



Ashurst

Navigating Employment and Labour Relations in Australia

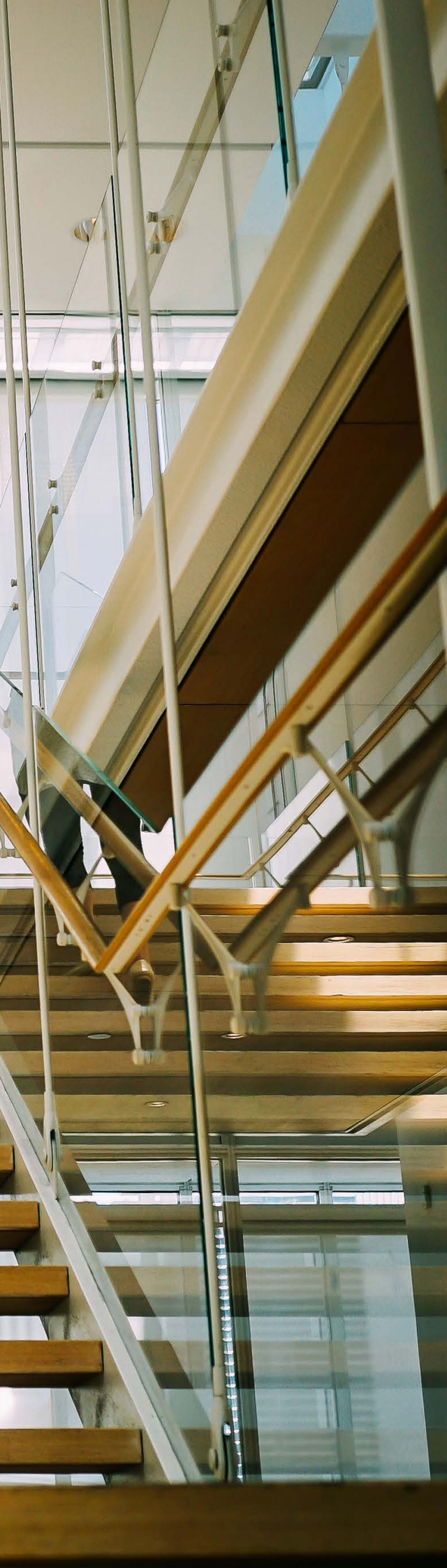
A guide for employers

2025

Outpacing change

A woman with dark hair, wearing an orange long-sleeved top and a grey skirt, is walking up a wide, modern wooden staircase. She is carrying a black shoulder bag and has her right hand on the glass railing. The staircase is made of light-colored wood and is set within a bright, modern building with large glass windows and white walls. The lighting is warm and comes from above, creating a sense of upward movement and progress.

The centrepiece of the
Australian industrial relations
legislative framework is the
Fair Work Act 2009.



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Types of employment

Employees who work in Australia can be engaged on a full-time or part-time basis (either permanently or for a fixed term), or as casual employees. Part-time employees are usually paid on a pro rata basis and will ordinarily have the same entitlements, on a pro rata basis, as full-time employees under a contract or an applicable modern award or enterprise agreement. Full-time employment is generally determined by the hours worked by the employee each week, which is usually 38 hours plus reasonable additional hours.

A fixed term contract cannot be for a period that exceeds two years or provide for an option to extend the contract for a period that exceeds two years, or to extend the contract more than once. There are several exceptions to this limitation.

Casual employees do not have the same entitlements as full-time or part-time employees. Casual employees do not have a firm advance commitment to continuing and indefinite work and are paid a percentage loading on their hourly wage (or a specific rate of pay) in lieu of entitlements such as annual and personal/carer's leave.

Individual employment relationships

Employment is contractual at its base. This applies to an employee working under a collective industrial agreement as much as for staff or senior managers. All employees – whether truck drivers or marketing managers – have contracts of employment.

The terms of a contract of employment can be found in a variety of sources. There is no special form required. While a contract of employment may be set out in an elaborate document expressed to be a contract, it is common for employment contracts not to be recorded this way.

Other sources of contractual terms are likely to include:

- a letter of appointment;
- memos to and from employees about matters such as wage rates;
- oral communications, especially at the time of recruitment or at the time of a promotion;
- a course of dealings; and
- a certain and well known industry usage.

There are some contractual provisions, also, which the courts say are present by implication in a contract of employment. For example, there is a duty of good faith and fidelity which binds an employee whether or not it is expressly written down. In the case of an indefinitely continuing employment contract which does not provide for termination, the courts may imply a term to the effect that it may be terminated by either side upon reasonable notice.

The Fair Work Act prohibits pay secrecy provisions in employment contracts entered into, or changed, on or after 7 December 2022. This means that contractual provisions cannot prevent an employee from enquiring about another employee's remuneration or from disclosing their own. There is no obligation on any employee (or employer) to answer these queries.

Collective employment relationships

Collective enterprise agreements and industrial awards operate in conjunction with individual contracts of employment between an employer and an employee. Typically, they provide a base which must not be undercut. They will override a contract of employment where there is inconsistency, but usually not if it is possible to comply both with the contract, on the one hand, and the award or enterprise agreement, on the other.

For example, if an applicable award provides a wage rate of \$1,000 per week, a contract of employment which provides for only \$900 per week will not relieve the employer of the obligation to pay what the award prescribes; but if the contract provides for \$1,100 per week, the employer will be required to comply both with the award and the contract of employment and pay the full contractual rate of \$1,100 per week.

Independent contractors and sham contracting

In Australia, a person may also be engaged as an independent contractor, rather than as an employee. There can be benefits to both parties in this. The relationship between an employer and an employee is often referred to as a contract of service, whereas a contractor is hired under a contract for services. Generally, when determining whether a person is engaged as an independent contractor or an employee, a multi-factor test is used assessing factors such as the degree of control over the worker, who determines the hours worked, who provides equipment/assets, method of payment and exclusivity of relationship.

The distinctions can be difficult to draw and seeking legal advice will often be appropriate. Employers must avoid engaging in “sham contracting”. Under the Fair Work Act, an employer must not misrepresent to a person, who is in truth an employee, that he or she is an independent contractor. An employee must not be dismissed only to be re-engaged as an independent contractor who performs substantially the same work. Contraventions of these provisions can attract large penalties. Additionally, there can be adverse tax consequences, including penalties, if an error is made in wrongly treating an employee as an independent contractor.

The Fair Work Commission can regulate work for contractors in the road transport industry and those performing work on digital platforms in the gig economy. The Fair Work Commission can set minimum standards for these contractors, and deal with disputes about unfair termination/unfair deactivations, in particular circumstances. Independent contractors earning less than the contractor high income threshold (\$183,100 as at 1 July 2025) can apply to the Fair Work Commission if they think the terms of their services contract relating to “workplace relations matters” are unfair. The contract must have been entered on or after 26 August 2024.

National Employment Standards

There is a set of statutory national employment standards applicable to all employees at all levels. These are:

- maximum weekly working hours of 38 plus reasonable additional hours;

- a right to request, and have considered, flexible working arrangements;
- a right for casual employees to request to change to permanent employment if their employment does not meet the definition of casual employment – after 6 months of employment (or 12 months of employment with a small business);
- unpaid parental leave – maternity, paternity, birth-related leave (including in relation to premature birth, stillbirth or infant death) and adoption. There is also a right to request an extension of unpaid parental leave;
- annual leave;
- personal leave (including sick leave), carer’s leave, family and domestic violence leave and compassionate leave (including for a miscarriage or stillborn birth);
- long service leave (more commonly dealt with under state legislation);
- public holidays;
- community service leave;
- notice of termination of employment;
- redundancy pay;
- provision of a “Fair Work Information Statement”, and a “Casual Employment Information Statement” to casual employees; and
- superannuation payments to be made to employees’ superannuation funds.

Right to disconnect

Employees also have a right to refuse to monitor, read or respond to contact or attempted contact from their employer (or from a third party) outside of working hours, unless that refusal is unreasonable.

Employees can raise disputes about their right to disconnect, including with the Fair Work Commission.

Modern Awards

So-called *modern awards*, operating in respect of broadly defined industry or occupational groups, interact with and add to the national employment standards for most employees other than executive or managerial employment categories. Modern awards deal with matters such as minimum wages, employment categories (full time, part time, casual, etc), hours of work and overtime, shift work arrangements and penalties, various allowances and leave matters.

There is a facility for employers and “high income employees” earning over \$183,100 (as at 1 July 2025, a figure indexed on 1 July each year) to agree to opt out of application of a modern award which would otherwise apply.

A minority of enterprises are governed instead by historical enterprise-specific awards. These awards have their origin in earlier legislative regimes but, where applicable, continue to operate on a similar minimum or safety net basis and displace otherwise applicable modern awards.

Enterprise agreements

Although there is a facility for multi-enterprise agreements, collective enterprise agreements usually relate to a single business, project or undertaking, or a discrete part of a single business, project or undertaking. There is also a capacity for a greenfields agreement in circumstances where a new enterprise is being established.

Enterprise agreements may cover the following matters:

- matters pertaining to the employment relationship;
- matters pertaining to the relationship between the employer and relevant unions;
- deductions from wages for any purpose authorised by an employee; and
- how the agreement will operate – ie. machinery matters.

There is a maximum nominal term of four years for all enterprise agreements.

Enterprise agreements operate to the exclusion of awards but in conjunction with the national employment standards. Both must be complied with.

An enterprise agreement other than a greenfields agreement must have the prior approval of a valid majority of employees employed in the enterprise who will be covered by the agreement.

Enterprise agreements are required to pass a better-off overall test, administered by a government tribunal known as the Fair Work Commission.

In short, the proposed agreement is assessed against the modern award provisions which, but for the agreement, would apply, to see if they are, in a global way, met and exceeded. Once an enterprise agreement is approved and while it operates, the modern award against which the agreement was measured ceases to apply for the time being.

Representative role of trade unions

One of the central themes of the Fair Work Act concerns the role of trade unions as representatives of employees. For example:

- The legislation puts a priority on collective enterprise bargaining in which unions have an entrenched and privileged role.
- A union with membership within a workplace is assumed to be a bargaining representative responsible for each member in an enterprise bargaining environment unless something is done by the member in question to alter that outcome.
- Union workplace delegates (employees elected or appointed to be a delegate or representative of union members in the workplace) have particular rights and are entitled to particular workplace facilities.
- Unions have an entrenched workplace rights enforcement role, with statutory rights of access to courts and tribunals independent of the employees represented.
- A particularly significant right of a union is the statutory right of entry to a workplace.

Union right of entry

A union is entitled to enter premises in each of these situations:

- Where it is suspected that a breach has occurred or is occurring under the Fair Work Act or an operative award or enterprise agreement. For the purpose of investigating the suspected breach, the union official may enter, during working hours, any premises where employees work who are members of the relevant organisation. There are then powers, for example, to inspect and copy timesheets, inspect work and interview relevant employees.
- During employee meal breaks and other such periods, for the purpose of holding discussions with employees who are members or eligible to be members of the union and who wish to participate in the discussions. This applies whether or not the work being carried out is governed by an enterprise agreement which binds the union in question and whether or not the union has members in the workplace. The governing criterion is whether the union has the capacity, under its rules, to enrol as a member and represent the industrial interests of at least one person employed in the workplace.
- Under state or territory work health and safety laws in connection with workplace health and safety issues provided it is done in conformity with the rules and procedures established in the Fair Work Act.

It is generally the case that:

- The person seeking to exercise the right of entry must hold an entry permit and produce their permit when requested; and
- If the purpose is to hold discussions with employees, the person seeking to exercise the right of entry must have given the occupier of the premises at least 24 hours' (and not more than 14 days') written notice of the intention to do so.

However:

- A union official assisting a health and safety representative under a state or territory work health and safety law does not need a Fair Work Act right of entry permit; and

- A union can apply to the Fair Work Commission for an exemption certificate to enter premises without notice to investigate suspected contraventions in particular circumstances (including relating to suspected underpayments).

If a union official abuses his or her entitlements, or fails a fit and proper person test, a permit can be revoked.

Staff relationships

Many employees do not relate to their employers through formal enterprise or similar agreements. These employees, often referred to colloquially as staff, simply operate in an environment created by contracts of employment, legislation and company policy.

There is no impediment to this style of employment relationship stemming from the Fair Work Act. It is routinely pursued in the case of managerial, administrative and clerical staff, sales personnel and supervisors. It can be pursued in the case of employees who belong to unions and could otherwise be covered by collective enterprise agreements, provided the employees are willing to accept and work under by such arrangements.

There are some advantages and disadvantages in following this course. Advantages of a staff employment approach include that it does not introduce a periodic collective bargaining cycle, and it can help foster direct relations between an employer and its employees taking into account business imperatives and values relevant to the employment. A principal disadvantage of a staff employment approach is that it affords much less protection for an employer against industrial action if a group of employees becomes disaffected or if a union manages to impose itself.

Of the 12.1 million employees in August 2024, 13.1% were a member of a trade union in their main job. This is an increase from the 12.5% recorded in August 2022.

Australian Bureau of Statistics, Characteristics of Employment, Australia, August 2024

Transfer of business

An employer will generally be bound by an enterprise agreement in respect of a transferring employee binding on a predecessor employer if:

- the employment of the employee with the predecessor employer has terminated (no matter how);
- within three months, the employee has become an employee of the new employer;
- the work (the transferring work) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer; and
- one of four relevant connection requirements is satisfied.

The four possible connections, any of which will suffice, are:

- the new employer (or an associated entity) has the beneficial use of assets used by the old employer, or an associated entity, and which relate to or are used in connection with the transferring work;
- the new employer is an outsourced provider for the old employer (or an associated entity);
- there having been such an outsourcing, the work is now being “insourced”; or
- the new employer and the old employer are associated legal entities.

There are also detailed provisions dealing with the circumstances in which a new employer must recognise employment service and credits earned during employment by a predecessor employer.

Protected industrial action

The Fair Work Act contemplates that taking industrial action will be permitted and “protected” in particular situations, and that it should be unavailable in all other situations.

Industrial action will be protected where it is engaged in by employees (through strikes or bans) or by an employer (through a responsive lockout) in a formal enterprise bargaining context in the lead-up to the making of an enterprise agreement.

Industrial action may be taken where:

- there has been a genuine attempt made to negotiate;
- in the case of employee action, a secret ballot order has been obtained from the Fair Work Commission and the industrial action has been agreed upon by relevant employees in a secret ballot;
- there is no in-term enterprise agreement in operation;
- the industrial action is only in pursuit of claims which could be included in an enterprise agreement;
- the industrial action is not in support of pattern bargaining claims; and
- certain other stipulations are met, such as giving three days’ prior notice (unless the period has been extended by the Fair Work Commission, or except if the employer is taking lockout action).

Where industrial action is taken, those involved are protected from any legal action as a consequence.

The Fair Work Commission has power in various circumstances to intervene by terminating or suspending the industrial action. It has power in limited circumstances to resolve the issues in dispute by compulsory arbitration.

Dealing with unlawful industrial action

The various types of unprotected industrial action to which an employer might be subject include:

- action by employees about concerns connected with their employment; and
- action by employees about concerns relating to other employees – e.g. secondary boycotts or sympathy strikes.

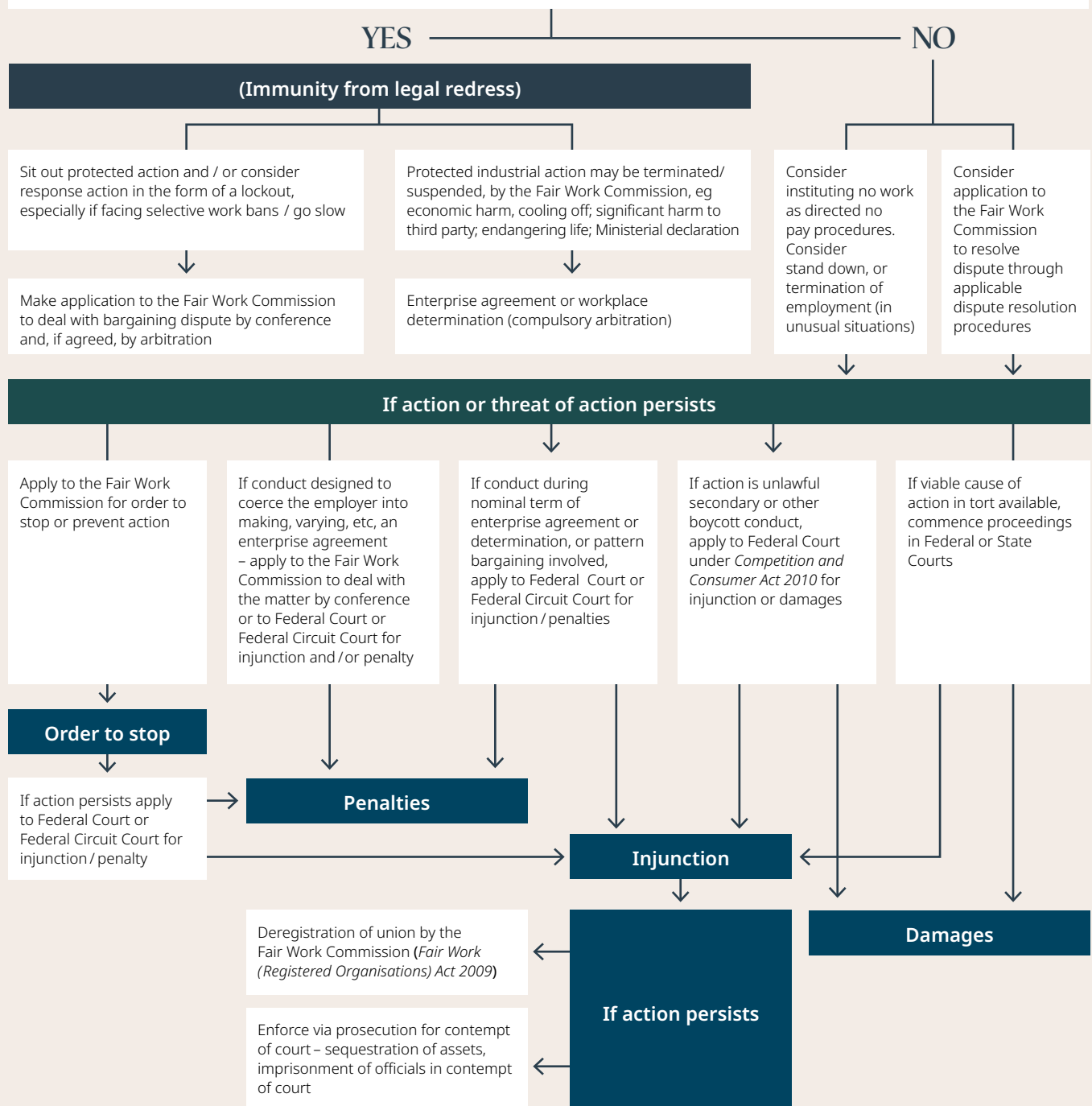
The options available to deal with such industrial action will depend on its type and all of the circumstances. They can include remedies available under the Fair Work Act, actions under the Federal *Competition and Consumer Act 2010*, common law actions and unilateral action such as “no work no pay” and dismissals. They might also include simply sitting out the industrial action.

Fair Work Act and industrial action flow-chart

Is the industrial action protected?

Requirements for protected action include:

- The action must be for the purpose of supporting / advancing claims in relation to a proposed enterprise agreement that is not a greenfields agreement or a cooperative workplace agreement
- The action must be about permitted matters only
- The action must be against a national system employer covered by the proposed enterprise agreement
- The action must be authorised by a protected action ballot
- The action must be organised or engaged in by a bargaining representative of an employee who will be covered by the proposed agreement, or an employee who is covered by the protected action ballot order for the action
- The action must not be in support of unlawful terms in the proposed agreement
- The action must not be in support of pattern bargaining
- The action must not relate to demarcation disputes
- The bargaining representatives of the employees taking the action must be genuinely trying to reach agreement
- The action must not occur before the nominal expiry date
- The party taking action must have given written notice of at least three working days in advance, or 120 hours in advance for a proposed multi-enterprise agreement (or such longer period as specified in the protected action ballot order) after the protected action ballot was declared; and
- Each bargaining representative must attend a conference ordered by the Fair Work Commission, for the purposes of mediation or conciliation in relation to the agreement.



Is the industrial action protected?

A critical issue is whether or not the industrial action is protected action.

If the action is protected, an employer will have only limited access to third party intervention but could respond with industrial action of its own by locking employees out of the workplace.

If the industrial action is not protected, other options potentially arise. These options are not mutually exclusive. Some main options, other than sitting out the industrial action, are:

- to apply to the Fair Work Commission for an order to stop or prevent the action;
- to invoke “no work no pay” procedures of employees engaging in selective work bans and stand downs of other staff rendered idle;
- if the industrial action involves matters dealt with in a current enterprise agreement (or in a workplace determination made following compulsory termination of protracted protected action), or if it involves unlawful coercion or pattern bargaining claims, to apply to the Federal Court or Federal Circuit Court for an injunction to prevent the unlawful industrial action and/or for the imposition of penalties;
- if the industrial action involves secondary or other unlawful boycott conduct, to apply to the Federal Court for an injunction and/or damages; or
- if the industrial action is tortious, to commence an action for an injunction or damages in the ordinary courts.

Limits on certain senior management employment termination benefits

Section 200B of the *Corporations Act 2001* prohibits a company from giving a person a benefit (even if required to do so by contract) in connection with retirement from office or position of employment in a company (or related entity) if the office or position is a managerial or executive office (or the person in question has held such a managerial or executive office in the last three years) in the company or a related entity.

The prohibition operates unless:

- one of a number of limited exemptions applies; or
- the benefit is given with shareholder approval under section 200E of the Corporations Act.

For a company required under section 300A of the Corporations Act to include details of key management personnel in a remuneration report, a person holds a managerial or executive office in the company during the year if those details were included in the previous year's report.

For other companies, and also for a company required to lodge a report under section 300A of the Corporations Act, a managerial or executive office is or extends to:

- an office of director; and
- any other office or position in connection with the management of the company's affairs which is held by a person who also holds an office of director in the company or a related body corporate.

The essential scheme is to limit termination benefits (broadly defined) to not more than the amount of salary (narrowly defined) received in the previous 12 months unless shareholder approval has been obtained for payment of the termination benefits.

These provisions are complex and difficult. It is very important to obtain competent legal advice prior to making employment termination payments which might be affected by the Corporations Act limits.

Unfair dismissal

The Fair Work Act provides remedies, subject to various exceptions, for an employee who has been unfairly dismissed from employment. These remedies are applicable to an employee earning not more than \$183,100 per annum for the financial year ending 30 June 2026 (a figure indexed on 1 July each year) and any other employee employed under the terms of an award or enterprise agreement.

Two critical exceptions (among others) to the right to claim a remedy in the Fair Work Commission about a potentially unfair dismissal are:

- if the employee has not served a qualifying period of at least six months in the employment (twelve months in a small business), and
- if the dismissal is due to a genuine redundancy, and redeployment within the employer (or an associated employer) is not reasonably available.

Other protections

General protections

General protections:

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

An employer must not take any “adverse action” against an employee because the employee has a workplace right, has exercised a workplace right or proposes to exercise that workplace right, or has another attribute protected by the general protections provisions in the Fair Work Act.

Adverse actions that can be taken against an employee or potential employee might include:

- dismissal;
- not giving the employee his or her legal entitlements;
- changing the employee’s job to his or her disadvantage;
- treating the employee differently than others;
- not hiring the person; or
- offering an employee or prospective employee different (and unfair) terms and conditions, compared to other employees.

Workplace rights include:

- receiving a benefit or having a role or responsibility under a workplace law (such as the Fair Work Act), a workplace

instrument (such as a modern award or enterprise agreement), or an order made by an industrial body (such as an order made by the Fair Work Commission);

- commencing or participating in a process or proceeding under a workplace law or instrument (such as taking court action); and
- being able to make a complaint or inquiry about employment.

Other protected attributes include:

- temporary absence from work because of illness or injury;
- the employee engaging in or proposing to engage in “industrial activity” such as belonging to or participating in a union or participating in lawful industrial action;
- race, colour, sex, sexual preference, age, physical or mental disability, marital status; and
- family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The relevant court may dismiss the application if satisfied the employer did not take the adverse action for a prohibited reason. Alternatively, if the case is made out, it may reinstate the employee into the former employment (if the employment was terminated) or award compensation.

Other claims:

There are also remedies made available by a variety of other legislative sources according to circumstances. For example, if the situation involves an allegation of unlawful discrimination there will be a potential for actions under state or federal discrimination laws.

The contractual obligations owed by an employer to an employee must not be overlooked. There will often be a potential for an action for damages for breach of contract in a contested employment termination situation. Such an action may be run independently of the statutory unfair dismissal claim or, in some situations, in tandem with the statutory claim in consolidated proceedings brought in the Federal Court.

Bullying

An employee who reasonably believes that he or she has been bullied at work can apply to the Fair Work Commission for an order to stop the bullying.

Bullying is said to occur when:

- a person or a group of people repeatedly behaves unreasonably towards an employee or a group of employees at work; and
- the behaviour creates a risk to health and safety.

Bullying behaviour may involve, for example, any of the following types of behaviour:

- aggressive or intimidating conduct;
- belittling or humiliating comments;
- spreading malicious rumours;
- teasing, practical jokes or “initiation ceremonies”;
- exclusion from work-related events;
- unreasonable work expectations, including too much or too little work, or work below or beyond a worker’s skill level;
- displaying offensive material; and/or
- pressure to behave in an inappropriate manner.

Where reasonable management action is carried out in a reasonable manner, this will not constitute bullying. Reasonable management action may include:

- performance management processes;
- disciplinary action for misconduct;
- informing an employee about unsatisfactory work performance or inappropriate work behaviour;
- asking an employee to perform reasonable duties in keeping with their job; and
- maintaining reasonable workplace goals and standards.

An employee can also apply to the Fair Work Commission for an order to stop sexual harassment, including after a single instance of sexual harassment.

The Fair Work Commission must start to deal with an application within 14 days. Apart from dismissing the application, it has powers to make such order as it considers appropriate (other than an order requiring payment of money) to prevent the employee from being bullied or sexually harassed at work by an individual or group.

Discrimination

The legislative framework for discrimination in Australia is quite complicated. While Commonwealth legislation applies throughout Australia, States and Territories also have laws relating to discrimination. Employees are usually able to choose whether to bring a complaint under Commonwealth or state or territory legislation.

At the Federal level, there are four main statutes dealing with discrimination. Each deals with a particular characteristic or set of characteristics:

- *Racial Discrimination Act 1975* – prohibits discrimination on the basis of race, colour, descent, national or ethnic origin. An exception is made for the purpose of securing adequate advancement of certain racial or ethnic groups or individuals in order to give them equal rights and freedoms with other groups;
- *Sex Discrimination Act 1984* – prohibits discrimination on the basis of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding and family responsibilities;
- *Disability Discrimination Act 1992* – prohibits discrimination on the basis of physical or intellectual disability or illness, and includes a genetic predisposition to a disability or illness; and
- *Age Discrimination Act 2004* – prohibits discrimination on the basis of age.

The Fair Work Act also allows an employee to bring an application about alleged discrimination because of an attribute including race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Sexual Harassment

Under the Sex Discrimination Act, employers have a positive duty to take reasonable and proportionate measures to eliminate, so far as possible, workplace sexual harassment, sex-based harassment, work environments that are hostile on the ground of sex, sex discrimination and victimisation.

The Fair Work Act also prohibits sexual harassment in connection with work. Sexual harassment, sex-based harassment and workplaces that are hostile on the ground of sex are expressly prohibited under Commonwealth legislation.

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