



**THE
COMPACT
LEGAL
GUIDE
TO
HR**

FINLAYSONS
LAWYERS

UPDATED JULY 2020

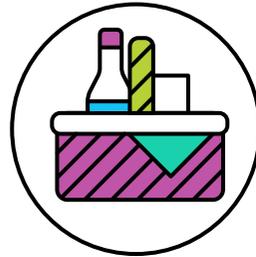


ABOUT THIS GUIDE

The Fair Work Act is as big a phone book. There is also a mountain of information on the internet and in excellent books about employment law and decisions made by Courts and Tribunals which have applied these laws.

In this Guide we will clearly and simply set out the signposts on the big issues and illustrate these with examples from cases we have managed (in most situations, avoiding the Courts).

HOW THIS WORKS:



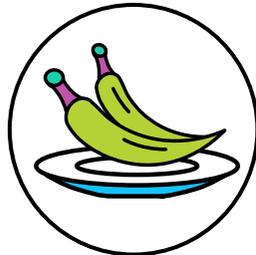
Pack a picnic

We're giving you a pointer on where you can go to dive deeper. Pack a picnic. You may be some time.



Here be dragons

We're inviting you to consider the sorts of nightmare scenarios that keep managers and HR up at night and which bring joy to the hearts of lawyers. You want to avoid repeating the same mistakes. The cases are real, but the names have been changed.



Hot tip

A useful shortcut to save time, money and hassle

INTRODUCTION

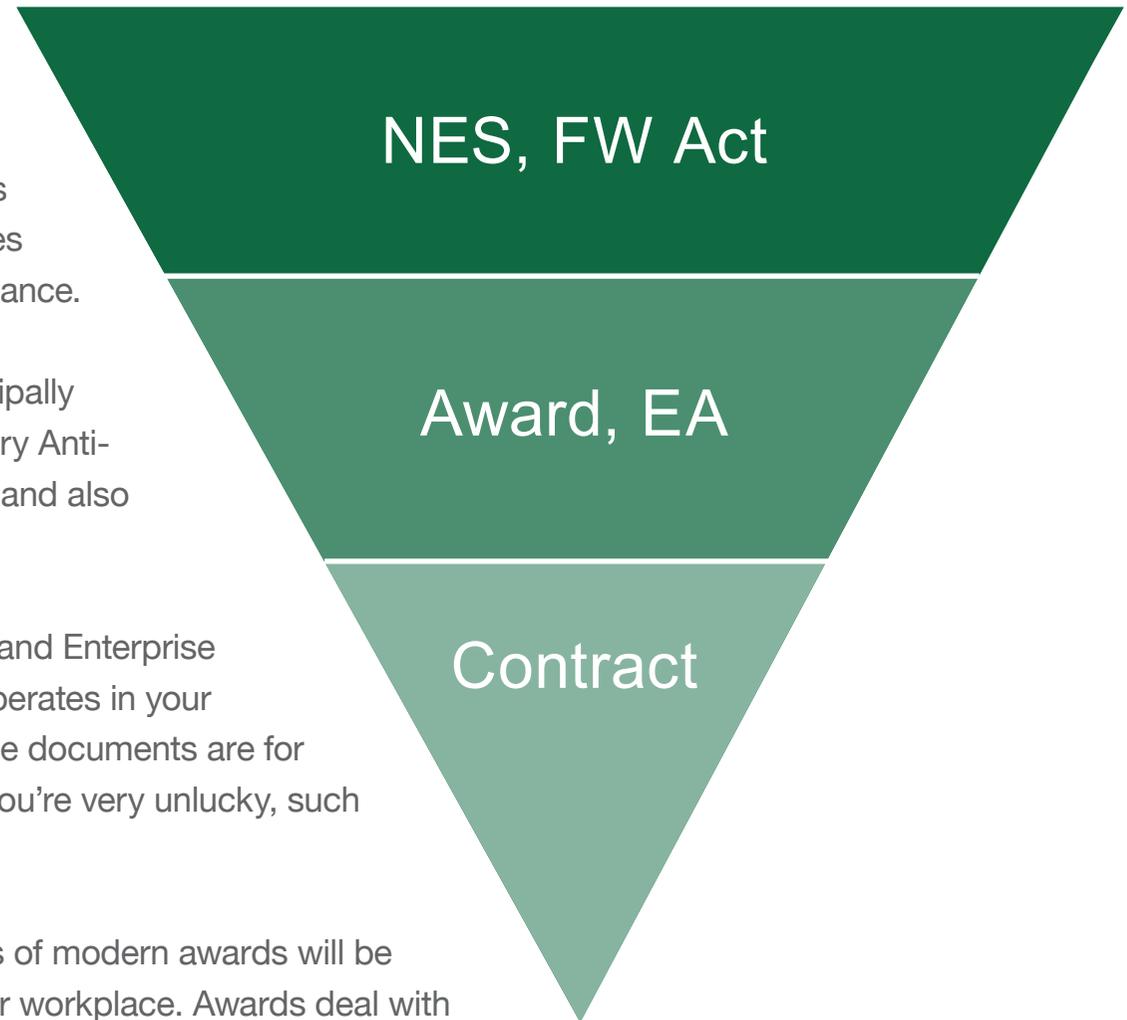
Before we get started we need to know the basics of Australian HR Law.

This diagram above shows fundamental and crucial issues for most workplaces at the top cascading down to the ones which are still important but in diminishing order of significance.

At the top we have our employment laws which are principally the Fair Work Act 2009 (Cth), along with State and Territory Anti-discrimination laws (e.g. the Anti Discrimination Act (NT)) and also workers compensation laws.

Below that on the pyramid we have the terms of Awards and Enterprise Agreements. If you have an Enterprise Agreement that operates in your workplace, you don't need us to tell you how crucial these documents are for setting out the rules of the road about the workplace. If you're very unlucky, such agreements can run into 80 or even 200 pages long.

If you don't have an Enterprise Agreement then the terms of modern awards will be applicable to at least some if not many employees in your workplace. Awards deal with



minimum rates of pay and also classification issues (i.e. what skills are required for work at certain levels and what the payment is). They also deal with very specific industry issues that apply, for example, in the building industry where different rules apply to redundancies than is otherwise the case.

Awards also deal with issues like consultation about change in the workplace as well as other monetary payments such as motor vehicle allowance – more on that later.

Finally, we have the terms of a person's employment contract. An employment contract can never undercut the basic rights and entitlements under the Fair Work Act or the minimum entitlements under Awards and Enterprise Agreements. However, employment contracts commonly deal with a host of other additional issues such as the confidentiality of information that belongs to the business and also notice of termination as well as dealing in detail with an employee's salary and their superannuation arrangements. You might even want to prevent a former employee from competing with you after they leave your business.



Hot tip

Below is a link to a basic but effective “letter of engagement” produced by the Fair Work Ombudsman. You will need to tailor it for your own situations and risks but it is a great start and better than no contract at all.

<https://www.fairwork.gov.au/ArticleDocuments/766/Letter-of-engagement-full-time-and-part-time-employees.doc.aspx>

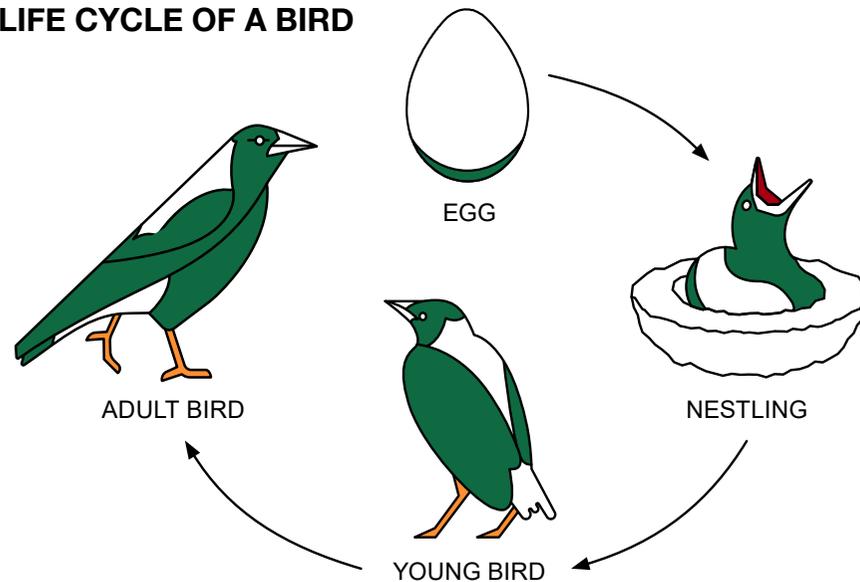


Checklist for taking on an employee

There are a number of other compliance issues which may be relevant for your organisation, such as eligibility to work, workers compensation insurance in your State or Territory etc. Find an example checklist for taking on a employee at the link below:

<https://www.business.gov.au/people/hiring/taking-on-an-employee-checklist>

LIFE CYCLE OF A BIRD



As employees, we all start by being taken on, being managed and contributing to our organisation's objectives and then leaving the job (for a host of reasons).

From an HR perspective this breaks down to;

- 1) Hiring
- 2) Managing
- 3) Firing

At each of those points different legal issues spark up. We want you to keep this Guide as a handy reference if difficult things crop up in your workplace at any of these three stages.

HIRING

We can't guess what need has arisen within your business to add a team member however we'll assume that you've considered the situation and determined that an employee is the best fit, and not a contractor.

Employment remains the tried and tested model for engaging individuals to perform work and the Courts continue to deal with



Hot tip

Here is a link to the ATO's 'employee/contractor decision tool', which gives a very basic snapshot on this issue:

<https://www.ato.gov.au/Calculators-and-tools/Employee-or-contractor/>



Stay in School Support Services

A not for profit in the community sector, Stay In School, had around 100 staff members, most of which provided case management support to young people in a school setting to encourage their attendance at school and their engagement with studies and constructive life goals. Their staff members would travel distances to visit various schools, the homes of young people and other locations, including in remote and regional settings. Stay In School got advice from an accountant that it should provide a flat rate of motor vehicle allowance for its staff members. However, under the applicable Award, a set rate of motor vehicle allowance had to be paid on a cents per kilometre basis to such staff members. Stay In School had been paying the flat rate for many years and it was faced with a liability of several hundred thousand dollars when it was made aware that it had not complied with the terms of the Award.

Take Out - Understand the Minimum Entitlements under the Award

claims and issues from individuals who assert that they ought to have been engaged as employees and not contractors (and have missed out on employment entitlements and minimum payments because of this). We are also making the assumption that you are satisfied that either an ongoing, fixed term, part-time or casual employment arrangement best suits the need.

However, what we do want to raise now is whether you have fully considered minimum Award entitlements and also a contract of employment.

If you haven't properly considered what Award covers the employee and what their level (i.e. classification) under the Award is, then you're putting your organisation at real risk.



Bushtracks Health

Bushtracks appointed a new community expertise seemed to be an ideal fit for the role.

Continued on next page

The Chair of Bushtracks drafted a very simple contract and Caitlin signed - a very attractive offer of \$150,000 salary plus a fully maintained motor vehicle, under a 2 year contract. Bushtracks was wholly funded by the State Government Health Department. It became known to the Department that Caitlin had been employed by Bushtracks. The Department was concerned – a senior manager at the Department was aware of allegations about Caitlin regarding her past behaviour and her association with organised crime. The Department advised Bushtracks that it must no longer engage Caitlin to deliver services on its behalf, and Bushtracks communicated this position to Caitlin, terminating the contract. As Bushtracks had prepared the document itself, it had written up a two year fixed term contract but without any capacity for Bushtracks to terminate the contract on notice, or if a funding decision outside of its control meant that Bushtracks could no longer maintain Caitlin's employment.

Caitlin brought a claim against Bushtracks and Bushtracks was forced to settle out of Court for the balance of the term of the contract – being \$120,000.

Take out - Anyone can draft a contract but just be very careful of fixed term contracts and overlooking the key risks of your circumstances



Hot Tip

If you are paying someone above minimum Award entitlements, then there is one clause that you should consider putting in your contracts - known as a set-off clause.

This clause means that if you are paying someone above Award, then you can receive the value of those above Award entitlements and set the value of the above Award amounts against other Award payments which may become payable. For example, if I am being paid a salary of \$70,000.00 per year, but under an Award I may also be entitled to motor vehicle allowance, then you can set off the higher salary against allowance that may be payable.

A set-off clause looks like this:

The parties agree that (to the extent permitted by law) the Total Remuneration is in satisfaction of the Employee's entitlements (including, without limitation, minimum wage, additional payments for working overtime or outside the normal business hours, and loadings (including annual leave loading and penalties) under the relevant Award or Enterprise Agreement

MANAGING

The difficult legal issues around managing staff often come down to managing requests for leave, in particular personal (i.e. sick) leave and also managing complaints or grievances regarding bullying and harassment. Employee rights to take leave are all provided for under the National Employment Standards and there are some, although limited, things that businesses can do to manage such requests in a way that does not overly impact on a business. Fixed opposition to employee requests for leave needs serious thought.

A word on bullying and harassment

Complaints about how we treat each other at work cut across a number of laws and give rise to issues and risks not only under the Fair Work Act but also safety legislation and workers compensation.

Issues of interpersonal conflict can also be amongst the most tricky and delicate problems that HR and managers need to solve. The management of complaints of sexual harassment, in particular, presents a significant challenge



New Leaf Aged Care

New Leaf employed Frank as an Enrolled Nurse. Frank was perceived to be someone who took excessive sick leave. Frank was engaged to be married to his partner and had booked flights and accommodation in Bali. Although the company policy said employees must give 6 months' notice of their intention to take annual leave, Frank had overlooked putting in his leave application for his wedding trip. When he did so, 3 months before his departure date, New Leaf refused. Frank then brought a claim to the Federal Circuit Court alleging that New Leaf was unlawfully denying his request for annual leave.

Frank was successful on the grounds that an employer cannot unreasonably refuse an employee's request for annual leave and in doing so, the Court took into account Frank's circumstances, his excitement and his intentions to get married and also the expenses that Frank had already shelled out for the wedding, including the travel expenses, flowers for the ceremony and a deposit paid for the monkey who was to act as Frank's ring-bearer!



Ready2Go!

Ready2Go! employed Tony in its Brisbane warehouse. Tony had worked for the business for 30 years. Tony was very fond of practical jokes and loved to initiate new members of staff. On his first day, Patrick was approached by Tony who offered a kiwi fruit to him. Tony was holding a tray of kiwi fruit at around his hip height. Patrick went to grab one of the kiwi fruit and recoiled in horror when he observed that, nestled among the brown, hairy, oblong shapes of kiwi fruit were in fact Tony's testicles.

For the avoidance of doubt, this is what sexual harassment looks like.

and risk for businesses. Often HR managers are forced to make decisions on the basis of limited information, despite the best efforts of processes to investigate and understand the issues at play. Central to management of these issues is a clear understanding of the legal definitions at play and also for your organisation to have clear and simple policies that provide guidance to staff if they experience unpleasant interpersonal conflict.

Bullying is defined as repeated unreasonable behaviour, directed at someone, and that behaviour creates a risk to health and safety. The risks to health and safety can be physical or, much more common, a risk to somebody's mental wellbeing. It is clear that bullying behaviour, whether name calling, put downs, comments or other conduct will create a risk to employee wellbeing.

Sexual harassment is defined as sexual behaviour (which can be very broad e.g. comments, personal attention, leering, or physical acts) that is unwanted and causes offence and a responsible person would anticipate that reaction in the circumstances.

FIRING

We're looking here at circumstances where you are initiating termination (so we are not talking about resignation).

The decision to terminate is informed by the conclusion that you have reached that an employee, or the role performed by that employee, is no longer adding value to the business or in fact their continued involvement with the business is creating significant risk.

Firstly, redundancy—there is a bag of reasons why you may decide to make a role redundant. You may have decided to engage a contractor (outsourcing), or you may have decided that a whole part of your business is no longer required to be done by anyone. When implementing redundancies, and in order to manage an unfair dismissal risk, you may also need to engage in some form of consultation and consider whether there are any other suitable roles in the organisation to which the individual can be redeployed.



Perspective Financial

Perspective Financial employed Rosie as its senior customer service manager. On Friday night, Rosie sent HR an email making the allegation that there was a culture of staff giving and receiving sexual favours in order to be allocated new clients to the business. On Monday morning, an investigation into the allegations began and HR sat down with Rosie to understand further details. When asked for evidence of this serious allegation, Rosie stated that it was “just obvious”. She gave an example where Phay would address their midweek meetings and would put his jacket on even when it was hot, and would puff out his chest “like a silver back gorilla” and also how Phay would tuck his shirt into his pants. Rosie told HR that these were all signs that Phay was demanding sexual favours from her. When pressed for other and further details regarding her allegations, Rosie gave more such examples of relatively innocuous conduct but which she had interpreted in a particular fashion.

It is clear that the conduct complained of does not meet the test of sexual harassment.



Hot tip

At the link below, see Safework Australia's 'guide to preventing and responding to bullying'. This has a clear and effective draft policy on pages 26/27 which can be adapted for your organisation.

<https://www.safeworkaustralia.gov.au/doc/guide-preventing-and-responding-workplace-bullying>

Please consider how easy it is to find and to read your policies on making a complaint, dealing with bullying or dealing with harassment. If a member of your team can't find this guidance within 30 seconds (should something bad happen) then make your policy shorter and/or more accessible. You must train staff on what the policy means—this does not need to be a long and costly exercise, you can simply bring it up periodically and inform staff of your expectations.

Termination for Conduct or Performance

In other termination situations, the question is whether the employee has engaged in poor performance, misconduct, or a combination of both.

Termination for misconduct must be supported by a basic process that you have used in order to adequately determine what has happened.

An effective termination will be supported by some evidence that you have looked at the issues and that you have made a finding, that it was more likely than not, that the particular conduct occurred. This is called making a finding on the balance of probabilities.

Termination for performance, on the other hand, does not need to be supported by an investigation or allegations of misconduct. It requires adequately bringing performance issues to someone's attention, giving them some amount of time to fix the issues, some history of warnings to the person about ongoing poor performance, and then termination of employment.

Termination on performance grounds is difficult to do very well (and avoiding any legal risk).

Finally, there is no such thing as 3 strikes and you're out or a requirement for any set number of warnings to be given to an employee in order to effect a lawful dismissal.

What claims can employees make when terminated?

By far the most common claim made by dismissed employees is an unfair dismissal application.

However, an employee may also claim that their dismissal was because they had made a complaint about work such as a safety issue or because of discriminatory ground. This is a general protections claim.

For every 3 unfair dismissal claims filed with the Fair Work Commission, 1 general protections claim is made.

Each of these claims have their advantages and disadvantages and the eligibility and other requirements can be complicated.



Fair Work Commission Benchbooks

The Fair Work Commission has produced thorough publications on unfair dismissals and general protections.

Link to the FWC Unfair Dismissals Benchbook:

<https://www.fwc.gov.au/documents/documents/benchbookresources/unfairdismissals/unfair-dismissals-benchbook.pdf>

Link to the FWC General Protections Benchbooks:

<https://www.fwc.gov.au/documents/documents/benchbookresources/generalprotections/general-protections-benchbook.pdf>

Where to from here?

If you would like to discuss any aspect of the Guide or if you have an issue you'd like to run past us, please get in touch with the Finlaysons Employment & Workplace Safety team:



THE COMPACT LEGAL GUIDE TO HR

FINLAYSONS
LAWYERS

UPDATED JULY 2020

© Copyright Will Snow, Finlaysons Lawyers, 2020

This e-book is copyright. Except as permitted under the Copyright Act 1968 (Cth), no part of this publication may be reproduced by any process, electronic or otherwise, without the specific written permission of the copyright owner.

This guide is a very brief overview of the legal issues covered. It's no substitute for legal advice that takes into account your circumstances and risks and it must not be taken as legal advice.