



Fair Work
Commission

The role of the Fair Work Commission

Presented by

DEPUTY PRESIDENT WRIGHT to
CLUBS AUSTRALIA 2024 WR & HR CONFERENCE

12 August 2024



Agenda

- About the Commission
 - Bargaining and agreement making
 - Individual disputes
 - Appearing before the Commission
 - Useful resources
 - Questions
-



About the Fair Work Commission

- Australia's national workplace relations tribunal and independent regulator or registered organisations
- We support simple, fair and flexible workplace relations for employees and employers
- Create a safety net of minimum conditions
- Help to resolve workplace disputes
- Regulate unions and employer organisations

How we perform our role

The Commission must perform its functions and exercise its powers in a manner that:

is fair and just

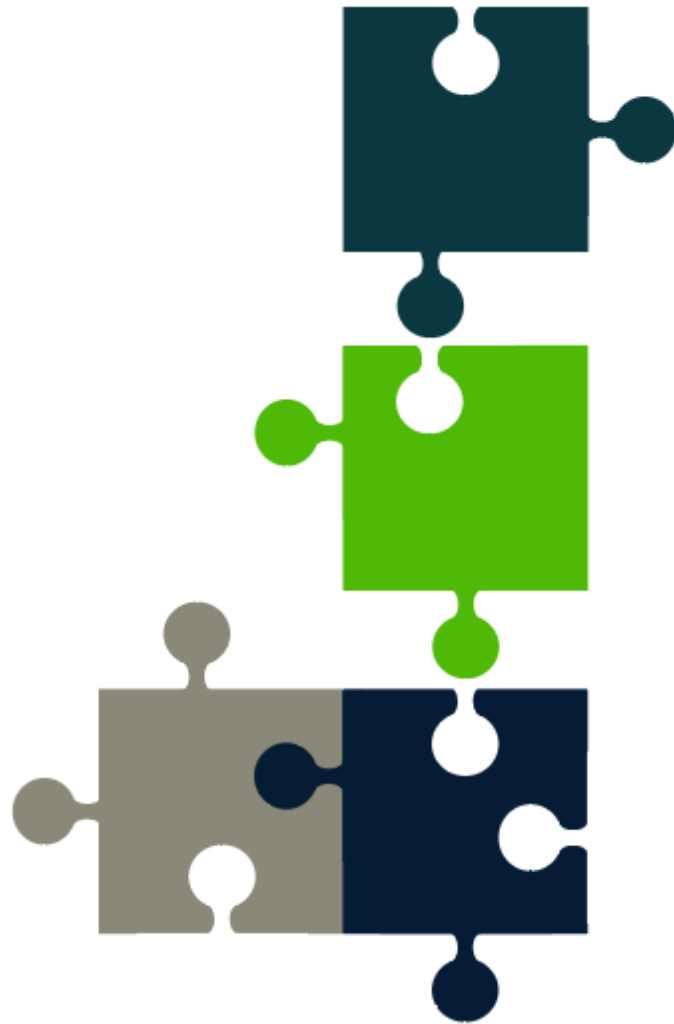
is quick, informal and avoids unnecessary technicalities

is open and transparent

promotes harmonious and cooperative workplace relations

The safety net

National
Employment
Standards



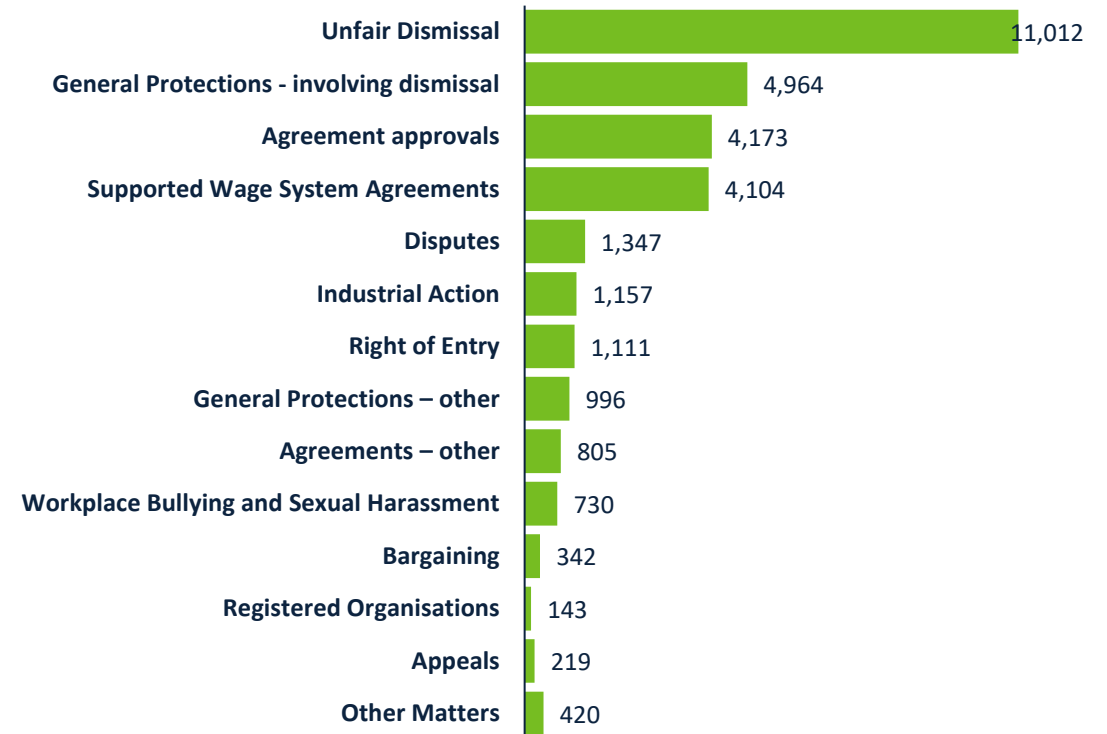
Enterprise
Agreements

Modern
Awards

National
Minimum
Wage

Commission's workload

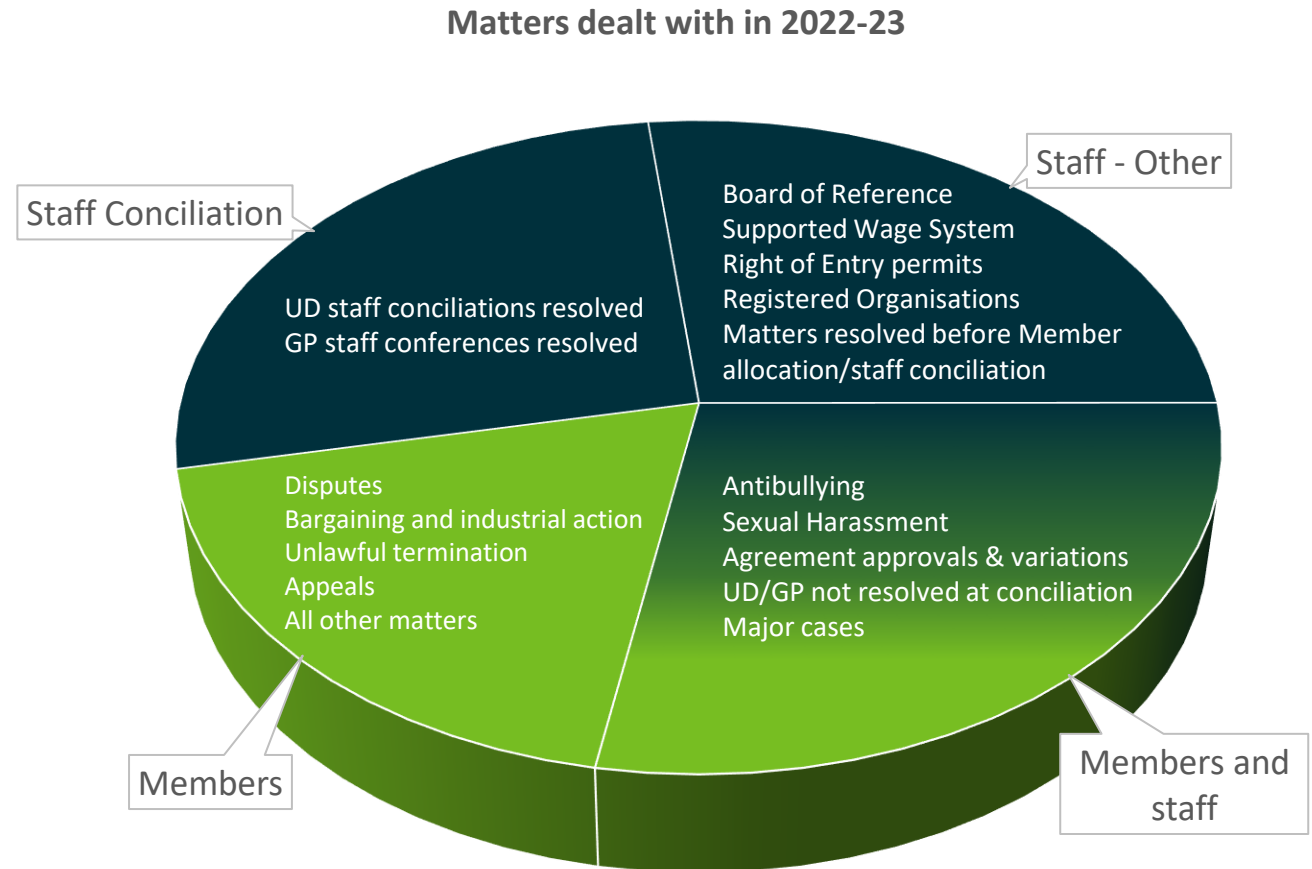
- **Annual workload**
- We generally receive between 33,000 and 36,000 applications per year.
- In 2022-23 we received **31,523** applications.



How staff manage case workload

Of approximately 32,200 applications finalised in 2022-23:

- 6,100 dealt with by Members (with staff involvement limited to processing files and allocating)
- 17,100 dealt with by staff
- 9,000 dealt with by Members and staff



Workload 2022-23

Operational performance



22,490

Hearings, conferences
and conciliations

31,523

Applications lodged



11,041

Statutory documents
published

Workload 2022-23

Engagement



Bargaining and agreement making

The background is a solid teal color. There are two large, white, thin-lined circles. One circle is positioned in the upper right quadrant, and the other is in the lower right quadrant. They overlap each other and the text area.

The process to make an enterprise agreement

The process to make a new single and multi-enterprise agreement can be complex. The timeframe is set by the Fair Work Act 2009. The process for greenfields agreements is different but the high-level process is set out below:

1. Plan
2. Bargain
3. Develop agreement
4. Vote
5. Complete forms
6. Apply for approval
7. Commission Member reviews agreement – BOOT and mandatory terms
8. Commission Member issues a decision

Key concepts

- Good faith bargaining
- Protected Action Ballot Orders - PABOs
- Notice of Employee Representational Rights- NERR
- Mandatory Terms / Unlawful terms
- Better Off Overall Test
- Undertakings to meet the requirements of the Act

Unfair dismissal

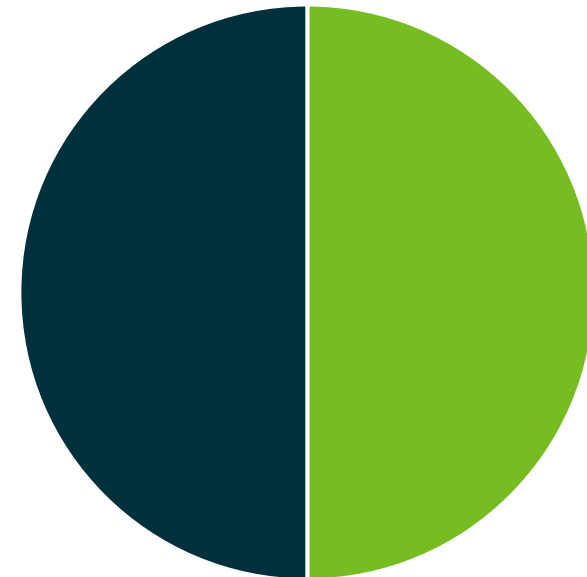


Individual disputes

- Unfair dismissals – half of all cases
- General protections
- Anti-bullying applications
- Sexual harassment
- Flexible work arrangements

Commission cases

■ Unfair Dismissal



Unfair dismissal

Was the dismissal was **harsh, unjust or unreasonable**?

Threshold issues:

- a) Has the person **made their application within time** (21 days)?
- b) Was the person **protected from unfair dismissal**?
 - a) **Minimum employment period** (6 or 12 months)
 - b) **Award or Agreement covered or paid less than the High-Income Threshold** (\$167,500 pa)
- c) Was the dismissal a **genuine redundancy**?
- d) Was the dismissal consistent with the **Small Business Fair Dismissal Code**?
- e) Was the person **dismissed**?

The Unfair Dismissal process

- 75% of cases resolve at conciliation
- Informal, private, confidential and with no public decision issued
- Quicker resolution than hearing and more resolution options
- Hearing is before a Commission Member for a publicly released decision



Determining whether a dismissal was harsh, unjust or unreasonable

- Was there a **valid reason**?
 - “sound, defensible or well rounded”
- Was the employee **notified of that reason**
- Was there an **opportunity to respond**
- Did the **employer refused a support person**
- Were there **any warnings about unsatisfactory conduct**
- The **size** of the employer’s business
- Whether the **employer had dedicated HR**
- **Any other matters** the Commission considers relevant.

Remedies and outcomes for unfair dismissal applications

Dismissed

- Ss.587 and 399A of the Act provide guidance on when an application can be dismissed.

No remedy

- A dismissal can be found to be unfair but no remedy is awarded

Reinstatement

- May be the primary remedy although, it may not be the most appropriate remedy.

Payment of compensation

- Compensation will only be ordered where the Commission considers it appropriate. Eg, significant economic hardship in circumstances.
- Amount awarded cannot be more than the compensation cap
 - \$87,500 or the amount of remuneration received by the person, or that they were entitled to receive (whichever is higher) in the 26 weeks before the dismissal

Remedies and outcomes for unfair dismissal applications

Unfair dismissal – arbitration outcomes

Outcome	2022-23	2021-22	2020-21	2019-20	2018-19	2017-18
Application dismissed – dismissal was fair	191	128	104	93	89	104
Application granted – no remedy granted	5	9	9	7	11	7
Application granted – monetary	75	50	144	92	96	110
Application granted – reinstatement	7	1	4	4	4	6
Application granted – reinstatement and lost remuneration	9	20	13	12	9	17
Application granted – remedy to be determined	9	5	36	17	20	19
Application granted – parties settled on remedy	0	2	3	-	-	-
Total	296	215	313	225	229	263

General Protections

The background is a solid teal color. On the right side, there are two large, white, thin-lined circles. One circle is positioned higher and further to the left, while the other is lower and further to the right, with their edges overlapping.

The General Protections process



We aim to finalise the case within 16 weeks of lodgment

General Protections

- The General Protections laws protect rights at work
- They protect most people from:
 - Harmful (adverse) action
 - Coercion
 - Undue influence or pressure
 - Misrepresentation
- There are two types of general protections applications that can be lodged at the Commission – those that **involve dismissal** and those that **do not involve dismissal**.

The Commission's role in General Protection applications


Conference and arbitrate (with consent)

- Conference is scheduled between the parties.
 - Some jurisdictional issues now determined by the Commission before a conference (out of time; whether dismissed and whether any contraventions are alleged)
- Only after an unsuccessful Conference, and with the consent of both parties, can the Commission arbitrate the dispute and then **only in a “dismissal” application.**
- No determinative function for a “non-dismissal” application

Certificates

- “dismissal” application;
 - All reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful (s.368(3)(a))
 - Whether application would not have reasonable prospect of success (s.368(3)(b))
- “non-dismissal application” – no reasonable prospects (s.375)
- Once a certificate is issued, the Applicant can take the application to the Federal Court or the Federal Circuit Court of Australia to be litigated.

Flexible work and unpaid parental leave

The background is a solid teal color. On the right side, there are two large, white, thin-lined circles that overlap each other and the edge of the frame. The top circle is partially cut off by the top edge, and the bottom circle is partially cut off by the bottom edge. They are positioned to the right of the main text.

Flexible work and unpaid parental leave disputes

The Commission can now deal with disputes about requests for flexible working arrangements and extensions of unpaid parental leave.

Flexible working arrangements eligibility:

- Pregnancy; school age parent; carer; disability; >55 years old; family & domestic violence
- Greater than 12 months employment; some casuals
- Request must be in writing and specify what is wanted
- Employer obliged to respond to request within 21 days
- Employer may refuse request after genuine consideration AND the refusal is on reasonable business grounds

Workplace bullying



What is bullying?

- Bullying at work occurs when:
 - a person, or a group of people, behaves unreasonably towards a worker or a group of workers at work AND
 - this happens more than once AND
 - this creates an ongoing risk to health and safety.

Not all behaviour that upsets a person at work is bullying. **Managers need to be able to give feedback.** It is not bullying if the management action is reasonable AND the way the manager does it is reasonable.

Examples of what is and what is not bullying

Bullying

- teasing or playing jokes
- leaving some workers out of work-related events
- giving someone too much or too little work



Reasonable management action

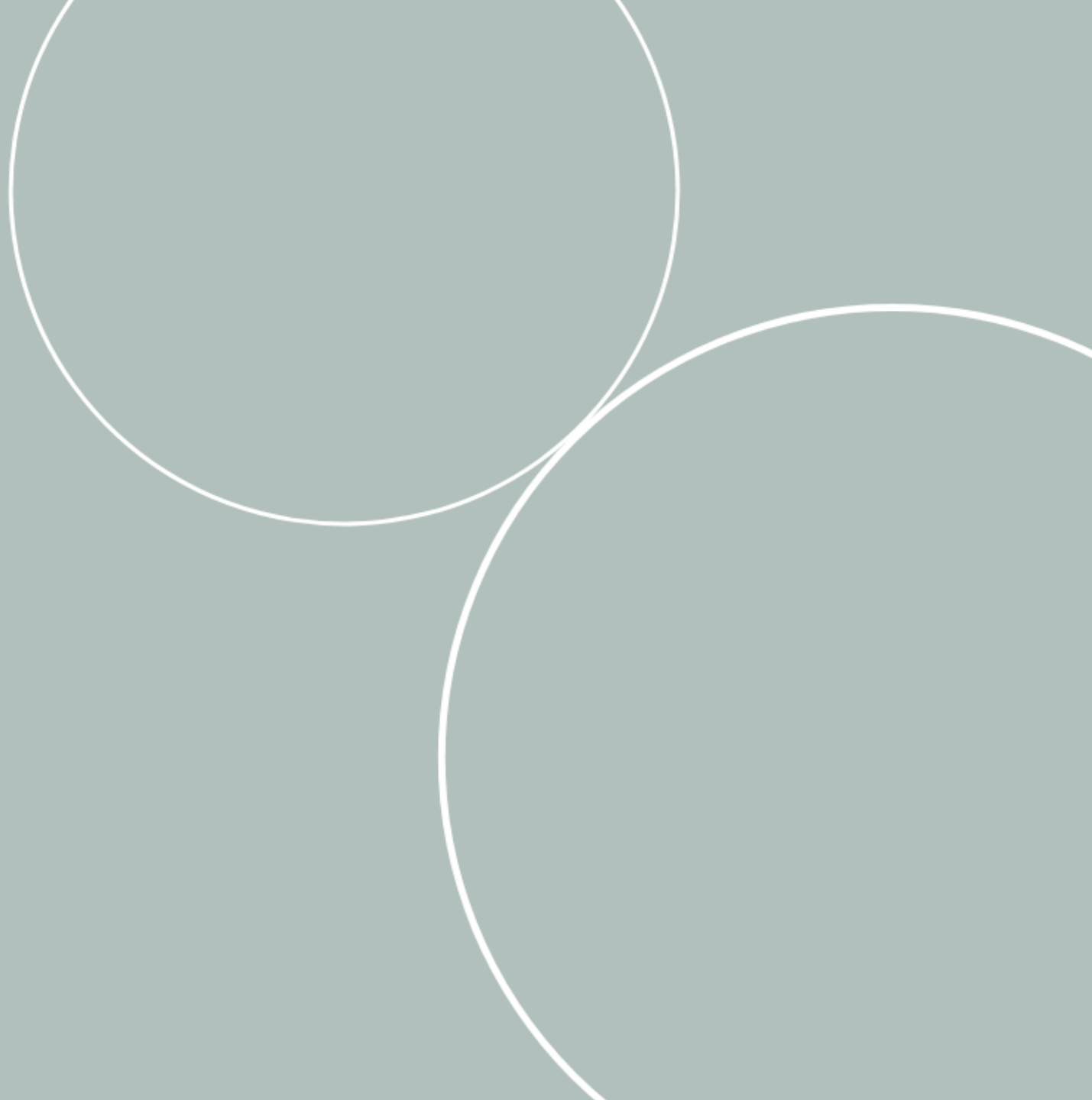
- take disciplinary action for misconduct
- tell a worker about work performance that is not satisfactory
- tell a worker their behaviour at work is not appropriate



What we can do

- An employee can make an application to stop bullying at work
- At conference - parties can agree on an outcome that they feel is right.
- If there is a formal hearing, a Commission Member can make any order they consider right to stop the bullying.
- Orders may include
 - the people involved to stop the bullying
 - compliance with, or review of, the employer's bullying policy
 - an employer to give workers information, support and training.
- **We cannot:**
 - order any party to pay financial compensation
 - order any disciplinary action
 - punish parties or terminate someone's employment.

Sexual harassment





Prohibition on sexual harassment

- The Commission can deal with sexual harassment disputes and/or to make orders to stop sexual harassment in connection with work.
 - According to the laws a person (the first person) must not **sexually harassment** another person (the second person) who is:
 - a worker in a business or undertaking
 - seeking to become a worker in a particular business or undertaking or
 - a person conducting a business or undertaking
 - if the harassment occurs in connection with the second person being a person of one of the above kinds.
-



Understanding sexual harassment

- The meaning of Sexually harassment is the same as the *Sex Discrimination Act 1984*:
 - an unwelcome sexual advance, or an unwelcome request for sexual favours, made to the person harassed or other unwelcome conduct of a sexual nature in relation to the person harassed
 - in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. **Conduct of a sexual nature** includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.
-



What we can do

- A person can apply to the Commission:
 - for orders to stop sexual harassment (our preventative role),
 - to otherwise deal with the sexual harassment dispute (our remedial role),
 - for both of these.
 - Applications must usually be made within 2 years of last alleged contravention. Employer/Principals can now be vicariously liable for the acts of an individual.
-



Stop sexual harassment orders – possible outcomes

- The Commission can make any **preventative** order considered appropriate **other than the payment of money**.
 - Conditions for making a stop sexual harassment order:
 1. Finding that person has been unlawfully sexually harassed, and
 2. Finding of risk that the person will continue to be unlawfully sexually harassed by the same person(s).
-



Non-monetary orders

- A person can be required to perform any reasonable act, or carry out any reasonable course of conduct, **to redress loss or damage suffered** by an aggrieved person in relation to the dispute.
- As with compensation orders, these are **remedial** in nature – redress: to “set right; remedy or repair”.
- Requires finding of relevant “loss or damage suffered” by the aggrieved person.

Examples (drawn from the bullying jurisdiction):

- Apology or withdrawal of apology
 - Withdrawal of disciplinary action
 - Restoration of reporting lines
 - Restoration of duties or hours of work
 - Restoration of accrued entitlements
 - Approval of leave request
 - Take a step required under a Code of Conduct or Policy
 - Resume daily greetings/civilities
-

Appearing at the Commision

Process for individual disputes

The process for individual disputes can vary pending the case. The high-level process involves:

1. Application to the Commission
2. Respondent/persons named respond
3. Conciliation – informal and more options to resolve
4. Conference with a Commission Member for some matter types
5. Hearing before Commission Member
6. Formal decision





Responding to a claim

- It is important to respond to a claim made against you even if it has no merit.
- This gives you a chance to tell us your side of the case.
- We will send you a copy of the application and the correct response form
- You typically have 7 days to respond
- We are a tribunal and do not take sides. Your responses help us understand the facts of the case.

Objecting or challenging a claim

- You can only object for a valid reason
- Jurisdictional objection – We do not have the power to deal with the case.
- Common objections in dismissal matters include:
 - Application was made outside the 21-day time limit
 - The employee didn't work for the minimum employment period
 - They were a contractor not an employee
 - Genuine redundancy
- In bullying cases a common challenge to the claim is reasonable management action.



Conciliation

- This is the first step in all dismissal matters
- Over 75% of cases resolve at conciliation
- Less formal than a hearing and usually led by a staff conciliator
- They are independent and will work with parties to resolve the issue
- The outcome can be whatever the parties agree to
- Takes up to 90 minutes and occurs about 5 weeks after lodgment

Our Online Learning Portal has a dedicated learning module on Preparing for conciliation.

www.learn.fwc.gov.au

Legal representation

- Many people represent themselves at the Commission
- Choose a lawyer or paid agent carefully
- Complete Form F53 to tell us they are acting for you or to ask permission to take part in hearings or conferences
- There are rules we follow when deciding whether the lawyer or paid agent can take part

Hearings

- The final step in the process
- The case is heard and decided by a Commission Member
- They perform a quasi-judicial role similar to a judge at a court
- They are independent and can issue legally binding decisions and orders
- Decisions are published to our website
- The hearing will generally happen several months after the application is lodged

Useful resources



Resources and help for unrepresented parties

Part 4—What is dismissal?
What does 'dismissed' mean?

Part 4—What is dismissal?

What does 'dismissed' mean?

See Fair Work Act s.386

The term **dismissed** is defined in the Fair Work Act as a situation where:

- a person's employment has been terminated at the employer's initiative, or
- a person was forced to resign because of the conduct or course of conduct engaged in by the employer.

A dismissal does NOT include where:

- a person is demoted in his or her employment without a significant reduction in duties or remuneration and remains employed by the employer,
- a person was employed under a contract for a specified period of time, specified task or for the duration of a specified season and the employment comes to an end at the end of that period, or
- a person had a training arrangement with their employer which:
 - specified that the employment was limited to the duration of the training arrangement, and
 - whose employment ends at the end of that training arrangement.

When does a dismissal take effect?

A dismissal does not take effect unless and until it is communicated to the employee who is being dismissed.¹⁰⁷ A dismissal can be communicated orally.¹⁰⁸

Where the communication is in writing only, the communication must be received by the employee in order for the termination to be effective.¹⁰⁹

A notice of termination may still be valid even if it is stated to take effect subject to a condition, such as a future date, provided that:

- the notice clearly expresses the condition
- the condition has been satisfied, and
- the employee is in a position to know that the condition has been satisfied.¹¹⁰

Where payment in lieu of notice is made the dismissal usually takes effect immediately.¹¹¹

¹⁰⁷ Burns v Aboriginal Legal Service of Western Australia (INC) [2001] 134 ALJ 666 (AIRC FB, Williams SDP, Acton SDP, Gregor C, 21 November 2000) at para. 24.
¹⁰⁸ Andros v Rail Corporation NSW [2007] 148 ALJ 833 (Cartwright SDP, 26 April 2007) at para. 8, citing Barolo v Centro Hotel Melbourne [2005] 216 ALJ 805 (AIRC, Whelan C, 10 December 1999).
¹⁰⁹ Ayub v Nair Trans [2015] 120 ALJ 3500 (Hatcher VP, Wells DP, Johns C, 30 September 2016) at para. 17.
¹¹⁰ Ibid., at para. 18.
¹¹¹ Sagion v Sanel Pty Limited [1994] 139 ALJ 322 (7 May 1994), [1994] 122 ALR 383 at p. 355.

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Part 2—How to use this resource
About general protections

Part 3—What are the general protections?

About general protections

Historically protections from unlawful actions being taken in or in relation to the workplace have been scattered throughout legislation. The introduction of the Fair Work Act saw these provisions collected together in a single Part.


The principal protections have been divided into:

- protections relating to workplace rights (which can be broadly described as employment entitlements and the freedom to exercise and enforce those entitlements)
- engaging in industrial activities (which encompasses the freedom to be or not be a member or officer of an industrial association and to participate in lawful activities, including those of an industrial association)⁷
- other protections including protection from discrimination, and
- sham arrangements.

Certain persons, including employers, principals, employees and industrial associations, are prohibited from taking adverse action against certain other persons because the other person has, or exercises, a workplace right, or engages in industrial activity. Adverse action includes dismissal of an employee but also includes a range of other action such as prejudicing an employee or independent contractor and organising industrial action against another person. Coercion and misrepresentation in relation to workplace rights and industrial activities are also prohibited.⁸

Civil remedy provisions

All of the general protections prohibitions are civil remedy provisions.⁹

 A civil remedy provision is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

Involvement in contravention treated in same way as actual contravention

A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.¹⁰

⁷ Explanatory Memorandum to Fair Work Bill 2008 [1338].
⁸ Explanatory Memorandum to Fair Work Bill 2008 [1339].
⁹ Explanatory Memorandum to Fair Work Bill 2008 [1341].
¹⁰ Fair Work Act s.550(1).

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Part 3—What is workplace bullying?
Definition of bullying

Part 3—What is workplace bullying?

Definition of bullying

See Fair Work Act s.789FD(1)


Workplace bullying occurs when:

- an individual or group of individuals repeatedly behaves unreasonably towards a worker or a group of workers at work,

AND

- the behaviour creates a risk to health and safety.¹

Reasonable management action conducted in a reasonable manner does not constitute workplace bullying.²

 **Related information**

- What does "Reasonable management action carried out in a reasonable manner" mean?

Examples of bullying

Depending on the nature and context of the conduct, bullying behaviours can include:

- the making of vexatious allegations against a worker
- spreading rude and/or inaccurate rumours about an individual, and
- conducting an investigation in a grossly unfair manner.³

In *Amie Mac v Bank of Queensland Limited and Others*⁴ the Commission indicated that some of the features which might be expected to be found in a course of repeated unreasonable behaviour constituting bullying at work were:

... intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, diversions, mobbing, mocking, victim-blaming and discrimination.

The following behaviours could also be considered as bullying, based on cases heard in other jurisdictions:

- aggressive and intimidating conduct⁵
- belittling or humiliating comments⁶

¹ Fair Work Act s.789FD(1).
² Fair Work Act s.789FD(2).
³ See Am 58 [2012] FWC 1104 (Hampton C, 13 May 2014) at para. 105.
⁴ [2015] FWC 723 (Hatcher VP, 13 February 2015) at para. 95.
⁵ *Nesidi v Group 4 Securities Pty Ltd* [2003] NSWSC 618 (24 June 2003).

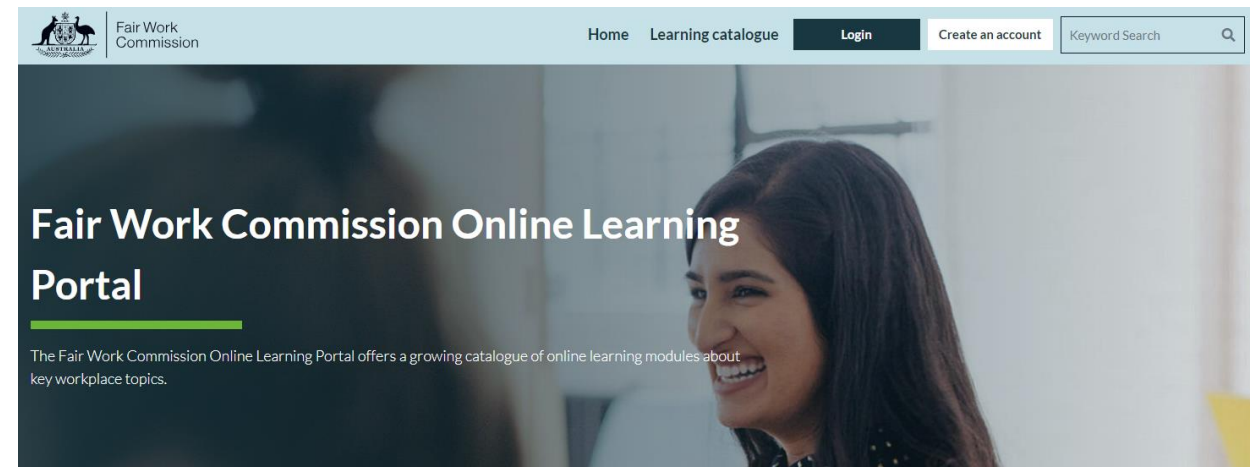
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Online Learning Portal

Free online modules to help you:

- Preparing for an unfair dismissal conciliation
- Workplace sexual harassment
- Interest based bargaining process
- What is interest based bargaining



Our Online Learning Portal has a dedicated learning modules to help you

www.learn.fwc.gov.au



Resources and help for unrepresented parties

The screenshot shows the 'Apply or lodge' page on the Fair Work Commission website. The navigation bar includes 'Job loss or dismissal', 'Issues we help with', 'Agreements & awards', 'Hearings & decisions', 'Registered organisations', and 'Apply or lodge'. The main heading is 'If you decide to represent yourself'. Below the heading, there is a paragraph: 'When you have a case at the Commission, you can represent yourself. Lots of people do this. Use this website to help you prepare.' A section titled 'On this page:' lists three links: 'Introduction', 'If you want a friend or family member to help', and 'If you decide you need legal representation'. The 'Introduction' section begins with the text: 'Many people choose to represent themselves in a case at the Commission. We aim to make it easy for you to represent yourself, whether you are making a claim or responding to someone else's application.'

The screenshot shows the 'Case law benchbooks' page on the Fair Work Commission website. The navigation bar includes 'Job loss or dismissal', 'Issues we help with', 'Agreements & awards', 'Hearings & decisions', 'Registered organisations', and 'Apply or lodge'. The main heading is 'Case law benchbooks'. A sidebar on the left lists various benchbooks: 'Hearings & decisions', 'Hearings schedule', 'How the Commission works', 'Appeal a decision or order', 'Decisions and orders', 'Major cases', 'Case law benchbooks', 'Enterprise agreements benchbook', 'General protections benchbook', 'Industrial action benchbook', 'Sexual harassment benchbook', 'Stop bullying benchbook', 'Unfair dismissals benchbook', 'JobKeeper disputes benchbook', 'References in the benchbooks', 'Vaccination related matters', 'Practice notes', and 'Transcripts and recordings'. The main content area contains the following text: 'The benchbooks are like handbooks to help you understand Fair Work legislation. They explain how the Commission has interpreted the legislation in previous cases to make decisions (case law). You may find the examples useful as you prepare for a case at the Commission. We do not show all possible examples for every situation. You can use our document search to [find decisions](#) about other cases. Aboriginal and Torres Strait Islander people should be aware that these resources may contain the names of people who have recently died. We acknowledge AustLII, Thomson Reuters and LexisNexis, whose services we used to create these resources. To give us feedback, email benchbook@fwc.gov.au.' Below the text is a grid of nine benchbook tiles, each with a right-pointing arrow: 'Enterprise agreements benchbook', 'General protections benchbook', 'Industrial action benchbook', 'Sexual harassment benchbook', 'Stop bullying benchbook', 'Unfair dismissals benchbook', 'JobKeeper disputes benchbook', 'References in the benchbooks', and 'Vaccination related matters'.

Questions?
