

Employsure e-guide

# Fair Work in Australia

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A photograph of a woman with long blonde hair, wearing a white long-sleeved shirt with black polka dots and a red apron, standing behind a counter in a cafe. She is using a black card reader. In front of her, another woman with dark hair is partially visible, holding a card. The background shows a kitchen area with a stainless steel range hood and various items on shelves. A large blue diagonal overlay covers the left side of the image.

Chapter 1

# What is the Fair Work Act?

# What is the Fair Work Act?

The Fair Work Act 2009 (Act) is the primary piece of legislation governing Australia's workplaces. The Act and the associated regulations include entitlements that cover all employees within the Australian workforce.

Business owners and employers are responsible for treating all your employees fairly and issuing them with the correct entitlements as required under the legislation. With this in mind, it is important to be well aware and informed of any requirements and obligations under the Act.

The Fair Work Act (which outlines the National Employment Standards) and regulations, Modern Awards, and Enterprise Agreements provide the minimum entitlements for employees in Australia.

These standards, Awards and agreements are mandatory and individual employment contracts cannot take away the minimum entitlements which are outlined in the NES or any applicable Modern Award.

You can find out more about Modern Awards in Employsure's e-guide on **Wages and Awards.**

# The Fair Work Act:

- provides fair terms and conditions of employment
- sets out rights and responsibilities of employees, employers and organisations in relation to employment
- provides for compliance with an enforcement of the Act
- provides for the administration of the Act by establishing the Fair Work Commission and the Fair Work Ombudsman

# How do I comply with the Fair Work Act?

Similar to a lot of other items of Australian legislation, the Fair Work Act is a complicated and long document which can be difficult to comprehend. Business owners and employers are often confused by the difficult language, however as noncompliance can have significant consequences it's important to stay informed.

There are also frequent changes to the document which means that even if employees are familiar with it, keeping up to date means regularly revising and understanding it. Some of these changes include updates to parental leave, concurrent parental leave, changes to minimum wages and flexible working arrangements, as well as anti-bullying or harassment measures.

There are two bodies which govern the oversight of the Act's practical application in Australian workplaces. They are the Fair Work Commission and the Fair Work Ombudsman. These agencies work in tandem to administer, govern, and facilitate fair work within Australia and ensure that employers and business owners alike adhere to what is included in the legislation.

The Fair Work Act is a **long and complicated document.**

**1  
July**

—  
is an important date as minimum wage rates are often updated for the new financial year.



Chapter 2

# The importance of Fair Work in Australia.

# The importance of Fair Work in Australia.

With most of Australia's population spending the majority of their days at work, it is important that the relationships between employees and employers is fair, productive and equal for all involved. To achieve this, employers and business owners have a responsibility to keep up to date with Fair Work legislation and regulations, and ensure all rules are implemented within their respective organisations.

In many cases, workplace incidents and disputes occur due to employers not knowing their obligations, but equally so, many cases involve a degree of uncertainty or confusion with what the exact requirements are. Even so, it is the responsibility of business owners and employers to be fully up to date with all legislation,

and ensure that their employees both receive the correct entitlements and that they are treated fairly.

The Fair Work Act is strictly enforced within Australian businesses and non-compliance is a serious issue. In addition to facing heavy fines, non-compliant businesses can be severely impacted by negative publicity due to the public nature of Government investigations.

Breaches of the Fair Work Act can result in **large fines and long term reputational damage.**



Chapter 3

# National Employment Standards.

# The National Employment Standards

The Fair Work Act includes a provision of 10 legislated National Employment Standards (NES). Compliance with these standards is mandatory for all Australian businesses, regardless of industry, business size or unique circumstance. The purpose of these standards is to provide protection to all people working in Australia.

The National Employment Standards outline leave entitlements, set maximum working hours and stipulate the regulations surrounding termination and redundancy. We recommend all employers read through these minimum standards and ensure their business is compliant.

## Minimum standards:

- Maximum weekly working hours
- right to request flexible working arrangements
- parental leave
- personal/carer's and compassionate leave
- community service leave
- annual leave
- long service leave
- public holidays
- notice of termination and redundancy pay
- Fair Work information statement



Chapter 4

# Modern Awards and Minimum Wage.

# Modern Awards.

While the National Employment Standards provide a base level of provisions which are applicable to all employees, most employees are also covered by a Modern Award.

These Awards cover variances in both industry and occupation, and provide additional enforceable minimum employment standards.

Modern Awards may also cover terms about industry specific redundancy entitlements – that is, what employees who are being made redundant are entitled to. Download Employsure's eGuide on Wages and Modern Awards to find everything employers need to know about this essential piece of employment relations.

Modern Awards typically contain terms and entitlements relating to minimum wages, penalty rates, types of employment, flexible working arrangements, hours of work, rest breaks, classifications, allowances, leave and leave loading, superannuation, and procedures for consultation, representation, and dispute settlement.

**Many employees are covered by a Modern Award** which determines their wages and conditions.

# National Minimum Wage.

As the name suggests, a minimum wage is the absolute base rate an employee is entitled to be paid for their ordinary hours of work. The minimum wage that an employee is to be paid is determined by the specific industrial instrument which they are employed under; whether it be a Modern Award, Enterprise Agreement or National Minimum Wage order.

Regardless of which industrial instrument the employee is working under, they cannot be paid an amount less than the national minimum rate of pay, even if a different amount is agreed upon by the employee.

The national minimum wage and pay rates under Modern Awards are not

set indefinitely. Both are reviewed by the Fair Work Commission (FWC) every year to determine if an increase is required based on national living standards.

The national minimum wage is reviewed **every financial year.**

## Employer tip.

It is important for employers to remain vigilant in being aware of any changes to their relevant Modern Awards or national minimum wage to ensure that they are not underpaying their employees.



Chapter 5

# The Fair Work Commission and Fair Work Ombudsman.

# The Fair Work Commission.

The Fair Work Commission (FWC) is the independent national workplace relations tribunal which has the power to carry out a range of functions relating to workplace matters. Some of the workplace matters the FWC oversees are: the ten minimum conditions set out in the NES, enterprise bargaining, industrial actions and dispute resolution.

The FWC's core focus is on resolving workplace issues and disputes between employees and employers. Both employers and employees are able to make an application to the FWC, but it is important to know that an application with the FWC indicates the beginning of a legal process.

## What does the FWC handle?

- unfair dismissal and general protection claims
- stop bullying orders
- disputes under Awards or agreements
- making enterprise agreements
- regulating the taking of industrial action

You should also know that there are certain fees associated with **making an application to the FWC.**

# How does the FWC work?

The Fair Work Commission is an independent body which operates in a similar way to a court. The FWC can hear claims and disputes that are related to the workplace and deliver binding decisions, which must be adhered to.

The Fair Work Commission has a number of roles, with its responsibilities spanning a variety of spectrums in Australian workplace relations. Some of its key roles include:

- setting the national minimum wage
- creating and changing Modern Awards
- approving enterprise agreements
- acting as the independent moderator in disputes including unfair dismissal and adverse action
- resolving disputes under awards, agreements, or the National Employment Standards (NES)

The Fair Work Commission also has the power to make orders. For instance, if a dismissal is deemed to be unfair, they can determine a reinstatement of the job, or even financial compensation depending on the particular circumstance.

## Lodging a claim.

An employee must lodge an application form, as well as stipulate their reasoning. They may believe they have been:

- unfairly dismissed
- discriminated against, victimised or unfairly treated under the provisions of the Fair Work Act
- bullied at work and want an order to prevent that from occurring

## Then what?

The Fair Work Commission will assess the application, and send documents to the employer with the request for a response to the claims. This is the beginning of the dispute resolution process with the next steps being dependent on the employer's response and the severity of the claim.

# The Fair Work Ombudsman.

Similar to the Fair Work Commission, the Fair Work Ombudsman (FWO) works to ensure the correct understanding and implementation of the Fair Work Act in Australia.

Unlike the Fair Work Commission's tribunal nature, the FWO works to help employees, employers, contractors and the wider workplace community understand their workplace rights and responsibilities, with the key agenda being to keep workplaces fair through education and mediation. All of the FWO's services are free and they offer information, tools, templates and help for individuals to resolve workplace matters without the need for intervention.

Employers that are unsure of Fair Work obligations can also use the FWO to gain advice where necessary. However, the FWO traditionally assists employees in disagreement with their employer.

Employers and employees can contact the Fair Work Ombudsman for advice on understanding the terms associated with the applicable Modern Award for their industry or role. Alternatively, there is also the opportunity to check and clarify entitlements within an Enterprise Agreement such as pay rates and holidays.

The Fair Work Ombudsman works to help employees and employers **meet their obligations.**

A close-up photograph of a person's hands holding an open book. The person is wearing a light blue, long-sleeved button-down shirt. The book is open, and a bright yellow sticky note is attached to one of the pages. The background is slightly blurred, showing more of the person's shirt and a dark belt. A large, solid blue diagonal shape is overlaid on the left side of the image, serving as a background for the text.

Chapter 6

# Fair Work Information Statement.

# Fair Work Information Statement.

To ensure both employees and employers are aware of their obligations, it is important to follow certain procedures. Prior to, or shortly after, commencing employment employees are to receive a Fair Work Information Statement (FWIS). This is a fact sheet compiled by the Fair Work Ombudsman. It informs employees about their workplace entitlements under core workplace legislation, the Fair Work Act.

The Fair Work Information Statement covers:

- the 10 National Employment Standards
- right to request flexible working arrangements
- Modern Awards
- agreement making under the Fair Work Act
- individual flexibility arrangements
- freedom of association and workplace rights (general protections)
- termination of employment
- right of entry
- the roles of the Fair Work Ombudsman and the Fair Work Commission



Chapter 7

# Resolving workplace disputes.

# Resolving workplace disputes.

The ideal scenario for a workplace issue would be to have it resolved prior to any regulatory bodies becoming involved – this would not only save time but also reduce any discomfort between the parties. However, this is not always possible. If an employee suspects they are not receiving the correct entitlements as per Fair Work legislation, the Ombudsman is available to help resolve the issue through processes like mediation.

While it may seem like a big deal to have the Ombudsman involved in your employees' work relations, their emphasis is on early intervention and resolution by providing advice and support. Which means that seeking the advice of the Ombudsman well in advance of any issues arising is the best way to prevent them occurring in the first place.

In some cases though, employers and employees do not seek the advice of the Ombudsman or a professional workplace specialist and serious instances of non-compliance can occur.

If this happens then the Fair Work Ombudsman may investigate any possible breaches of workplace laws. You should know that Ombudsman inspectors have a high level of power when they are conducting investigations. They are permitted access to inspect workplaces, review and copy documentation and records and even interview any person they believe will be able to assist with determining an outcome.

**Seek advice as early as possible when managing workplace disputes.**

Early intervention can often resolve situations without the involvement of regulatory bodies.

# Inspections.

For the most part, the Ombudsman responds to employee complaints before conducting investigations. For example, if any of your employees have underpayment queries or make complaints about actions and entitlements at the workplace, you will most likely receive a visit from an inspector. But you should also know that they often inspect businesses at random. So, it is important to ensure you know the ins and outs of Fair Work legislation relating to your industry and that you are compliant.

Even though the Ombudsman may receive a lot of complaints, they do not necessarily investigate every single request for assistance. As it is a relatively simple process to put forward a complaint, there needs to be some discretion in deciding which complaints are legitimate and require investigation. The Ombudsman

will only choose to investigate if the request for assistance is fairly significant or is of public interest.

Employers may find their business comes under the scrutiny of the Ombudsman and may even be investigated. When facing an investigation, it is strongly advisable to cooperate with the Ombudsman and the investigation, while also ensuring basic rights and responsibilities are acknowledged and respected.

The Ombudsman responds to **employee complaints and conducts investigations.**

## Employer tip.

The best way to prevent an investigation is to ensure a detailed understanding of employment obligations and have the correct documents, policies and procedures in place to ensure basic entitlements of employees.

Seeking the correct professional advice will ensure employers meet the requirements under the Fair Work Act 2009.



Chapter 8

# Unfair dismissals.

# Unfair dismissal.

Each year the Fair Work Commission lodges over 14,000 claims of unfair dismissal. It is important to note that while many employees may consider their dismissals to be “unfair” the Fair Work Commission defines an unfair dismissal as, “harsh, unjust or unreasonable”.

When presiding over a matter, the Fair Work Commission does not only assess the question of fairness as to why the employee was dismissed, but they also look into how they were dismissed. What this means is that even though an employer may have a legitimate reason to dismiss their employee, if the dismissal itself was not procedurally fair, it may still be deemed to be “harsh, unjust, or unreasonable”.

Source: [FWC Annual Report 2014-15](#)

## Procedural fairness.

When considering procedural fairness, the Fair Work Commission will make its determination based on three key factors:

1. if allegations were put to the employee in adequate detail
2. if the employee was allowed to respond appropriately, and
3. whether or not the employee’s response was taken into account before the termination was executed.

Employers should know that when the Fair Work Commission assesses issues of unfair dismissal, it is expected that employers are able to demonstrate that they have taken all reasonable actions to resolve the issue prior to ending the employment.

In the interest of promoting positive relations between employee and employer, the Fair Work Commission also provides the opportunity for the two parties to have an informal conciliation before the case is listed for hearing. This is so that both sides have the chance at coming to an agreed settlement without the need for a court hearing.

The conciliation is hosted by an independent conciliator who is part of the Fair Work Commission. They do not represent or advocate for either employees or employers, with their role only to assist the two in reaching an agreement.

While the conciliator will be an independent party to the discussions, they do play an active role in ensuring the proceedings occur in the most beneficial fashion for all involved.

The role of the conciliator is to:

- actively help the parties to reach a resolution
- lead discussions and provide guidance
- explore the issues
- challenge views expressed, explore alternatives and comment on possible outcomes

## Employer tip.

If the conciliation process is unsuccessful in resolving the issue, then the case will proceed to a formal conference or hearing (similar to a court hearing) - unless the employee discontinues their application. It is often preferable for both parties that any unfair dismissal issues be resolved prior to a hearing as the process requires extensive preparation and requires representation for both parties.

See our e-guide on Employee Performance and Termination for more information on best practice on managing employee dismissal.

# Navigating workplace relations can be confusing.

Employsure works directly with employers to ensure they stay on top of rapidly changing legislation and provide a fair and safe workplace for their staff.

Whether it be dealing with a difficult employee, facing a tribunal claim or reviewing work health and safety, our clients can rest assured we have them covered.

**Get in touch with us today to find out how we can help your business grow.**

**1300 651 415**

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workplace relations specialists