



JULY 2017

# **Employment Law in Australia Overview**

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# Employment Law in Australia Overview<sup>i</sup>

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## 1. Introduction

- 1.1 In Australia, employment is primarily regulated by legislation at the Federal level. There are some areas, notably long service leave, which continue to be regulated at the State and Territory level.
- 1.2 The primary piece of legislation is the *Fair Work Act* 2009 (Cth) (**FW Act**).<sup>ii</sup> The FW Act applies to all businesses located in Australia.
- 1.3 The FW Act, among other things:
  - (a) sets out the National Employment Standards; and
  - (b) creates the framework for modern awards.
- 1.4 All employees are covered by the National Employment Standards while modern awards apply to most employees.

## 2. National Employment Standards

- 2.1 **Introduction.** There are 10 National Employment Standards (set out in paragraphs 2.2 to 2.11 below) that must be complied with by all employers, even where there is a modern award. A list of the National Employment Standards is available at <http://www.fairwork.gov.au/employment/national-employment-standards/pages/what-are-the-10-nes-entitlements.aspx>.
- 2.2 **Hours of work.** Full time employees must not be required to work more than 38 hours per week unless the additional hours are reasonable. An employee has a right to refuse to work additional hours. Employees who are not full time cannot be required to work more than 38 hours per week. Modern awards and enterprise agreements may provide for averaging of weekly hours but a weekly average cannot exceed 38 hours.
- 2.3 **Flexible Working Arrangements.** An employee who has at least 12 months continual service or is a long term casual employee and who is a parent of a child under school age or a child with a disability may request flexible working arrangements. The request must be in writing setting out the reasons for the change. An employer must respond in writing within 21 days and may only refuse the request on reasonable business grounds.
- 2.4 **Parental Leave.** This applies where there is a birth of a child or the adoption of a child. An employee who has completed at least 12 months continual service or is a long term casual employee is entitled to up to 12 months unpaid parental leave that must start within 12 months of the birth or adoption of the child. In the case of the birth of a child, a female employee who is pregnant may commence the unpaid parental leave up to 6 weeks before the expected date of birth of the child. There are special rules where both parents are employed by the same employer (see [section 71](#)).

An employee may request an extension of unpaid parental leave for up to a further twelve months beyond available parental leave and this must not be refused by an employer except on reasonable business grounds (see [section 76](#)). There are also special provisions relating to maternity leave (see [section 80](#)) and to an employee being transferred to a safe job during pregnancy (see [section 81](#)). The employer must guarantee employment of the employee in his or her prior position after the end of unpaid parental leave or, if that position no longer exists, a similar, available position for which that employee is suitably qualified.
- 2.5 **Annual Leave.** An employer must provide 4 weeks' (5 weeks' in the case of a shift worker) paid annual leave. Annual leave accrues progressively during the year and accumulates from year to year. Paid annual leave must be taken as agreed between the employee and the employer. An employer must not unreasonably refuse to an employee's request to take annual leave. Public holidays are not included in annual

leave. Subject to [sections 92, 93 and 94](#), untaken paid annual leave must be paid out to the employee upon termination of employment.

- 2.6 Paid and Unpaid Personal/Carer's Leave.** An employee is entitled to up to 10 days' paid personal/carers' leave for each year of employment. Such leave accrues progressively each year and accumulates from year to year. Personal/carers' leave can only be taken where a person is not fit for work due to illness or injury or where an employee has to provide care to a member of the employee's immediate family due to their illness, injury or an unexpected emergency affecting that family member. Public holidays are not to be included in paid personal/carers' leave. Paid personal/carers' leave is not paid out at the end of employment, except in circumstances as set out in [section 101](#).

An employee is entitled to two days of unpaid personal/carers' leave on each occasion where the employee is ill or injured or a member of the employee's immediate family is ill, injured or there is an unexpected emergency. An employee cannot take unpaid carers' leave if the employee could take paid personal/carers' leave.

An employee is entitled to take two days compassionate leave on each occasion that a member of the employee's family suffers a life-threatening illness, has a life-threatening injury or dies. Compassionate leave is paid leave for full time employees and unpaid leave for casual employees.

There are various notice and evidence requirements in respect to personal/carers' leave and compassionate leave in [section 107](#) of the FW Act. Notice must be given as soon as practical by the employee and the employer must be advised as to the period or expected period of the leave. The employee must also provide the employer with evidence that would satisfy a reasonable person of his/her entitlement to take such leave.

- 2.7 Community Service Leave.** [Section 109](#) defines eligible community services. These include jury service, voluntary emergency management activities, civil defence, rescue and other emergencies. An employee must give notice as soon as practicable of any absence and advise his/her employer of the period or expected period of absence. The employee must provide reasonable evidence that the absence is required. Where the employee is a full time employee and is absent on jury service, the employer must pay the difference between the jury service pay and the employee's wage but only for 10 days of jury service.
- 2.8 Long Service Leave.** Long service leave is provided at the State level and State legislation is preserved by [section 113](#). An employee's entitlement to long service leave varies slightly from State to State. In New South Wales, the relevant legislation is the *Long Service Leave Act 1955* (NSW) (the **LSL Act**). Under the LSL Act, an employee located in New South Wales is entitled to long service leave of 2 months paid leave after 10 years' service with the same employer and one month paid leave for each additional 5 years of service. In certain circumstances, an employee is entitled to a pro rata payment after 5 years' service.

[Sections 113 and 113A](#) do not set out an alternative regime for long service leave but recognises that long service leave entitlements may be established under applicable awards, prior workplace agreements or other industrial agreements entered into prior to 1 January 2010.

A national long service scheme is currently being developed. At this stage, it is unclear when this is likely to be completed.

- 2.9 Public Holidays.** Public holidays include both State and Federal public holidays. An employee is entitled to be absent on public holidays; however, an employer may make reasonable requests for an employee to work on a public holiday. In determining whether the request is reasonable, there is criteria in the FW Act, such as the nature of the employer's workplace, the employee's personal circumstances, including family responsibilities, whether the employee is entitled to overtime, penalty rates or other compensation, the type of employment of the employee, the amount of notice given by

the employer to the employee and the amount of notice given by the employee if he or she refuses the request. An employee is entitled to be paid for public holidays.

**2.10 Notice of Termination and Redundancy.** An employer can only terminate employment by giving prior written notice. That notice must be delivered personally or left at the employee's last known address or sent to the employee by prepaid post. Section 117 sets out the minimum periods of notice that must be given. These depend upon the number of years of continuous service by the employee. In summary, they are as follows:

Period of Continuous Service	Period of Notice
Less than 1 year	1 week
More than 1 year but less than 3 years	2 weeks
More than 3 years but less than 5 years	3 weeks
More than 5 years	4 weeks

**Note:** the relevant period of notice in the above table is increased by 1 week if the employee is over 45 years of age and has completed at least 2 years of continuous employment.

The employment contract may provide that payment is made in lieu of this notice period. If the employee is entitled to any statutory redundancy payment, payment in lieu of notice is in addition to such redundancy payment.

An employer is not liable to pay redundancy to an employee if it is a small business employer. Section 23 defines a small business employer as an employer who employs fewer than 15 employees (including the employee who is being dismissed). A casual employee is not counted towards this number unless, at the relevant time, he or she has been employed by the employer on a regular and systematic basis. Associated entities (eg. related companies or businesses) are taken to be one entity for the purposes of calculating the total number of employees.

Section 119 deals with redundancy. An employee is entitled to be paid redundancy pay if the employer terminates his or her employment because the employer no longer requires the job to be done by the employee or anyone else or because the employer is insolvent or is bankrupt. Section 119 sets out the entitlements in respect to redundancy as follows:

Period of Continuous Service	Redundancy Pay Period
1 year but less than 2 years	4 weeks
2 years but less than 3 years	6 weeks
3 years but less than 4 years	7 weeks
4 years but less than 5 years	8 weeks
5 years but less than 6 years	10 weeks
6 years but less than 7 years	11 weeks
7 years but less than 8 years	13 weeks
8 years but less than 9 years	14 weeks
9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

Redundancy payments are to be made in addition to termination notice or payment in lieu of notice.

There are provisions in the FW Act for variation of redundancy where the employer finds other acceptable employment for the employee or cannot pay the amount. An application needs to be brought by the employer to Fair Work Australia for a determination of any variation (see [section 120](#)).

A person who has less than 12 months continual service is not entitled to redundancy.

- 2.11 **Fair Work Information Statement.** A Fair Work Information Statement must be given to each employee before or as soon as practical after the employee starts employment. A copy of this Information Statement (which is attached) is available on the Fair Work Australia website at <http://www.fairwork.gov.au/Pay-leave-and-conditions/Conditions-of-employment/Pages/Fair-Work-Information-Statement.aspx>.

### 3. Modern Awards

- 3.1 In addition to the minimum statutory entitlement provided by the National Employment Standards, further conditions of employment may be provided for a particular category of employees in a document called a “modern award”.
- 3.2 There are a range of modern awards, copies of which are available from the Fair Work Australia website at <http://www.fwa.gov.au/>. With the exception of high income employees<sup>iii</sup>, all employees will be covered by a modern award.
- 3.3 A high income employee is an employee that earns a salary above a statutory limit. This limit is indexed and increases each year on 1 July. As from 1 July 2017, the high income threshold is \$142,000. A high income employee and an employer can agree that a modern award applies to the high income employee’s employment but this is rare.

### 4. Enterprise Agreements

- 4.1 An enterprise agreement is an agreement between a particular employer and its employees as a group or groups.

### 5. Paid Parental Leave

- 5.1 In 2010, the Federal Government introduced a paid parental leave scheme. The scheme provides government-funded Parental Leave Pay at the National Minimum Wage (currently \$694.90 per 38 hour week before tax) for a maximum period of 18 weeks, and can be received before, after, or at the same time as existing entitlements such as annual leave, long service leave, and employer-funded paid parental leave.
- 5.2 To be eligible for paid parental leave, the employee must:
- (a) be the primary-carer of a new born or a recently adopted child;
  - (b) earn an income of less than \$150,000.00 per annum;
  - (c) be an Australian resident or citizen;
  - (d) have been in paid employment for 10 of the 13 months prior to the birth or adoption of the child; and
  - (e) have worked 330 hours in that 10 month period (which is just over 1 day a week), with no more than an 8 week gap between 2 consecutive working days.
- 5.3 An employer paying Parental Leave Pay has the following responsibilities:
- (a) provide Parental Leave Pay to your employee for their Paid Parental Leave period;
  - (b) provide Parental Leave Pay to your employee in accordance with their normal pay cycle;
  - (c) withhold tax from the Parental Leave Pay under the usual PAYG withholding arrangements;

- (d) provide your employee with a record of their Parental Leave Pay – usually a pay slip – within one working day of your employee receiving their pay;
- (e) include Parental Leave Pay in the total amounts on your employee's annual or part-year payment summary (statements produced and given to your employee for tax purposes);
- (f) keep written financial records of Paid Parental Leave funds received from Centrelink and of the Parental Leave Pay provided to your employee;
- (g) notify Centrelink:
  - (i) if and when your employee returns to work before or during their Paid Parental Leave period;
  - (ii) if and when your employee is no longer your employee, if this occurs before the end of their Paid Parental Leave period;
  - (iii) if you change your bank account details or your employee's pay cycle details; and
  - (iv) if you receive an incorrect amount of Paid Parental Leave funds from Centrelink, or if you are unable to provide Parental Leave Pay to your employee;
- (h) return any unpaid Paid Parental Leave funds to Centrelink; and
- (i) notify Centrelink, in advance if possible if you are ceasing to trade, selling your business, transferring ownership or merging with another business.

### 6. Superannuation

6.1 An employer is required to contribute the compulsory superannuation levy for all employees. The levy as from 1 July 2015 is 9.5% of an employee's base salary up to the maximum contribution base. The government has announced the rate will remain at 9.5% until 30 June 2021 and then increase by 0.5% each year until it reaches 12% on 1 July 2025. The maximum contribution base also increases each year on 1 July. For the period 1 July 2017 to 30 June 2018, the maximum superannuation base is to \$52,750 per quarter. The portion of an employee's salary that is above this limit does not attract the levy (an employer may still pay superannuation above this amount if it wishes).

6.2 The superannuation levy is provided for by the *Superannuation Guarantee (Administration) Act 1992* (Cth). A copy of this act is available at <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/current/bytitle/C25385CFCC6F5E3BCA2576E9002BA2E5?OpenDocument&mostrecent=1>.

### 7. Dismissal

7.1 An employer is generally not required to provide reasons for termination.

7.2 **Unlawful dismissal:** It is unlawful to dismiss an employee on certain grounds and an employer that does so risks considerable consequences.<sup>iv</sup> A dismissal will be unlawful if the employee was dismissed on any of the following grounds:

- (a) temporary absence from work due to illness or injury;
- (b) trade union membership or participation in trade union activities outside working hours or with the employer's consent during working hours;
- (c) non-membership of a trade union;
- (d) seeking office, acting or having acted in the capacity of a representative of employees;
- (e) the filing of a complaint against the employer or participation in proceedings (e.g. whistle blowers);
- (f) absence during parental leave;

- (g) temporary absence from work because of carrying out a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances; or
- (h) discrimination on grounds of race, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

7.3 Unfair dismissal: All unfair dismissal claims are now handled by a government tribunal, Fair Work Commission. To be eligible to make a claim of unfair dismissal an employee must have been employed for 6 months or more and not be a high income employee. A dismissal will be unfair if it is:

- (a) harsh, unjust or unreasonable<sup>v</sup>, and
- (b) not a case of genuine redundancy.

Separate rules apply to small businesses.<sup>vi</sup>

### 8. Proposed Changes

8.1 As noted above, a national long service leave scheme is in development. At this stage, it is unclear when this is likely to be completed.

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<sup>i</sup> The overview is current as at 1 July 2017.

<sup>ii</sup> All section references in this memo are to the *Fair Work Act 2009* (Cth).

<sup>iii</sup> A high income employee may be covered by a modern award if the position is usually covered by a modern award.

<sup>iv</sup> High income employees that are covered by a modern award are entitled to make a claim for unfair dismissal. As set out above, the high income threshold is raised on 1 July each year. The current threshold as from 1 July 2017 is \$142,000.

<sup>v</sup> There is no set definition for what will constitute harsh, unjust or unreasonable. Factors that will be considered by Fair Work Australia include the reason for the dismissal, the notification and opportunity to respond provided to the employee, the ability for the employee to have a support person present, the nature of any unsatisfactory performance, any warnings provided to the employee, the size of the employer's business and any other relevant factors.

<sup>vi</sup> As noted above, a small business with fewer than 15 full-time equivalent employees.