would be an offer of permanent employment after that (subject to performance and operational requirements). On appeal, the apprentices were held to be subject to contracts for a specified period of time. Therefore when the apprenticeship contracts expired and the apprentices were not offered further employment, this was not a termination of employment at the initiative of the employer. | *Qantas Airways Limited v Fetz* (1998) 84 IR 52. |

## Forced resignation

Contains issues that may form the basis of a jurisdictional issue if the parties agree to have the Commission conduct an arbitration for a general protections dismissal dispute.

A forced resignation is when an employee has no real choice but to resign.[84]

The onus is on the employee to prove that they did not resign voluntarily.[85] The employee must prove that the employer forced their resignation.[86]

A resignation is forced where the employee can prove that the employer took action with the intent (or which had the probable result) of bringing the relationship to an end.[87]

The line distinguishing conduct that leaves an employee no real choice but to resign, from an employee resigning at their own initiative, is a narrow one.[88] The line, however, must be 'closely drawn and rigorously observed'.[89]

A **forced resignation** can also be referred to as **constructive dismissal**.

[84] *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200, 206.
[85] *Australian Hearing v Peary* (2009) 185 IR 359, 367 [30].
[86] ibid.
[87] *O'Meara v Stanley Works Pty Ltd* (2006) 58 AILR 100 [23].
[88] *Doumit v ABB Engineering Construction Pty Ltd* (unreported, AIRCFB, Munro J, Duncan DP, Merriman C, 9 December 1996) Print N6999, 12.
[89] ibid.

### *Heat of the moment resignation*

An employer is generally able to treat a clear and unambiguous resignation as a resignation.[90]

Where a resignation is given in the heat of the moment or under extreme pressure, special circumstances may arise.[91] In special circumstances an employer may be required to allow a reasonable period of time to pass.[92] The employer may have a duty to confirm the intention to resign if, during that time, they are put on notice that the resignation was not intended.[93]

[90] *Ngo v Link Printing Pty Ltd* (1999) 94 IR 375 [12]; citing *Minato v Palmer Corporation Ltd* (1995) 63 IR 357, 361–362 (Murphy JR); citing *Sovereign House Security Services Ltd v Savage* [1989] IRLR 115, 116 (May LJ).
[91] *Ngo v Link Printing Pty Ltd* (1999) 94 IR 375 [12]; citing *Kwik-Fit (GB) Ltd v Lineham* [1992] ICR 183, 191.
[92] ibid.
[93] ibid.

## Case examples

| Forced resignation | Case reference |
|---|---|
| **Employee notified employer of future intention to resign**<br>A letter from the employee to the employer indicating an intention to resign in the future, and sent at a time that the employee was distressed and unwell, was held not to be an effective notice of resignation. Accordingly, the employer's purported acceptance of the resignation was held to constitute a termination of employment at the employer's initiative. | *Marks v Melbourne Health* [2011] FWA 4024 (unreported, Ives DP, 24 June 2011). |
| **Employer alleged employee resigned – employee continued to present for work**<br>After an angry discussion between an employee and her manager, the employee believed she had been dismissed and the employer believed the employee had resigned. The employee continued to attend for work afterwards in the belief she had to work out the notice period for her dismissal. The employee was found not to have resigned because she did not demonstrate an intention not to be bound by her contract of employment. | *Bender v Raplow Pty Ltd* [2011] FWA 3407 (unreported, Richards SDP, 8 June 2011). |
| **Failure to pay wages**<br>An employee gave notice of his resignation after having been paid under half of what he was owed in wages over a period of 4 months. This was held to be a forced resignation due to the conduct of the employer, and constituted a dismissal by the employer. | *Hobbs v Achilleus Taxation Pty Ltd ATF the Achilleus Taxation Trust; Achilleus Accounting Pty Ltd ATF The Achilleus Accounting Trust* [2012] FWA 2907 (unreported, Deegan C, 4 April 2012).<br>Permission to appeal refused [2012] FWAFB 5679 (unreported, Drake SDP, Richards SDP, Gregory C, 20 July 2012). |

| NOT a forced resignation | Case reference |
|---|---|
| **Employee resigned before a disciplinary interview**<br>An employee who admitted to police that he had taken company property without authorisation resigned rather than attend a scheduled meeting with his employer about the matter. This was held on the facts to be a voluntary and not a forced resignation. | *Love v Alcoa of Australia Limited* (2012) 224 IR 50. |

| NOT a forced resignation | Case reference |
|---|---|
| **Resignation of employee while under suspension and investigation**<br><br>The resignation of an employee who was barred from access to the workplace, and then suspended from work and subjected to a disciplinary investigation was held not to have been forced to resign by the employer. | *Davidson v Commonwealth* [2011] FWA 3610 (unreported, Deegan C, 7 June 2011).<br><br>Permission to appeal refused (2011) 213 IR 120. |
| **Employee negotiating conditions following change in position**<br><br>The employee resigned in the belief that her employer required her to accept a lower rate of pay or resign. It was found that the employee had misunderstood the position and acted prematurely because the employer had made no final decision about the matter. Therefore the resignation was not forced by the employer's conduct. | *Blair v Kim Bainbridge Legal Service Pty Ltd T/as Garden & Green* [2011] FWA 2720 (unreported, Gooley C, 10 May 2011). |
| **Employee on performance management plan**<br><br>An employee who resigned after having been placed on supervisory requirements was found not to have been forced to resign by the employer. | *Ashton v Consumer Action Law Centre* [2010] FWA 9356 (unreported, Bissett C, 20 December 2010). |
| **Employee resigned prior to a decision being made following a disciplinary process**<br><br>The employee was subject to a disciplinary procedure relating to falsification of timesheets. The employee acted on the advice of the union and resigned before the employer had come to a decision in relation to the disciplinary matter. This was held on appeal to be a voluntary, not a forced, resignation. | *Pacific National (NSW) Limited v Bell* (2008) 175 IR 208. |
| **Employee resigned over failure to pay wages on time**<br><br>The employee resigned after the employer repeatedly paid her wages late and failed to pay superannuation. The lateness was commonly one to two days but had been more on occasion. The Commission found that whilst the employer's conduct was improper the circumstances did not leave the employee with no choice other than to resign. The resignation was not found to be forced by the employer's conduct. | *Bruce v Fingal Glen Pty Ltd (in liq)* [2013] FWC 3941 (unreported, O'Callaghan SDP, 19 June 2013).<br><br>Permission to appeal refused *Bruce v Fingal Glen Pty Ltd (in liq)* [2013] FWCFB 5279 (unreported, Boulton J, Gooley DP, Hampton C, 2 August 2013). |

## Demotion

If a demotion involves a significant reduction in duties or remuneration, it may constitute a 'dismissal', even if the person demoted remains employed by the employer.[94]

The employment contract may be repudiated when an employee is demoted, without consent, and suffers a significant reduction in pay.[95] If the repudiation is accepted, either expressly or through conduct, the contract is terminated.[96]

If the demoted employee remains in employment after accepting the repudiation they would be under a new contract of employment.[97] However, a demoted employee may accept the repudiation and remain employed in the demoted position without agreeing to the demotion; that is, under protest or for financial or similar reasons.[98]

If the employee's contract or industrial instrument contains an express term allowing demotion without termination then any demotion will not amount to a termination.[99]

## Case example

| Demotion a dismissal | Case reference |
|---|---|
| **Significant reduction in remuneration**<br><br>The employee had worked for a clothing retailer for over 12 years, in a variety of roles including National Sales Manager and National Operations Manager. She was asked to manage a store that was performing poorly, and she agreed on the basis of the maintenance of her then current salary package.<br><br>Within a year the company sought to have the employee agree to a change in the terms of her contract of employment, equivalent to a reduction of over $30,000 per year. When the employee did not accept the change, the company treated her refusal to accept the new terms and conditions of employment as a resignation.<br><br>The Commission concluded that the actions of the company brought the employment relationship to an end, and found that the applicant was dismissed at the initiative of the employer. There was no valid reason for the dismissal, the termination of the employee's employment was harsh, unjust or unreasonable. | *Johnson v Zehut Pty Limited T/A URBRANDS* [2014] FWC 7496 (unreported, Boulton J, 10 November 2014). |

[94] *A Gerrard v UPS Pty Ltd* (unreported, AIRC, Eames C, 19 March 2004) PR944681; *Blair v Chubb Security Australia Pty Ltd* (unreported, AIRC, Whelan C, 19 August 2003) PR936527.
[95] *Charlton v Eastern Australia Airlines Pty Ltd* (2006) 154 IR 239, 247 [34].
[96] ibid.
[97] *Charlton v Eastern Australia Airlines Pty Ltd* (2006) 154 IR 239, 247 [34]; citing *Advertiser Newspapers Pty Ltd v Industrial Relations Commission (SA)* (1999) 90 IR 211, 218; and *Tokyo Network Computing Pty Ltd v Tanaka* [2004] NSWCA 263 [6].
[98] *Irvin v Group 4 Securitas Pty Ltd* (unreported, AIRC, Deegan C, 18 December 2002) PR925901 [17].
[99] *Hermann v Qantas Airways Ltd* (unreported, AIRC, Whelan C, 3 April 2001) PR903096 [88]; see also *Boo Hwa v Christmas Island Administration* (unreported, AIRC, Polites SDP, 2 December 1999) Print S1443 [19] in relation to redeployment.

# What is 'injuring' the employee in his or her employment?

Injuring the employee in his or her employment covers injury of any compensable kind.[100]

'Injury' refers to deprivation of one or more immediate practical incidents of employment, such as loss of pay or reduction in rank.[101]

'Injuring the employee in his or her employment' has also been taken to have a wider meaning than financial injury or injury involving deprivation of rights which the employee has under a contract of service. It can be applicable to any circumstances where an employee in the course of his or her employment is treated substantially differently to the manner in which he or she is ordinarily treated and where that treatment can be seen to be injurious or prejudicial.[102]

'Singling out' has been used as a way of categorising a particular injury in employment.[103] However, it does not in itself constitute injurious treatment. The 'injury' in this context continues to refer to the deprivation of one of the more immediate practical incidents of employment.[104]

## Case examples

| Employee injured in his or her employment | Case reference |
|---|---|
| **Forced removal of a worker from a worksite**<br>Union officials demanded that an employer remove an employee from a worksite because he had refused to pay union fees and sought to resign from the union. The Court found that the forced removal of a worker from a worksite was sufficient to constitute injury to them in their employment. | *Construction Forestry Mining & Energy Union v Hamberger* (2003) 127 FCR 309. |
| **Transferring employee to a different worksite**<br>The employee complained to 'Wageline' about the under-payment of wages and entitlements. The employer transferred the employee from a store located reasonably close to her home to one which was a considerable distance from her home. When she refused to be transferred she was suspended. The Court found both the transfer and the suspension to be an injury to the employee in her employment and an alteration of her position to her prejudice. | *Byrne v Australian Ophthalmic Supplies Pty Ltd* (2008) 169 IR 236. |

[100] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 [4].
[101] *Childs v Metropolitan Transport Trust* (1981) IAS Current Review 946.
[102] *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155, 164.
[103] *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155; *Byrne v Australian Ophthalmic Supplies Pty Ltd* (2008) 169 IR 236; *Community & Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93.
[104] *Childs v Metropolitan Transport Trust* (1981) IAS Current Review 946; *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34 [229].

| Employee injured in his or her employment | Case reference |
|---|---|
| **Stand down**<br>An employer stood an employee down at the direction of a union because the employee had refused to engage in industrial action. The Court found the employer's action injured the employee in his employment. | *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155. |
| **'Take-it-or-leave-it'**<br>The Federal Circuit Court found that a newspaper publisher took adverse action when it attempted to force a full-time journalist to sign a statement, drafted for him, stating that he had requested and agreed to the employer terminating his full-time position and having his entitlements paid in instalments. The employer changed the journalist's employment status from full-time to part-time and reduced his work hours from five days per week to two days per week. It was also alleged that the publisher threatened the journalist by saying that he would not be paid anything if he did not agree to have his entitlements paid in instalments. | *Fair Work Ombudsman v F.L. Press Pty Ltd & Anor* [2015] FCCA 1578. |

| Employee NOT injured in his or her employment | Case reference |
|---|---|
| **Verbal abuse – intimidation**<br>The employee claimed that he was verbally abused and intimidated as a result of a pay claim and was denied an opportunity for promotion. The Court held that the employer's reaction to the employee's queries altered his position to his prejudice in that it reduced his status in relation to his colleagues and it upset him. However, this did not constitute an 'injury' as the employer's actions had not impacted negatively upon one or more of the immediate practical incidents of employment such as remuneration, duties or hours of work and had not resulted in an injury of any compensable kind. | *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd* (2011) 201 IR 441. |

# What is altering the position of the employee to the employee's prejudice?

Altering the position of an employee to the employee's prejudice is a broad additional category of adverse action. It covers not only legal injury but any adverse affect to, or deterioration in, the advantages enjoyed by the employee before the conduct in question.[105]

A prejudicial alteration to the position of an employee may occur even though the employee suffers no loss or breach of a legal right. It will occur if the alteration in the employee's position is real and substantial rather than merely possible or hypothetical.[106]

In order to determine that a person's position has been altered to their prejudice, it must be found that:

- the employee is, individually speaking, in a worse situation after the employer's acts than before them
- the deterioration has been caused by those acts, and
- the acts were intentional in the sense that the employer intended the deterioration to occur.[107]

## Case examples

| Employee's position altered to their prejudice | Case reference |
|---|---|
| **Issuing a written warning**<br><br>The Court accepted the applicant's contention that the issuing of a written warning has the effect of making the employee's continuing employment less secure. Conduct engaged in by an employee who has received a warning could lead to the termination of his or her employment although the same conduct engaged in by an employee who had not received a warning would not lead to the termination of that employee's employment. It was found therefore that by issuing a written warning the respondent altered the position of the employee to the employee's prejudice. | *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd* (1999) 140 IR 131. |

[105] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 [4]; *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 [84].
[106] *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 [84]; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 [4]; *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association* (2012) 202 FCR 244 [32].
[107] *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482 [54].

| Employee's position altered to their prejudice | Case reference |
|---|---|
| **Disappointment of an expectation**<br><br>Employees were terminated when their employer's premises were destroyed by fire. The employer told them they would be re-deployed when the operation resumed. However, the employer subsequently decided not to resume that operation and not to re-deploy those employees. Although the employees had no legal right to re-employment, it was held that the disappointment of their expectation was an alteration of their position to their prejudice. | *Australasian Meat Industry Employees Union v Belandra Pty Ltd* (2003) 126 IR 165. |
| **Lessening of security in employment**<br><br>An email was sent to managers directing that preference be given to employees who had signed AWAs in a redundancy process. The Court found that the email constituted an instruction that employees employed under awards or certified agreements were to be discriminated against in that process. Before the sending of the email those employees enjoyed the benefit of being subject to redundancy only in accordance with a process which rated their eligibility on the basis of merit. There was an adverse affection of, or deterioration in, that benefit after the sending of the email and the employment of affected employees had become less secure than it had been previously. In those circumstances the position of the relevant employees had been altered to their prejudice. | *Community & Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93. |
| **Alteration to roster**<br><br>The applicant was removed from the weekend shift and placed on a weekday afternoon shift purportedly because of absences from work in order to care for his wife and for occasions of his own ill health. The Court was satisfied that the shift change altered the applicant's position to his prejudice because he lost the additional annual leave entitlement which accompanied work on weekend shifts and had to work longer hours on the weekday shift than he had done on the weekend day shift. | *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* [2013] FCCA 473. |
| **Reduced status and level of responsibility**<br><br>The applicant was employed by the respondent as the Centre Manager at one of its storage sites but was transferred to another location where she was put in the role of Assistant Centre Manager after an occasion where she left work early to pick up her son from school. The Court was satisfied that the alteration in the applicant's status from Centre Manager to Assistant Centre Manager was an alteration in her position to her prejudice, in that it reduced her status and level of responsibility. | *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056. |

| Employee's position altered to their prejudice | Case reference |
|---|---|
| **Suspension from duties**<br><br>The applicant was a health and safety representative at the factory of the respondent. He 'tagged' a forklift that he considered to be unsafe. The applicant was suspended and an investigation was conducted. At the conclusion of the investigation, the applicant was given a final written warning. In relation to the suspension, the Court said that the removal of an employee from their employment against his or her will, even temporarily, will usually be adverse to their interests. It was found that the suspension resulted in a deterioration in the advantages otherwise enjoyed by the applicant in his employment and constituted adverse action. | Au*tomotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525. |
| **Suspension and disciplinary process**<br><br>The applicant was employed as an Audio-Visual Co-ordinator by the respondent. In an application for an injunction the Federal Court held that suspending the employee on pay may constitute adverse action, and that subjecting the employee to a disciplinary process including an investigation may constitute adverse action. Interim orders were made restraining the school from dismissing the employee, or subjecting him to the disciplinary process until the matter was further determined. | *Murray v The Peninsula School* [2015] FCA 447. |

| Employee's position NOT altered to their prejudice | Case reference |
|---|---|
| **External recruitment for a vacant position**<br><br>During a restructuring process in which the applicant was retrenched, another job was upgraded and subsequently filled by an external candidate. The applicant alleged that by not giving him an opportunity to apply for the position and by appointing an external candidate to that role instead of retaining him, the respondent injured him in his employment, altered his position to his detriment and discriminated between him and other employees. The Court held that the action could not be considered to have altered the applicant's position to his prejudice because there was no real or substantial possibility that he could have been successful in obtaining the role. | *Wolfe v Australia and New Zealand Banking Group Ltd* [2013] FMCA 65. |

| Employee's position NOT altered to their prejudice | Case reference |
|---|---|
| **Commencement of investigation**<br>The applicant was the CEO of QTAC. She claimed that she was subject to improper investigation and bullying complaints after participating in enterprise bargaining negotiations. The Court referred to various authorities, and accepted as a general proposition that the commencement of an investigation by an employer into conduct of an employee can in certain circumstances constitute adverse action, either as injury or alteration of the position of the employee. In this case, however, the applicant specifically pleaded that she had been subject to adverse action because the investigation was commenced without reasonable cause, or because QTAC ought to have known that complaints against her were not genuine but were made in the context of her role in enterprise agreement negotiations. The Court did not accept this argument and accordingly did not consider that the commencement of the investigation into the complaints against the applicant constituted adverse action against her. | *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22. |

# What is discriminating between the employee and other employees of the employer?

To discriminate is to make a distinction in favour of or against a person or thing.[108]

Discrimination between employees involves an employer deliberately treating an employee, or a group of employees, less favourably its other employees.[109]

The element of intent is central to establishing discrimination. To discriminate requires a conscious decision to make a distinction.[110]

Discrimination in this context is not limited to direct discrimination and could encompass indirect discrimination.[111] Indirect discrimination is conduct that is 'facially neutral' but may nevertheless amount to, or result in, less favourable treatment.[112]

Determining whether an employer has discriminated between an employee and other employees requires a comparative test between the applicant and another employee who acted in the same way as the employee in question.[113]

[108] *Hodkinson v Commonwealth* (2011) 207 IR 129 [176].
[109] ibid., [178].
[110] *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341 [59]–[61].
[111] *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178; *Waters v Public Transport Corporation* (1991) 173 CLR 349; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549.
[112] *Waters v Public Transport Corporation* (1991) 173 CLR 349.
[113] *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341 [66].

# Threatened action and organisation of action

Adverse action includes threatening to take action of the type earlier described, or organising such action.[114]

The essence of a threat is the communication of an intention to inflict harm on a person, made for the purpose of intimidating the person. However, a mere statement of an intention to harm a person does not necessarily constitute threatening the person. The statement of intention needs to be communicated directly to the target of the threat, or communicated in a way where it is intended or likely to find its way to the target.[115]

# Exclusions

Adverse action does not include:

- action that is authorised by or under the Fair Work Act, or any other law of the Commonwealth, or a law of a State or Territory prescribed by the regulations,[116] or
- an employer standing down an employee who is engaged in protected industrial action and who is employed under a contract of employment that provides for standing down in those circumstances.[117]

[114] Fair Work Act s.342(2).
[115] *CPSU v Telstra Corporation Limited (No 2)* (2000) 101 FCR 45 [15].
[116] Fair Work Act s.342(3).
[117] Fair Work Act s.342(4).

# Part 6 – The protections

## Division 3 – Workplace Rights

This Division protects workplace rights, and the exercise of those rights.

### Section 340 – Protection

*(1) A person must not take adverse action against another person:*

*(a) because the other person:*

*(i) has a workplace right; or*

*(ii) has, or has not, exercised a workplace right; or*

*(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or*

*(b) to prevent the exercise of a workplace right by the other person.*

*(2) A person must not take adverse action against another person (the **second person**) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.*

#### *What is the protection?*

A person must not take adverse action against another person because the other person:

- has a workplace right
- has (or has not) exercised a workplace right, or
- proposes to (or proposes not to) exercise a workplace right.

A person must not take adverse action against another person to prevent the exercise of a workplace right by the other person.

> **Example**
>
> An employer must not dismiss an employee because the employee made a complaint or claim to the Fair Work Ombudsman about being underpaid.

#### *Are there exceptions?*

There are no exceptions.

## Meaning of workplace right

See Fair Work Act s.341

A person has a workplace right if the person:

- is entitled to the benefit of a workplace law, workplace instrument or an order made by an industrial body
- has a role or responsibility under a workplace law, workplace instrument or order made by an industrial body
- is able to initiate or participate in a process or proceedings under a workplace law or instrument
- is able to make a complaint or inquiry to a person or body with capacity to seek compliance with a workplace law or instrument, or
- is able to make a complaint or inquiry in relation to his or her employment.

### *Workplace law*

A workplace law is a law that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).[118]

Workers' compensation laws are directed to matters that both regulate and define the employer/employee relationship and therefore fall within the definition of 'workplace law'.[119]

The fact that a law regulates other relationships as well as the employment relationship does not take it outside the definition of workplace law.[120] The Equal Opportunity Act has been found to be a workplace law.[121]

The Privacy Act has been found not to be a workplace law as it does not regulate the relationship between employers and employees.[122]

A particular provision within an Act or regulation could be said to regulate the relationship between employers and employees, even though the Act or the regulations as a whole do not.[123]

A workplace law must be a statute law (including delegated legislation). It does not generally include rights arising under contracts of employment or other common law rights.[124]

### *Workplace instrument*

A workplace instrument is an instrument that is made under, or recognised by a workplace law and concerns the relationships between employers and employees.[125]

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[118] Fair Work Act s.12.
[119] *Construction, Forestry, Mining and Electrical Union v Leighton Contractors Pty Ltd* (2012) 225 IR 197 [62].
[120] *Bayford v Maxxia Pty Ltd* (2011) 207 IR 50 [141].
[121] ibid.
[122] *Austin v Honeywell Ltd* [2013] FCCA 662 [60]–[61].
[123] *Australian Licenced Aircraft Engineers Association v Sunstate Airlines (Qld) Pty Ltd* (2012) 208 FCR 386 [24].
[124] *Barnett v Territory Insurance Office* (2011) 211 IR 439 [29]–[32]; *Daw v Schneider Electric (Australia) Pty Ltd* [2013] FCCA 1341 [106]–[114].
[125] Fair Work Act s.12.

The term 'workplace instrument' does not apply to the contract of employment itself.[126]

A **workplace instrument** usually refers to an enterprise agreement or an award.

### *Order made by an industrial body*

Industrial body means:

- the Fair Work Commission
- a court or commission (however described) performing or exercising, under an industrial law, functions and powers corresponding to those conferred on the Fair Work Commission by the Fair Work Act, or
- a court or commission (however described) performing or exercising, under a workplace law, functions and powers corresponding to those conferred on the Fair Work Commission by the *Fair Work (Registered Organisations) Act 2009* (Cth).[127]

Other bodies that can be considered 'industrial bodies' are:

- the Federal Court
- the Federal Circuit and Family Court
- an eligible State or Territory court (meaning one of the following):
  - a district, county or local court
  - a magistrates court
  - the South Australian Employment Tribunal, and
  - the Industrial Court of New South Wales
- a State or Territory commission (meaning one of the following):
  - the Industrial Relations Commission of New South Wales
  - the Queensland Industrial Relations Commission
  - the South Australian Employment Tribunal
  - the Western Australian Industrial Relations Commission, and
  - the Tasmanian Industrial Commission.

### *Role or responsibility under a workplace law or instrument*

It has been accepted that the role of a bargaining representative is a role or responsibility under a workplace law.[128]

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[126] *Barnett v Territory Insurance Office* (2011) 211 IR 439; cited in *Atkinson v Vmoto Limited* [2012] FWA 9043 (unreported, Spencer C, 26 October 2012) [57]; *Bayford v Maxxia Pty Ltd* (2011) 207 IR 50 [155].
[127] Fair Work Act s.12.
[128] *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22 [15].

An obligation to ensure workplace safety as a Health and Safety Officer is also a role or responsibility under a workplace law.[129]

### *Is able to make a complaint or inquiry to a person or body with capacity to seek compliance with a workplace law or instrument*

A person exercises a workplace right where they make a complaint or inquiry to a body having capacity to seek compliance with the law or a workplace instrument, even when the complaint concerns other employees.[130]

### *Is able to make a complaint or inquiry in relation to his or her employment*

A person exercises a workplace right where they make a complaint or inquiry in relation to their employment.

The Fair Work Act does not restrict the person or body to whom such an inquiry or complaint could be directed. It can include situations where an employee makes an inquiry or complaint to their employer.[131] Seeking legal advice in relation to a person's employment has also been held to fall within the meaning of making an inquiry.[132]

Although the words 'is able to' are taken to have a broad meaning, in order for the complaint or inquiry to be considered a workplace right, the complaint or inquiry must concern and be confined to the subject employee's employment. '[T]he employee's ability to "complain or inquire" [is] in respect of matters personal to the employee as governed by that person's contractual arrangements and or the statutory framework.'[133]

In *Alam v National Australia Bank Limited*[134] the Full Court of the Federal Court upheld the approach taken by the Full Court in *Cigarette & Gift Warehouse Pty Ltd v Whelan*[135] to the effect that:

- there must be a relationship between the subject matter of the employee's complaint and the employee's employment
- the subject of the employee's complaint must be founded on a source of entitlement or right (such as in an employment contract, award, enterprise agreement or legislation), and
- it is not necessary for the ability to make a complaint or inquiry to itself have an instrumental source. This means the employee does not have to identify a grievance procedure or some other right to bring a complaint in their employment contract, award, enterprise agreement or legislation in order to attract the protections in Part 3-1 Division 3

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[129] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 2)* (2011) 213 IR 48, 52.
[130] *McCormack v Chandler Macleod Group Limited* [2012] FMCA 231 [67].
[131] *Hodkinson v Commonwealth* (2011) 207 IR 129 [131]; *Devonshire v Magellan Powertronics* (2013) 231 IR 198 [63].
[132] *Murrihy v Betezy.com.au Pty Ltd* [2013] FCA 908 [142]-[143].
[133] *Harrison v In Control Pty Ltd* [2013] FMCA 149 [63], (2013) 273 FLR 190.
[134] [2021] FCAFC 178.
[135] [2019] FCAFC 16 [28], (2019) 268 FCR 46, where the Full Court of the Federal Court described the statement of principle by Collier J in *Whelan v Cigarette & Gift Warehouse Pty Ltd* [2017] FCA 1534 [33]-[34]; (2017) 275 IR 285 as 'unremarkable and correct' (per Greenwood, Logan and Derrington JJ). In the decision at first instance, Collier J found that the making of inquiries in the weeks prior to, and on the day of, the employee's dismissal about the payment of a bonus or the establishment of a bonus plan constituted the exercise of a workplace right as such matters were terms of the employment contract.

of the Fair Work Act[136] It will be sufficient if the complaint or inquiry relates to subject matter for which the employment contract makes provision.[137]

The Fair Work Act does not provide a definition of 'complaint' for the purposes of s.341(1)(c).[138]

The term 'complaint' has been held to connote an expression of discontent which seeks consideration, redress or relief from the matter about which the complainant is aggrieved.[139]A complaint is more than a mere request for assistance and should state a particular grievance or finding of fault.[140]

In *Shea v TRUenergy Services Pty Ltd (No 6)*[141], having reviewed the authorities Dodds-Streeton J held that for the purposes of s.347(1)(c), a complaint could be treated as having been made if the 'relevant communication, whatever its precise form, would be reasonably understood in context as an expression of grievance or a finding of fault which seeks, whether expressly or implicitly, that the employer or other relevant party at least take notice of and consider the complaint'.[142]

**An illustrative example** is provided in the Explanatory Memorandum:[143]

> Freddy works part-time at a petrol station. He believes he is not being paid the correct award rate for a console operator. He writes a letter of complaint to the Australian Competition and Consumer Commission (ACCC) as he mistakenly believes that it is able to investigate wage underpayments. Freddy tells his manager about the letter. Following this, his hours for the next fortnight are cut in half. While the complaint would not be covered by subparagraph 341(1)(c)(i) as the ACCC does not have the capacity under a workplace law to seek compliance with the applicable award, Freddy would still have exercised a workplace right because he has made a complaint regarding his employment (subparagraph 341(1)(c)(ii)).

### *Process or proceedings under a workplace law or instrument*

Each of the following is a process or proceedings under a workplace law or instrument:

- a conference or hearing held by the Commission
- court proceedings under a workplace law or instrument
- protected industrial action

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[136] *Alam v National Australia Bank Limited* [2021] FCAFC 178 [97] (read with [81] and [95]).
[137] Ibid [75].
[138] *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 242 IR 1 [576].
[139] *Alam v National Australia Bank Limited* [2021] FCAFC 178 [59], citing *Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204 [13], (2020) 302 IR 400.
[140] Ibid [59], citing *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 242 IR 1 [579]-[581] and *Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204 [13], (2020) 302 IR 400.
[141] *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 242 IR 1.
[142] Ibid [626].
[143] Explanatory Memorandum to Fair Work Bill 2008 [1370].

- making, varying or terminating an enterprise agreement
- appointing (or terminating the appointment of) a bargaining representative
- making or terminating an individual flexibility arrangement under a modern award or enterprise agreement
- agreeing to cash out paid annual leave or paid personal/carer's leave
- making a request for flexible working arrangements
- dispute settlement under a workplace law or instrument, or
- any other process or proceedings under a workplace law or instrument.[144]

### *Industrial action*

Industrial action by an employee is:

- the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on or a delay in the performance of the work
- a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee, or
- a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work.[145]

Industrial action by employees is protected industrial action if it is 'employee claim action' or 'employee response action' for a proposed agreement.[146] Employee claim action is action organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement.[147] Employee response action is action organised or engaged in as a response to industrial action by an employer.[148]

Industrial action may be taken by an employer and most commonly takes the form of a lockout of employees. It is protected if it is 'employer response action', being industrial action organised or engaged in as a response to industrial action by a bargaining representative or by the employees.[149]

For industrial action to be protected, the requirements in ss.413 and 414 of the Fair Work Act must be satisfied. Industrial action by employees must be authorised by a protected action ballot of employees in accordance with the requirement of Part 3–3 Division 8 of the Fair Work Act.

The wearing of union campaign clothing may constitute industrial action, depending on the circumstances. If an employee is only prepared to perform work if they are wearing a particular item of clothing then they are placing a limitation or restriction on the performance of work or on the acceptance or offering of work and therefore engaging in industrial action.[150]

Wearing particular clothing whilst performing work has nothing to do with the manner in which the work is performed and will not constitute industrial action if wearing the clothing does not amount

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[144] Fair Work Act s.341(2).
[145] Fair Work Act s.19(1)(a)–(c).
[146] Fair Work Act s.408.
[147] Fair Work Act s.409.
[148] Fair Work Act s.410.
[149] Fair Work Act s.411.
[150] *Mornington Peninsula Shire Council* [2011] FWAFB 4809 (unreported, Watson SDP, Kaufman SDP, Gooley C, 22 July 2011)[31].

to banning the performance of the work, limiting the performance of the work or restricting the performance of the work. There may be situations where particular work can only be performed whilst wearing certain clothing, such as personal protective equipment, and the refusal to wear that clothing could affect the manner in which the work is being performed and result in a restriction or limitation on, or delay in, the performance of the work.[151]

## Prospective employees

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

## Case examples

| Applicant had a workplace right | Case reference |
|---|---|
| **Personal/carer's leave**<br><br>The employee had a workplace right under the provisions of the Fair Work Act to take personal/carer's leave due to an 'unexpected emergency', being the need to collect a primary school child from school.<br><br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **$32,130.78** for loss suffered. | *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056. |
| **Benefit under an enterprise agreement**<br><br>McCorkell was successful in tendering for construction works with the Victorian Government. The contract required McCorkell and any of its subcontractors to comply with the Victorian Code of Practice for the Building and Construction Industry and the Implementation Guidelines to the Code. McCorkell put the demolition work out to tender and Eco was an unsuccessful bidder in that tender process because its enterprise agreement was not 'code compliant'. McCorkell took adverse action against employees of Eco by refusing to engage or make use of the services of Eco because those employees were entitled to the benefit of the Eco Agreement. The Court found that the Victorian Government also took adverse action against Eco with intent to coerce Eco and its employees to exercise their workplace right to vary the Eco Agreement. | *Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2)* [2013] FCA 446. |

[151] *United Firefighters Union of Australia v Easy* [2013] FCA 763 [154].

| Applicant had a workplace right | Case reference |
|---|---|
| **Making complaints about a supervisor**<br><br>The respondent made use of its redundancy processes to rid itself of an employee who it considered to be troublesome because she exercised her workplace rights by making complaints about the behaviour of her immediate supervisor.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the union representing the applicant **$37,000** as pecuniary penalty. | *National Tertiary Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451. |
| **Underpayment**<br><br>The respondent took unlawful adverse action when it stopped giving shifts to a casual bartender who complained of being underpaid.<br><br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **$8,120.08** for unpaid wages and superannuation; **$2,500** for distress, hurt, and humiliation; and **$685.07** interest. | *Hall v City Country Hotel Management Pty Ltd & Ors (No.2)* [2014] FCCA 2317. |
| **Underpayment**<br><br>The applicant was employed as a casual truck driver and had worked for the company for only a few weeks when he was dismissed. The applicant was dismissed after making complaints to, and inquiries of, his supervisor about his pay rates and employment status.<br><br>The Court noted that there had been a number of previous instances where employees, who had complained about the company failing to pay them their award entitlements, had been dismissed.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the applicant **$7,500** as a pecuniary penalty.<br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **$2,900.85** for loss suffered. | *Kennewell v MG & CG Atkins trading as Cardinia Waste & Recyclers* [2015] FCA 716. |

| Applicant did NOT have a workplace right | Case reference |
|---|---|
| **Personal/Carer's leave**<br><br>The employee took personal/carer's leave and was subsequently removed from the weekend shift, asked to sign an agreement as a precondition to returning to his normal shift and issued with a final written warning.<br><br>A clause in the enterprise agreement permitted the employer to require an employee to prove to its satisfaction that an absence from work was caused by illness or injury. The employer submitted that evidence provided by the employee about the absence was unsatisfactory.<br><br>The Court held that by virtue of s.107(4) of the Fair Work Act, even if an employee does not provide satisfactory evidence of illness on the request of the employer then an entitlement to that leave does not exist.<br><br>Where an enterprise agreement applies, the Court will look to the particular wording of that agreement, and whether it contains any pre-conditions to the entitlement to personal/carer's leave to determine whether or not the person had a workplace right in a particular situation.<br><br>The Court accepted that the absences in question were unauthorised and found that they did not represent the exercise of a workplace right. | *Construction, Forestry, Mining & Energy Union v Endeavour Coal Pty Ltd* [2013] FCCA 473. |
| **Complaint or inquiry in relation to employment**<br><br>The applicant continually disagreed with the respondent about the company's strategic direction. The Court found that the complaints or inquiries of the applicant were not 'in relation to his ... employment' and therefore did not give rise to a workplace right. | *Harrison v In Control Pty Ltd* (2013) 273 FLR 190. |

## Section 343 – Coercion

*(1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:*

*(a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or*

*(b) exercise, or propose to exercise, a workplace right in a particular way.*

*(2) Subsection (1) does not apply to protected industrial action.*

### *What is the protection?*

A person must not organise, take or threaten any action against another person to force that other person, or a third person, to:

- exercise or not exercise a workplace right

- propose to exercise or not exercise a workplace right, or
- exercise or propose to exercise a workplace right in a particular way.[152]

**Example**

An employer must not threaten an employee with demotion unless the employee stops a harassment claim against their supervisor.

### *Are there exceptions?*

This protection does not apply to organising (or threatening) protected industrial action.

## What is coercion?

A person coerces another to act in a particular way if the first person brings about that act by force or compulsion. Coercion will cause a person to act in a way that is non-voluntary.[153]

There must be two elements to prove 'intent to coerce':

- it needs to be shown that it was intended that pressure be exerted which, in a practical sense, will negate choice, and
- the exertion of the pressure must involve conduct that is unlawful, illegitimate or unconscionable.[154]

Coercion is distinguished from other concepts including influence, persuasion and inducement. Coercion implies a high degree of compulsion and not some lesser form of pressure where a person is left with a realistic choice as to whether or not to comply.[155]

Coercion may take many forms. Persuasion becomes coercion when a person who influences another does so by threatening to take away something they possess, or by preventing them from obtaining an advantage they would otherwise have obtained.[156]

The prohibition applies irrespective of whether the action taken to coerce the other person is effective.[157] However, the actual effect of conduct may indicate the intent or purpose of the alleged contravener when the action was taken.[158]

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[152] Fair Work Act s.343.
[153] *Finance Sector Union v Commonwealth Bank of Australia* (2000) 106 IR 139 [44]; cited in *Liquor Hospitality & Miscellaneous Union v Arnotts Biscuits Ltd* (2010) 188 FCR 221 [63].
[154] *Seven Network (Operations) Limited v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378 [39].
[155] *National Tertiary Education Industry Union v Commonwealth of Australia* (2002) 117 FCR 114 [103]; cited in *Liquor Hospitality & Miscellaneous Union v Arnotts Biscuits Ltd* (2010) 188 FCR 221 [65].
[156] *Ellis v Barker* (1871) 40 LJ Ch 603; cited in *National Tertiary Education Industry Union v Commonwealth of Australia* (2002) 117 FCR 114 [103]; and *Australian Licenced Aircraft Engineers Association v Qantas Airways Ltd* (2011) 201 IR 441 [49].
[157] Explanatory Memorandum to Fair Work Bill 2008 [1391].
[158] *Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd* [2013] FCA 446 [228].

## Case examples

| Alleged conduct found to be coercion | Case reference |
|---|---|
| **Threat to commence industrial action**<br><br>The Court found that threats had been made with intent to coerce the employer to enter into a local, rather than national, enterprise agreement. The Union had threatened disruption to the Seven Network's coverage of the AFL finals and the Olympic Games, a time which was considered by the Seven Network to be the most important period for live coverage in the history of its business.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the applicant **$7,500** as a pecuniary penalty.<br>Officers of the respondent were ordered to pay the applicant **$1,500** and **$500** as pecuniary penalties. | *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378; [2001] FCA 672. |
| **Threat to prevent future postings**<br><br>The Court found that a threat by the respondent to prevent the applicant from going on future postings was an attempt to bring illegitimate pressure on him to prevent him from further pursuing claims relating to his entitlements.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the applicant **$13,200** as a pecuniary penalty.<br>The manager of the respondent was ordered to pay the applicant **$2,200** as a pecuniary penalty. | *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd* (2011) 201 IR 441; [2012] FMCA 711. |
| **Threat to reject future tenders**<br><br>McCorkell put work out to tender and Eco was an unsuccessful bidder. Eco was informed by the Victorian Government that its agreement was not Code compliant and that compliance was necessary in order for Eco to continue to obtain government work. The action contravened the Fair Work Act as it was taken with the intention of coercing Eco and Eco's employees to exercise their workplace right to vary the agreement to make it compliant with the Code. | *Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd* [2013] FCA 446. |

| Alleged conduct found to be coercion | Case reference |
|---|---|
| **Changes to conditions of employment**<br><br>The respondent told the applicant that if he did not sign an individual flexibility agreement he would become a casual employee, would not receive standard hours each week, could not continue working the hours he was currently working and could not be employed by the respondent. The Court found that the respondent threatened to take action with intent to coerce the applicant to exercise or not to exercise his workplace right and/or exercise his workplace right in a particular way.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the Commonwealth **$25,000** as a pecuniary penalty.<br>The managing director and company secretary of the respondent was ordered to pay the Commonwealth **$5,000** as a pecuniary penalty.<br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **$7,146** for loss suffered. | *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064. |
| **Right to take paid personal leave**<br><br>The applicant was dismissed after telling the respondent he would need chemotherapy treatment for cancer. The Court found the respondent took action against the applicant with intent to coerce him not to exercise a workplace right, namely the right to take paid personal leave.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the Commonwealth **$35,000** as a pecuniary penalty.<br>The managing director of the respondent was ordered to pay the Commonwealth **$6,500** as a pecuniary penalty.<br>**Compensation ordered**<br>The respondent was ordered to pay the employee **$10,953.73** for accrued leave; **$4,037.40** for non-payment of notice of termination; and interest. | *Fair Work Ombudsman v AJR Nominees Pty Ltd* [2013] FCA 467; [2014] FCA 128. |
| **Right to benefits under award**<br><br>The respondent stopped providing the applicant with shifts after the applicant lodged a claim with the Commission about her entitlements under the award. The Court found the respondent deliberately engaged in conduct with the intention of coercing the applicant to abandon her claim to receive the benefits of the award or to leave the respondent's employment.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the applicant **$20,000** and the Commonwealth **$10,000** as pecuniary penalties. | *Dicks v Gemco Foods Pty Ltd* [2012] FMCA 230. |

| Alleged conduct found NOT to be coercion | Case reference |
|---|---|
| **Disciplinary action for serious misconduct**<br>The respondent gave three employees the option of taking one month leave without pay instead of dismissal as disciplinary action for a serious OH&S breach. The applicants alleged the respondent had threatened them with dismissal so as to coerce them into agreeing not to exercise their right to attend and be paid for work under the certified agreement. The Court found in making the offer, the respondent did not negate choice but rather offered a choice. | *Liquor Hospitality & Miscellaneous Union v Arnotts Biscuits Ltd* (2010) 188 FCR 221. |
| **Provision of information relating to a workplace injury**<br>The applicant alleged coercion on the part of the respondent in its dealings with Comcare and the Merit Protection Commissioner. The applicant claimed, among other things, that the respondent acted with the intention of coercing Comcare to deny liability for her workplace injury. The Court found that the third parties sought information at different times from the respondent and such information was provided. It was stated by the Court that the allegations were fanciful in the extreme. | *Evangeline v Department of Human Services* [2013] FCCA 807. |
| **Workplace law not identified**<br>The applicant claimed that an offer of employment was withdrawn after she refused to provide the respondent with certain information during the pre-employment screening process. She claimed to have exercised a workplace right under the Privacy Act, however the Court found that this was not a workplace law. Since the provision concerns the exercise of a workplace right and the applicant had not identified a workplace right because she had not identified a workplace law or instrument, the claim of coercion was not made out. | *Austin v Honeywell Ltd* [2013] FCCA 662. |

## Section 344 – Undue influence or pressure

*An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:*

*(a) make, or not make, an agreement or arrangement under the National Employment Standards; or*

*(b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2); or*

*(c) agree to, or terminate, an individual flexibility arrangement; or*

*(d) accept a guarantee of annual earnings; or*

*(e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.*

### *What is the protection?*

An employer must not exert undue influence or undue pressure on an employee in relation to the employee's terms and conditions of employment.

> **Example**
>
> An employer must not pressure an employee to agree to an individual flexibility arrangement.

### *Are there exceptions?*

There are no exceptions.

## What is undue influence or pressure?

These provisions do not require coercion, but there must be some conduct which nevertheless amounts to the exercise of some influence or some pressure in order to make an employee act in a particular way. The provisions set a lower threshold than coercion.[159]

The prohibition applies in circumstances where an employer makes an agreement with an individual employee (not employees acting collectively) and where the employer should be expected to take care not to exert significant and inappropriate pressure on an employee to make the agreement.[160]

'Undue' conduct is conduct that is 'unwarranted; excessive; too great' or 'not proper, fitting or right; unjustified.'[161]

To 'influence' is 'to move or impel to, or to do, something'.[162]

The word 'pressure' refers to harassment or oppression.[163]

> **An illustrative example** is provided in the Explanatory Memorandum:[164]
>
> David is 18 years old and is employed by Sparkles Pty Ltd (Sparkles). The manager of Sparkles has approached David about the possibility of cashing out his annual leave entitlement saying that, because Sparkles is a small business, if David took leave the business would have to close temporarily to cover David's absence. In the circumstances, David feels obliged to agree to the manager's request. Depending on the exact way in which this issue was raised with David, the manager's request may amount to undue influence or pressure and would be prohibited. Of course, if the manager made it clear to David that he was in no way obliged to cash out his leave and that the manager was merely exploring all possible business options, the manager's request is unlikely to amount to undue influence or pressure.

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[159] Explanatory Memorandum to Fair Work Bill 2008 [1396].
[160] Explanatory Memorandum to Fair Work Bill 2008 [1395].
[161] *Stuart v Construction, Forestry, Mining and Energy Union* (2009) 190 IR 82 [18], cited in *Wintle v RUC Cementation Mining Contractors Pty Ltd* (No. 2) [2012] FMCA 459 [36].
[162] The Macquarie Dictionary (2nd ed, 1991), 903; cited in *Wintle v RUC Cementation Mining Contractors Pty Ltd (No. 2)* [2012] FMCA 459 [37].
[163] ibid.
[164] Explanatory Memorandum to Fair Work Bill 2008 [1370].

## Case examples

| Conduct amounted to undue influence or pressure | Case reference |
|---|---|
| **Pressure to sign an individual flexibility arrangement**<br>The respondent was found to have exerted undue influence and undue pressure on an employee in relation to his decision on whether or not to agree to an individual flexibility arrangement. It did this by threatening to dismiss the employee if he did not sign the employer's proposed individual flexibility arrangement.<br>**Penalty ordered**<br>The respondent was ordered to pay the Commonwealth **$25,000** as a pecuniary penalty.<br>The managing director and company secretary of the respondent was ordered to pay the Commonwealth **$5,000** as a pecuniary penalty<br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **$7,146** for loss suffered. | *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064. |

| Conduct did NOT amount to undue influence or pressure | Case reference |
|---|---|
| **Request to sign a termination letter**<br>The applicant claimed that at a meeting in which he was asked to sign a letter of termination, the respondent exercised undue influence or pressure on him to agree, or not agree, to a deduction from amounts payable in relation to the performance of work.<br>The Court listened to the recording of the meeting and found that the meeting was conducted plainly. The tone of the meeting was unremarkable with no evidence, either in the recording or from the witnesses, of any raised voices, agitation, or body language or movements which could be interpreted as an attempt to exercise undue pressure or to exercise undue influence with respect to any matter. There was a request, and nothing more than that, for the applicant to sign the Termination Letter, and there was nothing in the terms of anything said or read to the applicant, or the Termination Letter itself, which constituted undue influence or undue pressure. | *Wintle v RUC Cementation Mining Contractors Pty Ltd (No. 3)* [2013] FCCA 694. |

## Section 345 – Misrepresentations

*(1) A person must not knowingly or recklessly make a false or misleading representation about:*

*(a) the workplace rights of another person; or*

*(b) the exercise, or the effect of the exercise, of a workplace right by another person.*

*(2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.*

### *What is the protection?*

A person must not deliberately make a false or misleading representation about:

- the workplace rights of another person, or
- the exercise, or the effect of the exercise, of a workplace right by another person.

**Example**

A union representative must not advise an employee that they can go on strike for reasons other than protected industrial action.

### *Are there exceptions?*

This does not apply if the person to whom the representation is made would not be expected to rely on it.

## What is misrepresentation?

A misrepresentation is a representation that does not accord with the true facts (past or present). Only if a discrepancy between the true facts and the represented facts can be shown will a misrepresentation be established.[165]

Most commonly, a statement will contain or convey a false meaning if what is stated concerning the past or present fact is not accurate; but a statement which is literally true may contain or convey a meaning which is false.[166]

A misrepresentation does not necessarily have to be a 'statement'. Representations involve a broader concept than statements. As such, a representation may be made by conduct or by silence.[167]

Liability does not depend on evidence that the statement 'caused' the person to whom the representation was made to act in a particular way.[168]

[165] Butterworths Australian Legal Dictionary, 1997, 754.
[166] *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, 88; cited in *Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151 [80].
[167] *Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151 [11].
[168] Explanatory Memorandum to Fair Work Bill 2008 [1398].

**An illustrative example** is provided in the Explanatory Memorandum:[169]

> Madison is a long-term casual employee of Benny J Enterprises Pty Ltd. Madison is pregnant with her first child and asks her manager about her parental leave entitlement. Madison's manager tells her that only full-time employees are entitled to parental leave knowing that this is not true. In doing so, the manager will contravene the prohibition in paragraph 345(1)(a).
>
> Moon Enterprises Pty Ltd (Moon Enterprises) would like to enter into a new enterprise agreement with its employees. The manager of Moon Enterprises provides the employees with a document that contains false and misleading statements relating to the terms and effect of the proposed new agreement. In particular, the document contains false statements in relation to pay increases, casual loadings and penalty rates. The misrepresentation made by the manager is in relation to the effect of approving the enterprise agreement and is prohibited under paragraph 345(1)(b).

The section is not contravened if the person to whom the representation was made would not be expected to rely on it.

**An illustrative example** is provided in the Explanatory Memorandum:[170]

> Peter, Emma, Audrey and Annabelle attend a large end of year party hosted by their employer, Sunny Up Pty Ltd (Sunny Up). During the course of the festivities, the manager of Sunny Up is talking to a group of employees, including Peter, about the project the company is working on that has to be completed in a couple of weeks. Peter says that it's a tight timeframe and it might not be achievable. The manager laughs and jokes that everyone's sick leave entitlement will be suspended until the project is completed. The exception in subclause 345(2) applies in this case because the statement it (sic) was a joke delivered in a social context, meaning it would not be expected that Peter or the others would have relied on it as a true representation of what the employer intended to do.

For a representation to be reckless it must be one made carelessly or indifferent as to its truth.[171]

[169] Explanatory Memorandum to Fair Work Bill 2008 [1370]. On 27 March 2021, the Fair Work Act was amended to remove the definition of 'long term casual' and include a definition of 'regular casual employee' in s.12. Section 67 of the Fair Work Act provides parental leave entitlements for regular casual employees in some circumstances.
[170] Explanatory Memorandum to Fair Work Bill 2008 [1399].
[171] *Derry v Peek* (1889) 14 App Case 337, 374; cited in *Fenwick v World of Maths* [2012] FMCA 131 [51].

## Case examples

| Conduct amounted to a misrepresentation | Case reference |
|---|---|
| **Statements made to WorkCover**<br><br>The respondent dismissed the applicant after he injured his shoulder at work and made a WorkCover claim. The respondent told a WorkCover inspector that the applicant's claim was fraudulent because the injury happened at home and not at work. The Court found the transmission of information to WorkCover was done 'recklessly, not caring whether the representations be true or false'.<br><br>**Penalty ordered**<br><br>The respondent was ordered to pay the applicant **$5,000** as a pecuniary penalty.<br><br>**Compensation ordered**<br><br>The respondent was ordered to pay the applicant **$7,000** for lost wages; and **$516** interest.<br><br>The respondent was ordered to pay a superannuation fund nominated by the applicant **$630** for lost superannuation benefits; and **$111** interest. | *Corke-Cox v Crocker Builders Pty Ltd* [2012] FMCA 677. |

| Conduct did NOT amount to a misrepresentation | Case reference |
|---|---|
| **No workplace right**<br>The applicant claimed the respondent made a false or misleading representation about his workplace right, being the right to have a 'thorough investigation' conducted before being summarily dismissed. The reference to a 'thorough investigation' appeared in the Human Resource Management Plan. However the Human Resource Management Plan had no effect at all because the terms of the collective agreement expressly state that the agreement is 'intended to cover all matters pertaining to the employment relationship' to the exclusion of other laws, awards, agreements, custom and practice and like instruments or arrangements. Since there was no workplace right to a 'thorough investigation', no misrepresentation had been made. | *Wintle v RUC Cementation Mining Contractors Pty Ltd (No.3)* [2013] FCCA 694. |
| **Representation not 'knowingly' false**<br>The respondent did not knowingly make a false representation concerning the employment arrangement between himself and the applicant because the respondent believed from its interaction with the ATO that the arrangement was a proper and legitimate arrangement. The fact that the Court's view differed from the ATO's view was not to the point. | *Fenwick v World of Maths* [2012] FMCA 131. |

## Section 94H of the Privacy Act 1988 – Requiring the use of COVIDSafe

*(1) A person commits an offence if the person requires another person to:*

*(a) download COVIDSafe to a communication device; or*

*(b) have COVIDSafe in operation on a communication device; or*

*(c) consent to uploading COVID app data from a communication device to the National COVIDSafe Data Store.*

*Penalty: Imprisonment for 5 years or 300 penalty units, or both.*

*(2) A person commits an offence if the person:*

*(a) refuses to enter into, or continue, a contract or arrangement with another person (including a contract of employment); or*

*(b) takes adverse action (within the meaning of the Fair Work Act 2009) against another person; or*

*(c) refuses to allow another person to enter:*

*(i) premises that are otherwise accessible to the public; or*

*(ii) premises that the other person has a right to enter; or*

*(d) refuses to allow another person to participate in an activity; or*

*(e) refuses to receive goods or services from another person, or insists on providing less monetary consideration for the goods or services; or*

*(f) refuses to provide goods or services to another person, or insists on receiving more monetary consideration for the goods or services;*

*on the ground that, or on grounds that include the ground that, the other person:*

*(g) has not downloaded COVIDSafe to a communication device; or*

*(h) does not have COVIDSafe in operation on a communication device; or*

*(i) has not consented to uploading COVID app data from a communication device to the National COVIDSafe Data Store.*

*Penalty: Imprisonment for 5 years or 300 penalty units, or both.*

*(3) To avoid doubt:*

*(a) subsection (2) is a workplace law for the purposes of the Fair Work Act 2009; and*

*(b) the benefit that the other person derives because of an obligation of the person under subsection (2) is a workplace right within the meaning of Part 3-1 of that Act.*

A ***communication device*** includes a mobile telephone or tablet computer.

### *What is the protection?*

An employer must not take adverse action[172] against an employee or prospective employee, on the grounds that they:

- have not downloaded COVIDSafe to a communication device
- do not have COVIDSafe in operation on a communication device, or
- have not consented to uploading COVID app data from a communication device to the National COVIDSafe Data Store.

**Example**

An employer must not dismiss an employee or refuse to employ a person because they haven't downloaded COVIDSafe.

### *Are there exceptions?*

There are no exceptions.

## Division 4 – Industrial Activities

This Division protects freedom of association and involvement in lawful industrial activities.

[172] *Privacy Act 1988* (Cth) s.94H(2)(b).

## Section 346 – Protection

*A person must not take adverse action against another person because the other person:*

*(a) is or is not, or was or was not, an officer or member of an industrial association; or*

*(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or*

*(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).*

**Comparison – Unlawful termination**

The provisions of **s.346** are **very similar** to the provisions of **ss.772(1)(b)–(c)** – meaning that if a person is not eligible to make an application for freedom of association under the general protections then the following information may also be relevant to an unlawful termination claim.

### *What is the protection?*

A person must not take adverse action against another person for their membership (or not) of an industrial association, and for participating (or not) in industrial activities.

**Example**

An employer must not refuse to employ a person because they are a member of a union.

### *Are there exceptions?*

There are no exceptions.

## What are industrial activities?

 See Fair Work Act s.347

The Fair Work Act provides protections in relation to a person's freedom of association and participation or non-participation in industrial activities. The protections revolve around the right to engage or not engage in certain industrial activities – namely, being a member or officer of an industrial association or engaging in activities of industrial associations. The Fair Work Act describes the meaning of 'engages in industrial activities' at s.347.

The Fair Work Act prohibits adverse action, coercion and misrepresentations in connection with these industrial activities. It also prohibits inducements to be, or not be, a member of an industrial association.[173]

[173] Explanatory Memorandum to the Fair Work Bill 2008 [1400].

An employer contravenes s.346 if it can be said that engagement by the employee in an industrial activity was a 'substantial and operative factor' in the employer's reasons for taking the adverse action.[174]

### *Membership and officers*

Section 347 prohibits a person from taking adverse action against another person because the other person is, or is not, or was or was not, an officer or member of an industrial association.

Industrial associations are defined as:

- unions and employer associations (whether or not registered or recognised under a law), or
- employees and/or independent contractors who come together informally in the workplace for a purpose which includes protecting and promoting their interests in matters concerning their employment.[175]

An officer of an industrial association is a person who holds an office in the association, or an employee of the association, or a delegate or other representative of the association.[176]

**An illustrative example** is provided in the Explanatory Memorandum:[177]

> Andrea works at the Bouncy Bluebell Childcare Centre. The manager, Bernadette, has been asking child care workers to put away heavy equipment at the end of each day while also watching the children. This requires the staff to leave the children without supervision. Andrea is concerned that this breaches the relevant government regulations. She suggests to a number of her co-workers that they meet after work to talk about whether they should take a collective approach on this issue, including reporting the issue or contacting the union. If the other employees agree to the meeting, they will be an industrial association within the meaning of clause 12.

The protections also prohibit a person from taking adverse action against another person because of the person's membership or non-membership of a particular industrial association - i.e., they would operate to protect someone from adverse action because they are a member of union A rather than unions B or C.[178]

### *Participation and non-participation in lawful industrial activities*

A person also engages in industrial activity if she or he does or does not:

- become or remain an officer or member of an industrial association
- become involved in establishing an industrial association
- organise or promote a lawful activity for, or on behalf of, an industrial association

[174] *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605; cited in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549 [62]; and *United Firefighters Union of Australia v Easy* [2013] FCA 763 [23].
[175] Explanatory Memorandum to Fair Work Bill 2008 [1401]; Fair Work Act s.12.
[176] Fair Work Act s.12.
[177] Explanatory Memorandum to Fair Work Bill 2008 [1401].
[178] Explanatory Memorandum to Fair Work Bill 2008 [1408].

- encourage or participate in a lawful activity organised or promoted by an industrial association
- comply with a lawful request made by, or requirement of, an industrial association, or
- represent or advance the views, claims or interests of an industrial association.[179]

These can broadly be described as 'participation protections' and cover a broad range of lawful participation activities including:

- carrying out duties or exercising rights as an officer of an industrial association, and
- participating in union discussions at the workplace where a union has exercised a right of entry for this purpose.[180]

Persons exercising a representative function in the workplace are protected, even if the person is not a union member, officer or workplace delegate.[181]

A person also engages in industrial activity if she or he does or does not pay a fee to an industrial association. This covers payment (and non-payment) of bargaining and other fees.[182]

A person also engages in industrial activity if she or he seeks or does not seek to be represented by an industrial association.[183]

**An illustrative example** is provided in the Explanatory Memorandum:[184]

> Kylie is employed by Daffy Duke Pty Ltd (Daffy Duke). Daffy Duke proposes, during negotiations for an enterprise agreement, to make a number of rostering changes at the workplace. A number of staff are unhappy about the proposal and the relevant union organises protected industrial action that includes a strike against Daffy Duke. Kylie is happy with the proposed rostering changes and declines to participate in the protected action ballot to authorise the taking of industrial action or participate in the protected industrial action. The union would be prohibited from taking adverse action against Kylie (e.g., refusing to provide her with union services) because she refused to participate in the protected action ballot and any subsequently approved protected industrial action.

### *Non-participation in unlawful industrial activities*

A person is protected from adverse action for **NOT** engaging in any of the following unlawful industrial activities:

- organising or promoting an unlawful activity for, or on behalf of, an industrial association
- encouraging, or participating in, an unlawful activity organised or promoted by an industrial association
- complying with an unlawful request made by, or requirement of, an industrial association
- taking part in industrial action, or

[179] Fair Work Act s.347(b).
[180] Explanatory Memorandum to Fair Work Bill 2008 [1416].
[181] Explanatory Memorandum to Fair Work Bill 2008 [1417].
[182] Explanatory Memorandum to Fair Work Bill 2008 [1418].
[183] Explanatory Memorandum to Fair Work Bill 2008 [1419].
[184] Explanatory Memorandum to Fair Work Bill 2008 [1419].

- making a payment that the person must not pay, or to which an employee is not entitled, in relation to periods of industrial action.[185]

## Case examples

| Adverse action taken because a person engaged in industrial activities | Case reference |
|---|---|
| **Employment denied to non-union members**<br><br>A couple applied for work as ship stewards in 2009 and although the respondent wished to employ them, it told them they would need to first join the Maritime Union of Australia (MUA). The MUA refused their membership applications, in line with its policy of giving preference to 'beached' out-of-work members.<br><br>The Court found that the conduct of the MUA, not only in refusing the couple membership, but in the intimidation by threats of industrial action to which that company succumbed, such that the respondent, although it wanted to employ the couple, did not do so. The MUA's conduct involved its blatant use of illegitimate industrial action power to bully the respondent into not employing the couple.<br><br>The MUA was culpable at two levels: first, for refusing the membership applications; and second, by illegitimately using the threat of industrial action to pressure the respondent not to employ non-union members. The respondent was also culpable, although at a lesser level than the MUA, for applying and maintaining the unlawful employment practice.<br><br>**Penalty ordered**<br>The MUA was ordered to pay the couple **$79,200** as a pecuniary penalty.<br>**Compensation ordered**<br>The MUA and the respondent were ordered to pay the couple a total of **$723,300** for loss suffered. | *Fair Work Ombudsman v Offshore Marine Services Pty Ltd* (2012) 219 IR 435.<br><br>*Fair Work Ombudsman v Offshore Marine Services Pty Ltd (No 2)* [2013] FCA 943.<br><br>*Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd* [2015] FCA 275. |

[185] Fair Work Act ss.347(c)–(g).

| Adverse action taken because a person engaged in industrial activities | Case reference |
|---|---|
| **Filing an affidavit in court proceedings**<br><br>The applicant was dismissed because he had engaged in industrial activity by swearing and filing an affidavit in freedom of association proceedings in the Federal Court in which he represented or advanced the views, claims or interests of the union.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the applicant **$10,000** as a pecuniary penalty.<br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **$94,572.02** for loss suffered including interest. | *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* (2011) 193 FCR 526. |
| **Denial of accommodation on mining site**<br><br>An employer provided its fly in/fly out employees on a mining site with accommodation on location for the duration of their work at that location. Some of those employees intended to engage in protected industrial action within the meaning of s.470 of the Fair Work Act. The employer sought, not to terminate their employment, but to cease providing them with accommodation on the basis of s.470(1) which provides:<br><br>*If an employee engaged, or engages, in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day.*<br><br>The union applied to the Federal Magistrates Court for relief on the basis that the employer's refusal to provide accommodation contravened an employment agreement between the employer and the employees and constituted adverse action against the relevant employees in contravention of s.340.<br><br>The application was dismissed on the ground that the employer was required to act as it intended by s.470. An appeal by the union to the Federal Court of Australia was dismissed. The union was granted special leave to appeal to the High Court from the decision of the Federal Court.<br><br>The High Court held that the employees' contractual entitlement to accommodation while on location was dependent on the subsistence of the employer-employee relationship and not on whether the employees were ready, willing and able to work. The employer's denial of accommodation would be an alteration to the position of the employees to their prejudice so was considered adverse action. | *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619. |

| Adverse action NOT taken because a person engaged in industrial activities | Case reference |
|---|---|
| **Offensive behaviour on a picket line**<br><br>A member of a union participated in a lawful activity at the Saraji mine organised by the union. During the course of that participation, he held and waved a sign supplied by the association which read 'No principles SCABS No guts'. His employment was terminated three months later. The union alleged that the employer had taken adverse action in contravention of ss.340 and 346 of the Fair Work Act in dismissing the employee because the employee was a member of the association, or because he had participated in a lawful activity organised by the association, or had represented or advanced its views or interests.<br><br>The union commenced proceedings against the employer in the Federal Court. The reasons for the dismissal were explained in evidence given by the decision-maker on behalf of the employer which was accepted at trial. The reasons included that the decision-maker considered that the use of the word 'scab' was inappropriate, offensive, humiliating, harassing, intimidating and flagrantly in violation of the employer's workplace conduct policy, of which the employee was aware, and that the employee demonstrated arrogance when confronted with objections to his conduct. The primary judge accepted that the fact that the employee had engaged in industrial activity did not play any part in the reasons for the decision to terminate his employment.<br><br>At first instance the claim under s.340 was dismissed but the employer was found to have contravened s.346 by taking adverse action against the employee for engaging in industrial activity and was ordered to reinstate the employee and pay a penalty of $7,500 to the union for the contravention. The employer appealed to a Full Court of the Federal Court. The appeal was allowed by the Full Court with the orders for reinstatement and payment of the penalty set aside. The union was granted special leave to appeal to the High Court.<br><br>The majority of the High Court held that there had been no contravention of s.346. None of the reasons accepted as fact by the primary judge was a prohibited reason. The employer did not dismiss the employee because he participated in the lawful activity of a protest organised by the union, nor was he dismissed because, in carrying and waving the sign, the employee was representing or advancing the views or interests of the union, as the union alleged. The employer's reasons related to the content of the employee's communications with his fellow employees, the way in which he made those communications and what that conveyed about him as an employee. The reasons included a concern that the employee could not, or would not, comply with the standards of behaviour which the employer was attempting to instil in employees at the mine. | Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (2014) 253 CLR 243. |

| Adverse action NOT taken because a person engaged in industrial activities | Case reference |
|---|---|
| **Wearing of a union T-shirt**<br>The applicant claimed she had engaged in 'industrial activity' by taking 'protected action', namely wearing a union T-shirt at work. The Court found that, whilst wearing a union T-shirt could constitute 'industrial action' in certain circumstances, in this case it did not because there was no ban, limitation or restriction on the performance of work by the employee. Since the wearing of the union T-shirt did not constitute industrial action, the applicant was not exercising a workplace right; nor was she engaging in an industrial activity. | *United Firefighters Union of Australia v Easy* [2013] FCA 763. |
| **Expulsion from a union**<br>The applicant's argument that he engaged in industrial activity by reason of his expulsion from the union was rejected. Each subsection in s.347 refers to or identifies a conscious decision or act by a person. The applicant did not take any conscious action to cease to be a member – it was done by the union. | *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178. |
| **Application for unpaid leave to attend a union meeting**<br>The applicant asked for unpaid leave to attend a union meeting on three occasions and his requests were refused. The employer's leave policy stated that unpaid leave was only available if an employee had first exhausted all accrued leave. The applicant was told that he could apply for annual leave and that the company would support such an application. The applicant did not apply for annual leave. As a result, his absences were treated as unauthorised and disciplinary action ensued. The Court found the disciplinary action was not taken for a prohibited reason. | *Construction, Forestry, Mining and Energy Union v Bengalla Mining Company Pty Limited* [2013] FCA 267. |

## Section 348 – Coercion

> *A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.*

### *What is the protection?*

A person must not organise, take or threaten any action against another person to force that other person, or a third person, to engage in industrial activity.

**Example**

A union must not threaten a member to ensure they join a strike because it is 'one in-all in'.

### *Are there exceptions?*

There are no exceptions.

## Section 349 – Misrepresentations

*(1) A person must not knowingly or recklessly make a false or misleading representation about either of the following:*

*(a) another person's obligation to engage in industrial activity;*

*(b) another person's obligation to disclose whether he or she, or a third person:*

*(i) is or is not, or was or was not, an officer or member of an industrial association; or*

*(ii) is or is not engaging, or has or has not engaged, in industrial activity.*

*(2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.*

### *What is the protection?*

A person must not deliberately make a false or misleading representation about:

- another person's duty to engage in industrial activity
- another person's duty to disclose whether they, or another person, is or was a member of an industrial association and whether they have had any involvement in industrial activity.

**Example**

An employer must not say they have a right to know whether an employee is a member of a union.

### *Are there exceptions?*

This does not apply if the person to whom the representation is made would not be expected to rely on it.

## Section 350 – Inducements – membership action

*(1) An employer must not induce an employee to take, or propose to take, membership action.*

*(2) A person who has entered into a contract for services with an independent contractor must not induce the independent contractor to take, or propose to take, membership action.*

*(3) A person takes **membership action** if the person becomes, does not become, remains or ceases to be, an officer or member of an industrial association.*

### *What is the protection?*

An employer (or principal) must not persuade an employee (or independent contractor) to take membership action.

**Example**

An employer must not persuade an employee to resign from the union.

### *Are there exceptions?*

There are no exceptions.

### *Promoting membership*

'Promotion' of union membership by an employer in accordance with a provision of an enterprise agreement does not necessarily involve inducement to take membership action in contravention of s.350.[186]

# Division 5 – Other Protections

This Division provides other protections, including protection from discrimination.

## Section 351 – Discrimination

*(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*

*(2) However, subsection (1) does not apply to action that is:*

*(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or*

*(b) taken because of the inherent requirements of the particular position concerned; or*

*(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed – taken:*

*(i) in good faith; and*

*(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

*(3) Each of the following is an **anti-discrimination law**:*

*(aa) the Age Discrimination Act 2004;*

*(ab) the Disability Discrimination Act 1992;*

*(ac) the Racial Discrimination Act 1975;*

*(ad) the Sex Discrimination Act 1984;*

*(a) the Anti-Discrimination Act 1977 of New South Wales;*

*(b) the Equal Opportunity Act 2010 of Victoria;*

*(c) the Anti-Discrimination Act 1991 of Queensland;*

*(d) the Equal Opportunity Act 1984 of Western Australia;*

*(e) the Equal Opportunity Act 1984 of South Australia;*

*(f) the Anti-Discrimination Act 1998 of Tasmania;*

*(g) the Discrimination Act 1991 of the Australian Capital Territory;*

*(h) the Anti-Discrimination Act of the Northern Territory.*

[186] *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 [85]–[89].

**Comparison – Unlawful termination**

The list of attributes in **s.351(1)** are **identical** to the attributes in **s.772(1)(f)** – meaning that if a person is not eligible to make an application for discrimination under the general protections provisions then the following information can also be appropriate for an unlawful termination claim.

### *What is the protection?*

An employer is prohibited from taking adverse action against an employee or prospective employee because of a number of listed attributes.[187]

**Example**

An employer must not dismiss an employee because she is pregnant.

### *Are there exceptions?*

This protection does not extend to action that is:

- not unlawful under any anti-discrimination law in force in the place where the action is taken
- taken because of the inherent requirements of the particular position concerned, or
- if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed – taken:
  - in good faith, and
  - to avoid injury to the religious susceptibilities of adherents of that religion or creed.

## Adverse action and discrimination

***Discrimination*** is any distinction, exclusion, restriction, or preference made on a particular basis, such as race, sex, religion, national origin, marital status, pregnancy, or disability, which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of life.[188] The element of intent is central. To discriminate requires a conscious decision to make a distinction, in this case between people.[189]

However, although s.351 is headed 'Discrimination', it does not prohibit discrimination as such, but rather adverse action which is motivated by any one of a list of prohibited reasons which, generally speaking, may be said to fall under the heading of discriminatory conduct.[190] Definitions of what may constitute 'discrimination' under anti-discrimination legislation are not imported into s.351, and conduct which breaches anti-discrimination legislation may not necessarily breach s.351.[191] The

[187] Fair Work Act s.351(1).
[188] Butterworths Australian Legal Dictionary, 1997, 368.
[189] *Hodkinson v The Commonwealth* (2011) 207 IR 129 [176].
[190] ibid., [140]–[141].
[191] ibid.

focus must always be upon the occurrence of adverse action and the reason for the taking of any such action.

The attributes included in the list of prohibited reasons in s.351(1) are not defined in the Fair Work Act. Accordingly, unless they are given special meaning, they should be given their ordinary meaning. Where the attribute is defined within another Act in terms consistent with the ordinary meaning of the word, it can assist in its interpretation where it appears in s.351.[192]

This benchbook includes definitions from other anti-discrimination laws. These definitions are only included to assist in interpreting the meaning of the attributes in s.351.

## What are the grounds?

### Race

Race is a group of people who regard themselves as having a particular historical identity in terms of their colour, or their racial, national or ethnic origins.[193]

The *Racial Discrimination Act 1975* (Cth) (the Racial Discrimination Act) provides that it is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[194]

In determining cases about racial discrimination in employment under the Racial Discrimination Act, the Federal Court has held that the group with whom the complainant's position is to be compared is not persons of the same race, colour, descent or national or ethnic origin as the complainant. Instead the comparison should be between persons of the same group as the complainant and members of other groups, regardless of whether or not those other groups are required to comply with the same condition.[195]

To substantiate a complaint of racial discrimination under the Racial Discrimination Act, it is not sufficient for a person to show that he or she is of a different race, colour, descent, national or ethnic background and has suffered unfair treatment. He or she must show that the unfair treatment was based on, or sufficiently connected to, his or her race, colour, descent or national or ethnic background.[196]

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[192] ibid., [145].
[193] Butterworths Australian Legal Dictionary, 1997, 975.
[194] Racial Discrimination Act s.9.
[195] *Commonwealth of Australia v Stamatov* (1999) 94 FCR 341 [42]; citing *Australian Medical Council v Wilson* [1996] FCA 1618 [81].
[196] *Paramasivam v Tay* [2001] FCA 758 [16].

## Case examples

| Discriminatory action based on race found | Case reference |
|---|---|
| The applicant alleged that she was dismissed because of her race. She was told by the club president that she was dismissed because she was not Croatian. Although this would not establish conclusively that the applicant was being dismissed because of her race, the Court found that the Club did not displace the statutory presumption that the termination was for the reason the applicant alleged.<br><br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **$12,100** for loss suffered. | *Shackley v Australian Croatian Club Ltd* (1995) 61 IR 430.<br><br>*Industrial Relations Act 1988* (Cth) |

| Discriminatory action based on race NOT found | Case reference |
|---|---|
| The applicant claimed to have experienced discrimination based on race on many occasions during the course of his employment with the respondent, in particular in relation to selection processes. The Court concluded that there was nothing to indicate the applicant's race was a factor which operated in the decision-making process for the selections. The decision was upheld on appeal. | *Sharma v Legal Aid (Qld)* (2001) 112 IR 124.<br><br>Appeal upheld (2002) 115 IR 91.<br><br>*Racial Discrimination Act 1975* (Cth) |
| The applicant applied for a place in a Policing degree. The applicant was assessed as having 'poor' English skills after two telephone interviews. A file note was made indicating that he had an accent. It was also noted that the applicant had become agitated during the second interview and that he was difficult to understand. The application for admission into the degree was rejected on the grounds of failure to meet the English communication skills standards, and the applicant's attitude. The applicant argued that he was discriminated against because of his race, claiming that his accent pertained to his ethnic origin. The Court held that the decision was not based exclusively on the applicant's failure to demonstrate adequate English communication skills but rather his abrasive attitude displayed during his telephone interviews. No discrimination was established and the application was dismissed. | *Philip v New South Wales* [2011] FMCA 308.<br><br>*Racial Discrimination Act 1975* (Cth) |

## Colour

Colour is a separate ground to race, however they often appear together in claims involving discrimination.

Sometimes a reference to the colour of a person's skin can be taken to allude to a person's race.[197] However this will depend on the circumstances of the case and in some contexts, a reference to being 'white' or 'black', for example, is not considered to be descriptive of any particular ethnic, national or racial group.[198]

## Sex (gender identity)

The *Sex Discrimination Act 1984* (Cth) provides that a person discriminates against another person on the ground of the gender identity of a person if the discrimination occurs by reason of:

- the gender identity of the aggrieved person
- a characteristic that applies generally to persons who have the same gender identity as the aggrieved person, or
- a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person.[199]

This includes a person with an intersex status.[200]

The sex of a person may include the gender assigned to a post-operative transsexual.[201]

Sexual harassment has been found to constitute sex discrimination.[202] Similarly, sexual harassment may constitute adverse action against a person by reason of the person's sex.

Whilst the dictionary meaning of 'harass' implies repetition, one act may be sufficient.[203]

A person sexually harasses another person if:

- the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or
- the person engages in other unwelcome conduct of a sexual nature in relation to the other person;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.[204]

Conduct motivated by general assumption and stereotypes, known as 'imputed characteristics', can constitute conduct based on sex.[205]

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[197] *Velagapudi v Symbion Pharmacy Services Pty Ltd (formerly Faulding HealthCare Pty Ltd)* [2006] NSWADT 329 [37].
[198] *McLeod v Power* (2003) 173 FLR 31 [55].
[199] *Sex Discrimination Act 1984* (Cth) s.5B.
[200] *Sex Discrimination Act 1984* (Cth) s.5C.
[201] *Attorney-General (Cth) v Kevin and Jennifer* (2003) 172 FLR 300.
[202] *Birch v Wesco Electrics (1966) Pty Ltd* (2012) 218 IR 67 [81]; citing *Aldridge v Booth* (1988) ALR 1 [16]–[17]; *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, 274–276; *Elliott v Nanda & Commonwealth* (2001) 111 FCR 240, 278-282.
[203] *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, 247.
[204] *Anti-Discrimination Act 1977* (NSW) s.22A.
[205] *Waterhouse v Bell* (1991) 41 IR 435.

## Case example

| Discriminatory action based on sex NOT found | Case reference |
|---|---|
| The applicant made sexual harassment allegations against another employee, however the investigation established that the other employee had not breached the employer's Code of Conduct. The Court held that apart from the applicant's own beliefs that she had been sexually harassed and discriminated against there was no evidence whatsoever of a contravention of the general protection provisions. | *Evangeline v Department of Human Services* [2013] FCCA 807. |

## Sexual orientation

The *Sex Discrimination Act 1984* (Cth) defines **sexual orientation** as a person's sexual orientation towards:

- persons of the same sex
- persons of a different sex, or
- persons of the same sex and persons of a different sex.[206]

It is unlawful to take adverse action on the basis that a person is, or is believed to be lesbian, gay, bisexual or transgender.[207]

## Age

Age discrimination is the prejudicial or less favourable treatment of a person on the basis of that person's age.[208] The *Age Discrimination Act 2004* (Cth) defines 'age' as including an 'age group'.[209]

## Case examples

| Discriminatory action based on age NOT found | Case reference |
|---|---|
| The applicant was 68 years old. He took a significant period of time off work due to becoming unwell with pneumonia and golden staph and was subsequently dismissed. He alleged that he was dismissed due to his age and/or physical disability. The Court held that age was not an operative factor in the applicant's termination, however his physical disability and health issues were. | *Silver v Rogers & Rogers* (2012) 224 IR 439. |

[206] *Sex Discrimination Act 1984* (Cth) s.4.
[207] *Sex Discrimination Act 1984* (Cth) s.5A; see also 'Q&As on business, discrimination and equality' International Labour Organization, 01 February 2012.
[208] Butterworths Australian Legal Dictionary, 1997, 37.
[209] *Age Discrimination Act 2004* (Cth) s.5.

| Discriminatory action based on age NOT found | Case reference |
|---|---|
| The applicant alleged that he was dismissed from his employment at a Sydney cafe due to his age (47 years). The respondent was able to show that the applicant was dismissed because of a change in business objective. The Court said that age probably did not play any part in the applicant's dismissal and it was not satisfied that the respondent had contravened s.351. | *Farah v Ahn* [2012] FMCA 44. |

## Physical or mental disability

The word 'disability' in the context of s.351 should be understood to refer to a particular physical or mental weakness or incapacity and to include a condition which limits a person's movements, activities or senses.[210] Examples can be found in the definition of disability in the *Disability Discrimination Act 1992* (Cth). 'While physical or mental limitations may be a disability or an aspect of a disability, their practical consequences, such as absence from work, are not.'[211]

## Case examples

| Discriminatory action based on disability found | Case reference |
|---|---|
| The applicant was terminated because 'he was always sick'. The Court found that the applicant had been terminated due to his sickness, which was held to be a disability.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the union representing the applicant **$16,500** as a pecuniary penalty. | *Pavolvich v Atlantic Contractors Pty Ltd* [2012] FMCA 1080. |
| A work related lumbar spine injury, together with its symptoms and functional impairments, was held by the court to constitute a 'physical or mental disability' for the purpose of s.351(1). The respondent argued that it dismissed the applicant due to a missed 'pick-up'. However, the Court found that the respondent was very aware of the applicant's disability, including its past, present and future ramifications. The Court could not find that the real reasons for the dismissal were not associated with the applicant's disability.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the applicant **$25,000** as a pecuniary penalty. | *Stephens v Australian Postal Corporation* (2011) 207 IR 405. |

[210] *Hodkinson v The Commonwealth* (2011) 207 IR 129 [146].
[211] ibid.

|  **Discriminatory action based on disability found** | **Case reference** |
|---|---|
| The applicant was employed by the respondent as an Account Manager. The applicant took sick leave and presented a medical certificate upon her return to work. The respondent requested the applicant attend a company doctor to ensure that she was fit for work. The company doctor reported that the applicant was suffering anxiety and stress disorder but was fit to return to her normal duties.<br><br>Shortly afterwards the respondent's State Manager told the applicant that, based on the company doctors report, the applicant could not perform her duties as Account Manager. The State Manager offered the applicant the option of either performing a telephonist role with a reduced salary of $30,000.00 pa, moving to the position of Sales Executive with a significant increase in workload or resignation. The applicant was told to decide by close of business that day.<br><br>The applicant attended her doctor claiming she was anxious and distressed. The doctor provided her with a certificate of incapacity and she completed a Workcover claim. Approximately six weeks later the applicant returned to work where she was told that her position had been made redundant, effective immediately.<br><br>The applicant claims that the respondent breached s.340 of the Fair Work Act as it dismissed her because of her Workcover claim, breached s.351 as it dismissed her because of her physical and mental disability being her medical condition, and breached s.352 because of her temporary absence from work because of illness or injury.<br><br>The Court found that the respondent did not make the applicant redundant because of her mental illness or because she took time off her illness, and accepted the evidence that the redundancy resulted from a restructure. However the Court found that the respondent changed the applicant's position to the applicant's detriment due to the applicant being unwell in breach of s.340(1)(a) and s.351(1).<br><br>**Penalty ordered**<br>The respondent was ordered to pay the applicant **$5,940** as a pecuniary penalty. | *Penglase v Allied Express Transport Pty Ltd* [2015] FCCA 804. |

| Discriminatory action based on disability found | Case reference |
|---|---|
| The applicant became unwell due to pneumonia and golden staph and was subsequently off work for a significant period of time. His employment was terminated due to 'economic circumstances and health related issues'. The Court found that the applicant's physical disability and health issues were an operative reason for his dismissal.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the applicant **$2,500** as a pecuniary penalty.<br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **$15,000** for distress and lost opportunity damages; **$5,417.25** for non-payment of notice of termination; and **$3,180.38** interest. | *Silver v Rogers & Rogers* (2012) 224 IR 439. |

| Discriminatory action based on disability NOT found | Case reference |
|---|---|
| The applicant failed to meet targets whilst on a Workplace Improvement Plan (WIP) and a back-to-work regime as a result of a back injury. The applicant claimed that she was dismissed as a result of her disability or because of her temporary absence from work due to her medical concerns. It was determined that the dismissal instead resulted from the applicant's failure to meet the specified targets of her WIP. | *Hodkinson v The Commonwealth* (2011) 207 IR 129. |
| The applicant made sexual harassment allegations against another employee, claiming that preferential treatment was provided to the accused employee because of the applicant's disability. The Court found that there was nothing to suggest that the comprehensive action taken by the respondent as a result of the applicant's harassment allegations against a colleague had anything to do with her disability. The application was dismissed. | *Evangeline v Department of Human Services* [2013] FCCA 807. |
| The applicant claimed that the respondent failed to accommodate his disability and terminated his employment after incorrectly concluding that he could not perform the inherent requirements of the job. The Court accepted that the applicant had a physical disability but held that the decision to dismiss him was a considered one and was only reached after an investigation into the applicant's conduct. | *Cugura v Frankston City Council* [2012] FMCA 340. |

## Marital status

Under the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act) a person discriminates against another person on the ground of their marital or relationship status if the discrimination occurs by reason of:

- their marital or relationship status
- a characteristic that applies generally to persons with that marital or relationship status, or
- a characteristic that is generally suggested to apply to persons of that marital or relationship status.[212]

Marital or relationship status means the condition of being:

- single
- married
- married but living separately and apart from one's spouse
- divorced
- widowed, or
- the current or former de facto spouse of another person.[213]

An extended meaning of 'marital status' to include the characteristics of a person's spouse has been rejected by the Courts.[214]

However, this is to be distinguished from a situation where a person acts or makes a decision on the basis of a characteristic which is generally suggested of a person of a particular marital status. For example, where a married woman is denied an opportunity because her husband has been involved in various corrupt activities and it is believed that she, in common with married women generally is susceptible to the corrupting influence of her husband.[215]

## Case example

| Discriminatory action based on marital status NOT found | Case reference |
|---|---|
| The respondent applied for a position with the company and was rejected. She contended that the company discriminated against her on the ground of her marital status because she was rejected on the basis that her husband worked for a competitor. The Court held that the definition of 'marital status' did not extend to the identity or situation of one's spouse and therefore no discrimination was found. | *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13.<br>*Anti-Discrimination Act 1977* (NSW) |

[212] Sex Discrimination Act s.6.
[213] Sex Discrimination Act s.4.
[214] *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13; cited in *Waterhouse v Bell* (1991) 41 IR 435.
[215] *Waterhouse v Bell* (1991) 41 IR 435.

## Family or carer's responsibilities

Under the Sex Discrimination Act family responsibilities are the responsibilities of a person to care for or support:

- a dependent child of the person, or
- any other immediate family member who is in need of care and support.[216]

The elements of this definition are further defined in s.4A of the Sex Discrimination Act.

## Case examples

| Discriminatory action based on family or carer's responsibilities found | Case reference |
|---|---|
| The Court found that adverse action was taken against the applicant when the respondent issued a final written warning, transferred the applicant against her wishes and demoted her, which resulted in her ultimate dismissal. This adverse action directly resulted from an incident where she had to leave work early to pick up her primary school-aged son, after providing 24 hours' notice. As this unexpected emergency resulted from her responsibilities as a parent it was held to constitute family responsibilities.<br><br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **$32,130.78** for loss suffered. | *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056. |
| The respondent sacked a heavy vehicle driver for taking carer's leave to take his daughter to a doctor's appointment. The respondent made threats of violence towards him, his family and his union solicitor when he instituted legal proceedings, and performed 'burnouts' outside the applicant's residence.<br><br>The respondent admitted threatening the driver and the TWU solicitor who represented him, but denied threatening the driver's family. He apologised to both the driver and the solicitor.<br><br>The Court ordered that the respondent undertake a course of treatment by a counsellor or psychologist after he admitted in cross-examination to having anger management issues.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the applicant **$10,000** as a pecuniary penalty.<br>**Compensation ordered**<br>The respondent was ordered to pay the affected employee **$10,000** for non-economic loss. | *Transport Workers' Union of Australia v Atkins* [2014] FCCA 1553. |

[216] Sex Discrimination Act s.4A.

| Discriminatory action based on family or carer's responsibilities NOT found | Case reference |
|---|---|
| Family responsibilities were held not to constitute the reason for dismissal as the outcome was the result of a valid restructuring exercise. | *Wolfe v Australia and New Zealand Banking Group Limited* [2013] FMCA 65. |
| The Court found that pregnancy, maternity leave and family responsibilities did not provide the basis for the termination of two employees and instead that their redundancies were based on operational reasons. However, both applicants were awarded one week's pay as the respondent had failed to appropriately consult regarding the restructure of the company and the redundancies. | *Aitken v Virgin Blue Airlines and Vandeven v Virgin Blue Airlines* [2013] FCCA 981. |

## Pregnancy

Under the Sex Discrimination Act the prohibition against discrimination on the basis of pregnancy includes potential pregnancy.[217]

Potential pregnancy refers to the fact that a woman:

- is or may be capable of bearing children
- has expressed a desire to become pregnant, or
- is likely, or is perceived as being likely to become pregnant.[218]

## Case examples

| Discriminatory action based on pregnancy found | Case reference |
|---|---|
| It was held that the applicant was terminated due to her pregnancy and family responsibilities. Any procedural issues had not been raised with her previously and there was nothing to suggest that the discriminatory issues were not the substantive reasons behind the termination.<br>**Penalty ordered**<br>The respondent was ordered to pay the applicant **$5,500** as a pecuniary penalty.<br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **$8,956.61** for loss suffered. | *Ucchino v Acorp Pty Limited* (2012) 218 IR 194. |

[217] Sex Discrimination Act s.7.
[218] Sex Discrimination Act s.4B.

| Discriminatory action based on pregnancy found | Case reference |
|---|---|
| The applicant was employed as a photographer for over 12 years with a small family-run business. The applicant advised the respondents that she was 10 weeks pregnant and proposed to take a period of maternity leave.<br><br>It was held that the applicant was forced to resign as a result of the course of conduct taken by the respondents due to her pregnancy.<br><br>The Court was also satisfied that the applicant was injured in her employment by the:<br>• demand that she work additional hours<br>• refusal to allow her to work in her usual occupation, or in alternative duties, after the Christmas break<br>• refusal to consider a return to work on a part-time basis, and<br>• abusive conduct which was directly related to her refusal to work additional hours and her letter complaining of discrimination.<br><br>**Penalty ordered**<br><br>The respondents were ordered to pay the applicant a total of **$61,000** as a pecuniary penalty.<br><br>**Compensation ordered**<br><br>The respondents were ordered to pay the applicant **$164,097** for loss suffered and **$10,000** for distress, hurt and humiliation. | *Sagona v R & C Piccoli Investments Pty Ltd & Ors* [2014] FCCA 875. |

| Discriminatory action based on pregnancy NOT found | Case reference |
|---|---|
| The applicant alleged that her redundancy was not genuine and that she was terminated because she was pregnant and about to take maternity leave. The Court found that the applicant's maternity leave was not a substantial and operative reason for the termination of her employment. Further, the mere failure of an employer to comply with their own procedures in relation to terminating an employee does not lead to a finding that the action was a prohibited one. Family responsibilities were held not to constitute the reason for her dismissal. | *Lai v Symantex (Australia) Pty Ltd* [2013] FCCA 625. |

## Religion

Religious discrimination includes distinctions made on the basis of expression of religious beliefs or membership in a religious group. This also includes discrimination against people who do not ascribe to a particular religious belief or are atheists.[219]

Courts have had difficulties defining the term 'religion' due to the absence of a universally satisfying definition of the term.[220] The following features were provided by the High Court as helpful but not determinative aids in deciding whether a particular collection of ideas and/or practices should objectively be characterised as 'a religion':

- the particular collection of ideas and/or practices involves belief in the supernatural, ie belief that reality extends beyond that which is capable of perception by the senses
- the ideas relate to man's nature and place in the universe and relation to things supernatural
- the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance
- however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups, and
- the adherents themselves see the collection of ideas and/or practices as constituting a religion.[221]

Although discrimination on the basis of religious beliefs is not permitted, there may be legitimate bases for imposing requirements in the workplace which restrict the worker's freedom to practice a particular religion, such as:

- a religion may prohibit work on a day on which the employer usually operates
- a religion may require a special type of clothing which may not be compatible with safety equipment
- a religion may prescribe dietary restrictions or daily routines during work hours which may be difficult for the establishment to fully accommodate, or
- an employment position may require an oath incompatible with a religious belief or practice.[222]

**Related information**

- Action that is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed

[219] 'Q&As on business, discrimination and equality' International Labour Organization, 01 February 2012.
[220] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 150.
[221] ibid., 174.
[222] 'Q&As on business, discrimination and equality' International Labour Organization, 01 February 2012.

## Case example

| Discriminatory action based on religion found | Case reference |
|---|---|
| When the applicant's contract expired the respondent reformulated the job description to be framed around attendance of a particular church, which the applicant was not a member of. The Court held that the applicant had been discriminated against based on religion and that 'religious belief' included holding or not holding a religious belief. | *Dixon v Anti-Discrimination Commission of QLD* [2004] QSC 58.<br>*Anti-discrimination Act 1991* (Qld) |

## Political opinion

Political opinion includes membership of a political party; expressed political, socio-political, or moral attitudes; or civic commitment. Workers are protected against adverse action in employment based on activities expressing their political views, but this protection does not extend to politically motivated acts of violence.[223]

## National extraction

National extraction includes distinctions made on the basis of a person's place of birth, ancestry or foreign origin; for instance, national or linguistic minorities, nationals who have acquired their citizenship by naturalization, and/or descendants of foreign immigrants.[224]

The meaning of 'national extraction' is a little wider than 'nationality' or 'national origin'. Nationality is generally restricted to citizenship of a country but 'national extraction' refers to past history or previous circumstances as well as citizenship.[225]

National extraction means both the nation and the nationality from which a person is derived, either by birth or by self and community identification.[226]

[223] ibid.
[224] ibid.
[225] *Merlin Gerin (Australia) Pty Ltd v Wojcik* [1994] VicSC 209.
[226] ibid.

## Case example

| Discriminatory action based on national extraction NOT found | Case reference |
|---|---|
| The applicant was an Australian who alleged that he was dismissed because of his race or national extraction. Other than a reference by the applicant to all other employees of the respondent being 'foreign people' and 'visa-imported', there was no evidence of any actual foreign employees employed by the respondent. The Court preferred and accepted the evidence of the respondent that the reason for the dismissal was the applicant's conduct and work performance and that neither race nor national extraction played any part in the termination of his employment. | *Wintle v RUC Cementation Mining Contractors Pty Ltd (No.3)* [2013] FCCA 694. |

## Social origin

Social origin includes social class, socio-occupational category and caste. Social origin may not be used to deny certain groups of people access to various categories of jobs or limit them to certain types of activities.[227]

A **caste** is a hereditary social group, consisting of people who generally marry within that group, and who have customs or conventions which distinguish it from other such groups.

Social origin includes factors other than country of birth. It refers to elements that a person adopts from the surrounding culture. These include, but are not limited to, language or mother tongue/s, life cycle customs such as initiation into a religious community, affirmation of adulthood, and such things as diverse as dress and diet. What determines social origin is not merely self-defined, but also depends upon the way in which a person is recognised by the dominant or majority group in the community in which that person socialises, lives or works. Consequently a person may have one social origin in one circumstance and a different one in another.[228]

## Exceptions

The prohibition in s.351 does not apply to action which is:

- not unlawful under any anti-discrimination law in the place where the action is taken
- based upon the inherent requirements of the particular position concerned, or
- action taken against a staff member of an institution conducted in accordance with a religion or creed, where the action is taken in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed.

[227] 'Q&As on business, discrimination and equality' International Labour Organization, 01 February 2012.
[228] *Merlin Gerin (Australia) Pty Ltd v Wojcik* [1994] VicSC 209.

### *Not unlawful under any anti-discrimination law*

The operation of s.351 is limited by reference to exceptions derived from anti-discrimination legislation.[229]

A person needs to be covered by either the Commonwealth law or applicable State or Territory Law for the protection to apply.

The only exclusion of this type is for people in New South Wales and South Australia who are seeking protection on the grounds of 'Religion' or 'Political opinion' – neither State's law provide that discrimination on these grounds is unlawful and there is no Commonwealth law which provides protection for these grounds. As a result a person in New South Wales or South Australia would not be eligible to make a general protections application in respect of adverse action taken on the grounds of 'Religion' or 'Political opinion'[230].

**HOWEVER** these persons would be eligible to make an application for Unlawful Termination instead if the adverse action was constituted by a dismissal, as 'Religion' and 'Political opinion' are expressly covered and these protections extend to **ALL** Australian workers.

### *Inherent requirements of the position*

The expression 'inherent requirements' is to be given its natural and ordinary meaning. That meaning directs attention to the essential features or defining characteristics of the position in question.[231]

An **inherent requirement** is something essential to the position, rather than something added to it.[232]

Whether a requirement is an inherent requirement is a matter which should be determined according to common sense and objective fact rather than as a matter of mere speculation or impression.[233]

A practical method of determining whether or not a requirement is an inherent requirement is to ask whether the position would be essentially the same if that requirement were removed.[234]

A stipulation in a contract of employment is not necessarily conclusive to show whether a requirement is inherent in an employee's position.[235] An employer cannot create inherent requirements by stipulating contractual terms.

The requirements of a particular 'position' may be different from those of a particular 'job'.[236] Position concerns rank and status. What is required of a person's position, however, will usually require an examination of the tasks performed from that position. That is because the capacity to perform those tasks is an inherent requirement of the particular position.[237]

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[229] *Hodkinson v The Commonwealth* (2011) 207 IR 129 [142].
[230] See comments of Cambridge C in *McIntyre V Special Broadcasting Services Corporation t/a SBS Corporation* [2015] FWC 6768 [29]
[231] *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 [35].
[232] ibid., [31].
[233] *Commonwealth v Human Rights & Equal Opportunity Commission* (1996) 70 FCR 76, 88.
[234] *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 [36].
[235] ibid., [1].
[236] ibid., [73].
[237] ibid., [72].

What is an inherent requirement will usually depend upon the way in which the employer has arranged its business. Only those requirements that are essential in a business sense or in a legal sense can be regarded as inherent in the particular employment.[238]

## Case examples

| Inherent requirement | Case reference |
|---|---|
| The applicant was dismissed after consistently and for long periods of time not attending work at his required place of employment. The applicant's mental disability was a cause of his inability to attend at his workplace and a reason for his dismissal. The Court found that the applicant was unable to fulfil the inherent requirements of his particular position – the inherent requirement being his attendance at work. The decision was upheld on appeal. | *Keys v Department of Disability, Housing & Community Services* [2011] FMCA 35.<br>Appeal dismissed (2011) 215 IR 452. |

| NOT an inherent requirement | Case reference |
|---|---|
| The applicant was transferred after needing 'to take a number of days off due to medical and personal reasons'. The respondent argued that the transfer was necessary due to the inherent requirement of the position because the centre where the applicant worked was operated with only one full-time and one part-time employee. It was argued that it was an inherent requirement that the full-time employee be there for all rostered hours. The Court found that while it is clearly an inherent requirement of an employee to attend for work, it could hardly be an inherent requirement of a position that the person not access the annual leave, personal leave and carer's leave to which they are entitled by statute and contract.<br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **$32,130.78** for loss suffered. | *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056. |

### *Action that is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed*

If the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed and are taken in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed, the action does not fall within the prohibition of s.351.

[238] *X v The Commonwealth* (1999) 200 CLR 177 [36]–[37].

'**Good faith**' is to be applied in a particular context by giving the words their ordinary meaning in accordance with established principles.[239] The Court has accepted the ordinary meaning of 'good faith' to be 'a state of mind consisting in honesty in belief or purpose' and 'faithfulness to one's duty or obligation'.[240]

Honesty is an element embedded in the ordinary meaning of good faith.[241] It must involve a belief that all is being regularly and properly done.[242]

**Injury to the religious susceptibilities of adherents** requires more than mere offence.[243] While the action must have been taken to avoid injuring the religious susceptibilities of adherents in order to satisfy the exception, there is no requirement that adherents were actually injured.[244]

An adherent is a person who is a supporter or a follower. At least some or a proportion of adherents must be affected to satisfy this limb.[245]

**Related information**
- Religion

## Case example

| Action taken in good faith | Case reference |
|---|---|
| The applicant was a member of a church which was also her employer. It was a condition of her employment to remain 'temple-worthy'. The applicant was 'disfellowshipped' from the church and terminated from her employment after it was found that she was in a relationship with a man whilst she was separated from her husband but not divorced. The Church successfully argued that the decision to terminate the applicant's employment was made in good faith for the purpose of avoiding injury to the religious susceptibilities of its adherents. | *Hozack v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441. |

[239] *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105 [88].
[240] ibid., [90].
[241] ibid., [91].
[242] *Cannane v J Cannane Pty Ltd (in Liquidation)* (1998) 192 CLR 557 [101].
[243] *Hozack v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441.
[244] ibid.
[245] *Members of the Board of the Wesley Mission Council v OV (No 2)* [2009] NSWADTAP 57 [54].

## Section 352 – Temporary absence – illness or injury

*An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.*

**Comparison – Unlawful termination**

The protection in **s.352** is **identical** to the protection in **s.772(1)(a)** – meaning that if a person is not eligible to make an application for temporary absence under the general protections then the following information can also be appropriate for an unlawful termination claim.

### *What is the protection?*

An employer must not **dismiss** an employee because the employee was temporarily absent from work due to an illness or injury.

**Example**

An employer must not dismiss an employee because they were away from work for two days on sick leave.

### *Are there exceptions?*

There are two exceptions. Firstly this protection only relates to an **employer dismissing an employee**.

Secondly, an employee will not be protected if:

- the employee's absence extends for more than 3 months

  **OR**

- the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries)

  **AND**

- the employee is not on paid personal/carer's leave for the duration of the absence.[246]

## Substantiation requirements

***Regulation 3.01 Temporary absence – illness or injury***

*(1) For section 352 of the Act, this regulation prescribes kinds of illness or injury.*

*Note: Under section 352 of the Act, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.*

[246] Fair Work Regulations 2009, reg 3.01(5).

*(2) A prescribed kind of illness or injury exists if the employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury, within:*

*(a) 24 hours after the commencement of the absence; or*

*(b) such longer period as is reasonable in the circumstances.*

*Note: The Act defines **medical certificate** in section 12.*

*(3) A prescribed kind of illness or injury exists if the employee:*

*(a) is required by the terms of a workplace instrument:*

*(i) to notify the employer of an absence from work; and*

*(ii) to substantiate the reason for the absence; and*

*(b) complies with those terms.*

*(4) A prescribed kind of illness or injury exists if the employee has provided the employer with evidence, in accordance with paragraph 107(3) (a) of the Act, for taking paid personal/carer's leave for a personal illness or personal injury, as mentioned in paragraph 97(a) of the Act.*

*Note: Paragraph 97(a) of the Act provides that an employee may take paid personal/carer's leave if the leave is taken because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee.*

*(5) An illness or injury is not a prescribed kind of illness or injury if:*

*(a) either:*

*(i) the employee's absence extends for more than 3 months; or*

*(ii) the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries); and*

*(b) the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence.*

*(6) In this regulation, a period of paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act does not include a period when the employee is absent from work while receiving compensation under a law of the Commonwealth, a State or a Territory that is about workers' compensation.*

The protection will only apply if the employee satisfies **at least one** of the substantiation requirements set out in the regulations:

1. The employee provides a **medical certificate** or **statutory declaration** about the illness or injury within 24 hours after the commencement of the absence or such longer period as is reasonable in the circumstances.

A **medical certificate** is defined in s.12 as meaning 'a certificate signed by a medical practitioner'.

A **medical practitioner** is defined in s.12 as meaning 'a person registered, or licensed, as a medical practitioner under a law of a State or Territory that provides registration and licensing of medical practitioners'.

**OR**

2. If the employee is required by the terms of a **workplace instrument** to notify the employer of an absence from work and to substantiate the reason for the absence, the employee complies with those terms.

A **workplace instrument** is defined in s.12 as meaning 'an instrument that is made under, or recognised by, a workplace law and concerns the relationships between employers and employees'.

A **workplace law** is defined in s.12 as meaning 'this Act or the Registered Organisations Act or the Independent Contractors Act 2006 or any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).

**OR**

3. If required by the employer, the employee gives the employer evidence that would satisfy a reasonable person that the leave is taken because the employee is not fit for work because of a personal illness or personal injury affecting the employee.

## How is this applied?

The Courts have not yet addressed how a temporary absence should be calculated in order for the exception to be applied under the current Act and Regulations. However, decisions issued under predecessor Acts and Regulations could provide guidance on how this should be done.[247]

The Courts have previously decided that where a continuous period of leave is made up of various types of leave, for example, annual leave, paid sick leave and unpaid sick leave, the period is treated as a single absence from work.[248]

It appears that if an employee's absence because of illness or injury lasts for more than three months, or if their total absences for illness or injury in a 12 month period amount to more than three months, the protection will not apply to them **if any part** of the temporary absence is not on paid sick leave.

The regulations expressly state that a period of paid personal/carer's leave does not include a period when the employee is absent from work while receiving workers' compensation.

[247] Although reg 3.01(5) in the *Fair Work Regulations 2009* is drafted slightly differently to the equivalent reg 12.8 under the *Workplace Relations Regulations 2006*, the Explanatory Memorandum to the Fair Work Bill 2008 [1432] indicates that it is intended to be applied in much the same way.
[248] *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784.

Regulation 3.01 has been found to contain all of the situations where illnesses or injuries will support a claim under s.352.[249] If a particular absence does not fall within the scope of the regulation, the protection will not apply, even if in ordinary language it would be regarded as a temporary absence.[250]

For an employer to act in breach of s.352, there must be an awareness that the absence was because of an illness or injury and this absence must have been the reason for the termination. This means that the employer must prove that they either did not know the reason for the absence or that they did not terminate the employment because of the absence.[251]

The Courts have confirmed that s.352 does not preclude the dismissal of an employee while the employee is temporarily absent from work because of an illness or injury. If the employee may be dismissed validly it is not to the point that the decision to dismiss happens to be made while the employee is on leave.[252]

## Case examples

| Prescribed kind of illness or injury exists | Case reference |
|---|---|
| The employee provided a medical certificate four weeks after the commencement of the absence, and after she had been dismissed while absent.<br><br>Consideration of a claim of contravention of s.352 was not beyond jurisdiction by reason of the late provision of the certificate after dismissal. | *Devonshire v Magellan Powertronics* (2013) 231 IR 198. |
| The employer insisted that the applicant respond to allegations of misconduct while she was on sick leave despite medical and other evidence as to her inability to respond. The Court found that the employer took advantage of and used the applicant's temporary absence from work due to illness in terminating her employment. The Court was satisfied that the applicant's employment was terminated at least for a reason that included a proscribed reason, namely her temporary absence from work because of illness.<br><br>**Penalty ordered**<br>The respondent was ordered to pay the applicant **$7,500** as a pecuniary penalty.<br>**Compensation ordered**<br>The respondent was ordered to pay the applicant **6 months remuneration**. | *Stevenson v Murdoch Community Services Inc* (2010) 202 IR 266. |

[249] *Hodkinson v The Commonwealth* (2011) 207 IR 129 [157]; *Rogers v Millenium Inorganic Chemicals Limited* (2009) 178 IR 297 [52]; *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784.
[250] *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784 [169].
[251] *Devonshire v Magellan Powertronics* (2013) 231 IR 198 [69]; citing *Sperandio v Lynch t/as Doctors of Northcote* (2006) 160 IR 360 [91].
[252] *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109 [26]; affirming original decision (2010) 199 IR 281.

| Prescribed kind of illness or injury does NOT exist | Case reference |
|---|---|
| The Court was satisfied that the applicant had an illness or injury and that he attended various medical practitioners and obtained medical certificates which would have addressed the statutory requirement provided for in the regulations. However he did not satisfy the requirement to provide the medical certificate to his employer within 24 hours of commencement of the absence or at any other time. Verbal advice does not constitute the provision of a medical certificate as required by the Regulations. | *Corke-Cox v Crocker Builders Pty Ltd* [2012] FMCA 677. |
| The applicant was dismissed after calling in sick. He produced a medical certificate but had previously expressed that he intended to attend a football game in Perth on the day in question. The Court did not accept the validity of the medical certificate and found that the applicant was not ill on the day in question. Therefore the termination was not for ill health but for the perception that the employer had of misconduct by the applicant. | *Anderson v Crown Melbourne Ltd* (2008) 216 FLR 164. |
| The applicant provided certificates covering most of his periods of absence from work. However it was found that his periods of absence exceeded three months on both the continuous basis and the 12 month period basis. The Court found that parts of the period of leave of absence taken as annual leave and leave without pay should be included in the calculation of the period of absence for the purposes of the regulations. | *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784. |

## Section 353 – Bargaining services fees

*(1) An industrial association, or an officer or member of an industrial association, must not:*

*(a) demand; or*

*(b) purport to demand; or*

*(c) do anything that would:*

*(i) have the effect of demanding; or*

*(ii) purport to have the effect of demanding;*

*payment of a bargaining services fee.*

*(2) A **bargaining services fee** is a fee (however described) payable:*

*(a) to an industrial association; or*

*(b) to someone in lieu of an industrial association;*

*wholly or partly for the provision, or purported provision, of bargaining services, but does not include membership fees.*

*(3) **Bargaining services** are services provided by, or on behalf of, an industrial association in relation to an enterprise agreement, or a proposed enterprise agreement (including in relation to bargaining for, or the making, approval, operation, variation or termination of, the enterprise agreement, or proposed enterprise agreement).*

*Exception for fees payable under contract*

*(4) Subsection (1) does not apply if the fee is payable to the industrial association under a contract for the provision of bargaining services.*

### *What is the protection?*

An industrial association (such as a union) cannot charge non-members for bargaining services in relation to a proposed enterprise agreement which will also cover the non-members.

### *Are there exceptions?*

Non-members can enter into a contract with an industrial association for bargaining services.

## What are bargaining services fees?

A bargaining services fee is a charge made for the negotiation of an enterprise agreement. They are similar to fees charged by professionals such as solicitors.

An industrial association may not demand a bargaining services fee or include a requirement to pay such a fee in an enterprise agreement, even if employees who are not union members will benefit from their services in negotiating the agreement.

However, a person can freely enter into a contract or commercial arrangement with an industrial association for the provision of bargaining services.

## Section 354 – Coverage by particular instruments

*(1) A person must not discriminate against an employer because:*

*(a) employees of the employer are covered, or not covered, by:*

*(i) provisions of the National Employment Standards; or*

*(ii) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or*

*(iii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation; or*

*(b) it is proposed that employees of the employer be covered, or not be covered, by:*

*(i) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or*

*(ii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation.*

*(2) Subsection (1) does not apply to protected industrial action.*

### *What is the protection?*

A person (including an industrial association or a business) cannot discriminate against an employer because of the type of document which sets out the employees' terms and conditions of employment.

**Example**

A business must not refuse to subcontract with another business because the latter business's employees are covered by an enterprise agreement which covers a particular union.

### *Are there exceptions?*

A person can discriminate against an employer if the discriminatory conduct is protected industrial action.

## Section 355 – Coercion – allocation of duties etc. to particular person

> *A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:*
>
> *(a) employ, or not employ, a particular person; or*
>
> *(b) engage, or not engage, a particular independent contractor; or*
>
> *(c) allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor; or*
>
> *(d) designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.*

### *What is the protection?*

A person cannot take action which will force another person to make specific business decisions which they would not otherwise make.

> **Example**
>
> A union representative must not threaten to organise industrial action to force the employer to only employ members of the union in the future.

### *Are there exceptions?*

There are no exceptions.

# Division 6 – Sham Arrangements

This Division deals with sham arrangements.

**IMPORTANT: This section (pages 125-132 of this benchbook) dealing with whether a worker is an independent contractor or employee are currently under review in light of the High Court decisions in Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 and ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2. Please refer to these cases for the current approach to be taken in determining whether a worker is an independent contractor or employee.**

## Section 357 – Misrepresenting employment as independent contracting arrangement

> *(1) A person (the **employer**) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.*

*(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:*

*(a) did not know; and*

*(b) was not reckless as to whether;*

*the contract was a contract of employment rather than a contract for services.*

### *What is the protection?*

An employer cannot pretend that they are offering a person a job as an independent contractor when the position actually involves entering into an employment contract.

**Example**

An employer must not tell a person whom the employer proposes to engage as an employee that the person needs to get an ABN and register themselves as their own business before they start work because they will be an independent contractor.

### *Are there exceptions?*

The provision will not apply if the employer can prove that they did not know, and were not reckless, as to whether the engagement was not meant to be as an independent contractor but as an employee.

A **contract of employment** is a contract between an employer and an employee which creates the employment relationship between the parties.

A **contract for services** is a contract between a person (the principal) and an independent contractor which creates a commercial arrangement where the independent contractor agrees to provide a specified service to the principal – no employment relationship is created.

### *What is the difference between an employee and an independent contractor?*

In an employment relationship, labour (being a combination of time, skill and effort) is traded for remuneration.[253] There is a provider, a purchaser, an exchange and a contract containing terms and conditions that regulate the exchange.[254]

The 'label' the parties have expressly given to their legal relationship is an important consideration.[255] However '[t]he parties cannot create something which has every feature of a rooster, but call it a duck and insist that everyone else recognise it as a duck'.[256]

[253] ibid.
[254] ibid.
[255] *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 122 IR 215 [34]; citing *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 37.
[256] *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 122 IR 215 [34]; citing *Re Porter* (1989) 34 IR 179, 184; *Massey v Crown Life Insurance* [1978] 2 All ER 576, 579; approved in *AMP v Chaplin* (1978) 18 ALR 385, 389.

In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: that is, the parties cannot deem the relationship between themselves to be something it is not.[257]

Courts will look to the 'real substance of the relationship in question.'[258]

There have been many detailed discussions by courts and tribunals about the distinction between an employee and an independent contractor, including what issues should be considered and the way the issues should be decided.

In *Hollis v Vabu Pty Ltd*[259] it was held that 'the distinction between an employee and an independent contractor is rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own'.[260]

In simple terms, the issue is whether a person works for an employer or works for themselves.

### *How to determine if a person is an employee or an independent contractor*

To help determine whether a person is an employee or an independent contractor, there are a series of factors, referred to as 'indicia', which generally help decide what a person is.

There are no rules as to the weighting given to the indicia in the decision making process.[261] The indicia are just a guide, with the ultimate question being whether the worker is acting for another or on their own behalf.[262]

In considering the criteria, it is necessary to consider the following questions (posed by Bromberg J) in *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No. 3)*:[263]

> *'Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:*
>
> *Viewed as a "practical matter":*
>
> *(i) is the person performing the work an entrepreneur who owns and operates a business; and,*
>
> *(ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?*
>
> *If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.'*

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[257] *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 122 IR 215 [34]; citing *AMP v Chaplin* (1978) 18 ALR 385, 389; and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 45.
[258] *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No. 3)* (2011) 206 IR 252 [189].
[259] (2001) 207 CLR 21.
[260] ibid., 39; citing *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, 217.
[261] *Sammartino v Mayne Nickless Express t/a Wards Skyroad* (2000) 98 IR 168 [58].
[262] *Stevens v Brodribb Sawmilling Pty Ltd* (1986) 160 CLR 16, 37.
[263] (2011) 206 IR 252 [208].

The following table is adapted from the summary of indicia originally provided in *Abdalla v Viewdaze Pty Ltd t/a Malta Travel*[264] and updated in *Jiang Shen Cai t/a French Accent v Do Rozario:*[265]

| **To be generally considered an employee** | **To be generally considered an independent contractor** |
|---|---|
| Employer exercises, or has the right to exercise, control over the manner in which work is performed, the location and the hours of work etc. | Worker controls how work is performed. |
| Employee works solely for the employer.* | Worker performs work for others, or is genuinely entitled to do so. |
| Employer advertises the goods or services of its business. | Worker has a separate place of work and or advertises his or her services to the world at large. |
| Employer provides and maintains significant tools or equipment. | Worker provides and maintains significant tools or equipment. |
| Employer can determine what work can be delegated or sub-contracted out and to whom. | Worker can delegate or sub-contract any work to other persons to complete. |
| Employer has the right to suspend or dismiss the worker. | Contract may be terminated for breach. |
| Employer provides a uniform or business cards. | Worker wears their own uniform or other clothing of their choice. Worker has own business cards. |
| Employer deducts income tax from remuneration paid. | Worker responsible for own tax affairs. |
| Employee is paid by periodic wage or salary. | Worker provides invoices after the completion of tasks. |
| Employer provides paid holidays or sick leave to employees. | Worker does not receive paid holidays or sick leave. |
| The work does not involve a profession, trade or distinct calling on the part of the employee. | The work involves a profession, trade or distinct calling on the part of the worker. |
| The work of the employee creates goodwill or saleable assets for the employer's business. | The worker creates goodwill or saleable assets for their own business. |
| The employee does not spend a significant portion of their pay on business expenses. | The worker spends a significant portion of their remuneration on business expenses. |

* *Generally referring to full-time employment – some employees may choose to work additional jobs.*

[264] (2003) 122 IR 215 [34].
[265] (2011) 215 IR 235 [30].

The table above is not exhaustive and whether a worker is an employee or contractor may be determined by a factor other than those listed above.[266]

## Case examples

| Employment misrepresented as independent contracting arrangement | Case reference |
|---|---|
| Seven people engaged by a company as bus drivers were told by the company that they were engaged as independent contractors. This was admitted to constitute sham contracting because the seven people were employees, not independent contractors. The company also underpaid award rates by $26,082.22 and failed to keep proper employment records.<br>**Penalty ordered**<br>The respondent was ordered to pay the Commonwealth **$252,120** (included 7 penalties of $18,480 each for 7 breaches of s.357(1))<br>The respondent's sole director and company secretary was ordered to pay the Commonwealth **$47,784** (included 7 penalties of $3,696 each for 7 breaches of s.357(1)) | *Fair Work Ombudsman v Happy Cabby Pty Ltd* [2013] FCCA 397. |
| Persons engaged by a kitchenware products company to engage in promotional and sales activities were told that they would perform the work as independent contractors and would be paid on commission. The Court held that they were in fact employees, and that the company had misrepresented their status in breach of s.357(1) of the Fair Work Act. Barnes J noted that the company's director and controlling mind was aware of the distinction between employees and independent contractors and the risks involved in misrepresenting the truth of the relationships (given the fact that he had obtained legal advice on the topic in the past), and despite these risks he had been 'careless or incautious' in his actions. The company did not succeed in making out the defence that it did not know and was not reckless as to whether the persons were engaged under a contract of employment rather than a contract for services. The employees as a consequence of the mischaracterisation of their status were also underpaid.<br>**Penalty ordered**<br>The respondent was ordered to pay the Commonwealth **$161,700** (included 4 penalties of $23,100 each for 4 breaches of s.357(1)) | *Fair Work Ombudsman v Metro Northern Enterprise Pty Ltd* [2013] FCCA 216; [2013] FCCA 1323. |

[266] *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 122 IR 215 [34].

| **Employment misrepresented as independent contracting arrangement** | **Case reference** |
|---|---|
| The respondent was the sole director and responsible for the day to day management, direction and control of a business. It was alleged that the respondent misrepresented to certain employees that they were engaged under a contract for services when in fact they were each engaged under a contract of employment. It was alleged, and admitted, that as a consequence each of the relevant employees was not paid annual leave or annual leave entitlements.<br><br>**Penalty ordered**<br><br>The respondent was ordered to pay the relevant employees a total of **$17,820**.<br><br>(included 7 penalties of $1,980 each for 7 breaches of s.357(1)) | *Fair Work Ombudsman v Bedington* [2012] FMCA 1133. |
| The Court found the respondent had engaged in sham contracting with 10 workers at different times between 2007 and 2010. The respondent deprived the workers of minimum entitlements when it misrepresented their employment relationship.<br><br>The Court found there had been 139 contraventions in total of the Workplace Relations Act and the Fair Work Act and a number of applicable industrial instruments. Other breaches occurred when it failed to meet minimum statutory entitlements for annual leave, superannuation, travel allowance, meal allowance, overtime, weekend penalty rates, redundancy and crib breaks.<br><br>When looking at whether the respondent had exhibited contrition, taken corrective action, and co-operated with investigating authorities, the Court found that the respondent had shown 'a remarkable lack of insight into its behaviour and its impact'.<br><br>**Penalty ordered**<br><br>The respondent was ordered to pay the Commonwealth **$313,500** (included 10 penalties of $23,100 each for 10 breaches of s.357(1)). | *The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No.9)* [2014] FCCA 1124. |

| Employment NOT misrepresented as independent contracting arrangement | Case reference |
|---|---|
| There was no evidence to substantiate the applicant's assertions that the respondent was her employer such as a letter of appointment or payslips. However the applicant's invoices to the respondent were in evidence. They showed that the applicant provided her ABN, described herself as a consultant and charged GST. Consequently, the Court did not consider that the respondent was the applicant's employer for the purposes of s.357 of the Fair Work Act. It was accepted that there were some features of the applicant's engagement with the respondent that were consistent with both casual employment and an independent contractor relationship, such as no sick leave or annual leave. However, overall, it was considered that the circumstances were more consistent with an independent contractor relationship. Consequently, the Court did not consider that there had been a misrepresentation about the nature of the relationship between the respondent and the applicant. | *Austin v Honeywell Ltd* [2013] FCCA 6762. |

## Section 358 – Dismissing to engage as independent contractor

*An employer must not dismiss, or threaten to dismiss, an individual who:*

*(a) is an employee of the employer; and*

*(b) performs particular work for the employer;*

*in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.*

### *What is the protection?*

An employer cannot dismiss an employee so that the former employee can be engaged as an independent contractor. For the protection to apply the dismissal must occur with the intent to subsequently re-engage the employee as if they were an independent contractor.[267]

**Example**

An employer must not dismiss their existing staff and make them get ABNs and operate as independent contractors to perform the same jobs because it will be cheaper for the employer.

### *Are there exceptions?*

There are no exceptions.

[267] *Fenwick v World of Maths* [2012] FMCA 131 [55].

## Case example

| Employee dismissed to be engaged as independent contractor | Case reference |
|---|---|
| The respondent provided serviced apartment accommodation and employed receptionists and various housekeepers. In 2009 it was determined that particular employees would be 'converted' to independent contractors and their employment terminated. Thereafter they would perform the same service for and under the control and direction of the respondent. The respondent entered into an agreement with Contracting Solutions to carry out this process. The applicant argued that the employees had no real option but to participate in the process of conversion if they wanted to continue working with the respondent in the same capacity. The Court considered that the workers concerned were talked into or persuaded to sign forms agreeing to become independent contractors, but, with one exception, not threatened with dismissal if they refused to do so. The applicant succeeded on an allegation that the respondent threatened one of the employees with dismissal if she did not become an independent contractor. | *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No 2)* [2013] FCA 582. |

## Section 359 – Misrepresentation to engage as independent contractor

> *A person (the **employer**) that employs, or has at any time employed, an individual to perform particular work must not make a statement that the employer knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.*

### *What is the protection?*

An employer cannot knowingly seek to persuade an employee, by making a false statement, to perform the same work which they have performed as an employee as an independent contractor.

**Example**

An employer must not tell an employee that they have the right to perform their job as an independent contractor and pay less tax as long as they get an ABN in order to induce the employee to perform the same work as an independent contractor, if the employer knows that statement to be false.

### *Are there exceptions?*

There are no exceptions.

# Part 7 – Making an application

**Note:** A person making a general protections application is alleging that another person has broken the law. It is important, therefore, that the applicant ensures their claim is based on facts and is supported by evidence.

If you are making a general protections application to the Fair Work Commission you will need to identify:

- the adverse action taken or threatened against you, and
- the general protections provision that was breached by that action or threatened action.

## Types of application

There are two types of general protections application that the Commission can deal with:

- a **dismissal** dispute, and
- a non-dismissal dispute.

**Related information**
- Dismissal dispute
- Non-dismissal dispute
- Other types of applications

# Dismissal dispute

See Fair Work Act s.365

If:

- a person has been **dismissed**, and
- the person, or an industrial association that is entitled to represent them, alleges that the person was dismissed **in contravention of the general protections**;

then the person (or their industrial association) may apply to the Commission for the Commission to deal with the dispute. If no such application is made, the person cannot take the matter to a Court.

## What if there is a question about whether the dismissal occurred?

If an employer argues that the applicant left their employment for a reason other than dismissal (such as resignation), the Commission can conduct a conference in an attempt to resolve the dispute as long as:

- an application has been lodged, and

- on the face of the application, it is alleged that a dismissal has occurred in contravention of the general protections provisions.[268]

The Commission does **not** need to make a determination that the applicant in a s.365 proceeding has been 'dismissed' from their employment (within the meaning of s.365), **before** the Commission can conduct a conference in relation to the dispute.[269]

**Related information**
- What is dismissal?

## Timeframe for lodgment – 21 days (Dismissal disputes)

See Fair Work Act s.366

An application for a dismissal dispute must be lodged with the Commission within 21 days after the dismissal takes effect.[270]

The Commission may allow a further period for lodgment in exceptional circumstances.

**Related information**
- When does a dismissal take effect?
- What are exceptional circumstances?
- What is a day?

## How is 21 days calculated?

The 21 days for lodgment does not include the date that the dismissal took effect.[271] This means that day one commences the day following the dismissal.

### *Weekends and public holidays*

If the **final day** of the 21 day period falls on a weekend or on a **national public holiday** (when the Commission is closed) the timeframe will be extended until the next business day.[272] Public holidays or weekends that fall **during** the 21 days will not extend the period of lodgment.

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[268] *Hewitt v Topero Nominees Pty Ltd T/A Michaels Camera Video Digital* [2013] FWCFB 6321 (unreported, Ross J, Hatcher VP, Johns C, 3 September 2013) [40].
[269] ibid., [34].
[270] Fair Work Act s.366(1)(a).
[271] *Acts Interpretation Act 1901* (Cth) s.36(1) (item 6 - where a period of time 'is expressed to begin after a specified day' the period 'does not include that day'). This Act as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A).
[272] *Acts Interpretation Act 1901* (Cth) s.36(2). This Act as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A). See also *Hemi v BMD Constructions Pty Ltd* [2013] FWC 3593 (unreported, Richards SDP, 12 June 2013); *Cahill v Bstore Pty Ltd T/A Bstore for Birkenstock* [2015] FWCFB 103 (unreported, O'Callaghan SDP, Gooley DP, Williams C, 9 January 2015); *Stedman v Transdev NSW Pty Ltd T/A Transdev Buses* [2015] FWCFB 1877 (unreported, Harrison SDP, Lawrence DP, Cambridge C, 20 March 2015).

The Commission is closed on the following **national public holidays** (or substitute public holiday):

- New Year's Day
- Australia Day
- Good Friday
- Easter Monday
- ANZAC Day
- Christmas Day
- Boxing Day

On state or local public holidays (such as the Queen's Birthday) the local Commission offices will be closed however the other Commission offices nationally will be open and able to accept applications electronically.

## When does a dismissal take effect?

A dismissal does not take effect unless and until it is communicated to the employee who is being dismissed.[273]

A dismissal can be communicated orally.[274]

Where payment in lieu of notice is made the dismissal usually takes effect immediately.[275]

**Example**

If an employee is given four weeks' notice that they will be dismissed, and they work through the four week period – then the date that the dismissal takes effect will generally be at the end of that four week notice period.

**HOWEVER**, if an employee receives four weeks' pay in lieu of working and is **NOT** required to work through the four week period – then the date that the dismissal takes effect will generally be the last day worked.

**In lieu** means instead of; in place of.[276]

[273] *Burns v Aboriginal Legal Service of Western Australia (Inc)* (unreported, AIRCFB, Williams SDP, Acton SDP, Gregor C, 21 November 2000) Print T3496 [24].
[274] *Plaksa v Rail Corporation NSW* [2007] AIRC 333 (unreported, Cartwright SDP, 26 April 2007) [8]; citing *Barolo v Centra Hotel Melbourne* (unreported, AIRC, Whelan C, 10 December 1998) Print Q9605.
[275] *Siagian v Sanel Pty Ltd* (1994) 122 ALR 333, 355.
[276] *Butterworths Australian Legal Dictionary*, 1997, 577.

Whether an employment relationship exists is a **question of fact** (unless a law deems an employment relationship to exist when it otherwise would not).[277]

A **question of fact** is when the Commission must decide what the facts of the case are based on the evidence. Often a question of fact arises where there are two or more versions of events presented.

This means the Commission must determine which one, if either, of the circumstances is more likely to have occurred on the balance of probabilities.

## Late lodgment

Contains issues that may form the basis of a jurisdictional issue

The Commission may extend the time period for lodging a dismissal dispute application only if the Commission is satisfied that there were exceptional circumstances for not lodging the application on time.

The Commission will take into account:

- the reasons for the delay
- any action taken by the former employee to dispute the dismissal
- prejudice to the employer (including prejudice caused by the delay)
- the merits of the application, and
- fairness between the former employee and other persons in similar positions.

### *What are exceptional circumstances?*

These are circumstances that are:

- out of the ordinary course
- unusual
- special, or
- uncommon.[278]

They need not be:

- unique
- unprecedented, or
- very rare.[279]

Exceptional circumstances are NOT regularly, routinely or normally encountered.[280]

[277] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 427.
[278] *Ho v Professional Services Review Committee No 295* [2007] FCA 388 [25]; citing *R v Kelly* [2000] 1 QB 198, 208; cited in *Nulty v Blue Star Group Pty Ltd* (2011) 203 IR 1 [13].
[279] ibid.
[280] ibid.

Exceptional circumstances may be a single exceptional event or a series of events that together are exceptional.[281] The assessment of whether exceptional circumstances exist requires a consideration of ALL the relevant circumstances.[282]

Ignorance of the timeframe for lodgment is not an exceptional circumstance.[283]

### *Reason for delay*

The Commission must consider the reason for the delay.[284]

The absence of any explanation for any part of the delay, will usually weigh against an applicant in such an assessment. Similarly a credible explanation for the entirety of the delay, will usually weigh in the applicant's favour, though, it is a question of degree and insight. However, the ultimate conclusion as to the existence of exceptional circumstances will turn on a consideration of all of the relevant matters (including the reason for delay) and the assignment of appropriate weight to each.[285]

### *Representative error*

A late lodgment of an application due to representative error may be grounds for an extension of time.[286]

There is a distinction between a delay caused by the representative where the employee is blameless and when the employee has contributed to the delay.[287]

The actions of the employee are the central consideration in deciding whether the explanation of representative error is acceptable.[288]

Where an application is delayed because the employee has left the matter in the hands of their representative and has not followed up their claim, the extension may be refused.[289]

Where an employee has given clear instructions to lodge an application and the representative has failed to do so, the extension may be granted.[290]

A representative error is only one of a number of factors to be considered in deciding whether to extend the timeframe for lodgment.[291]

A representative error includes inactivity or failure to act promptly.[292]

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[281] ibid., [26].
[282] *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [2018] FWCFB 901 (Ross J, Binet DP, Harper-Greenwell C, 16 February 2018) at para. 38.
[283] *Nulty v Blue Star Group Pty Ltd* (2011) 203 IR 1 [14].
[284] Fair Work Act s.366(2)(a).
[285] *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [2018] FWCFB 901 (Ross J, Binet DP, Harper-Greenwell C, 16 February 2018) at para. 39.
[286] *Clark v Ringwood Private Hospital* (1997) 74 IR 413, 418–420; cited in *Davidson v Aboriginal & Islander Child Care Agency* (1998) 105 IR 1; cited in *McConnell v A & PM Fornataro T/A Tony's Plumbing Service* (2011) 202 IR 59 [35].
[287] ibid.
[288] ibid.
[289] ibid.
[290] ibid.
[291] ibid.
[292] *Burns v Aboriginal Legal Service of Western Australia (Inc)* (unreported, AIRCFB, Williams SDP, Acton SDP, Gregor C, 21 November 2000) Print T3496 [28].

## Case examples

**Exceptional circumstances – extension granted**

| Reason for delay | Length of time outside timeframe | Case reference |
|---|---|---|
| **Representative error**<br>The employee's initial representative overlooked a reminder to file the application for a general protections claim. The employee had given specific instructions to his representative to file the claim. On appeal it was found that he was entitled to rely on his representative and was blameless in relation to the delay. | 3 days | *Robinson v Interstate Transport Pty Ltd* (2011) 211 IR 347. |
| **Various reasons**<br>The reasons for the delay were a combination of the applicant's representative being absent on pre-arranged leave, the applicant's inability to obtain another solicitor who would take the matter without guarantee of payment and the applicant's state of health, which caused him to miss a meeting with his solicitor on the next working day after the date the application was due. Whilst any one of these circumstances taken separately might not satisfy the criteria of 'exceptional', taken together they satisfied the criteria for admission of the application out of time. | 2 days | *Wayne Candy v Structural Cranes Pty Ltd* [2012] FWA 5878 (unreported, Harrison DP, 12 July 2012). |
| **Impairment of cognitive capacity**<br>The applicant was suffering from severe impairment of her cognitive capacity to make the application within the period between the termination of her employment until sometime not long before it was made. This was confirmed by descriptive evidence from her doctor of the psychological condition she suffered after the termination of her employment. | 48 days | *Ellis v Melton Shire Council* [2012] FWA 1033 (unreported, Lewin C, 8 February 2012). |

**Exceptional circumstances – extension granted**

| Reason for delay | Length of time outside timeframe | Case reference |
|---|---|---|
| **Technical issues**<br>The critical reason for the delay concerned a simple filing error made by the barrister briefed to prepare and file the application in circumstances where the simple error was not readily identifiable by either the barrister or the Commission who received the application through the eFiling system. | 101 days | *Paterson v Sunraysia Crane and Rigging Pty Ltd T/A Sunraysia Crane and Rigging* [2011] FWA 2496 (unreported, Ryan C, 27 April 2011). |
| **Error in initial application**<br>The applicant made an initial application under s.773 within time. The application was made in error as s.773 was not available in that situation. The applicant did not become aware of the error until the conference. To the extent that this explained the subsequent delay in lodgment of the correct application, the Commission considered it represented an acceptable reason for the delay. | 12 days | *Lane v Kangaroo Island Dive & Adventures Pty Ltd* [2010] FWA 3939 (unreported, O'Callaghan SDP, 25 May 2010). |
| **Lodged in wrong jurisdiction**<br>In the first place the applicant made an application within the time limit to the Fair Work Ombudsman. He was then advised to make an application to the Commission. The Commissioner said a confused state of mind about the proper basis of an application to the correct public body might not itself provide an exceptional circumstance, however the FWO did not respond to registered mail until nine days after it was sent and was therefore responsible for the subsequent period of delay. | 16 days | *Gough v LifeAid Pty Ltd* [2010] FWA 2481 (unreported, Richards SDP, 15 April 2010). |

**NOT exceptional circumstances – extension NOT granted**

| Reason for delay | Length of time outside timeframe | Case reference |
|---|---|---|
| **Mental state**<br>The Commission was prepared to accept that the termination had an effect on the applicant's state of mind but was not prepared to accept that this condition existed for almost two years. The Commission also did not accept that the applicant's limited English or lack of knowledge of the time limit for lodgment rendered the situation exceptional. | 562 days | *Kuruppuarachchige v Curry Leaf Sri Lankan Restaurant Pty Ltd* [2012] FWA 8205 (unreported, Deegan C, 20 September 2012). |
| **Illness**<br>The applicant was successful at first instance in arguing that she could not file an application within the requisite time because she was suffering anxiety and depression-related illnesses. This was rejected on appeal. Evidence showed that the applicant could engage in formal dealings relating to her dismissal because she was able to contact JobWatch and WorkSafe for assistance, write to the owner of the employer, meet with a solicitor to complete a WorkCover claim and provided a written summary of events. | 28 days | *Ballarat Truck Centre Pty Ltd v Kerr* [2011] FWAFB 5645 (unreported, Acton SDP, Kaufman SDP, Williams C, 29 September 2011). |
| **Applicant acted on suggestion of FWO**<br>The applicant acted on the comments of the Fair Work Ombudsman that caused him to make an application for unfair dismissal. He later decided to seek an application under the general protections provisions on the advice of his representative. At all times the matter was left to the judgment of the applicant himself to consider as to what manner of approach he sought to take in relation to the circumstances. Nothing in the action of the FWO was obligatory or directive in relation to the decision-making of the employee. | 64 days | *McConnell v A & PM Fornataro T/A Tony's Plumbing Service* [2011] FWAFB 466 (unreported, Lawler VP, O'Callaghan SDP, Bissett C, 31 January 2011). |

|  **NOT exceptional circumstances – extension NOT granted** | | |
|---|---|---|
| **Pursuing another claim**<br>The applicant said that part of the delay in lodging the application was because of delays in appointments with the insurer regarding his worker's compensation claim. There was no reason why the applicant could not lodge his application immediately after his dismissal because it is a separate and independent claim that is not related to any workers' compensation issues. | 108 days | *Smith v Signature Security Group* [2010] FWA 7803 (unreported, Williams C, 6 October 2010). |
| **Concerns about future employment prospects**<br>The Commission did not find the applicant's fears about any potential damage to his employment prospects from lodging an application prior to obtaining a new job a convincing explanation for his delay. | 20 days | *The Applicant v Origin Energy Ltd* [2010] FWA 3181 (unreported, Hamberger SDP, 19 April 2010). |

## Action taken to dispute the dismissal

Action taken by the employee to contest the dismissal, other than lodging a dismissal application, may favour granting an extension of time.[293]

## Case examples

|  **Action taken to dispute the dismissal – extension granted** | | |
|---|---|---|
| **Reason for delay** | **Length of time outside timeframe** | **Case reference** |
| **Direct communication with employer**<br>The applicant attempted to address matters by way of direct communication with the respondent after his employment had been terminated. That is a matter which displays an intention to contest the application and to demonstrate to the respondent that despite the decision to terminate his employment, the issues in contest had not reached finality and the respondent was therefore on notice that the matters would be contested in the future. | 15 days | *Wilson v Woolworths* [2010] FWA 2480 (unreported, Richards SDP, 15 April 2010). |

|  **Action NOT taken to dispute the dismissal – no extension granted** | | |
|---|---|---|
| **Reason for delay** | **Length of time outside timeframe** | **Case reference** |
| **Action taken after time limit expired**<br>The applicant provided a large amount of correspondence that he had made with various persons in the respondent, WorkCover, and others. However all of this correspondence took place well after the expiration of the time limit. The applicant did not attempt to dispute the termination of his employment within the statutory time limit. | Approx 1 year | *Mr Timothy Dwyer v Verifact Pty Ltd T/A Verifact Security* [2013] FWC 2634 (unreported, Spencer C, 18 June 2013). |

[293] *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, 299–300.

## Prejudice to the employer

Prejudice to the employer will go against granting an extension of time.[294] However the 'mere absence of prejudice to the employer is an insufficient basis to grant an extension of time'.[295]

A long delay gives rise 'to a general presumption of prejudice'.[296]

The employer must produce evidence to demonstrate prejudice. It is then up to the employee to show that the facts do not amount to prejudice.[297]

**Prejudice to the employer** means unfair disadvantage to the employer that was caused by the delay in filing the application.

## Case examples

**Prejudice to the employer – extension granted**

| Reason for delay | Length of time outside timeframe | Case reference |
|---|---|---|
| The employer argued that the application raised fresh issues which were not relied on in an unfair dismissal application that was previously made and withdrawn. The Commission could not discern any prejudice that may flow against the respondent merely because the grounds relied upon were different from the grounds relied upon in an unfair dismissal application. | 45 days | *Hartig v Form 2000 Sheetmetal Pty Ltd* [2010] FWA 7836 (unreported, Ryan C, 8 October 2010). |
| The respondent highlighted it was a not-for-profit organisation reliant on government funding. The respondent also stated one of its key witnesses was on maternity leave whilst another resides in rural Victoria. The Commission was not persuaded that the respondent was prejudiced by the delay over and above the usual prejudice that may accompany any grant of an extension of time. | 18 days | *Bradbury v Interact Australia (Victoria) Ltd* [2010] FWA 4829 (unreported, Cribb C, 8 July 2010). |

[294] ibid.
[295] ibid.
[296] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 556 (McHugh J).
[297] *Cowie v State Electricity Commission of Victoria* [1964] VR 788; cited in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 547. See also *Jervis v Coffey Engineering Group Pty Limited* (unreported, AIRCFB, Marsh SDP, Duncan SDP, Harrison C, 3 February 2003) PR927201 [16].

| **Prejudice to the employer – extension NOT granted** | | |
|---|---|---|
| **Reason for delay** | **Length of time outside timeframe** | **Case reference** |
| The employer argued prejudice due to the significant delay in filing the application. This argument was accepted. | 377 days | *Burke v Department of Agriculture, Fisheries and Forestry – Australian Quarantine and Inspection Service* [2011] FWA 1386 (unreported, Simpson C, 4 March 2011).<br>Permission to appeal refused [2011] FWAFB 8480. |
| The applicant took action from the time of refusal of wages and immediately upon the dismissal to pursue her entitlements. The applicant acted to have the Commission application filed as soon as she sought advice given her other actions for her entitlements were barred. It was argued that the respondent should not be put to the cost of defending yet another action simply because the applicant's chosen course was stopped. The Commission said that acceptance of this application, now aimed at disputing the dismissal, so far out of time would prejudice the employer. | 142 days | *Atkinson v Vmoto Limited; Yi (Charles) Chen; Trevor Beazley* [2012] FWA 9043 (unreported, Spencer C, 26 October 2012). |

## Merits of the application

The merits of the application are a relevant consideration in determining whether to exercise the discretion to extend the timeframe.[298]

A highly meritorious claim may persuade a decision-maker to accept an explanation for delay that would otherwise have been insufficient.[299]

When considering the merits, the Commission may consider whether the employee has a sufficient case.[300] The Commission cannot make any findings on contested matters without hearing

[298] *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, 299–300.
[299] *Haining v Deputy President Drake* (1998) 87 FCR 248, 250.
[300] *Kyvelos v Champion Socks Pty Ltd* (unreported, AIRCFB, Giudice J, Acton SDP, Gay C, 10 November 2000) Print T2421 [14].

evidence.[301] Evidence on the merits is rarely called at an extension of time hearing.[302] As a result of this the Commission 'should not embark on a detailed consideration of the substantive case'.[303]

## Case examples

**Merits of the matter – extension granted**

| Reason for delay | Length of time outside timeframe | Case reference |
|---|---|---|
| The applicant stated that he raised harassment claims in the week before his termination. The termination letter acknowledges that the applicant did make a complaint which was the subject of mediation in the week before his termination. On that basis the Commission could not say that the application was completely without merit. | 2 days | *Lwin v Manpower Services (Australia) Pty Limited T/A Manpower Professional* [2011] FWA 1555 (unreported, Simpson C, 21 April 2011). |

**Merits of the matter – extension NOT granted**

| Reason for delay | Length of time outside timeframe | Case reference |
|---|---|---|
| The letter of termination referred to an event where the applicant lost his temper and verbally abused a customer. It also referred to a second event where the applicant abused a customer or employee of the respondent. The applicant admitted that he did abuse the customer. The applicant's misconduct would provide a valid reason for dismissal. However the applicant believed that the lodging of his worker's compensation claim is what led to his dismissal. The Commission was of the view that the applicant's case was not a strong one and that the merits of his case did not weigh in favour of granting an extension of time. | 16 days | *Stein v Bucyrus (Australia) Pty Ltd* [2010] FWA 5983 (unreported, Spencer C, 1 September 2010). |

[301] ibid.
[302] ibid.
[303] ibid.

## Fairness as between the person and other persons in a similar position

This consideration may relate to fairness in matters of a similar kind that:

- are currently before the Commission, or
- have been decided in the past.[304]

The comparison should be limited to a comparison of persons who have also had their employment terminated and are capable of lodging an application under s.365.[305]

## Case examples

**Fairness as between applicant and other persons in a similar position – extension granted**

| Reason for delay | Length of time outside timeframe | Case reference |
|---|---|---|
| **Representative error**<br>The applicant took steps to instruct her legal representatives to make an application and executed the necessary documents within the time frame in which the application was required to be made. Persons who provide clear instructions to legal representatives and execute necessary documents in a reasonable time frame to allow them to be filed within time limits under the Fair Work Act should not be prejudiced because of the failure on the part of those legal representatives to comply. It is not unfair to other persons in the same position as the applicant in this case to extend the time limit for filing the application. | 1 day | *Dean-Villalobos v QGC Limited T/A QGC* [2013] FWC 1537 (unreported, Asbury C, 21 March 2013). |

[304] *Wilson v Woolworths* [2010] FWA 2480 (unreported, Richards SDP, 15 April 2010) [24]–[29].
[305] *Ballarat Truck Centre Pty Ltd v Kerr* [2011] FWAFB 5645 (unreported, Acton SDP, Kaufman SDP, Williams C, 29 September 2011) [26].

**Fairness as between applicant and other persons in a similar position – extension NOT granted**

| Reason for delay | Length of time outside timeframe | Case reference |
|---|---|---|
| **Application significantly out of time**<br>The Commissioner considered that persons in a similar position would have had the benefit of advice at some point in the last 30 years to enable proper action to have been undertaken. Given that there were some issues that related to the health of the applicant over that period of time, fairness would have suggested that persons in a like position would have sought advice through professional services of some description in a period which would have enabled an application, even if it was out of time, to be made much earlier than 30 years after the event. | Approx 30 years | *Pereira v Department of Human Services* [2012] FWA 3782 (unreported, Ryan C, 7 May 2012). |

# Non-dismissal dispute

See Fair Work Act s.372

If:

- a person alleges a contravention of the general protections, and
- the person has **NOT** been dismissed;

then the person may apply to the Commission to deal with the dispute.

When an application is made the Commission will notify both parties that they can only deal with the dispute if both parties agree. The parties are also advised that if they do not agree to the Commission having a conference, the applicant has the option of taking the dispute directly to the Court.

**If the parties to the dispute agree to participate**, the Commission may deal with a non-dismissal dispute by conference.

**Note:** An applicant in a non-dismissal dispute matter may make an application directly to the Court, an application does not need to be lodged with the Commission.

# Other types of applications

## What are the options and when is it appropriate?

The scope of the general protections provisions is so wide that a person who is eligible to make a general protections application to the Fair Work Commission is also likely to be eligible to make claims in other Federal and also State jurisdictions.

As a result of such a variety of options, different applications in different jurisdictions can result in very different outcomes. The speed the application is dealt with, the power of the body to award compensation or even the possibility of criminal charges may need to be considered when trying to determine which application (if any) is appropriate to make in the circumstances.

Advice should therefore be obtained promptly on all available options, before a final decision is made about making an application under the general protections provisions.

**Legal advice**

If you would like free legal advice there are Community Legal Centres in each state and territory who may be able to assist.

The law institute or law society in your state or territory may be able to refer you to a private solicitor who specialises in workplace law.

## Multiple actions relating to dismissal

See Fair Work Act ss.725–733

When a person is dismissed, it may be necessary to choose one of several available options for challenging the dismissal (apart from a general protections application there could for example, be a right to make an unfair dismissal application or a claim under anti-discrimination laws).

The Fair Work Act contains provisions which allow only one application to be made (a single action) in relation to a dismissal. Multiple actions for the same conduct are not permitted.[306]

A general protections dismissal dispute application **must not be made** if another application or complaint dealing with the dismissal (such as an unfair dismissal application) has also been made.

[306] *Cugura v Frankston City Council* (2011) 206 IR 205.

## Case example

| Multiple actions found | Case reference |
|---|---|
| **Application to Australian Human Rights Commission**<br><br>An employee made a general protections dismissal dispute application to the Commission after his dismissal. The employer objected on the basis that the employee had also made an application to the Australian Human Rights Commission (AHRC) in which the employee alleged that his dismissal was discriminatory and related to his race and colour.<br><br>The employee argued that the multiple action prohibition did not apply because the AHRC complaint dealt with discrimination alleged to have occurred during employment and consequently was not a dismissal complaint.<br><br>The Commission concluded that the multiple actions provisions of the Fair Work Act operated as a bar to the general protections application being made because the AHRC complaint was a complaint made under another law by the applicant in relation to the dismissal and it had not been withdrawn nor failed for want of jurisdiction at the time the general protections dismissal dispute application was made. | *Alex v Costco Wholesale Australia* [2014] FWC 1904 (unreported, Gostencnik DP, 20 March 2014]. |

## Unfair dismissal

See Fair Work Act s.394

A dismissal which breaches the general protections provisions could also be unfair. If eligible for either application the person would have to consider which option will deliver the best possible outcome.

An **unfair dismissal** occurs where an employee makes an unfair dismissal remedy application and the Fair Work Commission finds that:

- the employee was dismissed, and
- the dismissal was harsh, unjust or unreasonable, and
- the dismissal was not a case of genuine redundancy, and
- where the employee was employed by a small business, the dismissal was not consistent with the Small Business Fair Dismissal Code.

A **small business** is a business that employs fewer than 15 employees.

An employee is eligible to make an application for unfair dismissal remedy if they have completed the **minimum employment period** of:

- one year – where the employer employs fewer than 15 employees (a small business employer), or
- six months – where the employer employs 15 or more employees.

In addition, if the employee's **earnings** are more than $175,000[307] per year, at least one of the following must apply:

- the employee is covered by an award, or
- the employee is covered by an enterprise agreement.

**Comparison – Unfair dismissal**

Coverage: National system employees
Cost for application: $87.20[308] (can be waived in cases of serious financial hardship)

Lodgment Time Limit: 21 days
High Income Threshold: $175,000[309]

Maximum amount of compensation possible: 6 months wages up to total of $87,500[310]

**Note:** The Unfair Dismissal Benchbook contains detailed information and links to cases setting out eligibility and the Commission process, including information on objections.

You can access the Benchbook through the following link:
www.fwc.gov.au/unfair-dismissals-benchbook/coverage/who-is-protected

## Unlawful termination

See Fair Work Act ss.723 and 772

> ***Unlawful termination applications***
>
> *A person must not make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct.*[311]

This provision of the Fair Work Act prevents a person from making an unlawful termination application if they are able to make an application to a Court under the general protections provisions in relation to the same dismissal. This is because the general protections and unlawful termination provisions cover the same grounds relating to when a dismissal is for a prohibited reason.[312]

The unlawful termination provisions are only intended to be an extension of these protections to persons who are not covered by the general protections provisions.

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[307] This figure applies from 1 July 2024. For a dismissal which took effect between 1 July 2023 and 30 June 2024 the high income threshold was $167,500.
[308] This figure applies from 1 July 2024.
[309] This figure applies from 1 July 2024. For a dismissal which took effect between 1 July 2023 and 30 June 2024 the high income threshold was $167,500.
[310] This figure applies from 1 July 2024. The compensation cap is expressed as half the high income threshold at s.392(5) of the Fair Work Act.
[311] Fair Work Act s.723.
[312] Explanatory Memorandum to Fair Work Bill 2008 [2702].

The additional coverage in unlawful termination arises because these provisions rely on the external affairs power, as they give effect, or further effect, to the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer (Geneva, 22 June 1982) [1994] ATS 4.

**Comparison – Unlawful termination**

Coverage: ALL Australian employees (through ILO Conventions)
Cost for application: $87.20[313] (can be waived in cases of serious financial hardship)
Lodgment Time Limit: 21 days
High Income Threshold: No limit
Maximum amount of compensation possible: No limit

## Court application (Interim injunction)

See Fair Work Act s.370(b)

If a person is affected by a contravention of a civil remedy provision the person can apply to the Federal Court or the Federal Circuit and Family Court for an order from the court.

If the contravention involves the dismissal of a person, this type of application cannot be made without first applying to the Commission to deal with the dispute, unless the application for a court order includes an application for an interim injunction.

An **interim injunction** enables the federal courts to stop the termination, or order the reinstatement, of the employee if the termination is said to be on a prohibited ground.

**Comparison – Court application (Interim injunction)**

Coverage: ALL Australian employees
Cost for application: $87.20[314] (can be waived in cases of serious financial hardship)
Lodgment Time Limit: 14 days
High Income Threshold: No limit
Maximum amount of compensation possible: Imposing a maximum penalty for each breach of $82,500 for a body corporate or $16,500 for an individual.[315]

[313] This figure applies from 1 July 2024.
[314] This figure applies from 1 July 2024.
[315] Fair Work Act s.546(2).

## Other legislation

The following laws operate at a Federal level and the Australian Human Rights Commission has statutory responsibilities under them:

- Age Discrimination Act 2004 (Cth)
- Australian Human Rights Commission Act 1986 (Cth)
- Disability Discrimination Act 1992 (Cth)
- Racial Discrimination Act 1975 (Cth)
- Sex Discrimination Act 1984 (Cth)

Commonwealth laws and the state/territory laws generally cover the same grounds and areas of discrimination. However, there are some 'gaps' in the protection that is offered between different states and territories and at a Commonwealth level.

In addition, there are circumstances where only the Commonwealth law would apply or where only the state or territory law would apply.

## Australian Human Rights Commission

The Australian Human Rights Commission is an independent body which investigates and resolves:

- complaints about sex, race, disability and age discrimination, and
- complaints about discrimination in employment based on religion, criminal record, trade union activity, sexual preference, political opinion and social origin.

A complaint can be made no matter where you live in Australia and it doesn't cost anything to make a complaint. The steps in the complaint process are:

- Make an enquiry
- Make a complaint
- Investigation
- Conciliation
- Decision

**Comparison – Australian Human Rights Commission**

Coverage: ALL Australian employees
Cost for application: No cost
Lodgment Time Limit: 12 months
High Income Threshold: No limit
Maximum amount of compensation possible: No limit

### State and Territory anti-discrimination agencies

There are agencies in each State and Territory which deal with anti-discrimination matters under their respective laws. The agencies are:

- ACT Human Rights Commission
- Anti-Discrimination Board of New South Wales
- Anti-Discrimination Commission of Queensland
- Equal Opportunity Commission Western Australia
- Northern Territory Anti-Discrimination Commission
- Office of the Anti-Discrimination Commission (Tasmania)
- South Australia Equal Opportunity Commission
- Victorian Equal Opportunity and Human Rights Commission
-

## Power to dismiss applications

Contains issues that may form the basis of a jurisdictional issue

See Fair Work Act s.587

An application in respect of a general protections **non-dismissal** dispute can be dismissed by the Commission on the grounds that the application is not made in accordance with the Fair Work Act, is frivolous or vexatious or has no reasonable prospect of success.[316]

An application in respect of a general protections **dismissal** dispute may only be dismissed on the ground that the application is not made in accordance with the Fair Work Act.[317]

The Commission can dismiss an application under s.587(1) on its own motion or upon application.[318]

## Evidence

See Fair Work Act ss.590 and 591

Section 590 of the Fair Work Act outlines the ways in which the Commission may inform itself including:

- requiring a person to attend the Commission
- requiring written and oral submissions
- requiring a person to provide copies of documents
- taking evidence under oath or affirmation

[316] Fair Work Act s.587(1).
[317] Fair Work Act ss.587(1)(a) and 587(2).
[318] Fair Work Act s.587(3).

- by conducting inquiries or undertaking research, or
- by holding a conference or a hearing.

Section 591 of the Fair Work Act states that the Commission is not bound by the rules of evidence and procedure (whether or not the Commission holds a hearing).

Although the Commission is not bound by the rules of evidence, they are relevant and cannot be ignored if that would cause unfairness between the parties.[319]

Because of the legal principle that the strength of the evidence necessary to establish an alleged fact on the balance of probabilities will be greater where the allegation is serious in nature, or is inherently unlikely or may, if established, lead to grave consequences;[320] the Commission is more likely to apply the rules of evidence, or the principles underlying those rules, in that situation.[321]

Even where the rules of evidence are not applied, any conclusion of fact by the Commission must have a basis in 'evidence having rational probative force'. [322] Such a conclusion may not be based on no information at all, or upon information which cannot reasonably support that conclusion.

Commission Members are expected to act judicially and in accordance with 'notions of procedural fairness and impartiality'.[323]

Commission Members are ultimately expected to get to the heart of the matter as quickly and effectively as possible, without unnecessary technicality or formality.[324]

The rules of evidence 'provide general guidance as to the manner in which the Commission chooses to inform itself'.[325]

## Case example

| Following rules of evidence | Case reference |
|---|---|
| **Employer used illegally obtained evidence for allegation of theft**<br>The employee was accused of stealing oil from the employer. After becoming suspicious that the theft had occurred, the employer searched for and took samples of oil from the employee's vehicle without the employee's authority in order to have it tested. It was held that the evidence of the sample was unlawfully obtained and that the evidence should not be admitted. | *Walker v Mittagong Sands Pty (t/as Cowra Quartz)* [2010] FWA 9440 (unreported, Thatcher C, 8 December 2010). |

[319] *Re: Construction, Forestry, Mining and Energy Union*, (unreported, AIRC, Ross VP, 25 July 2003) PR935310 [36].
[320] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; [1992] HCA 66.
[321] *McNiece v Big Punt Pty Ltd t/as Flat Out Car & Truck Sales* (unreported, AIRC, Lewin C, 5 October 2006) PR974172 [32].
[322] *Re: Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492.
[323] *Coal and Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78 [25]; Fair Work Commission, 'Member Code of Conduct' (1 March 2013).
[324] ibid.
[325] *Australasian Meat Industry Employees' Union v Dardanup Butchering Company Pty Ltd* (2011) 209 IR 1 [28]; citing *Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2004) 143 IR 354 [47]–[50].

# Part 8 – Commission process – Hearings and conferences

**Related information**
- Flowchart – Dismissal dispute process
- Flowchart – Non-dismissal dispute process

## Powers of the Commission

The Fair Work Act sets out various requirements relating to how these disputes can be dealt with and what powers the Commission has in relation to them.

The Commission may, except as provided by the Fair Work Act, inform itself in relation to any matter before it in such manner as it considers appropriate, such as by conducting a conference or by holding a hearing.[326]

### Conducting a conference

See Fair Work Act ss.592 and 595

Any conference conducted by the Commission in a general protections matter must be held in private.[327]

#### *In private*

In private means that members of the public are excluded.

Persons who are necessary for the Commission to perform its functions are permitted to be present.[328]

The Commission may deal with a dispute (other than by arbitration) as it considers appropriate, including:

- by mediation or conciliation, or
- by making a recommendation or expressing an opinion.

A **mediation** is an informal method of resolving a dispute application by helping the parties to reach a settlement.

A **conciliation** differs in that the person conducting the mediation may get more involved in the matters in dispute in an effort to help the parties reach a settlement.

[326] Fair Work Act s.590.
[327] Fair Work Act s.368(2).
[328] *SZAYW v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 230 CLR 486 [25].

### Holding a hearing

See Fair Work Act s.593

If the Commission holds a hearing in relation to a matter, the hearing must be held in public. The Commission may consider that the matter involves sensitive or confidential evidence and do any of the following:

- order that all or part of the hearing is to be held in private
- restrict who may or may not be present at the hearing
- prohibit or restrict the publication of the names and addresses of persons appearing at the hearing, or
- prohibit or restrict the publication of evidence, or its disclosure to some or all of the persons present at the hearing.

### 'On the papers'

Sometimes the Commission is able to determine a matter based on written submissions without the need for a formal hearing or conference where the facts are not in dispute. This is referred to as a matter being determined **'on the papers'**.

The Commission has the power to direct a party to a matter to provide copies of documents, records, or any other information.[329]

## Dealing with the different types of general protections disputes

### Dealing with a dismissal dispute (Other than by arbitration)

See Fair Work Act s.368

If a person believes that there has been a breach of the general protections provisions and they have been dismissed, they can make a general protections dismissal dispute application.

The Commission may deal with a dismissal dispute by conference.

### Dealing with a non-dismissal dispute

See Fair Work Act s.374

If a person believes that there has been a breach of the general protections provisions however they have not been dismissed, they can make a general protections non-dismissal dispute application.

**If the parties to the dispute agree to participate**, the Commission may deal with a non-dismissal dispute by conference.

**Note:** An applicant in a non-dismissal dispute matter may make an application directly to the Court, an application does not need to be lodged with the Commission.

[329] Fair Work Act s.590.

If the parties to the non-dismissal dispute do not agree to a conference at the Commission, the applicant can take the dispute directly to the Federal Court or Federal Circuit and Family Court as a general protections court application.

One of the grounds the Court looks at in regard to ordering costs is whether a party unreasonably refused to participate in a matter before the Commission.[330]

### Dealing with a dismissal dispute by arbitration

See Fair Work Act ss. 369 and 595

The Commission may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if expressly authorised to do so under or in accordance with the Fair Work Act.

If the Commission has issued a certificate stating that the dismissal dispute could not be resolved by conference, the parties can agree to have the dismissal dispute heard by arbitration.

The Commission can arbitrate a general protections dismissal dispute if the following circumstances exist:

- the dismissal took effect on or after 1 January 2014
- an application for the Commission to deal with the dismissal dispute is lodged within 21 calendar days from the date the dismissal took effect (or within such a period as the Commission allows)
- there have been no other applications or complaints lodged in relation to the dismissal (multiple actions)
- after conducting a conference, the Commission has issued a certificate stating that it is satisfied that all reasonable attempts to resolve the dispute have been unsuccessful
- the parties to the dispute agree to the Commission arbitrating the dispute, and
- the parties to the dispute notify the Commission within 14 calendar days of the certificate being issued (or within such a period as the Commission allows).

## Rescheduling or adjourning matters

Parties to matters before the Commission may apply to have a conference or hearing adjourned to a later time or date.

There should be no presumption that an adjournment will be granted.[331] The principles in relation to adjourning (or staying) proceedings are as follows:

- a party to a matter before the Commission has a right to have the matter determined as quickly as possible
- serious consideration needs to be given before any action interferes with this right

[330] Fair Work Act s.570(2)(c)(i).
[331] *Sanford v Austin Clothing Company Pty Ltd (t/as Gaz Man)* (unreported, AIRC, Watson SDP, 19 July 2000) Print S8287 [26].

- the party who applies for the adjournment must prove that it is necessary
- a party is not automatically entitled to an adjournment because they are involved in a criminal hearing, and
- an application for an adjournment must be determined on its own merits.[332]

The Commission's task is a 'balancing of justice between the parties' taking all relevant factors into account.[333]

### Ongoing criminal matters

Sometimes an adjournment is sought because the subject matter overlaps with a criminal matter before a court, and the defendant's rights, including the right to silence, may be prejudiced if a hearing in the Commission precedes the criminal hearing. In determining whether a civil matter interferes with a defendant's right to silence in a criminal matter the following relevant factors may be considered:

- the possibility of publicity reaching and influencing jurors in the criminal matter
- the proximity of the criminal hearing
- the possibility of a miscarriage of justice
- the burden on the defendant of preparing for both the civil and the criminal matters, or
- whether the defendant has already disclosed his defence to the criminal allegations.[334]

These principles have been questioned in subsequent judgments but the decision which set them out has not been overturned.[335]

## Representation by lawyers and paid agents

See Fair Work Act ss.12 and 596

A lawyer or paid agent must seek the permission of the Commission to represent a person in a matter before the Commission. This includes making an application or submission on another person's behalf.[336]

Only a Commission Member can give permission for a lawyer or paid agent to represent a party.[337]

#### *Lawyer*

A 'lawyer' is a person who is admitted to the legal profession by a Supreme Court of a state or territory.[338]

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[332] *Sanford v Austin Clothing Company Pty Ltd (t/as Gaz Man)* (unreported, AIRC, Watson SDP, 19 July 2000) Print S8287 [31]; summarising the relevant principles from *McMahon v Gould* (1982) 7 ACLR 202.
[333] *Sanford v Austin Clothing Company Pty Ltd (t/as Gaz Man)* (unreported, AIRC, Watson SDP, 19 July 2000) Print S8287 [28]; citing *McMahon v Gould* (1982) 7 ACLR 202.
[334] *McMahon v Gould* (1982) 7 ACLR 202, 206.
[335] See for e.g. *Baker v Commissioner of Federal Police* (2000) 104 FCR 359 [34]–[35]; *Yuill v Spedley Securities Ltd* (in liq) (1992) 8 ACSR 272 (Kirby P).
[336] Fair Work Act s.596(1).
[337] *Department of Education and Early Childhood Development v A Whole New Approach Pty Ltd* [2011] FWA 8040 (unreported, Gooley C, 29 November 2011) [67].
[338] Fair Work Act s.12.

### *Paid agent*

A 'paid agent' is a person who charges or receives a fee to represent a person in the matter before the Commission.[339]

### *In house counsel, union representatives and employer association representatives*

The following representatives are **not** required to seek permission to appear:

- a lawyer or paid agent who is an employee (or officer) of the person, or
- a lawyer or paid agent who is an employee (or officer) of any of the following, which is representing the person:
  - an organisation (including a union or employer association), or
  - an association of employers that is not registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), or
  - a peak council, or
  - a bargaining representative, or
- a lawyer or paid agent who is a bargaining representative.[340]

In these circumstances a person is not considered to be represented by a lawyer or paid agent.[341]

### *Others*

In circumstances where the person seeking to represent a person or organisation is **not** a lawyer or paid agent as defined in the Fair Work Act, permission from the Commission to represent is not required.[342]

## When will permission be granted?

The Commission can only give permission for a person to be represented by a lawyer or paid agent in a matter before the Commission if:

- it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter (**complexity**), or
- it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively (**effectiveness**), or
- it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter (**fairness**).[343]

In granting permission, the Commission will have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties.[344]

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[339] Fair Work Act s.12.
[340] Fair Work Act s.596(4).
[341] Fair Work Act s.596(4).
[342] *Cooper v Brisbane Bus Lines Pty Ltd* [2011] FWA 1400 (unreported, Simpson C, 3 March 2011) [13].
[343] Fair Work Act s.596(2).
[344] Explanatory Memorandum to Fair Work Bill 2008, [2296]. Also see *Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* [2011] FWA 1520 (unreported, Lewin C, 18 March 2011) [41].

In practice the Commission is likely to grant permission in formal proceedings, however, where a party raises an objection, the discretion afforded to the Commission will be exercised on the facts and circumstances of the particular case.[345]

The Commission is obliged to perform its functions and exercise its powers in a manner that is 'fair and just'.[346] In some cases it may not be fair and just for one party to be represented by a lawyer or paid agent when the other is not.[347]

The 'normal position' of the Act is that 'a party ""in a matter before FWA"" must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law …'[348]

A party might be required to represent themselves if the Commission is not satisfied permission should be granted for a lawyer or paid agent to appear for a client on the grounds of complexity, effectiveness or fairness.[349]

If a party has not made submissions objecting to representation, it is still the case that representation requires permission of the Commission.[350]

Partial representation may be permitted during examination-in-chief and cross-examination of the party seeking representation[351] or during argument about jurisdictional issues.[352]

### *Complexity*

Where a party raises a jurisdictional issue, permission for representation will usually be granted.[353]

Jurisdictional issues by their nature are often complex and may require expertise in case law.[354]

However, even if there is a jurisdictional issue which needs to be resolved, permission may still be refused or limited to specific parts of a hearing.[355]

### *Effectiveness*

Where a person would be unable to effectively represent themselves, permission for representation may be granted.[356]

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[345] *Rodgers v Hunter Valley Earthmoving Company Pty Ltd* [2009] FWA 572 (unreported, Harrison C, 9 October 2009) [12].
[346] Fair Work Act s.577(a).
[347] *Warrell v Fair Work Australia* [2013] FCA 291 [27] (title corrected from *Warrell v Walton*).
[348] ibid., [24].
[349] *Azzopardi v Serco Sodexo Defence Services Pty Ltd* [2013] FWC 3405 (unreported, Cambridge C, 29 May 2013).
[350] *Viavattene v Health Care Australia* [2012] FWA 7407 (unreported, Booth C, 9 October 2012) [4].
[351] *Blair v Kim Bainbridge Legal Service Pty Ltd T/A Garden & Green* [2011] FWA 2720 (unreported, Gooley C, 10 May 2011) [6].
[352] *O'Grady v Royal Flying Doctor Service of Australia (South Eastern Section)* [2010] FWA 1143 (unreported, Leary DP, 17 February 2010) [31].
[353] *CEPU v UGL Resources Pty Limited (Project Aurora)* [2012] FWA 2966 (unreported, Richards SDP, 10 April 2012) [23].
[354] ibid.
[355] See *Blair v Kim Bainbridge Legal Service Pty Ltd T/A Garden & Green* [2011] FWA 2720 (unreported, Gooley C, 10 May 2011) [5]–[6].
[356] Fair Work Act s.596(2)(b).

The Commission will generally grant permission for representation where the person is unable to represent themselves in a manner that creates a 'striking impression', or which has an 'impressive' effect or which is 'powerful in effect'.[357]

However, what might be of 'striking impression' or 'impressive' or 'powerful in effect' is a matter of assessment by the Commission.[358]

**Example**

A circumstance where a person may be given permission to be represented is where the person is from a non-English speaking background or has difficulty reading or writing.[359]

### *Fairness*

Permission may be granted if it would be unfair to refuse permission taking into account the fairness between the parties to the matter.[360]

**Example**

A circumstance where a person may be given permission to be represented is where one party to the matter is a small business with no human resources staff and the other is represented by a union.[361]

[357] *CEPU v UGL Resources Pty Limited (Project Aurora)* [2012] FWA 2966 (unreported, Richards SDP, 10 April 2012) [16].
[358] *Australian Rail, Tram and Bus Industry Union v Rail Corporation New South Wales T/A RailCorp* [2012] FWA 9906 (unreported, Cambridge C, 22 November 2012) [15].
[359] Fair Work Act, Note (a) to s.596(2).
[360] Fair Work Act s.596(2)(c).
[361] Fair Work Act, Note (b) to s.596(2).

## Case examples

| Permission granted | Case reference |
|---|---|
| **Complexity – jurisdictional issues – genuine redundancy**<br><br>The employer objected to the employee's application for an unfair dismissal remedy on the basis that the dismissal was a case of genuine redundancy. The employer sought permission to be legally represented. The employee opposed legal representation. It was held that the determination of jurisdiction was a legal issue. Legal representation would allow the matter to be dealt with more efficiently. There were complex issues to be considered and the employer was a not for profit organisation without a person experienced in workplace relations advocacy. This was not a 'simple factual contest' but a contest about jurisdiction which might raise issues not previously considered. Permission for legal representation was granted to both parties while dealing with the issue of jurisdiction. | *O'Grady v Royal Flying Doctor Service of Australia (South Eastern Section)* [2010] FWA 1143 (unreported, Leary DP, 17 February 2010). |
| **Complexity – serious misconduct – allegation dismissal related to general protections dispute**<br><br>The employee was dismissed for alleged sexual harassment. The employee contended his dismissal was, in part, related to an application made to the Commission concerning a workplace right. The employee, who was represented by a union, objected to the employer being legally represented. It was held that the relevant factual matrix was sufficiently complex that legal representation would assist in its effective and efficient resolution. The Union's advocate, although not legally qualified, was highly experienced. Permission for legal representation was granted. | *Rollason v Austar Coal Mine Pty Limited* [2010] FWA 4863 (unreported, Stanton C, 1 July 2010). |
| **Complexity – serious misconduct – workers' compensation legislation**<br><br>The employee was dismissed while under a modified work regime pursuant to workers' compensation legislation. The employee was dismissed on the grounds of serious misconduct. The employee opposed permission for the employer to be legally represented. It was held that, among other factors, the matter had some complexity given the interaction with the workers' compensation legislation, and that the applicant was represented by an experienced and legally qualified union advocate. Permission for legal representation was granted to the employer. | *Wesslink v Walker Australia Pty Ltd T/as Tenneco* [2011] FWA 2267 (unreported, Hampton C, 21 April 2011). |

| Permission granted | Case reference |
|---|---|
| **Complexity – appeals to Full Bench**<br><br>The employee appealed against a decision. The employee objected to her employer having legal representation during the appeal proceedings.<br><br>On appeal the Full Bench concluded that appeal proceedings were likely to involve a greater degree of complexity than proceedings at first instance. Permitting representation would enable the matter to be dealt with more efficiently. Permission for legal representation was granted. | *Pedler v The Commonwealth of Australia, represented by Centrelink* [2011] FWAFB 4909 (unreported, Watson VP, Ives DP, Bissett C, 1 August 2011). |
| **Efficiency – complexity – human resources manager was a witness and had restraining order against employee**<br><br>The employee opposed permission for the employer to be legally represented because the employee was unrepresented and the employer could be represented by its human resources officer. However, the employee had obtained a restraining order against the human resources officers, and the human resources officer was going to be a witness in the matter. The employer had no-one else capable of presenting its case. Permission for legal representation was granted. | *Venn v The Salvation Army T/A Barrington Lodge* [2010] FWA 912 (unreported, Leary DP, 9 February 2010). |
| **Fairness – human resources had little or no industrial experience – employee represented by union**<br><br>The employer was a medium-size business with some specialist human resources staff, but no-one with experience as an advocate. The applicant was represented by a legally qualified, skilled and experienced advocate from a union. Although the matter was not a complex one, unfairness would arise from an imbalance of representation should permission for legal representation not be granted. | *Rahman v Storm International Pty Ltd T/A Storm International Property Maintenance* [2011] FWA 7583 (unreported, Cambridge C, 4 November 2011). |

| Permission NOT granted | Case reference |
|---|---|
| **Employer a member of employer association**<br><br>The employer in this matter was a large employer who was a member of an employer association. They sought to be represented by a private lawyer (not the employer association). The employee was self-represented. It was found that there were no particularly complex jurisdictional or substantive issues. Effective representation from experienced, legally qualified persons was available from within the employer's employer association. Permission was refused. | *Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* [2011] FWA 1520 (unreported, Lewin C, 18 March 2011). |

| Permission NOT granted | Case reference |
|---|---|
| **Complexity – simple factual contest**<br>The employee was represented by his union. The employee opposed the employer being represented by a lawyer. The employer argued that the complexity of the issues meant that the matter would be more efficiently dealt with by a lawyer. However it was determined that because the employee admitted to engaging in the behaviour which led to his dismissal, the matter was a relatively simple factual contest, and so permission for the employer to be legally represented was refused. | *Rodgers v Hunter Valley Earthmoving Company Pty Ltd* [2009] FWA 572 (unreported, Harrison C, 9 October 2009). |
| **Complexity – availability of in-house counsel**<br>The employee in this matter was represented by his union. The employer sought to be represented by a lawyer. The employer was a large employer with in-house counsel. The employer argued that their in-house counsel was inexperienced in arbitrations of unfair dismissal matters compared to the applicant's union advocate. It was held the matter, while not straightforward, did not involve complex jurisdictional issues or technicalities, and that no unfairness would arise if permission was refused. Permission for legal representation was refused. | *Hamilton v Carter Holt Harvey Wood Products Australia Pty Ltd* [2012] FWA 5219 (unreported, Bartel DP, 19 June 2012).<br>Permission to appeal refused [2012] FWAFB 6832. |
| **Complexity – availability of human resources staff**<br>The employee in this matter was self-represented. The employer sought to be represented by a lawyer. The employee opposed permission for the employer to be legally represented.<br>It was found that the matter appeared to be a performance-based termination and did not involve any complex facts, and that the employer company, with 1180 employees and a dedicated human resources department, did have the ability to represent itself. Permission for legal representation was refused. | *Bowley v Trimatic Management Services Pty Ltd T/A TSA Telco Group* [2013] FWC 1320 (unreported, Steel C, 1 March 2013). |

# Bias

A Commission Member should not hear a case if there is a reasonable apprehension that they are biased.[362]

**Reasonable apprehension of bias** means that a party to a matter before the Commission has a genuine concern that the Commission Member might not be impartial and as a result may not deal with the matter in a fair and balanced way.

[362] *R v Watson; Ex parte Armstrong* (1976) 136 ALR 248; cited in *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 294.

The question of a reasonable apprehension of bias is a difficult one involving matters 'of degree and particular circumstances [which] may strike different minds in different ways'.[363]

A reasonable apprehension of bias involves deciding whether a 'fair-minded lay observer' would reasonably apprehend that the decision maker would not decide a case impartially and without prejudice.[364] It is not bias where a decision maker decides a case adversely to one party.[365]

Reasonable apprehension of bias may arise in the following four (sometimes overlapping) ways:

- if a Commission Member has some direct or indirect interest in the case, financial or otherwise
- if a Commission Member has published statements or acted in a way that gives rise to a reasonable apprehension of prejudice
- if the Commission Member has some direct or indirect relationship, experience or contact with anyone involved in the case, and
- if the Commission Member has some knowledge of extraneous information, which cannot be used in the case, but would be seen as detrimental.[366]

While it is important that justice must be seen to be done, it is of equal importance that Commission Members discharge their duty to hear the evidence and decide the matter.[367] This means that they should not accept the suggestion of apprehended bias too readily.[368]

## Expression of a view or prejudgment

In deciding whether a Commission Member should be disqualified for the appearance of bias, the Commission will consider whether a reasonable and fair minded person might anticipate that the Commission Member might approach the matter with a partial or prejudiced mind.[369]

The question is not whether the decision maker's mind was blank, but whether their mind was open to persuasion.[370]

The expression of a provisional view on a particular issue, or warning parties of the outcome of a provisional view, is usually entirely consistent with procedural fairness.[371]

## Prior relationship

Generally, a Commission Member will not be disqualified in circumstances where it is found that the Member, before being appointed as a Member, gave legal advice or represented a person who now appears before them as a party in their capacity as a Member.[372] However the Member should not hear a matter if the Member:

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[363] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; citing *R v Shaw; Ex parte Shaw* (1980) 32 ALR 47 (Aickin J).
[364] *Dain v Bradley* [2012] FWA 9029 (unreported, Booth DP, 29 October 2012) [14]; citing *British American Tobacco Australia Services v Laurie* (2011) 242 CLR 283 [104].
[365] *Re J.R.L. Ex parte C.J.L.* (1986) 161 CLR 342, 352.
[366] *Webb v The Queen* (1994) 181 CLR 41, 74.
[367] *Re J.R.L. Ex parte C.J.L.* (1986) 161 CLR 342, 352.
[368] ibid.
[369] *Johnson v Johnson* (2000) 201 CLR 488 [11].
[370] *The Minister for Immigration & Multicultural Affairs v Jia* (2001) 205 CLR 507 [71].
[371] *Oram v Derby Gem Pty Ltd* (2004) 134 IR 379 [110].
[372] *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78, 87–88.

- is determining the correctness of advice they gave to a party in their role as a legal representative
- recommended a course of conduct to a party in their role as a legal representative and the legality, reasonableness or wisdom of that conduct is to be determined, or
- is determining the quality of the advice they gave while they were the legal representative of one of the parties.[373]

## Extraneous information

The general rule is that a Commission Member should disclose any independent knowledge of factual matters that affect or may affect the decision to be made.[374]

A central element of the justice system is that a matter must be decided based on the evidence and arguments presented.[375] A judge (or Commission Member) should not take into account, or indeed receive, secret or private representations from a party or from a stranger about the case they are to decide.[376]

## Case examples

| NO apprehension of bias | Case reference |
|---|---|
| **Prior relationship and representation in alleged similar matter**<br>The respondent requested that this matter be referred to another Commission Member on the basis of reasonable apprehension of bias. The reasons the respondent gave were:<br>• the Member had, in her previous role as a solicitor, acted on behalf of the applicant in a similar dispute with the respondent, and<br>• the legal firm that the Member had worked for in their previous role was acting for the applicant in the current matter before the tribunal.<br>It was held that there was no relevant overlap between the previous and current proceedings, and that the Member's previous association with the applicant and the applicant's legal firm was, on the authorities, an insufficient reason for the Member to stand aside from the matter. Accordingly the Member declined to disqualify herself. | *National Tertiary Education Industry Union v Victoria University* [2010] FWA 2263 (unreported, Gooley C, 17 March 2010). |

[373] ibid., 88.
[374] *Re Media, Entertainment and Arts Alliance and Theatre Managers' Association; Ex parte Hoyts Corporation Pty Ltd* (1994) 119 ALR 206, 210.
[375] *Re J.R.L. Ex parte C.J.L.* (1986) 161 CLR 342, 350.
[376] ibid.

| NO apprehension of bias | Case reference |
| --- | --- |
| **Alleged prejudgment**<br>The union in this matter requested that the Commission Member disqualify himself from hearing an application for an order to stop industrial action. The reason was that the Member had, in deciding a related dispute involving the same parties, characterised any future 'ban' on the completion of a particular project as unprotected industrial action. The ban had eventuated and was the subject of the current application. It was held that because the earlier decision did not amount to any conclusion that such a ban was in place, it could not indicate to a fair-minded and impartial observer that an order to stop industrial action should issue. | *RMIT University v National Tertiary Education Industry Union* [2012] FWA 2418 (unreported, Lawler VP, 21 March 2012). |

# Part 9 – Commission process – Outcomes

A general protections dispute can be resolved through taking action in either, and sometimes, both:

- the Commission, and
- a Court.

The end result will depend on whether the application is for a dismissal dispute or a non-dismissal dispute, and the willingness of the parties to resolve the matter.

**Related information**

- Part 8 – Commission process–Hearings and conferences

## Outcome of conference

### Dismissal disputes and non-dismissal disputes

A general protections dismissal dispute application starts within the Commission, unless the general protections dispute application includes an application for an interim injunction, which means that it is taken directly to Court.

In contrast, a non-dismissal dispute application will only commence with a Commission conference if both parties agree. If both parties do not agree to a conference then the matter can proceed directly to Court.

**Note:** An applicant in a non-dismissal dispute matter may make an application directly to the Court, an application does not need to be lodged with the Commission.

#### *If settled – Terms of Settlement*

If the general protections dispute is resolved during the Commission conference, the parties should sign a 'Terms of Settlement' document which formalises their agreement. The Terms of Settlement is customised to reflect the wishes of the parties. It can contain details of compensation or steps to be taken, as well as issues regarding privacy or non-disparagement terms.

**Mutual non-disparagement** means that both parties agree that they will not make negative comments about the other party which could affect their reputation or standing in the community.

#### *If NOT settled – Certificate (Dismissal disputes)*

If the general protections dispute is not resolved during the Commission conference, and the Commission is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then the Commission must issue a certificate to that effect.

A certificate is a Commission document which states the parties to the dispute, that the Commission conducted a conference and that the dispute could not be resolved by that process.

### *Advice on arbitration or court application (Dismissal disputes and non-dismissal disputes)*

After conducting a conference and taking into account all of the material presented, if the Commission considers that the dispute, if taken to Court, would not have a reasonable prospect of success, the Commission must advise the parties.

This is done to ensure that the parties understand the likelihood of success if the dispute continues to a general protections court application or arbitration.

There is no specified way for this advice to be given.

# Outcome of Consent Arbitration

## Commission order (Dismissal disputes)

If a general protections dismissal dispute is not resolved during the Commission conference, and after receiving the certificate the parties agree to the Commission resolving the dispute by arbitration, the Commission will hold a determinative conference or hearing.

At the conclusion of the arbitration process the Commission may make one or more of the following orders:

- an order for reinstatement of the person
- an order for the payment of compensation to the person
- an order for payment of an amount to the person for remuneration lost
- an order to maintain the continuity of the person's employment, or
- an order to maintain the period of the person's continuous service with the employer.

If a Commission order applies to a person, then that person must not contravene a term of the order. If the order is contravened, it can be enforced through the Courts, which may result in further penalties being applied.

**Related information**
- Enforcement of Commission orders
- Role of the Court

### *What can be included in an order for compensation after consent arbitration?*

Compensation is a broad concept which should not be interpreted in a narrow way.[377]

The Commission has power to make 'an order for the payment of compensation to the person'[378] in relation to a general protections matter. The Fair Work Act does not limit the scope of the compensation as it does in relation to unfair dismissal, where an amount ordered to be paid to a

[377] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* (2006) 150 IR 179 [4].
[378] Fair Work Act s.369(2)(b).

person who has been unfairly dismissed 'must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal'[379] and is otherwise limited to six months' pay.

Compensation can include compensation for non-economic loss such as hurt, humiliation and distress.[380]

There must be a causal connection between the contravention and the loss, which is always a question of fact.[381]

## Case examples

| Order made | Case reference |
|---|---|
| The applicant was employed as General Manager Retirement Services. The applicant became ill and was away from work for several months. After returning to work she was provided with a performance warning. The applicant resigned from her employment indicating her resignation was to take effect on 30 January 2015. The respondent accepted the resignation but substituted 1 December 2014 as the date on which employment would end.<br><br>The applicant made a general protections application alleging she was subjected to adverse action because she had been away from work for a considerable period because of personal illness (in breach of s.340 of the Fair Work Act). She also alleged that she was subjected to adverse action because she was 'an officer or member of an industrial association or was engaging in an industrial activity' (in breach of s.346).<br><br>The Commission found the applicant was exercising a workplace right when she did not attend for work for reason of personal illness and also that she was an officer of an industrial association participating in a lawful activity organised by or promoted by an industrial association. The Commission held that the respondent took adverse action against the applicant through its dismissal of her by forced resignation, and the adverse action was taken because of a prohibited reason, or reasons which included a prohibited reason. The Commission ordered compensation in the amounts of $17,451 for remuneration lost, together with $3000 for non-economic loss. | *Masson-Forbes v Gaetjens Real Estate Pty Ltd* [2015] FWC 4329 (unreported, Wilson C, 26 June 2015). |

[379] Fair Work Act s.392(4).
[380] *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* (2011) 193 FCR 526 [443]–[444]; see also *Ucchino v Acorp Pty Limited* (2012) 218 IR 194 [78].
[381] *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, 525; *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* (2011) 193 FCR 526 [423].

| Order NOT made | Case reference |
|---|---|
| The applicant was employed as a Lab Tech/Sampler and reported an injury that occurred when picking up a sample for testing. After meeting with her supervisor and area co-ordinator a week later, her employment was terminated. The applicant alleged she was dismissed because she exercised her workplace right to engage in, report and suggest occupational health and safety issues.<br><br>The respondent gave evidence that the reason for dismissal was that the applicant's understanding of safety wasn't adequate, and that she was a concern and a risk to herself and also to other team members. The respondent accepted that it might look like there was a connection between the applicant reporting her injury and her dismissal, but denied any link.<br><br>The Commission was prepared to accept that the applicant exercised a workplace right when she reported her injury, and found that the respondent took adverse action against applicant by dismissing her. However the Commission found, on the balance of probabilities, that the respondent did not dismiss the applicant because she exercised a workplace right. The respondent had satisfactorily discharged the onus of establishing that the reasons for the decision to terminate the applicant's employment were not for a prohibited reason and the application was dismissed. | *Mowle v Downing Teal Pty Ltd T/A DT Workforce* [2015] FWC 3513 (unreported, Gooley DP, 27 May 2015). |
| The applicant was dismissed from her role as a part-time Centre Carer in a small community based child care centre. The applicant argued that the respondent had taken two forms of adverse action against her. First, that she was injured in her employment with the decision to conduct a performance review of her; and second, that she was dismissed. The applicant submitted that she was dismissed because she had exercised a workplace right when she made complaints about her manager and a committee member in the course of allegations being put to her about her conduct.<br><br>The Commission found that the applicant had exercised a workplace right when she made the complaints. The evidence supported that adverse action was taken against the applicant in the form of a dismissal, however it did not support that she was injured in her employment with the decision by the respondent to conduct a performance review, because she was not treated any differently from any other employee.<br><br>When considering the reasons for the adverse action, the Commission found that the respondent did not dismiss the applicant 'because of a prohibited reason, or reasons which included that reason'. The application was dismissed. | *Sultana v Thomastown Child Care Centre Inc* [2016] FWC 422 (unreported, Wilson C, 22 January 2016). |

# Part 10 – Associated applications

# Costs

See Fair Work Act ss. 375B, 376, 570 and 611

Persons who incur legal costs in a general protections matter before the Commission or a court generally pay their own costs.[382]

The Commission or a court has the discretion to order one party to a general protections matter to pay the other party's legal or representational costs, but only where the Commission is satisfied the matter was commenced or responded to:

- vexatiously or without reasonable cause, or
- with no reasonable prospect of success.[383]

Costs may also be awarded to one party if the Commission or the Court is satisfied that the costs were incurred as a result of an unreasonable act or omission of the other party (but in the case of the Commission only for dismissals taking effect from 1 January 2014, when s.375B commenced).[384]

Costs may also be ordered against legal representatives.[385]

## What are costs?

Costs are the amounts a party has paid to a lawyer or paid agent for advice and representation before a court or tribunal.

If a party is ordered to pay another party's legal costs it will not usually be for the whole amount of legal costs incurred.

The Commission may order that only a proportion of the costs be paid. This may be either on a party-party basis or on an indemnity basis.

### Party–party costs

Party–party costs are the legal costs that are deemed necessary and reasonable.[386]

The Commission will look at whether the legal work done was necessary and will decide what a fair and reasonable amount is for that work.[387]

### Indemnity costs

Indemnity costs are also known as solicitor–client costs.

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[382] Fair Work Act s.611(1).
[383] Fair Work Act s.611(2).
[384] Fair Work Act s.375B(1).
[385] Fair Work Act s.376(2).
[386] *Butterworths Australian Legal Dictionary*, 1997, 852.
[387] ibid.

Indemnity costs are all costs including fees, charges, disbursements, expenses and remuneration as long as they have not been unreasonably incurred.[388]

Indemnity costs cover a larger proportion of the legal costs than party-party costs.

They may be ordered when there has been an element of misconduct or delinquency on the part of the party being ordered to pay costs.[389]

**Party–party costs** are the costs that one side pays to the other side in legal proceedings. They are the result of the Commission ordering that one party pay costs to the other party.

**Indemnity costs** are the costs that you pay to your solicitor for the work that they perform for your matter. The basis of these costs is a costs agreement between you and your solicitor.

# Applying for costs

An application for costs before the Commission **must be made within 14 days** after the Commission finishes dealing with the dispute.[390]

## What costs may be recovered?

The Fair Work Regulations include a 'schedule of costs' which sets out appropriate rates for common legal services. The schedule provides the Commission with guidance when exercising its jurisdiction to make an order for costs.[391]

The Commission is not limited to the items in the schedule of costs, but cannot exceed the rates or amounts in the schedule if an item is relevant to the matter.[392]

# When are costs ordered by the Commission?

 See Fair Work Act ss. 375B, 377 and 611

Section 611 of the Fair Work Act sets out the general provision for when the Commission may order costs. The Commission may order a person to pay the other party's costs if it is satisfied:

- that the person's application or response to an application was made **vexatiously** or **without reasonable cause**, or
- it should have been reasonably apparent that the person's application or response to an application had **no reasonable prospect of success**.

[388] *Butterworths Australian Legal Dictionary*, 1997, 586.
[389] *Oshlack v Richmond River Council* (1998) 193 CLR 72 [44]; cited in *Goffett v Recruitment National Pty Ltd* (2009) 187 IR 262 [50]; and *Stanley v QBE Management Services Pty Ltd* [2012] FWA 10164 (unreported, Jones C, 18 December 2012) [24].
[390] Fair Work Act s.377.
[391] Fair Work Regulations reg 3.04; sch 3.1.
[392] Fair Work Regulations reg 3.04; sch 3.1.

Section 375B of the Fair Work Act sets out the circumstances in which the Commission can make costs orders against parties in general protections matters. Orders under this section can only be made if a party has lodged an application in accordance with s.365 of the Fair Work Act.

The Commission may order costs against a party to a general protections dispute if the first party caused the second party to incur costs because of an **unreasonable act or omission** in connection with the conduct or continuation of the matter.[393]

The power to award costs is discretionary. It is a two stage process:

- decide whether there is power to award costs, and
- if there is power, consider whether the discretion to award costs is appropriate.[394]

## Vexatiously

Vexatious means that:

- The main purpose of an application (or response) is to harass, annoy or embarrass the other party.[395]
- There is another purpose for the action other than the settlement of the issues arising in the application (or response).[396]

The question of whether an application was made 'vexatiously' looks to the motive of the applicant in making the application. It is an alternative ground to the ground that the application was made 'without reasonable cause' and may apply where there is a reasonable basis for making the application.[397]

## Without reasonable cause

The test for 'without reasonable cause' is that the application (or response):

- is 'so obviously untenable that it cannot possibly succeed'
- is 'manifestly groundless'
- is 'so manifestly faulty that it does not admit of argument'
- 'discloses a case which the Court is satisfied cannot succeed'
- 'under no possibility can there be a good cause of action'.[398]

The Commission may also consider whether, at the time the application (or response) was made, there was a 'substantial prospect of success.'[399] It is inappropriate to find that an application (or

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[393] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 [230].
[394] *McKenzie v Meran Rise Pty Ltd* (unreported, AIRCFB, Giudice J, Watson SDP, Whelan C, 7 April 2000) Print S4692 [7].
[395] *Nilsen v Loyal Orange Trust* (1997) 76 IR 180, 181; citing *Attorney-General v Wentworth* (1988) 14 NSWLR 481, 491; cited in *Holland v Nude Pty Ltd (t/as Nude Delicafe)* (2012) 224 IR 16 [7].
[396] ibid.
[397] *Church v Eastern Health* (2014) 240 IR 377 [29].
[398] *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129; cited in *Walker v Mittagong Sands Pty Limited T/A Cowra Quartz* (2011) 210 IR 370 [17].
[399] *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257; cited in *Dryden v Bethanie Group Inc* [2013] FWC 224 (unreported, Williams C, 11 January 2013) [20].

response) was without reasonable cause if success depends on the resolution of an arguable point of law.[400]

An application (or response) is not without reasonable cause just because the court rejects a person's arguments.[401]

A proceeding is not to be classed as being instituted without reasonable cause simply because it fails, but rather in circumstances where on the applicant's own version of the facts, it is clear that the proceeding must fail.[402]

In simple terms, **without reasonable cause** means that an application (or response) is made without there being any real reason, basis or purpose.

## No reasonable prospect of success

Whether it should have been reasonably apparent that an application (or response) had no reasonable prospect of success is an **objective test**.[403]

A finding that an application (or response) has no reasonable prospects of success should be reached with extreme caution and should only be reached when an application (or response) is 'manifestly untenable or groundless'.[404]

An **objective test** considers the view of a reasonable person. In this case it looks at whether it would have been apparent to a reasonable person that an application or response had no reasonable prospect of success. This is the appropriate test.

A **subjective test** would look at the view of the person themselves. A subjective test would look at whether it would be reasonably apparent to the person that their application or response had no reasonable prospect of success. This is not the appropriate test as the person has a vested interest in the matter being decided in their favour, which can influence how the person will look at the issues.

## Unreasonable act or omission

An unreasonable act or omission can include a failure to discontinue a general protections dispute application or a failure to agree to terms of settlement.[405] What is unreasonable will depend on the circumstances.[406] It is intended that costs only be ordered where there is clear evidence of unreasonable conduct.[407]

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[400] ibid.
[401] *R v Moore; Ex Parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470, 473; cited in *Walker v Mittagong Sands Pty Limited T/A Cowra Quartz* (2011) 210 IR 370 [20].
[402] *Zornada v St John Ambulance Australia (Western Australia) Inc.* (2013) 237 IR 48 [35].
[403] *Baker v Salver Resources Pty Ltd* [2012] FWAFB 4014 (unreported, Watson SDP, Drake SDP, Harrison C, 27 June 2011) [10]; citing *Wodonga Rural City Council v Lewis* (2005) 142 IR 188, 191 [6].
[404] *Baker v Salver Resources Pty Ltd* [2012] FWAFB 4014 (unreported, Watson SDP, Drake SDP, Harrison C, 27 June 2011) [10]; citing *Deane v Paper Australia Pty Ltd* (unreported, AIRCFB, Giudice J, Williams SDP, Simmonds C, 6 June 2003) PR932454 [7].
[405] Explanatory Memorandum, Fair Work Amendment Bill 2012 [170].
[406] Explanatory Memorandum, Fair Work Amendment Bill 2012 [171].
[407] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 [234].

## Case examples

| Costs against parties ordered | Case reference |
|---|---|
| **Costs ordered against employer – employer relied on false evidence**<br><br>It was found that the employer dismissed the employee based on a false allegation of theft of oil. The employer had based the decision to dismiss the employee on evidence obtained by a manager of the employer. The manager was found to be an unreliable witness, having knowingly sent a false sample of oil for testing. It was held that it should have been reasonably apparent to the employer, after the employee's tests results were known, that the case had no reasonable prospect of success. Indemnity costs were ordered against the employer. | *Walker v Mittagong Sands Pty Ltd T/A Cowra Quartz* (2011) 210 IR 370. |
| **Costs ordered against employee – employee appealed a decision with no proper basis**<br><br>The employee's unfair dismissal application was dismissed as he had not met the minimum period of employment. On appeal the employee appeared to try and change the application to an unlawful termination application and did not contest that he had not met the minimum period of employment. The Full Bench found that the application to appeal was made without reasonable cause and had no reasonable prospects of success, and that some order for costs was justified. | *Timmins v Compass Security* (2012) 219 IR 5. |
| **Costs ordered against employer – employer did not attend hearing and then appealed**<br><br>The employer objected to the unfair dismissal application on the basis that it was frivolous and vexatious, but did not attend the hearing and did not provide an acceptable reason for his absence. The matter was decided in the employer's absence in the employee's favour. The employer appealed the decision. The appeal was dismissed. Costs were granted in relation to the appeal which was found to be without merit and manifestly untenable. | *Cremona (formerly trading as Frooty Fresh) v Lane* [2011] FWAFB 6984 (unreported, O'Callaghan SDP, Kaufman SDP, Lewin C, 13 October 2011). |
| **Costs ordered against employee – application was dismissed because the applicant had not been dismissed**<br><br>Due to a misunderstanding about arrangements concerning light duties, an employee believed her employment had been terminated and lodged an application for unfair dismissal.<br><br>After the application was lodged the employer sent evidentiary materials and correspondence confirming the employee was still employed, yet the employee did not discontinue the matter once she was made aware of this. Costs were ordered for the period from when the employer's correspondence was lodged up to and including the hearing for costs. | *Mijaljica v Venture DMG Pty Ltd* [2012] FWA 2800 (unreported, Watson SDP, 3 April 2012. |

| Costs against parties ordered | Case reference |
|---|---|
| **Costs ordered against employee – appeal application made vexatiously**<br><br>The employer sought an order for the payment of its costs incurred in relation to an appeal filed by the employee. The appeal was made against a decision granting permission for the employer to be represented by a lawyer at the hearing the employee's unfair dismissal application. At all relevant times the employee was represented by the Health Services Union. The appeal was withdrawn about an hour before its hearing was scheduled to commence. The employer contended that the appeal was made vexatiously and without reasonable cause.<br><br>The Full Bench concluded that the appeal application was made vexatiously. It was made for the improper collateral purpose of delaying the first instance hearing. Having concluded that the appeal application was made vexatiously the Commission's discretion to order costs against the employee was enlivened.<br><br>The Full Bench decided to exercise the discretion and made an order for costs. The Full Bench ordered that the employee pay the employer's costs on a party-party basis, in respect of the appeal application. | *Church v Eastern Health* (2014) 240 IR 377. |

| Costs against parties NOT ordered | Case reference |
|---|---|
| **Seeking compensation for lost wages is not a collateral purpose**<br><br>The employees were dismissed and subsequently lodged applications for unfair dismissal. Discussions between the representatives were ongoing up until the afternoon prior to the matter being heard, when the applicants discontinued their applications.<br><br>The employer sought costs which were granted on the grounds that the employees were seeking a collateral advantage, being payment of wages for lost wages while they were out of work, and that the application had no reasonable prospect of success. On appeal the Full Bench overturned the costs order. It held that the application was arguable, and that seeking compensation for lost wages is not a collateral purpose as it is a remedy for unfair dismissal. | *Holland v Nude Pty Ltd (t/as Nude Delicafe)* (2012) 224 IR 16. |

| Costs against parties NOT ordered | Case reference |
|---|---|
| **Employee withdrew application after conciliation conference and before arbitration**<br><br>Applications for unfair dismissal were made by an employee and her daughter. The employer claimed that the daughter had never been an employee. After unsuccessful conciliation, the applications were discontinued 18 days before the employer was due to file its materials. The employer sought costs, but this was rejected. The withdrawal of the applications did not necessarily mean that they were vexatious, and there was no basis to conclude that it should have been apparent to the applicants that their applications had no reasonable prospect of success. | *Ross-Davis v JD Pty Ltd T/A Daniel Lightfoot Studios* [2011] FWA 3767 (unreported, Asbury C, 15 June 2011). |
| **Employee failed to attend a Commission hearing and discontinued her application after the scheduled hearing dates**<br><br>The applicant refused offers of settlement, failed to attend the hearing because of alleged illness, failed to supply medical certificates in respect of this illness, and then discontinued her application. The employer sought costs on the basis that the application was filed vexatiously and had no reasonable prospect of success.<br><br>While the Commission noted the negative effect the applicant's actions had on the employer, the actions were characteristic of an ex-employee who lacked appreciation for what is involved in pursuing an application. The application for costs was rejected. | *Dryden v The Bethanie Group Inc* [2013] FWC 224 (unreported, Williams C, 11 January 2013). |
| **Employee appealed a decision refusing an extension of time**<br><br>The employee filed an appeal against an original decision to refuse to extend time to make an application. The appeal was unsuccessful and the employer sought costs. The appeal was properly characterised as contending that no or insufficient regard was had to medical reasons for the delay. The Full Bench was not satisfied that it should have been reasonably apparent to the employee that her appeal had no reasonable prospect of success. Costs were not awarded. | *Baker v Salva Resources Pty Ltd* [2011] FWAFB 4014 (unreported, Watson SDP, Drake SDP, Harrison C, 27 June 2011). |
| **Employer sought costs – employee dismissed before Fair Work Act came into force**<br><br>The employee was found to have been dismissed before the Fair Work Act came into operation, and because of the size of the employer was therefore not protected from unfair dismissal. The employer applied for a costs order against the employee. The Commission dismissed the application on the basis that the employee's case that the dismissal occurred after the Fair Work Act took effect was arguable and not manifestly untenable. The employer appealed that decision and the appeal was refused. | *Expanse Pty Ltd t/as Expanse Search and Selection v Mocsari* (2010) 197 IR 303. |

| Costs against parties NOT ordered | Case reference |
|---|---|
| **Employee applied for costs more than 14 days after the matter had been determined**<br><br>The employee made an application for costs on 29 July 2011 against her employer following a decision issued on 14 July 2011 in which the employee was successful. The application for costs needed to have been lodged by 28 July 2011. The Commission found that it had no discretion to extend the time for lodging an application for costs. The application was dismissed. | *Lindsay v Department of Finance and Deregulation* [2011] FWA 6115 (unreported, Williams C, 9 September 2011). |
| **Union sought costs against employer**<br><br>The employee was represented by his union, which sought a costs order against the employer. It was found that the employer's conduct warranted a costs order. However, there was insufficient evidence that the union had actually charged any costs to the employee. Unless evidence was provided as to an enforceable costs agreement between the employee and the union, the costs application would be dismissed. | *Keogh v P & R Mitchell Contractors (Vic) Pty Ltd* [2011] FWA 5070 (unreported, Gooley C, 17 August 2011). |
| **Employer sought costs against employee [s.375B]**<br><br>The employee was dismissed and subsequently made a general protections dismissal dispute application alleging that the employer had taken 'adverse action' against him because he exercised a 'workplace right'. A conference did not resolve the dispute and the parties agreed to the Commission determining the dispute by consent arbitration. The Commission decided that the employer had established that the reasons for the 'adverse action' were not for a prohibited reason, and the employee's application was dismissed.<br><br>The employer sought orders that the employee pay the employer's costs for the consent arbitration proceedings on the basis that the application was made without reasonable cause and had no reasonable prospect of success. In the alternative, the employer contended that the employee unreasonably continued the application, which caused the respondent to incur costs.<br><br>The Full Bench was not persuaded that the application was made without reasonable cause or that it had no reasonable prospect of success. Regarding the employer's alternative submission that the employee acted unreasonably in failing to discontinue the application, the Full Bench was not persuaded that the continuation of the dispute was unreasonable.<br><br>As the employer was unable to satisfy the Full Bench regarding the requirements in s.611(2)(a) or (b), or s.375B(1)(b) of the Fair Work Act, the discretion to make an order for costs was not enlivened. The costs application was dismissed. | *Keep v Performance Automobiles Pty Ltd* [2015] FWCFB 1956 (unreported, Ross J, Wells DP, Lee C, 24 March 2015). |

## Costs against representatives

See Fair Work Act s.376

The Commission may make an order for costs against a representative for costs incurred by the other party to the matter if satisfied that the representative caused those costs to be incurred because:

- the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success in the matter, or
- of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.

There is no requirement that representatives be granted permission to appear before the Commission can make an order for costs.[408]

### *Encouraging the person to start, continue or respond to the matter etc.*

This requires a positive act on the part of the lawyer or paid agent, not merely an absence of discouragement.[409]

An example of where the Commission may award costs against a representative under the new s.376 is where the representative knows that his or her client's general protections application is dishonest or without foundation but still actively encourages them to proceed with the application to try and extract a remedy such as a financial settlement from the employer.[410]

## Case example

| Costs against representatives NOT ordered | Case reference |
|---|---|
| **Employer claimed that employee's representative failed to analyse the jurisdictional basis of employee's claim**<br>The employer sought indemnity costs from the employee, and from the employee's representative on the basis that he had failed to analyse the jurisdictional basis for the claim. In relation to the representative, it was found that the application was lodged before the representative was engaged, and that the representative did nothing more than represent the interests of his client in a professional manner and in reliance on material provided by the applicant. Costs were refused. | *Andrews v Cooperative Research Centre for Advanced Composite Structures Ltd t/as Advanced Composite Structures* [2011] FWA 2575 (unreported, Blair C, 3 May 2011). |

[408] Explanatory Memorandum, Fair Work Amendment Bill 2012, 37 [179].
[409] *Khammaneechan v Nanakhon Pty Ltd* [2011] FWA 651 (unreported, Bartel DP, 31 January 2011) [22].
[410] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 [241].

| Costs against representatives NOT ordered | Case reference |
|---|---|
| **Cross applications for costs**<br><br>In this matter there were cross applications for costs arising from a jurisdictional decision of the Commission. In the primary decision, the Commission dismissed the jurisdictional objections of the employer, which had sought to have the employee's general protections dismissal dispute application summarily dismissed.<br><br>The employee was seeking costs against the employer's representative on the basis that application to summarily dismiss the application had no reasonable prospects of success and that this outcome should have been reasonably apparent to the employer's representative.<br><br>The employer was seeking costs against the employee's representative on the basis that the general protections dismissal dispute application identified no workplace right/s allegedly contravened and that this was an unreasonable act/s and/or omissions through which the employee's representative had caused the employer to incur unnecessary costs.<br><br>The Commission found that both the employee's and the employer's applications for costs did not satisfy the relevant tests under the Fair Work Act and as a result were dismissed. | *Price v John Holland Group Pty Limited* [2013] FWC 6700 (unreported, Sams DP, 6 September 2013). |

# Appeals

See Fair Work Act ss.375A and 604

The following information is limited to providing general guidance for **appeals against dismissal dispute ARBITRATION decisions**.

For information about lodging an appeal, stay orders, appeals directions and the appeals process please refer to the Appeal Proceedings Practice Note.

## Overview

A person who is aggrieved by a decision made by the Commission (other than a decision of a Full Bench or Expert Panel) may appeal the decision to the Full Bench with the permission of the Commission.[411]

A decision of the Commission includes any decision of the Commission, however described.[412]

However, a 'decision of the Commission' does not include the outcome of a process carried out:

- by mediation or conciliation, or
- by making a recommendation or expressing an opinion.[413]

The mere conduct of a conciliation conference does not constitute the making of a decision which can be subject to an appeal.

A person who is aggrieved by a decision made by the Full Bench or a Judicial Member such as the President may apply to the Federal Court for a judicial review.[414]

A **person who is aggrieved** is generally a person who is affected by a decision or order of the Commission and who does not agree with the decision or order. The term can extend beyond people whose legal interests are affected by the decision in question to people with an interest in the decision beyond that of an ordinary member of the public, such as a union.

[411] Fair Work Act s.604(1); *Tokoda v Westpac Banking Corporation T/A Westpac* [2012] FWAFB 3995 [7].
[412] Fair Work Act s.598(1).
[413] Fair Work Act s.595(2).
[414] *Judiciary Act 1903* (Cth) s.39B(1A)(c).

# Time limit

An appeal must be lodged with the Commission **within 21 days** after the date the decision being appealed was issued.[415] If an appeal is lodged late, an application can be made for an extension to the time limit.[416]

**Related information**

- What is a day?

# Considerations

In each appeal, a Full Bench of the Commission needs to determine two issues:

- whether permission to appeal should be granted, and
- whether there has been an error in the original decision.

## Permission to appeal

The general requirements relating to appeals are altered in the case of appeals against dismissal dispute arbitration decisions.

The Fair Work Act provides that the Commission must grant permission to appeal to the Full Bench if it is satisfied that it is in the public interest to do so.[417] Permission to appeal a dismissal dispute arbitration decision must not be granted unless the Commission considers that it is in the public interest to do so.[418]

If the alleged error in the original decision is an error of fact, then the person making the appeal must persuade the Full Bench that it is a **significant** error of fact.[419]

### *Public interest*

The task of assessing whether the public interest test has been met is a discretionary one involving a broad value judgment.[420]

Some considerations that the Commission may take into account in assessing whether there is a public interest element include:

- where a matter raises issues of importance and general application
- where there is a diversity of existing decisions so that guidance from an appellate court is required
- where the original decision manifests an injustice or the result is counter intuitive, or

[415] Fair Work Commission Rules 2013 r 56(2)(a)–(b).
[416] Fair Work Commission Rules 2013 r 56(2)(c).
[417] Fair Work Act s.604(2).
[418] Fair Work Act s.375A(1).
[419] Fair Work Act s.375A(2).
[420] *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78 [44].

- that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[421]

The public interest test is not satisfied simply by the identification of error or a preference for a different result.[422]

## Grounds for appeal

***Error of law***

An error of law may be a jurisdictional error, which means an error concerning the Commission's power to do something, or it may be a non-jurisdictional error concerning any question of law which arises for decision in a matter.

In cases involving an error of law, the Commission is concerned with the correctness of the conclusion reached in the original decision, not whether that conclusion was reasonably open.[423]

***Significant error of fact***

In unfair dismissal cases, if the error that is alleged is an error of fact, then the appellant must demonstrate that it is a **significant** error of fact.[424]

An error of fact can exist where the Commission makes a decision that is 'contrary to the overwhelming weight of the evidence ...'[425]

In considering whether there has been an error of fact, the Commission will consider whether the conclusion reached was reasonably open on the facts.[426] If the conclusion was reasonably open on the facts, then the Full Bench cannot change or interfere with the original decision.[427]

It is not enough to show that the Full Bench would have arrived at a different conclusion to that of the original decision maker.[428] The Full Bench may only intervene if it can be demonstrated that some error has been made in exercising the powers of the Commission.[429]

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[421] *GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266 [27].
[422] See e.g. *Qantas Airways Limited v Carter* [2012] FWAFB 5776 (unreported, Harrison SDP, Richards SDP, Blair C, 17 July 2012) [58].
[423] *SPC Ardmona Operations Ltd v Esam* (2005) 141 IR 338 [40].
[424] Fair Work Act s.375A(2).
[425] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 155–156.
[426] *SPC Ardmona Operations Ltd v Esam* (2005) 141 IR 338 [40].
[427] *House v The King* (1936) 55 CLR 499.
[428] ibid.
[429] ibid.

## Case examples

| Permission to appeal granted | Case reference |
|---|---|
| **Duty to provide adequate reasons**<br><br>The appellant argued that there were a number of significant errors of fact in the original decision. The Full Bench found that there were no errors warranting review on appeal on the decision-making process on unfair dismissal. However, in failing to give adequate reasons for the decision as to remedy, there was error such that it was in the public interest to grant permission to appeal. The appeal was allowed and the decision as to remedy was quashed and remitted to the first instance decision-maker. | *Dianna Smith T/A Escape Hair Design v Fitzgerald* (2011) 204 IR 305.<br><br>Decision at first instance [2010] FWA 7358. |
| **Misapplication of provisions of the Fair Work Act**<br><br>In deciding the initial application, the Full Bench determined that there had been a failure to properly consider whether there was a valid reason for termination. This misapplication of the statutory test was significant and produced a plainly unjust result. The preservation of public confidence in the administration of justice was a matter of public interest and could be undermined by decisions that were manifestly unjust. The appeal was allowed, the order quashed, and the matter re-heard. | *Aperio Group (Australia) Pty Ltd T/a Aperio Finewrap v Sulemanovski* (2011) 203 IR 18.<br><br>Decision at first instance [2010] FWA 9958 and order PR505584. |
| **Interpretation of provisions of the Fair Work Act**<br><br>These were two appeals against a decision determining whether certain dismissals were the result of genuine redundancies. The Full Bench found that, because these appeals concerned the interpretation of an important section of the Fair Work Act which had not been considered by a Full Bench before, it was in the public interest to grant permission to appeal. However, the Full Bench concluded that the Commission's decision was open on the evidence and other material before it and did not involve any error in interpretation of the section. | *Ulan Coal Mines Limited v Honeysett* (2010) 199 IR 363.<br><br>Decision at first instance [2010] FWA 4817. |

| Permission to appeal NOT granted | Case reference |
|---|---|
| **Significant error of fact established but not in the public interest to grant permission to appeal**<br><br>The employer appealed a decision that there was no valid reason for the employee's dismissal, that the dismissal was unfair and that the employee be reinstated. The Full Bench found that the Commission was in error in failing to find that the employer had a valid reason to dismiss the employee. However, permission to appeal was not granted, because the matter turned on its particular facts, and raised no wider issue of principle or of general importance, and no issue of jurisdiction or law. | *Qantas Airways Limited v Carter* (2012) 223 IR 177.<br><br>Decision at first instance [2011] FWA 8025 and order PR517011. |

# Role of the Court

The Court will conduct a hearing to determine any application made to it in respect of:

- an unresolved dismissal dispute (after the Commission conference when a certificate has been issued)
- a non-dismissal dispute after refusal to have a Commission conference, or
- an application for a dismissal dispute which includes an application for an interim injunction.

## Determination after failed conference (General Protections court application) (Dismissal disputes)

If the general protections dispute is not resolved during the Commission conference, a person has only **14 days** after the day the certificate is issued by the Commission to make a general protections court application in relation to the dispute.

In the Fair Work Division of the Federal Circuit and Family Court this application is made with *Form 2 – Claim under the Fair Work Act 2009 alleging dismissal in contravention of a general protection*.

When the Commission issues the certificate, if the parties agree to the Commission arbitrating the dispute then a general protections court application **cannot** be made in relation to the dispute.

## Determination after no conference (General Protections court application) (Non-dismissal disputes)

With a non-dismissal dispute, if the parties do not agree to the Commission conducting a conference the matter may proceed directly to Court as a general protections court application.

In the Fair Work Division of the Federal Circuit and Family Court this application is made with *Form 4 – Claim under the Fair Work Act 2009 alleging contravention of a general protection*.

### Application for dispute with an interim injunction included (General Protections court application)

If a general protections court application includes an application for an interim injunction, then the dispute does not need to have had a conference with the Commission or a certificate issued.

In the Fair Work Division of the Federal Circuit and Family Court this application is made with *Form 2 - Claim under the Fair Work Act 2009 alleging dismissal in contravention of a general protection*.

# Enforcement of Commission orders

## What is a Commission order?

An order is a compulsory direction given by the Commission in accordance with a decision.

An order made by the Commission is legally binding.[430] However the Commission does not itself have the power to enforce its orders.

Normally an order from the Commission will provide a timeframe within which the order must be complied with. It is advisable to wait until the timeframe has lapsed before seeking enforcement of the order.

**Related information**

- Commission order (dismissal disputes)

## What options are available when orders are not complied with?

It is a criminal offence to not comply with an order of the Commission.[431]

If an employee does not receive the compensation ordered by the Commission or is not reinstated in accordance with the order of the Commission, the employee (or an industrial association acting on the employee's behalf or a Fair Work Inspector) may seek enforcement of the Commission's order through the commencement of civil proceedings in:

- the Fair Work Division of the Federal Circuit and Family Court of Australia, or
- the Fair Work Division of the Federal Court of Australia.[432]

A failure to comply with a Commission order may result in the Court awarding a pecuniary penalty.

An application before the Fair Work Division of the Federal Circuit and Family Court of Australia may be dealt with as a small claim proceeding if the amount sought to be recovered for non-compliance with the Commission's order is $20,000 or less and no application is made for a pecuniary penalty.

Normally an order for compensation or reinstatement from the Commission will provide a timeframe within which the order must be complied with. It is advisable to wait until the timeframe has lapsed before seeking enforcement.

[430] Fair Work Act s.369(3).
[431] Fair Work Act s.675.
[432] Fair Work Act s.539, item 11.

### *What is a small claim procedure?*

See Fair Work Act s.548

A small claim procedure in the Federal Circuit and Family Court of Australia is a way by which a person can seek to recover unpaid monies. The proceedings are generally faster and more informal than other court proceedings and each party can only be represented by a lawyer if permission is given by the court.

The maximum amount you can recover through the small claim procedure is $20,000. If a general protections dismissal dispute order for compensation is more than this, you can still make a claim for enforcement of the order using other court procedures.

A pecuniary penalty order cannot be sought through this small claim procedure.

**Comparison – Small claims procedure**

Coverage: ALL Australian employees
Cost for application: $265 (if the claim is less than $10,000)
$425 (if the claim is between $10,000 and $20,000)
Lodgment Time Limit: 6 years
High Income Threshold: No limit
Maximum amount of compensation possible: $20,000

## Penalties

If an employer has not complied with an order made by the Commission, it is possible for the Court (except in a small claim proceeding) to order the payment of an additional penalty. This kind of penalty is known as a pecuniary penalty and is in addition to any order made by the Commission.

### Case example

| Commission order enforced by Court | Case reference |
|---|---|
| The employee was found to have been unfairly dismissed and the Commission ordered that she be reinstated and awarded compensation of $24,143 in May 2013.<br><br>By June, when the company still hadn't reinstated or compensated her, the employee sought Federal Court orders requiring it to do so, plus pecuniary penalties. The company paid the compensation but still did not reinstate the employee.<br><br>The Court held that the company's managing director had made a 'deliberate decision' not to reinstate the employee or pay her compensation for lost wages until the end of its appeals process, despite both the Commission and the company's employer association making it clear it had to comply with the Commission's orders.<br><br>The company was fined $10,000 and the employee was awarded a further $15,045 in redundancy pay, lost wages, notice and accrued leave entitlements, plus interest. | *Meadley v Sort Worx Pty Ltd* [2013] FCA 1012. |

# Types of order made by the Court

See Fair Work Act ss.545, 546 and 570

The Federal Court or the Federal Circuit and Family Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision (such as section 352, which prohibits an employee being dismissed because of a temporary absence from work due to illness or injury).

Orders the Federal Court or Federal Circuit and Family Court may make include the following:

- an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention
- an order awarding compensation for loss that a person has suffered because of the contravention (which can include interest), or
- an order for reinstatement of a person.

## Pecuniary penalty orders

The Federal Court or the Federal Circuit and Family Court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

The pecuniary penalty for an individual must not be more than the maximum penalty for the relevant contravention set out in section 539 of the Fair Work Act.

In the case of a body corporate, the maximum penalty is five times the maximum for an individual.

A **penalty unit** is used to define the amount payable for pecuniary penalties.

The maximum number of penalty units for contravening section 352 of the Fair Work Act (which prohibits an employee being dismissed because of a temporary absence from work due to illness or injury) is 60 penalty units.

From 1 July 2020 a penalty unit was $313.[433]

- for an individual – 60 penalty units = $18,780
- for a body corporate – 5 x 60 penalty units = $93,900

The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

- the Commonwealth
- a particular organisation (such as a union), or
- a particular person.

## Costs orders by the Court

A party to proceedings (including an appeal) in a court in relation to a matter arising under the Fair Work Act may be ordered by the court to pay costs incurred by another party to the proceedings.

The party may be ordered to pay the costs only if the court is satisfied that:

- the party instituted the proceedings vexatiously or without reasonable cause
- the party's unreasonable act or omission caused the other party to incur the costs, or
- the party unreasonably refused to participate in a matter before the Commission, and the matter arose from the same facts as the proceedings.

[433] *Crimes Act 1914* (Cth) s.4AA and Crimes (Amount of Penalty Unit) Instrument 2023.