

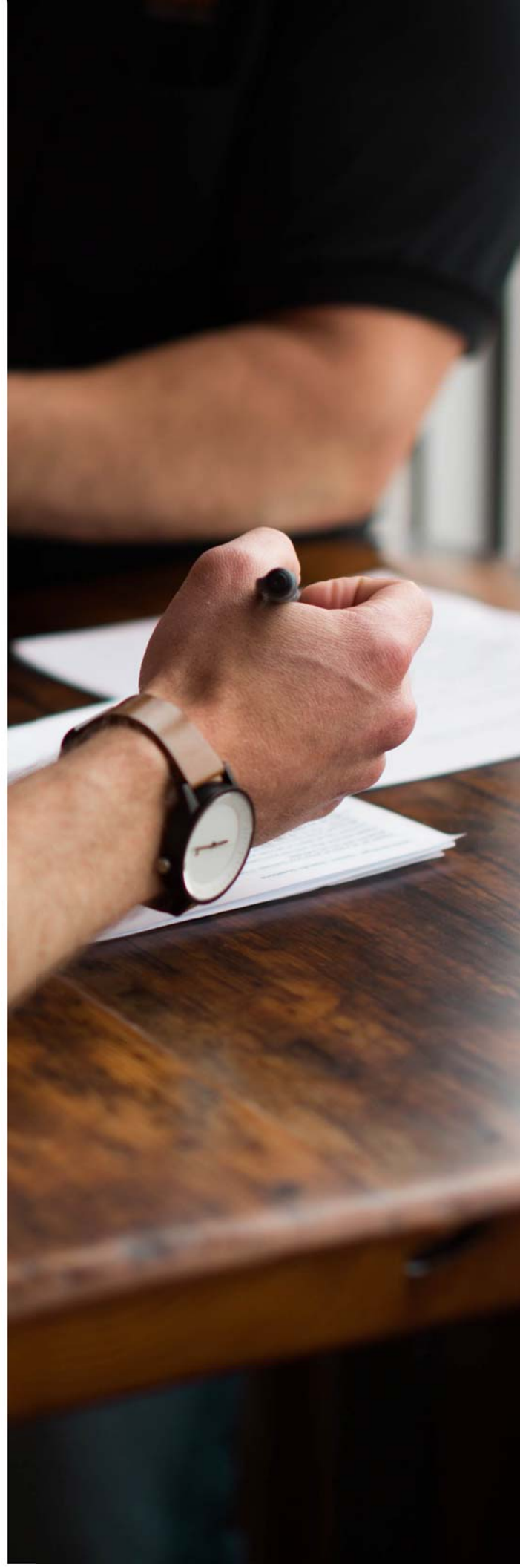


Employment Law in Australia

NOVEMBER 2023

Addisons delivers commercially-minded legal solutions that help drive the ongoing business success of our Australian and international clients.

addisons.com



Employment Law in Australia Overview¹

Authors: Martin O'Connor and Brandon Chakty

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 level.
- 1.2. The primary piece of Federal legislation is the *Fair Work Act 2009* (Cth) (the **FW Act**). The FW Act applies to most businesses operating in Australia.
- 1.3. The FW Act, among other things:
 - (a) sets out the National Employment Standards;
 - (b) creates the framework for modern awards and enterprise agreements; and
 - (c) provides various protections to employees, including the protection from unfair dismissal and other general protections.

2. National Employment Standards

- 2.1. The National Employment Standards (the **NES**) are minimum employment entitlements that must be provided to all employees. Modern awards, enterprise agreements and contracts of employment generally cannot stipulate conditions of employment that are less favourable than the NES nor can they exclude the NES. The NES are set out in paragraphs 2.2 to 2.13 below.
- 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. All other employees must not be required to work more than the lesser of 38 hours per week or their ordinary hours of work per week unless the additional hours are reasonable. Employees have a right to refuse to work additional hours if those hours are unreasonable. Most modern awards and enterprise agreements allow the averaging of weekly hours over certain periods, but a weekly average cannot exceed 38 ordinary hours of work.
- 2.3. **Flexible Working Arrangements.** An employee who has completed at least twelve (12) months of continuous service with their employer and who:
 - (a) is pregnant;
 - (b) is the parent of, or has responsibility for the care of, a child who is of school age or younger;
 - (c) is a carer;

¹ This overview is current as of 1 November 2023.

- (d) has a disability;
- (e) is 55 or older; and/or
- (f) is experiencing violence from a member of the employee's immediate family, or cares or supports an immediate family member experiencing such violence,

is generally permitted to request flexible working arrangements with their employer. The request must be in writing and must set out the reasons why a change in working arrangements is needed.

The employer must respond to the request in writing within 21 days and may only refuse the request if the employer has followed the strict processes outlined in the FW Act, which involve discussing and genuinely trying to reach an agreement with the employee on a change in the employee's working arrangements that will reasonably accommodate the employee's circumstance, considering the consequences of refusing the request, and having reasonable business grounds to refuse the request. There is also a prescribed list of matters that must be addressed in the employer's written response to a request, particularly where the request is to be refused.

2.4. **Casual Conversion.** An employer must make a written offer to convert a casual employee to full-time or part-time employment if the employee has completed twelve (12) months' service, has worked a regular pattern of hours on an ongoing basis for at least the last six (6) months, and could (without significant adjustments needing to be made) continue working these hours on a permanent basis.

2.5. **Parental Leave.** Generally speaking, an employee who has completed at least twelve (12) months of continuous service with their employer is entitled to take twelve (12) months of unpaid parental leave if:

- (a) that leave relates to the birth or adoption of a child; and
- (b) the employee will have responsibility for the care of the child.

The employee may request an extension of unpaid parental leave for up to a further twelve (12) months. Employers must respond in writing to an employee's request for an extension of unpaid parental leave within 21 days of the request being made. An employer can grant the request or, following a discussion between the employer and employee, the parties can agree to a different extension period. An employer may only refuse the request if the employer has genuinely tried to reach an agreement with the employee about an extension of the leave period, has considered the consequences of the refusal for the employee, and there are reasonable business grounds for refusing the request.

There are special rules that apply where both parents of a child are employees (not necessarily of the same employer), and both intend to take unpaid parental leave. There are also rules relating to unpaid special parental leave, unpaid 'no safe job' leave, and transfers to 'safe jobs' during a pregnancy.

On ending unpaid parental leave, an employee is entitled to return to the employee's pre-parental leave position or, if that position no longer exists, an available position for which the employee is qualified and suited nearest in status and pay to the employee's pre-parental leave position.

2.6. **Annual Leave.** Permanent employees are entitled to four (4) weeks of paid annual leave (or five (5) weeks in the case of shift workers) for each year of employment. Annual leave accrues progressively during the year and accumulates from year to year. Annual leave must be taken as agreed between the employee and the employer, but an employer must not unreasonably refuse an employee's request to take annual leave. If an employee has accrued an entitlement to annual leave but has not used that entitlement, the entitlement must be paid out to the employee upon termination of the employee's employment.

2.7. **Personal Leave.** Permanent employees are entitled to ten (10) days of paid personal/carer's leave for each year of employment (pro-rated for part-time employees). Personal/carer's leave accrues progressively during the year and accumulates from year to year. Personal/carer's leave can only be taken where an employee is not fit for work due to a personal illness or injury or where an employee has to provide care to a member of the employee's immediate family or household due to an illness, injury or an unexpected emergency affecting that family or household member. Unlike annual leave, accrued but unused entitlements to personal/carer's leave are not paid out on termination of employment.

An employee is entitled to two (2) days of unpaid carer's leave on each occasion where the employee has to provide care to a member of the employee's immediate family or household due to their illness, injury or an unexpected emergency affecting that family or household member. An employee cannot take unpaid carer's leave if the employee can take paid personal/carer's leave instead.

An employee is entitled to take two (2) days of compassionate leave on each occasion where a member of the employee's immediate family or household sustains a life-threatening injury, contracts a life-threatening illness, or dies. Compassionate leave may also be taken where a child is stillborn (provided the child would have been a member of the employee's immediate family or household if the child had been born alive) or where the employee, or the employee's spouse or de facto partner, has a miscarriage. Compassionate leave is paid leave for permanent employees and unpaid leave for casual employees.

All employees are entitled to ten (10) days of paid family and domestic violence leave each year. Family and domestic violence leave does not accrue (i.e., it is available in full at the beginning of each year) and does not accumulate from year to year. Family and domestic violence means violent, threatening, or other abusive behaviour by an employee's close relative, a member of an employee's household, or an employee's current or former intimate partner that seeks to coerce or control the employee or causes the employee harm or fear. Employees can take this leave if they are experiencing family and domestic violence and they need to do something to deal with the impact of that violence, and it is impractical to do that thing outside their ordinary hours of work.

There are various notice and evidence requirements which apply when taking personal/carer's leave, compassionate leave and family and domestic violence leave. Notice must be given as soon as practicable by the employee and the employer must be advised as to the period or expected

period of leave. If required by the employer, the employee must provide the employer with evidence that would satisfy a reasonable person of the employee’s entitlement to take such leave.

- 2.8. **Community Service Leave.** The types of community services which are eligible for community service leave include jury service, voluntary emergency management activities and civil defence duties. An employee must give notice of any absence for reason of community service as soon as practicable and must advise the employee’s employer of the period or expected period of absence.

If a permanent employee is absent on jury service, the employer must pay the difference between the jury service pay and the employee’s wage but only for the first ten (10) days of jury service.

- 2.9. **Long Service Leave.** Long service leave is generally governed at the State level and State legislation is preserved by the FW Act.

In New South Wales, the relevant legislation is the *Long Service Leave Act 1955* (NSW) (the **LSL Act**). Under the LSL Act, an employee is entitled to two (2) months of paid long service leave after ten (10) years of continuous service with the same employer and one (1) month of paid leave for each additional five (5) years of continuous service thereafter. In certain circumstances, an employee is entitled to a pro rata long service leave payment after only five (5) years of continuous service. Other States may have different qualifying periods.

- 2.10. **Public Holidays.** An employee is generally entitled to be absent from work on a public holiday. However, an employer may request (not require) an employee to work on a public holiday if the request is reasonable. If an employer requests an employee to work on a public holiday, the employee may refuse the request if the request is not reasonable or if the refusal is reasonable. The FW Act sets out several factors which must be considered when determining this question of reasonableness, including the nature of the employer’s workplace, the employee’s personal circumstances, and any entitlement to further compensation for working on the public holiday.

If a permanent employee is absent from work on a public holiday and they ordinarily work on that day, the employer must still pay the employee their base salary for the hours they would have ordinarily worked on that day.

- 2.11. **Notice of Termination and Redundancy.** Employers are generally required to give employees prior written notice of the termination of their employment. The notice should be delivered to the employee personally, left at the employee’s last known address or sent to the employee by prepaid post.

The FW Act sets out the minimum period of notice that must be given to an employee depending on the employee’s period of continuous service. The minimum periods 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

Period of Continuous Service	Period of Notice
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 one (1) week if the employee is over 45 years of age and has completed at least two (2) years of continuous service with the employer.

Employers are generally permitted to provide employees with a payment in lieu of this notice period. If the employee is entitled to any statutory redundancy pay, payment in lieu of notice is in addition to such redundancy pay.

An employee is entitled to be paid redundancy pay if the employee is terminated because the employer no longer requires the employee's job to be performed by the employee or anyone else, or because the employer is insolvent or bankrupt.

The FW Act sets out the minimum amount of redundancy pay that must be paid to an employee depending on the employee's period of continuous service with their employer. The minimum amounts are as follows:

Period of Continuous Service	Redundancy Pay (No. of Weeks' Salary)
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

An employer can apply to vary the amount of redundancy pay that is payable in circumstances where the employer finds other acceptable employment for the employee or where the employer

cannot pay the minimum amount. This application needs to be brought by the employer to the Fair Work Commission.

An employer is not liable to pay redundancy pay to an employee if the employee has less than twelve (12) months of continuous service with the employer or if the employer is a “small business employer”.

A “small business employer” is an employer who employs fewer than 15 employees. A casual employee is not counted towards this number unless, at the relevant time, the casual employee has been employed by the employer on a regular and systematic basis. Associated entities (e.g., related companies or businesses) are taken to be one entity for the purpose of calculating the total number of employees.

An employer is also not liable to pay redundancy pay in certain transfer of business situations.

- 2.12. **Fair Work Information Statement.** The Fair Work Information Statement must be given to each employee before or as soon as practical after the employee commences employment. A copy of the Fair Work Information Statement is available [here](#).
- 2.13. **Casual Employment Information Statement.** In addition to the Fair Work Information Statement, the Casual Employment Information Statement must be given to each casual employee before or as soon as practical after the employee commences employment. A copy of the Casual Employment Information Statement is available [here](#).

3. Modern Awards

- 3.1. In addition to the minimum statutory entitlements provided by the NES, further conditions of employment may be stipulated for particular categories of employees in legal instruments called “modern awards”.
- 3.2. There are a range of modern awards, copies of which are available [here](#). An employee will normally be covered by the modern award that relates to the industry or occupation in which the employee works.

4. Enterprise Agreements

- 4.1. An enterprise agreement is an agreement between one or more employers and their employees.
- 4.2. Enterprise agreements also stipulate conditions of employment which are in addition to the minimum statutory entitlements provided by the NES.

5. Casual Employees

- 5.1. An employee is a casual employee under the FW Act if an offer of employment was made by the employer to the employee on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the employee, and the employee accepted the offer on that basis.

6. High Income Employees

- 6.1. A high income employee is an employee who has a guarantee of annual earnings above the high income threshold. This threshold is indexed and increases each year on 1 July. As from 1 July 2023, the high income threshold is \$167,500.
- 6.2. High income employees must be covered by a modern award or an enterprise agreement in order to be protected from unfair dismissal.

7. Set-Term Agreements

- 7.1. On and from 6 December 2023, employers will be prohibited from engaging an employee on a set-term agreement where:
 - (a) the agreement operates for a period of greater than 2 years;
 - (b) the agreement provides an option to extend or renew the agreement more than once or for a period of greater than 2 years; or
 - (c) it would result in the employee being engaged under two consecutive set term agreements that cumulatively exceed 2 years, or under multiple consecutive set term agreements, where the employee is performing the same, or substantially similar, work and there is substantial continuity between the relevant employment periods.
- 7.2. There are numerous exceptions to the above limitations, including where the employee is engaged to perform only a distinct task involving specialised skills, where the employee is engaged to undertake essential work during a peak demand period, or where the employee earns above the high income threshold.
- 7.3. Employers must also give the Fixed Term Contract Information Statement to their employees who are engaged on a set-term contract. The Fixed Term Contract Information Statement has not yet been published by the Fair Work Ombudsman.

8. Pay Secrecy

- 8.1. Employees now have a strict workplace right to disclose (or not disclose) information about their remuneration and their terms and conditions of employment.
- 8.2. Pay secrecy clauses contained in employment agreements are also now unlawful and unenforceable. Employers will be liable for civil liabilities if they include pay secrecy clauses in their employment agreements.

9. Paid Parental Leave

- 9.1. The Federal Government's paid parental leave scheme provides Government-funded parental leave payments at the National Minimum Wage for a maximum period of 100 days. As from 1 July 2023, the National Minimum Wage is \$882.80 per 38 hour week before tax. These payments can

be received by employees before, after, or at the same time as existing entitlements such as annual leave, long service leave and employer-funded paid parental leave.

- 9.2. To be eligible for parental leave payments under this scheme, an employee must be caring for a newborn or a recently adopted child and must meet certain income, work, and residency tests.
- 9.3. An employer has several responsibilities under this scheme, including the obligation to:
- (a) provide the parental leave payments to the employee in accordance with the employer's normal pay cycle;
 - (b) withhold tax from the parental leave payments under the usual PAYG withholding arrangements; and
 - (c) notify Services Australia if certain events occur (e.g., if the employer is ceasing to trade, selling its business, transferring ownership or merging with another business) and return any unpaid funds to Services Australia.

10. Superannuation

- 10.1. Employers are required to make the minimum superannuation contributions on behalf of their employees in accordance with the *Superannuation Guarantee (Administration) Act 1992* (Cth). From 1 July 2023, the minimum contribution rate is 11% of an employee's ordinary time earnings up to the maximum contribution base. This rate will remain at 11% until 30 June 2024 and will then increase by 0.5% each year until it reaches 12% on 1 July 2025.
- 10.2. The maximum contribution base increases each year on 1 July. For the period 1 July 2023 to 30 June 2024, the maximum contribution base is \$62,270 per quarter. Superannuation contributions do not need to be paid in respect of the portion of an employee's earnings that is above this limit.

11. Dismissal

- 11.1. An employer is generally not required to provide reasons for the dismissal of an employee. However, whether there was a valid reason for the dismissal and whether the employee was notified of that reason are two factors that weigh heavily in unfair dismissal claims.
- 11.2. **Unfair dismissal.** All unfair dismissal claims are handled by the Fair Work Commission. To be eligible to make an unfair dismissal claim, an employee generally must have been employed for at least six (6) months and must:
- (a) be covered by a modern award or enterprise agreement; and/or
 - (b) earn less than the high income threshold.

A dismissal will be unfair if it is harsh, unjust, or unreasonable, and not a case of genuine redundancy.

- 11.3. Separate rules apply to "small business employers". For example, the minimum employment period for employees of "small business employers" is twelve (12) months.

11.4. **Unlawful dismissal.** It is unlawful to dismiss an employee on certain grounds and an employer that does so risks considerable consequences. Examples of unlawful grounds for termination include:

- (a) having a workplace right, or the exercise of a workplace right;
- (b) temporary absence from work due to illness or injury;
- (c) membership or non-membership with a trade union or participation in trade union activities;
- (d) the filing of a complaint against the employer or participation in proceedings against the employer; and
- (e) the employee's race, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Martin O'Connor | Partner

D +61 2 8915 1027

E martin.oconnor@addisons.com

Brandon Chakty | Solicitor

D +61 2 8915 0124

E brandon.chakty@addisons.com

Level 12, 60 Carrington Street, Sydney, NSW 2000, Australia

addisons.com | [LinkedIn](#)



Level 12, 60 Carrington Street
Sydney NSW 2000 Australia

ABN 55 365 334 124
Telephone +61 2 8915 1000

mail@addisons.com
www.addisons.com

Liability limited by a scheme approved under Professional Standards Legislation