

Locher Human Resources Fair Work Act Information



Key Issues

- Introduction of modern awards
- New minimum conditions
- Increase in employee rights of action
- Changes to transmission rules

[Link to: Overview of Fair Work Act](#)

Individual Flexibility Agreements

- Override specific provisions in the Modern Award
- Must identify those provisions
- Must leave the employee better off overall
- Genuine agreement must be achieved in writing
- May be terminated by either party (default provision of written notice of not more than 28 days)

[Link to: Individual Flexibility Arrangements \(Best Practice\)](#)

Enterprise Agreements

(collective industrial agreement)

- “No disadvantage test” / better off overall
- Employees have a right to appoint a bargaining agent
- Default Bargaining agents
- Good faith Bargaining
 - *Attending and participating in meetings at reasonable times.*
 - *Disclosing relevant information in a timely manner, subject to protection for confidential information.*
 - *Responding to proposals made by a party in a timely fashion.*
 - *Giving genuine consideration to the needs of the other parties, and providing reasons for their responses.*
 - *Refraining from capricious or unfair conduct or conduct that undermines freedom of association or collective bargaining*

[Link to: Enterprise Agreements](#)

Guarantee of annual earnings

(for high income employees who would otherwise be covered under Award)

- High income employees only
- Must notify employee in writing of consequences
- Must guarantee earnings over threshold for > 1 year
- Earnings
 - include wages and agreed value of non-cash benefits
 - do not include payments which cannot be determined in advance, reimbursements, or statutory superannuation
- Employee must accept the guarantee
- Undertaking must be in writing

[Link to: Guarantee of Annual Earnings - Template](#)

Relevant Protection

- An employer must not exert undue influence or pressure on an employee in relation to a decision by the employee to:
 - make/not make agreements in relation to modern awards or enterprise agreements
 - agree to or terminate an individual flexibility arrangement
 - accept a guarantee of annual earnings

Link to: [General protection information](#)



Interaction with Unions

- Industrial Disputes – protected action
- Freedom of Association / Adverse Action
- Rights of entry
 - Suspected Breaches
 - By permit to investigate suspected breaches of the *Fair Work Act 2009*, meet with and interview employees, inspect records, and exercise rights under OH&S laws.
 - Members which the Union can represent and who perform work on the premises
 - Non-members where order is obtained from FWA
 - Entry to Hold discussions
 - Non-member which Union can represent
 - Who wish to participate in discussions
 - Notice between 24 hours to 14 days

Link to: [Right of entry diagram](#)

National Employment Standards

Maximum weekly hours

Enhanced parental leave

Flexible work for parents

Personal / Carer's Leave

Compassionate Leave

Annual Leave

Long Service Leave

Community Service Leave

Public Holidays

Information in the workplace

Notice of termination

Redundancy pay

[Link to: National Employment Standards Overview](#)

Maximum weekly hours

- Work in a week must not exceed 38 hours (incl. authorised leave)
- Employee may be required to work reasonable additional hours
- Employee may refuse to work unreasonable additional hours
- Relevant factors: health & safety, personal circumstances, business needs, overtime / penalty rates, prior notice

[Link to: Maximum weekly hours information](#)

Requests for flexible working hours

- Parent / Responsible carer of a child under school age
- For the purpose of taking care of child
- Must be in writing
- Employer may refuse on reasonable business grounds
- Employer must give reasons in writing within 21 days
- Only for employees with at least 12 months continuous service

[Link to: Requests for flexible working hours information](#)

Parental Leave

- Employee Couples (who work in same business) may separately take up to 12 months to take care of child
- Employee Couples have ability to take 3 weeks concurrently
- Individual Employee may request additional 12 months (less any unpaid leave taken by partner)
- Request can be made up to 4 weeks before end of leave
- Employer may refuse on reasonable business grounds – but must provide reasons
- Right to return to the same position, or if it does not exist, an available position for which the employee is qualified and suited nearest in status and pay to the pre-leave position

[Link to: Parental leave information](#)

Annual Leave

- 4 weeks
- Taken when agreed
- Employer cannot unreasonably refuse a request to take leave
- Employer may require employee to take leave, but only if the request is reasonable
- Accrues progressively
- Annual leave pay calculated on base pay only (modern awards)
- May agree to method of taking leave (e.g. employee may request 8 weeks per year at $\frac{1}{2}$ pay)
- Cashing out may be permitted – provided that a 4 week accrual remains

[Link to: Annual Leave information](#)

Long service leave

- No new standard established
- Existing entitlements preserved

[Link to: Long service leave information](#)



Personal / Carer's leave

- 10 days per year on base pay
- Accumulates progressively
- No limit on carer's leave
- Additional 2 days unpaid carer's leave for each permissible occasion
- Rights to casuals to unpaid carer's leave
- Must provide evidence which would satisfy reasonable person

[Link to: Personal/Carer's Leave Information](#)

Compassionate leave *(No limit)*

2 days paid leave per **occasion**

- Two (2) days paid compassionate leave for each permissible occasion when a member of the employee's immediate family or household sustains a serious illness, serious injury or dies. Casual employees have access to two (2) days unpaid compassionate leave in these circumstances.



Community Service Leave

- Unpaid leave - no limit
- Jury service – up to 10 days paid leave (less jury service payments)
- Jury service, voluntary emergency activity, or activity specified in regulations
- Examples – firefighting, disaster relief, civil defense and emergency rescue

[Link to: Community Service Leave information](#)

Public Holidays

- Employer may request an employee to work on a public holiday
- Employee may refuse the request if the request is not reasonable or the refusal is reasonable.

[Link to: Public holidays information](#)



Fair Work Information Statements

- Must give them to employees shortly after commencement
- Matters such as:
 - Rights of representation
 - The Standards
 - Modern Awards
 - Freedom of association



Link to: [Fair Work Information Statements](#)

Unfair Dismissal

- No new unfair contract rights
- Some changes to unfair dismissal laws

[Link to: Small Business Fair Dismissal Code](#)

[Link to: Unfair dismissal information](#)



Who has access?

“*Minimum employment period*” must be completed

And either

- Annual rate of earnings is under the cap
[\$100,000 indexed from 27 August 2007]

Or:

- Covered by a modern award or enterprise agreement



Minimum employment period

- 6 months' continuous service
- 12 months if Small Business Employer (15 employees or less)
- Continuous service is defined – section 22
 - Transfer within three months to an associated entity
 - Transfer of business (unless second employer gives written notice before commencement)
- Casuals – service not counted unless:
 - employed on a regular and systematic basis; and
 - reasonable expectation of continuing employment on a regular and systematic basis.

Four Conditions for Unfair Dismissal

- Person must be “dismissed” ; AND
- Dismissal must be “harsh, unjust or unreasonable; AND
- Dismissal must be inconsistent with the Small Business Fair Dismissal Code [only SBE can comply with this]; AND
- Dismissal must not be a case of genuine redundancy.

A Dismissal does not include:

- “Expiry” of a contract which is for a specific period, task, limited duration of a season
- “Expiry” of a training arrangement which is of a limited duration
- A demotion where:
 - the employee remains employed; and
 - not a significant reduction in pay /duties

A Dismissal includes:

- Termination at the employer's initiative
- Employee is forced to resign because of the employer's conduct



Harshness Criteria

“(d) any unreasonable refusal by the employer to allow the person to have a support person to assist at any discussions relating to dismissal”

Remedies / Process

- Lodgment within 14 days from dismissal (FWA can waive)
- Flexible process – inquisitorial style
- Remedies are the same.
- Limited costs orders
- Lawyers must obtain leave
- Costs orders against lawyers (e.g. no R prospects of success)
- Limited appeal rights – only if:
 - in public interest and Full Bench of FWA gives permission;
 - error of law;
 - “significant” error of fact

Unlawful Dismissal

- Remains largely the same
- e.g An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed in the regulations.

Genuine Redundancy

- The person's employer no longer requires the person's job to be performed by anyone because of changes in the operation requirements of the employer's enterprise.
- The employer has complied with any consultancy obligations in an applicable modern award or enterprise agreement.
- It is not a genuine redundancy if:
 - it was reasonable in all the circumstances for the person to be redeployed within the employer's enterprise or the enterprise of an associate entity.

Link to: [Genuine redundancy guidelines](#)

Redundancy Exceptions incl.

- Seasonal workers, temporary employees, casuals etc
- Employer may apply to FWA to reduce redundancy payments where:
 - Employer obtains other acceptable employment for the employee
 - Employee cannot pay redundancy payments
- No right on “transfer of employment” unless:
 - The transfer is to a non-associated entity and that entity does not recognise continuity of service
 - The employee rejects the offer of employment may by another employer that is on terms and conditions substantially similar to, and considered on an overall basis, no less favorable than, the employee’s terms and conditions of employment with the first employer and the second employer recognises continuity of service

Redundancy Payments

Less than one year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

Adverse Action

- (s340) A person must not take ADVERSE ACTION against another person in relation to Workplace Rights.

Workplace rights include:

- A right to a benefit
- A right to commence / participate in proceedings or process
- A right to make a complaint or an inquiry
- A role or responsibility

Where that right / role arises under a law regulating employment relationships.

IN RELATION TO AN EMPLOYEE – AN ABILITY TO MAKE A COMPLAINT OR INQUIRY IN RELATION TO HIS/HER EMPLOYMENT

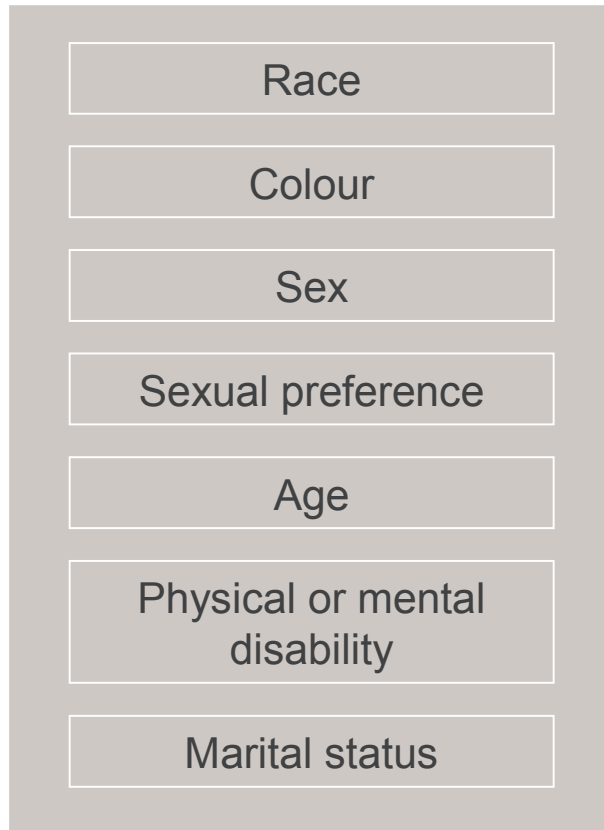
[Link to: Information re General Protections](#)

Examples:

- You select an employee for redundancy because that employee has refused to cash out paid leave entitlements.
- You reduce the services which you obtain from an independent contractor after that contractor makes a complaint that he should be classified as an employee
- You refuse to rehire an ex-employee because he/she previously made a work-related claim against your company.

Adverse Action – Discrimination (s351)

An employer must not take adverse action against an employee/prospective employee because of:



Misrepresentation (s345)

- A person must not knowingly or recklessly make a false or misleading representation about:
 - a) the Workplace Rights of another person;
 - b) the exercise or effect of exercise of those rights
- Does not apply if person to whom it was made would not be expected to rely on it.

Sham Arrangements

- Must not:
 - Represent to a prospective recruit that a contract of employment is a contract for services (s357) [defence – did not know and not reckless]
 - Dismiss/threaten to dismiss an employee in order to engage him as independent contractor for substantially the same work (s358)
 - Knowingly make a false statement to influence the above (s359)

What is a Transfer of Business?

- An employee transfer from an "old employer" to a "new employer" within a period of three months
- The work is substantially the same;
- One of the following exists:
 - an arrangement between the employers (or associated entities) to transfer assets that relate to the work;
 - the work is being outsourced;
 - the work was previously outsourced, and is now being insourced; or
 - the new and old employers are associated entities.

[Link to: Transfer of Business information](#)

What Transmits?

- Named Employer Awards
- Enterprise Agreements
- Workplace Determinations
- Guaranteed periods of income for high income employees



Impact of Transmitted Instruments

- No 12 month limit
- May apply to new non-transferring employees doing the same type of work who cannot be covered by another applicable instrument
- Employers can take "adverse action"
- May approach the FWA for orders

Any Questions?

Please contact Carly Austin at Locher Human Resources for further information on (08) 8201 1131 or via email on carlya@locher.com.au