

Australia¹

Sources of regulation

The central piece of federal legislation governing the termination of employment in Australia is the Workplace Relations Act 1996 (WRA) (as supplemented by the Workplace Relations Regulations 1996 (WRR)). In addition, the states of Australia, with the exception of Victoria, have unfair dismissal legislation which employees covered by state awards may be entitled to use. Collective agreements and awards may also form a supplementary source of regulation of termination of employment.

Other legislation relevant to termination of employment in the private sector is the Sex Discrimination Act 1984, the Racial Discrimination Act 1975, the Human Rights and Equal Opportunity Commission Act 1986 and the Disability Discrimination Act 1992. Given the extensive list of grounds on which employment may not be terminated in the WRA (*sec. 170 CK(2)*, WRA), employees covered by the it may be able to elect under which legislation to bring a claim of discriminatory dismissal. Anti-discrimination legislation also exists in all states of Australia.

All employees who are not covered by the WRA, or state legislation, may bring a wrongful dismissal claim at common law. Case law decided under the WRA, and under the previous legislation, is also a source of regulation.

Scope of legislation

With respect to allegations that a dismissal was harsh, unjust or unreasonable, the WRA and WRR cover (apart from some employees of State governments) employees covered by federal awards and employees of constitutional corporations. They also cover waterside workers, maritime employees, and flight crew employed in the course of interstate or international trade or commerce (*sec. 170 CB(1)*, WRA). Regarding an allegation that a dismissal was discriminatory, in breach of notice, or in violation of the notice requirements in relation to collective dismissals, the WRA and WRR cover all such employees who are not excluded (*sec. 170 CB(2), (3) and (4)*, WRA). The WRR *excludes* the following employees from the WRA (*Reg. 30B*, WRR):

- C employees engaged for a specified period of time or specified task;
- C probationary employees;
- C casual employees engaged for a short period²;
- C trainees; and
- C non-award employees earning more than A\$64,000 (indexed) per year³.

In addition, daily hire employees in the building and meat industries, seasonal weekly hire employees in the meat industry and certain seafarers are excluded from the notice requirements of the WRA but are covered by the anti-discrimination provisions⁴

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2 The WRR defines the concept of 'casual employees engaged for a short period of time' by providing (regulation 30B(3)) that a casual employee is taken to be engaged for a short period unless the employee is engaged by the employer on a regular and systematic basis for a period of at least 12 months and the employee had a reasonable expectation of continuing employment by that employer.

3 The amount is currently A\$71,200 for the 2000-2001 financial year.

4 That is, these employees are not covered by *secs. 170 CL and 170 CM* of the WRA but are covered by *sec. 170 CK(2)* which deals with prohibited grounds of dismissal (*Reg. 30BA*).

Contracts of employment

For the purpose of establishing the ambit of the WRA, the WRR contains definitions of fixed term employees, casual employees, probationary employees and trainees¹. Each of these classes of employee is excluded from the WRA. Notably, a probationary period must be determined in advance and cannot last for more than three months, unless such longer period is reasonable having regard to the nature and circumstances of the employment.

Termination of employment

Employment can terminate, without being considered a dismissal@:

- C by mutual agreement of the parties;
- C by the death of one of the parties;
- C if the employee resigns by giving any agreed period of notice;
- C if the employment contract is frustrated by a supervening event beyond either party's control; or
- C for fixed-term or casual contracts, upon the expiry of the agreed term or task.

Termination of employment at the initiative of the employer

The employer can terminate the employment of those who are not covered by the WRA, any unfair dismissal legislation, or any award or collective agreement governing termination by giving the contractual period of notice or, if no notice period has been agreed, reasonable notice.

Under the WRA, an employer must:

- C ensure the dismissal is not harsh, unjust or unreasonable (for those employees to whom this requirement applies (see above));
- C ensure the dismissal is not on a prohibited ground (see below);
- C ensure statutory notice periods are complied with (see below); and,
- C for dismissals of 15 or more employees on economic, technological or structural grounds, consult with any unions of which its employees are a member and notify the government.

Sec. 170 CK(2) of the WRA sets out grounds on which termination is prohibited, including:

- C temporary absence of work because of illness or injury (as defined by *Reg. 30C(1)*, WRR);
- C union membership or activity;
- C non-membership of a union;
- C acting, or seeking to act, as an employees' representative;
- C the filing of a complaint or participation in proceedings against the employer;
- C absence from work during maternity or parental leave;
- C race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
- C refusal to negotiate, agree to or amend a workplace agreement.

However, a termination based on the above grounds will be lawful if it is based on the inherent requirements of the position (*sec. 170 CK(3)*, WRA) or, for employees of religious institutions, if the

1. Respectively defined in *Reg. 30B(1)(a) and (b)*, *Reg. 30B(1)(d) and 30B(3)*, *Reg. 30B(1)(c) and Reg. 30B(1)(e)*.

termination is in good faith and to avoid injury to the religious susceptibilities of adherents (*sec. 170 CK(4)*, WRA).

Notice and prior procedural safeguards

The WRA sets out statutory notice periods which must be complied with, unless a payment in lieu of notice is made or the dismissal is on the grounds of serious misconduct (*sec. 170 CM(1)*, WRA). The notice periods range from one to six weeks and depend on the employee's length of service and whether the employee is more than 45 years old (*sec. 170 CM(2) and (3)*, WRA).

For dismissals of 15 or more employees for reasons of an economic, technological, structural or similar nature, notice of contemplated dismissals must be given to the Commonwealth Employment Service (*sec. 170 CL*, WRA). In addition, an employer must consult any trade union of which any of its employees is a member regarding contemplated dismissals, including the reasons for the terminations, the employees likely to be affected, the timing of the terminations and measures to avert or minimize the effects of the terminations (*sec. 170 GA*, WRA).

Sec. 170 CG(3) of the WRA sets out the procedural aspects that the Commission will consider in determining whether a dismissal was harsh, unjust or unreasonable (see above for those employees who are able to make such an allegation). These include:

- C** whether there was a valid reason for the termination related to the capacity or conduct of the employee or the operational requirements of the employer;
- C** whether the employee was notified of that reason;
- C** whether the employee was given an opportunity to respond to any reason related to his or her capacity or conduct; and,
- C** for terminations relating to unsatisfactory performance, whether the employee had been warned about unsatisfactory performance (*sec. 170 CG(3)*, WRA). In addition, *sec. 170 CA(2)* of the WRA states that the aim of the procedures and remedies under that Act is to ensure a fair go all round to employers and employees.

Severance pay

The WRA and WRR only specify notice periods and do not require redundancy compensation or severance pay. Prior to the commencement of the WRA awards contained a range of measures relating to redundancy such as the entitlement to severance pay, and a requirement on employers to consult with unions and notify a government agency about proposed redundancies. Since the commencement of the WRA the range of redundancy-related matters that can be included in awards has been reduced (*sec. 89A(2)(m)*, WRA; Re Award Simplification Decision (1997) 75 IR 272). Awards can no longer include provisions requiring employers to consult with unions and notify a government agency of proposed redundancies. The main provisions that can now be included in awards are as follows: the definition of redundancy, severance pay entitlements, deductions from severance payments due to superannuation benefits, and exemptions from severance pay due to, for example, misconduct. Such provisions are usually included in an award following the consideration by the Commission of an application made by one of the parties to an award, usually a trade union.

Avenues for redress

The body which will determine any complaint about a dismissal depends on the grounds of the complaint. If the employee alleges a dismissal was harsh, unjust or unreasonable the complaint will be heard by the Industrial Relations Commission (*sec. 170 CE*, WRA) if, and only if, the Commission is unable to settle the complaint by conciliation (*sec. 170 CF*, WRA). If, on the other hand, the employee is alleging discrimination or breach of notice requirements (either for collective or individual dismissals), the Federal Court will hear the matter; but again, if, and only if, the Commission is unable to settle the matter by conciliation (*ibid.*). If both grounds are alleged, the employee must elect the forum in which to pursue the complaint. However, the Commission may not hear an application if an effective alternative remedy under another federal law or state law exists (*sec. 170 GC*, WRA).

If the Commission determines that a dismissal was harsh, unjust or unreasonable, it may (having regard to the employer's financial circumstances and the employee's length of service) reinstate or re-engage the employee, order damages in lieu of reinstatement, or order compensation for lost remuneration provided such compensation does not exceed the amount that employee earned from that employer in the last six months, up to a maximum of six months pay or A\$32,000 (indexed), whichever is the lesser (*sec. 170 CH*, WRA). The Commission also hears complaints about non-consultation of unions for collective dismissals and, where there has been a failure to consult, it may make any order to restore the parties, as far as possible, to the position they would have enjoyed had there been consultation (*sec. 170 GA(2)*, WRA).

If the Court finds that a dismissal is discriminatory it may award any of the following: a penalty, reinstatement or compensation (*sec. 170 CR*, WRA). When the Court finds that the requisite notice period has not been given it can award damages in lieu of notice (*sec. 170 CR(4)*, WRA). Finally, the Court may order an employer not to terminate certain employees (*sec. 170 CR(3)*, WRA) if the Commonwealth Employment Service has not been notified of pending collective dismissals.