10. Human resource management and the law

The employer-employee relationship is governed by various State and Federal legislation. Whether your business is large or small, it is necessary to have at least a basic understanding of employment law. A manager who is responsible for the recruitment, development, overall supervision of employees and termination of the employment relationship will make decisions every day that are governed by law.

In addition to satisfying matters of compliance, organisations that work within the law will reap benefits through developing a positive working partnership with their employees. Both parties will understand their rights and obligations and will work towards a more unified approach. As a result, productivity gains will become evident.

Managers should be in a position to make the right decisions quickly with respect to their employees. This is only possible if the manager has an understanding of both the business's needs and the legal responsibilities pertaining to the employment relationship.

This chapter provides an overview of:

- common law and the employment relationship
- contract of employment
- employment-related legislation.

10.1 Common law and the employment relationship

Common law is the name given to the body of 'case law' that has been established by the courts over many years. Common law imposes certain duties and obligations on the employment relationship. These obligations apply to all contracts of employment, whether or not the parties are aware of them or have agreed to them.

Both the employer and the employee have a number of common law duties imposed on them when in an employment relationship. The following table outlines those duties:

Employee	Employer
Duties and obligations to the employer: - to work in a skillful and competent manner - to obey the employer's lawful demands - to provide faithful service, which includes a prohibition on disclosing confidential information; to account for and protect the employer's property; and to give complete attention to performing the work. Further, the benefit of discoveries or inventions developed by employees during the course of their employment must be given to the employer.	**Duties and obligations to the employee:** - to pay wages and reasonable expenses incurred in the course of the employment - to provide work in circumstances where payment is directly tied to performance - to take reasonable care for their health and safety - to indemnify an employee for losses incurred by the employer while performing duties under the contract of employment.

10.2 Contract of employment

When an employer agrees to engage a person to perform work in exchange for monetary payment, a legal relationship begins. At the time the agreement is made, a contract of employment is formed. A contract of employment is a legally binding contract and a significant body of law exists relating to such contracts.

Discussion about the contract of employment can be confusing as people usually refer to the contract of employment as a written document. At law, however, the term 'contract of employment' refers to the legal relationship between an employer and employee, whether in writing or not.

10.2.1 Implied terms

A contract of employment exists whether or not the contract terms are in writing. Some terms apply to the contract even if the parties have not specifically discussed or agreed to them (refer *10.1 Common Law*). Those terms of a contract of employment that apply without having been verbally agreed to or put in writing are referred to as **implied terms**.

A court may imply certain terms into a contract of employment where it is considered necessary to give the contract business efficacy or to allow the contract to be effective or capable of being carried out. In simple terms, these terms 'fill the gaps' that may exist in a contract of employment. For a court to imply a term into a contract of employment, the term must be something that 'goes without saying' and does not contradict an expressed term. Implied terms may include:

- terms implied by law (including common law obligations)
- terms implied by fact (i.e. based on the circumstances of the particular employment relationship, e.g. custom and practice).

10.2.2 Express terms

Express terms of a contract of employment refer to those terms that have been expressly agreed upon (verbally or in writing). Usually, parties entering into an employment relationship will agree on a number of terms and conditions of employment. In many cases, some or all of these terms will be set out in writing in some form.

In Australia, the National Employment Standards and the Federal Modern Award system determine minimum terms and conditions for many employees. Federal Awards are comprehensive, leaving little else to be expressed in a contract. However, even where a comprehensive Modern Award or Enterprise Agreement is in place, it is important that both parties fully understand all of the terms of the contract of employment. It is recommended therefore that all employees have a written contract of employment (refer *10.2.3 below* and *Chapter 4 Recruitment and Selection*).

10.2.3 Terms and conditions of employment

Employment contracts should not be long, complicated documents. They should be written in clear, plain English so that both parties fully understand the content. In most cases, a standard base employment contract can be developed for each major category of employee (e.g. award covered/management, full-time, part-time, casual, fixed term).

An employment contract checklist and sample or outline contract is included in Chapter 4 (refer *4.9 Documentation*). This chapter sets out the minimum terms and conditions of employment for Victorian

employees. It is important to consider your individual circumstances and to get more advice, if necessary, to ensure your employment contracts are both legal and suited to your business needs.

The checklist provides an extensive list of items that may be included. Some of the terms recommended to be included in a contract of employment are listed below:

- job title
- probationary period
- position description/duties
- work location
- remuneration and benefits
- hours of work
- superannuation
- leave entitlements
- overtime and penalties
- confidential information
- security
- refer to all other human resource policies and procedures
- termination of employment.

Once you have established the content of the employment contract, ask the employee to review it thoroughly. Ensure both parties have signed the employment contract before the employee begins work. Provide the employee with a signed copy and keep the original on the employee's personnel file.

10.3 Employment-related legislation

In Australia, Federal and State Governments have developed a wide range of legislation that relates to the employment relationship. Such legislation crosses many boundaries of the employer/employee relationship. Although it is not reasonable to expect that employers understand all of the complexities of the legislation fully, serious penalties are imposed in the event of a breach of the law. Therefore, it is important to be familiar with the general guidelines, and to seek advice where and when you have concerns. Unfortunately, there are no exceptions for small businesses, regardless of limited time and resources.

Some of the employment related legislation that employers should be familiar with include:

- *Fair Work Act 2009 (Cth) (see below)*
- *Equal Opportunity Act 2010 (Vic) (see also Chapter 8)*
- *Sex Discrimination Act 1984 (Cth) (see also Chapter 8)*
- *Racial Discrimination Act 1975 (Cth) (see also Chapter 8)*
- *Disability Discrimination Act 1992 (Cth) (see also Chapter 8)*
- *Occupational Health and Safety Act 2004 (Vic) (see also the Victorian Chamber OHS Manual)*
- *Long Service Leave Act 1992 (Vic)*

10.3.1 The Fair Work Act 2009 (Cth)

In 1996, the Victorian Government referred certain aspects of its industrial relations powers to the Commonwealth so that workplace relations in Victoria are regulated by a single piece of Federal legislation, now known as the *Fair Work Act 2009 (Cth)*.

The Federal Act contains approximately 800 sections, each relating to a particular aspect of the workplace relations system, such as:

- The Fair Work Commission
- Fair Work Ombudsman
- Fair Work inspectors
- National Employment Standards (NES)
- Modern awards
- Enterprise agreements
- Interaction between NES, modern awards and enterprise agreements
- Workplace determinations
- Minimum wage
- Equal remuneration
- Transfer of business
- General protections
- Termination of employment including unfair dismissal and unlawful termination
- Industrial action
- Right of entry
- Registered organisations
- Employment records.

Awards

The first 122 modern awards commenced on 1 January 2010 coinciding with the introduction of the new national workplace relations system. Together with 10 minimum National Employment Standards (NES) and the **national minimum wage order**, the modern awards make up a safety net for employees in the new system. While modern awards commenced on 1 January 2010, many contain transitional arrangements which phase-in changes in wages, loadings and penalty rates over a five year period.

The National Employment Standards (NES) are contained in the *Fair Work Act 2009 (Cth)*. They are minimum standards applying to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms that have the same (or substantially the same) effect as provisions of the NES.

The Fair Work Act empowers the Fair Work Commission to make and adjust the modern awards. An award is a formal document, enforceable at law, which details the rights, duties and conditions of employment for both employers and employees in a particular industry or occupation.

A modern award may include terms about any of the following matters:

- minimum wages (including wage rates for junior employees, employees with a disability and employee to whom training arrangements apply); and skill-based classifications and career structures; and incentive-based payments, piece rates and bonuses;
- type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;
- arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
- overtime rates;
- penalty rates, including for any of the following:
  - employees working unsocial, irregular or unpredictable hours;
  - employees working on weekends or public holidays;
  - shift workers;
- annualised wage arrangements that:
  - have regard to the patterns of work in an occupation, industry or enterprise; and
  - provide an alternative to the separate payment of wages and other monetary entitlements; and
  - include appropriate safeguards to ensure that individual employees are not disadvantaged;
- allowances, including for any of the following:
  - expenses incurred in the course of employment;
  - responsibilities or skills that are not taken into account in rates of pay;
  - disabilities associated with the performance of particular tasks or work in particular conditions or locations;
- leave, leave loadings and arrangements for taking leave;
- superannuation;
- procedures for consultation, representation and dispute settlement.

Any allowance included in a modern award must be separately and clearly identified in the award.

The modern awards set minimum conditions for any employer who is employing people in an occupation or in an industry sector covered by the scope of a particular modern award.

National Employment Standards - Minimum terms and conditions of employment

For those employees who are not subject to modern award coverage, their minimum terms and conditions of employment are also determined by the National Employment Standards are set out in the *Fair Work Act 2009 (Cth)*. The National Employment Standards are:

1. *Maximum weekly hours of work* – 38 hours per week, plus reasonable additional hours.
2. *Requests for flexible working arrangements* – An employee will be eligible to make a request to a change in their working arrangements if they meet any of the following criteria:
   - the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

- the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
- have a disability;
- 55 years old or older;
- experiencing violence from a member of the employee's family;
- providing support to a member of his or her immediate family (please see Definitions below)or member of his or her household who requires care/support because the member is experiencing violence from the member's family;

3. *Parental leave and related entitlements* – up to 12 months unpaid leave for every employee (inclusive of the entitlement to 10 'keeping in touch' days), plus a right to request an additional 12 months unpaid leave, and other forms of maternity, paternity and adoption related leave.
4. *Annual leave* – four weeks paid leave per year, plus an additional week for certain shift workers. Accrues on a pro-rata basis and is cumulative. Annual leave is to be taken by mutual agreement between the employer and the employee and must not be unreasonably refused.
5. *Personal / carer's leave* – An employee may take paid personal/carer's leave when the employee is sick or injured or when the employee needs to care for an immediate family or household member who is sick, injured or has an unexpected emergency.

   - Ten days paid personal / carer's leave, an employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the number of ordinary hours worked and accumulate from year to year.
   - Two days unpaid carer's leave as required
   - Five days unpaid family and domestic violence leave in a 12 month period where the employee is experiencing family and domestic violence and needs to do something to deal with the impact of the family and domestic violence where they cannot do that thing outside of ordinary work hours.
   - *Compassionate leave* – 2 days per occasion, not from accrued entitlements. A permissible occasion is defined as a circumstance where 'a member of the employee's immediate family, or a member of the employee's household': contracts or develops a personal illness that poses a serious threat to his or her life, sustains a personal injury that poses a serious threat to his or her life, dies.

6. *Community service leave* - unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service.
7. *Long service leave (LSL)* - a transitional entitlement for employees who had certain LSL entitlements before 1 January 2010 pending the development of a uniform national long service leave standard.
8. *Public holidays* - a paid day off on a public holiday, except where reasonably requested to work.
9. *Notice of termination and redundancy pay* - up to four weeks' notice of termination (five weeks if the employee is over 45 and has at least two years of continuous service) and up to 16 weeks redundancy pay, both based on length of service.
10. *Provision of a Fair Work Information Statement* - employers must provide this statement to all new employees. It contains information about the NES, modern awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, right of entry, transfer of business, and the respective roles of the Fair Work Commission and the Fair Work Ombudsman.

These conditions comprise the National Employment Standards (NES) and apply to all employees covered by the Federal system. Employees who are covered by a modern award will continue to be entitled to their award conditions if those conditions are more generous that the Standard.

This information is intended as general advice.

If you need specific advice about employment matters such as the National Employment Standards, drafting an employment contract, rates of pay or whether employees are subject to award coverage and, if so, under which award, contact the Victorian Chamber Workplace Relations Advice Line on 03 8662 5222 to discuss your particular circumstances.

10.3.2 Enterprise agreements

Under the *Fair Work Act 2009 (Cth)*, an employer may enter into an Enterprise Agreement with some or all of their employees. Enterprise Agreements cannot be made with a single employee.

An employer is no longer able to enter into an individual statutory agreement (previously known as Australian Workplace Agreements (AWA) and Individual Transitional Employee Agreements (ITEAs)) that were approved by the Workplace Authority. However an employer can enter into a common law contract of employment that is not registered with or approved by a government agency.

Enterprise (collective) agreements are made with employees. Employees have a right to have a bargaining representative act on their behalf in the negotiations. The bargaining representative may be the employees' union or unions, the employee themselves or another representative. A union official cannot act as bargaining representative for an employee unless the union has coverage to represent that employee. Enterprise agreements made under the Federal Act are required to be lodged with the Fair Work Commission for approval.

Enterprise agreements need to be approved by the Fair Work Commission. An enterprise agreement must comply with the National Employment Standard and employees must be 'better off overall' in comparison to any relevant modern award. The Fair Work Commission will be responsible for applying the Better Off Overall Test (BOOT).

Enterprise agreements will cover 'matters pertaining to the employment relationship' generally. However, enterprise agreements cannot contain unlawful content (e.g. terms that are discriminatory, terms that are inconsistent with union right of entry laws, provisions allowing payment of bargaining service fees to unions).

Enterprise agreements must include a provision allowing individual flexibility arrangements for employees and must include a term requiring consultation where major workplace change is proposed together with a term for dispute resolution.

The individual flexibility clause is restricted to changes regarding:

- arrangements for when work is performed
- overtime rates
- penalty rates
- allowances
- leave loading.

Good faith bargaining obligations are set out in the *Fair Work Act 2009 (Cth)*, and provide that a bargaining representative must:

- attend, and participate in, meetings at reasonable times
- disclose relevant information (other than confidential or commercially sensitive information) in a timely manner
- respond to proposals made by other bargaining representatives for the agreement in a timely manner
- give genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals
- refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining
- recognise and bargain with the other bargaining representatives for the agreement.

The good faith bargaining requirements do not require a bargaining representative to:

- make concessions during bargaining for the agreement
- reach agreement on the terms that are to be included in the agreement.

If a party is not acting in good faith during negotiations for an enterprise agreement, the Fair Work Commission may be asked to make orders for compliance. However, a party will not be compelled to agree to a proposal unless there are exceptional circumstances.

The Fair Work Commission will only arbitrate a dispute if a bargaining representative has breached a bargaining order and such breach is serious and has undermined the negotiations for an enterprise agreement. The involvement of the Fair Work Commission in such cases is intended to be a "last resort" only, and there must be evidence all other reasonable alternatives have been exhausted.

Victorian Chamber consultants can advise and/or assist in the process of developing contracts of employment or enterprise agreements, and we strongly advise that you seek this additional advice before considering any agreement-making options.

10.3.3 Industrial action

Unions and employees will not be able to take lawful industrial action when negotiating an enterprise agreement unless this has been authorised by a majority of employees, voting by secret ballot. The Fair Work Commission can prevent industrial action during negotiations if it is causing significant harm to a third party. Industrial action can be stopped if it is threatening health, safety or the economy.

10.3.4 Unfair dismissals

This information is intended as a general overview of the legislation. If you need specific advice about terminating an employee please contact the Victorian Chamber Workplace Relations Advice Line on 03 8662 5222 to discuss your particular circumstances.

When considering whether a dismissal was unfair, the Fair Work Commission needs to determine whether the dismissal was harsh, unjust or unreasonable, and must take into account the points in *10.3.4 Unfair Dismissals, What is harsh, unjust or unreasonable.*

Who is eligible to make an application?

An employee is eligible to make an application for unfair dismissal if they have completed the minimum employment period of:

- one year—where the employer employs less than 15 employees (a small business employer). For the definition of a 'small business' see *10.3.4 Unfair Dismissals, Who is eligible to make an application*).
- six months—where the employer employs 15 or more employees.

In addition, if the person earns more than $148,700 per year, at least one of the following must apply:

- an award covers the person
- an enterprise agreement applies to the person.

There are certain employees who are excluded from making unfair dismissal claims. The exclusions include:

- where the dismissal was a case of *genuine redundancy*
- where the employee is not covered by an award or enterprise agreement and their annual rate of earnings exceeds the *high income threshold* ($148.700 as at 1 July 2019)
- the employee was under a contract of employment for a specified period of time, for a specified task or for the duration of a specified season
- the employee was under a training arrangement for a specified period
- certain casual employees.

Penalties imposed for inappropriate handling of dismissal / termination

Reinstatement

The Fair Work Commission may order reinstatement by:

- reappointing to the position held immediately before dismissal; or
- appointing to another position on terms and conditions no less favourable than before the dismissal.

If the position held before dismissal no longer exists, and that position or an equivalent position exists with an associated entity of the employer, then the Fair Work Commission may order appointment to that position with the associated entity on terms and conditions no less favourable than before the dismissal.

When reinstating employment, the Fair Work Commission may order that continuity employment from the date of dismissal be recognised.

In addition to reinstatement, the Fair Work Commission may order that the employer pay an amount for remuneration lost, or likely to have been lost, because of the dismissal.

Compensation

The Fair Work Commission may order payment of compensation in lieu of reinstatement. When ordering compensation the Fair Work Commission must take into account all the circumstances of the case including:

- the effect of the order on the viability of the employer's enterprise
- the length of service
- the remuneration that would have been received if there was no dismissal
- the effort to mitigate the loss suffered by the former employee
- the amount of remuneration earned by the former employee since dismissal and making the order
- the amount of income reasonably likely to be earned from making the order and receiving the compensation
- any other matter the Fair Work Commission considers relevant.

If misconduct contributed to the dismissal, the Fair Work Commission must reduce the amount of compensation by an appropriate amount on account of the misconduct. Compensation must not include a component by way of compensation for shock, distress or humiliation, or other equivalent hurt.

Compensation is to be capped at half the high income threshold which is currently $148,700 (as at 1 July 2019) or 26 weeks remuneration, whichever is the lesser amount.

Small Business Fair Dismissal Code

For the purposes of the Small Business Fair Dismissal Code, 'small business' is defined as a business with less than 15 employees.

From 1 January 2011, this is based upon a simple head count of less than 15 employees. This must include the employees of the business, and any other associated entities. The concept of 'other associated entities' is explained further below.

The definition of a small business employer is set out at section 23 of the Fair Work Act 2009. In summary, this section provides that a national system employer is a small business employer at a particular time if the employer employs fewer than 15 employees at that time.

For the purpose of calculating the number of employees employed by the employer at a particular time the employer must count:

- All employees employed by the employer at that time (including regular and systematic casual employees).
- Irregular casuals will not be included.

What is harsh, unjust or unreasonable?

In considering whether a dismissal was harsh, unjust or unreasonable, the Fair Work Commission must take into account:

> whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees), and
> whether the person was notified of that reason, and
> whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person, and
> any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal, and
> if the dismissal related to unsatisfactory performance by the person, whether the person had been warned about that unsatisfactory performance before the dismissal, and
> the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal, and
> the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal, and
> any other matters that the FWC considers relevant.

There are certain employees who are excluded from making unfair dismissal claims. The exclusions include:

- where the dismissal was a case of *genuine redundancy*
- where the employee is not covered by an award or enterprise agreement and their annual rate of earnings exceeds the high income threshold
- the employee was under a contract of employment for a specified period of time, for a specified task or for the duration of a specified season which has been completed.
- the employee was under a training arrangement for a specified period
- certain casual employees.

What is a genuine redundancy?

A person's dismissal was a case of genuine redundancy if:

- the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise, and
- the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

- the employer's enterprise
- the enterprise of an associated entity of the employer.

Costs

A person involved in an unfair dismissal case before the Fair Work Commission must meet their own costs.

The Fair Work Commission may order a person to bear some or all of the costs of another person if the unfair dismissal application or response to it:

- was frivolous, vexatious or made without reasonable cause
- had no reasonable prospect of success.

In certain circumstances, the Fair Work Commission may also make a costs order against a lawyer or paid agent representing a party in an unfair dismissal case.

Privacy

In general, unfair dismissal case files and discussions in private conferences are confidential. Details will usually only be disclosed to the parties directly involved or their representatives. The Fair Work Commission is required to publish its decisions and does so by reproducing them on a section of its website.

An unfair dismissal application must be lodged **within 21 days** of the dismissal taking effect.

10.3.5 General protections disputes

This information is intended as a general overview of the legislation.

If you need specific advice about general protections please contact the Victorian Chamber Workplace Relations Advice Line on 03 8662 5222 to discuss your particular circumstances.

What are general protections?

The general protections provisions of the *Fair Work Act 2009 (Cth)* aim to protect workplace rights and freedom of association and to provide protection from workplace discrimination.

A person (such as an employer) must not take any adverse action against another person (such as an employee) because the other person has a workplace right, has exercised a workplace right, or proposes to exercise such a right.

'Workplace rights' has a very broad meaning. For example, a person has a workplace right if he or she has an entitlement under an award or agreement or a workplace law, is able to initiate a proceeding under a workplace law or is able to make a complaint or inquiry in relation to their employment.

'Adverse action' includes dismissing or refusing to employ someone, and also includes discriminating against them or otherwise injuring them in their employment (by for example demoting them). Further, a person (such as an employer) must not take adverse action against another person (such as an employee) because he or she has engaged in lawful industrial activity (such as belonging to or participating in a union). In addition, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury.

An employer must not take any adverse action against an employee (or prospective employee) because of his or her race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

General protections dispute applications

If a person has not been dismissed, but alleges that there has been some other contravention of the general protections provisions of the *Fair Work Act 2009 (Cth)*, they may make an application to the Fair Work Commission to deal with the dispute.

If the parties agree to participate, the Fair Work Commission must convene a private conference to deal with the dispute. The Fair Work Commission may deal with the dispute by mediation or conciliation, or by making a recommendation or expressing an opinion.

If the dispute remains unresolved, the applicant can make an application to a court to deal with the matter. If the Fair Work Commission considers that such an application would not have a reasonable prospect of success, it must advise the parties accordingly.

General protections dismissal applications

If a person believes they have been dismissed and alleges that their dismissal was in contravention of the general protections provisions of the Act, they can apply to the Fair Work Commission to deal with the dismissal.

The Fair Work Commission must convene a private conference to deal with the dismissal. The Fair Work Commission may deal with the dismissal by mediation or conciliation, or by making a recommendation or expressing an opinion.

If the dismissal remains unresolved the Fair Work Commission must issue a certificate. The applicant can then make an application to a court to deal with the matter. This must occur within 14 days of the certificate being issued.

If the Fair Work Commission considers that such an application would not have a reasonable prospect of success it must advise the parties accordingly.

A general protections dismissal application must be lodged **within 21 days** of the dismissal taking effect.

Note: A person **cannot** make a general protections dismissal application at the same time as an unfair dismissal application.

10.3.6 Unlawful termination

If an employee has been dismissed because of discrimination and they are not a national system employee they may make an unlawful termination application to the Fair Work Commission.

Employers must not terminate employees for any of the following reasons, or for reasons which include one of the following:

- a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (some exceptions apply, such as where it's based on the inherent requirements of the job)
- temporary absence from work because of illness or injury
- trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours
- non-membership of a trade union
- seeking office as, or acting as, a representative of employees
- being absent from work during maternity leave or other parental leave
- temporary absence from work to engage in a voluntary emergency management activity
- filing a complaint, or participating in proceedings against an employer.

An unlawful termination application must be lodged within 21 days of the dismissal taking effect.

10.4 Legislative compliance

The following section provides information regarding legislative compliance. It is designed to be a guide to the key activities that need to be managed, as prescribed by legislation, and subsequent penalties for breaches of these obligations.

The following list outlines the key human resource activities guided by specific legislation, and provides some penalties you could face if they are handled inappropriately. It is designed to provide a checklist of issues that need to be managed to minimise risk to your business.

The checklist incorporates:

Agreements/modern awards	industrial action	employment records
freedom of association	occupational health and safety	superannuation 'choice of funds'
Discrimination	access to records and right of entry	termination of employment

If an issue arises, in all likelihood you will need more information and advice. This list highlights your basic rights and responsibilities so that you can be better informed when you seek more information.

10.5 Employee relations legislative overview

10.5.1 Awards

The modern awards set minimum conditions for any employer who is employing people in an occupation or in an industry sector covered by the scope of a particular modern award. (Contact the Victorian Chamber Workplace Relations Advice Line on 03 8662 5222 for more information.)

10.5.2 Superannuation 'Choice of Fund'

Many employees have the right to choose the superannuation fund into which their employer superannuation contributions are paid. Employers need to determine which of their employees are eligible for choice of superannuation fund. Employees who are generally not eligible are:

- covered by a State industrial award or agreement
- covered by an Australian Workplace Agreement or Collective Agreement which specifies the name of a super fund
- some public servants and some members of defined benefits funds.

In summary, employers need to:

1. **Identify which employees need to be offered choice of fund**
   (see exemptions above)
2. **Provide a standard choice form to eligible employees**
   New employees should be given a standard choice form within 28 days of their starting date.
3. **Select a default fund**
   Legislation requires that employers have a default fund for employees who do not make a choice.
4. **Act on an employee's choice**
   When your employee has chosen a fund, you have two months to make contributions to that fund. If your employee does not choose a fund, contributions must be made to your selected default fund.

5. **Assess record keeping requirements**

   Legislation requires choice of fund records to be kept for a minimum of five years.

10.5.3 Workplace agreements

The rules about making enterprise agreements are contained in the *Fair Work Act 2009 (Cth)*. Employers can choose to enter into an individual common law contract of employment or an enterprise agreement with a group of employees.

1. Contract of employment

These may cover basic entitlements such as pay, allowances and leave, and may be in writing or verbal, and enforced as if they were legally-binding contracts.

Unlike enterprise agreements, this type of agreement does not replace or exclude the applicable modern award. It operates in addition to the applicable modern award.

It is preferable that any form of contract of employment is in writing and that the parties understand their rights and obligations.

2. Enterprise agreements Key features:

- terms of the agreement must pertain to the employment relationship
- must be approved by a valid majority
- the union, which may apply to be covered by the agreement, must have at least one member employed in the business
- the employer must ensure all employees have access to a copy of the proposed agreement seven days before approval is given
- must comply with the *Fair Work Act 2009 (Cth)* and pass the Better Off Overall Test (BOOT)
- cannot provide terms and conditions that fall below that National Employment Standard or the relevant modern award
- subject to any State laws dealing with occupational health and safety, workers' compensation, apprenticeships or any other prescribed law.

10.5.4 Employment records

Adequate record keeping

The organisation will benefit from developing good record keeping practices:

- meeting legislative and regulatory requirements
- protecting the rights of all employees and the interests of the organisation
- protection and support for the organisation when involved in litigation, including the better management of risks associated with the existence or lack of evidence
- support for consistency, continuity and productivity in management and administration
- documentation of activities, development and achievements.

Where to record information:

- Employee acknowledgement form - new employees need to complete a form to confirm their understanding of key organisation information. A representative of the organisation also needs to sign this form; therefore, it may be necessary to test and verify the knowledge gained by the new employee.
- Probation form - This report is designed to provide an accurate record of employees' performance over the initial period of employment and needs to be filed securely until all sections are completed with details of periodic reviews. (Refer *4.9.11 Recruitment and Selection, Documentation, Probationary Period Performance Review.*)
- Occupational Health and Safety (OHS) Checklist – An OHS checklist should be completed with each new employee.
- Training attendance - Attendance at training courses, both mandatory and optional, should be recorded in the employee's file – in particular for OHS courses.

Rules for record keeping

The rules for record keeping and payslips under the *Fair Work Act 2009 (Cth)* are:

1. An employer which is a constitutional corporation, or an employer in Victoria, must keep detailed records for each employee.
2. Records must be legible, in English, and readily accessible to a Fair Work Inspector.
3. Records must allow the Fair Work Inspector to ascertain an employee's entitlements and whether the employee is receiving them.
4. Records must be kept for seven years from the date the record is made (or altered to reflect a change).
5. Under the Fair Work Act 2009 (Cth), the following details are required to be kept:

    a. **Employment**
    - Employer name.
    - Employee name and date of birth.
    - Name of every modern award or enterprise agreement under which the employee has rights.
    - Classification of the employee under the modern award or enterprise agreement.
    - Employee work type (full-time, part-time, permanent, temporary, casual).
    - Employee commencement date.

    b. **Termination**
    - Whether the employment was terminated: by consent; by notice; summarily; or in some other manner (specifying the manner).
    - The name of the person who acted to terminate the employment

    c. **Pay records, pay slips, hours worked and leave**

Under the *Fair Work Act 2009 (Cth)* there are now compulsory requirements on employers to provide essential information on their employees' pay slips.

Employers must issue pay slips to each employee within one working day of their pay day. It is best practice for these to be written in plain and simple English. The pay slip must be issued in electronic form or hard copy. Employers must ensure that a pay slip is issued to an employee, even when they are on leave.

What information must be on the pay slip?

The employee's pay slip must include:

- the name of the employer (for example, XYZ Pty Ltd trading as XYZ Pie Shop)
- the Australian Business Number (ABN) (if any) of the employer
- the employee's name
- the date of payment
- the pay period (e.g. 24 March 2010 to 30 March 2010)
- the gross and net amount of pay
- any loadings, monetary allowances, bonuses, incentive-based payments, penalty rates or other entitlements paid that can be singled out
- if the employee is paid an hourly rate - the ordinary hourly pay rate and number of hours worked at that rate and the amount of pay at that rate
- if the employee is paid an annual rate (salary), the rate as at the last day in the pay period
- any deductions made from your employee's pay, including the amount and details of each deduction (including superannuation) including the name, or the name and number, of the fund or account the deductions are paid into
- if you are required to pay superannuation contributions for your employee's benefit, you should include:
  - the amount of each superannuation contribution you will make during the pay period
  - the name or the name and number of the superannuation fund you put or will put superannuation contributions into.

10.5.5 Access to records and right of entry

a) Access to records

Federal legislation provides for the inspection and copying of records, and the legislation sets out who can inspect and copy the employer's records. This includes:

- former employees, who only have the right to look at their own records
- authorised officers of the Federal Department of Workplace Relations and Small Business
- union officials, provided that they are authorised in accordance with the legislation.

b) Right of entry

A union official (which may include an employee of the union) has the right to enter premises if they hold a valid and current right of entry permit issued by the Fair Work Commission.

The permit allows the official to:

- investigate suspected breaches of the *Fair Work Act 2009 (Cth)* and other instruments
- investigate breaches relating to textile, clothing and footwear industry outworkers
- meet with employees
- exercise rights under OHS laws.

Certain rights and obligations exist in relation to the exercise of a right of entry.

Written notice (an **entry notice**) may be required to be given before entering a workplace and should be provided no less than 24 hours and no more than 14 days before the proposed visit. An exemption may be given by the Fair Work Commission under certain circumstances.

A visit to a workplace must take place during working hours. Penalties may apply for refusing, delaying or obstructing entry as well as for other breaches of the legislation.

What does an entry notice include?

An entry notice should include details of:

- the premises to be entered
- the day of entry
- the organisation the permit holder belongs to
- the section of the *Fair Work Act 2009 (Cth)* that authorises the entry
- details of the suspected breach
- a declaration by the permit holder that they represent an employee who works on the premises and:
  - to whom the suspected breach relates, or
  - who is affected by the suspected breach
- the provision of the organisation's rules that details the organisation's right to represent the employee.

Conduct in relation to right of entry

Permit holders must:

- abide by conditions imposed on their permit
- comply with reasonable occupational health and safety requests
- comply with reasonable requests to hold discussions in a particular room or area
- comply with reasonable requests that certain routes be taken to a room or area
- act in a proper manner and not intentionally hinder or obstruct others
- not enter any part of the premises used for residential purposes. A permit holder must not:
- be refused or delayed entry to the premises
- be refused the right to inspect and copy records or documents regarding a suspected breach
- be hindered or obstructed from exercising their rights
- give the impression that they are authorised to do things they are not, nor be reckless about giving that impression
- use information for any purposes other than the investigation.

Rights while on the premises

While on the premises, the permit holder may:

- inspect any work, process or object relevant to the suspected breach

- interview any person about the suspected breach whose interests the permit holder's organisation is entitled to represent and who agrees to be interviewed
- inspect and copy any record or document that is directly relevant to the suspected breach, that is kept on the premises or is accessible from a computer that is kept on the premises.

Documents that relate to a person who is not a member of the permit holder's organisation and that do not substantially relate to the employment of a person who is a member are not included as documents that may be inspected or copied. A permit holder may apply to the Fair Work Commission to inspect such documents or consent may be given by that person.

The permit holder may also request, by written notice, access to records and documents at a later time. The permit holder is required to produce their entry permit and a copy of their entry notice for inspection upon request or before exercising any right to inspect records or documents. Guidelines for discussions with employees:

- can hold discussions with 'eligible employees'
- 'eligible employees' are:
  - those on the premises working under award/agreement binding on a union
  - members, or those who are eligible to be members, of a union
- entry only during working hours
- discussions during meal or other breaks.

c) Right of entry (Victoria)

Union right of entry provisions also exist in respect of OHS due to legislative changes which came into effect in Victoria from 1 July 2005.

An 'authorised representative' may enter a workplace during business hours if they 'reasonably suspect' a contravention of the *Occupational Health and Safety Act 2004 (Vic)* or regulations has occurred or is occurring.

In order to be an authorised representative, the following requirements must be satisfied:

- the representative must be a permanent employee
- the representative must have satisfactorily completed a training course which is WorkSafe approved
- the representative must have no convictions in the previous five years
- the Entry Permit must have been issued by the Magistrates Court.

Immediately on entering a workplace, an authorised representative must take all reasonable steps to give a notice to the employer who controls the workplace. The notice must include the description of the suspected contraventions. The authorised representative must not do anything to cause work to stop unless there is a reasonable belief that there is an immediate and significant risk of serious injury or death.

Once in the workplace and solely for the purpose of inquiring into the suspected contravention described in the entry notice, the authorised representative is entitled to:

- inspect any plant, substance or any other thing at the place
- observe work
- talk to employees (with their consent)
- talk to the employer about anything relevant to the suspected contravention.

10.5.6 Freedom of association

Freedom of association is the right to choose whether or not to join an employee or employer association.

The law prohibits victimisation or discrimination on various grounds, including a person's membership or non-membership of an association, or the exercise of a person's rights under industrial laws.

The law abolishes preference in employment and compulsory unionism. The freedom of association provisions cannot be overridden.

Penalties imposed for inappropriate handling

The Federal Court may make one or more of the following orders to remedy a breach of the freedom of association provisions:

- Financial penalties
- the reinstatement of an employee or the re-engagement of an independent contractor
- payment of compensation
- an order that a person or an industry association does not carry out a threat, or not make any further threat
- interim and permanent injunctions, or other orders, to stop conduct or to remedy its effects, and any other consequential orders.

10.5.7 Anti-discrimination

Federal and State anti-discrimination law provides that an employer may be legally responsible for discrimination and harassment that occurs in the workplace or in connection with a person's employment (such as provision of goods and services) unless it can be shown that 'reasonable steps' have been taken to reduce this liability.

This responsibility is called 'vicarious liability'. The vicarious liability provisions do not preclude individuals from being held liable for their own discrimination or harassment behaviour in the workplace or in connection with their employment.

Both the employer (by not taking reasonable steps) and the employee (who is the alleged discriminator or harasser) will be held jointly liable for the behaviour (refer *8.2.5 Grounds of Discrimination*).

The *Fair Work Act 2009 (Cth)* includes a number of provisions intended to help prevent and eliminate discrimination. They relate to the objects of the Act and to awards, agreements and termination of employment. Specific provisions also deal with ensuring equal remuneration for work of equal value, and the prevention of discrimination on the basis of union membership or non-membership (refer *10.5.6 Freedom of Association*).

An employer must not discriminate against a person in determining who should be offered employment, or the terms on which they offer employment.

Advertising – Employment advertisements should not openly state, or imply, that the job is restricted to people on the basis of certain attributes protected under various legislation (some exceptions apply, such as genuine occupational requirements).

Selection criteria – Employers cannot assess candidates for the same role on different criteria. Consistent application of pre-set criteria is important.

Interview questions – It is against the law to request information that could be used to discriminate against a person. This means persons conducting interviews cannot request information either in an application form or as a question in an interview if the information could be used as a basis for discrimination.

10.5.8 Industrial action

The definition of industrial action in the *Fair Work Act 2009 (Cth)* is very broad (i.e. your employees are engaged in industrial action if they do something which restricts, limits or delays work, such as imposing bans, or work-to-rule or go-slow campaigns).

Action based on a reasonable concern about an imminent risk to health and safety is not considered to be industrial action.

The *Fair Work Act 2009 (Cth)* provides for a limited right for employees to engage in protected industrial action and employers to take response action in the negotiation of an enterprise agreement.

Protected industrial action is seen as a legitimate part of the Australian bargaining framework; however, not if pattern bargaining is taking place, or if a 'cooling off' period might assist.

Before protected action can be taken, the following must occur:

- compulsory secret ballot
- must have been a genuine attempt to reach agreement
- majority of eligible employees must vote, and majority must vote in favour.

Industrial action is protected when it meets all three of the following requirements:

1. the action must happen during a properly notified bargaining period
2. a genuine attempt to reach agreement before the industrial action is taken
3. three working days' written notice of the proposed industrial action is given.

a) Penalties imposed for inappropriate handling of industrial action

Unprotected industrial action by an employee or organisation of employees subject to an enterprise agreement is prohibited during the period of the agreement's operation. It is illegal for an employer to pay a worker during any period of industrial action.

b) Damages and injunctions

An employer may ask a State or Territory Supreme Court for damages or an injunction for a breach of common law (e.g. unlawful interference with your trade or business). It is illegal for an employer to dismiss an employee or threaten to do so for engaging in protected industrial action. However, this does not affect any right the employer might otherwise have to take employer response action including stand down or lockout of an employee.

10.5.9 Occupational health and safety

Occupational health and safety (OHS) legislation is imposed by various Acts and their relevant regulations. The laws surrounding OHS fall into three main categories:

1. prevention – through the prescription of safety standards that are enforced through systems of inspection, and ultimately by prosecution
2. compensation – which is paid to those who suffer from work-related injuries
3. rehabilitation – for sufferers of work related injuries and diseases.

The Acts provide OHS duties which must be met by employers, while the regulation outlines more specific guidelines on how to comply with the Act.

The *Occupational Health and Safety Act 2004 (Vic)* is the key Act that employers must comply with, however, there are additional Acts and supporting regulations to be aware of, including the *Crimes Act 1958 (Vic)*, *Accident Compensation Act 1985 (Vic)* and the *Dangerous Goods Act 1985 (Vic)*. Supporting Regulations are:

- Accident Compensation 2001
- Accident Compensation (Self Insurers' Contributions) 1999
- Dangerous Goods (Explosives) 2000
- Dangerous Goods (Storage and Handling) 2000
- Dangerous Goods (Transport by Rail) 1998
- Equipment (Public Safety) (Incident Notification) 2007
- Equipment (Public Safety) (General) 2007
- Road Transport (Dangerous Goods) (Licence Fees) 1998
- Road Transport Reform (Dangerous Goods) 1997.

Key duties under the Occupational Health and Safety Act 2004

- Employers must, so far as 'reasonably practicable', provide and maintain a working environment that is safe and without risk to the health of their employees and independent contractors. This duty extends to the psychological health of employees.
- Consult, so far as reasonably practicable, on issues which may affect employees' health and safety.

Penalties under the OHS Act

Offences for breaches of Section 21 - Duties of employers to employees are punishable by a maximum fine of up to $3,171,400 for a corporation and $285,426 for a natural person. Other offences may hold higher fines.

Other offences include:

- Duty not to recklessly endanger persons and workplaces.
- Discriminating against employees.
- Failure to comply with a prohibition notice.
- Intentionally obstructing an inspector.

The Occupational Health and Safety Act includes the following provisions to prevent unlawful discrimination against employees:

'An employer shall not dismiss, injure or alter a position to the detriment of the employee for the predominant reason that the employee:

a. performed a function as a health and safety representative
b. assisted an inspector or the health and safety committee
c. raised health and safety issues with management.

An employer shall not refuse employment to a prospective employee on the above grounds.'

Workplace Injury, Rehabilitation and Compensation Act 2013

The *Workplace Injury, Rehabilitation and Compensation Act 2013 (Vic)* provides the parameters of access to benefits, the level of benefits and the duties of both employees and employers when a compensation entitlement is sought or established.

Workers' compensation in Victoria provides 'no fault' insurance to workers injured in the course of their employment (i.e. a worker does not have to show fault on behalf of the employer to access benefits). A worker is entitled to compensation for any injury or disease (physical or mental) suffered in the course of their employment or which arises out of their employment – including the aggravation, exacerbation, recurrence or acceleration of any pre- existing injury or disease.

Note: Employers may request new employees complete a pre-existing injury declaration. Failure of an employee to disclose pre-existing injuries in this regard may ultimately affect any subsequent claim for workers compensation arising from a workplace injury. Employers have a duty to forward any claim received, which includes time off work, to their chosen WorkCover Agent within 10 days. Workers must co-operate with their employer in participating in any return-to-work plan offered by the employer.

The *Workplace Injury, Rehabilitation and Compensation Act 2013 (Vic)* is administered and regulated by WorkSafe. As part of our service to members, contact the Victorian Chamber Advice Line on (03) 8662 5222 for the following information and advice:

> WorkCover claims management
> Return-to-work program management
> Other business consulting services.